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“Affordable Housing” as Metaphor

Steven J. Eagle

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“AFFORDABLE HOUSING” AS METAPHOR

Steven J. Eagle*

ABSTRACT

This Article examines the varying and often-conflicting meanings and goals ascribed to the term “affordable housing.” It asserts that the term often serves as a metaphor; it obscures rather than clarifies, and contributes to the intractability of problems pertaining to housing from any perspective. The Article further asserts that attempts to deal with what are termed affordable housing issues must realistically take into account the shelter, cultural, and economic needs of various populations, and also the effects of housing decisions on economic prosperity. Above all, the affordable housing metaphor is agreeable precisely because it defers responding to the need to make hard choices about priorities and funding.

Among proffered affordable housing goals are making available an ample supply of housing in different price ranges; attracting and retaining residents who contribute to the growth and economic prosperity of cities; and ensuring that neighborhood housing remains available for existing residents, while preserving their cultural values. Other goals include providing adequate housing in high-cost cities for low- and moderate-income individuals and families, and the overlapping concern for “fair housing” for persons of all races and backgrounds.

After considering these often conflicting goals, the Article examines the benefits and detriments of various means of providing more affordable housing, including fair-share mandates, rent control, and inclusionary zoning (including whether that leads to impermissible government takings of private property). It then briefly considers the merits and demerits of federal subsidy programs.

The Article briefly considers conceptual and practical problems in implementing the Supreme Court’s 2015 Inclusive Communities disparate impact holding and HUD’s 2015 regulations on “Affirmatively Furthering

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Fair Housing,” especially in light of the 2016 elections. Finally, it discusses how the concept of “affordable housing” conflates the separate issues of high housing prices and poverty and how housing prices might be reduced through removal of regulatory barriers to new construction.

Throughout, the Article stresses that advancing affordable housing goals has both explicit and implicit costs and that goals often are conflicting. To those ends, it employs economic, sociological, and legal perspectives.

TABLE OF CONTENTS

Introduction	303
I. The Diverse Goals of Affordable Housing.....	306
A. The Purposes of the City	306
B. Costs are Constraints	308
C. Residents of American Cities are Burdened by High Housing Costs.....	310
D. Affordable Housing as Conducive to Economic Prosperity	312
1. Housing Attracting and Retaining Productive Residents...312	
2. Adequate Housing for Low- and Moderate-Income Families Buttresses Economic Growth.....	313
3. Gentrification as Conducive to Prosperity	314
4. Preservation of Existing Close-Knit Communities Can Abet Prosperity	314
E. Affordable Housing as Supportive of Existing Community ...	315
1. Social Capital.....	315
2. Gentrification as Harmful to Community	317
3. Middle or Upper-Middle Class Way of Life	319
II. Exploring Solutions to Affordable Housing Problems	322
A. Expert versus Market Decision-Making	323
B. Some Affordable Housing Issues	325
1. Is Housing a Right?	325
2. Affordable Housing and Fair Housing.....	326
3. Is Income Inequality in Cities Undesirable?.....	327
4. Should We Benefit People or Benefit Places?.....	327
5. Housing Affordability for Different Income Groups.....	329
6. Are People and Places Distinguishable?.....	332
C. State and Local Land-Use Mandates	333
1. Affordable Housing Fair Share Mandates	334
2. Inclusionary Zoning.....	336
3. Rent Control	337
4. Affirmative Use of Eminent Domain.....	338
5. Is Compelled Inclusionary Zoning a “Taking?”	339

D. Legislation Through Complex and Opaque Public-Private Bargains.....341

E. Federal Subsidies and HUD Mandates.....342

1. Federal Subsidy Programs342

2. Proposed HUD Rule on Housing Choice Vouchers344

3. Disparate Impact and Affirmatively Furthering Fair Housing.....345

4. Affordable Housing Mandates Will be Difficult to Apply and Enforce.....348

5. Conflicting Value Systems and the Idea of “Fairness”354

F. Reducing Government Barriers to New Market-Rate Housing355

Conclusion358

INTRODUCTION

This Article asserts that what commonly is called the problem of “affordable housing”¹ has largely been intractable because it is a conflation of many separate societal problems and goals. Affordable housing is a metaphor invoked by diverse interest groups to define issues and choices in their favor, so that they might more effectively attempt to shape public policy.

Metaphors, according to George Lakoff and Mark Johnson, “can have the power to define reality . . . through a coherent network of entailments that highlight some features of reality and hide others.”² They add that “acceptance of the metaphor, which leads us to focus *only* on those aspects of our experience that it highlights, forces us to view the entailments of the metaphor as being *true*”³

Amos Tversky and Daniel Kahneman utilized the similar organizing principle of the “decision frame,” which they defined as “the decision-maker’s conception of the acts, outcomes, and contingencies associated with a particular choice.”⁴ While the frame is “controlled partly by the

1. There is an extensive legal literature on affordable housing. *See, e.g.*, BRUCE KATZ ET AL., THE BROOKINGS INST., RETHINKING LOCAL AFFORDABLE HOUSING STRATEGIES: LESSONS FROM 70 YEARS OF POLICY AND PRACTICE (2003); J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527 (2007); Tim Iglesias, *Maximizing Inclusionary Zoning’s Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 593 (2015); Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413 (2004).

2. GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 157-58 (1980).

3. *Id.*

4. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453, 453 (1981).

formulation of the problem,” it also is controlled “partly by the norms, habits, and personal characteristics of the decision-maker.”⁵

In more pithy language, Cass Sunstein and Richard Thaler observed that Tversky and Kahneman “didn’t care for metaphors.”⁶ “They replace genuine uncertainty about the world with semantic ambiguity. A metaphor is a cover-up.”⁷

This Article attempts to bring “genuine uncertainty” to the fore of the affordable housing debate. It discusses how decisions about where people live, the identity of their neighbors, the types of amenities they might enjoy, and regional prosperity are interrelated in multifaceted ways. The apparently intractable shortage of “affordable housing” in many American cities results from inconsistent housing goals and the lack of a societal consensus on how to prioritize and fund the advancement of these goals. It further asserts that “affordable housing” should be defined and analyzed in a broad context, taking into account the shelter, cultural, and economic needs of various populations, as well as the effects of housing decisions on economic prosperity. This definition is broader than the more conventional emphasis on housing for low- and moderate-income families.⁸ However, a broader view permits a more realistic, comprehensive, and effective approach toward housing issues.

The Article focuses on three different affordable housing goals. One is developing an ample supply of housing in price ranges that attract and retain residents conducive to the growth and economic prosperity of cities.⁹ Two major problems are that governments have created extensive barriers to the creation of new housing at the behest of existing residents¹⁰ and that the concept of “affordable housing” has different meanings for middle-class families, moderate-income families, and poor families.

A second affordable housing goal is ensuring that neighborhood housing remains available for existing residents, while preserving their cultural and other non-pecuniary values.¹¹ This goal is associated with resistance to gentrification in minority and lower-income neighborhoods and resistance

5. *Id.*

6. Cass Sunstein & Richard Thaler, *The Two Friends Who Changed How We Think About How We Think*, NEW YORKER (Dec. 7, 2016), <http://www.newyorker.com/books/page-turner/the-two-friends-who-changed-how-we-think-about-how-we-think> [<https://perma.cc/JRV3-CTAC>].

7. *Id.*

8. *See, e.g.*, Byrne & Diamond, *supra* note 1 (focusing on housing opportunities for low-income persons within the context of a comprehensive set of goals that such housing might achieve).

9. *See infra* Section I.D.

10. *See infra* Section II.F.

11. *See infra* Section I.E.

to densification and concomitant environmental concerns in more upscale areas. More generally, neighborhood preservation often is in opposition to economic growth.

Finally, “affordable housing,” in its most familiar sense, refers to the provision of adequate housing in high-cost cities for low- and moderate-income persons and the overlapping concern for “fair housing” for families of all races and backgrounds.¹² Governments have long made special provisions for housing, since the provision of physical shelter and a locus for intimate family relationships serves fundamental needs.¹³ But this raises many questions, such as whether affordable housing not only encompasses safe and adequate shelter but also neighborhood integration, economic and cultural opportunity, and equal dignity. It is important to come to grips, as well, with the essential conflation of housing unaffordability and poverty. As leading urban economists have flatly stated, “a housing affordability crisis means that housing is expensive relative to its fundamental costs of production—not that people are poor.”¹⁴

The lack of a societal consensus on the importance and priority of housing objectives tends to perpetuate the status quo. The most direct government responses to affordable housing needs, massive government housing subsidies and substantially increased residential density, are politically unpalatable. This encourages local government responses marked by a lack of transparency, logrolling, inefficiency, opportunities for favoritism, and disregard for private property rights.

In the aftermath of the Supreme Court’s recent adoption of “disparate impact” analysis in fair housing determinations in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*¹⁵ and HUD’s subsequent promulgation of rules on “Affirmatively Furthering Fair Housing,”¹⁶ it is likely that the federal judicial and executive branches will become more immersed in local housing decisions. But that might place the federal government in the role of closely supervising local land-use practices more generally, a role it has resisted in other contexts. It is highly

12. See *infra* Sections II.C and II.E.

13. Byrne & Diamond, *supra* note 1, at 529.

14. Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 FED. RES. BANK N.Y. ECON. POL’Y REV. 21, 21 (2003), <https://www.newyorkfed.org/medialibrary/media/research/epr/03v09n2/0306glae.pdf> [<https://perma.cc/7FXB-5AYB>]. See Glaeser & Gyourko, *infra* note 375 and accompanying text for a more extensive quotation.

15. 135 S. Ct. 2507 (2015) (upholding the use of “disparate impact” as a test for determining if local housing regulations or actions violate the Fair Housing Act).

16. HUD Final Rule on “Affirmatively Furthering Fair Housing,” 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, et al.).

problematic that President Donald J. Trump or HUD Secretary Ben Carson would support this approach.¹⁷

Many solutions to narrow aspects of the affordable housing problem seem tenable in theory, although perhaps not in practice. Without a broad change in political will leading to a consensus on goals and priorities, more comprehensive solutions will remain elusive. In approaching affordable housing issues, it is important to recall, as the central theme in well-known books by Jonathan Haidt¹⁸ and George Lakoff¹⁹ demonstrate, that people of good will have different moral frameworks, as well as different life experiences.

I. THE DIVERSE GOALS OF AFFORDABLE HOUSING

A. The Purposes of the City

Affordable housing, however defined, must be evaluated in the context of the purposes that the city is to serve. Should cities primarily facilitate religious or social values, the production of goods or economic transactions, or consumerism?²⁰ One beginning point is that they should facilitate human values and the nurturing of families.²¹ However, in our disparate society, these are political problems with no clear answers. The eminent mid-twentieth century political scientist Harold Lasswell did not define “politics” in terms of rational decision-making based on comprehensive data. Rather, as the title of his classic book, *Politics: Who Gets What, When, How*,²² suggests, politics is a practical contest for power, with elites having a very substantial advantage. That does not mean, of course, that those who have little political power and who feel displaced from home or community yield gracefully.

In dealing with affordable housing, it is tempting to be ruled by abstract and overarching principles, applicable to broad populations and geographic regions. However, as Jane Jacobs wryly noted in *The Death and Life of Great American Cities*,²³ a “region” might be defined as “an area safely

17. See *infra* Section II.E.

18. JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012).

19. GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2016).

20. To be sure, decisions involving cities often have substantial spillovers, and there often are mismatches between the legal decision-making powers of cities, suburbs, regional authorities, state governments, and their relative competencies to deal with problems. See, e.g., Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515 (2007). These issues generally are beyond the scope of this Article.

21. See JOEL KOTKIN, *THE HUMAN CITY: URBANISM FOR THE REST OF US* 5-18 (2016).

22. HAROLD D. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936).

23. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

larger than the last one to whose problems we found no solution.”²⁴ This insight pertains to housing, as well. Economic prosperity, community cohesiveness, societal fairness, and government transparency and honesty are discrete problems for which we have not found good solutions. Combining them under the rubric of top-down edicts for “affordable housing” is unlikely to be more successful. On the other hand, modest efforts, building upon a Burkean notion of incremental change, might be more prudent and ultimately desirable.²⁵

Questions about what kind of city we want imply assumptions about whether decisions are to be made by individuals or collectively by government. In considering private actors, this Article assumes that decisions are made by developers acting largely as proxies for their ultimate residential purchasers and by existing homeowners to maximize some combination of pecuniary value and subjective desires. In considering government decision-making, this Article assumes participation by tenants, businesses, environmentalists, and other local, regional, and state interest groups, as well as by owners and developers. This multiplicity of stakeholders attenuates government concerns about future residents. Navigating the system of government permits and subsidies, thus, makes developers more attuned to political deal-making and rent-seeking than to pleasing prospective purchasers.²⁶

There is no necessarily ideal model for the American city. David Brooks recently noted that two types of urban places in America seem to be functioning well. The first are “dense, highly educated, highly communal places These cities, like Austin, Seattle and San Francisco, have lots of innovation, lots of cultural amenities, but high housing prices and lots of inequality.”²⁷ The second are “opportunity cities like Houston, Dallas and Salt Lake City. These places are less regulated, so it’s easier to start a business. They are sprawling with easy, hodgepodge housing construction, so the cost of living is low. Immigrants flock to them.”²⁸

Brooks urged that there be a debate between these “two successful ways to create prosperity, each with strengths and weaknesses. That would be a forward-looking debate between groups who are open, confident and innovative.”²⁹ The debate “might divide by cultural values and aesthetics,

24. *Id.* at 410.

25. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (Oxford Univ. Press 1993) (1790) (advocating incremental political change arising from a society’s customs and traditions, as opposed to sweeping reforms based on theory).

26. *See infra* Sections II.D, II.F.

27. David Brooks, *Where America Is Working*, N.Y. TIMES, June 3, 2016, at A23.

28. *Id.*

29. *Id.*

[but] wouldn't divide along ugly racial lines."³⁰ In public exchanges, alas, issues involving personal aspirations, social class, race, and substantial illiquid housing investments typically do not readily lend themselves to reasoned debate. We often do not ask others to understand and try to accommodate our needs and desires as fellow citizens and neighbors but, rather, engage in "rights talk," demanding that others yield to our alleged legal entitlements.³¹

Thus, our dialogue often proceeds not through civil discourse but, rather, through the promulgation of ordinances and regulations demanding either densification or large-lot zoning, lawsuits objecting to development approvals based on often-ostensible environmental concerns, and judicial challenges to community growth that disparately affect legally protected groups, without regard to intent. Recourse to the legal system, for better or worse, often imposes substantial additional expense and delay.³² Those, or their threat, often are sufficient to sink a residential development project.³³

Where individuals make choices regarding their own residences, the aggregate of their separate decisions weighs heavily on overall housing patterns and availability. As Thomas Schelling demonstrated with respect to "neighborhood tipping," individual choices interact in ways not necessarily anticipated, or even desired, by the people involved.³⁴ Furthermore, prospective new residents are the most sensitive to neighborhood characteristics, and possible buyers often look carefully at the racial and socioeconomic makeup of neighborhoods.³⁵

B. Costs are Constraints

Individuals often express preferences for all of the following: inexpensive housing, economic vibrancy and growth, and maintenance of existing neighborhood values and ways of life. "Neighborhood values," in turn, might include resisting gentrification and supporting institutions furthering the ethnic and cultural needs of lower-income groups. Conversely, they might include maintaining the low densities and high

30. *Id.* (alteration in original).

31. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (noting that foreign observers are struck by the extent to which legal discourse and lawyers have permeated and influenced American ways of life).

32. See, e.g., Lisa C. Goodheart & Karen A. McQuire, *Revisiting the Issue of Causation in CERCLA Contribution Litigation*, 82 MASS. L. REV. 315, 322 (1998) (noting the "great expense, delays and other burdens associated with protracted environmental litigation").

33. See *infra* notes 382-85 and accompanying text for a vivid example.

34. Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143, 181-86 (1971).

35. See Lee Anne Fennell, *Searching for Fair Housing*, (Pub. L. and Legal Theory, Working Paper No. 575, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2762026 [<https://perma.cc/L3VH-U6EW>].

amenities favored by more upscale communities. Such preferences typically are articulated without apparent regard for their inconsistent nature, or the burdens they impose upon others.

