

## GENTRIFICATION AND URBAN PUBLIC SCHOOL REFORMS: THE INTEREST DIVERGENCE DILEMMA

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## ABSTRACT

Cities across the country are experiencing rapid increases in gentrification: the influx of middle-class, usually white, residents into cities with large minority populations. Reversing a decades-long trend of white flight out of urban city schools, a significant number of white middle-class gentrifiers are now enrolling their children in urban city public schools. Local officials in many gentrifying cities value the renewed interest of middle-class white residents in urban public schools because it represents an opportunity to finally racially integrate urban public schools. It also represents an opportunity to keep middle-class gentrifiers, and their tax dollars, from fleeing to the suburbs and suburban school districts once they have school-aged children.

In order to attract white middle-class gentrifiers, this Article suggests that local officials in some gentrifying cities are implementing certain public school reforms for the specific purpose of making their school systems more palatable to gentrifiers. Such reforms, the Article argues, harm poor and minority students by disproportionately displacing them from their neighborhood public schools while simultaneously limiting the number of quality public and charter schools available to them. While advocates for poor and minority students are mounting legal challenges to the reforms, to date the legal challenges have not been successful because courts lack the doctrinal support to find that the reforms constitute an actionable form of intentional discrimination.

This Article applies Derek Bell's Interest Convergence Theory and argues for the implementation of legislative solutions that can benefit both poor minority students and gentrifiers. Such an approach is a more effective way to both capitalize on the renewed interest of white middle-class residents in urban public schools and to improve educational opportunities for poor and minority students.

## I. INTRODUCTION

For much of the late 20th century, the dominant narrative surrounding American urban public schools revolved around middle-class white flight and abandonment of public schools. Precipitated in part by the Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education*<sup>1</sup> and buttressed by the Supreme Court's decision in *Milliken v. Bradley*,<sup>2</sup> middle-class white students fled urban schools for suburban schools or enrolled in private schools in large numbers.<sup>3</sup> As a result, most urban schools were left with a predominately poor and minority student population.<sup>4</sup> Recently however, in some urban school districts, the trend of white middle-class flight is slowly subsiding. A small but increasing number of white middle-class families are enrolling their children in urban public schools.<sup>5</sup> This increase is part of a much broader trend involving a resurgence of gentrification.<sup>6</sup> Indeed, cities across the country are gentrifying at a rapid rate as young, middle-class, and usually white professionals take up residence in neighborhoods that were occupied by predominately poor and minority residents for decades.<sup>7</sup>

<sup>1</sup> 402 U.S. 1 (1971) (allowing for the busing of students across neighborhoods in order to desegregate schools).

<sup>2</sup> 418 U.S. 717 (1974) (prohibiting inter-district desegregation orders, which in light of urban/suburban residential segregation, essentially insulated suburban white schools from having to integrate).

<sup>3</sup> See, e.g., Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597, 1608 (2003) (arguing that the Supreme Court's decision in *Milliken* encouraged white flight by allowing those who wished to avoid racially integrated schools to move to the suburbs without fear that desegregation would reach suburban schools); Christine H. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans?*, 12 J. LEGAL STUD. 69, 80–94 (1983) (summarizing various white-flight studies and concluding that school desegregation orders accelerated white flight).

<sup>4</sup> See generally Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since: Education and the Unfinished March*, ECON. POL'Y INST. 17–18 (2013), <http://s2.epi.org/files/2013/Unfinished-March-School-Segregation.pdf>.

<sup>5</sup> See, e.g., Linn Posey, *Middle- and Upper-Middle-Class Parent Action for Urban Public Schools: Promise or Paradox*, 114 TCHR. C. REC. 1, 1–34 (2012) (finding that a growing number of young professionals in central city areas want to maintain an urban lifestyle while raising a family and that growing economic pressures are compelling a large number of parents to opt for public rather than private school); Bill Turque, *Henderson Calls White Enrollment Growth Good for D.C. Schools*, WASH. POST (Sept. 2, 2011), [https://www.washingtonpost.com/local/education/henderson-calls-white-enrollment-growth-good-for-dc-schools/2011/09/02/gIQAkBknxJ\\_story.html](https://www.washingtonpost.com/local/education/henderson-calls-white-enrollment-growth-good-for-dc-schools/2011/09/02/gIQAkBknxJ_story.html) (noting that “white enrollment in the 45,000-student system was approaching 10 percent—about double the share of a decade ago”).

<sup>6</sup> For a more in-depth discussion of the meaning of gentrification generally and how it is used in this Article, see *infra* Part II.

<sup>7</sup> See Elvin K. Wyly & Daniel J. Hammel, *Islands of Decay in Seas of Renewal: Housing Policy and the Resurgence of Gentrification*, 10 HOUSING POL'Y DEBATE 711, 711–63 (1999)

While much scholarly attention is being paid to the ways in which the resurgence of gentrification is impacting urban housing markets,<sup>8</sup> little attention is being paid to the effects of gentrification on urban public schools.<sup>9</sup> This is likely the case because in past waves of urban gentrification, white middle-class residents either avoided the public schools or moved out of the city once they had school-aged children.<sup>10</sup> In the most recent resurgence of urban gentrification, however, insulation of public schools from the effects of gentrification is no longer the norm.<sup>11</sup> Instead, schools which were once considered too Black,<sup>12</sup> too poor, and too academically deficient to warrant

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(finding that widespread evidence points to a revival of central land markets in urban cities such as Chicago, Boston, and New York); Natalie Hopkinson, Opinion, *Farewell to Chocolate City*, N.Y. TIMES (June 23, 2012), <http://www.nytimes.com/2012/06/24/opinion/sunday/farewell-to-chocolate-city.html>.

<sup>8</sup> See, e.g., Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 814–815 (1993) (“While gentrification may indeed increase property values and bring higher maintenance and investment levels in a neighborhood, gentrification necessarily involves displacement of low-income tenants.”); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 768–70 (1993) (describing the effects of certain types of zoning measures as resulting in the displacement of low-income residents through the process of gentrification).

<sup>9</sup> A few scholars have analyzed the effects of gentrification on public schools. See, e.g., MAIA BLOOMFIELD CUCCHIARA, MARKETING SCHOOLS, MARKETING CITIES: WHO WINS AND WHO LOSES WHEN SCHOOLS BECOME URBAN AMENITIES (2013) (describing efforts in Philadelphia’s gentrifying Center City to market public schools to gentrifiers); JENNIFER BURNS STILLMAN, GENTRIFICATION AND SCHOOLS: THE PROCESS OF INTEGRATION WHEN WHITES REVERSE FLIGHT (2012) (describing efforts by middle-class gentrifiers to reform local public schools); Chase M. Billingham & Shelley McDonough Kimelberg, *Middle-Class Parents, Urban Schooling, and the Shift from Consumption to Production of Urban Space*, 28 SOC. F. 85 (2013) (analyzing shifts in gentrifiers’ public school consumption patterns in Boston).

<sup>10</sup> See Maureen Kennedy & Paul Leonard, *Dealing with Neighborhood Change: A Primer on Gentrification and Policy Choices*, BROOKINGS INSTITUTION CTR. ON URB. & METROPOLITAN POL’Y 1, 37–38 (2001), <http://www.brookings.edu/research/reports/2001/04/metropolitanpolicy> (examining in a series of essays the displacement of low-income, usually minority, residents caused by gentrification but noting that “poor schools in neighborhoods ripe for gentrification rarely pose an obstacle [to gentrification] since many of those who move to [gentrifying] neighborhoods . . . do not have children”).

<sup>11</sup> See, e.g., CUCCHIARA, *supra* note 9, at 187 (noting increases in the number of white children of gentrifiers enrolled in neighborhood public schools in the gentrified Center City section of Philadelphia, Pennsylvania, and anticipating a greater increase due to the changing racial demographics in Center City neighborhoods); STILLMAN, *supra* note 9, at 2 (describing the internal conflict that an increasing number of gentrifiers feel in New York City as they grapple with finding a way to stay in the city and provide their children with a quality education).

<sup>12</sup> When using the term “Black,” I use the upper-case “B” to reflect the view, articulated by other scholars, that Black people are a specific cultural group; therefore, the term “Black” is worthy of being capitalized as a proper noun. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (“When using ‘Black,’ I shall use an upper-case ‘B’ to reflect my

serious consideration by middle-class whites are now being given a second look by middle-class white gentrifiers who wish to remain in the city rather than flee to the suburbs or pay costly tuition for private school.<sup>13</sup>

Importantly, government economic development and housing policies are playing a critical role in facilitating the resurgence of gentrification.<sup>14</sup> This Article suggests that government policies aimed at facilitating gentrification are now extending into the education policy arena as well. To be sure, many local governments see the increasing willingness of gentrifiers to enroll their children in urban schools as a critical opportunity to retain white middle-class residents.<sup>15</sup> These local governments view white middle-class residents as a key ingredient to uplifting the economic and social trajectory of urban cities that often struggle with an anemic tax base and a plethora of social problems.<sup>16</sup>

To that end, local officials often view improving urban public schools as necessary in order to sustain gentrification because gentrifiers expect the amenities in cities to match their middle- and upper-class status and privilege.<sup>17</sup>

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view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.”); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1710 n.3 (1993) (“I use the term ‘Black’ throughout the paper for the reasons articulated by Professor Kimberlé Crenshaw. I share her view that ‘Blacks, like Asians, Latinos, and other “minorities,” constitute a specific cultural group and, as such, require denotation as a proper noun.’”); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN IN CULTURE & SOC’Y 515, 516 (1982) (suggesting that the letter “B” in Black should be capitalized because Black is not “merely a color of skin pigmentation, but . . . a heritage, an experience, a culture and personal identity”).

<sup>13</sup> See Katherine B. Hankins, *The Final Frontier: Charter Schools as New Community Institutions of Gentrification*, 28 URB. GEOGRAPHY 113, 126 (2007) (“Parent-gentrifiers are driving a new demand for urban services that gentrifiers of old largely did not need or bypassed.”); Billingham & Kimelberg, *supra* note 9, at 101 (studying gentrifier parents in Boston and finding that many decided to utilize their “financial, social, and human capital” to find schools in Boston rather than move to the suburbs or enroll their children in private school).

<sup>14</sup> See *infra* Part II.B.1–2.

<sup>15</sup> See, e.g., Linn Posey-Maddox, Shelley McDonough Kimelberg & Maia Cucchiara, *Middle-Class Parents and Urban Public Schools: Current Research and Future Directions*, 8 SOC. COMPASS 466, 466–67 (2014) (“[A]ttracting [middle-class] families to local public schools has emerged as a strategy for nurturing the revitalization of some cities.”).

<sup>16</sup> See, e.g., Jonetta Rose Barras, *Recruiting Diversity: Michelle Rhee’s Campaign to Diversify DCPS Means Wooing White Parents*, WASH. CITY PAPER (Aug. 27, 2010), <http://www.washingtoncitypaper.com/articles/39647/michelle-rhees-campaign-to-diversify-dc-public-schools-means-wooing/full> (“What used to be white flight is turning into ‘bright flight’ to the cities that have become magnets for aspiring young adults who see access to knowledge-based jobs, public transportation and a new city ambiance as an attraction.”); Kevin Hartnett, *Middle-Class Parents in the Boston Public Schools*, BOS. GLOBE (June 4, 2013, 10:00 AM), [http://www.boston.com/bostonglobe/ideas/brainiac/2013/06/middle\\_class\\_pa.html](http://www.boston.com/bostonglobe/ideas/brainiac/2013/06/middle_class_pa.html) (“For city officials, middle-class parents are a seduction and also a policy riddle. They are a boon to the schools their kids attend and a great source of tax revenue for the city in general.”).

<sup>17</sup> See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of Police Power*, 8 U. PA. J. CONST. L. 1, 23 (2006) (documenting

Many urban school systems in gentrifying areas do not match the middle- and upper-class privilege and status of gentrifiers because they serve predominately poor and minority students.<sup>18</sup> They also have a reputation for being low quality. In a quest to make their schools attractive for gentrifiers, this Article argues that local officials in some gentrifying cities are enacting or expanding pre-existing public school reforms in an attempt to increase both the reputational value of their school systems and the number of middle-class and non-minority students willing to enroll in urban public schools.<sup>19</sup> The Article further suggests that they are most prominently relying upon two public school reforms: (i) replacing so-called failing or underutilized traditional public schools with charter schools and (ii) enacting school enrollment policies that favor neighborhood schools rather than a system of open enrollment.<sup>20</sup>

The net effect of these two reforms has been to further increase racial segregation in schools. To be sure, research suggests that closing public schools diminishes the number of traditional public schools available to poor and minority students.<sup>21</sup> Poor and minority students are then required to compete for entry into a limited number of quality charter schools.<sup>22</sup> Further, the better public schools in many urban areas are often located in heavily gentrified neighborhoods.<sup>23</sup> As a result, by changing enrollment policies to favor

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the ways in which urban cities offer various upscale amenities and services which allow gentrifiers to “display [their] status through [their] environment”).

<sup>18</sup> See, e.g., Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 117, 201 (2002) (finding that middle-class parents relied upon information passed through social networks and the number of middle-class and white students enrolled in a school in determining whether a school was high quality or not).

<sup>19</sup> See, e.g., CUCCHIARA, *supra* note 9, at 2 (“Urban areas have experimented with voluntary choice programs, magnet schools, charter schools . . . all designed, at least in part, to slow suburban flight and increase race and class integration in schools.”).

<sup>20</sup> See Tomeka Davis & Deirdre Oakley, *Linking Charter School Emergence to Urban Revitalization and Gentrification: A Socio-Spatial Analysis of Three Cities*, 35 J. URB. AFF. 81, 99 (2013) (finding “clear trends in Chicago and Philadelphia, demonstrating an association between urban revitalization and charter school emergence”); Pauline Lipman & Nathan Haines, *From Accountability to Privatization and African American Exclusion: Chicago’s “Renaissance 2010,”* 21 EDUC. POL’Y 471, 488 (2007) (detailing a plan to close failing schools in Chicago and noting that “[c]losing schools and then reopening them as new schools is a key aspect of signifying to middle-class gentrifiers that the area will be literally reborn”).

<sup>21</sup> See *infra* Part III.D.

<sup>22</sup> See *infra* Part III.D.

<sup>23</sup> See, e.g., CUCCHIARA, *supra* note 9, at 10–11 (describing the ways in which neighborhood schools in gentrified areas in Philadelphia benefit from the resources and active involvement of middle-class parents to create high quality neighborhood schools); JACQUELINE EDELBURG & SUSAN KURLAND, *HOW TO WALK TO SCHOOL: A BLUEPRINT FOR A NEIGHBORHOOD RENAISSANCE* (2009) (discussing how parents in a middle-class gentrified neighborhood in Chicago utilized their financial and cultural capital to transform a traditional neighborhood school into one of the best schools in Chicago).

neighborhood enrollment rather than open enrollment, schools are created for gentrifiers that serve almost exclusively their children and no others.

Advocates for poor and minority students wishing to challenge the aforementioned exclusionary effects of public school reforms in gentrifying areas have, to date, relied upon court actions in which they allege that the reforms constitute unlawful discrimination.<sup>24</sup> Some groups are also bringing administrative complaints with the United States Department of Education, Office for Civil Rights (“OCR”) alleging violations of Title VI of the 1964 Civil Rights Act (“Title VI”).<sup>25</sup>

The primary argument made by this Article is that neither the courts nor OCR have the necessary doctrinal support in the case law related to intentional discrimination to properly address the harms caused to poor and minority students by the reforms. Thus, instead of using the court system to prevent the harms to poor and minority students as a result of the market-based reforms, this Article takes the position that legislative solutions that benefit both poor and minority students and gentrifiers should be explored. A legislative approach, rather than a litigation approach, is a more effective way of capitalizing on the renewed interest of white middle-class gentrifiers in enrolling their children in urban public schools.

The Article proceeds as follows: Part II briefly describes the resurgence of gentrification in urban areas. It examines the various waves of gentrification in the United States and assesses the ways in which government economic development and housing policies contribute to the resurgence of gentrification in the United States. It then discusses the benefits and costs of gentrification. Part III examines the impact of the resurgence of gentrification on urban public schools. It specifically focuses on three cities: Chicago; Philadelphia; and Washington, D.C. It analyzes the ways in which public school reforms are being used in these cities as a means of enticing predominantly white middle- and upper-class gentrifiers to remain in the city. It also analyzes how such a strategy harms poor and minority students.

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<sup>24</sup> See *Smith v. Henderson*, No. 13-420 (JEB), 2014 WL 3555310 (D.D.C. July 18, 2014) (challenging the closure of neighborhood schools in predominately Black areas as racially discriminatory); *Swan v. Bd. of Educ.*, No. 13-C-3623, 2013 WL 4401439 (N.D. Ill. Aug. 15, 2013) (challenging the closure of several Chicago public schools in predominately Black and Latino neighborhoods as racially discriminatory); *V.L. v. Sch. Dist. of Phil.*, No. 2:12-cv-03182 (E.D. Pa. filed June 5, 2012) (challenging the closure of North Philadelphia neighborhood schools as having a disparate impact on poor and disabled students).

<sup>25</sup> See, e.g., Lyndsey Layton, *Are School Closings the “New Jim Crow?” Activists File Civil Rights Complaints*, WASH. POST (May 13, 2014), [http://www.washingtonpost.com/local/education/2014/05/13/1a0d3ae8-dab9-11e3-b745-87d39690c5c0\\_story.html](http://www.washingtonpost.com/local/education/2014/05/13/1a0d3ae8-dab9-11e3-b745-87d39690c5c0_story.html) (“Arguing that school closures in cities across the country disproportionately affect African American students, community activists filed three federal civil rights complaints . . . challenging closures in Newark, New Orleans and Chicago . . . ”).

Part IV discusses the various legal challenges that advocates for poor and minority students are making to public school closings and the expansion of charter schools in gentrifying areas. It then analyzes the refusal of courts to conceptualize the harms suffered by poor minority students because of the public school reforms as an actionable discrimination.

Part V examines the ways in which the public school reforms currently being enacted in gentrifying areas create an interest divergence between poor minority students and gentrifiers. It applies Derek Bell's Interest Convergence Theory, identifies ways in which the interests of poor and minority families converge with white middle-class gentrifiers, and argues that application of this theory to legislative reforms of gentrification may allow for a political solution that satisfies both parties' interests. It then proposes legislative solutions that could meet the needs of both poor and minority students and gentrifiers. Part VI concludes.

## II. THE RESURGENCE OF GENTRIFICATION

Various meanings and political connotations are ascribed to the term gentrification.<sup>26</sup> Some scholars use the term to describe the process by which housing stock and infrastructure in an urban neighborhood are upgraded and low-income residents are displaced by middle- and upper-class residents.<sup>27</sup> Indeed, the term gentrification was first used by English writer Ruth Glass to describe the process of middle-class residents moving into working class neighborhoods in London, upgrading the housing stock, and eventually displacing the working-class residents.<sup>28</sup> Other scholars use the term gentrification to encapsulate a much broader process of intentional disinvestment in an urban neighborhood followed by a period of reinvestment which causes both a class- and race-based transformation of the neighborhood.<sup>29</sup> Lastly, some scholars eschew the notion that gentrification is

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<sup>26</sup> For a comprehensive discussion of the historical definitions given to gentrification, see J. JOHN PALEN & BRUCE LONDON, GENTRIFICATION, DISPLACEMENT AND NEIGHBORHOOD REVITALIZATION 6–10 (1984).

