

LIMITING LOCAL CONTROL TO SAVE CALIFORNIA'S SOUL

Evelyn Danforth

I. INTRODUCTION

A. *The Strange Story of 3333 California Street*

The University of California at San Francisco (UCSF) operates a leafy, spacious research facility at 3333 California Street, squarely in San Francisco's posh Laurel Heights neighborhood.¹ Although it is currently the workplace of twelve-hundred doctors, scientists, and administrators, the University plans to vacate the space within the year as part of a long-term effort to consolidate its operations into a single campus elsewhere in the city.²

So what will happen to the prime ten-acre parcel? In San Francisco, where residential real estate has become dizzyingly expensive over the past decade, the answer is obvious enough: It is slated to be redeveloped into new housing. UCSF sold 3333 California to private developers in 2014.³ Two years later, the new owners announced plans for a mixed-use development that would create 560 units of housing.⁴

But the seemingly straightforward conversion of a soon-to-be abandoned office park hit a snag last spring when a neighborhood group calling itself the Laurel Heights Improvement Association (LHIA) nominated the existing structure and its surrounding landscaping to the National Register of Historic Places.⁵ They argued that the complex represents "an important example of a suburban corporate property type adapted to an urban setting," embodying the

¹*Laurel Heights*, UNIVERSITY OF CAL. S.F., <https://space.ucsf.edu/laurel-heights>.

² *Id.*

³ Tracy Elsen, *UCSF Chooses Developers for Laurel Heights Campus Site*, CURBED SAN FRANCISCO (May 16, 2014, 2:00 PM PDT), <https://sf.curbed.com/2014/5/16/10098812/ucsf-chooses-developers-for-laurel-heights-campus-site>.

⁴ Tracy Elsen, *Initial Plans Revealed for Big New Laurel Heights Development*, CURBED SAN FRANCISCO (Feb. 9, 2016, 11:00 AM PST), <https://sf.curbed.com/2016/2/9/10953590/initial-plans-revealed-for-big-new-laurel-heights-development>.

⁵ *A Bid to Block the Redevelopment of UCSF's Laurel Heights Campus*, SOCKETSITE (Apr. 26, 2018), <http://www.socketsite.com/archives/2018/04/a-bid-to-block-the-big-redevelopment-of-ucsfs-laurel-heights-campus.html>.

“postwar decentralization and suburbanization of San Francisco.”⁶ In November, thanks to support from San Francisco’s Historic Preservation Commission, the group succeeded in adding the building to California’s Register of Historic Places.⁷ The hundreds of new housing units promised by the developer are now in jeopardy, as the designation opens the planned development up to significant new legal challenges.⁸

At first blush, the story of 3333 California Street might read like satire: riled up neighbors successfully convincing bureaucrats that the city’s one-time “suburbanization” bears special historic significance—so much so that preserving that legacy trumps contemporary efforts to densify urban spaces in order to meet regional housing needs.

But readers who are already steeped in California housing politics can read a darker theme into 3333 California’s fate: as a stark embodiment of a land use regime that gives existing homeowners significant, wide-ranging powers to dictate the terms of local housing development. Indeed, 3333 California Street is just one of scores of proposed housing projects in California’s urban centers that have been forestalled indefinitely by legal maneuvering from existing residents.⁹ In essence, the intensely local nature of zoning law in California means that the state’s private homeowners have been able to systematically resist growth and change in their neighborhoods.

Meanwhile, with new development stalled, affordable housing grows more out of reach for Californians by the day—while those very homeowners reap the attendant benefits of increased property values.¹⁰

B. The Mixed Heritage of Local Control

As California’s housing crisis mounts, the state is grappling with tough choices about how to build toward a future that is equitable, welcoming, and fair. Amidst this important debate, an ancient question in American political life has

⁶ *Id.*

⁷ *UCSF Campus Deemed Historic but Developers Have a Plan*, SOCKETSITE (Nov. 21, 2018), <http://www.socketsite.com/archives/2018/11/ucsf-campus-deemed-historic-but-developers-have-a-plan.html>.

⁸ *Id.*

⁹ For example, residents in Cupertino spent years blocking a plan to redevelop the city’s largely abandoned Vallco Mall. See *Cupertino Approves Vallco Development Plan Near Apple Park*, CURBED S.F. (Sept. 24, 2018, 9:31 AM PDT), <https://sf.curbed.com/2018/9/20/17883244/vallco-mall-city-council-vote-housing>. And in Los Angeles, the AIDS Healthcare Foundation has repeatedly sued local developments to block new housing construction. Kevin Drum, *Small LA Apartment Building Now in Tenth Year of Lawsuits*, MOTHER JONES (Dec. 17, 2018, 3:12 PM), <https://www.motherjones.com/kevin-drum/2018/12/small-la-apartment-building-now-in-tenth-year-of-lawsuits/>.

