

DECOUPLING PROPERTY AND EDUCATION

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Over the past several years, the landscape of K–12 education policy has shifted dramatically, thanks in part to increasing prevalence of parental-choice policies, including intra- and inter-district public school choice, charter schools, and private-school choice policies like vouchers and (most recently) universal education savings accounts. These policies decouple property and education by delinking students’ educational options from their residential addresses. The wisdom and efficacy of parental choice as education policy is hotly debated, including among contributors to this Symposium. This Essay takes a step back from these education-policy debates and examines the underappreciated fact that decoupling property and education also advances at least three economic development goals. First, they decrease incentives for center-city residents to move from urban neighborhoods to suburban ones in order to secure space for their children in higher-performing suburban public schools. Second, they reduce the likelihood that urban Catholic and other faith-based schools will close, thereby stabilizing important neighborhood community institutions. Third, they lessen legal and economic barriers to mobility between municipalities within metropolitan regions, including exclusionary zoning, thereby addressing the persistent challenge of intra-metropolitan economic inequality.

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INTRODUCTION

Until relatively recently, property and education were inextricably linked because students' publicly funded education options were limited to the district public school assigned to them by virtue of their residential address. Parents—or at least parents with the financial means to do so—“chose” their children's schools by either moving or paying tuition at a private school. Over the last several decades, however, this has changed. A majority of states have now enacted (to varying degrees) policies embracing educational choice for parents by funding a variety of educational options both within and outside of the traditional public school system, including charter schools, private-school-choice programs, and open enrollment for district public schools. Debates about the wisdom and efficacy of these parental-choice policies are intense and far ranging, including among the contributors to this Symposium, as are debates about the appropriate scope of school-choice policies. Some argue that public education expenditures should be concentrated on traditional (district) public schools;¹ others would limit parents' choices to district and charter schools;² and still others support private-school-choice programs that enable parents to use public funds to send their children to private and faith-

1. See, e.g., Erika K. Wilson, *Charters, Markets, and Universalism*, 26 *Geo. J. on Poverty L. & Pol'y* 291, 306–10 (2019) [hereinafter Wilson, *Charters, Markets, and Universalism*] (“Despite charter schools' potential to take advantage of . . . universalist solutions, they often fall short . . . because race within the context of a market for public education creates sub-optimal market conditions and leads to a collective action problem.”); Zachary Jason, *The Battle Over Charter Schools*, *Harv. Ed. Mag.*, Summer 2017, at 22, 26 <https://www.gse.harvard.edu/sites/default/files/edmag/pdfs/2017-SUM-22.pdf> [<https://perma.cc/P66B-ZYKA>] (“The top criticism of charters is that they rob funding from district schools.”); End Federal Funding for Corporate Charter Schools, *Nat'l Educ. Ass'n* (Apr. 7, 2022), <https://www.nea.org/resource-library/end-federal-funding-corporate-charter-schools> [<https://perma.cc/QV8N-Z9T9>] (criticizing charter schools for undermining “local public schools and communities” and “taking taxpayer money with no oversight or any overall increase in student learning and growth”); Kimberly Hefling, *NAACP President Tackles Charter School Question*, *Politico* (July 12, 2018), <https://www.politico.com/story/2018/07/12/naacp-president-charter-schools-derrick-johnson-676432> [<https://perma.cc/C5P8-H22E>] (discussing the NAACP's 2016 resolution “that called for a moratorium on the expansion of charter schools until there was more accountability and transparency in their operations”).

2. See, e.g., Nicole Stelle Garnett, *Are Charters Enough Choice? School Choice and the Future of Catholic Schools*, 87 *Notre Dame L. Rev.* 1891, 1904–07 (2012) [hereinafter

based schools (in addition to choices among district and charter schools).³ Wherever one falls in these debates, there is no question that the American educational landscape has shifted dramatically in the past several decades, thanks in large part to the expansion of policies expanding the publicly funded educational options available to students.⁴

My maximalist views on parental choice as education policy are well established,⁵ and it is not the purpose of this Essay to rehash them here. Rather, the purpose of this Essay is to discuss the underappreciated fact that parental choice advances both economic development and education policy goals. This is because parental-choice policies decouple property and education by unlinking students' educational options from their residential addresses. By decoupling property and education, parental-choice policies serve at least three economic development functions: First, they reduce incentives for center-city residents to move from urban neighborhoods to suburban ones in order to secure space for their children in higher-performing suburban public schools.⁶ Second, they reduce the likelihood that urban Catholic schools will close by leveling the competitive playing field between low-cost urban private schools, which must charge tuition, and district- and charter-school options, which are tuition free. This leveling is important because, as my previous work with Professor Margaret Brinig demonstrates, Catholic schools—which are rapidly disappearing from urban neighborhoods—are important, stabilizing community institutions in urban neighborhoods.⁷ Third, these policies

Garnett, Enough Choice?] (reviewing scholarship and highlighting that “private-school choice is intensely controversial” while “charter schools enjoy broad, bi-partisan political support”); Andrea Gabor, Opinion, These Ways to Cool the Charter-School Wars Probably Won't, Bloomberg (May 21, 2022), <https://www.bloomberg.com/opinion/articles/2022-05-21/charter-schools-and-public-schools-should-welcome-new-biden-guidelines> (on file with the *Columbia Law Review*) (noting that advocates argue that the public-school system is “essential for democracy” while privatization may “undermine public schools”); Mona Vakilifathi, How Democrats Can Compromise on Charter Schools to Benefit All Students, Brookings Inst.: Brown Ctr. Chalkboard (Aug. 27, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/08/27/how-democrats-can-compromise-on-charter-schools-to-benefit-all-students/> [<https://perma.cc/45GS-LN89>].

3. See, e.g., Alina Adams, Opinion, Adams: Public Funds for Religious Schools? It's Been Happening in NYC for Years, The74 (July 11, 2022), <https://www.the74million.org/article/adams-public-funds-for-religious-schools-its-been-happening-in-nyc-for-years/> [<https://perma.cc/5QPU-AEDX>] (reporting on New York City's allocation of public funds to religious schools and faith-based day care centers).

4. See Garnett, Enough Choice?, *supra* note 2, at 1904–07.

5. See, e.g., Garnett, Enough Choice?, *supra* note 2, at 1894.

6. See *infra* note 124 and accompanying text.

7. See Margaret F. Brinig & Nicole Stelle Garnett, Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America 9–75 (2014) [hereinafter Brinig & Garnett, Lost Classroom, Lost Community]; *infra* section II.B.

help reduce legal and economic barriers to mobility between municipalities within metropolitan regions, thereby addressing the persistent challenge of intrametropolitan economic inequality.⁸

It is important to note that, while all parental-choice policies decouple property and education to some extent, these economic development effects are likely to be greatest for universal parental-choice policies that maximally delink residential address and educational options by permitting parents to use public funds to send their children to the district, charter, or private school of their choice. In July 2022, Arizona became the first state to embrace universal parental choice—that is, to give parents the option of using some of the public funds allocated for their children’s education at district, private, and charter schools—when it enacted legislation that expanded access to the Arizona’s Empowerment Scholarship Account (ESA) program to all K–12 students.⁹ Beginning in September 2022, every child became eligible to receive approximately \$7,000 in public funds to spend on a wide array of educational expenses, including private-school tuition, “microschooling,”¹⁰ online courses, tutoring, textbooks, educational therapies, and curricular materials for homeschooling.¹¹ Even before this legislation, Arizona offered students the option of enrolling in any public district school in the state (if space was available) or one of over 500 charter schools.¹² Arizona also has three programs granting tax credits for donations to organizations funding private-school scholarships.¹³

A few days after the ESA expansion took effect in Arizona, West Virginia became the second state with universal parental choice when the state supreme court rejected a state constitutional challenge to a similar ESA program, which was enacted in 2021 but was on hold due to litigation.¹⁴ In 2023, Arkansas, Florida, Iowa, and Utah followed suit, enacting

8. See *infra* section II.C.

9. Empowerment Scholarship Account (ESA) Program, Ariz. Dep’t of Educ., <https://www.azed.gov/esa> [<https://perma.cc/Y373-3LCF>] (last updated Feb. 27, 2023).

10. Andrew Bauld, What Is a Microschool? U.S. News & World Rep. (Apr. 7, 2022), <https://www.usnews.com/education/k12/articles/what-is-a-microschool> (on file with the *Columbia Law Review*) (describing a microschool as a “modern-day one-room schoolhouse” featuring “personalized, student-centered learning and multiple age groups in the same classroom”).

11. Ariz. Dep’t of Education, *supra* note 9.

12. Nicole Stelle Garnett, A Radical Step in the Right Direction, *City J.* (Oct. 2, 2022), <https://www.city-journal.org/arizona-embraces-universal-school-choice> [<https://perma.cc/K84S-26C3>].

13. School Choice in Arizona, EdChoice, <https://www.edchoice.org/school-choice/state/arizona/> [<https://perma.cc/629X-WCLV>] (last visited Jan. 7, 2023).

14. Andrew Handel & Rose Laoutaris, Victory for West Virginia Families: Historic Education Opportunity Program Declared Constitutional, *Am. Legis. Exch. Council* (Oct. 10, 2022), <https://alec.org/article/victory-for-west-virginia-families-historic-education-opportunity-program-declared-constitutional/> [<https://perma.cc/8NNT-VWLF>].

universal education savings account programs,¹⁵ and Oklahoma adopted a universal refundable tuition tax credit.¹⁶ Like Arizona, Arkansas, Florida, Iowa, and Utah also have unrestricted open-enrollment policies for district public schools and charter schools.¹⁷ West Virginia also authorizes both open-enrollment policies and charter schools, but the state currently caps the number of charter schools at ten and allows districts to set their own open-enrollment policies.¹⁸

Although the recent embrace by six states of universal parental choice reflects, in many ways, a seismic shift in education policy, momentum for parental choice has been building for decades. Thirty states, the District

15. Stephen Gruber-Miller & Katie Akin, *Jubilant Kim Reynolds Signs Iowa's Seismic 'School Choice' Bill Into Law. What It Means*, Des Moines Register (Jan. 24, 2023), <https://www.desmoinesregister.com/story/news/politics/2023/01/24/iowa-governor-kim-reynolds-signs-school-choice-scholarships-education-bill-into-law/69833074007/> [https://perma.cc/FP9X-3YH9] (last updated Jan. 25, 2023); Andrew Handel, *Utah Parents and Students Celebrate Passage of Universal Education Savings Accounts*, Am. Legis. Exch. Council (Jan. 30, 2023), <https://alec.org/article/utah-parents-and-students-celebrate-passage-of-universal-education-savings-accounts/> [https://perma.cc/AV87-8ZDC]; Jeremiah Poff, *Florida Legislature Sends Universal School Choice Bill to DeSantis's Desk*, Wash. Exam'r (Mar. 23, 2023), <https://www.washingtonexaminer.com/restoring-america/community-family/florida-legislature-sends-universal-school-choice-bill-to-desantiss-desk> [https://perma.cc/DN6A-KQ89]; Brett Rains, *Arkansas Gov. Sarah Huckabee Sanders Signs Education Bill Into Law*, 40-29 News (Mar. 8, 2023), <https://www.4029tv.com/article/arkansas-sarah-huckabee-sanders-education-bill/43250254> [https://perma.cc/6P89-3VAP] (last updated Mar. 9, 2023).

16. Ben Felder, *Governor Signs Private- And Home-School Tax Credit Bill, One of His Top Priorities*, Oklahoman (May 25, 2023), <https://www.oklahoman.com/story/news/politics/government/2023/05/25/oklahoma-private-school-tax-credits-governor-kevin-stitt-signs-bill/70257151007/> [https://perma.cc/Y32Z-58HB]

17. *Arkansas School Choice Roadmap*, Nat'l Sch. Choice Wk., <https://schoolchoiceweek.com/guide-school-choice-arkansas/> [https://perma.cc/2SUG-RFGX] (last updated Apr. 6, 2023); *Florida School Choice Roadmap*, Nat'l Sch. Choice Wk., <https://schoolchoiceweek.com/guide-school-choice-florida/> [https://perma.cc/L7SG-JXA8] (last updated Jan. 19, 2023); *Iowa School Choice Roadmap*, Nat'l Sch. Choice Wk., <https://schoolchoiceweek.com/guide-school-choice-iowa/> [https://perma.cc/R9EP-MP6P] (last updated Jan. 24, 2023); *Utah School Choice Roadmap*, Nat'l Sch. Choice Wk., <https://schoolchoiceweek.com/guide-school-choice-utah/> [https://perma.cc/92Z5-PXSJ] (last updated Jan. 28, 2023).

18. *West Virginia School Choice Roadmap*, Nat'l Sch. Choice Wk., <https://schoolchoiceweek.com/guide-school-choice-west-virginia/> [https://perma.cc/A8RC-74TQ] (last updated Jan. 19, 2023); see also Liz McCormick, *All 5 W.Va. Public Charter Schools on Track to Open in Fall 2022*, W. Va. Pub. Broad. (Apr. 22, 2022), <https://www.wvpublic.org/section/education/2022-04-22/all-5-w-va-public-charter-schools-on-track-to-open-in-fall-2022> [https://perma.cc/46WZ-Y63E]; Timothy Sandefur, *Goldwater Stands Up for West Virginia Families*, Goldwater Inst. (Sept. 6, 2022), <https://www.goldwaterinstitute.org/goldwater-stands-up-for-west-virginia-families/> [https://perma.cc/YTN2-M5T3].

of Columbia, and Puerto Rico have one or more private-school-choice programs,¹⁹ which collectively enabled 700,000 children to attend a private school during the 2021–2022 school year.²⁰ Moreover, while 2023 may yet eclipse it, 2021 was the most successful year in private-school-choice history: That year, more than two dozen states enacted, improved, or expanded choice programs, and several states—including Indiana, Ohio, and Wisconsin—opened participation in school voucher programs to a large proportion of K–12 students.²¹ And several recently elected governors have made universal private school choice a legislative priority.²² Public-school-choice policies are even more widespread. Currently, forty-five states authorize charter schools, which now educate over seven percent of all public-school students.²³ From 2019 to 2020, nearly 3.5 million students attended one of 7,700 charter schools in the United States.²⁴ Finally, many states and school districts offer parents the option of enrolling their children in a district public school other than the one assigned to them by virtue of their residence, sometimes as a matter of right.²⁵

19. School Choice in America, Am. Fed'n for Child., <https://www.federationforchildren.org/school-choice-in-america/> [<https://perma.cc/9LU6-9T56>] (last visited Apr. 9, 2023) [hereinafter Am. Fed'n for Child., School Choice].

20. Our Impact Across America, Am. Fed'n for Child., <https://www.federationforchildren.org/about-us/school-choice-victories/> [<https://perma.cc/H5K4-PJCF>] [hereinafter Am. Fed'n for Child., Our Impact Across America] (last visited Jan. 7, 2023).

21. *Id.*; Am. Fed'n for Child., School Choice, *supra* note 19.

22. See, e.g., Press Release, Off. of Governor Brad Little, Gov. Little Rolls Out 'Idaho First' Plan to Support Schools, Provide Property Tax Relief, Fight Fentanyl in 2023 State of the State and Budget Address (Jan. 9, 2023), <https://gov.idaho.gov/pressrelease/gov-little-rolls-out-idaho-first-plan-to-support-schools-provide-property-tax-relief-fight-fentanyl-in-2023-state-of-the-state-and-budget-address/> [<https://perma.cc/3QWQ-YSR>]; Talk Bus. & Pol. Staff, Arkansas Gov.-Elect Sanders Lays Out Education, Criminal Justice Road Map, KUAR (Jan. 9, 2023), <https://www.ualrpublicradio.org/local-regional-news/2023-01-09/arkansas-gov-elect-sanders-lays-out-education-criminal-justice-road-map> [<https://perma.cc/MAB4-JLCW>]; Supporting Every Student's Success at School, Off. of the Governor of Iowa Kim Reynolds, <https://governor.iowa.gov/vision-iowa/school-choice> [<https://perma.cc/T9E6-M73E>] (last visited Feb. 2, 2023).

23. Jamison White, 1. How Many Charter Schools and Students Are There?, Nat'l All. for Pub. Charter Schs. (Dec. 6, 2022), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/> [<https://perma.cc/M8GJ-CWT8>].

24. Charter School Data Dashboard, Nat'l All. for Pub. Charter Schs., <https://data.publiccharters.org/> [<https://perma.cc/5E2C-2AC3>] [hereinafter Charter School Data Dashboard] (last visited Jan. 7, 2023).

