

# NOW IS THE TIME!: CHALLENGING RESEGREGATION AND DISPLACEMENT IN THE AGE OF HYPERGENTRIFICATION

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*Gentrification is reaching a tipping point of resegregating urban space in global cities like New York and San Francisco, often spurred by seemingly neutral government policies. The displacement resulting from gentrification forces low-income people from their homes into areas of concentrated poverty. Low-income communities consequently lose space, place, social capital, and cultural wealth that residents and small businesses have spent decades building up.*

*This Article argues that communities at this tipping point must integrate litigation strategies directly aimed at stemming the adverse impacts of gentrification. Community organizing is integral to antidisplacement efforts, but litigation—and its injunctive powers—should play a larger role in protecting residents in hypergentrified neighborhoods. Using a rezoning that spurred gentrification in New York City’s Chinatown and Lower East Side as a case study, this Article considers how the Fair Housing Act, state constitutions, and a new vision of property law could counter the negative and often racially discriminatory effects of gentrification on low-income communities.*

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## INTRODUCTION

In New York City's Chinatown, the writing is literally on the wall. In 2009, on a piece of plywood covering a soon-to-be-revealed coffee shop in the heart of the neighborhood, someone had scribbled the word "gentrification" in Chinese. Chinatown has long remained one of the few places in Manhattan where working-class people can afford to live. Even based on recent census numbers, the low median income of Chinatown's census tracts contrast sharply with the six-figure incomes in surrounding areas.<sup>1</sup> Yet, as with many culturally rich immigrant enclaves and neighborhoods of color across the country experiencing gentrification, New York City's Chinatown is increasingly facing destruction of the networks, resources, and social capital the community has spent decades building.

Gentrification is notoriously difficult to define because of the term's evolution and the contention it incites.<sup>2</sup> This Article defines gentrification as a process that displaces low-income residents and systematically remakes the class composition and character of a neighborhood. Gentrification is distinct from revitalization, which enhances a neighborhood's physical, social, and commercial components without displacement.<sup>3</sup> Thus, unlike revitalization, gentrification ultimately resegregates<sup>4</sup> and scatters poor people into other low-income neighborhoods without the support networks that may have previously existed in their old neighborhoods.<sup>5</sup> These effects are devastating to communities and displaced people.

The speed and breadth of luxury development are the defining characteristics of gentrification in the twenty-first century.<sup>6</sup> In cities with competitive housing markets, such as New York and San Francisco, government policies have pushed neighborhoods into states of hypergentrification, which is the collaboration of city government and

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1. See Matthew Bloch et al., *Mapping America: Every City, Every Block*, N.Y. TIMES (Dec. 15, 2010), <http://projects.nytimes.com/census/2010/explorer> [<https://perma.cc/X54R-AJAJ>].

2. See *infra* Part I.A.

3. See *infra* Part I.A.

4. Gary Orfield first popularized the term "resegregation" in his landmark work on the accelerating inequality of American schools. See generally GARY ORFIELD, CIVIL RIGHTS PROJECT HARVARD UNIV., SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (2001); GARY ORFIELD & JOHN T. YUN, CIVIL RIGHTS PROJECT HARVARD UNIV., RESEGREGATION IN AMERICAN SCHOOLS (1999).

5. See *infra* Part I.B.

6. See Jason Hackworth, *Postrecession Gentrification in New York City*, 37 URB. AFF. REV. 815, 828 (2002).

private corporations to create a massive and rapid influx of development and affluent populations into urban areas.<sup>7</sup>

Zoning is one of the most prominent tools local governments use to gentrify.<sup>8</sup> Since 2002, New York City has completed more than 100 rezonings, covering approximately 40 percent of the city,<sup>9</sup> allowing for more luxury development in lower-income neighborhoods of color while limiting that same type of development in more affluent and predominantly white neighborhoods.<sup>10</sup> Zoning to gentrify dense urban areas decreases the already limited housing opportunities for low-income people.

For several years as a civil rights attorney, I represented tenants, workers, community organizations, and small property owners in low-income Asian immigrant neighborhoods. I grew up witnessing the beginnings of gentrification in Boston's Chinatown, and I have used what I learned from the collective movement of these immigrant neighborhoods to inform my work against forced displacement. I realized that community organizing must drive policies and litigation for any community to be able to slow gentrification effectively. But, through my work, I also observed that communities underutilize legal strategies.

Communities facing gentrification have protested on streets,<sup>11</sup> engaged in community planning,<sup>12</sup> and demanded benefits for the community in the

7. See LORETTA LEES ET AL., *GENTRIFICATION* 178 (2008) (describing how corporate developers, encouraged by federal and local governments, have become the most assertive initiators of gentrification); Jason Hackworth & Neil Smith, *The Changing State of Gentrification*, 92 J. ECON. & SOC. GEOGRAPHY 464, 465 (2000); Jeremiah Moss, *New Yorkers Need to Take Back Their City*, N.Y. TIMES (Apr. 13, 2014), <http://www.nytimes.com/roomfordebate/2014/04/13/the-pros-and-cons-of-gentrification/new-yorkers-need-to-take-back-their-city> (defining the term "hyper-gentrification") [<https://perma.cc/8D9B-2MVH>]. See generally RIGHT TO THE CITY ALL., *THE RISE OF THE CORPORATE LANDLORD: THE INSTITUTIONALIZATION OF THE SINGLE-FAMILY RENTAL MARKET AND POTENTIAL IMPACTS ON RENTERS* (2014), <http://homesforall.org/wp-content/uploads/2014/07/corp-landlord-report-web.pdf> (describing how the foreclosure crisis and 2008 recession, which resulted in private equity funds and large banking institutions owning millions of single family homes, may decrease future affordability for renters) [<https://perma.cc/J8G4-QBHK>].

8. See James C. Ohls et al., *The Effect of Zoning on Land Value*, 1 J. URB. ECON. 428, 433 (1974); Michael White & Philip Allmendinger, *Land-Use Planning and the Housing Market: A Comparative Review of the UK and the USA*, 40 URB. STUD. 953, 954 (2003); see also Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 769–72 (1993).

9. See Julie Satow, *Amanda Burden Wants to Remake New York. She Has 19 Months Left*, N.Y. TIMES (May 18, 2012), <http://www.nytimes.com/2012/05/20/nyregion/amanda-burden-planning-commissioner-is-remaking-new-york-city.html?r=0> [<https://perma.cc/TDS3-5Q5B>].

10. See AMY ARMSTRONG ET AL., *FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, HOW HAVE RECENT REZONINGS AFFECTED THE CITY'S ABILITY TO GROW?* 9–11 (2010), [http://furmancenter.org/files/publications/Rezonings\\_Furman\\_Center\\_Policy\\_Brief\\_March\\_2010.pdf](http://furmancenter.org/files/publications/Rezonings_Furman_Center_Policy_Brief_March_2010.pdf) [<https://perma.cc/3LU2-ZJYL>].

11. See, e.g., Justine Hofherr, *Chinatown Residents Rally After Community Land Trust Efforts Thwarted by Developer*, BOSTON.COM: REALESTATE (Jan. 30, 2015, 10:52 AM), <http://realestate.boston.com/news/2015/01/30/chinatown-residents-rally-after-community-land-trust-efforts-thwarted-by-developer/> [<https://perma.cc/G4JZ-LCBG>]; Tim Logan, *Highland Park Renters Feel the Squeeze of Gentrification*, L.A. TIMES (Dec. 21, 2014, 6:00 AM), <http://www.latimes.com/business/realestate/la-fi-highland-park-renters-20141221->

face of development.<sup>13</sup> But these strategies alone are inadequate where development and resegregation have reached a tipping point in the largest and most rapidly gentrifying cities.

Any movement to slow gentrification in urban areas must include legal strategies aimed at stopping the discriminatory and segregative effects on low-income communities. Litigation—and its injunctive powers—can create greater leverage for community organizing to stop an adverse zoning plan or development or help establish a financial burden on proposed development. Just as the effects of gentrification are not homogenous, litigation countering gentrification's effects also depends on that particular urban area.<sup>14</sup> The litigation strategies discussed in this Article focus primarily on the cities that are undergoing the most gentrification. But because local governments in smaller cities emulate larger cities in crafting zoning plans and other policies to gentrify low-income neighborhoods, communities in smaller housing markets may also draw from these strategies.<sup>15</sup>

Litigation in this era of hypergentrification has focused on eviction defense or environmental review lawsuits. But eviction defense, while

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story.html [https://perma.cc/KW8T-KA3W]; Carol Pogash, *Gentrification Spreads an Upheaval in San Francisco's Mission District*, N.Y. TIMES (May 22, 2015), [http://www.nytimes.com/2015/05/23/us/high-rents-elbow-latinos-from-san-franciscos-mission-district.html?\\_r=0](http://www.nytimes.com/2015/05/23/us/high-rents-elbow-latinos-from-san-franciscos-mission-district.html?_r=0) [https://perma.cc/BQE7-8PEE]; Kelton Sears, *From Capitol Hill to City Hall, Citizens Battle the Scourge of Rising Rents*, SEATTLE WKLY. (Feb. 18, 2014, 5:49 PM), <http://www.seattleweekly.com/home/951164-129/the-curse-of-san-francisco> [https://perma.cc/R95U-PG6K]; Perry Stein, *'System is Guilty as Hell': D.C. Activists Cite Gentrification, Police Brutality in Protest*, WASH. POST (Apr. 30, 2015), <https://www.washingtonpost.com/news/local/wp/2015/04/30/system-is-guilty-as-hell-d-c-activists-cite-gentrification-police-brutality-in-protest/> [https://perma.cc/V8UT-23HG].

12. For example, through community organizing and a community-wide planning process, public housing residents in Red Hook, New York forced the city to approve a neighborhood plan created by the community itself. See CMTY. BD. 6, RED HOOK: A PLAN FOR COMMUNITY REGENERATION (1996), [https://www1.nyc.gov/assets/planning/download/pdf/community/197a-plans/bk6\\_red\\_hook\\_197a.pdf](https://www1.nyc.gov/assets/planning/download/pdf/community/197a-plans/bk6_red_hook_197a.pdf) [https://perma.cc/4SSR-UPPA]; see also CHINATOWN MASTER PLAN 2010 OVERSIGHT COMM., CHINATOWN MASTER PLAN 2010: COMMUNITY VISION FOR THE FUTURE (2010), <http://www.brownwalkerplanners.com/files/CTMP2010.pdf> [https://perma.cc/EGD2-EKGK]; DUDLEY ST. NEIGHBORHOOD INITIATIVE, ANNUAL REPORT 2013–2014 (2014), <https://static1.squarespace.com/static/5515d04fe4b0263cc20b3984/t/551873f1e4b08ae213ec5fac/1427665905961/FY+2014+DSNI+Annual+Report.pdf> [https://perma.cc/N59C-MM6N]; PRATT CTR. FOR CMTY. DEV. & COLLECTIVE FOR CMTY., CULTURE & THE ENV'T, PRESERVING AFFORDABILITY & AUTHENTICITY: RECOMMENDATIONS TO THE CHINATOWN WORKING GROUP (2013), <http://www.chinatownworkinggroup.org/2014-01-01%20Pratt%20Report%20to%20CWG.pdf> [https://perma.cc/SXH3-9DQ3].

13. See Benjamin S. Beach, *Strategies and Lessons from the Los Angeles Community Benefits Experience*, 17 J. AFFORDABLE HOUSING 77, 79 (2008); William Ho, *Community Benefits Agreements: An Evolution in Public Benefits Negotiation Processes* (July 27, 2007) (unpublished M.S. thesis, Massachusetts Institute of Technology).

14. See Loretta Lees, *A Reappraisal of Gentrification: Towards a 'Geography of Gentrification'*, 24 PROGRESS HUM. GEOGRAPHY 389, 395 (2000).

15. See Hackworth, *supra* note 6, at 818 (noting that New York City's experience of gentrification, though not "typical," has foreshadowed the gentrification experiences of other cities).

crucial, is a piecemeal solution.<sup>16</sup> Meanwhile, environmental review lawsuits focusing on procedural equality provide significant deference to local government decisions and thereby often fail to even identify displacement as a problem.<sup>17</sup> Courts have therefore served as passive participants in gentrifying cities.

It is important to note that the correlation of housing to education, healthcare, and employment means that gentrification affects opportunities available to low-income people wherever it occurs. Access to opportunity includes the ability to remain in one neighborhood or to move to another. Litigation, grounded in community organizing, is critical to fostering this choice.

Part I of this Article identifies the adverse impacts of gentrification, including displacement, loss of social capital and safe community spaces, and increased mental health problems. Part II explains how local governments have used zoning in recent years to gentrify. Part II also introduces a case study regarding the 2008 rezoning of New York City's Chinatown and Lower East Side, and it provides broader context to local governments historically using zoning to exclude and segregate low-income communities of color. Finally, Part III argues that legal strategies are critical to complement community organizing aimed at addressing the adverse impacts on communities undergoing gentrification. In doing so, Part III explores possibilities under the Fair Housing Act, state constitutions, and common law property principles.

### I. UNDERSTANDING GENTRIFICATION

Cities have long been centers of culture, creativity, and jobs, but gentrification has changed the landscape for middle- and low-income people who live, or seek to live, in urban neighborhoods. Major cultural and artistic movements, such as the Harlem Renaissance, relied on vibrant exchanges of ideas and talents in neighborhoods that could support a range of income levels.<sup>18</sup> Decades later, hip-hop was born in a subsidized housing complex less than five miles away.<sup>19</sup> The communities in these

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16. Due to congressional restrictions on federal funding for legal services, many of the legal services attorneys who are most familiar with the patterns of eviction and harassment in communities are prohibited from engaging in more systemic litigation aimed at the root of displacement in gentrifying neighborhoods. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 104-134, 110 Stat. 1321, 1321-50 (1996).

17. See, e.g., *Chinese Staff & Workers Ass'n v. Bloomberg*, 896 N.Y.S.2d 588, 594 (Sup. Ct. 2009) (deferring to local government and noting that “[t]he court’s role is not to weigh the desirability of the proposed action, choose among alternatives, resolve disagreements among experts, or substitute its judgment for that of the reviewing agency”).

18. See Richard Schaffer & Neil Smith, *The Gentrification of Harlem?*, 76 ANNALS ASS'N AM. GEOGRAPHERS 347, 347 (1986). See generally JEFFREY B. FERGUSON, *THE HARLEM RENAISSANCE: A BRIEF HISTORY WITH DOCUMENTS* (2008); NATHAN IRVIN HUGGINS, *HARLEM RENAISSANCE* (2007).

19. See JEFF CHANG, *CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION* 77-79 (2005); see also David Gonzalez, *Will Gentrification Spoil the Birthplace of Hip-*

neighborhoods built social bonds that allowed individuals to flourish. Such social bonds, however, do not transfer easily when individuals are uprooted from those neighborhoods. In addition, immigrants historically have sought affordable housing in these neighborhoods and have created major cultural hubs. These possibilities arose largely due to the relationships fostered organically in these urban neighborhoods. Gentrification changes these opportunities.

#### A. Defining Gentrification

Gentrification is a polarizing term.<sup>20</sup> Urban scholars have described gentrification as “ethnic cleansing”<sup>21</sup> and “class conquest . . . to scrub the city clean of its working-class geography and history.”<sup>22</sup> Central to these critiques of gentrification as a form of colonization<sup>23</sup> is the specter or actual displacement of low-income populations from their neighborhoods.<sup>24</sup> In contrast, local governments often promote gentrification as the antidote to “blight” in urban areas.<sup>25</sup> The long list of benefits that governments associate with gentrification include increased property tax bases, more tourism dollars, cleaner streets, reduced crime, more economic activity, and integrated neighborhoods.<sup>26</sup> Also, increased government and private investment is believed to improve a neighborhood’s housing conditions and inject resources long demanded in low-income neighborhoods.<sup>27</sup>

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*Hop?*, N.Y. TIMES (May 21, 2007), [http://www.nytimes.com/2007/05/21/nyregion/21citywide.html?\\_r=0](http://www.nytimes.com/2007/05/21/nyregion/21citywide.html?_r=0) [<https://perma.cc/PBF7-2XPY>].

20. See JUDITH DESENA, GENTRIFICATION AND INEQUALITY IN BROOKLYN: THE NEW KIDS ON THE BLOCK 11 (2009) (describing the differing views of gentrification from ecological and critical theory).

21. DOROTHY HUGHES, I’M JUST SAYING . . . IT LOOKS LIKE ETHNIC CLEANSING: THE GENTRIFICATION OF HARLEM 1 (2012) (describing the gentrification of Harlem, New York, as “the planned deliberate removal of parts, or all of a particular ethnic group from a special territory”).

22. NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY 11 (1996).

23. See, e.g., GENTRIFICATION IN A GLOBAL CONTEXT: THE NEW URBAN COLONIALISM (Rowland Atkinson & Gary Bridge eds., 2005).

24. According to a study on mayoral priorities by the Initiative on Cities at Boston University, which surveyed mayors from more than seventy cities, nearly half of all mayors agree with the following statement on gentrification: “It is good for a neighborhood when it experiences rising property values, even if it means that some current residents might have to move out.” KATHERINE LEVINE EINSTEIN ET AL., BOS. UNIV. INITIATIVE ON CITIES, MAYORAL POLICY MAKING: RESULTS FROM THE 21ST-CENTURY MAYORS LEADERSHIP SURVEY 22 (2014), [https://open.bu.edu/bitstream/handle/2144/9212/BUIOC\\_Mayors%20Leadership%20Survey\\_Oct%202014.pdf?sequence=8](https://open.bu.edu/bitstream/handle/2144/9212/BUIOC_Mayors%20Leadership%20Survey_Oct%202014.pdf?sequence=8) [<https://perma.cc/VQX4-KZBT>].

25. Implicit in this language seeking to “cleanse” and “purify” undesirable elements of urban areas, however, is the whitewashing and displacement of neighborhoods of color. *But see* Terra McKinnish et al., *Who Gentrifies Low-Income Neighborhoods?*, 67 J. URB. ECON. 180, 181 (2010).

26. See Justin Feldman, *Gentrification, Urban Displacement and Affordable Housing: Overview and Research Roundup*, JOURNALIST’S RESOURCE, <http://journalistsresource.org/studies/economics/real-estate/gentrification-urban-displacement-affordable-housing-overview-research-roundup> (last updated Aug. 15, 2014) [<https://perma.cc/8VVW-WVY6>].

27. Governments are increasing the amount of public dollars spent toward gentrifying neighborhoods. See Peter Marcuse, *Gentrification, Abandonment, and Displacement:*

This Article defines gentrification as a systematic remake of the class composition of urban areas due to the displacement of low-income residents and businesses. Although many studies of gentrification primarily focus on direct displacement of residents as a measure of impact, this Article anticipates the direct and secondary displacement<sup>28</sup> of residents and businesses that results from gentrification, and it also considers effects on community life and structures.<sup>29</sup>

In its original conception, gentrification described the movement of middle-class families into working-class neighborhoods.<sup>30</sup> The demand-side theory argues that gentrification reflects the individual choices of so-called “pioneers.”<sup>31</sup> This theory sometimes counters, but also interacts with, the supply-side theory. Representative of the supply-side theory, Neil Smith argues that gentrification results from the rent gap that occurs when disinvestment depreciates the neighborhood and developers capitalize on the margin between the actual and potential ground-level rent.<sup>32</sup>

Government actions have played a prominent role in exploiting these rent gaps, making gentrification now “powerful and breathtakingly fast.”<sup>33</sup> Policies that created disinvestment and depreciation of inner-city neighborhoods, such as redlining and blockbusting, have made possible the large margin for profit that these neighborhoods now produce.<sup>34</sup> City and state policies, such as zoning and tax breaks, facilitate and accelerate the gentrification of the same neighborhoods previously suffering from government disinvestment.<sup>35</sup> Federal policies have also gentrified

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*Connections, Causes, and Policy Responses in New York City*, 28 WASH. U. J. URB. & CONTEMP. L. 195, 228 (1985).

28. Direct displacement generally refers to the type of displacement that occurred during the urban renewal period, “when a demographic or ethnic group succeeds another due specifically to a process or program.” DIANE K. LEVY ET AL., *URBAN INST., IN THE FACE OF GENTRIFICATION: CASE STUDIES OF LOCAL EFFORTS TO MITIGATE DISPLACEMENT 3* (2006), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411294-In-the-Face-of-Gentrification.PDF> [<https://perma.cc/PM6V-G35Q>]. Secondary displacement refers to the type of displacement that occurs when low-income residents are forced out by economic or social forces, such as rising rents or, for instance, “tenant harassment.” *Id.*

29. *See infra* Part II.B.

30. Sociologist Ruth Glass coined the term “gentrification” in 1964. *See* Tom Slater, *Gentrification of the City*, in *THE NEW BLACKWELL COMPANION TO THE CITY* (Gary Bridge & Sophie Watson eds., 2011).

31. Andrew C. Helms, *Understanding Gentrification: An Empirical Analysis of the Determinants of Urban Housing Renovation*, 54 J. URB. ECON. 474, 475 (2003).

32. Neil Smith, *Toward a Theory of Gentrification: A Back to the City Movement by Capital, Not People*, 45 J. AM. PLAN. ASS’N 538, 545–46 (1979).

