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Disparate Impact, School Closures, and Parental Choice

Nicole Stelle Garnett[†]

ABSTRACT

We live in an era of parental choice. Today, forty-two states and the District of Columbia authorize charter schools, and twenty states and the District of Columbia permit students to use public funds to attend a private school. During the 2012–2013 school year, nearly 2 million children attended charter schools, and nearly 250,000 children received publicly funded scholarship to attend a private school. The expanding menu of publicly funded educational options is one (but by no means the only) factor contributing to the current, intensely controversial, waves of urban public school closures. In school-closure debates, proponents of traditional public schools frequently demand a reduction in parental choice policies in order to preserve neighborhood public schools. These demands are reflected in complaints alleging that school closures, and the parental choice policies influencing them, violate Title VI's disparate-impact regulations. This Article argues that, absent evidence of intentional discrimination in the adoption or implementation of parental choice policies themselves, these regulations should not be interpreted as requiring state and local education officials to restrict parental choice programs. Disparate-impact analysis requires an inquiry into the potential harms and benefits of, and alternatives to, education policies that neither federal officials nor federal judges are well-situated to evaluate. To illustrate these complexities, the Article focuses on the frequently asserted claim that traditional neighborhood public schools are more-effective community institutions than choice schools.

INTRODUCTION

On January 29, 2013, public school activists and parents from across the United States convened a raucous meeting with

[†] Professor of Law, Notre Dame Law School. I received valuable feedback on this paper at the Yale Law Economics and Organization Workshop and the Notre Dame Law and Economics Workshop. I am also indebted to Margaret F. Brinig, Robert C. Ellickson, Rick Garnett, Michael Heise, Daniel Kelly, Matthew Kloser, and James Ryan for helpful suggestions. Bridget Nugent and Jason O'Brien provided valuable research assistance.

U.S. Secretary of Education Arne Duncan to demand an immediate nationwide moratorium on urban public school closures.¹ Since the U.S. Department of Education almost certainly lacks the legal authority to impose a nationwide moratorium on school closures, the immediate outcome of the gathering was foreordained. The activists nevertheless declared victory, arguing that the meeting signaled an inflection point in their effort to build a national movement to fight public school closures.² They also used the meeting to draw national attention to the fact that the Department of Education currently is investigating complaints alleging that public school closures in a number of large urban districts violate federal civil rights guarantees by disproportionately targeting minority students and teachers.³ Duncan, who closed dozens of schools as the head of the Chicago Public Schools and who pledged to close or restructure one thousand failing public schools per year as Secretary of Education, promised a prompt and thorough investigation of these complaints.⁴ But, he also acknowledged that school closings are complex.⁵

School closures are also, apparently, becoming increasingly common. In the 2010–2011 school year, 1,069 public schools

¹ See, for example, *Community Members from 18 Cities Call on US Dept. of Education to End Discriminatory Public School Closings at Washington D.C. Hearing*, Think Inc. (Jan 30, 2013), online at <http://www.thinkincstrategy.com/2013/01/30/community-members-from-18-cities-call-on-us-dept-of-education-to-end-discriminatory-public-school-closings-at-washington-d-c-hearing> (visited Oct 18, 2014); *First report on Journey for Justice 2 hearing in D.C.*, Parents Across America (Jan 29, 2013), online at <http://parentsacrossamerica.org/report-journey-justice-2-hearing-d-c> (visited Oct 18, 2014).

² See *First report on Journey for Justice 2 hearing in D.C.*, Parents Across America (Jan 29, 2013), online at <http://parentsacrossamerica.org/report-journey-justice-2-hearing-d-c> (cited in note 1).

³ See *id.* At least one federal court currently is considering a similar claim, which focuses on the disparate effects of the Chicago public school closures on minority teachers and staff. See First Amended Complaint, Chicago Teachers Union, Local 1, *American Federation of Teachers v Board of Education of the City of Chicago*, Case No 1:12-cv-10311 Doc 8 (ND Ill filed Dec 12, 2012) (alleging that the Chicago Public School's practice of "school turnarounds" violates the civil rights of African American tenured teachers, who account for approximately 51.1 percent of the tenured teachers terminated as a result of turnarounds).

⁴ See Lyndsey Layton, *Activists to U.S. Education Department: Stop school closings now*, (Wash Post Jan 29, 2013), online at http://www.washingtonpost.com/local/education/activists-to-us-education-department-stop-school-closings-now/2013/01/29/7eb27f40-6a39-11e2-95b3-272d604a10a3_story.html (visited Oct 18, 2014).

⁵ See *id.*

were closed in the United States, up from 717 a decade earlier.⁶ In 2013, the School Reform Commission of Philadelphia, which has operated the city's schools since a state takeover in 2001, announced plans to shutter 10 percent of the district's schools (23 total) at the end of this school year;⁷ the Kansas City, Missouri School District closed half its public schools in 2010,⁸ having closed roughly that many schools over the previous three decades;⁹ in New York City, former Mayor Michael Bloomberg closed 164 public schools during his tenure,¹⁰ although his successor, Bill de Blasio has pledged to reverse this policy;¹¹ Chicago closed 104 schools between 2001 and 2011, with no more than 16 schools being closed in any given year,¹² but closed

⁶ See *id.*

⁷ See Jon Hurdle, *Philadelphia Officials Vote to Close 23 Schools*, NY Times (Mar 7, 2013), online at http://www.nytimes.com/2013/03/08/education/philadelphia-officials-vote-to-close-23-schools.html?_r=0 (visited Oct 18, 2014); Jesse Blitzstein, et al, *New Life for Old Schools*, 18–19, (U Pa School of Design: Dept of City and Regional Planning Spring 2013), online at http://issuu.com/pennpraxis/docs/new_life_for_old_schools_final_report_2013 (visited Oct 18, 2014). See generally *Shuttered Public Schools: The Struggle to Bring Old Buildings New Life* (Thomas B. Fordham Institute, Feb 19, 2013), online at <http://edexcellence.net/ohio-policy/gadfly/2013/february-20/shuttered-public-schools-the-struggle-to-bring-old-buildings-new-life.html> (visited Oct 18, 2014). (visited Oct 18, 2014). The announced closures were a response to a 2012 study that public school authorities in Philadelphia commissioned the Boston Consulting Group to study the issue. The report recommended that the district close forty to fifty schools “in the near term” and another fifteen to twenty over the next five years in order to address underperformance and predicted attrition due to competition from charter schools. See The Boston Consulting Group, *Transforming Philadelphia's Public Schools: Key findings and recommendations*, 7–9 (Aug 2012), online at http://www.williampenfoundation.org/ArticleFiles/327/BCG-Summary-Findings-and-Recommendations_August_2012.pdf (visited Oct 18, 2014).

⁸ See Susan Saulny, *Board's Decision to Close 28 Kansas City Schools Follows Years of Inaction*, NY Times (Mar 11, 2010), online at http://www.nytimes.com/2010/03/12/us/12schools.html?_r=0 (visited Oct 18, 2014); *Half of Kansas City public schools to close*, USA Today (Mar 11, 2010), online at http://usatoday30.usatoday.com/news/nation/2010-03-10-Kansas-City_N.htm (visited Oct 18, 2014).

⁹ See Eric Barton, *Buy This School*, The Pitch News (Aug 14, 2008), online at <http://www.pitch.com/kansascity/buy-this-school/Content?oid=2191168> (visited Oct 18, 2014).

¹⁰ Bloomberg also opened 656 new schools—most of them small and co-located with other schools in large public school buildings—illustrating the complexity of school closures. See Eric Durkin and Ben Chapman, *City to open 78 new schools in September, bringing tally under Mayor Bloomberg to a Record 656*, NY Daily News (Apr 2, 2013), online at <http://www.nydailynews.com/new-york/city-open-78-new-schools-septemer-article-1.1306060> (visited Oct 18, 2014).

¹¹ Javier C. Hernandez, *De Blasio Recognizes Obstacles Standing in the Way of Schools Plan*, NY Times (Dec 30, 2013), online at http://www.nytimes.com/2013/12/31/nyregion/de-blasio-names-veteran-city-educator-to-lead-schools.html?_r=0 (visited Oct 18, 2014).

¹² See Linda Lutton, Sarah Karp, and Elliot Ramos, *Mapping 10 Years of School*

an additional 49 in the spring of 2013,¹³ prompting massive protests by teachers, students, and parents.¹⁴

Public school closures are the result of many factors. Parental choice policies are among them, both because empowering parents to exit traditional public schools for charter schools (and, to a much lesser extent, private schools) suppresses public school enrollment in many urban districts, and because public officials increasingly opt to convert underperforming public schools into charter schools. And, since many of the students taking advantage of parental choice policies live in racially isolated neighborhoods, these consequences have racial dimensions. Many charter and private schools in urban areas are majority-minority, as are many of the schools that are closed for under-enrollment and under-performance. For example, almost all of the public schools closed in Chicago in 2013 were located in majority-black neighborhoods.¹⁵ As a result, the students displaced by the

Closures, WBEZ 91.5 (Dec 7, 2011), online at <http://www.wbez.org/content/mapping-10-years-school-closures> (visited Oct 18, 2014).

¹³ See Noreen S. Ahmed-Ullah, John Chase, and Bob Sexter, *CPS approves largest school closure in Chicago's history*, Chicago Tribune (May 23, 2013), online at http://articles.chicagotribune.com/2013-05-23/news/chi-chicago-school-closings-20130522_1_chicago-teachers-union-byrd-bennett-one-high-school-program (visited Oct 18, 2014); Ben Joravsky, *The Chicago manual of school closings: A close look at how Chicago officials shutter public schools*, Chicago Reader (Jan 22, 2013), online at <http://www.chicagoreader.com/chicago/how-officials-close-public-schools-cps/Content?oid=8556450> (visited Oct 18, 2014); Mary Wisniewski, *Chicago School Closings: CPS CEO Proposes 5-Year Moratorium On Closings Post-2013*, Huffington Post (Nov 26, 2012), online at http://www.huffingtonpost.com/2012/11/26/chicago-school-closings_n_2193277.html (visited Oct 18, 2014). On March 6, 2013, the Commission on School Utilization issued its final recommendations to CPS officials. The report suggests that the district can “safely” close eighty schools in the fall of 2013 (that is, it could guarantee that students could be safely transferred to higher-performing schools). See Commission on School Utilization, *Final Report* (Mar 6, 2013), online at <http://www.chicagotribune.com/news/local/breaking/chi-cps-commission-on-school-utilization-report-20130307,0,1595383.htmlpage> (visited Oct 18, 2014).

¹⁴ See Kim Geiger, *People protesting planned school closings arrested at City Hall*, Chicago Tribune (May 20, 2013), online at http://articles.chicagotribune.com/2013-05-20/news/chi-people-protesting-planned-school-closings-arrested-at-city-hall-20130520_1_chicago-teachers-union-53-elementary-schools-one-high-school-program (visited Oct 18, 2014). Job guarantees in the event of anticipated school closures also were a focal point of the teachers' strike in Chicago last fall. See Madison Gray, *Chicago Teachers Go on Strike: 5 Things They're Fighting For*, Time (Sept 10, 2012), online at <http://newsfeed.time.com/2012/09/10/chicago-teachers-go-on-strike-5-things-theyre-fighting-for/#ixzz2NAPOnMNe> (visited Oct 18, 2014).

¹⁵ See Lauren Fitzpatrick and Art Golab, *Black students most likely to have their school on CPS closure list*, Chicago Sun Times (Apr 8, 2013), online at <http://www.suntimes.com/news/education/18626817-418/black-students-far-more-likely-to-see-their-cps-school-closed-than-others-sun-times-analysis.html> (visited Oct 18, 2014).

school closures were overwhelmingly African American.¹⁶ In the months leading up to the final closure announcement, the Chicago Teacher's Union published a report accusing the Chicago Public Schools of instituting a policy of "educational apartheid," including a "charter proliferation campaign" in predominantly-black neighborhoods designed to drive down public school enrollment.¹⁷ In 2011, charter schools in Chicago served a much higher percentage of African American students (60.8 percent) than the Chicago Public Schools (42.9 percent), but a lower percentage of Latino students.¹⁸ Less than three months after finalizing its school-closure plans, the Chicago Public Schools issued a request for proposals for new charter schools.¹⁹

Although claims that parental choice policies result in children learning in less-integrated settings than traditional public schools are deeply contested,²⁰ these apparent racial

(analyzing the 129 schools on the school-closure watch list and finding that 88 percent of the students at these schools are black).

¹⁶ See *id.*

¹⁷ Carol Caref, et al, *The Black and White of Education in Chicago's Public Schools: Class, Charters & Chaos: A Hard Look at Privatization Schemes Masquerading as Education Policy*, Chicago Teachers Union, *1, 4 (Nov 30, 2012), online at http://www.catalyst-chicago.org/sites/catalyst-chicago.org/files/blog-assets/files/ctureportfinal_120112_pdf.pdf (visited Oct 18, 2014).

¹⁸ See Illinois State Board of Education, *2009–2010 and 2010–2011 Illinois Charter School Biennial Report* *15 (Jan 2012), online at http://www.isbe.state.il.us/charter/pdf/biennial_rpt_09-10_10-11.pdf (visited Oct 18, 2014).

¹⁹ See *Request for Proposals for New Schools*, *4 (Chicago Public Schools 2013), online at http://www.cps.edu/newschools/documents/rfp_fornewschools.pdf (visited Oct 18, 2014).

²⁰ See, for example, Matthew M. Chingos, *Does Expanding School Choice Increase Segregation?*, EducationNext (May 16, 2013), online at <http://educationnext.org/does-expanding-school-choice-increase-segregation/> (visited Oct 18, 2014) (contesting the claim that charter schools are more racially isolated than comparable public schools); Gary Ritter, et al, *A Closer Look at Charter Schools and Segregation: Flaws comparisons lead to overstated conclusions*, 10 EducationNext 69 (2010), online at <http://educationnext.org/a-closer-look-at-charter-schools-and-segregation/> (visited Oct 18, 2014); Yehoshua Bedrick, *DOJ Lawsuit Would Keep Black Kids in Failing Schools*, Jay P. Greene's Blog: With Help From Some Friends (Aug 25, 2013), online at <http://jaypgreene.com/2013/08/25/doj-lawsuit-would-keep-blacks-in-failing-schools/> (visited Oct 18, 2014) (contesting the claim that vouchers increase segregation in Louisiana public schools); Howard L. Fuller and Deborah Greiveldinger, *The Impact of School Choice on Racial Integration in Milwaukee Private Schools*, American Education Reform Council (Aug 2002); Jay P. Greene, Jonathan N. Mills, and Stuart Buck, *The Milwaukee Parental Choice Program's Effect on School Integration*, School Choice Demonstration Project (U Ark Apr 2010); Jay P. Greene and Marcus A. Winters, *An Evaluation of the Effect of D.C.'s Voucher Program on Public School Achievement and Racial Integration After One Year*, Center for Civic Innovation: Manhattan Institute 10 (Jan 2006), online at http://www.manhattan-institute.org/html/ewp_10.htm (visited Oct

disparities have ignited calls for more intense federal civil rights oversight of state and local education policies.²¹ In debates about public school closures, for example, proponents of traditional public schools frequently blame parental choice policies (especially charter schools) for necessitating public school closures in minority neighborhoods and demand that parental choice be constrained in order to preserve neighborhood public schools.²²

The Civil Rights Act may come to play a central role in mediating disputes about the shifting urban educational landscape, since opponents currently are seeking to use both Title VI and the Americans with Disabilities Act to prevent school closures and reverse the policies that are driving them. This Article focuses exclusively on the Title VI claims, specifically on the claims that school closures violate Title VI regulations that prohibit the recipients of federal funds from enacting policies that have disproportionate *effects* on minorities.

Although the Supreme Court has held that Title VI of the Civil Rights Act, a federal funding statute, only prohibits

18, 2014).

²¹ These arguments surface outside the school closure context as well. For example, in addition to the school-closure-related civil rights complaints flagged above, the UCLA Civil Rights Project published an influential report in 2010 arguing that racial isolation was more prevalent in charter schools than in traditional public schools. The report called for more-intensive data collection on the demographics of charter school students as well as the development and enforcement of Title VI civil rights standards that combine school choice and integration goals in the charter school sector. See Erica Frankenberg, Genevieve Siegel-Hawley, and Jia Wang, *Choice without Equity: Charter School Segregation and the Need for Civil Rights Standards* *82–83, The Civil Rights Project (UCLA Grad School of Education & Information Studies Jan 2010), online at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenber-choices-without-equity-2010.pdf> (visited Oct 18, 2014). More recently, the Justice Department filed a petition asking a federal court to enjoin the state of Louisiana from issuing any vouchers without judicial approval to students who reside in districts remaining under federal desegregation decrees. See Danielle Dreilinger, *U.S. government sues to block vouchers in some Louisiana school systems*, The Times-Picayune (Aug 24, 2013), online at http://www.nola.com/education/index.ssf/2013/08/us_government_files_to_block_s.html (visited Oct 18, 2014); Editorial Board, *Justice Department bids to trap poor, black children in ineffective schools*, (Wash Post Sept 9, 2013), online at http://www.washingtonpost.com/opinions/the-justice-department-bids-to-trap-poor-black-children-in-ineffective-schools/2013/09/01/2173e5a6-0f77-11e3-85b6-d27422650fd5_story.html (visited Oct 18, 2014).

