

# Affordable Private Education and the Middle Class City

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*City leaders, who have struggled for decades with public education reform, are well aware that good schools are needed to attract residentially mobile families to urban neighborhoods. But, while critically important, public education reform alone is not enough. Rather, state and local officials hoping to make our central city neighborhoods attractive places to raise children should come to understand that affordable private schools serve an important urban-development function: they partially unbundle the residential and educational decisions of families with children. Most middle class families, however, cannot afford to send their children to private schools. Thus, state and local officials hoping to make our central city neighborhoods attractive places to raise children should consider employing a familiar urban development tool—tax incentives—to make quality private schools more financially accessible to middle-income families.*

## INTRODUCTION

The University of Chicago operates private elementary and secondary schools on its main campus in Chicago's Hyde Park neighborhood. Founded over a century ago by John Dewey, the University of Chicago Laboratory Schools no longer serve their original purpose of training teachers in cutting-edge educational theory.<sup>1</sup> But, they remain an important resource for the University, which effectively guarantees admission for all faculty members' children and also pays half of the approximately \$20,000 tuition that the Lab Schools charge for the children to attend.<sup>2</sup> Undoubtedly, guaranteed admission into an elite private school at a dramatically cut rate helps the University attract outstanding faculty members. But the Lab Schools—and the University's tuition

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<sup>1</sup> See University of Chicago Laboratory Schools, *About the Lab Schools*, online at <http://www.ucls.uchicago.edu/about-lab/index.aspx> (visited Dec 19, 2009) (“[L]earning by doing has guided the efforts of the University of Chicago Laboratory Schools since Professor John Dewey first began testing his educational theories in 1896.”). The University closed its Department of Education in 1997, long after the Laboratory Schools had evolved into elite private schools with only tenuous connections to the department. See Ethan Bronner, *End of Chicago's Education School Stirs Debate*, NY Times A27 (Sept 17, 1997).

<sup>2</sup> See University of Chicago Laboratory Schools, *Schedule of Tuition 2009–2010 School Year*, online at <http://www.ucls.uchicago.edu/admission/tuition/index.aspx> (visited Oct 22, 2009). Information on the tuition benefit can be found at *University of Chicago Educational Assistance Plan*, online at <http://hr.uchicago.edu/benefits/spds/Education.pdf> (visited Oct 22, 2009).

subsidy policy—also make Hyde Park a more attractive place to live. Absent the Lab Schools, and the University’s generous tuition benefit, more faculty members would opt to commute from suburbs with high-performing public schools. And Hyde Park, which has already weathered its share of urban woes, would suffer as a result.

City leaders, who have struggled for decades to reform urban public schools, are well aware that quality educational options are needed to attract residentially mobile families to urban neighborhoods. But it is an animating assumption of this Article that, while critically important, public education reform alone is not enough. Rather, state and local officials hoping to make our central city neighborhoods attractive places to raise children should learn from the institution sponsoring this Symposium. That is, they should come to understand private schools as an important part of the local government toolkit. It is undisputable that, for many parents, a decision to raise children in a major city also entails a decision to send them to a private school. This is not a new reality: for much of the twentieth century, parochial schools anchored stable urban neighborhoods, helping to forestall middle class families’ migration to the suburbs.<sup>3</sup> Today, affordable private schools continue to provide parents who prefer to live in cities with alternatives to suburban public schools. State and local officials seeking to convince middle class families to make their lives in urban neighborhoods should therefore consider employing a familiar urban development tool—tax incentives—to help make quality private education more affordable.

This Article proceeds in three parts. Part I builds the case for a middle class city. Many urban development strategies pin hopes of central city renewal on the “creative class”—the well-educated, the young and unattached, gays and lesbians—who might be attracted to an urban lifestyle and who do not face the life-cycle pressures that draw many middle class urbanites to the suburbs.<sup>4</sup> This “cool cities” strategy is not unreasonable:<sup>5</sup> a plausible case can be made that the downtown rebound experienced in recent years has been fueled by a growing preference among elites for city life, especially the informal social interactions enabled by dense, mixed-land-use environments.<sup>6</sup>

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<sup>3</sup> See notes 53–56 and accompanying text.

<sup>4</sup> See generally Richard Florida, *The Rise of the Creative Class* (Basic Books 2002).

<sup>5</sup> See Joel Kotkin, *Uncool Cities*, *Prospect Magazine* (Oct 2005), online at <http://www.prospectmagazine.co.uk/2005/10/uncoolcities> (visited Oct 22, 2009) (describing efforts by cities to appeal to young professional demographics).

<sup>6</sup> See Edward L. Glaeser and Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 *Urban Stud* 1275, 1286, 1297 (2006).

Still, while many central cities' fortunes improved during the last decade and a half—importantly, concentrated poverty declined dramatically and population losses began to reverse<sup>7</sup>—most cities continue to lose middle class families, even as they gain wealthier ones. This latter trend is troubling. As elaborated in greater detail below, there are reasons to believe that middle class families are a cornerstone of sustainable urban health—especially the connection between residential tenure, homeownership, and healthy urban neighborhoods.

Part II demonstrates the centrality of quality educational options, including affordable private schools, to the goal of building a middle class city. Middle class families choose suburban rather than urban lives for many reasons—crime and the fear of crime, local government efficiency and responsiveness, lower housing prices, more space, yards, access to mass retail outlets—the list goes on and on. But there is no question that public school quality strongly influences middle class parents' residential decisions. Many young parents migrate to suburbs from cities as their children approach school age;<sup>8</sup> many, many more shun cities altogether in anticipation of future schooling needs.<sup>9</sup> And, importantly, families that remain in city neighborhoods frequently choose to invest in private education for their children.<sup>10</sup> Most middle class families, however, cannot afford to send their children to private schools like the Lab Schools. The average private school tuition in the United States is \$6,600.<sup>11</sup> But this figure would be much higher were it not for the fact that about half of private school students are enrolled in Catholic schools, which charge, on average, less than \$5,000,<sup>12</sup> and which are, unfortunately, rapidly disappearing from urban neighborhoods.<sup>13</sup> The aver-

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<sup>7</sup> See notes 17, 18, and 58.

<sup>8</sup> See, for example, Elizabeth Warren and Amelia Warren Tyagi, *The Two-Income Trap: Why Middle Class Parents Are Going Broke* 22–28 (Basic Books 2003).

<sup>9</sup> See, for example, David P. Varady and Jeffrey A. Raffell, *Selling Cities: Attracting Home-Buyers through Schools and Housing Programs* 67–89 (SUNY 1995).

<sup>10</sup> See, for example, 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); Ingrid Gould Ellen, Amy Ellen Schwartz, and Leanna Stiefel, *Can Economically Integrated Neighborhoods Improve Children's Educational Outcomes?*, in Margery Austin Turner, Howard Weil, and Harold Wolman, eds, *Urban and Regional Policy and Its Effects* 181, 200 (Brookings 2008) (noting that, in 2000, 18.4 percent of elementary and secondary students in New York City were enrolled in private schools and that the probability of private-school attendance increases as income levels rise). See also note 76 and accompanying text.

<sup>11</sup> Council for American Private Education, *Facts and Studies: Average Private School Tuition, 2003–2004*, online at <http://www.capenet.org/facts.html> (visited Oct 21, 2009).