<sup>27</sup> See, e.g., Kennedy & Leonard, *supra* note 10, at 5 (defining gentrification as the involuntary displacement of residents by higher income residents and the physical upgrading of the neighborhood and change in the neighborhood's character).

<sup>28</sup> See Ruth Glass, *Aspects of Change*, in THE GENTRIFICATION DEBATES 18, 18–27 (Japonica Brown-Saracino ed., 2010).

<sup>29</sup> See, e.g., NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY 37 (1996) ("Gentrification is no longer about a narrow and quixotic oddity in the housing market but has become the leading residential edge of a much larger endeavor: the class remake of the central urban landscape."); Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 WASH. U. J. URB. & CONTEMP. L. 195, 198–99 (1985) (defining gentrification as "new residents—who are disproportionately white, professional, technical, and managerial workers with higher education

synonymous with displacement and instead use the term to mean an overall revitalization or improvement of commercial and residential areas in urban neighborhoods.<sup>30</sup>

While the definitions and political connotations attached to the term gentrification vary, three common components emerge: (i) an influx of capital; (ii) displacement—or at a minimum a change in the class of people who occupy a neighborhood; and (iii) transformation of the community within the neighborhood. Given the common modules that emerge from the different definitions of gentrification used by scholars, this Article uses the term gentrification to mean an influx of capital into a community that once suffered from a disinvestment of capital, which results in the movement of people, particularly higher-income people, into a community. Applying this definition of gentrification, urban cities across America are experiencing staggering increases in gentrification.<sup>31</sup> Scholars are labeling this uptick in gentrification as a resurgence of gentrification.<sup>32</sup>

This current resurgence of gentrification is being further fueled by the enactment of local public school reforms. To better understand the ways in which these reforms are being used, it is important to understand the contours of modern day gentrification, particularly the ways in which it is different from past rounds of gentrification. To that end, this section provides a brief description of the various waves of gentrification in the United States. It then examines the most recent resurgence of gentrification, paying particular attention to the role that government economic development and housing policies are playing in facilitating the resurgence of gentrification. It concludes by discussing the benefits and downsides to the most recent resurgence of gentrification.

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and income levels—replac[ing] older residents—who are disproportionately low-income, working-class and poor, minority and ethnic group members, and elderly from older and previously dilapidated inner-city housing in a spatially concentrated manner that is to a degree differing substantially from the general level of change in the community or region as a whole”); John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”: Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 *How. L.J.* 433 (2003) (describing the ways in which gentrification is rooted in race and class transformation of urban areas).

<sup>30</sup> See, e.g., J. Peter Byrne, *Two Cheers for Gentrification*, 46 *How. L.J.* 405, 406 (2003) (noting that the negative connotations attached to gentrification are misguided, particularly the idea that gentrification displaces poor minorities, and instead defining gentrification as “the process by which people of higher incomes move into lower income urban areas and seek to change its physical and social fabric to better meet their needs and preferences”).

<sup>31</sup> See Wyly & Hammel, *supra* note 7, at 713 (arguing that “[g]entrification . . . witnessed a resurgence in the 1990s that . . . quickly erased any lingering suspicion that the process was only a brief historical aberration”).

<sup>32</sup> See *id.* at 713–15.

### A. Waves of Gentrification

The causes and consequences of gentrification are subject to much debate.<sup>33</sup> A complete account of the various theories regarding gentrification is beyond the scope of this Article and has been written about extensively by other authors.<sup>34</sup> Nevertheless, the scholarly literature on gentrification generally recognizes three different time periods or waves in which gentrification occurred in American urban cities.<sup>35</sup> Some scholars also suggest that the gentrification that is currently occurring is part of an evolving fourth wave of gentrification.<sup>36</sup>

The first wave of gentrification occurred from the 1950s through the mid-1970s.<sup>37</sup> It involved the infusion of public subsidies, particularly tax incentives, into urban areas in order to induce investment and relocation into inner-cities by businesses and affluent individuals.<sup>38</sup> This was done in an attempt to counter the mass outmigration of white residents from urban inner-cities to the suburbs during the same time frame.<sup>39</sup> Gentrification during this time period generally occurred in a sporadic rather than deliberate manner.<sup>40</sup> In the United States, gentrification during this time period was also localized insofar as it was limited to larger urban inner-cities primarily in the northeastern part of the country.<sup>41</sup>

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<sup>33</sup> See, e.g., Japonica Brown-Saracino, *Overview: The Gentrification Debates*, in THE GENTRIFICATION DEBATES, *supra* note 28, at 1, 14.

<sup>34</sup> See, e.g., *id.*; TIM BUTLER, GENTRIFICATION AND THE MIDDLE CLASSES 35–54 (1997); SMITH, *supra* note 29, at 38–42.

<sup>35</sup> See generally Elvin K. Wyly & Daniel J. Hammel, *Gentrification, Housing Policy and the New Context of Urban Redevelopment*, in 6 CRITICAL PERSPECTIVES ON URBAN REDEVELOPMENT 211, 217–19 (Kevin Fox Gotham ed., 2001) (describing three waves of gentrification with “each wave ‘tied to a particular constellation of political and economic conditions nested at larger geographic scales’”); Jason Hackworth & Neil Smith, *The Changing State of Gentrification*, 92 J. ECON. & SOC. GEOGRAPHY 464, 465–68 (2001).

<sup>36</sup> See LORETTA LEES, TOM SLATER & ELVIN WYLY, GENTRIFICATION 179 (2008) (“Several developments in the first half of this decade . . . suggest that we are seeing a new, distinctive fourth wave of gentrification . . . .”).

<sup>37</sup> See Hackworth & Smith, *supra* note 35, at 466.

<sup>38</sup> See *id.*

<sup>39</sup> See Wyly & Hammel, *supra* note 35, at 217.

<sup>40</sup> See Hackworth & Smith, *supra* note 35, at 466 (noting that the first wave of gentrification during the 1950s though 1970s was sporadic and state-led as local and national governments sought to counteract the economic decline of inner-city neighborhoods); Christopher Niedt, *Gentrification and the Grassroots: Popular Support in the Revanchist Suburb*, 28 J. URB. AFF. 99, 100 (2006).

<sup>41</sup> See Hackworth & Smith, *supra* note 35, at 467.

The second wave of gentrification occurred in the post-recession 1970s through the late 1980s.<sup>42</sup> Generally speaking, during the second wave, the state took a laissez-faire approach towards gentrification.<sup>43</sup> It only intervened in the form of public-private partnerships once investment by private actors proved that gentrification was viable in a particular area.<sup>44</sup> Significantly, gentrification during this time period became integrated into a much larger global and national scale process.<sup>45</sup> Put another way, whereas gentrification during the first wave occurred on a localized level in certain areas such as the northeast United States, gentrification during the second wave became a global phenomenon.<sup>46</sup> Importantly, during this wave of gentrification, long-time residents and activists often mounted aggressive challenges to gentrification because gentrification was commonly linked to the displacement of minorities and the poor.<sup>47</sup>

The third wave of gentrification occurred during the post-recession 1990s.<sup>48</sup> This third wave—or resurgence of gentrification—is arguably ongoing today,<sup>49</sup> though some scholars suggest that this third stage is morphing into an even more complex fourth wave of gentrification.<sup>50</sup> For purposes of this Article, the third and fourth waves of gentrification are discussed together as the “resurgence of gentrification.”

The resurgence of gentrification differs from prior waves of gentrification in significant ways. First, the bounds of gentrification are now expanding beyond just the inner-city and into more remote locations such as

<sup>42</sup> See Wyly & Hammel, *supra* note 35, at 217.

<sup>43</sup> See Hackworth & Smith, *supra* note 35, at 466.

<sup>44</sup> See *id.* (noting that most local state efforts related to gentrification “focused on prodding the private market rather than directly orchestrating gentrification”).

<sup>45</sup> See *id.* at 468; Niedt, *supra* note 40, at 100.

<sup>46</sup> See SMITH, *supra* note 29, at 36–37 (suggesting that gentrification by the 1970s became part of a global urban restructuring as cities found themselves competing in the global market).

<sup>47</sup> See Hackworth & Smith, *supra* note 35, at 468.

<sup>48</sup> See Wyly & Hammel, *supra* note 35, at 218.

<sup>49</sup> See Powell & Spencer, *supra* note 29, at 459–65 (detailing the different stages of gentrification occurring in Detroit, San Francisco, Boston, and Chicago); Wyly & Hammel, *supra* note 7, at 761 (concluding that gentrification in Chicago, Boston, Seattle, Washington D.C., Detroit, Milwaukee, and Philadelphia showed clear evidence of gentrification in the 1990s and noting that “[b]etween 1992 and 1997 gentrified neighborhoods in those cities attracted mortgage investment[s] that grew more than 2.3 times as fast as the suburban rate”); Timothy Williams, *Cities Mobilize to Help Those Threatened by Gentrification*, N.Y. TIMES (Mar. 3, 2014), [http://www.nytimes.com/2014/03/04/us/cities-helping-residents-resist-the-new-gentry.htm?\\_r=0](http://www.nytimes.com/2014/03/04/us/cities-helping-residents-resist-the-new-gentry.htm?_r=0) (noting that the latest wave of gentrification happened very quickly and citing Boston, Seattle, New York, Washington D.C., and Atlanta amongst the fastest gentrifying cities).

<sup>50</sup> See, e.g., LEES, SLATER & WYLY, *supra* note 36, at 173–86 (arguing that a new fourth wave of gentrification emerged after the 2001 recession which is being fueled by changes to housing finance policies, resulting in increased capital investment in inner-cities).

inner-ring suburbs.<sup>51</sup> Similar to the gentrification expansion that occurred during the second wave, the boundary expansions of gentrification are also part and parcel of globalization.<sup>52</sup>

Second, corporate developers and financial institutions are much more involved and visible during this recent resurgence of gentrification. Corporate developers are increasingly spearheading current gentrification efforts, whereas in past waves of gentrification, corporate developers and financial institutions only got involved once a neighborhood had already begun the process of gentrifying.<sup>53</sup> Further, some scholars suggest that while financial institutions were previously risk averse, reluctant to make loans to borrowers in gentrifying areas, financial institutions during the resurgence of gentrification are much more aggressive in making loans, particularly to wealthy individuals or corporations seeking to enter a gentrifying urban area.<sup>54</sup>

Third, there is less resistance to gentrification from policymakers and grassroots advocates this time. Gentrification is now theorized as uplifting the economic and political plight of poor individuals who are purportedly doomed to live in neglected and disinvested neighborhoods without the entry of more affluent individuals and corporations.<sup>55</sup> Thus, while gentrification was once thought to be a dirty word synonymous with displacement and marginalization of the poor and minorities,<sup>56</sup> it is now more readily embraced as a solution to the capital and cultural disinvestment that has long plagued urban areas.<sup>57</sup>

Lastly, a key factor that differentiates the most recent resurgence of gentrification from other waves of gentrification is that the resurgence of gentrification coincides with a cultural shift and economic shift that is drawing more educated and affluent people to urban cities. With respect to the cultural shift, living in urban inner-cities was once considered a last resort for minorities, the poor, and others who lacked viable housing choices.<sup>58</sup>

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<sup>51</sup> See Hackworth & Smith, *supra* note 35, at 468.

<sup>52</sup> See *id.*

<sup>53</sup> *Id.*; Loretta Lees, *Super-Gentrification: The Case of Brooklyn Heights, New York City*, 400 URB. STUD. 2487, 2496 (2003) (describing the gentrifying effect of corporate development in downtown Brooklyn).

<sup>54</sup> See LEES, SLATER & WYLY, *supra* note 36, at 181 (arguing that “[i]n contrast to earlier waves [of gentrification] when financial institutions were risk averse . . . lenders are now aggressively competing to make loans”).

<sup>55</sup> See Byrne, *supra* note 30, at 406; Hackworth & Smith, *supra* note 35, at 468.

<sup>56</sup> See Byrne, *supra* note 30, at 405.

<sup>57</sup> See, e.g., J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 551 (2007) (arguing that “[r]esiding in a gentrifying neighborhood also should ameliorate the social isolation entailed by economic housing segregation, which some have seen as an important factor in the perpetuation of poverty”).

<sup>58</sup> See McFarlane, *supra* note 17, at 11.

Particularly for the white middle-class, the ideal vision of success and achievement was the ability to live in a suburb with a spacious home, minimal crime, and plenty of space for children and pets to roam.<sup>59</sup> Urban cities were painted as the antithesis of this ideal.<sup>60</sup> This is no longer the case. Middle-class residents, particularly young professionals, are now more likely to be drawn to urban cities and resist moving to the suburbs.<sup>61</sup>

Scholars also suggest that the cultural shift that is drawing middle-class and affluent young professionals to urban cities is intertwined with an economic shift away from manufacturing and towards service industries.<sup>62</sup> They further suggest that “[g]lobalization’s re-ordering of economies away from manufacturing and towards service industries has dualized the economy into groups of those with high salaries and those without.”<sup>63</sup> The group of people with high incomes—often called the “creative class”—are typically knowledge-based professionals such as scientists, engineers, artists, lawyers, or anyone who makes a living based upon their creative thought process.<sup>64</sup> They value space that allows them to have face-to-face interactions to meet both their professional and personal needs.<sup>65</sup> Urban cities and not the suburbs are intentionally positioning themselves to fill the demands of this creative class. As discussed in the section that follows, local, state, and federal government policies, economic development, and housing policies are often put in place specifically to draw the creative class to urban cities, thereby facilitating gentrification.

#### *B. Recruiting Middle-Class Residents: The Public Policy Dimensions of the Resurgence of Gentrification*

During the mid-20th century, urban cities were decimated by the decline in the manufacturing economy and the rise of the knowledge-based

<sup>59</sup> See *id.* at 12–13.

<sup>60</sup> See *id.* at 13.

<sup>61</sup> See, e.g., Joseph Berger, *Suburbs Try to Prevent an Exodus as Young Adults Move to Cities and Stay*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/2014/04/17/nyregion/suburbs-try-to-hold-onto-young-adults-as-exodus-to-cities-appears-to-grow.html> (summarizing the results of a study finding that “younger adults are becoming more drawn to denser, more compact urban environments that offer a number of amenities within walking distance of where they live,” and suggesting that younger professionals are now inclined to stay in the city rather than move to a suburb).

<sup>62</sup> See generally RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS, REVISITED (2012).

<sup>63</sup> McFarlane, *supra* note 17, at 13.

<sup>64</sup> *Id.* at 13–14.

<sup>65</sup> See FLORIDA, *supra* note 62, at 188–89 (suggesting that place is critical for the creative class and that they prefer cities because cities are “enabling infrastructure where connections take place, networks are built, and innovative combinations are consummated”).

economy.<sup>66</sup> The decline in the manufacturing economy significantly reduced the tax base for many urban cities because as manufacturing plants closed down, cities lacked other viable options for generating tax revenue.<sup>67</sup> Urban cities also saw a substantial number of their middle-class residents depart for the suburbs.<sup>68</sup>

Importantly, racially circumscribed government policies encouraged and aided the mass migration of white middle-class residents from the cities to the suburbs while keeping minority residents confined to the inner-cities.<sup>69</sup> For example, federal government mortgage insurance underwriting programs would only underwrite loans for home purchases in racially homogenous white communities and explicitly encouraged the maintenance of residential segregation as a matter of public policy.<sup>70</sup> Such a policy raised substantial barriers for Blacks wishing to migrate to the suburbs.<sup>71</sup> At the same time, government policies paved the way for white residents to move to the suburbs. Federal subsidization of home mortgages for whites only, along with the federal government providing states with federal funds to build highways, made it easy for white middle-class citizens to live in suburban outposts and to commute to central cities for work.<sup>72</sup> As a result of these policies, by the mid-20th century, middle-class white flight from the cities to the suburbs reached its peak.<sup>73</sup> In turn, many American urban cities found themselves in fiscal distress due to a limited tax base from which to draw.<sup>74</sup> In addition, the residents who remained in the city were overwhelmingly poor and minority.<sup>75</sup>

Because of the loss of actual and human capital caused by the decline of manufacturing and white flight, many urban inner-cities have been on a quest to attract more middle-class and affluent residents in hopes of shoring up their tax bases. Indeed, since the 1960s, local government policies in most

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<sup>66</sup> See *supra* Part II.A.

<sup>67</sup> See FLORIDA, *supra* note 62, at 314 (describing the inability of cities such as Detroit, Cleveland, and Pittsburgh to adjust away from the norms of the previous manufacturing economy and the declines that occurred in those cities as a result); McFarlane, *supra* note 17, at 9 (“The loss of middle and upper-income households affected central cities negatively by decreasing the demand for urban land, reducing land values, and diminishing central cities’ tax bases.”).

<sup>68</sup> See generally WILLIAM H. CHAFE, THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II, at 112–13 (2007); DAVID RUSK, CITIES WITHOUT SUBURBS (1993).

<sup>69</sup> See generally sources cited *supra* note 68.

<sup>70</sup> See ERIKA K. WILSON, TOWARDS A THEORY OF EQUITABLE FEDERATED REGIONALISM IN PUBLIC EDUCATION, 61 UCLA L. REV. 1416, 1428–29 (2014).

<sup>71</sup> *Id.* at 1428–30 (describing the role of federal, state, and local policies in contributing to residential racial segregation in the suburbs and urban areas).

<sup>72</sup> *Id.* at 1428.

<sup>73</sup> *Id.* at 1428–30.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

urban localities have reflected James Buchanan's Recruitment Theory.<sup>76</sup> Buchanan theorized that in order to not only survive but thrive, urban cities must enact policies aimed at attracting and retaining more affluent taxpayer residents.<sup>77</sup>

More specifically, Buchanan suggested that urban cities must enact fiscal policies and add amenities to induce "potentially-mobile central-city taxpayers who contribute to the net fiscal surplus" of a city.<sup>78</sup> He also recommended providing amenities like museums, symphony orchestras, and theaters that middle-class and affluent residents would find attractive but unlikely to obtain without great cost in the suburbs.<sup>79</sup> While Buchanan acknowledged that such a deliberate policy strategy aimed at recruiting middle-class and affluent residents had the potential to exclude poor and minority residents, he also reasoned that such policies "by preserving the fiscal base of the community, may benefit the very groups that seem initially to be harmed."<sup>80</sup> Put another way, he theorized that the benefits that accrue from having residents who can contribute to a city's tax base would trickle down to poor and minority residents. Similar arguments have been made by other scholars in defense of urban localities adopting a middle-class recruitment strategy.<sup>81</sup>

Buchanan's theory regarding affluent resident attraction is being put into practice heavily during the resurgence of gentrification. Federal, state, and local policies are being enacted explicitly to attract middle-class and more affluent residents to cities.<sup>82</sup> The two primary ways in which government policies are being utilized to aid in the resurgence of urban gentrification are through policies aimed at spurring economic development and through housing placement and finance policies.<sup>83</sup> The roles that these policies are playing in facilitating the resurgence of gentrification are discussed in turn.

<sup>76</sup> See James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1, 13–16 (1971).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See generally Douglas W. Rae, *Two Cheers for Very Unequal Incomes*, in JUSTICE AND THE AMERICAN METROPOLIS 105, 106 (Clarissa Rile Hayward & Todd Swanstrom eds., 2011) (suggesting that "those . . . who want better life chances for low-earning households in major cities should set out to increase inequality by attracting and keeping high [income] earners, now greatly underrepresented in central city populations").