33. ULDUZ MASCHAYKH, *THE CHANGING IMAGE OF AFFORDABLE HOUSING: DESIGN GENTRIFICATION AND COMMUNITY IN CANADA AND EUROPE 17* (2015); *see also* Michael Powell, *A Contrarian’s Lament in a Blitz of Gentrification*, N.Y. TIMES (Feb. 19, 2010), <http://www.nytimes.com/2010/02/21/nyregion/21gentrify.html> [<https://perma.cc/RWB5-7YTX>].

34. *See infra* Part II.C.

35. *See* MAUREEN KENNEDY & PAUL LEONARD, BROOKINGS INST. CTR. ON URBAN & METRO. POLICY, *DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 13* (2001), <http://www.brookings.edu/~media/research/files/reports/2001/4/metropolitanpolicy/gentrification.pdf> [<https://perma.cc/T5KJ-Z4FD>]. Other city policies that can accelerate gentrification include transit-oriented development, construction

neighborhoods.<sup>36</sup> The actors now instrumental in gentrification are not consumers but local governments, developers, and financial institutions.<sup>37</sup> Using census data on the median home price and average educational attainment of residents, one study of the United States's fifty largest cities found that 20 percent of neighborhoods have experienced gentrification since 2000, in contrast to 9 percent in the 1990s.<sup>38</sup> Today's gentrification reflects a turbocharged gentrification—also termed “hyper” or “super” gentrification—that relies on the collaboration of the finance industry, private corporations, and municipal governments.<sup>39</sup>

However, gentrification differs from revitalization.<sup>40</sup> Gentrification results in the displacement of low-income individuals, families, and people of color, thereby changing the character of the neighborhood, whereas revitalization invests in and enhances the physical, social, and commercial components of neighborhoods.<sup>41</sup> Many low-income neighborhoods need government injection of resources. But if this remaking of the neighborhood displaces low-income residents that have long demanded many of these services, then this effort does not benefit them.

### B. Gentrification's Impact on Communities

Gentrification's effect varies depending on the city.<sup>42</sup> In wealthy cities, like New York and San Francisco, gentrification may result in displacement of low-income people of color from the city and even the surrounding region, whereas in midmarket cities, like Chicago and Boston, it may displace people to nearby suburbs. Poorer cities, like Detroit, in contrast, may not experience much displacement due to gentrification.<sup>43</sup> Yet, understanding how wealthy, global cities experience gentrification is

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of large development projects like convention centers and stadiums, and selling city-owned property.

36. See *infra* text accompanying notes 222–23.

37. See Smith, *supra* note 32, at 547.

38. Mike Maciag, *Gentrification in America Report*, GOVERNING (Feb. 2015), <http://www.governing.com/gov-data/census/gentrification-in-cities-governing-report.html> [<https://perma.cc/P3WY-4FF8>]. Washington, D.C., was representative of rapidly gentrifying urban areas as fifty-four of its neighborhoods gentrified in the 2000s in contrast to only five neighborhoods in the 1990s.

39. See Lees, *supra* note 14, at 398, 403; Loretta Lees, *Super-Gentrification: The Case of Brooklyn Heights, New York City*, 40 URB. STUD. 2487, 2501 (2003) (noting that a “tidal wave of Wall Street money swept over [Brooklyn] Heights,” and discussing the relocation of large “globally linked” firms to the area); see also *supra* notes 6–7 and accompanying text.

40. See John A. Powell & Margeurite L. Spencer, *Giving Them the Old One-Two: Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 442 (2003); see also KENNEDY & LEONARD, *supra* note 35, at 5.

41. See KENNEDY & LEONARD, *supra* note 35, at 6; Powell & Spencer, *supra* note 40, at 442.

42. Lees, *supra* note 14, at 403.

43. See Melena Ryzik, *For Detroit Artists, Almost Anything Goes*, N.Y. TIMES (July 15, 2015), <http://www.nytimes.com/2015/07/16/arts/design/for-detroit-artists-almost-anything-goes.html> (describing efforts to inject public resources and investment in a city just emerging from bankruptcy) [<https://perma.cc/T8CK-7HCP>]. Poorer cities may not experience much displacement due to revitalization efforts, but low-income communities must have input to ensure that displacement does not become a defining characteristic of revitalization plans.



important because they create gentrification blueprints for midsized and smaller cities, where effects may ultimately be similar.<sup>44</sup>

Census data in the past few decades show how populations in urban areas have changed as government policies have contributed to gentrification. Between 2000 and 2010, the largest metropolitan areas (i.e., areas with census populations of more than five million) experienced large population growth in their central districts.<sup>45</sup> Significant gentrification in cities correlated with a spike in the population living two miles from city halls, with Chicago recording the largest growth at 48,000 new residents, followed by New York, Philadelphia, San Francisco, and Washington, D.C.<sup>46</sup> Meanwhile, studies focused on neighborhood-level census data in cities have shown decreases in populations of color, decreases in the share of family households and households with children, and higher median housing values and rents than that of the city overall.<sup>47</sup> The “exurbs”—the peripheral, low density neighborhoods of large urban areas—also have witnessed growth of three to five times the average rate between 2000 and 2010, with white people now composing an overwhelming portion of the total population and growth.<sup>48</sup>

Parts of suburban America reflect the flip side of changing urban demographics.<sup>49</sup> The suburbs are generally becoming more racially diverse due to increased Hispanic populations.<sup>50</sup> But since 2000, concentrated

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44. New York’s PlaNYC 2030 to rezone for “livability and sustainability,” for example, provided the model to gentrify through zoning for Philadelphia’s similarly named Philadelphia2035. *Compare* NYC MAYOR’S OFFICE, ONE NEW YORK: THE PLAN FOR A STRONG AND JUST CITY (2016), <http://www.nyc.gov/html/onenyc/downloads/pdf/publications/OneNYC.pdf> [<https://perma.cc/DHS3-6X7K>], with PHILA. CITY PLANNING COMM’N, PHILADELPHIA 2035: CITYWIDE VISION (2011), <http://phila2035.org/pdfs/final2035vision.pdf> [<http://phila2035.org/pdfs/final2035vision.pdf>].

45. STEVEN G. WILSON ET AL., U.S. DEP’T OF COMMERCE, PATTERNS OF METROPOLITAN AND MICROPOLITAN POPULATION CHANGE: 2000 TO 2010, at 25 (2012).

46. *Compare id.* at 26, with Maciag, *supra* note 38.

47. *See generally* BETHANY Y. LI ET AL., ASIAN AM. LEGAL DEF. & EDUC. FUND, CHINATOWN THEN AND NOW: GENTRIFICATION IN BOSTON, NEW YORK, AND PHILADELPHIA (2013) (describing demographic changes in the Chinatowns of Boston, New York, and Philadelphia); *New York City Demographic Shifts, 2000 to 2010*, CTR. FOR URB. RES., <http://www.urbanresearchmaps.org/plurality/> (last visited Nov. 19, 2016) (noting that the black population in Harlem dropped as white population grew considerably, mimicking patterns in Williamsburg where whites grew in number and share, and Latinos dropped in number and share) [<https://perma.cc/3232-B538>].

48. WILLIAM H. FREY, BROOKINGS METRO. POLICY PROGRAM, MELTING POT CITIES AND SUBURBS: RACIAL AND ETHNIC CHANGE IN METRO AMERICA IN THE 2000s, at 11 (2011), [https://www.brookings.edu/wp-content/uploads/2016/06/0504\\_census\\_ethnicity\\_frey.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/0504_census_ethnicity_frey.pdf) [<https://perma.cc/6GN3-JQXB>].

49. *See* Smith, *supra* note 32, at 547 (predicting that the movement of capital back to the city would mean “the working class and the poor would inherit the old declining suburbs in a cruelly ironic continuation of the filtering process . . . [and] then be trapped in the suburbs, not the inner city”).

50. WILLIAM H. FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA 44–45 (2015). Frey notes that Hispanic populations are growing in most suburbs of metropolitan areas, but particularly in the New Sun Belt, including cities like Nashville and Charlotte. *Id.* at 50–51; *see also* Sam Roberts, *Region Is Reshaped as Minorities Go to Suburbs*, N.Y. TIMES (Dec. 14, 2010), <http://www.nytimes.com/2010/12/15/nyregion/15nycensus.html> (stating that 2010 census numbers reveal that

poverty in the suburbs has grown at three times the rate of poverty growth in cities.<sup>51</sup> In 2000, the number of poor people living below the federal poverty line was greater in urban areas than in the suburbs, but by 2010, the number of poor people in the suburbs was greater than those in urban and rural areas.<sup>52</sup>

People who displace, however, are not monolithically white populations. In Boston, city policies have created significant speculation in the real estate market, and Chinese gentrifiers from mainland China are, in part, financing the gentrification and displacement of low-income Chinese people from Boston's Chinatown. For example, wealthy mainland Chinese people have bought more than one-third of the units in a recently constructed luxury condominium in Chinatown that received a zoning variance from the city.<sup>53</sup> Similarly, affluent Latin Americans are buying new luxury housing in downtown Miami and squeezing out opportunities for affordable housing development.<sup>54</sup>

Yet, although a comprehensive racial analysis of gentrification has not been done,<sup>55</sup> data show that in the United States, people of color make up a significant portion of those displaced.<sup>56</sup> A recent study conducted by Harvard University researcher Jackelyn Hwang indicates that gentrification is more prevalent in cities with higher levels of immigration and neighborhoods with more immigrants.<sup>57</sup> Oakland's eviction rate has risen by 300 percent since 1998, and 75 percent of those evicted are people of color.<sup>58</sup> Only 300 Asian residents remain in Washington, D.C.'s Chinatown, spurred by the building of a large sports and entertainment complex in 1997.<sup>59</sup> Between 2000 and 2010, the black population in Brooklyn dropped by approximately 50,000.<sup>60</sup>

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"[m]etropolitan New York is being rapidly reshaped as blacks, Latinos, Asians and immigrants surge into the suburbs, while gentrification by whites is widening the income gap in neighborhoods in Manhattan and Brooklyn") [<https://perma.cc/6FVZ-79ET>].

51. See Elizabeth Kneebone, *The Growth and Spread of Concentrated Poverty, 2000 to 2008–2012*, BROOKINGS (July 31, 2014), <http://www.brookings.edu/research/interactives/2014/concentrated-poverty#/M10420> [<https://perma.cc/S2AK-F43R>].

52. *Id.*

53. BETHANY Y. LI ET AL., *supra* note 47, at 21.

54. See Shaaila Dewan, *In Many Cities, Rent Is Rising out of Reach of Middle Class*, N.Y. TIMES (Apr. 14, 2014), <http://www.nytimes.com/2014/04/15/business/more-renters-find-30-affordability-ratio-unattainable.html> [<https://perma.cc/EQ5K-3AUL>].

55. See Lees, *supra* note 14, at 403.

56. See *infra* Part II.C (providing a historical overview and context for why gentrification has disproportionately affected people of color in the United States).

57. See Jackelyn Hwang, *Gentrification in Changing Cities: Immigration, New Diversity, and Racial Inequality in Neighborhood Renewal*, 660 ANNALS AM. ACAD. POL. & SOC. SCI. 319, 319 (2015).

58. See Powell & Spencer, *supra* note 40, at 438.

59. See Yanan Wang, *D.C.'s Chinatown Has Only 300 Chinese Americans Left, and They're Fighting to Stay*, WASH. POST (July 18, 2015), [http://www.washingtonpost.com/lifestyle/style/dcs-chinatown-has-only-300-chinese-americans-left--and-fighting-to-stay/2015/07/16/86d54e84-2191-11e5-bf41-c23f5d3face1\\_story.html](http://www.washingtonpost.com/lifestyle/style/dcs-chinatown-has-only-300-chinese-americans-left--and-fighting-to-stay/2015/07/16/86d54e84-2191-11e5-bf41-c23f5d3face1_story.html) [<https://perma.cc/9KLC-R7T2>].

60. See *New York City Demographic Shifts, 2000 to 2010*, *supra* note 47.

Studies also provide insight into the resegregation that occurs from gentrification.<sup>61</sup> Although data do not easily capture where people move due to gentrification,<sup>62</sup> low-income people who are displaced for various reasons move to other low-income areas that have “worsening neighborhood trajectories.”<sup>63</sup> In the famous *Moving to Opportunity* study on Gautreaux public housing residents in Chicago, the U.S. Department of Housing and Urban Development (HUD) found that when low-income people are priced out of high-opportunity areas, they are often left with few options but to live in areas of low or very low opportunity.<sup>64</sup> Data also show that Latinos and Asians who have moved to new neighborhoods since the 1980s still live in areas segregated from whites.<sup>65</sup>

As demographics change, residents have encountered increased police presence in public spaces. Clashes between new and long-time residents over valuable park space erupted in New York City’s Chinatown, where, in response to noise complaints, the police beat, bloodied, and arrested an elderly musician participating in a weekly open-air Chinese opera performance at a local park used by many elderly residents as an extension of their cramped apartments.<sup>66</sup> Reports of increased stop-and-frisks in the 1990s in New York City’s Harlem highlight similar encounters with the police.<sup>67</sup>

Additionally, the loss of community capital and support due to gentrification—often not represented through census numbers or physical

61. See Powell & Spencer, *supra* note 40, at 434 (“Gentrification is good for neither cities nor the poor . . . unless we disrupt the market in pursuit of a more egalitarian goal: the creation of integrated life opportunities for all people in all places.”).

62. See KENNEDY & LEONARD, *supra* note 35, at 7–8.

63. JENNIFER COMEY ET AL., METRO. HOUS. & CMTYS. CTR., STRUGGLING TO STAY OUT OF HIGH-POVERTY NEIGHBORHOODS: LESSONS FROM THE MOVING TO OPPORTUNITY EXPERIMENT 3 (2008).

64. MARK SHRODER, HUD, MOVING TO OPPORTUNITY: AN EXPERIMENT IN SOCIAL AND GEOGRAPHIC MOBILITY (2001); see POVERTY & RACE RESEARCH ACTION COUNCIL, AN ANALYSIS OF THE *THOMPSON V. HUD* DECISION (2005) (describing how HUD deeply segregated public housing over a period of decades).

65. See JOHN R. LOGAN & BRIAN J. STULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2 (2011), <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf> [<https://perma.cc/K2LD-WSUT>].

66. See Jeffrey E. Singer, *Arrest of Musician in Chinatown Muffles Park Performances*, N.Y. TIMES: CITY ROOM (June 1, 2011, 7:05 AM), <http://cityroom.blogs.nytimes.com/2011/06/01/arrest-of-musician-in-chinatown-muffles-park-performances/> [<https://perma.cc/4W83-YTK2>]. Additionally, in San Francisco’s Mission District, Latino teenagers argued with adult tech workers over which group had the right to a soccer field—the teens, who, along with other residents, had long used the space for pickup games, or the tech workers who had recently moved to the neighborhood and reserved the newly renovated field based on a new city policy. *ICYMI 2014: Soccer Field Standoff Highlights Gentrification Tension*, NPR: CODE SWITCH (Dec. 27, 2014, 6:50 AM), <http://www.npr.org/sections/codeswitch/2014/12/27/373284989/icymi-2014-soccer-field-standoff-highlights-gentrification-tension> [<https://perma.cc/78F3-DEZ7>].

67. See Rose Hackman, *What Will Happen When Harlem Becomes White*, GUARDIAN (May 13, 2015, 12:45 PM), [http://www.theguardian.com/us-news/2015/may/13/harlem-gentrification-new-york-race-black-white?CMP=share\\_btn\\_fb](http://www.theguardian.com/us-news/2015/may/13/harlem-gentrification-new-york-race-black-white?CMP=share_btn_fb) [<https://perma.cc/ZR8S-P43G>].

markers in the neighborhood—can be just as devastating as displacement.<sup>68</sup> Even the threat of displacement due to gentrification leads to losses of culture and capital that communities have spent decades building.<sup>69</sup> Social capital is built through the relationships and connections of individuals or organizations.<sup>70</sup> Social capital can create a self-sustaining community. For example, a small flower shop in Los Angeles's Highland Park allows immigrants in the community without bank accounts to pay utility bills.<sup>71</sup> Social capital can also increase political power outside of neighborhoods and within the city. Collective efficacy in neighborhoods—the established social connections and relations that enable intervention on behalf of the common good—corresponds with increased civic participation and collective movement against policies that encroach on the community's sense of place.<sup>72</sup> Social capital is difficult to quantify, but its loss has far reaching effects.<sup>73</sup> Data on the displacement of residents from New Orleans after Hurricane Katrina reveal that residents, who are now long removed from their homes and communities, experience significant psychological and physical damage.<sup>74</sup>

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68. A case study of gentrification in Columbia Heights in Washington, D.C., and Jamaica Plain in Boston identifies “social displacement,” defined as cultural, demographic, or legal changes leading to residents no longer feeling comfortable in their homes, as a critical, but often overlooked, byproduct of gentrification due to the difficulty of measuring this effect. Stephanie Brown, *Beyond Gentrification: Strategies for Guiding the Conversation and Redirecting the Outcomes of Community Transition* 4 (Harvard Joint Ctr. for Hous. Studies, Working Paper No. 14-12, 2014), [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w14-12\\_brown.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w14-12_brown.pdf) [<https://perma.cc/MRF4-RS8A>].

69. See STEPHEN SHEPPARD, CTR. FOR CREATIVE CMTY. DEV., WHY IS GENTRIFICATION A PROBLEM? (2012), <http://web.williams.edu/Economics/ArtsEcon/library/pdfs/WhyIsGentrificationAProbREFORM.pdf> [<https://perma.cc/3PTP-W4FF>]. But see Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811, 811 (2013).

70. See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95, 104–05 (1988). Bonding social capital refers to social networks within a community tying individuals and organizations to a closely knit group, while bridging social capital creates connections to networks and assets outside of the community. See Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 826 (2012).

71. See Aura Bogado, *Dispatch from Highland Park: Gentrification, Displacement and the Disappearance of Latino Businesses*, COLOR LINES (Jan. 20, 2015, 7:00 AM), <http://www.colorlines.com/articles/dispatch-highland-park-gentrification-displacement-and-disappearance-latino-businesses> [<https://perma.cc/4LV4-TF9Z>].

72. See Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 918–19 (1997). Social scientists have concluded that stronger collective efficiency within neighborhoods correlates to lower rates of violence. *Id.* at 920.

73. In the last decade or so, scholars have departed from focusing stringently on quantitative data about the economic and demographic effects of gentrification to broader analyses that include subjective and first person accounts of displaced residents. See, e.g., LANCE FREEMAN, THERE GOES THE 'HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP 10 (2006). Lance Freeman's study of Harlem, New York, and Clinton Hill, Brooklyn, includes lengthy discussions of concepts, such as isolation and resentment, which have largely been underemphasized in the traditional literature. See generally *id.*

74. See Bill Quigley & Davida Finger, *Katrina Pain Index 2012: Seven Years and Counting* . . . , LA. WKLY. (Aug. 27, 2012), <http://www.louisianaweekly.com/katrina-pain-index-2012-seven-years-and-counting%E2%80%A6/> [<https://perma.cc/49JK-8XHN>].

The mental health implications of displacement due to gentrification can be far reaching. Dr. Mindy Thompson Fullilove, a psychiatrist who spent years studying the psychological effects of upheaval on individuals and communities, termed the result of displacement as “root shock.”<sup>75</sup> She described root shock as the “traumatic stress reaction to the destruction of all or part of one’s emotional ecosystem.”<sup>76</sup> For the individual, loss of an ethnic neighborhood and the neighbors who had become a form of physical insurance is “devastating,” while, for the community, loss of the collective ability and capacity to approach problems is “permanently crippling.”<sup>77</sup> Dropping individuals from a supportive environment into a new neighborhood that does not have a similar network can create even greater societal problems, such as homelessness, mental health issues, and educational instability, on which the government might have to spend more resources than if it had otherwise invested resources in and helped to support low-income neighborhoods.<sup>78</sup> After examining the impact of upheaval on individuals and communities, Dr. Fullilove declared that “displacement is the problem the twenty-first century must solve.”<sup>79</sup>

Proponents of gentrification have focused on its limited reach, but studies concluding that gentrification is not widespread<sup>80</sup> often do not consider qualitative factors, detailed block-level data,<sup>81</sup> or secondary displacement.<sup>82</sup>

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75. MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* 11 (2005).

76. *Id.*

77. *Id.* at 99.

78. See Ana Petrovic, *The Elderly Facing Gentrification: Neglect, Invisibility, Entrapment, and Loss*, 15 *ELDER L.J.* 533, 547–50 (2007). See generally Marc Fried, *Grieving for a Lost Home*, in *THE URBAN CONDITION: PEOPLE AND POLICY IN THE METROPOLIS* (1963); Tamar Heller, *The Effects of Involuntary Residential Relocation: A Review*, 10 *AM. J. COMMUNITY PSYCHOL.* 471 (1982).

79. FULLILOVE, *supra* note 75, at 5.

80. See, e.g., Mark Davidson, *Spoiled Mixture: Where Does State-Led ‘Positive’ Gentrification End?*, 45 *J. URB. STUD.* 2385, 2386 (2008); Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 *J. AM. PLAN. ASS’N* 39, 48 (2004) (finding low correlation between gentrification and heightened displacement of residents); Jacob L. Vigdor, *Does Gentrification Harm the Poor?*, 2002 *BROOKINGS-WHARTON PAPERS URB. AFF.* 133, 133.