²² Rebecca Klein, *Chicago Requests More Charter Schools After Massive Wave of Public School Closings*, Huffington Post (Aug 15, 2013), online at http://www.huffingtonpost.com/2013/08/15/chicago-charter-schools_n_3757911.html (visited Oct 18, 2014).

intentional discrimination,²³ various agencies have adopted regulations implementing Title VI that extend to disparate impact claims.²⁴ These regulations have the effect of prohibiting policies with disparate racial effects if “equally effective” alternatives are available to policymakers.²⁵ Without question, both private litigants and federal civil rights officials should vigilantly pursue claims that state or local education policies are racially motivated. Such claims, which have surfaced in debates about public school closures, are serious and sobering.²⁶

However, Title VI’s disparate impact regulations should not be used as a means of curbing parental choice in order to protect traditional public schools from competition. The investigation and pursuit of disparate-impact claims against parental choice policies would not only entail confronting highly contested empirical claims about racial demographics and student performance, but also would require courts to resolve deeply disputed questions about how the public education funds should be allocated. Title VI litigation would also involve second-guessing the decisions of parents—who are not bound by Title VI at all—about what learning environments are best for their children. Given the uncertainty surrounding education policies’ effects, federal intervention to curb parental choice also unnecessarily disrupts state and local experimentation in the critical context of education reform.

This Article focuses on the *community* consequences of parental choice policies and public school closures, rather than their *educational* consequences.²⁷ The Article avoids rehashing

²³ See *Alexander v Sandoval*, 532 US 275, 281 (2001) (“Title VI itself directly reaches only instances of intentional discrimination.”).

²⁴ See *id.* at 282 (“[W]e must assume . . . that regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.”).

²⁵ See notes 103–104 and text accompanying notes.

²⁶ See, for example, *Smith v Henderson*, 944 F Supp 2d 89, 99–103 (DDC 2013) (considering and rejecting the claim that the reorganization of the District of Columbia Public Schools was discriminatory); *Spurlock v Fox*, 716 F3d 383, 394–402 (6th Cir 2013) (considering a similar claim for Nashville, Tennessee).

²⁷ These consequences are conceptually distinct, since school closures might (at least in some circumstances) help students but harm urban neighborhoods, or *vice versa*. Evidence of the academic effects of school closures is sparse. A recent study of two hundred Michigan school closures found little evidence that school closures result in persistent harm to academic achievement of displaced students and that displacing students to higher-achieving schools can result in achievement gains for the displaced students but modest negative spillovers in the receiving schools. See Quentin Brummet,

familiar, even if unresolved, debates about the consequences of school choice policies on students. Instead, to illustrate the complexity surrounding the consequences of parental choice policies, the Article explores a claim that takes center stage in debates about public school closures, but which has captured little attention in the academic literature to date: the claim that public school closures harm urban neighborhoods. As Diane Ravitch has argued, “Communities of color have been unjustly targeted for school closings. These closings . . . shatter and destabilize communities.”²⁸

The precise “communitarian” objection to public school closures is somewhat of a moving target, since school “closures” frequently do not result in empty school buildings. As discussed below, when a traditional public school “closes,” it often reopens as a different *kind* of school—usually a charter school, or, in some cases, multiple smaller specialized schools co-located in a

The Effects of School Closings on Student Achievement *1 (Institute of Education Sciences Sept 23, 2012), online at http://econ.msu.edu/seminars/docs/SC_Draft9232012.pdf (visited Oct 18, 2014). Other studies have found that achievement in schools slated for closure declines in their final months of operation, but the overall long-term academic effects are neutral. See Marisa de la Torre and Julia Gwynne, *When Schools Close: Effects on Displaced Students in Chicago Public Schools* *1–3 (Consortium on Chicago School Research at U Chi Urban Educ Inst October 2009) (summarizing findings of study of school closures in Chicago from 2001–2006 and finding little effect on overall academic performance); John Engberg, et al, *Closing Schools in a Shrinking District: Does Student Performance Depend on Which Schools are Closed?* *5 (Society for Research on Educational Effectiveness 2011), online at <https://www.sree.org/conferences/2011/program/downloads/abstracts/34.pdf> (visited Oct 18, 2014) (finding that the adverse transitional effects in schools slated for closure were offset by relocation to schools with stronger academic performance and rebutting the suggestion that closures have negative academic consequences in receiving schools). There is voluminous literature on the efficacy of interventions designed to improve the performance of struggling urban schools, including school restructurings, restarts, and charter-school conversions. I leave this literature to the side here.

²⁸ Alliance for Quality Education, *NYC Parents & Students Join National “Journey for Justice,” U.S. Office of Civil Rights to Investigate Mayor’s School Closings Policy* (Jan 29, 2013), online at <http://www.aqeny.org/2013/01/release-3> (visited Oct 18, 2014) (quoting Ravitch). See also Dave Stieber, *The “Justification” for Closing Schools in Chicago*, Huffington Post (Dec 5, 2012), online at http://www.huffingtonpost.com/dave-stieber/chicago-school-closings_b_2233440.html (visited Oct 18, 2014) (“The research shows that when a school is closed it further destabilizes a community.”); Kathy Matheson, *Philadelphia Schools Enveloped in Anger, Frustration Amid Austere Budget*, Huffington Post (June 12, 2012), online at http://www.huffingtonpost.com/2012/06/12/anger-frustration-envelop_n_1590410.html (visited Oct 18, 2014) (“Students and community members fear school closures will destroy neighborhoods and create blight.”); United States Department of Education, *United States Department of Education Community Hearing* 66 (Jan 29, 2013) (on file with author) (“*Journey for Justice Transcript*”) (“If you close a school, you kill a community.”).

building that formerly housed only one school.²⁹ Throughout this paper, I refer to all these phenomena as “school closures” since opponents’ rhetoric makes clear that they object to more than empty schools. At the heart of the communitarian objection to school closures is dismay at the diminished role that traditional, geographically assigned public schools are coming to play in urban education, and vehement opposition to the policies that are fueling that trend, including parental choice. This objection to this shift in the urban educational landscape can be distilled to the following: Closing traditional public schools harms urban neighborhoods, even when closed schools are replaced with schools-of-choice.³⁰

The communitarian consequences of these shifts in the urban educational landscape deserve more academic attention than they have received because any realistic assessment suggests both that the parental choice footprint is expanding rapidly and that school closures will continue, perhaps increasingly in the coming years. Many of these school buildings will come to be occupied (by design or default) by new schools with different institutional forms. As a result, schools other than traditional public schools will fill the educational and communitarian gaps created by the closure of traditional public schools, and the claim that traditional public schools are critical community institutions feature prominently in debates about public school closures. Through the Title VI complaint process, these policy claims are assuming civil-rights dimensions as well.

The Article proceeds as follows. Part I dissects the complex causes of public school closures, including their connection to school choice policies. Part II turns to the anatomy of a Title VI disparate impact claim in the school-closure context, using this as a case study to illustrate the cost-benefit-analysis aspect of disparate impact claims. Part III turns to claims that school closures harm urban communities by depriving them of

²⁹ See notes 63–72 and text accompanying notes. The “small school” phenomenon was fueled by both education theory and a massive influx of funding from the Gates Foundation, which has since abandoned its efforts to promote small schools. See also *Bill Gates’ latest mission: fixing America’s schools*, Bloomberg Businessweek (Jul 17, 2010), online at http://www.nbcnews.com/id/38282806/ns/business-bloomberg_businessweek/#.UTH4waJ318E (visited Oct 18, 2014).

³⁰ See John Tierney, *The Coming Revolution in Public Education: Why the current wave of reforms, with its heavy emphasis on standardized tests, may actually be harming students*, The Atlantic (Apr 25, 2013), online at <http://www.theatlantic.com/national/archive/2013/04/the-coming-revolution-in-public-education/275163> (visited Oct 18, 2014).

neighborhood public schools, which are important community institutions. Part IV makes the case that Title VI's disparate-impact litigation should not be used to secure a retrenchment in parental choice. While there is little question that school closures are far from costless,³¹ federal judges are poorly suited to weigh the contested costs and benefits of different education-delivery mechanisms—for either students or urban communities. While claims about the centrality of neighborhood public schools for urban communities have strong intuitive appeal, the communitarian consequences of school closures likely depend on context-specific dynamics. These dynamics include the possibility that closed public schools may be replaced by new schools that will be *more successful* than their predecessors, both as educational institutions and as community institutions.

I. THE COMPLEXITIES OF PUBLIC SCHOOL CLOSURES

An understanding of the causes and consequences of public school closures, which are both complex and interrelated, is a necessary prerequisite for evaluating the claim that “school closures harm urban neighborhoods.” This Section tackles both, first exploring the various reasons for the current closure trends and then examining the practical consequences of school closures.

A. Why Are Public Schools Closing?

Multiple related factors, both legal and demographic, contribute to current school-closure trends. These include declining enrollment—due to both the shifting demographics and the rise of parental choice—academic underperformance, the conversion of public schools to charter schools, and the fiscal pressures facing local governments (including urban districts).

³¹ For example, children and families who are attached to their schools are saddened when they close, and their subsequent reassignment disrupts their lives and learning—concerns that take center stage in lawsuits alleging that recent school closures unduly disrupt the learning environments of children with special needs. See *Henderson*, 944 F Supp 2d at 105 (rejecting an ADA claim against school closures in Washington, D.C.); Complaint, *Mandi Swan v Board of Education of the City of Chicago*, Case No 1:13-cv-03623 Doc #1 (ND Ill filed May 15, 2013).

1. Declining enrollments.

Many public schools are closing because they are operating far below enrollment capacity. The Chicago Public Schools, for example, claims that 330 of its 681 school buildings are under-enrolled, and over 140 are more than half empty.³² The district has space for 511,000 students, but only 403,000 are enrolled.³³ In Philadelphia, more than a quarter of the district's 195,000 seats are empty.³⁴ And, since the demographic shifts in cities are not evenly distributed across neighborhoods, many districts face the dual problems of under-enrollment in some schools and over-enrollment in others.³⁵

³² See Lauren Fitzpatrick, Rosalind Rossi, and Art Golab, *CPS: West, South sides saw biggest drops in number of school-age kids*, Chicago Sun-Times (Jan 6, 2013), online at <http://www.suntimes.com/16804641-418/cps-west-south-sides-saw-biggest-drops-in-school-age-kids.html> (visited Oct 18, 2014).

³³ See Noreen S. Ahmed-Ullah and John Chase, *Anxiety Grows as CPS Releases Preliminary School Closing List*, Chicago Tribune (Feb 14, 2013); *Facing Massive Deficits, Chicago to Consider Closing 129 Schools*, CBS Chicago (Feb 13, 2013), online at <http://chicago.cbslocal.com/2013/02/13/facing-massive-deficit-chicago-to-consider-closing-129-schools> (visited Oct 18, 2014). See also Jennifer Smith Richards, *Ax may fall on Columbus high schools: A few are less than 60% full as district looks to shut buildings*, Columbus Dispatch (Oct 17, 2011), online at <http://www.dispatch.com/content/stories/local/2011/10/17/ax-may-fall-on-high-schools.html> (visited Oct 18, 2014).

³⁴ See Hurdle, *Philadelphia Officials Vote to Close 23 Schools*, NY Times (cited in note 7).

³⁵ Chicago, for example, lost about 181,000 African-American residents and gained 25,000 Latino residents between 2000 and 2010, leaving public schools on the city's West and South sides half-empty and schools in predominantly Latino neighborhoods overcrowded. See *Which Chicago Schools will Close?*, Chicago Tribune (Mar 8, 2013), online at http://articles.chicagotribune.com/2013-03-08/opinion/ct-edit-schools-20130308_1_school-closings-public-schools-new-schools (visited Oct 18, 2014); Antonio Olivo, *Crowded Chicago school faces a year of frustration: Elbow room in short supply for Reinberg Elementary School's 1,400 students*, The Chicago Tribune (Sept 11, 2009), online at http://articles.chicagotribune.com/2009-09-11/news/0909100786_1_new-school-classroom-capacity-overcrowded (visited Oct 18, 2014) ("Built for 850 students but bursting with nearly twice that amount, Reinberg is among 64 overcrowded elementary schools in Chicago. Most of them are concentrated in [Latino] neighborhoods on the Northwest and Southwest Sides."); *Campaign To End Overcrowding*, United Neighborhood Organization, online at http://www.uno-online.org/campaign_to_end_overcrowding (visited Oct 18, 2014) ("The Chicago Public Schools (CPS) has historically faced severe academic overcrowding in neighborhoods with a growing Hispanic population. A 2009 UNO study revealed a need for 16,552 new elementary school seats, equivalent to 28 new elementary schools in Chicago to ease overcrowding, much of which is in Hispanic neighborhoods."). Similarly, in Philadelphia, where the district counts 70,000 empty seats, schools on the northeast side of the city, with burgeoning African-American and Latino populations, are bursting at the seams. See *Closing Public Schools in Philadelphia: Lessons from Six Urban Districts* *3 (The Pew Charitable Trusts Oct 19, 2011), online at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Philadelphia_Research_Initiative/Closing-Public-Schools-Philadelphia.pdf (visited Oct 18, 2014).

Declining urban public school enrollments are fueled in part by urban demographics. Although population declines in many urban centers have slowed or even reversed in recent decades, many cities continue to lose families with young children. From 2000 to 2010, the number of school-aged children fell in many cities, including some with stable or growing overall populations. The school-aged population dropped 4 percent in Kansas City, 6 percent in Milwaukee, 11 percent in Philadelphia, 12 percent in Washington, D.C., 18 percent in Chicago, 21 percent in Pittsburgh, and 30 percent in Detroit.³⁶ During this same time period, enrollment in many school districts declined even more sharply than the population of school-aged children. For example, Detroit's public school enrollment declined by 54 percent, Kansas City's by 42 percent, Washington, D.C.'s by 30 percent, Philadelphia's by 23 percent, and Milwaukee's by 17 percent.³⁷

The shifting educational preferences of parents and the rise of parental choice policies (especially charter schools) also contribute to declining enrollment. Not only do the ongoing academic struggles of urban public schools drive many families to suburban locales with strong public school systems, but those that remain in cities also increasingly seek alternatives to traditional urban public schools for their children.³⁸ Many of these families are now choosing charter schools. Since Minnesota enacted the nation's first charter school law in 1991, the number of students enrolled in charter schools nationwide has grown exponentially, increasing to nearly two million students in 5,700 schools in 2011.³⁹ All told, twenty districts—almost all of them urban—reported charter school enrollments

³⁶ See *Closing Public Schools in Philadelphia* at 3 (cited in note 35).

³⁷ See *id.* at 4.

³⁸ See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U Chi L Rev 201, 212 (2010). In 2004, almost one quarter of parents reported having moved to their current neighborhood to enable their children to attend the local public school, and this residential sorting increases with parental income. See Jack Buckley and Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence from Washington, D.C.*, in William A. Fischel, ed., *The Tiebout Model at Fifty: Essays in Public Economics in Honor of Wallace Oats* 104 (Lincoln Inst of Land Pol 2006).

³⁹ See *2011–12 National Charter School & Enrollment Statistics* (The Center for Education Reform Dec 2011), online at <http://www.edreform.com/wp-content/uploads/2012/03/National-Charter-School-Enrollment-Statistics-2011-12.pdf> (visited Oct 18, 2014).

in excess of 20 percent.⁴⁰ While New Orleans remains the only city with a majority of students enrolled in charter schools, charter-school enrollment in 2011 exceeded 40 percent in two urban districts (Washington, D.C. and Detroit), and 30 percent in five more (Kansas City, and St. Louis, Missouri; Flint, Michigan; and Gary, Indiana).⁴¹ The trend lines, moreover, clearly favor increasing charter enrollment.⁴² In a handful of cities, competition from private schools participating in parental choice programs also fuels declining public school enrollment, although outside of Milwaukee (where more than twenty thousand children participate in a voucher program), the effect remains modest.⁴³

2. Academic performance.

In some cases, the academic performance issues that are indirectly fueling enrollment declines also directly trigger closures. In recent years, federal and state education laws have come to encourage, and in some cases require, the closure of persistently failing schools. Importantly, funding provisions of the controversial No Child Left Behind Act (NCLB) require districts to divide their schools into four academic “tiers” and condition federal funding on the implementation of one of four intervention methods in the lowest performing schools, three of which might arguably be categorized as “closing” the school.⁴⁴

⁴⁰ See *id.*

⁴¹ See *A Growing Movement: America's Largest Charter School Communities* *3 (National Alliance for Public Charter School Dec 2012), online at http://www.publiccharters.org/wp-content/uploads/2014/01/2013-Market-Share-Report-Report_20131210T133315.pdf (visited Oct 18, 2014).

⁴² See, for example, Emma Brown, *D.C. charter school enrollment outpaces that of DCPS*, (Wash Post Feb 6, 2013), online at http://articles.washingtonpost.com/2013-02-06/local/36942662_1_charter-school-enrollment-enrollment-figures-school-closures (visited Oct 18, 2014) (noting that enrollment in Washington, D.C. charter schools increased by 10 percent—to 43 percent—between 2011 and 2012); Boston Consulting Group, *Transforming Public Schools* at 6 (cited in note 7) (predicting that 40 percent of Philadelphia public school students will attend charter schools within next five years).

⁴³ Nationwide, approximately 250,000 children enrolled in private schools with a publicly funded voucher or tax credit in 2012. See Malcom Glenn and Randan Swindler, *School Choice Now: The Power of Educational Choice: School Choice Yearbook 2012–13* *6 (Alliance for School Choice 2013). Overall, private school enrollments are declining nationwide, although they remain substantial in large urban communities. Gerald E. Frug and David J. Barron, *City Bound: How States Stifle Urban Innovation* 128–29 (Cornell 2008) (providing statistics of private school enrollment in several major cities).