<sup>12</sup> Id (reporting that average Catholic school tuition was \$4,254 in 2003–2004).

<sup>13</sup> See, for example, Peter Meyer, *Can Catholic Schools Be Saved?*, *Educ Next* 13, 15 (Spring 2007) (noting that, in the span of five years, Catholic elementary schools in twelve urban

age tuition at a nonsectarian private high school in the US is \$17,413,<sup>14</sup> more than one-third of the median household income.<sup>15</sup>

In light of these financial realities, Part III suggests a use of tax policy to help make private schools accessible to those of modest means. State and local governments already rely on tax policy to attract businesses and residents to center cities. In my view, they should also consider using tax policy to attract and retain middle class families by reducing the financial burden of private school tuition. Specifically, the Article proposes that state or city governments grant tax credits for charitable donations to nonprofit organizations that award scholarships to children attending private elementary and secondary schools. Seven states already have such “scholarship tax credit” programs in place,<sup>16</sup> which could either be replicated in other states or adapted to the local government setting. By increasing the affordability and diversity of their educational options, scholarship tax credits can partially unbundle middle class families’ residential and educational decisions. Admittedly, this proposal is not a silver bullet to solve all urban problems, but rather is an incremental suggestion about how to begin to reverse a trend that feeds those problems—the fact that fewer and fewer middle class families with children choose to put down roots in urban neighborhoods.

### I. A CASE FOR A MIDDLE CLASS CITY

Not long ago, an urban rebound was widely regarded as an unrealistic pipedream; most polite observers believed that our cities were so mired in poverty, crime, and disorder as to be unredeemable. Nevertheless, in recent years, many center cities enjoyed an unexpected ascendancy. As a result, those who believed two decades ago that urban centers were socially and economically obsolete began to confront

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dioceses had lost almost 20 percent of their students); Sol Stern, *Save the Catholic Schools!*, 2 City J 74, 74–83 (2007).

<sup>14</sup> See Council for American Private Education, *Average Private School Tuition, 2003–04* (cited in note 11).

<sup>15</sup> See US Census Bureau News, *Household Income Rises, Poverty Rate Unchanged, Number of Uninsured Down* (Aug 26, 2008), online at [http://www.census.gov/Press-Release/www/releases/archives/income\\_wealth/012528.html](http://www.census.gov/Press-Release/www/releases/archives/income_wealth/012528.html) (visited Oct 24, 2009) (reporting that the real median income in 2007 was \$50,233).

<sup>16</sup> See Alliance for School Choice, *2008–09 School Choice Yearbook 20* (2009), online at [http://www.allianceforschoolchoice.org/UploadedFiles/ResearchResources/Yearbook\\_02062009\\_finalWEB.pdf](http://www.allianceforschoolchoice.org/UploadedFiles/ResearchResources/Yearbook_02062009_finalWEB.pdf) (visited Oct 22, 2009) (noting that Arizona, Florida, Georgia, Iowa, Pennsylvania, and Rhode Island have scholarship tax credit programs). Indiana became the seventh state to adopt scholarship tax credits in June 2009. See Russ Pullman, *They Got It Right on These Issues*, Ind Star A10 (July 10, 2009).

communities that appeared to return to life just as they appeared to be hanging on by a thread at the edge of the abyss. Not only was the 1990s the best postwar decade for those American cities that previously suffered the most devastating population losses, but the population growth of many downtowns—the most “urban” areas—outpaced overall population growth in many cities.<sup>17</sup> Some cities experienced overall population losses but still saw their *downtown* population grow.<sup>18</sup> Even poor neighborhoods began to regenerate, sometimes enough to raise gentrification concerns.<sup>19</sup> And, while the current economic downturn has slowed the pace of urban development—and the recent wave of mortgage foreclosures left city officials dazed<sup>20</sup>—urban leaders have reason to remain cautiously optimistic about the future.

As Richard Schragger’s contribution to this Symposium illustrates, the reasons for the urban rebound are complex and somewhat mysterious.<sup>21</sup> Edward Glaeser and Joshua Gottlieb, however, provide a plausible explanatory summary of the phenomenon.<sup>22</sup> They argue that large cities rebounded because elites increasingly developed an affinity for urban life, especially the social interactions and consumer amenities enabled by dense, mixed-land-use urban environments.<sup>23</sup> The reasons for the shift in lifestyle preferences, Glaeser and Gottlieb posit, include rising incomes and educational attainment and, importantly, a dramatic decline in central city crime rates.<sup>24</sup> Crime and disorder are two major disutilities of urban life; they prevent city dwellers from enjoying urban amenities and decrease opportunities for the informal social interactions that city life can foster. Glaeser and Gottlieb argue that, over the past two to three decades, as crime plummeted and urban officials began to focus on improving the quality of life in public

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<sup>17</sup> Rebecca R. Sohmer and Robert E. Lang, *Downtown Rebound*, in Bruce Katz and Robert E. Lang, eds, 1 *Redefining Urban and Suburban America* 63, 65 (Brookings 2003).

<sup>18</sup> *Id.* at 65–67.

<sup>19</sup> Compare, for example, J. Peter Byrne, *Two Cheers for Gentrification*, 46 *Howard L J* 405, 406 (2003) with John A. Powell and Marguerite Spencer, *Giving Them the Old “One-Two”*: *Gentrification and K.O. of Impoverished Urban Dwellers of Color*, 46 *Howard L J* 433, 434–45 (2003).

<sup>20</sup> See, for example, Julie Kay, *Empty Homes Spur Cities’ Suits: Banks, Lenders, Sued to Recover Costs*, 30 *Natl L J* 1 (May 5, 2008), online at <http://www.law.com/jsp/article.jsp?id=1202421240174> (visited Oct 21, 2009).

<sup>21</sup> Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 *U Chi L Rev* 311, 320–31 (2010).

<sup>22</sup> Glaeser and Gottlieb, 43 *Urban Stud* at 1281–86 (cited in note 6).

<sup>23</sup> *Id.* at 1288–93.

<sup>24</sup> *Id.* at 1276.

places, city dwellers (and would-be city dwellers) found it easier to enjoy the advantages of urban life.<sup>25</sup>

#### A. Beyond Cool Cities

Glaeser and Gottlieb's hypothesis provides some support for what social critic Joel Kotkin derisively refers to as "the cool city strategy."<sup>26</sup> Many cities now pin urban development hopes on promoting a "hip" image in order to compete for young, childless professionals. The aesthetics of these efforts were captured well in a 2003 *New York Times* article, which reported that even "boring" cities were "on a hunt for ways to put sex in the city":

In the same way that companies during the dot-com boom tried to present their offices as playgrounds, adding slides and masseurs, cities are now getting in on the act. In Michigan, Gov. Jennifer M. Granholm encouraged the mayors of 200 towns to form "cool commissions" to attract and retain the state's young people. In Baltimore, a nonprofit group called Live Baltimore Home Center, partly financed by the city, has gone after young professionals as "low hanging fruit."<sup>27</sup>

The logic of this strategy is obvious: seek out residents who can "risk moving to neighborhoods with subpar school systems, fixer-upper housing stock or a little street crime."<sup>28</sup> The cool city strategy draws intellectual heft from Richard Florida's influential 2002 book, *The Rise of the Creative Class*.<sup>29</sup> Florida argues that, in order to thrive, modern cities must attract "the creative class"—the young and well educated, artists, high-tech professionals, gays and lesbians.<sup>30</sup> Cities, according to Florida, "have become the prime location for the creative lifestyle and the new amenities that go with it."<sup>31</sup> And, importantly, cities are benefiting from the energy provided by creative young professionals, who stay single longer than in previous generations, and who prefer to live in diverse, urban neighborhoods.<sup>32</sup>

In his contrarian historical account of cities and suburbs, Robert Bruegmann contextualizes this strategy, arguing that the very econom-

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<sup>25</sup> Id at 1290–93.