81. Gentrification is most visible from neighborhood or block-level data, as well as qualitative observations like changing storefronts. See William Easterly et al., *A Long History of a Short Block: Four Centuries of Development Surprises on a Single Stretch of a New York City Street* 3 (Dev. Research Inst., Working Paper No. 96, 2015), <https://static1.squarespace.com/static/5451873de4b008f3c5898336/t/54cfbedee4b092432af5f5f8/1422900969104/DR1w1.pdf> [<https://perma.cc/4KP9-Q32X>]. A study of just one block in SoHo, New York, demonstrated that property values exploded and increased six-fold between 1990 and 2010, pushing out the artists who had redefined the area in the 1980s. *Id.* at 35–37.

82. Secondary displacement is defined by James P. Lewandowski and Steve Stover in their article about baseball:

Direct displacement is calculated by simply tabulating the number of minority residents forced to move because of the stadium’s footprint. Indirect and secondary displacement is derived by first estimating minorities’ elasticity of demand for housing in the district and then applying the resulting coefficient to expected changes in rent to the stadium’s neighborhood and to adjacent neighborhoods.

Studies of gentrification also have not focused on small business displacement, a critical consideration given the symbiotic relationship of small businesses with low-income residents.<sup>83</sup> City planning departments make these same mistakes when considering the impact of redevelopment plans on neighborhoods. Lance Freeman and Frank Braconi's study on gentrification in New York City in the 1990s found little connection between displacement and gentrification and concluded that low- and moderate-income people were more likely to stay in gentrifying neighborhoods due to increased services and resources.<sup>84</sup> But, using the same data set supplemented by qualitative research, Kathe Newman and Elvin Wyly revealed how nuances of secondary displacement, overcrowding, and the speed of gentrification paint a different picture.<sup>85</sup>

Further, although some studies discount gentrification because its effects are most prominent in large cities,<sup>86</sup> residents and businesses living on gentrified blocks experience the negative effects even if people in other neighborhoods and cities do not.<sup>87</sup> Where gentrification does impact low-income neighborhoods, local governments should be concerned with its effects, which can result in loss of resources, worsened mental health, and weakened support networks.

Claims that gentrification benefits low-income communities are specious. If a neighborhood's housing conditions improve and government services become more accessible due to gentrification, increasing rents force out many low-income people who do not benefit from the opportunity that gentrification may bring. Economist Stephen Shepherd argues that the overall net cost of gentrification is significant because, when gentrification increases the risk of displacement, the level of activity people engage in to

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James P. Lewandowski & Steve Stover, *Urban Redevelopment, Baseball, and Displacement in Washington D.C.*, 40 MIDDLE STATES GEOGRAPHER 57, 58 (2007).

83. See Sharon Zukin et al., *New Retail Capital and Neighborhood Change: Boutiques and Gentrification in New York City*, 8 CITY & COMMUNITY 47, 47 (2009) (noting that the businesses that are displaced are often "older stores catering to a poorer, more traditional, and less mobile clientele"). A Hunter College research team examined commercial businesses in Brooklyn between 2002 and 2012 and found that "the most substantial displacement of independently owned businesses occurred in areas that were rezoned by the city and rebuilt by private developers." Mike Owen Benediktsson et al., *The Real Small Business Killer*, N.Y. DAILY NEWS (Oct. 12, 2014, 4:00 AM), <http://www.nydailynews.com/opinion/benediktsson-lamberta-larsen-real-small-business-killer-article-1.1970620> [<https://perma.cc/CA23-8BVV>]. The research team described the change in rezoned neighborhoods as "slash-and-burn." *Id.* The data revealed that in one twenty-square block area of Williamsburg, 90 percent of the bars and restaurants had opened in the last decade, while the number of Hispanic-owned small businesses had dropped by half. *Id.*

84. Freeman & Braconi, *supra* note 80, at 39–40.

85. Kathe Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 URB. STUD. 23, 25–26 (2006).

86. One study based on census data concluded that concentrated poverty, and not gentrification, appears to be the biggest urban challenge. See JOE CORTRIGHT & DILLON MAHMOUDI, CITY OBSERVATORY, LOST IN PLACE: WHY THE PERSISTENCE AND SPREAD OF CONCENTRATED POVERTY—NOT GENTRIFICATION—IS OUR BIGGEST URBAN CHALLENGE 18–19, 34–35 (2014). Yet, the study also acknowledged the significance of gentrification in some of the largest cities like New York, Chicago, and Washington, D.C. See *id.* at 19.

87. See generally Easterly et al., *supra* note 81.

improve that community decreases.<sup>88</sup> Therefore, a cost-benefit analysis shows that even if gentrification does not cause displacement, it creates a significant social cost.<sup>89</sup> Similarly, through a review of gentrification literature, published between 1964 and 2001, researcher Rowland Atkinson determined that gentrification leads to more net negative consequences—including rising rents, tenant harassment, and community conflict and racial tensions, all of which were supported by evidence—than purported benefits like increased city revenue and services, which were backed by little empirical evidence.<sup>90</sup>

A recent study also questions the purported integrative effects of gentrification.<sup>91</sup> Comparing census data, police records, street-level observations, community surveys, and other city records, the study concluded that gentrification occurs in neighborhoods that are at least approximately 35 percent white and slowed or stopped in neighborhoods that were 40 percent or more black.<sup>92</sup> This study indicates that gentrification occurs in neighborhoods that are already relatively integrated, and displacement of low-income people of color in the neighborhoods would drive people away from resources and critical support structures that communities to which people are displaced cannot automatically recreate.<sup>93</sup>

## II. ZONING TO GENTRIFY

Increasingly, cities have used zoning to gentrify neighborhoods. While affluent suburban areas have used zoning to resist integration, cities claim to use zoning to integrate by gentrifying. But rather than ameliorate the problems of segregation, zoning and other policies that gentrify have engineered the resegregation of urban space. In gentrifying urban areas, low-income people battle the daily effects of gentrification through heightened landlord harassment, baseless evictions, rising commercial rents for small businesses, increased police harassment, loss of social capital and resources, and forced displacement. The resulting reconcentration of poverty continues the United States's long history of segregating and ignoring low-income neighborhoods of color.

### A. *Urban Exclusionary Zoning*

Zoning is the “preferred tool” for local governments to redevelop cities.<sup>94</sup> Zoning controls development in communities through density allowances.

88. SHEPPARD, *supra* note 69.

89. *Id.*

90. ROWLAND ATKINSON, ESRC CTR. FOR NEIGHBOURHOOD RESEARCH, DOES GENTRIFICATION HELP OR HARM URBAN NEIGHBOURHOODS?: AN ASSESSMENT OF THE EVIDENCE-BASE IN THE CONTEXT OF THE NEW URBAN AGENDA 7–16 (2002).

91. *See generally* Jackelyn Hwang & Robert J. Sampson, *Divergent Pathways of Gentrification: Racial Inequality and the Social Order of Renewal in Chicago Neighborhoods*, 79 AM. SOC. REV. 726 (2014).

92. *Id.* at 746.

93. *See* Powell & Spencer, *supra* note 40, at 441.

94. SHARON ZUKIN, *NAKED CITY: THE DEATH AND LIFE OF AUTHENTIC URBAN PLACES* 23 (2010).

Downzoning lowers density and upzoning increases it.<sup>95</sup> Contextual zoning regulates density consistent with existing buildings and neighborhood character and can operate as a form of downzoning if buildings are not built to their maximum zoning.<sup>96</sup> The regulation of density can preserve or drastically change neighborhoods.<sup>97</sup>

Downzoning has become the urban equivalent of exclusionary zoning in suburbs.<sup>98</sup> Exclusionary zoning in suburbs can restrict lot sizes or ban multifamily housing to prevent developers from building low-income housing and exclude low-income people from living in certain neighborhoods.<sup>99</sup> Similarly, downzoning—and the often accompanying contextual zoning—in urban neighborhoods restricts development and aims to retain the existing neighborhood character. As with exclusionary zoning in suburbs, downzoning in affluent urban neighborhoods shuts out low-income people.

A report studying rezonings in New York City between 2002 and 2007 concluded that the majority of upzonings occurred in low-income neighborhoods of color, while the majority of downzonings occurred in affluent white neighborhoods.<sup>100</sup> Cities often will use claims of sustainability to justify development through upzoning, but the study also revealed that New York City had downzoned, and thereby limited development on, 59 percent of lots within half a mile of a transit stop.<sup>101</sup>

The interaction of downzoning and upzoning can exacerbate the impact of development in poor neighborhoods. If cities restrict development of affluent neighborhoods in space-limited urban areas, developers will target other neighborhoods for more luxury housing, particularly upzoned low-income communities.<sup>102</sup> The impact of suddenly siting luxury development

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95. See JOHN P. LEWIS, *LAND USE CONTROLS AND PROPERTY RIGHTS: A GUIDE FOR REAL ESTATE PROFESSIONALS* 54–55 (2007).

96. See N.Y.C. DEP'T OF CITY PLANNING, *ZONING HANDBOOK* 145 (2011).

97. See, e.g., TOM ANGOTTI, *NEW YORK FOR SALE: COMMUNITY PLANNING CONFRONTS GLOBAL REAL ESTATE* 10 (2008); DESENA, *supra* note 20, at 3.

98. See Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 *FORDHAM URB. L.J.* 1667, 1675–76 (2013).

99. See GERRIT KNAAP ET AL., *ZONING AS A BARRIER TO MULTIFAMILY HOUSING DEVELOPMENT* 2 (2007) (stating that “[r]egulatory problems in housing markets take many forms, but zoning that excludes certain housing—usually based on type, size, or lot size—is perhaps the most pervasive”).

100. ARMSTRONG ET AL., *supra* note 10, at 9.

101. *Id.* at 11. Urban planners predicted that the number of free off-street parking spots required for new construction in one gentrifying “transit-oriented development” area would ensure that suburban-like automobiles replace the walkable environment that had existed prior to rezoning. Brian Paul, *How ‘Transit-Oriented Development’ Will Put More New Yorkers in Cars*, *GOHAM GAZETTE* (Apr. 21, 2010), <http://www.gothamgazette.com/index.php/development/501-how-transit-oriented-development-will-put-more-new-yorkers-in-cars> [https://perma.cc/3CX5-LFG7].

102. See, e.g., Affidavit of Tom Angotti in Support of the Petition to Invalidate the Final Environmental Impact Statement (FEIS) for the East Village/Lower East Side Rezoning, *Chinese Staff & Workers Assoc. v. Bloomberg*, 896 N.Y.S.2d 588 (Sup. Ct. 2009) (No. 100961/2009) [hereinafter Angotti Affidavit].



in poor neighborhoods<sup>103</sup> within cities facing gentrification becomes more acute because of the close physical proximity of poor and wealthy neighborhoods—sometimes separated by just one block—and the density of urban areas.<sup>104</sup>

The zeal of cities to gentrify masks the problems of housing affordability and opportunity to access fair housing on a regional scale. Exclusionary zoning in suburbs surrounding gentrifying cities heightens the effects of gentrification in those cities.<sup>105</sup> Low-income people do not have access to affluent white suburbs that remain hostile to low-income housing.<sup>106</sup> Areas where low-income people can afford to live in and around cities, like New York, shrink as the effects of exclusionary zoning in suburbs, downzoning in wealthy urban neighborhoods, and upzoning in poor urban neighborhoods collide.<sup>107</sup>

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103. Many of these neighborhoods are the same ones that experienced “white flight” and urban renewal. See Powell & Spencer, *supra* note 40, at 436–37.

104. In fact, new luxury developments in New York City have segregated poor and wealthy residents even within the same building, creating separate entrances for people living in low-income versus market rate units. Only recently has the city prohibited this practice. See Jennifer Gould & Danika Fears, ‘*Poor Doors*’ Are No More Thanks to Rent-Regulation Bill, N.Y. POST (June 28, 2015, 11:33 PM), <http://nypost.com/2015/06/28/poor-doors-are-no-more-thanks-to-rent-regulation-bill/> [<https://perma.cc/A2PW-XYE3>].

105. See ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA*, at vii (1976) (observing that exclusion of the poor from suburbs “helps perpetuate a host of problems by concentrating the burdens of coping with poverty inside central cities”); see also Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459, 477 (2009); John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 106 (2014).

106. See generally MARK OBRINSKY & DEBRA STEIN, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *OVERCOMING OPPOSITION TO MULTIFAMILY RENTAL HOUSING* (2006). Obrinsky and Stein contend that resistance to affordable housing manifests in one of two ways: either by “actions in opposition to specific projects or proposals” or “actions against a whole class of housing.” *Id.* at 3. For example, in Chappaqua, a wealthy predominantly white community in New York’s Westchester County, a developer’s effort to increase affordable housing was met with considerable resistance. See Joseph Berger, *An Affordable Housing Project Faces Opposition in Wealthy Chappaqua*, N.Y. TIMES (Feb. 17, 2014), [http://www.nytimes.com/2014/02/18/nyregion/an-affordable-housing-project-faces-opposition-in-wealthy-chappaqua.html?\\_r=0](http://www.nytimes.com/2014/02/18/nyregion/an-affordable-housing-project-faces-opposition-in-wealthy-chappaqua.html?_r=0) [<https://perma.cc/L93G-5YBV>]. Westchester County reached a settlement with HUD after a lawsuit by the Anti-Discrimination Center. See Sam Roberts, *Westchester Adds Housing to Desegregation Pact*, N.Y. TIMES (Aug. 10, 2009), <http://www.nytimes.com/2009/08/11/nyregion/11settle.html> [<https://perma.cc/GNC4-XR68>].

107. This Article mainly focuses on the effect of gentrification on residential displacement, but, as discussed in Part I.B, zoning changes and redevelopment plans also change the composition of businesses in immigrant neighborhoods and neighborhoods of color. The displacement of small businesses inevitably influences the daily living of low-income residents. For a discussion of business gentrification through the lens of retail spaces in New York City, see Zukin et al., *supra* note 83, at 47. See generally Tarry Hum, *City Industrial Manufacturing Plan Still Needed*, GOTHAM GAZETTE (July 23, 2015), <http://www.gothamgazette.com/index.php/opinion/5820-city-industrial-manufacturing-plan-still-needed-de-blasio-hum> (describing a \$1 billion rebranding and reinvestment of a sixteen-building complex on the Sunset Park, Brooklyn, waterfront that requires a zoning change to include a hotel and academic facility and threatens the neighborhood’s current industrial ecosystem of small businesses) [<https://perma.cc/TQ3K-AMCL>].

*B. Case Study of a New York City Rezoning*

A 2008 rezoning of the East Village and parts of the Lower East Side neighborhoods in New York City epitomizes an approach to zoning that promotes luxury development while falsely claiming to create affordability and sustainability. In the 2008 East Village and Lower East Side rezoning, the city upzoned by more than 100 percent major avenues and streets cutting directly into low-income neighborhoods of color that divided wealthier and low-income parts of the rezoning map. The upzoned streets ran directly into the heart of Chinatown and next to public housing.<sup>108</sup> Meanwhile, the same rezoning initiative restricted development in the more affluent, already gentrified, and predominantly white East Village, an area that notably housed immigrant and low-income households in prior decades.<sup>109</sup>

A study conducted by the Hunter College Center for Community Planning and Development concluded that this upzoning would accelerate a disproportionate amount of new development below Houston Street, the de facto dividing line between the more affluent East Village and the predominantly low-income neighborhoods of color of Chinatown and portions of the Lower East Side.<sup>110</sup> North of Houston Street within the zoning map, the population was 70 percent white and had higher incomes, smaller household sizes, and higher rates of home ownership.<sup>111</sup> South of Houston Street, the population was 78 percent Asian and Latino with median incomes 75 percent of the income north of Houston Street, 65 percent larger household sizes, and fewer homeowners.<sup>112</sup> Combined with the contextual zoning and downzoning in much of the area above Houston Street, the Hunter College study predicted that the rezoning plan would funnel development to the upzoned areas closest to low-income and immigrant households.<sup>113</sup>

The 111-block rezoning plan, which at that time was the third largest in the history of New York City, had quietly churned through the government approval process until Chinatown and Lower East Side immigrant residents and workers learned of its potential impact on their community. The community quickly and strongly opposed the rezoning, but city officials met charges of racism with skepticism and indignation.<sup>114</sup> This rezoning to

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108. The rezoning plan proposed to upzone Delancey Street, East Houston Street, and Chrystie Street by 147 percent, including Avenue D by 109 percent. *See Chinese Staff & Workers Ass'n v. Bloomberg*, 896 N.Y.S.2d 588, 592–93 (Sup. Ct. 2009).

109. The zoning changes in the East Village neighborhood north of Houston Street implemented contextual zoning and downzoning that protected against high-rise overdevelopment in response to resident complaints. The rezoning increased the development capacity on the majority of streets by 16 percent and by 34 percent on all but one north-south avenue. Angotti Affidavit, *supra* note 102, at 9.

110. *See id.* at 10.

111. *Id.* at 5.

112. *Id.*

113. *Id.*

114. *See, e.g.,* Chris Kui, *AAFE: Why It's Wrong to Call Rezoning Plan Racist*, VILLAGER (Aug. 6, 2008), [http://thevillager.com/villager\\_275/talkingpoint.html](http://thevillager.com/villager_275/talkingpoint.html) [https://perma.cc/5XU5-ZJZ3]; Heather Murray, *Chinatown Group Brands East Side Rezoning*

gentrify became a touchstone for the history of discriminatory treatment and disinvestment by federal, state, and local governments.<sup>115</sup>

Where downzoning in wealthy neighborhoods has restricted development, upzoning in poor neighborhoods has resulted in new housing units that are almost always rented or sold at market rate.<sup>116</sup> This incentive leads to intensified landlord harassment to evict tenants from low-rent units, including those protected by rent regulation.<sup>117</sup> Even where developers must produce low-income units as part of new development through inclusionary zoning, the number of these units is low.<sup>118</sup> Given developers'

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"Racist," VILLAGER (May 14, 2008), [http://thevillager.com/villager\\_263/chinatown.html](http://thevillager.com/villager_263/chinatown.html) [<https://perma.cc/X4HQ-DBYK>].

115. See generally Casey Samulski, *As Lawsuit Looms, No End to Talk on Rezoning*, VILLAGER (Oct. 1, 2008), [http://thevillager.com/villager\\_283/aslawsuitlooms.html](http://thevillager.com/villager_283/aslawsuitlooms.html) [<https://perma.cc/89L6-2RFL>].

116. See Angotti Affidavit, *supra* note 102, at 22; see also Laura Wolf-Powers, *Up-Zoning New York City's Mixed Use Neighborhoods: Property-Led Economic Development and the Anatomy of a Planning Dilemma*, 24 J. PLAN. EDUC. & RES. 379, 390 (2005) (describing how New York City's principle of zoning for "highest and best use" has contributed to opportunistic development); Lauren Chooljian, *Rental Market in Hip Neighborhoods Tightens Up, Causing Potential Tenants to Scramble*, WBEZ 91.5 CHI. (Aug. 6, 2012), <https://www.wbez.org/shows/eight-fortyeight/rental-market-in-hip-neighborhoods-tightens-up-causing-potential-tenants-to-scramble/d2ce5ab1-e915-43d0-aefc-f5e929803def> [<https://perma.cc/59KD-FDKK>]. See generally ARMSTRONG ET AL., *supra* note 10; JOSIAH MADAR, FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, INCLUSIONARY HOUSING POLICY IN NEW YORK CITY: ASSESSING NEW OPPORTUNITIES, CONSTRAINTS AND TRADE-OFFS (2015).

117. Studies that find limited displacement also incorrectly assume that tenant protections like rent regulation and public housing protect against displacement as these sources of affordable housing have come under increasing attack and more pressure due to the increase of rents in gentrifying areas. See Newman & Wyly, *supra* note 85, at 47. Acknowledging the harassment that occurs in upzoned low-income neighborhoods, New York City's Mayor Bill de Blasio pledged in his 2015 State of the City address to provide free legal services to tenants who face harassment and neglect by landlords. *Text of Mayor de Blasio's State of the City Address*, N.Y. TIMES (Feb. 3, 2015), <http://www.nytimes.com/2015/02/04/nyregion/new-york-mayor-bill-de-blasios-state-of-the-city-address.html> [<https://perma.cc/D4J7-5HM4>]; see also FIFTH AVENUE COMM., A FAIR EXCHANGE: BALANCING PRIVATE & PUBLIC DEVELOPMENT WHEN REZONING GOWANUS 14 (2010) (documenting harassment of rent-stabilized tenants following the Park Slope rezoning). One recent example involves the increased prevalence in New York City of lump sum payments to black families to vacate their rent-controlled apartments for wealthier white gentrifiers. See D.W. Gibson, 'I Put in White Tenants': *The Grim, Racist (and Likely Illegal) Methods of One Brooklyn Landlord*, N.Y. MAG. (May 12, 2015, 11:19 AM), <http://nymag.com/daily/intelligencer/2015/05/grim-racist-methods-of-one-brooklyn-landlord.html> [<https://perma.cc/FXP4-ZWV7>]. In the magazine profile, the author quotes a landlord as saying:

My saying is—again, I'm not racist—every black person has a price. The average price for a black person here in Bed-Stuy is \$30,000 dollars [sic]. Up over there in East New York, it's \$10,000 dollars [sic]. Everyone wants them to leave, not because we don't like them, it's just they're messing up—they bring everything down. Not all of them.