¹⁰ The crisis has grown so acute that in his inaugural address, Governor Gavin Newsom analogized it to rebuilding Europe after World War II—promising “a Marshall Plan for affordable housing.” *Governor Newsom’s Inaugural Address: “A California for All,”* OFFICE OF GOVERNOR GAVIN NEWSOM (Jan. 7, 2019), <https://www.gov.ca.gov/2019/01/07/newsom-inaugural-address/>.

risen to the fore once more: What is the proper scope of local control? The conversation has been catalyzed by recent legislative proposals that would constrain local governments' zoning powers in order to spur housing production near mass transit hubs. In doing so, these proposed bills dramatically reset the balance of power between California's legislature and its local governments in order to "upend the entire framework for the past century of American racial politics and wealth building."¹¹

Local control has, to put it mildly, a mixed legacy in American public life. In his landmark account of Revolutionary-era America, Alexis de Tocqueville credited local control with Americans' "pride in the glory of [their] nation" and the unique "pleasure" they draw from civic participation.¹² For de Tocqueville, local control offered increased engagement, ownership, and participation—a constellation of democratic virtues that he lavishly praised as "a superabundant force" which may "produce wonders."¹³

During the Civil Rights Era, the phrase "local control" became, to many, a shorthand for policies that subordinated and marginalized communities of color to preserve Southern apartheid. As Justice Thurgood Marshall cautioned in his dissent in *San Antonio v. Rodriguez*, although local control promises the "inherent benefits of community support," all too often it "is offered primarily as an excuse rather than as a justification"—effectively, invoked as a smokescreen for exclusionary policies rather than reflecting a principled position on the proper locus of political power.¹⁴

More recently, as hyper-partisanship and gridlock have neutered federal legislative efforts, local control has been recast as a vector for innovative progressive change.¹⁵ Perhaps nowhere has this evolution been as dramatic as in California. In 2004, San Francisco's then-Mayor Gavin Newsom invoked local control to marry gay couples—sparking a watershed moment for both the gay rights movement and liberals' re-conception of city government as a vehicle for their desired policy victories.¹⁶ A few years later, when the Affordable Care Act was still just a twinkle in Democrats' eyes, the same California city provided the nation with a template for universal health care with its Healthy San Francisco initiative.¹⁷ California's cities have also pioneered ordinances to improve worker

¹¹ Henry Grabar, *Why Was California's Radical Housing Bill so Unpopular*, SLATE (Apr. 20, 2018, 5:22 PM), <https://slate.com/business/2018/04/why-sb-827-californias-radical-affordable-housing-bill-was-so-unpopular.html>.

¹² GERALD E. FRUG, RICHARD FORD, & DAVID J. BARON, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS*, 88 (6th ed., 2015).

¹³ *Id.* at 248.

¹⁴ *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 126 (1973) (Marshall, J., dissenting).

¹⁵ Claire Caine Miller, *Liberals Turn to Cities to Pass Laws and Spread Ideas*, N.Y. TIMES (Jan. 26, 2016), <https://www.nytimes.com/2016/01/26/upshot/liberals-turn-to-cities-to-pass-laws-and-spread-ideas.html>.

¹⁶ Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

¹⁷ Mitchell H. Katz, *Golden Gate to Health Care for All?: San Francisco's New Universal Access Program*, 358 NEW ENG. J. MED. 327-329 (2008). ("Impatient with the lack of progress at the federal and state levels in reducing the number of

welfare,¹⁸ promote conservation and environmental sustainability,¹⁹ and tackle public health crises.²⁰

But despite the Golden State’s impressive record of innovative, progressive policymaking at the city and county level, local control now poses an arguably existential threat to the state.

II. THE LOCAL CONTROL ROOTS OF CALIFORNIA’S HOUSING CRISIS

A. Understanding the Scope of the Crisis

California’s housing shortage has reached crisis levels. The median home price is double the nationwide average.²¹ In San Francisco, where the crisis is particularly acute, purchasing the average home requires a staggering income of \$333,000 annually.²² In every metropolitan area in the state, at least 30% of

uninsured Americans, many counties across the United States are seeking their own solutions to the health care crisis.”).

¹⁸ See, e.g., L.A., Cal., ADMIN. CODE § 1, ch. 1, art. 11, div. 10 (2018), <https://bca.lacity.org/Uploads/lwo/Amended%20Living%20Wage%20Ordinance%20%281%29.pdf>. For an overview of how such ordinances impact workers, see David Fairris, *The Impact of Living Wages on Employers: A Control Group Analysis of the Los Angeles Ordinance*, 44 J. INDUS. REL. 84 (2005). David Fairris, David Runsten, Carolina Briones et al. *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses*. (2011), <https://escholarship.org/uc/item/0b73b6f0> (“Local Governments are increasingly turning to living wage policies as a means to improve job quality for low-income workers.”). San Francisco was also the first jurisdiction in the nation to require paid sick leave for workers. Miller, *supra*.