25. See *infra* note 49 and accompanying text. This Essay, refers to traditional public schools as “district schools” or “district public schools” in order to distinguish them from charter schools, which all charter school laws also designate as “public schools.” Elsewhere, I have argued that charter schools in many states should be considered private schools for federal constitutional purposes, but this question is beyond the scope of this Essay. Nicole Stelle Garnett, Manhattan Inst., Religious Charter Schools: Legally Permissible? Constitutionally Required? 8–10 (2020), <https://media4.manhattan-institute.org/>

This Essay is organized as follows: Part I describes the current landscape of parental-choice policies that decouple property and education. These policies, which are embraced to varying degrees in different states, include: (1) in a number of states, open-enrollment policies that give parents the option of sending their children to district public schools other than the one geographically assigned to them, including—in some cases—any school with available space in any school district in the state; (2) in forty-five states, charter schools, which are privately operated but publicly funded and called “public schools” in all state laws; (3) in thirty states, private-school-choice mechanisms that enable students to use public funds to attend a private school (or home school). Part II then discusses benefits of decoupling property and education for both central cities and the overall economic health of American metropolitan areas. These include: (1) reducing a major incentive that parents of school-age children have for living in suburbs rather than central cities—namely, the relative academic performance of district public schooling options;²⁶ (2) helping to stem the tide of urban Catholic school closures, thereby preserving important stabilizing community institutions in urban neighborhoods; and (3) addressing economic inequity within metropolitan areas by reducing suburbs’ incentives to erect barriers to intrametropolitan mobility, including exclusionary zoning policies.

The Essay concludes with some tentative observations about the implications of decoupling property and education for future developments in education law. In particular, these developments further undermine the factual predicates behind so-called “school funding equity litigation,” which seeks to leverage state constitutional provisions guaranteeing a right to education to secure more funding for district public schools in high-poverty communities.²⁷ As a number of commentators have noted, judicial decisions invalidating public education funding systems on state-constitutional grounds are predicated on somewhat-outdated assumptions about an increasingly tenuous connection between local property taxes and public school resources.²⁸ By decoupling property and education, parental-choice policies further increase the tensions between the prevailing theory of these funding equity cases and the on-the-ground reality of education finance in many states.

sites/default/files/religious-charter-schools-legally-permissible-NSG.pdf [https://perma.cc/BV3C-MX7P] [hereinafter Garnett, Religious Charter Schools].

26. See *infra* section II.A.

27. See Katharine Bohrs, COVID-19 Brings School Funding Inequities and Litigation Front and Center, Harv. C.R.-C.L. L. Rev. Amicus Blog (Nov. 5, 2020), <https://harvardcrcl.org/covid-19-brings-school-funding-inequities-and-litigation-front-and-center/> [https://perma.cc/X45M-WY2B] (“An equity argument can be brought under either the state’s equal protection clause or its education clause, and alleges that the state is failing to provide funding in an equitable way across or within districts.”); *infra* note 199 and accompanying text.

28. See *infra* note 215 and accompanying text.

This is an opportune time to consider the economic development benefits of decoupling property and education. Many cities continue to struggle to recover economically from the COVID-19 pandemic, which appears to have permanently and dramatically restructured the nature of work for many Americans.²⁹ The availability of remote work has reduced a major incentive for professionals to live in urban neighborhoods—proximity to their offices—thereby increasing the risk of financial crisis for center cities.³⁰ At the same time, serious crime appears to be on the rise in urban centers,³¹ increasing the need for stabilizing urban community institutions like Catholic schools and more residential mobility options for low-income and minority residents in metropolitan areas who are all too often priced out of suburban communities by exclusionary zoning policies motivated, in part, by a desire to preserve elite school district status.³²

I. DECOUPLING PROPERTY AND EDUCATION: THE CURRENT POLICY LANDSCAPE

Until relatively recently, education and property were inextricably linked because public school assignments were almost universally determined by residential address.³³ In a world of mandatory, geographically based, “zoned” school assignments, property and education are “coupled” because school assignments are determined by residential address. In these circumstances, most parents choose their children’s schools by *moving* to secure seats for their children in academically strong schools and school districts.³⁴ A small minority do so by paying tuition at a private school.

29. See, e.g., Roland Li, *Downtown S.F. Still Has North America’s Weakest Pandemic Recovery*, S.F. Chron. (Jan. 18, 2023), <https://www.sfchronicle.com/sf/article/downtown-s-f-still-has-north-america-s-weakest-17726176.php> [<https://perma.cc/HC59-SJC9>] (last updated Jan. 20, 2023); Jimmy Vielkind, *New York Panel Unveils New Vision to Revive Manhattan*, Wall St. J. (Dec. 14, 2022), <https://www.wsj.com/articles/new-york-panel-unveils-new-vision-to-revive-manhattan-11671025421> (on file with the *Columbia Law Review*).

30. See *infra* notes 104–108 and accompanying text.

31. Alexandra Thompson & Susannah N. Tapp, Bureau of Just. Stat., DOJ, NCJ 305101, *Criminal Victimization, 2021*, at 8 (2022), <https://bjs.ojp.gov/content/pub/pdf/cv21.pdf> [<https://perma.cc/57R7-NEKA>] (“From 2020 to 2021, the rate of violent victimization in urban areas rose from 19.0 to 24.5 victimizations per 1,000 persons . . .”).

32. See Vanessa Brown Calder, U.S. Cong., Joint Econ. Comm., SCP Rep. No. 6-19, *Zoned Out: How School and Residential Zoning Limit Educational Opportunity* 7–8 (Nov. 12, 2019), https://www.jec.senate.gov/public/_cache/files/f4880936-8db9-4b77-a632-86e1728f33f0/jec-report-zoned-out.pdf [<https://perma.cc/6MNT-5GDY>] (detailing Portland zoning policies that segregate housing by income and “likely drive[] inter-district segregation”).

33. *Id.* at 2.

34. See generally LaToya Baldwin Clark, *Education as Property*, 105 Va. L. Rev. 397 (2019) (discussing various implications of assigning educational opportunities by address, including the prosecution of parents who lie about their addresses to enroll children in good public schools).

Property and education remain “coupled” for many parents in the United States. In 2019, approximately 91% of students in grades one to twelve attended a public school, and 9% attended a private school.³⁵ The vast majority of students—73%—attended an assigned public school, and 17% attended a chosen public school.³⁶ In that same year, 42% of parents with children enrolled in grades one to twelve reported that they had the option of sending their children to a school other than the one geographically assigned to them.³⁷ Increasingly, education policies decouple property and education by empowering parents to send their children to schools of their choice.

This Part describes a variety of decoupling mechanisms. Intra- and interdistrict open-enrollment policies allow parents the option of sending their children to a district public school other than the one geographically assigned to them.³⁸ Charter schools, which operate outside of the traditional public-school system altogether, must select students by lottery if oversubscribed and typically cannot consider factors such as residential address.³⁹ Private-school-choice policies, including vouchers, education savings accounts, and tax-credit scholarship programs, give parents financial resources to enroll their children in nonpublic schools. This Part provides a brief sketch of the complex landscape of these parental-choice policies in the United States, all of which decouple property and education by delinking residential address from school assignment.

A. *Public-School Choice*

The decoupling of property and education began in an unexpected place and time—suburban Detroit, Michigan, in 1971. That year, a federal district court ruled that the Detroit Public Schools had unconstitutionally discriminated against Black students and that Michigan had violated the Equal Protection Clause by failing to supervise the district to prevent this

35. Fast Facts: Public School Choice Programs, Nat'l Ctr. for Educ. Stat., <https://nces.ed.gov/fastfacts/display.asp?id=6> [<https://perma.cc/Q8M6-G2BU>] [hereinafter Fast Facts] (last visited Jan. 7, 2023); see also *infra* notes 70–73 and accompanying text.

36. Fast Facts, *supra* note 35.

37. *Id.* This kind of residential sorting increases as parents' educational attainment rises. Jack Buckley & Mark Schneider, School Choice, Parental Information, and Tiebout Sorting: Evidence From Washington, DC, *in* *The Tiebout Model at Fifty: Essays in Public Economics in Honor of Wallace Oates* 101, 104 (William A. Fischel ed., 2006) [hereinafter Buckley & Schneider, School Choice, Parental Information, and Tiebout Sorting].

38. See *infra* notes 51–54 and accompanying text. It is worth noting that many parents with open-enrollment options do not exercise them, suggesting that they are either pleased with their children's assigned school (and, in many cases, moved to secure the assignment) or unaware of or unable to access their options. In 2019, for example, 19% of parents who reported that public-school choice was available to them also reported that they moved to their current neighborhood for the assigned public school. Fast Facts, *supra* note 35.

39. Adam Gerstenfeld, What Is a Charter School Lottery?, Nat'l All. for Pub. Charter Schs. (Feb. 7, 2019), <https://www.publiccharters.org/latest-news/2019/02/07/what-charter-school-lottery> [<https://perma.cc/29WH-GWBN>].

discrimination.⁴⁰ To remedy this discrimination, the district court ordered the effective consolidation of (and busing of students between) Detroit and fifty-three surrounding suburban districts.⁴¹ In *Milliken v. Bradley*, the U.S. Supreme Court held that the district court lacked the power to include the suburban districts in the busing remedy because there was no evidence that the suburban school districts had engaged in intentional race discrimination.⁴² “Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief,” Chief Justice Warren E. Burger wrote for the majority, “but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.”⁴³

Milliken prompted school districts and states to experiment with strategies to achieve integration by means other than busing, including magnet schools and public-school-choice programs that let students choose to attend a district public school other than the one geographically assigned to them.⁴⁴ The Supreme Court approved these “compensatory” strategies in 1977,⁴⁵ and, since then, magnet schools and public-school choice have proliferated. According to the National Center for Education Statistics, in 2000, there were 1,469 magnet schools in the United States, enrolling 1.2 million students.⁴⁶ That number increased to 3,285 schools enrolling 2.6

40. See *Bradley v. Milliken*, 338 F. Supp. 582, 587–90 (E.D. Mich. 1971), *aff’d*, 484 F.2d 215 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974) (explaining that the School-Board-created housing optional attendance zones violated the Fourteenth Amendment by “building upon housing segregation” and “perpetuating racial segregation of students”).

41. See *Bradley v. Milliken*, 345 F. Supp. 914, 916–19 (E.D. Mich. 1972), *aff’d* in part and *vacated* in part, 484 F.2d 215 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974) (“A *de jure* segregation violation having been found, the minimum remedy is maximum actual desegregation . . .”); see also *Bradley v. Milliken*, 484 F.2d 215, 250–51 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974) (affirming an interdistrict desegregation plan as a remedy).

42. See *Milliken v. Bradley*, 418 U.S. 717, 745–47 (1974).

43. *Id.* at 741.

44. Kevin Brown, *Race, Law and Education in the Post-Desegregation Era* 16–17 (2005); see also *id.* at 210–12 (explaining that the *Milliken* decision’s limitations on desegregation plans dramatically limited desegregation and contributed to “white flight” to suburban school districts); Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* 45 (2004) (arguing that after *Milliken*, “racial disparities between districts tended to widen”); Gary Orfield & Susan E. Eaton, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 143 (1996) (discussing the difficulty of how to integrate schools and courts’ attempts to find a solution in *Milliken*); James E. Ryan, *Five Miles Away, A World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America* 91–108 (2010) (discussing *Milliken* and its consequences).

45. See *Milliken v. Bradley (Milliken II)*, 433 U.S. 267, 290 (1977) (“That the programs are also ‘compensatory’ in nature does not change the fact that they are part of a plan that operates prospectively to bring about the delayed benefits of a unitary school system.”).

46. Table 216.20. Number and Enrollment of Public Elementary and Secondary Schools, by School Level, Type, and Charter, Magnet, and Virtual Status: Selected Years, 1990–91 Through 2016–17, Nat’l Ctr. for Educ. Stat., https://nces.ed.gov/programs/digest/d18/tables/dt18_216.20.asp?referer=schoolchoice [<https://perma.cc/>

million students in 2014.⁴⁷ Today, there are 4,340 magnet schools educating over 3.5 million students.⁴⁸

While attendance at a traditional, geographically assigned public school remains the norm in many (if not most) communities (especially in suburbs),⁴⁹ the number of students attending “chosen” public schools continues to steadily rise.⁵⁰ According to the Education Commission of the States, twenty-four states mandate that school districts adopt open-enrollment policies giving parents the right to enroll their children in a school in a school district other than the one where they reside (subject to available space), and twenty-eight states make interdistrict open enrollment voluntary for districts.⁵¹ Additionally, nineteen states and the District of Columbia require intradistrict open enrollment, giving parents the right to enroll their child in any school within the district in which they reside (again subject to available space), and eleven states make intradistrict open enrollment voluntary.⁵² The availability of public-school-choice options, including magnet schools, is greatest in urban districts.⁵³

9T9F-7ZKD] [hereinafter Education Statistics] (last visited Jan. 7, 2023); see also Martin F. Lueken & Michael Q. McShane, *Manhattan Inst., School Districts Without Borders: Public School Students, Families and Teachers Shut In by Education Boundaries* 6 (2022), <https://media4.manhattan-institute.org/sites/default/files/k-12-without-borders.pdf> [https://perma.cc/G9S9-4SLZ].

47. Education Statistics, *supra* note 46; see also Lueken & McShane, *supra* note 46, at 6.

48. What Are Magnet Schools, Magnet Schs. Am., <https://magnet.edu/about/what-are-magnet-schools> [https://perma.cc/Y8U8-54UY] (last visited Jan. 7, 2023). Although magnet schools enroll roughly the same number of students as charter schools (3.5 million), there are significantly more charter schools (7,800) than magnet schools (4,340). *Id.*; see also Charter School Data Dashboard, *supra* note 24.

49. In 2016, 69% of K–12 students in the United States attended an assigned public school, down from 74% in 1999. School Choice in the United States: 2019, Nat’l Ctr. for Educ. Stat., https://nces.ed.gov/programs/schoolchoice/ind_01.asp [https://perma.cc/GG3Q-6XCX] [hereinafter Nat’l Ctr. for Educ. Stat., School Choice 2019] (last visited Jan. 7, 2023).

50. See Amanda Waldron & Alison Burke, *Can You Choose Where Your Child Goes to School? How U.S. School Districts Stack Up*, Brookings Inst. (Mar. 1, 2016), <https://www.brookings.edu/blog/brookings-now/2016/03/01/can-you-choose-where-your-child-goes-to-school-how-u-s-school-districts-stack-up/> [https://perma.cc/W8BM-6JS7] (finding that the percentage of the nation’s largest school districts that allow parents to choose what school their child attends increased from 25% to 55% between 2000 and 2015); see also Nat’l Ctr. for Educ. Stat., *School Choice 2019*, *supra* note 49.

51. Ben Erwin, Bryan Kelley & Gerardo Silva-Padron, *50-State Comparison: Open Enrollment Policies*, Educ. Comm’n of the States (Mar. 8, 2022), <https://www.ecs.org/50-state-comparison-open-enrollment-policies/> [https://perma.cc/SLK7-CRBR].

52. *Id.*

53. Grace Chen, *What Is A Magnet School?*, Pub. Sch. Rev. (Feb. 10, 2023), <https://www.publicschoolreview.com/blog/what-is-a-magnet-school> [https://perma.cc/FNA9-VMBG] [hereinafter Chen, *What Is a Magnet School?*]; Matthew Chingos & Kristin Blagg, *Whether School Choice Policies Actually Increase Choice Depends on Where You Live*, Urban Inst. (Apr. 6, 2017), <https://www.urban.org/urban-wire/>

In 2019, more than 40% of public-school parents reported that one of these public-school choice programs provided them the option of sending their children to a school other than the one geographically assigned to them.⁵⁴

B. *Charter Schools*

Magnet schools not only opened the door for public-school choice but also arguably paved the way for charter schools.⁵⁵ The term “charter school” is often attributed to the late Albert Shanker, the long-time president of the American Federation of Teachers, the nation’s second-largest teachers’ union. In a 1988 speech, Shanker advocated for a “fundamentally different model of schooling” that would “enable any school or any group of teachers . . . within a school to develop a proposal for how they could better educate youngsters and then give them a ‘charter’ to implement that proposal.”⁵⁶ In 1991, Minnesota enacted the first charter school law, but the legislation fundamentally altered Shanker’s proposal.⁵⁷ The Minnesota legislation envisioned charter schools free from school districts’ control or supervision, operated by private entrepreneurs, and staffed with nonunionized teachers.⁵⁸

At their inception, charter schools were viewed as a relatively modest reform that offered a more moderate alternative to “voucher” policy proposals that would give parents public funds to enroll their children at private and religious schools.⁵⁹ Within debates about educational finance,

whether-school-choice-policies-actually-increase-choice-depends-where-you-live [https://perma.cc/8KPX-YK24].

