

THE NEW EXCLUSIONARY ZONING

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INTRODUCTION	91
I. LOOKING AT HOUSING MARKETS SCHEMATICALLY	96
II. POLICY AND POLITICS OF THE NEW EXCLUSION	99
III. TWO TAKES ON RISING HOUSING COSTS	104
IV. FIGHTING THE NEW EXCLUSION	113

INTRODUCTION

The term “exclusionary zoning” is understood to apply only to suburbs, where municipalities dominated by homeowner cartels anxious about property values and taxes demand land use regulations that prevent certain kinds of development and raise housing costs above what low-income families can afford to pay.¹ (“Housing costs” are just “property values” viewed from a different angle.) Decades of scholarship—legal and sociological—outline how these policies left low-income families stranded in faltering cities whose abandonment by suburban homeowners-to-be at least left behind a large supply of low-cost housing.² In cities, where renters predominate, and whose size and heterogeneity opened the door to special interest politics, developers had more power and a

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1. See WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS* (2001); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); see also *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983); *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975).

2. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 8 (1999); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 45 (1993); see also Roderick Hills, Professor of Law, N.Y. Univ. Sch. of Law, Presentation at the Fordham Urban Law Journal Symposium: What Is Urban Law Today (Feb. 23, 2013) (calling “White Flight”—the abandonment of central cities by whites in the mid-Twentieth Century—“the largest affordable housing program in U.S. history”).

much freer hand. To the extent they wanted to build, they could.³ In the 1960s, '70s, and beyond, many cities were desperate for any development they could get.

A separate and newer strain of scholarship—primarily economic—has complicated and updated this story. Urban populations and incomes grew as people of relative means trickled back in to certain cities starting in the 1970s and '80s, then streamed in as urban crime subsided and the economy boomed into the 2000s. These new residents expected to exert a measure of control over their cities and neighborhoods, and demand for development controls increased as cities got denser and richer.⁴ Starting with San Francisco and Los Angeles, and later Boston, New York, and Washington, D.C., and now spreading to the interior, development is not keeping pace with the number of people who want to live in these regions.

As in the suburbs, cities began to employ land use restrictions to limit the density of housing, impose lengthy approvals processes that provide ample hooks for NIMBYs, and mandate expensive forms of housing.⁵ Many of the country's most desirable and most economically vibrant cities are no longer "Growth Machines." They may be getting richer, and in that sense "growing," but an emphasis on building housing and adding population is a thing of the past. Consequently, housing prices in these post-Growth Machine cities have risen much faster than the national average.⁶ The effect has been the same as in the exclusionary suburbs: The anti-development orientation of certain cities is turning them into preserves for the wealthy as housing costs increase beyond what lower-income families can afford to pay. The phenomenon deserves a similar name—the New Exclusionary Zoning.

If low-income families can't afford the suburbs and they can't afford the cities, where should they go? For the first time in American history, it makes sense to talk about whole regions of the country "gentrifying"—whole metropolitan areas whose high housing costs have rendered them inhospitable to low-income families, who, along with solidly middle class families, also feeling the

3. See generally Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309 (1976).

4. WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 66 (1985); Albert Saiz, *The Geographic Determinants to Housing Supply*, 125 Q. J. OF ECON. 1253, 1255 (2010); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1674-75 (2013).

5. "NIMBY" stands for "not in my backyard" and is used as a pejorative term for groups opposed to an excessively wide-range of development in their neighborhoods or municipalities. FISCHER, *supra* note 4, at 207-30; FISCHER, *supra* note 1, at xi-i; Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms from the Inside Out*, 119 YALE L.J. 1904, 1910-12 (2010); Schleicher, *supra* note 4, at 33-52.

6. See generally Edward Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AMER. ECON. REV. 329 (2005); Saiz, *supra* note 4; Joseph Gyourko et al., *Superstar Cities* (Nat'l Bureau Econ. Research, Working Paper No. 12355, 2006); Andrew D. Paciorek, *Supply Constraints and Housing Market Dynamics* (Federal Reserve Board, Finance and Economic Discussion Series 2012), available at <http://www.federalreserve.gov/pubs/feds/2012/201201/201201pap.pdf>.

crunch, have been paying higher housing costs or migrating to low-housing cost (and low-wage) areas like Texas, Arizona, or North Carolina.⁷

Underlying both of these phenomena—high housing costs in the suburbs and high housing costs in the cities—is a relatively straightforward problem of supply and demand. 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. In the regions that form this Article’s focus, the second effect predominates.⁸

This is uncontroversial among urban economists but not broadly understood by low-income families, advocates for low-income families, housing activists, and their allies in academia, policy, and government—in short, the housing advocacy community. In the face of higher housing costs, the housing advocacy community tends to argue for a “kludgy”⁹ set of policies that can actually *prevent* new development and end up *increasing* housing prices—campaigns to impose building moratoria, for example, or downzonings, community benefits agreements and other exactions, lengthy approvals procedures that disadvantage developers relative to NIMBYs, various forms of rent control, and a focus on affordable housing to the exclusion of other types of development.¹⁰ Many of these tools have their uses—many low-income families

7. RYAN AVENT, *THE GATED CITY* 861-1007 (2011); EDWARD GLAESER, *TRIUMPH OF THE CITY*, 64-67 (2011); Peter Ganong & Daniel Shoag, *Why Has Regional Convergence in the US Stopped?* (Harv. Kennedy Sch. Working Paper No. RWP12-028, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081216. For most of American history, people have migrated from areas with low incomes to areas with high incomes in search of economic opportunity (this is also a driver of global migration). Over the last couple decades, however, the fastest growing regions, in terms of population, have all had incomes 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 towards high incomes. See MATTHEW YGLESIAS, *THE RENT IS TOO DAMN HIGH* 364-508 (2012).

8. EDWARD GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* 341-554 (2008); Edward L. Glaeser et al., *Housing Supply and Housing Bubbles*, 64 J. URB. ECON. 198, 204 (2008).

9. STEVEN M. TELES, *NEW AM. FOUND., KLUDGEOCRACY: THE AMERICAN WAY OF POLICY* (Dec. 20, 2012), available at http://www.newamerica.net/publications/policy/kludgeocracy_the_american_way_of_policy.

10. Almost none of the legal research and writing on gentrification draws on the economic research into the nature of housing markets and housing pricing, for reasons addressed below. See generally Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Postmodernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 818 (1993); Jorge O. Elorza, *Absentee Landlords, Rent Control and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in Urban America*, 17 CORNELL J. L. & PUB. POL’Y 1, 51 (2007); Matthew Jerzyk, *Gentrification’s Third Way: An Analysis of Housing Policy & Gentrification in Providence*, 3 HARV. L. & POL’Y REV. 413 (2009); Deliah D. Lawrence, *Can Communities Effectively Fight Displacement Caused By Gentrification?*, 11 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 357, 360 (2002); Diane K. Levy et al., *In the Face of Gentrification: Case Studies of Local Efforts to Mitigate Displacement*, 16 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 238 (2007); Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New*

continue to need subsidies even where housing is cheap—but they should be considered in light of broader drivers of housing costs—namely, supply and demand.

A city's ability to remain affordable depends most crucially on its ability to expand housing supply in the face of increased demand. Among the people who care most about high housing costs there is a lack of understanding of the main causes and the policy approaches that can address them. The central message of this Article is that the housing advocacy community—from the shoe-leather organizer to the academic theoretician—needs to abandon its reflexively anti-development sentiments and embrace an agenda that accepts and advocates for increased housing development of all types as a way to blunt rising housing costs in the country's most expensive markets.

In the suburbs, the politics of exclusionary policies are hopeless: the cartel-like interests of suburban “homevoters” are well-served by current exclusionary policies, state and federal courts for the most part won't intervene, and there is very little interest among state legislators to impose regional or state-wide solutions.¹¹ The picture is less bleak in exclusionary cities: renters, who would directly benefit from lower housing prices, are a majority in many of these cities, and advocates for affordable housing already form a politically influential bloc—but they use their power to ends that are often counterproductive.¹² While there are other serious obstacles to expanding housing supply, the housing advocacy community could and should become an important part of the

York City, 28 WASH. U. J. URB. & CONTEMP. L. 195 (1985) [hereinafter Marcuse, *Gentrification, Abandonment, and Displacement*]; Peter Marcuse, *To Control Gentrification: Anti-Displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931 (1985) [hereinafter Marcuse, *To Control Gentrification*]; John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”*: *Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433 (2003); Molly McUsic, Note, *Re-assessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988); Dara K. Newman, Note, *If You Can't Build It, They Won't Come: Condominium Construction Moratoria and Gentrification*, 35 B.C. ENVTL. AFF. L. REV. 593 (2008).

11. The legal academy hasn't completely run out of ideas. See, e.g., LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009) (arguing for a new set of policies that would redefine homeownership to align the interests of risk-averse homeowners with those of the regional public). Other articles argue for judicial intervention or removing control of land use to regional or state bodies; these ideas have been around for a while and there is no indication that they will be embraced in the face of settled doctrine and massive unpopularity, respectively.