Thus, even before examining various affordable housing goals, it is necessary to inject the concept of costs. No less than goods denominated as “free,” goods termed “affordable” often have high implicit costs.³⁶ “Costs,” as economists use the term, refers to the “highest-valued opportunity necessarily forsaken” in order to obtain the good in question.³⁷ While “costs” often are identified as the pecuniary value of goods traded in markets, the concept is broader than that and includes subjective tradeoffs.³⁸ When individuals make decisions for themselves, it generally is assumed that they accurately judge their relative likes and dislikes, although a considerable literature has developed in recent years asserting that they make systematic errors.³⁹

Some scholars dismiss the distinction between normative and positive economic analysis and assert that economics cannot be value-free⁴⁰ and that the provision of affordable housing sometimes is linked to moral obligation.⁴¹ However, regardless of one’s views about the objectivity or subjectivity of economics, in a world of scarce resources, “economic actors cannot pursue every course of action with positive expected value” but, instead, “must make decisions by comparing the value of alternatives.”⁴²

36. See, e.g., DONALD C. SHOUP, *THE HIGH COST OF FREE PARKING* (2005) (asserting that mandatory parking requirements result in excessive land set aside for parking and are triggered by concerns of existing homeowners and businesses that newcomers otherwise would occupy scarce public parking spaces, which are a public good only because municipalities insufficiently charge for their use).

37. See Armen A. Alchian, *Cost* (1968), reprinted in ARMEN A. ALCHIAN, *ECONOMIC FORCES AT WORK* 301 (1977).

38. See Karen I. Vaughn, *Does It Matter That Costs Are Subjective?*, 46 *SOUTHERN ECON. J.* 702 (1980). “[C]ost is an all pervasive concept that reaches to the core of economic thinking. Economic decision making is an exercise in choosing among alternatives, and cost can only be understood to be a personal subjective evaluation of the consequences of choice.” *Id.* at 702.

39. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008).

40. See, e.g., THE END OF VALUE-FREE ECONOMICS (Hilary Putnam & Vivian Walsh eds., 2012).

41. See, e.g., Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 *W. NEW ENG. L. REV.* 323, 346-47 (2001) (asserting that providing urban families access to affordable suburban educational, employment, and other opportunities “serves the national and moral goal of increasing equality of opportunity”).

42. Abraham J.B. Cable, *Opportunity-Cost Conflicts in Corporate Law*, 66 *CASE W. RES. L. REV.* 51, 78 (2015).

Alas, with housing, as with the environment, considerations are interrelated.⁴³

C. Residents of American Cities are Burdened by High Housing Costs

Recent reports suggest that urban rents often create hardships for residents. According to a 2016 Furman Center study, “[i]n both 2006 and 2014, a majority of renters in all but three of the largest metro areas were *rent burdened*, meaning their rents were equal to at least 30 percent of their income.”⁴⁴ The study also noted that “[i]n all but four of the largest metro areas, at least a quarter of renters were *severely* rent burdened in 2014, meaning they faced rents equal to at least half their household income.”⁴⁵

Perhaps notably, of the eleven largest metro areas, Dallas and Houston were the only two to be more affordable than metros nationwide.⁴⁶ A 2016 National Low Income Housing Coalition study stated,

[I]n no state, metropolitan area, or county can a full-time worker earning the prevailing minimum wage afford a modest two-bedroom apartment. In only twelve counties and one metropolitan area is the prevailing minimum wage sufficient to afford a modest one-bedroom apartment.⁴⁷

The squeeze between rising rents and low incomes has particularly affected minority and low-income neighborhoods.⁴⁸

Similarly, the National Low Income Housing Coalition concluded that “[w]hile stagnant wages for lower-income workers are contributing to rental affordability challenges, the findings suggest a dearth of low-cost supply is also a culprit.”⁴⁹ “Of 370,000 multifamily rental units completed from 2012 to 2014 in 54 U.S. metropolitan areas, 82% were in the luxury

43. See JOHN MUIR, *MY FIRST SUMMER IN THE SIERRA* 91 (Sierra Club Books 1988) (1911) (“When we try to pick out anything by itself, we find it hitched to everything else in the universe.”).

44. Ingrid Gould Ellen & Brian Karfunkel, *Renting in America’s Largest Metropolitan Areas*, NYU Furman Center/Capital One National Affordable Rental Housing Landscape Research Study 21 (Mar. 8, 2016).

45. *Id.*

46. *Id.* at 4.

47. *Out of Reach 2016*, NAT’L LOW HOUSING COALITION 1 (2016), http://nlihc.org/sites/default/files/oor/OOR_2016.pdf [<https://perma.cc/XLN2-VUTD>].

48. Joint Center for Housing Studies of Harvard University, *The State of the Nation’s Housing 2015*, (2015), <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-sonhr-2015-full.pdf> [<https://perma.cc/4Y4S-DFC9>] (noting a 2014 housing market “fueled” by more renter households, but in which “the number of housing cost-burdened renters set another record,” and “a number of minority and low-income neighborhoods remain severely distressed”).

49. NAT’L LOW HOUSING COALITION, *supra* note 47, at 1.

category, well out of reach for low-income earners.”⁵⁰ Furthermore, “[i]n more expensive cities, the numbers are particularly daunting. A family in the San Francisco metro area would need to earn nearly \$35 an hour to afford a one-bedroom apartment and \$44 to afford a two-bedroom apartment.”⁵¹ These numbers do not take into account unreported work in the “informal economy.”⁵²

While affordable housing concerns often focus on low- and moderate-income individuals and families, large segments of the middle class are affected as well. A 2016 Pew Research Center report noted that the middle class is shrinking in most American cities, to the extent that “it may no longer be the economic majority in the U.S.”⁵³ The report added that “the national trend is the result of widespread declines in localities all around the country.”⁵⁴

Despite highly publicized concerns that education debts present a unique impediment to home purchase for college graduates, young people without college degrees face large hurdles to achieving home ownership.⁵⁵

According to Brookings Institution scholars Elizabeth Kneebone, Carey Nadeau, and Alan Berube, “[t]here also is evidence that, as poverty has increasingly suburbanized this decade, new clusters of low-income neighborhoods have emerged beyond the urban core in many of the nation’s largest metro areas.”⁵⁶ The poor in the suburbs often are concentrated in lower-income communities, with little access to middle-class amenities or opportunities, yet lacking safety-net resources more readily available in urban areas.⁵⁷

Thus, in the wake of the Great Recession, homeowners have become tenants, financially squeezing lower-income tenants in metropolitan areas.

50. Laura Kusisto, *No Relief in Sight for Minimum-Wage Renters*, WALL. ST. J., May 25, 2016, at A2.

51. *Id.*

52. See Noah D. Zatz, *What Welfare Requires From Work*, 54 UCLA L. REV. 373 (2006) (discussing conceptual and practical problems regarding the nature of “work” and societal support for those earning undisclosed income).

53. Pew Research Center, *America’s Shrinking Middle Class: A Close Look at Changes Within Metropolitan Areas* (May 11, 2016) (citing Pew Research Center, *The American Middle Class Is Losing Ground: No Longer the Majority and Falling Behind Financially* (Dec. 2015)).

54. *Id.*

55. Kusisto, *supra* note 50.

56. Elizabeth Kneebone, et al., *The Re-Emergence of Concentrated Poverty: Metropolitan Trends in the 2000s*, BROOKINGS INST. 19 (Nov. 2011), http://www.brookings.edu/~media/research/files/papers/2011/11/03-poverty-kneebone-nadeau-berube/1103_poverty_kneebone_nadeau_berube.pdf [https://perma.cc/5DKF-X63W].

57. *Id.*

This results in personal hardship and also affects area economies, as will be discussed next.

D. Affordable Housing as Conducive to Economic Prosperity

In each of its varying meanings, good arguments are made that affordable housing is conducive to economic prosperity. However, as always, there are significant tradeoffs.

1. Housing Attracting and Retaining Productive Residents

Unnecessary restrictions on new housing in economically vibrant areas raise housing prices, which discourages productive workers from moving in or remaining and harms the regional and national economies. Those were important conclusions of a recent study of the role that housing prices and availability play in attracting and retaining skilled and talented workers by Professors Chang-Tai Hsieh and Enrico Moretti.⁵⁸

Their intent was to study how the economic growth of individual cities determined the growth of nations. Hsieh and Moretti used a research model in which workers were free to move and where local labor demand reflects factors like “infrastructure, industry mix, agglomeration economies, human capital spillovers, access to non-tradable inputs and local entrepreneurship” that affect the overall productivity of firms.⁵⁹ They added that the “local labor supply reflects amenities and housing supply.”⁶⁰

After exploring the relationship of productivity and wages in various cities, Hsieh and Moretti noted that, “if labor is more productive in some areas than in others, then aggregate output may be increased by reallocating some workers from low productivity areas to high productivity ones.”⁶¹ However, in very productive cities, higher productivity was reflected in higher nominal wages rather than in productive workers moving in. They discussed, as an example, Silicon Valley, where natural amenities could be preserved while stringent land-use regulations governing “underutilized land within its urban core” could be relaxed so that the housing supply could be “greatly expanded.”⁶² “Our findings indicate that in general equilibrium; this would raise income and welfare of *all* US workers.”⁶³

Thus, Hsieh and Moretti concluded:

58. See generally Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 21154, 2015), <http://www.nber.org/papers/w21154.pdf> [<https://perma.cc/7CQ4-QE2D>].

59. *Id.* at 1.

60. *Id.*

61. *Id.* at 2.

62. *Id.* at 35 (citing Edward Glaeser, *Land Use Restrictions and Other Barriers to Growth*, Cato Inst. (2014)).

63. *Id.* at 35 (emphasis in original).

[T]hree quarters of aggregate U.S. growth between 1964 and 2009 was due to growth in Southern U.S. cities and a group of 19 other cities. Although labor productivity and labor demand grew most rapidly in New York, San Francisco, and San Jose thanks to a concentration of human capital intensive industries like high tech and finance, growth in these three cities had limited benefits for the U.S. as a whole. The reason is that the main effect of the fast productivity growth in New York, San Francisco, and San Jose was an increase in local housing prices and local wages, not in employment.⁶⁴

Similarly, Peter Ganong and Daniel Shoag concluded that the United States is “increasingly characterized by segregation along economic dimensions, with limited access for most workers to America’s most productive cities.”⁶⁵ As an example of this phenomenon, Edward Glaeser noted that the Houston area is gaining population at a rate much faster than the New York area, although New Yorkers are better educated and have higher wages. While home prices in New York and other major coastal cities are unaffordable for average workers, prices in Houston are not.⁶⁶

2. *Adequate Housing for Low- and Moderate-Income Families
Buttresses Economic Growth*

Workforce housing has become an important part of the affordable housing landscape. The term describes “housing that is affordable to working families and individuals who do not qualify for housing subsidies.”⁶⁷ Through workforce housing initiatives, including “inclusionary zoning laws, a reduction in regulatory barriers, the creation of housing trust funds, the provision of ‘gap funding’ measures, and incentives for employer-assisted housing initiatives,” some localities have tried to respond to the need for firefighters, teachers, and other employees to commute for long distances.⁶⁸

According to Professor Tim Iglesias, “[t]he public appeal of such programs is the functional necessity of these workers for the city’s harmonious operation and the consequent need to enable these workers to live within the jurisdiction.”⁶⁹ Politically, of course, this appeals to

64. *Id.* at 34.

65. Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* (Harvard Kennedy Sch., Working Paper No. RWP12-028, 2013), <http://ssrn.com/abstract=2081216> [<https://perma.cc/E9Q6-G59C>].

66. EDWARD GLAESER, *TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER* 186 (2011).

67. Matthew J. Parlow, *Whither Workforce Housing?*, 23 J. AFFORD. HOUS. & CMTY. DEV. L. 373, 384 (2015).

68. *Id.* at 374-75.

69. Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 580 (2007).

homeowners and other taxpayers because the beneficiaries will be performing services *they* need and also because the beneficiaries' status as gainfully employed helps shield them from the stigma of being undeserving of assistance.

3. *Gentrification as Conducive to Prosperity*

The often-maligned phenomenon of gentrification also is an engine for urban prosperity. While the damage to existing neighborhood ways of life that result from gentrification will be discussed subsequently,⁷⁰ it is important to note that the gentrification of existing neighborhoods provides both neighborhood business opportunities and places of residence for productive workers who otherwise might relocate to other cities. Professor J. Peter Byrne conceded that individuals have been displaced through their loss of affordable apartments, but asserted that “increases in the number of affluent and well-educated residents is plainly good for cities, on balance, by increasing the number of residents who can pay taxes, purchase local goods and services, and support the city in state and federal political processes.”⁷¹ He added:

My contention here goes somewhat further: gentrification is good on balance for the poor and ethnic minorities. The most negative effect of gentrification, the reduction in affordable housing, results primarily not from gentrification itself, but from the persistent failure of government to produce or secure affordable housing more generally. Moreover, cities that attract more affluent residents are more able to aggressively finance affordable housing. Thus, gentrification is entitled to “two cheers,” if not three, given that it enhances the political and economic positions of all, but exacerbates the harms imposed on the poor by the failures of national affordable housing policies.⁷²

Explicit disagreement with Professor Byrne's assessment has not so much challenged his view of gentrification as conducive to economic development as it has the notion that communal values should be subordinated.⁷³

4. *Preservation of Existing Close-Knit Communities Can Abet Prosperity*

While gentrification is conducive to economic prosperity, preservation of existing neighborhoods, although providing primarily social and cultural benefits for existing residents, has economic development aspects as well. “Many ethnic inner city neighborhoods in US cities are rich in traditions,

70. See *infra* Section I.E.2 (discussing gentrification's harms).

71. J. Peter Byrne, *Two Cheers for Gentrification*, 46 *How. L.J.* 405, 405-06 (2003).

72. *Id.* at 406.

73. See *infra* notes 102-06 and accompanying text.

history, art, and cuisine,” but also suffer the effects of decline.⁷⁴ “In the face of a growing popularity of cultural tourism, an opportunity exists to explore how neighborhood cultural assets can be used to promote economic development in such neighborhoods.”⁷⁵ The difficult challenge is to obtain the economic advantages of tourism while maintaining neighborhood authenticity.

E. Affordable Housing as Supportive of Existing Community

One goal of affordable housing is strengthening the ability of people to remain and thrive in their existing communities. However, the term “community” elides the deep divisions between universality and particularity. As the political theorist Michael Walzer noted, communities are marked by their character as “historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.”⁷⁶ Professor Kenneth Stahl added that, “the very notion of community, however broadly conceived, is dependent on exclusion.”⁷⁷ He attributed the NIMBY (“not in my backyard”) impulse as “merely an outward manifestation of this deeply embedded and widely shared desire to preserve community.”⁷⁸

The tension between abiding by the wishes of existing residents and mandating change to benefit potential newcomers permeates affordable housing issues.⁷⁹

1. Social Capital

On a physical level, existing communities are built of infrastructure, commercial and institutional buildings, and residences. But what makes communities and holds them together is social capital. In his well-known book *Bowling Alone*,⁸⁰ sociologist Robert Putnam noted that, “[w]hereas physical capital refers to physical objects and human capital refers to properties of individuals, social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them.”⁸¹

74. Anastasia Loukaitou-Sideris & Konstantina Soureli, *Cultural Tourism as an Economic Development Strategy for Ethnic Neighborhoods*, 26 *ECON. DEV. Q.* 50, 50 (2012).

75. *Id.*

76. MICHAEL WALZER, *SPHERES OF JUSTICE* 62 (1984).

77. Kenneth A. Stahl, *The Challenge of Inclusion* 5 (Dale E. Fowler Sch. of Law, Chapman Univ., Working Paper No. 16-05, 2016), <http://ssrn.com/abstract=2770185> [<https://perma.cc/P66B-S8KP>].

78. *Id.* Stahl also favored inclusion. See *infra* notes 196-99 and accompanying text.

79. See *infra* notes 116-17 and accompanying text.

80. ROBERT D. PUTNAM, *BOWLING ALONE* (2000).

81. *Id.* at 19.

Social capital often is considered in the contexts of low-income and minority communities resisting gentrification and of more affluent communities resisting change. However, a community need not be affluent, nor fear affluence, to resist change. For instance, leaders of the remnant of the Orthodox Jewish community on New York City's Lower East Side have resisted the construction of affordable housing in order to help keep their community intact.⁸²

Despite the promise of the notion that affordable housing will bring disparate groups together, melding and strengthening their social capital, it might actually be problematic. Professor Robert Ellickson is skeptical.⁸³ He discussed Putnam's newer publication, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*.⁸⁴

After reviewing the vast literature on the consequences of the integration of neighborhoods, particularly by race and ethnicity, Putnam comes to sobering conclusions. He asserts that residents of diverse neighborhoods have less social capital than do residents of more homogeneous neighborhoods. Moreover, the members of an ethnic group who live in a relatively integrated neighborhood are likely to have weaker ties to other members of their own ethnic group than they would if they lived in an ethnic enclave. Putnam affirms his support for integration, but he is compelled by his findings to shift his emphasis to the long-term benefits of neighborhood diversity.⁸⁵

Other less-publicized studies similarly cast doubt on the traditional view that economic integration gives rise to significant social benefits. Ellickson also discussed Philip Oreopoulos' finding that growing up in a poor neighborhood does not, by itself, lead to worse outcomes for children, and

82. See Josh Nathan-Kazis, *How One Funeral and 2 Dead Men Walking Herald Epic Shift on the Jewish Lower East Side*, JEWISH DAILY FORWARD (July 24, 2016), <http://forward.com/news/national/345770/how-one-funeral-and-2-dead-men-walking-herald-epic-shift-on-the-jewish-lowe/> [https://perma.cc/9QVE-5Y6D]. "For decades [leaders] held off a city redevelopment plan that would have brought new low-income housing into the neighborhood, while bolstering the institutions and social services that kept their community intact." *Id.*; see also Ronda Kaysen, *New Mixed-Income Housing on the Lower East Side*, N.Y. TIMES (July 24, 2015), <http://nyti.ms/1IrT4V1> [https://perma.cc/2HUL-KKLG] (noting that "some groups [are] calling for only affordable housing and others demanding none.").

83. Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2010).

84. Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137 (2007).

85. Ellickson, *supra* note 83, at 1014-15 (discussing Putnam, *supra* note 84, at 149-51, 156, 163-65).

his results indicate that a child’s household environment has a far greater effect than a child’s neighborhood environment.⁸⁶

2. *Gentrification as Harmful to Community*

“Gentrification” generally has come to be understood to be “the process by which higher income households displace lower income [households] of a neighborhood, changing the essential character and flavor of that neighborhood.”⁸⁷ It has been referred to as “changing the character of a neighborhood from one that reflects distinct ethnic and class needs and cultural traditions into a bland emporium for expensive consumer goods.”⁸⁸ As Judge Higginbotham observed, “[t]his process often causes the eviction of the less affluent residents who can no longer afford the increasingly expensive housing in their neighborhood.”⁸⁹ This definition is not dissimilar from what apparently was the first usage of the term “gentrification” in 1964 by Ruth Glass.⁹⁰ She used the term to describe

[T]he “invasion” of members of the middle and upper classes into traditionally working-class neighborhoods, resulting in the displacement of incumbent residents and a change of the social character of the neighborhood. This definition can be broken down into two interrelated components. First, gentrification raises the economic level of a neighborhood population. Second, gentrification changes the ‘social character’ or culture of neighborhoods.⁹¹

What has been styled the “chaos and complexity of gentrification”⁹² results from the fact that some scholars have attempted to ascertain the existence of gentrification through quantitative data, while others have used qualitative data, which is much richer, but results in complex, multidimensional definitions.⁹³ However it is measured, Judge Higginbotham described gentrification as a “deceptive term” masking the

86. *Id.* (discussing Philip Oreopoulos, *The Long-Run Consequences of Living in a Poor Neighborhood*, 118 Q. J. ECON. 1533 (2003)).

87. Maureen Kennedy & Paul Leonard, *Dealing with Neighborhood Change: A Primer on Gentrification and Policy Choices*, BROOKINGS INST. CTR. ON URB. & METRO. POL’Y 6 (2001), <https://www.brookings.edu/wp-content/uploads/2016/06/gentrification.pdf> [<https://perma.cc/E8ZU-6B8P>].

88. Byrne, *supra* note 71, at 405 (internal references omitted).

89. *Business Ass’n of Univ. City v. Landrieu*, 660 F.2d 867, 874 n.8 (3d Cir. 1981).

90. RUTH GLASS, LONDON: ASPECTS OF CHANGE xviii (1964).

91. Michael Barton, *An Exploration of the Importance of the Strategy Used to Identify Gentrification*, 53 URB. STUD. 92, 93 (2016).

92. See generally Robert A. Beauregard, *The Chaos and Complexity of Gentrification*, in NEIL SMITH & PETER WILLIAMS, GENTRIFICATION OF THE CITY 35-55 (1986).

93. Barton, *supra* note 91, at 93.

“dire consequences” to “less affluent residents who bear the brunt of the change.”⁹⁴

A consequence of gentrification is the “displacement of low-income renters who are unable to afford rental price increases, those evicted by landlords who want to upgrade the building for a new clientele, [and] low-income homeowners unable to afford increased property taxes . . . ”⁹⁵ Eviction, in turn, can lead to substantial and prolonged deprivation.⁹⁶

In light of these negative effects, Professor Jon Dubin has advocated “a right to protective zoning in low-income communities of color.”⁹⁷ This right would resist “noxious commercial or industrial uses which undermine the quality of the residential environment and discourage continued residencies.”⁹⁸ Dubin added:

Higher-grade zoning, zoning or planning measures that induce certain higher-quality residential or other uses can produce similar incompatible and disruptive results. These higher-cost uses create market pressures that effectively price out existing low-income residents through the process of gentrification. Residents subjected to incompatible upzoning face the prospect of involuntary displacement and the functional and psychological trauma of dislocation and perhaps homelessness.⁹⁹

Likewise, Professor Erika Watson has argued that urban school districts implement certain reforms to attract white middle-class gentrifiers by giving them more viable high-quality options.¹⁰⁰ However, such reforms “harm poor and minority students by disproportionately displacing them from their neighborhood public schools while simultaneously limiting the number of quality public and charter schools available to them.”¹⁰¹

Professor Peter Byrne’s generally positive view of gentrification, quoted earlier,¹⁰² has been challenged on grounds that he exalts pecuniary values

94. *Business Ass’n of Univ. City v. Landrieu*, 660 F.2d 867, 874 n.8 (3d Cir. 1981).

95. Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 12 (2006).

96. See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016). See also Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 91 (2012) (noting that “eviction often increases material hardship, decreases residential security, and brings about prolonged periods of homelessness In inner-city neighborhoods, it is women who disproportionately face eviction’s fallout.”).

97. Jon C. Dubin, *From Junkyards to Gentrification: Explicating A Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 744 (1993).

98. *Id.* at 742.

99. *Id.* at 742-43.

100. Erika K. Wilson, *Gentrification and Urban Public School Reforms: The Interest Divergence Dilemma*, 118 W. VA. L. REV. 677, 711 (2015).

101. *Id.* at 678.

102. See Byrne *supra* note 71 and accompanying text.

over community values and views gentrification “through a decidedly white, upper-class, market-driven lens.”¹⁰³ Overall, gentrification is a good example of what Joseph Schumpeter termed the process of “creative destruction,” whereby innovation results in benefits to society at the cost of eliminating outmoded structures and products.¹⁰⁴ In the context of affordable housing, the merits and demerits of community development are manifold, subtle, and intermixed.¹⁰⁵ Unfortunately, substantial theoretical and practical challenges have so far prevented efforts to quantify or prioritize in an objective manner the increases and decreases to human welfare that result or how those gains and losses should best be distributed.¹⁰⁶

3. *Middle or Upper-Middle Class Way of Life*

Just as the metaphor of “gentrification” signifies displacement of a culture and way of life of racial and ethnic minorities and lower-income individuals, terms such as “densification,” “environmental degradation,” “apartments in residential neighborhoods” and the like signify displacement within the frame of reference of a middle- or upper-middle-class way of life. A century ago, the rise of the automobile and the ensuing enhanced mobility for ordinary people was a powerful motivator for the spread of zoning.¹⁰⁷ The first comprehensive zoning ordinance was adopted in New York City at the behest of Fifth Avenue merchants, who were anxious to shield their clientele from teeming immigrants working in new high-rise loft buildings nearby.¹⁰⁸

In the seminal case upholding comprehensive zoning, *Village of Euclid v. Ambler Realty Co.*,¹⁰⁹ Justice Sutherland gratuitously explained that apartment houses (then often “tenements”) “come very near to being

103. John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”:* *Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 434 (2003). The authors further note that “[g]entrification is good for neither cities nor the poor (nor for gentrifiers like Byrne for that matter), unless we disrupt the market in pursuit of a more egalitarian goal: the creation of integrated life opportunities for all people in all places.” *Id.* at 434.

104. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (2d ed. 1947).

105. See Keith H. Hirokawa & Patricia Salkin, *Can Urban University Expansion and Sustainable Development Co-Exist?: A Case Study in Progress on Columbia University*, 37 FORDHAM URB. L.J. 637, 688-96 (2010) (presenting a thoughtful array of benefits and costs of gentrification).

106. See Vaughn *supra* note 38 and accompanying text.

107. See Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137, 140 (1999) (noting that Euclidean zoning and the emergence of the automobile began to establish the first distant “suburbs”).

108. SEYMOUR I. TOLL, ZONED AMERICAN 173, 180 (1969).

109. 272 U.S. 365 (1926).

nuisances”¹¹⁰ and that “very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”¹¹¹ Indeed, homeownership is widely assumed to bring numerous advantages to the community, including civic participation,¹¹² although this approach recently has been disputed.¹¹³

Professors Lee Anne Fennell and Julie Roin have described that the financial stakes of homeowners are important in describing the extent to which they will be civic-minded and cooperative.¹¹⁴ They note that the home is the single largest financial asset of most homeowners and that because the home is a highly undiversified investment, they are quite concerned about the risk of loss.¹¹⁵ What they term “understaked” households are in danger of losing their homes through foreclosure or gentrification; “overstaked” households, more typical of upper-income groups, resist change that would harm their investments. To a greater or lesser extent, “[a]ll homeowners have an incentive to stop new housing because if developers build too many homes, prices fall, and housing is many families’ main asset.”¹¹⁶ Ultimately, Fennell and Roin suggest both over- and under-investment in individual homes create conflicts and pit communities against each other.¹¹⁷

Consistent with those concerns, a recent study found that “[i]n areas where affordable housing developments are viewed as an amenity, higher income households are willing to pay more for proximity. Conversely, higher income households are willing to pay more to live further away from affordable housing developments in areas where such properties are viewed as a disamenity.”¹¹⁸

110. *Id.* at 395. The case was about land intended for industrial use, and did not involve residential zoning.

111. *Id.* at 394.

112. See A. Mechele Dickerson, *Public Interest, Public Choice, and the Cult of Homeownership*, 2 UC IRVINE L. REV. 843, 848-49 (2012).

113. See Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890 (2011) (challenging whether “citizenship virtues” flow from homeownership).

114. Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 143, 143-44 (2010).

115. *Id.* at 144 n.4 (citing, *inter alia*, WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 9 (2001)).

116. Derek Thompson, *Why Middle-Class Americans Can’t Afford to Live in Liberal Cities*, ATLANTIC (Oct. 29, 2014), <http://www.theatlantic.com/business/archive/2014/10/why-are-liberal-cities-so-unaffordable/382045/> [<https://perma.cc/WQ7G-ASZH>] (quoting UCLA economist Matthew Kahn).

117. See Fennell & Roin *supra* note 114, at 143-44.

118. Rebecca Diamond & Timothy McQuade, *Who Wants Affordable Housing in Their Backyard? An Equilibrium Analysis of Low Income Property Development* 27 (Nat’l Bureau

In recent decades, the disengagement of the upper middle class from the more extensive community might have substantially increased. Richard Reeves has argued that “[t]he American upper middle class is separating, slowly but surely, from the rest of society.”¹¹⁹ Whereas “the top fifth have been prospering while the majority lags behind . . . [,] [g]aps are growing on a whole range of dimensions, including family structure, education, lifestyle, and geography.”¹²⁰ Also, “[s]egregation of affluence not only concentrates income and wealth in a small number of communities, but also concentrates social capital and political power. As a result, *any self-interested investment the rich make in their own communities has little chance of ‘spilling over’ to benefit middle- and low-income families.*”¹²¹

The cutting edge of this class-based separation appears to involve the quest by affluent parents for neighborhoods with excellent schools. While wealthy parents are pouring money into enrichment programs for their children, “[t]he biggest investment the rich can make in their kids, though—one with equally profound consequences for the poor—has less to do with ‘enrichment’ than real estate.”¹²² Such parents “can buy their children pricey homes in nice neighborhoods with good school districts.”¹²³ Indeed, for some home buying parents who are willing to commute extreme distances, “there is no factor more important than the public schools their children will attend.”¹²⁴

Recent research by sociologist Ann Owens examined income segregation from 1990 to 2010 in America’s hundred largest metropolitan areas and concluded that income segregation among childless households had “changed little and is half as large as among households with children.”¹²⁵ She noted:

Rising income inequality provided high-income households more resources, and parents used these resources to purchase housing in

of Econ. Research Working Paper 22204, 2016), <http://www.nber.org/papers/w22204.pdf> [<https://perma.cc/X37Y-VGU3>].

119. Richard Reeves, *The Dangerous Separation of the American Upper Middle Class*, BROOKINGS INST. (Sept. 3, 2015), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/09/03-separation-upper-middle-class-reeves> [<https://perma.cc/2XTR-HFCW>].

120. *Id.*

121. SEAN F. REARDON & KENDRA BISCHOFF, THE CONTINUING INCREASE IN INCOME SEGREGATION 14 (2016) (emphasis added).

122. Emily Badger, *Study: Upscale Neighborhood Best Gift Parents Can Buy Kids*, WASH. POST, May 11, 2016, at A12.

123. *Id.*

124. See Katy McLaughlin, *The New Kids on the Block*, WALL ST. J., Jan. 27, 2017, at M1 (describing, *inter alia*, an attorney couple where one telecommutes and the other drives 165 miles each way to the office).

125. Ann Owens, *Inequality in Children’s Contexts: Income Segregation of Households With and Without Children*, 81 AM. SOC. REV. 549, 549 (2016).

particular neighborhoods, with residential decisions structured, in part, by school district boundaries. Overall, results indicate that children face greater and increasing stratification in neighborhood contexts than do all residents, and this has implications for growing inequalities in their future outcomes.¹²⁶

The fact that high incomes are correlated with separation in residential and cultural patterns should come as no surprise. Neither should the fact that, while people pay obeisance to all having equal starts in life, they work to provide advantages to their own children. In an era of meritocracy, where income from professional achievement far outstrips income from inherited wealth, it likewise is no surprise that “[e]ducation-as-inheritance crowds out education-as-opportunity.”¹²⁷

While the term “meritocracy” was coined as a satire on the British educational system¹²⁸ and neglects the structural impediments to opportunity faced by many,¹²⁹ most Americans understand that term to describe the United States, “a place where those most deserving of power, wealth, and influence will succeed through innate aptitude and hard work. Conversely, those lacking natural talents will fail under the weight of their own inadequacies.”¹³⁰ This, perhaps even more than the self-interest of some, describes why the value system of many Americans looks askance at fairness as equality and why achieving a societal consensus willing to sacrifice for low- and moderate-income housing assistance would be so difficult.¹³¹

II. EXPLORING SOLUTIONS TO AFFORDABLE HOUSING PROBLEMS

As previously noted,¹³² methods of providing more affordable housing, however the term is defined, come replete with explicit and implicit costs. Indeed, many aspects of the affordable housing problem reflect that those who might benefit from affordable units do not have the ability to buy or rent them. This might simply be a function of the individuals not being able to afford the cost of erecting or rehabilitating the units. However, it might also be a function of regulatory barriers created by zoning and other

126. *Id.*

127. *See generally* Palma Joy Strand, *Education-As-Inheritance Crowds Out Education-As-Opportunity*, 59 ST. LOUIS U. L.J. 283, (2015).

128. MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY* 11 (Transaction Publishers 1994) (1958).

129. *See infra* notes 188-89 and accompanying text. *See also* Aaron N. Taylor, *Reimagining Merit as Achievement*, 44 N.M. L. REV. 1, 29 (2014) (asserting that “[t]he transmission of cultural norms is the primary means by which families militate against equality of opportunity.”).

130. Taylor, *supra* note 129, at 18.

131. *See infra* Section II.E.5.

132. *See supra* Section I.B.

government restrictions or of racial or class prejudice, perhaps manifested through the actions of local officials.

Houston, which epitomizes the free market approach, has little in the way of land-use controls and inexpensive housing. San Francisco, which epitomizes heavy government regulation, has extremely high housing prices and an affordability crisis. Whether San Francisco regulations are “artificial,” or Houston’s *laissez faire* approach is indifferent to the general welfare, depends on one’s perspective.

A. Expert versus Market Decision-Making

For economists such as Robert Nelson, zoning functions as a property right, giving neighborhood residents “a collective property right to their common neighborhood environment.”¹³³ On the other hand, for Charles Haar, the specification in the Standard State Zoning Enabling Act that zoning be “in accordance with a comprehensive plan”¹³⁴ was crucial.¹³⁵

As described by Professors Roderick Hills and David Schleicher,¹³⁶ “Haar took properly planned zoning to be a communal effort to wrest control of a community’s development away from land-use markets—what he called ‘the evil of uncontrolled growth’ and the ‘principle of profit maximization.’”¹³⁷ The comprehensive plan would be the standard against which courts would weigh the local legislature’s small-scale zoning changes. “This quality of trumping local zoning laws gave plans their ‘constitutional’ status.”¹³⁸

Yet planners have come to realize that social interactions and changes in technology make land use dynamic so that planning should have a time frame of, perhaps, five years and twenty-five years, at most.¹³⁹ Also, professional planners bring their own biases to their work, including favoring dense central business districts, multi-family housing, and open

133. ROBERT NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 146-47 (2005) (arguing that by transferring the right to exclude from the individual to the community, zoning becomes a private property right belonging to the community of homeowners).