*Id.*; see ALAN MALLACH, A DECENT HOME: PLANNING, BUILDING AND PRESERVING AFFORDABLE HOUSING 10 (2009).

118. Inclusionary zoning, which requires new development to include a certain amount of affordable or low-income housing, shows that normal supply and demand principles in competitive housing markets are distorted and do not produce sufficient housing for people of all income levels. See Brad Lander, *How Much Affordable Housing Has NYC's Inclusionary Zoning Created?*, N.Y.C. COUNCIL MEMBER BRAD LANDER (Aug. 16, 2013),

resistance to building affordable housing, even when mandated or offset by government subsidies, the likelihood of new construction in cities with competitive housing markets benefiting low-income people is small despite increases in supply.<sup>119</sup>

In the case of the East Village and Lower East Side rezoning, the combination of upzoning in low-income areas with the more restricted zoning in affluent areas led the Hunter College Center for Community Planning and Development to predict significant displacement in low-income areas.<sup>120</sup> Although cities can directly displace low-income residents by demolishing low-income housing,<sup>121</sup> zoning policies that promote luxury development often cause indirect displacement by spiking the neighborhood's rental and home sale prices.<sup>122</sup> This potential for higher profit margins in gentrifying neighborhoods results in secondary displacement pressures, including high rent, rising evictions, tenant

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<http://bradlander.nyc/iz> (finding that New York City's zoning-based inclusionary housing program created only 2,769 affordable units throughout the city in the seven years since 2005 and that much of those units were in Brooklyn's Greenpoint/Williamsburg and Manhattan's Upper West Side) [<https://perma.cc/Q2LK-P6CR>]. In cities like New York, where inclusionary zoning for affordable units is voluntary, developers resist including low-income units because of the high price of land. *See generally* ARMSTRONG ET AL., *supra* note 10; MADAR, *supra* note 116.

119. Between 2008 and 2012, only five of the sixty-one buildings built in and around downtown Brooklyn, New York, that received a state tax subsidy included any below market rate apartments, and only 6 percent of the total units were affordable to low or moderate income families. *See* REAL AFFORDABILITY FOR ALL CAMPAIGN, LUXURIOUS LOOPHOLE: HOW DEVELOPERS USE TAXPAYER\$ TO SUBSIDIZE HOUSING FOR THE RICH 3 (2014), <https://www.scribd.com/doc/216192277/Luxurious-Loophole-Report-Real-Affordability-for-All-Campaign> [<https://perma.cc/5AQF-3EQ8>]. Of the 500 housing units approved for construction in the Mission neighborhood of San Francisco as of August 2015, only thirty-four units were below market rate. *See* Carl Finamore, *An Affordable Housing Victory: High End San Francisco Development Implodes*, COUNTERPUNCH (Aug. 25, 2015), <http://www.counterpunch.org/2015/08/25/an-affordable-housing-victory-high-end-san-francisco-development-implodes/> [<https://perma.cc/ELJ7-KFG2>]. Supply and demand principles suggest that upzoning urban areas to allow for more development should decrease rental and housing prices because of the increased supply, assuming that new development will provide housing for all individuals, including those in the lowest income brackets. *See* Mangin, *supra*, note 105, at 106; *see also* Harney, *supra* note 105, at 463. But supply and demand does not seem to be the only variable influencing the cost of housing. *See* DAVID LEY, MILLIONAIRE MIGRANTS: TRANS-PACIFIC LINES 160–61 (2010) (exploring how globalization, including immigration of new and wealthy immigrants and offshore investment, and not supply and demand principles based on owner-occupiers, have influenced the rising cost of the real estate market); John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 CITYSCAPE 69, 86 (2005) (concluding that a review of the literature demonstrates that the effects of density control on land prices are ambiguous).

120. *See* Angotti Affidavit, *supra* note 102, at 22.

121. *See, e.g.*, Davida Finger, *Public Housing in New Orleans Post Katrina: The Struggle for Housing as a Human Right*, 38 REV. BLACK POL. ECON. 327, 329 (2011); Rachel E. Luft & Shana Griffin, *A Status Report on Housing in New Orleans After Katrina: An Intersectional Analysis*, in *KATRINA AND THE WOMEN OF NEW ORLEANS* 50 (Beth Willinger ed., 2008).

122. Recall that secondary displacement refers to displacement caused by economic and social forces as opposed to specific governmental programs or policies aimed at replacing resident populations. *See* LEVY ET AL., *supra* note 28, at 3. *See generally* KENNEDY & LEONARD, *supra* note 35.

harassment, excessive housing code enforcement, increased policing, and loss of small businesses.<sup>123</sup> The push by local governments and corporations to maximize profit and expand tax bases has dramatically changed inner-city neighborhoods in the span of just a decade.

The study conducted by the Hunter College Center for Community Planning and Development also emphasized the potential for displacing businesses in low-income neighborhoods.<sup>124</sup> Policies that gentrify can directly and indirectly displace businesses that serve low-income and immigrant populations.<sup>125</sup> Businesses providing affordable goods and services and the residents who rely on those benefits have a symbiotic relationship.<sup>126</sup> As gentrification prices out and displaces tenants in a neighborhood, businesses previously serving those residents suffer. Remaining residents then lose access to those businesses as they also face displacement.

In considering any policy that gentrifies,<sup>127</sup> the question of who benefits is critical. Gentrification may improve housing conditions and government

123. See KENNEDY & LEONARD, *supra* note 35, at 5; see also Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 89 (2012); Adam Hudson, *How Punitive and Racist Policing Enforces Gentrification in San Francisco*, TRUTHOUT (Apr. 24 2015), <http://www.truth-out.org/news/item/30392-how-punitive-and-racist-policing-enforces-gentrification-in-san-francisco> (explaining that the San Francisco public defender's office's cases demonstrate that many professionals in gentrifying neighborhoods will incorrectly call the police for alleged petty crimes) [<https://perma.cc/N8CV-5A6X>].

124. See Angotti Affidavit, *supra* note 102, at 13.

125. See Zukin et al., *supra* note 83, at 48. Zukin and her coauthors argue that higher rents displace the retail spaces that low-income communities depend on in favor of more expensive boutiques that can meet the increasing rent prices. *Id.* Quoting a displaced retail storeowner, Zukin and her coauthors write, "This whole area is getting expensive," the video store owner adds. "The neighborhood is changing a lot," a salesperson in another store says, relating higher residential rents to further change in the retail landscape. "There is a shift from mostly single college students [bohemians] to young couples with babies [gentrifiers]. This has a lot to do with rents, for sure." *Id.* at 61 (alterations in original).

126. A review of the literature shows little focus on the interaction of business and residential displacement. But interviews with small business owners on East Broadway, a main commercial strip in New York City's Chinatown, have revealed that, as declining manufacturing jobs and rising rents have displaced factory workers and immigrant tenants to other neighborhoods, small businesses in Chinatown have lost business and closed. See Mark Cohen, *San Francisco's Neighborhood Commercial Use District Ordinance: An Innovative Approach to Commercial Gentrification*, 13 GOLDEN GATE U. L. REV. 367, 370–71 (1983).

127. Zoning is not the only large-scale method used to gentrify neighborhoods, though it is this Article's focus due to its prominence in altering urban areas. Other government policies like tax breaks also lead to displacement of low-income people. See Kristen Erickson, Note, *Protecting Low Income Residents During Tax Increment Financing Redevelopment*, 36 WASH. U. J.L. & POL'Y 203, 203–04 (2011). Additionally, the sale of public land for minimal cost to developers harms low-income neighborhoods. New York's Department of Housing and Preservation has sold land in Brooklyn's newly designated "cultural district" for \$1. See Reuven Blau, *City Plans to Sell Prime Land for \$1 to Private Developer for 49 Below-Market-Rate Units*, N.Y. DAILY NEWS (Jan. 26, 2015, 6:33 PM), <http://www.nydailynews.com/new-york/hpd-plans-sell-prime-land-1-private-developer-article-1.2092855> [<https://perma.cc/533V-CHAK>]. In exchange, the developer must build a certain percentage of apartments that remain affordable for only thirty years. *Id.* Tax credits can incentivize large development, like Nationals Stadium in the Southeast quadrant of Washington, D.C.'s Navy Yard neighborhood, and change the class and racial composition of a neighborhood as much as a city's rezoning plan. Similarly, though also beyond the

services and resources. But if gentrification also forces out low-income residents, then the increased resources do not flow to the most vulnerable, as has been the case in New York City's Chinatown and Lower East Side neighborhoods.

### C. Past Examples of Racialized Zoning and Mapping

Zoning in the United States has long led to adverse impacts on communities of color. Segregation was not a hallmark of American neighborhoods until the end of the nineteenth century when racial violence forced people of color out of towns and counties across the country, resulting in all-white towns and concentrated racial and ethnic neighborhoods.<sup>128</sup> Cities used zoning ordinances to entrench these prejudices into institutionalized segregation.<sup>129</sup>

Zoning has explicitly and implicitly delineated where people of different races can live, effectively excluding “undesirable” black residents and other people of color from white neighborhoods.<sup>130</sup> Although many policies are

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scope of this Article, the push by cities to privatize and shrink public housing, one of the few remaining sources of affordable housing in some urban neighborhoods, significantly contributes to gentrification. See TOM ANGOTTI & SYLVIA MORSE, HUNTER COLL. CTR. FOR CMTY. PLANNING & DEV., KEEPING THE PUBLIC IN PUBLIC HOUSING 5–6 (2014).

128. See JAMES W. LOEWEN, SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM 55 (2006). After slavery ended and throughout most of the twentieth century, approximately six million black people migrated out of the South to other states during what was called the Great Migration. See U.S. CENSUS BUREAU, THE GREAT MIGRATION, 1910–1970 (2012), <https://www.census.gov/dataviz/visualizations/020/> [<https://perma.cc/Z57R-A5LK>]. In just one decade—between 1910 and 1920—525,000 black people left their homes in the South and moved north. See DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 45 (1993). During the same period, Chinese people who had immigrated to the United States to work on the transcontinental railroad also began settling in towns across the country. See LOEWEN, *supra*, at 50. For more information on the impact migration has had on specific urban communities, see MIN ZHOU, CHINATOWN: THE SOCIOECONOMIC POTENTIAL OF AN URBAN ENCLAVE 33 (1992). Chinese workers were the earliest group that white people drove out of their neighborhoods. See LOEWEN, *supra*, at 50–52. In a typical expulsion, white coal miners in Rock Springs, Wyoming, gave Chinese workers one hour to leave and burned any Chinese person remaining. See *id.* at 50. These violent expulsions foreshadowed the more widespread forced removal of black people by the beginning of the twenty-first century. See *id.* At least fifty towns across the United States violently banned black people while another approximately fifty towns in the West similarly expelled their Chinese population. See *id.* at 12. One study estimates white people took 24,000 acres of land worth tens of millions of dollars from black people in the post-antebellum period. Todd Lewan & Dolores Barclay, *'They Stole Our Land': An Investigation Documents Land Taken from Blacks Through Trickery, Violence and Murder*, TOPEKA CAP. J. (Dec. 2 2001), [http://cjonline.com/stories/120201/usw\\_blackland.shtml#.WAvHj48rKCg](http://cjonline.com/stories/120201/usw_blackland.shtml#.WAvHj48rKCg) [<https://perma.cc/Y9DB-5Z7G>].

129. See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 203–15 (1985); JASON REECE ET AL., KIRWAN INST., HISTORY MATTERS: UNDERSTANDING THE ROLE OF POLICY, RACE AND REAL ESTATE IN TODAY'S GEOGRAPHY OF HEALTH EQUITY AND OPPORTUNITY IN CUYAHOGA COUNTY 5–6 (2015); RICHARD ROTHSTEIN, ECON. POLICY INST., THE MAKING OF FERGUSON: PUBLIC POLICIES AT THE ROOF OF ITS TROUBLES 1 (2014).

130. Racial discrimination animated even the United States's first zoning ordinance, which restricted laundry buildings and disproportionately impacted the economic livelihood of Chinese immigrants. See *Yick Wo v. Hopkins*, 118 U.S. 356, 362–63 (1886).

now illegal, they continue to shape the segregation of metropolitan areas throughout the United States. From approximately 1890 until 1968, local governments implemented ordinances and policies that prohibited nonwhite residents, including blacks, Jews, Chinese, Japanese, Mexicans, and Native Americans.<sup>131</sup> The first explicit and comprehensive racial zoning ordinance in the United States, enacted in Baltimore in 1910, sought to “quarantine[]” black residents, reduce civil disturbance and “disease,” and “protect property values among the white majority.”<sup>132</sup> These racial zoning ordinances spread until 1917 when the U.S. Supreme Court barred cities from explicitly excluding people of color from white districts.<sup>133</sup>

Yet, in *Village of Euclid v. Ambler Realty Co.*,<sup>134</sup> the Supreme Court found that appropriate considerations for zoning included maintaining open spaces and “attractive surroundings” and providing safe and open areas for children in “favored” localities.<sup>135</sup> Cities therefore could use economic interests similar to Baltimore’s 1910 racialized zoning ordinance to effectively bar affordable and multifamily housing from “favored” neighborhoods (i.e., white neighborhoods).<sup>136</sup> Simultaneously, cities zoned “disfavored” and “incompatible uses” like power plants and toxic dumping areas in neighborhoods where low-income people of color live.<sup>137</sup>

Other types of racialized mapping furthered segregation. Sanctioned by the government, white property owners and neighborhood improvement associations widely used restrictive covenants to explicitly bar blacks and other people of color from leasing or buying the property, thereby shutting them out from whole neighborhoods.<sup>138</sup> Even though the Supreme Court

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131. LOEWEN, *supra* note 128, at 15. For example, the Atlanta Zoning Plan of 1922 designated sections of the city as: “R1—White district; R2—colored district; and R3—undetermined.” See Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23, 34 (Manning Thomas & Marsha Ritzdorf eds., 1997). In 1931, testimony by local preservationists in Charleston, South Carolina indicated that a goal of the neighborhood revitalization plan was to displace from the proposed historic area the several thousand black residents who still lived there so white people could move in. See *id.* at 34–35.

132. Silver, *supra* note 131, at 27.

133. See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917). Cities tried to thwart this ruling but generally stopped using explicit race-based zoning ordinances by the 1930s. See Silver, *supra* note 131, at 24 (“The racial zoning movement received a sharp reversal in 1917, when the U.S. Supreme Court declared a Louisville, Kentucky racial zoning ordinance unconstitutional.”).

134. 272 U.S. 365 (1926).

135. *Id.* at 394.

136. *Id.*

137. For helpful background on the history of zoning for “incompatible uses,” see generally C. McKim Norton, *Elimination of Incompatible Uses and Structures*, 20 LAW & CONTEMP. PROBS. 305 (1995), and Silver, *supra* note 131. Former low-income neighborhoods now gentrified with luxury buildings are encountering some of the toxins previously dumped into formerly disvalued areas. See, e.g., Cara S. Trager, *Are Brooklyn’s Hipster Havens Poisonous?*, CRAIN’S (July 26, 2015, 12:01 AM), [http://www.craains.com/article/20150726/REAL\\_ESTATE/307269999](http://www.craains.com/article/20150726/REAL_ESTATE/307269999) [https://perma.cc/7UA9-59SS].

138. See Gregory D. Squires, *Community Reinvestment: An Emerging Social Movement*, in FROM REDLINING TO REINVESTMENT: COMMUNITY RESPONSE TO URBAN DISINVESTMENT 1, 4–7 (1992). From 1924 to 1950, the national code of ethics for the National Association of Real Estate Boards read: “A realtor should never be instrumental in introducing into a

declared restrictive covenants unenforceable in 1948, they were still permissible.<sup>139</sup> “Redlining”<sup>140</sup> effectively shut out whole city neighborhoods where people of color lived from home ownership opportunities.<sup>141</sup> The first government program to provide long-term mortgages with uniform payments on a wide scale used maps created by the Home Owners’ Lenders Corporation (HOLC) to evaluate risk that deemed neighborhoods of color, primarily in urban areas, too risky.<sup>142</sup> This prejudice further steered the suburbanization and segregation of the United States when the Federal Housing Administration and the Veterans Administration’s loan programs adopted HOLC’s maps to evaluate loan applications.<sup>143</sup> Expanding home ownership opportunities through long-term mortgages therefore meant creating affordable housing opportunities almost exclusively for white families in the suburbs.<sup>144</sup> As cities became

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neighborhood a character of property or occupancy, members of any race or nationality, or any individual whose presence will clearly be detrimental to property values in the neighborhood.” *Id.* at 4. For an overview of the history of restrictive covenants, see Michael Jones-Correa, *The Origins and Diffusion of Racial Restrictive Covenants*, 115 POL. SCI. Q. 541, 541 (2001) (defining racially restrictive covenants as “private agreements barring non-Caucasians from occupying or owning property”).

139. See *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

140. To evaluate the risks of making loans to people in city neighborhoods, the Home Owners’ Lenders Corporation coded areas in four color categories ranging from green for most “in demand” neighborhoods, where not “a single foreigner or Negro” lived, to the least desirable red category, where mostly black families lived. MASSEY & DENTON, *supra* note 128, at 51–52. Courts have defined redlining as an actionable cause under the FHA. See, e.g., *Nationwide Mut. Ins. v. Cisneros*, 52 F.3d 1351, 1358 (6th Cir. 1995); *NAACP v. Am. Family Mut. Ins.*, 978 F.2d 287, 290 (7th Cir. 1992); *United Cos. Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 203 n.5 (D. Mass. 1998) (defining redlining as “the practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents”).

141. See BERYL SATTER, *FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA* 45 (2009); see also MASSEY & DENTON, *supra* note 128, at 51–52; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/> [<https://perma.cc/T3H5-JWYH>]. Home Owners’ Lenders Corporation (HOLC) underwriters even rated neighborhoods with small percentages of black people “hazardous.” Coates, *supra*. HOLC reports inversely valued the property depending on the density of black people in neighborhoods. See *id.*

142. See MASSEY & DENTON, *supra* note 128, at 51. Banks adopted the HOLC “Residential Security Maps.” *Id.* at 52. HOLC institutionalized prejudice by individuals and reflected the racist trends in the private sector and other government policies that encouraged disinvestment in cities. Squires, *supra* note 138, at 7.

143. See MASSEY & DENTON, *supra* note 128, at 52–53. The Federal Housing Administration reinforced all-white communities in suburbs by favoring single family over multifamily homes, new home purchase over renovations, and lot sizes and setbacks associated with suburban land plots. *Id.* at 53. The Veterans Administration (VA) followed similar criteria. Even by 1961, the VA refused to adopt a nondiscrimination policy because it feared that such a policy would mean that white veterans would ultimately not be able to take advantage of the VA’s programs. See U.S. COMM’N ON CIVIL RIGHTS, 1961 U.S. COMMISSION ON CIVIL RIGHTS REPORT: HOUSING 71 (1961), <https://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk4.pdf> [<https://perma.cc/37XN-VM7T>].

144. MASSEY & DENTON, *supra* note 128, at 52–53. Consequently, suburbs in the United States began to starkly contrast with suburbs in other countries, where the most affluent



“blighted,” local governments turned to urban renewal, which critics have analogized to “Negro removal,”<sup>145</sup> and used funding acquired through the housing acts of 1949 and 1951, which were slated to clear “slum properties” for redevelopment to displace entire black neighborhoods that threatened white business districts.<sup>146</sup> Urban renewal ultimately destroyed more housing units than it replaced and pushed people of color from areas next to white neighborhoods deeper into segregated communities of color.<sup>147</sup>

Even after Congress passed a series of laws intended to combat housing discrimination and segregation in the 1960s, neighborhoods of color continued to bear the brunt of racialized targeting.<sup>148</sup> Predominantly white suburbs have employed exclusionary zoning for years with the stated goal of maintaining property values and preserving open space, effectively barring housing affordable to low-income people of color.<sup>149</sup> Further, even in the twenty-first century, black homebuyers were more likely than white homebuyers to take out subprime loans.<sup>150</sup> Lenders made a disproportionately large number of predatory loans to families in neighborhoods that are more than 90 percent black,<sup>151</sup> stripping wealth

people live in the city center and low-income people live outside. *See id.*; *see also* JACKSON, *supra* note 129, at 8.

145. Thomas J. Campanella, *Urban Resilience and the Recovery of New Orleans*, 72 J. AM. PLAN. ASS’N 141, 144 (2006).

146. *See* MASSEY & DENTON, *supra* note 128, at 56. Required to replace housing for displaced families, cities placed some residents in public housing that had previously served middle-income families and veterans and others residents in new public housing towers sited in areas of concentrated poverty. *Id.*

147. Kevin Fox Gotham, *Urban Redevelopment: Past and Present*, in CRITICAL PERSPECTIVES ON URBAN REDEVELOPMENT 9 (2001). The policy of urban renewal effectively ended with *Hill v. Gautreaux*, 425 U.S. 284 (1976), in which the Supreme Court found in favor of public housing residents who challenged the Chicago Housing Authority and HUD for racially discriminating in selecting sites for urban renewal and sending black people to public housing. *See* DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 22–23 (2013).

