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UNJUST CITIES? GENTRIFICATION, INTEGRATION, AND THE FAIR HOUSING ACT

Olatunde C.A. Johnson *

ABSTRACT

What does gentrification mean for fair housing? This article considers the possibility that gentrification should be celebrated as a form of integration alongside a darker narrative that sees gentrification as necessarily unstable and leading to inequality or displacement of lower-income, predominantly of color, residents. Given evidence of both possibilities, this article considers how the Fair Housing Act might be deployed to minimize gentrification's harms while harnessing some of the benefits that might attend integration and movement of higher-income residents to cities. Ultimately, the article urges building on the fair housing approach but employing a broader set of tools to advance a more robust form of integration. This broader framework would attend to how public and private goods are distributed in gentrifying cities, and build governance and participation mechanisms that enhance the voice and participation of traditionally excluded groups.

INTRODUCTION

The drafters of the Fair Housing Act of 1968 ("FHA") could not have contemplated that gentrification would be a central fair housing challenge. Fifty years ago it would have been difficult to imagine the in-migration of affluent whites into low-income neighborhoods of color. While the goal of the FHA is now "balanced,"

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“integrated” living and dismantling the ghettos,¹ the discourse at the time centered on providing greater opportunity for African Americans to live outside cities in low-poverty, whiter suburbs. In the months prior to passage of the FHA, the Kerner Commission convened and issued its recommendations to address the civil disorders that had taken place in several cities in 1967.² The Commission identified segregation as the root of the problem—describing blacks as trapped by discrimination and structural racism in under-resourced, crowded, central cities.³ The answer would be found in improving the conditions of “ghettos,” but also in combating racial isolation and divided neighborhoods by opening up the suburbs to black residents.⁴ And yet today many discussions about housing and cities quickly identify “gentrification” as a key problem—that affluent residents, mostly whites, are moving to these “ghettos,” and the effects of these trends on lower-income residents of color.

Gentrification is not a precise term.⁵ In popular discourse, it has a negative cast—one in which people describe a set of inchoate demographic and cultural changes in cities. Often, this discourse identifies “gentrification” as a type of cultural displacement, a takeover of a neighborhood that might have once been low-income, predominantly people of color, economically and racially diverse, or affordable for artists, to one that is now occupied by “monocultures”—people who work in a particular industry, for instance “techies” or “breeders.”⁶ The visual markers of this displacement

1. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 576 U.S. ___, ___, 135 S. Ct. 2507, 2525–26 (2015); 114 CONG. REC. 3421–22 (1968) (statement of Sen. Mondale) (describing the goal of the FHA as eliminating ghettos to produce “truly integrated and balanced living patterns”).

2. NAT’L CRIMINAL JUSTICE REFERENCE SERV., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1–3 (1968).

3. *Id.* at 5.

4. *Id.* at 5, 10–11.

5. Sociologist Ruth Glass coined the term to describe changes in working class neighborhoods in London in the late 1950s and early 1960s. See Ruth Glass, *Introduction to LONDON: ASPECTS OF CHANGE*, at xiii, xvii–xix (Ctr. for Urban Studies ed., 1964); Urban Lab., *How Ruth Glass Changed the Way We Approach Our Cities*, U.C. LONDON (Jan. 13, 2015), <http://www.ucl.ac.uk/urbanlab/news/ruth-glass-seminar> [<https://perma.cc/C99G-A8F6>].

6. See *Gentrifying Ditmas Park: The Move That Dare Not Speak Its Name*, INTELLIGENCER (Nov. 9, 2007), http://nymag.com/intelligencer/2007/11/gentrifying_ditmas_park_the_mo.html [<https://perma.cc/J6SB-AU5Y>] (describing the hipsters turned breeders of Clinton Hill Brooklyn); Robin Grearson, *The Aesthetics of Gentrification, and New York’s Top-Down Approach to Change*, HYPERALLERGIC (May 9, 2018), <https://hyperallergic.com/440547/the-aesthetics-of-gentrification-and-new-yorks-top-down-approach-to-change/> [<https://perma.cc/ZFE4-PB3C>] (describing “sameness,” the “monoculture” produced by “hypergentrification” in New York); Rebecca Solnit, *Resisting Monoculture*, GUERNICA (Jan. 7,

might be the disappearance of diners, bodegas, and taco stands, replaced with yoga studios, craft beer bars, pour over coffee bars, and, well, artisanal taco stands. This type of “cultural displacement” is not irrelevant to the question of fair housing, but the agreed-upon concern about gentrification that most clearly seems to implicate fair housing is a little less encompassing than in popular discourse. In the housing field, gentrification at a minimum refers to the in-migration of more affluent residents into previously low-income, urban minority neighborhoods.⁷ When researchers study gentrification, what they typically study are a specific set of measurable changes in the racial and demographic composition of neighborhoods—specifically increases in the number of whites in neighborhoods that were previously composed predominantly of low-income people of color.⁸ To be sure, gentrification is not necessarily about race and ethnicity. But the most pervasive trends today involve the in-migration of relatively affluent whites, and because of the nature of pre-existing segregation, many of the harms of gentrification are concentrated most heavily on communities of color.⁹

While movement of this sort has historically been too rare to be documented, much less generate legal or policy concerns, gentrification is now a pervasive phenomenon across many cities, especially since 2000.¹⁰ Professor Lance Freeman’s data presented for this symposium shows these trends.¹¹ According to this data, the in-migration of the affluent between 2000 and 2010 happened most prominently in New York, the District of Columbia, Philadelphia,

2014), <https://www.guernicamag.com/rebecca-solnit-resisting-monoculture/> [https://perma.cc/6HZB-L78K] (decrying the loss of artists, activists, immigrants, and teachers as San Francisco becomes dominated by wealthy, young, white tech workers).

7. NYU FURMAN CTR., FOCUS ON GENTRIFICATION 4 (2016), https://furmancenter.org/files/sotc/Part_1_Gentrification_SOCin2015_9JUNE2016.pdf [https://perma.cc/2WXL-9ZHJ].

8. See, e.g., *id.* at 4, 12–17 (looking at increases in rental prices and changes in resident characteristics, such as race and income).

9. See Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1196–99 (2016) (discussing the impact of gentrification on displacement of low-income people of color and resegregation).

10. See Richard Sander, *The Opportunity and the Danger of the New Urban Migration*, 53 U. RICH. L. REV. 871 (2019) (describing it as rare in the 1970s and 1980s for the white population in majority-minority neighborhoods to increase, but that since 2000 it has become “commonplace”).

11. Lance Freeman, Remarks at the University of Richmond Law Review Symposium: 50th Anniversary of the Fair Housing Act—Past, Present, and Future (Oct. 5, 2018).

Chicago, and New Orleans.¹² But these demographic changes are also prominent in smaller cities such as Richmond and Atlanta.¹³ Along with other demographic trends such as the “decade of the city”¹⁴ and millennials remaining in cities, these trends are slowing, with many cities growing at lower rates or “sustained population losses” compared to the previous year.¹⁵

There are signs too that gentrification is a factor contributing to greater integration in communities. Overall, there is mixed assessment about whether the FHA has been successful in combating segregation. By several measures there has been more progress in combating discrimination than in achieving integration.¹⁶ However, some find positive progress in greater black-white integration of communities today than in 1968,¹⁷ and a steady increase in the percentage of Americans living in “shared” neighborhoods.¹⁸ Some

12. *Id.*

13. *Id.*

14. See William H. Frey, *Early Decade Big City Growth Continues to Fall Off, Census Shows*, BROOKINGS (May 29, 2018), <https://www.brookings.edu/blog/the-avenue/2018/05/25/early-decade-big-city-growth-continues-to-fall-off-census-shows/> [https://perma.cc/RS4A-299R] (documenting urban growth between 2000 and 2017 but finding that this growth began to slow in 2015).

15. *See id.*

16. *See, e.g.*, Jacob S. Rugh & Douglas S. Massey, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century*, 11 DU BOIS REV. 205, 206, 212–13 (2014) (noting how public policies enacted during the Civil Rights era largely ended overt racial discrimination in real estate and lending, but many neighborhoods remain hypersegregated).

17. *See* EDWARD GLAESER & JACOB VIGDOR, MANHATTAN INST., *THE END OF THE SEGREGATED CENTURY: RACIAL SEPARATION IN AMERICA'S NEIGHBORHOODS, 1890–2010*, at 3–6 (2012), https://www.manhattan-institute.org/pdf/cr_66.pdf [https://perma.cc/CBT4-HX8Q]; Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOC. F. 571, 579 (2015) (describing black segregation as having “declined substantially in some metropolitan areas” but also as displaying a “remarkable persistence in many places”); Rugh & Massey, *supra* note 16, at 207, 212 (analyzing 287 metropolitan areas and finding decreases in black-white segregation from 1970 and 2010, declining 4.5 points per decade).

18. One definition of integration is a neighborhood in which a community of color accounts for at least 20% of the census tract population and the census tract is at least 20% white. *See* Ingrid G. Ellen et al., *Pathways to Integration: Examining Changes in the Prevalence of Racially Integrated Neighborhoods*, 14 CITYSCAPE, no. 3, 2012, at 33, 37, 39. In 2000, 23.9% of Americans resided in such “shared” census tracts and the percentage increased to 30.35% by 2011. *See* JONATHAN SPADER & SHANNON RIEGER, JOINT CTR. FOR HOUS. STUDIES OF HARV. UNIV., *PATTERNS AND TRENDS IN RESIDENTIAL INTEGRATION IN THE UNITED STATES SINCE 2000*, at 8 (2017). There have also been decreases in the prevalence of hypersegregated communities. *See* Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black & Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373, 373 (1989) (defining hypersegregation as high segregation of African Americans or Latinos on at least four of the five spatial dimensions); Douglas S. Massey & Jonathan Tanen, *A Research Note on Trends in Black Hypersegregation*, 52

researchers have cast those improvements as marking the end of segregation as a key feature of the American landscape.¹⁹ Other researchers have less positively characterized progress towards integration as stalled,²⁰ because high segregation persists in many metropolitan areas.²¹ Against this backdrop, some researchers are skeptical that gentrification has anything to do with this integration debate because the moves are too limited and occur in too few cities to make much of a dent in the overall picture of segregation and integration.²² Professor Richard Sander suggests that white in-migration in nonwhite areas is relatively dispersed, and does not lead to neighborhood resegregation, leading to some hope that it will lead to integration.²³

Researchers offer a range of theories on what is fueling gentrification. Leading accounts include increased racial tolerance by whites;²⁴ decreased crime in big cities;²⁵ deliberate investments in

DEMOGRAPHY 1025, 1028 (2015) (finding that the number of areas in which African Americans were hypersegregated decreased from forty to twenty-one between 1970 and 2010 and that the percentage of African Americans living in hypersegregated neighborhoods declined by half).

19. See GLAESER & VIGDOR, *supra* note 17, at 10 (declaring their data to show a sharp decline in segregation); see also RICHARD H. SANDER ET AL., MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 1–2 (2018); Sander, *supra* note 10, at 871.

20. See, e.g., JOHN R. LOGAN & BRIAN J. STULTS, US 2010, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 2, 23 (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf> [<https://perma.cc/E7QN-7T4S>].

21. See *id.* at 2–3.

22. See, e.g., MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 328–29 (2016); GLAESER & VIGDOR, *supra* note 17, at 10; Joe Cortright, *An Infographic Summarizing Neighborhood Change*, CITY COMMENT. (Sept. 11, 2016), http://www.cityobservatory.org/neighborhood_change_infographic/ [<https://perma.cc/6HML-XYT6>]. For instance, some researchers argue that conversations about gentrification can obscure more widespread challenges of concentrated poverty and affordable housing shortages. Cortright, *supra* (“[The data examined] the total number of people living in high poverty neighborhoods from 1970 to 2010. . . . [W]hile most of the focus has been on gentrification[.] . . . our own research shows that low-income communities are much more likely to suffer from the opposite problem: increasing poverty and severe population decline.”).