12. I assume simply that affordable housing advocates want housing prices to be lower, though I want to acknowledge the dangers of using a narrow economic lens into real property and land use issues. Housing markets and land use debates are drenched in sentiment and not completely legible through rational economic analysis. See, e.g., Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

fight against urban land use regimes that systematically privilege a city's wealthiest and most powerful residents.¹³

This Article considers these issues through the lens of housing costs in gentrifying neighborhoods, defined as low-income neighborhoods experiencing an increase in demand and a consequent rise in housing costs and average incomes.¹⁴ There are a couple reasons to shift down in scale. First, gentrification and exclusion are intimately related at a neighborhood level. If a high-demand, high-cost neighborhood won't build, developers and people looking for housing will be diverted to the nearest low-cost neighborhoods. That increases demand and development and leads to gentrification. (Don't blame in-movers or developers for gentrification—they'd rather be in the high-cost neighborhoods. Blame the exclusionary practices of people in the high-cost neighborhoods.) Second, gentrifying neighborhoods are the most contentious and perhaps the most important front of the affordable housing wars—they are the areas where costs are rising the fastest and most consequentially. For the universe of people concerned with the ability of low-income families to house themselves, gentrifying neighborhoods present the starkest picture of the problem.

This Article uses economics as a positive analytic tool to think through the causes and potential solutions of some of the problems that attend gentrification in low-income neighborhoods. It does not use economics as a source of normative commitments.¹⁵ The proposals in this Article do not seek to maximize economic efficiency, land values, consumer surplus, welfare,¹⁶ or similar topics. This Article also makes no arguments (despite their considerable merits!) about the benefits of agglomeration to individual productivity or about the benefits of density for local, regional, and national economic output,¹⁷ locational efficiency,¹⁸ and the environment.¹⁹ Much of the voluminous qualitative and

13. The problem also has a very significant procedural aspect as well. See Schleicher, *supra* note 4, for a fascinating account of the way the structures of city politics and land use procedure lead to levels of development that are suboptimal from a city-wide, regional, or national perspective. See also David Schleicher & Roderick Hills, *Balancing the "Zoning Budget,"* 62 CASE W. RES. L. REV. 81 (2011).

14. Jacob L. Vigdor, *Does Gentrification Harm the Poor?*, BROOKINGS-WHARTON PAPERS ON URB. AFF. 133 (2002); Ingrid Gould Ellen & Katherine M. O'Regan, *How Low Income Neighborhoods Change: Entry, Exit and Enhancement*, (U.S. Census Bureau Center for Economic Studies, Paper No. CES-WP-10-19, 2010), available at <http://ssrn.com/abstract=1687759>; Veronica Guerrieri et al., *Endogenous Gentrification and Housing-Price Dynamics*, (Fed. Reserve Bank of Cleveland, Working Paper No. 10-08R, 2012), available at <http://papers.ssrn.com/abstract=1657176>.

15. Eduardo M. Peñalver, *supra* note 12, at 832–846. Peñalver makes the very helpful distinction between the use of economics as a positive analytical tool and the use of economics as a source of normative commitments. He sees the former as extremely useful and the latter as overreach.

16. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2006).

17. AVENT, *supra* note 7; GLAESER, *supra* note 7; Schleicher, *supra* note 4.

18. See Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637 (2012).

social-theoretical work on gentrification is indispensable, but this Article proceeds in the belief that when studying the consequences of various policy prescriptions one should not ignore economics.²⁰

I. LOOKING AT HOUSING MARKETS SCHEMATICALLY

Housing markets, like other markets, are fundamentally a function of supply and demand. To say so is not an attempt to minimize the extraordinary degree to which housing markets are structured and influenced by non-quantitative, affective, not-strictly-economic factors like racial prejudice or senses of identity, belonging, and personhood.²¹ Both supply and demand in housing markets are dynamic and influenced by factors that range from the extremely local—neighborhood cachet or a nuisance next door—to the national and global—credit markets or the state of the world economy.²²

It is important also to keep in mind that housing is a composite good whose price reflects the house itself and the land it sits on, but also a full range of locational amenities and disamenities. A good school district, pleasant weather, and access to a booming economy are capitalized into housing prices, as are high crime rates or proximity to a waste transfer station.²³ Housing markets have a dependent relationship with mortgage markets, as well—looser lending, as during the boom years, can have a dramatic effect on the supply of and demand for housing, as can a credit crunch.²⁴

Eliding all that for a moment, it will be helpful to take a schematic look at the typical functioning of housing markets before delving into the particular pathologies of housing markets in the areas of concern to this Article.

In most of the country, geographically speaking, demand for housing and supply of housing maintain a rough balance.²⁵ In a typical region, an increase in demand for housing will lead to a temporary housing shortage. Prices will increase as potential buyers outbid each other for a scarce supply of housing. This increase in price signals to developers that there are profits to be made and that it's time to build. New land is brought under development, or old land is

19. See DAVID OWEN, *GREEN METROPOLIS: WHY LIVING SMALLER, LIVING CLOSER, AND DRIVING LESS ARE THE KEYS TO SUSTAINABILITY* (2010).

20. See Peter Byrne, *Rhetoric and Realities of Gentrification: Reply to Powell and Spencer*, 46 HOW. L.J. 491, 494 (2003); Peñalver, *supra* note 12.

21. See, e.g., DEBRA SATZ, *WHY SOME THINGS SHOULD NOT BE FOR SALE: THE LIMITS OF MARKETS* (2010).

22. Adam Levitin & Susan Wachter, *Why Housing?*, (Univ. of Pa. Inst. for Law & Econ., Research Paper No. 12-28, 2013), available at <http://ssrn.com/abstract=2114620>.

23. FISCHER, *supra* note 4, at 105.

24. We've of course seen both situations, in exaggerated fashion, over the last decade. The boom and bust also illustrate the extent to which markets are driven by not-strictly-economic stories and beliefs—in 2008, for example, the story that housing prices would continue to rise indefinitely.

25. Glaeser et al., *supra* note 8.

developed more densely. As developers build, the housing shortage eases and prices start to fall. Developers will continue to build so long as they can sell it for what they spent to build it—the cost of land plus construction costs and normal profit.²⁶ In these parts of the country, then, housing costs roughly equal land costs plus construction costs plus normal profit.²⁷ When demand for housing increases, as in Houston, or Phoenix, or Wichita, more housing gets built.²⁸ Today, the median sale price of a house in Phoenix is about \$160,000.²⁹

There are other parts of the country where the supply of housing is greater than the demand for housing. These tend to be places with shrinking economies and not much else in the way of amenities to recommend them. Think of Detroit or Buffalo or other parts of the Rust Belt or Great Plains, that are much smaller today, population-wise, than they once were. In these places, there are more houses on the market than there are people who want to buy them or live in them. There's a glut. There's no shortage of owners willing to unload existing housing at below the cost of new construction. How far below replacement depends on how big the supply and how weak the demand. The median sale price of a house in Detroit in 2013 was about \$40,000.³⁰

In these parts of the country, then, housing costs are below the cost of land and construction. Not much new development happens in places like this.³¹ If a developer built a house and tried to charge land costs plus construction costs, she would be hard-pressed to find a buyer because the market is glutted with lower-cost substitutes—decent existing housing that the current owners are willing to unload below the cost of new construction. Since a developer would not be able to recoup her costs and would therefore lose money, she will not build.

Finally, there are parts of the country where demand for housing is greater—and sometimes much greater—than the supply of housing. Think of the famously high housing costs in San Francisco and Manhattan.³² Demand for housing outstrips the supply, and there is a housing shortage. Unlike Wichita or

26. From here on out, this Article will subsume normal profit into construction costs. ARTHUR O'SULLIVAN, *URBAN ECONOMICS* 374-76 (1996).

27. GLAESER & GYOURKO, *supra* note 8, at 491-554; Paciorek, *supra* note 6, at 3.

28. I make the simplifying assumption that the costs of renting a house and costs of buying a house bear a rough-and-ready relation to each other across the different types of housing markets discussed in this Part. If the cost of buying housing goes up in a particular area, the cost of renting in that area will follow, and if the cost of buying housing in one area is greater than the cost of buying housing in a second area, the cost of renting will be higher in the first area as well. See Paciorek, *supra* note 6, at 7.

29. *Phoenix Market Trends*, TRULIA.COM, http://www.trulia.com/real_estate/Phoenix-Arizona/market-trends (last visited Mar. 30, 2014).

30. *Detroit Market Trends*, TRULIA.COM, http://www.trulia.com/real_estate/Detroit-Michigan/market-trends (last visited Mar. 30, 2014).

31. GLAESER & GYOURKO, *supra* note 8, at 1377.

32. Glaeser et al., *supra* note 6, at 329-31; Gyourko et al., *supra* note 6, at 2-4; Paciorek, *supra* note 6, at 1-4; Saiz, *supra* note 4, at 1253-55.

Phoenix, this is not a temporary condition. Developers want to build—there are certainly profits to be made—but they can't for reasons we'll explore below.

In the face of capped supply, housing costs in these areas are higher than land costs plus construction costs on a seemingly permanent basis.³³ The median sale price of a house in San Francisco in 2013 was about \$850,000. The median sale price of a house in Manhattan in 2013 was just over \$1,000,000.³⁴

Implicit in the above discussion is the fact that prices are set by the market, not by developers or, for that matter, buyers. If a developer builds a median-quality house in Phoenix and attempts to sell it for \$850,000, she will not be able to sell the house. The median sales price for a home in Phoenix—\$160,000—indicates that there are many similar-quality houses on the market for a lot less. As much as the developer would like to make several hundred thousand dollars in profit, she will not make anything until she lowers the house to a competitive price. There will be no demand for houses so high above the market price.

