

DIFFERENTIATING EXCLUSIONARY TENDENCIES

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Abstract

Despite an academic consensus that easing land use regulations to increase the supply of housing can help lower housing prices, local opposition to new development remains prevalent. Onerous zoning regulations and resistance to new housing persist not only in wealthy suburbs, but also in lower income urban neighborhoods. In addition to making housing more expensive, such policies increase residential segregation, exacerbate urban sprawl, and have detrimental environmental effects. If increasing supply tends to reduce costs, what explains this opposition, particularly during a period of rising housing costs?

One factor is concern about the localized costs of greater density and its effect on neighborhood character and livability. There is a perception that new development may, by changing the character and desirability of its immediate neighborhood, play some role in increasing housing prices and exacerbating gentrification and displacement in lower income communities. Empirical evidence suggests this is not the case, but efforts to exclude new development and demands for greater local control over land use persist in lower income urban neighborhoods. These tendencies mirror responses in wealthier communities.

This Article compares these exclusionary tendencies and asks whether there is a normative basis for differentiating them. It concludes that there is a modest case for distinct treatment, based on a combination of factors including the historical treatment of lower income urban communities, the more fragile relationship between property and personhood in such neighborhoods, the structure of local government law, and the principle of subsidiarity. However, any preferential treatment must avoid undermining broader efforts towards reducing regulatory and procedural obstacles to denser development and increased housing supply. Instead,

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it should primarily address concerns about neighborhood character and the claims of long-term residents to a distinct stake in the neighborhood that entitles them to some degree of deference and perhaps some share of the increased property values generated by a zoning change. Rather than provide additional process or opportunities for public participation, legal responses should carefully circumscribe local authority in the realm of planning and grant individual residents a property entitlement they can freely transfer. This entitlement, granted to both owners and tenants, would allow residents to derive some benefit from new development, while strengthening the voice of a more representative share of the local population.

INTRODUCTION	1273
I. IS ALL OPPOSITION TO NEW DEVELOPMENT THE SAME?.....	1279
A. <i>Supply-Side Responses and Their Discontents</i>	1279
B. <i>The Costs of Slowing New Development</i>	1288
C. <i>Are All Demands for Local Control the Same?</i>	1294
II. IS THERE A JUSTIFICATION FOR DIFFERENTIAL TREATMENT OF CERTAIN EXCLUSIONARY TENDENCIES?.....	1297
A. <i>Historical and Lingering Disparities in Power and Autonomy</i>	1297
B. <i>Property and Individual Identity</i>	1301
C. <i>Property and Group Identity</i>	1305
D. <i>Subsidiarity and Solidarity</i>	1310
III. GETTING LOCAL CONTROL RIGHT.....	1314
A. <i>Why More Participation is Not the Right Response</i>	1314
B. <i>Circumscribed Local or Sublocal Control</i>	1317
C. <i>Harnessing and (Re)distributing the Value of New Development</i>	1319
D. <i>Transferable Development Rights in Gentrifying Neighborhoods</i>	1322
1. Individual TDRs.....	1324
2. Preservation TDRs	1325
3. A Brief Note on Potential Challenges and Criticisms.....	1326
CONCLUSION.....	1328

INTRODUCTION

Over the past few decades, a significant volume of academic research has criticized the negative effects that overly restrictive land use regulations have on housing supply and affordability.¹ While an increase in the supply of housing should lead to lower housing prices, at least at the municipal or regional level, such restrictions—and local opposition to new development—remain prevalent, even during a period of rising housing costs throughout much of the country.² These restrictions not only raise the cost of housing, they also exacerbate patterns of residential segregation, reduce labor productivity regionally and nationally, and have negative environmental consequences by increasing vehicle miles traveled.³ In wealthy suburban communities, the tendency to exclude new development is often attributed to homeowners’ concerns about property values,⁴ or those who invoke such concern to cloak a desire to exclude more affordable housing units and the lower income and minority

1. See, e.g., Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RES. BANK N.Y. ECON. POL’Y REV., 21, 21–23 (2003) (“[H]ousing is expensive because of artificial limits on construction created by the regulation of new housing.”); Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. (PAPERS & PROC.) 329, 329 (2005) (arguing that limits on the housing supply stem from regulatory limitations rather than a declining availability of land); Andrew D. Paciorek, *Supply Constraints and Housing Market Dynamics* 1 (Fin. & Econs. Discussion Series, Working Paper No. 2012-01, 2011), <http://www.federalreserve.gov/pubs/feds/2012/201201/201201pap.pdf> [<https://perma.cc/W399-TVYB>] (analyzing the relationship between housing price volatility and the regulation of new housing supply). For a similar discussion in the legal literature, see Roderick M. Hills, Jr. & David Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81, 86 (2011); Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 93 (2015) [hereinafter Hills, Jr. & Schleicher, *Affordable City*]. Admittedly, as Vicki Been notes, while “[d]ozens of empirical studies have shown that more restrictive land use regulations are associated with higher housing prices” they have not proven causation. Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENVTL. L. 217, 227 (2018) (emphasis added).