148. For example, the 1968 Fair Housing Act aimed to dismantle segregation. *See* Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOC. F. 571, 571 (2015) (describing the FHA as achieving, “[f]or the first time in American history, legislation [that] bann[ed] racial discrimination in the sale or rental of housing”). The Equal Credit Opportunity Act of 1974 banned discrimination in mortgage lending, *see* 15 U.S.C. § 1691 (2012), while the Home Mortgage Disclosure Act of 1978 provided some enforcement and accountability by requiring lenders to publish data on loan applicants’ race and ethnicity, *see* 12 U.S.C. § 2801. Finally, the Community Reinvestment Act prohibited redlining. *See* 12 U.S.C. §§ 2901–2908.

149. Examples of exclusionary zoning policies include prohibiting multifamily housing or mandating a minimum lot size. *See* Serkin & Wellington, *supra* note 98, at 1689. A recent nationwide survey found that the wealthier the community, the greater the degree of local land use regulation. Joseph Gyourko et al., *New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693, 695 (2008).

150. For example, in Baltimore, census tracts with more than 80 percent African Americans and only 37 percent of owner-occupied households represent 49 percent of foreclosures in the city. John P. Relman, *Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 636 (2008); *see also* Coates, *supra* note 141.

151. David H. Kaplan & Gail Sommers, *Lending and Race in Two Cities: A Comparison of Subprime Mortgages, Predatory Mortgages, and Foreclosures in Washington, D.C. and Akron, Ohio*, in RACE, ETHNICITY, AND PLACE IN CHANGING AMERICA 101 (John W. Frazier

from many neighborhoods of color.<sup>152</sup> These neighborhoods were easy targets for predatory lending on racialized maps.<sup>153</sup>

The history of housing policy in the United States represents decades of federal, state, and local governments systematically denying and destroying the capital, including assets, of low-income communities of color. Going forward, a fair and just housing policy with the goal of increasing opportunity must not destroy the capital that the most vulnerable and marginalized communities have spent years building as they have created and asserted their ownership of place.

### III. RECONCEPTUALIZING LEGAL CHALLENGES TO GENTRIFICATION

Because cities experience gentrification differently, strategies to address the negative effects should differ. This Article does not propose litigation as the main solution to challenge the effects of gentrification. Public policy, including land use regulation, could most productively reduce or eliminate the potential for displacement due to gentrification in many cities.<sup>154</sup> The need for community organizing in countering gentrification also cannot be understated.<sup>155</sup> But some of the larger, rapidly gentrifying cities have reached a tipping point in gentrification. In these areas, city governments have failed to implement strong policies countering displacement, and organizing alone has not stemmed gentrification. Litigation is a critical and underutilized tool to help slow and shape

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& Eugene L. Tetley-Fio eds., 2006); *see also* Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 21 (D.C. 2000).

152. *See* UNITED FOR A FAIR ECON., FORECLOSED: STATE OF THE DREAM 2008, at v (2008) (“[T]he subprime lending debacle has caused the greatest loss of wealth to people of color in modern US history.”).

153. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 630 (2010). Ta-Nehisi Coates also observes, “Plunder in the past made plunder in the present efficient.” Coates, *supra* note 141.

154. *See* Marcuse, *supra* note 27, at 231 (proposing special district antidisplacement zoning that specifies where development should go in relation to other zones as “the key element of a comprehensive antidisplacement plan”). *See generally* RANDY SHAW, THE TENDERLOIN: SEX, CRIME, AND RESISTANCE IN THE HEART OF SAN FRANCISCO (2015) (outlining the following successful strategies in San Francisco’s Tenderloin district for helping a neighborhood’s low-income population remain while nearby communities in gentrifying neighborhoods face displacement: (1) pass strict residential zoning controls and height limits, (2) buy land through nonprofit groups so the land is not in the private housing market, (3) preserve single-room occupancy hotels through strong laws, and (4) organize).

155. *See* Carla Dorsey, Note, *It Takes a Village: Why Community Organizing Is More Effective than Litigation Alone at Ending Discriminatory Housing Code Enforcement*, 12 GEO. J. POVERTY L. & POL’Y 437 (2005); Alasdair Fotheringham, *Ada Colau: Tough-Talking Poverty Activist Voted in as Barcelona’s First Female Mayor*, INDEPENDENT (May 25, 2015), <http://www.independent.co.uk/news/world/europe/ada-colau-tough-talking-poverty-activist-voted-in-as-barcelonas-first-female-mayor-10275067.html> (describing how grassroots movement against evictions led to the election of the spokesperson of Spain’s anti-eviction movement as the first female mayor of Barcelona) [<https://perma.cc/SZ9P-TCS6>].

gentrification and can spur conversations in city governments to effect policies.<sup>156</sup>

Whereas environmental review laws, like the National Environmental Policy Act, substitute procedural remedies to deal with substantive problems, procedural assurances have proven inadequate in the context of gentrification.<sup>157</sup> In his seminal piece “The New Property,” Charles Reich anticipates that procedural rights for low-income people would prove largely futile.<sup>158</sup> Environmental review cases largely focus on fair hearing and procedures and have established important precedents requiring the government to consider the potential for displacement due to government action.<sup>159</sup> But in the face of government collaboration with private corporations to gentrify neighborhoods, recent environmental review cases are little more than a blip in an otherwise predetermined planning process.<sup>160</sup> In recent years, communities seeking procedural remedies in highly competitive housing markets have repeatedly lost—whether the residents lived in poor, middle-income, or affluent neighborhoods.

In a recent fight by residents in Greenwich Village to stop a massive redevelopment plan proposed by New York University, residents lost at each stage of the public participation process and failed to obtain any relief through the traditional avenue for challenging land use decisions under environmental review laws.<sup>161</sup> One critic observed “[t]hat a mostly wealthy, white, politically connected community could not influence the process suggests the even greater hurdles faced by low-income communities of color.”<sup>162</sup>

In the absence of wide-ranging policies and procedural protections that can counter and stem gentrification, incorporating litigation strategies that move beyond procedural remedies into broader antidisplacement campaigns is crucial. Communities have identified the following primary goals to

156. In 1985, the New Jersey legislature enacted the New Jersey Fair Housing Act to assess, review, and approve the availability of affordable housing in the state in direct response to the New Jersey Supreme Court’s two decisions in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 725 (N.J. 1975), and *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*, 456 A.2d 390, 415 (N.J. 1983). See *What Is the Mount Laurel Doctrine?*, FAIR SHARE HOUSING CTR., <http://fairsharehousing.org/mount-laurel-doctrine/> (last visited Nov. 19, 2016) [https://perma.cc/HBY9-XTDW].

157. *But see* Hannah Weinstein, *Fighting for a Place Called Home: Litigation Strategies for Challenging Gentrification*, 62 UCLA L. REV. 794, 822 (2015).

158. Charles Reich, *The New Property*, 73 YALE L.J. 733, 751–52 (1964).

159. See, e.g., *Chinese Staff & Workers Ass’n v. City of New York*, 502 N.E.2d 176 (N.Y. 1986).

160. See Elizabeth S. Natrella, *The Contextual Rezoning of Sunset Park, Brooklyn, and the Decision in Chinese Staff & Workers’ Association v. Burden: The Basic Principles Governing Limited Judicial Review of Environmental Challenges in New York Endure*, 76 ALB. L. REV. 1239, 1251 (2013) (claiming that the rezoning of Sunset Park would preserve the character of the low-income immigrant neighborhood despite failing to consider secondary displacement effects).

161. See Sylvia Morse, *NYU Controversy Shows It’s Time to Rethink City Planning Process*, CITY LIMITS (July 22, 2015), <http://citylimits.org/2015/07/22/nyu-controversy-shows-its-time-to-rethink-city-planning-process/> [https://perma.cc/YV65-V3CP].

162. *Id.*

fight gentrification: stopping city policies that disproportionately displace low-income people of color, retaining existing sources of low-rent housing, and staking and sustaining ownership and their right to city neighborhoods.<sup>163</sup> The litigation strategies proposed in this Article aim to respond directly to these goals.

#### A. Fair Housing Act

Housing advocates have underutilized the bold vision and breadth of the Fair Housing Act (FHA) to challenge the displacement and resegregation that results from zoning caused by gentrifying neighborhoods. The FHA prohibits discrimination based on race, religion, color, national origin, sex, disability status, and familial status. The FHA broadly declares that “[i]t is the policy of the United States to provide . . . for fair housing throughout the United States”<sup>164</sup> and serves as the primary vehicle to address the injustices of housing discrimination and residential segregation. To end residential segregation, the law imposes requirements that jurisdictions receiving federal housing funding bar discrimination and affirmatively further fair housing. The FHA also uses proactive steps to promote housing choice to ensure low-income people living in segregated neighborhoods achieve “equality of opportunity.” The discriminatory effects of gentrification should fall squarely within the FHA’s mandate.

Promoting fair housing must mean freedom from impediments like discriminatory rental, sales, and lending practices, exclusionary zoning and land use practices, and other barriers to housing choice and mobility. The provisions effectuating the FHA’s corresponding goals of combating racial discrimination and affirmatively furthering fair housing can directly address the injustices of gentrification’s displacement and resegregation.

The FHA is well poised to challenge zoning and other large redevelopment plans that spur gentrification in cities.<sup>165</sup> Courts have held that a range of local government actions violate the FHA, including redlining,<sup>166</sup> providing inferior city services to neighborhoods of color, and excluding affordable housing through zoning.<sup>167</sup> Gentrification largely mirrors the racial disparities and negative effects of these government policies. Although the FHA has not been wholly successful in this goal,<sup>168</sup> HUD’s active involvement is key, and advocates have used the law

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163. See generally ANGOTTI, *supra* note 97; URBAN JUSTICE CTR., NEW YORK CITY ANTI-GENTRIFICATION NETWORK: SUMMATION OF CONVENINGS (2007).

164. 42 U.S.C. § 3601 (2012).

165. See *Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 573–74 (N.D. Tex. 2000) (striking down zoning ordinances that required one-acre or larger plots because the ordinances produced racially discriminatory effects and increased the cost of housing).

166. See *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 855, 892 (N.D. Ill. 2000).

167. See, e.g., *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1294 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974).

168. Roberta Achtenberg, *Keynote Address*, 143 U. PA. L. REV. 1191, 1194 (1995) (stating that “[f]ederal fair-housing law enforcement has been weak and inadequate”).

effectively in particular situations, including in neighborhoods that have implemented exclusionary zoning to prohibit low-income people from moving in.<sup>169</sup> Zoning bars poor people from wealthy suburbs and displaces poor people from urban areas with the same results—poor people end up shut out of neighborhoods with fewer places to live. Just as communities have used the FHA to create greater housing opportunities in predominantly white suburban neighborhoods opposing affordable housing, the FHA is critical for challenging the analogous effects of gentrification on low-income people in urban neighborhoods.

### 1. Challenging Racially Discriminatory Effects

Few FHA cases challenge government policies that gentrify and displace low-income communities, but in *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*,<sup>170</sup> residents of the Mount Holly Township (“the Township”) in New Jersey successfully established a prima facie case for disparate impact under the FHA to counter displacement caused by the Township’s redevelopment plans.<sup>171</sup> This story is universal to gentrifying communities facing displacement but unusual for FHA claims. Although the *Mount Holly* case challenged a redevelopment plan, the case has useful implications for how zoning policies that displace low-income communities might also fare under the FHA.<sup>172</sup>

In 2003, the Township implemented a redevelopment plan in the Gardens neighborhood to raze the homes of hundreds of residents, replace low-income housing with high-priced market-rate housing, and generally “dismantle” and “destroy” the neighborhood.<sup>173</sup> Many residents had lived in the Gardens neighborhood for years, cultivated a strong sense of community and a strong network of family and friends, and created a stable environment for their families.<sup>174</sup> Residents described their neighborhood as a “cohesive, racially, and ethnically diverse community” that is predominantly African American and Hispanic with majority low- and moderate-income families.<sup>175</sup> Within the broader county, the neighborhood had the highest concentration of African Americans and Hispanics and the highest rate of home ownership among these racial groups.<sup>176</sup> The neighborhood had a high poverty level, but many residents, some of whom

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169. Margalynne J. Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1063 (1997) (noting that advocates have used the FHA successfully in some discriminatory zoning cases).

170. 658 F.3d 375 (3d Cir. 2011).

171. *See id.* at 382; Amended Complaint & Demand for Jury Trial at 36, *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, No. 1:08-cv-02584, 2013 WL 3200713 (D.N.J. June 10, 2008) [hereinafter Amended Complaint].

172. Although the context of a redevelopment plan and the direct displacement that results is different from zoning plans that may lead to more secondary displacement effects, cases concerning redevelopment and the FHA are still instructive given the overlapping consequences.

173. *See* Amended Complaint, *supra* note 171, at 36.

174. *See id.* at 13–14.

175. *Id.* at 11.

176. *See id.* at 3, 12.

had paid off their mortgages, wanted to remain in large part due to their community of friends and family.

The Township had concluded that the Gardens neighborhood represented a “significant opportunity for redevelopment” due to “blight, excess land coverage, poor land use, and excess crime.”<sup>177</sup> Residents called out the Township for creating the blighted conditions to drive down property values, which made the area ripe for redevelopment.<sup>178</sup> In the years leading up to its redevelopment plans, the Township had failed to provide adequate public services, purchased properties and left them vacant and deteriorated, and acquired funding for but did not rehabilitate or improve structures in the neighborhood.<sup>179</sup> This scenario created ideal conditions for Neil Smith’s supply-side rent gap theory of gentrification to prosper.<sup>180</sup>

The Third Circuit ultimately held that the Gardens neighborhood residents had established a prima facie case for disparate impact under the FHA.<sup>181</sup> Contrary to the Township’s assertions, residents challenged the Township’s plan to gentrify their community because they held value in the neighborhood, not because residents were “asking for permission to continue to live in ‘blighted and unsafe’ conditions” or seeking to perpetuate segregation.<sup>182</sup> In allowing residents to go forward with their case, the court recognized that residents have valid reasons for wanting to remain in their community.<sup>183</sup>

*Mount Holly* seemingly flips the situation of exclusionary zoning in suburbs by presenting a low-income neighborhood of color seeking to prevent an affluent white population from moving in. Mount Holly Township seized on this perceived contradiction and accused residents of perpetuating segregation with their lawsuit, calling any injunction “contrary to the purposes of the FHA” because “the underlying policy behind Title VIII is to encourage the dispersion of urban ghettos and to create more integrated neighborhoods.”<sup>184</sup> Yet the FHA does not embrace dispersing

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177. *Mount Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 379 (3d Cir. 2011). Notwithstanding an inaccurate determination of blight, courts have held that removing blight is a legitimate government interest under the FHA. See ROBERT G. DREHER & JOHN D. ECHEVERRIA, *KELO’S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT* 14 (2006); Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 55 (2005).

178. See Amended Complaint, *supra* note 171, at 35.

179. *Id.* at 38.

180. See generally Smith, *supra* note 32.

181. *Mount Holly*, 658 F.3d at 377. The Supreme Court had granted a writ of certiorari in this case to determine whether the FHA allowed for disparate impact claims, but the parties settled before the case was heard. In 2015, the Supreme Court upheld disparate impact under the FHA in another case. *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

182. *Mount Holly*, 658 F.3d at 386.

183. See *id.*

184. Township Defendants’ Brief in Support of Its Motion to Dismiss Plaintiff’s Second Amended Complaint at 14, *Mount Holly*, 658 F.3d 375 (No. 1:08-cv-02584) (quoting *S. Camden Citizens in Action v. N.J. Dep’t of Env’t. Prot.*, 254 F. Supp. 2d 486, 500 (D.N.J. 2003)).

one “ghetto” to add to another. Further, sustaining a vibrant community of color should not violate the FHA. The Third Circuit recognized that the hollow predictions of Mount Holly’s redevelopment plans to integrate created a cognizable FHA claim. Arguments used in *Mount Holly* to combat the redevelopment plan to tear down housing and displace residents can be similarly applied to zoning plans that gentrify with similar effects.

The most common FHA provision used to challenge zoning decisions based on disparate impact (i.e., discriminatory effect) is § 3604(a), which deems “unlawful” any attempt “[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”<sup>185</sup> To “otherwise make unavailable” dwellings based on one of the protected categories covers discriminatory zoning practices.<sup>186</sup> A prima facie case for discriminatory impact under the FHA requires the defendant’s actions to either perpetuate segregation or disproportionately impact a minority group, which should hold true with zoning decisions—whether through exclusion or displacement.<sup>187</sup>

Typically, courts have found that exclusionary zoning in suburban areas violates the FHA under the perpetuation of segregation theory, salient in the context of gentrification, which often results in secondary displacement to other low-income neighborhoods.<sup>188</sup> In *Munoz-Mendoza v. Pierce*,<sup>189</sup> the First Circuit established that a municipality violates the FHA if the municipality’s action causes an increase in rents that displaces low-income tenants and raises local housing demand, ultimately “result[ing] in a less integrated community.”<sup>190</sup>

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185. 42 U.S.C. § 3604(a) (2012). This provision also makes unlawful any action “[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.” *Id.* § 3604(b).

186. *See* LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir. 1995). Courts have found municipalities liable for claims under the FHA when the municipality’s land development plan or zoning classification discriminates even if private developers carry out the plan. *See* Town of Huntington v. Huntington Branch, NAACP, 488 U.S. 15, 18 (1988); Rivera v. Incorporated Village of Farmingdale, 571 F. Supp. 2d 359, 369 (E.D.N.Y. 2008).

187. *See* *Town of Huntington*, 488 U.S. at 18. Plaintiffs often demonstrate the disparity between groups through statistical evidence. *See* Tsombanidis v. W. Haven Fire Dep’t, 352 F.3d 565, 575 (2d Cir. 2003); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 131–33 (3d Cir. 1977). Once plaintiffs have made their prima facie case, the burden shifts to the defendant to demonstrate that its actions furthered a legitimate, bona fide governmental interest and that no alternatives exist that would have a less discriminatory effect. The burden then shifts back to plaintiffs to provide an alternative.

188. *See, e.g.,* Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 937–38 (2d Cir. 1988) (finding that the town’s refusal to permit multifamily housing in a particular area “significantly perpetuated segregation” and therefore violated § 3604 of the FHA), *aff’d*, 488 U.S. 15; *Broadway Triangle Cmty. Coal. v. Bloomberg*, 941 N.Y.S.2d 831, 839 (Sup. Ct. 2011) (granting an injunction where “three proposed developments [resulting from the city’s rezoning plan] will not only not foster integration of the neighborhood, but they will perpetuate segregation”).

189. 711 F.2d 421 (1st Cir. 1983).

190. *Id.* at 427.

In urban areas where local governments downzone affluent areas, particularly where upzoning and subsequent luxury development occurs in adjacent low-income neighborhoods, the effect is the same—the zoning fails to allow for housing affordable to low-income people. In urban areas, upzoning and downzoning work in tandem to exclude and displace low-income communities. In a recent zoning case in Brooklyn, New York, the court explicitly analogized contextual zoning allowing construction of low-rise buildings that would exclude low-income black residents from a Yiddish-speaking Jewish neighborhood to exclusionary zoning in suburban areas.<sup>191</sup> The barriers to housing opportunity created by downzoning and contextual zoning in urban areas are parallel to those of exclusionary zoning and are therefore contemplated by the FHA.<sup>192</sup>

Cases that rely on a perpetuation of segregation theory under the FHA also create an opportunity to examine the interaction of zoning policies at a level broader than the neighborhood in question. In *Dews v. Town of Sunnyvale*,<sup>193</sup> the district court found, based on demographic statistics, that the town's exclusionary zoning ordinances had a racially disparate impact not just on the town itself but also on those surrounding it “by increasing the costs of housing in the Town.”<sup>194</sup> As demonstrated by the collision of exclusionary zoning, downzoning, and upzoning, gentrification and the displacement that results should not be viewed in isolation.

The displacement that occurs due to gentrification ultimately resegregates poor populations, and the loss of integrated communities should resonate as the neighborhood becomes one of concentrated wealth with a significantly greater white population. The study on displacement conducted by Hwang and Sampson, discussed in Part I.B, highlighted the resegregative effects of gentrification in concluding that gentrification is more likely to occur in neighborhoods that are less than 40 percent black.<sup>195</sup> Similarly, New York City's Chinatown reflects the threat of dispersing an integrated neighborhood. Numbers from the 2010 census show that New York City's Chinatown had approximately 20 percent non-Hispanic white, 7 percent black, 26 percent Latino, and 45 percent Asian/Pacific Islander populations.<sup>196</sup> In the last decade, however, the only population that has grown in absolute numbers in the neighborhood is the white population, which census data show is also generally more affluent than other racial groups.<sup>197</sup> If this pattern continues and, as urban planners have predicted,

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191. *Broadway Triangle*, 941 N.Y.S.2d at 839. The state court granted an injunction to low-income black residents demonstrating that the proposed development of low-rise buildings containing large apartments would perpetuate segregation. *See id.* The zoning change called for large apartments in a Yiddish-speaking Jewish community that was more suited to the needs of Yiddish-speaking Jewish families despite the community demand for smaller apartments that would accommodate a larger low-income black population. *See id.* at 833.