54. Fast Facts, *supra* note 35.

55. See Chester E. Finn, Jr., Bruno V. Manno & Gregg Vanourek, *Charter Schools in Action: Renewing Public Education* 17 (2000) (“[C]harter schools have cousins in the K–12 family. Their DNA looks much the same under the education microscope as that of lab schools, magnet schools, site-managed schools, and special focus schools . . .”).

56. Albert Shanker, *Restructuring Our Schools*, 65 *Peabody J. Educ.*, no. 3, 1988, at 88, 97–98. Ray Budde, an education professor at the University of Massachusetts, apparently suggested the concept—and used the term—over a decade earlier. Susan Saulny, Ray Budde, 82, *First to Propose Charter Schools, Dies*, *N.Y. Times* (June 21, 2005), http://www.nytimes.com/2005/06/21/us/ray-budde-82-first-to-propose-charter-schools-dies.html?_r=0 (on file with the *Columbia Law Review*).

57. 1991 Minn. Laws 943; see also *Charter Schools*, Minn. Legis. Reference Libr., <http://www.lrl.mn.gov/guides/guides?issue=charter> [https://perma.cc/HP7P-HTHV] (last updated Aug. 2022) (documenting the development of the law and its legislative history).

58. These changes led Shanker to reject the charter schools as “gimmicks” and “quick fixes that won’t fix anything.” Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education* 122–24 (2010); Paul E. Peterson, No, Al Shanker Did Not Invent the Charter School, *Educ. Next*, <http://educationnext.org/no-al-shanker-did-not-invent-the-charter-school/> [https://perma.cc/68KK-N49J] (last updated July 21, 2010).

59. Nicole Stelle Garnett, *Sector Agnosticism and the Coming Transformation of Education Law*, 70 *Vand. L. Rev.* 1, 13 (2017) [hereinafter Garnett, *Sector Agnosticism*]; see

many reformers historically advocated for charter schools as an alternative to private-school-choice programs. For example, Professor Michael Heise has demonstrated that the likelihood that a state enacted or expanded a charter program increased along with the “threat” of publicly funded private-school choice.⁶⁰ Heise hypothesized that opponents believed that the appetite for private-school choice would decrease as the range of public-school choice options increased.⁶¹ Heise labeled this reality as “ironic.”⁶² School-voucher proponents often intentionally established private voucher programs to fuel demand for publicly funded vouchers, but their efforts backfired and instead fueled political support for charters, which in turn decreased demand for private-school choice.⁶³ Heise’s observation that charter schools suppress demand for private-school choice has arguably not stood the test of time. In fact, charter schools’ growth—and their acculturation of parents to choice—may be one factor fueling the growing demand for private-school choice.

As they have evolved, however, charter schools have become conceptually and operationally quite distinct from their more modest progenitors. Importantly, unlike magnet schools, they are not operated by the school districts—or by the government at all. Although nominally designated as “public schools,” charter schools are privately operated. Technically, charter schools are created by an agreement—the “charter”—between a charter operator (usually a nonprofit, but in some cases, a for-profit entity) and a charter authorizer (which, depending upon the state, can include a range of governmental, educational, and nonprofit private entities).⁶⁴ Charter schools resemble public schools in that they are tuition-free, secular, and open to all who wish to attend; although oversubscribed charter schools generally must admit applicants by lottery, some are permitted to prioritize neighborhood students or test applicants for admission.⁶⁵

Charter schools also share many attributes with private schools. Importantly, they are privately operated—increasingly, by “charter management organizations” that operate multiple schools within and

also Jack Buckley & Mark Schneider, *Charter Schools: Hope or Hype?* 115–70 (2007) (describing the “spread of vouchers” as “hotly contested”).

60. Michael Heise, *Law and Policy Entrepreneurs: Empirical Evidence on the Expansion of School Choice Policy*, 87 *Notre Dame L. Rev.* 1917, 1923 (2012).

61. *Id.* at 1922–26.

62. *Id.* at 1931.

63. *Id.* at 1929–32.

64. *Charter School Authorizers by State*, Nat’l Ass’n of Charter Sch. Authorizers, <https://www.qualitycharters.org/state-policy/multiple-authorizers/list-of-charter-school-authorizers-by-state/> [<https://perma.cc/M8TD-SAA9>] (last visited Jan. 7, 2023).

65. Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 *U. Chi. Legal F.* 289, 338; Valerie Strauss, *How Charter Schools Choose Desirable Students*, *Wash. Post* (Feb. 16, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/02/16/how-charter-schools-choose-desirable-students/> (on file with the *Columbia Law Review*).

across jurisdictions.⁶⁶ They have wide-ranging autonomy over staffing, curriculum, budget, and internal organization. Charter schools are also exempt from many regulations governing district public schools (although the extent of this autonomy varies by jurisdiction).⁶⁷ And, like private schools, they are schools of choice—that is, parents select them for their children, and public funding “follows the child” to the school, as it does with students participating in private-school-choice programs. These distinctions have led some commentators, including myself, to argue that charter schools should be treated as private schools, at least for federal constitutional purposes.⁶⁸ The federal courts of appeals are currently divided over this question.⁶⁹

66. “Technically, ‘charter management organizations’ are nonprofit entities that manage two or more charter schools, and ‘educational management organizations’ are for-profit entities that do the same. Some states prohibit for-profit entities from operating charter schools.” Garnett, *Sector Agnosticism*, *supra* note 59, at 13 n.44 (quoting Nat’l All. for Pub. Charter Schs., CMO and EMO Public Charter Schools: A Growing Phenomenon in the Charter School Sector 1, http://www.publiccharters.org/wp-content/uploads/2014/01/NAPCS-CMO-EMO-DASHBOARD-DETAILS_20111103T102812.pdf [<https://perma.cc/U47T-B7XQ>] (last visited Jan. 7, 2023)).

67. Garnett, *Sector Agnosticism*, *supra* note 59, at 13–14.

68. See, e.g., Garnett, *Religious Charter Schools*, *supra* note 25, at 8–10 (discussing the “state action doctrine” and its application to charter schools); Garnett, *Sector Agnosticism*, *supra* note 59, at 52–58 (reviewing case law on the question of when charter schools should be treated as state actors); Preston C. Green III, Bruce D. Baker & Joseph O. Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 *Emory L.J.* 303, 305–15 (2013) (confronting the difficulty of properly categorizing charter schools as state actors); Aaron Saiger, *Charter Schools, the Establishment Clause, and the Neoliberal Turn in Public Education*, 34 *Cardozo L. Rev.* 1163, 1189–1210 (2013); Stephen D. Sugarman, *Is It Unconstitutional to Prohibit Faith-Based Schools From Becoming Charter Schools?*, 32 *J.L. & Religion* 227, 245–62 (2017). But see Preston C. Green III, Erica Frankenberg, Steven L. Nelson & Julie Rowland, *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 *Wash. & Lee J.C.R. & Soc. Just.* 253, 271–75 (2012) (examining the implications of treating charter schools as private schools for the constitutional protections of students, particularly students of color); Justin M. Goldstein, Note, *Exploring “Unchartered” Territory: An Analysis of Charter Schools and the Applicability of the U.S. Constitution*, 7 *S. Cal. Interdisc. L.J.* 133, 134–35 (1998) (suggesting that charter schools are unlikely to be subject to constitutional limitations under Supreme Court precedent); Maren Hulden, Note, *Charting a Course to State Action: Charter Schools and Section 1983*, 111 *Colum. L. Rev.* 1244, 1248 (2011) (arguing that charter schools should be treated as state actors in Section 1983 suits brought by students but not employees); Catherine LoTempio, Comment, *It’s Time to Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 *Wake Forest L. Rev.* 435, 458–61 (2012) (proposing that courts classify charter schools as state actors in cases in which they have acted as education providers rather than employers); Jason Lance Wren, Note, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment’s State Action Doctrine to These Innovative Schools*, 19 *Rev. Litig.* 135, 159–66 (2000).

69. Compare *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 808 (9th Cir. 2010) (holding that an Arizona charter school was not a state actor for employment purposes), with *Peltier v. Charter Day Sch.*, 37 F.4th 104, 106 (4th Cir. 2022) (holding that a North Carolina charter school was a state actor for purposes of dress code), petition for cert. filed no. 22-238.

Today, forty-five states, Washington, D.C., Puerto Rico, and Guam have enacted laws authorizing charter schools, and charter school enrollment has more than doubled in the past twenty years to nearly 3.5 million students.⁷⁰ In the 2019–2020 school year, there were 7,700 charter schools operating in the United States, which collectively enrolled 7.2% of all public-school students.⁷¹ A majority of charter schools are located in urban school districts, and in some of these districts, the percentage share of charter-school enrollment often far surpasses the national average.⁷² In the 2017–2018 school year, charter schools enrolled more than 40% of public-school students in seven school districts, more than 30% in twenty-one school districts, more than 20% in sixty-four school districts, and at least 10% in 214 school districts.⁷³ For many reasons, including the fact that most of them are located in urban areas, charter schools enroll a disproportionate share of low-income and minority students.⁷⁴

C. *Private-School Choice*

Private-school-choice programs, which give children public resources to enable them to attend private schools, serve far fewer students than charter schools. In the current school year, 702,000 children—less than 1% of all K–12 students and approximately 15% of private-school students—participate in a private-school-choice program.⁷⁵ These programs

70. Magnet Schs. of Am., *supra* note 48.

71. Jamison White & Matt Hieronimus, How Many Charter Schools and Students Are There?, Nat'l All. for Pub. Charter Schs. (May 20, 2022), <https://data.publiccharters.org/digest/charter-school-data-digest/how-many-charter-schools-and-students-are-there/> [<https://perma.cc/MEZ2-K23W>].

72. Yueting “Cynthia” Xu, 3. Where Are Charter Schools Located?, Nat'l All. for Pub. Charter Schs. (Dec. 6, 2022), <https://data.publiccharters.org/digest/charter-school-data-digest/where-are-charter-schools-located/> [<https://perma.cc/2EGB-725G>] (reporting that 58.2% of charter schools are located in urban areas and that those schools enroll 57.4% of charter students nationwide).

73. Kevin Hesla, Jamison White & Adam Gerstenfeld, *A Growing Movement: America's Largest Charter Public School Communities 2* (13th ed. 2019), https://www.publiccharters.org/sites/default/files/documents/2019-03/rdl_napcs_enrollment_share_report%2003112019.pdf [<https://perma.cc/S5ZJ-7NSL>].

74. Yueting “Cynthia” Xu, 2. Who Attends Charter Schools?, Nat'l All. for Pub. Charter Schs. (Dec. 6, 2022), <https://data.publiccharters.org/digest/charter-school-data-digest/who-attends-charter-schools/> [<https://perma.cc/9UEX-SDHA>] (“In the past 16 years . . . charter schools have consistently had a higher portion of students of color compared to district schools.”); see also Charter School Data Dashboard, *supra* note 24 (noting the higher proportion of students of color in charter schools); *infra* notes 146–149 and accompanying text.

75. Stephen P. Broughman, Brian Kincel, Jennifer Willinger & Jennifer Peterson, Nat'l Ctr. for Educ. Stat., *Characteristics of Private Schools in the United States: Results From the 2019–20 Private School Universe Survey 2* (2021), <https://nces.ed.gov/pubs2021/2021061.pdf> [<https://perma.cc/V2XZ-EM3A>]; Am. Fed'n for Child., *Our Impact Across America*, *supra* note 20; Press Release, U.S. Census Bureau, *Census Bureau Reports Nearly 77 Million Students Enrolled in U.S. Schools* (Dec. 3, 2019), <https://>

fall into roughly three programmatic buckets: voucher programs, scholarship-tax-credit programs, and education savings account programs (ESAs).⁷⁶ Voucher programs give eligible students publicly funded scholarships to attend private schools. These scholarships follow eligible children to the school of their choice upon enrollment. Scholarship-tax-credit programs provide a tax credit against state tax liability for donations to private nonprofit organizations that fund private-school scholarships.⁷⁷ These organizations, which have different names in different states, are commonly referred to as SGOs (“scholarship granting organizations”).⁷⁸ ESAs give students funds that parents can use for a wide variety of educational expenses, including private-school tuition, homeschooling, microschooling, tutoring, and educational therapies.⁷⁹ Missouri has hybrid ESA/SGO programs that grant tax credits for donations to private organizations that then give qualified students education savings accounts. A handful of states also give parents tax deductions or tax credits for their own children’s tuition.⁸⁰

Thirty states, Puerto Rico, and Washington, D.C. currently have at least one private-school-choice program.⁸¹ Sixteen states have voucher programs,⁸² twenty-one states have scholarship-tax-credit programs,⁸³ and eleven states have ESA programs.⁸⁴ And there are sixty-four private-school-

www.census.gov/newsroom/press-releases/2019/school-enrollment.html [https://perma.cc/Q4HW-NFG4].

76. Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 *Fordham Urb. L.J.* 703, 705–06 (2015).

77. Jon Huske Davies, *School Choices in the Sunflower State: The Kansas Tax Credit Scholarship for Low-Income Students Program*, 28 *Kan. J.L. & Pub. Pol’y* 197, 209 (2019).

78. *Id.*

79. *Az. Dep’t of Educ.*, *supra* note 11.

80. *Am. Fed’n for Child.*, 2021 *School Choice Guidebook* 4–5 (2021), <https://www.federationforchildren.org/wp-content/uploads/2021/10/Final-Guidebook-2021-Opt.pdf> [https://perma.cc/QXL5-XQUE] [hereinafter *School Choice Guidebook*]. In December 2022, the Kentucky Supreme Court invalidated the state’s ESA program on state-constitutional grounds. Peter Greene, *In Kentucky, The Court Rejects Tax Credit Scholarship Voucher Program*, *Forbes* (Dec. 18, 2022), <https://www.forbes.com/sites/petergreene/2022/12/18/in-kentucky-the-court-rejects-tax-credit-scholarship-voucher-program/?sh=3e8af06c1e6a> (on file with the *Columbia Law Review*).

81. *School Choice Guidebook*, *supra* note 80, at 5. The *School Choice Guidebook* places the count at thirty-one, but that count included the now-invalidated Kentucky program.

82. *School Vouchers*, edChoice, <https://www.edchoice.org/school-choice/types-of-school-choice/what-are-school-vouchers-2/> [https://perma.cc/H3VQ-NHKU] (last visited Apr. 10, 2023).

83. *Tax Credit Scholarships*, edChoice, <https://www.edchoice.org/school-choice/types-of-school-choice/tax-credit-scholarship/> [https://perma.cc/SS3C-GP78] (last visited Apr. 10, 2023).

84. *Education Savings Accounts*, edChoice, <https://www.edchoice.org/school-choice/types-of-school-choice/education-savings-account/> [https://perma.cc/Q6FD-SFPK] (last visited Apr. 10, 2023).

choice programs in the United States—twenty-six voucher programs, twenty-six scholarship-tax-credit programs, and twelve ESAs—in addition to two programs that provide refundable tax credits for private-school tuition.⁸⁵

With the exception of recently enacted universal programs, almost all private-school-choice programs restrict student eligibility in some way. For example, sixteen private-school-choice programs (in fourteen states) exclusively serve students with disabilities, or in some cases, children with specific learning needs such as autism or dyslexia.⁸⁶ Of the remaining programs, most are means tested, with income limits ranging from 185% to 400% of the federal poverty level.⁸⁷ Some means-tested programs have multiple levels of funding depending on family income. For example, Indiana’s voucher program has four levels of funding.⁸⁸ Eight of the thirty-five means-tested programs are also “failing schools” programs that restrict eligibility to students transferring from a failing public school or zoned to attend a failing school or a failing school district.⁸⁹ Other programs combine one or more of these eligibility limitations with others; for example, limiting eligibility to low-income students who are (1) transferring from a public school, (2) beginning kindergarten or high school, (3) siblings of current participants, (4) in the foster-care system, (5) children of active-duty military personnel, or (6) victims of bullying.⁹⁰ A number of programs cap the number of participants, either limiting the total number of participants to some specific number of students or pegging enrollment limits to some percentage of total public-school enrollment.⁹¹

II. PARENTAL CHOICE AS A POSTPANDEMIC ECONOMIC DEVELOPMENT STRATEGY

Debates about the costs and benefits of parental choice are typically centered (for obvious reasons) on questions of education policy. But parental-choice policies also can serve economic development functions

85. School Choice Guidebook, *supra* note 80, at 5; see also Nicole Stelle Garnett, *Unlocking the Potential of Private-School Choice: Avoiding and Overcoming Obstacles to Successful Implementation*, Manhattan Inst. (Mar. 16, 2023), <https://www.manhattan-institute.org/unlocking-the-potential-of-private-school-choice> [<https://perma.cc/3DDJ-LXNZ>].