2. See, e.g., Stefanos Chen, *The People vs. Big Development*, N.Y. TIMES (Feb. 10, 2020), <https://www.nytimes.com/2020/02/07/realestate/the-people-vs-big-development.html> [<https://perma.cc/9LQD-P4PM>] (discussing efforts to stop or slow new development in multiple New York City neighborhoods). In addition to reducing the supply of housing statewide, onerous regulations and lengthy review processes can also drive up the cost of housing production, necessitating even larger state subsidies for affordable housing. See Joe Cortright, *Why is “Affordable” Housing So Expensive to Build?*, CITY COMMENT. (Oct. 18, 2017), http://cityobservatory.org/why_affordable_so_expensive/ [<https://perma.cc/W77Z-RG64>].

3. See John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 831–32 (2019).

4. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 4 (2001) (articulating influential “homevoter hypothesis,” which posits that homeowners, driven by concerns about home values, are “the most numerous and politically influential group within most localities”).

households likely to reside in them.⁵ Such exclusionary zoning is frequently subject to criticism but, generally speaking, is not unlawful.⁶

In recent years, the restrictive zoning traditionally associated with suburban communities has spread to cities facing growing populations and rising housing costs, a phenomenon one commentator termed “the New Exclusionary Zoning.”⁷ Many of these cities have, in turn, increasingly become preserves for the wealthy.⁸ But it is not just wealthy

5. See Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1068 (2017) (“Although [land use] is often considered a ‘traditional’ local concern, the record of local governments using their authority therein to exclude ‘undesirable’ uses, like low-income housing, is legion.”); Shelia R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J.F. 480, 485 (2017) (“Part of the reason for such restrictive land policies . . . is the vested interest of existing homeowners who favor policies that preserve the status quo and minimize the negative externalities of urban agglomeration, thus maintaining their home values.”); Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 497 (2017) (“[M]any communities seek not only to limit the number of residents but also to ensure that homes are sufficiently expensive so that poor people (defined as anyone poorer than existing residents) cannot afford to live there.”). See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1870 (1994) (“‘Exclusionary zoning’ is a generic term for zoning restrictions that effectively exclude a particular class of persons from a locality by restricting the land uses those persons are likely to require. Today, exclusionary zoning takes the form both of restrictions on multi-family housing and of minimum acreage requirements for the construction of single-family homes (‘large-lot’ zoning).”).

6. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 269–71 (1977) (upholding prohibition on multi-family housing); see also Ford, *supra* note 5, at 1874 (“In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court upheld a village’s prohibition of multi-family housing despite demonstrable racially restrictive effects.” (footnote omitted)); cf. Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1828 (2003) (reviewing FISCHER, *supra* note 4) (“So-called ‘fiscal zoning’—minimum acreage requirements, minimum square footage requirements, and outright limitations on multi-family housing—is a common (and much condemned) suburban strategy to limit development and ensure that newcomers purchase a minimum level of housing.”). Some state courts and legislatures have required local governments to consider regional housing needs, a requirement that, if enforced, can constrain efforts to exclude low-income housing. See *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975) (requiring municipalities to consider regional need for low- and moderate-income housing); *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975) (“[I]n enacting a zoning ordinance, consideration must be given to regional needs and requirements.”).

7. John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 92 (2014); see also Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 229 (2014) (exploring the power of home voters in urban cities); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1675 (2013) (discussing how city politics and laws governing land use decision-making constrain efforts to allow more development).

8. See Mangin, *supra* note 7, at 92 (“The anti-development orientation of certain cities is turning them into preserves for the wealthy as housing costs increase beyond what lower-income families can afford to pay.”).

homeowners in tony neighborhoods who resist new and denser development. In high-rent cities, renters have been found to exhibit resistance comparable to that of homeowners when it comes to new market-rate housing in their neighborhood, even as they support housing development citywide.⁹ According to one analysis, these sentiments are “correlated with anxiety over housing prices, signaling that renters are responding to the spatial threat of gentrification.”¹⁰

But if increasing supply tends to reduce housing costs (or slow increases), what explains this opposition to new development and to proposed zoning reforms, such as California’s recently rejected Senate Bill 50,¹¹ that would make it easier to build new housing? One factor is concern about the localized costs of greater density and its effect on neighborhood character and livability.¹² But there is also a perception that new development may, by changing the character and desirability of its immediate neighborhood, play some role in increasing housing prices, perhaps by inducing demand, at least in the short term.¹³ Critics of zoning reform contend that allowing new development—particularly market-rate development—will only exacerbate housing costs, gentrification, and displacement in lower income urban communities.¹⁴

9. See Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473, 483 (2018) (“[T]hese scale-dependent preferences are reserved for market-rate housing, not affordable housing . . .”). *But see* William Marble & Clayton Nall, *Where Self-Interest Trumps Ideology: The Persistent Influence of Homeowners in Local Development Politics* 19 (Feb. 5, 2018) (unpublished manuscript) (on file with author) (finding greater support for apartment development among renters than among owners).

10. Hankinson, *supra* note 9, at 483.

11. See Liam Dillon & Taryn Luna, *California Bill to Dramatically Increase Home Building Fails for the Third Year in a Row*, L.A. TIMES (Jan. 30, 2020, 4:49 PM), <https://www.latimes.com/california/story/2020-01-29/high-profile-california-housing-bill-to-allow-mid-rise-apartments-near-transit-falls-short> [<https://perma.cc/L5D8-PCN7>].