23. See SANDER ET AL., *supra* note 19, at 460–62.

24. See generally *id.* (describing increases between 1973 and 2002 in white tolerance for anti-discrimination laws, increases in the share of whites objecting to housing policies that exclude blacks, and increased share of whites who report that they are favorable or neutral to living in neighborhoods that are half-black). Notably, African Americans have grown more skeptical about racial integration in 2018 than in 1968. See *id.* at 462.

25. See Ingrid Gould Ellen et al., *Has Falling Crime Invited Gentrification?* 2–5 (U.S. Census Bureau, Ctr. for Econ. Stud., Working Paper CES No. 17-27, 2017), <https://www2.census.gov/ces/wp/2017/CES-WP-17-27.pdf> [<https://perma.cc/M8LD-P3NG>] (examining evidence from 1990, 2000, 2010, 2011, and 2012, and finding declines in city crime are associated with increases in the probability that high-income and college-educated households

revitalizing cities and in improving schools;²⁶ millennials' love for the city and distaste for commuting;²⁷ the urban "creative class" of college-educated professionals, celebrated by urbanist Richard Florida, who led cities to invest in loft living and coffee shops;²⁸ and the effect of all these forces on urban housing prices, which pushes more affluent households to lower-income neighborhoods in search of less costly housing.²⁹

In the face of these trends, this article considers how one should address the question of gentrification from a fair housing perspective. Part I discusses two possible frameworks for understanding the fair housing implications of gentrification. The first possibility is to cast it as a form of integration that should be celebrated. The second, darker narrative sees gentrification as necessarily unstable or at most superficial, and predicts that it is unlikely to benefit the prior low-income residents. Given evidence of both possibilities, this part concludes that the goal should be to minimize gentrification's harms—such as displacement and exclusion from planning decisions—while harnessing some of the benefits that might attend integration. Part II lays out the FHA's response to gentrification, highlights litigation in a number of areas, and discusses the use of the FHA's affirmatively furthering fair housing framework to address questions of displacement and the creation and preservation of affordable housing. Part III urges building on the fair housing approach, while moving beyond the quite limited legal tools that it offers. This part provides a framework for addressing some of the

choose to move into low income and/or major minority central city neighborhoods, but finding "some evidence that crime reductions disproportionately attract white households").

26. See Miriam Zuk et al., *Gentrification, Displacement and the Role of Public Investment*, 33 J. PLAN. LITERATURE 31, 31 (2018).

27. Richard Florida, *Millennials Are Happiest in Cities*, CITYLAB (June 29, 2018), <https://www.citylab.com/life/2018/06/millennials-are-happiest-in-cities/563999/> [https://perma.cc/3HHA-4YS4]; Sarah Landrum, *For Millennials, a Happier Day at Work Starts with the Morning Commute*, FORBES (Aug. 8, 2016, 3:08 PM), <https://www.forbes.com/sites/sarahlandrum/2016/08/08/for-millennials-a-happier-day-at-work-starts-with-the-morning-commute/> [https://perma.cc/2XBK-4Q5W].

28. See Sam Wetherell, *Richard Florida Is Sorry*, JACOBIN (Aug. 19, 2017), <https://jacobinmag.com/2017/08/new-urban-crisis-review-richard-florida> [https://perma.cc/6Q6Z-C6J6] ("After fifteen years of development plans tailored to the creative classes, Florida surveys an urban landscape in ruins. The story of London is the story of Austin, the Bay Area, Chicago, New York, Toronto, and Sydney. When the rich, the young, and the (mostly) white rediscovered the city, they created rampant property speculation, soaring home prices, and mass displacement. The 'creative class' were just the rich all along, or at least the college-educated children of the rich."). Richard Florida advanced his central arguments for urban revitalization in RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* (2002).

29. See Zuk et al., *supra* note 26, at 31–32; Ellen et al., *supra* note 25, at 24.

inequalities that are enabled by gentrification. This framework entails designing public goods such as schools in ways that are more redistributive; linking private development (which often depends on public resources such as zoning and tax incentives) to public benefits (such as through community benefits agreements and inclusionary zoning); and building governance and participation mechanisms that enhance the voice of traditionally excluded groups.

I. TWO VIEWS OF GENTRIFICATION

It is not obvious how to assess gentrification from a fair housing perspective. In its language and design, the FHA seeks to promote integration and avoid the perpetuation of segregation.³⁰ Some of the changes associated with gentrification might conceivably be consistent with fair housing goals. Implicit in the FHA is the recognition that segregation and racial isolation are unnatural products of public policy and private discrimination, which must now be undone by public policy. One possible account of gentrification is that it is a form of integration (both economic and racial and/or ethnic). Unlike suburban integration, it is also in potential harmony with the goals of urban revitalizers who have sought to combat the loss of population and commercial activity in cities, and indeed may have spurred some of the demographic changes through successful efforts to stabilize and “improve” minority neighborhoods.

From the fair housing perspective, neighborhoods that gentrify might become integrated in ways that produce better outcomes for long-term residents. Gentrification might improve the schools if more public and private money flows to them. These schools might attract higher-quality teachers and other instructional resources. The affluent might bring their networks and social capital, which

30. See 42 U.S.C. §§ 3601–3631 (2012). Key supporters articulated the FHA’s goals as both promoting integration and combating bias. See, e.g., 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale) (stating that the goal of the FHA was to promote “an integrated society, a stable society free of the conditions which spawn riots, free of riots themselves”); Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 371–88 (2007) (documenting drafters’ integration goals).

might translate to improved outcomes for low-income urban children.³¹ Affluent residents are better able to sustain public and private neighborhood institutions, including businesses and parks.³² You would also have integration's desired "democratic" benefits—increased interaction among groups which might decrease social hostility and indifference, and help build shared goals.³³

Integration through gentrification (the gentrification-as-integration model) also has the benefit of refocusing integration in cities. This integration comes at a time when there are strong arguments for investment in cities because of cities' density (and thus environmental superiority to suburbs), economic power, and generative creativity.³⁴ As a matter of emphasis, cities might be more able to achieve integration than suburbs. Cities may not engage in as much exclusionary zoning or employ discriminatory mechanisms to exclude poor residents from city boundaries. Cities may also be less politically motivated to externalize poverty in this way, because their residents are more "progressive," and thus they may have some "taste" for economic, racial and/or ethnic, and cultural integration. Another benefit of the gentrification-as-integration model is that economic and racial integration might be achieved without minority residents having to move away from the communities in which they have history, social supports, and networks—

31. See Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 899 (2016) (evaluating a voucher program that moved families to low-poverty neighborhoods and finding long-term benefits (as measured by increased lifetime earnings) for those who moved to these neighborhoods as young children); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. EDUC. RES. 531, 532–34 (1994) (among the positive long-term effects of school desegregation are gains to black children from exposure to white, middle-class networks).

32. IRIS M. YOUNG, INCLUSION AND DEMOCRACY 212 (2000).

33. See *id.* at 208–09 (identifying the harms of segregation as fundamentally democratic harms, including that segregation obscures the privilege that it creates and impedes political communication). For a discussion of benefits of racial integration in K–12 education in reducing racial and ethnic prejudice and stereotyping, improving cross-racial trust, friendship, and the ability to navigate multicultural settings, see Jomills Henry Braddock II & Amaryllis Del Carmen Gonzales, *Social Isolation and Social Cohesion: The Effects of K–12 Neighborhood and School Segregation on Intergroup Orientations*, 12 TCHRS. C. REC. 1631, 1649–50 (2010).

34. See, e.g., FLORIDA, *supra* note 28, at 220–22 (explaining that an influx of human capital to an area can spur economic growth and that investments should focus on that influx); DAVID OWEN, GREEN METROPOLIS: WHY LIVING SMALLER, LIVING CLOSER AND DRIVING LESS ARE THE KEYS TO SUSTAINABILITY 3, 7, 13, 19–20 (2009) (explaining that New York City's population concentration in a small area helps reduce its environmental impact).

which is one of the chief criticisms of integration programs that center on providing urban residents mobility to live in suburbs.³⁵

There is some evidence of this gentrification-as-integration account. Some have urged “two cheers for gentrification,” casting it as necessary to: stem population loss in cities; rebuild public and private neighborhood institutions in under-resourced neighborhoods; and promote interaction across race and class lines.³⁶ Empirical work, while not wholly supporting all the benefits of the gentrification-as-integration account, shows some of the benefits that may accompany the influx of more affluent residents, including crime reduction and improvements in amenities.³⁷ Lance Freeman’s early work on New York shows that some of the benefits might be achieved without displacement of poorer residents or making neighborhoods more homogeneous.³⁸

But there is reason to doubt that the gentrification-as-integration story will hold. If economic and racial integration are not stable, and if gentrification instead leads to displacement of lower income residents of color, then gentrification seems in severe tension with fair housing goals. Gentrification might lead to the demolition of affordable housing, or efforts by landlords and developers to push out lower-income renters. Even without demolition or intentional push-out, housing prices might increase in ways that render a neighborhood unaffordable for tenants in unregulated or unsubsidized units. With these mechanisms, integration might not be stable at the neighborhood level (though at the city level one could claim “diversity”). Poorer residents, disproportionately black and Latino,³⁹ would be pushed out of housing completely (i.e., into homelessness), or to the periphery of the city into newly segregated

35. See, e.g., EDWARD G. GOETZ, *CLEARING THE WAY: DECONCENTRATING THE POOR IN URBAN AMERICA* 8, 249–50 (2003).

36. J. Peter Byrne, *Two Cheers for Gentrification*, 46 *HOW. L.J.* 405, 405–06 (2003) (arguing that increasing the number of affluent residents is good for cities because it increases: cities’ tax base to finance affordable housing and other services; the number of consumers able to purchase local goods and services; and the number of citizens who can engage in local political processes).

37. See *id.* at 423.

38. See generally LANCE FREEMAN, *THERE GOES THE HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP* (2006) (discussing the benefits of gentrification for indigenous residents and evaluating policies aimed to reduce displacement while retaining these benefits).

39. See Edward Goetz, *Gentrification in Black and White: The Racial Impact of Public Housing Demolition in the United States*, 48 *URB. STUD.* 1581, 1594 & tbl. 5 (2011).

neighborhoods. These outcomes would intensify racial and economic segregation—rather than promote integration.

These predictions are not speculative. While Lance Freeman's study of New York shows minimal displacement, these results are likely a function of studying an early stage of gentrification, and doing so in neighborhoods with relatively stable subsidized rental housing and middle-class property owners.⁴⁰ More recent data, after 2000, has shown that housing costs are rising fastest in communities with the greatest rates of in-migration of affluent residents, and show decreases in the number and percentage of residents of color and of low-income residents in gentrifying neighborhoods.⁴¹ There is also evidence of out-migration of working and lower-income individuals to higher-poverty neighborhoods, further away from whiter, low-poverty neighborhoods, or from business centers.⁴² It seems logical that these changes would occur. Indeed, a primary aim of property holders (developers and individuals) is often to raise their own property values. In so doing, they may engage in forms of housing and neighborhood "improvement" that have the effect of raising housing costs for lower-income residents (and of course may engage in more direct and aggressive efforts to

40. Freeman's study only included census data from 1970 to 2000 and gentrification increased markedly after 2000. FREEMAN, *supra* note 38, at 27, 43. In addition, Freeman's analysis focused on Harlem (with stably subsidized housing at the time) and Clinton Hill (where working class and middle-class black property ownership was higher than in most cities). *See id.* at 78–79, 93.