86. School Choice Guidebook, *supra* note 80, at 94.

87. *Id.* at 93–95.

88. *Id.* at 32; Indiana Choice Scholarship Program, edChoice, https://www.edchoice.org/school-choice/programs/indiana-choice-scholarship-program/#student_eligibility [<https://perma.cc/J98Q-KUA4>] (last visited Jan. 7, 2023).

89. School Choice Guidebook, *supra* note 80, at 93.

90. See generally *id.* (documenting eligibility requirements for respective state programs). Before its expansion in 2022, students could qualify for Arizona’s ESA program in nine different ways. *Id.* at 18.

91. *Id.*

for at least three reasons discussed in this Part. First, decoupling property and education addresses a major “push factor” that leads many parents with the financial means to do so to exit urban neighborhoods for suburban ones—namely, the perceived need to secure space for their children in suburban public schools. It cannot, however, address the fact that the pandemic has made it easier (or at least more professionally acceptable) for professionals to work from home, thereby blunting a major “pull factor” for urban life, namely the convenience of living in close proximity to work. Second, decoupling property and education may help prevent the further closure of urban Catholic schools, which my previous research has demonstrated help stabilize disadvantaged urban communities.⁹² Third, decoupling property and education can help address economic inequalities within metropolitan areas by reducing barriers to mobility within metropolitan regions that prevent lower-income residents of center cities and inner-ring suburbs from moving to more affluent suburban communities.⁹³ The magnitude of the effects of parental-choice policies on each of these factors above likely turns on the extent of the parental-choice policies themselves. The greater the extent of “decoupling” between property and education—that is, the closer that the parental-choice policies get to universal eligibility—the more extensive the beneficial effects on these three economic development goals.

A. *Urban Residential Stability, Collective Efficacy, and High-Quality Schools*

The years leading up to the COVID-19 pandemic were hopeful ones for American cities. Many center cities’ fortunes improved during the last few decades: Importantly, concentrated poverty declined dramatically, and population losses began to reverse. In fact, beginning in the 1990s, the population growth of many downtowns—the most “urban” areas—outpaced overall population growth in many cities. Some cities experienced

92. See, e.g., Brinig & Garnett, *Lost Classroom, Lost Community*, *supra* note 7, at 9–75. While my research focuses explicitly and solely on Catholic schools, parental-choice policies may also spur the development of new schooling models that serve a similar stabilizing function in urban neighborhoods.

93. The importance of intrametropolitan mobility to the life prospects of lower-income, less-educated individuals is also well documented, but beyond the scope of this Essay. See, e.g., Edward Glaeser & David Cutler, *Survival of the City: The Future of Urban Life in an Age of Isolation* 299–302 (2021); see also Raj Chetty, John N. Friedman, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* 5–6 (Nat’l Bureau of Econ. Rsch., Working Paper No. 25147, 2018), <https://www.nber.org/papers/w25147> [<https://perma.cc/Y5W5-FLF5>]. The Opportunity Atlas developed by Harvard economist Raj Chetty and his colleagues maps children’s adult outcomes across a variety of factors (including income, education, and incarceration rates) based on the neighborhood where they grew up. Low-income children who grow up in low-income communities have worse outcomes than those who grow up in more affluent ones. These dynamics continue to be studied and documented by the Opportunity Atlas. The Opportunity Atlas, <https://www.opportunityatlas.org/> (last visited Apr. 10, 2023).

overall population losses but still saw their *downtown* populations grow.⁹⁴ Even poor neighborhoods began to regenerate, sometimes enough to raise gentrification concerns.⁹⁵

Then came the COVID-19 pandemic. Almost overnight, pandemic mitigation strategies stifled the urban vitality that many commentators (including myself) have long viewed as critical to healthy urban neighborhoods.⁹⁶ Social distancing turned neighbors into strangers and commercial districts into ghost towns; office buildings once teeming with economic activity emptied as employees transitioned to remote work or were laid off. Many residents with the financial means to do so decamped to less dense environs in order to reduce the risk of transmission.⁹⁷ As Edward Glaeser, one of the foremost scholars of urban economics, has observed, “[t]here are demons that come with density, the most terrible of which is contagious disease.”⁹⁸

A recent Brookings Institute report provides a snapshot of the effects of this reality on major U.S. cities.⁹⁹ From 2020 to 2021, among the eighty-eight cities with populations exceeding 250,000, seventy-seven showed either slower growth, greater population declines, or a shift from growth to decline compared to the previous year.¹⁰⁰ Fifty-one registered population losses, including fourteen that had not lost population since 2010.¹⁰¹ Those cities that experienced population gains were low density and concentrated in the South and Southwest.¹⁰² It is too soon to tell whether and

94. Rebecca R. Sohmer & Robert E. Lang, *Downtown Rebound*, in *1 Redefining Urban and Suburban America* 63, 65 (Bruce Katz & Robert E. Lang eds., 2003).

95. See, e.g., J. Peter Byrne, *Two Cheers for Gentrification*, 46 *How. L.J.* 405, 405–407 (2003) (identifying causes of gentrification); John A. Powell & Marguerite Spencer, *Giving Them the Old “One-Two”*: Gentrification and K.O. of Impoverished Urban Dwellers of Color, 46 *How. L.J.* 433, 434–35 (2003) (responding to Byrne, *supra*, and highlighting the harms of gentrification).

96. See, e.g., Nicole Stelle Garnett, *Ordering the City: Land Use, Policing, and the Restoration of Urban America* 189–211 (2010) (advocating for land use reforms that would encourage mixed-use neighborhoods and encourage urban vitality); Jane Jacobs, *Death and Life of Great American Cities* 198–233 (1961) (arguing that mixed-use neighborhoods are critical to urban neighborhood health).

97. Glaeser & Cutler, *supra* note 93, at 207–09 (describing the pandemic’s effects on urban vitality).

98. Tim Sablink, *Fed. Rsv. Bank of Richmond, Has the Pandemic Changed Cities Forever?: COVID-19 Transformed How We Work and Socialize, Which Could Put the Future of Cities on a New Path*, *Econ Focus*, First Quarter, 2021, at 4, https://www.richmondfed.org/publications/research/econ_focus/2021/q1/feature1 [<https://perma.cc/M8XJ-G99U>] (internal quotation marks omitted) (quoting Edward Glaeser).

99. William H. Frey, *Big Cities Saw Historic Population Losses While Suburban Growth Declined During the Pandemic*, *Brookings Inst.* (July 11, 2022), <https://www.brookings.edu/research/big-cities-saw-historic-population-losses-while-suburban-growth-declined-during-the-pandemic/> [<https://perma.cc/T7L5-X2UQ>].

100. *Id.*

101. *Id.*

102. *Id.*

when cities will fully rebound from the devastation wreaked by the pandemic, but there are early signs that the road to recovery will not be an easy one. In the New York City metropolitan area, for example, office occupancy rates are currently under 50%, and only 9% of Manhattan office employees report working in the office five days a week.¹⁰³

The pandemic appears to have radically transformed the nature of work, thereby eliminating a major “pull factor” for city life: proximity to the office. Before the pandemic, remote work—while possible in many cases—was relatively uncommon.¹⁰⁴ The pattern of work established during the Industrial Revolution—leaving home to go to work—persisted; both skilled and unskilled employees continued commuting to workplaces daily, even when technology enabled more remote work.¹⁰⁵ That has changed for millions of Americans, perhaps permanently. A Pew Research Center survey conducted in January 2022 found that nearly 60% of workers who stated that their jobs can be done mainly from home continue to work remotely all or most of the time.¹⁰⁶ Only 23% of the same group reported frequently working from home before the pandemic.¹⁰⁷ And, tellingly, the number of individuals working from home by choice (rather than because their workplace was closed or unavailable) increased from 36% to 61% between October 2020 and January 2022.¹⁰⁸

As offices reopen, many employers continue to offer workers, especially highly skilled ones, the option of working remotely for at least part of the week.¹⁰⁹ Unsurprisingly, the commercial real estate market has responded: Sales and rentals of office space continue to lag behind retail

103. Vielkind, *supra* note 29.

104. See Glaeser & Cutler, *supra* note 93, at 223 (“The pre-COVID share of Americans working from home is not entirely known One 2018 census figure is that . . . 95 percent of Americans left their home on the majority of weekdays.”).

105. *Id.* at 223 (arguing that the development of technology made our economy vastly more “connection intensive” and “turned the past forty years into a centripetal, urbanizing era”).

106. See Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, Pew Rsch. Ctr., COVID-19 Pandemic Continues to Reshape Work in America 4 (2022), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2022/02/PSDT_2.16.22_covid_work_report_clean.pdf [<https://perma.cc/YKD8-8F8Y>].

107. *Id.*

108. *Id.*

109. *Id.* 8–9; see also Ben Popken, Full Return to Office Is “Dead,” Experts Say—And Remote Is Only Growing, NBC News (Jan. 7, 2022), <https://www.nbcnews.com/business/economy/full-return-work-dead-experts-say-remote-only-growing-rca11323> [<https://perma.cc/8MHB-R5RQ>]; Taylor Telford, Corporate America Is Coming Around to Remote Work. But More Big Changes Lie Ahead., Wash. Post (Jan. 15, 2022), <https://www.washingtonpost.com/business/2022/01/15/remote-work-omicron/> (on file with the *Columbia Law Review*). Not all jobs can be done remotely, of course. The same Pew survey found that approximately 60% of American workers cannot work remotely. Parker et al., *supra* note 106, at 5. Jobs that cannot be done remotely tend to be concentrated among lower skilled, less educated workers. “In May 2020, 36 out of the 49 million who were working remotely came from the cluster of jobs that the Bureau of Labor Statistics calls

and industrial properties.¹¹⁰ Especially if the shift to remote work is—as appears to be the case—here to stay, retaining middle-class professional families with children is important for cities’ long term economic prospects. After all, those with the luxury of working remotely now have one fewer reason to live in cities: the convenience of living in closer proximity to their offices no longer matters.¹¹¹

Although the exact reasons for the prepandemic urban ascendance are the subject of debate, Edward Glaeser and Joshua Gottlieb compellingly argue that cities rebounded because elites increasingly developed an affinity for urban life, especially the social interactions and consumer amenities enabled by dense, mixed-land-use urban environments.¹¹² The reasons for the shift in lifestyle preferences included rising incomes and educational attainment and, importantly, a dramatic decline in central-city crime rates. Crime and disorder are two major disutilities of urban life; they prevent city dwellers from enjoying urban amenities and decrease opportunities for the informal social interactions that city life fosters. Beginning in the 1990s, as crime rates plummeted and urban officials began to focus on improving the quality of life in public places, city dwellers (and would-be city dwellers) found it easier to enjoy the advantages of urban life.¹¹³

This explanation supports what urban studies commentator Joel Kotkin has derisively referred to as “the cool city strategy.”¹¹⁴ At least before the pandemic, many cities’ urban development strategies turned on competing for what Professor Richard Florida famously described as “the creative class,” made up of individuals drawn to urban neighborhoods that “have become the prime location for the creative lifestyle and the new amenities that go with it.”¹¹⁵ To do so, as a 2003 *New York Times* article observed, even “boring” cities began “a hunt for ways to put sex in the city”

management, professional, and related occupations[;] . . . only 1.5 million out of 22 million employed service workers” reported working remotely. Glaeser & Cutler, *supra* note 93, at 228. Among employed adults, two-thirds of those with advanced degrees and 54% of those with college degrees were working remotely, compared to 15% of those without a college degree. *Id.* at 229. In November 2020, about one in two workers with an advanced degree were telecommuting, compared to fewer than one in ten of those without a college degree. *Id.*

110. Yijia Wen, Li Fang & Qing Li, Commercial Real Estate Market at a Crossroads: The Impact of COVID-19 and the Implications to Future Cities, 14 *Sustainability*, no. 19, art. 12851, 2020, at 12–13, <https://www.mdpi.com/2071-1050/14/19/12851/pdf> [<https://perma.cc/E33F-MDTX>].

111. See Glaeser & Cutler, *supra* note 93, at 208–09.

112. See *id.* at 234–36.

113. See Edward L. Glaeser & Joshua D. Gottlieb, Urban Resurgence and the Consumer City, 43 *Urban Stud.* 1275, 1286, 1297 (2006).

114. See Joel Kotkin, Uncool Cities, *Prospect Mag.* (Oct. 22, 2005), <http://www.prospectmagazine.co.uk/2005/10/uncoolcities> [<https://perma.cc/34BH-V3D3>] (describing efforts by cities to appeal to young professional demographics).

115. Richard Florida, *The Rise of the Creative Class: And How It’s Transforming Work, Leisure, Community, and Everyday Life* 67–89, 287 (2002).

to attract residents who could “risk moving to neighborhoods with subpar school systems, fixer-upper housing stock or a little street crime.”¹¹⁶

Even before COVID, the cool city strategy had limits, including the fact that most young professionals, even hip ones, do not remain unattached and childless forever. When their life circumstances change, they face the same pressures and demands that all parents face—including, importantly, the need for good schools for their children. As Kotkin observed, “[i]t turns out that many of the most prized members of the ‘creative class’ are not 25-year-old hip cools, but fortysomething adults who, particularly if they have children, end up gravitating to the suburbs.”¹¹⁷ Each year, fewer and fewer families choose to build their lives in city neighborhoods. Before COVID-19, at least, although many central cities were gaining more wealthy residents than they had in decades prior, almost all of them continued to lose families in general and middle-class families in particular. For example, a 2006 Brookings Institution study of twelve large metropolitan areas found that only 23% of central-city neighborhoods had middle-income profiles (that is, incomes between 80–100% of the median metropolitan income), compared to 45% in 1970.¹¹⁸

There are many reasons why middle-class families shun cities, including concerns about crime,¹¹⁹ which appears to be on the rise post-COVID

116. John Leland, On a Hunt for Ways to Put Sex in the City, *N.Y. Times* (Dec. 11, 2003), <https://www.nytimes.com/2003/12/11/garden/on-a-hunt-for-ways-to-put-sex-in-the-city.html> (on file with the *Columbia Law Review*).

117. Kotkin, *supra* note 114.

118. Jason C. Booza, Jackie Cutsinger & George Galster, Brookings Inst., *Where Did They Go?: The Decline in Middle-Income Neighborhoods in Metropolitan America 4* (2006), https://www.brookings.edu/wp-content/uploads/2016/06/20060622_middleclass.pdf [<https://perma.cc/CBE3-UTMV>].