The same rules apply in San Francisco, even though the market looks very different. Many, many people want access to San Francisco's booming economy, mild climate, world-class consumption opportunities, and its refined-yet-relaxed lifestyle. If a developer wanted to charge \$160,000 for a median-quality house in San Francisco, she would be inundated with thousands of potential buyers—there would be tremendous demand because similar houses in the area are selling for much, much more. The developer might try to narrow down the pool of potential buyers by gradually raising the price, kind of like an auction. As the price rose, fewer and fewer buyers would be interested, until at last there would only be one potential buyer—the person with the greatest willingness to pay. Chances are that person would be willing to pay roughly what other similar-quality houses are going for. If the price were higher than that, the potential buyer would just buy a similar-quality house for less. If the price were lower than that, there would likely be more than one potential buyer and the developer would be able to raise the price a bit.

In both situations, the developer would like to sell the house for more, and the buyer would like to buy the house for less, but both are “price takers”—that is, in the context of a big regional housing market, no single developer and no single buyer has the power to dictate price.³⁵ The price is determined by the interaction of supply and demand on the market. The concept of “price-taking” is important and we'll return to it later in the Article.

33. It is worth noting that land costs and construction costs tend to be higher in these areas than elsewhere, but that does not wholly account for the price differences between places like Manhattan and places like Phoenix. Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311 n.82 (2010).

34. *New York Market Trends*, TRULIA.COM, http://www.trulia.com/real_estate/New_York-New_York/market-trends (last visited Mar. 30, 2014).

35. See PAUL SAMUELSON & WILLIAM NORDHAUS, *ECONOMICS* (1998).

II. POLICY AND POLITICS OF THE NEW EXCLUSION

Why do these areas have such low housing supply elasticities? Stated another way: when prices go up, why doesn't the housing supply expand? A good deal of economic scholarship over the last decade has sought to answer this question. The answer is basically two-fold: the first reason is that many high-demand areas have a limited supply of developable land.³⁶ Compare Omaha to Los Angeles. Pick a point at the center of downtown Omaha, and imagine a fifty-mile radius extending from that point. The circle described encompasses overwhelmingly flat, dry, developable land. Developers could build almost anywhere on it. Do the same thing for Los Angeles and the circle described encompasses thousands of square miles of ocean and mountains that are undevelopable. This relative dearth of potentially developable land afflicts all coastal cities, as well as those surrounded by mountains, wetlands, etc. (Coastal California gets a double and sometimes triple whammy.) This raises the price of land, which goes into the land costs plus construction costs baseline, but can also prevent municipalities from quickly expanding housing supply, which, in high-demand areas, can help to send prices above the land costs plus construction costs baseline, at least temporarily.

The second and probably more crucial reason behind low housing supply elasticity is that various land-use regulations and political pressures prevent increases in housing supply.³⁷ This factor is more important because even along the coast and in other land-constrained areas, the technical capacity to develop more densely exists but is not exploited. San Francisco, for instance, whose housing prices, in real terms, increased nearly three times the national average, or about 458%, from 1960 to 2000, added just 269 housing units in 2011.³⁸ San Francisco grew more between 1950 and 1960 than it has since then.³⁹ But many parts of the city could be developed much more densely. How did this happen in San Francisco and other places where housing demand is greater than the supply?

A main factor has been the ascendance of nearly plenary local power over zoning, which limits the bulk of buildings and thereby the density at which developers can build. The zoning power, granted to municipalities by state enabling acts starting in the 1920s, is ostensibly limited by the police power to serve public health, safety, and the general welfare.⁴⁰ As late as the 1950s and '60s, municipalities that wanted to, say, zone out a particular hotel would have

36. See generally Saiz, *supra* note 4.

37. Edward Glaeser et al., *Why is Manhattan So Expensive?: Regulation and the Rise in House Prices*, 48 J.L. & ECON. 331 (2005); Glaeser et al., *supra* note 6; Gyourko et al., *supra* note 6; Paciorek, *supra* note 6.

38. Gyourko et al., *supra* note 6, at 8; Amanda Erickson, *The Number of the Day: 418*, ATLANTIC CITIES (May 21, 2012), <http://www.theatlanticcities.com/housing/2012/05/number-day-418/2065>.

39. Gyourko et al., *supra* note 6, at 18.

40. See *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

to make the argument that a hotel in that location would encourage the spread of venereal disease or corrupt the morals of youth.⁴¹ No more. Now any old justification will do, be it health- and safety-based, or simply economic or aesthetic.⁴² As long as there are no bald violations of equal protection or due process rights, state courts will uphold zoning laws. The Supreme Court has shown little interest in upsetting this state of affairs. Cities and other municipalities, formerly “chilled” by legal uncertainty, have zoned up with alacrity in the intervening decades.⁴³

Municipalities use Floor-Area Ratios (FAR) and other bulk limits embedded in zoning laws to keep densities as low as they want.⁴⁴ If San Francisco or Washington, D.C., wants to zone for low-density row houses rather than multi-family apartment buildings near BART or Metro stops, they are free to do so. If they want to impose robust parking requirements, which further limit density and add to the cost of development, they are free to do that, too. Certain constituencies demand it and so cities supply it, and that legally and practically limits the supply response in high-demand areas.⁴⁵

A host of new approvals procedures have also become popular over the last few decades. There might be a second layer of review, creating what’s known as “double-veto approvals,” as in parts of California, where locally approved projects then go before the California Coastal Commission.⁴⁶ Many projects in New York City must go through the multi-layered Uniform Land Use Review Procedure (ULURP), involving separate approvals by community boards, the borough president, the City Planning Commission, and sometimes City Council and the Mayor. Not all of these layers are empowered to veto a project, but the process creates multiple pressure points for anti-development activists to block developments.⁴⁷

The rise of environmentalism and environmental review has also been consequential, giving municipalities a positive rationale for growth control

41. RICHARD BABCOCK, *THE ZONING GAME* 35 (1965).

42. *See* *Berman v. Parker*, 348 U.S. 26 (1954).

43. FISCHER, *supra* note 4, at 49; Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1207-10 (1981).

44. Schleicher, *supra* note 4, at 18.

45. Michael Manville, *Parking Requirements as a Barrier to Housing Development: Regulation and Reform in Los Angeles* (Lewis Ctr. for Reg'l Policy Studies, Inst. of Transp. Studies, UCLA, 2010), available at http://www.its.ucla.edu/research/rpubs/Manville_ARO_DEC_2010.pdf.

46. Matthew Kahn et al., *The Housing Market Effects of Discrete Land Use Regulations: Evidence from the California Coastal Boundary Zone*, 19 J. OF HOUSING ECON. 269 (2010); FISCHER, *supra* note 4, at 26.

47. Michael H. Schill, *Removing Regulatory Barriers: One City’s Experience* (Furman Ctr. for Real Estate & Urban Policy, Working Paper No. 04-05, 2004), available at <http://furmancenter.org/files/publications/RemovingRegulatoryBarrierscombined0504.pdf>.

measures that are, in practice, exclusionary.⁴⁸ Many projects require an Environmental Impact Statement (EIS) under federal or state laws, and it is a tried-and-true tactic for opponents of a development to smuggle as many potential impacts as possible, whether conventionally “environmental” or not, into the public meetings that determine the scope of the EIS.⁴⁹

The advent of historic preservation in the 1960s is also part of this secular trend. Historic preservation districts effectively remove parts of the city from the stock of developable land and impose additional approvals for development within them. This makes development more expensive or prevents it outright, both of which raise housing prices in high-demand areas.⁵⁰ Open meetings laws also make it difficult or impossible for developers and city officials open to development to negotiate workable compromises and streamlined approvals.⁵¹ Imagine the scene if Tea Party activists were entitled to be present during high-level federal budget negotiations and you will get a sense of the effect of NIMBYs at a planning board meeting.

All of these approval processes make development more costly (adding to our land costs plus construction costs baseline) and also systematically skew the approvals game in favor of anti-development activists by giving them more hooks for legal action, more opportunities for delay, and in general more chances for them to win and for developers to lose. And while the remedy in a successful NIMBY suit is a blocked development, the remedy in a successful developer suit is typically the privilege of starting the costly approvals process all over again.⁵² Delay can kill projects outright if carrying costs and approvals costs become too burdensome. The developer loses the property or simply gives up.⁵³

To be clear, this is not an argument that approvals processes, community participation, environmental review, historic preservation, or open meetings laws should not exist. These laws and procedures have legitimate purposes and worthy ends. Frequently unacknowledged is the fact that they also raise the cost of development, which raises the cost of housing.⁵⁴ I’ll sketch potential policy

48. William A. Fischel, *Do Growth Controls Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulation* 1-3 (Lincoln Instit. of Land Policy, Working Paper No. 87-9, 1990).

49. See *Chinese Staff & Workers Ass’n v. City of New York*, 68 N.E.2d 359 (N.Y. 1986); Ellickson, *supra* note 43, 1204-05.

50. David B. Fein, Note, *Historic Districts: Preserving City Neighborhoods for the Privileged*, 60 N.Y.U. L. REV. 64 (1985); GLAESER, *supra* note 7, at 148-152.

51. FISCHEL, *supra* note 4, at 26.

52. *Id.* at 42.

53. I have experienced this first-hand as a land use attorney for Fair Share Housing Development, an affordable housing developer in South Jersey that grew out of the Mount Laurel exclusionary zoning cases in the 1970s and ‘80s. Suburban municipalities will baldly reject conforming applications for multifamily affordable development, knowing that applicants will most likely not be able to carry a property through a drawn-out legal battle.