<sup>26</sup> Kotkin, *Uncool Cities* (cited in note 5).

<sup>27</sup> John Leland, *On a Hunt for Ways to Put Sex in the City*, NY Times F1, F9 (Dec 11, 2003).

<sup>28</sup> Id at F9.

<sup>29</sup> Florida, *The Rise of the Creative Class* at 67–89 (cited in note 4).

<sup>30</sup> Id.

<sup>31</sup> Id at 287.

<sup>32</sup> Id at 67–89, 287.

ic changes lamented by many urban scholars—especially the decline in the urban industrial base—ultimately may save our cities.<sup>33</sup> Freed from the congestion, pollution, and disease that once characterized urban life, Bruegmann suggests, cities will become increasingly more attractive to wealthy individuals who might previously have chosen to live in the suburbs.<sup>34</sup> Bruegmann hypothesizes that cities may thrive by abandoning their traditional roles as centers of social, cultural, and economic activity, and becoming temporary way stations for the unattached and gentrified playgrounds for the wealthy—“essentially resort areas filled with second homes.”<sup>35</sup> In fact, he argues, “[i]t is quite possible that sprawl could recede everywhere as more citizens become affluent enough to live like the residents of the Upper East Side.”<sup>36</sup>

Even assuming that the “creative class” is attracted to urban life (despite the fact that most of its members were raised in suburbs),<sup>37</sup> there are limits to the lure of hipness. In an influential article, for example, Joel Kotkin argues that, while a handful of cities may “find their sustenance as amusement parks for adults,” reliance on “the lure of coolness” dooms most cities to failure.<sup>38</sup> There are reasons why the most successful cities focus on important, but decidedly “uncool,” issues like housing, education, and public safety. The fact remains that most young professionals, even hip ones, do not remain unattached and childless forever.<sup>39</sup> When their life circumstances change, they face the same pressures and demands that all parents face—the need for more space, for a yard, for good public schools. And, these pressures inevitably lead many of them to move to the suburbs. Not surprisingly, therefore, the fastest-growing cities tend to be car-friendly, sprawling, and located in the fastest-growing regions—the West and Southwest.<sup>40</sup> Many denser, public-transit oriented northeastern cities continue to

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<sup>33</sup> Robert Bruegmann, *Sprawl: A Compact History* 222–23 (Chicago 2005).

<sup>34</sup> *Id.* at 221.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 *Mich L Rev* 277, 290–92, 301 (2007).

<sup>38</sup> See Kotkin, *Uncool Cities* (cited in note 5).

<sup>39</sup> For example, growing numbers of gay and lesbian couples also face child rearing responsibilities. In 2000, 22.3 percent of same-sex male households and 34.3 percent of same-sex female households reported having children under eighteen. US Census Bureau, *Married-Couple and Unmarried Partner Households: 2000* 9 table 4 (Feb 2003), online at <http://www.census.gov/prod/2003pubs/censr-5.pdf> (visited Oct 22, 2009).

<sup>40</sup> Edward L. Glaeser and Jesse M. Shapiro, *City Growth: Which Places Grew and Why*, in Katz and Lang, eds, 1 *Redefining Urban and Suburban America* 13, 14–15 (cited in note 17).

lose residents,<sup>41</sup> although at a slower rate than in previous decades.<sup>42</sup> As Glaeser and Gottlieb observe, “[T]he 20 years since 1980 have been much better for America’s biggest cities than the 20 years before 1980. While this is surely true, it should not blind us to the fact that the general trend to sun and sprawl has continued relatively unabated.”<sup>43</sup> Creativity may be a key to modern economic success, but, as Kotkin quips, “It turns out that many of the most prized members of the ‘creative class’ are not 25-year-old hip cools but fortysomething adults who, particularly if they have children, end up gravitating to the suburbs and more economically dynamic cities like Phoenix, Boise, Charlotte or Orlando.”<sup>44</sup>

#### B. Middle Class Families, Collective Efficacy, and Neighborhood Stability

Retaining families with children is not just important for cities’ long-term economic prospects. It also promises to increase the stability of urban neighborhoods. I leave to one side the most obvious reasons why this is so—including the uncontested benefits of breaking up pockets of concentrated poverty and the connections between residents’ wealth and educational attainment and neighborhood stability—and focus instead on the link between rooted middle class families and collective efficacy. Collective efficacy—a term used by sociologists and social psychologists to describe the “ability of neighborhoods to realize the common values of residents and maintain effective social controls”—is perhaps best understood as applied, neighborhood social capital.<sup>45</sup> Not surprisingly, neighborhoods with high levels of collective efficacy are healthier than those with lower levels: numerous studies demonstrate that neighborhoods with low levels of collective efficacy exhibit more signs of social distress than those with higher levels—for

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<sup>41</sup> Id at 19 (showing that the cities which lost more than 2 percent of their population between 1990 and 2000 tended to be located in the northeast and “Rust Belt”).

<sup>42</sup> See Patrick A. Simmons and Robert E. Lang, *The Urban Turnaround*, in Katz and Lang, eds, 1 *Redefining Urban and Suburban America* 51, 54–55 (cited in note 17) (discussing the slowing in the rate of decline from the 1970s to the 1990s).

<sup>43</sup> Glaeser and Gottlieb, 43 *Urban Stud* at 1285 (cited in note 6).

<sup>44</sup> Kotkin, *Uncool Cities* (cited in note 5).

<sup>45</sup> Robert Sampson, Stephen Raudenbush, and Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 *Science* 918, 918 (1997). See also Tracey Meares, *Praying for Community Policing*, 90 *Cal L Rev* 1593, 1604 (2002).



example, they are more dangerous and disorderly, and residents are more fearful.<sup>46</sup>

There are a number of things that cities can do to bolster collective efficacy,<sup>47</sup> including taking steps to attract and retain residents who are likely to purchase homes and put down roots in their neighborhoods. This is because collective efficacy increases along with residential tenure and homeownership. For example, in a major study of 343 Chicago neighborhoods, Robert Sampson, Stephen Raudenbush, and Felton Earls found that residential stability, measured by average residential tenure and levels of homeownership, was one of three major factors explaining neighborhood variation in collective efficacy.<sup>48</sup> They also found that collective efficacy, in turn, mediated the negative effects of the other two factors—economic disadvantage and immigration—enough to reduce violent victimization in a community.<sup>49</sup> These findings are consistent with other social science research linking residential tenure and homeownership, especially of single-family homes, with high levels of collective efficacy.<sup>50</sup> This connection between homeownership and residential tenure is, of course, easily explained. Not only do homeowners have economic incentives to organize to address neighborhood problems, but social integration into a neighborhood naturally increases over time, providing opportunities to build trust relationships.<sup>51</sup> All of these realities suggest that the most successful, safest city neighborhoods ultimately will be the kinds of places where people choose to make their lives long term—to live, work, and raise families.