119. Julie Berry Cullen & Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 *Rev. Econ. & Stat.* 159, 159–69 (1999) (finding a strong correlation between rising crime rates and suburbanization, especially among highly educated residents with children); see also, e.g., Robert J. Sampson & John D. Wooldredge, *Evidence that High Crime Rates Encourage Migration Away From Central Cities*, 70 *Socio. & Soc. Rsch.* 310, 310–14 (1986) (similar).

after decades of decline,¹²⁰ a topic beyond the scope of this Essay. But access to academically strong schools is undoubtedly a major factor.¹²¹ For obvious reasons, most parents prioritize the quality of their children's schools. And for many American families, "school choice" continues to mean residential choice. The 2019 Parent and Family Involvement in Education Survey of the National Household Education Surveys Program found, for example, that 20% of respondents with K–12-age children indicated that they moved to their current residence specifically so that their child would attend a public school there.¹²² Of parents with a child attending their residentially assigned school, 80% indicated that the school was their first choice.¹²³

As a result, an important—perhaps the most important—reason that cities find it so hard to attract and retain middle-class families is that most middle-class parents believe that suburban public schools will do a better job at educating their kids than urban ones.¹²⁴ Charles Tiebout was right: Local governments compete for "consumer-voters."¹²⁵ And, without question, the quality of public schools drives the competition for families with

120. E.g., Jeffrey H. Anderson, Criminal Neglect: Newly Released Numbers From the National Crime Victimization Survey Confirm that Violent Crime in Urban Areas Is Rising Dramatically, *City J.* (Oct. 4, 2022), <https://www.city-journal.org/violent-crime-in-cities-on-the-rise> [<https://perma.cc/R7WK-Q93V>]. From 2020 to 2021, the rate of violent victimization in urban areas increased from 19 to 24.5 victimizations per 1,000 persons, but there was no statistically significant change in suburban and rural areas. See Thompson & Tapp, *supra* note 31, at 8. Crime declined dramatically between 1993 and 2021. *Id.* But see, e.g., Grace Hauck, Data From Big Cities Suggests Most Violent Crime Fell Last Year. It's Not the Full Picture, Experts Say, *USA Today* (Jan. 26, 2023), <https://www.usatoday.com/story/news/nation/2023/01/26/crime-rate-homicides-shootings-declined-2022/11075070002/> [<https://perma.cc/3QZA-TLM9>] ("The trends in 2022 are largely the inverse of what happened in the U.S. amid the height of the COVID-19 pandemic in 2020 and 2021, when violent crime rose According to the report, homicides fell about 4% in 2022"); Jamiles Lartey, Weihua Li & Liset Cruz, Ahead of Midterms, Most Americans Say Crime Is Up. What Does the Data Say?, *Marshall Project* (Nov. 5, 2022), <https://www.themarshallproject.org/2022/11/05/ahead-of-midterms-most-americans-say-crime-is-up-what-does-the-data-say> [<https://perma.cc/8E4H-WQCC>] ("[V]iolent and property crimes have both been on a steady decline since the early 1990s. Murders did increase . . . in 2020, and have remained elevated, but murder is the least common form of violent crime. Overall, violent crime has remained roughly static since 2010, following decades of decline.").

121. See, e.g., Nicole Stelle Garnett, Affordable Private Education and the Middle Class City, 77 *U. Chi. L. Rev.* 201, 210–14 (2010) [hereinafter Garnett, Affordable Private Education].

122. Ke Wang, Amy Rathbun & Lauren Musu, Nat'l Ctr. for Educ. Stat., NCES 2019-106, School Choice in the United States: 2019, at 79 tbl.8.1 (2019), <https://nces.ed.gov/pubs2019/2019106.pdf> [<https://perma.cc/59JB-RF75>].

123. *Id.*

124. Garnett, Affordable Private Education, *supra* note 121, at 212.

125. Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 *J. Pol. Econ.* 416, 423–24 (1956).

children,¹²⁶ especially as parents' income and educational attainment rise.¹²⁷ For this reason, as discussed in more detail below, parental-choice policies—especially maximalist “universal” choice policies that fully decouple property and education—are an important tool for recruiting and maintaining middle-class and professional families to center cities: These policies eliminate the need to move to secure seats in high-quality public schools.

1. *Why Middle-Class Families Matter.* — Whatever the cause, no one disputes that the disappearance of stable middle-class urban enclaves has not been good for cities. Cities ignore this reality at their own peril. Attracting and retaining middle-class residents promises to increase the stability of urban neighborhoods for a number of related reasons, especially because overall resident wealth is one of the most important indicators of urban success.¹²⁸ Another predictor of urban stability is “collective efficacy,” a term sociologists and social psychologists use to describe the “ability of neighborhoods to realize the common values of residents and maintain

126. See, e.g., Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 6 *J. Pol. Econ.* 957, 968 (1969) (concluding that “people do appear willing to pay more to live in a community which provides a high-quality program of public services,” such as education); see also William A. Fischel, *Why Voters Veto Vouchers: Public Schools and Community-Specific Social Capital*, 7 *Econ. Governance* 109, 117–18 (2006) [hereinafter Fischel, *Why Voters Veto Vouchers*] (similar).

127. The academic struggles of urban school districts were well documented before the pandemic. See, e.g., Glaeser & Cutler, *supra* note 93, at 299–309; Christopher B. Swanson, *Educ. Rsch. Ctr., Cities in Crisis 2009: Closing the Graduation Gap: Educational and Economic Conditions in America's Largest Cities* 13 (2009), <https://epe.brightspotcdn.com/11/c9/ce165102486a982aeddf2e8446fa/cities-in-crisis-2009.pdf> [https://perma.cc/K6MW-Y54T] (recording statistics on the “graduation crisis” as of 2009); Buckley & Schneider, *School Choice, Parental Information, and Tiebout Sorting*, *supra* note 37, at 104. The most recent result on the National Assessment of Educational Progress, or the “Nation’s Report Card,” however, suggests that things got much worse in the last three years: Math and reading scores declined precipitously in many urban districts; for some, far more so than the overall sobering national results. See, e.g., Editorial, *The School Lockdown Catastrophe*, *Wall St. J.* (Oct. 24, 2022), https://www.wsj.com/articles/the-school-lockdown-catastrophe-naep-test-results-national-assessment-of-educational-progress-11666643369?mod=article_inline (on file with the *Columbia Law Review*) (recording educational declines in urban districts including Detroit, Milwaukee, Baltimore, Philadelphia and Cleveland). And, whether these results are attributable to extended school closures or not—in my view, there is no question that they are—extended school closures generated frustration among parents, many of whom turned to other educational options during the pandemic, including private schools, charter schools, and homeschooling. As a result, many urban districts have not recovered from COVID-related enrollment declines. Collin Binkley, *Cities Face Crisis With Smaller Schools as Enrollment Shrinks in Wake of Pandemic*, *PBS Newshour* (Aug. 1, 2022), <https://www.pbs.org/newshour/education/cities-face-crisis-with-smaller-schools-as-enrollment-shrinks-in-wake-of-pandemic> [https://perma.cc/MBL9-UQR9].

128. See Glaeser & Cutler, *supra* note 93, at xvi (“There are three common measures of urban success[:] . . . earnings, population growth, and housing prices.”).

effective social controls.”¹²⁹ Numerous studies demonstrate that neighborhoods with low collective efficacy levels exhibit more signs of social distress—for example, they are more dangerous and disorderly, and residents are more fearful of being victimized—than those with higher levels.¹³⁰ Unsurprisingly, residents who do not know their neighbors—or, worse, are afraid of them—will not enlist their help in addressing community problems.¹³¹

Collective efficacy increases along with residential tenure and homeownership, suggesting that the most successful, safest city neighborhoods will ultimately be the kinds of places where people choose to live their lives long term—to live, work, and raise families. For example, in a major study of 343 Chicago neighborhoods, Professors Robert Sampson, Stephen Raudenbush, and Felton Earls found that residential stability, measured by average residential tenure and homeownership levels, was one of three major factors explaining neighborhood variation in collective efficacy.¹³² They also found that collective efficacy, in turn, mediated the negative effects of the other two factors—economic disadvantage and immigration—enough to reduce violent victimization in a community.¹³³ These findings are consistent with other social science research linking residential tenure and homeownership, especially of single-family homes, with high collective efficacy levels.¹³⁴ This connection between homeownership and residential tenure is, of course, easily explained. Homeowners have not only economic incentives to organize in order to address neighborhood

129. Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *Science* 918, 918 (1997). Although collective efficacy is sometimes defined as a form of social capital, it might be better understood as a measure of how successfully members of a community can harness social capital. Tracey L. Meares, *Praying for Community Policing*, 90 *Calif. L. Rev.* 1593, 1604 (2002).

130. See, e.g., Chris L. Gibson, Jihong Zhao, Nicholas P. Lovrich & Michael J. Gaffney, *Social Integration, Individual Perceptions of Collective Efficacy, and Fear of Crime in Three Cities*, 19 *Just. Q.* 537, 540–42 (2002) (collecting literature).

131. See, e.g., Matthew R. Lee & Terri L. Earnest, *Perceived Community Cohesion and Perceived Risk of Victimization: A Cross-National Analysis*, 20 *Just. Q.* 131, 138 (2003) (noting that the “subjective side” of community cohesion is relevant because “individuals must actually perceive their communities to be cohesive”); Pamela Wilcox, Neil Quisenberry, Debra T. Cabrera & Shayne Jones, *Busy Places and Broken Windows? Toward Defining the Role of Physical Structure and Process in Community Crime Models*, 45 *Socio. Q.* 185, 188–89 (2004) (highlighting the harms to resident-based social control as a result of “attracting outsiders, limiting familiarity of faces, . . . and providing ‘holes’ in the resident-based fabric for which no resident will take responsibility”).

132. Sampson et al., *supra* note 129, at 921.

133. *Id.* at 923. This is particularly important because crime and the fear of crime tend to undermine residential stability. See Cullen & Levitt, *supra* note 119, at 159–69; Sampson & Wooldredge, *supra* note 119, at 310–14.

134. See, e.g., Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 *Am. J. Socio.* 603, 610 (1999).

problems but also social incentives: Social integration into a neighborhood naturally increases over time, providing opportunities to build trust relationships.¹³⁵

City officials should also consider the historical connection between middle-class families' departure from urban neighborhoods and center cities' economic struggles, both of which can be traced in part to mass suburbanization in the postwar decades.¹³⁶ There is no question that postwar suburbanization left metropolitan areas more racially and economically segregated.¹³⁷ Middle-class and working-class white residents moved to the suburbs, at least in part because of a desire to avoid school integration efforts.¹³⁸ As they left, urban communities became more racially isolated, and urban public schools resegregated.¹³⁹ Racially isolated urban neighborhoods, in turn, struggled with poverty, crime, and unemployment, and racially isolated schools struggle with declining academic achievement.¹⁴⁰ Although race was, of course, not the only factor leading

135. Gibson et al., *supra* note 130, at 552.

136. Garnett, *Affordable Private Education*, *supra* note 121, at 210. Historians date the origins of the urban crisis differently. Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940–1960*, at xii–xiii (1983) (examining Chicago during World War II and the postwar period to assess the forces that contributed to the city's rigid residential segregation); Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 4–6, 140–41 (1996) (examining Detroit as a case study of the urban crisis in America and tracing its origins to the 1940s and two related problems: economic inequality and its disproportionate burden on African Americans).

137. E.g., William Julius Wilson, *When Work Disappears* 25–41 (1996); Richard Arnott, *Economic Theory and the Spatial Mismatch Hypothesis*, 35 *Urb. Stud.* 1171, 1171–72 (1998); John Kain, *Housing Segregation, Negro Employment, and Metropolitan Centralization*, 82 *Q.J. Econ.* 175, 197 (1968).

138. See, e.g., Charles T. Clotfelter, *After Brown: The Rise and Retreat of School Desegregation* 81–86 (2004) (using school enrollment data to measure the rate of white families leaving desegregated districts); Kevin M. Kruse, *White Flight: Atlanta and the Making of Modern Conservatism* 167–69 (2007) (reporting that the desegregation of schools in Atlanta, Georgia, inflamed local white residents who feared that the transition would jeopardize their homeownership); John T. McGreevy, *Parish Boundaries: The Catholic Encounter With Race in the Twentieth-Century Urban North* 83–84, 104–07 (1996) (describing some white Catholic communities' resistance to residential integration in urban neighborhoods during the mid-twentieth century).

139. See, e.g., Brown, *supra* note 44, at 9–25; LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 *U. Chi. L. Rev.* 499, 510–22 (2022) [hereinafter Baldwin Clark, *Barbed Wire Fences*] (“[R]edlining to restrict the availability of home loans in Black areas, developing public housing that created monoracial urban spaces, passing zoning laws that slowed growth in some regions to only single-family homes that were financially out of reach for most Black families, and enforcing racially restrictive covenants . . . created the segregation that we see today.”).

140. Baldwin Clark, *Barbed Wire Fences*, *supra* note 139, at 510–22 (“[W]hen the state withdraws support for the wellbeing of its citizens . . . [it] begets social suffering[,] . . . creates vulnerability[,] . . . [and] traps people in spaces of violence, poverty, and subordination where pain and suffering concentrate. Mobility opportunities are low in these spaces, and ‘escape is difficult, if not impossible.’” (footnote omitted) (quoting Douglas S. Massey, *Getting Away With Murder: Segregation and Violent Crime in Urban America*, 143 *U. Pa. L. Rev.* 1203, 1216 (1995))); see also Michelle Wilde Anderson, *Cities Inside Out: Race,*

to postwar suburbanization, it was a major one.¹⁴¹ The pull to suburbs, however, now extends to all racial groups. Indeed, in recent years, minorities also have suburbanized. The 2020 Census found that the bulk of suburban population gains between 2010 and 2020 were attributable to an influx of *minority* suburban residents. A majority of each ethnic group in major metropolitan areas now reside in suburbs: 76% of the white population, 77% of the Asian population, 61% of the Latino population, and 54% of the Black population.¹⁴²

2. *Parental Choice and the Recruitment and Retention of Families.* — Public education reforms, including inter- and intradistrict public-school choice, undoubtedly help cities attract and retain families by giving children educational options other than the public school geographically assigned to them. For example, more than half of urban school districts operate magnet schools, compared to less than 10% of suburban school districts.¹⁴³ Urban school districts are also more likely to have open-enrollment policies offering families the option of sending their children to any school in the district, subject to space limitations.¹⁴⁴ Charter schools are also overwhelmingly (in most states, at least) an urban phenomenon: Nearly 58% are currently located in urban areas.¹⁴⁵ But, at least before

Poverty, and Exclusion at the Urban Fringe, 55 *UCLA L. Rev.* 1095, 1118–24 (2008) (examining such effects in rural and unincorporated rural areas).

141. A plausible case can be made that postwar suburbanizers were the last strands of a well-frayed urban fabric. See Robert Bruegmann, *Sprawl: A Compact History* 24–50 (2005) (describing the process of residential and retail decentralization from urban to suburban areas in American and European cities in late-nineteenth and early-twentieth centuries); Gerald Gamm, *Urban Exodus: Why the Jews Left Boston and the Catholics Stayed* 24–29 (1999) (“The white-ethnic exodus since World War II, though more visible because of its association with racial change, was only the late stage of an exodus that was already under way in the 1920s.”). Our cities began decanting before the turn of the twentieth century, and middle-class “flight” from urban centers was well underway by the 1920s. See generally Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 73–133 (1985) (describing the late-nineteenth-century growth of wealthy suburban communities outside of Boston, Chicago, Philadelphia, and New York that was enabled by rail systems). As Gerald Gamm argues in his fascinating study of Boston’s Dorchester neighborhood, a majority of Protestant and Jewish families exited urban neighborhoods well before the Second World War. Gamm, *supra*, at 11–17, 27–29. The white urban enclaves that remained intact well into the 1960s tended to be Catholic, where religious rules fostered an allegiance to geographic parishes and, importantly, schools, which rooted residents to their neighborhoods. *Id.* at 237–47. Postwar suburbanization, Gamm argues, occurred when Catholics’ attachments to their neighborhoods and parishes finally gave way. See *id.* at 11–24 (describing a pattern of Catholic families remaining rooted to their religious and neighborhood institutions and resisting suburbanization longer than other communities).

142. William H. Frey, *Today’s Suburbs Are Symbolic of America’s Rising Diversity*, Brookings Inst. (June 15, 2022), <https://www.brookings.edu/research/todays-suburbs-are-symbolic-of-americas-rising-diversity-a-2020-census-portrait/> [https://perma.cc/3MFD-EEDS].

143. Chen, *What Is a Magnet School?*, *supra* note 53.

144. See *supra* notes 48–52 and accompanying text.

145. Charter School Data Dashboard, *supra* note 24; see also Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *The C.R. Project, Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards* 57 (2010),

COVID-19, middle-class families had not widely embraced charter schools as an option for their kids. For a variety of reasons, including many charter schools' explicit mission of serving disadvantaged students, charter schools disproportionately educate lower-income minority students,¹⁴⁶ leading some civil rights leaders to raise concerns about racial isolation within them.¹⁴⁷ Currently, according to the National Alliance for Public Charter Schools, nearly 60% of charter-school students qualify for the federal free and reduced lunch program, and nearly 65% are racial minorities.¹⁴⁸ This may change over time: Some networks of charter schools—for example, the Great Hearts schools (which focus on classical education) and BASIS schools (which focus on STEM)—do attract many middle-class families, but not necessarily in urban communities.¹⁴⁹

Without discounting the importance of public education reforms, however, it is also important to recognize that, for many parents, deciding to live in a major city also entails a decision to send their children to private schools. The evidence is difficult to contest. The overall proportion of American schoolchildren attending a private school has held relatively

<https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenbergs-choices-without-equity-2010.pdf> [<https://perma.cc/8KYF-M9XK>] (“[A]nalyses of charter school enrollments have noted how the concentration of charter schools in urban areas skews the charter school enrollment towards having higher percentages of poor and minority students.”). Whether charter schools are more racially isolated than district public schools in similar neighborhoods is a contested question. See, e.g., Brian P. Gill, *Charter Schools and Segregation: What the Research Says*, Educ. Next, <https://www.educationnext.org/charter-schools-segregation-what-research-says/> [<https://perma.cc/H477-BYWJ>] (last updated Nov. 19, 2018) (reviewing literature); Thomas Monarrez, Brian Kisida & Matthew M. Chingos, *Do Charter Schools Increase Segregation?*, Educ. Next, <https://www.educationnext.org/do-charter-schools-increase-segregation-first-national-analysis-reveals-modest-impact/> [<https://perma.cc/TJ7U-U7EG>] (last updated July 24, 2019) (finding compelling evidence that over the last twenty years charter schools have led to slightly higher rates of segregation but noting that impact may be related to the purpose of some charter schools to serve specific populations of students).