<sup>82</sup> See, e.g., Kennedy & Leonard, *supra* note 10, at 12 (noting that "[m]any cities pursue revitalization policies with the expressed intention of providing incentives for middle- and high-income families to move into distressed communities, or inducements for original residents to upgrade their homes").

<sup>83</sup> See generally Powell & Spencer, *supra* note 29, at 454 ("While the restructuring of the national system of housing finance opens up home mortgages to low- and moderate-income

### 1. Policies Aimed at Spurring Economic Development

At the state and local level, economic development policies are being enacted with the deliberate goal of luring middle-class and affluent individuals and businesses to urban inner-cities. One of the most prominent policy tools being used to attract residents are tax incentives that take the form of tax credits or abatements.<sup>84</sup> For example, in Philadelphia, residents who choose to reside in new urban construction or renovated buildings are given a 10-year tax abatement.<sup>85</sup> The tax abatement program “holds the tax assessment at a property’s predevelopment level for 10 years.”<sup>86</sup> Arguably as a result of the tax abatement program, Philadelphia, which was previously in the midst of a 40-year decline in population, saw its population increase significantly.<sup>87</sup> Favorable tax policies enacted in gentrifying cities such as San Francisco and Atlanta are also arguably causing significant increases in gentrification in those cities.<sup>88</sup>

In addition to tax incentives, state and local governments are utilizing their police power as an economic development tool to facilitate gentrification. They do so through strategic enforcement of housing codes.<sup>89</sup> Targeted

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households, it also has ‘unleashed powerful gentrification forces.’”); Wyly & Hammel, *supra* note 7, at 720–23.

<sup>84</sup> See, e.g., Kennedy & Leonard, *supra* note 10, at 12–13 (describing the various tax abatements and incentives that are given by state and local governments to spur home and condo purchases in urban areas); Louise Story, *As Companies Seek Tax Deals, Governments Pay High Price*, N.Y. TIMES (Dec. 1, 2012), <http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html?pagewanted=all> (noting that “states, counties and cities are giving up more than \$80 billion each year to companies” in an effort to induce companies to remain in or relocate to urban cities in an effort to create jobs for residents).

<sup>85</sup> See Lisa Chamberlain, *Tax Breaks Drive a Philadelphia Boom*, N.Y. TIMES (Jan. 8, 2006), <http://www.nytimes.com/2006/01/08/realestate/08nati.html?pagewanted=all> (describing the impact of the tax abatement program on revitalizing the Center City area of Philadelphia and noting that “from the time that tax abatements were passed, more than 8,000 converted and new units will have been added to Center City, and half of all new residents benefiting from tax abatements came from outside the city”); *Tax Abatement*, OFF. OF HOUSING & COMMUNITY DEV., <http://www.phila.gov/ohcd/taxabate.htm> (last visited Nov. 5, 2015).

<sup>86</sup> Chamberlain, *supra* note 85.

<sup>87</sup> *Id.*

<sup>88</sup> See, e.g., Kennedy & Leonard, *supra* note 10, at 12–13 (“In San Francisco, the favorable tax treatment of live/work lofts, totaling in the tens of millions of dollars is believed to have been an important factor in the development of large numbers of . . . upper income units in the South of Market area.”).

<sup>89</sup> See, e.g., DIANE K. LEVY, JENNIFER COMEY & SANDRA PADILLA, *KEEPING THE NEIGHBORHOOD AFFORDABLE: A HANDBOOK OF HOUSING STRATEGIES FOR GENTRIFYING AREAS* 13 (2006), <http://www.urban.org/research/publication/keeping-neighborhood-affordable> (discussing the ways in which housing code enforcement can be used to preserve affordable housing or displace residents and noting that “[i]n gentrifying areas, an agency might over-

enforcement (or lack thereof) of housing codes can make a neighborhood more (or less) attractive to the type of development that spurs gentrification.<sup>90</sup> State and local governments also use other policy tools to further gentrification, such as constructing new sports stadiums, museums, restaurants, and shopping centers that cater to the interests of the middle-class and the affluent in an attempt to draw them to the city.<sup>91</sup>

## 2. Housing Policies

At the federal level, changes to national housing policies are playing a substantial role in the recent resurgence of gentrification. Most notably, in an effort to increase homeownership, the federal government put policies in place to expand the secondary mortgage market.<sup>92</sup> In particular, in 1992 Congress passed the Federal Housing Enterprises Financial Safety and Soundness Act (“FHEFSSA”) which required Government Sponsored Enterprises (“GSEs”) to increase their acquisition of residential loans to low-income and minority borrowers.<sup>93</sup> The FHEFSSA also established affordable housing goals which required GSEs to promote home ownership for low- and moderate-income families and for any borrower in an “underserved area,” regardless of their income level.<sup>94</sup> The term “underserved area” was defined in such a way that it captured a large number of urban neighborhoods. Case in point, the definition section of the FHEFSSA includes language that allows the term “underserved area” to mean an area with an African-American and Hispanic population of at least 30%.<sup>95</sup> Some scholars suggest that the “underserved area” definition,

enforce to further neighborhood revitalization and increase displacement pressures on lower-income households”).

<sup>90</sup> See, e.g., Kennedy & Leonard, *supra* note 10, at 14 (“In San Francisco, observers argue that lax code enforcement has encouraged the construction of thousands of upper-income live/work lofts in gentrifying neighborhoods.”).

<sup>91</sup> See *id.* (“In Washington, D.C., the two hottest gentrifying areas surround a newly opened subway station (Columbia Heights) and a new convention center (Shaw.”); McFarlane, *supra* note 17, at 16 (describing how consumption policy strategies such as “[t]ailor[ing] land use and development to meet the consumption tastes of people with money to spend by building entertainment venues, convention centers, festival marketplaces, ethnic and historical festivals, sports stadiums, hotels, restaurants, shopping, and bars (both coffee and alcohol)” facilitate gentrification).

<sup>92</sup> See Powell & Spencer, *supra* note 29, at 449–50.

<sup>93</sup> 12 U.S.C. §§ 4501–4642 (2014); see also Wyly & Hammel, *supra* note 35, at 247 (describing the impact of the FHEFSSA on urban gentrification).

<sup>94</sup> 12 U.S.C. § 4565(a)(1) (“To increase the liquidity of mortgage investments and improve the distribution of investment capital available for mortgage financing for underserved markets, each enterprise shall provide leadership to the market in developing loan products and flexible underwriting guidelines to facilitate a secondary market for mortgages . . .”).

<sup>95</sup> See Stuart A. Gabriel & Stuart S. Rosenthal, *The Government-Sponsored Enterprises, the Community Reinvestment Act, and Home Ownership in Targeted Underserved Neighborhoods*,

along with the mandates in the FHEFSSA for GSEs to increase their acquisition of loans to low-income and minority borrowers, allowed capital to easily flow into urban areas.<sup>96</sup> The flow of capital into urban areas is theorized as accelerating gentrification because it allows for the building of an infrastructure that makes the area more attractive to middle- and upper-class residents.<sup>97</sup> Put another way, the so-called desirable residents follow the capital into the city which results in gentrification.

In addition, federal government policies related to housing assistance for the poor are also helping to facilitate gentrification. Beginning in the 1930s, the federal government gave funds to local governments to provide and operate government-owned housing for the poor.<sup>98</sup> Local governments were allotted wide latitude in deciding where to site public housing buildings.<sup>99</sup> Working-class and middle-class residents often objected to having public housing buildings located in their neighborhoods.<sup>100</sup> As a result, local governments almost exclusively sited public housing in poorer inner-city neighborhoods.<sup>101</sup> This led to the geographic isolation of poor persons in public housing and concentrated poverty.<sup>102</sup>

Concentrated poverty, scholars theorize, has pernicious side-effects, particularly a lack of positive role models, increased criminal activity, and maladjusted social behavior.<sup>103</sup> Inspired by such theories regarding public

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in *HOUSING MARKETS AND THE ECONOMY* 209 (2009) (noting that the FHEFSSA targeted underserved communities and in so doing defined the proportion of each GSE's annual loan purchases that must derive from lower-income borrowers, borrowers residing in lower-income communities, and borrowers in certain "high minority" neighborhoods or "underserved areas").

<sup>96</sup> See, e.g., Wyly & Hammel, *supra* note 35, at 247.

<sup>97</sup> See Neil Smith, *Toward a Theory of Gentrification: A Back to the City Movement by Capital, Not People*, 45 J. AM. PLAN. ASS'N 538, 547 (1979) (concluding that gentrification is spurred by people taking advantage of the return of capital to the city).

<sup>98</sup> See United States Housing Act of 1937, 42 U.S.C. §§ 1437–1440 (2013); Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of The Housing Act of 1949*, 11 HOUSING POL'Y DEBATE 299, 302 (2000) (noting that "[t]he Housing Act of 1937 established a federal public housing authority to make loans, grants, and annual contributions to local public housing agencies to develop, acquire, and manage housing projects").

<sup>99</sup> See Michael H. Schill & Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1292 (1995) (noting that the federal-local structure of public housing placed the decision of where to locate public housing in the hands of local governments).

<sup>100</sup> See von Hoffman, *supra* note 98, at 315 ("Working- and middle-class people objected, sometimes violently, to the development of housing projects in their neighborhoods.").

<sup>101</sup> See *id.* ("In response to site controversies, housing authorities built new housing projects near old ones, thus concentrating public housing in certain working- and lower-class areas of the city.").

<sup>102</sup> See generally WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

<sup>103</sup> See Schill & Wachter, *supra* note 99, at 1289.

housing and concentrated poverty, a movement ensued to eliminate public housing buildings and to deconcentrate poverty by dispersing persons residing in public housing buildings.<sup>104</sup> Through the Housing Opportunities for Everyone (“HOPE”) VI program, public housing projects were demolished and residents were provided with vouchers to pay their rent in privately owned buildings.<sup>105</sup> The HOPE VI program also encouraged privatization of formerly public housing projects through the forming of relationships with developers to build mixed-income housing developments, purportedly as a way to remedy the ill effects of the poor being geographically isolated in public housing projects.<sup>106</sup>

Mixed-income housing was supposed to replace the previously demolished public housing units. In many cases, however, the housing stock was either not replaced or not replaced in high enough numbers to allow significant numbers of prior public housing residents to be placed in the new mixed-income developments.<sup>107</sup> Further, while HOPE VI aimed to deconcentrate poverty by relocating former public housing residents to higher income areas, source of income discrimination—a phenomenon in which landlords lawfully declined to accept the vouchers that Hope VI residents received to assist them in paying their rent—was prevalent.<sup>108</sup> As a result, it was often nearly impossible for the former public housing residents to relocate anywhere within the city, causing them to leave the city altogether.<sup>109</sup> The exit of poor people along with increasing land where public housing projects once

<sup>104</sup> See 42 U.S.C. § 1427(a)(1)–(4) (2013); SUSAN J. POPKIN ET AL., A DECADE OF HOPE VI: RESEARCH FINDINGS AND POLICY CHALLENGES 14 (2004), <http://www.urban.org/research/publication/decade-hope-vi> (“A central premise of HOPE VI—and of the broader public housing transformation effort that began in the 1990s—was that the overconcentration of profoundly poor, nonworking households was a major contributor to the high levels of social problems in distressed public housing.”).

<sup>105</sup> POPKIN ET AL., *supra* note 104, at 14 (describing a central focus of HOPE VI as helping residents relocate to better neighborhoods).

<sup>106</sup> See *id.* at 15.

<sup>107</sup> See Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned from the D.C. Housing Authority’s Hope VI Projects*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 353, 360 (2001).

<sup>108</sup> See Danya E. Keene & Arline T. Geronimus, “Weathering” HOPE VI: The Importance of Evaluating the Population Health Impact of Public Housing Demolition and Displacement, 88 J. URB. HEALTH 417, 421 (2011) (finding that one of the challenges that the HOPE VI program faced in successfully relocating residents to better neighborhoods was the lack of incentive by landlords to accept vouchers in a tight rental market and general discrimination against voucher holders by landlords).

<sup>109</sup> See Cunningham, *supra* note 107, at 361 (noting that deconcentration did not make sense in a market where the poor face tremendous obstacles in finding housing anywhere).

stood paved the way for private development.<sup>110</sup> The private development in turn attracted middle- and upper-class residents, thereby resulting in gentrification.<sup>111</sup>

### C. The Consequences of Gentrification

The economic development and housing policies described above are achieving varying levels of success in luring middle-class residents and businesses to urban cities. As noted by other scholars, as a result of these policy interventions, many urban cities are undergoing a spatial, social, racial, and economic transformation that has important ramifications for both new and old residents.<sup>112</sup> The assessment of whether gentrification is ultimately beneficial varies wildly depending upon the lens through which the benefits and drawbacks are weighed.

On the one hand, some argue that gentrification provides much needed economic stability to declining urban cities by increasing their tax base and ensuring that public services are improved.<sup>113</sup> Such improvements purportedly benefit the city as a whole, including poor and minority residents.<sup>114</sup> Put another way, supporters of gentrification suggest that the rising tide of gentrification lifts all boats. The influx of middle-class and affluent white residents is thought to trickle down to the original low-income minority residents who were previously stuck in an area with subpar conditions, but who lacked the economic, political, and social capital to remedy the conditions prior to the arrival of middle-class and affluent white gentrifiers.<sup>115</sup>

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<sup>110</sup> See Adalberto Aguirre, Jr. & Jonathan Brooks, *City Redevelopment Policies and the Criminalization of Homelessness: A Narrative Case Study*, in CRITICAL PERSPECTIVES ON URBAN REDEVELOPMENT 75, 94–95 (Kevin Fox Gotham ed., 2001).

<sup>111</sup> See Smith, *supra* note 97, at 547 (suggesting that people follow capital into cities, thereby accelerating gentrification).

<sup>112</sup> See, e.g., McFarlane, *supra* note 17, at 26 (“The urban spatial restructuring taking place in cities is called gentrification as it applies to neighborhoods that are changing. The term restructuring keeps us focused on the fact that there is a deliberate, as well as structural, dimension to the changes taking place in the city.”); Powell & Spencer, *supra* note 29, at 437–42 (describing the racial and economic transformations that occur in cities as a result of gentrification).

<sup>113</sup> See, e.g., Byrne, *supra* note 30, at 405–06 (arguing that gentrification is good for all urban residents of gentrifying areas because “increases in the number of affluent and well-educated residents is plainly good for cities, on balance, by increasing the number of residents who can pay taxes, purchase local goods and services, and support the city in state and federal political processes”).

<sup>114</sup> *Id.* at 406.

<sup>115</sup> See, e.g., J. Peter Byrne, *Rhetoric and Realities of Gentrification: Reply to Powell and Spencer*, 46 How. L.J. 491, 494 (2003) (“A central aspect of my argument is that the market will not provide adequate low-income housing in cities, that more public funds must be made available, and that gentrification creates wealth that can be taxed to provide this housing.”);

Critics of gentrification on the other hand suggest that gains to gentrified urban areas do not trickle down to the original residents, particularly poor and minority residents.<sup>116</sup> Instead, critics suggest that gentrification causes displacement of original residents and that the benefits of gentrification accrue almost exclusively to the middle- and upper-class and typically white residents.<sup>117</sup> While the actual evidence regarding resident displacement caused by gentrification is contested and subject to much debate,<sup>118</sup> there is little question that gentrification causes changes to communities and that the original residents of those neighborhoods bear a tremendous burden in adapting to those changes.<sup>119</sup> As discussed in the next section, gentrification of urban areas has important implications for public schools similar to those that exist with respect to gentrification in the broader sense.

### III. GENTRIFICATION AND URBAN PUBLIC SCHOOLS

In addition to the economic development and housing policies, this Article takes the position that the current resurgence of gentrification is being further fueled by the enactment of local public school reforms. This is the case because the residents driving the resurgence of gentrification tend to be young middle-class white professionals<sup>120</sup> who enter urban cities—at least initially—without children or with small children who are not school-aged.<sup>121</sup> Conventional wisdom previously held that once this demographic had children, they would either send their children to private school or “concede to the suburban dream and move to an area with a better school system.”<sup>122</sup> This is no

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Andres Duany, *Three Cheers for “Gentrification,”* AM. ENTERPRISE 37, 38 (2001) (“Gentrification usually benefits the present owners. They receive better prices for their homes if they sell. If they remain, there is a general improvement in quality of life as a result of improved consumer services, higher tax bases, and the beneficial effects of middle-class vigilance over municipal services.”).

<sup>116</sup> See Powell & Spencer, *supra* note 29, at 434 (arguing that gentrification is not good for the poor or for the city as a whole and that the state manipulates the housing market in favor of gentrifiers and is not poised to use gentrification to redistribute resources to help poor minority residents).

<sup>117</sup> See *id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> While whites are commonly seen as the primary agents of gentrification, Blacks and other minorities can also be gentrifiers. See, e.g., Loretta Lees, *A Reappraisal of Gentrification: Towards a “Geography of Gentrification,”* 24 PROGRESS HUM. GEOGRAPHY 389, 403 (2000) (noting that Blacks and Latinos are often portrayed as the victims of gentrification but that they too can be gentrifiers in predominantly poor minority communities). However, for purposes of this Article, the focus lies on gentrification by predominantly white residents, as understandings regarding the impacts of non-white gentrification are still rather nascent and developing.

<sup>121</sup> See CUCCHIARA, *supra* note 9, at 202–06.

<sup>122</sup> McFarlane, *supra* note 17, at 15.

longer automatically the case. While urban schools in most gentrifying areas are still undoubtedly predominately minority and poor, an increasing number of young middle-class white residents with children are deciding to give the urban public schools a chance.<sup>123</sup> Some local officials see this as an opportunity to retain white middle-class residents with children who would otherwise leave the city for suburban schools. They recognize however, that in order to attract such gentrifiers to urban public schools, changes to the school system must be made.<sup>124</sup>

This section examines a budding connection between some urban public school reforms and efforts by localities to sustain gentrification. It briefly describes the current conditions of urban public schools and how white middle-class flight from urban schools helped to create these conditions. It then examines the ways in which urban public school reform efforts have shifted away from judicially-based reforms to more choice and market-oriented reforms. It concludes by documenting the ways in which choice and market-oriented reforms are being used to entice gentrifiers to enroll their children in urban schools and discussing the consequences of those efforts for poor and minority students.

#### A. *Middle-Class White Flight and Declining Urban Public School Conditions*

Just as white middle-class flight decimated urban cities, white middle-class flight also decimated urban public schools. Due to the loss of middle-class and white residents and their children from urban cities, the majority of urban schools have a student population in which the majority of students are poor and minority.<sup>125</sup> As other scholars have noted, the absence of middle-class

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<sup>123</sup> See, e.g., Tara Malone, *More Families Sticking with City and Private Schools on North and Northwest Sides*, CHI. TRIB. (July 19, 2011), [http://articles.chicagotribune.com/2011-07-19/news/ct-met-chicago-parents-stay-put-20110731\\_1\\_private-schools-enrollment-magnet](http://articles.chicagotribune.com/2011-07-19/news/ct-met-chicago-parents-stay-put-20110731_1_private-schools-enrollment-magnet) (suggesting that Chicago “Mayor Rahm Emanuel, focused early on improving public education offerings as a lifeblood for economic growth”).