134. A STANDARD STATE ZONING ENABLING ACT § 3 (Dep’t of Commerce 1926).

135. Charles M. Haar, “*In Accordance with a Comprehensive Plan*,” 68 Harv. L. Rev. 1154, 1155-56 (1955).

136. Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015).

137. *Id.* at 99 (citing Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 333, 344-48, 351 (Charles M. Haar & Jerold S. Kayden eds., 1989)).

138. *Id.*

139. See ROBERT C. ELICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 70 (4th ed. 2013).

space.¹⁴⁰ It is not professional expertise that gives rise to the legitimacy of land-use planning, Professor Carol Rose observed, but, rather, the intimate knowledge that local legislators have of their constituents' values and needs.¹⁴¹ Furthermore, planners have no particular ability to presage community needs in the future.¹⁴²

Combining the legitimacy of local elected officials and the knowledge implicit in markets, economist William Fischel advocated that officials and developers bargain over the conditions under which specific projects might be built.¹⁴³ Charles Tiebout advanced a different view of the bargaining model, describing how localities compete for residents and tax monies.¹⁴⁴ Under the "Tiebout hypothesis," individuals and communities alike take into account the benefits, as well as the costs, associated with the individual's potential entry into the polity. Potential residents consider the menu of services and amenities to be found in each locale and offset those by taxes to be paid and disamenities incurred. Some localities might prosper by offering low services and low taxes or, conversely, high services and high taxes. However, municipalities decidedly discourage or zone out those who would pay low taxes and demand expensive services, such as low-income families with many children who have to be educated. The Tiebout hypothesis has been criticized as failing to take into account that changes in a community's tax base "will be offset by an equal and opposite change in another community's tax base. And any increase in the number of children in the community's public schools will be offset by an equal and opposite decrease in school enrollment somewhere else."¹⁴⁵

140. William L.C. Wheaton, *Operations Research for Metropolitan Planning*, 29 J. AM. INST. PLANNERS 250, 254-57 (1963) (outlining planners' biases).

141. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 867-70 (1983).

142. See, e.g., Michael Lewyn & Judd Schechtman, *No Parking Anytime: The Legality and Wisdom of Maximum Parking and Minimum Density Requirements*, 54 WASHBURN L.J. 285, 293-94 (2015) (observing that "in the long run, any attempt to establishing the 'right' amount of parking by bureaucratic mandate, rather than through the market, creates a risk of absurd results.").

143. WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 75-101 (1985).

144. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

145. Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 34 (1996).

B. Some Affordable Housing Issues

1. *Is Housing a Right?*

The U.S. Supreme Court effectively held in 1972 that there is no Constitutional right to housing.¹⁴⁶ “Because housing has been denied fundamental right status with its attendant strict scrutiny standard of review,” Professor Ann Burkhart noted, “federal and state courts routinely have rejected attempts by the poor to obtain adequate shelter despite the extremely hard facts that these cases often present.”¹⁴⁷ On the other hand, several international treaties and declarations have embodied a right to housing,¹⁴⁸ and housing has been defended as a basic human right.¹⁴⁹ It is in the context of housing as a “basic human need” that subsidized housing for the poor has been defended as preferable to simple wealth transfers.¹⁵⁰ That said, in the United States, “the private sector may choose to participate in developing affordable housing, but it rarely does so unless the state provides deep discounts.”¹⁵¹

Responding to suggestions from international organizations that everyone should have secure housing tenure and be free from forced evictions,¹⁵² Professors John McGinnis and Ilya Somin noted that such provisions might have their place in a regime of government-provided housing. “We do, however, believe that it is clear that a housing system that depends on private enterprise, including contractual freedom between renters and owners, has virtues and should not be limited by international fiat.”¹⁵³

146. *Lindsey v. Normet*, 405 U.S. 56 (1972) (upholding state wrongful detainer statute against tenants who withheld rent). Subsequent circuit court cases interpreted *Lindsey* to mean that there is no constitutional right to housing. See, e.g., *Perry v. Hous. Auth.*, 664 F.2d 1210, 1217 (4th Cir. 1981) (noting that the district court cited *Lindsey* for the proposition that there is no constitutional right to housing).

147. Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 212 (2003).

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

149. See Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 253 (2015) (asserting that the right to housing “vitiates against arguments that housing is merely a commodity, and that an unfettered market always optimally and equitably allocates housing entitlements.”); Frank I. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207 (1970).

150. Byrne & Diamond, *supra* note 1, at 529.

151. Katherine Hannah, *Carrying Out the Promise: How Shared Equity Models Can Save Affordable Housing*, 23 GEO. J. ON POVERTY L. & POL’Y 521, 528 (2016).

152. See, e.g., *Universal Declaration of Human Rights*, *supra* note 148.

153. John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1781-82 (2009).

2. Affordable Housing and Fair Housing

The problem of affordable housing for low-income and minority groups relates broadly to the role of communities. Concerns about income and social class seem indelibly mixed with concerns about race and ethnicity, both as a proxy for other issues and as a discrete and separate factor. “Neighborhood tipping” plays an important role.¹⁵⁴

According to Professor James Kushner, the nature of urban communities changed after World War II.¹⁵⁵ Massive movements to the suburbs, together with strict racial segregation, marked the period through 1968. During the next phase, through 1975, there was “hyper-sprawl, the loss of the central city economic base and population, and hyper-segregation.”¹⁵⁶ The subsequent period, through 1990, was “characterized by class segregation, increased cost to access the suburbs, and increased class and racial separation.” Thereafter, through 2008, urban communities “witnessed hyper-segregation; voluntary class, racial, and ethnic separation; and persistent racial discrimination.”¹⁵⁷

In her article *The Fair Housing Choice Myth*, Stacy Seicshnaydre examined “why racial segregation persists in residential neighborhoods despite the fact that the nation codified the policy of equal housing opportunity over four decades ago.”¹⁵⁸ She noted that, regardless of income or crime rate, “[a]s the number of minorities in a neighborhood increases, it becomes increasingly undesirable to whites, particularly if the minority residents are black or Hispanic.”¹⁵⁹ Perhaps concomitantly, “people of color perceive overwhelmingly white neighborhoods as unwelcoming or hostile; they thus gravitate towards neighborhoods that have already achieved some integration.”¹⁶⁰

In terming the lack of HUD enforcement of fair housing a “missing link” between law and real housing opportunity, Seicshnaydre declared “HUD must do more than dismantle ghettos and allow local governments to decide whether to provide housing choice.”¹⁶¹

154. See *supra* note 34 and accompanying text.

155. James A. Kushner, *Urban Neighborhood Regeneration and the Phases of Community Evolution After World War II in the United States*, 41 IND. L. REV. 575 (2008).

156. *Id.* at 575.

157. *Id.*

158. Stacy E. Seicshnaydre, *The Fair Housing Choice Myth*, 23 J. AFFORD. HOUS. & CMTY. DEV. L. 149, 149 (2015).

159. *Id.* at 165.

160. *Id.* at 166 (quoting Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in *THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA* (Xavier de Souza Briggs ed., 2005)).

161. *Id.* at 195. See also *infra* notes 298-300 and accompanying text.

In the aftermath of the Supreme Court’s 2015 decision upholding the use of “disparate impact” as a test for housing discrimination in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*¹⁶² and HUD’s subsequent promulgation of rules on “Affirmatively Furthering Fair Housing,”¹⁶³ many new developments undoubtedly will occur.¹⁶⁴

3. *Is Income Inequality in Cities Undesirable?*

While income inequality within cities sometimes is berated, it is not necessarily a bad thing. Douglas Rae has argued that “[t]hose of us who want better life chances for low-earning households in major cities should set out to increase inequality by attracting and keeping high earners, now greatly underrepresented in central city populations.”¹⁶⁵ Similarly, then-outgoing mayor Michael R. Bloomberg, “suggested New Yorkers would benefit if the income gap were even wider because the wealthy pay for a big portion of city services.”¹⁶⁶ The very wealthy, he added,

are the ones that pay a lot of the taxes. They’re the ones that spend a lot of money in the stores and restaurants and create a big chunk of our economy . . . [a]nd we take tax revenues from those people to help people throughout the entire rest of the spectrum.¹⁶⁷

4. *Should We Benefit People or Benefit Places?*

As Professor Kenneth Stahl noted, “[p]erhaps one of the most pressing issues for city governments today is whether they best serve their constituents by focusing on people or on places.”¹⁶⁸ The view that government assistance should be directed toward individuals has two bases. The first, as summarized by Stahl, is that we can “alleviate poverty by issuing housing vouchers to enable the urban poor to escape from devastated ghettos, and deter criminality with crackdowns that emphasize the draconian consequences of poor choices.”¹⁶⁹

162. 135 S. Ct. 2507 (2015).

163. HUD Final Rule on “Affirmatively Furthering Fair Housing,” 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, et al.)

164. See *infra* Section II.E for discussion.

165. Douglas W. Rae, *Two Cheers for Very Unequal Incomes: Toward Social Justice in Central Cities*, in JUSTICE AND THE AMERICAN METROPOLIS (Clarissa Rile Hayward & Todd Swanstrom eds., 2011).

166. Michael Howard Saul, *City News: Mayor Welcomes the Rich*, WALL ST. J., Sept. 21, 2013, at A17.

167. *Id.*

168. Kenneth A. Stahl, *Mobility and Community in Urban Policy: An Essay on Great American City* by Robert J. Sampson, 46 URB. LAW. 625, 625 (2014).

169. *Id.* at 625-26 (footnote omitted).

Stahl states as an additional advantage that those with “decreasing attachments to particular places” might be “lure[d]” by cities “with high-quality services and amenities.”¹⁷⁰ But the authorities he cites for that proposition mostly emphasize how prospering cities can attract talented people, most of all those Richard Florida calls the “creative class” and not those in need of affordable housing assistance.¹⁷¹ To the extent that strivers have been attracted to prosperous American cities in the past, it is primarily because they have sought opportunity in areas with higher incomes.¹⁷²

Notably, Professor John Mangin has observed that, in recent decades, the highest growth rates are in regions with income below the national median, and “the regions with the highest incomes have been growing more slowly than the national average. The most likely culprit is that, for the first time in American history, people are migrating toward low housing costs rather than toward high incomes.”¹⁷³ Providing government benefits to low-income individuals, instead of places, can help them to relocate to parts of the country with better job and social opportunities.¹⁷⁴ Presumably, discerning better opportunities would take housing costs into account.

Advocates that government aid should benefit places, as Stahl notes, “believe that urban policy must be directed at strengthening the communities that shape people’s lives rather than treating community as a disposable consumer good.”¹⁷⁵ To be sure, people are ineluctably products of their environment so that “people cannot improve their fortunes simply by fleeing bad neighborhoods for good ones because, in an important sense, ‘neighborhoods choose people’ rather than the reverse.”¹⁷⁶ More practically, low-to-middle income people often are reliant on nearby family and friends for assistance and do not readily have the capital to establish themselves elsewhere, especially without a guaranteed job at the destination city. Also, the political process that provides affordable

170. *Id.* at 625 (footnote omitted).

171. *Id.* at 625 n.2 (citing RICHARD L. FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE* (2002); GLAESER, *supra* note 66; JOEL KOTKIN, *THE CITY: A GLOBAL HISTORY* (2005)).

172. See John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 93 n.7 (2014).

173. *Id.*

174. See Randall Crane & Michael Manville, *People or Place?: Revisiting the Who Versus the Where of Urban Development*, LAND LINES: LINCOLN INST. LAND POL’Y 1 (July 2008), https://www.lincolnst.edu/sites/default/files/pubfiles/1403_719_ll080702.pdf [<https://perma.cc/CF5N-2UPZ>].

175. Stahl, *supra* note 168, at 626.

176. *Id.* (discussing and quoting SAMPSON, *supra* note 168, at 327).

housing and other assistance is itself heavily place-based and gives little support to funding that would facilitate a move out of town.

A similar argument for place-based assistance is made by Professors Rebecca Diamond and Timothy McQuade:

Our results show that affordable housing development has large welfare impacts as a place based policy, which more than offset the welfare impacts to tenants living in affordable housing. Given the goals of many affordable housing policies is to decrease income and racial segregation in housing markets, these goals might be achieved by investing in affordable housing in low income and high minority areas, which will then spark in-migration of high income and a more racially diverse set of residents.¹⁷⁷

Low-income neighborhoods can benefit from government-sponsored enterprise zones, redevelopment, Tax Increment Financing (“TIF”) and similar programs.¹⁷⁸ In addition, spatial public goods, such as safety, education, and transit, can help as well. However, improvements in city neighborhoods make them more attractive to newcomers, and the market value of those amenities is capitalized into real estate values. Owners of apartment buildings, other commercial properties, and homeowners are the beneficiaries. Residential and commercial tenants are not benefitted and might face displacement through gentrification.

Whether our decision frame is predicated on “distressed communities” or “distressed cities” greatly affects ensuing public policy choices.

5. *Housing Affordability for Different Income Groups*

In a political and social context, “affordable housing” might be framed as a middle income family’s ability to buy a home in a “good” neighborhood, a working class family’s ability to rent an apartment in an area with civic associations and decent schools, or a low income family’s ability to reside in a habitable apartment in a secure area. These generalizations are inherently incompletely defined and contestable.

Should affordable housing include social equality, cultural amenities, and opportunities for advancement for all? Complicating this issue is the fact that housing in excess of minimal shelter is what Fred Hirsch termed a “positional good,”¹⁷⁹ one which we value not for its intrinsic merit but because others don’t have it. Reviewing Professor Robert Frank’s *Falling Behind*,¹⁸⁰ Thomas Leonard noted that Frank’s “big idea” is that the consumption of positional goods “leads to expenditure arms races that

177. Diamond & McQuade, *supra* note 118, at 27.

178. See *infra* Section II.E.1 for discussion.

179. FRED HIRSCH, SOCIAL LIMITS TO GROWTH 27 (1976).

180. ROBERT H. FRANK, FALLING BEHIND: HOW RISING INEQUALITY HARMS THE MIDDLE CLASS (2007).

make all consumers of the positional good worse off. In other words, when what we want depends upon what others have, a consumption externality arises, and getting what we want will be inefficient.”¹⁸¹ Leonard adds that “status hunger is in genes,” and cites the example of owners who prefer homes of 3000 square-feet where their neighbors have only 2000 square-feet, as opposed to having homes of 4000 square-feet, where the neighbors have homes of 6000 square-feet.¹⁸²

The problem of whether government-incentivized affordable housing for lower-income groups should provide the dignity and status for which their wealthier neighbors pay large sums is epitomized by the recent “poor door” controversy in Manhattan.¹⁸³ Market-rate buyers in a luxury high-rise condominium pay up to \$25 million for their units, for which they expect amenities such as “concierge service, entertainment rooms, and unobstructed views of the Hudson River and miles beyond.”¹⁸⁴ As the *New York Times* noted, “[t]he project will also cater to renters who make no more than about \$50,000. They will not share the same perks, and they will also not share the same entrance.”¹⁸⁵ The fact that low- or moderate-income families might have separate entrances, street addresses, and amenities has split advocates for affordable housing. Some argue for equality of persons and others for practical accommodations leading to the construction of more affordable units.¹⁸⁶

The same issue is presented more broadly in connection with the location of affordable and adequate housing units in areas both with and without neighborhood cultural, educational, and other amenities. Professor Tim Iglesias has noted that the legislative history of the federal Fair Housing Act described the goal of “integration” being “truly integrated and balanced living patterns.”¹⁸⁷ He delineated two models of integration, the “traditional integration model” and the “individual access to the opportunity structure model.”¹⁸⁸

181. Thomas C. Leonard, Robert H. Frank, *Falling Behind: How Rising Inequality Harms the Middle Class*, 19 CONST. POL. ECON. 158, 159 (2008) (book review).

182. *Id.*

183. See Mireya Navarro, “Poor Door” in a New York Tower Opens a Fight Over Affordable Housing, N.Y. TIMES (Aug. 26, 2014), <http://nyti.ms/1mNRrSf> [<https://perma.cc/S55C-2VWC>]. Under New York City’s 421-A subsidized inclusionary zoning program, the affordable units had to be located on-site. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (quoting advocates).

187. Iglesias, *supra* note 1, at 593 (quoting 114 CONG. REC. S3422 (daily ed. Feb. 20, 1968) (comments of Sen. Mondale)).