⁴⁴ These interventions include: *turnaround* (all teachers and the principal are fired and a new staff hired, although the new principal can rehire up to 50 percent of the

However, the law also allows districts to take “[a]ny other major restructuring that makes fundamental reforms.”⁴⁵ NCLB also requires school districts to allow students to transfer from persistently failing schools to higher-performing ones.⁴⁶ In theory, this school choice mandate ought to suppress enrollment in low-performing schools, thereby increasing the probability that they will be closed.⁴⁷

Separate from NCLB, Congress appropriated money for education as a part of the federal stimulus bill (the American Recovery and Reinvestment Act),⁴⁸ which also required states to restructure “struggling schools.”⁴⁹ Stimulus funds were distributed to states through a competitive program known as “Race to the Top” (RTT), which required states to guarantee that

original teachers); *transformation* (the school principal is fired and the new principal required to implement various accountability and professional development strategies); *restart* (the school is closed and reopened as a charter school or privately managed public school); and *closure* (the school is closed and its students transferred to higher-achieving schools in the district). No Child Left Behind Act of 2001 §§ 1003, 1116, Pub L No 107-110, 115 Stat 1425 (2002), codified at 20 USC § 6301. See also US Department of Education, *Guidance on Fiscal Year 2010 School Improvement Grants: Under Section 1003(g) of the Elementary and Secondary Education Act of 1965* xvii (Feb 23, 2011), online at <http://www2.ed.gov/programs/sif/sigguidance02232011.pdf> (visited Oct 18, 2014); Tina Trujillo and Michelle Renée, *Democratic School Turnarounds: Pursuing Equity and Learning from Evidence* *3 (National Education Policy Center Oct 2012), online at http://greatlakescenter.org/docs/Policy_Briefs/Research-Based-Options/02-Trujillo_Turnarounds-PB.pdf (visited Oct 18, 2014) (summarizing NCLB penalties).

⁴⁵ No Child Left Behind Act of 2001 § 1116(b)(8)(B)(v), 115 Stat at 1478. Although accurate data is difficult to obtain, these legal requirements apparently have not directly triggered many school closures. In 2007–2008, the Center on Education Policy found that 3,500 schools were “in” or “planning” “restructuring” as a result of NCLB. Unfortunately, a high percentage of districts opting to employ “other” restructuring options, rather than the four set forth in the NCLB, make it difficult to determine what, exactly, “restructuring” meant in any given context. See *A Call to Restructure Restructuring: Lessons from the No Child Left Behind Act in Five States* *1 (Center on Educ Pol Sept 2008), online at <http://www.cep-dc.org/displayDocument.cfm?DocumentID=175> (visited Oct 18, 2014). A more recent report found that only fourteen states reported using the “closure” model and twelve reported using the “restart” model (usually the conversion to a charter school) to address failing schools. See Sarah Yatsko, et al, *Tinkering Toward Transformation: A Look at Federal School Improvement Grant Implementation* *3 (Center on Reinventing Public Education Mar 2012), online at <http://crpe.org/publications/tinkering-toward-transformation-look-federal-school-improvement-grant-implementation> (visited Oct 18, 2014).

⁴⁶ See No Child Left Behind Act of 2001 § 1116(b)(5), 115 Stat at 1482–83.

⁴⁷ In practice, however, the NCLB’s school choice mandate has prompted few transfers because higher-performing schools often do not have empty seats to fill with transfer students. See Joseph P. Viteritti, *The Federal Role in School Reform: Obama’s Race to the Top*, 87 Notre Dame L Rev 2087, 2113 (2012).

⁴⁸ American Recovery and Reinvestment Act of 2009, Pub L No 111-5, 123 Stat 115 (2009), codified at 42 USC § 17930.

⁴⁹ See 42 USC § 14005(d)(5).

persistently failing schools would be targeted for the intervention set forth in NCLB.⁵⁰ Most recently, the Obama administration has begun to waive the provisions of NCLB in states that agree to implement a different set of accountability measures for public schools.⁵¹ Forty-five states have requested waivers, and forty-three waivers have been granted.⁵² The guidance provided for states seeking a waiver mandates that states must “provide for systemic, context-specific interventions that focus on the lowest-performing schools and schools with the largest achievement gaps.”⁵³ Many of the successful waiver applications included the closure of the lowest performing schools and their conversion to charter schools among the range of available accountability devices addressing underperformance.⁵⁴

Additionally, a number of states and school districts independently have adopted accountability measures that include the closure of persistently failing schools and/or their

⁵⁰ On Race to the Top, see US Department of Education, *Race to the Top Fund*, 74 Fed Reg 59688, 59764–65 (2009); US Department of Education, *School Improvement Grants; American Recovery and Reinvestment Act of 2009 (ARRA); Title I of the Elementary and Secondary Education Act of 1965, as Amended (ESEA)*, 74 Fed Reg 65618, 65619 (2009) (“We have fully aligned the school intervention models and related definitions across the Race to the Top, the State Fiscal Stabilization Fund Phase II, and the School Improvement Grants programs to make it easier for States to develop and implement consistent and coherent plans for turning around their persistently lowest-achieving schools.”). As is the case with NCLB, RTT does not appear to have directly triggered many school closures. A study of twelve states, which self-reported their Race to the Top intervention efforts, found that school closures were rarely used as an intervention. Of the 494 schools that states identified as the lowest achieving in 2011–2012, 350 were following the transformation model, 100 the turnaround model, 29 the restart model, and 11 the closure model, with an additional 3 schools closing despite initiating a different model. See US Department of Education, *Race to the Top State Progress*, online at <http://www.rtt-apr.us> (visited Oct 18, 2014) (providing each states’ list of low-achieving schools and the method of intervention; data tabulated manually from these lists). See also Jennifer McMurrer and Shelby McIntosh, *State Implementation and Perceptions of Title I School Improvement Grants under the Recovery Act: One Year Later* *2 (Center on Educ Pol Mar 2012), online at <http://www.cep-dc.org/displayDocument.cfm?DocumentID=398>; (visited on Oct 18, 2014) US Department of Education, *State and Local Implementation of the No Child Left Behind Act: Volume IX—Accountability Under NCLB; Final Report* (Jan 2010), online at <http://www2.ed.gov/rschstat/eval/disadv/nclb-accountability/nclb-accountability-final.pdf> (visited Oct 18, 2014).

⁵¹ See US Department of Education, *Elementary & Secondary Education: ESEA Flexibility* (Mar 7, 2014), online at <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (visited Oct 18, 2014).

⁵² See id.

⁵³ Id.

⁵⁴ See id.

conversion to charter schools.⁵⁵ Most state statutes essentially track the federal programmatic requirements, mandating interventions—especially school turnarounds—for persistently failing schools.⁵⁶ While school closures (and charter conversions) remain a last resort in most states, some districts do exercise these options when other methods of intervention fail.⁵⁷ A number of the largest and most troubled urban districts, including New York City, Chicago, Detroit, Washington, D.C., and Philadelphia, have employed school closures aggressively as a tool to address academic underperformance.⁵⁸ State (or mayoral) takeovers of public school districts appear to trigger more-aggressive use of school closures as a response to academic under-performance.⁵⁹ And, even when school officials choose not

⁵⁵ See Education Commission of the States, *From the ECS State Policy Database: Accountability—Sanctions/Interventions*, online at <http://www.ecs.org/ecs/ecscat.nsf/WebTopicView?OpenView&count=-1&RestrictToCategory=Accountability—Sanctions/Interventions> (visited Oct 18, 2014). See also 23 Ill Admin Code § 1.85(e)(1)–(4) (2012) (“Each school restructuring plan shall indicate that the district is undertaking one or more of the following actions in the affected school: 1) reopening the school as a public charter school . . .”).

⁵⁶ See, for example, Mich Comp Laws § 380.1280c(2) (“The redesign plan shall require implementation of 1 of the 4 school intervention models that are provided for the lowest achieving schools under the federal incentive grant program . . . known as the ‘race to the top’ grant program.”); NC Gen Stat § 115C-105.37B(a) (stating that “the State Board of Education is authorized to approve a local board of education’s request to reform any school” via the transformation, restart, turnaround, or closure model); Fla Stat § 1008.33(4)(b)(1)–(5) (allowing a school district to either take over the school, reassign students to another school, close and reopen the school as a charter school, contract with a private management company, or any other model “that [has] a demonstrated record of effectiveness”); Mass Gen Laws ch 69, § 1J(o) (listing sixteen possible actions that a superintendent may take with respect to a persistently low performing school).

⁵⁷ For example, one study of one hundred school closures in Denver, Chicago, Hartford, and Pittsburgh between 2001 and 2007 found that academic performance generally was one of several factors influencing the districts’ decisions to close schools (along with budgetary and enrollment considerations) and that district officials universally reported turning to closure as a “last resort” after other efforts to improve performance failed. See Lucy Steiner, *Tough Decisions: Closing Persistently Low-Performing Schools* *4 (Center on Innovation & Improvement 2009), online at http://www.centerii.org/survey/downloads/Tough_Decisions.pdf (visited Oct 18, 2014).

⁵⁸ See Andy Smarick, *The Turnaround Fallacy: Stop trying to fix failing schools. Close them and start fresh*, 10 *EducationNext* 21 (Winter 2010), online at <http://educationnext.org/the-turnaround-fallacy/> (visited Oct 18, 2014). See also de la Torre and Gwynne, *When Schools Close* at 1 (cited in note 27) (noting that between 2001 and 2009, Chicago had closed forty-four schools because of either “poor academic performance or underutilization”).

⁵⁹ See, for example, Kenneth K. Wong, et al, *The Education Mayor: Improving America’s Schools* 8 (Georgetown 2007). For a description of the turmoil accompanying Michelle Rhee’s decision to close schools for academic underperformance after a mayoral takeover of the Washington, D.C. public schools, see Richard Whitmire, *The Bee Eater*:

to close schools *because* of underperformance, academic performance is almost always a factor influencing decisions about which schools to close when enrollment or financial considerations necessitate closures. For example, in November 2012, the Chicago Public Schools announced that school closure decisions would henceforth be based upon enrollment, not academic performance.⁶⁰ A few months later, the Chicago Commission on School Utilization issued final recommendations about which under-enrolled schools the struggling district should close.⁶¹ One of two criteria driving the recommendations was a guarantee that displaced students could be transferred to a *higher-performing* school.⁶²

3. Conversion to charter schools.

Although many public school officials view charter schools as unwanted competitors, some state and local officials have come to see the conversion of struggling public schools to charter schools as an answer to chronic academic underperformance. This phenomenon has manifested itself most dramatically in New Orleans, where—following Hurricane Katrina—public school authorities announced plans to convert the city’s schools into an “all-charter district.”⁶³ In Detroit, Robert Bobb, the former state receiver operating the troubled public school

Michelle Rhee Takes on the Nation’s Worst School District 93–105 (Jossey-Bass 2011).

⁶⁰ See Becky Vevea, *Public school closures to be based on enrollment, not performance: District leaders could still use performance to pick schools for turnaround*, WBEZ 91.5 (Nov 1, 2012), online at <http://www.wbez.org/news/public-school-closures-based-enrollment-not-performance-103583> (visited Oct 18, 2014).

⁶¹ See Commission on School Utilization, *Final Report* at 1 (cited in note 13).

⁶² See *id.* at 6 (discussing preliminary recommendations, including “don’t close any high performing schools”).

⁶³ See Danielle Dreilinger, *Recovery School District will be country’s first all-charter district in September 2014*, *The Times-Picayune* (Dec 19, 2013), online at http://www.nola.com/education/index.ssf/2013/12/recovery_school_district_will_3.html (visited Oct 18, 2014). During the 2011–2012 school year, there were eighty-eight public schools open in New Orleans, including twenty-two traditional public schools and sixty-six charter schools. Seventy-eight percent of the district’s students were enrolled in charter schools. See *The State of Public Education in New Orleans: 2012 Report *2* (Scott S Cowen Inst for Public Educ Initiatives 2012), online at <http://www.coweninstitute.com/wp-content/uploads/2012/07/SPENO-20121.pdf> (visited Oct 18, 2014). New Orleans closed its last traditional public school last spring. See Lyndsey Layton, *In New Orleans, major school district closes traditional public schools for good* (Wash Post May 28, 2014), online at http://www.washingtonpost.com/local/education/in-new-orleans-traditional-public-schools-close-for-good/2014/05/28/ae4f5724-e5de-11e3-8f90-73e071f3d637_story.html (visited Oct 18, 2014).

system, announced plans in 2011 to convert 41 of the district's 142 public schools into charter schools, although he subsequently scaled back his ambitions.⁶⁴ In New York City, Mayor Bloomberg opened 656 new schools during his tenure, many replacing larger, low-performing public schools. There are now 180 charter schools in the city, many of which are small schools "co-located" in buildings that once housed now-defunct traditional public schools.⁶⁵ Bloomberg had promised to convert large traditional public schools into at least one hundred new small schools, including charter schools, in the next five years.⁶⁶ In the fall of 2013 alone, New York City opened seventy-eight new schools, including twenty-six new charter schools.⁶⁷ And, the former Washington, D.C. school superintendent, Michelle Rhee, sparked a maelstrom of controversy when she engaged charter operators to run several of her district's most-troubled schools.⁶⁸

⁶⁴ See Steven Wasko and Jennifer Mrozowski, *DPS presents Renaissance Plan 2012 to radically restructure academically-failing schools, significantly reduce operating costs under model to seek charter proposals for 41 schools* (Detroit Public Schools Mar 12, 2011), online at <http://detroitk12.org/content/2011/03/12/dps-presents-renaissance-plan-2012-to-radically-restructure-academically-failing-schools-significantly-reduce-operating-costs-under-model-to-seek-charter-proposals-for-41-schools/> (visited Oct 18, 2014).

⁶⁵ See Carl Campanile and Beth DeFalco, *Charter schools get green light – for now*, NY Post (Oct 14, 2013), online at <http://nypost.com/2013/10/14/charter-schools-get-green-light-for-now/> (visited Oct 18, 2014); Mary Frost, *Bloomberg Promises More Charter Schools, Pushes Teacher Evaluation Plan*, Brooklyn Daily Eagle (Jan 18, 2012), online at <http://www.brooklyneagle.com/articles/bloomberg-promises-more-charter-schools-pushes-teacher-evaluation-plan> (visited Oct 18, 2014).

⁶⁶ See Campanile and DeFalco, *Charter Schools*, NY Post (cited in note 65). See also Marc La Vorgna, *Mayor Bloomberg Delivers 2013 State of the City Address*, (NYC.gov Feb 14, 2013), online at <http://www1.nyc.gov/office-of-the-mayor/news/063-13/mayor-bloomberg-delivers-2013-state-the-city-address> (visited Oct 18, 2014):

We've opened 576 new schools over the past 11 years, and we're on track to have added 100,000 new classroom seats by the end of this year. 149 of those new schools have been charters and yet there are still more than 50,000 children who are still on charter school waiting lists. Those children and their parents have waited long enough. This September, we'll open 26 new charters and we'll work to approve many more for 2014. Some of them will be located within existing public school buildings even though there are special interests who want to prohibit that from happening.

Id.

⁶⁷ See Al Baker, *With Legacy on His Mind, Mayor Adds More Schools*, NY Times (Apr 2, 2013), online at http://www.nytimes.com/2013/04/03/nyregion/with-legacy-on-his-mind-bloomberg-says-he-will-add-78-new-schools.html?_r=1& (visited Oct 18, 2014); Durkin and Chapman, *City to open 78 new schools in September*, NY Daily News (cited in note 10).

⁶⁸ See generally Whitmire, *The Bee Eater* (cited in note 59). See also Illinois

There are reasons to believe this charter “conversion” trend may accelerate in the next few years. To begin, both President Obama and Secretary of Education Arne Duncan support charter conversions, and they have pledged to fund them.⁶⁹ Moreover, controversial proposals for “parent-trigger” laws, which give parents the option of intervening in the management of their children’s public schools (including demanding their conversion to charter schools), are gaining momentum. As of 2012, seven states had passed a “parent trigger” law, six of which give parents the option of converting their children’s schools to a charter school.⁷⁰ The provisions received the unanimous endorsement of the bipartisan U.S. Conference of Mayors in June 2012.⁷¹ Former Los Angeles Mayor (and Conference of Mayors Chairman) Antonio Villaraigosa said of the decision, “Parent Trigger empowers parents to turn failing schools into high-achieving schools.”⁷²

Facilities Fund, *Quality Schools: Every Child, Every School, Every Neighborhood: An analysis of school location and performance in Washington, D.C.*, 6 (Wash Post Jan 2012), online at http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2012/01/26/Education/Graphics/IFF_Final_Report.pdf (visited Oct 18, 2014) (recommending further conversions of failing public schools to charter schools, especially in D.C.’s poorer neighborhoods, where quality schools are in short supply). Less dramatically, in Chicago, Mayor Rahm Emanuel has asked charter operators to consider engaging school turnarounds, rather than opening new schools. See Vevea, *Public school closures to be based on enrollment, not performance*, WBEZ 91.5 (cited in note 60). According to the California Charter School Association, there were 140 conversion charter schools in California as of 2011. See *Charter FAQ*, online at <http://engagepl.com/charterfaq/> (visited Oct 18, 2014).

⁶⁹ See Melissa Lazarin, *Charting New Territory: Tapping Charter Schools to Turn Around the Nation’s Dropout Factories* *1 (Center for American Progress and The Broad Foundation Jun 2011), online at http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/charter_schools.pdf (visited Oct 18, 2014) (“The president and U.S. Secretary of Education Arne Duncan have set their sights on turning around the nation’s 5,000 lowest-performing schools, and they are hoping charter school operators will help shoulder part of the effort.”). See also James Cersonsky, *A Lesson for Arne Duncan*, *The Nation* (Sept 26, 2012), online at <http://www.thenation.com/blog/170194/lesson-arne-duncan#> (visited Oct 18, 2014).

⁷⁰ See *Parent Trigger Laws in the States*, National Conference of State Legislature, online at <http://www.ncsl.org/issues-research/educ/state-parent-trigger-laws.aspx> (visited Oct 18, 2014).