146. See Wilson, *Charters, Markets, and Universalism*, *supra* note 1, at 293–95 (2019) (“The growth of the charter school movement is particularly prevalent in predominately poor and minority neighborhoods.”).

147. Charter schools appear to be more effective at educating disadvantaged children than students from middle-class families. Grace Chen, *More Truths Revealed About Charter Schools: Which Students Do They Serve Best?*, *Pub. Sch. Rev.* (June 25, 2012), <https://www.publicschoolreview.com/blog/more-truths-revealed-about-charter-schools-which-students-do-they-serve-best> [<https://perma.cc/7A7U-YKWT>] (citing one study showing that “charter schools were more effective with lower-income and lower-achieving students, but less effective with high-income, high-achieving students”).

148. Charter School Data Dashboard, *supra* note 24.

149. Richard Whitmire, *More Middle Class Families Choose Charters*, Educ. Next, <https://www.educationnext.org/middle-class-families-choose-charters/> [<https://perma.cc/9P58-HXXL>] (last updated Apr. 7, 2015). One of the contributors to this Symposium, Professor Erika Wilson, has raised concerns that white middle-class families have begun to exit district schools for predominantly white charter schools. See Erika K. Wilson, *The New White Flight*, 14 *Duke J. Const. L. & Pol’y* 233, 256–59 (2019).

steady—around 10%—for decades, as has that of private-school students disproportionately residing in urban areas. Across all income categories, the percentage of K–12 students enrolled in private schools is higher in cities than suburbs, and the proportion of private-school enrollment increases along with income.¹⁵⁰ In 2008, 31% of students living in the Seattle School District were enrolled in private schools; in San Francisco, this number was approximately 25%, and in Chicago, Denver, and New York, it was approaching 20%.¹⁵¹

There are multiple reasons why urban families choose private schools over charter and district ones, including competition for scarce space. Space in sought-after public schools can be scarce, including because some types of public schools—namely, magnet schools—can set admissions requirements (and often do). Sometimes these requirements are based on standardized tests or student GPAs. Some magnet schools exclude students for past disciplinary issues: For example, they do not admit students who have previously been suspended. Still others require interviews or parent meetings to ensure that the student is a good fit for the school. Some have lotteries, but others consider applications on a rolling basis, giving motivated parents a leg up on securing spots for their children.¹⁵² Competition for entry into the academically strongest magnet schools is frequently fierce, as recent debates about whether test-based admissions ought to be scrapped in order to achieve racial diversity highlight.¹⁵³

150. Richard J. Murnane, Sean F. Reardon, Preeya P. Mbekeani & Anne Lamb, *Who Goes to Private School?*, Educ. Next, <https://www.educationnext.org/who-goes-private-school-long-term-enrollment-trends-family-income/> [<https://perma.cc/HA84-H9NP>] (last updated July 17, 2018).

151. See, e.g., Gerald E. Frug & David J. Barron, *City Bound: How States Stifle Urban Innovation* 129 (2008) (providing statistics of private school enrollment in several major cities); Ingrid Gould Ellen, Amy Ellen Schwartz & Leanna Stiefel, *Can Economically Integrated Neighborhoods Improve Children’s Educational Outcomes?*, in *1 Urban and Regional Policy and Its Effects* 181, 200 (Margery Austin Turner, Howard Wial & Harold Wolman eds., 2008) (noting that, in 2000, 18.4% of elementary and secondary students in New York City were enrolled in private schools and that the probability of private-school attendance increases as income levels rise).

152. Lueken & McShane, *supra* note 46, at 6.

153. See Troy Closson, *In a Reversal, New York City Tightens Admissions to Some Top Schools*, N.Y. Times (Sept. 29, 2022), <https://www.nytimes.com/2022/09/29/nyregion/nyc-schools-admissions.html> (on file with the *Columbia Law Review*) (“The question of whether to base admissions on student performance prompted intense debate . . . Asian American families [argued] that the lotteries excluded their children But Black and Latino students are significantly underrepresented at selective schools, and some parents . . . hoped the previous admissions changes would become permanent to boost racial integration”); Campbell Robertson & Stephanie Saul, *Judge Strikes Down Elite Virginia High School’s Admissions Rules*, N.Y. Times (Feb. 25, 2022), <https://www.nytimes.com/2022/02/25/us/thomas-jefferson-school-admissions.html> (on file with the *Columbia Law Review*) (reporting that a federal judge struck down new admissions policies at a Virginia school that eliminated standardized testing requirements because the new rules left Asian American students “disproportionately deprived of a level playing field”

Parents seeking to take advantage of other public-school-choice options also frequently confront scarcity issues. As mentioned previously, both intra- and interdistrict choice is expanding: Thousands of students are taking advantage of open-enrollment opportunities in states where they are available. To give one example, more than 3,800 out-of-district students attend schools in Arizona's Scottsdale Unified School District, and more than 5,500 students enroll in a school other than their neighborhood school.¹⁵⁴ But, even in states with open-enrollment policies like Arizona, students must apply to transfer from their assigned schools, and schools and school districts are typically permitted (or required) to allocate seats to students who are residentially assigned to the school. And, since space tends to be a premium in the strongest schools, inter- and intradistrict choice is often illusory for many parents.¹⁵⁵ Many states also allow or require schools and school districts to restrict the number of out-of-district transfer students.¹⁵⁶ For example, some states place conditions on interdistrict transfers, in particular, limiting transfers to students attending failing schools or school districts (as is the case in many private-school-choice programs). Even when space is available, transportation is rarely provided for students transferring between schools and districts, creating a major logistical hurdle to interdistrict transfers.¹⁵⁷ For all these reasons, a more radical version of interdistrict choice is likely needed to sufficiently decouple property and education to incentivize parents with school-age children to remain in urban communities.

Scarcity of space is also an issue for parents seeking to enroll their children in charter schools.¹⁵⁸ In recent years, after long enjoying strong

(internal quotation marks omitted) (quoting *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21cv296, 2022 WL 579809, at *6 (E.D. Va. Feb. 25, 2022))).

154. Lueken & McShane, *supra* note 46, at 6; see also Mike McShane, Solving the School Choice Transportation Puzzle, *Forbes* (Mar. 11, 2020), <https://www.forbes.com/sites/mikemcshane/2020/03/11/solving-the-school-choice-transportation-puzzle/?sh=4644861a5119> (on file with the *Columbia Law Review*).

155. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *Yale L.J.* 2043, 2064–65 (2002) (describing the different varieties of school choice plans).

156. Lueken & McShane, *supra* note 46, at 6–7.

157. Michael Q. McShane & Michael Shaw, edChoice, *Transporting School Choice Students: A Primer on States' Transportation Policies Related to Private, Charter, and Open Enrollment Students* 5–7 (2020), <https://files.eric.ed.gov/fulltext/ED605559.pdf> [<https://perma.cc/L96R-5K6W>].

158. See, e.g., Top 5 Facilities Struggles for Charter Schools, Nat'l All. for Pub. Charter Schs. (Dec. 13, 2017), <https://www.publiccharters.org/latest-news/2017/12/13/top-5-facilities-struggles-charter-schools#:~:text=Not%20surprisingly%2C%20nearly%20half%20of,anticipated%20enrollment%20in%20five%20years.> [<https://perma.cc/B7XS-3RPA>] (“Nearly half of charter schools [responding to a national research survey] . . . were in school buildings that did not have space for their anticipated enrollment in five years.”); Christy Wolfe, *Opinion: Charter Schools Can't Grow If They Can't Afford Buildings for Their Students. Some Ways the Federal Government Can Help*, *The74* (Mar. 26, 2018), <https://www.the74million.org/article/opinion-charter-schools-cant-grow-if-they-cant-afford-buildings-for-their-students-some-ways-the-federal-government-can-help/> [<https://perma.cc/E88T-CHV7>] (“[S]chool facilities are one of the biggest obstacles to expanding

support among education reformers on both the left and the right, charter schools have become intensely controversial.¹⁵⁹ One result of the growing opposition to charter schools is that operators now face major hurdles when seeking authorization to open a new school.¹⁶⁰ This is especially the case when they seek authorization from school districts, which account for 90% of the country's authorizers. For example, districts authorized 222 fewer charter schools in 2016 than 2013.¹⁶¹ During those four years, nearly two-thirds of school districts that already had charter schools did not authorize a single new charter.¹⁶² In states with nondistrict authorizers, most charter school authorization activity has shifted to state education agencies and—where state law makes them an option—independent charter boards. This slowdown in authorizations causes many charter schools to have long waitlists, especially in urban areas.¹⁶³

charter school options.”); see also Thomas Sowell, *Charter Schools and Their Enemies* 51–67 (2020) (“[P]ower to deny classroom space to charter schools [is] in the hands of local school district officials, who can protect their existing traditional public schools from competition by limiting charter schools’ capacity to expand and admit the many students on their waiting lists.”).

159. See, Gabor, *supra* note 2 (“[R]anchor between charter and public-school proponents is so toxic that a potentially mutually beneficial Biden proposal for granting funding to charter schools . . . seems almost impossible to achieve.”); Erin Aubry Kaplan, *Opinion, School Choice Is the Enemy of Justice*, *N.Y. Times* (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/opinion/charter-schools-desegregation-los-angeles.html> (on file with the *Columbia Law Review*) (arguing that charter schools are often “intensely segregated” despite their “promise[] to equalize education”); Robert Maranto, *Opinion, The Biden Administration Has Quietly Declared War on Charter Schools*, *N.Y. Post* (Mar. 28, 2022), <https://nypost.com/2022/03/28/the-biden-administration-declares-war-on-charter-schools/> [<https://perma.cc/H25E-KGHV>] (arguing that the “decades-long honeymoon period” between Democratic officials and charter schools has ended and that “the US Department of Education has declared war on charter schools”).

160. See Nat’l Ass’n of Charter Sch. Authorizers, *Reinvigorating the Pipeline: Insights Into Proposed and Approved Charter Schools* 3, 12 (2019), https://www.qualitycharters.org/wp-content/uploads/2019/03/Reinvigorating-the-Pipeline_March_2019_FINAL_Web-1.pdf [<https://perma.cc/7B8Y-LY4F>] (noting “anecdotal claims that authorizers are becoming more hesitant to take risks on qualified applications from unproven applicants”); Matt Barnum, *Who Applies and Who’s Denied? Four Things We Learned From a New Report on America’s Charter Schools*, *Chalkbeat* (Mar. 14, 2019), <https://www.chalkbeat.org/2019/3/14/21121040/who-applies-and-who-s-denied-four-things-we-learned-from-a-new-report-on-america-s-charter-schools> [<https://perma.cc/9VYN-XRXF>] (reviewing the NACSA report’s conclusions).

161. Greg Richmond, *Opinion, Richmond: Why School Districts Are Walking Away From Authorizing New Charter Schools—And Why That’s Both a Good and a Bad Thing*, *The74* (Aug. 13, 2018), <https://www.the74million.org/article/richmond-why-school-districts-are-walking-away-from-authorizing-new-charter-schools-and-why-thats-both-a-bad-and-a-good-thing/> [<https://perma.cc/M9TN-PQ3C>].

162. *Id.*

163. Susan Pendergrass & Nora Kern, *Nat’l All. for Pub. Charter Schs., Waiting for Their Chance: A Closer Look at Wait Lists in Urban Public Charter Schools* 3 (2015), https://www.publiccharters.org/sites/default/files/migrated/wp-content/uploads/2015/05/waitlist_web.pdf [<https://perma.cc/Y7GS-7W7K>].

Unfortunately, space in moderately priced private schools is also declining, and with it the share of middle-income families choosing to send their children to private schools. While private-school enrollment has remained relatively steady (around 10%), the number of middle-income families enrolling their children in private schools has dramatically declined in recent decades.¹⁶⁴

One reason for the shift in private-school attendance is the disappearance of Catholic schools, which have long been the most affordable private-school option, from the American educational landscape. While Catholic schools, which tended to resume in-person instruction earlier than their public counterparts, enjoyed modest enrollment gains during the 2021–2022 school year (following decades of decline),¹⁶⁵ Catholic schools' closures continued apace. In the early 1960s, there were more than 5.2 million students enrolled in almost 13,000 K–12 Catholic schools. In the 2021–2022 school year, just under 1.7 million students attended 5,398 Catholic schools.¹⁶⁶ Between 2010 and 2020, 1,400 Catholic schools closed or consolidated, 261 opened (a 14.3% decline), and the number of students declined by 439,581 (a 21.3% decline).¹⁶⁷

Undoubtedly, a reason why many center cities are gaining wealthy residents but losing middle-class ones is that the wealthy can afford educational options that those of modest means cannot. The Education Data Initiative reports that, during the 2020–2021 school year, the average private school tuition in the United States was \$12,350 (\$8,700 at elementary schools and \$14,500 at high schools).¹⁶⁸ The average tuition at a Catholic school was \$6,080 (\$4,800 at elementary schools and \$11,200 at high schools).¹⁶⁹ In contrast, the average tuition at nonsectarian private schools was \$25,100 (\$20,900 at elementary schools and \$28,900 at high

164. Murnane et al., *supra* note 150.

165. Editorial, Catholic Schools' Good Covid Year: Staying Open During the Pandemic Paid Off in Growing Enrollment, *Wall St. J.* (Feb. 17, 2022), <https://www.wsj.com/articles/catholic-schools-good-covid-year-enrollment-increase-national-catholic-educational-association-11645139852> (on file with the *Columbia Law Review*).

166. Catholic School Data: 2021-22 Highlights, Nat'l Cath. Educ. Ass'n, https://ncea.org/NCEA/Who_We_Are/About_Catholic_Schools/Catholic_School_Data/2021_2022_Highlights/NCEA/Who_We_Are/About_Catholic_Schools/Catholic_School_Data/Highlights.aspx?hkey=e0456a55-420d-475d-8480-c07f7f090431 [<https://perma.cc/D7HE-GWKU>] [hereinafter Catholic School Data: 2021-22 Highlights] (last visited Jan. 7, 2023).

167. *Id.*

168. Melanie Hanson, Average Cost of Private School, Educ. Data Initiative, <https://educationdata.org/average-cost-of-private-school/> [<https://perma.cc/9UU8-X687>] (last updated Dec. 27, 2021).

169. *Id.*

schools).¹⁷⁰ Non-Catholic faith-based schools charge far less than their secular counterparts but still significantly more than Catholic schools.¹⁷¹ Those figures undoubtedly tip the balance in favor of suburban life for many families who are concerned about the educational options available to their children.

Universal parental-choice policies, which pair public-school-choice options with charter schools and private-school choice, reduce the sticker shock facing families who would choose to remain in urban neighborhoods if private schools were a realistic option. They also likely have the side benefit of stabilizing enrollments in and the finances of lower-cost faith-based schools, the majority of which—for historical reasons discussed elsewhere—are Catholic,¹⁷² thereby decreasing the likelihood that they close. Of course, Catholic and other faith-based schools are more attractive to some families than others.¹⁷³ I am certainly not suggesting otherwise. Still, embracing policies that completely decouple property and education by providing financial resources that make private schools more affordable for middle-income families will likely affect the residential choices of some families, at least at the margins. These policies will likely also stabilize the number of affordable private school options by preventing some Catholic schools from closing.¹⁷⁴

It is also worth noting that, in all likelihood, the primary beneficiaries of policies that help prevent the further disappearance of Catholic schools

170. *Id.* There are also tremendous regional variations in private-school tuition: Prices range from an average of \$23,980 in Connecticut to \$3,550 in Wisconsin. *Id.*

171. The average tuition at a non-Catholic religious school is \$10,200 (\$9,200 for elementary schools and \$18,900 for high school). *Id.*

172. Margaret F. Brinig & Nicole Stelle Garnett, Catholic Schools, Urban Neighborhoods and Education Reform, 85 *Notre Dame L. Rev.* 887, 900 (2012) [hereinafter Brinig & Garnett, Catholic Schools] (explaining the influence of parish donations and the role of religious sisters as teachers that traditionally kept tuition costs low at Catholic schools).