54. Ellickson, *supra* note 43, at 388-403; Fischel, *supra* 48, at 1.

reforms in the final Part, but a first and basic step toward reform is acknowledging the costs and negative consequences of the laws and procedures and balancing them against their benefits. As it is, demand for restrictive land use regulations only gets greater as cities get richer and denser. In places like San Francisco or Brownstone Brooklyn, any increase in development pressure seems to induce a countervailing demand by local residents for stricter regulation of development.⁵⁵

Many housing advocates look favorably upon government regulation as a solution to the problem of rising housing costs, and in many cases regulations might help. Almost wholly unacknowledged by housing advocates is the role that the regulations outlined above have played in creating the problem. Whatever their virtues, these regulations, as they've evolved in urban areas, have helped relatively high-income homeowners increase property values and exert *de facto* private control over their neighborhoods to the detriment of renters and potential in-movers.⁵⁶ In the areas of primary concern for this Article, these regulations (and the anti-development politics they enable) have ushered in a new kind of exclusionary zoning.

Restricted development in high-demand urban regions creates a number of pathologies beyond unnecessarily high housing costs. Among these are reverse filtering, a bias toward luxury development, a bias toward large-scale development, and a bias toward politically savvy and capital-rich developers at the expense of smaller developers. These pathologies of course have a disproportionate impact on low-income people and communities. Most in the housing advocacy community place the blame squarely on developers, but these pathologies are more accurately described as the consequences of a dysfunctional and restricted housing market.

What is filtering? In smoothly functioning housing markets, where demand for housing is met by a supply response, new housing gently degrades over time, decreases in price and quality relative to subsequently built housing, and “filters” down to people of lower income levels.⁵⁷ Think of the car market: Expensive new cars become cheaper used cars, and are owned by people of suc-

55. FISCHER, *supra* note 4, at 66; see Francois Ortalo-Magne & Andrea Prat, *The Political Economy of Housing Supply: Homeowners, Workers, and Voters* (LSE STICERD, Research Paper No. TE514, 2007).

56. It is doubtful that the political force behind zoning was ever about “health, safety, and welfare.” See SEYMOUR TOLL, *ZONED AMERICAN* (1969) for an account of the passage of New York’s comprehensive zoning ordinance in 1916. Neighboring landowners pushed for zoning for bulk after the construction of the massive Equitable Building eased a shortage of office space in the financial district and pushed down rents. Wealthy merchants pushed for zoning for use to keep the immigrant hordes employed in the garment district away from the swank Ladies’ Mile shopping corridor.

57. ANTHONY DOWNS, *GROWTH CONTROLS AND AFFORDABLE HOUSING: DO THEY CONFLICT?* 5 (2004); FISCHER, *supra* note 4, at 329; DANIEL R. MANDELKER & ROGER MONTGOMERY, *HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES* 161-203 (1979); ARTHUR O’SULLIVAN, *URBAN ECONOMICS* 376-80 (1996); Ellickson, *supra* note 43, at 1184-87.

cessively lower income levels. Many in the housing advocacy community are skeptical of the idea of filtering, at least in part because of the unfortunate resonance with the widely disparaged theory of “trickle-down economics” from the Reagan Era. But “filtering” is not a policy so much as a description of what happens in well-functioning housing markets. In fact, filtering provides the overwhelming majority of low-income housing in the United States.⁵⁸ By increasing the supply and facilitating filtering, even the construction of luxury housing can help to blunt the rise of housing costs for the entire market.⁵⁹

In areas with a capped supply and increasing demand, housing in effect “filters up”—housing formerly occupied by low-income people becomes housing for high-income people. If high-income people are unable to build new housing for themselves, they will buy existing housing and fix it up. (Now think of the Cuban car market: Restrictions on sales and imports cap the supply, meaning that even clunkers from the 1950s cost tens of thousands of dollars.)⁶⁰ This is the story of the Mission in San Francisco, Harlem in New York, or Logan Circle in Washington, D.C. “Filtering up” is just another word for “gentrifying.”⁶¹ This might be another reason why housing advocates are skeptical of filtering—because of capped supply, housing does not filter down in the cities where they live.

Restricting development in high-demand areas also biases the market toward luxury development. If profit-maximizing developers can only build a limited number of units, they will build the units with the highest margins—for instance, luxury housing.⁶² Not until upper-end demand is sated will developers build lower-margin products that meet demand lower down the income scale. This dynamic has been at work in Washington, D.C., where an unusually large pipeline of “Class A” luxury development has driven down Class A rents and led to increased investment in the Class B and C markets.⁶³

The flipside of restricted supply is pent-up demand, and pent-up demand can create the conditions for development on a scale that harkens back to the Urban Renewal era. A common NIMBY complaint is that a particular development is “out of scale,” or that it would change neighborhood character or dis-

58. DOWNS, *supra* note 57, at 5.

59. FISCHER, *supra* note 4, at 337.

60. Nick Miroff, *In Cuba, A Used Car Is No Bargain*, NPR (Nov. 12, 2013), <http://www.npr.org/2011/10/31/141858419/in-cuba-a-used-car-is-no-bargain>.

61. Jed Kolko, *The Determinants of Gentrification* (2007) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985714.

62. A similar dynamic was observed in the American market for Japanese automobiles in the 1980s and ‘90s after the imposition of import quotas. When Japanese automakers substituted high-margin luxury vehicles for less expensive models, their revenues actually increased. See David Sanger, *Japanese Seen Extending Auto Quotas* (N.Y. TIMES), Jan. 12, 1990, <http://www.nytimes.com/1990/01/12/business/japan-seen-extending-auto-quotas.html>.

63. Philip Tilly, *Vacancies Up, Rents Down for Class B Apartments in Region*, WASH. POST (July 28, 2013), http://articles.washingtonpost.com/2013-07-28/business/40864693_1_class-b-rents-class-a.

rupt an existing community. Large-scale development can certainly do these things, as the Urban Renewal era showed us. A city that keeps up with demand over time by allowing small-scale, piecemeal, organic development has no need for potentially destructive mega-developments.

Finally, multilevel approvals and opposition to development represent a tremendous barrier to entry for smaller developers and can be insurmountable to all but the largest, savviest, and richest developers with the closest ties to city government.

These developers are easily cast as villains by a housing advocacy community that fights on behalf of a low-income constituency that could never afford a spot in one of the developers' projects. While the typical for-profit developer is axiomatically an amoral, profit-seeking creature, the pathologies outlined above are the consequences of restricting development in high-demand areas, not of the greed of developers.⁶⁴

III. TWO TAKES ON RISING HOUSING COSTS

Now that we have a basic set of intuitions about housing markets, this Article will move down in scale to the neighborhood. This Article has implicitly treated housing costs as uniform across a city, but obviously that's not true—housing costs vary dramatically from neighborhood to neighborhood.⁶⁵ People with higher incomes will tend to outbid people with lower incomes for nice homes in desirable locations, so neighborhoods with high-quality homes and good locational amenities will tend to have people of higher incomes, and neighborhoods with low-quality homes and poor locational amenities will tend to have people of lower incomes.⁶⁶ Although some neighborhoods remain anchored to high or low incomes owing to persisting amenities or disamenities, other neighborhoods go from high-income to low-income and back again over time.⁶⁷

There are two general types of neighborhood change: the first is preference- or taste-driven change.⁶⁸ The move from city to suburb, for instance, was driven in part by the desire of many people for detached single-family homes with garages and yards—the suburban lifestyle.⁶⁹ A couple decades later,

64. As Ice-T said, "Don't hate the player, hate the game." ICE-T, *Don't Hate the Playa*, on *THE SEVENTH DEADLY SIN* (Coroner/Atomic Pop 1999).

65. Guerrieri et al., *supra* note 14, at 2.

66. See Sanghoon Lee & Jeffrey Lin, *Natural Amenities, Neighborhood Dynamics, and Persistence in the Spatial Distribution of Income* (Fed. Reserve Bank of Phila., Working Paper No. 13-48, Dec. 6, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2365778.

67. *Id.* at 2-3.

68. Vigdor, *supra* note 14, at 140.

69. Of course this preference was heavily shaped and incentivized by government intervention. See KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1987).

brownstones and other traditional architectural styles became fashionable, and those neighborhoods became more desirable again.⁷⁰ With preference-driven change, the level of demand in a given city isn't necessarily changing; it's just directing itself from one type of housing to another and from particular neighborhoods to others.⁷¹ Prices in neighborhoods will change, but regional price levels may not.

This Article is much more concerned with a second type of change: change driven by the expansion of the regional economy and the consequent increase in regional demand for housing.⁷² In the case of a region-wide boom, for instance, housing demand will increase and prices will begin to rise. In areas with low housing-supply elasticities, the increase in demand leads to higher prices instead of an expanded supply of housing. As an area experiences a regional demand increase, housing costs across the city do not rise uniformly.⁷³ The relatively low-income neighborhoods with low initial housing costs appreciate at a much faster rate than high-income neighborhoods with housing costs that are already high.⁷⁴ To draw that out a bit—in areas that cannot or will not build, low-income neighborhoods are systematically hit the hardest. Renters in low-income neighborhoods suffer the most.

Housing costs in low-income neighborhoods in high-demand, low-elasticity areas do not appreciate at a uniform rate, however. According to a study that comprehensively tracked intracity variation in housing prices in such areas over time, the low-income neighborhoods that border high-income neighborhoods appreciate at a substantially higher rate than the low-income neighborhoods that are farther away from high-income neighborhoods.⁷⁵ As a metropolitan area gets richer and housing prices increase, neighborhoods like Harlem, which abuts high-income areas, will gentrify before neighborhoods like Brownsville, Brooklyn, which is relatively isolated from high-income areas.