⁷¹ See Josh Eidelson, “Parent trigger”: *The latest tactic for fighting teachers’ unions*, *Salon* (Jun 30, 2012), online at http://www.salon.com/2012/06/30/parent_trigger_the_latest_tactic_for_fighting_teachers_unions/ (visited Oct 18, 2014). See also The United States Conference of Mayors, *Memorandum from Tom Cochran to Member Mayors, Resolutions for the 80th Annual Conference of Mayors* (May 29, 2012), online at <http://www.usmayors.org/80thAnnualMeeting/media/proposedresolutions2012.pdf> (visited Oct 18, 2014).

⁷² Eidelson, “Parent trigger”: *The latest tactic for fighting teachers’ unions*, *Salon* (cited in note 71).

4. The local government fiscal crisis.

Current public school-closure trends are also a result of a local government fiscal crisis that extends beyond school districts. It is no secret that many state and local governments, including many school districts, are in a state of financial crisis. Many urban school districts face huge operating budget deficits. For example, the Chicago Public Schools currently has a \$1 billion annual operating deficit,⁷³ Los Angeles Unified School District's operating deficit exceeds \$550 million,⁷⁴ Detroit's \$326 million deficit exceeds 30 percent of the district's total budget,⁷⁵ and Philadelphia's budget shortfall is projected to be \$1.35 billion over the next five years.⁷⁶ Under these circumstances, districts simply cannot afford to continue operating all their existing public schools, especially the under-enrolled ones.⁷⁷ When Philadelphia announced final school-closure plans in March 2013, for example, district officials cited the need to address the expanding deficit.⁷⁸ Many urban school districts' financial situation is so dire that they face the threat of state takeovers,⁷⁹ which are legally authorized in thirty-one states.⁸⁰

⁷³ See Chicago Public Schools, *Despite \$1 Billion Deficit and Lack of Pension Reform, Proposed FY14 Operating Budget Protects Investments in Student Learning* (July 24, 2013), online at http://www.cps.edu/News/Press_releases/Pages/PR1_07_24_2013.aspx (visited Oct 18, 2014).

⁷⁴ See *LAUSD's Annual Defecits*, Los Angeles Unified School District, online at <http://achieve.lausd.net/Page/1341> (visited Oct 18, 2014).

⁷⁵ See *Closing Public Schools in Philadelphia* at 5 (cited in note 35).

⁷⁶ See *Revised closings plan comes at a cost to district*, The Philadelphia Public School Notebook (Feb 19, 2013), online at <http://thenotebook.org/blog/135658/revised-closings-plan-comes-cost-district> (visited Oct 18, 2014).

⁷⁷ In February 2011, for example, the state of Michigan charged state-appointed emergency financial manager of the Detroit Public Schools, Robert Bobb, with the task of closing 50 percent of the district's schools to help cut the district's deficit. See *41 Detroit Public Schools to Become Charter Schools*, Huffington Post (Mar 14, 2011), online at http://www.huffingtonpost.com/2011/03/14/detroit-charter-schools_n_835719.html (visited Oct 18, 2014).

⁷⁸ See Hurdle, *Philadelphia Officials Vote to Close 23 Schools*, NY Times (cited in note 7).

⁷⁹ See Winnie Hu, *State Takeovers of Other Districts Have Had Mixed Results*, NY Times (Dec 11, 2011), online at http://www.nytimes.com/2011/12/12/education/state-takeovers-of-school-districts-have-had-mixed-results.html?_r=0 (visited Oct 18, 2014).

⁸⁰ See *Accountability-Sanctions: Takeovers*, Education Commission of the States, online at <http://www.ecs.org/ecs/ecscat.nsf/WebTopicP12?OpenView&count=-1&RestrictToCategory=Accountability--Sanctions/Interventions--Takeovers> (visited Oct 18, 2014) (noting that thirty-one states have laws that allow state-takeovers of school districts for a variety of reasons, including fiscal mismanagement and low academic performance).

Takeovers prompted in part by budgetary concerns already have occurred in Detroit, Newark, Philadelphia, and Oakland (among others).⁸¹ Some districts, including most recently Pittsburgh and Kansas City, have opted to close a large proportion of their districts' schools to save money and avoid state takeovers.⁸²

The causes of school districts' financial woes are multifaceted. High labor costs and the burden of public employee pensions that have amassed huge deficits are major contributing factors.⁸³ But there are others, including state budget cuts—two-thirds of states are providing less money for public education than they did five years ago—and declining property taxes, which have plunged after the housing crisis.⁸⁴ Federal support for public education is also waning, as the stimulus funds are depleted and Congress battles over the reauthorization of the NCLB.⁸⁵ Moreover, the delayed maintenance of aging school buildings exacerbates urban districts' financial woes.⁸⁶ For example, almost half of public schools in Chicago were built before 1930.⁸⁷ In 2010, the average

⁸¹ See Emily Richmond, *What Would Happen If the State Took Over Your School District*, *The Atlantic* (Apr 1, 2013), online at <http://www.theatlantic.com/national/archive/2013/04/what-would-happen-if-the-state-took-over-your-school-district/274527/> (visited Oct 18, 2014).

⁸² See *Closing Public Schools in Philadelphia* at 5 (cited in note 35).

⁸³ See Public School Teachers' Pension and Retirement Fund of Chicago, *116th Comprehensive Annual Financial Report* 21 (2011), online at <http://www.ctpf.org/AnnualReports/cafr2011.pdf> (visited Oct 18, 2014) (reporting a \$6.8 billion unfunded accrued liability); Teachers' Retirement System of the City of New York, *2013 Comprehensive Annual Financial Report* 4.18 (2013), online at <https://www.trsnyc.org/WebContent/publications/cafr.pdf> (visited Oct 18, 2014) (reporting \$24.9 billion in unfunded accrued liability); California State Teacher Retirement System, *Fast Facts: Fiscal Year Ended June 30, 2012* (2012), online at http://www.calstrs.com/sites/main/files/file-attachments/fastfacts2013_0.pdf (visited Oct 18, 2014) (reporting \$64.5 billion in unfunded accrued liability).

⁸⁴ See Motoko Rich, *School Districts Brace for Cuts as Fiscal Crisis Looms*, *NY Times* (Nov 15, 2012), online at http://www.nytimes.com/2012/11/16/education/school-districts-eyeing-fiscal-crisis-brace-for-cutbacks.html?_r=0 (visited Oct 18, 2014).

⁸⁵ See Joy Resmovits, *No Child Left Behind Reauthorization Debate Likely To Continue In Obama Second Term*, *The Huffington Post* (Nov 19, 2012), online at http://www.huffingtonpost.com/2012/11/19/no-child-left-behind-reauthorization_n_2161498.html (visited Oct 18, 2014).

⁸⁶ See Barbara Kent Lawrence, *Save a Penny, Lose a School: The Real Cost of Deferred Maintenance* *7 (The Rural School and Community Trust Jun 2003), online at http://www.ruraledu.org/user_uploads/file/Save_a_Penny_Lose_a.pdf (visited Oct 18, 2014).

⁸⁷ See Frank Clark, *The future of Chicago's schools: Tackling the hard issue of consolidating the public school district and closing some of the city's most underutilized schools*, *Chicago Tribune* (Dec 10, 2012), online at <http://articles.chicagotribune.com/>

age of a public school in Detroit was fifty-six years and approximately seventy years in Milwaukee.⁸⁸ In 2008, Washington, D.C.'s Office of Public Education Facilities Modernization called the physical conditions of its schools "truly deplorable."⁸⁹ In Philadelphia, where the average age of school buildings is sixty-three years, the district acknowledges that some school buildings are essentially beyond repair.⁹⁰

As a recent Pew Charitable Trust report on six cities' experiences found, the amount of money saved by school closures is largely dependent on the degree to which closings are accompanied by teaching staff reductions.⁹¹ Since staff reductions are at least as painful and controversial as school closures themselves, teachers frequently are redeployed, causing budgetary savings to fall short of expectations. But they remain significant: Milwaukee so far has saved \$6.6 million annually by closing 20 schools; Washington, D.C. has saved \$16.7 million by closing 23 schools; Detroit has saved \$35 million by closing 59 schools; Pittsburgh has saved approximately \$14.7 million per year by closing 22 schools and laying off 279 staff members; and Kansas City achieved more-substantial savings by combining closures with 700 layoffs as well as eliminating \$30 million paid to outside service-providers.⁹² Current plans in Philadelphia call for reducing payroll by 16 percent in 2013, to generate a savings of \$137 million, although all teachers displaced by the recently announced closings will be redeployed to other schools.⁹³

2012-12-10/news/ct-oped-1210-schools-20121210_1_shutter-schools-public-school-district-charter-schools (visited Oct 18, 2014).

⁸⁸ See *Closing Public Schools in Philadelphia* at 3 (cited in note 35).

⁸⁹ *Id.*

⁹⁰ A recently completed Facility Condition Index analysis identified 24 buildings with "poor" ratings; an additional 140 buildings were only "fair." The index compares the cost of renovation to the cost of replacement. A poor rating indicates that renovation would not be worth the cost. See The School District of Philadelphia, *Long Range Facilities Plan* 33 (Nov 2011), online at http://www.crpe.org/sites/default/files/Philadelphia_LongRangeFacilitiesPlan_Nov2011_0.pdf (visited Oct 18, 2014).

⁹¹ See *Closing Public Schools in Philadelphia* at 6 (cited in note 35).

⁹² *Id.*

⁹³ See *Budget: Red Alert*, The Philadelphia Public School Notebook (Feb 2013), online at <http://thenotebook.org/february-2013/135573/budget-red-alert> (visited Oct 18, 2014). See also Benjamin Herold, *Cash-strapped Philly Schools hoping to tackle tax deadbeats*, The Philadelphia Public School Notebook (Feb 18, 2013), online at <http://thenotebook.org/blog/135653/cash-strapped-philly-schools-hoping-tackle-tax-deadbeats> (visited Oct 18, 2014).

B. What Does It Mean to Close a School?

Not all (or perhaps not even most) school closures result in closed schools. Rather, there are three distinct school-closures scenarios, each of which may have different effects on urban neighborhoods. First, some school closures result in school buildings ceasing to house schools. That is, when a district closes a school, sometimes the building is vacated, and thereafter either remains vacant or is sold or leased for a non-school purpose. The fact that many urban school districts maintain a sizable *in rem* portfolio of vacant properties suggests that these “pure” school closures are not uncommon.⁹⁴ Second, many school closures are actually school restructurings. That is, frequently, a district “closes” a traditional public school and immediately reopens it as a new school with a different institutional form. Many districts close schools intending to reorganize them as “new” public schools with a different staff, magnet schools, schools-within-schools, or alternative schools.⁹⁵ And, many districts close schools in order to engage the service of a private provider who will operate them as charter schools.⁹⁶ In other words, some closed public schools become charter schools by design, when a district chooses to convert them to charter schools. Third, in some cases, closed schools come to be occupied by charter or private schools by default—that is, not by virtue of a district’s decision to “convert” them to a new school but because the district sells or leases the buildings that formerly housed traditional public schools to private- or charter-school operators. Indeed, many districts have a policy preference for

⁹⁴ See *Shuttered Public Schools* (cited in note 7).

⁹⁵ For example, in ongoing litigation, the American Federation of Teachers has alleged that the Bloomberg administration’s decision to close and reorganize nineteen traditional public schools violates the procedural requirements of New York state education law, discussed briefly above, which essentially require that the Chancellor of the New York City public schools issue an “educational impact statement” before closing or reorganizing any schools. A state trial judge enjoined the challenged reorganizations, finding that the Board of Education’s actions did not fully comply with this mandate. Subsequently, the parties entered into a Letter Agreement. In the Letter Agreement, the Department of Education agreed not to co-locate certain charter schools in certain specified school buildings. See *Mulgrew v Board of Education of City School District of City of New York*, 902 NYS2d 882, 890 (NY Sup Ct 2010). See also *Mulgrew v Board of Education of City School District of City of New York*, 927 NYS2d 855, 862 (NY Sup Ct 2011) (rejecting the claim that the City violated the settlement resulting from the previous litigation).

⁹⁶ See notes 63–72 and accompanying text.

disposing of closed school buildings for educational purposes,⁹⁷ although (as discussed below) others resist leasing closed schools to charter schools, which they see as harmful competition.⁹⁸ In both scenarios two and three, “closed” school buildings do not cease to house schools, but rather come to house schools with different institutional forms than their traditional public school predecessors.

As the preceding discussion demonstrates, school closures are, indeed, complex. They are the result of many factors—including urban demographic and financial trends as well as legal policy decisions favoring accountability and parental choice. Moreover, a variety of phenomena can be, and are, characterized as “school closures”—including some that do not result in the closure of public school buildings (such as the conversion of traditional public schools into charter schools). As the following section will demonstrate, these complexities pose significant difficulties for individuals seeking to mount Title VI challenges to school closures, and the policies that contribute to them.

II. THE ANATOMY OF A TITLE VI DISPARATE IMPACT CLAIM

In the wake of the recent wave of urban public school closures, some opponents have challenged these closings under Title VI of the Civil Rights Act of 1964.⁹⁹ The basic argument goes that the decision to close mostly urban schools serving minority students has a disparate impact on minority students, thus running afoul of Title VI. However, as this Section will discuss, those claiming disparate impact do not have direct access to federal courts, rather they must file such complaints with the U.S. Department of Education, Office of Civil Rights

⁹⁷ See, for example, *Shuttered Public Schools* at 2 (cited in note 7) (“Philadelphia’s governing School Reform Commission . . . has a policy in place offering price discounts for all educational uses.”).

⁹⁸ See Becky Vevea, *Rules tie up Milwaukee Public Schools real estate: 27 Milwaukee school buildings are vacant, and district restrictions prevent sale to possible competitors*, Milwaukee Wisconsin Journal Sentinel (Dec 31, 2010), online at <http://www.jsonline.com/news/education/112699029.html> (visited Oct 18, 2014) (noting that one reason for the high number of empty district properties in Milwaukee is the district’s reluctance to lease closed schools to other school operators and quoting Superintendent Gregory Thornton, who says he does not want the buildings to be used by anyone who is going to “take enrollment” from the public schools).

⁹⁹ See, for example, notes 114–116 and accompanying text.

(OCR).¹⁰⁰ It is ultimately up to OCR to pursue a remedy through the federal courts if it is unable to resolve a complaint on its own.

Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal funds. Specifically, Title VI provides that no person shall, on these grounds, be “excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”¹⁰¹ Although the Supreme Court has held that Title VI, like the Equal Protection Clause, only prohibits *intentional* discrimination, a number of the agencies charged with enforcing it have also promulgated regulations that prohibit programs and activities that have disparate effects.¹⁰² The recipients of federal funds generally are required to provide assurances that they will comply with these regulations, and the Supreme Court has at least nodded to their validity.¹⁰³ Title VI’s disparate impact regulations focus on the consequences of the challenged policies, rather than the funding recipient’s intent in adopting them. That is, a facially neutral policy or practice that has a disproportionate impact on a group protected by Title VI may be unlawful, even if it is adopted without any malign purpose.¹⁰⁴

In *Alexander v Sandoval*,¹⁰⁵ however, the Court ruled that Congress did not intend to create a private right of action to enforce Title VI’s implementing regulations, and that, therefore, only the federal officials charged with enforcing those regulations could pursue disparate impact claims against the recipients of public funds.¹⁰⁶ After *Sandoval*, private litigants may directly pursue only those Title VI challenges based upon allegations of intentional discrimination. Absent evidence of intentional discrimination, federal officials alone can use the Civil Rights Act to police the disparate racial effects of education policies, including the closure of public schools in predominantly

¹⁰⁰ See notes 101–108 and accompanying text.

¹⁰¹ The Civil Rights Act of 1964, 42 USC § 2000d.

¹⁰² See *Sandoval*, 532 US at 278.

¹⁰³ See *Guardians Association v Civil Service Commission of City of New York*, 463 US 582, 642 n 13 (1983).

¹⁰⁴ See *id* at 589.

¹⁰⁵ 532 US 275 (2001).

¹⁰⁶ See *id* at 293 (holding that the Title VI disparate impact regulations did not include a private right of action).

minority neighborhoods. In the education context, the OCR is responsible for investigating and remedying violations of Title VI and its implementing regulations. Thus, the disparate-impact claims prompted by recent school closures have been lodged with this office.¹⁰⁷ Currently, the OCR is investigating thirty-three complaints related to school closings in twenty-nine districts across twenty-two states.¹⁰⁸ During the complaint process, OCR serves as a “neutral fact-finder” and “does not act as an advocate for either party during the process.”¹⁰⁹ If OCR finds a violation but is unable to resolve the situation with the institution, OCR may choose to file suit in federal court. However, per *Sandoval*, OCR is the plaintiff in such litigation rather than the original complainants.

Disparate impact litigation follows a burden-shifting regime borrowed from Title VII disparate impact law. To establish liability, the agency pursuing the claim must make a prima facie case that the recipient of federal funds adopted a policy or practice that has a disproportionate effect on members of a class protected by Title VI.¹¹⁰ Upon making such a showing, the burden shifts to the defendant to articulate a “substantial legitimate justification” for the practice.¹¹¹ Courts have analogized this requirement to the Title VII’s “business necessity” requirement, generally holding in the education context that the funding recipient must demonstrate that the challenged practice “bear[s] a manifest demonstrable relationship to classroom education”¹¹² or “is demonstrably necessary to meeting an important educational goal.”¹¹³ These requirements obviously do not neatly apply to questions of school closures, since the closure of schools is not necessarily

¹⁰⁷ See 34 CFR §§ 100.6–100.8.

¹⁰⁸ See Motoko Rich and Jon Hurdle, *Rational Decisions and Heartbreak on School Closings*, NY Times (Mar 8, 2013), online at <http://www.nytimes.com/2013/03/09/education/rational-decisions-and-heartbreak-on-school-closings.html?pagewanted=all&r=0> (visited Oct 18, 2014).

¹⁰⁹ US Dept of Education, *Questions and Answers on OCR’s Complaint Process* (Nov 16, 2011), online at <http://www2.ed.gov/about/offices/list/ocr/qa-complaints.html> (visited Oct 18, 2014).