12. See Katherine Levine Einstein et al., *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSP. ON POL. 28, 30 (2019) (“The potential externalities of housing proposals are spatially concentrated while the benefits are diffuse.”). Einstein and her coauthors found that 11% of commenters in their data set “cited ‘neighborhood character’ in opposition to a housing project.” *Id.* at 36. They note that this may represent “racially coded language,” although most comments that referenced neighborhood character were “not explicitly linked with race.” *Id.*

13. See *infra* notes 83–87 and accompanying text.

14. See, e.g., Dillon & Luna, *supra* note 11. Researchers use a variety of measures for gentrification, a term that eludes precise definition. See, e.g., Kacie Dragan et al., *Does Gentrification Displace Poor Children? New Evidence from New York City Medicaid Data* 5 (Nat’l Bureau of Econ. Research, Working Paper No. 25809, 2019) (“We use the term gentrification to describe large, relative increases in the share of adults with college degrees in initially low-income, central city neighborhoods since such changes likely reflect the influx of gentrifiers to a neighborhood rather than any incumbent upgrading. Further, college degrees are measured with less error than income or rent, and are more likely to capture permanent income.”);

To the extent that opposition to new development is rooted in skepticism over the relationship between restrictive zoning, housing supply, and affordability, the available evidence and basic economics suggest this opposition is misplaced.¹⁵ Demand in these neighborhoods will exist regardless of new development, partly as a spillover from even more desirable nearby neighborhoods, bidding up housing prices for the existing stock.¹⁶ New supply is likely to alleviate some of this pressure and the research to date supports this theory.¹⁷ It also suggests this new development does not have any appreciable effect on the rate of displacement in nearby communities.¹⁸

Nonetheless, opposition to new development and demands for greater local control over land use persist in many urban communities, even though residents of those communities are likely to benefit—at least in terms of housing costs—from this new development. This seeming puzzle raises significant challenges for policymakers as calls for local control threaten to increase the costs of—or simply stifle—development, exacerbating housing shortages. The most high-profile recent zoning reform measure, California’s failed Senate Bill 50 (SB 50), would have overridden local zoning to permit denser development statewide in areas near transit and in higher opportunity communities.¹⁹ SB 50 sought to

Jackelyn Hwang & Robert J. Sampson, *Divergent Pathways of Gentrification: Racial Inequality and the Social Order of Renewal in Chicago Neighborhoods*, 79 AM. SOC. REV. 726, 727 (2014) (describing Smith’s definition as “influential”); Neil Smith, *Gentrification*, in THE ENCYCLOPEDIA OF HOUSING 198 (Willem Van Vliet ed., 1998) (defining gentrification as “the process by which central urban neighborhoods that have undergone disinvestments and economic decline experience a reversal, reinvestment, and the in-migration of a relatively well-off, middle- and upper-middle-class population.”). For purposes of this Article, the term is used to refer to a historically lower income neighborhood that sees a significant change in its residential composition, measured by either the share of adults with a college degree or by the median household income.

15. See BRIAN J. ASQUITH ET AL., W.E. UPJOHN INST. FOR EMP’T RESEARCH, SUPPLY SHOCK VERSUS DEMAND SHOCK 2–3 (2020) (indicating that new construction appears to decrease nearby rents relative to what would occur absent new construction, as in standard models of housing supply and demand, even at a very local level); see also *infra* Section I.B (discussing the lack of empirical support for concerns that the development of new housing will increase housing costs).

16. Mangin, *supra* note 7, at 106 (discussing a spillover effect and gentrification).

17. See *infra* Section I.B; see also Been, *supra* note 1, at 244 (“[T]here is very little research about how new market rate (or mixed-income) development affects sales prices for housing in the neighborhood, and none on how new development affects rents. The best existing evidence is a study of low-income neighborhoods in California’s Bay area, which found that the production of market rate housing was associated with a lower probability that low-income residents in the neighborhood would experience displacement.” (emphasis omitted) (footnote omitted)).

18. See *infra* note 88–102 and accompanying text.

19. See Conor Dougherty, *California, Mired in a Housing Crisis, Rejects an Effort to Ease It*, N.Y. TIMES (Jan. 30, 2020), <https://www.nytimes.com/2020/01/30/business/economy/sb50-california-housing.html> [<https://perma.cc/L5VH-EYTK>] (noting that SB 50 “drew opposition

respond to criticisms by granting a greater degree of local control to designated lower income communities facing gentrification.²⁰ Despite these concessions, the bill faced opposition—which contributed to its defeat—from certain tenant groups and affordable housing advocates, who deemed the measures inadequate to vindicate local interests in poorer neighborhoods.²¹ Even as it granted a limited degree of local control to lower income communities, SB 50 expressly limited the ability of more affluent communities to undermine its goal of greater density.²² These differing approaches suggest a calibration of state and local power based, in part, on an initial determination of what local concerns merit some degree of deference and which types of neighborhoods should be granted such deference.