The phenomenon makes sense when considered within a supply and demand framework—the highest-demand neighborhoods will tend to be the highest income, since high-income people generally have a higher willingness (and ability) to pay. High-income people tend to find and sit on the highest amenity neighborhoods.⁷⁶ For a variety of reasons, these neighborhoods also tend to

70. SULEIMAN OSMAN, *THE INVENTION OF BROWNSTONE BROOKLYN: GENTRIFICATION AND THE SEARCH FOR AUTHENTICITY IN POSTWAR NEW YORK* (2012); Aoki, *supra* note 10.

71. See Marcuse, *Gentrification, Abandonment, and Displacement*, *supra* note 10, for a discussion premised on preference-driven change that assumes a stable population, meaning that population inflows to certain neighborhoods (gentrification) necessitates population outflows from other neighborhoods (abandonment).

72. Vigdor, *supra* note 14, at 3-4.

73. Guerrieri et al., *supra* note 14, at 2-6.

74. *Id.* at 4.

75. *Id.* at 5.

76. Lee & Lin, *supra* note 66.

have the most restrictive regulations—the relationship between property values and restrictive land-use regulations takes the form of a positive feedback loop; high-income residents usually make the best organized, best connected, and most forceful NIMBY groups; and many historic districts exist in high-income neighborhoods.⁷⁷ People who want to live in these neighborhoods but who cannot afford housing there will seek out the closest substitutes that they can afford, and most often those substitutes are the nearest neighborhoods of sufficiently low cost. When metropolitan regions experience an upsurge in demand, high-income, high-housing-cost neighborhoods will basically expand as housing in neighboring low-income, low-housing-cost neighborhoods gets bid up. In this sense, gentrification is fundamentally a *demand-side spillover phenomenon*. People want to live in the highest-income, highest-demand areas, but there's no room and it's too expensive. Instead, they go to the nearest low-income neighborhood and bid up prices there.

As demand to live in particular neighborhoods increases, *ceteris paribus*, housing costs increase. This Article assumes that gentrification is a policy concern because it displaces low-income people *or* forces them to pay higher housing costs, both of which are potentially harmful.⁷⁸ This Article sidesteps the debate between housing advocates who maintain that gentrification causes widespread displacement⁷⁹ and certain academic skeptics who maintain that the empirical data is ambiguous.⁸⁰ It is not necessary to resolve these debates if we grant that unnecessarily high housing costs are a bad thing. Whether or not those costs cause displacement, they have to be borne by the people who live in a neighborhood in a way that disproportionately burdens low-income people. Studies that use housing cost, household income, and demographic data can readily identify low-income neighborhoods experiencing increases in housing costs and incomes. There is good and unambiguous data on this. The economic

77. FISCHER, *supra* note 4, at 173-75; GLAESER, *supra* note 7, at 148-52.

78. This Article remains agnostic as to whether gentrification is good or bad on balance, though I agree with many of the arguments about the benefits to low-income people of gentrifying neighborhoods. Less crime, cleaner streets, better schools, access to higher-paying jobs, wealthier markets, and a wider array of goods and services are good things. *See, e.g.,* J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405 (2003). Many housing advocates claim that these benefits are either inaccessible to longtime residents or outweighed by the loss of the neighborhood and the relationships among people in that neighborhood as they were prior to the influx of higher-income people. *See* NEIL SMITH, *THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY* (1996); Powell & Spencer, *supra* note 10.

79. Byrne, *supra* note 78; Marcuse, *Gentrification, Abandonment, and Displacement*, *supra* note 10; Marcuse, *To Control Gentrification*, *supra* note 10.

80. Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS'N. 39-52 (2004); Lance Freeman, *Displacement or Succession? Residential Mobility in Gentrifying Neighborhoods*, 40 URB. AFF. REV. 463-91 (2005); Vigdor, *supra* note 14.

studies this Article relies on most heavily track gentrification in this more elegant and less ambiguous way.⁸¹

Note the driver of gentrification in this model: demand.⁸² Inflation aside, prices will not increase unless there is an increase in demand relative to supply.⁸³ The resulting increase in prices indicates to developers that it's time to build. The potential profitability of a project depends on how much revenue it can generate from rents or from the sale of units. Developers will not build and, crucially, lenders will not lend, unless the rents or sales of units will cover operating expenses and debt service plus profit.⁸⁴ As the general price level in a neighborhood increases, projects that would not have been profitable to build at Time A become profitable to build at Time A+1. Developers' appetite for risk will vary, and sometimes development decisions are made based on speculative increases rather than current levels. Still—new development follows demand and the price increases and profit-making opportunities it occasions.

Remember: individual developers are price-takers. While developers use marketing, various amenities, and whatever else in the attempt to maximize rents and sale prices in their buildings, they have no control over the general price level in the housing market. As such, new construction in a gentrifying neighborhood is just a symptom of increased demand; try as they might, developers cannot drive the gentrification process by building luxury buildings and charging a lot to live there. If they build in areas without sufficient demand, they will lose money. Their choice in that situation will be to charge market rents and operate at a loss, or try to charge the rents necessary for the project to pencil out and operate an empty building.

Housing advocates may want to prevent the construction of new housing in low-income neighborhoods—a phenomenon explored in the next Part—but by the time a developer wants to build a luxury building in a neighborhood, it's already too late. High-income people are coming to bid up housing prices whether the building gets built or not.

It may not be the case that new construction can *never* induce its own demand. Perhaps some signature project by a high-profile architect can draw people to a previously non-gentrifying neighborhood through some residential analog to the Bilbao Effect, though it is difficult to imagine a developer who would try. And government infrastructure investment is a type of development that *can* induce demand—see the “Greenline Effect” in Washington, DC, that made low-income neighborhoods more convenient and attractive to higher-income

81. For an instance where this is done elegantly, see Guerrieri et al., *supra* note 14.

82. AVENT, *supra* note 7, at 1008-1296; GLAESER, *supra* note 7, at 161-63; YGLESIAS, *supra* note 7, at 664-740.

83. This could also come from a sudden decrease in supply, as after a natural disaster, though this is much less common. Note, though, that gentrifying neighborhoods often experience a marginal decrease in supply as smaller, lower-cost dwellings are combined into larger, higher-cost dwellings. See *infra* note 121 and accompanying text.

84. BABCOCK, *supra* note 41, at 44.

residents.⁸⁵ But, in the main, private developers will only build if the demand is already there to pay for the development.

Most in the housing advocacy community subscribe to what might be called a *supply-side theory* of gentrification. This theory is based on the idea that new buildings, renovated housing, and shops catering to high-end tastes *cause* gentrification.⁸⁶ If you want to know whom to blame, look to developers and financial institutions that target neighborhoods for gentrification and develop buildings that low-income residents can't afford, necessitating an influx of high-income residents.⁸⁷ Developers and other businesses set up shop to serve the new higher-income clientele, not the existing low-income residents. Higher housing costs force some residents to move; neighborhood character changes, leaving a less hospitable environment for anybody who can afford to pay higher rents and stay. In short, development causes gentrification.

This theory has serious implications for their recommended policy prescriptions. If development *causes* gentrification, then the best way to stop gentrification is to stop development. Iconic anti-gentrification campaigns in New York, Washington, D.C., San Francisco, and elsewhere involve coalitions of low-income people, activists and organizers, community groups, and allied elected officials working together to prevent some luxury high-rise or another from being built in a low-income area designated as the new “cool” neighborhood. Efforts to prevent particular developments often go hand-in-hand with proposals to downzone neighborhoods facing development pressure, to impose moratoria on forms of development associated with gentrification, or to exact Community Benefits Agreements to any development that does occur, or to push new construction of affordable housing to the exclusion of other forms of development.⁸⁸ Some of these policies have useful and important applications, but all express an impulse to clamp down on development in the face of gentrification pressure. These strategies increase housing costs by restricting a housing supply response or by increasing development costs.⁸⁹ If the goal is to

85. YGLESIAS, *supra* note 7, at 683.

86. GLAESER, *supra* note 7, at 144-148; YGLESIAS, *supra* note 7, at 664-740.

87. See JANE JACOBS, *DEATH AND LIFE OF GREAT AMERICAN CITIES 187-99* (1956).

88. See, e.g., Meredith Hoffman, *Bushwick Housing Boom Draws Local Backlash*, DNA INFO (Mar. 28, 2013), <http://www.dnainfo.com/new-york/20130328/bushwick/bushwick-housing-boom-draws-local-backlash>; Jennifer 8. Lee, *Lower East Side Rezoning Plan Has Defenders*, N.Y. TIMES (Aug. 7, 2008), <http://cityroom.blogs.nytimes.com/2008/08/07/lower-east-side-rezoning-plan-has-defenders>. For the spate of films that document anti-gentrification movements in New York City (and that are themselves anti-gentrification and anti-development), see, for example, *BATTLE FOR BROOKLYN* (Rumur Films 2011); *BROOKLYN MATTERS* (Building History Films 2007); *GUT RENOVATION* (Outcast Films 2012); *MY BROOKLYN* (Anderson 2012); *THE VANISHING CITY* (Senko and DeRosa 2009). Furthermore, see *Chinese Staff & Workers v. City of N.Y.*, 68 N.Y.2d 359 (1986), as an example of the many lawsuits anti-gentrification groups bring in an effort to stifle development.

89. Affordable housing development is a partial exception that we'll explore further below—it typically creates a relatively small number of subsidized units reserved for fami-

moderate housing price increases so that existing residents can remain in the neighborhood, this is not the policy agenda to pursue.