¹¹⁰ See, for example, *Georgia State Conference of Branches of NAACP v State of Georgia*, 775 F2d 1403, 1417 (11th Cir 1985).

¹¹¹ See *id.*

¹¹² See *Elston v Talladega County Board of Education*, 997 F2d 1394, 1412 (11th Cir 1993). See also *Larry P. by Lucille P. v Riles*, 793 F2d 969, 982 & n 9 (1984).

¹¹³ See *Elston*, 997 F2d at 1412.

directly related to classroom education. For example, in *Elston v Talladega County Board of Education*,¹¹⁴ the Eleventh Circuit considered a Title VI disparate impact challenge in the school closure context.¹¹⁵ The court ruled that when the challenged action was fairly characterized as an “infrastructure planning decision,” the relevant inquiry was whether the action was “necessary to meet a goal that was legitimate, important and integral to the defendant’s institutional mission.”¹¹⁶

Assuming that a district does meet this “educational necessity” burden—and the serious financial and enrollment challenges facing many urban school districts suggest that many will be able to do so—the OCR still can prevail by demonstrating that there are “comparably effective alternative practice[s]” that result in less racial disproportionality or that the proffered justification is a pretext for discrimination.¹¹⁷ For example, in Washington, D.C., teacher’s union president Nathan Saunders has asserted that “What appears to be lack of interest in traditional neighborhood public education is in fact the result of new options being offered” and expresses concerns that these options (primarily charter schools) do not outperform traditional public schools.¹¹⁸ A number of Title VI complaints argue that altering or restricting parental choice policies would be an “equally effective” alternative to closing traditional public schools. For example, a complaint lodged with OCR in May 2013 argues that the New York City Department of Education’s choice-based high school admissions policies, combined with the Department’s practice of closing underperforming predominantly minority schools, result in the concentration of African American and Latino students in high-needs, majority-minority schools.¹¹⁹ The complaint urges the OCR to order the district to adopt a policy of “controlled choice” that will result in

¹¹⁴ 997 F2d 1394 (11th Cir 1993).

¹¹⁵ See id at 1400.

¹¹⁶ Id at 1412–13.

¹¹⁷ Id.

¹¹⁸ Rich and Hurdle, *Rational Decisions and Heartbreak on School Closings*, NY Times (cited in note 108).

¹¹⁹ See generally Administrative Class Complaint, *Capers, et al v Board of Education of the City School District of the City of New York* (US Dept of Ed Office for Civil Rights filed May 20, 2013), online at <http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/Capers%20et%20al%20OCR%20complaint%20redacted.pdf> (visited on Oct 18, 2014).

the greater dispersal of high-needs students across all schools in the district.¹²⁰ The call for restrictions on parental choice policies was even starker in a complaint filed by Newark, New Jersey parents in July 2012. The Newark complaint alleges that the “external influence” of Facebook founder Mark Zuckerberg has forced Newark to close underperforming schools and reopen them as charter schools that do not outperform their public predecessors.¹²¹ The complaint further argues that these “experimental reforms” have failed and demands that the OCR “put an end to these actions” and “stop these closures immediately.”¹²² In other words, the individuals pursuing Title VI relief from school closures with the OCR make clear their view that curbing parental choice ought to be on the remedial table alternative to closing traditional public schools.

III. PUBLIC SCHOOL CLOSURES AND URBAN NEIGHBORHOODS: THE CLAIMS AND THE EVIDENCE

Public school proponents, parents and community organizers alike variously assert that public school closures “disrupt,” “destabilize,” and “devastate” urban communities.¹²³ While the foundation for these claims is not always well-articulated, there are at least three plausible reasons why closing public schools might have negative consequences for an urban neighborhood. First, when public school buildings remain vacant following closures, they may introduce additional physical blight into a community. Second, the decision to close a public school may be interpreted as a signal that a community is no longer worthy of investment, leaving residents feeling

¹²⁰ See *id.*

¹²¹ See *Newark OCR complaint on school closings*, NJ Educ News & Views (Jan 8, 2013), online at <http://njeducationnews.wordpress.com/2013/01/08/newark-ocr-complaint-on-school-closings-2/> (visited Oct 18, 2014).

¹²² See *id.* See also Jon Hurdle, *Education Department to Hear School Closing Complaints*, NY Times (Jan 28, 2013), online at <http://www.nytimes.com/2013/01/29/education/education-department-to-hear-school-closing-complaints.html> (visited Oct 18, 2014).

¹²³ See Valerie Strauss, *AFT's Weingarten on why she got arrested, "the gall" of reformers, etc.* (Wash Post Mar 12, 2013), online at <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/03/12/afts-weingarten-on-why-she-got-arrested-the-gall-of-reformers-etc/> (visited Oct 18, 2014) (quoting Randi Weingarten, President of the American Federation of Teachers, “Further research has now demonstrated that mass closing of schools is a reckless strategy that neither helps kids nor saves money. Instead it destabilizes neighborhoods and it’s an attempt to destroy public education in the city.”).

demoralized and abandoned by public education authorities. Third, school closures may eliminate important community institutions in urban neighborhoods. This section addresses each of these possibilities in turn, paying particular attention to the third, since it is at the heart of public school proponents' communitarian objection to school closures.

A. Public School Closures as a Vacant Property Problem

The negative consequences of school closures for urban neighborhoods undoubtedly are most pronounced when public school buildings remain empty. Vacant and abandoned properties represent a significant problem in many American cities—a reality reflected in a proliferation of city task forces on the disposition of vacant and abandoned buildings.¹²⁴ Social scientists have long considered abandoned or deteriorating properties to be a signal of serious neighborhood decline.¹²⁵ Blighted properties contribute to a city's economic problems by discouraging neighborhood investment,¹²⁶ depriving the city of tax revenue,¹²⁷ lowering market value of neighborhood property,¹²⁸ and increasing the cost of business and homeowner insurance.¹²⁹ Furthermore, blight has a “multiplier” effect; deferred maintenance of one building reduces the incentives for neighbors to continue upkeep efforts.¹³⁰

¹²⁴ See, for example, Task Force on Vacant and Abandoned Properties, *Combating Problems of Vacant and Abandoned Properties: Best Practices in 27 Cities* *1 (US Conference of Mayors June 2006), online at <http://www.usmayors.org/bestpractices/vacantproperties06.pdf> (visited Oct 18, 2014).

¹²⁵ See, for example, Susan D. Greenbaum, *Housing Abandonment in Inner-City Black Neighborhoods: A Case Study of the Effects of the Dual Housing Market*, in Robert Rotenberg and Gary McDonogh, eds, *The Cultural Meaning of Urban Space* 139, 140 (Bergin & Garvey 1993) (“Empty buildings, weedy lots, quantities of unsavory litter, and angry graffiti suggest profound maladies.”).

¹²⁶ See John Accordino and Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J Urban Aff 301, 303 (2000).

¹²⁷ See *id.* See also Benjamin P. Scafidi, Michael H. Schill, and Susan M. Wachter, *An Economic Analysis of Housing Abandonment*, 7 J Housing Econ 287, 288 (1998).

¹²⁸ See Accordino and Johnson, 22 J Urban Aff at 303 (cited in note 126); Greenbaum, *Housing Abandonment in Inner-City Black Neighborhoods* at 143 (cited in note 125).

¹²⁹ See Accordino and Johnson, 22 J Urban Aff at 303 (cited in note 126).

¹³⁰ See, for example, Greenbaum, *Housing Abandonment in Inner-City Black Neighborhoods* at 140–41 (cited in note 125); William Spelman, *Abandoned Buildings: Magnets for Crime?*, 21 J Crim Just 481, 481 (1993) (arguing that “processes of social and physical decay feed on one another, setting distressed neighborhoods on a downward spiral”).

For obvious reasons, abandoned and deteriorating properties also lead to serious social problems. Inner city residents consistently cite physical decay as one of the most significant “disorders” plaguing their communities.¹³¹ Abandoned buildings are “magnets for crime,” places that serve as criminals’ hangouts or staging areas.¹³² As the authors of a leading study of the effects of property abandonment on urban neighborhoods colorfully observe, “crooks, killers, and losers tend to infest areas with dead buildings, like maggots on a carcass.”¹³³ Moreover, while vacant buildings are detrimental to an urban community regardless of their prior use, vacant public school buildings may be particularly problematic because of their large size.

While urban officials hope to find productive uses for closed public school buildings—and, when possible, to generate revenue by selling or leasing them—some school closures introduce vacant buildings into neighborhoods already plagued by violence and disorder. In fact, the available evidence suggests that disposing of vacant school buildings poses a significant challenge for some urban districts, where shuttered public schools have stood empty for over a decade. In 2013, a Pew Charitable Trust study of the disposition of closed schools in 12 urban districts found that the “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.”¹³⁴ Not surprisingly, there is anecdotal evidence that empty public

¹³¹ See Wesley G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* 36 (The Free Press 1990); Accordino and Johnson, 22 J Urban Aff at 306 (cited in note 126) (finding that city administrators believe that abandoned property have a highly negative effect on neighborhood vitality and crime prevention efforts).

¹³² One study conducted in Austin, Texas found evidence of illegal activities in 83 percent of unsecured abandoned buildings. See Spelman, 21 J Crim Justice at 482 (cited in note 130).

¹³³ Accordino & Johnson, 22 J Urban Aff at 303 (cited in note 126). See also Robert W. Burchell and David Listoken, *The Adaptive Reuse Handbook: Procedures to Inventory, Control, Manage, and Reemploy Surplus Municipal Properties* 15 (Rutgers CUPR 1981) (observing that abandoned property serves as “a clubhouse for all of the deleterious elements in the neighborhood”).

¹³⁴ In 2012, there were 124 school district properties on the market in Detroit, 13 in St. Louis and over 20 in Milwaukee, Chicago, Pittsburgh, Kansas City, and Cleveland. See *Shuttered Public Schools* at 1, 4 (cited in note 7).

schools are targets for vandalism and squatting.¹³⁵ Some buildings have been razed in response to community complaints that they have become the locus for disorder and crime. Demolition, however, is costly (often exceeding the value of the building) and can prompt controversy since many schools are considered historic sites.¹³⁶

The Pew report found that a number of factors influence districts' ability to dispose of closed school buildings, including real estate markets, the length of time that the building has been vacant, the size of the building, the cost of renovation, and legal restrictions on the sale or lease of buildings. In the twelve cities studied, the typical school property available for sale or lease was larger than fifty thousand square feet—simply too large for most would-be purchasers.¹³⁷ Many shuttered school buildings are located in neighborhoods that are depopulating (not surprisingly, since depopulation drives many school closures), and many are tucked into residential neighborhoods, both factors decreasing their attractiveness to buyers hoping to repurpose the buildings for commercial uses. Renovation costs also deter many potential purchasers.¹³⁸ The typical school building on the market was more than sixty years old and had significant deferred maintenance issues.¹³⁹ And, renovation costs escalate the longer a building sits empty, making the rapid disposition of closed buildings imperative.¹⁴⁰

B. School Closures' Expressive Effects

School closures also carry the risk of sending a symbolic message of “abandonment” to urban residents, as public school officials appear to “pull out of” a neighborhood. To borrow from legal theory, it is possible that closures have a negative

¹³⁵ See, for example, Juliana Reyes, *City Howl Help Desk: It's a magnet school—for crime*, Philadelphia Inquirer (July 6, 2011), online at http://articles.philly.com/2011-07-06/news/29743161_1_clemente-school-magnet-school-inspections (visited Oct 18, 2014); Alia Conley, *Official: Fire at former Edison High could have been prevented*, Philadelphia Inquirer (Aug 4, 2011), online at http://articles.philly.com/2011-08-04/news/29850978_1_fire-officials-fire-engines-school-building (visited Oct 18, 2014).

¹³⁶ See *Shuttered Public Schools* at 7 (cited in note 7).

¹³⁷ See id at 6–7.

¹³⁸ See id at 6.

¹³⁹ See id at 5.

¹⁴⁰ See *Shuttered Public Schools* at 15 (cited in note 7).

“expressive effect” on urban communities.¹⁴¹ Residents 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.¹⁴² The fact that community members often express dismay, anger, and feelings of abandonment in debates over school closures provides anecdotal evidence supporting this possibility. For example, a Bronx student testified at the “Journey for Justice” hearing in Washington, D.C. that “when a school is set up for a closure . . . [i]t tells us that we are not important enough to invest in.”¹⁴³ Support for this sentiment is also found in a handful of studies suggesting that “more successful” closure efforts involve substantial community involvement.¹⁴⁴ Moreover, parents who frequently express concern that their children must walk farther distances to school through dangerous neighborhoods may interpret the government’s actions as a decision to place their children in harm’s way.¹⁴⁵ While, as discussed below, the “expressive” harms of public school closures ought to be particularly acute when school buildings remain vacant, students and parents affected by the forced conversion of their

¹⁴¹ See generally Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U Pa L Rev 1503 (2000); Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U Pa L Rev 1363 (2000).

¹⁴² See Martin Austerhuhle, *The End of the Neighborhood School*, The Atlantic (Feb 19, 2013), online at <http://www.theatlanticcities.com/politics/2013/02/end-neighborhood-school/4687/#> (visited Oct 18, 2014) (“Even Andy Smarick, a fervent charter advocate . . . recognizes that closing a neighborhood school can have negative and unintended consequences. ‘Even if it’s low-performing, at least it’s a stable institution and it’s an indication that the government has at least some investment in that neighborhood,’ he says.”).

¹⁴³ See Alliance for Quality Education, *NYC Parents & Students Join National “Journey for Justice”* (cited in note 28) (quoting Bronx student Ashley Payano).

¹⁴⁴ See, for example, Christina A. Samuels, *Study Warns of Limited Savings from Closing Schools*, Education Week (Nov 1, 2011), online at http://www.edweek.org/ew/articles/2011/11/02/10closings_ep.h31.html (visited Oct 18, 2014) (“Making a misstep in school closings can cause political fallout. The community uproar over the closings in Washington was one of the ingredients that led last year to the primary-election defeat of then-Mayor Adrian M. Fenty.”).

¹⁴⁵ See, for example, Noreen S. Ahmed-Ullah, *Gang expert testifies school closings will put kids ‘in line of fire’: UIC criminology professor says Safe Passage not enough to protect CPS students from street violence*, Chicago Tribune (Jul 17, 2013), online at http://articles.chicagotribune.com/2013-07-17/news/ct-met-cps-closings-hearings-20130717_1_school-closings-49-elementary-schools-wednesday (visited Oct 18, 2014).

public schools to charter or magnet schools express feelings of betrayal.¹⁴⁶

C. Neighborhood Public Schools as Community Institutions

A third possibility—and the one at the heart of the “communitarian” objection to closing schools—is that school closures remove important community institutions from urban neighborhoods. That is, traditional public school proponents argue that that traditional public schools are critical community institutions and that their alternatives—including public schools—are inadequate substitutes. In the Title VI context, plaintiffs’ rhetoric suggests that public school officials must use means other than school closures to address enrollment, achievement and financial woes. They offer, among other alternative courses of action, a restriction in charter school and parental choice alternatives to traditional public schools.

1. The claim.

The central “communitarian” complaint about school closures can be distilled to the claim that traditional public schools generate social capital, and, therefore, that closing these schools diminishes neighborhood social capital.¹⁴⁷ For example, when the New York City Department of Education held a hearing on the proposed closure of Paul Robeson High School, one resident testified, “Paul Robeson High School has been a pillar in the community for the past 20 years.”¹⁴⁸ The same hearing also contained testimony by a teacher claiming that the closure would harm the neighborhood by depriving residents of

¹⁴⁶ See Alliance for Quality Education, *NYC Parents & Students Join National “Journey for Justice”* (cited in note 28) (quoting public school parent Ocynthia Williams, “In NYC, . . . forced co-locations [of smaller specialized schools] have been divisive, hurtful and a failed strategy. The toxic environment created leaves everyone in the schools feeling broken.”).

¹⁴⁷ While the concept of social capital is the subject of a voluminous, and somewhat contentious, literature, see, for example, David Halpern, *Social Capital* 1–45 (Polity 2004) (reviewing the literature), I refer here to Robert Putnam’s “lean and mean” definition: “social networks and the norms of reciprocity and trustworthiness that arise from them.” Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* 19 (Simon & Schuster 2000).

¹⁴⁸ New York City Department of Education, *Hearing on the Closing of Paul Robeson High School* 36 (Jan 7, 2010), online at http://schools.nyc.gov/NR/rdonlyres/F0043783-8608-433C-855E-99228622A268/75881/154488Robeson_HS_Bus__TechK_10710.pdf (visited Oct 18, 2014).

non-educational social services that the school had traditionally provided.¹⁴⁹ At the Journey for Justice hearing in D.C. earlier this year, parents and community activists complained that closed schools had served as “anchors” of their communities.¹⁵⁰ In a similar vein, Karran Harper Royal, who founded Parents Across America (a national organization protesting school closures), has asserted that the post-Katrina closure of public schools in New Orleans (many of which were converted into charter schools) “really impeded the rebuilding of some of the neighborhoods.”¹⁵¹

Opponents further assert that school closures will disrupt neighborhood dynamics by triggering shifts in neighborhood composition, with negative consequences, especially for poor, minority residents.¹⁵² Some point to evidence that school closures have caused property values to fall, as housing near defunct schools becomes less attractive.¹⁵³ For example, during a

¹⁴⁹ See *id.* See also Michael Lytton, *Have all the costs of closing a school been considered?* *3 (Org for Econ Coop and Dev Aug 2011), online at <http://www.oecd.org/edu/innovation-education/centreforeffectivelearningenvironmentscele/48358265.pdf> (visited Oct 18, 2014) (asserting that closing neighborhood schools deprives communities of “resources to help meet social, recreational, health and personal needs of the community”).