173. Nationwide, just over 20% of students enrolled in Catholic schools are non-Catholic. Catholic School Data: 2021-22 Highlights, *supra* note 166.

174. A 2006 RAND Corporation study of Michigan found that “private schools will lose one student for every three students gained in the charter schools.” Eugenia F. Toma, Ron Zimmer & John T. Jones, Beyond Achievement: Enrollment Consequences of Charter Schools in Michigan, in *Improving School Accountability: Check-Ups or Choice* 241, 250 (Advances in Applied Microecon. vol. 14, 2006). In contrast, a study in Arizona—a state with a third more students enrolled in charter schools that, at the time of the study, also operated two tuition-tax-credit programs and two voucher programs—found that charter-school competition had not negatively affected Catholic school enrollment. See Matthew Ladner, The Impact of Charter Schools on Catholic Schools: A Comparison of Programs in Arizona and Michigan, 11 *J. Cath. Educ.* 102, 104 (2007) (“Arizona’s experience provides a counterexample to Michigan in that the Catholic school system has done well despite the proliferation of charter schools. Arizona therefore provides a roadmap as how to expand both public and private choice systems without losing Catholic schools in the process.”). The author concluded that the private-school-choice programs in Arizona increased Catholic schools’ competitiveness. See *id.* at 110–11 (positing that Arizona’s tax credit program for private school scholarships helped bolster the state’s Catholic school enrollment).

from urban neighborhoods will be families who lack the financial means to move to suburbs to secure space in high-performing public schools. Decades of social science research has demonstrated a “Catholic school effect” on student performance.¹⁷⁵ Beginning with the groundbreaking research of Professors James Coleman and Andrew Greeley, numerous scholars have found that Catholic school students—especially poor, minority students—tend to outperform their public-school counterparts.¹⁷⁶ Greeley found, for example, that minority students’ achievement in Catholic schools not only surpassed that of those in public schools but, moreover, that the differences were the greatest for the poorest, most disadvantaged, students.¹⁷⁷ More recently, Professor Derek Neal confirmed Greeley’s “Catholic school effect” in research demonstrating that Catholic school attendance increased the likelihood that a minority student would graduate from high school from 62% to 88% and more than doubled the likelihood that a similar student would graduate from college.¹⁷⁸ Catholic schools, in other words, have a sustained record of helping close the achievement gap.¹⁷⁹ And, most recently, the first postpandemic National Assessment of Educational Progress (NAEP) results found that—in stark contrast to public- and charter-school students—Catholic school students

175. Andrew M. Greeley, *Catholic High Schools and Minority Students* 107–08 (1982) (“Motivation for success seems to be much more adequately rewarded with learning achievement in Catholic secondary schools than in public secondary schools.”).

176. *Id.* at 108 (“The effect of Catholic schools seems to be especially powerful on the multiply disadvantaged—minority students whose parents did not attend college, who themselves have not qualified for academic programs.”); see also James S. Coleman, Thomas Hoffer & Sally Kilgore, *High School Achievement: Public, Catholic, and Private Schools Compared* 144 (1982) (“The first and most striking result is the greater homogeneity of achievement of students with different parental education levels in Catholic schools than in public schools.”).

177. Greeley, *supra* note 175, at 108.

178. See Derek Neal, *The Effects of Catholic Secondary Schooling on Educational Achievement*, 15 *J. Lab. Econ.* 98, 100 (1997).

179. To be sure, scholars debate the reasons for Catholic schools’ success. Skeptics point to selection bias; that is, the possibility that Catholic schools attract better students with more highly motivated parents than public schools. But there is ample evidence that the achievement differential between public and Catholic schools is not attributable to selection bias. See, e.g., Charles M. Payne, *So Much Reform, So Little Change: The Persistence of Failure in Public Schools* 117 (2008). A better explanation, in my view, is suggested by the work of improvement science researcher Anthony Bryk and his colleagues, who have argued that Catholic schools succeed because they are intentional communities with high levels of trust and social capital and high expectations for achievement for all community members, regardless of race or class. See Anthony S. Bryk, Valerie E. Lee & Peter B. Holland, *Catholic Schools and the Common Good* 297–304 (1993). Sociologist James Coleman also suggested that social capital helped to explain Catholic schools’ success. See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 *Am. J. Socio.* S95, S1115 (1988) (“The low dropout rates of the Catholic schools, the absence of low dropout rates in the other private schools, and the independent effect of frequency of religious attendance all provide evidence of the importance of social capital outside the school . . . for this outcome of education.”).

experienced virtually no learning losses during the pandemic, in part because more than 92% of Catholic schools resumed in-person instruction in the fall of 2020, compared to 43% of traditional public schools and 34% of charter schools.¹⁸⁰ Catholic schools led the nation for Hispanic achievement on four tests of educational progress (fourth- and eighth-grade reading and math), Black students on three of the four tests, and low-income students overall in eighth-grade reading.¹⁸¹

B. *Catholic Schools, Urban Neighborhoods, and Social Capital*

Policies that forestall Catholic school closures will likely benefit urban neighborhoods for another reason: Catholic schools appear to be stabilizing community institutions, and policies that make them more financially accessible to parents will likely have the side benefit of decreasing the likelihood that they will close. My prior work with Professor Brinig measured the effects of Catholic schools as community institutions separately from their benefits as educational institutions. This work proceeded in multiple stages, culminating in our 2014 book, *Lost Classroom, Lost Community: Catholic Schools' Importance in Urban America*.¹⁸² In this research, we measured the effects of Catholic schools and charter schools on both social capital and serious crime, initially in Chicago and then in Philadelphia and the greater Los Angeles area.

In our initial study, we relied upon data collected by the Project on Human Development in Chicago Neighborhoods to measure the effects of Catholic school closures on perceived disorder and perceived social cohesion in Chicago neighborhoods.¹⁸³ We were able to access systematic and

180. Kathleen Porter-Magee, Opinion, Amid the Pandemic, Progress in Catholic Schools, *Wall St. J.* (Oct. 27, 2022), <https://www.wsj.com/articles/amid-the-pandemic-progress-in-catholic-schoolspartnership-naep-report-card-math-reading-public-charter-black-hispanic-11666902117> (on file with the *Columbia Law Review*).

181. Catholic school students scored the highest on all four NAEP tests. *Id.* Notably, Catholic school students scored seventeen points higher in fourth-grade math (or 1.5 grade levels) than the national public-school average and 20 points higher (two grade levels) in eighth-grade math. *Id.* Between 2019 and 2022, the scores of Black students enrolled in Catholic schools increased by ten points (about a year of learning) while falling by five points and eight points for Black public- and charter-school students, respectively. *Id.* Similarly, on the eighth-grade reading test, Hispanic students in Catholic schools gained seven points, while Hispanic students in public schools lost one point and Hispanic students in charter schools lost two points. *Id.*

182. Brinig & Garnett, *Lost Classroom, Lost Community*, *supra* note 7.

183. Brinig & Garnett, *Catholic Schools*, *supra* note 172, at 890, 902; see also Brinig & Garnett, *Lost Classroom, Lost Community*, *supra* note 7, at 57–76. This data was collected to test James Q. Wilson and George Kelling's controversial "broken windows hypothesis," which posits a causal link between disorder and more-serious crime. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, *Atl. Monthly*, March 1982, at 29–38, <https://cdn.theatlantic.com/media/archives/1982/03/249-3/132638105.pdf> [<https://perma.cc/25Q3-SZ9M>] (theorizing that minor instances of social and physical disorder in urban spaces can contribute to lawlessness and may encourage more serious crimes).

very detailed observations made of every block in approximately eighty Chicago neighborhoods and surveys of approximately 6,000 Chicago residents. Using this data set, we estimated the effects of Catholic school closures on neighborhood social cohesion, disorder, and “collective efficacy.” Specifically, we found that a Catholic school closure explained nearly half the variance in social disorder between similar neighborhoods, nearly 70% of the variance in social cohesion and nearly 30% of the variance in collective efficacy.¹⁸⁴

In our second study, we obtained police-beat-level data from the Chicago Police Department on the incidence of six major crimes (aggravated assault, aggravated battery, murder, burglary, robbery, and aggravated sexual assault) from 1999 to 2005.¹⁸⁵ We then analyzed the effects of Catholic-school closures between 1990 and 1996 on the rate of serious crime in police beats between 1999 and 2005. While crime decreased across the city of Chicago during this period, our analysis suggested that Catholic school closures affected the *slope of the decline*. That is, crime decreased more slowly between 1999 and 2005 in police beats where Catholic schools closed between 1990 and 1996. On average, our analysis suggested that crime declined by approximately 25% in beats with Catholic schools and 17% in beats that experienced a Catholic school closure.¹⁸⁶

In a third study, we again relied on police-beat-level data to compare the effects of *open* Catholic schools and *open* charter schools on serious crime in Chicago neighborhoods. We found that an open Catholic school appeared to suppress crime in a police beat. In fact, our regression analysis suggested that crime in police beats with open Catholic schools was, on average, at least 33% lower than police beats without them.¹⁸⁷ In contrast, we found that charter schools appeared to have no statistically significant effect on overall crime rates, although they were later found to be correlated with a statistically significant increase in aggravated assault and aggravated battery.¹⁸⁸ In contrast to the previous two studies, however, we

184. Brinig & Garnett, Catholic Schools, *supra* note 172, at 926; see also Brinig and Garnett, Lost Classroom, Lost Community, *supra* note 7, at 57–76.

185. Margaret F. Brinig & Nicole Stelle Garnett, Catholic Schools and Broken Windows, 9 J. Empirical Legal Stud. 347, 350 (2012).

186. *Id.* at 362; see also Brinig & Garnett, Lost Classroom, Lost Community, *supra* note 7, at 90–99. We replicated these two studies in Philadelphia, Pennsylvania, and Los Angeles County, California. As they had in Chicago, Catholic school closures in Philadelphia negatively and significantly affected the amount of social capital in a neighborhood as well as explaining a large amount of the variations in crime rates. Interestingly, however, we were not able to replicate these effects in Los Angeles County. See Brinig & Garnett, Lost Classroom, Lost Community, *supra* note 7, at 99–112.

187. Margaret F. Brinig & Nicole Stelle Garnett, Catholic Schools, Charter Schools, and Urban Neighborhoods, 79 Chi. L. Rev. 31, 47 (2012) [hereinafter Brinig & Garnett, Charter Schools].

188. *Id.* at 47.

were unfortunately unable to demonstrate causation.¹⁸⁹ We took care to clarify that we were not making causal claims about the effects of open charter schools on neighborhood crime.¹⁹⁰

Although we admittedly do not know *why* Catholic schools were good for urban neighborhoods in Chicago and Philadelphia during the period that we studied, we suspect that these effects are explained by Catholic schools' generating social capital, which in turns helps residents organize and address neighborhood problems.¹⁹¹ But, at the very least, our research suggests that one of the most effective ways to maintain social capital in an urban community with an open Catholic school is to keep the school open. While we took care to emphasize that education policies should advance primarily educational goals—not community-development goals—we also noted that one side benefit of private-school-choice policies is that they likely will stem the tide of school closures, thus helping to stabilize urban communities by preserving important neighborhood institutions.¹⁹² It is important to point out that this research focuses only on Catholic schools, and to a lesser extent, charter schools, not other kinds of schools—or indeed, social institutions—that may have a stabilizing effect on urban neighborhoods.

Maintaining the stabilizing influence of Catholic schools on urban neighborhoods is an important side-effect of decoupling property and education. From 2015 to 2016, approximately 36% of private-school students attended a Catholic school, and 40% attended other religious private schools.¹⁹³ Catholic schools are the most affordable private educational option in the United States and therefore most financially accessible to those taking advantage of private-school-choice resources.¹⁹⁴ They also are, for historical and demographic reasons, more likely to be located in urban neighborhoods. But none of this is to say that other kinds of private schools, including other kinds of religious schools, do not have stabilizing effects on urban neighborhoods. Depending on the funds made available, a positive side effect of decoupling property and education may be to spur the development of a diversity of new private schools (faith-based and otherwise) and foster other educational options, such as microschoooling, that may exert a stabilizing effect on urban neighborhoods.

189. Specifically, in our studies of the effects of Catholic school closures on crime, disorder, social cohesion, and collective efficacy, we employed instrumental variables related to the management of Catholic parishes that were exogenous to demographic factors predicting school closures. See Brinig & Garnett, *Charter Schools*, supra note 187, at 41–42.

190. See *id.* at 41–42, 48.

191. See Brinig & Garnett, *Lost Classroom, Lost Community*, supra note 7, at 112–37.

192. See *id.* at 137–56.

193. Nat'l Ctr. for Educ. Stat., *School Choice 2019*, supra note 49.

194. Hanson, supra note 168.

C. *Parental Choice and Intrametropolitan Mobility*

This Part has, thus far, discussed two benefits of policies that decouple property and education for center cities: First, they decrease the likelihood that families with the financial means to do so will exit cities for suburbs to secure space for their children in higher-performing public schools; second, they can help stabilize and prevent further closures of urban Catholic schools. But the economic development benefits of parental-choice policies extend beyond center city boundaries. Decoupling property and education will also help address economic inequalities within metropolitan areas as a whole by reducing barriers to mobility within metropolitan regions that prevent lower-income residents of center cities and inner-ring suburbs from moving to more-affluent suburban communities.¹⁹⁵

As Professor Erika Wilson's contribution to this Symposium explains, American metropolitan areas are characterized by arguably excessive local government fragmentation.¹⁹⁶ A patchwork of municipal and school district boundaries enable local governments to exclude lower-income and minority residents from wealthier, white suburbs.¹⁹⁷ Wilson documents the unfortunate fact that many of these boundaries have racist origins.¹⁹⁸ Wilson argues that federal courts should take into account the racialized history of municipal and district boundaries in constitutional litigation seeking inter-school-district desegregation orders and boundary adjustments.¹⁹⁹ As she acknowledges, however, under current doctrine, courts are not likely to be amenable to interfering with local government boundaries in these ways.²⁰⁰ Thus, the need to overcome incentives for the exclusionary policies will likely persist.

It is well-documented that concerns about maintaining school district quality are a major contributor to exclusionary zoning policies that limit lower-income residents' opportunities to move to suburban communities with good public schools. It is well established that school district quality is capitalized into home values, leading residents of suburban communities to support exclusionary zoning policies that limit affordable housing development.²⁰¹ Exclusionary zoning policies, in turn, drive up suburban

195. The importance of intrametropolitan mobility to the life prospects of lower-income, less-educated individuals is also well documented, but beyond the scope of this Essay. See, e.g., Glaeser & Cutler, *supra* note 93, at 299–302; see also Chetty et al., *supra* note 93; text accompanying note 93.

196. Erika K. Wilson, *White Cities, White Schools*, 123 *Colum. L. Rev.* 1221, 1229 (2023) (“Metropolitan fragmentation provided a conduit to create municipalities that used legal methods and extralegal violence to exclude Black and some other nonwhite residents.”).

197. *Id.* at 1254–55.

198. See *id.* at 1233–34.

199. See *id.* at 1267.

200. *Id.* at 1256–57.

201. See Phuong Nguyen-Hoang & John Yinger, *The Capitalization of School Quality Into House Values: A Review*, 20 *J. Hous. Econ.* 30, 30–48 (2011) (reviewing fifty school capitalization studies conducted between 1999 and 2010 and concluding that “these studies

housing prices. This dynamic limits lower-income residents' access to suburbs and their many amenities, including academically strong public schools,²⁰² and increases economic segregation within metropolitan areas.²⁰³ Economist Jonathan Rothwell has summed up the net effects of this phenomenon as follows: “Limiting the development of inexpensive housing in affluent neighborhoods and jurisdictions fuels economic and racial

provide remarkably similar results, namely that house values rise by 1–4% for a one-standard-deviation increase in student test scores”); see also William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 *Urb. Stud.* 317, 327 (2004) (noting that “the value of owner-occupied homes is greatly affected by the things that local governments do[;] . . . [such as] [i]mprovements in schools . . . [that] raise the value of owner-occupied homes”); Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms From the Inside Out*, 119 *Yale L.J.* 1904, 1932 (2010) (reviewing Lee Anne Fennell, *The Unbounded Home: Property Values Beyond Property Lines* (2009)) (arguing that there may be reasons other than home value capitalization for families to desire high-quality neighborhood schools). See generally Lee Anne Fennell, *The Unbounded Home: Property Values Beyond Property Lines* (2009) (discussing the ways in which the value of a home is determined by community resources, such as schools); William A. Fischel, *The Homevoter Hypothesis: How Homevoters Influence Local Government Taxation, School Finance and Land-Use Policies* 154–55 (2001) (concluding that “homebuyers do notice differences in test scores, or some quality closely related to test scores, and are willing to pay a premium for them”).