¹⁹ See, e.g., S.F. Env’t Code §§ 1701-1709 (2007). For a discussion of how San Francisco’s plastic bag ban came into effect, see Jennie Reilly Romer, *The Evolution of San Francisco’s Plastic Bag Ban*, 1 GOLDEN GATE U. ENV’T L.J. 439, 439-40 (2007) (explaining how local governments have stepped up “[a]t a time when progressive environmental initiatives are receiving a chilly reception at the federal level.”). For a more recent initiative to address environmental waste at the local level, see Amel Ahmed, *Straw Wars! Bay Area Push to Ban Plastic Straws Picks Up Steam*, KQED (May 1, 2018), <https://www.kqed.org/science/1923141/straw-wars-bay-area-push-to-ban-plastic-straws-picks-up-steam>.

²⁰ See, e.g., BERKELEY, CAL., MUN. CODE tit. 7, § 72.010 (2014), <https://www.codepublishing.com/CA/Berkeley/?Berkeley07/Berkeley0772/Berkeley0772.html>.

²¹ F. Noel Perry et al., *Growth and Dysfunction: An Analysis in Trends of Housing, Migration, and Employment*, NEXT 10, at 4 (May 3, 2018), <http://next10.org/sites/default/files/growth-executive-summary-final2.pdf>.

²² Kathleen Pender, *San Franciscans Need to Earn \$333,000 a Year to Buy a Median-Priced Home*, SFGATE (May 16, 2018, 3:58 PM PDT),

residents cannot afford local rents.²³ More than half of all California renters are rent-burdened, the highest rate in the country.²⁴ Nine of the country's ten least-affordable metro regions nationwide are in California.²⁵

The crisis poses three interconnected threats. First, it portends potential disaster for the state's booming economy. California faces a steadily increasing trend of out-migration to elsewhere in the country, particularly among low- and middle-income workers.²⁶ As lower-wage workers are pushed out of jobs-rich urban cores, industries are struggling to adapt their business models.²⁷ Even in higher-wage industries, companies face challenges in attracting new talent; in a 2016 survey, Silicon Valley CEOs ranked the cost of housing as the top business challenge they faced.²⁸

Second, housing scarcity jeopardizes real policy gains that California has made with respect to the environment and public health. The crisis is increasingly driving Californians to the outer fringes of developed regions: the share of "super commuters" who travel more than ninety minutes each way to reach their jobs exploded by 112.7% from 2005 to 2016 in the San Francisco Bay Area,²⁹ and the average commute time in the region has increased at four times the rate of the nationwide average during the same period.³⁰ Even though California has set ambitious statewide policies to tackle climate change, transportation is the single

<https://www.sfgate.com/business/networth/article/San-Franciscans-need-to-earn-333-000-a-year-to-12916553.php?t=527592fb3d>.

²³ *A Tool Kit to Close California's Housing Gap: 3.5 Million Homes by 2025*, MCKINSEY & COMPANY (2016),

<https://www.mckinsey.com/~media/mckinsey/featured%20insights/urbanization/closing%20californias%20housing%20gap/mgi-california-housing-affordability-exhibits.ashx>.

²⁴ F. Noel Perry et al., *Current State of the California Housing Market: A Comparative Analysis*, NEXT 10 (2018),

<http://next10.org/sites/default/files/California-Housing.pdf>.

²⁵ Benjamin Schneider, *In California, Momentum Builds for Radical Action on Housing*, CITY LAB (Mar. 5, 2018), <https://www.citylab.com/equity/2018/03/in-california-momentum-builds-for-radical-action-on-housing/554768/>.

²⁶ Brian Uhler & Justin Garosi, *California Losing Residents via Domestic Migration*, LEGISLATIVE AFFAIRS OFFICE (Feb. 21, 2018), <https://lao.ca.gov/LAOEconTax/Article/Detail/265>.

²⁷ Emily Badger, *San Francisco Restaurants Can't Afford Waiters. So They're Putting Diners to Work.*, N.Y. TIMES (June 25, 2018),

<https://www.nytimes.com/2018/06/25/dining/san-francisco-restaurants-service.html>.

²⁸ David Wagner, *Is California's High Cost of Housing Scaring Off Job Seekers?*, CALMATTERS (May 24, 2018), <https://calmatters.org/articles/is-californias-high-cost-of-housing-scaring-off-job-seekers/>.

²⁹ Michelle Robertson, *Stunning Increase in the Share of Bay Area 'Super Commuters'*, S.F. CHRONICLE (Apr. 27, 2018, 2:02 PM PDT), <https://www.sfgate.com/traffic/article/Bay-Area-commute-San-Francisco-traffic-12861808.php>.