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<sup>46</sup> See, for example, Pamela Wilcox, et al, *Busy Places and Broken Windows*, 45 *Sociol Q* 185, 188–89 (2004); Matthew R. Lee and Terri L. Earnest, *Perceived Community Cohesion and Perceived Risk of Victimization*, 20 *Just Q* 131, 138 (2003); Chris L. Gibson, et al, *Social Integration, Individual Perceptions of Collective Efficacy and the Fear of Crime in Three Cities*, 19 *Just Q* 537, 540–42 (2002) (collecting literature).

<sup>47</sup> Many modern policing techniques, especially those that focus on curbing disorder and increasing the quality and frequency of police-citizen interactions, also seek to increase collective efficacy. See Nicole Stelle Garnett, *Ordering the City: The Restoration of Urban America* 140–46 (Yale 2009).

<sup>48</sup> Sampson, Raudenbush, and Earls, 277 *Science* at 923 (cited in note 45).

<sup>49</sup> *Id.* This is particularly important because crime and the fear of crime tend to undermine residential stability. See Julie Berry Cullen and Steven D. Levitt, *Crime, Urban Flight, and the Consequences for Cities*, 81 *Rev Econ & Stat* 159, 167 (1999); Robert J. Sampson and John D. Wooldredge, *Evidence That High Crime Rates Encourage Migration away from Central Cities*, 70 *Sociol & Soc Rsrch* 310, 312 (1986).

<sup>50</sup> See, for example, Robert J. Sampson and Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 *Am J Soc* 603, 610 (1999).

<sup>51</sup> Gibson, et al, 19 *Just Q* at 552 (cited in note 46).

City officials also should not ignore the historical connections between middle class rootedness and urban health. Historians date the origins of the urban crisis differently. Conventional wisdom blames the urban crisis on postwar white flight from integrating city neighborhoods.<sup>52</sup> But a plausible case can be made that the roots of urban woes date far earlier.<sup>53</sup> Our cities began decanting before the turn of the twentieth century, and middle class “flight” from urban centers was well underway by the 1920s.<sup>54</sup> As Gerald Gamm argues in his fascinating study of Boston’s Dorchester neighborhood, a majority of Protestant and Jewish families exited urban neighborhoods well before the Second World War.<sup>55</sup> The white urban enclaves that remained intact well into the 1960s tended to be Catholic, where religious rules fostered an allegiance to geographic parishes, and importantly, schools rooted residents to their neighborhoods. What happened to cities in the 1960s and 1970s, Gamm argues, is that Catholics’ attachments to their neighborhoods and parishes finally gave way to the economic and racial pressures that other middle class residents had succumbed to decades earlier.<sup>56</sup> In other words, postwar suburbanizers actually were the last strands of a well-frayed urban fabric.

## II. PRIVATE EDUCATION IN A MIDDLE CLASS CITY

Whatever the cause, no one disputes that the disappearance of stable middle class urban enclaves was a disaster for cities. And, unfortunately, cities have not, in the intervening years, reversed this trend. Each year, fewer and fewer families—especially middle class families—choose to build their lives in urban neighborhoods. While a handful of central cities are gaining wealthy residents, almost all cities continue to lose families in general and middle class families in partic-

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<sup>52</sup> See Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit* 140–41 (Princeton 1996); John T. McGreevy, *Parish Boundaries: The Catholic Encounter with Race in the Twentieth-Century Urban North* 83–84 (Chicago 1996); Arnold R. Hirsch, *Making the Second Ghetto: Race and Housing in Chicago, 1940–1960* xii–xiii (Chicago 1983).

<sup>53</sup> See Bruegmann, *Sprawl: A Compact History* at 24–50 (cited in note 33) (claiming that the cities’ problems date back as far as the Industrial Revolution); Gerald Gamm, *Urban Exodus: Why the Jews Left Boston and the Catholics Stayed* 25–29 (Harvard 1999) (tying the growth of the suburbs not to racial animosity, but to the rise of the automobile and other economic factors).

<sup>54</sup> See Kenneth Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 116–33 (Oxford 1985) (discussing the streetcar’s vital role in the development of the suburbs in the late nineteenth century).

<sup>55</sup> Gamm, *Urban Exodus* at 25–27 (cited in note 53).

<sup>56</sup> See id. at 237–40 (noting, as an example, that in the 1950s, the number of marriages in St. Joseph’s Parish “declined from 80 to 33, the number of deaths recorded by the parish fell almost in half, and enrollment in St. Joseph’s School declined 40 percent”).

ular. A 2006 Brookings Institution study of twelve large metropolitan areas found that only 23 percent of central city neighborhoods had middle-income profiles (that is, incomes between 80 and 120 percent of the median metropolitan income), compared to 45 percent in 1970.<sup>57</sup> As a result, even “successful” cities find themselves home to a growing upper class and a large, although slightly declining, lower class.<sup>58</sup>

There are many reasons why middle class families shun cities. Race undoubtedly remains a factor for some,<sup>59</sup> although the fact that minorities accounted for the bulk of suburban population gains during the 1990s strongly suggests that the pull of the suburbs is race blind.<sup>60</sup> Crime and the fear of crime also play a major role,<sup>61</sup> as do the American preference for single-family homes, and concerns about tax levels, local government responsiveness, and public service quality. Still, cities arguably should be doing a better job at reversing middle class losses. After all, many cities have begun to overcome some of the obstacles described above: urban governments have become more responsive and efficient, thanks in part to some of the innovations in the local government toolkit discussed in this Symposium, including tax increment financing, business improvement districts, and enterprise and empowerment zones.<sup>62</sup> Crime rates have declined dramatically, and urban police forces now focus intensely on curbing disorder and increasing

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<sup>57</sup> See George Galster, Jackie Cutsinger, and Jason C. Booza, *Where Did They Go?: The Decline of Middle-Income Neighborhoods in Metropolitan America* 1, 4, 9–11 (Brookings 2006), online at [http://www.brookings.edu/metro/pubs/20060622\\_middleclass.pdf](http://www.brookings.edu/metro/pubs/20060622_middleclass.pdf) (visited Oct 22, 2009).

<sup>58</sup> While concentrated urban poverty declined dramatically during the 1990s, central cities continue to contain a disproportionate number of poor families. See Paul A. Jargowsky, *Stunning Progress, Hidden Problems: The Dramatic Decline of Concentrated Poverty in the 1990s*, in Alan Berube, Bruce Katz, and Robert E. Lang, eds, 2 *Redefining Urban and Suburban America* 137, 153–59 (Brookings 2005); Alan Berube and William H. Frey, *A Decade of Mixed Blessings: Urban and Suburban Poverty in Census 2000*, in Berube, Katz, and Lang, eds, 2 *Redefining Urban and Suburban America* 111, 117–20.

<sup>59</sup> For disheartening evidence that racial and ethnic diversity reduces social capital, see Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-first Century*, 30 *Scandinavian Polit Stud* 137, 141–53 (2007).