41. *See, e.g.*, SPADER & RIEGER, *supra* note 18, at 4, 8–9 (2017); Ingrid Gould Ellen & Lei Ding, Symposium, *Advancing Our Understanding of Gentrification*, 18 CITYSCAPE 3, 3–4, 5 ex. 3 & 4 (2016); Ann Owens, *Neighborhoods on the Rise: A Typology of Neighborhoods Experiencing Socioeconomic Ascent*, 11 CITY & COMMUNITY 345, 346 (2012); Zuk et al., *supra* note 26, at 31, 36–37, 38 tbl. 2. At the same time, some post-2010 research shows that evictions do not increase in neighborhoods that are gentrifying. *See* Mathew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors*, 62 SOC. SCI. RES. 362, 370 (2017) (“[Findings] suggest[] that renters living in racially or economically transitioning neighborhoods do not have a higher likelihood of eviction than renters living in racially and economically homogeneous areas . . .”).

42. As housing prices have increased, many cities and counties have seen movement of Latino and black families to the outskirts of cities and unincorporated or suburban areas. *See, e.g.*, U.C. BERKLEY'S URBAN DISPLACEMENT PROJECT & CAL. HOUS. P'SHIP, *RIISING HOUSING COSTS AND RE-SEGREGATION IN CONTRA COSTA COUNTY 1*, 12–16 (2015), http://www.urbandisplacement.org/sites/default/files/images/cc_final.pdf [<https://perma.cc/55EC-CULF>] (describing the movement of low-income black and Latinx households in Contra Costa county); Alan Berube, *Segregation, Suburbs, and the Future of Fair Housing*, NYU FURMAN CTR. (Sept. 2016), <http://furmancenter.org/research/iri/essay/segregation-suburbs-and-the-future-of-fair-housing> [<https://perma.cc/3Z6Z-VYEW>] (detailing how urban housing costs have pushed lower-income households to inner-ring suburbs, increasing poverty rates there).

move out poor residents who they assume bring down housing values).

Even in neighborhoods that remain stably integrated (or at least “integrated” for the near term), one might be concerned about whether gentrification achieves the FHA goals of integration, if we understand those goals as more than just people living side-by-side. One could easily imagine a scenario in which more affluent residents (intentionally or unintentionally) hoard their social and political capital so that it does not trickle down to prior residents.⁴³ Or affluent residents could design public and private neighborhood resources to their benefit while excluding the less affluent.⁴⁴ Public goods such as schools might remain segregated through the exercise of public and private choice mechanisms, or effectively remain segregated within schools through tracking and specialty programs.⁴⁵ Democracy-furthering interaction might be limited since public and private spaces would not be shared. Some may frequent yoga studios, craft beer bars, and food festivals in the park, while others hang out on the stoop, at a bodega, or barbecue in the park.

And there is plenty of anecdotal evidence to support when gentrification-as-integration becomes gentrification-as-colonization, particularly around policing and criminalization of innocent activity by long-term residents. Recent flashpoints in Northern California include the #barbecuingwhileblack account of a white woman calling the police on long-term residents in Oakland for barbecuing in the park.⁴⁶ More tragically, the security guard Alejandro Nieto was killed in 2016 by the police in his San Francisco neighborhood after “transplants” reported his job-issued Taser as a threat.⁴⁷

43. For a general discussion of opportunity hoarding, see RICHARD V. REEVES, *DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT* 96, 100–06 (2017); see also Derek Thompson, *Why Middle-Class Americans Can't Afford to Live in Liberal Cities*, ATLANTIC (Oct. 29, 2014), <https://www.theatlantic.com/business/archive/2014/10/why-are-liberal-cities-so-unaffordable/382045> [<https://perma.cc/J9SS-LALC>].

44. For instance, they might limit the building of new housing, or shape the design of parks or bike lanes to their benefit. See Thompson, *supra* note 43 (describing San Francisco residents' unwillingness to authorize increases in density that might allow the building of more affordable housing).

45. See REEVES, *supra* note 43, at 102, 104, 106.

46. See Jonathan Kauffman, *Anti-Racist Barbecuers Take Back Oakland's Communal Backyard at Lake Merritt*, S.F. CHRON. (May 20, 2018, 5:28 PM), <https://www.sfchronicle.com/bayarea/article/Barbecuers-take-back-Oakland-s-communal-12929602.php> [<https://perma.cc/WD73-SHA7>].

47. See Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of>

There is some research that has begun to support the accounts of increased 911 calls in gentrifying neighborhoods and the expansion of punitive policing strategies.⁴⁸

There is evidence also that positive public goods are not distributed in gentrifying neighborhoods in ways that further the underlying goals of integration. For instance, schools often remain stubbornly segregated even as neighborhoods become more demographically diverse. Indeed gentrification can be facilitated by policies that allow school segregation.⁴⁹ New York stands as a powerful example. School choice, magnet, and tracking programs help lure middle- and upper-middle class parents to the public school system.⁵⁰ With these programs, upper-middle-class families may be more willing to settle in high-minority neighborhoods, knowing that they will not have to attend high-poverty, high-minority schools. For instance, test-in programs favor more affluent students. Studies have also shown that schools can shape who “chooses” the school by how they conduct outreach and by going outside formal processes to select students from higher socio-economic levels.⁵¹ Low-income families and vulnerable populations

-gentrifying-neighborhoods/548837/ [https://perma.cc/52V9-2KWY] (“[A]s demographics shift, activity that was previously considered normal becomes suspicious, and newcomers—many of whom are white—are more inclined to get law enforcement involved. Loitering, people hanging out in the street, and noise violations often get reported, especially in racially diverse neighborhoods.”); Louis Lin, “*Order Maintenance*” Policing and Its Role in Gentrification, ECON. OPPORTUNITY INST. (Aug. 29, 2017), <http://www.opportunityinstitute.org/blog/post/order-maintenance-policing-and-its-role-in-gentrification/> [https://perma.cc/V29K-NJ2Q]; Rebecca Solnit, *Death by Gentrification: The Killing That Shamed San Francisco*, GUARDIAN (Mar. 21, 2016, 1:38 PM), <https://www.theguardian.com/us-news/2016/mar/21/death-by-gentrification-the-killing-that-shamed-san-francisco> [https://perma.cc/YQB5-H6N8].

48. Ayobami Lanionu, *Coffee Shops and Street Stops: Policing Practices in Gentrifying Neighborhoods*, 54 URB. AFF. REV. 898, 900 (2017) (presenting data from New York City purporting to show strong positive association between gentrification and the rise of punitive policing strategies such as “order maintenance policing”).

49. See Francis A. Pearman II & Walker A. Swain, *School Choice, Gentrification, and the Variable Significance of Racial Stratification in Urban Neighborhoods*, 90 SOC. EDUC. 213, 214 (2017) (showing that school choice policies increase the role of gentrification by 22% in the most racially isolated neighborhoods).

50. See, e.g., NICOLE MADER ET AL., CTR. FOR N.Y.C. AFFAIRS, THE PARADOX OF CHOICE: HOW SCHOOL CHOICE DIVIDES NEW YORK CITY ELEMENTARY SCHOOLS 3–4, 6, 12 (2018), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5aebc1c3352f537d3541623b/1525461450469/The+Paradox+of+Choice.pdf> [https://perma.cc/P7KG-WQ9A].

51. See KEVIN G. WELNER, TCHRS. C. RES., HOW CHARTER SCHOOLS INFLUENCE STUDENT ENROLLMENT (Apr. 22, 2013), <http://68.77.48.18/RandD/Charter%20Schools/Cherry-Picking%20Students/How%20Charter%20Schools%20Influence%20Student%20Enrollment%20-%20Welner.pdf> [https://perma.cc/2FX6-HQAB]; Huriya Jabbar, “*Every Kid Is Money*”: *Market-Like Competition and School Leader Strategies in New Orleans*, 37 EDUC. EVALUATION & POL’Y ANALYSIS 638, 649–51 (2015). One study of school choice programs in

such as English language learner families are the least likely to exercise their choice.⁵² School choice decisions are also heavily shaped through parent networks.⁵³ And families may, of course, have different educational preferences that align with race and/or ethnicity and income.⁵⁴ Housing and school policy can be at odds with each other in achieving integration. A recent study of New York found that in higher-income areas, parents were likely to have their children enrolled in their zoned schools.⁵⁵ By contrast, in gentrifying neighborhoods, more than half of parents exercised school choice. Their choices moved them to schools with fewer poor students and higher test scores than the zoned schools.⁵⁶ One New York City community group has described this choice system as a

District 3 (the Upper West Side and parts of Harlem) found that schools engaged in “gate keeping” behavior to steer minority and poor families away, including a principal who told a parent that “[t]his is not a free lunch school.” See U. Aggarwal, *The Politics of Choice and the Structuring of Citizenship Post-Brown v. Board of Education*, 22 *TRANSFORMING ANTHROPOLOGY* 92, 93–94, 103 (2014); see also Ujju Aggarwal, *School Choice: The Freedom to Choose, the Right to Exclude*, in *WHAT’S RACE GOT TO DO WITH IT? HOW CURRENT SCHOOL REFORM POLICY MAINTAINS RACIAL AND ECONOMIC INEQUALITY* 103–05, 107–10 (Bree Picower & Edwin Mayorga eds., 2015).

52. See MADER ET AL., *supra* note 50, at 5, 12 (finding that lunch-eligible families were 80% less likely to opt out of their zoned schools and English language learners were 73% less likely to opt out of their zoned schools); see also CLARA HEMPHILL ET AL., *CTR. FOR N.Y.C. AFFAIRS, INTEGRATED SCHOOLS IN A SEGREGATED CITY* 18, 22–23 (2016), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5812567b15d5db0f1068e667/1477596798462/Integrated+Schools+in+a+Segregated+City.pdf> [<https://perma.cc/7CNN-ERS5>].

53. See Jennifer Jellison Holme & Meredith P. Richards, *School Choice and Stratification in a Regional Context: Examining the Role of Inter-District Choice*, 84 *PEABODY J. EDUC.* 150, 170 (2009); see also GENEVEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, *NAT’L EDUC. POL’Y CTR., REVIEW OF THE INTEGRATION ANOMOLY: COMPARING THE EFFECT OF K–12 EDUCATION DELIVERY MODELS ON SEGREGATION IN SCHOOLS* 6 (2016), https://nepc.colorado.edu/sites/default/files/ttr_siegel-hawley-frankenberg_integration_0.pdf [<https://perma.cc/6F6V-2KMX>]; Elliot B. Weininger, *School Choice in an Urban Setting*, in *CHOOSING HOMES, CHOOSING SCHOOLS* 268, 271 (Annette Lareau & Kimberly Goyette eds., 2014); Jennifer Jellison Holme, *Buying Homes: Buying Schools: School Choice and the Social Construction of School Quality*, 72 *HARV. EDUC. REV.* 177, 180 (2002); Amy Stuart Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 *REV. EDUC. RES.* 531, 534, 547, 549 (1994).

54. In New York, black and Latino students actually exercise rates of choice higher than their white counterparts because they are less likely to be satisfied with their zoned schools. MADER ET AL., *supra* note 50, at 11–12. In 2016–17, 60% of black families with kindergarten-aged children in public schools chose a school, and 39% of hispanic children. See *id.* at 11. I do not want to be overly cynical about this landscape, or unduly prioritize integration above other goals. New York City has also invested and adopted reforms overall, including targeted intervention for high-poverty schools and a range of private nonprofits have been invested in developing public charter schools. See *id.* at 6–7.