Supply-side theories of gentrification animate the work of many advocacy organizations. One classic example comes from a case initiated by the Chinese Staff & Workers Association, a remarkable coalition of low-income restaurant and garment workers in New York City. In *Chinese Staff & Workers Association, et al. v. City of New York*,⁹⁰ Chinese Staff sued the City under the State and the City Environmental Quality Review Acts (SEQRA and CEQR) to rescind the permits for a luxury high-rise apartment building, the Henry Street Towers, which was slated to be built on a vacant lot in Chinatown. They argued that the Environmental Impact Statement required under SEQRA and CEQR failed to consider “the potential displacement of local residents and businesses is an effect on population patterns and neighborhood character.”⁹¹ An amicus brief from the Association for Neighborhood and Housing Development, or ANHD, one of the New York City’s largest alliances of tenants’ advocates and affordable housing nonprofits, argued that environmental review under SEQRA and CEQR should consider socioeconomic impacts and the growing problem of gentrification.⁹² The New York Court of Appeals agreed. Rather than ordering an amended declaration, the court rescinded the permits and directed the City and the developer to begin environmental review anew, a remedy that was assured to delay the project for years and cost hundreds of thousands of dollars. The suit is premised on the belief that developing new market-rate housing in the neighborhood would lead to gentrification, higher housing costs, and increased displacement. (Note that the project was to be built on a vacant lot, so no direct displacement would have occurred.) The court remained agnostic on the merits of that argument, but imposed an ostensibly split-the-baby ruling that actually had the effect of stopping the project. The case demonstrates in early form what has become a common tactic among groups opposed to a particular project—introduce as large and as diverse a set of concerns as possible into environmental review at the scoping stage in the hopes of blocking the project or slowing down the approvals process.

Similar sentiments drive efforts to fight gentrification today. In Bushwick, Brooklyn, probably New York City’s fastest-gentrifying neighborhood, local housing advocates led by St. Nick’s Alliance, a neighborhood affordable housing advocacy organization, pushed for a down-zoning to prevent high-rise housing development in the face of massive increases in average rents.⁹³ Note

lies below certain percentages of Area Median Income, or AMI, but affordable housing requirements can prevent development and do raise the cost of development.

90. 68 N.Y.2d 359 (1986).

91. *Id.* at 366.

92. *Id.* at 361.

93. Meredith Hoffman, ‘Abnormal’ Leap Hikes Bushwick Rents by Nearly 20 Percent, *Report Says*, DNA INFO, Mar. 7, 2013, <http://www.dnainfo.com/new-york/20130307/bushwick/abnormal-leap-hikes-bushwick-rents-by-nearly-20-percent-report-says> (“The last

that these anti-gentrification efforts, and many like them, use the same tactics—environmental lawsuits, say, or restrictive zoning laws—as exclusionary suburban NIMBY groups. Campaigns like this are led by coalitions of renters and affordable housing groups who will not benefit from restricted housing supply and higher housing costs. Why do they engage in these campaigns?

It's not difficult to imagine why the housing advocacy community would embrace a supply-side theory of gentrification. First, new buildings are the most obvious signs of the unwelcome changes that gentrification brings. They are often a completely different style of construction that clashes with surrounding structures; they will house different, higher-income people; they serve as a potent symbol of a new presence that may or may not care that much about what came before. New buildings are typically expensive, and low-income people can't afford to live in them. If those new buildings weren't built, the thinking goes, the neighborhood could remain affordable for low-income residents.⁹⁴ Second, and relatedly, most in the housing advocacy community are concerned over all else with preserving neighborhoods for the people who live in them already, and it's highly intuitive to assume that *physical* change in a neighborhood is inextricably linked with the *social* and *demographic* change that is at the bottom of housing advocates' concerns. These different types of change have to be separated conceptually by any realistic policy program that seeks to mitigate the harmful effects of gentrification.⁹⁵ You can save buildings or people, but it is hard to save both. Third, as with most political questions, there's an element of identity and folk ideology here—many in the housing advocacy community define themselves in opposition to developers, landlords, big business, "Growth Machine" politicians, and other winners in the apparently zero-sum competition in increasingly unequal American cities. Opposing luxury development and rich developers makes for a powerful symbolic politics. The idea that what developers do might in most cases be broadly beneficial and even specifically beneficial to low-income constituencies is typically not entertained.

It is very worth noting that the political culture of community opposition to development traces back to the time of Urban Renewal, redlining, and block-busting when the enemies most definitely *were* the developers, landlords, and financial institutions on the supply-side.⁹⁶ Look at the opposition to massive

thing Bushwick needs is high rises. It needs affordable housing,' said Rolando Guzman, a Bushwick resident who worked with the North Brooklyn non-profit St. Nick's Alliance throughout Williamsburg's rezoning process in 2005. 'And there needs to be some rule to prevent the displacement of local businesses and residents.');

94. JACOBS, *supra* note 87, at 187-99.

95. For an interesting take on the difference between physical preservation of a neighborhood and "social preservation" of a neighborhood, see JAPONICA BROWN SARACINO, *A NEIGHBORHOOD THAT NEVER CHANGES: GENTRIFICATION, SOCIAL PRESERVATION, AND THE SEARCH FOR AUTHENTICITY* (2010).

96. WILLIAM SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY* 7 (2001).

and destructive Urban Renewal programs in the 1950s and '60s led by Jane Jacobs, among others. The wholesale razing of entire low-income neighborhoods in the name of slum clearance is not the type of investment and organic, steady, piecemeal development that growing cities need in order to increase housing supply in a nondestructive way and moderate increases in housing costs.⁹⁷ With redlining, financial institutions and government policy conspired to starve certain neighborhoods—overwhelmingly low-income and minority neighborhoods—of capital, leading to inevitable decline.⁹⁸ Contemporary, big-city anti-gentrification movements in many ways grow out of the urban participatory politics developed during these battles, and also owe a debt to the spirit of civil rights and student movements of the 1960s.⁹⁹ Despite admirable origins, many housing advocates, by opposing development, fight yesterday's battles.

Supply-side gentrification also comes in academic variants. In the legal academy, the Community and Economic Development (CED) movement emerged in the 1960s as an alternative to and a defense against the top-down imposition of Urban Renewal. (To this day there are CED clinics in law schools around the country.) It was and is intended as a neighborhood-based effort to empower low-income communities to develop their own jobs, housing, and business opportunities, and to protect themselves from the incursion of gentrification and other outside development.¹⁰⁰ It aims to substitute sub-local political structures for citywide institutions controlled by elites, and forwards community-based organizations as a third way between government bureaucracy and the market. Bill Simon, a law professor at Columbia and the dean of CED practitioners, writes in his treatise on the movement that CED employs something of a “double standard”—decrying the actions of exclusionary suburbs or the NIMBY groups that exercise ever-greater control in wealthy neighborhoods, while encouraging and empowering low-income communities to do the same.¹⁰¹

This argument has a certain appeal, and in a way pushes against the *status quo* in high-demand, high-cost regions, where NIMBYs prevent development in wealthy areas and effectively push it onto low-income neighborhoods. But it accedes to a certain kind of competition that low-income communities will be hard-pressed to win—wealthy communities can always exclude outsiders based on the high-cost of living there; low-income communities must depend on political action and anti-displacement policies like rent control that just does not work over time if high-income people want to move into the community. To the extent that low-income communities succeed in excluding outsiders and preventing development, they contribute to the sub-local political factors in-

97. For accounts of the destructiveness of urban renewal in New York City, see ROBERT CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* (1975).

98. JACKSON, *supra* note 69.

99. OSMAN, *supra* note 70; SARACINO, *supra* note 95.

100. SIMON, *supra* note 96, at 3.

101. *Id.* at 76.

creasing housing prices for everyone, including themselves and other low-income communities.

In the social sciences, the main academic experts are urban geographers and sociologists like the late Neil Smith, formerly of the City University of New York; Sharon Zukin at Brooklyn College; Peter Marcuse at Columbia University; Harvey Molotch at NYU; and others who, in the words of Zukin and Smith, seek explanations for gentrification and other forms of urban change that are “cultural and capital-centered” rather than “economic and demand-driven.”¹⁰² These writers come out of Marxian or Marxian-inflected traditions that emphasize identity-based narratives of exploitation of the poor by social and economic elites—in this context, developers, landlords, financial institutions, and their partners in government.¹⁰³ The driving forces, in their analysis, are the machinations of profiteers and strategically deployed flows of capital.¹⁰⁴

Neil Smith had perhaps the best-developed Marxian economic analysis of gentrification, which he calls the rent gap theory.¹⁰⁵ The rent gap is the disparity between the potential rent a property might generate and the actual rent under current land use. When neighborhood decline widens the gap sufficiently, developers, previously neglectful landlords, and financial institutions flood a neighborhood with capital, transforming it for a new and wealthier population. This may accurately describe the lifecycle of certain neighborhoods, but it does not create a convincing supply-side explanation—potential rent is not some quality inherent to a property but a function of demand to live there. In the absence of demand, potential rent plunges toward zero and gentrification does not happen. Academic solutions to gentrification tend to look like Peter Marcuse’s supply-side proposals in his article “Gentrification, Abandonment, and Displacement”—a series of development controls that would heavily restrict development in desirable and gentrifying neighborhoods.¹⁰⁶ In today’s high-demand, low-elasticity markets, this is precisely the wrong strategy for housing

102. See SMITH, *supra* note 78, at 41.

103. See, e.g., DAVID HARVEY, *REBEL CITIES: FROM RIGHT TO THE CITY TO URBAN REVOLUTION* (2012); DAVID HARVEY, *SPACES OF GLOBAL CAPITALISM: A THEORY OF UNEVEN GEOGRAPHICAL DEVELOPMENT* (2006); SMITH, *supra* note 78; SHARON ZUKIN, *THE CULTURES OF CITIES* (1996); Marcuse, *Gentrification, Abandonment, and Displacement*, *supra* note 10; Marcuse, *To Control Gentrification*, *supra* note 10; Molotch, *supra* note 3.