¹⁵⁰ *Journey for Justice Transcript* at 54 (cited in note 28) (“Each of the five closed schools have been the valued anchor of their neighborhood. They had educated generations of students, hosted community gatherings and meetings, and been the neighborhoods’ emergency shelters.”).

¹⁵¹ Dorothy Rowley, *National Alliance Calls for End of School Closures*, New American Media (Feb 8, 2013), online at <http://newamericamedia.org/2013/02/national-alliance-calls-for-end-to-school-closures.php> (visited Oct 18, 2014). Ms. Royal did not elaborate on this claim, other than to express concern that charter schools diluted African Americans’ political power in the majority-black school district. See *id.*

¹⁵² *Editorial: APS still feeling effects of two school closings*, The Alpena News (Oct 22, 2010), online at <http://www.thealpenanews.com/page/content.detail/id/515480/Editorial-APS-still-feeling-effects-of-two-school-closings.html?nav=5002> (visited Oct 18, 2014) (quoting the Michigan school superintendent, who reported late in 2010 that 195 students had moved from his district within 8 months of the closing of one of the largest elementary schools, resulting in a nearly \$775,000 lost revenue).

¹⁵³ See, for example, Lytton, *Have all the costs of closing a school been considered?* (cited in note 149) (asserting that schools “influence where families choose to live, property values and tax revenues, and the pace and location of residential and commercial development”). In Philadelphia last year, for example, the Philadelphia School District’s facilities online closings list allegedly depressed the housing prices across an entire up-and-coming neighborhood. See Patrick Kerkstra, *University City feeling the impact of school closings and consolidation threat cast*, PlanPhilly.com (Oct 19, 2011), online at <http://planphilly.com/articles/2011/10/19/university-city-feeling-impact-school-closings-and-consolidation-threat-cast> (visited Oct 18, 2014). The relevant proposal contemplated closing Alexander Wilson Elementary and redrawing the boundary for the University of Pennsylvania-sponsored Penn Alexander Elementary School. See *id.* This may be somewhat of an anomalous example, since presumably the

forum organized by the DeKalb (Georgia) Citizen Task Force on School Closings in 2010, dozens of parents warned that closing their local school would lower property values, fracture the community, and push young families to move elsewhere.¹⁵⁴

At the other extreme, some opponents worry that converting traditional public schools to higher-performing charter or magnet schools will fuel gentrification that prices current residents out of their neighborhoods, since the new schools will be more attractive to affluent families than the lower-performing ones that they replace.¹⁵⁵ At a minimum, public school advocates claim that replacing neighborhood schools with higher-performing charter or magnet schools will draw outsiders to a community, thereby disrupting existing community relationships.¹⁵⁶ Some also object to the closure of majority-minority public schools (especially majority African American schools), drawing upon a communitarian defense of majority-black neighborhood schools that spans decades.¹⁵⁷ Other closure

elementary school in question is one of the higher-performing, more attractive, public elementary schools in the city.

¹⁵⁴ See Maureen Downey, *School Closings: Does the loss to the community matter?*, Atlanta Journal-Constitution (Apr 11, 2010) (on file with journal). Although school locations and quality undoubtedly influence property values, there appears to be little empirical evidence to support the claim that school closures depress property values. One study of ten school closures in Seattle in the late 1970s, for example, found little effect. See Howard M. Johnson, *School Closure: How Much Impact on the Community?*, 59 Phi Delta Kappa 357, 358–59 (1978).

¹⁵⁵ See, for example, Daniel Hertz, *Chicago: Gentrification Comes to the Neighborhood School*, Urbanophile (Nov 26, 2013), online at <http://www.urbanophile.com/2013/11/26/chicago-gentrification-comes-to-the-neighborhood-school-by-daniel-hertz/> (visited Oct 18, 2014); Beth Fertig, *New Charter for Northern Brooklyn Fuels Debate Over Gentrification*, WNYC (Dec 20, 2012), online at <http://www.wnyc.org/story/303212-new-charter-for-northern-brooklyn-fuels-debate-over-gentrification/> (visited Oct 18, 2014).

¹⁵⁶ See Tracy A. Huebner, Grace Calisi Corbett, and Kate Phillippo, *Rethinking High School: inaugural graduations at New York City's new high schools* 13–16, WestEd (Bill & Melinda Gates Foundation 2006) (arguing that higher-income residents attracted to neighborhoods exert pressure to rehabilitate failing neighborhood institutions, which in turn drive up housing prices). See also Erik Engquist, *Textbook Lesson in Gentrification: Brooklyn housing boom causes clash as new arrivals reject city schools*, Crain's NY Business (Oct 7, 2007), online at <http://www.craigslist.com/article/20071007/REG/71006009> (visited Oct 18, 2014) (discussing school quality as an impediment to development in Brooklyn); *Pushed Out: The Hidden Costs of Gentrification: Displacement and Homelessness* *5 (Inst for Children and Poverty Spring 2009), online at http://www.icphusa.org/PDF/reports/ICP%20Report_Pushed%20Out.pdf (visited Oct 18, 2014) (asserting that the closure of two high schools in the Canarsie neighborhood in Brooklyn, and their replacement with four smaller, specialized schools fueled gentrification).

¹⁵⁷ As Drew Days has observed, as early as the era of forced busing, many African

opponents have argued that transferring students from schools with student populations that mirror neighborhood demographics to more-remote, but more-diverse, schools will disrupt the dynamics of both the sending and receiving neighborhoods.¹⁵⁸

2. The evidence.

It is uncontested, and well-documented, that social capital plays a critical role in establishing and maintaining safe and stable urban neighborhoods. Thus, the claim that public schools generate neighborhood social capital, and school closures suppress it, is worthy of serious consideration.¹⁵⁹ The claim is

American families also came to support a return to neighborhood schools, even when segregated housing patterns precluded the possibility of integration. See Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 *Wm & Mary L. Rev.* 53, 54 (1992). See also James Foreman Jr., *The Secret History of School Choice: How the Progressives Got There First*, 93 *Georgetown L. J.* 1287, 1291–92 (2005) (emphasizing the importance of Black schools to Reconstruction); Robert L. Woods Sr., *Ironically, Busing Denies Quality Education to Black Students*, 8 *Headway* 7, 7–8 (1996) (citing survey evidence suggesting that black parents reject busing and prefer neighborhood schools); *Missouri v. Jenkins*, 515 *US* 70, 114 (1995) (Thomas concurring) (“[B]lack schools can function as the center and symbol of black communities, and provide examples of independent black leadership, success, and achievement.”). Claims about the value of majority-minority schools is the subject of a sizable literature examining the highly contested question of the benefits of school integration, which I leave to the side here. See, for example, James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 *Harv L. Rev.* 131, 143–44 (2007) (reviewing debate).

¹⁵⁸ See Paul Katula, *Ceramics and civil rights are closing down in Chicago*, Voxitatis Blog (Feb 4, 2013), online at <http://schoolsnapshots.org/blog/2013/02/04/ceramics-and-civil-rights-are-closing-down-in-chicago/> (visited Oct 18, 2014) (objecting to the closure of Chicago’s Dyett High School on the grounds that it will disrupt neighborhood networks centered in around a racially homogenous school community); Rowley, *National Alliance Calls For End of School Closures*, *New American Media* (cited in note 151) (quoting activist who warns that school closures will increase violence and disruption in neighborhoods and schools receiving the displaced students).

¹⁵⁹ The best evidence about the effects of social capital on urban neighborhood health is found in the sizable literature on the importance of neighborhood “collective efficacy,” which is a term that sociologists and social psychologists use to describe the “ability of neighborhoods to realize the common values of residents and maintain effective social controls.” Robert J. Sampson, Stephen W. Raudenbush, and Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *Science* 918, 918 (1997). Collective efficacy is perhaps best understood as an output of social capital, although it is sometimes treated as synonymous with it. See Tracey L. Meares, *Praying for Community Policing*, 90 *Cal L. Rev.* 1593, 1604–08 (discussing the literature on both collective efficacy and social capital). Numerous studies demonstrate that neighborhoods with low levels of collective efficacy are more dangerous, more disorderly, and have lower levels of residential stability than neighborhoods with higher levels. See Robert J. Sampson and Stephen W. Raudenbush, *Systematic Social Observation in Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 *Am J Soc.* 603, 610 (1999); Edmund F. McGarrell, Andrew L. Giacomazzi, and Quint C. Thurman, *Neighborhood Disorder, Integration, and*

intuitively appealing. Theoretically, public schools ought to build neighborhood social networks by drawing together neighbors, especially parents who share a common interest forming their children into happy and productive adults.¹⁶⁰ Undoubtedly, many parents' social networks are substantially centered in their children's school (Mine certainly are). Logically, therefore, if a school draws students from the surrounding neighborhood, then the parents' social networks are more likely to be centered in the neighborhood as well. William A. Fischel has defended neighborhood public schools on this ground, arguing that they are engines of "community-specific social capital."¹⁶¹ Fischel argues that neighborhood schools benefit not only the children who attend them but also their parents.¹⁶² He reasons that local public schools enable residents of a neighborhood to network and build relationships with one another.¹⁶³ As Fischel observes, "My approach to social capital formation simply requires that parents get to know other parents."¹⁶⁴ Investment in community-specific social capital is simply adding local names to your address book, and sending your child to a local school does that more effectively than any other means."¹⁶⁵

Evidence supporting a connection between public schools and social capital can be found in two contexts. The first context is studies suggesting that the level of social capital in a neighborhood influences public schools' academic performance.¹⁶⁶ There is ample evidence that the level of social

the Fear of Crime, 14 Just Q 479, 484 (1997); Julie Berry Cullen and Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 Rev Econ & Stat 159, 159–69 (1999); Chris L. Gibson, et al, *Social Integration, Individual Perceptions of Collective Efficacy, and Fear of Crime in Three Cities*, 19 Just Q 537, 552 (2002).

¹⁶⁰ The empirical literature on public schools' neighborhood effects, discussed above, is at least suggestive of the contrary.

¹⁶¹ William A. Fischel, *Why voters veto vouchers: public schools and community-specific social capital*, 7 Econ Gov 109, 112 (2006).

¹⁶² See id at 113.

¹⁶³ See id at 109; William A. Fischel, *Making the Grade: The Economic Evolution of American School Districts* 227–31 (U Chi 2009).

¹⁶⁴ Fischel, 7 Econ Gov at 116 (cited in note 161).

¹⁶⁵ See id.

¹⁶⁶ Although the term "social capital" apparently was independently invented at least six times over the course of the twentieth century, the first person to use it was apparently a Progressive Era education reformer named L.J. Hanifan, who stressed the importance of community involvement as an input for successful schools. Interestingly, the third person was Jane Jacobs, who emphasized the role of non-residential land uses in generating the informal social relationships needed to ensure healthy city neighborhoods. See Putnam, *Bowling Alone* at 18 (cited in note 147).

capital in the community where a school is located is an important predictor of school performance.¹⁶⁷ In a recent book, for example, sociologists Anthony S. Bryk, Penny Bender Sebring, Elaine Allensworth, Stuart Luppescu, and John Q. Easton studied a Chicago Public Schools decision in the mid-1980s to devolve significant resources and authority to local school councils.¹⁶⁸ In the years that followed, some schools experienced a dramatic improvement, against the odds suggested by community and student demographics, while others stagnated or declined.¹⁶⁹

Not surprisingly, the decentralization was less likely to catalyze improvements in student performance in schools located in disadvantaged neighborhoods. When the researchers sought to understand what explained variations in improvement between schools located in similar neighborhoods, they found that schools located in neighborhoods with higher levels of social capital and lower levels of crime were more likely to improve.¹⁷⁰ The results were more pronounced for crime,¹⁷¹ and neighborhood religiosity also strongly predicted improvements.¹⁷² All of these factors (except perhaps religiosity), admittedly, are correlated with a neighborhood's socioeconomic status. But Bryk and his colleagues suggest that variations in social capital and crime go a long way in explaining the ability of some schools to overcome their structural odds and succeed.¹⁷³

The second context is the studies' suggestion that evidence that the level of social capital *within* a school also is an important predictor of academic performance. In other words, schools with strong networks and high levels of trust and

¹⁶⁷ See generally Anthony S. Bryk, et al, *Organizing Schools for Improvement: Lessons from Chicago* (U Chi 2010); Anthony S. Bryk and Barbara Schneider, *Trust in Schools: A Core Resource for Improvement* (Russell Sage Foundation 2002).

¹⁶⁸ See Bryk, et al, *Organizing Schools for Improvement* at 12 (cited in note 167).

¹⁶⁹ See id at 13.

¹⁷⁰ See id at 20–25. For example, over a third of schools in neighborhoods characterized by high levels of social capital improved, compared to only 22 percent of those located in low-social-capital neighborhoods. See id at 19.

¹⁷¹ More than one-third of schools in low-crime neighborhoods improved, compared to only 15 percent of those in high-crime neighborhoods. See Bryk, et al, *Organizing Schools for Improvement* at 177 (cited in note 167).

¹⁷² Schools located in neighborhoods with high levels of religious participation were more than twice as likely to improve than those in communities with weaker participation. See id at 180.

¹⁷³ See id at 198.

communication between members of the school community—administrators, teachers, parents, and students—are more likely to be successful schools. The original evidence about the connection between social capital and school performance can be found in James S. Coleman’s work on the role of social capital in fostering student performance. Coleman used schools to illustrate this conception of social capital, arguing that successful schools tended to be distinguished by parents’ connections to their children’s school and to the parents of their children’s peers.¹⁷⁴ These connections, he reasoned, “closed the loop” between school, teachers, and parents, thus guaranteeing the enforcement of appropriate norms.¹⁷⁵ Coleman further argued that these kinds of connections—and the norm-enforcement authority that they enable—helped to explain Catholic high schools’ high graduation rates.¹⁷⁶

Coleman’s hypothesis was further explicated and tested in the influential book *Catholic Schools and the Common Good*,¹⁷⁷ which linked Catholic high schools’ success as educational institutions to high levels of social capital among members of the school community¹⁷⁸ and the work of Stephen L. Morgan and Aage M. Sorenson, who concluded that the performance gap between public and Catholic schools is best explained by the social capital formed between members of a Catholic school community, that is, the connections formed between faculty members, students, and parents.¹⁷⁹

In his more recent study of the Chicago Public Schools’ decentralization experiment described above, Bryk and his colleagues applied these lessons to public schools, finding that social capital and trust within a school community is an important input into public school performance, especially in disadvantaged urban communities.¹⁸⁰ Bryk and his colleagues

¹⁷⁴ See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 Am J Soc S95, S106–07 (1988).

¹⁷⁵ See id.

¹⁷⁶ See id at S114–15.

¹⁷⁷ Anthony S. Bryk, Valerie E. Lee, and Peter B. Holland, *Catholic Schools and the Common Good* (Harvard 1993).

¹⁷⁸ See id at 292–94.

¹⁷⁹ See Stephen L. Morgan and Aage B. Sorensen, *Parental Networks, Social Closure, and Mathematics Learning: A Test of Coleman’s Social Capital Explanation of School Effects*, 64 Am Soc Rev 661, 674 (1999).

¹⁸⁰ See Bryk, et al, *Organizing Schools for Improvement* at 142–43 (cited in note

found that the level of social capital in a public school—particularly the level of trust between teachers, parents, and administrators—was one of the most important factors predicting improvement among schools facing similar structural and demographic impediments to student improvement.¹⁸¹ Levels of social capital (both inside a school and in the surrounding communities) also have effects beyond academic performance, as suggested by a recent study of safety in Chicago Public Schools. The researchers found that students and teachers consistently reported feeling more secure—regardless of the level of crime in the surrounding neighborhood—in schools characterized by high levels of trust and collaboration among members of a school community.¹⁸²

Interestingly, although there is ample evidence that levels of social capital both within a public school, and in the neighborhood surrounding it, affect school performance, there is very little evidence supporting the intuitively attractive claim that public schools themselves generate social capital in the surrounding neighborhood. On the contrary, the very limited available evidence on the effects of public schools in urban neighborhoods could be read to suggest the converse. This evidence is found in a specialized literature examining land-use “hot spots”—that is, land uses associated with high levels of crime and disorder and low levels of social capital. Researchers have linked a variety of non-residential land uses, *including public schools*, with increased crime and decreased social cohesion in a community.¹⁸³

167).

¹⁸¹ See id at 144. See generally Bryk and Schneider, *Trust in Schools* (cited in note 167).

¹⁸² See Matthew P. Steinberg, Elaine Allensworth, and David W. Johnson, *Student and Teacher Safety in Chicago Public Schools: The Roles of Community Context and School Social Organization* *1 (U Chi Urban Educ Inst May 2011), online at <http://ccsr.uchicago.edu/publications/student-and-teacher-safety-chicago-public-schools-roles-community-context-and-school> (visited Oct 18, 2014).

¹⁸³ For example, a number of studies document that residential blocks containing public high schools and immediately adjacent blocks experience a statistically significant higher incidence of crime. See generally Caterina Gouvis Roman, *Schools as Generators of Crime: Routine Activities and the Sociology of Place* (Am U 2002); Dennis W. Roncek and Donald Faggiani, *High Schools and Crime: A Replication*, 26 Soc Q 491 (1985); Dennis W. Roncek and Antoinette LoBosco, *The Effect of High Schools on Crime in their Neighborhoods*, 64 Soc Sci Q 598 (1983). In contrast, although one study of Cleveland found a slight, but not statistically significant, increase in crime in neighborhoods with private high schools, other studies have generally found no effect. See Roncek and Faggiani, 26 Soc Q at 491 (cited in note 183). At least one study found that public

These studies complicate, but do not necessarily disprove, the claim that public school closures are detrimental to urban neighborhoods. Conceivably, the negative effects of school closures might exceed the disorder and crime associated with open public schools. The effects of urban public school closures do not appear to have been studied, although there is some limited empirical support for the proposition that public schools are critical to rural communities, and that closing rural public schools can lead to significant community disruption.¹⁸⁴

IV. FEDERAL COURTS AS POLICY MAKERS: EVALUATING THE EFFECTIVENESS OF ALTERNATIVE EDUCATION POLICIES

Recall that Title VI disparate impact analysis entails an evaluation of whether a comparatively effective alternative policy would result in less disproportionality.¹⁸⁵ In the school-closure context, as discussed above, opponents argue that education policy must change courses dramatically. In particular, they vehemently oppose educational choice, including charter schools and parental choice programs that enable students to spend public funds at private schools.¹⁸⁶ These policies, they urge, are dangerous and wrongheaded for a number of reasons—including the fact that they decrease the number of students attending traditional public schools, and thus increase the likelihood of public school closures.¹⁸⁷ As a

elementary schools also appeared to generate crime as well—perhaps more crime than public high schools. See Roncek and LoBosco, 64 Soc Sci Q at 598 (cited in note 183).