<sup>60</sup> See William H. Frey, *Melting Pot Suburbs: A Study of Suburban Diversity*, in Katz and Lang, eds, 1 *Redefining Urban and Suburban America* 155, 159–65 (cited in note 17) (reporting that “[d]uring the 1990s minorities were responsible for the bulk of suburban (as well as central city) gains for 65 of the nation’s largest 102 large metro areas”).

<sup>61</sup> See, for example, Cullen and Levitt, 81 *Rev Econ & Stat* at 159–68 (cited in note 49); Sampson and Wooldredge, 70 *Sociol & Soc Rsrch* at 310 (cited in note 49).

<sup>62</sup> See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 *Minn L Rev* 503, 509–21 (1997) (describing a number of these municipal entrepreneurial tools). See generally, for example, Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 *U Chi L Rev* 65 (2010).

residents' sense of security.<sup>63</sup> City densities have been declining for much of the past century; infill projects and “teardowns” offer a greater range of housing options,<sup>64</sup> and tax incentives frequently are made available to middle class homebuyers.<sup>65</sup> And, importantly, as Glaeser and Gottlieb argue, demand for the consumer amenities and social interactions provided by urban life appears to be on the rise.<sup>66</sup>

Unfortunately, as urban governments across the country have been transforming, revamping, and improving, efforts to reform perhaps the *most important* governmental function to families—public schools—have proceeded in fits and starts. Despite decades of prodding from state and federal officials as well as courts, the records of most urban public schools remain abysmal, especially when compared to the records of most suburban public schools.<sup>67</sup> *And*, for obvious reasons, most parents prioritize the quality of public education available for their children. In other words, an important—perhaps the most important—reason cities find it so hard to attract and retain middle class families is that most middle class parents do not trust urban public schools to educate their children. Tiebout was right. Local governments do compete for “consumer voters.”<sup>68</sup> And, without question, the quality of public schools drives the competition for parents.<sup>69</sup> In 2004, almost one-quarter of parents reported having moved to their current neighborhood to enable their children to attend the local public school. What’s more, this kind of residential sorting increases as parents’ educational attainment rises.<sup>70</sup>

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<sup>63</sup> See, for example, Debra A. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing*, 97 Colum L Rev 551, 575–78 (1997); George L. Kelling and Catherine Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities* 157–93 (Touchstone 1996).

<sup>64</sup> See, for example, Bruegmann, *Sprawl: A Compact History* at 69–70 (cited in note 33).

<sup>65</sup> See, for example, Varady and Raffel, *Attracting Homebuyers through Schools and Housing Programs* at 138, 141–61 (cited in note 9).

<sup>66</sup> Glaeser and Gottlieb, 43 Urban Stud at 1286–93 (cited in note 6).

<sup>67</sup> See, for example, Sam Dillon, *Large Urban-Suburban Gap Seen in Graduation Rates*, NY Times A14 (Apr 22, 2009) (giving Cleveland for an example, where 38 percent of high school freshman graduated within four years in the city, as opposed to 80 percent in the suburbs); Christopher B. Swanson, *Cities in Crisis 2009: Closing the Education Gap: Educational and Economic Conditions in America's Largest Cities* 13 (Editorial Projects in Education 2009), online at [http://www.edweek.org/media/cities\\_in\\_crisis\\_2009.pdf](http://www.edweek.org/media/cities_in_crisis_2009.pdf) (visited Oct 23, 2009).

<sup>68</sup> Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J Polit Econ 416, 423–24 (1956).

<sup>69</sup> See, for example, William A. Fischel, *Why Voters Veto Vouchers: Public Schools and Community-Specific Social Capital*, 7 Econ Governance 109, 117–18 (2006).

<sup>70</sup> 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* 101, 104 (Lincoln Institute of Land Policy 2006).

These statistics are suggestive of how critical education reform is to the goal of rebuilding middle class cities. Public education reforms undoubtedly help retain some middle class families with a preference for city life. For example, 40 percent of central city school districts operate magnet schools, compared to less than 10 percent of districts nationwide.<sup>71</sup> Competition for magnet schools frequently is fierce, and local school officials' efforts to achieve racial diversity in these schools suggests that middle class white families are among the most successful competitors for scarce seats.<sup>72</sup> Intradistrict public school choice (an option in 71 percent of central cities)<sup>73</sup> and an explosion in the number and diversity of urban charter schools<sup>74</sup> also offer valuable educational options for parents.<sup>75</sup>

Without discounting the importance of public education reform, however, it is also important to recognize that, for many parents, a decision to live in a major city also entails a decision to send their children to private schools. The evidence is difficult to contest: 31 percent of students living in Seattle, 25 percent of students in San Francisco, and close to 20 percent of students in Chicago, Denver, and New York are enrolled in private schools.<sup>76</sup> Anecdotally, my own middle class neighborhood in South Bend, Indiana illustrates these dy-

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<sup>71</sup> Id.

<sup>72</sup> See, for example, *Parents Involved in Community Schools v Seattle School District*, 127 S Ct 2738, 2747 (2007) (describing the efforts of Seattle and Louisville school officials to get more minority students in popular magnet schools); *Wessmann v Gittens*, 160 F3d 790, 808–09 (1st Cir 1998) (striking down a magnet school's affirmative action program).

<sup>73</sup> Buckley and Schneider, *School Choice, Parental Information, and Tiebout Sorting* at 104 (cited in note 70). Between 1993 and 2003, the percentage of students attending a "chosen" public school increased from 11 to 15 percent. Department of Education, National Center for Education Statistics, *Fast Facts*, online at <http://nces.ed.gov/FastFacts/display.asp?id=6> (visited Oct 23, 2009).

<sup>74</sup> In fall 2008, 1.5 million children were enrolled in more than 4,600 charter schools. Center for Education Reform, *Charter School Facts*, online at <http://www.edreform.com/index.cfm?fuseAction=document&documentID=1964> (visited Oct 23, 2009) (noting also that 355 charter schools opened from 2008–2009). President Barack Obama has made charter schools a centerpiece of his educational agenda, and has urged states to lift caps on the number of available charters. See David Stout, *Obama Outlines Plan for Education Overhaul*, NY Times A14 (Mar 11, 2009).

<sup>75</sup> Buckley and Schneider, *School Choice, Parental Information, and Tiebout Sorting* at 103–20 (cited in note 70) (presenting evidence that school choice and charter schools transform the traditional "move for schools" dynamic to a "move schools" paradigm).