<sup>124</sup> See Maia Bloomfield Cucchiara, *Cities Are Trying to Fix Their Schools by Luring the Middle Class: It Won’t Work*, THE ATLANTIC (Oct. 15, 2013), <http://www.theatlantic.com/education/archive/2013/10/cities-are-trying-to-fix-their-schools-by-luring-the-middle-class-it-wont-work/280390/> (describing an initiative between Philadelphia business and education leaders to improve Philadelphia public schools and market the high performing schools to middle-class parents in the Center City District).

<sup>125</sup> See GARY ORFIELD & ERICA FRANKENBERG, CIV. RTS. PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 15 (2014), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future> (analyzing student enrollment data and finding that the majority of students in central city or urban school districts are Black and Latino and that more than 90% of students in the majority of Black and Latino schools are classified as low-income); James E.

students and racial diversity within urban public schools has important implications for the quality of education that students receive in urban public schools.<sup>126</sup>

For example, public schools that lack middle-class students often have unequal access to important educational inputs such as quality teachers and curriculum.<sup>127</sup> This is true of many urban schools as they consistently have teachers with lesser accreditations than suburban teachers and often offer fewer advanced placement or college level curriculum.<sup>128</sup> Further, poor students tend to have more social and academic needs due to the effects of concentrated poverty.<sup>129</sup> As a result, it costs more to effectively educate students in a school in which the majority of students are poor.<sup>130</sup> Yet, as a result of the limited tax base that exists in many urban cities, urban public schools typically suffer from inadequate funding relative to the needs of their student population.<sup>131</sup> Finally, the amalgamation of racial isolation and high levels of poverty in urban schools arguably is amongst the reasons that students in urban public schools perform significantly worse on indicators of academic achievement than students in

Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 272 (1999) (“Urban schools are attended primarily by African-American and Hispanic students.”).

<sup>126</sup> For a comprehensive examination of the negative effects of racially and economically segregated schools, see GARY ORFIELD & CHUNGMEI LEE, CIV. RTS. PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY (2005), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality>.

<sup>127</sup> See Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 409–10 (2012) (noting the resources schools with predominantly middle-class student bodies have that schools with more low-income students do not have).

<sup>128</sup> See, e.g., Christopher E. Adams, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1629 (2007) (arguing that teachers in low-income urban schools are “often less qualified, lower paid, and may be overwhelmed in classrooms with a disproportionate number of at-risk students”); Myrna Mandlawitz, *A Tale of 3 Cities: Urban Perspectives on Special Education*, CTR. ON EDUC. POL’Y 1, 28 (2003), <http://www.cepdc.org/displayDocument.cfm?DocumentID=115> (finding that general education teachers in urban areas are often not qualified in the subjects they teach).

<sup>129</sup> See Black, *supra* note 127, at 411 (“[T]he need for intensive instructional and social service programs tends to be significantly higher in high-poverty schools.”).

<sup>130</sup> See Ryan, *supra* note 125, at 285 (“[S]chools with large concentrations of impoverished students will face the greatest educational costs, even before factoring in such additional services as security or counseling, and even without considering the different prices for educational goods and services in cities as opposed to suburbs or rural areas.”).

<sup>131</sup> See Wilson, *supra* note 70, at 1422 (describing the ways in which school district boundary lines dictate funding resources and noting that “school districts in poorer, typically predominately minority localities have fewer resources and educational inputs to offer relative to the need of their students”).

suburban schools.<sup>132</sup> The combination of all of these issues results in most urban schools being categorized as low quality schools.

Efforts to improve the aforementioned conditions in urban public schools, particularly the racial and socioeconomic isolation, have and continue to be made through both the judicial and legislative branches at the state and federal level. For much of the mid- to late 20th century, attempts were made through federal school desegregation litigation.<sup>133</sup> Importantly however, in most urban cities, racial isolation in schools is caused by residential racial segregation between the suburbs and urban cities rather than *de jure* school segregation policies.<sup>134</sup> As a result, in order to racially integrate urban schools in any meaningful way, courts would have to allow for a desegregation order between a suburban and urban school system.

Unfortunately, the possibility of a court issuing such a desegregation order was for all practical purposes foreclosed by the Supreme Court's holding in *Milliken v. Bradley* ("*Milliken I*").<sup>135</sup> There, the Court found that a federal district court could not require an inter-district school desegregation plan between a suburban school system and city school system to be implemented unless there was proof of an inter-district violation.<sup>136</sup> Put another way, the court in *Milliken I* required proof that "racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district" before it would issue an inter-district desegregation order.<sup>137</sup> This is a very difficult standard to meet. Indeed, only a handful of courts have ordered an inter-district desegregation since the Court's decision in *Milliken I*.<sup>138</sup>

In light of *Milliken I* and the realities of racial segregation in urban schools, many legal advocates shifted away from attempting to racially integrate urban public schools and instead focused on school funding in an

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<sup>132</sup> See Ryan, *supra* note 125, at 286–93.

<sup>133</sup> See generally Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, 80 MINN. L. REV. 825 (1996).

<sup>134</sup> It is important to note however, that residential segregation between the suburbs and urban cities was very much caused by explicit federal, state, and local policies. Yet the Supreme Court does not recognize this state action as sufficient to trigger court mandated school desegregation orders. See generally Erika K. Wilson, *Leveling Localism and Racial Inequality Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. L.J. REFORM 625, 649–51 (2011) (analyzing the ways in which explicit government policies caused racial residential segregation in the suburbs and urban cities).

<sup>135</sup> 418 U.S. 717, 741 (1974).

<sup>136</sup> *Id.* at 741–43.

<sup>137</sup> *Id.* at 745.

<sup>138</sup> See, e.g., Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1, 778 F.2d 404, 433 (8th Cir. 1985); United States v. Bd. of Sch. Comm'rs, 637 F.2d 1101, 1117 (7th Cir. 1980); Evans v. Buchanan, 582 F.2d 750, 764 (3d Cir. 1978), superseded by statute, 14 DEL. CODE ANN. tit. 14, § 1004 (2015); Newburg Area Council, Inc. v. Bd. of Educ., 510 F.2d 1358, 1359 (6th Cir. 1974) (per curiam).

effort to make sure racially and economically segregated urban schools were at least appropriately funded.<sup>139</sup> This approach found only moderate success. Several state courts have issued orders finding that local systems of public school finance violate state constitutional provisions regarding a student's fundamental right to an education.<sup>140</sup> However, most state courts also tend to take a very limited view of their remedial authority. They often decline to order remedies that require state legislatures to make specific budgetary allocations.<sup>141</sup> Instead, they emphasize that judicial intervention in the state budgeting process is warranted only in very limited circumstances.<sup>142</sup> As a result, state legislatures are often left with wide discretion to craft funding schemes. In turn, all too often state legislatures create schemes that are insufficient at remedying funding disparities and inadequacies.<sup>143</sup> Thus, the combination of school-desegregation litigation and challenges to the ways in which states fund urban schools has done little to improve racial isolation and inadequate resources in urban public schools.

<sup>139</sup> See generally Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 553 (1998) (attributing the shift from equity theory to adequacy theory in school-finance litigation to state court decisions' inability to materially affect centralization or total education spending).

<sup>140</sup> *Id.* at 571.

<sup>141</sup> See, e.g., *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1156–58 (Mass. 2005) (Marshall, J., concurring) (declining to order a cost study pertaining to educational inadequacies in part because of the “difficult issue of forcing the Legislature to appropriate more money” and therefore finding that the state was not violating the Massachusetts Constitution’s education clause by not providing an adequate education to students); *Campaign for Fiscal Equity, Inc. v. State*, 861 N.E.2d 50, 57 (N.Y. 2006) (reversing the court of appeals’s directive to the state legislature to calculate the cost of a sound basic education for New York public school students, reasoning that “[t]he role of the courts is not, as Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State’s proposed calculation of that cost is rational”).

<sup>142</sup> See, e.g., *Campaign for Fiscal Equity, Inc.*, 861 N.E.2d at 59 (“Judicial intervention in the state budget ‘may be invoked only in the narrowest of instances.’” (quoting *Wein v. Carey*, 362 N.E.2d 587, 592 (N.Y. 1977)); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 785, 792 (Tex. 2005) (finding that the system of school financing did not violate the education provision of the Texas state Constitution and reasoning that “[i]f the Legislature’s choices are informed by guiding rules and principles properly related to public education—that is, if the choices are not arbitrary—then the system does not violate the constitutional provision”).

<sup>143</sup> See Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755, 758 (2004) (arguing that even when state legislatures increase funding for all public schools, most school funding legislation does not place a cap on how much districts can spend on students thereby allowing wealthier districts to continue to drastically outspend poorer districts).

### B. The Rise of Market-Based Public School Reforms

Faced with a federal judiciary that has seemingly receded from the business of mandating racial integration in urban schools along with state judiciaries that are often unwilling to go far enough in ensuring adequate funding for urban schools, those looking to improve urban public schools are now more likely to look outside of the federal or state judiciary. Significantly, non-judicial attempts to reform urban school conditions rely heavily on the theory that infusing market-based principles into urban public school systems is the answer to improving urban public schools.<sup>144</sup>

This line of reasoning suggests that poor and minority parents and students in urban schools should have agency in the form of school choice to improve the educational opportunities available to them, just as affluent and white suburban parents typically have.<sup>145</sup> It further theorizes that public schools should have to compete for students just as business and private schools compete for consumers.<sup>146</sup> Introducing such competition is said to be an effective way to compel public schools to relinquish the geographical monopoly that they currently have on students and to hold them accountable to students and parents.<sup>147</sup> Under this model, schools that fail to offer quality education will lose the competition for students and cease to exist.<sup>148</sup> The model further proposes that schools should have the ability to be innovative and flexible so that parents can choose from a variety of different types of schools that would best suit their child.<sup>149</sup>

To that end, most public school reforms currently being used to improve urban schools follow what this Article refers to as “market-based reforms.” These are reforms that promote free-market principles—such as

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<sup>144</sup> See Pauline Lipman & David Hursh, *Renaissance 2010: The Reassertion of Ruling-Class Power Through Neoliberal Policies in Chicago*, 5 POL’Y FUTURES EDUC. 160, 162 (2007) (suggesting that most public school reforms are defined by a commitment to neoliberalism, or an individual liberty, unfettered participation in the market, and a limited role for the state, and noting that “the current educational emphasis on choice, competition, markets, standardized testing and accountability[,]” particularly with respect to urban schools, is based on neoliberal rationales).

<sup>145</sup> See, e.g., Kevin Brown, *The Supreme Court’s Role in the Growing School Choice Movement*, 67 OHIO ST. L.J. 37, 56–63 (2006) (noting the ways in which affluent parents are able to exercise choice in schools through their residential location or paying for private school and chronicling efforts to increase the choices available to poor minority families through school vouchers, charter schools, and intradistrict school choice programs).

<sup>146</sup> See Lipman & Hursh, *supra* note 144, at 167.

<sup>147</sup> See Aaron Jay Saiger, *School Choice and States’ Duty to Support “Public” Schools*, 48 B.C. L. REV. 909, 918–19 (2007) (“When the local district in which a parent lives is the only one where a parent may send a child tuition free, each local school district is a monopoly provider.”).

<sup>148</sup> *Id.* at 921–22.

<sup>149</sup> See Lipman & Hursh, *supra* note 144, at 167–68.

individual choice and competition—as a way to reform public schools. The most prominent forms of market-based reforms include closing so-called under-enrolled or poor performing traditional schools and increasing the number of charter schools in urban areas.<sup>150</sup>

Market-based reforms initially gained momentum at the federal level. Federal officials adopted market-based reforms as a means of reducing achievement gaps between minority and poor students and white middle-class students.<sup>151</sup> Two pieces of federal public education reform legislation in particular, the No Child Left Behind Act (“NCLB”)<sup>152</sup> and the Race to the Top initiative,<sup>153</sup> laid the groundwork for the market-based public school reforms that are now filtering down to the state and local level.

NCLB incorporates market-based reforms by requiring schools to make Adequate Yearly Progress (“AYP”) towards academic proficiency for all students, as measured by the students’ performance on standardized tests.<sup>154</sup> If a school fails to make AYP for two consecutive years it must allow students the choice of transferring to another public school.<sup>155</sup> It also requires schools that fail to make AYP for five consecutive years to surrender control to the state, which then has the option of closing the school and reopening it as a charter school.<sup>156</sup> While there is evidence to suggest that few schools have been closed

<sup>150</sup> See, e.g., Derek W. Black, *Civil Rights, Charter Schools, and Lessons to Be Learned*, 64 FLA. L. REV. 1723, 1772–73 (2012) (chronicling the failure of traditional civil rights litigation to improve racial integration in and quality of urban public schools and the embrace of charter schools as an alternative to improving education for minority students); Nicole Stelle Garnett, *Disparate Impact, School Closures, and Parental Choice*, 2014 U. CHI. LEGAL F. 289, 290–92 (describing the increasing number of public school closures and noting that, “[p]arental choice policies are . . . empowering parents to exit traditional public schools for charter schools . . . [and] suppress[ing] public school enrollment in many urban districts”); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1115–16 (2014) (describing the affinity towards charter schools as being rooted in part by “the failure of integration to close the achievement gap, the white flight that many desegregation plans prompted, and the negative racial incidents to which students of color are subjected”).

<sup>151</sup> See, e.g., 20 U.S.C. § 6301(3) (2013) (noting in the NCLB statement of purpose that a goal of the Act is to “clos[e] the achievement gap between high- and low-performing children, especially the achievement gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers”); U.S. DEP’T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 1 (2009), <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf> (stating that a primary purposes of the Race to the Top Initiative is to “achiev[e] significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps”).

<sup>152</sup> Pub. L. No. 107-10, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

<sup>153</sup> U.S. DEP’T OF EDUC., *supra* note 151, at 1.

<sup>154</sup> 20 U.S.C. § 6316(a)(1)(A).

<sup>155</sup> *Id.* § 6316(b)(1)(E).

<sup>156</sup> *Id.* § 6316(b)(8)(B)(i).

directly as a result of the NCLB school closure option, states are independently adopting their own accountability statutes that mirror NCLB, closing schools pursuant to those statutes, and replacing them with charter schools.<sup>157</sup> Thus, NCLB's focus on closing underperforming schools and replacing them with charter schools significantly contributed to the ongoing movement to reform urban public education by replacing traditional public schools with charter schools.<sup>158</sup>

The second piece of federal legislation, the Race to the Top initiative, is a competitive grant funding program that awards grants to states if they, among other things, "ensur[e] successful conditions for high-performing charters and other innovative schools."<sup>159</sup> This funding provision incorporates market-based reforms by encouraging the expansion of charter schools.<sup>160</sup> Indeed, many states are following suit by amending their charter-enabling provisions to make it easier to establish charter schools.<sup>161</sup> As discussed in further detail in the next section, the market-based reforms encouraged at the federal level are paving the way for wholesale urban public school reform at the local level. The reforms are being used at the local level, at least in part, to make urban public schools more attractive for gentrifying families.

### C. *The Connection Between Urban Public School Reforms and Gentrification*

While market-based public school reforms for the most part proliferated at the federal level, because of a strong adherence to localism in American public education, the reforms are executed by local government

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<sup>157</sup> See JENNIFER McMURRER & SHELBY MCINTOSH, CTR. ON EDUC. POL'Y, STATE IMPLEMENTATION AND PERCEPTIONS OF TITLE I SCHOOL IMPROVEMENT GRANTS UNDER THE RECOVERY ACT 2 (2012), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=398>; U.S. DEP'T OF EDUC., STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT: VOLUME IX—ACCOUNTABILITY UNDER NCLB: FINAL REPORT (2010), <https://www2.ed.gov/rschs/tat/eval/disadv/nclb-accountability/nclb-accountability-final.pdf>.

<sup>158</sup> See, e.g., Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 24 (2010) ("[E]fforts to improve the academic performance of the nation's public schools revitalized the school-choice movement regarding public charter schools.").

<sup>159</sup> U.S. DEP'T OF EDUC., *supra* note 151, at 3.

<sup>160</sup> *Id.* at 11 (listing as a criterion for receiving a Race to the Top grant that "[t]he State has a charter school law that does not prohibit or effectively inhibit increasing the number of high-performing charter schools").

<sup>161</sup> See *Education Bill Tracking Database*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/education/education-bill-tracking-database.aspx> (last visited Nov. 5, 2015) (noting the number of states that have enacted or amended their state charter laws to allow for the expansion in the number of charter schools).

officials.<sup>162</sup> At the local level, local government officials often share the goal of using market-based reforms to close achievement gaps and increase the quality of schools available to students. In many gentrifying urban areas, however, local officials are also looking towards market-based reforms to increase the quality of urban schools—or at least the perception surrounding the quality of urban schools—in order to retain and recruit middle class white gentrifiers with school-aged children.<sup>163</sup>

Market-based reforms, particularly with their emphasis on creating more parental and student choice, are part of a legitimate attempt to improve urban school systems that are often in dire need of repair.<sup>164</sup> Indeed, the closing of failing or underutilized traditional public schools and expansion of charter schools is supposed to help improve the educational opportunities available to all students, including poor and minority students. Similar to the theory regarding gentrification being the tide which raises all boats, some suggest that enacting market-based, public school reforms as a means to keep middle-class white families in public school systems will benefit all students in urban school systems.<sup>165</sup>

To be sure, the greatest benefit that getting middle-class white gentrifiers to enroll their children in urban public schools brings is the ability to reintegrate urban schools which are now hyper-segregated as a result of middle-class white flight to suburban school districts.<sup>166</sup> The benefits of

<sup>162</sup> For a discussion of how localism in the American system of public education works, see Wilson, *supra* note 134, at 632–35.

<sup>163</sup> See, e.g., Barras, *supra* note 16, at 2 (describing former D.C. Chancellor of Schools Michelle Rhee's attempts to recruit parents and noting that the places within Washington, D.C., where Rhee's recruitment attempts were most focused, tended to be “gentrified locales where demographics have shifted . . . but neighborhood schools remain overwhelmingly African-American”); CENT. PHILA. DEV. CORP. & CTR. CITY DIST., GROWING SMARTER: THE ROLE OF CENTER CITY’S PUBLIC SCHOOLS IN ENHANCING THE COMPETITIVENESS OF PHILADELPHIA 6 (2004), <http://www.centercityphila.org/docs/growingsmarterreport2004.pdf> (“A generation ago, young professionals fled with their families to the suburbs. Philadelphia’s public schools now have a historic opportunity to capitalize on a decade of positive change, to ensure the sustainability of Center City’s remarkable revival and to retain a larger percentage of Philadelphia residents with college degrees.”).

<sup>164</sup> See, e.g., Davis & Oakley, *supra* note 20, at 99 (finding that the emergence of charter schools in gentrifying areas is a tool of both urban revitalization efforts and legitimate attempts at school reform).

<sup>165</sup> See, e.g., STILLMAN, *supra* note 9, at 1 (arguing that the “arrival of the children of the gentry” has the potential to improve racial segregation and poverty which contribute to poor learning outcomes in urban schools); Emily Badger, *How Diverse Schools Could Help Fight the Worst Effects of Gentrification*, CITYLAB (Apr. 17, 2013), <http://www.citylab.com/housing/2013/04/how-diverse-schools-could-help-fight-worst-effects-gentrification/5294/> (suggesting that gentrification “raises the possibility—albeit a fleeting one—that long-segregated schools in urban America might finally, if uneasily integrate”).