Is a differential grant of local control over zoning—in the case of SB 50, or in the context of future state and local efforts to ease land use regulations—*only* justified as a means of obtaining political support for new development or zoning reform? Or are there normative grounds for distinguishing between efforts to exclude, control, or derive some benefit from new development in certain urban neighborhoods, particularly lower income and historically disadvantaged neighborhoods, and similar efforts in wealthier communities? Stated differently, assuming that the effect of excluding a certain amount of new development on regional housing supply will be the same regardless of where within a region this exclusion occurs, is there a normative basis for treating efforts to exclude, control, or extract benefits from new developments in lower income neighborhoods differently than similar efforts in wealthier communities?

This Article approaches these questions with a general inclination to support the expansion of housing supply across all neighborhoods so as to counteract rising housing costs (with ultimate benefits—in terms of housing availability and affordability—for individuals at all income levels). In a recent article, I argued that the current housing crisis justifies state preemption of discrete elements of local zoning.²³ But I also suggested that such interventions can and should provide clear

from two key constituencies: suburbanites keen on preserving their lifestyle and less affluent city dwellers seeing a Trojan horse of gentrification”).

20. S.B. 50, 2019-2020 Leg., Reg. Sess. (Cal. 2018).

21. Jared Brey, *Why Some Tenant Groups Are Opposing California's Density Bill*, NEXT CITY (May 14, 2019), <https://nextcity.org/daily/entry/why-some-tenant-groups-are-opposing-californias-density-bill> [<https://perma.cc/C76X-7P33>] (quoting tenants advocate who argued SB 50's sensitive communities measure failed to empower low-income communities).

22. See *infra* note 47 and accompanying text.

23. Infranca, *supra* note 3, at 885–87.

mechanisms for addressing sufficiently significant countervailing local interests.²⁴

This Article examines whether the demand for local control over new development in lower income urban neighborhoods represents such an interest.²⁵ It concludes that there is a modest case for distinct treatment based on a combination of factors, including the historical treatment of these communities,²⁶ the more fragile personhood interests at stake,²⁷ the structure of local government law,²⁸ and the principle of subsidiarity.²⁹ However, any preferential treatment must avoid undermining broader efforts towards reducing regulatory and procedural obstacles to denser development and increased housing supply. Instead, it should be designed primarily to address concerns about unwanted changes to neighborhood character and the claims of long-term residents to a distinct stake in the neighborhood that merits deference and perhaps some share of the increased property values generated by a zoning change. Other local concerns, most notably concerns regarding displacement and rent increases, do not justify special treatment in the form of greater local control.

The proper response to these local concerns is not to simply expand opportunities for participation in the land use process. Nor is it to grant local or sublocal actors a veto or complete control over new development and rezoning. Both approaches will slow development, restrict supply, and exacerbate housing affordability problems. Instead, Part III evaluates potential responses that either permit carefully circumscribed local decision-making or that grant some form of entitlement to long-term residents of designated communities. Such an entitlement would provide

24. *Id.* at 886. Others have expressed similar sentiments. See Hankinson, *supra* note 9, at 485 (“More broadly, there may be times the microscale should have veto power over a land use. Or, the microscale should be compensated by other jurisdictions that are able to free-ride. Efforts to design institutional reforms will have to address these normative aspects of NIMBYism, including historic inequality, which has led to the clustering of low-income and minority communities least able to resist locally unwanted land uses.”).

25. This Article uses the term “control” loosely and broadly. Part III examines the precise forms this additional degree of control might take, including: expanded opportunities for public participation; a neighborhood veto over new development; an opportunity for a neighborhood to develop its own development plan, but in conformity with a state or city mandate requiring that the plan permit a certain amount of new development within the community; or the provision of distinct property entitlement to local residents and property owners, which would enable them to extract benefits from new development.

26. See *infra* Section II.A.

27. See *infra* Section II.B.

28. See *infra* Section II.C.

29. See *infra* Section II.D.

residents with some voice over local development, while also enabling them to derive economic benefit from that development.³⁰

This Article proceeds in three parts. To begin, Part I examines efforts to ease zoning restrictions and allow more housing development before delineating the primary concerns that drive opposition to these efforts and demands for local control. It also reviews relevant empirical research, which suggests many of these concerns are not supported by the best available evidence. Part II then discusses the historical treatment of lower income urban neighborhoods, relevant doctrinal and theoretical discussions in the property and local government law literature, and the relevance of the principle of subsidiarity for debates over the vertical allocation of power over land use. Finally, Part III evaluates potential policy responses and considers how they might vindicate important individual and communal interests without stymieing the residential development necessary to address critical housing supply and affordability concerns.

I. IS ALL OPPOSITION TO NEW DEVELOPMENT THE SAME?

Over the past few years, as housing costs have risen dramatically across the country, city and state officials have sought to reform existing zoning and land use regulations or have targeted specific neighborhoods for rezonings that permit greater density. These efforts are motivated, in part, by the belief that easing new development by increasing supply will render housing more affordable. Although a significant volume of empirical research supports this position, opposition to such efforts remains strong, including in lower income urban neighborhoods. This Part first examines this opposition and the concerns that motivate it. It then reviews the empirical research, which suggests many of these concerns are unfounded. Finally, it isolates the concerns that remain and discusses to what extent they differ from concerns expressed by wealthier communities facing new development.