188. *Id.* at 594-98.

While the “traditional” model focuses on the racial and socioeconomic makeup of a given area and the relationship of the people who live there, the second model “focuses on how location of a household relates to the ‘opportunity structure’ of a community (e.g. good schools, good jobs, decent shopping, healthy neighborhoods, etc.).”¹⁸⁹ As applied to the “poor door” controversy, Iglesias observed that comingling of residents was important under the “traditional” model but that, for the “access to opportunity” model, it is a location that facilitates access to good schools, jobs, and the like that counts.¹⁹⁰

An important distinction between the traditional and opportunity structure models is how they should regard extensive and efficient metropolitan transport networks. Housing built on relatively inexpensive land in the metropolitan periphery is inherently more affordable but might bring to mind the *banlieues* of Paris, the *favelas* of Brazil, or similar isolated racial or ethnic areas in the outskirts of large American cities. Using a traditional view of integration, such construction would be most problematic. On the other hand, with the important proviso that an adequate transportation system be available, housing in such areas would have easy access to the cultural, educational, and employment opportunities that the “opportunity structure” demands.¹⁹¹

Provision of such a transportation infrastructure would not be easy. In addition to the high cost of environmental review and physical construction, a sufficient legal infrastructure would have to be created.¹⁹² At present, the New York City subway system is dominant in American heavy rail metropolitan transit systems, and its ridership has grown in recent years, while ridership elsewhere in the U.S. has declined.¹⁹³ The Community Development Project has concluded that the “documented benefits” of better transit and smart growth include “providing affordable housing for residents with low income around major transit stops;

189. *Id.* at 594.

190. *Id.* at 596.

191. The value of new rail systems is vigorously contested. *See, e.g.*, Randal O’Toole, “*Paint Is Cheaper Than Rails: Why Congress Should Abolish New Starts*,” CATO INST. POL’Y ANALYSIS No. 727 (June 19, 2013), http://www.cato.org/sites/cato.org/files/pubs/pdf/pa727_web.pdf [<https://perma.cc/MX72-PBLH>].

192. *See* David Schleicher, *How Land Use Law Impedes Transportation Innovation* (Yale Law Sch., Pub. Law Research Paper No. 565, 2016) <http://ssrn.com/abstract=2763696> [<https://perma.cc/XTY7-VPZ2>].

193. *See* Wendell Cox, *New York’s Incredible Subway*, NEW GEOGRAPHY BLOG (May 19, 2016), <http://www.newgeography.com/content/005255-new-yorks-incredible-subway> [<https://perma.cc/97QX-UJ95>] (citing annual data published by the American Public Transportation Association showing that, from 2005-2015, ridership on the New York City Subway increased nearly one billion trips, whereas on services elsewhere, there was a loss of nearly two hundred million riders).

increasing community access to jobs, services, and amenities.”¹⁹⁴ It warns, however, that other impacts include “increased housing prices, neighborhood gentrification, . . . and fewer opportunities for affordable housing developers who are priced out of the market.”¹⁹⁵

While crediting NIMBYism as an effort to preserve community,¹⁹⁶ Professor Stahl argues that “inclusion is an equally essential component of community,” and that “if we desire a community that features housing for all socioeconomic classes, we may have to accept some degree of class segregation within the community.”¹⁹⁷ He deems the “challenge of inclusion” the attempt “to determine how much segregation is necessary to achieve a diverse and inclusive community.”¹⁹⁸ Stahl suggests that a “[diverse] municipality as a federation of [homogeneous] neighborhoods” might be better than an attempt at “granular-level integration.”¹⁹⁹

Do Americans, in fact, “desire a community that features housing for all socioeconomic classes”? Individuals affirming that sentiment might seek to relocate to integrated communities, perhaps taking advantage of public incentives and private donations to do so.²⁰⁰ Where legal mandates are concerned, it might be difficult to discern whether the voters regard them as merely aspirational or to be implemented elsewhere, as opposed to directly affecting their own communities (be they municipalities or neighborhoods).

There is considerable anecdotal evidence that communities are pulling apart. As Robert Putnam noted in his most recent book, *Our Kids: The American Dream in Crisis*,²⁰¹ in the 1950s there were “decent opportunities for all the kids in town,” but now kids in poorer areas “can barely imagine the future that awaits the kids” in wealthier neighborhoods.²⁰²

6. *Are People and Places Distinguishable?*

Just as Robert Sampson’s work demonstrated that people are the product of their places,²⁰³ so are places the product of their people.²⁰⁴ While it is

194. Community Development Project at Public Counsel, *Getting There Together: Tools to Advocate for Inclusive Development Near Transit*, 21 J. AFFORD. HOUS. & CMTY. DEV. L. 1, 2 (2012).

195. *Id.* (internal citation omitted).

196. *See supra* notes 77-78 and accompanying text.

197. Stahl, *supra* note 77, at 5.

198. *Id.* at 5-6.

199. *Id.* at 38-39.

200. *See, e.g.*, Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 925-26 (2006) (describing Shaker Heights, Ohio, where private donations funded low cost mortgage loans to integrating homebuyers).

201. ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* 1 (2015).

202. *Id.*

203. *See supra* notes 175-76 and accompanying text.

tempting to say that uplifting communities exist and that people would enjoy better life prospects by moving to them, Professor Lee Anne Fennell, referring to “participant assembly problems,” asserted that people don’t just come to an attractive place; rather, people *are* the place.²⁰⁵ The notion of a successful place refers to the benefits from agglomeration of complementary resources, such as the firms in a specialized industry and workers skilled in its crafts.²⁰⁶

Urban interaction space can be conceptualized as a type of commons. It presents the threat of overcrowding or overharvesting, but it also poses the risk of undercultivation if it fails to attract parties who are well suited to generate agglomeration benefits. The method for rationing access to prime urban space should, therefore, select not only for the value that users place on locating in particular spots, but also for those users’ agglomeration-friendly and congestion-mitigating traits The challenge is to assemble participants together whose joint consumption and production activities will maximize social value.²⁰⁷

This point is important, because it makes more explicit that the Tieboutian model of competition among localities for new residents potentially extends far beyond the tax monies such residents might supply or demand.²⁰⁸

C. State and Local Land-Use Mandates

State and local land-use laws affect types and supply of housing in general and, particularly, the availability of affordable housing. As an example, such local requirements as large-lot zoning benefit existing residents, since the “market value of each homeowner’s property will rise as the lot size minimum is increased.”²⁰⁹ Those prospective buyers subsequently finding houses in the community unaffordable will “bid[] up housing prices wherever they go.”²¹⁰

In *Village of Euclid v. Ambler Realty Co.*,²¹¹ Justice Sutherland’s opinion broadly upheld comprehensive zoning. He pronounced

204. See *supra* note 176 and accompanying text (observing that “neighborhoods choose people”).

205. See Lee Anne Fennell, *Agglomerama*, 2014 BYU L. REV. 1373 (2014) (hereinafter “*Agglomerama*”).

206. See ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 271 (8th ed. 1920) (noting “[w]hen an industry has . . . chosen a locality for itself, it is likely to stay there long: so great are the advantages which people following the same skilled trade get from near neighbourhood to one another.”).

207. *Agglomerama*, *supra* note 205, at 1374-75 (internal citations omitted).

208. See *supra* notes 144-45 and accompanying text.

209. David S. Schoenbrod, *Large Lot Zoning*, 78 YALE L.J. 1418, 1421 (1969).

210. *Id.* at 1418.

211. 272 U.S. 365 (1926).

the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined . . . by considering it in connection with the circumstances and the locality.²¹²

The trial judge whose decision was reversed was more blunt as to the municipality's intent: "The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life."²¹³

Indeed, municipal explanations for zoning as necessary to "preserve the character of the neighborhood" may well be "a code for the desire to preserve economic, ethnic and racial homogeneity."²¹⁴ Nevertheless, in light of the difficulty of implementing fair housing requirements under federal law,²¹⁵ efforts to resist invidious discrimination thus far have been left largely to individual states.²¹⁶

1. Affordable Housing Fair Share Mandates

An early embodiment of affirmatively furthering affordable housing was the New Jersey Supreme Court's *Mount Laurel* doctrine,²¹⁷ which was decreed exclusively under state law.²¹⁸ *Mount Laurel I* was premised on the state's zoning powers being legitimately invoked only if consistent with the state's general welfare. The court held housing to be a fundamental right and required every developing municipality to provide a "realistic opportunity" for a fair share of its region's affordable housing needs. In the subsequent absence of progress by Mount Laurel and other New Jersey municipalities in implementing those principles, *Mount Laurel II* provided much more detailed requirements. The *Mount Laurel* mandates were made

212. *Id.* at 387.

213. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 277 U.S. 365 (1926).

214. STEPHEN R. SEIDEL, *HOUSING COSTS & GOVERNMENT REGULATIONS* 164 (1978).

215. *See infra* notes 278-87 and accompanying text.

216. The federal role likely will become much greater in coming years, in light of Texas Department of Housing and Community Affairs v. Inclusive Communities Project, 135 S. Ct. 2507 (2015), and the new HUD Final Rule on "Affirmatively Furthering Fair Housing," 80 FR 42, 272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 92, et al.). *See infra* Sections II.E.3 and II.E.4 for discussion.

217. *Hills Dev. Co. v. Bernards Twp.*, 510 A.2d 621 (N.J. 1986) [hereinafter *Mount Laurel III*]; *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*]; *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*].

218. This treatment is a basic sketch. For more detail, see Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 CONN. PUB. INT. L.J. 325, 340-48 (2013); John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365 (2001).

applicable to all municipalities, with three judges to be designated to develop a methodology for assigning numerical requirements for every locality and to hear all *Mount Laurel* cases and a “builders remedy” put in place so that a plaintiff’s parcel would enjoy the fruits of *Mount Laurel* rezoning rather than the local legislature rezoning land belonging to someone else.²¹⁹ *Mount Laurel III* ratified a political compromise with the Legislature, whereby *Mount Laurel* enforcement would be transferred to a new administrative Council on Affordable Housing (“COAH”).²²⁰

In 2015, in *Mount Laurel IV*,²²¹ the court noted that COAH’s rules governing municipal housing obligations expired in 1999, that the agency had failed to promulgate updated rules, and that the futility of seeking administrative relief justified immediate access to the courts. In 2017, the court declared that “[f]or the last sixteen years, while [COAH] failed to promulgate viable rules creating a realistic opportunity for the construction of low- and moderate-income housing in municipalities, the *Mount Laurel* constitutional affordable housing obligation” did not go away.²²² It held that “under the current circumstances, the present-need analysis must be expanded to guarantee municipal compliance with the *Mount Laurel* doctrine.”²²³

In words both celebratory and wistful, Robert Holmes, who was well-steeped in the process, wrote that the *Mount Laurel* doctrine “is among the most significant contributions ever made to the advancement of affordable housing In effect, the court went beyond what any state or federal court had done prior to 1975 or has done since.”²²⁴

Some other states have cited the *Mount Laurel* doctrine in cases or in developing statutes discouraging exclusionary zoning. In New Hampshire, the Supreme Court adopted a less stringent version of the builders remedy but not numerical quotas.²²⁵ The Pennsylvania Supreme Court quoted from the requirement in *Mount Laurel I* that an ordinance could not presumptively foreclose the possibility of affordable housing in holding

219. *S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

220. *Hills Dev. Co. v. Bernards Twp.*, 510 A.2d 621 (N.J. 1986).

221. *In re Adoption of N.J.A.C. 5:96 and 5:97 ex rel. New Jersey Council on Affordable Hous.*, 110 A.3d 31 (N.J. 2015) [hereinafter *Mount Laurel IV*].

222. *In Re Declaratory Judgment Actions Filed By Various Municipalities, County of Ocean, Pursuant to the Supreme Court's Decision in In re Adoption of N.J.A.C. 5:96*, 221 N.J. 1 (2015), ___ A.3d ___, 2017 WL 192895, at *1 (N.J. Jan. 18, 2017) at *1.

223. *Id.*

224. Holmes, *op. cit.* at 325-26. Before beginning as a clinical professor at Rutgers School of Law-Newark, Holmes was as assistant commissioner, N.J. Department of Community Affairs; member of the inaugural N.J. State Planning Commission; and member of the drafting task for the N.J. Fair Housing Act.

225. *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991).

that a township ordinance limiting apartments to eighty of the community's 11,598 acres is exclusionary.²²⁶ Massachusetts and Connecticut do not emphasize planning for affordable housing but, rather, make available a builders remedy where less than ten percent of the housing stock is available to households with eighty percent of the area median income, with appeals from negative decisions subject to review under favorable presumptions.²²⁷

California law requires that the state and local governments “have a responsibility . . . to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.”²²⁸ Required plans “shall make adequate provision for the existing and projected needs of all economic segments of the community.”²²⁹ The California provisions are a complex and top-down array of nested plans and requirements.²³⁰ California's fair share laws have been described as “a useful foundation, [but] certainly only one piece of the puzzle, but in that piece they are not totally useless.”²³¹

2. Inclusionary Zoning

Another device for fixing the affordable housing problem is “inclusionary zoning.” Through one device or another, such as density bonuses, fast-track project approvals, or government mandates, developers are induced to provide housing at below-market prices. “Density bonuses” means that developers who construct affordable units, i.e., units for sale or rent at below-market rates to government-approved individuals, may construct more units than the underlying zoning otherwise would permit. Courts have deemed such programs to be valid land-use regulations.²³²

226. Twp. of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466, 468 (Pa. 1975).

227. See generally Thomas Silverstein, *State Land Use Regulation in the Era of Affirmatively Furthering Fair Housing*, 24 J. AFFORD. HOUS. & CMTY. DEV. L. 305, 321 (2015); Melinda Westbrook, 66 CONN. B.J. 169 (1992) (detailing land use appeals procedures).

228. Cal. Gov't Code Ann. § 65580 (West 2016).

229. *Id.* § 65583.

230. Jessie Agatstein, *The Suburbs' Fair Share: How California's Housing Element Law (and Facebook) Can Set A Housing Production Floor*, 44 REAL EST. L.J. 219, 226 (2015).

231. *Id.* at 270.

232. See Home Builders Ass'n. v. City of Napa, 108 Cal. Rptr. 2d 60 (Ct. App. 2001); Holmdel Builders Assoc. v. Twp. of Holmdel, 556 A.2d 1236 (N.J. 1983); S. Burlington Cty. N.A.A.C.P. v. Twp. of Mount Laurel (*Mount Laurel II*), 456 A.2d 390 (N.J. 1983); Fairfax County v. DeGroff Enters., 198 S.E.2d 600 (Va. 1973).

However, in his influential article *The Irony of ‘Inclusionary’ Zoning*,²³³ Robert Ellickson, described over thirty years ago why inclusionary programs are so problematic.

These programs are essentially taxes on the production of new housing. The programs will usually increase general housing prices, a result which further limits the housing opportunities of moderate-income families. In short, despite the assertions of inclusionary zoning proponents, most inclusionary ordinances are just another form of exclusionary practice.²³⁴

Ellickson’s insight has its critics. For instance, Barbara Ehrlich Kautz claims that Ellickson wrongfully asserted that “costs might be borne by other homebuyers or renters, the developer, or the landowner,” since programs could be designed that would create no additional costs for anyone; communities could provide density bonuses large enough to cover the entire cost of the inclusionary units.²³⁵ But unless one engages in magical thinking, these bonuses are “provided” by the community only as the direct result of restrictions imposed on existing owners in areas targeted for more intense development. As such, the regulations provide governments with a strong incentive to overregulate so that they could subsequently and selectively relax the regulations to their benefit, and might constitute takings.²³⁶ Also, overregulation could have been used to achieve some other government purpose. Again, the cost of a “free” choice is what someone must forego in order that it be provided.²³⁷

3. Rent Control

Rent control “historically has been among the most important interventions in housing markets.”²³⁸ It is a traditional, albeit controversial, way of providing affordable housing to sitting tenants and likely their successors.²³⁹ However, it has long been a truism among economists,

233. Robert C. Ellickson, *The Irony of ‘Inclusionary’ Zoning*, 54 S. CAL. L. REV. 1167 (1981).

234. *Id.* at 1170.

235. Barbara Ehrlich Kautz, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U. S.F. L. REV. 971, 984-85 (2002).

236. Steven J. Eagle, *The Perils of Regulatory Property in Land Use Litigation*, 54 Washburn L. J. 1 (2014).

237. *See infra* Section I.B.