<sup>166</sup> See GARY ORFIELD, JOHN KUCSERA & GENEVIEVE SIEGEL-HAWLEY, CIVIL RIGHTS PROJECT, E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 41–42

attending racially and economically integrated schools have long been documented.<sup>167</sup> Thus, market-based reforms that are successful in increasing racial and economic balance in urban public schools have the potential to benefit poor and minority students as well. Such reforms are necessary because gentrifiers often cite the state of urban public schools as the primary reason they would consider leaving the city.<sup>168</sup> In contrast, middle-class white parents who decide to remain in urban areas often express a desire to have a marketplace of public school options so that in the event their neighborhood school is low quality, they can shop outside of their neighborhood school for a better school for their child.<sup>169</sup>

Operating under the premise that market-based reforms will improve public schools in ways that will entice gentrifiers to send their kids to urban public schools, local officials are expanding upon the types of market-based school reforms contained in the Race to the Top Initiative and NCLB legislation, at least in part this Article suggests, to make their school systems more attractive for gentrifying families. The market-based reforms being implemented in gentrifying cities like Chicago, Philadelphia, and Washington, D.C., provide illustrative examples of the ways in which market-based reforms are being used to cater to the interests of gentrifiers in an attempt to get them to enroll their children in urban schools.

### 1. Chicago

Chicago is the birthplace of market-based public school reforms. Indeed, several of the reforms adopted in the federal NCLB and Race to the

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(2012), [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf) (finding that the typical white student attends a school where three quarters of their peers are white).

<sup>167</sup> See, e.g., *id.* at 6–11 (describing the relationship between racially and economically segregated schools and poor academic performance); Black, *supra* note 127, at 409–10 (documenting the benefits of racially and economically integrated schools, including more advanced curricula, better teachers, and higher expectations for students).

<sup>168</sup> See, e.g., Lyndsey Layton, *Schools Dilemma for Urban Gentrifiers: Keep Their Kids Urban, or Move to Suburbia?*, WASH. POST (Oct. 14, 2012), [https://www.washingtonpost.com/local/education/schools-dilemma-for-urban-gentrifiers-keep-their-kids-urban-or-move-to-suburbia/2012/10/14/02083b6c-131b-11e2-a16b-2c110031514a\\_story.html](https://www.washingtonpost.com/local/education/schools-dilemma-for-urban-gentrifiers-keep-their-kids-urban-or-move-to-suburbia/2012/10/14/02083b6c-131b-11e2-a16b-2c110031514a_story.html) (describing the decision-making process of a white, middle-class family who left Washington, D.C., for the suburbs because of the condition of Washington, D.C., public schools).

<sup>169</sup> See, e.g., A. Mechele Dickerson, *Caught in the Trap: Pricing Racial Housing Preferences*, 103 MICH. L. REV. 1273, 1288 (2005) (reviewing ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE (WITH SURPRISING SOLUTIONS THAT WILL CHANGE OUR CHILDREN'S FUTURES) (2004)) (suggesting that incorporating a robust public choice program will increase the number of white, middle-class families willing to enroll their children in urban public schools); Posey, *supra* note 5, at 12.

Top Initiative began on a smaller scale in Chicago.<sup>170</sup> In particular, in 2004 the Chicago Board of Education passed an initiative called Renaissance 2010 (“Ren10”), an initiative that sought to transform public education through innovative charter and contract schools.<sup>171</sup> Importantly, when Ren10 was created, local officials made an explicit connection between reforming the schools through Ren10 and attracting new residents to parts of the city in which public housing was being replaced with mixed-income housing.<sup>172</sup> The stated goal of the new schools was to “provide all families—regardless of their socio-economic standing—with options for a high-quality public education.”<sup>173</sup> The new schools were given autonomy and independence, but in exchange they were required to agree to higher levels of accountability, including having their students’ achievement measured by a separate set of metrics in addition to standardized tests.<sup>174</sup>

In order to open the new schools, Ren10 embarked on an aggressive campaign to close low-performing schools.<sup>175</sup> Eventually however, the initiative morphed from closing low-performing schools to consolidating and closing schools with low enrollment, even if the schools were academically successful.<sup>176</sup> While Ren10 is no longer in operation, the residue of Ren10 remains as numerous traditional Chicago public schools were closed, almost all of which were in predominately Black and Latino neighborhoods.<sup>177</sup>

<sup>170</sup> See Pauline Lipman, *Contesting the City: Neoliberal Urbanism and the Cultural Politics of Education Reform in Chicago*, 32 STUD. CULTURAL POL. EDUC. 217–18 (2011) (describing Chicago as the incubator of neoliberal education policies, particularly school closures and the expansion of charter and contract schools, and describing the ways in which federal public school reforms were modeled off of Chicago’s reforms).

<sup>171</sup> See *Renaissance 2010*, CHI. PUB. SCHS., <http://www.cps.edu/programs/districtinitiatives/pages/renaissance2010.aspx> (last modified Aug. 8, 2011).

<sup>172</sup> Lipman, *supra* note 170, at 223 (noting that the Chicago Metropolitan Planning Council made a direct connection between gentrification and the Ren10 formation with one official stating that they should embark upon a plan to market the new schools created by Ren10 to “parents considering moving into new mixed-income communities”).

<sup>173</sup> KATIE FURTICK, REASON FOUND., ANNUAL PRIVATIZATION REPORT 2014: EDUCATION 43 (2014), <http://reason.org/files/apr-2014-education.pdf>.

<sup>174</sup> *Id.*

<sup>175</sup> See Lipman, *supra* note 170, at 222.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* at 221–22 (noting that as of Spring 2010, Chicago Public Schools had consolidated or phased out 59 schools and opened 92 schools: 46 of which were charter schools, 15 of which were contract schools operated by private service providers, and 31 of which were Renaissance public “performance” schools that operated with a five-year renewable performance contract).

## 2. Philadelphia

In Philadelphia, the downtown Center City area is undergoing significant gentrification.<sup>178</sup> Local officials quickly realized that in order to sustain the gentrification, changes had to be made to make the Philadelphia public schools a more attractive option for gentrifiers with school-aged children.<sup>179</sup> As a result, Philadelphia school administrators and a local business improvement district called Center City District (“CCD”) created a partnership called the Center City Schools Initiative (“CCSI”). The stated purposes of the CCSI were to (i) infuse business marketing schemes targeted towards the professional workers in Center City and (ii) make changes to the school system’s administrative- and student-assignment processes in order to keep gentrifiers from leaving once their children reached school age.<sup>180</sup>

In order to accomplish its purpose, CCSI restructured the way in which the Philadelphia public schools were organized. It created a new academic unit *within* the Philadelphia Public School System called the Center City Region (“CCR”).<sup>181</sup> The CCR encompasses *only* schools in the gentrified City Center area.<sup>182</sup> Further, the CCR schools were “deliberately constructed and managed to appeal to professional parents.”<sup>183</sup> Indeed, the CCR schools were marketed to middle- and upper-class parents by highlighting the CCR schools’ membership within an elite cadre of the Philadelphia public school system.<sup>184</sup> Center City parents were also heavily recruited by CCR officials, including CCR officials organizing elaborate dinner parties in which parents with children were invited to attend and “pitched” to send their children to CCR schools.<sup>185</sup>

Finally, the school admission and assignment policy for the schools within the CCR was changed so that children who reside in the CCR catchment

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<sup>178</sup> See CENT. PHILA. DEV. CORP. & CTR. CITY DIST., *supra* note 163, at 1 (“Center City has become the preferred residence for the region’s young college-educated adults—future parents of the region’s school children. More than 30% of Center City’s 80,000 residents—24,000 people—are between the ages of 25 and 34. Seventy-nine percent of this group have a college degree, but only 14% have children.”).

<sup>179</sup> *Id.* (“Attracting recent college graduates is only half the battle. Retaining them—as they become 35–44, have children, prosper in their professions, or succeed in their own businesses—is key to Philadelphia’s prosperity.”).

<sup>180</sup> See Maia Cucchiara, *Re-branding Urban Schools: Urban Revitalization, Social Status, and Marketing Public Schools to the Upper Middle Class*, 23 J. EDUC. POL’Y 165, 165 (2008).

<sup>181</sup> *Id.* at 167.

<sup>182</sup> *Id.* at 169.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 171.

<sup>185</sup> *Id.* at 171–74 (summarizing efforts to recruit parents to Grant Elementary School, a school within the CCR, and noting the ways in which officials highlighted Grant’s unique position and how one parent was so heavily recruited that she stated “I’ve never felt so recruited in my life . . . Like, I felt like if I had been an athlete, maybe I’d have gotten a car.”).

zone had first preference.<sup>186</sup> Thus admission to CCR schools, which are the better performing schools in the city, for students living outside the CCR catchment zone, now occurs on a very limited basis.<sup>187</sup> Although the CCR was dissolved in 2010, the marketing campaign combined with the changed admission policy had long-term effects on the demographics of Philadelphia public schools.<sup>188</sup> The net result of the CCR was essentially the creation of a network of public schools within the Philadelphia public school system almost exclusively for the children of middle- and upper-class (and predominately white) gentrifiers.<sup>189</sup> Similar changes to the school admission and assignment processes for the benefit of middle- and upper-class gentrifiers are also being made in other gentrifying urban cities.<sup>190</sup>

### 3. Washington, D.C.

Washington, D.C., is also undergoing significant gentrification.<sup>191</sup> Similar to Philadelphia, reforming the public school system in order to make schools more palatable to young gentrifying families is also part of

<sup>186</sup> The school assignment process in Philadelphia was previously an open enrollment which allowed students to enroll in schools outside of their catchment zone on a frequent basis.

<sup>187</sup> Cucchiara, *supra* note 180, at 171.

<sup>188</sup> *Id.* at 184 (noting that after the dissolution of the CCR, “district data on student enrollment show that it had a significant, and lasting, impact”).

<sup>189</sup> *Id.* at 170 (noting that the creation of the CCD “with its unique educational market and high-status location signaled that it was a place where schools, parents and students would receive special treatment such as different rules and procedures around admissions, [and] a higher profile for the district”).

<sup>190</sup> See, e.g., Chase Billingham, *Parental Choice, Neighborhood Schools, and the Market Metaphor in Urban Education Reform*, 52 URBAN STUD. 685, 691 (2015). Changes that were made to Boston’s previous controlled choice school assignment policy which allowed poor minority families to escape poor performing neighborhood schools by allowing them to attend schools within a larger geographic assignment zone. *Id.* In 2013, a new system of neighborhood schools was implemented and “[t]hroughout the process, many municipal and business leaders drove home the argument that a return to neighborhood schools would prove instrumental in the city’s quest to attract and retain . . . new profession families, who [had] frequently expressed reluctance to live in the city lest their children be forced to attend an unacceptable public school.” *Id.*

<sup>191</sup> See Sabrina Tavernise, *A Population Changes, Uneasily*, N.Y. TIMES (July 17, 2011), [http://www.nytimes.com/2011/07/18/us/18dc.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/07/18/us/18dc.html?pagewanted=all&_r=0) (finding that in 2011, Washington, D.C., lost its Black majority for the first time in 50 years and that the social fabric and character of neighborhoods were being changed); Gerry Widdicombe, *The Fall and Rise of Downtown D.C.*, THE URBANIST (Jan. 2010) <http://www.spur.org/publications/article/2010-01-10/fall-and-rise-downtown-dc> (describing the process by which downtown Washington, D.C., was transformed into a vibrant economic hub, noting the infusion of money from the private sector, tax breaks and subsidies that were given in order to revitalize the downtown areas, and the overall tax base of the District has increased).

Washington, D.C.'s stated larger economic development strategy.<sup>192</sup> In Washington, D.C., as in many urban cities, an overwhelmingly Black public school system decayed after years of disinvestment and failed efforts to reform the school system through the courts.<sup>193</sup> To be sure, the charter school movement emerged in Washington, D.C., as an alternative to the chronically failing schools.<sup>194</sup> Yet local officials in Washington, D.C., are now openly using charter schools not only as a method of reforming their public school system, but also as a tool to attract and retain gentrifiers.<sup>195</sup>

For example, local officials implemented a program called City Build which provided \$1 million in funding for organizations to establish charter schools in gentrifying areas.<sup>196</sup> Notably, the stated impetus for the City Build initiative was to attract and retain residents to the District with the hope of helping the Washington, D.C., mayor meet his stated goal of drawing 100,000 new residents to the District.<sup>197</sup> In addition, some parents in gentrifying neighborhoods, particularly the gentrified Capitol Hill neighborhood, took

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<sup>192</sup> See, e.g., Barras, *supra* note 16, at 3 (describing how improvement in D.C. schools could increase the number of white gentrifiers who remain in the city and the implications for D.C.'s overall economy).

<sup>193</sup> See Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972); Hobson v. Hansen, 269 F. Supp. 401, 515 (D.D.C. 1967) (holding that the D.C. public schools still continued to segregate students by race after *Brown v. Board of Education*, 347 U.S. 483 (1954), and requiring them to make changes).

<sup>194</sup> See Matthew M. Gregor, *Continuing the Conversations: School Integration by Race and Socioeconomic Status in Gentrifying Neighborhoods*, 13 GEO. J. ON POVERTY L. & POL'Y 595, 603–04 (2006) (noting that "D.C.'s frustrating educational history, congressional oversight, and high national visibility have made it the battleground or breeding ground for a number of school reform movements").

<sup>195</sup> Emma Brown, *D.C. School Enrollment Increases, with Charters Growing Faster than DCPS*, WASH. POST (Oct. 17, 2013), [http://www.washingtonpost.com/local/education/overall-dc-school-enrollment-increases-with-charters-growing-faster-than-dcps/2013/10/17/0f8dd7fc-375e-11e3-80c6-7e6dd8d22d8f\\_story.html](http://www.washingtonpost.com/local/education/overall-dc-school-enrollment-increases-with-charters-growing-faster-than-dcps/2013/10/17/0f8dd7fc-375e-11e3-80c6-7e6dd8d22d8f_story.html) (containing comments from Vincent Gray, D.C.'s Mayor, stating that the increase of student enrollment in Washington, D.C.'s public schools evidenced that they were a "great place" for families).

<sup>196</sup> See Office of the Superintendent of Educ., *City Build*, DC.Gov, <http://osse.dc.gov/service/city-build> (last visited Nov. 6, 2015) ("The aim of City Build stretches beyond excellence in academics; it is a focus on encouraging community development, promoting strategic neighborhoods, attracting and retaining residents, and creating partnerships between public charter schools and community organizations.").

<sup>197</sup> See Gregor, *supra* note 194, at 596–97 (describing the City Build Initiative as "the best near-term hope for attracting and retaining residents to the District, with the hope of helping to meet Mayor Williams's stated goal of attracting 100,000 new residents" (quoting Press Release, District of Columbia, Sen. Landrieu, Mayor Williams Kick Off "City Build" Charter School Initiative (Aug. 18, 2004))).

matters into their own hands by creating a charter school for, and marketed almost exclusively to, parents in the gentrified Capitol Hill area.<sup>198</sup>

In addition to charter school expansion, Washington, D.C., local government officials and school officials recently changed the boundary lines that determine student assignment to traditional public schools.<sup>199</sup> The change was driven at least in part by a desire to provide predictability and stability in terms of school assignment for young families so that they would feel comfortable sending their kids to Washington, D.C., public schools.<sup>200</sup>

#### *D. The Impact of Market-Based Public School Reforms on Poor and Minority Students*

As the above examples in Washington, D.C., Chicago, and Philadelphia demonstrate, market-based public school reforms disproportionately affect poor minority students. For gentrified families, market-based reforms are for the most part a net positive. They actually work to give the families more viable choices when navigating urban public school systems with far too few high-quality options. Yet, market-based reforms typically have the opposite effect on the options available to poor and minority families. Instead of expanding the choices available to them, it constricts their choices.

For example, the closing of traditional public schools is leaving many predominantly poor and minority neighborhoods with no traditional public schools within close proximity.<sup>201</sup> In Chicago for example, a high number of poor minority neighborhoods are now considered “school deserts” or

<sup>198</sup> See *Save Our Schs.- Se. & Ne. v. D.C. Bd. of Educ.*, No. 04-01500, 2006 WL 1827654, at \*1 (D.D.C. July 3, 2006) (“Two Rivers, which was granted its charter in 2003 and began operating in Fall 2004, was assertedly founded by affluent white families who felt that the District’s public school student body was ‘too black.’”); Gregor, *supra* note 194, at 605–08 (describing the efforts of parents in the Washington, D.C., Capitol Hill area to create their own charter school because they were dissatisfied with the traditional public school offerings of the D.C. public school system).

<sup>199</sup> See D.C. ADVISORY COMM. ON STUDENT ASSIGNMENT, FINAL RECOMMENDATIONS ON STUDENT ASSIGNMENT POLICIES AND DCPS SCHOOL BOUNDARIES 14–19 (2014), [http://dme.dc.gov/sites/default/files/dc/sites/dme/publication/attachments/Final%20Recommendations%20on%20Student%20Assignment%208-18-14\\_0.pdf](http://dme.dc.gov/sites/default/files/dc/sites/dme/publication/attachments/Final%20Recommendations%20on%20Student%20Assignment%208-18-14_0.pdf).

<sup>200</sup> *Id.* at 5 (“DC is currently in a period of child population growth across the city, but whether young families will stay in the District, where families with children will settle, how long families will stay, and how large the families will be will all have a tremendous effect on DCPS and the public charter schools. In addition, the quality and character of public education in the District of Columbia and of individual DCPS and charter schools will affect the residential and school choices of these families.”).

<sup>201</sup> See *supra* Part II.C.

communities without public schools in close proximity.<sup>202</sup> Public school closures in predominately minority neighborhoods have the effect of destabilizing those neighborhoods because schools are often one of the most stable institutions in poor minority urban areas.<sup>203</sup> Closing public schools in already distressed, predominately poor, and minority neighborhoods often leaves vacant buildings that can exacerbate blight in poor communities, and the vacant buildings become a magnet for crime.<sup>204</sup> Indeed, many of the closed schools are not sold or repurposed for other uses.<sup>205</sup> The remnants of the closed physical buildings can also take a psychological toll on members of the community, leading them to believe that their community was abandoned and no longer worthy of investment.<sup>206</sup> This can in turn cause people to leave their communities, thereby depleting the neighborhood of critical social capital.

The closing of traditional neighborhood public schools is supposed to be balanced out by the expansion of non-neighborhood based charter schools that are of higher quality. However, the ability to actually attend high quality charter schools often proves illusive for poor and minority students and parents. Indeed, the better and more selective charter schools are often oversubscribed

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<sup>202</sup> See, e.g., Julianne Hing, *Activists Say No to Another “School Desert” in Chicago*, COLORLINES (Dec. 4, 2013, 7:00 AM), [http://colorlines.com/archives/2013/12/activists\\_say\\_no\\_to\\_another\\_school\\_desert\\_in\\_chicago.html](http://colorlines.com/archives/2013/12/activists_say_no_to_another_school_desert_in_chicago.html) (describing the high number of school closings in poor Black and Latino neighborhoods in Chicago and highlighting that the closure of public schools in the South Side Chicago neighborhood of Bronzeville will lead to there being only one public high school in close proximity for students to attend—a charter school two and a half miles away from Bronzeville).