55. See *id.* at 3, 5.

56. *Id.* at 16–17.

“perfect storm of segregation and unequal access.”⁵⁷ “[z]ones provide families of means with exclusive access to the schools they like, while choice allows them to flee the ones they don’t.”⁵⁸

Either gentrification-as-integration, or gentrification-as-new-segregation might be possible. But neither seems preordained. Policy, planning, and law have the power to shape these outcomes. One approach that might further fair housing goals would be to maximize the potential benefits to existing residents from gentrification, while attending to some of its harms including displacement and segregated public goods.

II. FAIR HOUSING’S LEGAL AND REGULATORY RESPONSE: PROMOTING INTEGRATION AND DISRUPTING SEGREGATION

This part considers how the FHA can be used to minimize the harm of displacement and segregation in gentrifying neighborhoods. The FHA provides powerful tools to help address some of the problems associated with gentrification, as well as the potential to be used more proactively as a framework for advancing integration for historically segregated groups. The antidiscrimination provisions of the FHA prohibit both disparate treatment and disparate impact discrimination.⁵⁹ Drawing on the FHA’s legislative history of dismantling segregation and promoting integration, courts have articulated two strands of disparate impact. The first, similar to the disparate impact theory under Title VII, prohibits facially neutral actions with an adverse effect on a group which lack legitimate justification.⁶⁰ The second theory responds to the deeply rooted history of segregation, which the FHA sought to ad-

57. N.Y. APPLESEED, SEGREGATION IN NYC DISTRICT ELEMENTARY SCHOOLS AND WHAT WE CAN DO ABOUT IT: SCHOOL-TO-SCHOOL DIVERSITY 1, 11 (2013), https://nyappleseed.org/wp-content/uploads/First-Briefing-FINAL-with-Essential-Strategies-8_5_13.pdf [<https://perma.cc/DBN3-FE63>].

58. MADER ET AL., *supra* note 50, at 3.

59. See 42 U.S.C. § 3604 (2012); Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 576 U.S. ___, ___, 135 S. Ct. 2507, 2525–26 (2015) (recognizing that the FHA prohibits actions with unjustified disparate impact); see also 24 C.F.R. § 100.500 (2018) (The Department of Housing and Urban Development’s Disparate Impact Rule). Lower courts had long held that the Act extended to disparate impact. See, e.g., United States v. City of Black Jack, 372 F. Supp. 319, 326 (E.D. Mo. 1974) (recognizing disparate impact claim).

60. See, e.g., Metro Hous. Dev. Comp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977).

dress by prohibiting actions with the effect of “perpetuating segregation.”⁶¹

The FHA’s requirement that federal agencies and federal grantees “affirmatively . . . further” fair housing⁶² provides another potential tool for promoting integration. This provision is rooted in the FHA’s recognition of the federal government’s complicity in creating segregation.⁶³ The answer is not only to ensure that federal funds would no longer be used to maintain segregation, but also to create an affirmative duty on the federal government and its grantees to promote integration.⁶⁴ Early lower court cases would hold that the United States Housing and Urban Development Department’s (HUD) duty to further fair housing required HUD to promote integration in locating public and subsidized housing.⁶⁵ With the strengthened 2015 regulations discussed below, the affirmatively furthering fair housing provisions require that grant recipients analyze the barriers to fair housing within their communities and take steps to address those barriers. This part lays out some of the possibilities and limitations of this framework in the context of gentrification.

A. Challenging Upzoning

One mechanism of gentrification is when cities redevelop lower-income minority neighborhoods to attract businesses and housing

61. See *id.* at 1289–90; see also *NAACP v. Town of Huntington*, 844 F.2d 926, 928, 937 (2d Cir. 1988), *aff’d*, 488 U.S. 15 (1988) (“The discriminatory effect of a rule arises in two contexts: adverse impact on a particular minority group and harm to the community generally by the perpetuation of segregation. . . . [R]ecognizing this second form of effect advances the principal purpose of Title VIII to promote, ‘open, integrated residential housing patterns.’” (quoting *Otero v. N.Y. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973))).

62. 42 U.S.C. § 3608(d) (2012).

63. Coty Montag, *Fifty Years On, HUD Abandons Dr. King’s Vision of Integrated Communities*, HILL (Jan. 17, 2018, 10:00 AM EST), <https://thehill.com/opinion/civil-rights/368859-fifty-years-on-hud-abandons-dr-kings-vision-of-integrated-communities> [https://perma.cc/7CFQ-4WDN].

64. See Florence Wagman Roisman, *Affirmatively Furthering Fair Housing in Regional Housing Markets: The Baltimore Public Housing Desegregation Litigation*, 42 WAKE FOREST L. REV. 333, 389 (2007) (providing the legislative history of the provision).

65. See, e.g., *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (finding the Fair Housing Act to require that HUD “use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases”); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 816, 821–22 (3d Cir. 1970) (holding that the Fair Housing Act and Title VII require HUD to affirmatively further fair housing by considering the racial and socioeconomic effects of its site selection decisions).

for more affluent residents. Even when this zoning for redevelopment—sometimes called “upzoning”—seeks to preserve or even expand affordable housing, it has faced challenges for creating insufficient amounts of affordable housing or displacing low-income residents through design choices or market effects. Advocates have begun to employ the FHA’s disparate impact standard to challenge these upzonings when the displacement has a disparate impact on a particular racial or ethnic group or based on another protected characteristic such as disability or familial status.⁶⁶ Another basis of challenge for upzonings that receive federal funds is that they fail to adequately “affirmatively further fair housing” as required by the FHA and its implementing regulations.⁶⁷

Residents in gentrifying Washington, D.C. neighborhoods have invoked the FHA to block redevelopments that would diminish the number of units for low- to moderate-income households, or decrease the number of family-size units. In one suit, plaintiffs challenged the city’s plan to attract more high-income households by adopting a public housing redevelopment plan that would increase the number of one-bedroom units and reduce the number of units for families.⁶⁸ The district court dismissed the claim for lack of ripeness because the analysis of impact was based solely on the developer’s letter to city zoning officials and not on a final building plan.⁶⁹ Another similar case brought under the FHA disparate impact standard, involving families at risk of displacement from a planned redevelopment, was allowed to go forward.⁷⁰

New York City, which in 2014 launched a plan to add or preserve 200,000 units of housing to the city by 2026,⁷¹ has seen a number of lawsuits by low-income housing and tenant groups challenging

66. Bradley Pough, *Neighborhood Upzoning and Racial Displacement: A Potential Target for Disparate Impact Litigation?*, 21 U. PENN. J.L. & SOC. CHANGE 267, 288–89 (2018) (“[U]p zoning and disparate impact liability seem made for each other. However, . . . several factors cut against [this litigation strategy’s] potential for success.”).

67. See 42 U.S.C. § 3608 (2012); 24 C.F.R. §§ 5.150–.151.

68. See *Barry Farm Tenants v. D.C. Hous. Auth.*, 311 F. Supp. 3d 57, 60, 62 (D.D.C. 2018).

69. *Id.* at 66–67.

70. See *Borum v. Berntwood Vill., LLC*, 324 F.R.D. 1, 8, 10, 20 (D.D.C. 2018) (“The following class is hereby [certified]. . . . [I]ndividuals who reside at Brookland Manor in a three-, four-, or five-bedroom unit that house one or more minor child and his or her guardian and are at risk of being displaced from [larger] unit[s].”).

71. See MAYOR BILL DE BLASIO, CITY OF N.Y., HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 5–6, 12 (2014), http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf [<https://perma.cc/GVH8-C9HF>].

aspects of the plan. The city's housing plan depends on rezoning several low-income, predominantly minority neighborhoods, which has led to concern at the community level about displacement and the lack of sufficient affordable housing units.⁷² Most of the lawsuits have so far been brought under environmental and land use laws, and to date none have succeeded.⁷³ But some community groups have found hope in an earlier successful challenge to a rezoning that sought to build affordable housing on city-owned land known as "Broadway Triangle"—an area surrounded by rapidly gentrifying Brooklyn neighborhoods.⁷⁴ In the *Broadway Triangle* case, plaintiffs challenged the redevelopment plan for failing to analyze the effect of the redevelopment on racial segregation, for including residency preferences that advantaged the existing white community, and for having density restrictions that limited affordable housing.⁷⁵ A judge preliminarily enjoined the project for failing to consider its effect on fair housing and segregation.⁷⁶ After eight years of litigation, the case was eventually settled, requiring the developer to build additional units of affordable housing and to broaden the community residency preference to create more diversity in the pool of lottery applicants.⁷⁷

While plaintiffs were successful in gaining affordable housing in the *Broadway Triangle* case, as a general matter, these cases are not easy to win. Under disparate impact, plaintiffs have to show a statistically significant impact, which in the context of displacement cases requires making an empirical prediction about the ex-

72. Tanay Warkerkar, *NYC's Controversial New Affordable Housing Proposals, Explained*, CURBED N.Y. (Feb. 8, 2016, 11:45 AM EST), <https://ny.curbed.com/2016/2/8/10940798/nycs-controversial-new-affordable-housing-proposals-explained> [<https://perma.cc/CJ3A-CTBN>].

73. See, e.g., *In re Ordonez v. New York*, No. 450100/2018, 2018 N.Y. Misc. LEXIS 2911, at *1, *79–80 (Sup. Ct. July 11, 2018) (dismissing two administrative challenges to the City of New York's rezoning plan that were made on environmental grounds as well as criticizing the city's lack of compliance with land use laws).

74. See *Broadway Triangle Cmty. Coal. v. Bloomberg*, 941 N.Y.S.2d 831, 832–33, 839 (Sup. Ct. 2011).

75. *Id.* at 834, 837–38.

76. *Id.* at 839.

77. See J. David Goodman, *City to Settle Discrimination Claim in Brooklyn Housing Plan*, N.Y. TIMES (Dec. 3, 2017), <https://www.nytimes.com/2017/12/03/nyregion/brooklyn-housing-discrimination.html>? [<https://perma.cc/878J-RE6A>] (stating that the final settlement creates 375 units of affordable housing and provides preferences to applicants currently residing in a wider, more diverse geographic area than in the original plan).

tent of affordable housing loss and the impact on low-income tenants.⁷⁸ Even if impact is shown, cities can justify upzoning as necessary to revitalize ailing corridors and build additional housing (which can produce economic benefits for existing and low-income residents, and increase overall housing supply).⁷⁹

A successor case to *Broadway Triangle* (involving a different development project on the same parcel of land) shows some of the challenges of meeting the second step of the disparate impact standard, and suggests that not all courts will be amenable to second-guessing city planning decisions in this regard. Justice Kennedy's opinion in *Inclusive Communities* urged caution in relying on disparate impact theories to challenge city planning decisions regarding affordable housing, and suggested that disparate impact cases that did not involve artificial barriers to building housing (such as exclusionary zoning) would often fail under the FHA's analogue to the "business necessity."⁸⁰ According to Justice Kennedy: "The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities."⁸¹

Echoing Justice Kennedy, a state trial judge dismissed a lawsuit in Williamsburg by Churches United for Fair Housing, Inc., which had argued that a rezoning failed to create sufficient affordable housing and thus led to a racially disparate impact in violation of the FHA.⁸² In dismissing the case, the judge found that the rezoning had already cleared sufficient bureaucratic review and public input. According to the judge: "The city needs more housing . . .

78. See Zachary C. Freund, Note, *Perpetuating Segregation or Turning Discrimination on Its Head? Affordable Housing Residency Preferences as Anti-Displacement Measures*, 118 COLUM. L. REV. 833, 858 (2018).