202. Gregory K. Ingram & Daphne A. Kenyon, *Introduction to Education, Land, and Location*, in *Education, Land, and Location* 1, 2–3 (Gregory K. Ingram & Daphne A. Kenyon eds., 2014).

203. See, e.g., Sheryll Cashin, *The Failures of Integration: How Race and Class Are Undermining the American Dream* 182–83 (2004) (highlighting that the strategic use of local zoning powers contributes to economic inequality in metropolitan areas); Edward L. Glaeser & Joseph Gyourko, *Rethinking Federal Housing Policy: How to Make Housing Plentiful and Affordable* 86–87 (2008) (studying the negative impact of land-use restrictions on affordability); Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* 6–7 (1997) (“As the central cities and inner suburbs become more socioeconomically challenged and diverse, these districts [developed through exclusionary zoning practices] become wealthier and less diverse.”); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *Stan. L. Rev.* 1115, 1136–37 (2000) (“The combination of local control over land use within local borders and local fiscal autonomy, thus, sustains a hierarchy of wealth and reinforces the differences in tax burdens and local service quality among localities in most metropolitan areas.”); Richard Briffault, *Localism and Regionalism*, 48 *Buff. L. Rev.* 1, 25–26 (2000) (“With property wealth and service needs unevenly distributed throughout the region and greater property wealth per household generally concentrated in areas of lower need, there are profound interlocal taxing and spending inequalities.”); Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 *U.C. Davis L. Rev.* 63, 79–80 (2013) (arguing that distribution of resources through sorting, even if acceptable in the normal market context, “is objectionable when applied to education, public safety, [and] local environmental quality”); Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 *Mich. L. Rev.* 277, 287 (2007) (“Because exclusionary zoning protects past exiters [of cities] from future ones, it raises serious transitional-fairness questions. It also has racial ramifications” (footnote omitted)); Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 *Harv. L. Rev.* 1662, 1685–89 (1979) (“[Z]oning barriers can prevent low and middle income families who live in the central city or small tax base suburbs from moving into the wealthy suburban communities, where they could enjoy a low tax, high spending fiscal package and an attractive living environment.”).

segregation and contributes to significant differences in school performance across the metropolitan landscape.”²⁰⁴

A full review of the voluminous literature on the persistence of economic inequalities among the municipalities within U.S. metropolitan areas and these inequalities’ connection to both exclusionary zoning policies and school-district quality is beyond the scope of this Essay. It suffices here to observe that these inequalities are linked, in part, to policies that connect educational opportunities with residential address. This link places a premium on living within school districts with high-performing public schools (driving up housing prices in these districts). It also incentivizes residents privileged to live in these communities to erect barriers to entry by lower-income families, including exclusionary zoning laws that block or dramatically limit the affordable housing supply. Policies that decouple property and education change this calculus, thereby muting these exclusionary incentives. Indeed, one (unattractive) reason why suburban residents have historically opposed parental-choice policies has been concern that they will lead to the influx of lower-income children into their schools.²⁰⁵

Although the effects of parental-choice policies on intrametropolitan inequality have not yet been systematically studied, there are a number of studies on individual choice programs.²⁰⁶ For example, studies of interdistrict choice programs have found that that housing values increase in

204. Jonathan Rothwell, Brookings Inst., *Housing Costs, Zoning, and Access to High-Scoring Schools 1–2* (2012), https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf [<https://perma.cc/LD22-EUKJ>].

205. See Ryan & Heise, *supra* note 155, at 2063–73 (“Suburbanites, meanwhile, at best tolerated the influx of transfer students.”); see also Fischel, *Why Voters Veto Vouchers*, *supra* note 126, at 117–18 (“An inarticulate desire to maintain the network of intracommunity links that public schools provide may account for voters’ resistance to statewide voucher programs even in places . . . where vouchers would seem to be most attractive.”).

206. There is related literature on the effects of school finance litigation, which partially decouples school funding from residential address, on housing prices and residential mobility. These studies suggest that equalizing funding across districts increases housing values in lower-income school districts. See Eric J. Brunner, *School Quality, School Choice, and Residential Mobility*, in *Education, Land, and Location*, *supra* note 202, at 62, 70–71 (2014) (collecting and reviewing studies); see also, e.g., Eric J. Brunner, James Murdoch & Mark Thayer, *School Finance Reforms and Housing Values: Evidence From the Los Angeles Metropolitan Area*, 2 *Pub. Fin. & Mgmt.* 535, 557 (2002) (finding that school finance reform resulted in a “convergence in housing values,” but that the convergence was achieved mainly by “leveling-down” school district quality in previously high-spending districts); Thomas S. Dee, *The Capitalization of Education Finance Reforms*, 43 *J.L. & Econ.* 185, 212 (2000) (finding that after school finance reform, “in the poorest school districts (that is, those that received the most new aid), median housing values and residential rents rose by at least 8 percent”); Dennis Epple & María Marta Ferreyra, *School Finance Reform: Assessing General Equilibrium Effects*, 92 *J. Pub. Econ.* 1326, 1345–48 (2008) (finding that, following reforms to the use of property taxes to fund education, changes in both the tax rate and school quality were capitalized to the value of homes). These studies have found only limited effects on residential mobility within metropolitan areas, however. See Brunner, *supra*, at 69–72 (summarizing research).

districts that send more students to neighboring districts and decrease in districts that receive more students.²⁰⁷ In other words, choice increases property values in academically weaker districts, a finding consistent with my argument, above, that the availability of parental choice will stabilize urban communities by giving residents options other than moving to high performing suburban school districts.²⁰⁸ These studies also suggest that interdistrict choice reduces income segregation across metropolitan areas. For example, one study of the effects of introducing interdistrict choice in twelve states between 1989 and 1999 found that decoupling education from housing location reduced housing value disparities and residential income segregation across school districts.²⁰⁹

Given the relatively limited scope of private-school-choice options to date, there have been fewer opportunities to study the real-world effects of universal choice policies such as now exist in Arizona, Arkansas, Florida, Iowa, Utah, and West Virginia on housing prices and intrametropolitan mobility. Economists, however, have sought to predict the effects of universal school choice (including private-school funding) on these variables using theoretical models. These models predict that introducing even modest private-school-choice options would significantly affect both housing price disparities and economic stratification in metropolitan areas. As María Marta Ferreyra, the author of one of these studies, observed, introducing a voucher into a previously residentially zoned school system will lead to reduced disparities in income and housing value across school districts as “some voucher users migrate toward neighborhoods with relatively low tax-inclusive housing prices and send their children to private schools, thus weakening the residential stratification of the current public school system.”²¹⁰

207. See Eric Brunner, Jon Sonstelie & Mark Thayer, *Capitalization and the Voucher: An Analysis of Precinct Returns From California's Proposition 174*, 50 *J. Urb. Econ.* 517, 519–21 (2001) (presenting a partial equilibrium model of the relationship between housing values and school quality); Eric J. Brunner, Sung-Woo Cho & Randall Reback, *Mobility, Housing Markets, and Schools: Estimating the Effects of Inter-District Choice Programs*, 96 *J. Pub. Econ.* 604, 609, 612 (2012) [hereinafter Brunner et al., *Mobility, Housing Markets, and Schools*] (“Expanded inter-district choice opportunities increase housing values in initially “low-quality” districts (districts with net outflows) and decreases housing values initially “high-quality” districts (district with net inflows).”); Randall Reback, *House Prices and the Provision of Local Public Services: Capitalization Under School Choice Programs*, 57 *J. Urb. Econ.* 275, 297–300 (2005) (“Both incoming and outgoing transfer rates have large, statistically significant effects on the future growth rate of a school district’s residential property values.”); Michael L. Walden, *Magnet Schools and the Differential Impact of School Quality on Residential Property Values*, 5 *J. Real Estate Rsch.* 221, 228–29 (1990) (“[S]chool quality does matter in the housing market. When houses are assigned to schools, houses assigned to better quality schools have that quality capitalized into their value.”).

208. See *supra* note 195 and accompanying text.

209. Brunner et al., *Mobility, Housing Markets, and Schools*, *supra* note 207, at 609.

210. María Marta Ferreyra, *Estimating the Effects of Private School Vouchers in Multidistrict Economies*, 97 *Am. Econ. Rev.* 789, 791 (2009); see also Eric J. Brunner, Jennifer Imazeki & Stephen L. Ross, *Universal Vouchers and Racial and Economic*

CONCLUSION

Decoupling property and education will likely affect not only where American children attend school but also where American families live. Parental-choice policies therefore serve an economic development function. In center cities, these policies reduce the need for families with children to move to the suburbs for high-performing public schools and help prevent the further disappearance of Catholic schools, which exercise a stabilizing effect on urban neighborhoods. Decoupling property and education also can help address the troubling and persistent pattern of economic stratification and segregation within U.S. metropolitan areas by reducing barriers to intrametropolitan mobility, including exclusionary zoning.

Decoupling property and education will also affect education law. My previous work addressed one way in which parental-choice policies are already fueling legal changes: the blurring of the public–private distinction that plays an important role in both state and federal constitutional law.²¹¹ Assuming these parental-choice policies continue to expand, lawmakers and courts also will face the question of how decoupling property and education affects other education law issues, including the future of school finance litigation. Over half of state supreme courts have relied on state constitutional education guarantees or equal protection clauses to require equalization of school funding across districts.²¹² Although litigants have more recently begun to shift their demands away from funding equity toward requests for nonmonetary remedies,²¹³ the most recent judicial

Segregation, 92 *Rev. Econ. Stat.* 912, 916 (2010) (“The home ownership variable captures the fact that vouchers may affect property values. In a system where households must live in a particular neighborhood in order to attend a particular school, it is well established that school quality will be capitalized into housing values”); Thomas J. Nechyba, *Introducing School Choice Into Multidistrict Public School Systems*, in *The Economics of School Choice* 145, 146 (Caroline Hoxby ed., 2003) (“By bringing choice into low-income school districts, private school vouchers sever the link between school quality and residential location, thus increasing the value of living in poor public school districts and lowering the value of living in wealthy districts.”).

211. Garnett, *Sector Agnosticism*, *supra* note 59.

212. *SchoolFunding.Info: A Project of the Center for Educational Equity at Teachers College*, <https://www.schoolfunding.info/litigation-map/> [<https://perma.cc/QM2N-SPVC>] (last visited Jan. 8, 2023) (tracking thirty-two states that have a legally recognizable right to “equity” or “adequacy” in school funding, under the state’s constitution); see also Rachel F. Moran, *School Finance Reform* and Professor Stephen D. Sugarman’s *Lasting Legacy*, 109 *Calif. L. Rev.* 355, 360–65 (2021) (describing the litigation in different states to equal school funding across districts); Educ. L. Ctr., *From Courthouse to Statehouse—and Back Again*, Executive Summary 3 (2021), https://edlawcenter.org/assets/files/pdfs/School%20Funding/ELC_Rpt_Exec_Summary_Courthouse_.pdf [<https://perma.cc/5Y77-XHE3>] (profiling significant school funding victories in Massachusetts, Kansas, Washington, and New Jersey).

213. These remedies include court-mandated socioeconomic integration as well as a range of remedies dependent on certain state statutes mandating, for example, more assistance for children with disabilities, more instructional minutes overall, and more due

decisions continue to focus on the need for increased funding of traditional public schools.²¹⁴ As some commentators have observed, the underlying theory of most funding inequity claims—that disparities in property wealth lead to the underfunding of high-poverty school districts—is, in many cases, outdated and oversimplified because property tax revenues today make up only a small fraction of the educational funds available to high-poverty districts.²¹⁵

Policies that decouple property and education by enabling residents to enroll their children across school-district boundaries and educational sectors further weaken the state constitutional arguments for equalization of funding by further minimizing the connection between local property taxes and education funding. This reality suggests that more state courts will eventually have to address the extent to which their education finance precedents have been rendered anachronistic. Additionally, although charter school advocates' efforts to leverage state education guarantees to obtain more funding on equality grounds have fallen short, litigation advancing this claim is currently pending in a number of states.²¹⁶ And efforts to demand private-school choice as a remedy for inequities in educational opportunities have also been unsuccessful,²¹⁷ as have—by and large—efforts to argue that charter-school and private-school-choice policies run afoul of these same guarantees.²¹⁸ As the policies that decouple property

process protections for teachers. William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 *Colum. L. Rev.* 1897, 1899 (2017); Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 *Kan. J.L. & Pub. Pol'y* 346, 352 (2018).

214. See *Educ. L. Ctr.*, *supra* note 212, at 2.

215. Naaz Modan, *School Funding Lawsuits Gain Prominence as States Eye Tax Cuts*, K-12 Dive (Jan. 28, 2022), <https://www.k12dive.com/news/school-funding-lawsuits-gain-prominence-as-states-eye-tax-cuts/617948/> [<https://perma.cc/V7QS-YWYD>] (“The idea that our entire funding formula is based around property taxes is sort of an outdated and oversimplified explanation of what’s going on.”).

216. See Phillip Geheb & Spenser Owens, *Charter School Funding Gap*, 46 *Fordham Urb. L.J.* 72, 127 (2019) (describing charter school lawsuits in Maryland, North Carolina, New Jersey, and, most recently, Texas); R. Craig Wood, *Charter School Constitutional Funding Challenges: North Carolina and Texas May Serve as Harbingers for the Future*, 44 *J. Educ. Fin.* 341, 346–47 (similar).

217. Michael Heise, *Education Rights and Wrongs: Publicly Funded Vouchers, State Constitutions, and Education Death Spirals*, 42 *Fordham Urb. L.J.* 745 (2015); Mead, *supra* note 76, at 743.

218. Garnett, *Sector Agnosticism*, *supra* note 59, at 57–65; Preston C. Green, III, Bruce D. Baker & Joseph O. Oluwole, *The Legal Status of Charter Schools in State Statutory Law*, 10 *U. Mass. L. Rev.* 240, 240–76 (2015); Aaron Jay Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 *B.C. L. Rev.* 909, 924–44 (2007); see also, e.g., *Magee v. Boyd*, 175 *So. 3d* 79, 111 (Ala. 2015) (rejecting state-education-clause challenge to private-school-choice program); *Meredith v. Pence*, 984 *N.E.2d* 1213, 1224–25 (Ind. 2013) (same); *Hart v. State*, 774 *S.E.2d* 281, 302–03 (N.C. 2015) (same); *Simmons-Harris v. Goff*, 711 *N.E.2d* 203, 207 (Ohio 1999) (same); *Jackson v. Benson*, 578 *N.W.2d* 602, 627–28 (Wis. 1998) (same), cert. denied, 525 *U.S.* 997 (1998). These lawsuits addressed private-school-choice programs, but there is a similar line of cases related to charter schools. See, e.g., *Wilson v. State Bd. of*

and education expand, courts will undoubtedly confront more of these claims.

Educ., 89 Cal. Rptr. 2d 745, 751 (Cal. Ct. App. 1999) (rejecting state-education-clause challenge to charter school law); Boulder Valley Sch. Dist. RE-2 v. Colo. State Bd. of Educ., 217 P.3d 918, 930 (Colo. App. 2009) (same); Council of Orgs. & Others for Educ. About Parochaid, Inc. v. Engler, 566 N.W.2d 208, 211 (Mich. 1997) (same); Ohio Cong. of Parents & Tchrs. v. State Bd. of Educ., 857 N.E.2d 1148, 1166 (Ohio 2006) (same); Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 17 P.3d 1125, 1131 (Utah 2001) (same); cf. Bush v. Holmes, 919 So. 2d 392 (Fla. 2006) (holding that "failing schools" voucher law violated Florida constitution); Gwinnett Cnty. Sch. Dist. v. Cox, 710 S.E. 2d 773, 775 (Ga. 2011) (same for Georgia constitution); League of Women Voters v. State, 355 P.3d 1131, 401–05 (Wash. 2015) (same for Washington constitution).