³⁰ Grabar, *supra* note 11.

biggest source of the state's greenhouse gas emissions.³¹ Within transportation, personal vehicle use creates the lion's share of emissions.³² The rise of "super commuters" pushed further out by housing scarcity, therefore, threatens to stymie California from reaching its ambitious climate goals. The data support that fear; in 2015, the state cut greenhouse gas emissions at just half the rate it was able to in the preceding year.³³

Finally, the housing crisis threatens to permanently degrade California's moral fabric. Between 2016 and 2017 alone, the state's homeless population grew by nearly 17%.³⁴ The uptick has been especially stark in Los Angeles, where homelessness grew by as much as 50% year-over-year in some parts of the metropolitan region.³⁵ While California is home to 12% of the country's overall population, it now has 22% of the homeless population.³⁶ In the words of Sacramento mayor Darrell Steinberg, the explosion in homelessness has become "the moral and humanitarian crisis of our time."³⁷

But while the crisis's adverse consequences are diverse and far-ranging, the underlying cause is surprisingly straightforward: chronic under-production of new housing. Since the 1980's, California has consistently produced less new housing than it has gained population. In the early 2000's for example, the state averaged just over 100,000 new units of housing per year.³⁸ To limit price appreciation to the nationwide average, it would have needed to build at more than double that rate.³⁹ Recent trends have only exacerbated the deficit. Currently, California needs to build about 180,000 new units per year to curb appreciation of already-high property values; as of 2017, it was averaging less than half that.⁴⁰

³¹ *California Greenhouse Gas Emission Inventory – 2018 Edition*, CAL. AIR RES. BD. (July 11, 2018), <https://www.arb.ca.gov/cc/inventory/data/data.htm>.

³² *Id.*

³³ Esmé E. Deprez, *California's Housing Policy is Holding Back its Climate Policy*, BLOOMBERG BUSINESSWEEK (Nov. 15, 2017, 1:00 AM PST), <https://www.bloomberg.com/news/articles/2017-11-15/california-s-housing-policy-is-holding-back-its-climate-policy>.

³⁴ Victoria Cabales, *California Sees Larger Increase in Homelessness than Any Other State since 2016*, DESERT SUN (July 4, 2018, 4:24 PM PDT), <https://www.desertsun.com/story/news/2018/07/04/homeless-california-heres-what-latest-data-reveals/758438002/>.

³⁵ Doug Smith & Shelby Grad, *What's Behind the Dramatic Rise in L.A. County's Homeless Population*, L.A. TIMES (May 31, 2017, 2:35 PM), <https://www.latimes.com/local/lanow/la-me-homeless-rise-explainer-20170531-htmstory.html>.

³⁶ Angela Hart, *How California's Housing Crisis Happened*, L.A. TIMES (Aug. 21, 2017, 12:01 AM), <https://www.sacbee.com/news/politics-government/capitol-alert/article168107042.html>.

³⁷ Darrell Steinberg, *California Cities Know Best How to Reduce Homelessness*, SACRAMENTO BEE (May 21, 2018, 12:00 PM), <https://www.sacbee.com/opinion/op-ed/soapbox/article211471884.html>.

³⁸ MAC TAYLOR, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 4 (2015), <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>.

³⁹ *Id.*

⁴⁰ Hart, *supra* note 36.

B. Local Control Over Zoning Decisions

So how did California get to this point? The answer is, in large part, local control. California is a so-called home rule state, meaning the legislature has delegated significant power to qualifying counties and municipal corporations; the state has also, to some extent, preemptively insulated its cities from future legislative interference.⁴¹ Gay marriage and Healthy San Francisco are just two examples of California's local governments using their home rule grants to sophisticatedly tackle a range of social issues. But because the most potent arrow in home rule municipalities' quiver is the zoning power, local control has the most bite when it comes to deciding what gets built in a given city—and what does not. As Brian Uhler, who oversees housing policy research for California's nonpartisan Legislative Analyst's Office, explained, "California's communities are vested with significant authority over land-use decisions, about how much can be built, and when and where."⁴²

These cities have few—if any—structural incentives to wield their significant zoning powers to encourage new housing. Local homeowners, who vote the officials tasked with planning and zoning decisions into office, reap enormous benefits from housing scarcity in the form of dramatically increased property values.⁴³ Because homeowners effectively froze their property tax bases to the assessed value at time of purchase through a ballot initiative called Proposition 13, they see financial upside from property value appreciation, without any concomitant burden of higher annual taxation.⁴⁴ In essence, Proposition 13 means that the only "benefits" that accrue to entrenched homeowners from housing development are increased traffic, crowds, and a greater strain on existing public services like schools and mass transit.

Meanwhile, Proposition 13 has also dramatically altered the budgetary landscape that cities themselves navigate to fund public services. Because the measure also severely constrains how local governments can raise revenue, officials have become "prisoners" to identifying and extracting funding beyond property taxes.⁴⁵ In particular, California cities compete aggressively for sales tax-rich land uses like automobile dealerships and big box retail, a desperate race for cash that scholars have deemed the "fiscalization" of land use.⁴⁶ As a corollary to this financial imperative, cities are disincentivized to encourage new housing

⁴¹ David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2290 (2003).