<sup>76</sup> See, for example, 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); Ellen, Schwartz, and Stiefel, *Can Economically Integrated Neighborhoods Improve Children's Educational Outcomes?* at 200 (cited in note 10) (noting that, in 2000, 18.4 percent of elementary and secondary students in New York City were enrolled in private schools and that the probability of private-school attendance increases as income levels rise).

namics: My three children, and most of my neighbors' children, attend Catholic schools; the rest of my neighbors send their kids to competitive public magnet schools. I am unaware of any neighborhood children who attend the local public school, where only 37 percent of the students achieve at grade level.<sup>77</sup> By way of contrast, 96 percent of the students at my children's Catholic school achieve at grade level.<sup>78</sup> The situation is an ideal one for my family and my neighbors, most of whom are—like me—Catholic. The Diocese of Fort Wayne-South Bend operates several excellent, and extremely affordable, parochial schools within a few miles of our neighborhood. My husband and I pay less than \$7,500 tuition *in total* for our three children to attend what is arguably the best elementary school in the city.<sup>79</sup>

### III. TAX CREDITS FOR PRIVATE SCHOLARSHIPS: A PROPOSAL

But, Catholic schools are more attractive to some families than to others. And, they also are rapidly disappearing from city neighborhoods. Undoubtedly one reason why many center cities are gaining wealthy residents but losing middle class ones is that the wealthy can afford educational options that those of modest means cannot. Sticker shock over private school tuition cannot but tip the balance in favor of suburban life for many families. Thus, rather than pinning all development hopes on the cool and childless or on prayers for the success of public school reforms over which they frequently exercise limited control,<sup>80</sup> state and local officials would do well to consider employing a familiar economic development tool—tax incentives—to help make private education a realistic option for more middle class families. Tax incentives already are used to promote investment within our cities:

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<sup>77</sup> Madison Primary Center, *ISTEP Avg Pct Pass—All Tested Grades*, online at <http://mustang.doe.state.in.us/SEARCH/benchmark.cfm?subnum=17&hidden=7573&ip95=checked&istavg=checked> (visited Oct 22, 2009).

<sup>78</sup> Saint Joseph School, *ISTEP Avg Pct Pass—All Tested Grades*, online at <http://mustang.doe.state.in.us/SEARCH/benchmark.cfm?subnum=17&hidden=D270&ip95=checked&istavg=checked> (visited Oct 23, 2009) (showing a rise in the number of students performing at grade level over the past decade, from 81.7 percent to 95.6 percent). The district's only "primary academy" performs comparably, with close to 95 percent of students achieving at grade level. Kennedy Primary Academy, *ISTEP Avg Pct Pass—All Tested Grades*, online at <http://mustang.doe.state.in.us/SEARCH/snapshot.cfm?schl=7555> (visited Oct 23, 2009).

<sup>79</sup> Our situation is nothing new. As John McGreevy observed, one reason why many middle class Catholic families remained in city neighborhoods well into the postwar period was that they sent their children to parochial schools, which were essentially free for church members. McGreevy, *Parish Boundaries* at 234–40 (cited in note 52).

<sup>80</sup> See, for example, Frug and Barron, *City Bound* at 123–25 (cited in note 10) (noting that, in most states, schools are governed by an elected board).

businesses located in enterprise zones are eligible for a host of tax breaks; tax increment financing funds redevelopment and infrastructure projects; residents receive property tax credits for purchasing homes;<sup>81</sup> and so on. Tax incentives can also enhance the attractiveness of city life to middle class families by increasing the affordability and diversity of private schooling options available to them.

#### A. The Proposal

Seven states have already implemented tax incentive programs that can help serve this urban development function. Rather than awarding tax credits directly to parents for their educational expenses, these innovative programs encourage charitable donations to non-profit organizations that fund scholarships to enable poor or middle class children to attend private schools. For example, Arizona offers both personal and corporate income tax credits for donations to “school tuition organizations” that allocate at least 90 percent of their annual revenue to educational scholarships for children attending private schools. The program requires participating scholarship organizations to work with more than one school and precludes donors from designating the recipient of any scholarship.<sup>82</sup> Variants of this scholarship-tax-credit program are also in place in Florida, Georgia, Indiana, Iowa, Pennsylvania, and Rhode Island.<sup>83</sup>

While these scholarship-tax-credit programs frequently are championed as a way to enable poor children to exit failing public schools, they also can serve to partially unbundle middle class parents’ residential and educational decisions, thereby making urban life more attractive to them. To achieve this important goal, other states might replicate the model, or alternatively, pass enabling legislation empowering cities to adapt it to the local government setting.<sup>84</sup> For purposes

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<sup>81</sup> See, for example, City of Cincinnati, *Residential Tax Abatement*, online at <http://www.cincinnati-oh.gov/cdap/pages/-3521-> (visited Oct 24, 2009); Live Cleveland, *City Incentives*, online at <http://www.livecleveland.org/cityIncentives> (visited Oct 24, 2009); District of Columbia, Office of Tax and Revenue, *Tax Relief and Credits*, online at <http://otr.cfo.dc.gov/otr/cwp/view,a,1330,q,594156.asp> (visited Oct 24, 2009).

<sup>82</sup> See Arizona Department of Revenue, *School Tax Credits*, online at <http://www.azdor.gov/LinkClick.aspx?fileticket=lyMlhtowOpw%3d&tabid=240> (visited Oct 23, 2009); Ariz Rev Stat §§ 43-1089, 43-1183.

<sup>83</sup> Alliance for School Choice, *School Choice Yearbook* at 20 (cited in note 16); Pullam, *They Got It Right on These Issues*, Ind Star at A10 (cited in note 16).

<sup>84</sup> In some states, local governments may have the authority to enact scholarship tax credits without enabling legislation. For purposes of brevity and the conservation of judicial resources, however, I proceed on the assumption that enabling legislation would be required in many states.

of brevity, I leave to one side the contestable question of which model is preferable: as an urban development tool, locally enacted scholarship tax credits arguably make more sense, since local credits could target city residents and might also be paired with other middle class tax incentives. On the other hand, local tax credits pose more institutional design difficulties, for reasons discussed below, and arguably would reduce the size of the potential donor pool and therefore the resources available for scholarships.

In the interest of full disclosure, I am an unapologetic supporter of educational choice, including school vouchers and tax credits for personal educational expenses. But, my proposal is not intended as a clever vouchers-through-the-back-door deception. As a means of building a middle class city, scholarship tax credits are, in my view, a superior school choice device, for at least three reasons: *First*, most voucher programs aim to expand the educational options available to poor children who tend to underperform in urban public schools. As a result, the programs are means-tested and inaccessible to middle class parents. By contrast, some state scholarship programs either do not set income limits on scholarship recipients or establish limits that make scholarships accessible to some middle class families.<sup>85</sup> Indeed, another important institutional design question is what income limits, if any, are appropriate if scholarship tax credits are to serve the function of increasing the attractiveness of city life to middle-income families. Leaving that important question to one side, it is undoubtedly the case that this reduction in regulatory “strings” (and others) give scholarship organizations flexibility to calibrate their policies to the unique needs of both scholarship recipients and the schools that they attend. *Second*, encouraging charitable donations to private scholarship organizations can both strengthen existing schools and encourage new ones to open. In Arizona last year, 55 “school tuition organizations” received nearly \$55 million in donations, which they in turn used to award 27,153 scholarships at 359 schools.<sup>86</sup> Scholarship granting organizations are therefore well situated to pressure schools to implement sound management, financial, and even pedagogical practices. Moreover, the requirement that scholarship organizations work with more than one school also may promote economies of scale and interschool cooperation. Anecdotal evidence from Arizona and Pennsylvania sug-

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<sup>85</sup> Alliance for School Choice, *School Choice Yearbook* at 38–39, 43, 45, 46, 51, 52 (cited in note 16).