192. *See generally* Mangin, *supra*, note 105.

193. 109 F. Supp. 2d 526 (N.D. Tex. 2000).

194. *Id.* at 566.

195. Hwang & Sampson, *supra* note 91, at 2.

196. LI ET AL., *supra* note 47, at 29.

197. *Id.*



accelerates due to 2008 zoning changes, the next census will show a significant demographic shift in this city-center neighborhood.

Although disparate impact theory is available under the FHA to be applied to gentrification, the secondary displacement that is most likely to occur from some zoning changes may be too remote for courts to find an injury.<sup>198</sup> Yet an exclusionary zoning ordinance may have a disparate impact where the balance of affordable and market-rate housing is skewed.<sup>199</sup> This finding reflects the zoning changes and other redevelopment projects that gentrify neighborhoods.<sup>200</sup>

In recently upholding disparate impact claims under the FHA in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,<sup>201</sup> the Supreme Court referenced challenges to zoning and land use laws as the “heartland” of disparate impact cases.<sup>202</sup> Zoning decisions often are not rife with intentional discrimination, and policies that result in widespread displacement may be cloaked with the veneer of seemingly neutral concerns like traffic congestion or even well-intentioned goals like creating affordable housing. Despite upholding disparate impact under the FHA, however, the Supreme Court’s focus was on finding “important and appropriate means of ensuring that disparate-impact liability is properly limited.”<sup>203</sup> One of the examples noted specifically for purposes of restricting the meaning of disparate impact was revitalization policies: “It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in the Nation’s cities merely because some other priority might seem preferable.”<sup>204</sup> Future cases will shape the breadth of any restrictions to disparate impact suggested by the Supreme Court. But courts would be wrong to conflate revitalization with gentrification in considering whether the FHA applies to zoning challenges of policies that displace low-income people from urban areas and decrease housing opportunities, impacts that the FHA squarely seeks to address.

## 2. Affirmatively Furthering Fair Housing

The obligation to affirmatively further fair housing under the FHA holds even greater potential than the FHA’s antidiscrimination provision to

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198. See, e.g., *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 192 (4th Cir. 1999) (finding an FHA challenge to the selection of a highway site directly adjacent to a predominantly African American neighborhood “too remotely related to the housing interests that are protected by the Fair Housing Act” to state a claim); see also *Laramore v. Ill. Sports Facilities Auth.*, 722 F. Supp. 443, 452 (N.D. Ill. 1989) (dismissing FHA claims where residents argued a stadium threatened their homes because § 3604 “cannot be extended to a decision such as the selection of a stadium site and plaintiffs therefore do not state a cause of action under Title VIII”).

199. See *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242–43 (N.Y. 1975).

200. The gentrification referred to here is generally a product of secondary displacement. See LEVY ET AL., *supra* note 28, at 3.

201. 135 S. Ct. 2507 (2015).

202. *Id.* at 2522.

203. *Id.* at 2512.

204. *Id.* at 2523.

challenge displacement due to gentrification.<sup>205</sup> New regulations issued by HUD in April 2016 defining the scope of § 3608 to affirmatively further fair housing have signaled that the harms caused by gentrification may well equate to those harms caused by segregation.<sup>206</sup> This moment is therefore ideal to ensure that HUD considers the negative effects of gentrification in shaping the affirmative steps necessary to promote housing opportunity.

The federal government has spottily enforced § 3608 despite its strong mandate. Senator Walter Mondale, the FHA's principal sponsor in the Senate, made clear that the federal government must take affirmative steps for the United States to "escape apartheid" and have "truly integrated and balanced living patterns."<sup>207</sup> Congress recognized that HUD must do more than just ban discrimination to reverse the effects of federal policies, like redlining, that institutionalized segregation, but this mandate is undefined and relatively unexplored. In 1983, Congress required jurisdictions receiving federal housing funding to certify that they will "affirmatively further fair housing."<sup>208</sup> Implementing regulations required jurisdictions to "assume the responsibility of fair housing planning by conducting an analysis to identify impediments to fair housing choice."<sup>209</sup> Although not further defined in the regulations, HUD's Fair Housing Planning Guide outlined the content of the "Analysis of Impediments" (AI) and broadly defined impediments to encompass "any actions, omissions, or decisions taken because of race, color, religion, sex, disability, familial status, or national origin, which restrict housing choices or the availability of housing choices."<sup>210</sup> In 1995, HUD published another rule, reinforcing the need for an AI by requiring jurisdictions receiving funding from community development programs to complete a "Consolidated Plan," designed to implement strategies to combat segregation and achieve affordable housing goals and certify that it will affirmatively further fair housing.<sup>211</sup> These

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205. See 42 U.S.C. § 3608 (2012). Section 3608 states:

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

*Id.*

206. 24 C.F.R. § 108.1 (2016).

207. 114 CONG. REC. 3422 (1968).

208. 24 C.F.R. § 91.225; 24 C.F.R. §§ 570.487(b), 570.601(a)(2).

209. 24 C.F.R. § 570.601(a)(2). More than four years passed before HUD published the regulations to implement this requirement. See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125, 146 n.125 (2012).

210. 1 OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, HUD, FAIR HOUSING PLANNING GUIDE 2-17 (1996) [hereinafter FAIR HOUSING PLANNING GUIDE].

211. These programs include Community Development Block Grants, HOME Investment partnerships, Emergency Solutions Grants, and Housing Opportunities for Persons with AIDS. Jurisdictions complete the certification through a three-step process that requires analyzing impediments to fair housing choice, taking actions to overcome the impediments identified, and maintaining records on the analysis and actions taken. 24 C.F.R. § 91.225. The purpose of the Consolidated Plans is "to develop viable urban communities by providing

jurisdictions include local governments.<sup>212</sup> Yet, in 2010, the U.S. Government Accountability Office concluded that many jurisdictions had either failed to submit or submitted incomprehensive AIs.<sup>213</sup> HUD's limited regulatory requirements and oversight led to lax enforcement. The new regulations published by HUD aim to respond to these weaknesses.

In the new federal regulations, HUD defines affirmatively furthering fair housing as "taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics."<sup>214</sup> The regulations, which HUD will phase in, require jurisdictions receiving HUD funding to conduct a standardized "Assessment of Fair Housing" (AFH), which will replace the AI, to identify fair housing issues and incorporate fair housing planning into existing planning processes like the Consolidated Plan.<sup>215</sup> Unlike the AI process, jurisdictions must submit the AFH for review by HUD.<sup>216</sup> HUD will also provide standardized data that jurisdictions must consider in the AFH to establish and address fair housing goals.<sup>217</sup>

HUD is central to enforcing § 3608's mandate and the development and implementation of the new AFH rule signals a period of active engagement by HUD. HUD's review of jurisdictions' obligations to affirmatively further fair housing is more vigorous and meaningful than other types of reviews such as environmental impact statements, which require little more than checking boxes to constitute analysis. HUD also may actively engage through a variety of means to enforce reviews that fail to identify barriers to fair housing. Requiring jurisdictions to comply with their obligation under § 3608 can take the form of lawsuits in which HUD can intervene,<sup>218</sup> administrative complaints with HUD,<sup>219</sup> and HUD's own investigation into fair housing and other civil rights issues.<sup>220</sup>

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decent housing and a suitable living environment and expanding economic opportunities principally for low- and moderate-income persons." *Id.* § 91.1(a)(1).

212. *See, e.g.*, CITY OF BOS., ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE (2010); CITY OF MILWAUKEE, ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING (2005).

213. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 14 (2010).

214. 24 C.F.R. § 5.152; *see* Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015).

215. 24 C.F.R. § 5.154; *see* 24 C.F.R. pt. 91.

216. Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,277.

217. *Id.* HUD's heavy emphasis on data lends the AFH process to a closer examination at census block and tract levels of the effects gentrification. Particularly in gentrified cities like New York and San Francisco, understanding the demographic changes that occur due to redevelopment or zoning plans must primarily focus on more detailed neighborhood data because the data for the city as a whole may not reveal significant changes.

218. Although § 3608 claims do not create a private right of action, courts can review such claims under the Administrative Procedure Act. NAACP v. Sec'y of HUD, 817 F.2d 149 (1st Cir. 1987). The arbitrary and capricious standard under the Administrative Procedure Act is highly deferential to HUD, which is why active engagement with HUD on enforcement of § 3608 is key.

219. *See Advocacy Groups Settle Civil Rights Complaint Against State of New Jersey Involving Superstorm Sandy*, RELMAN DANE & COLFAX PLLC, <http://www.reلمانlaw.com/>

Reflecting increased awareness that displacement resulting from gentrification creates a fair housing issue, HUD's new AFH rule offers great opportunity to challenge the negative impacts of gentrification in low-income neighborhoods of color. HUD has long promoted solutions emphasizing "sustainability" and "livability," key words that often signal progentrification policies.<sup>221</sup> In the 1990s, HUD increased support for "revitalization initiatives" to counter the loss of middle-class populations in the city.<sup>222</sup> Revitalization initiatives, like "HOPE VI," however, resulted in massive displacement, reduction of affordable housing units, and gentrification—leaving a mixed reaction to HUD policies that aimed to make poor neighborhoods more attractive to affluent people.<sup>223</sup> HUD's new AFH rule appears to revisit the rationale behind these policies, clarifying that "revitalization" should not result in significant displacement and that if displacement changes the neighborhood's character such that low-income residents of color do not benefit from the new resources, then fair housing issues may be prevalent.

Significantly, HUD changed the language of the final rule's purpose to substantiate concern over displacement and other isolating effects of gentrification by affirmatively addressing gentrification-generated displacement that may implicate low-income communities' access to fair housing. During the public rulemaking process for the new rule, comments submitted to HUD questioned whether the new rule would ignore the displacement of low-income people of color in gentrifying neighborhoods and further decrease socioeconomic opportunities of low-income families, thereby countering the stated purpose of the FHA.<sup>224</sup> In direct response to these comments, HUD revised the definition of "to affirmatively further fair housing" from "to end racially or ethnically concentrated areas of poverty" to "transforming . . . [those areas] into areas of opportunity."<sup>225</sup>

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civil-rights-litigation/cases/Sandy.php (last visited Nov. 19, 2016) [<https://perma.cc/G24G-FXDG>].

220. See Schwemm, *supra* note 209, at 166.

221. See generally DAVID RUSK, BUILDING SUSTAINABLE, INCLUSIVE COMMUNITIES: HOW AMERICA CAN PURSUE SMART GROWTH AND REUNITE OUR METROPOLITAN COMMUNITIES (2010). Rusk discusses the "Partnership for Sustainable Communities," an effort by HUD, along with a number of other agencies, to promote livable cities. See *id.* at 19; see also Lees, *supra* note 14, at 398.

222. See POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 64 (describing how HUD deeply segregated public housing over a period of decades); Lees, *supra* note 14, at 391.

223. Michael S. FitzPatrick, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421, 423 (2000) (arguing that HOPE VI has failed to achieve its goals). For a more favorable review of HOPE VI, see Patrick E. Clancy & Leo Quigley, *HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL'Y 527 (2001). Others have called for HUD to reexamine its HOPE VI program in light of the FHA mandate to "affirmatively further fair housing." See Herbert R. Giorgio Jr., Note, *HUD's Obligation to "Affirmatively Further" Fair Housing: A Closer Look at Hope VI*, 25 ST. LOUIS U. PUB. L. REV. 183 (2006).

224. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,280 (July 16, 2015).

225. *Id.* According to 24 C.F.R. § 5.512:

The shift in language in the new rule is subtle, but affirms that residents should not have to move from their existing communities to access increased opportunity. Low-income neighborhoods of color have remained poor and segregated because the government has not invested in these communities. High-income neighborhoods in the suburbs are not inherently high-opportunity neighborhoods. Rather, so-called “high-opportunity areas” historically have received an influx of public resources and investment.<sup>226</sup> As seen with the early stages of revitalization, when neighborhoods receive some investment, low-income residents may also have increased access to opportunity and want to remain. While some low-income people might seek opportunity through the suburbs, others want to stay in their urban communities. Attempting to address the wrongs of segregation cannot be done without regard to how people live their lives in their communities of choice. The final rule leaves open this possibility.<sup>227</sup>

The reasoning behind these changes indicates that HUD will take challenges to gentrification seriously. In response to comments highlighting displacement due to gentrification, HUD stated: “There could be issues . . . with strategies that rely solely on investment in areas with high racial or ethnic concentrations of low-income residents to the exclusion of providing access to affordable housing outside of those areas.”<sup>228</sup> HUD acknowledged that realizing § 3608’s mandate to increase access to opportunity includes “help[ing] avoid displacement of existing residents in areas experiencing renewed economic growth or housing price

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[a] balanced approach would include, as appropriate, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts, where any such actions are designed to achieve fair housing outcomes such as reducing disproportionate housing needs, transforming RCAPs/ECAPs by addressing the combined effects of segregation coupled with poverty, increasing integration, and increasing access to opportunity, such as high performing schools, transportation, and jobs.

24 C.F.R. § 5.512 (2015). The revised § 5.154(d)(4)(ii) also requires the AFH to identify significant contributing factors, prioritize such factors, and justify the prioritization of the contributing factors that will be addressed in the program participant’s fair housing goals. In prioritizing contributing factors, program participants shall give highest priority to those factors that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance.

24 C.F.R. § 5.154(d)(4)(ii).

226. *See generally* MARGERY AUSTIN TURNER ET AL., *URBAN INST., BENEFITS OF LIVING IN HIGH OPPORTUNITY NEIGHBORHOODS: INSIGHTS FROM THE MOVING TO OPPORTUNITY DEMONSTRATION 1* (2012), [http://www.urban.org/research/publication/benefits-living-high-opportunity-neighborhoods/view/full\\_report](http://www.urban.org/research/publication/benefits-living-high-opportunity-neighborhoods/view/full_report) (“Evidence supports ongoing investments in programs that help poor families find and afford housing in high-opportunity neighborhoods.”) [<https://perma.cc/H4NP-GXWF>].

227. The new HUD rules could promote more place-based strategies complimentary to mobility strategies. Place-based policies include the siting of affordable housing in low-income areas with strong social capital or “cultural collective efficacy.” *See* Alexander, *supra* note 70, at 865.

228. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. at 42,279.

appreciation, or disinvestment in existing low-income neighborhoods.”<sup>229</sup> HUD further recognized that some new immigrant groups may self-segregate and that the social dynamics creating this housing pattern may not be contrary to the FHA’s goals of creating “open residential communities” that do not “limit or deny individuals or groups with a full range of housing options and choices on the basis of being in a protected class as defined by the Fair Housing Act.”<sup>230</sup> HUD also highlighted the importance of preserving existing affordable housing, particularly in reference to protected class residents who want to remain in their communities.<sup>231</sup> This acknowledgement reimagines the characterization of immigrant communities and neighborhoods of color as “slums” or “ghettos.”

As acknowledged by HUD, its past stated goal of dissipating slums and ghettos to affirmatively further fair housing is not contrary to challenging gentrification that causes significant displacement.<sup>232</sup> HUD also should negatively view “those aspects of a proposed course of action that would further limit the supply of genuinely open housing”<sup>233</sup>—a direct consequence of gentrification for low-income people. Although past cases have focused on mobility to so-called “areas of opportunity,”<sup>234</sup> promoting open housing patterns to create opportunity depends as much on people choosing to remain in their homes in urban areas as it does on having the ability to move to a suburban neighborhood.

Given HUD’s rationale behind implementing the new rules, community organizing could place significant pressure on HUD to investigate the displacement that results from gentrification as a fair housing issue. HUD has been responsive in the past to perceived community opinion in

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229. *Id.* at 42,284.

230. *Id.* at 42,280. In direct acknowledgement of racial and ethnic enclaves that now may choose to self-segregate, HUD states it “is familiar with the research on immigrant communities and recognizes that there are complex social dynamics at work in different parts of the nation.” *Id.*

231. HUD directed this response at a comment that specified that the obligation to affirmatively further fair housing must include devoting resources to areas of concentrated racial and ethnic poverty by preserving affordable housing and implementing investment policies to help protected class residents access “essential community assets.” *Id.* at 42,330. These strategies would help residents who wished to remain in their communities and avoid displacement. *Id.*

232. The Second Circuit has declared that the FHA must promote “open, integrated residential housing patterns and . . . prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.” *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

233. *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 713 (8th Cir. 2003) (quoting *NAACP v. HUD*, 817 F.2d 149, 156 (1st Cir. 1987)). To achieve integrated housing, jurisdictions must also analyze the impact of proposed housing on racial concentrations and segregation. *See generally* United States *ex rel.* Anti-Discrimination Ctr. of Metro N.Y. v. Westchester County, 668 F. Supp. 2d 548 (S.D.N.Y. 2009); *Broadway Triangle Cmty. Coal. v. Bloomberg*, 941 N.Y.S.2d 831 (Sup. Ct. 2011).

234. HUD has defined “areas of opportunity” in its publications as “places where jobs are relatively plentiful and access to education, healthcare, and other amenities is close at hand.” *Equity Mapping and the Geography of Opportunity*, PD&R EDGE, [http://www.huduser.gov/portal/pdredge/pdr\\_edge\\_featd\\_article\\_042114.html](http://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_042114.html) (last visited Nov. 19, 2016) [https://perma.cc/5HPE-HGJF].

assessing jurisdictions' assessments of impediments. Targeting HUD to take seriously the civil rights and fair housing issues that arise from gentrification would bolster the goal of antidisplacement campaigns to establish stronger rights for tenants. Administrative complaints in other contexts have served as a central organizing focus to achieve communities' broader goals and the opening to focus on gentrification created by HUD's new regulations could bolster antidisplacement campaigns.<sup>235</sup>

HUD's new rule embraces the principle behind Loretta Lees' geography of gentrification theory.<sup>236</sup> Different solutions are needed in different places. HUD has indicated that it no longer promotes revitalization as a monolithic cure-all to problems experienced in urban areas. Gentrification may create barriers to opportunity and fair housing issues. In explaining how to reduce barriers to fair housing choice in the new rule, HUD highlighted the importance of revitalization but not at the expense of massive displacement.<sup>237</sup> HUD acknowledged that preserving affordability and the character of neighborhoods targeted for "transformation" is the "key challenge."<sup>238</sup> HUD noted that not only can gentrification help advance fair housing goals, but it also can significantly displace the people of color in gentrifying neighborhoods.<sup>239</sup> The new rule seeks "to avoid such outcomes that could negate the progress strived to be achieved by the new regulations."<sup>240</sup> HUD has flagged revitalization leading to displacement as a fair housing concern.<sup>241</sup>

HUD also recognized interaction of zoning between urban and suburban areas that can limit fair housing choice and opportunity. Zoning and land regulations create fair housing barriers depending on "the factual circumstances in specific cases."<sup>242</sup> According to HUD, the

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235. For instance, in the education context, community groups and high school students filed an administrative complaint with the Department of Justice alleging that the school district had unlawfully discriminated against Asian students on the basis of national origin, in violation of the Fourteenth Amendment. See Press Release, Asian Am. Legal Def. & Educ. Fund, AALDEF to File Civil Rights Complaint Against Philadelphia School District (Dec. 11, 2009), <http://aaldef.org/press-releases/press-release/aaldef-to-file-civil-rights-complaint-against-philadelphia-school-district.html> [<https://perma.cc/E2FK-NP27>]. The administrative complaint came at the end of a series of organizing activities by parents and students, including a boycott, which forced the superintendent to meet with activists in Philadelphia's Chinatown. See Cecilia Chen & Andrew Leong, *We Have the Power to Make Change: The Role of Community Lawyering in Challenging Anti-Asian Harassment at South Philadelphia High School*, 19 ASIAN AM. L.J. 61, 72 (2012); see also Cecilia Chen, *We Want an Education in a Safe School: Students Demand Institutional Accountability for Anti-Asian Violence at South Philadelphia High School*, 17 ASIAN AM. L.J. 219, 222–23 (2010).

236. Lees, *supra* note 14, at 398.

237. See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,349 (July 16, 2015).

238. *Id.*

239. *Id.*

240. *Id.*

241. The new regulation also emphasizes minimizing displacement of people and assisting anyone displaced even if jurisdictions predict no displacement in the citizen participation plan. 24 C.F.R. § 91.105(4)(b)(1)(ii) (2015).

242. Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42,310.

interconnectedness of exclusionary zoning in suburbs and urban areas and their effects may also create impediments to fair housing:

[P]lace-based and mobility strategies need not be mutually exclusive. . . . [P]reserving the existing affordable rental stock can also still be a priority based on the fair housing issues identified in the AFH, which may include . . . the need to avoid displacement of assisted residents from areas that may be experiencing economic improvement.<sup>243</sup>

Taking the East Village and Lower East Side rezoning example, the combination of downzoning in an affluent area directly adjacent to upzoning in low-income areas would produce the types of negative effects that the FHA seeks to prevent, as contemplated by the new regulations. Considering the data at a more granular level helps to highlight the disproportionate impact that such a rezoning would have on low-income neighborhoods in particular. New York City's examination of the rezoning on secondary displacement in the rezoning area as a whole obscured the impact on low-income communities because it averaged out the changes across the entire area. But the rezoning established restrictions on development favoring the more affluent white area while allowing for new out-of-scale development on streets where primarily low-income people of color live.<sup>244</sup> The displacement predicted in this scenario is counter to the obligation to affirmatively further fair housing. The new AFH rule invites examination of how the interaction of zoning protections on more affluent blocks, with zoning allowances for significant development on directly adjacent low-income blocks, may directly contradict § 3608's mandate.