⁴² Hart, *supra* note 37.

⁴³ In much of Northern California, for example, average home values have increased 3 to 4 times over the past 20 years. Kathleen Elkins, *Here's How Much You'd Have Made if You Bought a Home in These Cities 20 Years Ago*, CNBC (Apr. 13, 2018, 1:19 PM), <https://www.cnbc.com/2018/04/13/the-profit-you-d-have-made-if-you-bought-a-home-20-years-ago.html>.

⁴⁴ See *Nordlinger v. Hahn*, 505 U.S. 1, 1-7 (1992) (describing concisely how Proposition 13 was enacted and how it impacts Californians).

⁴⁵ Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, LOCAL GOVERNMENT LAW 697 (Gerald E. Frug, Richard T. Ford, & David J. Barron eds., 2015).

⁴⁶ *Id.* at 698.

development since “such developments no longer provide the same level of financial rewards to cities.”⁴⁷

Perhaps no city in California better highlights the cold budgetary calculus that chills housing production than Brisbane, California—a tiny speck of a town along the marshlands that link San Francisco with its southern suburbs. For years, the city of Brisbane has been debating what to do with a 640-acre undeveloped parcel alongside Highway 101, the main artery between the jobs-rich city and the jobs-rich Silicon Valley.⁴⁸ But despite the region’s dire need for housing—and the lack of other amenities on the land as-is—the city has little incentive to approve the new development. A developer’s plan to build over 4,000 new units of housing on the site has faced stiff community pushback.⁴⁹ According to a feasibility study that local officials commissioned to inform public debate, the proposed housing-centric development would net just over \$1 million in annual revenue to the city’s coffers.⁵⁰ By contrast, a commercial use-heavy alternate plan that local residents put forth would have yielded nearly 8 times as much revenue for the city.⁵¹ In effect, Brisbane’s government would be acting against its own best interests by approving the new housing units—even though doing so would indisputably address a dire regional and statewide need.⁵²

But Brisbane is far from the only California city to mount a self-interested response to the strange combination of Proposition 13-imposed revenue limits and the heady police power that California bestows on home rule municipalities. Neighboring San Francisco is a particularly egregious—and sophisticated—acolyte of land use “fiscalization.” The city is currently pushing to implement the Central SoMa Plan, an ambitious plan to upzone and redevelop a neighborhood

⁴⁷ *Id.* at 699.

⁴⁸ Liam Dillon, “A Bay Area Developer Wants to Build 4,400 Sorely Needed Homes. Here’s Why it Won’t Happen,” *L.A. TIMES* (Jul. 28, 2017), <http://www.latimes.com/politics/la-pol-ca-small-city-controls-big-housing-project-20170728-story.html#>.

⁴⁹ *Id.*

⁵⁰ Keysner Marton Associates, *Potential Funding Sources for Infrastructure and On-Going Municipal Services to Serve Brisbane Baylands*, CITY OF BRISBANE (MAR. 28, 2017), 11, http://brisbaneca.org/sites/default/files/Keyser%20Marston%20Updated%20Fiscal%20Analysis_1.pdf.

⁵¹ *Id.*

⁵² After years of public hearings and debate over the plan, the city submitted the project to the residents directly, who voted on it through a ballot measure in November of 2018. The final plan submitted to voters called for just 2,200 new units—nearly half the initial proposal. Adam Brinklow, *Brisbane Faces Ballot Vote on Baylands Housing*, CURBED SAN FRANCISCO (Jul. 16, 2018, 10:34 PM), <https://sf.curbed.com/2018/7/16/17573068/brisbane-ballot-initiative-general-plan>. In November 2018, voters finally approved the project by nearly a ten-point margin; still, the city manager predicted it would be more than a decade before the start of construction. Adam Brinklow, *Brisbane Housing Plan Wins in Landslide*, CURBED SAN FRANCISCO (Dec. 12, 2018), <https://sf.curbed.com/2018/12/12/18137559/brisbane-housing-election-measure-jj-landslide>.

surrounding one of the city's major commuter rail hubs.⁵³ The plan would bring 33,000 new jobs to the center of the city but just 8,300 new units of housing—inevitably exacerbating housing scarcity while generating over \$2 billion in revenue for San Francisco's public coffers.⁵⁴

III. SB827 AND SB50: A RADICAL REBALANCING OF STATE AND LOCAL POWER OVER HOUSING PRODUCTION

A. *Legislating Away Local Control*

Given the strong incentives against building new housing, it is no surprise that many California cities have developed a complex maze of discretionary administrative reviews, pathways for legal challenges, and fora for community input that housing proposals must navigate before developers can break ground. On average, it takes a little over ten months for a new building proposal in San Francisco to secure necessary approvals; by contrast, the process takes an average of about three months in Charlotte, North Carolina and just a hair over four months in Las Vegas.⁵⁵ Furthermore, most California cities—even ostensibly urban ones like San Francisco—artificially constrain how much can be built through mandatory parking minimums, single family home-only neighborhoods, and other zoning restrictions.⁵⁶