¹⁸⁴ See Jeanne L. Surface, *Assessing the Impact of Twenty-first Century Rural School Consolidation* *7–11 (U Neb Omaha 2011), online at <http://digitalcommons.unomaha.edu/cgi/viewcontent.cgi?article=1011&context=edadfacpub> (visited Oct 18, 2014). My own work with Margaret Brinig links Catholic school closures with decreased social cohesion and increased disorder and crime in urban neighborhoods. We did not, however, attempt to measure the effects of traditional public schools or charter schools on the neighborhoods that we studied because we were unable to identify an instrumental variable enabling us to disentangle the location of public schools from neighborhood demographics (as we did for Catholic schools). See Margaret F. Brinig and Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 Notre Dame L Rev 887, 890 (2010); Margaret F. Brinig and Nicole Stelle Garnett, *Catholic Schools and Broken Windows*, 9 J Empirical Legal Stud 347, 348 (2012); Margaret F. Brinig and Nicole Stelle Garnett, *Catholic Schools, Charter Schools, and Urban Neighborhoods*, 79 U Chi L Rev 31, 33 (2012).

¹⁸⁵ See Part III.

¹⁸⁶ See Part III.

¹⁸⁷ For example, one anti-closure advocacy group in New York City is called “Stop School Closings! Stop Charter Takeovers!” See *Stop School Closings and Charter Takeovers, We demand quality resources and support for our public schools, not closings*

community organizer testified at the recent “Journey for Justice” hearings in Washington, D.C., “We are shutting down neighborhood institutions and giving education to private operators instead of sustainable school transformation in communities like ours.”¹⁸⁸

The probability that school-closure opponents are poised politically to achieve sweeping policy changes seems relatively low. To be sure, public outcry over the current wave of public school closures places acute political pressure on urban leaders. For example, New York City Mayor Bill De Blasio, in the first months of his administration, pledged to reverse his predecessors’ policy of school closures and to halt charter school expansion.¹⁸⁹ But, the outcry cannot alter the fact that the demographic, budgetary, and academic realities fueling public-school-closure trends persist. And, while broad-scale reversals in school choice policies (especially a reduction in the size of the charter school sector) might boost urban public school enrollment, such changes seem unlikely to occur in the short term. With enrollments topping 2 million school children (4.5 percent of the nation’s school-aged population), charter schools are a popular and well-established presence in the American education landscape—strong enough politically and financially to withstand the current full frontal attack by public school advocates.¹⁹⁰ Moreover, momentum for parental choice programs

and privatization, online at <http://stopschoolclosings.wordpress.com/about/> (visited Oct 18, 2014). See also Matheson, *Philadelphia Schools Enveloped in Anger, Frustration Amid Austere Budget*, Huffington Post (cited in note 28) (quoting parent activist as saying, “For 10 years we’ve lived with promises that privatization and choice options would be the magic bullet to a lot of the problems . . . What we found is chasing after these silver bullets has really drained schools of resources and starved them to the point of dysfunction.”); *Journey for Justice and “School Choice” week; just whose choices are being respected??*, NYC Public School Parents (Feb 2, 2013), online at <http://nycpublicschoolparents.blogspot.com/2013/02/journey-for-justice-during-school.html> (visited Oct 18, 2014) (“The reality is that the corporate reformers pushing ‘school choice,’ including Arne Duncan, Jeb Bush, Bill Gates, Michael Bloomberg and Michelle Rhee, are not interested in the real-life choices of parents; but instead in privatization.”).

¹⁸⁸ *Journey for Justice Transcript* at 20 (cited in note 28).

¹⁸⁹ Mayor De Blasio’s earliest policy decisions included reducing funding for charter schools and demanding that charter schools pay rent for space in closed public schools. See Ben Chapman, *De Blasio administration’s education budget yanks \$210M from charter schools, boosts prekindergarten programs*, NY Daily News (Feb 1, 2014), online at <http://www.nydailynews.com/news/politics/de-blasio-administration-education-budget-yanks-210m-charter-schools-article-1.1598689> (visited Oct 18, 2014).

¹⁹⁰ See Veronica Devore, *U.S. Charter School Enrollment Hits Milestone, But Questions Remain*, PBS NewsHour (Dec 7, 2011), online at <http://www.pbs.org/newshour/runtdown/2011/12/us-charter-school-enrollment-hits->

that include private schools appears to be building. Eighteen states and the District of Columbia currently have programs in place that make public funds available on a limited basis to students attending private schools.¹⁹¹

In addition to fighting a political battle for a reduction, rather than for an expansion, in parental choice policies, the option of curbing parental choice policies might be offered as an “equally effective” policy alternative to school closures in disparate impact litigation. That is, public school advocates may seek to use Title VI to force both federal and state officials to do the following: (1) curb the charter-school competition that drives down public school enrollment, (2) to opt for school transformation policies other than charter conversions,¹⁹² (3) cease or slow the pace of new charter school authorizations,¹⁹³ (4) refuse to lease closed buildings to charter school providers,¹⁹⁴ (5) require that charter schools prefer neighborhood students,¹⁹⁵ or (6) block the implementation or expansion of private-school choice programs. As one Chicago community activist explained:

Recently, the Kenwood Oakland Community Organization worked with 18 cities from around the country to file Title VI Civil Rights complaints with the

milestone-questions-remain.html (visited Oct 18, 2014).

¹⁹¹ See Glenn and Swindler, *School Choice Now* at 13 (cited in note 43).

¹⁹² See Emma Sokoloff-Rubin, *Support for a moratorium on school closures gains steam*, Chalkbeat New York (Jan 23, 2013), online at <http://ny.chalkbeat.org/2013/01/23/support-for-a-moratorium-on-school-closures-gains-steam/> (visited Oct 18, 2014) (discussing the effort to secure New York legislation ending school closures followed by charter conversions and co-locations).

¹⁹³ See Rosalind Rossi, *Schools chief: CPS should put one-year freeze on new charter schools*, Chicago Sun-Times (Sept 24, 2012), online at <http://www.suntimes.com/news/metro/4209995-460/schools-chief-cps-should-put-one-year-freeze-on-new-charter-schools.html> (visited Oct 18, 2014); Eleanor Chute, *Moratorium sought on new charter schools: State auditor says funding system is flawed*, Pittsburgh Post-Gazette (Oct 6, 2010), online at <http://www.post-gazette.com/education/2010/10/06/Moratorium-sought-on-new-charter-schools/stories/201010060207> (visited Oct 18, 2014); *Shuttered Public Schools* at 2 (cited in note 7) (“Philadelphia’s governing School Reform Commission . . . recently gave itself the power to cap charter expansions for five years.”).

¹⁹⁴ See *Shuttered Public Schools* at 2 (cited in note 7) (“Chicago, which once favored charters as occupants, plans to strictly limit the ability of buyers of vacant school properties to use them for charters.”).

¹⁹⁵ See Emma Brown, *All D.C. charter schools shouldn’t have to admit neighborhood kids first, panel says* (Wash Post Dec 14, 2012), online at http://www.washingtonpost.com/local/education/all-dc-charter-schools-shouldnt-have-to-admit-nearby-kids-first-panel-says/2012/12/14/4f994144-461c-11e2-8061-253bccfc7532_story.html (visited Oct 18, 2014).

U.S. Department of Education (DOE) alleging the . . . policy of promoting charter schools over neighborhood schools has a negative disparate impact on communities of color across the U.S.¹⁹⁶

In order to evaluate these claims, legal decision-makers (OCR and federal judges) must determine whether traditional public schools are equally effective—as both educational and community institutions—as charter and private schools participating in parental choice programs. The answer to those questions is, if not unknowable, sufficiently contextual to make them poorly suited to judicial resolution. This Section explains these complexities.

A. Maximizing the Feedback Effects Between School-Level and Neighborhood-Level Social Capital

Public school closure opponents' focus on the institutional form and "neighborhoodness" of the schools targeted for closure disregards the very real possibility that the level of social capital within a school (which is a strong predictor of academic success) influences a school's ability to function effectively as a neighborhood community institution.¹⁹⁷ This oversight is unfortunate because most of the schools slated for closure are in extreme academic distress—and distressed schools may find it difficult to generate neighborhood social capital.

As discussed previously, the available evidence suggests feedback effects between a school's success as an academic institution and its success as a community institution. High levels of social capital within a school—that is, strong networks and high levels of trust among members of school community—helps members of the school community overcome structural impediments to learning.¹⁹⁸ Schools with high levels of internal social capital are more likely to be high-performing than those with lower levels. In other words, schools with high levels of internal social capital ought to find it easier to generate external

¹⁹⁶ J. Brian Malone, *Save Our Communities and Children From Charter Schools*, Equal Voice: America's Family Story (Feb 26, 2013), online at <http://www.equalvoiceforfamilies.org/save-our-communities-and-children-from-charter-schools/> (visited Oct 18, 2014).

¹⁹⁷ See Part III.B.

¹⁹⁸ See Part III.C.2.

social capital as well. This is particularly plausible because parental networks are both an important source of neighborhood social capital and critical to the trust relationships that researchers link to academically successful schools. Conversely, schools with internal low social capital are less likely to be the locus of strong parental networks. There likely is at least a correlation between the inputs needed to make a school successful academically, including an academic program and an environment that foster within-school social capital, and the inputs needed to make a school a successful community institution. To the extent that low-academic performance is predicted by low-social capital, then low-performing schools (regardless of their institutional form) might be both ineffective educational institutions and ineffective community institutions. And, high-social capital schools (regardless of their institutional form) might be both more effective educational institutions and more effective community institutions.

If these feedback effects between a school's success as an educational institution and its success as a community institution do, in fact, exist, then high-social capital, non-neighborhood schools ultimately may prove to be better neighborhood citizens than low-social-capital, neighborhood schools. Low-social-capital schools may generate negative externalities even—perhaps especially—if the majority of students live nearby: For example, discipline problems, including school violence, may spill over into the surrounding community, and truancy and high dropout rates may result in more teenagers in a community during school hours. In contrast, high-social capital schools may generate positive externalities, even if the majority of students do not live nearby: Parents, students, and teachers embracing a school's communitarian aspirations are likely not only to avoid engaging in anti-social behavior, but also to engage in pro-social behavior, such as volunteering in community organizations. Parents involved in their children's schools are also more likely to be present in the community and able to monitor and keep antisocial behaviors in check. Finally, as the social-norms literature suggests, communities where pro-social norms are frayed need "norm entrepreneurs" who can shift the prevailing norms in a community and even trigger what Robert Ellickson has called a

“norm cascade” that causes more community members to embrace pro-social norms.¹⁹⁹ While empirical evidence on the role of schools as engines of social capital is—as explained above—scarce, it seems logical that high-social-capital schools, even those that are not neighborhood schools, may both *produce* norm entrepreneurs and *be* norm entrepreneurs themselves.

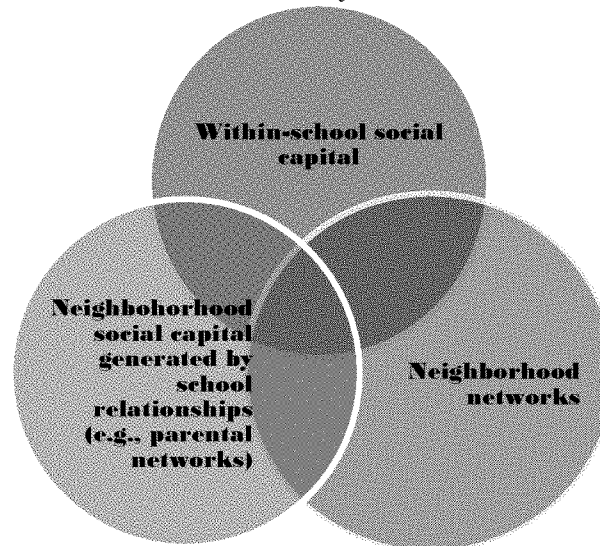
Of course, it remains possible—indeed likely—that high-social-capital schools perform best as community institutions when they also are neighborhood schools—that is, if the majority of students lived in the neighborhood where the school is located. If the *location* of social capital matters—and the literature connecting collective efficacy with neighborhood stability tends to suggest that, at least in urban communities, it does—then the opportunities for community building generated by high-social-capital neighborhood schools likely are particularly strong. In other words, good neighborhood schools may well make the best neighborhood institutions. To return to James Coleman’s classic formulation, social capital “inheres in the structure of relations between actors and among actors.”²⁰⁰ The more social networks overlap, the stronger the social capital generated by them. Thus, high-social-capital non-neighborhood schools may benefit urban communities, but high-social-capital neighborhood schools may benefit them more—if for no other reason than that the social networks fostered in effective schools will overlap with neighborhood social networks.

These relationships can be depicted in a simple Venn diagram, as in Figure 1.

¹⁹⁹ See Robert C. Ellickson, *The Market for Social Norms*, 3 Am L & Econ Rev 1, 26 (2001). See also Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* 26–29 (Harvard 1991); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 Mich L Rev 338, 340–42 (1997).

²⁰⁰ Coleman, 94 Am J of Soc at S98 (cited in note 174).

Figure 1. Schools as Community Institutions



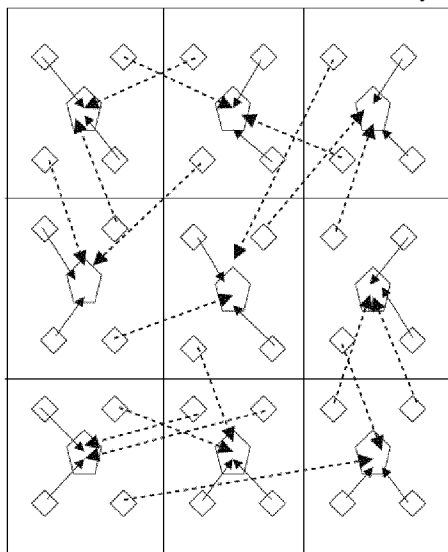
It seems reasonable to conclude that a school's effectiveness as a neighborhood institution increases along with the size of the center area of overlap. Obviously, the center area will increase along with both the "neighborhood-ness" of a school and the strength of the within-school social capital.

School-closure opponents' communitarian arguments assume that traditional public schools are more likely to be "neighborhood" schools than other schools, especially the charter and private schools participating in parental choice programs that frequently fill the physical and educational void left when traditional public schools close. This is the heart of Fischel's objection to school choice. Fischel acknowledges that school choice should not reduce the *aggregate* amount of social capital since the available evidence suggests that the social networks of children and parents in private and charter schools are no less extensive than public school-generated networks (and may in fact be more extensive).²⁰¹ Fischel worries, however, that

²⁰¹ See Fischel, 7 *Econ Gov* at 114 (cited in note 161). See also James H. Cox and Christopher Witko, *School Choice and the Creation of Social Capital Reexamined*, 52 *Am J Pol Sci* 142, 142 (2008); Kent L. Tedin and Gregory R. Weiher, *General Social Capital, Education-Related Social Capital, and Choosing Charter Schools*, 29 *Pol Stud J* 609, 612 (2011). There is a related literature exploring a different measure of social capital in public versus private schools, namely the level of civic engagement, political knowledge, and tolerance observed among students. Most of these studies find that private schools appear to do at least as good a job as public schools at preparing students to be engaged members of a diverse, democratic society. See, for example, Patrick J. Wolf, et al, *Private*

parental choice would result in more-diffuse social capital, since parental networks in chosen schools would be more diffuse, as depicted in Figure 2.

Figure 2. Parental Networks Generated by School Choice²⁰²



Schooling and Political Tolerance, in Paul E. Peterson and David E. Campbell, eds, *Charters, Vouchers, and Public Education* 268, 284 (Brookings Inst Press 2001) (finding that college students who attended private schools score more highly on measures of political tolerance); Jay P. Greene, *Civic Values in Public and Private Schools*, in Paul E. Peterson and Bryan C. Hassel, eds, *Learning from School Choice* 83, 100 (Brookings Inst Press 1998) (finding that students in private schools are more likely to participate in public service than public school students); Richard G. Niemi, Mary A. Hepburn, and Chris Chapman, *Community Service by High School Students: A Cure for Civic Ills?*, 45 *Polit Beh* 22, 53 (2000) (finding the same for religiously affiliated schools); Kenneth Godwin, Carrie Ausbrooks, and Valerie Martinez, *Teaching Tolerance in Public and Private Schools*, 82 *Phi Delta Kappa* 542, 542 (2001) (finding that private schools do a slightly better job than public schools of encouraging interethnic friendships and developing support for democratic norms); David E. Campbell, *Bowling Together: Private Schools, public ends*, 1 *EducationNext* 55 (Fall 2001), online at <http://educationnext.org/bowling-together/> (visited Oct 18, 2014) (noting that private school students were significantly more likely to engage in community service than public school students, were more likely to learn civic skills in school, were better informed about the political process, and were more politically tolerant than students in public schools; finding also that this result was driven by Catholic schools); Patrick J. Wolf, *Civics Exam: Schools of choice boost civic values*, 7 *EducationNext* 67 (Summer 2007), online at <http://educationnext.org/civics-exam/> (visited Oct 18, 2014) (reviewing twenty-one studies and concluding that “[t]he statistical record suggests that private schooling and school choice often enhance the realization of the civic values that are central to a well-functioning democracy. This seems to be the case particularly . . . when Catholic schools are the schools of choice”).