79. See Li, *supra* note 9, at 1204, 1219 & n.76.

80. See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project Inc., 576 U.S. ___, ___, 135 S. Ct. 2507, 2522 (2015) ("An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies.").

81. *Id.* at 2512, 2523 ("It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable."); see also *id.* at 2523 ("As HUD itself recognized in its recent rulemaking, disparate-impact liability 'does not mandate that affordable housing be located in neighborhoods with any particular characteristic.'" (quoting 78 Fed. Reg. 11,476)).

82. Churches United for Fair Hous., Inc. v. De Blasio, No. 151786, 2018 N.Y. Misc. LEXIS 3305, at *4, *12, *37, *56 (Sup. Ct. July 30, 2018).

a lot more. . . . The [project] has already passed political-process muster; today it passes judicial-process muster. This court finds no legal impediment to it and will not stand in its way one more day.”⁸³

Whatever the deficiencies in the Williamsburg case, skepticism about the utility of disparate impact in cases involving urban rezoning risks reading the “perpetuation of segregation” prong out of the FHA and erasing the historical context that informs it. Government decisions can serve to exacerbate historic patterns of segregation not merely through exclusionary zoning, but through siting, zoning, and land use decisions that compound historic patterns of segregation and concentrated poverty. Along these lines, Professor Stacy Seicshnaydre has argued that Justice Kennedy’s admonition that disparate impact not be used to chill “local discretion” should not be used to blunt the use of disparate impact to challenge urban revitalization projects.⁸⁴ Professor Seicshnaydre addresses instances, much like those before the court in *Inclusive Communities*, in which decisions on where to site low-income housing projects might serve to compound segregation by containing minority communities.⁸⁵ She notes that the FHA language, history, and long-standing interpretation would prohibit such actions.⁸⁶ The history of the FHA was precisely to question local planning decisions, scrutinizing them for whether they are in fact promoting integration.⁸⁷ While *Inclusive Communities* addresses revitalization in the context of creating more affordable housing, similar curbs should apply to upzonings which make decisions about where to locate housing,⁸⁸ whether to create affordable housing, or to determine who has access to new housing—all of which have impacts of historic patterns of segregation.

Still, Justice Kennedy’s pronouncement suggests the practical challenges of the disparate impact approach to upzoning. The success of any claim will depend on a court’s willingness to scrutinize

83. *Id.* at *56.

84. See Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After Inclusive Communities*, 24 *GEO. MASON L. REV.* 663, 683–84 (2017) (presenting Justice Kennedy’s concern about second-guessing local planning decisions).

85. *Id.* at 698.

86. *Id.* at 670–72.

87. *Id.* at 672–73.

88. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project Inc.*, 576 U.S. ___, ___, 135 S. Ct. 2507, 2513–14 (2015).

the justifications offered by the government actor and to consider less discriminatory alternatives.

B. *Residency Preferences*

Community residency preferences that address gentrification also implicate the FHA. Residency preferences provide priority status to existing neighborhood residents in lotteries for new affordable units. Residency requirements have historically been used as a way of keeping minorities outside of white communities⁸⁹ and, like exclusionary zoning, are in the “heartland”⁹⁰ of what is considered discriminatory under the FHA.⁹¹ In the context of gentrifying cities, challenges to community preferences arise in a different posture. A range of cities have adopted (or are considering adopting) residency preferences in gentrifying neighborhoods to ensure that existing residents can stay in their neighborhoods even as housing prices are increasing.⁹² Portland, Oregon recently instituted a preference policy that provides down payment assistance to homeowners who are at risk of displacement, or who were displaced from certain gentrifying neighborhoods under a “Right to Return Plan.”⁹³

89. See Florence Wagman Roisman, *The Lessons of American Apartheid: The Necessity and Means of Promoting Residential Racial Integration*, 81 IOWA L. REV. 479, 518 (1995) (noting exclusionary history of residence requirements); Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s “Affirmatively Further” Mandate*, 100 KY. L.J. 125, 136 & n.70 (2012) (discussing litigation against local government preferences).

90. See *Inclusive Cmty.*, 576 U.S. at ___, 135 S. Ct. at 2521–22.

91. See 42 U.S.C. § 3604(a) (2012); *United States v. Hous. Auth. of Chickasaw*, 504 F. Supp. 716, 726–31 (S.D. Ala. 1980) (holding that “citizenship requirements” violate the Fair Housing Act due the “segregative effect”).

92. See, e.g., Natalie Bicknell, *Community Resident Preference Policy and the Fight Against Displacement in Seattle*, URBANIST (July 23, 2018), <https://www.theurbanist.org/2018/07/23/community-resident-preference-policy-and-the-fight-against-displacement-in-seattle/> [<https://perma.cc/J7C3-4XAX>] (detailing pending proposals for community residence preference in Seattle to address gentrification and noting existing policies in New York City and San Francisco).

93. See *Frequently Asked Questions*, PORTLAND HOUSING BUREAU, <https://www.portlandoregon.gov/phb/article/671059> [<https://perma.cc/RG9A-AE2K>] (last visited Feb. 1, 2019) (detailing program providing preferences to former residents and their descendants displaced from certain neighborhoods in Portland); see also Dhruv Mandal, *How Portland’s “Right to Return” Is Indeed Right to Return Housing to the Underrepresented*, BERK. POL. REV. (June 1, 2018), <https://bpr.berkeley.edu/2018/06/01/how-portlands-right-to-return-is-indeed-right-to-return-housing-to-the-underrepresented/> [<https://perma.cc/4Y28-GJE2>]; Melanie Sevchenko, *Un-Gentrifying Portland: Scheme Helps Displaced Residents Come Home*, GUARDIAN (Mar. 1, 2018, 7:00 EST), <https://www.theguardian.com/cities/2018/mar/01/portland-anti-gentrification-housing-scheme-right-return> [<https://perma.cc/WB32-8D>]

Community preferences can be in conflict with the FHA because they may limit households of color to their “own” neighborhoods—neighborhoods that are the product of segregation and discrimination—while preventing these residents from accessing affordable housing in other nonminority areas in a city.

This tension between the FHA and community preferences arose recently in San Francisco. Beginning in 2015, the city adopted an ordinance providing a preference for tenants who had been evicted from housing in the city (including some who had been evicted as a result of urban renewal projects in the 1960s) and to those who were located in neighborhoods which were building new affordable housing.⁹⁴ When the city proposed building affordable housing in a historically African American neighborhood it sought to provide a lottery preference for low-income residents of that neighborhood (who were mostly black).⁹⁵ Because the project relied on federal funds, it was subject to fair housing review by HUD.⁹⁶ HUD (then under the Obama Administration) indicated that despite its sensitivity to San Francisco’s anti-displacement objectives, the preferences would “perpetuate segregation” and risked violating the FHA.⁹⁷ HUD’s FHA regulations prohibit residency requirements and indicate that residency preferences must be marketed and de-

4J]. The plan includes preferences for those who can show that their families were pushed out to make room for past waves of urban development. See Dirk VanderHart, *Portland’s Trying to Bring Displaced Residents Back to Their Old Neighborhoods. Why Isn’t It Working?*, PORTLAND MERCURY (Feb. 28, 2018), <https://www.portlandmercury.com/news/2018/02/28/19706866/portlands-trying-to-bring-displaced-residents-back-to-their-old-neighborhoods> [<https://perma.cc/ZRK3-WTXK>]. It remains to be seen whether the program will be successful in achieving its goals. See N./NE. NEIGHBORHOOD HOUS. STRATEGY OVERSIGHT COMM., PORTLAND HOUS. BUREAU, 2017 ANNUAL REPORT 15–16 (2017), <https://prosperportland.us/wp-content/uploads/2019/01/NNE-Housing-Strategy-Annual-Report-2017.pdf> [<https://perma.cc/SE4R-9Y9H>] (describing implementation challenges).

94. See Tim Iglesias, *Threading the Needle of Fair Housing Law in a Gentrifying City with a Legacy of Discrimination*, 27 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 51, 56–57 (2018).

95. See S.F., CAL., ORDINANCE § 204-15 (2015). The neighborhood known as the “Western Addition” was “[o]nce a thriving, predominantly African-American community” that was severely impacted by urban renewal in the 1960s, and now experiencing the exit of low-income tenants and an influx of more affluent residents. Iglesias, *supra* note 94, at 57–58 (quoting letter from community leader indicating that “households earning 50 percent to 100 percent of the area median income (AMI) shrank by almost 13 percent, while the number of families earning greater than 200 percent of AMI grew by almost 35 percent”).

96. See 29 U.S.C. § 794 (2012) (prohibiting discrimination on the basis of disability in any program or activity that receives financial assistance from any federal agency); 24 C.F.R. § 8.1 (2018) (applying 29 U.S.C. § 794 to Department of Housing and Urban Development); Iglesias, *supra* note 94, at 57.

97. Iglesias, *supra* note 94, at 59.

signed to avoid discrimination based upon a protected characteristic.⁹⁸

In part, HUD's refusal to approve the plan reflected a kind of formalism—concern about the historic uses of community residency preferences to limit opportunity for residents of color and other protected classes.⁹⁹ But it also seemed to indicate a lack of faith in whether San Francisco had adequately studied the potential effect of a city-wide preference in a city in which the African American population was shrinking.¹⁰⁰ After the city presented statistical and other information defending its plan, and after a series of high level meetings with political leadership and HUD officials, HUD allowed the city to adopt an alternative, more limited preference for HUD-funded projects.¹⁰¹ The city continues to apply its broader preference policies for projects that are not federally funded.¹⁰² This new preference policy would be targeted to neighborhoods that had suffered the highest displacement or were most vulnerable to displacement due to gentrification (about forty census districts).¹⁰³ HUD approved this type of more targeted “anti-displacement” preference for 40% of new affordable units “where residents from throughout the city are eligible for the preferences and where race is not considered in the selection process.”¹⁰⁴

San Francisco's 2015 community residency preference programs were modeled after New York City's community residency preference, which was adopted in 1988 in part because of pressure from low-income housing advocates.¹⁰⁵ The city's current policy (adopted in 2002) provides a preference to residents of a particular community district for up to 50% of the affordable housing created within

98. 24 C.F.R. § 960.206 (2018) (noting that these are for PHAs; regulations for federally funded housing generally to come).

99. See Iglesias, *supra* note 94, at 59 (“One of HUD's concerns was that approving the San Francisco neighborhood preference would be perceived as precedent for other communities to create such preferences.”).

100. *Id.* at 55, 58–59.

101. *Id.* at 61.

102. *Id.* at 62.

103. *Id.* at 61.

104. See *id.* (quoting Letter from Gustavo Velasquez, Assistant Sec'y for Fair Hous. & Equal Opportunity, to Edwin Lee, Mayor of San Francisco, at 1 (Sept. 21, 2016)).

105. See *id.* at 55–56, 59; see also Bicknell, *supra* note 92 (“In 1988, NYC became the first major municipality to adopt community residence preference policy after low-income residents demanded that they had a right to remain in their communities and benefit from community redevelopment.”).

that district.¹⁰⁶ In New York, it is a civil rights law organization that has challenged the community preference, pitting civil rights interests against the city and tenant groups.¹⁰⁷ According to the complaint in the case, *Winfield v. City of New York*, the community preference operates to entrench segregation patterns and prioritize white residents to live in low-poverty neighborhoods that have higher-quality public services.¹⁰⁸ The district court has so far allowed the case to go forward on both intentional and disparate impact discrimination theories, and the case is currently in discovery.¹⁰⁹

The takeaway from these cases is that community preferences, even when adopted to address the potential harms of gentrification, are in tension with the FHA. Here, again, as with rezoning, context will matter. New York's community preference seems vulnerable under disparate impact, because it does not provide low-income residents city-wide choice and is not tailored to displacement. Community preferences might still be an effective part of the toolkit to address gentrification, but they should be structured to prevent displacement and implemented only after an impact analysis to be sure that they do not exacerbate segregation.