Against this backdrop, in early 2018 California State Senator Scott Wiener introduced SB827, the “Housing-Rich Transit Bonus.”⁵⁷ The bill proposes a radical reduction in cities' control over the zoning power for land within half a mile of high-frequency public transit, imposing a state override of design standards that artificially constrain housing density in qualifying areas.⁵⁸ It would have effectively rezoned the land upon which “close to 50%” of Los Angeles's single-family homes sit,⁵⁹ and denuded nearly all of San Francisco's existing

⁵³ *The Central SoMa Plan*, CITY AND COUNTY OF SAN FRANCISCO PLANNING DEPT., http://sf-planning.org/central-soma-plan#project_description.

⁵⁴ Laura Waxmann, *SF Adopts Sweeping Development Plan for Central SoMa*, S.F. EXAMINER (May 11, 2018, 5:30 PM), <http://www.sfexaminer.com/sf-planning-commission-adopts-sweeping-development-plan-central-soma/>.

⁵⁵ Emily Badger, *It Takes Way Too Long to Build New Housing in Expensive Cities*, WASH. POST (JUL. 21, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/07/21/it-takes-way-too-long-to-build-new-housing-in-expensive-cities/?utm_term=.82f284979538.

⁵⁶ David Roberts, *The Future of Housing Policy is Being Decided in California*, VOX (Apr. 4, 2018, 9:22 AM), <https://www.vox.com/cities-and-urbanism/2018/2/23/17011154/sb827-california-housing-crisis>.

⁵⁷ S.B. 827, 2017-2018 Leg., Reg. Sess (Cal. 2018).

⁵⁸ Roberts, *supra* note 56.

⁵⁹ David Zahniser, Liam Dillion, & Jon Schleuss, *Plan to Dramatically Increase Development Would Transform Some L.A. Neighborhoods* (Mar. 25, 2018), <http://www.latimes.com/local/lanow/la-me-ln-housing-bill-transit-20180325-htmlstory.html> (quoting a Los Angeles Department of City Planning spokesperson).

zoning (albeit “to accommodate a residential scale about half that of a typical Parisian street”).⁶⁰ In exchange, areas around transit will be free to build up, welcoming more Californians along these crucial arteries. In the words of SB827’s author, “[a]llowing more housing near public transportation will make housing more affordable, reduce gridlock, sprawl & carbon emissions, & bolster transit ridership.”⁶¹

B. *Opposition to SB827*

Yet despite these purported virtues, SB827 faced stiff backlash almost immediately. Intriguingly, opposition was strongest among political coalitions traditionally associated with the very virtues Wiener claimed his bill promoted: environmentalism (the Sierra Club penned a strident letter in opposition⁶²) and affordability (renters’ rights groups voiced deep concerns⁶³). What explains their concerns, and what do they tell us about the propriety of local control over housing development?

The Sierra Club’s opposition to SB827 addressed the question of local control head-on. In a letter to Senator Wiener, the group lambasted the bill for “strip[ping] local governments from the decision-making process,” analogizing the move to efforts by Republican-controlled state legislatures in Louisiana and Texas to subordinate “blue cities” attempting to pass progressive local ordinances.⁶⁴ While the Sierra Club lauded Wiener’s underlying goals, it claimed that they require “complex policies that at their best are designed to include public participation and environmental mitigation at the local and regional level.”⁶⁵ This was, in the words of Slate’s Henry Grabar, a “tenuous” argument—one that willfully ignored the existing structural incentives that keep “public participation” at the “local and regional level” decidedly opposed to infill housing development.⁶⁶

Local advocacy groups presented a more nuanced argument. In a letter to Senator Wiener co-signed by a range of Los Angeles-based community organizations, they voiced twin concerns: first, that SB827 would accelerate the pace of displacement of low-income households around transit-rich corridors, and second, that SB827 would strip away cities’ ability to offer “incentives for developers to include low-income, very-low income, or extremely low-income units in their new buildings near transit.”⁶⁷ In effect, they voiced

⁶⁰ Grabar, *supra* note 11.

⁶¹ Scott Wiener (@Scott_Wiener), TWITTER (Feb. 21, 2018, 4:12 PM), https://twitter.com/Scott_Wiener/status/966450710077366272.

⁶² *Sierra Club Policy on Transit-Oriented Development*, THE SIERRA CLUB (Feb. 9, 2018), <https://www.sierraclub.org/press-releases/2018/02/sierra-club-policy-transit-oriented-development>.