<sup>203</sup> JOURNEY FOR JUSTICE ALL., DEATH BY A THOUSAND CUTS: RACISM, SCHOOL CLOSURES, AND PUBLIC SCHOOL SABOTAGE 19 (2014), [http://www.j4jalliance.com/wp-content/uploads/2014/02/J4JReport-final\\_05\\_12\\_14.pdf](http://www.j4jalliance.com/wp-content/uploads/2014/02/J4JReport-final_05_12_14.pdf) (noting that when public schools close “[r]esidents lose community services housed in schools, such as pre-K programs, before- and after-school programming, adult education classes, and health clinics. . . . Many of our communities experience a massive outflow of economic and human capital, which they can ill afford considering they were already substantially under-resourced.”).

<sup>204</sup> See, e.g., John Accordino & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFF. 301, 303 (2000) (“Ample evidence exists to suggest that such properties also have social ramifications, as they tend to serve as ‘magnets for crime’ and to increase the risks of fire and vandalism in urban neighborhoods.”).

<sup>205</sup> PEW CHARITABLE TRUSTS, SHUTTERED PUBLIC SCHOOLS: THE STRUGGLE TO BRING OLD BUILDINGS NEW LIFE 1 (2013), [http://www.pewtrusts.org/~media/Assets/2013/02/11/Philadelphia\\_School\\_Closings\\_Report.pdf?la=en](http://www.pewtrusts.org/~media/Assets/2013/02/11/Philadelphia_School_Closings_Report.pdf?la=en) (“Since 2005, the 12 districts have sold, leased or reused a total of 267 properties and still have 301 unused sites on the market, empty buildings that can cast a pall over their neighborhoods and be costly to seal, maintain and insure.”).

<sup>206</sup> See Garnett, *supra* note 150, at 320 (summarizing anecdotal evidence to support claims that “[r]esidents might interpret a school closure as signaling that their community is no longer worthy of investment, especially when (as is frequently the case) demographic realities concentrate school closures in minority neighborhoods”).

and utilize a lottery process in order to gain admission.<sup>207</sup> While in theory all participants in the lottery have an equal opportunity to gain admission, gentrifier families who tend to have more time, resources, and cultural capital to navigate the lottery process are more likely to apply and gain admission to the better charter schools.<sup>208</sup>

In fact, the majority of poor and minority students are more likely to enroll in charter schools that perform equivalent to or worse than traditional public schools.<sup>209</sup> Importantly, as a result of a steady stream of closures, many poor minority students are having to transfer to new schools multiple times within a short time period because schools are at times slated for closure shortly after accepting a batch of students from a previously closed school.<sup>210</sup> Thus, the expansion of charter schools arguably favors the interests of gentrifiers who are more likely to have the time and cultural capital to navigate the lottery process and obtain admission into the best charter schools.

Closing traditional public schools and expanding the number of charter schools also comes at a cost to traditional public schools. Traditional public schools are much more likely to serve minorities, poor students, and students with serious social and academic needs.<sup>211</sup> Indeed, it is well documented that charter schools tend to deny students with behavioral problems and students with disabilities.<sup>212</sup> Closing large numbers of traditional public schools means that the few traditional public schools that remain open are forced to educate students who have more social and academic needs, but the schools have less money to do so because they lose state and local funding that follows students

<sup>207</sup> See, e.g., Conor Williams, *What Applying to Charter Schools Showed Me About Inequality*, THE ATLANTIC (Mar. 20, 2014), <http://www.theatlantic.com/education/archive/2014/03/what-applying-to-charter-schools-showed-me-about-inequality/284530/> (noting that in Washington, D.C., the demand for quality seats greatly exceeded the supply and describing the lottery process by which seats are allocated).

<sup>208</sup> See, e.g., *id.* (describing how parents with more time and resources can increase their chances of obtaining a coveted spot in the charter school lottery by applying to more schools and having the ability to stand in line early in the morning to submit charter applications).

<sup>209</sup> JOURNEY FOR JUSTICE ALL., *supra* 203, at 12.

<sup>210</sup> Lipman, *supra* note 170, at 222 (noting that “[s]ome African-American students were transferred to as many as four schools in three years as one school after another was closed, and receiving schools were destabilized by the influx of dislocated students”).

<sup>211</sup> JOURNEY FOR JUSTICE ALL., *supra* note 203, at 11–12 (“Many charter schools also exclude students who are not perceived to be high-achievers or academically inclined. Charter schools use a variety of selective admission techniques, such as targeted marketing strategies, burdensome application processes, imposing academic prerequisites, and the active discouragement of less-desirable candidates.”).

<sup>212</sup> *Id.* at 12.

to charter schools.<sup>213</sup> Poor and minority students, not the children of gentrifiers, are more likely to attend such under-resourced traditional public schools.

Finally, gentrifiers are more likely to live in a neighborhood that has the best traditional public schools in the city.<sup>214</sup> Thus, if they are unable to gain admission to a quality charter school they are more likely to be able to exercise their choice of enrolling in a traditional neighborhood public school. This is especially true in gentrifying localities that have changed their school enrollment policies to favor neighborhood school enrollment. For example, in Washington, D.C., the boundary-line reassignment plan resulted in the shrinking of the boundary lines in two of the fastest gentrifying parts of the city.<sup>215</sup>

Indeed, the new attendance zones for the best performing middle and high schools in the city were shrunk so that only residents in the adjacent, predominately white, gentrified neighborhoods will have an automatic right to enroll in those schools.<sup>216</sup> On the other hand, students in the predominately Black and poor Ward Seven section of the city<sup>217</sup> were the most detrimentally impacted by the new boundary line changes. Over “1,266 students will be

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<sup>213</sup> See, e.g., *id.*; Valerie Strauss, *A Dozen Problems with Charter Schools*, WASH. POST (May 20, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/05/20/a-dozen-problems-with-charter-schools/> (summarizing the financial consequences of students moving from traditional public schools to charter schools and finding that “when a couple students leave a classroom to attend a charter school, that classroom still has to keep the lights on, and pay the teacher and the heating bill: the math is not a simple moving of dollars from one place to another”).

<sup>214</sup> See Japonica Brown-Saracino, *Social Preservationists and the Quest for Authentic Community*, in THE GENTRIFICATION DEBATES, *supra* note 28, at 261, 277–83.

<sup>215</sup> See Emma Brown, *D.C. Releases New Boundaries Proposal with Emphasis on Neighborhood Schools*, WASH. POST (June 12, 2014), [http://www.washingtonpost.com/local/education/dc-releases-new-boundaries-proposal-with-emphasis-on-neighborhood-schools/2014/06/12/828e30b0-f245-11e3-914c-1fbd0614e2d4\\_story.html?wpisrc=al\\_locmisc](http://www.washingtonpost.com/local/education/dc-releases-new-boundaries-proposal-with-emphasis-on-neighborhood-schools/2014/06/12/828e30b0-f245-11e3-914c-1fbd0614e2d4_story.html?wpisrc=al_locmisc) (“Most high school boundaries would also shift significantly, with some of the biggest changes at schools in the fastest-gentrifying parts of the city, such as Cardozo and Roosevelt. Cardozo’s zone, which currently extends far into Northeast Washington, would become an entirely Northwest school, encompassing wealthier neighborhoods around Dupont Circle and downtown that are currently zoned to Wilson.”).

<sup>216</sup> Michael Alison Chandler & Mike DeBonis, *D.C. Mayor Gray Adopts New School Boundary Recommendations*, WASH. POST (Aug. 21, 2014), [http://www.washingtonpost.com/local/education/dc-mayor-gray-adopts-new-school-boundary-recommendations/2014/08/21/9fed7d4a-249b-11e4-8593-da634b334390\\_story.html](http://www.washingtonpost.com/local/education/dc-mayor-gray-adopts-new-school-boundary-recommendations/2014/08/21/9fed7d4a-249b-11e4-8593-da634b334390_story.html) (“New attendance zones for Alice Deal Middle and Woodrow Wilson High—two Northwest schools that are among the most in-demand—are smaller, with some neighborhoods that had access to them now sent to other schools.”).

<sup>217</sup> See D.C. ACTION FOR CHILDREN, *A TALE OF THREE CITIES: WHAT THE CENSUS SAYS ABOUT THE DISTRICT AND HOW WE MUST RESPOND* 4, 7 (2011), [https://www.dactionforchildren.org/sites/default/files/CensusBrief4-27-11%20FINAL\\_0.pdf](https://www.dactionforchildren.org/sites/default/files/CensusBrief4-27-11%20FINAL_0.pdf) (showing that Ward 7 has the largest Black population (90%) in the city and the highest rate of poverty (over 40%)).

reassigned to a new school and 945 will no longer have a choice" to attend a neighborhood school.<sup>218</sup> This contrasts starkly with the impact on the predominately white and heavily gentrified Ward Three section of Washington, D.C., where no student will be reassigned to a new public school.<sup>219</sup> In an attempt to mitigate the segregating effects of the new zone-assignment policy, a limited number of seats in the highest performing schools in the city were set aside for socio-economically disadvantaged students who can attempt to enroll in those seats through the out-of-boundary lottery.<sup>220</sup> The out-of-boundary lottery, however, only offers a limited number of slots.<sup>221</sup> Often the most desirable schools have no seats available for students who enter the out-of-boundary lottery.<sup>222</sup>

In the end, market-based reforms create an interest divergence between poor and minority families and students, on the one hand, and gentrifiers, on the other. They do so by expanding the choices available to gentrifier families while simultaneously constricting the choices available to poor and minority families and students. Despite the harmful and racially disproportionate effects of market-based reforms, they have thus far withstood legal challenge. As discussed in the next section, market-based reforms are likely to continue to withstand legal challenges and, as a result, legislative reforms may prove more effective in meeting both the needs of poor and minority students and gentrifier families.

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<sup>218</sup> Aaron Wiener, *Who's Affected by the School-Assignment Changes*, WASH. CITY PAPER (Aug. 21, 2014, 2:49 PM), <http://www.washingtoncitypaper.com/blogs/housingcomplex/2014/08/21/whos-affected-by-the-school-assignment-changes/>.

<sup>219</sup> *Id.* ("Ward 3 will be the least affected, with no students reassigned.").

<sup>220</sup> See Chandler & DeBonis, *supra* note 216 ("[A]t-risk students should have a preference in the lottery for 25 percent of all out-of-boundary seats in any given year in more-affluent schools.").

<sup>221</sup> See D.C. PUB. SCHS., MY SCHOOL DC LOTTERY AND ENROLLMENT POLICY HANDBOOK 5 (2015), <http://dcps.dc.gov/sites/default/files/dc/sites/dcps/publication/attachments/Lottery%20Policy%20Handbook4.pdf> (describing the out-of-boundary lottery process as a lottery that allows a student "[t]o access a school that is not a right-to-attend school, also referred to as an out-of-boundary school, in kindergarten through Grade 12").

<sup>222</sup> See, e.g., Bill Turque, *DCPS Lottery: A Look at the Available Seats*, WASH. POST (Feb. 6, 2012), [http://www.washingtonpost.com/blogs/dc-schools-insider/post/dcps-lottery-a-look-at-the-available-seats/2012/02/03/gIQABTIpuQ\\_blog.html](http://www.washingtonpost.com/blogs/dc-schools-insider/post/dcps-lottery-a-look-at-the-available-seats/2012/02/03/gIQABTIpuQ_blog.html) (noting that there was zero to one seat available, through the out-of-boundary lottery, in the majority of Washington, D.C.'s most affluent and coveted public schools in the upper northwest section of the city).

#### IV. LEGAL CHALLENGES TO MARKET-BASED REFORMS IN GENTRIFYING URBAN CITIES AND THE INTEREST DIVERGENCE DILEMMA

Poor minority students in gentrifying areas are bringing legal challenges to market-based reform practices, particularly school closures and charter school expansion.<sup>223</sup>

Advocates bringing challenges to public school closures and charter school expansion have not made explicit the connection between gentrification and localities' use of market-based public school reforms as an economic development tool to sustain gentrification.<sup>224</sup> They are, however, challenging the harmful effects that public school closures and charter school expansion have on poor and minority students.<sup>225</sup> To date, the legal challenges have not been successful. This section provides an overview of the various legal challenges made by advocates both in the courts and with administrative agencies. It then analyzes the reasons why these challenges are either not succeeding or are unlikely to succeed.

##### A. *Court-Based Challenges to Market-Based Public School Reforms*

The primary method of challenging the exclusionary effects of market-based reforms thus far has been to seek relief from the courts or OCR. In particular, plaintiffs are filing complaints with courts and OCR alleging violations of the Fourteenth Amendment to the U.S. Constitution, Title VI of the 1964 Civil Rights Act, and various state-law antidiscrimination statutes.<sup>226</sup> While many of the administrative actions are still pending and under review, as

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<sup>223</sup> Notably, the school assignment policy changes that favor a return to neighborhood schools have not been subject to legal challenge. This is likely the case because courts have consistently ruled that issues of school assignment, particularly the drawing of attendance zones, are within the discretion of local officials and will not be disturbed absent compelling evidence of intentional discrimination or other misconduct. See, e.g., Annotation, *Discretion of Administrative Officers as to Changing Boundaries of School District*, 135 A.L.R. 1096 (1941).

<sup>224</sup> See *infra* Part IV.A.

<sup>225</sup> See *infra* Part IV.A.

<sup>226</sup> John Hurdle, *Education Dept. to Hear School Closing Complaints*, N.Y. TIMES (Jan. 28, 2013), [http://www.nytimes.com/2013/01/29/education/education-department-to-hear-school-closing-complaints.html?\\_r=0](http://www.nytimes.com/2013/01/29/education/education-department-to-hear-school-closing-complaints.html?_r=0) ("The United States Department of Education is investigating complaints that plans to close or reorganize public schools in Philadelphia, Detroit and Newark discriminate against black and Hispanic students, as well as those with disabilities, a department official confirmed on Monday."); Valerie Strauss, *Education Department Investigating Three School Civil Rights Complaints*, WASH. POST (Oct. 15, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/10/15/education-department-investigating-three-school-civil-rights-complaints/> ("The Education Department's Office of Civil Rights is investigating three complaints filed on behalf of African American parents in New Orleans, Chicago and Newark alleging racial discrimination in the closing of scores of neighborhood public schools in those three cities.").

discussed further in Part IV.B below, this Article takes the position that the administrative complaints are unlikely to prove fruitful in halting the use of exclusionary market-based reforms. Moreover, to date, courts are not finding that market-based reforms constitute intentional discrimination in violation of the Fourteenth Amendment, Title VI, or various state anti-discrimination laws.

For example, in Philadelphia, parents and students filed a lawsuit against the Philadelphia School System challenging the impact of public school closures and charter school expansion on poor, minority, and disabled students in North Philadelphia.<sup>227</sup> They alleged that the defendants were “closing neighborhood traditional public schools . . . [and] forcing plaintiffs to either [gain] admission into a local charter school or travel to another traditional public school through high crime areas where there was gang recruitment.”<sup>228</sup> The plaintiffs alleged that these actions violated their equal protection and substantive due process rights.<sup>229</sup> The plaintiffs ultimately voluntarily dismissed the case after reaching a settlement with the school district.<sup>230</sup> Importantly, however, the court noted that even if the plaintiffs had not dismissed the case voluntarily, their claims were unlikely to succeed because the “issues [they] raised [were] political question[s]”<sup>231</sup> better suited for the legislature than the court.

In Chicago, parents of Black students also brought a lawsuit in federal court challenging the disparate impact that public school closings were having on African-American students.<sup>232</sup> In particular, they challenged the closing of 49 elementary schools in predominately Black neighborhoods and sought a preliminary injunction to stop the closings.<sup>233</sup> The cornerstone of the plaintiffs’ complaint was that as a result of the school closings, “African-American students [were] suffer[ing] a disproportionate degree of academic harm . . . as compared to their non-African-American peers.”<sup>234</sup> In response, the school district denied that the closings were racially discriminatory and instead cited underutilization of schools in predominately Black neighborhoods and the need to save money as the reason for closing the schools.<sup>235</sup>

<sup>227</sup> See Complaint, V.L. v. Sch. Dist. of Phila., No. 2:12-cv-03182 (E.D. Pa. filed June 5, 2012), ECF No. 1.

<sup>228</sup> *Id.* at 15.

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

<sup>230</sup> See Transcript of Settlement Conference at 5, V.L. v. Sch. Dist. of Phila., No. 2:12-cv-03182 (E.D. Pa. filed July 17, 2012), ECF No. 11.

<sup>231</sup> *Id.* at 11–12.

<sup>232</sup> Swan v. Bd. of Educ. of Chi., Nos. 13 C 3623, 13 C 3624, 2013 WL 4401439, at \*1 (N.D. Ill. Aug. 15, 2013).

<sup>233</sup> *Id.* at \*1.

<sup>234</sup> *Id.* at \*21.

<sup>235</sup> *Id.* at \*3.

The plaintiffs countered by focusing specifically on the utilization criteria used by the Chicago Public Schools (“CPS”) to determine which schools to close.<sup>236</sup> They alleged that the utilization criteria resulted in African-American students disproportionately bearing the brunt of school closures.<sup>237</sup> They pointed to statistics showing that “African-American students make up 87% of the students in the closing schools, but only 40.5% of the students in CPS as a whole.”<sup>238</sup> They alleged such a disparity amounted to a violation of the Illinois Civil Rights Act (“ICRA”) which, amongst other things, prohibits discriminatory administration of any state program and allows proof of discriminatory administration to be shown through evidence of disparate impact.<sup>239</sup>

Despite the stark racial differences between the overall racial composition of the Chicago public schools and the schools slated for closure, the court rejected the plaintiffs claim that the closures violated the ICRA.<sup>240</sup> The court noted that in order to prevail on their ICRA claim, the plaintiffs had to “isolate and identify specific practices that are allegedly responsible for any observed statistical disparities” and show that they were “subject[] to an adverse action.”<sup>241</sup> With respect to the policy or practice prong, the court found that the plaintiffs failed to meet their burden of demonstrating that it was the utilization criteria used by the Chicago schools that resulted in the disparate impact upon African-American students.<sup>242</sup> In reaching that conclusion, the court reasoned that additional criteria other than the utilization criteria—such as the ability to maintain a high quality facility at a low cost—went into the decision to close the 49 elementary schools.<sup>243</sup> As a result, the court found that the plaintiffs failed to present statistical evidence of a “degree and kind” that could demonstrate that CPS violated the ICRA through its use of the utilization criteria.<sup>244</sup>

More significantly, the court also held that the plaintiffs failed to show that the closures resulted in any *actionable* harm against African-American students.<sup>245</sup> In so finding, the court reasoned that the plaintiffs’ evidence showed that the schools the students would be transferred to as a result of the closures were similar to but not worse than the schools they were leaving (and

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<sup>236</sup> *Id.* at \*19–20.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at \*19.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at \*20.

<sup>241</sup> *Id.* at \*12, \*21.

<sup>242</sup> *Id.* at \*19–20.