<sup>86</sup> *Id.* at 38 (noting that the average scholarship was just below \$1,800 during the 2008–2009 school year).



gests that scholarship tax credits have prevented school closures and incited new schools to open.<sup>87</sup> *Third*, the fact that scholarship tax credits have been successfully implemented in a number of states suggests that the model is able to overcome the public choice impediments to *any* educational choice proposal.

## B. The Rejoinders

The goal of this Article—to convince policymakers that private schools are an important urban resource and that tax policy should be used to help make them accessible to middle class families—is hardly uncontroversial. This Part briefly outlines some of the reasons for the controversy.

### 1. Legal objections.

Although properly structured scholarship tax credit programs should survive most legal challenges in most states,<sup>88</sup> potential hurdles include:

*a) Religious establishment challenges.* In *Zelman v Simmons-Harris*,<sup>89</sup> the US Supreme Court ruled that the Ohio Pilot Scholarship Program, which provided publicly funded scholarships to low-income Cleveland students enrolled in private schools, did not violate the First Amendment’s Establishment Clause.<sup>90</sup> The Court reasoned that the program was facially neutral between religious and secular schools and that public funds flowed to religious schools only as the result of parents’ private decisions.<sup>91</sup> *Zelman* presumably put to rest federal Establishment Clause concerns about religion-neutral scholarship tax credit programs, even if most students benefiting from the resulting

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<sup>87</sup> See Sherry Anne Rubiana, *Arizona Catholic Schools Flourishing*, Ariz Republic B4 (May 11, 2008); Sherry Anne Rubiana, *Diocese Sees Need for Additional Schools*, Ariz Republic 10 (May 10, 2008); Anya Stosek, *Tax Credit Breathes New Life into Pa.’s Catholic Schools*, Pittsburgh Post-Gazette B1 (Jan 28, 2008); Anya Stosek, *Diocese Opens 1st School since 1960s*, Pittsburgh Post-Gazette B1 (Sep 5, 2007).

<sup>88</sup> To date, apparently only Arizona’s scholarship tax credit program has faced legal challenges. See *Kotterman v Killian*, 972 P2d 606, 616 (Ariz 1999) (upholding scholarship tax credits); *Cain v Horne*, 202 P3d 1178, 1180 (Ariz 2009) (finding that the voucher programs violate the Arizona Constitution, which prohibits the “appropriation of public money . . . in aid of any . . . private or sectarian school”). See also *Winn v Arizona Christian School Tuition Organization*, 562 F3d 1002, 1013 (9th Cir 2009) (holding that taxpayers had a viable Establishment Clause claim against Arizona’s tax credit program).

<sup>89</sup> 536 US 639 (2002).

<sup>90</sup> *Id* at 653.

<sup>91</sup> *Id* at 653–64.

scholarships attend religious schools.<sup>92</sup> State anti-establishment provisions, however, may be a different story. Thirty-seven states expressly prohibit public funds from flowing to “sectarian” schools.<sup>93</sup> These “Blaine Amendments”<sup>94</sup> generally are believed to impose more formidable obstacles to educational choice than the First Amendment’s Establishment Clause.<sup>95</sup> Educational choice proponents, however, argue that scholarship tax credits are less vulnerable to state constitutional scrutiny.<sup>96</sup> This hypothesis has been borne out in Arizona, where the state supreme court rejected a Blaine Amendment challenge to scholarship tax credits, but, more recently, invalidated two limited voucher programs on Blaine Amendment grounds.<sup>97</sup>

b) *Education clause challenges.* All state constitutions have provisions addressing public education, for example by mandating the maintenance of a public education system that satisfies certain constitutional criteria (“uniformity,” “adequacy,” “efficiency,” “high quali-

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<sup>92</sup> See *id.* at 655–60 (rejecting the claim that the program was not neutral toward religion because 96 percent of students attended religious schools). See also *Mueller v. Allen*, 463 US 388, 390–91 (1983) (upholding Minnesota law authorizing tax deductions for educational expenses, including private school tuition, even though 96 percent of the beneficiaries attended religious schools). Recently, however, the Ninth Circuit called into question the constitutionality of the Arizona scholarship tax credit program because several of the participating “school tuition organizations” provide scholarships only to religious schools. See *Winn*, 562 F3d at 1013 (9th Cir 2009) (allowing Establishment Clause claim to go forward when it was unclear whether a program allowing for a tax credits for donations to nonprofits that give scholarships to private schools “deliberately skew[ed] incentives toward religious schools”). In my view, the *Winn* decision clearly is out of step with *Zelman* and other cases suggesting that the Establishment Clause only requires legal neutrality among the choices available to taxpayers.

<sup>93</sup> See The Becket Fund for Religious Liberty, *What Are Blaine Amendments?*, online at <http://www.blaineamendments.org/Intro/whatis.html> (visited Oct 22, 2009); Joseph P. Viteritti, *Choosing Equality: Religious Freedom and Educational Opportunity under Constitutional Federalism*, 15 *Yale L. & Pol. Rev.* 113, 146–47 (1996).

<sup>94</sup> Named for Senator James Blaine of Maine, who sought to insert one into the US Constitution in 1875, Blaine Amendments represent a sad legacy of our nation’s anti-Catholic history. See, for example, Richard W. Garnett, *The Theology of the Blaine Amendments*, 2 *First Amend. L. Rev.* 45, 60–71 (2004).

<sup>95</sup> See Ira C. Lupu and Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 *Notre Dame L. Rev.* 917, 960–61 (2003).

<sup>96</sup> See Richard D. Komer and Clark Neily, *School Choice and State Constitutions: A Guide to Designing School Choice Programs* 5 (Institute for Justice 2007) [http://www.ij.org/index.php?option=com\\_content&task=view&id=1622&Itemid=249#download](http://www.ij.org/index.php?option=com_content&task=view&id=1622&Itemid=249#download) (visited Oct 24, 2009) (encouraging sympathetic lawmakers to examine the stance of their state’s judiciary before determining whether to propose tax credits or vouchers).

<sup>97</sup> See *Kotterman*, 972 P2d at 606 (upholding scholarship tax credits); *Cain*, 202 P3d at 1178 (invalidating special-needs and foster-children voucher programs). That said, very broad, or broadly interpreted, “no aid” mandates likely preclude scholarship tax credits in some states. See Komer and Neily, *School Choice and State Constitutions* at 3–6 (cited in note 96).

ty”).<sup>98</sup> More than half of state supreme courts have relied upon these provisions to invalidate the traditional system of locally financed public schools.<sup>99</sup> While these provisions generally are not considered significant obstacles to educational choice, in 2006, the Florida Supreme Court ruled that a statewide voucher program violated the constitutional mandate that the state maintain a “uniform, efficient, safe, secure, and high quality system of public education.”<sup>100</sup> Other state courts have rejected similar arguments, including, most recently, the Arizona Court of Appeals in a case challenging the state’s scholarship tax credit program.<sup>101</sup>

c) *Tax uniformity challenges.* Almost all state constitutions also have provisions mandating the uniform application of taxes, many of which focus exclusively on property taxation.<sup>102</sup> Courts routinely struggle with the question of whether and when tax credits and abatements run afoul of uniformity mandates.<sup>103</sup> So long as scholarship tax credits are made available to all taxpayers, however, they should not be interpreted as treating similarly situated taxpayers unequally.