⁶³ *L.A. Community Organizations Oppose SB 827*, ALL. FOR CMTY. TRANSIT – L.A. (Feb. 12, 2018), <http://allianceforcommunitytransit.org/l-a-community-organizations-oppose-sb-827/>.

⁶⁴ SIERRA CLUB, *supra* note 62.

⁶⁵ *Id.*

⁶⁶ Grabar, *supra* note 11.

⁶⁷ ALL. FOR CMTY. TRANSIT – L.A., *supra* note 63.

concerns that SB827 would further exacerbate development inequities in areas that serve as a critical link to economic opportunity.

Notably, however, these community groups did not wholly reject the broader premise of the bill: reorganizing the zoning power to diminish local control. And in response, Wiener revised the bill to include displacement and demolition protections—welcoming the additions as provisions that “make the bill even stronger,” rather than diluting its core premise.⁶⁸

But other critiques of the bill were more nakedly self-serving. In thinly veiled allusions to local property values, a string of elected officials in areas that would see significant upzoning critiqued the bill as “a declaration of war on our neighborhoods,”⁶⁹ “too blunt for our single-family-home areas,”⁷⁰ and even poised to “destroy our neighborhoods”⁷¹ by “turning over decisions about San Francisco’s future.”⁷²

Ultimately, this litany of criticism overwhelmed SB827. The bill, “[o]pposed by virtually every Californian in a position of power,” failed to advance past committee in April of 2018—just four months after it was first introduced.⁷³

C. SB827 Redux

The story of SB827 does not end with its defeat in committee. Eight months later—in December 2018—Senator Weiner introduced a modified version of the bill, SB50. In April 2019, the bill cleared its first procedural hurdle by advancing from the State Senate Committee on Housing.⁷⁴ The new bill has the same principal aims as its predecessor: dramatically decrease local discretion over residential development near major transit zones.

In response to anti-gentrification groups’ critiques of SB827, the new bill also enshrines certain protections for existing residents. Key among these is a provision prohibiting developers from invoking the bill’s zoning largesse to tear down apartment buildings already occupied by renters.⁷⁵ It also creates a

⁶⁸ Scott Wiener, *SB 827 Amendments: Strengthening Demolition & Displacement Protections*, MEDIUM (Feb. 27, 2018), https://medium.com/@Scott_Wiener/sb-827-amendments-strengthening-demolition-displacement-protections-4ced4c942ac9.

⁶⁹ Janis Mara, *Berkeley Mayor on Wiener-Skinner Housing Bill*, BERKELEYSIDE (Jan. 22, 2018), <http://www.berkeleyside.com/2018/01/22/berkeley-mayor-wiener-skinner-housing-bill-declaration-war-neighborhoods>.

⁷⁰ Grabar, *supra* note 11.

⁷¹ *This is our City – We Need to Shape it*, JANE KIM FOR MAYOR (Apr. 16, 2018), <https://www.janekim.org/2018/04/16/release-jane-kim-on-sb827/>.

⁷² Jane Kim, *SB 827 Postmortem: Let’s Build More Housing the Right Way*, S.F. EXAM’R (Apr. 25, 2018), <http://www.sfexaminer.com/sb-827-postmortem-lets-build-housing-right-way/>.

⁷³ Grabar, *supra* note 11.

⁷⁴ Camille von Kaenel, *California’s Transit-Housing Bill Pushing for Taller, Denser Growth Clears First Hurdle*, CURBED SAN FRANCISCO (Apr. 3, 2019), <https://sf.curbed.com/2019/4/3/18293731/senate-bill-50-scott-wiener-density-transit-hearing-housing>.

⁷⁵ S.B. 50, 2017-2018 Leg., Reg. Sess (Cal. 2018).

framework for the state to declare neighborhoods as “vulnerable to displacement pressures”—allowing these “sensitive communit[ies]” to delay implementation of the new zoning changes for up to five years.⁷⁶ Moreover, the bill covers *more* neighborhoods than SB827 by targeting not just transit-rich areas, but also “jobs rich” neighborhoods that may lack existing public transit infrastructure.⁷⁷

The result, analysts believe, is a bill that trains its fire primarily at low-density, high-opportunity neighborhoods currently dominated by wealthier, whiter single-family homeowners.⁷⁸ Functionally, this means the bill now promises to alleviate California’s housing crisis without displacing vulnerable existing residents. Politically, it means the bill has the potential to disrupt the alliance between wealthy homeowners and neighborhood affordability activists that doomed SB827—by explicitly addressing the displacement concerns that made homeowners seeking to maximize property values and tenant advocates seeking to minimize displacement odd bedfellows in their opposition to SB827.⁷⁹

IV. CONCLUDING THOUGHTS: LOCAL CONTROL AS A VIRTUE OR VICE?

In hindsight, SB827’s failure seems pre-ordained. Local control over residential zoning has metastasized into a cherished civic tradition, one even stamped with the imprimatur of legitimacy by our nation’s highest court.⁸⁰ SB827 would have violently uprooted that tradition, in turn ushering in dramatic and unpredictable changes to the very face of the neighborhoods where Californians live and work. It would have been, in short, a big change.