<sup>243</sup> *Id.* at \*20.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at \*21.

in the case of 12% of the students who would be transferred the schools would be better).<sup>246</sup> Notably, in reaching its conclusion the court went to great lengths to note that the loss of a neighborhood school was not the type of harm that a court should give much weight to in determining whether an actionable harm was committed.<sup>247</sup> Finally, the court also determined that the Chicago public school system offered a legitimate non-discriminatory reason for the school closures, namely that the closing of so-called underutilized schools would save money which could then be reallocated to schools throughout the district.<sup>248</sup>

Similarly, plaintiffs in Washington, D.C., challenging the exclusionary impact of market-based reforms were also unsuccessful. In *Smith v. Henderson*, advocates for poor minority children sought a preliminary injunction prohibiting the Washington, D.C. public school system from going forward with a plan to close 15 public schools with low enrollment.<sup>249</sup> They alleged that the school closures, along with an expansion of charter schools in D.C., were racially discriminatory in violation of the Fourteenth Amendment to the U.S. Constitution, Title VI of the 1964 Civil Rights Act, and the D.C. Human Rights Act.<sup>250</sup> The plaintiffs presented evidence that 93% of the students displaced as a result of the closures were Black, 6.6% Latino, while less than 0.1%—or fewer than six students—were white.<sup>251</sup> This contrasted with the overall demographics of the District in which 69% of students were Black, 16% Latino, 11% white, and 4% Asian, other, or unknown.<sup>252</sup> The plaintiffs claimed that this disparity demonstrated that the District was engaging in unconstitutional racial discrimination.<sup>253</sup>

The court rejected the plaintiffs' claims, emphasizing that many of plaintiffs' "contentions are political rather than legal."<sup>254</sup> The court emphasized the heavy burden that the plaintiffs bore in trying to establish the kind of intentional discrimination needed to prevail on a Title VI or equal protection claim.<sup>255</sup> The court emphasized that they would need to show that the schools were closed "at least in part 'because of,' not merely 'in spite of,'" the impact

<sup>246</sup> *Id.* at \*22 (citing testimony from the plaintiffs' expert witness stating that approximately 12.5% of students from closing schools were sent to better performing schools, where one would expect the students to improve academically, but that 87% of students would be transferred to schools where one would not expect improved academic performance).

<sup>247</sup> *Id.* at \*23–24.

<sup>248</sup> *Id.*

<sup>249</sup> 54 F. Supp. 3d 58, 60–61, 69 (D.D.C. 2014).

<sup>250</sup> *Id.* at 64–65.

<sup>251</sup> *Id.* at 64.

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

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 67.

<sup>255</sup> *Id.* at 68–69.

on the closure's minority students.<sup>256</sup> Although the court conceded that statistics cited by the plaintiffs were stark, the court determined that the district provided a legitimate non-discriminatory reason for the disparities through its allegation that closing the under-enrolled schools would save resources that could be spread throughout the district to the benefit of all students.<sup>257</sup>

Challenges to charter schools expansion in Washington, D.C., have also met a similar unsuccessful fate. In *Save Our Schools-Southeast and Northeast v. District of Columbia Board of Education*, plaintiffs alleged that the D.C. public school system created a dual and unequal system of education in which charter schools were given more funding and resources than traditional public schools.<sup>258</sup> As a result, the plaintiffs alleged students in charter schools received better educational opportunities.<sup>259</sup> The plaintiffs further alleged that the dichotomy in resources given to charter schools versus public schools was racially discriminatory because the traditional public schools were predominately Black and poor while the charter schools were primarily white and affluent families.<sup>260</sup>

The court rejected the plaintiffs' discrimination claims.<sup>261</sup> The court instead found that the plaintiffs failed to allege or demonstrate any discriminatory intent underlying the different funding and resources given to charter schools versus traditional public schools.<sup>262</sup> The court further noted that the plaintiffs conceded that mismanagement and incompetent leadership explained, at least in part, some of the reasons why the predominately Black traditional public schools offered fewer educational opportunities.<sup>263</sup> Because the plaintiffs conceded that reasons other than a discriminatory motive by the school system caused the injury of which plaintiffs complained (i.e. fewer educational opportunities), the court found that the plaintiffs failed to state an equal protection claim.<sup>264</sup> Courts in other jurisdictions considering race-based challenges to charter school expansion have come to similar conclusions.<sup>265</sup>

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<sup>256</sup> *Id.* (emphasis added) (quoting Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 257–58 (1979)).

<sup>257</sup> *Id.* at 64.

<sup>258</sup> See *Save Our Schs.-Se. & Ne. v. D.C. Bd. of Educ.*, No. 04-01500(HHK), 2006 WL 1827654, at \*1 (D.D.C. July 3, 2006).

<sup>259</sup> *See id.*

<sup>260</sup> *See id.* at \*11–12.

<sup>261</sup> *Id.* at \*13.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> Indeed, in the face of race-based equal protection challenges to charter school expansion in both gentrifying and non-gentrifying areas, most courts have found that plaintiffs challenging the expansion of charter schools cannot demonstrate racial discrimination because they fail to show the requisite discriminatory intent. See, e.g., *Villanueva v. Carere*, 85 F.3d 481, 485–87

As demonstrated above, court challenges to both public school closures and charter school expansion have been unsuccessful. This is the case primarily because of the inability of plaintiffs to show discriminatory intent. In the public school closure cases in particular, the only tangible evidence plaintiffs can typically present that the facially neutral public school policies are discriminatory is the disparate impact that the school closures would have on poor Black and Latino communities. Yet, as other legal scholars have noted, the discriminatory intent requirement places a nearly insurmountable obstacle on plaintiffs.<sup>266</sup> Government actions usually involve a multitude of motives and an improper motive can easily be subsumed within a proper motive.<sup>267</sup> Indeed, the courts' decisions in *Swann* and *Smith* focused heavily on the non-discriminatory reason proffered by the school systems for closing the schools—specifically the alleged underutilization of those schools and the cost savings that would accrue by closing the schools.<sup>268</sup>

Importantly, however, in heavily deferring to the school system's underutilization rationale, the courts completely ignored the history of discrimination that gave rise to the conditions which caused public schools in predominately Black neighborhoods to be underutilized in the first place. In particular, both the *Swann* and *Smith* decisions fail to account for or assign responsibility to the school systems for the history of racial segregation and inadequate funding once white flight occurred in these school systems.<sup>269</sup> The courts likely ignored this history because of the narrow scope of the discriminatory intent requirement of the disparate impact analysis. In this analysis, only the motive of the actor is considered without any historical context.<sup>270</sup> As a result, the plaintiffs in *Swann* and *Smith* were unable to

(10th Cir. 1996) (Latino parents challenging the closing of traditional public elementary schools and opening of charter schools in their place as racially discriminatory in violation of their Fourteenth Amendment equal protection rights, but the court finding that the school system did not have discriminatory intent in closing the elementary schools and opening the charter schools), *abrogated by* Alexander v. Sandoval, 532 U.S. 275 (2001).

<sup>266</sup> Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 40–41 (1977) (critiquing the discriminatory purpose requirement imposed in disparate impact cases).

<sup>267</sup> See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) (noting that “a motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute. Improper motives are easy to hide.”).

<sup>268</sup> See, e.g., *Smith v. Henderson*, 54 F. Supp. 3d 58, 70–71 (D.D.C. 2014) (finding that the racial disparities related to the school closings were related to the location of the schools, not intentional discrimination), *appeal dismissed*, No. 14-7120 (D.C. Cir. Aug. 19, 2015); *Swann v. Bd. of Educ.*, Nos. 13 C 3623, 13 C 3624, 2013 WL 4401439, at \*25 (N.D. Ill. Aug. 15, 2013) (finding that the school board’s stated assertion of wanting to save money by closing underutilized schools was a valid and non-discriminatory reason for the closures).

<sup>269</sup> See generally sources cited *supra* note 268.

<sup>270</sup> See Eisenberg, *supra* note 266, at 114–15.

demonstrate that the schools were slated for closure because of, and not in spite of, the impact closure would have on minority students. This will prove problematic for any litigant attempting to show that public school closings and charter school expansion are intentionally discriminatory.

### B. Administrative Challenges to Market-Based Public School Reforms

Advocates attempting to stop school closures and charter school expansion that disproportionately impact poor and minority students are also filing administrative complaints with OCR.<sup>271</sup> They are alleging that the school closings and charter school expansion violate Title VI.<sup>272</sup> To date, such complaints have been filed in gentrifying urban cities such as Philadelphia, Pennsylvania; Newark, New Jersey; New Orleans, Louisiana; and Chicago, Illinois.<sup>273</sup> Advocates are using this approach because agencies charged with enforcing Title VI are able to rely upon regulations that state that if a program or policy has a disparate impact on protected classes, it is a violation of Title VI.<sup>274</sup> The ability to use the disparate impact regulations in the context of challenging public school closings is limited to OCR because the Supreme Court held that the disparate impact regulations cannot be enforced through a private right of action.<sup>275</sup> Thus, only OCR, and not private individuals, can use a disparate impact theory to challenge public school closings and charter school expansion.

Given the disparate impact shown in cases such as *Smith* and *Swann* in Washington, D.C., and Chicago respectively, filing administrative complaints with OCR under a disparate impact theory of discrimination is the most promising legal avenue in which to challenge public school closures and charter school expansion. Yet, that strategy will also be challenging for at least three reasons.

First, upon receiving a complaint, OCR first investigates the complaint to determine whether it has any merit.<sup>276</sup> In conducting the investigation, OCR uses a variety of fact-finding techniques in order to determine whether the allegations in the complaint have merit.<sup>277</sup> A number of advocates suggest that

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<sup>271</sup> See, e.g., sources cited *supra* note 226.

<sup>272</sup> See, e.g., sources cited *supra* note 226.

<sup>273</sup> See Layton, *supra* note 168; JOURNEY FOR JUSTICE ALL., *supra* 203, at 1.

<sup>274</sup> See 28 C.F.R. § 42.104(b)(2) (2015).

<sup>275</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 275 (2001) (“This Court has not, however, held that Title VI disparate-impact regulations may be enforced through a private right of action.”).

<sup>276</sup> See Office of Civil Rights, *OCR Complaint Processing Procedures*, U.S. DEPT. OF EDUC. (Feb. 2015), <http://www2.ed.gov/about/offices/list/ocr/complaints-how.html>.

<sup>277</sup> *Id.* (“OCR may use a variety of fact-finding techniques in its investigation of a complaint. These techniques may include reviewing documentary evidence submitted by both parties,

OCR during the fact-finding investigative stage “does not appear to regularly apply the adverse impact doctrine in complaint investigations and determinations,” but instead applies the more stringent intentional discrimination standard.<sup>278</sup> In the context of school closures and charter school expansions, the use of disparate impact analysis is likely critical to finding a violation of Title VI. As demonstrated in the *Swann* and *Smith* cases, under a strict intentional discrimination theory, it is unlikely that the school closings and charter school expansions will be deemed discriminatory.<sup>279</sup> If the intentional discrimination theory is indeed used when investigating the school closures and charter school expansions, it is highly unlikely that OCR will find a violation of Title VI.

Second, as other scholars have also noted, the vigor of any OCR investigation is very much dependent upon a number of factors including political priorities.<sup>280</sup> As discussed in Part II.B, the executive branch’s embrace of charter school expansion, at a minimum, calls into question the likelihood of OCR finding that the school closings and charter school expansions are discriminatory.

Third, even if OCR were to find a violation and find it necessary to sue in federal court in order to ensure compliance, despite the existence of the disparate impact regulations, OCR would still have a difficult time meeting its legal burden of showing that the school closings and charter school expansions violate Title VI. In assessing whether a policy or practice violates Title VI under a disparate impact theory, courts follow the same burden-shifting framework used in Title VII disparate impact cases.<sup>281</sup> Thus, a plaintiff must first make a *prima facie* showing of discrimination. He or she must demonstrate by a preponderance of the evidence that a recipient of federal funds adopted a

conducting interviews with the complainant, recipient’s personnel, and other witnesses, and/or site visits.”).

<sup>278</sup> David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 513 (2014); see also Adira Siman, *Challenging Zero Tolerance: Federal and State Legal Remedies for Students of Color*, 14 CORNELL J.L. & PUB. POL’Y 327, 438 (2005).

<sup>279</sup> See generally *Smith v. Henderson*, 54 F. Supp. 3d 58 (D.D.C. 2014), *appeal dismissed*, No. 14-7120 (D.C. Cir. Aug. 19, 2015); *Swann v. Bd. of Educ.*, Nos. 13 C 3623, 13 C 3624, 2013 WL 44014395 (N.D. Ill. Aug. 15, 2013).

<sup>280</sup> See, e.g., Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1311–12, 1328 (2014) (“The disadvantages of the administrative process are well understood, including potential problems of bureaucratic torpor, politics, and even capture.”).

<sup>281</sup> See Ga. St. Conf. of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985) (noting that “[t]he elements of a disparate impact claim may be gleaned by reference to cases decided under Title VII”), abrogated by *Pitts v. Freeman*, 887 F.2d 1438 (11th Cir. 1989); see also N.Y. Urb. League v. New York, 71 F.3d 1031 (2d Cir. 1995) (“Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance.”).

facially race neutral policy that has a disproportionate impact on a protected category of individuals.<sup>282</sup> Importantly, a finding that the disparate impact would have existed in the absence of the policy or action taken by a federal fund recipient will impede a plaintiff's ability to meet this showing.<sup>283</sup> For example, if a defendant school system were able to show that the schools would have been closed because all neighborhood children chose to go elsewhere, OCR would likely be unable to make its *prima facie* case.

Assuming OCR is able to make a *prima facie* case, the burden would then shift to the defendant school systems to show that they have a "substantial and legitimate justification" for closings schools and expanding charter schools.<sup>284</sup> In the context of education cases, courts interpret this to mean that the defendant school system must show that "their challenged practices 'bear a manifest demonstrable relationship to classroom education.'"<sup>285</sup> Courts set a low bar for what this means in practical terms. Courts have found that the defendant school system only needs to show that the challenged practice is necessary to meet an important educational goal.<sup>286</sup> In the *Swann* and *Smith* cases, the plaintiffs argued that the school closures met the important goal of saving money that could be better used to help students district wide by eliminating underutilized schools.<sup>287</sup> Such a justification is likely to be used by other school systems. Given the low bar set by courts, this would in all likelihood be considered a substantial and legitimate justification.<sup>288</sup>

Lastly, if a school system did indeed show a substantial and legitimate justification for closing schools, OCR could then only prevail by showing that there are effective alternative practices that would have less of a racially disparate impact or that the school closings were a pretext for discrimination.<sup>289</sup>

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<sup>282</sup> See *Ga. St. Conf. of Branches of NAACP*, 775 F.2d at 1417.

<sup>283</sup> *Elston v. Talledega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 2013) ("[P]laintiff cannot make out a *prima facie* disparate impact claim if the evidence tends to show that even had the defendant not engaged in the challenged practice, the same disparate impact would nonetheless have existed."); *United States v. Lowndes Cty. Bd. of Educ.*, 878 F.2d 1301, 1305 (11th Cir. 1989) ("Racial imbalance in the public schools amounts to a constitutional violation only if it results from some form of state action and not from factors, such as residential housing patterns, which are beyond the control of state officials.").

<sup>284</sup> See *Ga. St. Conf. of Branches of NAACP*, 775 F.2d at 1417–18.

<sup>285</sup> *Elston*, 997 F.2d at 1412 (quoting *Ga. St. Conf. of Branches of NAACP*, 775 F.2d at 1418).

<sup>286</sup> See *id.* at 1412–13; *Ga. St. Conf. of Branches of NAACP*, 775 F.2d at 1417–20; *Sharif v. N.Y. Dep't of St. Educ.*, 709 F. Supp. 345, 361–62 (S.D.N.Y. 1989).

<sup>287</sup> *Smith v. Henderson*, 54 F. Supp. 3d 58, 71 (D.D.C. 2014), *appeal dismissed*, No. 14-7120 (D.C. Cir. Aug. 19, 2015); *Swann v. Bd. of Educ.*, Nos. 13 C 3623, 13 C 3624, 2013 WL 4401439, at \*24–25 (N.D. Ill. Aug. 15, 2013).

<sup>288</sup> See, e.g., *Garnett*, *supra* note 150, at 316 (suggesting that financial and enrollment challenges facing school districts would likely meet the substantial justification test for closing under public schools and expanding charter schools).

<sup>289</sup> *Elston*, 997 F.2d at 1407.

It would likely be difficult for OCR to convince a court that there are effective alternative practices, as courts often loathe to wade into what they consider questions of appropriate education policy.<sup>290</sup> Similarly, showing that the closings were a pretext for discrimination would also be difficult as it would require OCR to prove subjective intent on the part of the school system, which as other scholars have noted, is extremely difficult.<sup>291</sup> For these reasons, administrative challenges through OCR are unlikely to halt the public school closings and charter school expansion.

In sum, challenges to market-based reforms through the courts and OCR have not proved successful. Poor and minority students continue to be harmed by market-based reforms but are left without a viable remedy due to the ineffectiveness of the litigation-based challenges. As discussed in the following Part, enacting state legislation that seeks to capitalize on the shared interests of gentrifiers and poor and minority students is one potential solution that may prove effective.

#### V. GENTRIFICATION, URBAN PUBLIC SCHOOL REFORMS, AND THE POSSIBILITIES FOR INTEREST CONVERGENCE

The renewed interest of white middle class gentrifiers in urban public schools presents a rare situation in which the interests of gentrifiers and poor minority families actually coincide. Yet local officials are creating an unnecessary and harmful interest divergence between gentrifiers and poor and minority families in an attempt to cater to the interest of gentrifiers. Further, to date, the only recourse that advocates have utilized to remedy the problem (unsuccessfully) are legal claims with the courts and OCR. This Part situates the shared interests of poor minority families and gentrifiers in improving urban public schools within the context of Derek Bell's Interest Convergence Theory. It concludes by offering suggestions on how to use the Interest Convergence Theory to formulate effective legislative-based urban school reforms that benefit all children in urban schools.

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<sup>290</sup> See, e.g., *Smith*, 54 F. Supp. at 7 (“For any policymaker, whether to embrace these [school] reforms is a difficult question that requires expert judgment. For courts, it is simply an impossible—indeed, an impermissible—question to answer.”).

<sup>291</sup> See, e.g., Suzanne B. Goldberg, *Discrimination By Comparison*, 120 YALE L.J. 728, 731 (2011) (noting the challenges in proving discriminatory intent).

### A. The Interest Convergence Theory

The Interest Convergence Theory was created by Professor Derek Bell in order to explain the Supreme Court's decision in *Brown v. Board of Education*.<sup>292</sup> The theory posits that

the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. The fourteenth amendment, *standing alone*, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.<sup>293</sup>

The theory further suggests that protection of minorities in racial cases "may not actually be determined by the character of the harm suffered by blacks or quantum of liability against whites . . . instead [it will be determined by] the subconscious judicial conclusion that the remedies, if granted, will . . . advance or at least not harm societal interest deemed important . . . [to] whites."<sup>294</sup> Professor Bell used this theory to explain how the Supreme Court's decision to end racial segregation in schools coincided with elite whites' interests in winning the Cold War.<sup>295</sup> More specifically, he suggested that elite whites had an interest in ending racial segregation in public schools to assure Black Americans that they were a welcome part of the American democracy and to lend credibility to America's fight against Communism.<sup>296</sup>

The Interest Convergence Theory examines the progress that Blacks (and other minorities) have made in America from a historical perspective, looking not at "what will be" but "what has been."<sup>297</sup> It describes societal or macro changes—it does not describe the subjective motivations or psychological attitudes of all individuals.<sup>298</sup> Thus, the Interest Convergence Theory suggests that historically racial progress tends to occur when there is a convergence between minority and white interests, regardless of the psychological motivations of individuals.<sup>299</sup> Significantly, the Interest Convergence Theory does not suggest that the aggregate of minority interests

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<sup>292</sup> See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence-Dilemma*, 93 HARV. L. REV. 518 (1980).