238. EDWARD L. GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* 58 (2008).

239. Compare Curtis J. Berger, *Home Is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 BROOK. L. REV. 1239, 1240 (1989) (“Rent control, in New York City and elsewhere, makes it possible for tenants to regard their apartment as a home, and to think of themselves as belonging to a community.”), with Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 744 (1988) (“Rent control statutes

regardless of their political views, that “[a] ceiling on rents reduces the quantity and quality of housing” overall.²⁴⁰ Nevertheless skyrocketing rents facing tenants in California now militate toward the largest expansion in rent controls in decades.²⁴¹ To the extent that such measures become law, they will surely benefit current tenants and provide some positive spillovers. More importantly, however, they will further discourage the construction of rental housing and decrease housing affordability for all except entrenched and lucky renters.

4. *Affirmative Use of Eminent Domain*

In *Kelo v. City of New London*, the U.S. Supreme Court broadly interpreted government’s power of eminent domain to encompass takings for public benefit, as well as public use.²⁴² *Kelo* continues to be regarded by many as impermissibly intruding on private property rights,²⁴³ and many states have imposed significant limitations on its use.²⁴⁴

In addition to other concerns, the use of eminent domain has a disreputable past with regard to affordable housing and racial justice. In *Berman v. Parker*,²⁴⁵ Justice Douglas declared for the Court that the use of eminent domain for the demolition of an entire neighborhood was warranted so that the area would not “revert again to a blighted or slum area, as though possessed of a congenital disease.”²⁴⁶ Responding to the “disease” metaphor, Professor Wendell Pritchett described how “blight” became regarded as a “public menace,” justifying the demolition of minority neighborhoods near the urban core and their replacement by

operate to take part of the landlord’s interest in his reversion and to transfer it to the tenant.”).

240. Bruno S. Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 AM. ECON. REV. 986, 988, 991 (1984) (fewer than two percent of U.S. economists in a random survey disagreed).

241. See Conor Dougherty, *In Silicon Valley Suburbs, Calls to Limit the Soaring Rents*, N.Y. TIMES (June 11, 2016), <http://nyti.ms/1Oin1uE> [<https://perma.cc/Y3MM-6CDB>]. “After years of punishing rent increases, activists across Silicon Valley and the San Francisco Bay Area are pushing a spate of rent control proposals, driven by outrage over soaring housing prices and fears that the growing income gap is turning middle-class families into an endangered species. Those campaigns, if successful, would lead to the largest expansion of tenant laws since the 1970s.” *Id.*

242. 545 U.S. 469 (2005).

243. See, e.g., Gideon Kanner, *Kelo v. New London: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006) (setting forth jurisprudential and practical objections).

244. See generally Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009) (enumerating individual state responses).

245. 348 U.S. 26 (1954).

246. *Id.* at 34.

upscale housing and shops.²⁴⁷ Quoting Pritchett in his dissent in *Kelo*, Justice Thomas noted that “[u]rban renewal projects have long been associated with the displacement of blacks; [i]n cities across the country, urban renewal came to be known as ‘Negro removal.’”²⁴⁸

A different, affirmative, use of eminent domain was suggested by Professors Carol Necole Brown and Serena Williams in connection with the rebuilding of New Orleans after Hurricane Katrina.²⁴⁹ They argued that the creation of affordable housing through the use of eminent domain in conjunction with tax subsidies would prevent the creation of “affluent segregated neighborhoods” and preserve the “cultural complexity” that has marked the city.²⁵⁰ While eminent domain might be useful in other affordable housing situations, Professor John Lovett later noted that it has not been necessary in New Orleans.²⁵¹

5. *Is Compelled Inclusionary Zoning a “Taking?”*

In *California Building Industry Association v. City of San Jose* (“*CBIA*”),²⁵² the California Supreme Court held in 2015 that a requirement that a developer sell fifteen percent of its on-site for-sale units at an affordable housing price was not an unconstitutional exaction violative of the takings clause and that this result was not dependent upon a showing that the affordable housing shortage that the ordinance was attempting to ameliorate was related to the development for which a permit was sought. Prior to *Koontz v. St. Johns River Water Management District*,²⁵³ the city’s demand might be shrugged off as yet one more example of a type of incentive zoning or, more bluntly, “zoning for dollars.”²⁵⁴

247. Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1 (2003).

248. 545 U.S. 469, 522 (Thomas, J., dissenting) (internal quotations omitted) (quoting Pritchett, *op. cit.*, at 47).

249. Carol Necole Brown & Serena M. Williams, *The Houses That Eminent Domain and Housing Tax Credits Built: Imaging a Better New Orleans*, 34 FORDHAM URB. L.J. 689 (2007).

250. *Id.* at 718-19.

251. John A. Lovett, *Tragedy or Triumph in Post-Katrina New Orleans? Reflections on Possession, Dispossession, Demographic Change and Affordable Housing*, 40 FORDHAM URB. L.J. CITY SQUARE 22, 24-25 (2013) (explaining that mixed income housing developers found many well-situated large parcels otherwise available, and that the local development agency had access to thousands of smaller parcels throughout the city, obtained from departed residents who accepted a state buy-out offer).

252. 351 P.3d 974 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

253. 133 S. Ct. 2586 (2013).

254. See generally Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991) (describing bargaining for the relaxation of zoning requirements in exchange for developer payment of fees to fund various community needs and amenities).

In *Nollan v. California Coastal Commission*,²⁵⁵ the Commission had conditioned a development approval for the enlargement of a beachfront home on the applicants' granting a public easement of way along the dry sand behind the home. The U.S. Supreme Court held that this demand would constitute an unconstitutional condition since no "essential nexus" existed between it and the Commission's regulatory power to preserve the view of the ocean from the highway in front of the house. In *Dolan v. City of Tigard*,²⁵⁶ where there was such a nexus, the Court further held that conditioning a development approval upon an exaction was permissible only where there was "rough proportionality" between it and the police power burden resulting from the development, as ascertained through an "individualized determination."²⁵⁷ The Court extended the *Nollan-Dolan* principle in 2013, in *Koontz*.²⁵⁸ There, the Court held it applicable to exactions of cash as well as real property, and that the denial of a development permit because the landowner refused to accept the condition could "impermissibly burden the right not to have property taken without just compensation."²⁵⁹

The California Supreme Court in *CBIA* distinguished *Koontz* by declaring the requirement that fifteen percent of units be sold at below-market rate for affordable housing "does not require the developer to dedicate any portion of its property to the public or to pay any money to the public."²⁶⁰ Rather, it "simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale."²⁶¹ This reasoning, premised on the fact that developers can refrain from selling or renting units in residential subdivisions, seems inconsistent with recent U.S. Supreme Court precedent. In *Horne v. Department of Agriculture*,²⁶² the Court held that the right to sell a legal product (there, raisins for table use) might be regulated, but is "not a special government benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection."²⁶³ *Horne* extended to personal property the Court's earlier declaration in *Nollan* that "the right to build on one's own property—even

255. 483 U.S. 825, 837 (1987).

256. 512 U.S. 374, 414 (1994).

257. *Id.* at 391.

258. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

259. *Id.* at 2596.

260. 351 P.3d 974, 991 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016).

261. *Id.*

262. 135 S. Ct. 2419 (2015)

263. *Id.* at 2430-31.

though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘government benefit.’”²⁶⁴

Furthermore, the permit condition does require the developer to sell housing to a government designee at below-the-market price. This functionally is no different than a mandatory bargain-sale to the government, with subsequent resale to the affordable housing buyer. While the Supreme Court has not decided any exaction cases subsequent to *Koontz*, the issue posed by *CBIA* will continue to be pressed before it.

D. Legislation Through Complex and Opaque Public-Private Bargains

One way to develop comparative less expensive housing is through various public-private development schemes. The notion is that government will guide the development so that it serves a public purpose and that private enterprise will provide the capital and expertise. As the popular metaphor has it, public agencies will steer and private actors will row.²⁶⁵

However, the public sector often pays inadequate attention to the costs of managing outside contractors.²⁶⁶ More disturbingly, the very information government needs to plan effectively often is in the hands of discerning developers who want to ensure profit from the government’s choice as the price of disclosure.²⁶⁷

Given the general unwillingness of the public to pay for affordable housing or to suffer increased densification that would result from additional housing, various ways have been suggested for “grand bargains” and “citywide deals that promote housing.”²⁶⁸ However, as I have elaborated upon elsewhere,²⁶⁹ “grand bargains” often entrench the fruits of logrolling and crony capitalism in the form of property rights. They also do not facilitate most effective land use, since developers still have strong

264. *Id.* at 2430 (quoting *Nollan*, 483 U.S. at 834 n.2).

265. See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 30 (1992) (“As they unhook themselves from the tax-and-service wagon, [political leaders] have learned that they can steer more effectively if they let others do more of the rowing. Steering is very difficult if an organization’s best energies and brains are devoted to rowing.”).

266. Jonas Prager, *Contracting Out Government Services: Lessons From the Private Sector*, 54 *PUB. ADMIN. REV.* 176 (1994).

267. See Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 *FORDHAM URB. L.J.* 1023, 1078-79 (2011).

268. See Hills & Schleicher, *supra* note 136, at 111-16.

269. Steven J. Eagle, *On Engineering Urban Densification*, 4 *PROP. RTS. CONF. J.* 73 (2015).

incentives to build projects most profitable instead of most responsive to community need.²⁷⁰

E. Federal Subsidies and HUD Mandates

Other ways to provide more affordable housing are based on federal subsidies and Department of Housing and Urban Development mandates. According to a 2015 Congressional Budget Office report,²⁷¹ the previous year the federal government provided about fifty billion dollars in spending and tax subsidies that was specifically designated as housing assistance for low-income households.²⁷² That assistance (as measured in 2014 dollars) increased by about fifteen percent between 2000 and 2003, but has “remained relatively stable” thereafter.²⁷³ Furthermore, unlike means-tested programs like food stamps, which are intended to assist all eligible individuals, only a quarter of the twenty million eligible households receive federal housing assistance.²⁷⁴ As a result of lack of horizontal equity between those who benefit from housing assistance and those who do not, “some have likened it to a lottery.”²⁷⁵

1. Federal Subsidy Programs

The Congressional Budget Office’s 2015 report briefly discussed the federal housing subsidy programs for low-income housing.²⁷⁶ A classic way to provide for new urban development is through TIF, which utilizes federally tax-subsidized bonds and which is politically attractive because it brings money to cities without the need for local taxation.²⁷⁷ Under TIF, the bonds are issued to build projects, and the bonds are paid through diversion of the incremental real estate tax revenues resulting from the higher property valuations generated by the new construction. However, there are considerable problems with TIF. One is that local officials and developers seek “the blight that’s right”—areas bad enough to be approved for tax subsidies but good enough so that even non-subsidized private

270. See *infra* notes 281-82 and accompanying text.

271. CONGR. BUDGET OFF., FEDERAL HOUSING ASSISTANCE FOR LOW-INCOME HOUSEHOLDS (Sept. 2015), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50782-LowIncomeHousing-OneColumn.pdf> [<https://perma.cc/WNH5-G67M>].

272. *Id.* at 1.

273. *Id.*

274. *Id.* at 10.

275. Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 539 (1993).

276. CONGR. BUDGET OFF., *supra* note 271.

277. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 73 (2010).

projects might be sustainable.²⁷⁸ Another problem is that the “incremental” tax revenues syphoned off to repay the bonds are vitally needed for local public services, such as education, police, and fire protection.

Another subsidy for development of affordable housing is the federal Low-Income Housing Tax Credit (“LIHTC”).²⁷⁹ The LIHTC has been called “the largest and most important federal housing program in the United States . . . with a size and scale comparable to public housing and the federal Section 8 program.”²⁸⁰

A recent study in Philadelphia found that “LIHTC-funded developments are more likely to be built in gentrifying neighborhoods because developers have strong market incentives to, and may be more likely to receive LIHTCs if they target gentrifying neighborhoods.”²⁸¹ The author suggested that “building these developments in poor, non-gentrifying neighborhoods seems to be a more efficient use of government resources.”²⁸²

One of the most expensive government subsidies for housing²⁸³ is the income tax mortgage interest deduction (“MID”) for interest payments on up to one million dollars million in primary or second-home mortgage debt.²⁸⁴ Professor Mechele Dickerson accurately noted that the MID “gives higher-income taxpayers an incentive to buy expensive homes, but is of little use to lower- or middle-income renters.”²⁸⁵ She also recognized, however, that public support for the MID, together with lobbying by interest groups such as homebuilders and lenders, makes change politically untenable.²⁸⁶ More than that, the advantage of government subsidies and other regulatory advantages attached to specific assets immediately is capitalized into the value of those assets.²⁸⁷ Intense political opposition to substantial tampering with the MID will come from owners of existing

278. George Lefcoe, *Finding the Blight That’s Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 1004-05. (2001).

279. 26 U.S.C. § 42 (2012).

280. Kristin Niver, *Changing the Face of Urban America: Assessing the Low-Income Housing Tax Credit*, 102 VA. L. REV. ONLINE 48, 49 (2016).

281. Benjamin Field, *Why Low-Income Housing Tax Credits Are Flowing to Gentrifying Neighborhoods* (Apr. 23, 2016), <http://ssrn.com/abstract=2778182> [<https://perma.cc/7BGP-UQED>].

282. *Id.*

283. *See generally* JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012-2017 (2013) (noting that the deduction costs the federal government in excess of seventy billion dollars annually).

284. I.R.C. § 163(h)(3)(C) (2012).

285. A. Mechele Dickerson, *Millennials, Affordable Housing, and the Future of Homeownership*, 24 J. AFFORD. HOUS. & CMTY. DEV. L. 435, 460 (2016).

286. *Id.*

287. *See generally* Gordon Tullock, *The Transitional Gains Trap*, 6 BELL J. ECON. 671 (1975).

homes who paid their sellers a higher price in order to reap the advantage of future income tax deductions and stand to lose considerable sums if they could not pass the same advantage to their own purchasers.

2. *Proposed HUD Rule on Housing Choice Vouchers*

The Federal Housing Choice Voucher program (also known as Section 8 housing),²⁸⁸ assists eligible low- and moderate-income families obtain housing through HUD subsidies to private landlords. HUD recently proposed rulemaking that would permit custom tailoring of maximum permissible rents to small neighborhoods.²⁸⁹

Rather than determine rents on the basis of an entire metropolitan area, this rule proposes to determine rents on the basis of ZIP codes. ZIP codes are small enough to reflect neighborhood differences and provide an easier method of comparing rents within one ZIP code to another ZIP code area within a metropolitan area . . . HUD believes that Small Area FMRs [Fair Market Rents] are more effective in helping families move to areas of higher opportunity and lower poverty.²⁹⁰

One public housing authority that was authorized to experiment with the plan, the Chicago Housing Authority (“CHA”), selected “four lucky residents” to reside in a high-rise on North Lake Shore Drive that is “the second-most expensive in the city, with rents for a one-bedroom apartment approaching \$3,000 a month, well beyond the reach of most Chicago residents.”²⁹¹ The CHA’s intent was to “expand its housing voucher program so that more low-income residents can leave the city’s roughest neighborhoods and start a new life in places with low poverty and crime and close to good schools and jobs.”²⁹²

Some landlords maintain it is a mistake to use scarce tax dollars to pay ultra-high rents for a fortunate few when more than 15,000 people sit on the CHA’s voucher waiting list.²⁹³ One added: “In a situation where you’re

288. *See generally* 24 C.F.R. § 982 (2015).

289. Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs, 81 Fed. Reg. 39,218 (June 8, 2016) (to be codified at 24 C.F.R. pts. 888, 982, 983, and 985).

290. *Id.* at 39,219.

291. Alby Gallun, *Poor Families Use ‘Supervouchers’ to Rent in City’s Priciest Buildings*, CHI. BUS. J. (July 26, 2014), <http://www.chicagobusiness.com/article/20140726/ISSUE01/307269984/poor-families-use-supervouchers-to-rent-in-citys-priciest-buildings> [<https://perma.cc/X4R8-T65U>].

292. *Id.*

293. *Id.*

dealing with a low-income person, do they really need a 25th-floor apartment with a lake view? It just doesn't make sense to me.”²⁹⁴

The new HUD and Chicago approach raises a number of issues, including the debate between the “traditional” and “opportunities access” models of integration²⁹⁵ and concerns that government subsidies ought not to be used to leapfrog benefit recipients over moderate- and middle-income taxpayers.²⁹⁶

3. *Disparate Impact and Affirmatively Furthering Fair Housing*

While the Fair Housing Act (“FHA”) addressed the denial of housing opportunities on the basis of “race, color, religion, or national origin,”²⁹⁷ “by the late 1970s, it was clear the FHA had the potential to serve as a tool for remedying exclusionary zoning, but the constraints of standing doctrine and the difficulty of proving discriminatory intent through circumstantial evidence somewhat curtailed the effectiveness of that tool.”²⁹⁸ Professor David Troutt argued that the FHA is the “least successful of the civil rights acts.”²⁹⁹ While it envisioned that “[o]vercoming discrimination that denied protected classes residency in high-opportunity areas would produce integrated communities of more equal opportunity, the problem has been that discrimination has matured in less recognizable ways and segregation has calcified, leading to more concentrated poverty, re-segregation and widening economic inequality.”³⁰⁰

The notion that “discrimination has matured in less recognizable ways” undergirded the Supreme Court’s five to four decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.³⁰¹ The ICP, a nonprofit corporation facilitating affordable housing, alleged that the Department had allocated too many federal low-income tax credits for construction of low-income housing in predominantly minority inner city areas and too few in predominantly white suburbs.³⁰² Texas asserted that the appropriate standard of review was “disparate treatment,” whereas IPC asserted it was “disparate impact.” “In contrast to a disparate-treatment case, where a plaintiff must establish that the defendant had a

294. *Id.* (quoting landlord Tony Rossi, president of a Chicago-based management company).