104. The ivory tower is not as far removed from ground-level anti-gentrification efforts as one might think. The most prominent national coalition of grassroots tenant advocates, housing activists, and other anti-gentrification groups is Right to the City, which takes its name from the book *Le Droit à la Ville* by French Marxist sociologist Henri Lefebvre. HENRI LEFEBVRE, *LE DROIT À LA VILLE* (1968); see also *Member Organizations*, RIGHT TO THE CITY, <http://www.righttothecity.org/index.php/about/member-organizations> (last visited Mar. 30, 2014). “Right to the City” was also the title of a subsequent article by CUNY geographer David Harvey. David Harvey, *The Right to the City*, 53 *NEW LEFT REV.* 23 (2008).

105. SMITH, *supra* note 78, at 67-69.

106. Marcuse, *Gentrification, Abandonment, and Displacement*, *supra* note 10, at 230-36.

advocates who want to moderate housing price increases and avoid displacement.

IV. FIGHTING THE NEW EXCLUSION

At the most basic level, this Article frames the problem with intro-level economics: supply and demand. The apparent simplicity of that story doesn't mean solutions are easy to come by. In reality, the problem emerges from a complex tangle of policy and politics, a proliferation of overlapping land use regulations, broadly defined, that exist in reciprocal relationship to growing neighborhood-level opposition to development in urban areas. Development is hard because people want it to be hard.

Urban homeowners, who benefit greatly from the status quo, may not be as omnipotent as their suburban counterparts, but the rise of sub-local politics has aggrandized their power relative to pro-growth constituencies like developers. Housing advocates, by and large, have inherited a reflexively anti-development stance from an earlier era with a different set of problems. The politics of urban land-use reform, while not as hopeless as in exclusionary suburbs, are nonetheless daunting.

What to do? I'd like to divide this prescriptive section into three parts: first, a word on conventional affordable housing strategies, since they dominate the policy conversation in high-cost cities today; second, a note on the implications of this Article's analysis for the housing advocacy community, the primary audience for this Article and an indispensable party to meaningful reform; and finally, a brief sketch of the types of reforms that, despite the entrenchment of the land use policies that have led us to our current predicament, can begin to turn the ship in the decades ahead.

What about conventional affordable housing strategies, like inclusionary zoning, government subsidies, and policies like rent control? It depends.

Under inclusionary zoning programs, developers set aside a percentage of market-rate developments as affordable housing for low- and moderate-income families, typically in exchange for density bonuses and subsidies.¹⁰⁷ The programs can be mandatory or optional. The density bonuses can allow for more units than would be permitted under the default regulatory baseline, but affordable units always increase the costs of development.¹⁰⁸ Depending on the structure of the program and local housing market conditions, those additional costs can serve to block development and exacerbate the supply problem.¹⁰⁹

107. Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, D.C., and Suburban Boston* 15-16 (Furman Center for Real Estate and Urban Policy, Working Paper No. 08-02).

108. *Id.* at 15.

109. Ellickson, *supra* note 1, at 400-03.

Inclusionary zoning aside, there are several government subsidy programs for the new construction of affordable units—the Low-Income Housing Tax Credit (LIHTC) program, for instance. LIHTC is the largest affordable housing program, producing an average of 100,000 units per year over the last twenty years.¹¹⁰ Government outlays for these programs can run to several hundred thousand dollars per unit in big cities, not counting ongoing operating subsidies. At that cost, the programs can't produce enough units to make a dent in the underlying problem. Units are allocated by lottery, meaning that a small number of families—typically not the lowest income families—get enormous subsidies while everyone else gets nothing.¹¹¹

New construction subsidies don't maximize the usefulness of the limited funds available for affordable housing. Subsidies that help to preserve existing affordable units or help to convert existing housing to affordable units can create more units with the same amount of funds.¹¹² The same goes for demand-side subsidies like housing vouchers. The \$300,000 in initial subsidies used to create one new-construction affordable unit can provide many, many more families with housing vouchers.

Other advocates forward rent control as a possible solution.¹¹³ While plausible on its face, rent control policies have a poor record of effectively targeting the intended recipients.¹¹⁴ If all units are covered, it can strongly discourage investment and new development by limiting the income that buildings can generate and interfering with the price signals that induce developers to build.¹¹⁵ If some units are covered and others are not, rent control can artificially push up prices in unregulated units, harming new potential residents and low-income people not fortunate enough to have regulated units.¹¹⁶ It can create a system of insiders and outsiders that replicates the dysfunctional incentives of exclusionary zoning. Rent control also creates a series of bad incentives for landlords that must be addressed with additional regulations. A typical rent control scheme would also have to include a warranty of habitability to prevent under-maintenance, eviction restrictions to prevent increases attendant to unit turnover, a moratorium on condo conversion, and other residential zoning restrictions—quite a messy set of policies and an uncertain outcome.¹¹⁷

110. *Low-Income Housing Tax Credits*, U.S. DEP'T OF HOUSING & URB. DEV., <http://www.huduser.org/portal/datasets/lihtc.html> (last visited Mar. 30, 2014).

111. *See, e.g.*, Current Housing Lotteries, N.Y.C. DEP'T OF HOUSING PRESERVATION & DEV., <http://www.nyc.gov/html/hpd/html/apartment/lotteries.shtml> (last visited Mar. 30, 2014).

112. GLAESER & GYOURKO, *supra* note 8, at 141.

113. McUsic, *supra* note 10.

114. ANTHONY DOWNS, RESIDENTIAL RENT CONTROLS: AN EVALUATION 17-28 (1988).

115. *Id.*

116. *Id.*; *see also* Adam Davidson, *The Perverse Effects of Rent Regulation*, N.Y. TIMES (July 23, 2013), <http://www.nytimes.com/2013/07/28/magazine/the-perverse-effects-of-rent-regulation.html>.

117. McUsic, *supra* note 10.

But some form of housing subsidies (or at least cash equivalents that people can use as they see fit) will always be necessary. Even highly elastic and highly filtered housing markets will never provide housing for everyone, though there is a difference between not being able to afford housing that is artificially expensive due to market restrictions and not being able to afford housing due to a simple lack of money. The former is a housing market problem and the latter is a poverty problem.¹¹⁸ The fact is that no politically or fiscally conceivable number of new units can solve the affordability problem in high-demand, highly inelastic housing markets, and a better functioning housing market will reduce the subsidies necessary to ensure that all are adequately housed.¹¹⁹ As it is, the government policies mentioned above are aimed at problems created by other government policies—restrictive land use regimes. The result is that cities like New York and San Francisco lose affordable units to rising housing costs faster than they can produce them through conventional subsidy strategies.¹²⁰

If the conventional strategies to fight rising housing costs and gentrification are flawed, what should the housing advocates be fighting for instead? Since the problem is at base one of supply and demand, effective solutions should serve either to increase supply or decrease demand.

First, on the supply-side, neighborhood-level housing advocates should not attempt to clamp down on development in the face of increasing demand. It's obviously difficult for people attempting to preserve a gentrifying neighborhood to allow it to change physically, but it's a necessary evil for moderating housing prices so as to allow as many existing residents as possible to remain in the neighborhood.

To impose the conventional suite of anti-development policies only makes housing costs increase more quickly. Once a neighborhood experiences an upsurge in demand, the public can make room for in-movers or watch as they outbid low-income people for the limited supply of existing units, exacerbating rent increases and displacement. Think of Logan Circle in Washington, D.C., or parts of Brownstone Brooklyn where wealthy people have been more than happy to buy mansions that had been subdivided into apartments and convert them back into mansions.¹²¹ (The conversion from multi-family to single family compounds the supply problem by decreasing density.) Even luxury housing

118. GLAESER & GYOURKO, *supra* note 8, at 19.

119. DOWNS, *supra* note 57, at 17.

120. Cindy Rodriguez, *As Bloomberg Built Affordable Housing, City Became Less Affordable*, WNYC (July 9, 2013), <http://www.wnyc.org/story/304422-new-york-remade-city-more-desirable-ever-also-too-expensive-many>.

121. Marc Santora, *Brooklyn's Gold Rush*, N.Y. TIMES (June 1, 2012), http://www.nytimes.com/2012/06/03/realestate/brooklyns-gold-rush.html?_r=0 ("With so few single-family homes available, buyers have also been eagerly snatching up two- and three-family homes with the goal of converting them to single-family residences.").

can redound to the ultimate benefit of low-income people by increasing the supply of housing.¹²²

This is true of the neighborhood, but also the region at large—preventing development in a particular neighborhood just contributes to the sub-local collective action problem that drives up costs region-wide. Even if the strategy were effective in slowing rent increases in the gentrifying neighborhood—this Article argues it isn't—it would be hurting similar low-income neighborhoods with the marginal rent increases that come with preventing development.