A. *Supply-Side Responses and Their Discontents*

Advocates for increasing housing supply to address affordability and environmental concerns have had reason to cheer in recent years as a number of measures at the local and state level move to liberalize local

30. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (describing a conceptual ultimatum presented to dissatisfied consumers). Hirschman distinguishes between exit as an economic mechanism and voice as a political mechanism. *Id.* at 15–20. The entitlement discussed in Part III would provide a degree of each to residents of lower income neighborhoods.

zoning.³¹ Some of these measures focus on allowing denser development in single-family neighborhoods, which cover much of the land area in many major cities.³² These measures include Minneapolis 2040, which will allow triplexes to be built on any single-family lot in the city.³³ A similar measure at the state level in Oregon requires cities to allow, at a minimum, a duplex and, in some cases, a fourplex, on any land currently zoned exclusively for single-family housing.³⁴ In California, efforts over many years to ease the development of accessory dwelling units on single-family lots culminated in 2019 in a series of legislation permitting single-family homeowners statewide to both build a new detached housing unit on their property and convert part of an existing structure into a third unit.³⁵

While helpful in addressing the undersupply of housing, incremental additions of new units in single-family neighborhoods are unlikely to prove sufficient. Accordingly, city and state governments have recognized the need to allow larger multi-family development, particularly in areas near public transit. Minneapolis 2040 also permits denser buildings between five and ten stories tall along certain transit corridors throughout the city.³⁶ One particularly controversial state reform effort, California's Senate Bill 827 (SB 827), would have altered the applicable zoning throughout the state for any "transit-rich housing project," defined as a residential development "the parcels of which are all within a one-half mile radius of a major transit stop or a one-quarter

31. See generally Infranca, *supra* note 3 (arguing that recent state zoning initiatives have more potential to support denser development and increase housing supply than historic state interventions).

32. See *id.* at 826 & n.9.

33. See MINNEAPOLIS CITY COUNCIL, MINNEAPOLIS 2040: THE CITY'S COMPREHENSIVE PLAN 105-06 (2019); see also Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html> [<https://perma.cc/JL67-BADD>] (reporting that "Minneapolis has decided to eliminate single-family zoning" and "instead allow residential structures with up to three dwelling units—like duplexes and triplexes—in every neighborhood").

34. H.B. 2001, 80th Leg. Assemb., Reg. Sess., 2019 Or. Laws 639.

35. Assemb. B. 68, 2019 Leg., Reg. Sess. (Cal. 2019); see also Liam Dillon, *How Lawmakers Are Upending the California Lifestyle to Fight a Housing Shortage*, L.A. TIMES (Oct. 10, 2019, 5:00 AM), <https://www.latimes.com/california/story/2019-10-10/california-single-family-zoning-casitas-granny-flats-adus> [<https://perma.cc/CC56-CBRY>] (quoting former director of the state's Department of Housing and Community Development, who remarked: "We're on the precipice of single-family zoning functionally not existing").

36. Martin Moylan, *Minneapolis 2040 Plan Gets Final Approval*, MINN. PUB. RADIO (Oct. 25, 2019, 11:35 AM), <https://www.mprnews.org/story/2019/10/23/minneapolis-2040-plan-poised-for-final-approval> [<https://perma.cc/RS8R-TQTP>].

mile radius of a high-quality transit corridor.”³⁷ Larger, multi-family projects on such parcels would have been exempt from local density controls, minimum parking requirements, design standards that limit the number of units that can be developed, and certain height restrictions.³⁸

SB 827 sparked considerable opposition from, among others, those who feared a loss of local control,³⁹ suggested SB 827 would have adverse environmental effects,⁴⁰ and, of most relevance for the present discussion, cautioned it could lead to significant displacement of existing residents.⁴¹ SB 827’s advocates disputed the second claim and amended the measure to address the last one.⁴² Despite these efforts, SB 827 failed to get out of committee.⁴³ A revised version, SB 50, also failed in early 2020.⁴⁴ Like its predecessor, SB 50 sought to override local zoning to promote greater housing density near transit.⁴⁵ But it responded to criticisms by providing stronger protections from displacement in lower

37. S.B. 827, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (as introduced on Jan. 3, 2018).

38. *Id.* A “High-quality transit corridor” was defined as “a corridor with fixed route bus service that has service intervals of no more than 15 minutes during peak commute hours.” *Id.*

39. See Jane Kim, *SB 827 Postmortem: Let’s Build More Housing the Right Way*, S.F. EXAMINER (Apr. 25, 2018, 12:00 AM), <http://www.sfexaminer.com/sb-827-postmortem-lets-build-housing-right-way/> [<https://perma.cc/F6TS-N2WF>] (“[T]his bill proposed to take away our ability to negotiate and have a conversation about what works in our neighborhoods and communities.”). *But see* Scott Wiener, *SB 827 Retains an Awful Lot of Local Control and Community Planning*, MEDIUM (Apr. 8, 2018), https://medium.com/@Scott_Wiener/sb-827-retains-an-awful-lot-of-local-control-and-community-planning-b1d111fc1007 [<https://perma.cc/W7ZE-D4TD>] (detailing eight ways “SB 827 retains local control and the ability of local communities to plan and shape their neighborhoods”).