## 2. Education- and tax-policy objections.

Educational-choice proposals inevitably prompt concern about the diversion of both students and resources away from public schools. This Part briefly discusses these concerns as they apply to the proposal outlined in this Article.

a) *Resource-diversion concerns.* Since public education funding levels are partially determined on a per-pupil basis, *state* scholarship tax credits, like all school choice programs, might divert resources away from public schools if they cause students to move from public

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<sup>98</sup> Paul L. Tractenberg, *Education*, in G. Alan Tarr and Robert F. Williams, eds, 3 *State Constitutions for the Twenty-first Century: The Agenda of State Constitutional Reform* 241, 241–49 (SUNY 2006).

<sup>99</sup> See James E. Ryan and Michael Heise, *The Political Economy of School Choice*, 111 *Yale L J* 2043, 2058–59 (2002) (discussing trends in educational finance litigation); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 *Vand L Rev* 101, 121–40 (1995) (same).

<sup>100</sup> *Bush v Holmes*, 919 So 2d 392, 405 (2006).

<sup>101</sup> *Green v Garriott*, 212 P3d 96, 107 (Ariz App 2009). See also generally *Jackson v Benson*, 578 NW2d 602 (Wis 1998) (rejecting the argument that the Milwaukee Parental Choice Program violated a state constitutional provision requiring “uniform” system of public schools).

<sup>102</sup> See, for example, Richard Briffault, *State and Local Finance*, in Tarr and Williams, 3 *State Constitutions for the Twenty-first Century* 211, 221–22 (cited in note 98).

<sup>103</sup> See id at 222–23.

to private schools.<sup>104</sup> In my view, it is a disputable proposition whether it is problematic to leave districts with proportionally fewer dollars to educate fewer students. *Local* tax credits, however, admittedly raise more resource-diversion concerns. Extant state scholarship tax credit programs grant credits primarily against *income taxes*, but many cities do not or cannot impose income taxes.<sup>105</sup> Local governments seeking to implement scholarship tax credits would therefore have to provide credits against other tax burdens, and an obvious candidate would be property taxes. And, while state income tax credits have at best an indirect effect on the resources available to public schools, property tax credits would directly deplete a pool of resources traditionally used to finance public schools.

In reality, however, neither state nor local scholarship tax credits are likely to have more than minimal effects on public school revenues. Public school districts—especially urban public school districts—depend far less on property taxes than in the past, for a variety of reasons, including desegregation efforts and the state-court funding equity decisions discussed above.<sup>106</sup> Moreover, school districts are often separate taxing entities from municipalities. As a result, city governments, rather than public schools, would take the hit for revenue decreases resulting from the tax credit proposal.<sup>107</sup> And evidence that tax credit programs designed to attract middle class *homeowners* pay for themselves within a few years suggests that a city's investment in attracting families may make financial sense, even in difficult fiscal times.<sup>108</sup> Finally, even if public school revenues do decrease slightly as a result of scholarship tax credits, there is no reason to assume that public school enrollments will be held constant. Although my proposal aims to retain middle class families in urban neighborhoods as their children approach school age (and, hopefully, to attract new families as well), the experience in states with scholarship tax credits suggests

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<sup>104</sup> In reality, most voucher programs hold public school funding constant. As a result, districts losing students to private schools wind up with *more* education dollars per student. See, for example, Susan L. Aud, *School Choice by the Numbers: The Fiscal Effect of School Choice Programs, 1990–2006*, School Choice Issues in Depth 20 (Apr 2007), online at <http://www.friedmanfoundation.org/downloadFile.do?id=243> (visited Jan 25, 2010).

<sup>105</sup> See, for example, Frug and Barron, *City Bound* at 85–86 (cited in note 10).

<sup>106</sup> See Ryan and Heise, 111 Yale L J at 2058–59 (cited in note 99).

<sup>107</sup> See, for example, Briffault, 77 U Chi L Rev at 88–89 (cited in note 62).

<sup>108</sup> Varady and Raffell, *Selling Cities* at 141–46 (cited in note 9).

that many scholarships go to low-income children who might otherwise enroll in public schools.<sup>109</sup>

*b) Student-diversion concerns.* This final reality points to the second source of anxiety about parental choice programs, namely, that they will draw the best students out of public school classrooms, thereby exacerbating what is already a very bad educational situation. Leaving to one side the empirical and normative questions raised by this “cream skimming” argument,<sup>110</sup> it is obvious that urban public school officials would like for city residents, especially middle class residents, to send their kids to public schools, not private ones. This is one reason why urban school districts invest heavily in elite magnet schools: not only is there little question that parents’ income and educational attainment is strongly correlated with children’s educational success, but even disadvantaged children perform better in socioeconomically diverse classrooms.<sup>111</sup>

Certainly, state and local officials have every reason to hope for the success of public education reform. But, they also should not lose sight of the fact that, absent the availability of affordable private schools, many of the families coveted by urban public schools likely would not live in a major city *at all*. Nor should they forget that there are ample reasons— independent of the public school demographics— to attract middle class families to cities. Importantly, as outlined above, middle class families—even those that choose to send their kids to private schools—can serve a critically important stabilizing and community-building role in urban neighborhoods. Moreover, in an era of expanding school choice, parents’ educational decisions are likely far less static in urban than suburban districts, where geographic school assignments remain the norm. Urban parents are becoming increasingly accustomed to “shopping” for schools.<sup>112</sup> Perhaps, as newcomers

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<sup>109</sup> National Center for Policy Analysis, *Tax Credit Programs for School Choice* (Mar 1, 1998), online at <http://www.ncpa.org/pub/st213> (visited Oct 24, 2009) (finding that per pupil expenditures would increase if 5 percent of students exited public schools because of scholarship tax credits).

<sup>110</sup> See, for example, Patrick Walsh, *Effects of School Choice on the Margins: The Cream Is Already Skimmed*, 28 *Econ Educ Rev* 227, 235 (2009) (empirically challenging the cream skimming argument); Richard W. Garnett, *The Right Questions about School Choice: Education, Religious Freedom, and the Common Good*, 23 *Cardozo L Rev* 1281, 1297–1304 (2002) (challenging this argument on normative grounds).

<sup>111</sup> See Ryan and Heise, 111 *Yale L J* at 2103–09 (cited in note 99).

<sup>112</sup> See Buckley and Schneider, *School Choice, Parental Sorting, and Tiebout Sorting* at 105 (cited in note 70) (reporting that, in survey of 1,012 Washington, DC parents, 18.2 percent reported trying to get into a charter school in the last year, 13.7 percent into a private school, and 20.4 percent into a public school outside their attendance boundary).

become more socially integrated into their communities, the relative weight assigned to different school attributes will shift in favor of public school options.

#### CONCLUSION

Cities need families, and families need good schools. It is entirely reasonable to assume that our cities' failure to provide quality educational options tips the balance in favor of suburban life for many middle class parents. This reality highlights the critical importance of public education reform as an economic development tool. This Article has argued, however, that public education reform, standing alone, is not enough. Private schools are also an important part of the local government toolkit, and city leaders should therefore consider turning to a familiar economic development tool—tax incentives—to make them more accessible to middle class families.