295. *See* discussion *supra* Section II.B.5.

296. *See infra* note 361 and accompanying text.

297. Civil Rights Act of 1968, 42 U.S.C. §§ 3601-06 (2012).

298. Silverstein, *supra* note 227, at 315.

299. David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 *BUFF. L. REV.* 5 (2017).

300. *Id.*

301. 135 S. Ct. 2507 (2015).

302. *See id.* at 2514.

discriminatory intent or motive,’ a plaintiff bringing a disparate-impact claim challenges practices that have a ‘disproportionately adverse effect on minorities’ and are otherwise unjustified by a legitimate rationale.”³⁰³ The district court had concluded that ICP had established a prima facie case of disparate impact.³⁰⁴

In holding that disparate-impact claims were cognizable under the Fair Housing Act, Justice Kennedy stressed America’s history of segregated housing,³⁰⁵ that Congress was aware when it amended the FHA in 1988 that the nine Courts of Appeals to have considered disparate-impact claims unanimously held them cognizable by the courts³⁰⁶ and that recognition of disparate-impact claims was “consistent with the FHA’s central purpose [to] eradicate discriminatory practices within a sector of our Nation’s economy.”³⁰⁷

However, Justice Kennedy stressed it would raise “serious constitutional questions” if disparate-impact liability could be “imposed based solely on a showing of a statistical disparity.”³⁰⁸ Noting the principal dissent by Justice Alito, he added that the “limitations on disparate-impact liability discussed here are also necessary to protect potential defendants against abusive disparate-impact claims.”³⁰⁹ These qualifications have been described as “promulgat[ing] terms for a peace settlement between disparate impact and equal protection.”³¹⁰ The nuances in Justice Kennedy’s opinion suggest that applying the disparate-impact standard might not be without difficulty.³¹¹

303. *Id.* at 2513 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (internal quotation marks omitted)).

304. *Id.* at 2514 (noting, *inter alia*, that over 92% of credits in Dallas were allocated to census tracts with less than 50% Caucasian residents, and that 49.7% of units were approved for areas with less than 10% Caucasians, but only 37.4% approval in areas with at least 90% Caucasians).

305. *See id.* at 2515-16 (noting, *inter alia*, that de jure residential segregation was declared unconstitutional almost a century ago, *Buchanan v. Warley*, 245 U.S. 60 (1917), “but its vestiges remain today, intertwined with the country’s economic and social life.”).

306. *See id.* at 2519-20.

307. *Id.* at 2521.

308. *Id.* at 2522.

309. *Id.* at 2524 (joining in Justice Alito’s dissent were Roberts, C.J., and Scalia and Thomas, JJ.).

310. Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1117 (2016).

311. *See* discussion *infra* Section II.E.4.

Three weeks after *Inclusive Communities* was handed down, HUD promulgated its rules on Affirmatively Furthering Fair Housing (“AFFH”).³¹² These rules included an affordable housing component.

HUD’s rule recognizes the role of place-based strategies, including economic development to improve conditions in high poverty neighborhoods, as well as preservation of the existing affordable housing stock, including HUD-assisted housing, to help respond to the overwhelming need for affordable housing.

* * *

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 . . .³¹³

Pursuant to the AFFH final rules, jurisdictions receiving HUD funding will be provided with data and tools for conducting the analysis of fair housing issues specific to their area and are asked by HUD to assess their performance and devise goals based on data and analysis.³¹⁴ Metrics and technics for doing so are now being developed and assessed.³¹⁵ Furthermore, the Supreme Court has granted certiorari in two cases raising the issue of whether a city alleging that it has suffered consequential damages has standing to allege discriminatory practices under the Fair Housing Act.³¹⁶

312. See generally HUD Final Rule on “Affirmatively Furthering Fair Housing,” 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, et al.).

313. *Id.* at 80 FR 42,279.

314. AFFH defines a “fair housing issue” as “a condition in a program participant’s geographic area of analysis that restricts fair housing choice or access to opportunity, and includes such conditions as ongoing local or regional segregation or lack of integration, racially or ethnically concentrated areas of poverty, significant disparities in access to opportunity, disproportionate housing needs, and evidence of discrimination or violations of civil rights law or regulations related to housing.” 24 C.F.R. § 5.152.

315. See generally Mindy Kao & Dan Immergluck, *AFFH Metrics for Affordable Housing Programs: An Approach to Assessing the Spatial Distribution of Housing Subsidies in Large Jurisdictions in the Assessment of Fair Housing* (May 25, 2016), <http://ssrn.com/abstract=2784583> [<https://perma.cc/9AQL-3MWA>].

316. See *Bank of America Corp. v. City of Miami*, 136 S. Ct. 2544, No. 15-1111, *granting cert.* (June 28, 2016); *Wells Fargo & Co. v. City of Miami*, 136 S. Ct. 2545, No. 15-1112, *granting cert.* (June 28, 2016). The City sued the petitioners, claiming that their predatory loans, and refusal to extend credit to minorities on equal terms, violated the FHA because they were intentionally discriminatory and had a disparate impact on minorities. It asserted that this conduct led to a higher foreclosure rate, depressed property values, and that, as a consequence, the City suffered a loss of real estate tax revenue.

4. *Affordable Housing Mandates Will be Difficult to Apply and Enforce*

It is beyond the scope of this Article to offer a detailed analysis of the substantial volume of litigation culminating in *Inclusive Communities*,³¹⁷ the HUD Final Rule on “Affirmatively Furthering Fair Housing,”³¹⁸ and the administrative interpretations and cases that surely will follow. However, a few cautions are in order.

Fair housing advocate Thomas Silverstein reviewed attempts in recent decades to reverse land-use regulations leading to exclusionary housing and noted that none “have fundamentally reshaped how people in communities on the ground think about land-use regulation. As evidenced by the rhetoric of [some] local policy-makers . . . many continue to see exclusionary zoning as something that is natural, inevitably local, and supportive of individual property rights.”³¹⁹ He added that the New Jersey Fair Housing Act is “in some ways the gold standard for state law innovations,” but “that system was the result of and continues to be fraught with litigation.”³²⁰ “That conflict is both a reflection of its effectiveness, which has riled exclusionary suburbs, and its complexity, which has even baffled supporters at times.”³²¹

Another advocate, Professor Tim Iglesias, added:

Sometimes we yearn for affordable housing and fair housing to be front-burner issues, but as the old saying goes: “be careful what you wish for.” In my view, we are not a “post-racial society” in any meaningful sense. Race, income, and integration are still difficult and volatile topics among legislators, opinion leaders, and among the general public. Increased proposed use of inclusionary zoning is likely to incite a controversial public debate about “forced integration.” If we are not ready for this debate, it could hurt both affordable housing and fair housing in general as well as increase local opposition to inclusionary zoning ordinances. In particular, if the Affirmatively Furthering Fair Housing (“AFFH”) regulation is finalized, we should expect much more critical attention to integration.³²²

317. *See* Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

318. *See* 80 Fed. Reg. 42,272 (July 16, 2015).

319. Silverstein, *supra* note 227, at 328.

320. *Id.* at 317 (citing N.J. STAT. ANN. §§ 52:27D-301-329.9 and, *inter alia*, In re the Adoption of N.J.A.C. 5:96 and 5:97 by the N.J. Council on Affordable Hous., 110 A.3d 31 (N.J. 2015)).

321. *Id.* at 317

322. Iglesias, *supra* note 1, at 593.

Although the “regnant scholarly consensus” is that the Fair Housing Act is “tepid, toothless, and ineffective,”³²³ Professor Jonathan Zasloff asserted that during its first decade strong enforcement by the Department of Justice, especially with respect to realtors, brought about significant success.³²⁴ It is instructive to recall that HUD Secretary George Romney, formerly a moderate Republican governor of Michigan, was a supporter of fair housing, but his attempts to use subsidized housing programs to promote housing integration in the suburbs were not in line with Nixon Administration policy and he was forced out of office.³²⁵ Significantly, “[t]here is little evidence that top Nixon officials *encouraged* fair housing enforcement, but they basically left the Civil Rights Division alone.”³²⁶

It seems clear that implementing *Inclusive Communities* and the HUD AFFH regulations will take a considerable and sustained effort by the Department of Justice, HUD, and other federal agencies. Much will depend on whether President Trump and his administration would be desirous of pursuing those goals.

Testimony at Attorney General Jeff Sessions’ confirmation hearings was sharply divided regarding his commitment to civil rights.³²⁷ Likewise, when HUD Secretary Ben Carson was a presidential candidate at the time *Inclusive Communities* was handed down and HUD issued its AFFH final regulations, he spoke of those developments disapprovingly:

Remember busing, that brilliant social experiment that was to usher in a new era of racial utopia in America? Undaunted by the failed socialist experiments of the 1980s, the Obama administration has recently implemented a new Department of Housing and Urban Development (HUD) rule designed to “desegregate” housing by withholding funds from communities that fail to demonstrate their projects “affirmatively further” fair housing.”³²⁸

Dr. Carson further asserted:

323. Jonathan Zasloff, *Between Resistance and Embrace: American Realtors, the Justice Department, and the Uncertain Triumph of the Fair Housing Act, 1968-1978*, 60 *How. L.J.* (forthcoming 2017) (UCLA School of Law Public Law & Legal Theory Research Paper Series Research Paper No. 17-08), <https://ssrn.com/abstract=2909872> [<https://perma.cc/75ZV-8REH>].

324. *Id.* at *10-11.

325. See CHARLES M. LAMB, *HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS* 163-64 (2005).

326. See Zasloff, *supra* note 323, at *12.

327. See, e.g., Matt Apuzzo & Eric Lichtbau, *Black Leaders Put Race Front and Center at Confirmation Hearing for Sessions*, N.Y. TIMES, Jan. 12, 2017, at A25.

328. Ben S. Carson, *Experimenting With Failed Socialism Again*, WASH. TIMES (July 23, 2015), <http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/> [<https://perma.cc/KJ3C-49QT>].

These government-engineered attempts to legislate racial equality create consequences that often make matters worse. There are reasonable ways to use housing policy to enhance the opportunities available to lower-income citizens, but based on the history of failed socialist experiments in this country, entrusting the government to get it right can prove downright dangerous.³²⁹

Federal judges, too, will have a substantial role in shaping the outcome of affirmatively furthering fair housing efforts. Even under a “disparate treatment” analysis, subtle and contestable judgments will be required. *Inclusive Communities* cautioned:

Disparate-impact liability mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid governmental policies. The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.³³⁰

Inclusive Communities added that “[a]n important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies.”³³¹

Balancing the various goals of the FHA against other important local needs necessarily implicates federal executive and judicial review of local land-use determinations. Historically, the federal government has not generally intruded on local land-use decisions.³³² The U.S. Court of Appeals for the Ninth Circuit opined that federal courts are not the “grand mufti” of land use.³³³ The Fourth Circuit likewise pronounced, “[r]esolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts”³³⁴

329. *Id.*

330. *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

331. *Id.* at 2522.

332. See Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL’Y 445. “The reasons for this absence stem from a country-specific blend of constitutional, historical, cultural, and economic ingredients that together favor local land-use planning and regulation over higher level exercises.” *Id.* at 446.

333. See *Hoehne v. Cty. of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (noting that the Supreme Court has erected procedural barriers “to guard against the federal courts becoming the Grand Mufti of local zoning boards.”). See generally Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1 (2014).

334. *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 828 (4th Cir. 1995).

The Trump administration is likely to appoint a record number of federal judges.³³⁵ It is reasonable to speculate that they would not be inclined towards a broad view of federal land use regulatory powers. It is instructive in this regard to consider the 2016 Republican Platform:

Zoning decisions have always been, and must remain, under local control. The current Administration is trying to seize control of the zoning process through its Affirmatively Furthering Fair Housing regulation. It threatens to undermine zoning laws in order to socially engineer every community in the country. While the federal government has a legitimate role in enforcing nondiscrimination laws, this regulation has nothing to do with proven or alleged discrimination and everything to do with hostility to the self-government of citizens.³³⁶

Although the Supreme Court has stated that the Fifth Amendment Takings Clause³³⁷ is not a “poor relation” to other constitutional rights,³³⁸ the Court has set its protections at a fairly low level with regard to alleged “regulatory takings” that result from stringent regulations.³³⁹ Even then, a practical caveat is in order. Professors James Krier and Stewart Sterk recently noted that the Supreme Court’s takings jurisprudence is a “body of doctrine [that] sets a constitutional bottom.”³⁴⁰

States must protect property at least as much as the Court’s rules decree, but they are free in principle to protect it more. Moreover, *state courts*

335. See, e.g., Philip Rucker & Robert Barnes, *Trump to Inherit More Than 100 Court Vacancies, Plans to Reshape Judiciary*, WASH. POST (Dec. 25, 2016), https://www.washingtonpost.com/politics/trump-to-inherit-more-than-100-court-vacancies-plans-to-reshape-judiciary/2016/12/25/d190dd18-c928-11e6-85b5-76616a33048d_story.html [<https://perma.cc/YWC7-736A>].

336. Republican Platform 2016 at 4 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf [<https://perma.cc/JVH2-7HGD>].

337. U.S. CONST. amend. V, provides: “nor shall private property be taken for public use, without just compensation.” The Takings Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. See *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 238-39 (1897).

338. *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) (“We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”).

339. Takings liability generally is premised on a multifactor, ad hoc, test stressing economic impact on the claimant, investment-backed expectations, and the character of the regulation. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). The Court of Federal Claims has indicated that a diminution in value as a result of a regulation “approaching 85 to 90 percent” would “not necessarily dictate the existence of a taking.” *Walcek v. United States*, 49 Fed. Cl. 248, 271 (Fed. Cl. 2001), *aff’d*, 303 F.3d 1349 (Fed. Cir. 2002).

340. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35 (2016), <http://scholarship.law.wm.edu/wmlr/vol58/iss1/3/> [<https://perma.cc/W66D-AMGT>].

are able, in practice, to protect it less, because the Supreme Court has developed ripeness and preclusion rules that limit the ability of lower federal courts to oversee their work, and because the Court can review only a fraction of takings cases in any event.³⁴¹

Those “ripeness and preclusion” rules³⁴² apply only to takings and closely related substantive due process claims³⁴³ and not to “constitutional torts” related to free speech, racial and religious discrimination, and other constitutionally protected rights.³⁴⁴

In a somewhat analogous situation, a clear federal policy regarding local land-use decisions was enunciated in the Religious Land Use and Institutionalized Persons Act (“RLUIPA”).³⁴⁵ Courts are required to apply strict scrutiny in reviewing local land-use decisions that arguably impose a substantial burden on religious exercise if those decisions involve “individualized assessments” of the proposed use of the parcel.³⁴⁶ While alleged discrimination against religious uses of land always has been susceptible to attack under the Free Exercise³⁴⁷ and Equal Protection Clauses,³⁴⁸ some supporters of RLUIPA grounded it in claims that the underlying nature of land-use regulation lacks objective standards, and granting local officials with “virtually unlimited discretion” thus “readily lends itself to religious discrimination.”³⁴⁹

341. *Id.* (internal citations omitted) (emphasis added).

342. *See* *San Remo Hotel, L.P. v. City and Cty. of San Francisco*, 545 U.S. 323 (2005) (holding full faith and credit statute to preclude further litigation of issues adjudicated in state courts, so that mandatory state “ripening” of federal takings claims in fact serves as collateral estoppel barring the subsequent hearing of those claims in federal court); *Williamson Cty. Reg’l Plan. Com’n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) (setting forth “final determination” and “state litigation” prongs required before regulatory takings claims are “ripe” for review in federal courts).

343. R.S. Radford & Jennifer Fry Thompson, *The Accidental Abstention Doctrine: After Thirty Years, the Case for Diverting Federal Takings Claims to State Court Under Williamson County Has Yet to Be Made*, 67 BAYLOR L. REV. 568, 588-93 (2016).