²⁰² Fischel, 7 *Econ Gov* at 115 (cited in note 161). The dotted lines in the figure indicate where the individual students attending school live.

As Fischel acknowledges, however, Figure 2 does not reflect school choice realities in the large urban school districts where public school closures are concentrated.²⁰³ Public education in the United States has been evolving away from geographically assigned neighborhood public schools for over a half a century. This evolution began with forced busing, next expanded to include magnet schools and other public-school-choice devices, and, more recently, has encompassed charter schools and a growing number of private-school-choice programs.²⁰⁴

In districts with public school choice, the standard practice continues to be that all students are assigned by geography to a traditional public school, but then given the opportunity to opt out of that assignment and enroll in a non-neighborhood school. However, there are variations on this practice. For example, in Boston, only 50 percent of seats in traditional public schools are reserved for students within a school's designated "walk zone."²⁰⁵ The percentage of students attending a non-assigned school varies by both location and student demographics. Nationwide, 20 percent of white students and 36 percent of black students report attending a non-assigned school.²⁰⁶ In urban districts, however, the percentage of students taking advantage of public school choice opportunities can exceed 50

²⁰³ See id at 114.

²⁰⁴ For example, 40 percent of central city school districts operate magnet schools. See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U Chi L Rev 201, 213 (2010). Seventy-one percent of central-city school districts offer intra-district school choice, permitting students to attend an in-district public school other than the one geographically assigned to them. Nationally, public-school choice was available to 46 percent of students in 2007, although the availability of these programs ranged from 55 percent in Western states to 33 percent in Northeastern states. See National Center for Educational Statistics, *Fast Facts: Public school choice programs*, online at <http://nces.ed.gov/fastfacts/display.asp?id=6> (visited Oct 18, 2014). Forty-two states and the District of Columbia have enacted charter school laws. See the Center for Education Reform, *Charter School Law*, online at <http://www.edreform.com/issues/choice-charter-schools/laws-legislation/> (visited Oct 18, 2014). Eighteen states and the District of Columbia make public funds available on a limited basis to students attending private schools. See Glenn and Swindler, *School Choice Now* at 13 (cited in note 43).

²⁰⁵ See Boston Public Schools, *Countdown to Kindergarten: Information Sheets School Year 2013-2014*, online at <http://www.bostonpublicschools.org/cms/lib07/MA01906464/Centricity/Domain/29/countdown%20to%20kindergaten%20info.pdf> (visited Oct 18, 2014).

²⁰⁶ Between 1993 and 2003, the percentage of students attending a "chosen" public school increased from 11 to 16 percent. See National Center for Education Statistics, *Fast Facts: Public school choice programs* (cited in note 204).

percent.²⁰⁷ If charter schools are added to the equation, public-school-choice participation rates are even higher, for the reasons highlighted above.

In this environment, it may soon become the case that chosen schools (that is, charter schools and private schools participating in parental choice programs) will be as likely to be “neighborhood” institutions as traditional public schools.²⁰⁸ Some states allow charter schools to prefer neighborhood students over others seeking admission, or require them to do so in certain circumstances.²⁰⁹ And, regardless of the legal rule,

²⁰⁷ See Grover J. “Russ” Whitehurst, *The Educational Choice Competition Index: Background and Results 2011*, (Brookings Nov 30, 2011), online at <http://www.brookings.edu/research/reports/2011/11/30-education-choice-whitehurst> (visited Oct 18, 2014); Yesenia Roberts, *53 percent of DPS students opt out of assigned campuses*, Denver Post (Apr 7, 2011), online at http://www.denverpost.com/news/ci_17789432 (visited Oct 18, 2014).

²⁰⁸ For this reason (among others), in fact, Fischel suggests that school choice makes the most sense in urban districts. See Fischel, *Making the Grade* at 231 (cited in note 163).

²⁰⁹ See New York City Charter School Center, *Enrollment FAQ*, online at <http://www.nyccharterschools.org/enrollment-faq#12> (visited Oct 18, 2014) (stating that New York law requires admission preference for “students who reside in the Community School District in which the charter school is located”); 105 ILCS § 5/27A-4(d):

Enrollment in a charter school shall be open to any pupil who resides within the geographic boundaries of the area served by the local school board, provided that the board of education in a city having a population exceeding 500,000 may designate attendance boundaries for no more than one-third of the charter schools permitted in the city if the board of education determines that attendance boundaries are needed to relieve overcrowding or to better serve low-income and at-risk students. Students residing within an attendance boundary may be given priority for enrollment, but must not be required to attend the charter school.

See also Ariz Rev Stat Ann § 15-184(C) (“A charter school that is sponsored by a school district governing board shall give enrollment preference to eligible pupils who reside within the boundaries of the school district where the charter school is physically located.”); Mo Ann Stat § 160.410.2(1) (“A charter school may establish a geographical area around the school whose residents will receive a preference for enrolling in the school, provided that such preferences do not result in the establishment of racially or socioeconomically isolated schools.”); NC Gen Stat Ann § 115C-238.29F(g)(3) (“[A]ny local school administrative unit in which a public school converts to a charter school shall give admission preference to students who reside within the former attendance area of that school.”); Oakland Unified School District, *Charter Schools Admissions Preference Eligibility Charter*, online at http://www.weebly.com/uploads/4/1/6/1/41611/ousd_charter_admissions_matrix_v1.pdf (visited Oct 18, 2014) (stating that under California law, preference must be given to students residing in the district where the charter is located); Emma Brown, *D.C. considers neighborhood admissions preference for charter schools*, (Wash Post Oct 3, 2012), online at http://www.washingtonpost.com/blogs/dc-schools-insider/post/dc-considers-neighborhood-admissions-preference-for-charter-schools/2012/10/03/b3934846-0cc6-11e2-bb5e-492c0d30bfff_blog.html (visited Oct 18, 2014).

many urban charter schools are, in fact, neighborhood schools. In fact, parents' preference for neighborhood charter schools may be one factor fueling concerns about racial isolation within the charter-school sector.²¹⁰ Although the legal definition of "neighborhood" varies by state, making it difficult to interpret charter school data uniformly, New Orleans charter schools draw nearly 80 percent of their students from defined neighborhood catchment boundaries,²¹¹ New York City charter schools draw over 70 percent of their students from "community school district zones,"²¹² Chicago's draw an average of 63 percent of their students from "the neighborhood,"²¹³ and Washington, D.C.'s draw an average of 57 percent of students from their neighborhood cluster or an adjacent one.²¹⁴ Moreover, although there is (to my knowledge) no available data tracking whether and how frequently students participating in voucher or tax-credit programs select schools near their homes, it seems likely that neighborhood schools are appealing in this context as well. Not only is free transportation usually not provided by private

²¹⁰ See Ritter, et al, 10 *EducationNext* 69 (cited in note 20); Frankenberg, et al, *Choice without Equity* at 4 (cited in note 21); Chad d'Entremont and Charisse Gulosino, *Circles of influence: How neighborhood demographics and charter school locations influence student enrollments* *2 (Nat Center for the Study of Privatization in Educ 2008), online at http://ncspe.org/publications_files/OP160.pdf (visited Oct 18, 2014).

²¹¹ See *The State of Public Education in New Orleans* at 24 (cited in note 63); Louisiana Believes, *RSD's New Enrollment System Matches 84 percent of Kindergarten and 9th Grade Applicants to Top School Choices* (May 9, 2012), online at <http://www.louisianabelieves.com/newsroom/news-releases/2012/05/09/rsd-s-new-enrollment-system-matches-84-percent-of-kindergarten-and-9th-grade-applicants-to-top-school-choices> (visited Oct 18, 2014).

²¹² For online profiles, see New York City Charter School Center, *Browse all Charter Schools in New York City*, online at <http://www.nyccharterschools.org/school-search> (visited Oct 18, 2014). See also Caroline M. Hoxby, Sonali Murarka, and Jenny Kang, *How New York City's Charter Schools Affect Achievement* *I-2 (The New York City Charter Schools Evaluation Project Sept 2009), online at http://users.nber.org/~schools/charterschoolseval/how_NYC_charter_schools_affect_achievement_sept2009.pdf (visited Oct 18, 2014).

²¹³ Chicago Public Schools Office of New Schools, *2008-09 Charter and Contract Schools Performance Report* 6 (Dec 2009), online at http://cps.edu/NewSchools/Documents/2008-2009_PerformanceReport.pdf (visited Oct 18, 2014) (reporting that, in 2009, Chicago charter schools drew, on average, 63 percent of students "from the communities in which the schools are located").

²¹⁴ See Illinois Facilities Fund, *Quality Schools* at 47 (cited in note 68). See also District of Columbia Public Charter School Board, *Neighborhood Preference Task Force Report for the DC City Council* 31 (Dec 14, 2012), online at http://www.dcpsb.org/data/files/data_center/neighborhood%20preference%20task%20force%20report_12%2014%20121.pdf (visited Oct 18, 2014) (showing enrollment percentage of neighborhood students according to distance from school building).

schools, making neighborhood schools attractive to parents, but also a substantial proportion of students participating in school choice programs opt to attend religious schools, which have been imbedded in urban neighborhoods for decades.

All of this suggests that the community consequences of public school closures may turn on what comes to fill the physical and educational space previously occupied by closed public schools. If higher-performing, higher-social-capital charter and private schools take the place of struggling traditional public schools, then community consequences of public school closures will be minimized—and may even be positive—especially if these schools also draw students from the surrounding neighborhood. If closed school buildings remain empty, on the other hand, then these consequences will be exacerbated. I remain agnostic about whether chosen schools ultimately will prove to be more effective community institutions than their traditional public school predecessors. While there is evidence that private schools, especially urban Catholic schools, generate both within-school and neighborhood social capital, these schools are, like traditional public schools, closing in urban neighborhoods—a trend that is likely to continue unless private-school choice continues to expand.²¹⁵ As a result, the educational and physical space created by public school closures will be filled (or not filled), at least in the short term, by charter schools. Evidence on charter schools' academic record is mixed.²¹⁶ Although charter-school parents appear to exhibit higher levels of within-school social capital among parents than traditional public schools, this effect could be the result of selection bias.²¹⁷ Regardless of academic performance,

²¹⁵ See Peter Meyer, *Can Catholic Schools Be Saved?: Lacking nuns and often students, a shrinking system looks for answers*, 7 *EducationNext* 12 (Spring 2007), online at <http://educationnext.org/can-catholic-schools-be-saved/> (visited Oct 18, 2014).

²¹⁶ See, for example, US Department of Education, *The Evaluation of Charter School Impacts: Final Report* xvii (June 2010), online at http://www.mathematica-mpr.com/publications/pdfs/education/charter_school_impacts.pdf (visited Oct 18, 2014) (finding that charter middle schools did not outperform public schools, but did have positive effect on urban minority students math scores); Ron Zimmer, et al, *Charter Schools in Eight States: Effects on Achievement, Attainment, Integration, and Competition* xii–xiv (RAND Education 2009), online at http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG869.pdf (visited Oct 18, 2014) (finding no academic effects on test scores resulting transfer from public to charter schools, but that attending a charter high school substantially increases the probability of graduating and enrolling in college).

²¹⁷ See Cox and Witko, 52 *Am J Pol Sci* at 143 (cited in note 201); Tedin and Weiher,

parents whose children enroll in charter schools or participate in school choice programs express higher satisfaction with their chosen schools, which may be attributable in part to higher social capital in those schools.²¹⁸

At this point, it is impossible to know for certain how frequently closed traditional public schools will be replaced by schools of choice that are more-effective community institutions. Clearly some will be, and others will not. But, given the demographic and budgetary realities facing urban school districts, effort to prevent the closure of traditional public schools by curbing parental choice policies instead have the effect of leaving neighborhoods *without any schools*.

B. Minimizing the Dual “Abandonment” Problems

This is unfortunate since the most serious community consequences of school closures likely result when school buildings remain empty. Although the community consequences of transitioning from geographically assigned schools to chosen ones are uncertain, the community consequences of large, empty buildings—both economic and sociological—are not. Large, empty buildings can quickly decay, becoming a source of physical and social blight and a symbol of community abandonment.

Unfortunately, many of the policies that school-closure advocates support in the name of decreasing the number and frequency of public school closures likely will have the perverse effect of increasing the risk that closed school buildings will remain empty. Charter schools represent the largest market for closed school buildings, and opponents’ policy antidotes to school closures would dramatically shrink that market. In the Pew study, for example, 42 percent of successfully repurposed closed school buildings housed a charter school.²¹⁹ The reasons for this are obvious—school buildings are built to house schools and therefore have the space and amenities needed by school operators.²²⁰ Charter schools frequently also have financial advantages over other would-be purchasers, including the

²¹⁸ Pol Stud at 610 (cited in note 201).

²¹⁹ See Fischel, *Making the Grade* at 263–64 (cited in note 163).

²²⁰ See *Shuttered Public Schools* at 11 (cited in note 7).

²²⁰ See *id.* at 12.

availability of both public and private philanthropic funding.²²¹ Thus, a willingness to sell or lease closed buildings to charter schools minimizes the risk that school buildings will remain vacant after public schools are closed.

Both legal and political factors can complicate the transfer of closed schools to charter operators. On the one hand, many districts have policies in place that prioritize educational uses, including charter schools, of closed schools. Philadelphia, for example, has a formal policy requiring that closed buildings be offered to educational or nonprofit groups at discount prices.²²² And laws in Oklahoma, Ohio, Georgia, and Washington, D.C. give charter operators the right to bid on closed schools before any other would-be purchasers.²²³ Other districts, however, seek to constrain competition by refusing to sell or lease public school buildings to charter operators. For years, the Milwaukee Public Schools refused to sell or lease buildings to charter or private schools, prompting the state legislature to enact a law in 2011 giving the City of Milwaukee the power to sell school buildings over the district's objection.²²⁴ The Chicago Public Schools' director of real estate reported in 2011 that the district's schools will be sold with deed restrictions banning K-12 uses for forty years.²²⁵ The Ohio Supreme Court recently invalidated the Cincinnati School District's attempt to use deed restrictions to ban charter schools from operating in former public school buildings.²²⁶ And, the St. Louis Public Schools has a practice of inserting a "no school" clause in a lease or contract for sale when it is suspicious that a buyer will "flip" a building to a charter operator.²²⁷

School closures only increase pressure on districts to implement these policies, since public school advocates see charter schools as a primary cause of the shrinking public school sector. The pressure to curb charter competition, moreover, is hardly limited to preventing charter schools from occupying

²²¹ See *id.* at 13.

²²² See *id.* at 8.

²²³ See *Shuttered Public Schools* at 8 (cited in note 7).

²²⁴ See *id.* at 9.

²²⁵ See *id.*

²²⁶ See *Cincinnati City School District Board of Education v Connors*, 974 NE2d 78, 85 (Oh 2012).

²²⁷ See *Shuttered Public Schools* at 18 (cited in note 7).

closed public schools. In the wake of school closures, public school officials also face pressure to curb the growth of the charter school sector, a policy that will shrink the market for closed school buildings, and increase the likelihood that they remain empty.

These policies all aim to maximize public school investment in urban neighborhoods. But, to the extent that closures will continue—and, it seems almost certain that they will—these policies also may exacerbate the negative community effects of public school closures. Not only can empty school buildings become a source of blight and a tangible symbol of abandonment, but the policies sought by public school proponents ultimately may force financially pressed school districts to close schools instead of restructuring them. This is unfortunate because the symbolic message of “abandonment” presumably ought to be less acute when schools are restructured rather than permanently closed. Indeed, it is plausible that such reorganizations—for example, from a traditional public school to a magnet or charter school—might send the message that public education authorities are recommitting to, rather than abandoning, a community. After all, although opinions vary strongly, these schools are restructured because existing educational institutions have failed urban residents.²²⁸ Competing views of these policies, in fact, only serve to emphasize the difficulty that federal judges will face if asked to weigh their relative merits. The fact is that federal judges are ill-situated to decide whether public officials are mistakenly investing in charter schools at the expense of neighborhood schools (or vice-versa); this question is one best left to the political process.

V. CONCLUSION

The educational landscape of American cities is shifting dramatically, and in real time. These trends undoubtedly will have consequences for urban neighborhoods, but these consequences should not become the subject of federal civil

²²⁸ But see Alliance for Quality Education, *NYC Parents & Students Join National “Journey for Justice”* (cited in note 28) (quoting public school parent Ocyntia Williams, “In NYC, . . . forced co-locations [of smaller specialized schools] have been divisive, hurtful and a failed strategy. The toxic environment created leaves everyone in the schools feeling broken.”).

rights litigation. Opponents of school closures, and the policies that drive them, paint a bleak picture of urban communities devastated by the withdrawal of traditional public schools. This Article has presented evidence suggesting that the community consequences of education policies favoring parental choice are not necessarily as dire as school-closure opponents portend, as well as suggesting that opponents' "antidotes" to school closures may themselves have perverse consequences for urban neighborhoods. In some cases, neighborhood public schools may be better neighborhood citizens than charter or private schools participating in parental choice programs. In others, they may not be. Moreover, since parental choice policies are only one factor contributing to school closures, curtailing them may, perversely, be more likely to increase the chances that school closures will have negative community consequences than to dramatically curb the number of future school closures. Policies that curb parental choice in the name of "saving" traditional schools have two unfortunate side effects. They reduce the likelihood that schools that are unsuccessful as both educational and community institutions will be replaced by those that are more-successful ones. And, they increase the likelihood that closed schools will remain *empty*.