40. See Letter from Kyle Jones, Policy Advocate, Sierra Club Cal., to Scott Weiner, Cal. State Sen. (Jan. 18, 2018) (explaining that SB 827 “will increase pollution, discourage transit, and potentially displace disadvantaged residents”); see also Josh Cohen, *California Is Considering a “Radical” Statewide Upzone*, NEXT CITY (Feb. 8, 2018), <https://nextcity.org/daily/entry/california-is-considering-a-radical-statewide-upzone> [<https://perma.cc/Y7V2-XDPU>] (discussing opposition by the California chapter of the Sierra Club).

41. David Roberts, *The Future of Housing Policy Is Being Decided in California*, VOX (Apr. 4, 2018, 9:22 AM), <https://www.vox.com/cities-and-urbanism/2018/2/23/17011154/sb827-california-housing-crisis> [<https://perma.cc/T8VK-GGVJ>].

42. See Scott Wiener, *SB 827 Amendments: Strengthening Demolition & Displacement Protections*, MEDIUM (Feb. 27, 2018), https://medium.com/@Scott_Wiener/sb-827-amendments-strengthening-demolition-displacement-protections-4ced4c942ac9 [<https://perma.cc/9HNE-P3W7>]; cf. Cohen, *supra* note 40.

43. See Toshio Meronek, *Looking Back at the Racial Dynamics Around Controversial Zoning Bill*, NEXT CITY (June 11, 2018), <https://nextcity.org/daily/entry/looking-back-at-the-racial-dynamics-around-controversial-zoning> [<https://perma.cc/S2JU-A8A6>].

44. See Dillon & Luna, *supra* note 11.

45. See Scott Wiener, *Senator Wiener Introduces Zoning Reform Bill to Allow More Housing Near Public Transportation and Job Centers*, MEDIUM (Dec. 4, 2018), https://medium.com/@Scott_Wiener/senator-wiener-introduces-zoning-reform-bill-to-allows-more-housing-near-public-transportation-and-3fb77b794004 [<https://perma.cc/GE3C-P48E>].

income communities⁴⁶ and enabling denser development not only near transit, but also in “area[s] of high opportunity close to jobs.”⁴⁷

At the city level, efforts to increase housing development often face opposition in specific neighborhoods targeted for rezoning, at times even when these efforts are coupled with measures to limit displacement.⁴⁸ This is partly attributable to the fact that lower income areas frequently are targeted for rezoning that increase permissible density, even as higher income areas are downzoned to reduce permissible densities.⁴⁹ In

46. *See id.* (“Since SB 827’s demise, Senator Wiener has worked with a broad coalition of stakeholders to recraft the bill, in order to protect vulnerable communities.”).

47. S.B. 50, 2019-2020 Leg., Reg. Sess. (Cal. 2018). The latter addition was designed in part to address concerns that higher opportunity neighborhoods would resist new public transportation so as to avoid being subject to the law. *Cf.* Wiener, *supra* note 45 (explaining that S.B. 50 aims “to ensure that communities with easy access to jobs and in neighborhoods with high-performing public schools allow a broader range of housing choices for people of all income levels, even in the absence of high-quality transit”). The bill allows for denser development in “either a job-rich housing project or transit-rich housing project.” Cal. S.B. 50. It defined the former as “a residential development within an area identified by the Department of Housing and Community Development and the Office of Planning and Research, based on indicators such as proximity to jobs, high area median income relative to the relevant region, and high-quality public schools, as an area of high opportunity close to jobs.” *Id.* (proposing a definition of job-rich housing project in section 65918.50(f)).

48. *See, e.g.*, Sadeq Ali Kully, *City Releases Survey Results Ahead of Possible Second Bronx Rezoning*, CITY LIMITS (June 18, 2018), <https://citylimits.org/2018/06/18/city-releases-survey-results-ahead-of-possible-second-bronx-rezoning/> [<https://perma.cc/X6MJ-CMUT>] (discussing protests during a community meeting regarding rezoning of the Southern Boulevard Neighborhood in the Bronx); Emily Nonko, *Charlottesville Fights Back Against Its Racist Zoning Demons*, NEXT CITY (Jan. 10, 2019), <https://nextcity.org/daily/entry/charlottesville-fights-back-against-its-racist-zoning-demons> [<https://perma.cc/9L39-PBL5>] (reporting fears that permitting denser development in Charlottesville, Virginia will lead to displacement in lower income communities); Sam Raskin, *The YIMBY Movement Comes to New York City*, CURBED: N.Y. (Sept. 17, 2018, 12:56 PM), <https://ny.curbed.com/2018/9/17/17869546/open-new-york-yimby-rezoning-brooklyn-nimby> [<https://perma.cc/C5UM-HJDD>] (“[T]enants’ rights advocates often fight against new development, believing it will accelerate gentrification and drive people from their neighborhoods.”); Tanay Warerkar, *East Harlem Rezoning Faces Mounting Public Opposition*, CURBED: N.Y. (Aug. 24, 2017, 4:45 PM), <https://ny.curbed.com/2017/8/24/16199516/east-harlem-rezoning-city-planning> [<https://perma.cc/934T-TQX2>] (discussing concerns among local residents regarding building heights, rent increases, and potential displacement); *see also* Vicki Been, *Gentrification, Displacement, and Fair Housing: Tensions and Opportunities*, in FURTHERING FAIR HOUSING: PROSPECTS FOR RACIAL JUSTICE IN AMERICA’S NEIGHBORHOODS (Temp. Univ. Press eds., forthcoming 2021) (manuscript at 175–76) (discussing examples of neighborhood opposition to rezoning in different parts of New York City). For a discussion of measures taken to limit displacement in New York; specifically, the city’s efforts to develop neighborhood-based anti-displacement strategies, *see* THE CITY OF N.Y., HOUSING NEW YORK 2.0, at 22 (2017).