Although HUD generally has not engaged in displacement related gentrification issues to require compliance with § 3608's mandate, HUD's Fair Housing Planning Guide has explicitly identified displacement through gentrification as an impediment by the public sector.<sup>245</sup> This guide identified traditional impediments to fair housing choice, including zoning and site selection, the sale of subsidized housing and possible displacement, and planning and zoning boards.<sup>246</sup> But the guide also identified public sector impediments to include "[a]ctivities causing displacement (e.g., revitalization of neighborhoods, property tax increases, and demolition of subsidized housing) which affect opportunities of minority households to select housing inside or outside areas of minority concentration."<sup>247</sup> Communities should use both past and reaffirmed recognition of displacement caused by gentrification as a fair housing issue to place more pressure on HUD to address and remedy this impediment to fair housing.

Review of past AIs also suggests that HUD is unafraid to question exclusionary and discriminatory practices resulting in displacement that jurisdictions may cloak as revitalization or integration efforts. Joliet, Illinois, is a suburb of Chicago that, for the last couple decades, has drawn a

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243. *Id.* at 42,279.

244. *See* Angotti Affidavit, *supra* note 102, at 8.

245. *See* 1 FAIR HOUSING PLANNING GUIDE, *supra* note 210, at 2-31.

246. *Id.*

247. *Id.* at 4-6.



more affluent population with its vintage architecture and low prices.<sup>248</sup> In the past decade, the city has denied any multifamily housing applications and systematically downzoned all vacant lots.<sup>249</sup> Like many cities, Joliet lackadaisically enforced housing codes in poor neighborhoods but began using aggressive code enforcement under the guise of improving housing to displace low-income residents in areas that began to revitalize while certifying that the aggressive enforcement of housing codes in public housing affirmatively furthers fair housing.<sup>250</sup> HUD rejected Joliet's characterization and required the city instead to identify its discriminatory housing code enforcement as an impediment to fair housing.<sup>251</sup>

The duty to affirmatively further fair housing must encompass removing the barriers to housing created by government policies that seek to exclude or revitalize. The organizing that must happen in any community's struggle against displacement is critical to the pressure that gentrifying communities must place on HUD to require local governments to comply with § 3608. Community organizing and involvement is critical to HUD's analysis of whether jurisdictions violated their duty to affirmatively further fair housing. In some cases, HUD reviewed jurisdictions' compliance with civil rights laws only after the community and fair housing advocates drew attention to inadequate AIs.<sup>252</sup> HUD also has excused seemingly insufficient AIs primarily because advocates who originally objected to the AI had withdrawn their objections.<sup>253</sup> For § 3608 to live up to its mandate, communities should press forward on all impediments, including those caused by gentrification.

### *B. State Constitutional Claims*

Although more limited in reach than the FHA on zoning, state constitutional claims have barred exclusionary zoning in predominantly white suburbs and could similarly apply to zoning policies that push low-income people out of urban neighborhoods. A state constitutional claim could complement an FHA claim and provide fertile and broader ground

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248. See Barbara Sullivan, *Gentrifying Trend Hits Old Suburbs: Outer Cities' Blight Finds Bright Future*, CHI. TRIB. (July 16, 1997), [http://articles.chicagotribune.com/1997-07-16/news/9707160044\\_1\\_neighborhoods-pioneers-single-family-homes](http://articles.chicagotribune.com/1997-07-16/news/9707160044_1_neighborhoods-pioneers-single-family-homes) [https://perma.cc/X9LZ-HASK].

249. See Letter from Maurice J. McGough, Dir., Office of Fair Hous. & Equal Opportunity, HUD, to Arthur Schultz, Mayor, City of Joliet (May 25, 2011) (on file with author).

250. *Id.*

251. See Letter from Mercedes Marquez, Assistant Sec'y, Cmty. Planning & Dev., HUD, to Arthur Schultz, Mayor, City of Joliet (Jan. 29, 2010) (on file with author).

252. See MARIN CTY., ANALYSIS OF IMPEDIMENTS TO FAIR CHOICE (2011); see also CITY OF HOUS., ANALYSIS OF IMPEDIMENTS (2010).

253. Letter from Gary L. Sweeney, Dir., Fort Worth Reg'l Office of Fair Hous. & Equal Opportunity, HUD, to Kevin Hamby, Senior Counsel, Tex. Dep't of Hous. & Community Affairs 2 (May 13, 2011) (on file with author).

than the U.S. Constitution in promoting socioeconomic rights.<sup>254</sup> Almost every state constitution explicitly addresses rights like education, income assistance, and housing support,<sup>255</sup> and more than twenty state constitutions contain social welfare provisions.<sup>256</sup> In addition, international human rights principles have long promoted a “right to shelter.”<sup>257</sup> Though the interpretation of one state constitution is not universal to others, state constitutions could give international rights principles some teeth.

New Jersey’s two landmark decisions in *Southern Burlington County NAACP v. Township of Mount Laurel*<sup>258</sup> (*Mount Laurel I*) and *Southern Burlington County NAACP v. Township of Mount Laurel*<sup>259</sup> (*Mount Laurel II*) demonstrate both the strength and limitations of state constitutional claims. In the *Mount Laurel* decisions, the New Jersey Supreme Court relied on a general constitutional provision<sup>260</sup>—not the general welfare or housing provision—to prohibit towns from barring low-income people through exclusionary zoning and require municipalities to affirmatively provide a “fair share” of necessary low- and moderate-income housing and to zone for general welfare.<sup>261</sup> The language on which the court relied is general language typical in state constitutions. These decisions hold great promise for increasing housing units affordable to low-income communities, but enforcement of the *Mount Laurel* doctrine has spanned decades of monitoring and even more litigation.<sup>262</sup> Further, no other state has truly replicated analogous power over exclusionary zoning. Yet, the *Mount Laurel* decisions show the possibilities of using state constitutions to

254. Decades ago, Justice William J. Brennan Jr. sounded the call for using state constitutions as a “font of individual liberties.” William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

255. See, e.g., Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 927–30 (2011).

256. See, e.g., ALA. CONST. art. IV, § 88; ALASKA CONST. art. 7, §§ 4–5; CAL. CONST. art. XVI, § 3; COLO. CONST. art. XXIV, § 3; GA. CONST. art. IX, § 3; HAW. CONST. art. IX, §§ 1–7; IDAHO CONST. art. X, § 1; IND. CONST. art. IX, §§ 1, 3; KAN. CONST. art. 7, §§ 1, 4; LA. CONST. art. XII, § 8; MASS. CONST. amend. XLVII; MICH. CONST. art. IV, § 51; MISS. CONST. art. IV, § 86; MONT. CONST. art. XII, § 3; NEV. CONST. art. 13, § 1; N.Y. CONST. art. XVII, § 1; *id.* art. XVIII, § 1; N.C. CONST. art. XI, §§ 3–4; OHIO CONST. art. VII, § 1; OKLA. CONST. art. XII, § 1; *id.* art. XXV, § 1; W. VA. CONST. art. IX, § 2; WYO. CONST. art. 7, § 18; see also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893–94 (1989); Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL’Y SYMP. 111 (1996).

257. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 25 (Dec. 10, 1948).

258. 336 A.2d 713 (N.J. 1975).

259. 456 A.2d 390 (N.J. 1983).

260. “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.” N.J. CONST. art. I, § 1.

261. See *Mount Laurel II*, 456 A.2d at 415; *Mount Laurel I*, 336 A.2d at 725.

262. See Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 309–19 (2002).

challenge zoning policies that effectuate gentrification, even beyond the social welfare clauses.

State constitutions with social welfare provisions include California, Massachusetts, and New York—all states with cities representing some of the most competitive housing markets in the country.<sup>263</sup> The social welfare provisions contain relatively general language that requires the state to provide for the public's general welfare but range in the specificity of groups, services, and responsibility identified.<sup>264</sup> Some states also have policies or established rights that may strengthen state constitutional claims. For example, Massachusetts, New York, and Washington, D.C., have versions of right to shelter laws or policies related to homelessness that could bolster state constitutional arguments for retaining low-income housing in gentrifying neighborhoods.

A closer look at two state constitutions that have among the strongest social welfare and housing provisions demonstrates how communities could use state constitutions to challenge the negative effects of gentrification. Aside from social welfare provisions, the New York and Massachusetts state constitutions are among the few that authorize, though do not mandate, the provision of housing.<sup>265</sup> Both states have large and dense urban cities as the locus of gentrification, poor racialized communities with significant rental populations, and Chinatowns at high risk of gentrification. New York City and Boston, the two densest urban areas within these two states, also have the highest percentages of renters in the country.<sup>266</sup> Although both states have similar social welfare and housing provisions in their constitutions, each state has relied on these provisions differently.

With among the strongest provisions promoting socioeconomic rights and one of the most competitive urban housing markets, New York serves as an ideal laboratory to explore using the state constitution to help stem the effects of gentrification.<sup>267</sup> The state constitution's social welfare clause

263. California, Massachusetts, and New York are among the ten states considered the most expensive by the National Low Income Housing Coalition's 2015 report on the housing wage. NAT'L LOW INCOME HOUSING COAL., *OUT OF REACH* 2015, at 10 (2015).

264. A review of the social welfare provisions of all state constitutions shows that many states generally provide for the support of low-income people, while a smaller number of states focus on specific groups of people like those who have disabilities. Compare ALA. CONST. art. IV, § 88, with OKLA. CONST. art. XXV, § 1. Additionally, state constitutions for Hawaii, Massachusetts, Mississippi, and New York are the only ones that explicitly authorize the provision of housing. See HAW. CONST. art. IX, § 5; MASS CONST. amend. XLVII; MISS. CONST. art. IV, § 86; N.Y. CONST. art. XVIII, § 1.

265. See MASS. CONST. amend. XLVII; MISS. CONST. art. XIV, § 262; N.Y. CONST. art. XVIII, § 1.

266. See RIGHT TO THE CITY ALL., *RISE OF THE RENTER NATION: SOLUTIONS TO THE HOUSING AFFORDABILITY CRISIS* 15 (2014).

267. No social welfare and housing provisions in other state constitutions go as far. The state constitutions of Hawaii, Massachusetts, Mississippi, and New York authorize the state to provide housing or shelter. The constitutions of Hawaii and New York also include the goals of slum clearance. HAW. CONST. art. IX, § 5; N.Y. CONST. art. XVIII, § 1; see also MISS. CONST. art. IV, § 86. Although no other state constitution explicitly addresses low-income housing, the Massachusetts constitution mentions "maintenance and distribution [of housing] at reasonable rates." MASS. CONST. amend. XLVII.

contains mandatory language for “aid, care and support of the needy”<sup>268</sup> and a housing provision that explicitly considers providing “low rent housing . . . for persons of low income.”<sup>269</sup> These constitutional provisions give New York the authority and responsibility to ensure subsistence benefits for “needy” and low-income populations.<sup>270</sup> Courts have considered these two socioeconomic provisions separately, but forging interaction between the similarly intentioned provisions could provide relief to low-income communities fighting gentrification.<sup>271</sup> The New York Court of Appeals has held that the social welfare provision requires the state to continue providing aid to eligible low-income individuals once it begins providing aid.<sup>272</sup> In *McCain v. Koch*,<sup>273</sup> the Court of Appeals affirmed the trial court’s issuance of an injunction ordering the state to continue providing emergency housing and assistance to families who needed assistance until they had an opportunity to contest a denial.<sup>274</sup> Using this same reasoning under the housing provision, once the state begins providing low-rent housing, it would have to continue that aid unless the renter otherwise becomes ineligible.<sup>275</sup>

The state has its hands in a range of low-rent housing in low-income neighborhoods like Chinatown and the Lower East Side. Nearly half of all rental units in these neighborhoods are “rent-regulated.”<sup>276</sup> The Public Housing Law, intended to conform with the state constitution’s housing provision, defines “low rent housing” broadly<sup>277</sup> and governs the state agency that oversees rent regulation in New York City. The definition of low-rent housing and the obligation to ensure its retention could be vast as rent-regulated units are the city’s largest source of affordable housing.

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268. N.Y. CONST. art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”).

269. *Id.* art. XVIII, § 1.

270. *See id.* art. XVII; *id.* art. XVIII.

271. Enacted during the post-Depression era, the legislature intended both provisions to ensure a minimum standard of subsistence for low-income people. *See generally* 6 N.Y. STATE CONSTITUTIONAL CONVENTION COMM., PROBLEMS RELATING TO BILL OF RIGHTS AND GENERAL WELFARE chs. XXXI, XXXVIII (1938) (stating the need to ensure a standard of living that promotes adequate maintenance of health in discussing background for both the social welfare and housing provisions). The legislature was concerned with public health problems that result when low-income populations cannot find places to live or live in substandard units.

272. *See McCain v. Koch*, 511 N.E.2d 62, 62 (N.Y. 1987).

273. 511 N.E.2d 62 (N.Y. 1987).

274. *Id.* at 66–67.

275. Section 1 of the housing provision in the New York State Constitution covers both the state’s authority to provide low-income housing and to exercise eminent domain powers. Courts have made clear that these are separate powers. *See Murray v. La Guardia*, 52 N.E.2d 884, 889 (N.Y. 1943) (stating that clearing and reconstructing a “slum” is not dependent on providing low-rent housing for persons of low-income because the conjunction “or” in the provision separates these powers and makes them distinct).

276. FURMAN CTR. FOR REAL ESTATE & URBAN POL’Y, STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS 2010, at 82 (2010).

277. The Public Housing Law defines low-rent housing as “dwellings within the financial reach of families of low income and embraces recreational and other facilities incidental and appurtenant thereto.” N.Y. PUB. HOUS. LAW § 3 (McKinney 2015).

Another approximately one-third of all units in Chinatown and the Lower East Side are public or subsidized rental housing, which includes state-subsidized middle-income housing.<sup>278</sup> The New York Department of City Planning maintains that rent-regulated and subsidized housing units need not be considered in examining the potential displacement caused by a rezoning plan in a neighborhood.<sup>279</sup> Yet, in gentrifying neighborhoods, sources of affordable housing, including rent-regulated units, are even more at risk because the incentives for landlords to sell their properties to large developers drastically increase.<sup>280</sup> A constitutional obligation to retain low-rent housing would significantly strengthen efforts to sustain affordability in gentrifying neighborhoods.

Retaining low-income units is crucial to countering gentrification. In urban neighborhoods that are quickly gentrifying, the government often subsidizes the only low-rent housing remaining in the area.<sup>281</sup> The mash-up of city upzoning and downzoning resulting in exclusionary effects drives up rent in gentrifying neighborhoods and causes displacement through a variety of means. A gentrifying neighborhood might lose low-rent units through speculation or landlord harassment. Establishing a constitutional duty to retain low-income units, once the state begins providing them, would counter secondary displacement caused by accelerating government-sponsored gentrification.

The social welfare and housing provision of the Massachusetts Constitution offers similar protections for affordable housing. The state constitution provides for “[t]he maintenance and distribution at reasonable rates, during . . . public exigency, emergency or distress, of a sufficient supply” of “common necessities of life and the providing of shelter.”<sup>282</sup> Unlike courts in New York, however, courts in Massachusetts have established no legal precedent on this provision. But the state legislature’s treatment of the provision with respect to affordable housing policies elucidates how communities could use this provision to respond to the scarcity of affordable housing due to gentrification.

State responses to homelessness have relied on the social welfare and housing provision of the state constitution for authority.<sup>283</sup> To address chronic homelessness in Massachusetts, the state exercised its constitutional authority to introduce its “Emergency Assistance” program that used hotels and motels to provide shelter for homeless families in the absence of state

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278. FURMAN CTR. FOR REAL ESTATE & URBAN POL’Y, *supra* note 276, at 82.

279. See Natrella, *supra* note 160, at 1266 n.158.

280. See ANGOTTI, *supra* note 97.

281. See Perry Stein, *Remaining Chinese Residents Fight to Stay near Chinatown Neighborhood*, WASH. POST (June 23, 2015), [http://www.washingtonpost.com/local/chinatowns-remaining-chinese-residents-fight-to-stay-in-neighborhood/2015/06/23/66ea4684-19cf-11e5-ab92-c75ae6ab94b5\\_story.html](http://www.washingtonpost.com/local/chinatowns-remaining-chinese-residents-fight-to-stay-in-neighborhood/2015/06/23/66ea4684-19cf-11e5-ab92-c75ae6ab94b5_story.html) (describing how the remaining few hundred low-income Chinese residents left in Washington, D.C.’s Chinatown currently live in “Section 8” housing with a contract that expires soon) [<https://perma.cc/SW8V-DXP3>].

282. MASS. CONST. amend. XLVII.

283. See, e.g., SUZANNA M. BUMP, OFFICE OF THE STATE AUDITOR, MUNICIPAL COST IMPACTS OF MASSACHUSETTS’S HOTEL/MOTEL-BASED HOMELESS FAMILIES SHELTER PROGRAM (2015).

homeless shelter accommodations.<sup>284</sup> Although legislative debates over the social welfare and housing provision did not explicitly establish a “right to shelter,” the legislature has the authority to provide shelter at public expense “when circumstances warrant.”<sup>285</sup>

The legislature’s intent and past invocation of the social welfare and housing provision is instructive for the crisis of housing affordability that has resulted from gentrification. In a landmark study of gentrification in cities, the Federal Reserve Bank of Cleveland concluded that Boston had 61 percent gentrification in its low-income census tracts.<sup>286</sup> Gentrification is widespread in low-income communities throughout Boston<sup>287</sup> and most pronounced in the Chinatown and Downtown Crossing neighborhoods, where 83.6 percent of residential units are rentals.<sup>288</sup> In both neighborhoods, developers are building luxury rentals at a rapid rate due to zoning variances, and the increasing rents are forcing out small businesses and low-income renters.<sup>289</sup> As the effects of gentrification in low-income communities reach a crisis point, the past exercise of the state’s constitutional authority to protect low-income residents from homelessness should help to ground any emergency measures necessary to keep families and communities intact.

### C. Property Law Redefined Through Community

Low-income neighborhoods should have the same right to shape and preserve community that courts have granted to more affluent neighborhoods.<sup>290</sup> Yet, cities often disregard the distinctive character of gentrifying low-income neighborhoods.<sup>291</sup> Communities and groups have asserted the right for all to shape, design, and sustain its neighborhoods.<sup>292</sup>

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284. *Id.* at i.

285. *Id.* at 5.

286. Daniel Hartley, *Gentrification and Financial Health*, FED. RES. BANK CLEV. (Nov. 6, 2013), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-trends/2013-economic-trends/et-20131106-gentrification-and-financial-health.aspx> [<https://perma.cc/EM2Z-MDCL>].

287. *See generally* RIAN AMITON, TUFTS UNIV., *ASSESSING THE RISK OF GENTRIFICATION ACROSS BOSTON* (2009); LI ET AL., *supra* note 47; Brown, *supra* note 68.

288. *See* AMITON, *supra* note 287.

289. *See* Marie Szaniszló, *Grounds for Concern in Chinatown*, BOS. HERALD (Sept. 11, 2015), [http://www.bostonherald.com/business/real\\_estate/2015/09/grounds\\_for\\_concern\\_in\\_chinatown](http://www.bostonherald.com/business/real_estate/2015/09/grounds_for_concern_in_chinatown) [<https://perma.cc/N8CA-MB7Q>].

290. Courts have found preservation of neighborhood or control of schools to justify policy decisions. *See* David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1827 (2013).

291. In assessing the impact of a rezoning plan in Sunset Park, Brooklyn, for example, New York City’s planning agency dedicated less than a page to the impact on neighborhood character in its environmental review, merely stating that no impact would occur. Petitioner-Appellants’ Brief at 42, *Chinese Staff & Workers’ Ass’n v. Burden*, 973 N.E.2d 1277 (N.Y. 2012) (No. 2012-0124), 2011 WL 9519026, at \*42.

292. For example, the Right to the City Alliance, a national alliance of racial, economic, and environmental justice organizations focused on the effects of gentrification on low-income communities. *See generally* RIGHT TO THE CITY, <http://righttothecity.org/> (last visited Nov. 19, 2016) [<https://perma.cc/HG4H-MYXQ>]. A study conducted by the Right to the City Alliance confirms that the affordability crisis will fall squarely on renters. *See* RIGHT TO

But renters' claims to the city are limited because they traditionally do not have property interests in their homes. Broadening common law property principles to recognize renters' investment and capital in their community could establish stronger rights for all, including the city's most vulnerable populations, and help address gentrification's debilitating effects.

In the aftermath of the Great Recession, renters constitute a larger and growing part of the population,<sup>293</sup> with a growth rate doubling the pace of recent decades.<sup>294</sup> These additional renters in the next decade are expected to be "virtually all" people of color.<sup>295</sup> Moreover, many nonprofit housing developers in more competitive real estate markets are unable to build new affordable housing.<sup>296</sup> The recent housing crisis has also demonstrated that gaining wealth through home ownership is not guaranteed.<sup>297</sup> The growing prominence of renters in our society should change our conception of property.