It is too soon to tell whether the new version of the bill, SB50, will win over tenants’ rights activists and anti-displacement crusaders in order to break the potent political alliance that defeated SB827. But the headwinds that made SB827 difficult *politically* do not mean it was undesirable as a matter of *policy*. To unpack whether the bill is normatively desirable, we must turn once more to the thorny question of local control—re-engaging with a debate that has been inexorably woven throughout the centuries-long struggle to calibrate the contours of American political life. Is the local control that SB827 sought to limit a vice, or a virtue? To answer this question, we must reflect on whether local control over residential zoning serves to promote participation in the small-scale democratic scrum—virtues that both de Tocqueville and Justice Marshall embrace—or

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Matthew Yglesias, *Gavin Newsom Promised to Fix California’s Housing Crisis. Here’s a Bill That Would Do It*, VOX (DEC. 7, 2018, 4:00 PM), <https://www.vox.com/policy-and-politics/2018/12/7/18125644/scott-wiener-sb-50-california-housing>.

⁷⁹ *Id.*

⁸⁰ *See, e.g.,* Village of Euclid, Ohio, et al. v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning regime did not constitute impermissible government takings); City of Renton v. Playtime Theaters, 475 U.S. 41 (1986) (local zoning ordinance did not unconstitutionally impinge on free speech).

merely lets policies that enrich entrenched incumbents masquerade as civically-minded.

Concededly, it is difficult to ascertain the extent to which the locally instituted gauntlet for new development that SB827 would have short-circuited is truly motivated by the cold economic and budgetary realities that local governments and homeowners face. Advocates of local control over housing would argue that stringent review processes and robust participatory channels are essential to ensure neighborhoods—and the residents who have painstakingly built their lives there—have control over their own destinies.⁸¹ In essence, their view is that local control serves as an important vehicle to ensure the people have mechanisms to prevail against developers' voracious appetites to destroy and rebuild. It is a bulwark against community-destroying catastrophes like San Francisco's racially charged 1970's-era decision to bulldoze the predominantly black Fillmore neighborhood in the name of "urban renewal."⁸² And it allows neighbors to participate firsthand in democracy, fosters civic bonds, and encourages long-term investment in communities. Far from invidiously promoting incumbents' bottom lines, the complex requirements and processes that govern new construction may reflect the very Tocquevillian ideals that make local control so seductive.

Yet Justice Marshall's warning that local control often serves as an "excuse rather than a justification" should ring loudly in Californians' ears as they process these arguments in light of the state's ever-deepening housing crisis. Even if we concede that existing review processes could further important democratic objectives in the abstract, as-applied they seem suspiciously well suited to obstruct new housing for the sake of protecting entrenched interests. Effectively, available evidence—the fundamental incentives already in place, the obstructionist ways these local zoning tools are deployed, the veiled rhetoric about neighborhood integrity—suggests that the invocation of local control in response to California's housing crisis amounts to an insincere "excuse" that masks entrenched incumbents' efforts to exclude newcomers while enriching themselves, rather than a principled "justification" for continued local control. In fact, by leaning on the most cherished elements of our democratic heritage, rhetoric around local control provides a uniquely potent smokescreen to exclude and subordinate outsiders through policies that, by design, remain unaccountable to broader political bodies. In this way, the language of local control that permeates California housing politics has eerie echoes of the local control that Justice Marshall fought so assiduously in order to dismantle de jure segregation across the American South.

Building off this perspective on local control, one cannot help but conclude that the fundamental idea underpinning SB827 and SB50 would be good law, even if imperfect—overriding prejudicial policies at the city and county level in order

⁸¹ See, e.g., Editorial, *Yes, California Has a Housing Crisis. But Killing Community Planning Isn't How Democracy Should Work*, L.A. TIMES (Apr. 7, 2018), <http://www.latimes.com/opinion/editorials/la-ed-sb827-local-control-20180407-story.html> ("Overruling local control ultimately means ignoring local voices.").

⁸² Walter Thompson, *How Urban Renewal Destroyed the Fillmore in Order to Save It*, HOODLINE (Jan. 3, 2016, 12:23 PM), <https://hoodline.com/2016/01/how-urban-renewal-destroyed-the-fillmore-in-order-to-save-it>.

to tackle a pressing economic, environmental, and humanitarian crisis that has cast a long shadow on the world's fifth-largest economy.⁸³ While local control may have a time and a place, nothing about California's current experience suggests that it should remain the gravamen of the state's housing policy.

⁸³ Thomas Fuller, *The Pleasure and Pain of Being California, the World's 5th-Largest Economy*, N.Y. TIMES (May 7, 2018), <https://www.nytimes.com/2018/05/07/us/california-economy-growth.html>.