49. *See* AMY ARMSTRONG ET AL., FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, HOW HAVE RECENT REZONINGS AFFECTED THE CITY’S ABILITY TO GROW? 9–10 (2010) (finding that upzoned lots were more likely to be census tracts with median incomes lower and proportions of

neighborhoods subject to upzoning, opposition also often targets market-rate development, with many community members arguing that new development and any increase in residential density should be exclusively (or nearly exclusively) below-market-rate (BMR) housing.⁵⁰ In other cases, communities may be open to mixed-income housing generally and to projects built pursuant to local inclusionary zoning ordinances, but demand affordability levels targeted to existing neighborhood residents (and in some cases so demanding they are likely to stifle any development).⁵¹

A few brief examples illustrate the types of concerns often expressed in lower income urban communities facing new development. In Boston, Massachusetts, the Boston Planning and Development Agency (BPDA) recently conducted a two and one-half year planning process for a neighborhood in close proximity to the city's Orange Line train.⁵² The line's existing train cars are set to be entirely replaced in the coming years, a move that will increase peak service capacity on the crowded line by as much as thirty percent.⁵³ In light of this increased capacity, coupled with gentrification pressures in an area on the border between the Jamaica Plain neighborhood, which has seen rapidly rising housing prices in recent years, and the less expensive Egleston Square neighborhood, the

non-white residents higher than the citywide median); *see also* Chen, *supra* note 2 (citing claims that most rezonings under New York City Mayor Bill DeBlasio are in low-income communities of color); Raskin, *supra* note 48 ("The lion's share of the downzonings during Mayor Michael Bloomberg's tenure . . . occurred in high-income areas. During Mayor Bill de Blasio's administration, exclusively low-income, majority-minority areas have been rezoned with the aim of adding more housing."); *c.f.* C.J. Gabbe, *Why Are Regulations Changed? A Parcel Analysis of Upzoning in Los Angeles*, J. PLAN. EDUC. & RES. 1, 7 (2017) (finding that "[u]p zoning was less likely in neighborhoods with higher shares of homeowners" and better amenities).

50. *See, e.g.*, BUSHWICK COMMUNITY PLAN 8, 30, 32 (2018), https://static1.square-space.com/static/57e402b946c3c4b30fb3cdcb/t/5b9ff0fb575d1f5b7bc7e6f2/1537208573834/BC_P_Final_09172018-web.pdf [<https://perma.cc/N6P7-382B>]; Justin Monticello, *This Insane Battle to Block a New Apartment Building Explains Why San Francisco and Other Cities Are So Expensive*, REASON (Dec. 27, 2018, 12:51 PM), <https://reason.com/video/san-francisco-mission-housing-crisis> [<https://perma.cc/P9FF-CRVM>] (discussing opposition to market-rate development by neighborhood groups in San Francisco's Mission neighborhood); *see also* Been, *supra* note 48, at 175 (discussing calls for upzoning that only would allow affordable housing development).

51. *See* Toshio Meronek, *Affordable Housing in San Francisco Affordable Only for Upwardly Mobile*, AL JAZEERA (Feb. 3, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/2/3/san-francisco-affordable-housing-is-unaffordable.html> [<https://perma.cc/K2VK-TCMM>] (stating that, in San Francisco, "activists argue that . . . [b]ecause lower- to middle-income people still can't afford this [inclusionary] housing,[] they say, cities are effectively subsidizing upper-middle-class people to move in and paving the way for gentrification").

52. *See* PLAN: JP/ROX, BOS. PLAN. & DEV. AGENCY, <http://www.bostonplans.org/planning/planning-initiatives/plan-jp-rox> [<https://perma.cc/G3G4-V4NJ>].

53. BOS. PLANNING & DEV. AGENCY, CITY OF BOS., PLAN: JP/ROX 5 (2017).

BPDA conducted a comprehensive planning initiative for the neighborhood, which sought in part to increase development capacity.⁵⁴ The BPDA hoped that comprehensive planning might address neighborhood concerns more holistically, limit opposition to individual projects, and enable more as-of-right development.⁵⁵ The result was PLAN: JP/ROX; the initial draft of the plan encountered significant resistance from local individuals and grassroots organizations, which argued it did not do enough to provide below-market-rate housing and would exacerbate displacement.⁵⁶ Public meetings in the neighborhood were frequently met with protests.⁵⁷ One resident went as far as to claim that if the plan were acted upon, it would be “one of the worst incidents of racism this city has ever seen.”⁵⁸ The plan was revised in response to these concerns.⁵⁹ These revisions included a requirement that 30% of units allowed under a density bonus program be affordable units, a share significantly higher than the city’s baseline inclusionary housing requirement.⁶⁰ Coupled with increasing construction prices in recent years, this requirement has made compliance with the plan either unattractive or simply not financially feasible for many developers; as a result, some have chosen to simply build smaller projects (with fewer units) to avoid the affordability requirement or have sought variances