Second, and on the demand side: housing advocates should become the most forceful constituents for increasing development throughout high-demand metropolitan regions—especially in high-cost, high-demand areas where wealthy homeowner cartels successfully prevent denser development. Remember: gentrification is fundamentally a spillover phenomenon. People bid up prices in low-income neighborhoods adjacent to high-income neighborhoods when there isn't any room in the high-income neighborhoods. Increasing supply in high-demand, high-cost neighborhoods—the West Villages and Dupont Circles—will reduce demand and moderate housing cost increases in outlying lower-cost neighborhoods.¹²³

Let's face it: allowing development in low-income neighborhoods may be a rational move for housing advocates, but it will never be a satisfying program. It's a little too passive for the self-respecting activist. On the other hand, fighting the new exclusionary zoning in high-cost, high-demand areas appeals to the need for action. High-income people, and especially high-income homeowners, are the primary beneficiaries of the recent trend toward restrictive land use regulations in major cities.¹²⁴ In too many cases, the high-income and well-connected use land-use regulations for private ends, to protect their neighborhoods at the expense of other neighborhoods, just like the suburbs. This is not a form of regulation that serves the general public or protects low-income people. The political problems with opposing exclusionary zoning in the suburbs are intractable, but cities, with their heterogeneous, majority-renter populations, can begin to solve these political problems, especially if housing advocates switch sides in the development wars. NIMBY politics in high-income neighborhoods thrive on long queues of neighbors, all but unopposed, decrying new development. An equal or greater number of housing advocates at those meet-

122. FISCHER, *supra* note 4, at 339.

123. This is the converse of the argument that development restrictions in desirable areas are good because they spread development around. "Spreading development around" equals "gentrification." See Kaid Benfield, *The Urbanist Case for Keeping DC's Height Restrictions*, ATLANTIC CITIES (Nov. 19, 2012), <http://www.theatlanticcities.com/politics/2012/11/urbanist-case-keeping-dcs-height-restrictions/3934>.

124. Schleicher, *supra* note 4, at 33-52.

ings could alter the political equation as a local NIMBY group in Washington, D.C., has started to do.¹²⁵

Finally, what approach to reform can begin to unravel the complex tangle of policy and politics that have led us to the current predicament? This really deserves to be the subject of a separate paper, but a quick sketch will have to do for now.

Reformers first have to acknowledge the difficulty of reform. The *status quo* serves a number of the most powerful constituencies, like urban homeowners, pretty well, and the problems it causes have unfolded only gradually over the last few decades. It's hard to imagine some public education campaign that could convince homeowners to go against their immediate self-interest, or some sudden land-use cataclysm that could galvanize reform.¹²⁶

The conventional reform proposal for exclusionary municipalities is some form of regional government or some state-level intervention that would impose development on places that don't want it.¹²⁷ Related proposals seek simply to deregulate in order to let developers do their thing. These straightforward proposals share an impulse to remove decision-making power from lower-level political subdivisions to higher-level ones, effectively disempowering those lower down the chain. The most powerful constituencies in this story—homeowners—obviously don't like this. This presents a serious problem for advocates of these reforms: Are they plausible when they're also wildly unpopular?

A very few places have attempted reforms along these lines, but these exceptions prove instructive: look at New Jersey, where the *Mount Laurel* decisions have occasioned decades of political backlash. Note also that an exceptionally activist judiciary imposed the reform, which has just barely kept the doctrine alive in the face of broad-based hostility and constant interference by

125. Rachel Nania, *Meet Michael Hamilton, Creator of "In My Back Yard, DC"*, BORDERSTAN.COM (Feb. 6, 2013), <http://www.borderstan.com/02/meet-michael-hamilton-creator-of-in-my-back-yard-dc>. Other ways to reduce demand in gentrifying neighborhoods might include a strategically deployed and well-publicized crime wave. Anti-gentrification advocates in Pilsen, a primarily Mexican low-income neighborhood in Chicago, engaged in a high-profile intimidation campaign against high-income newcomers to keep future waves away. Whatever one thinks of their tactics, their economic logic is sounder than that of most anti-gentrification groups. See David Wilson et al., *Successful Protect-Community Discourse: Spatiality and Politics in Chicago's Pilsen Neighborhood*, 36 ENV. & PLANNING 1173 (2004).

126. The frame for this discussion is adapted from Heather Gerken's "here-to-there" pieces on election law. See Heather Gerken, *Getting From Here to There in Election Reform*, 34 OKLA. CITY. UNIV. L. REV. 33 (2009); Heather Gerken, *Getting From Here to There in Redistricting Reform*, 5 DUKE J. OF CON. L. & PUB. POL. 1 (2010).

127. See, e.g., MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* (2002); DAVID RUSK, *CITIES WITHOUT SUBURBS: A CENSUS 2010 PERSPECTIVE* (2013); Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000).

the legislative and executive (i.e., the more democratic) branches.¹²⁸ There's a reason David Barron calls regionalism and like proposals the “*deus ex machina*” of land use reform.¹²⁹

A more fruitful approach to reform will not wish away difficult politics or rely on impossible-to-achieve victories like restructuring local government. Instead, it will focus on smaller scale reforms that preserve a space for sub-local politics while altering, sometimes subtly, the incentives that political actors face and the procedures by which they arrive at decisions. The problems described in this Article are decades in the making and their causes, as this Article has tried to show, are varied and multitudinous; their solutions will not come all at once or through any one policy.

Several economists and law professors have forwarded financial tools that could alter the incentives that drive homeowner opposition to development. Most simply, William Fischel proposes home value insurance to ameliorate risk-aversion opposition to development.¹³⁰ Robert Shiller has been instrumental in setting up a housing futures market that might one day help homeowners transfer the risk of declining home values onto more risk-tolerant parties.¹³¹ These proposals don't address the affective component of homeowner opposition to development, and they have a ways to go in terms of market design and depth, but they are welcome as pieces of a broader program.

Others have proposed ways to compensate people who live in a neighborhood for the costs associated with increased development. David Schleicher, for instance, proposes TILTs—Tax-Increment Local Transfers—that could enable neighborhood homeowners to share directly in the benefits of additional development.¹³² With TILTs, some portion of the tax-increment from new development could be transferred to people within a defined neighborhood in the form of tax breaks or direct payments for a period of time.

Others have sought to alter land use decision-making procedures in ways that increase overall development without stripping sub-local actors of a meaningful role. Rick Hills and David Schleicher have proposed a “zoning budget” to alter the NIMBY dynamics typical of citywide efforts to increase density.¹³³ Local governments, in their proposal, would set a hard target for increases in development capacity. Any downzoning in one neighborhood would have to be matched an equivalent upzoning elsewhere. NIMBY groups would be forced to

128. See *Mount Laurel Material*, NEW JERSEY DIGITAL LEGAL LIBRARY, <http://njlegallib.rutgers.edu/mtlaurel/aboutmtlaurel.php> (last visited May 1, 2014).

129. David Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 732 (2003).

130. William Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUDIES 317 (2004).

131. ROBERT SHILLER, *THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT* 149 (2008).

132. Schleicher, *supra* note 4, at 59.

133. Hills & Schleicher, *supra* note 13.

horse-trade and compete with one another for limited political victories. Ed Glaeser proposes something similar for historic preservation: a cap on the number of buildings that can be protected.¹³⁴ If preservation boards want to put a new building on the register, they'd have to free up room by kicking another building off.

Individually, none of these reforms will solve the problems outlined in the Article, but small, incremental reforms like these will be the way forward as the problems of the new exclusionary zoning come to broader public attention. The options are pretty clear: build more, or stand by as low-income and middle-class people get priced out of ever-wider swaths of the country.

Critics of increased development bring up a number of valid points. First, there's what might be called the Houston problem. Houston is a high-demand region that has relatively unrestricted land-use regulations and high housing supply elasticity. Housing costs are low and partially for that reason Houston has attracted large numbers of in-movers over the last few decades. Houston is also reputed to be ugly, not like New York or San Francisco or other high-demand areas that don't allow for easy increases in housing supply. If these areas allowed for more development, or enough development to make a dent in housing costs, would they render themselves as unprepossessing as Houston? I have no idea. My personal take is that aesthetics and housing costs are incommensurate goods, with housing costs being the more important. Housing costs for many speak to basic needs in a way that the aesthetic concerns of more privileged groups should not be able to trump so easily, even though they typically do so today. It also should be said that the new exclusionary zoning is a relatively recent phenomenon, a few decades out of urban histories that span hundreds of years. The aspects of New York and San Francisco that aesthetes love date from a time when developers operated in those cities with a much freer hand. I agree with Jane Jacobs when she says "a city cannot be a work of art."¹³⁵

Second, and related, will cities become too congested? Call this the Mumbai problem. Will lower housing costs under a regime of freer development simply induce more demand until no one wants to live there anymore because it's too crowded?¹³⁶ Again, this strikes me as a concern of those who like cities just the way they are—namely, high-income homeowners. Even if cities removed all density restrictions—which this Article does not propose—cities would not become infinitely dense. While it is impossible to say exactly where a less-restricted market would balance, the cities discussed in this Article have a lot of development to do before they reach this dystopian overcrowding fu-

134. GLAESER, *supra* note 7, at 161.

135. JACOBS, *supra* note 75, at 372.

136. This might also be called the Yogi Berra Problem.

ture. (And, by the way, Mumbai is horribly congested because of its strict height regulations.)¹³⁷

As it is, the housing advocacy community should realize that land use is crucially important to the future of affordability in their cities. They should realize the ways in which current land use regimes privilege homeowners, the wealthy, and the well-connected. They should fight the new exclusionary zoning that is turning many of our cities into enclaves for the well-off. They should engage in a broad-based campaign to expand housing supply in high-demand cities and embrace the dozens of policy tweaks and adjustments that it will take to get us there. Such a campaign is the only path to broadly affordable housing.

137. GLAESER, *supra* note 7, at 157.