Scholar David A. Super argues that poor people could shape their communities using mechanisms like implied easements to maintain possessory interests in land just as wealthy individuals have preserved neighborhood character through reciprocal easements, real covenants, and equitable servitudes.<sup>298</sup> An easement in gross can benefit an individual even if she does not own the land. For example, an easement in gross may allow an individual to access a lake by using a path through a neighbor's property, but that individual would still have access even if she moves away. The flexibility and changing nature of property law is useful for applying these principles to help renters retain access to communities where they have invested significant social capital.

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THE CITY ALL., *supra* note 266; David Harvey, *The Right to the City*, 53 NEW LEFT REV. 23, 23 (2008). Harvey explains the "right to the city" as "far more than the individual liberty to access urban resources: it is a right to change ourselves by changing the city. It is, moreover, a common rather than an individual right since this transformation inevitably depends upon the exercise of a collective power to reshape the processes of urbanization." Harvey, *supra*, at 23.

293. See Dionne Searcey, *More Americans Are Renting, and Paying More, as Homeownership Falls*, N.Y. TIMES (June 24, 2015), <http://www.nytimes.com/2015/06/24/business/economy/more-americans-are-renting-and-paying-more-as-homeownership-falls.html> (noting that the strongest decade of rental growth since the 1980s was between 2004 and 2014) [<https://perma.cc/9XU4-V9UP>]. Statistics showing the increase in renters are further compounded by the inability of nonprofit housing developers in more competitive real estate markets to build more affordable housing. See DOMENIC VITIELLO, *THE POLITICS OF PLACE IN IMMIGRANT AND RECEIVING COMMUNITIES, WHAT'S NEW ABOUT THE "NEW" IMMIGRATION?: TRADITIONS AND TRANSFORMATION IN THE UNITED STATES SINCE 1965*, at 95 (Marilyn Halter et al. eds., 2014).

294. BARBARA ALEXANDER ET AL., *AMERICA'S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS 3* (2013).

295. *Id.*

296. See VITIELLO, *supra* note 293.

297. See BEN HENRY ET AL., *ALL FOR A JUST SOC'Y, WASTED WEALTH: HOW THE WALL STREET CRASH CONTINUES TO STALL ECONOMIC RECOVERY AND DEEPEN RACIAL INEQUITY IN AMERICA 1* (2013) (finding that some \$196.2 billion has been lost in wealth as a result of foreclosures across the United States, an average of \$1,700 per each of the households in the country).

298. Super, *supra* note 290, at 1791.

The potential reach includes both individual renters and broader community interests. Renters who have contributed to a neighborhood's collective interests have used their homes as a platform and have access to a community that might not exist but for their efforts. In some instances, those efforts may have even increased the value of certain properties. The effects of gentrification also can threaten private areas that individuals have turned into community spaces. Residents who invested their capital in neighborhood spaces, like community gardens or murals, may be able to assert a right to that land by expanding the traditional definition of common law property principles.

Property laws already serve renters more broadly than otherwise believed.<sup>299</sup> Through a range of mechanisms, property law and state and federal statutes have shifted property rights from landlords to tenants. The justification often is based on relationships and individuals' reliance interest in the property. Traditional property law principles that embrace this shift include adverse possession, prescriptive easements, and the warranty of habitability. Many states also have rent control and stabilization laws, just cause eviction statutes, and tenants' first right of purchase laws.<sup>300</sup> In response to the heightened vulnerability of renters during the Great Recession, the foreclosure protections that Congress enacted established not only greater procedural protections for renters but also allowed them to stay in their homes through the remainder of their lease or ninety additional days after foreclosure.<sup>301</sup> Washington, D.C., Massachusetts, New Jersey, and Rhode Island do not consider foreclosure "just cause" to evict tenants.<sup>302</sup>

Principles prioritizing the input and relationships of the community beyond landowners also are prominent in zoning and planning processes. Public participation requirements for zoning changes anticipate and seek broad community involvement.<sup>303</sup> In addition, they do not restrict public testimony only to property owners. Public participation is integral to creating city planning and zoning plans, and cities should actively encourage everyone from the community, including renters, to participate.

Zoning laws also have prioritized collective history and culture beyond the participatory process. Historic preservation districts reflect the ability of a community's collective interests to limit the rights of property owners from changing buildings' facades or other aspects of the physical structure.<sup>304</sup> Past and present owners of historic buildings do not usually

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299. See generally Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

300. See *State and Local Tenant Protections*, NAT'L HOUSING L. PROJECT, <http://nhlp.org/node/1341> (last updated Jan. 23, 2015) [<https://perma.cc/39Y3-6HML>].

301. See 12 U.S.C. § 5220 (2012).

302. *State and Local Tenant Protections*, *supra* note 300.

303. See TOM ANGOTTI, *LAND USE & THE NEW YORK CITY CHARTER* (2010) (discussing New York City's Uniform Land Use Review Procedure); see also *Design Review*, SEATTLE.GOV, <http://www.seattle.gov/dpd/aboutus/whoweare/designreview/program/> (last visited Nov. 19, 2016) [<https://perma.cc/S8R6-XV9P>].

304. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 792 (2009).



contribute to a building's unique historical characteristics. The owners of the Stonewall Inn, a now-landmarked building recognized as the birthplace of the LGBT rights movement after people rioted in 1969 to resist police harassment in New York City's West Village, did not create the history that warranted landmark preservation status.<sup>305</sup> Rather, the community's connection and interaction with the building increased its value. Because these economic benefits often develop due to the relationships and labor of the community, zoning laws allow for limitations on the rights of the owners.<sup>306</sup>

People facing displacement should benefit from the same principle. Tenants should draw from property laws that shift rights to tenants to assert a property interest in a community or particular urban area. Neighborhoods like Chinatown and Harlem in New York City are as indispensable as historically preserved buildings in maintaining and promoting a city's culture.<sup>307</sup> The rich culture of these neighborhoods enhances New York City's stature as a global city in the same way as buildings like Grand Central Station. The New York tourism industry actively promotes these landmarks. Yet, whereas building facades remain through historic preservation, the people who contributed to making areas of the city culturally rich now face displacement. Mandating where people live is not permissible or desirable. But just as historic preservation protects the collective interests and effort that created a landmarked building or area, property laws can also protect and compensate the collective interests of the people who have contributed and enhanced the value of a neighborhood due to their labor.

This Article does not understate the significant problems often prevalent in areas of concentrated poverty such as failing school systems, health issues, and high crime rates.<sup>308</sup> To do so would negate and absolve the long history of government disinvestment and neglect that created these areas of concentrated poverty. Many low-income neighborhoods face hurdles due to a historical lack of investment and resources from the government. But the "ghetto" is not monolithic. The investment in place that some communities have built can help to mitigate negative effects of concentrated

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305. See *New York City Makes Stonewall Inn a Landmark*, N.Y. TIMES (June 23, 2015), [http://www.nytimes.com/2015/06/24/nyregion/new-york-city-makes-stonewall-inn-a-landmark.html?\\_r=0](http://www.nytimes.com/2015/06/24/nyregion/new-york-city-makes-stonewall-inn-a-landmark.html?_r=0) [<https://perma.cc/WXG6-BGZS>].

306. Alexander, *supra* note 304, at 792.

307. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 109 (1978) (stating that "[t]he city acted from the conviction that the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character").

308. See, e.g., Alan Barube, *Concentrated Poverty in America: An Overview*, in *THE ENDURING CHALLENGE OF CONCENTRATED POVERTY IN AMERICA: CASE STUDIES FROM COMMUNITIES ACROSS THE U.S.* 3, 12–15 (David Erickson et al. eds., 2008); Vijaya Murali & Femi Oyebo, *Poverty, Social Inequality and Mental Health*, 10 *ADVANCES PSYCHIATRIC TREATMENT* 216 (2004).

poverty.<sup>309</sup> The intangibles of social capital and collective efficacy are lost with gentrification and subsequent displacement.<sup>310</sup>

Despite past discriminatory policies, anti-immigrant or racist sentiment, and the problems of concentrated poverty, many communities of color now facing gentrification have poured resources and capital into creating self-sustaining economies, rich cultures, and crucial networks of support. In the South Bronx, long heralded as the birthplace of hip-hop, the children of Caribbean immigrants in Mitchell-Lama middle-income buildings started mixing reggae, soul, and disco beats at parties for youth of varying socioeconomic levels who also lived in the neighborhood's subsidized housing.<sup>311</sup> Residents of Chicago's first majority Latino community in the Lower West Side neighborhood of Pilsen, which formed because of racially based urban planning policies, painted murals on buildings and deteriorating billboards, opened the Mexican Fine Arts Museum, and created a rich arts district.<sup>312</sup> Residents of Philadelphia's Chinatown, which formed from anti-immigrant discrimination, built shared cultural institutions and small businesses that both neighborhood residents and nonresidents frequent.<sup>313</sup> Vietnamese residents of New Orleans's Versailles neighborhood coalesced around the Catholic Church, which had historically served as a unifying institution in Vietnam.<sup>314</sup> In each instance, the ownership and attachment to place helped strengthen collective struggles against gentrification, displacement, and destruction of community.<sup>315</sup>

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309. See generally MARGERY AUSTIN TAYLOR ET AL., TACKLING PERSISTENT POVERTY IN DISTRESSED URBAN NEIGHBORHOODS (2014). The authors, in a section titled "Lessons Learned from a Century of Place-Based Investments," argue for urban development strategies that are "place conscious," based on the knowledge that concentrated poverty grew largely out of a lack of investment. *Id.* at 1.

310. See John J. Betancur, *The Politics of Gentrification: The Case of West Town in Chicago*, 37 URB. AFF. REV. 780, 807 (2002). The most traumatic aspect of this analysis is perhaps the destruction—without any compensation—of the elaborate and complex community fabric that is crucial for low-income, immigrant, and minority communities. See *id.*

311. Alexander, *supra* note 70, at 832.

312. *Id.* at 842–44.

313. See Ellen Somekawa, *Philly Chinatown Beats Back a Stadium*, FREEDOM ROAD SOCIALIST ORG. (Jan. 1, 2001), <http://freedomroad.org/2001/01/philly-chinatown-beats-back-a-stadium-2/> [https://perma.cc/456N-TLUQ].

314. See Bethany Li, "We Are Already Back": *The Post-Katrina Struggle for Survival and Community Control in New Orleans East's Vietnamese Community of Versailles*, 18 ASIAN AM. L.J. 25, 46 (2011).

315. Residents of 1520 Sedgwick in the Bronx used the Mitchell-Lama building's prominence as the birthplace of hip-hop to fight against the gentrification that threatened the displacement of residents from the building. Alexander, *supra* note 70, at 837–41. The Pilsen residents successfully stemmed city-backed gentrification by actively participating in development planning, protesting urban renewal plans that characterized the neighborhood as "blighted." *Id.* at 845–50. The shared pride and dedication to place from residents and nonresidents alike contributed significantly to the community organizing that has stopped Philadelphia's persistent plans to build a baseball stadium, jail, and casino in Chinatown. See Somekawa, *supra* note 313. Finally, despite years of insularity, the Vietnamese community in New Orleans, post-Katrina, developed a new sense of activism and connection between youth and elderly that enabled strong opposition to proposals by the City of New Orleans not

Scholars have promoted a “social relationship” approach to property law that premises legal rights on relationships, whether short lived or continuing, and the interconnectedness of individuals.<sup>316</sup> Many scholars who support this approach do not discredit economic analyses toward property law and land use but assert that market value cannot be the only way of interacting with land given the complexity of human interaction with property.<sup>317</sup> Foundational to this social relational theory is Charles Reich’s “The New Property,” which long ago recognized that changes in society should result in changing definitions of property and proposed that the rise of the regulatory state meant that property should encompass not only “tangible goods” but also “rights or status.”<sup>318</sup>

As imagined by Reich, the development of “new property” can define “economically valuable interests that are of vital importance to the holders of those interests, but that do not come within the traditional definition of ‘property.’”<sup>319</sup> The economic value of neighborhoods with greater social capital is evident in many urban areas that local governments choose to gentrify.<sup>320</sup> Take two low-income neighborhoods in the same city that might have similar demographics and problems associated with concentrated poverty, but one is identified as “hip.” In determining which neighborhood to redevelop, the city sees greater economic benefit to gentrifying the hip neighborhood. Cities will spend more resources in the neighborhoods they choose to gentrify, underscoring the higher economic value of the hip neighborhood over the other one without the same cultural cache. In many cases, the neighborhood has developed its hip image primarily because of the history and culture created by renters and others who do not own property during periods when the city did not invest in the neighborhood.<sup>321</sup>

This formula of exploitation translates into successful home sales and high rental values. Private developers, with the help of local governments,

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to include the neighborhood in post-Katrina rebuilding plans and to site a landfill with toxic hurricane debris a mile away from their neighborhood.

316. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 623 (1988). One of the most prominent examples of relationships changing individuals’ right to property is marriage. *Id.* at 692–93.

317. See, e.g., Alexander, *supra* note 304; Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

318. See Super, *supra* note 290, at 1827. Charles Reich’s “The New Property” and “Individual Rights and Social Welfare: Emerging Legal Issues” largely influenced the Supreme Court’s precedential holding that welfare recipients have a due process right to a hearing. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Reich, *supra* note 158.

319. Charles Reich, *The New Property After 25 Years*, 24 U.S.F. L. REV. 223, 225 (1990).

320. Lisa T. Alexander argues that the work of Latino residents in creating ownership and pride in the neighborhood of Pilsen in Chicago has made the community “a prime commodity for global capital investment and city-led revitalization,” leading to its threatened existence. Alexander, *supra* note 70, at 848.

321. According to urban planner Sharon Zukin, when given the freedom to develop authentically, the neighborhood’s culture is organic and individuals use it to claim ownership of a neighborhood. ZUKIN, *supra* note 94, at xiii.

then commodify and exploit that culture for increased property values.<sup>322</sup> Chicago's Pilsen neighborhood or New York City's Lower East Side are prime examples of culturally rich and "gritty" communities marketed to upper class tastes clamoring for "authenticity."<sup>323</sup> Neil Smith's seminal work *The Revanchist City* transforms the idea of the inner city from an "emancipatory space" for gentrifiers acting as "urban pioneers" into a warzone similar to the violent colonization of native people's places.<sup>324</sup>

Individuals in these communities prior to gentrification created economic value in these neighborhoods and should benefit from their contributions. That this labor should be compensated is not a revolutionary idea.<sup>325</sup> In lieu of physical capital, low-income communities have acquired significant social capital, and their vulnerability is enhanced if redevelopment does not recognize its value. The murals in the Pilsen neighborhood of Chicago are a product of residents' labor and have contributed to the allure in the city's process of gentrifying. Low-income residents have increased the value of capital, the land, through their own labor. All of this value is lost if gentrification destroys the community by displacing the residents who have contributed to the neighborhood.

If developers must compensate for labor spent building that social capital, the cost-benefit calculation for luxury development changes.<sup>326</sup> The value of social capital can be difficult to discern, but the business context provides a parallel measure of a multilayered intangible asset in business goodwill.<sup>327</sup> Business goodwill, which adds a premium on top of the fair market value of a company, is similarly difficult to calculate, yet companies will account for this intangible in assessing value by subtracting the fair market value of a company from the total business value. In the housing context, professional real estate appraisers could estimate the value of social capital in relation to a building or area's fair market value in the same way.<sup>328</sup> Courts have considered intangibles that would raise a

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322. Despite the marginalization that occurs with gentrification, Paul Chatterton and Robert Hollands note that some elements of "residual youth street cultures" persist. PAUL CHATTERTON & ROBERT HOLLANDS, *URBAN NIGHTSCAPES: YOUTH CULTURES, PLEASURE SPACES AND CORPORATE POWER* 172 (2003). However, as the authors note, the "commodification" of these cultures (namely rap and hip-hop) "by corporate capital demonstrates how commercialization and incorporation can succeed where repression and laws fail." *Id.*

323. *See id.*

324. *See SMITH, supra note 22, at 17.*

325. Charles Reich proclaimed, "Society must protect the fruits of people's labor, the investments people make through their life activities." Reich, *supra* note 319, at 227.

326. *See Dawn Jourdan & Ryan Feinberg, Valuing Grief: A Proposal to Compensate Relocated Public Housing Residents for Intangibles*, 21 U. FLA. J.L. & PUB. POL'Y 181, 198 (2010).

327. Goodwill has been defined as "the term (and value) ascribed to the excess of the cost of acquiring the business over the value of the net assets acquired." Tracy Gomes, *Defining Goodwill for Transfer Pricing*, TRANSFER PRICING INT'L J., Nov. 2012, at 10, 10.

328. *See, e.g., Parcel One Phase One Assocs., L.L.P. v. Museum Square Tenants Ass'n*, No. 15-CV-609, 2016 WL 5335774 (D.C. Sept. 22, 2016).

building's offer of sale higher than the fair market value.<sup>329</sup> Another example of social capital manifested in monetary value is in the land use context through community benefits agreements.<sup>330</sup> These agreements specify the benefits that the community is able to extract from a developer and include such tangible items as apartment units and public space that could be monetarily valued.<sup>331</sup> The stronger the collective interests, the more benefits the agreement should include.<sup>332</sup>

Increasing choice of housing is important—not only to move but also to stay. On the heels of the mortgage foreclosure crisis, unsustainable inequality,<sup>333</sup> and gradual shift from an ownership to rental society,<sup>334</sup> this moment is critical for reframing the rights of renters. In many gentrifying neighborhoods, renters have a significant stake in property and community even if their names do not appear on the deed. Renters have invested significant resources, time, and effort to create community and develop their ownership of place and space. Gentrification undervalues and discredits this labor while simultaneously exploiting and promoting its product. To address inequity, communities should use common law property principles to assert their right to the city.

#### CONCLUSION

At the end of a hard-fought eviction case in New York's housing court, an attorney suddenly turned to his client, the landlord, and asked, "What's going to happen to Chinatown?" I had spent five years representing that

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329. See, e.g., 1618 Twenty-First St. Tenants' Ass'n, Inc. v. Phillips Collection, 829 A.2d 201, 204 (D.C. 2003).

330. Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 8 (2010). In the famous Staples Center example, the Community Benefits Agreement provided that the developers would commit \$1 million toward a community park, give preference in hiring to displaced individuals, and provide interest free loans to nonprofit housing developers in the neighborhood, among other concessions. *Id.*

331. See, e.g., *Los Angeles Sports and Entertainment District CBA*, PARTNERSHIP WORKING FAMILIES, <http://www.forworkingfamilies.org/resources/staples-cba> (last visited Nov. 19, 2016) [<https://perma.cc/EXR2-DYQS>].

332. Sociologists, particularly those writing about labor movements, have long suggested that exercises of strong collective interests are likely to restrict the profit-seeking behavior of a corporate actor. See, e.g., Erik Olin Wright, *Working-Class Power, Capitalist-Class Interests, and Class Compromise*, 105 AM. J. SOC. 957 (2000). Wright writes that his study is concerned with "the extent of constraint on capitalists imposed by the collective action of workers reflecting their associational power in various forms," also concluding that "[s]uch associational power reduces capitalists' individual capacity to make profit-maximizing decisions." *Id.* at 979–80.

333. Approximately half of all renters make \$30,000 or less. ALEXANDER ET AL., *supra* note 294, at 5. The income gap between wealthy and poor Americans is increasing and the wealth gap between middle- and upper-income households is at its widest ever. Richard Fry & Rakesh Kochhar, *America's Wealth Gap Between Middle-Income and Upper-Income Families Widest on Record*, FACTTANK (Dec. 17, 2014), <http://www.pewresearch.org/fact-tank/2014/12/17/wealth-gap-upper-middle-income/> [<https://perma.cc/UE32-E8UC>].

334. Meanwhile, half of all renters spent more than 30 percent of their income on their housing in 2010, a percentage that is at record levels and up from 38 percent in 2000. See ALEXANDER ET AL., *supra* note 294, at 5–6.

landlord's tenant, a feisty middle-aged Chinese woman who ultimately accepted a buyout for the rent-regulated apartment she had lived in since moving with her family to New York City's Chinatown in the 1970s. Upon seeing the disappearance of yet another affordable unit, the landlord's attorney—out of genuine curiosity, and perhaps some concern, about the future of the neighborhood—asked his client the same question that communities in gentrifying neighborhoods have tried to resolve.

The hallmark vitality and creativity of many urban communities made possible by affordable homes is disappearing as displacement from gentrification and its threats disrupt the social fabric of low-income communities of color. Gentrification is excluding low-income populations from living within its boundaries. Underutilized litigation strategies can help address some immediate problems that result from gentrification.

But to fully embrace the right to the city for all, a different vision of development must prioritize community and tenants. As observed by urban planner Sharon Zukin, “[T]he right to produce authentic places in both senses, historically old and creatively new, offers an alternative to the kind of growth that pushes many groups out.”<sup>335</sup> To address socioeconomic inequities and its social impact, cities cannot ignore the damaging effects of gentrification and must respond to the needs of tenants, who represent among the most vulnerable. The challenge of creating and sustaining community demands it.

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335. ZUKIN, *supra* note 94, at xiii.