C. *Affirmatively Furthering Fair and Affordable Housing*

Another point of intervention is the FHA's requirement that recipients of federal funds take steps to affirmatively further fair housing.¹¹⁰ Implementing regulations require federal fund recipients to assess fair housing barriers in their own communities and take steps to address these barriers.¹¹¹

The current HUD rule adopted in 2015 requires local grant recipients to conduct an Assessment of Fair Housing (AFH) for a wide range of fair housing barriers facing their communities (such as the siting of public and affordable housing, mobility for rental

106. See First Amended Complaint ¶¶ 83–84, 87, *Winfield v. City of New York*, No. 15-CV-05236 (S.D.N.Y. Sept. 1, 2015) [hereinafter *Winfield Complaint*]. For a detailed discussion of NYC's community residency preferences, see Freund, *supra* note 78, at 845–48.

107. *Winfield Complaint*, *supra* note 106, ¶ 6.

108. *Id.* ¶ 7.

109. See Memorandum Opinion and Order Denying Defendant's Motion to Dismiss, *Winfield v. City of New York*, 2016 U.S. Dist. LEXIS 146919 (S.D.N.Y. 2016) (No. 15-CV-05236).

110. See 42 U.S.C. § 3608 (2012).

111. See 24 C.F.R. §§ 5.150–.151 (2018).

voucher holders, weak enforcement of antidiscrimination laws, exclusionary zoning, and displacement). This assessment must be conducted with involvement from a range of public agencies, community groups, and community members. Localities must then develop a plan to address those barriers to integration and fair housing within their communities.¹¹² In 2018, a new administration suspended the rule, giving communities until 2020 to submit fair housing plans.¹¹³ Still, some jurisdictions are continuing to implement the rule, developing AFHs as originally planned.¹¹⁴

For example, Los Angeles conducted an AFH that was approved by the Los Angeles City Council in October 2017.¹¹⁵ Los Angeles's AFH "analyzes a variety of fair housing issues including patterns of integration and segregation . . . racially or ethnically concentrated areas of poverty . . . within Los Angeles and regionally; disparities in access to opportunity in education, employment, transportation, environmental health, and exposure to poverty; and disproportionate housing needs."¹¹⁶

112. *Id.*

113. *See* Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683, 683 (Jan. 5, 2018). Several groups have challenged the suspension of the rule as arbitrary and capricious. *See, e.g.,* Nat'l Fair Hous. All. v. Carson, 330 F. Supp. 3d 14, 23 (D.D.C. Aug. 17, 2018).

114. Los Angeles, Philadelphia, and New York are among those cities who have committed to the affirmatively furthering fair housing process despite the rule suspension. *See County Affirms Commitment to Fair Housing*, OFF. L.A. COUNTY SUPERVISOR, DISTRICT 3, SHEILA KUEHL (Apr. 27, 2018), <https://supervisorkuehl.com/county-affirms-commitment-to-fair-housing/> [<https://perma.cc/7LSL-6E7S>] (Los Angeles); Eleanor Goldberg, *Trump Administration Killed a Housing Discrimination Rule. Some Cities Are Following It Anyway*, HUFFPOST (June 1, 2018, 5:21 PM ET), https://www.huffingtonpost.com/entry/cities-following-suspended-housing-discrimination-rule_us_5b1195cbe4b0d5e89e1fa5c8 [<https://perma.cc/GR7P-N8S8>] (Philadelphia). Philadelphia's planning and development director was quoted as saying after completion of the planning process that "[i]t was a lift, but it proved to be a worthwhile lift . . . We embraced the opportunity and ran with it." Goldberg, *supra*. Philadelphia's process culminated in a "758-page document that led the city to consider issues it previously didn't . . . [and the Obama Administration's] HUD accepted the city's submission in the first round." *Id.* Amy Plitt, *NYC Launches Fair Housing Planning Process, Despite HUD Delays*, CURBED N.Y. (Mar. 9, 2018, 11:50 AM EST), <https://ny.curbed.com/2018/3/9/17097132/new-york-fair-housing-hud-ben-carson> [<https://perma.cc/JMT9-2MC7>] (New York).

115. *See generally* *Assessment of Fair Housing*, L.A. HOUSING & COMMUNITY INV. DEP'T, <https://hcidla.lacity.org/assessment-fair-housing> [<https://perma.cc/G984-K9ZS>] (last visited Feb. 1, 2019) ("The Assessment of Fair Housing (AFH) Plan identifies fair housing issues and develops strategies to reduce existing barriers throughout the City of Los Angeles.")

116. CITY OF L.A. & THE HOUSING AUTHORITY OF L.A., ASSESSMENT OF FAIR HOUSING PLAN 2018–2023, at 16 (2017) [hereinafter ASSESSMENT OF FAIR HOUSING PLAN], <https://hcidla.lacity.org/assessment-fair-housing> [<https://perma.cc/G984-K9ZS>].

Los Angeles's AFH places gentrification and affordability squarely at the center, and, in so doing, offers an expansive vision of fair housing.¹¹⁷ The City of Los Angeles has faced an affordable housing crisis, gentrification, and increases in the number of homeless individuals and families.¹¹⁸ The state overall has a shortage of affordable housing, with the deepest shortfalls existing for those within 50% of the area median income.¹¹⁹ The AFH plan commits the city to take a number of steps including generally increasing the availability of affordable housing in neighborhoods of opportunity (low-poverty neighborhoods) and preventing displacement in gentrifying neighborhoods.¹²⁰ It also seeks to improve neighborhoods of concentrated poverty, particularly by improving transportation and schooling opportunities.¹²¹ The AFH calls for the adoption of an Affordable Housing Linkage Fee which would require market developers to invest in a fund for the preservation and creation of affordable housing.¹²² It also recommends the adoption of specific policies to preserve existing affordable housing, and to streamline the process for the development of city-owned property to create more housing.¹²³ The plan also seeks to prevent displacement of low- and moderate-income households, though its recommendations in this regard seem more tentative.¹²⁴ The recommendations include exploring the creation of a "right to counsel" provision for tenants facing unjust eviction.¹²⁵

117. *Id.*

118. CAL. HOUS. P'SHIP CORP., LOS ANGELES COUNTY ANNUAL AFFORDABLE HOUSING OUTCOMES REPORT 7 (2018), <https://1p08d91kd0c03rlxhmtydpr-wpengine.netdna-ssl.com/wp-content/uploads/2018/06/Full-LA-County-Outcomes-Report-with-Appendices.pdf> [<https://perma.cc/62WJ-WCLP>] (finding that Los Angeles requires over 568,000 more units for low-income earners); CAL. DEP'T OF HOUS. & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES 1, 32 (2018), http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf [<https://perma.cc/NE2S-5WFA>]; JONATHAN WOETZEL ET AL., MCKINSEY INST., A TOOLKIT TO CLOSE CALIFORNIA'S HOUSING GAP: 3.5 MILLION HOMES BY 2025, at 6 (2016), <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Urbanization/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.ashx> [<https://perma.cc/U9VL-7AYJ>].

119. Michael Hiltzik, *California's Housing Crisis Reaches from the Homeless to the Middle Class—but It's Still Almost Impossible to Fix*, L.A. TIMES (Mar. 29, 2018, 9:55 AM), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-housing-crisis-20180330-story.html> [<https://perma.cc/ZFR2-YWST>].

120. ASSESSMENT OF FAIR HOUSING PLAN, *supra* note 116, at 18, 48, 91.

121. *Id.* at 20–21.

122. *See id.* at 387. Los Angeles has since passed a linkage fee ordinance. L.A., CAL., MUN. CODE ch. 1, art. 9, § 19.18 (2018) (effective Feb. 17, 2018).

123. *See* ASSESSMENT OF FAIR HOUSING PLAN, *supra* note 116, at 388, 391, 395–98.

124. *Id.* at 398, 404–09.

125. *Id.* at 405–06. New York City began implementing such a program in August 2017,

Other cities similarly use the AFH process to address gentrification and displacement. A recent study examines the responsiveness of localities to the 2015 changes in the HUD AFH rule.¹²⁶ The study compares localities' assessments of fair housing under the earlier version of the rule to their assessments after the rule became stronger in 2015 and finds that post-2015, AFHs have more goals and measurable objectives than under the prior rule.¹²⁷ Many plans prominently feature affordable housing (creation and siting) with measurable goals and timelines.¹²⁸ In addition, several plans specifically attend to questions of displacement.¹²⁹ The study also intervenes in a debate about the overall efficacy of HUD's 2015 affirmatively further fair housing regulation given its open-endedness and the lack of strong oversight from the federal regulator.¹³⁰

The new AFH also emphasizes coordinating housing planning with other agencies such as transportation and schools.¹³¹ This provides another way to address whether in-migration of the affluent is translating into meaningful integration and improved outcomes for long-term residents.

Implementation of HUD's affirmatively furthering fair housing regulation is a promising framework for addressing questions at the intersection of fair housing and gentrification. It also has advantages over fair housing litigation as a mode of addressing the potential harms of gentrification. It intervenes at the level of planning, rather than after decisions have been made; incorporates a

and early accounts indicate that represented tenants are less likely to be evicted. RTCNYC COALITION, <https://www.righttocounselnyc.org/> [<https://perma.cc/QR9U-8EA6>] (last visited Feb. 1, 2019).

126. See Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance 2–3* (Sept. 15, 2017) (unpublished working paper) (on file with the University of Pennsylvania Future of Housing Policy in the U.S. Conference), <https://furtheringfairhousing.mit.edu/sites/default/files/documents/Steil%20Kelly%20Fair%20of%20them%20All%202018%2005%2008.pdf> [<https://perma.cc/NTV3-HJ9H>].

127. *Id.* at 33.

128. *Id.* at 19–21, 24.

129. *Id.* at 24 tbl. 6. For instance, Seattle's AFH builds on the city's "preexisting Race and Social Justice Initiative and focuses extensively on increasing the affordability of housing and preventing displacement." *Id.* at 31. Seattle's goals include "expand[ing] the supply of affordable housing in neighborhoods where residents are at high risk of displacement, such as [by] piloting city bond financing for affordable housing and advocating for a state preservation tax exemption to incentivize landlords to preserve affordable housing." *Id.*

130. *Id.* at 2, 36.

131. *Getting the Most Out of the AFH Process: An AFFH Backgrounder*, POVERTY & RACE RES. ACTION COUNCIL (May 7, 2018), <https://prrac.org/getting-the-most-out-of-huds-affirmatively-furthering-fair-housing-process/> [<https://perma.cc/T847-R529>].

regional and city-wide perspective rather than focusing on a specific city project; and engages affected community members and other stakeholders in the planning process.

III. TOWARDS INCLUSIVE CITIES

My ultimate assessment is that the FHA is an important but limited tool for addressing the potential harms of gentrification. The litigation approach is constrained by the doctrine of disparate impact, and cases inevitably focus on challenging specific redevelopment projects or practices rather than the broader question of how to balance city development with integration and the needs of low-income residents.¹³² The affirmatively furthering fair housing approach is more promising in that it requires cities to assess revitalization projects for their impact on segregation and engages community members in the planning process before plans are put in place.¹³³ However, any approach that depends solely on fair housing law hardly seems strong enough to meet the scale of the challenges. Gentrification is well on its way in many cities. Cities are committed to continuing to attract affluent residents and businesses. The real question is how to do so in a way that does not perpetuate racial and/or ethnic and economic inequality. To do so requires cities and reformers to engage a much broader set of questions. Gentrification exposes a larger problem of inequality—one at the heart of even those cities that celebrate their progressivism and their diversity.