344. *See* J. David Breemer, *Ripeness Madness: The Expansion of Williamson County’s Baseless “State Procedures” Takings Ripeness Requirement to Non-Takings Claims*, 41 URB. LAW. 615, 635 (2009) (“No Supreme Court precedent sanctions requiring state court procedures to ripen a non-takings claim, and no precedent supports compressing all property-related injuries into one takings claim.”).

345. *See* 42 U.S.C. §§ 2000cc-2000cc-5 (2012).

346. *Id.* at § 2000cc(a).

347. U.S. CONST. amend. I.

348. U.S. CONST. amend. XIV, § 1, cl. 1.

349. Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 722 (2008) (citing HOUSE JUDICIARY COMMITTEE, Religious Liberty Protection Act of 1999, H.R. Rep. No. 106-219, at 18 (1999)).

Unlike RLUIPA, neither *Inclusive Communities*³⁵⁰ nor HUD’s new affirmative regulations³⁵¹ purports to impose strict scrutiny.³⁵² It is possible, of course, that the executive branch and the courts will apply affordable housing mandates zealously and might use RLUIPA as a model in such efforts. It might be that the filing of a few highly publicized cases and HUD withdrawals of housing funding would serve as a sufficient incentive for localities to conform their conduct to advancing fair housing. On the other hand, such actions might redouble the efforts of opponents who see broad-based attempts to impose income and racial integration as “social engineering.”³⁵³

Professor Lee Anne Fennell wrote that a driver of segregation has been the desires and search patterns of homeseekers.³⁵⁴ This practice might partially be thwarted through devices such as interactive search tools that employ algorithms to provide home seekers with results from neighborhoods similar to those they are searching, but in more integrated neighborhoods.³⁵⁵

Fennell’s speculations seem to be an example of government “nudging” of individuals, with the ambiguity associated with soft paternalism.³⁵⁶ But, for proponents, this might be insufficient, and

nudges faced with firm opposition must be supported by a web of regulation and government marketing so strong that the cost of cutting through that web exceeds the benefits Changing the default is not enough; regulation must also control the framing of the default and the opt-out process.³⁵⁷

350. Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, 135 S. Ct. 2507 (2015).

351. HUD Final Rule on “Affirmatively Furthering Fair Housing,” 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, et al.).

352. See *supra* notes 311-13 and accompanying text (discussing cautions against an over-zealous approach in *Inclusive Communities*; HUD Final Rule, 80 Fed. Reg. at 42,272 (noting that HUD “does not mandate specific outcomes for the planning process[.]” but rather, “recognizing the importance of local decisionmaking” helps HUD program participants “to be better positioned to fulfill their obligation to affirmatively further fair housing.”).

353. See Iglesias, *supra* note 1, at 593 & n.34 (noting Patrik Jonsson, ‘Fair’ Housing or ‘Social Engineering’? HUD Proposal Stirs Controversy, CHRISTIAN SCI. MONITOR (Aug. 9, 2013), <http://www.csmonitor.com/USA/2013/0809/Fair-housing-or-social-engineering-HUD-proposal-stirs-controversy> [https://perma.cc/FRJ3-36XG] (reporting fears that the proposed AFFH rule would “force communities to diversify in ways that may hurt local property values, their tax bases, and their overall economies”)).

354. Fennell, *supra* note 35.

355. *Id.* at 53-56.

356. See THALER & SUNSTEIN, *supra* note 39.

357. Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1229 (2013).

In the somewhat unlikely event that the executive branch or the courts opt for far-reaching change, they might adopt the advice of Professor Dan Kahan, who suggested that enforcing statutory requirements in the face of societal “sticky norms” to the contrary might best be done through the imposition of only mild sanctions, at first, until public attitudes change.³⁵⁸

5. *Conflicting Value Systems and the Idea of “Fairness”*

One fundamental source of social tension, as interpreted by the noted sociologist Jonathan Haidt in *The Righteous Mind*,³⁵⁹ is that liberals and conservatives have different moral “palates.” Liberals have two values, “care” for the needs of others and “fairness” (defined as “equality”). Conservatives are concerned equally with five values: “care,” “fairness” (defined very differently, as people reaping what they sow), “loyalty,” “authority,” and “sanctity.”³⁶⁰ Housing in good neighborhoods, then, is either a right that all people should be able to enjoy (fairness as equality), or, conversely, a reward for diligent effort (fairness as just deserts). Howard Husock exemplifies the latter view in claiming that socioeconomic status rightfully is the primary determinant of where people live.

[F]amilies strive, save and move up the steps of the economic ladder. When they do, the symbol of their achievement, as well as its reward, is the neighborhood or municipality in which they live.

Scattering subsidized housing breaks the unspoken rules of housing, and thus inspires bitter opposition. Public housing built in affluent or blue-collar neighborhoods allows families (or individuals) who have not followed the same route of upward mobility to share the reward. What is undermined is a defining aspect of middle-class life: accepting the discipline of work and family, as well as law and order, to attain, after a time, comfortable and secure surroundings.³⁶¹

Discussions of “equality” and “merit” often neglect, on one hand, the problem of accounting for “work” in the “informal economy”³⁶² and, on the other, structural changes that make it difficult for children to rise above the status of their parents.³⁶³

Professor George Wright asserted that “the most crucial Supreme Court discussions on equal protection bear only modest indication, either direct or

358. Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

359. Haidt, *supra* note 18.

360. *Id.* at 155-86.

361. Howard Husock, *The Folly of Public Housing*, WALL ST. J., Sept. 28, 1993, at A18.

362. See Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1132-33 (2006) (noting that for government benefits purposes “work often is casually equated with the production of earned income or, even more narrowly, with full-time employment for wages.”).

363. See generally PUTNAM, *supra* note 201.

indirect, explicit or implicit, and however diluted, of any of the leading historic, traditional, or contemporary understandings of the idea of equality itself.”³⁶⁴ It might be that litigation based on *Inclusive Communities*³⁶⁵ or the HUD “Affirmatively Furthering Fair Housing” regulations³⁶⁶ ultimately will push the Supreme Court toward addressing that basic question.

F. Reducing Government Barriers to New Market-Rate Housing

It is perhaps intrinsic to democracy that people demand goods despite the fact that their demands are inconsistent. Also, existing voters are advocates of what Richard Babcock referred to as “municipal primogeniture,” the right of the first residents of a community to assert its character by placing the burden of undesirable uses upon others.³⁶⁷ As *Washington Post* housing reporter Emily Badger summed up:

San Francisco can have a dynamic economy and charming neighborhoods unmarred by new construction and denser housing. But it can't have both of those things without paying a steep cost in rent (and without pushing lower-wage workers out). Other cities face a similar fate if their economies boom but their housing construction does not.³⁶⁸

In cities like San Francisco, amenity-based restrictions, such as historic preservation, environmental preservation, and height ceilings “add up, across a city, even if they’re well-intentioned. The affordability issue will rear its head.”³⁶⁹ Likewise, mandates for strict urban growth containment, as in Portland, Oregon “probably do[] cause higher housing prices.”³⁷⁰

Indeed, while the high tech boom often is blamed for the extraordinarily high rents in San Francisco, in fact, rents have risen at a remarkably steady 6.6 percent per year since 1956, or 2.5% after inflation.³⁷¹ The California average home price of \$440,000 is 2.5 times the national average of

364. R. George Wright, *Equal Protection and the Idea of Equality*, 34 L. & INEQ. 1, 1 (2016).

365. Texas Dep’t of Hous. and Cmty. Affairs v. Inclusive Communities Project, 135 S. Ct. 2507 (2015).

366. HUD Final Rule on “Affirmatively Furthering Fair Housing,” 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, et al.).

367. RICHARD BABCOCK, *THE ZONING GAME* 150 (1966).

368. Emily Badger, *What It Would Actually Take to Reduce Rents in America’s Most Expensive City*, WASH. POST (May 22, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/05/22/what-it-would-actually-take-to-reduce-rents-in-americas-most-expensive-city/> [https://perma.cc/CP3R-PYV7].

369. See Thompson, *supra* note 116 (quoting UCLA economist Matthew Kahn).

370. William A. Fischel, *Comment on Anthony Downs’s “Have Housing Prices Risen Faster in Portland than Elsewhere?”*, 13 HOUS. POL’Y DEBATE 43, 44 (2002).

371. See Eric Fisher, *Employment, Construction, and the Cost of San Francisco Apartments*, EXPERIMENTAL GEOGRAPHY (May 14, 2016), <http://experimental-geography.blogspot.com/> [https://perma.cc/9RRC-ZI2J]. Fisher is a professor of economics at California Polytechnic State University, San Luis Obispo.

\$180,000; the average monthly rent of \$1240 is 50% higher than the rest of the country (\$840).³⁷²

Two leading land-use economists, Edward Glaeser and Joseph Gyourko, have concluded,

America does not uniformly face a housing affordability crisis. In the majority of places, land costs are low (or at least reasonable) and housing prices are close to (or below) the costs of new construction. *In the places where housing is quite expensive, building restrictions appear to have created these high prices.*³⁷³

“As demand to live in a particular suburb or city outstrips the existing housing stock, two things can happen: more housing gets built to meet the demand, or prices get bid up to ration the existing stock.”³⁷⁴

In fact, the price of housing and individual inability to afford adequate housing are analytically separate and distinct issues. As Glaeser and Gyourko note:

In general, housing advocates have confused the role of housing prices with the role of poverty. Both housing costs and poverty matter for the well-being of American citizens, but only one of these factors is a housing issue per se. Certainly, the country should pursue sensible antipoverty policies, but if housing is not unusually expensive, these policies should not be put forward as a response to a housing crisis. To us, a housing affordability crisis means that housing is expensive relative to its fundamental costs of production—not that people are poor. Therefore, we will focus entirely on housing prices, not on the distribution of income.

A second key concept in thinking about a housing affordability crisis is the relevant benchmark for housing costs. Affordability advocates often argue for the ability to pay (for example, some percentage of income) as a relevant benchmark, but this again confuses poverty with housing prices. We believe that a more sensible benchmark is the physical construction costs of housing. If we believe that there is a housing crisis, then presumably the correct housing response would be to build more housing. Yet the social cost of that new housing can never be lower than the cost of construction. For there to be a “social” gain from new construction, housing must be priced appreciably above the cost of new construction.³⁷⁵

Jason Furman, former Chair of the President’s Council of Economic Advisors, recently observed that “excessive . . . land-use or zoning regulations have consequences that go beyond the housing market to

372. Cal. Legislative Analyst’s Office, *California’s High Housing Costs: Causes and Consequences* (2015).

373. See Glaeser & Gyourko, *supra* note 14, at 23 (emphasis added).

374. Mangin, *supra* note 172, at 93.

375. Glaeser & Gyourko, *supra* note 14, at 21.

impede mobility and thus contribute to rising inequality and declining productivity growth.”³⁷⁶ Enrico Moretti’s *The New Geography of Jobs* provides a more extensive discussion of how land-use regulations restrict economic development and income mobility.³⁷⁷

Building upon data derived by Paul Emrath,³⁷⁸ the National Association of Home Builders reported that “average cost for home builders to comply with regulations for new home construction has increased by nearly 30% over the last five years.”³⁷⁹ Emrath added that “[i]t really makes it hard to satisfy the lower end of the market, which is a lot of first-time buyers.”³⁸⁰ A further indication of this is that “[a]cross the U.S., new home construction has remained at historic lows throughout the housing recovery of the last five years, but the share of starter homes priced below \$200,000 has dwindled more than any other segment, according to U.S. Census data.”³⁸¹

Part of the problem of expensive regulation that reduces housing construction is complex and strict environmental regulation, sometimes compounded by courts. A pertinent example is the rejection by the California Supreme Court of the Environmental Impact Report for the Los Angeles County’s planned Newhall Ranch community, which would house 58,000 people.³⁸² The project had been approved by Los Angeles County twelve years earlier and had been affirmed as sufficient by the Court of Appeal.³⁸³ Justice Corrigan dissented, concluding that “[t]he majority’s contrary conclusion is inconsistent with our deferential standard of

376. Jason Furman, Remarks at The Urban Institute, *Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents* (Nov. 20, 2015). See also David Schleicher, *Stuck in Place: Law and the Economic Consequences of Residential Stability*, Yale Law School, Public Law Research Paper No. 593 (Jan. 9, 2017), <https://ssrn.com/abstract=2896309> [<https://perma.cc/5HYQ-WNVJ>] (discussing legal impediments to residential mobility and its economic effects).

377. ENRICO MORETTI, *THE NEW GEOGRAPHY OF JOBS* (2012).

378. Paul Emrath, *Government Regulation in the Price of a New Home*, NAHB HOUS. ECON. (May 2, 2016), <http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID> [<https://perma.cc/X9LX-FMMK>].

379. Chris Kirkham, *Homebuilders Say They Are Squeezed by Rising Compliance Costs*, WALL ST. J. (May 7, 2016), <http://www.wsj.com/articles/home-builders-say-they-are-squeezed-by-rising-compliance-costs-1462613401> [<https://perma.cc/MF7U-Y55D>].

380. *Id.*

381. Chris Kirkham, *Affordable Starter Homes Prove Increasingly Elusive*, WALL ST. J. (May 6, 2016), <http://www.wsj.com/articles/affordable-starter-homes-prove-increasingly-elusive-1462527001> [<https://perma.cc/P3YQ-T6ZA>].

382. See *Ctr. for Biological Diversity v. Cal. Dep’t of Fish & Wildlife*, 361 P.3d 342 (Cal. 2015).

383. See *Ctr. for Biological Diversity v. Dep’t of Fish & Wildlife*, 196 Cal. Rptr. 3d 413 (Cal. App. 2014), *overruled by Ctr. for Biological Diversity*, *supra* note 383.

review.”³⁸⁴ The dissent of Justice Chin emphasized not only the extensiveness of the Report and its review by numerous agencies and lower courts, but also the harm that would flow from delay.

This litigation has already delayed implementing the EIR some five years or so. Now this court is sending the case back to the Court of Appeal. Among other things, it is permitting the project opponents to relitigate some already decided issues even though the Court of Appeal fully rejected the arguments the first time At some point after that [appeal ends], the EIR will have to be revised, with the necessary period of public comment, etc Then it is predictable that yet more litigation will follow the finalization of the new EIR. Given the glacial pace of litigation, this will easily take years.

And it gets worse. The majority strongly hints that the time will come when compliance with goals established for the year 2020 will not be sufficient, and the proposed project will have to meet some different goals established for the future beyond 2020. By the time this litigation ends, and the new EIR is prepared and finalized, we will be much closer to 2020 than when the current EIR was finalized in 2010. Delay can become its own reward for project opponents. Delay the project long enough and it has to meet new targets, and then perhaps new targets after that. All this is a recipe for paralysis. But CEQA [the California Environmental Quality Act] is not meant to cause paralysis. Carefully planned green communities are needed to accommodate California’s growing population. CEQA ensures the informed planning, but it does not prohibit the planned communities.³⁸⁵

CONCLUSION

The problem of “affordable housing” is a battle of competing metaphors. For advocates of housing for those with low- and moderate-incomes, it focuses on those socioeconomic groups to the exclusion of others, and elides the quite distinct problems of high housing prices and poverty.³⁸⁶ Affordable housing also is closely linked with the problem of “fair housing,” which entails amelioration of racial exclusion through some balance of strategies involving classic integration and provision of access to opportunities. Those viewing these issues through the lens of the local polity and its entrenched economic and political interests frame them differently from those who do not.³⁸⁷ Maintaining rootedness in existing communities is another concern, although interest groups fighting

384. *Ctr. for Biological Diversity*, 361 P.3d at 366 (Corrigan, J., concurring and dissenting).

385. *Id.* at 373 (Chin, J., dissenting).

386. *See* Glaeser & Gyourko, *supra* note 14 and accompanying text.

387. *See* Iglesias, *supra* notes 187-90 and accompanying text.

gentrification and those fighting change in upper-income communities frame the issues quite differently.³⁸⁸ High housing prices exacerbate poverty and exclusion and harm regional economies and the national economy.³⁸⁹ While all of these separate problems interact in a myriad of ways, we should be aware that metaphors leading to inconsistent patterns of issue conflation do not lead to effective solutions.³⁹⁰

The removal of barriers to what we term “affordable housing” might be accomplished through an unlikely democratic expression of broad popular will. However, more likely are complex and opaque bargains among legislators and interest groups or active micro-management by federal or state agencies and courts, all of which are often apt to be largely counter-productive as well as intrusive.

The metaphors of “affordable housing” collectively serve largely to obfuscate both issues and possible solutions.

388. *See supra* Section I.E.

389. *See Hsieh & Moretti, supra* notes 58-64 and accompanying text.

390. *See JACOBS, supra* notes 23-24 and accompanying text.