<sup>293</sup> *Id.* at 523 (emphasis added).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 524.

<sup>296</sup> *Id.* at 524–25.

<sup>297</sup> See Stephan F. Feldman, *Do the Right Thing: Understanding the Interest Convergence Thesis*, 106 NW. U. L. REV. COLLOQUY 248, 249 (2012).

<sup>298</sup> *Id.* at 254.

<sup>299</sup> *Id.*

and white interests always coincide.<sup>300</sup> It does suggest, however, that on a macro level, in some instances some minorities and some whites will have shared interests and that when those shared interests coincide, racial progress will occur.

The Interest Convergence Theory, while initially dismissed as substantially inaccurate, has come to gain acceptance amongst a broad swath of advocates and scholars.<sup>301</sup> The theory is often utilized to explain court cases and trends.<sup>302</sup> It is also used as an affirmative tool or strategy to get legislative reform enacted.<sup>303</sup> The section that follows examines how the Interest Convergence Theory might be used to enact legislation that satisfies the interests of both poor and minority families and gentrifiers.

#### *B. Creating Interest Convergence Between Poor and Minority Families and Gentrifiers*

Using the Interest Convergence Theory as a guide, if the ultimate goal for local governments is to better urban public schools through gentrification without disproportionately affecting poor minority students, progress will occur if we cause the interests of the poor minority students and gentrifying students to converge. Poor and minority parents and students have long had an interest in improving urban public schools, particularly after years of decline and decay brought on by middle-class white flight. As a result of the resurgence of urban gentrification and an influx of middle- and upper-middle class white professionals, white middle- and upper-middle class residents also, at least in the abstract, share an interest in improving urban public schools with poor and minority families.

In reality, however, this shared interest is complicated by the nuances of race and class. While middle-class white gentrifiers are interested in seeing improvements to urban school systems, their interest is understandably limited to reforms that positively impact the options available to them, rather than the system as a whole. Paradoxically, even though many gentrifiers express a desire for schools with racial diversity, when choosing schools they also tend to

<sup>300</sup> *Id.*

<sup>301</sup> See, e.g., Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. REV. 369, 373 (2002) (“[Professor Bell’s] hypothesis was greeted with cries of outrage. Deemed a cynical explanation of whites’ benevolent conduct, it was dismissed as the jaded speculation of a civil rights warrior who had given up on the promise of America.”).

<sup>302</sup> See Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ. L. REV. 911, 925–30 (2007) (demonstrating the ways in which the Interest Convergence Theory has been used by legal scholars to explain key U.S. Supreme Court and lower federal court cases).

<sup>303</sup> *Id.* at 933–39 (explaining how the Interest Convergence Theory has been used to advocate for legislative reform in the areas of education, workplace, political, and other reform).

prefer schools with a smaller minority student population because of the negative perceptions attached to schools with high concentrations of minority students.<sup>304</sup> As a result, gentrifiers often do not object to, but instead demand, market-based reforms that increase the urban public school options available to them while simultaneously increasing race and class segregation in urban schools.<sup>305</sup> Thus, an interest displacement rather than an interest convergence is created between gentrifier families and poor and minority families.

The challenge therefore is to understand the ways in which interest convergence rather than interest displacement can be created between poor and minority families and middle-class gentrifier families. The key question in this analysis involves finding ways to get white gentrifiers to care about and become invested in the schooling options available to poor minority families. In other words, one must expand the abstract interest (that poor minority families and gentrifiers share in improving urban school systems) to a more concrete one that allows gentrifiers to disfavor school reform methods that improve only a subset of the urban public school system in ways that only benefit them.

One way to create interest convergence is to expand white gentrifiers' understanding of what is in both their short-term and long-term self-interest. To be sure, self-interest is a key component in creating interest convergence.<sup>306</sup> The Interest Convergence Theory suggests that it is only when the self-interest of elite whites is in line with racial justice for minorities will such justice actually occur.<sup>307</sup> In the case of urban public school reforms, important self-interests that gentrifiers hold are being obfuscated by the marginal increase in the urban public school choices made available to them by market-based reforms. In particular, the number of quality charter schools or traditional public schools in many urban school systems is in short-supply. At some point, as gentrification expands, there will no longer be enough seats in the best charter schools or best traditional public schools for all gentrifier children. Indeed, this is already the case in cities like Philadelphia and Washington, D.C., where the demand for quality public schools by gentrifiers is greatly

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<sup>304</sup> See Posey, *supra* note 5, at 17–18 (noting that for gentrifier parents, “race, class, and school quality [are] conflated in [their] minds” and finding that gentrifier parents were reluctant to send their children to a school with a high concentration of African-American students because such a school is associated with poverty and less rigorous academic programs).

<sup>305</sup> See, e.g., STILLMAN, *supra* note 9, at 100–01.

<sup>306</sup> See, e.g., Sheryll D. Cashin, *Shall We Overcome? Transcending Race, Class, and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253, 288 (2005) (suggesting that “a more enlightened understanding of self-interest can form the basis for political coalitions that [are able to] transcend race, class, and ideology”).

<sup>307</sup> See DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 7 (1992) (“[Only] [w]hen whites perceive that it will be profitable or at least cost-free to serve, hire, admit, or otherwise deal with blacks on a nondiscriminatory basis, they do so. When they fear—accurately or not—that there may be a loss, inconvenience, or upset to themselves or other whites, discriminatory conduct usually follows.”).

outstripping the supply.<sup>308</sup> For that reason, it is in the long-term best interest of gentrifiers to become invested in reforms that improve the entire urban public school system rather than a small cross-section of the system.

Further, as previously noted, gentrifiers expect the amenities in urban cities to match their higher class status.<sup>309</sup> Research suggests that for the gentrifier demographic, white middle- and upper-class residents, construction of what constitutes a quality public school is heavily depended upon the overall perception of the school system in which the individual school is situated.<sup>310</sup> A school is more likely to be perceived as a high quality school by white middle- and upper-class residents if it is part of a school system that has strong reputation.<sup>311</sup> To the extent that gentrifiers do indeed want the schools that they select for their children to be perceived as high quality, enacting reforms that improve urban public systems from top to bottom rather than a few choice schools would go a long way towards that interest.

Finally, gentrifiers have a long-term specific economic self-interest in ensuring that urban school reforms increase educational opportunities for all students, not just their own. An educated workforce is a necessary pre-requisite for economic growth, particularly in the new knowledge-based economy.<sup>312</sup> Continued growth of urban areas is predicated upon having a well-educated urban populace. Yet scholars have noted that because “of the growing number of minority students in public schools, if existing educational trends continue, the nation risks something it has never before seen: an intergenerational decline

<sup>308</sup> See, e.g., Patrick Kerkstra, *Urban Education’s Breadline Problem*, NEXT CITY (Jan. 25, 2013), <http://nextcity.org/daily/entry/urban-educations-breadline-problem> (noting that demand for seats in Philadelphia’s Penn Alexander elementary school led to parents waiting in line for four days prior to the date that registration applications for the school were due and that as a result, the city changed the admission process for the school from first-come, first-serve to an admissions lottery).

<sup>309</sup> See McFarlane, *supra* note 17, at 23.

<sup>310</sup> STILLMAN, *supra* note 9, at 29 (describing the school selection process for gentrifiers in New York and finding that gentrifier “‘high-status’ parents, through conversation, reinforced each other’s beliefs about what was, and was not, an acceptable schooling option, primarily based upon whether other ‘high-status’ children attended a school”); Jellison Holme *supra* note 18, at 192 (“[P]arents in the study drew conclusions about the quality of schools based on where other high-status parents sent their children.”).

<sup>311</sup> Jellison Holme, *supra* note 18, at 202 (“[P]arents’ school choice decisions are, therefore, not the individualized endeavor that choice proponents portray them to be, nor are they simply about obtaining a good education. Rather, such choices are fundamentally a struggle for status and distinction, a means by which privileged parents seek out high-status institutions that will confer both material and social advantages on their children.”).

<sup>312</sup> Anthony P. Carnevale, Nicole Smith & Jeff Strohl, *Help Wanted: Projections of Jobs and Education Requirements Through 2018*, GEO. UNIV. CTR. ON EDUC. & THE WORKFORCE 19–28 (June 2010), <https://cew.georgetown.edu/wp-content/uploads/2014/12/fullreport.pdf> (documenting the ways in which higher levels of education will shape the job opportunities available to workers).

in its educational level, a threatening outcome in a knowledge-based, global economy.”<sup>313</sup> To the extent that gentrifiers are part of the knowledge-based group of workers that benefit from a revitalized and economically strong urban core, they should support urban school reforms that benefit and provide more opportunity for a larger cross-section of the urban city.

### C. Using Legislative Solutions to Capitalize on Interest Convergence

Focusing on the aforementioned ways in which the self-interest of gentrifiers can be used to create true interest convergence with poor and minority families offers a rare opportunity to improve urban public schools: improvements that will actually have substantive benefits for poor and minority students. The following is a non-exhaustive list of potential legislative solutions that, if implemented, could meet the interests of both poor and minority families and gentrifier families.

First, as other scholars have noted, most low-performing schools in urban areas are low-performing because, among other things, students and their families are dealing with a plethora of non-school issues that make learning difficult.<sup>314</sup> Instead of closing low-performing schools and replacing them with charter schools, a better alternative might be to replace low-performing schools with Community Based Schools (“CBS”). CBSs are schools that partner with other public service providers to provide not just educational services, but also much needed support to distressed communities in areas such as health care, counseling, adult education, and cultural events.<sup>315</sup>

For example, in Cincinnati, Ohio, the Cincinnati School District revamped its failing schools with CBSs called community learning centers.<sup>316</sup> The community learning centers in Cincinnati have shown modest but important progress. Improved graduation rates, test scores, attendance, and community revitalization have been a hallmark of the community learning

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<sup>313</sup> See Brief for 553 Social Scientists as Amici Curie Supporting Respondents at 12, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2006) (Nos. 05-908 and 05-915), 2006 WL 2927079, at \*12.

<sup>314</sup> See, e.g., Black, *supra* note 127, at 404–06.

<sup>315</sup> See, e.g., *What Is a Community School?*, COALITION FOR COMMUNITY SCHS. [http://www.communityschools.org/aboutschools/what\\_is\\_a\\_community\\_school.aspx](http://www.communityschools.org/aboutschools/what_is_a_community_school.aspx) (last visited Nov. 5, 2015) (describing community schools as a “place and set of partnerships between the school and other community resources” and noting that community schools “bring together a range of supports and opportunities to children, youth, families, and communities”).

<sup>316</sup> CINCINNATI CITY SCH. DIST., BYLAWS & POLICIES § 7500, <http://community.cps-k12.org/sites/boardpolicies/7000%20Property/7500%20Policy%20Community%20Learning%20Centers.pdf> (last visited Nov. 5, 2015) (“[E]ach school should also be a community learning center in which a variety of partners shall offer academic programs, enrichment activities, and support to students, families, and community members before and after school as well as during the evenings and on weekends throughout the calendar year.”).

center expansion in Cincinnati.<sup>317</sup> Some form of CBSs have been successfully implemented in other high poverty urban school systems and achieved similar successes.<sup>318</sup>

Given the self-interest that gentrifiers should have in improving all aspects of urban school systems, enacting CBSs could achieve that goal while simultaneously providing meaningful learning opportunities for poor minority children and revitalizing predominately poor and minority communities. In order to ensure their substantive quality, CBSs could be subject to monitoring requirements similar to the monitoring requirements in the school desegregation context in the South. In those southern school districts, prior to achieving unitary status, each district had to file reports documenting the quality of the curricular offerings to Black students, discipline measures, access to extracurricular activities, the quality of the teaching staff, etc.<sup>319</sup>

One obvious question with respect to CBSs is the question of scale. In particular, whether a system of CBSs could be implemented on a district-wide basis given the high number of failing schools in many urban districts and the intensive financial and manpower cost associated with putting CBSs in place.<sup>320</sup> One answer to this dilemma might be to implement CBS on an individual school-wide basis rather than systematically in areas with no or limited public schools available.<sup>321</sup> Such an approach, though not ideal, would at least be a

<sup>317</sup> See Javier C. Hernández, *Mayoral Candidates See Cincinnati as a Model for New York Schools*, N.Y. TIMES (Aug. 11, 2013), [http://www.nytimes.com/2013/08/12/nyregion/candidates-see-cincinnati-as-model-for-new-york-schools.html?\\_r=0](http://www.nytimes.com/2013/08/12/nyregion/candidates-see-cincinnati-as-model-for-new-york-schools.html?_r=0) (“[A]fter years of poor performance and an exodus of middle-class families to the suburbs, Cincinnati has made some of the greatest gains in test scores in Ohio in recent years, even though it lags behind state averages. School officials here credit the city’s embrace of the community schools model, which is now fully in place in 34 of 55 schools in the system.”).

<sup>318</sup> *Community School—Results that Turn Around Failing Schools: Test Scores, Attendance, Graduation and College-Going Rates*, COALITION FOR COMMUNITY SCHS. 2 (May 2010), [http://www.communityschools.org/assets/1/AssetManager/Turning\\_Around\\_Schools\\_CS\\_Result\\_s2.pdf](http://www.communityschools.org/assets/1/AssetManager/Turning_Around_Schools_CS_Result_s2.pdf) (describing successful implementation of community schools in New York, New York; Providence, Rhode Island; and Tukwila, Washington.).

<sup>319</sup> See, e.g., *Youngblood v. Bd. of Pub. Instruction*, 448 F.2d 770, 771 (5th Cir. 1971) (requiring the school district to submit semi-annual reports); *United States v. Hinds Cty. Sch. Bd.*, 433 F.2d 611, 612 n.1, 618–19 (5th Cir. 1970) (same).

<sup>320</sup> See generally Martin J. Blank, Reuben Jacobson, Atelia Melaville & Sarah S. Pearson, *Financing Community Schools: Leveraging Resources to Support Student Success*, COALITION FOR COMMUNITY SCHS. (Nov. 2010), <http://www.communityschools.org/assets/1/AssetManager/finance-paper.pdf>.

<sup>321</sup> In Philadelphia, Pennsylvania, policymakers implemented one CBC concept school at Sayre High School through a partnership with the University of Pennsylvania. *Philadelphia School-Based Family Service Centers*, CITY COUNCIL OF PHILA. 12 (2015), [http://issuu.com/phlcouncil/docs/brochure\\_-\\_school-based\\_family\\_serv](http://issuu.com/phlcouncil/docs/brochure_-_school-based_family_serv). The school was modeled off of Cincinnati’s Community Learning Center model and resulted in a 90% graduation rate with 56% of the students going on to college. *Id.* at 8.

start to creating more educational opportunities for poor minority students while at the same time improving the overall quality of the school system.

Second, in the event that a school closure is indeed necessary as a result of low-enrollment or underutilization, state legislation should be enacted to ensure that the closing of a public school does not destabilize a neighborhood. Such legislation could include a rule regarding replacement of closed public schools that is similar to the one-for-one replacement rule used to ensure that affordable housing remains when public housing units are demolished.<sup>322</sup> While the one-for-one replacement rule was eventually repealed by Congress (and arguably contributed to the displacement of poor and minorities from gentrifying areas), the new Choice Neighborhoods Initiative has a replacement rule worth modeling.<sup>323</sup> The new Choice Neighborhoods Initiative Rule requires that “grantees build at least one subsidized replacement housing unit for every unit demolished in the target development, except when objective measures indicate that the local housing market is too weak to warrant full replacement.”<sup>324</sup>

Similarly, state legislation targeting school closures could require that every neighborhood have at least one public school within a specific proximity (for example, two miles), except when objective measures indicate that there would be issues obtaining adequate enrollment in a replacement school. Having neighborhood schools in predominantly Black and Latino neighborhoods benefits cities as a whole to the extent that schools serve a stabilizing function in neighborhoods.<sup>325</sup> Requiring that schools be replaced where feasible is a better solution than the market-based reforms because such measures aim to ensure that there are neighborhood schools in Black and Latino neighborhoods.

Third, and finally, while the proliferation of charter schools is often viewed as a positive in terms of providing parents with more choices, the reality is often that very few charter schools provide high quality education.<sup>326</sup> Both poor and minority families and more affluent gentrifier families are left fighting for the limited number of slots in the better charter schools.<sup>327</sup> Thus, both groups should have a similar interest in lobbying for legislation that limits incentives for further expansion of charter schools and instead calls for

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<sup>322</sup> See 42 U.S.C. §§ 3535(d), 4601, 5304, 12705(b) (2013); 24 C.F.R. § 42.375 (2015).

<sup>323</sup> See ROLF PENDALL & LEAH HENDEY, A BRIEF LOOK AT THE EARLY IMPLEMENTATION OF CHOICE NEIGHBORHOODS 2 (2013), <http://www.urban.org/research/publication/brief-look-early-implementation-choice-neighborhoods> (“Choice maintains HOPE VI’s emphasis on public-private partnerships and mixed-financing for replacing or rehabilitating assisted housing. Choice also extends eligibility beyond public housing to privately-owned, federally subsidized developments.”).

<sup>324</sup> *Id.*

<sup>325</sup> See JOURNEY FOR JUSTICE ALL., *supra* 203, at 25.

<sup>326</sup> See discussion *supra* Part III.D and text accompanying note 214.

<sup>327</sup> See discussion *supra* Part III.D and text accompanying note 214.

increased investment in public schools. For example, some advocates suggest applying pressure at the federal level to exclude charter schools from receiving the New Market Tax Credit,<sup>328</sup> a credit often given to charter schools located in urban areas as part of a broader scheme to spur investment in low-income communities.<sup>329</sup> This is one solution worth pursuing along with a simultaneous push for added incentives through Title I of the Elementary and Secondary Education Act<sup>330</sup> (“ESEA”) for urban school systems that maintain a balance of having at least 70% traditional public schools versus no more than 30% charter schools. The push should be for amendments to the ESEA that provide additional funding for school districts in which at least 70% of the schools within the system are traditional public schools.

## VI. CONCLUSION

This Article examines the implications of gentrification on urban public schools. In particular, it argues that certain market-based reforms are being implemented en masse, at least in part, in order to make urban public schools more attractive options for gentrifiers. However, the current reliance upon market-based reforms to improve urban school systems creates an unnecessary rift between the interests of gentrifiers and the interests of poor and minority students. These market-based reforms are ultimately harming the poor, minority students in urban cities by creating school deserts and charter schools that favor the interests of gentrifiers. Both gentrifiers and poor and minority students have an interest in improving urban public schools. As a result, a unique opportunity exists to reform urban public school systems in ways that benefit all students. Legislative reform, rather than solely market-based reform and reactionary litigation, should be used to reform urban schools in ways that benefit both poor and minority students and gentrifiers alike.

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<sup>328</sup> See JOURNEY FOR JUSTICE ALL., *supra* 203, at 26.

<sup>329</sup> See U.S. Dep’t of Treasury, *New Markets Tax Credit Program*, COMMUNITY DEV. FIN. INSTITUTIONS FUND, <https://www.cdfifund.gov/programs-training/Programs/new-markets-tax-credit/Pages/default.aspx> (last visited Nov. 5, 2015).

<sup>330</sup> See 20 U.S.C. §§ 6301–578 (2013).