In what follows, I offer a framework of how gentrification might yield something closer to “gentrification-as-integration” and perhaps address the ways in which cities perpetuate or exacerbate inequality. This framework builds on the civil rights approach, but engages regulatory and legal solutions beyond traditional fair housing and attends to the design of public and private goods and governance structures.

It is important to emphasize at the outset that the problems of displacement and affordability that accompany gentrification are

132. See, e.g., *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 576 U.S. ___, ___, 135 S. Ct. 2507, 2513, 2516 (2015).

133. See 24 C.F.R. §§ 5.150–.151 (2018).

linked to widening economic inequality, poverty, and housing supply.¹³⁴ These are not problems that can be solved solely by cities. And yet even in the face of these larger challenges, cities, which engage in policies to attract development, are not powerless in confronting the costs of that development and have some responsibility to harness this development in more redistributive ways. City residents or leadership may be motivated to take this course by broad fairness considerations, political pressures from minority and low-income communities, as well as economic incentives to promote well-being and participation.

A. (Re-)Distribution of Public Goods

Gentrification implicates the distribution of public goods. As discussed above if the affluent move into previously poor neighborhoods, but the less affluent do not benefit, then gentrification fails to further the underlying purposes of integration, and can in fact contribute to widening inequality. Just as schools provided an example of gentrification-as-re-segregation, they also provide an important point of intervention for addressing the unequal distribution of public goods. New York provides a good case study. In New York, school integration has emerged on the policy agenda over the past five years.¹³⁵ Quite apart from the issue of gentrification, New York City's public schools are among the most segregated in the

134. Matthew Desmond, author of *Evicted: Poverty and Profit in the American City*, has noted that

only a small portion of poor, minority neighborhoods are affected by gentrification. Perhaps gentrification enjoys heightened visibility by community activists, journalists, and students because gentrification often is regularly visible to those groups. Its effects are seen in beloved, hip neighborhoods where we shop, eat, and live. If we knew the South Bronx as well as we know Harlem, Woodlawn, or Wicker Park—if we travelled to the heart of the ghetto, instead of lingering at its edges—perhaps it would become clear to us that the major source of displacement, by a wide margin, is not gentrification but the fact that millions of people cannot afford rent even in some of our cities' worst neighborhoods.

The City in Space: Racial and Economic Segregation in NYC, THINK URBANISM (Oct. 18, 2017), <http://thinkurbanism.com/2017/10/18/the-city-in-space/> [https://perma.cc/42AZ-TB V3]. For data on the general crisis of affordability in housing and its effect on the bottom 20%, see Jenny Schuetz, *Yet More Evidence That Housing Affordability Is Getting Worse*, BROOKINGS (Oct. 31, 2017), <https://www.brookings.edu/blog/the-avenue/2017/10/31/yet-more-evidence-that-housing-affordability-is-getting-worse/> [https://perma.cc/QQ8J-5VJU].

135. See Christina Veiga, *Five New York City School Districts Putting Integration on the Map*, CHALKBEAT (Oct. 5, 2016), <https://www.chalkbeat.org/posts/ny/2016/10/05/five-new-york-city-school-districts-putting-integration-on-the-map/> [https://perma.cc/8Y45-GHPH].

country.¹³⁶ What is striking, however, is that schools are more segregated than housing patterns.¹³⁷ As suggested above, housing diversity is enabled by school zoning policies that allow white and upper middle-class families to avoid schools that are majority African American and Latino, or that have a significant number of low-income children.¹³⁸ In recent years, educators, local politicians, families, students, and community groups have engaged in small-scale but important efforts to alter this dynamic. This has included piloting a program of socio-economically diverse schools (with funding from the state)¹³⁹ and the passage of a city law requiring reporting and data on school diversity.¹⁴⁰ Most responsive to the challenges of the housing-school integration mismatch have been efforts to rezone schools in diverse neighborhoods. In 2017, the city completed a multi-year effort to rezone schools in one school district (District 1, which encompasses the East Village and parts of the Lower East Side).¹⁴¹ The district had an all-choice system for

136. See Press Release, C.R. Project, *New York City's Schools Most Segregated in the Nation* (Mar. 26, 2014), <https://www.civilrightsproject.ucla.edu/news/press-releases/2014-press-releases/new-york-schools-most-segregated-in-the-nation/> [<https://perma.cc/995M-WZWH>].

137. Compare *id.* (showing that 73% of charter schools in New York City had less than 1% white enrollment and 90% had less than 10% white enrollment), with Sally Goldenberg, *Fifty Years After Fair Housing Act, New York City Still Struggles with Residential Segregation*, POLITICO (Apr. 23, 2018, 5:10 AM), <https://www.politico.com/states/new-york/albany/story/2018/04/23/50-years-after-fair-housing-act-new-york-city-still-struggles-with-residential-segregation-376170> [<https://perma.cc/7JCZ-TSBM>] (claiming that about three-quarters of preserved housing units, which the New York City Hall financed, are in neighborhoods with black or Hispanic majorities).

138. See Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated. This Is How Well Your District Does.*, VOX (Aug. 27, 2018, 8:46 AM EDT), <https://www.vox.com/2018/1/8/16822374/school-segregation-gerrymander-map> [<https://perma.cc/VF8Y-86NL>].

139. See Veiga, *supra* note 135.

140. See N.Y.C., SCHOOL DIVERSITY & ACCOUNTABILITY ACT, N.Y., ADMINISTRATIVE CODE §§ 27-957, -958 (2015).

141. See NYC DEP'T OF EDUC., *Chancellor Farnia Announces District 1 Diversity Plan*, (Oct. 16, 2017), <https://www.schools.nyc.gov/about-us/news/announcements/contentdetails/2017/10/16/chancellor-faria%C3%B1a-announces-district-1-school-diversity-plan> [<https://perma.cc/4QZ4-FPUW>] (announcing creation of controlled choice socio-economic integration plan); see also Christina Veiga, *How to Integrate Manhattan Middle Schools? This Parent Says Make Them Enroll a Mix of Low- and High-Achievers*, CHALKBEAT (Jan. 25, 2018), <https://www.chalkbeat.org/posts/ny/2018/01/25/how-to-integrate-manhattan-middle-schools-this-parent-says-make-them-enroll-a-mix-of-low-and-high-achievers/> [<https://perma.cc/953P-BV3V>]; Christina Veiga, *Prodded by Advocates, City Unveils District-wide Integration Plan for Lower East Side*, CHALKBEAT (Sept. 12, 2017), <https://www.chalkbeat.org/posts/ny/2017/09/12/prodded-by-advocates-city-unveils-district-wide-integration-plan-for-lower-east-side/> [<https://perma.cc/NXR2-TFAH>].

elementary schools, and the rezoning pushed the system to a “controlled choice” system to further integration based on socio-economic status, language, and disability.¹⁴² Brooklyn parents have now taken some initiative to desegregate the middle schools in particular neighborhoods, schools whose admission currently depends in part on test scores.¹⁴³ The proposed plan would reserve half of the target middle school spots for low-income students, homeless children, and English-language learners.¹⁴⁴

An inevitable question is what will prompt cities to move towards this more redistributive approach to public goods. The emergence of school integration on the New York City policy agenda might contain lessons for other cities. Emerging efforts to advance integration in New York City schools seem prompted by powerful reports by advocacy groups and journalists exposing the problem of school integration¹⁴⁵ as well as key political leaders and “policy

142. See Christina Veiga, *Efforts to Integrate Schools in One Corner of New York City Show Promise, According to New Data*, CHALKBEAT (Mar. 22, 2018), <https://chalkbeat.org/posts/ny/2018/03/22/efforts-to-integrate-schools-in-one-corner-of-new-york-city-show-promising-signs-according-to-new-data/> [<https://perma.cc/V929-9VM9>]; see also Clara McCarthy, *NYC to Roll Out School Integration Plan in the Lower East Side*, EAST VILLAGE PATCH (Oct. 27, 2017, 3:51 PM ET), <https://patch.com/new-york/east-village/nyc-roll-out-school-integration-plan-lower-east-side> [<https://perma.cc/4QUS-YUEM>].

143. Christina Veiga, *Brooklyn Middle Schools Eliminate ‘Screening’ as New York City Expands Integration Efforts*, CHALKBEAT (Sept. 20, 2018), <https://chalkbeat.org/posts/ny/2018/09/20/brooklyn-middle-schools-eliminate-screening-as-new-york-city-expands-integration-efforts/> [<https://perma.cc/CD9R-9DH5>].

144. See Press Release, N.Y.C., Mayor de Blasio and Chancellor Carranza Announce District 15 Middle School Diversity Plan and Launch \$2 Million School Diversity Grant Proposal (Sept. 20, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/478-18/mayor-de-blasio-chancellor-carranza-district-15-middle-school-diversity-plan-and#0> [<https://perma.cc/J2Q2-R393>] (announcing middle school diversity plan that would begin in the Fall of 2019); Brad Lander & Carlos Manchaca, *Real Diversity, in Brooklyn: A New School Integration Plan Puts More Equitable and Excellent Schools for All in Reach*, DAILY NEWS (Sept. 5, 2018, 3:55 PM), <http://www.nydailynews.com/opinion/ny-oped-real-diversity-brooklyn-2018-0905-story.html> [<https://perma.cc/J8GK-J5MD>].

145. Several reports were released in 2013 and 2014 by advocacy groups highlighting how NYC schools were among the most segregated in the country. See, e.g., JOHN KRUSCERA WITH GARY ORFIELD, *NEW YORK CITY’S EXTREME SCHOOL SEGREGATION*, CIVIL RIGHTS PROJECT, at vi, 22–23 (2014), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norflet-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf> [<https://perma.cc/KT5B-7PRC>] (“[I]n 2009, black and Latino students in [New York state] had the highest concentration in intensely-segregated public schools (less than 10% white enrollment), the lowest exposure to white students, and the most uneven distribution with white students across schools. . . . New York City [was] home to the largest and one of the most segregated public school systems in the nation.”). Journalist Nikole Hannah-Jones highlighted the problem of segregation in a set of widely circulated articles. See, e.g., Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, N.Y. TIMES MAG. (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html> [<https://perma.cc/3NZ3-94N6>].

entrepreneurs”—advocacy groups of students, parents, and reformers—poised to organize, and to identify and implement concrete solutions.¹⁴⁶

B. *Accountable Development*

Gentrification is fueled by conscious policies to attract affluence to cities. The FHA’s legal liberalist answer to that development juggernaut (disparate impact and eviction counsel), hardly seems up to the task of addressing the scope of the transformation of cities through an influx of capital. The framework that I would suggest instead builds on the accountable development movement.¹⁴⁷ The insight of that movement is that much of private development depends on public levers and largesse—be it tax credits or land rezoning. Accountable development would ask for a public benefit in exchange. In the context of gentrification, some examples are requiring community benefits agreements (i.e., agreements to create housing, jobs and job training, or increase public services) in exchange for tax credits and rezoning of public land. For instance, the City of San Francisco has for several years required entities that receive city funds or city leases, or whose projects require planning approval, to engage in “first source” hiring of local residents from particular training centers with the goal of connecting economically disadvantaged local residents to employment in growing sectors.¹⁴⁸ The city also required Twitter and other technology companies to create public green space and provide job training for local residents when it provided tax credits and land

146. In New York, this included NYC Appleseed Foundation, Integrate NYC, and the Alliance for School Integration and Diversity in New York. See N.Y. APPLESEED, <https://www.nyappleseed.org/> [<https://perma.cc/4VGC-V8BD>] (last visited Feb. 1, 2019); INTEGRATE N.Y.C., <https://www.integratenyc.org/> [<https://perma.cc/RYP2-9NWG>] (last visited Feb. 1, 2019); ALLIANCE FOR SCH. INTEGRATION & DIVERSITY, <https://www.nycasid.com/> [<https://perma.cc/A2NF-ZDNY>] (last visited Feb. 1, 2019). Certain political leaders, most notably City Council Member Brad Lander were instrumental in supporting efforts and promoting reform plans. See, e.g., Lander & Manchaca, *supra* note 144. National-level advocacy groups also emerged in the 2000s to provide technical and other forms of support for school districts seeking to promote integration. See, e.g., NAT’L COAL. ON SCH. DIVERSITY, <http://school-diversity.org/> [<https://perma.cc/C7SG-GM2C>] (last visited Feb. 1, 2019).

147. See Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic of the New Accountable Development Movement*, 17 J. COMMUNITY PRAC. 88, 89 (2009).

148. See CITY & CTY. OF S.F. OFFICE OF ECON. & WORKFORCE DEV., WORKFORCE DEV. DIV., FIRST SOURCE HIRING PROGRAM, http://mission.sfgov.org/oca_bid_attachments/fa22336.pdf [<https://perma.cc/P887-ZP89>] (last visited Feb. 1, 2019).

rezoning to lure companies to the Tenderloin district in San Francisco.¹⁴⁹ Developers of housing in many cities are required to (or incentivized by density bonuses) to fund affordable housing and or include affordable housing in their developments.¹⁵⁰

Many of these initiatives are underway in high-cost cities. The requirements may have to be stronger and much more pervasive to be effective in stemming inequalities.

C. Governance, Participation, and Voice

A third plank of the framework is about governance, participation, and voice—a counter to harm of exclusion from participation in the planning and direction of neighborhoods. Objections to the political and cultural displacement of gentrification by long-term residents emphasize the residents' lack of voice in shaping the direction of their neighborhood; that when improvements arrive they are not the intended beneficiaries; and that long-term residents ex-

149. See CENT. MKT. CITIZEN'S ADVISORY COMM., FRAMEWORK FOR COMMUNITY BENEFIT AGREEMENTS (2012), <https://sfgov.org/centralmarketcac/sites/default/files/FileCenter/Documents/10356-2012%20-%20CAC%20Central%20Market%20-%20CBA%20Framework%206-21-12.pdf> [<https://perma.cc/BVU8-EPP6>]; COMMUNITY BENEFIT AGREEMENT 2015–2018 MEMORANDUM OF UNDERSTANDING BETWEEN CITY AND COUNTY OF SAN FRANCISCO CITY ADMINISTRATOR AND TWITTER, INC. 5, 7–9 (2015), <http://sfgsa.org/sites/default/files/FileCenter/Documents/12590-TwitterCBA.pdf> [<https://perma.cc/FVC7-F3RZ>]; *Policy & Tools: Community Benefits Agreements and Policies in Effect*, PARTNERSHIP WORKING FAM., <http://www.forworkingfamilies.org/page/policy-tools-community-benefits-agreements-and-policies-effect> [<https://perma.cc/B66E-D9F5>] (last visited Feb. 1, 2019); see also Oscar Perry Abello, *S.F. Tax Break Tapped by Twitter Intended to Help Struggling Neighborhoods*, NEXT CITY (May 31, 2017), <http://nextcity.org/daily/entry/san-francisco-tax-breaks-twitter-community-benefits-agreement> [<https://perma.cc/R4BH-UXCX>]; Citizen's Advisory Comm. for Cent. Mkt. & Tenderloin Area, *Community Benefit Agreements (2013)*, CITY & COUNTY S.F., <https://sfgov.org/centralmarketcac/community-benefit-agreements-2013> [<https://perma.cc/2Z9C-DQU7>] (last visited Feb. 1, 2019) (listing CBAs signed in 2013 between the City of San Francisco and six technology companies when the Tenderloin community was rezoned, which provided tax benefits to employers).

150. See Constantine E. Kontokosta, *Mixed-Income Housing and Neighborhood Integration: Evidence from Inclusionary Zoning Programs*, 36 J. URB. AFF. 716, 717 (2014) (describing the expansion of inclusionary zoning). In 2016, Los Angeles residents adopted by referendum an inclusionary zoning ballot measure that would require private developers to set aside some developments for low and moderate income housing. See Elijah Chiland, *Measure JJJ Triggers New Incentives to Encourage Affordable Housing Near Transit*, CURBED L.A. (Mar. 14, 2017, 8:46 PM PDT), <https://la.curbed.com/2017/3/14/14928306/los-angeles-incentives-affordable-housing-transit-jjj> [<https://perma.cc/5TAX-SULU>]. While supported by many fair housing groups, the measure was opposed by some affordable housing groups who feared that it would not be successful in producing affordable housing as intended. See *id.*

perience either an invisibility or hyper-visibility (through criminalization) in neighborhoods that were once their own.¹⁵¹ Governance and participation in decisionmaking also provides a buffer to some of the concessions to the inevitability of market-oriented urban development in the “accountable development” framework.

Increasing voice allows those most affected by gentrification as well as other residents to affect the government and community decisions that affect housing and segregation in neighborhoods. In part, this means taking seriously existing mandates of participation in government decision-making. At the same time, to recall the New York judge tired of all the public participation and review requirements that currently exist (from land use regulations to environmental review), some will argue that there is currently a fair amount of process involved in the development of housing and the zoning of neighborhoods.

Yet there are some models to build on that might improve this participation in a way that enhances both the democratic benefits of participation and might affect substantive outcomes. The AFH process provides a model to evaluate. It emphasizes identification of a specific set of barriers to achieving fair housing and integration; data gathering and data informed discussions and front-end participation.¹⁵² In many communities, this process was done not simply through the traditional public hearing, which emphasizes prepared statements, but through discussion, dialogue, and information sharing.¹⁵³ The participation components of the AFH process should be assessed to inform the nature of effective participation (as measured by the government participants as well as community stakeholders).

Another similar model would require ongoing assessment of racially and ethnically disparate impacts of public policies and ongoing outreach with stakeholders to help address adverse impacts. The City of Seattle requires racial impact statements for major government decisions and has an office of “Racial and Ethnic Equity” charged with addressing structural inequities.¹⁵⁴ Similarly, others have suggested creating opportunity impact statements to

151. *See supra* notes 149–56 and accompanying text.

152. 24 C.F.R. §§ 5.150–.151 (2019).

153. *Id.*

154. *See Racial and Ethnic Equity Initiative (RSJI)*, SEATTLE.GOV, <https://www.seattle.gov/rsji> [<https://perma.cc/7KHF-YTXN>] (last visited Feb. 1, 2019).

identify how land use and school zoning and siting decisions affect opportunity on the basis of race/ethnicity and socio-economic status.¹⁵⁵

Despite this part's emphasis on how government can structure more inclusion in its decision-making, some of the changes required to address the challenges of gentrification would have to occur below the level of government governance structures, in neighborhoods and communities. The internet abounds with advice (some cheeky¹⁵⁶) on how to be a "good" gentrifier, and a several academics offer recommendations in that vein. Richard Reeves—who has advanced the notion that opportunity hoarding is causing the top 20% of income earners to separate from the bottom 80%¹⁵⁷—has generally suggested ways to not be a "dream hoarder" that include sharing PTA resources and being a YIMBY (yes, in my backyard) as opposed to a NIMBY (not in my backyard).¹⁵⁸ The instructions on how to gentrify decently tend to amount to knowing, understanding, and having empathy for long-term residents—interacting with neighbors as well as existing community-based institutions and organizations.¹⁵⁹ This idea of the "good" gentrifier confronts a central reality of many cities. In high cost cities, gentrification is always relative, and neighborhoods are not static and

155. See, e.g., 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, 482 (2003) (suggesting gentrification impact statements and other gentrification assessment tools to help facilitate the engagement of communities of color and inform equitable regional development plans); Alan Jenkins et al., *Promoting Opportunity Through Impact Statements*, OPPORTUNITY AGENDA (2012), <https://opportunityagenda.org/explore/resources-publications/promoting-opportunity-through-impact-statements> [<https://perma.cc/WYE9-5C24>].

156. See, e.g., Neil DeMause, *The Gentrifier's Guide to Not Being an Asshole*, VILLAGE VOICE (Aug. 25, 2015), <https://www.villagevoice.com/2015/08/25/the-gentrifiers-guide-to-not-being-an-asshole/> [<https://perma.cc/UN4R-P8VJ>].

157. See REEVES, *supra* note 43, at 96.

158. See Richard V. Reeves, *Don't Want to Be a Dream Hoarder? 5 Things You Can Do Right Now.*, BROOKINGS (June 23, 2017), <https://www.brookings.edu/blog/social-mobility-memos/2017/06/23/dont-want-to-be-a-dream-hoarder-here-are-5-things-you-can-do-right-now/> [<https://perma.cc/UHJ6-CQXS>].

159. See Roxanne Earley, *10 Rules for Being a Good Gentrifier from an Urban Planner in Brooklyn*, THOUGHT CATALOG (Aug. 2014), <https://thoughtcatalog.com/roxanne-earley/2014/08/10-rules-for-being-a-good-gentrifier-from-an-urban-planner-in-brooklyn/> [<https://perma.cc/7MCK-W3L6>]; Rachel Krantz, *Can You Be a Good Neighbor If You're a Gentrifier? 9 Tips from Advocates*, BUSTLE (July 7, 2016), <https://www.bustle.com/articles/171201-can-you-be-a-good-neighbor-if-youre-agentrifier-9-tips-from-advocates> [<https://perma.cc/S24T-6EE3>]; Michael Schaffer, *Washington City Paper's Handbook for the Responsible Gentrifier*, WASH. CITY PAPER (Apr. 27, 2012, 12:00 AM), <https://www.washingtoncitypaper.com/news/article/13042449/washington-city-papers-handbook-for-the-responsible-gentrifier> [<https://perma.cc/7VJA-RV5K>].

always changing.¹⁶⁰ The question at bottom is how to manage that change. It would be naïve to imagine that block parties and inclusive neighborhood associations will fully address the problems of political and cultural displacement, but it is similarly doubtful that these problems can be addressed by government institutions alone.

CONCLUSION

Gentrification poses both promises and challenges for cities. This article has examined the ways in which the FHA might be used to advance meaningful integration and prevent race and ethnicity based exclusion as cities adapt to the in-migration of white and affluent residents. The article is both pragmatic and aspirational. In many respects the discussion assumes the dominant model of urban development that emphasizes development through affluence and the attraction of capital to cities. And yet, it asks that this model attend to economic and racial integration. It is not fanciful to assume that cities will begin to do so. Some cities are addressing school segregation and requiring greater public benefit from development projects. The current AFH process undertaken by some cities is an important start. It establishes a framework of identifying barriers to integration (through data and mapping), and a process for engaging stakeholders. One possibility is that this framework will have influence even outside the scope of those programs covered by the AFH. That some cities have pursued AFH in the absence of a current mandate reflects the larger incentives and motivations that cities have to address problems of inequality in their borders.

160. Joe Cortright, *The Constancy of Change in Neighborhood Populations*, CITY COMMENT. (Sept. 10, 2017), http://cityobservatory.org/constancy_of_change/ [https://perma.cc/A2SR-PKJ3].