54. *See id.* at 46, 194; *see also* Press Release, Bos. Planning & Dev. Agency, BPDA Bd. Approves Planning Study Guidelines to Prevent Displacement, Promote Affordable Hous. in JP/Rox (Mar. 2, 2017), <https://us7.campaign-archive.com/?u=c680a920917b91377ae543202&id=202633f427> [<https://perma.cc/QSG5-33FX>] (“With transportation access, parks, a diverse population and culture, the JP/Rox corridor is an attractive place to live and is experiencing significant market pressure for development.”); Qainat Khan, *Housing Displacement Pressures Mount in Boston’s Changing Egleston Square*, WBUR (Feb. 19, 2019, 1:41 PM), <https://www.wbur.org/radioboston/2019/02/19/egleston-square-housing> [<https://perma.cc/C35H-42MK>] (discussing changing neighborhood demographics).

55. *See* BOS. PLANNING & DEV. AGENCY, *supra* note 53, at 54 (discussing desire to update zoning to allow certain as-of-right development).

56. *See* Kyle Scott Clauss, *BPDA Approves “Plan JP/Rox” Amidst Protests, Police Presence*, BOS. MAG. (Mar. 3, 2017, 5:17 PM), <https://www.bostonmagazine.com/news/2017/03/03/bpda-approves-plan-jp-rox/> [<https://perma.cc/VU3W-VM8H>].

57. *See, e.g.*, Richard Heath, *Keep It 100% Egleston Interrupts and Protests at JP-Rox Workshop*, JAM. PLAIN NEWS (May 16, 2016), <https://www.jamaicainnews.com/2016/05/16/keep-it-100-egleston-interrupts-and-protests-at-jp-rox-workshop/19330> [<https://perma.cc/8XPJ-2JQY>].

58. Clauss, *supra* note 56.

59. BOS. PLANNING & DEV. AGENCY, PLAN:JP/ROX - SUMMARY OF PROPOSED CHANGES 1 (2017).

60. *Id.* at 5, 19; *see also* Tim Reardon, *Opinion: Get PLAN JP/Rox Back on Track*, JAM. PLAIN NEWS (Jan. 11, 2017), <https://www.jamaicainnews.com/2017/01/11/op-ed-get-plan-jprox-back-on-track> [<https://perma.cc/65N6-MM6F>] (“The new 30 percent goal is, by the city’s own admission, based on wishful thinking about falling land prices and occupancy assumptions that will be rejected out of hand by any reasonable lender.”).

rather than building in conformity with the plan, resulting in both fewer below-market-rate units and fewer total housing units.⁶¹

In New York City, a resident of the Inwood neighborhood in Northern Manhattan framed the city's 2018 proposed rezoning of the area as "ethnic cleansing."⁶² Other residents expressed concern that it would "change the feeling of the neighborhood" and increase rents, displacing residents and local businesses.⁶³ Although the rezoning included provisions for the creation or preservation of 4,100 affordable housing units, many residents opposed it out of fear that even with those units "an influx of market-rate apartments will increase rents and displace longtime residents."⁶⁴ City officials responded that the neighborhood was already facing rising rents and that the rezoning would bring significant investment and resources to a historically underserved community.⁶⁵ In December 2019, a state court overturned the rezoning in response to a lawsuit from community groups.⁶⁶

These examples highlight two key concerns expressed by residents of lower income urban neighborhoods facing new development: fear of displacement (both residential and commercial and both direct, through evictions, and indirect, through rising rents) and fear of significant change to neighborhood character.⁶⁷ These concerns are of course linked as significant displacement (or even the replacement of those who voluntarily leave by new residents with different salient characteristics) is one potential cause of a change in neighborhood character. And

61. See Peter Shanley, *Opposition Continues to Green St. Development*, JAM. PLAIN GAZETTE (Dec. 7, 2018), <http://jamaicaplaingazette.com/2018/12/07/opposition-continues-to-green-st-development/> [<https://perma.cc/U27X-ZMFW>] (describing first proposed development that conformed with the plan).

62. Anna Sanders, *Inwood Residents Say Rezoning Plan Is an "Ethnic Cleansing,"* N.Y. POST (July 21, 2018, 4:09 PM), <https://nypost.com/2018/07/21/inwood-residents-say-rezoning-plan-is-an-ethnic-cleansing/> [<https://perma.cc/J9WE-QCJM>].

63. *Id.*

64. Jeffery C. Mays, *City Council Approves Inwood Rezoning, Despite Resident Protests*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/nyregion/inwood-rezoning-manhattan-affordable-housing.html> [<https://perma.cc/NK8H-NVZC>].

65. See *id.* See generally *Inwood Rezoning*, N.Y.C. COUNCIL, <https://council.nyc.gov/land-use/plans/inwood-rezoning/> [<https://perma.cc/6HDV-QKD9>] (discussing affordable housing as a priority in Inwood rezoning).

66. Elizabeth Kim, *In Huge Defeat for de Blasio, Judge Knocks Down Inwood Rezoning*, GOTHAMIST (Dec. 19, 2019, 6:01 PM), <https://gothamist.com/news/huge-defeat-de-blasio-judge-knocks-down-inwood-rezoning> [<https://perma.cc/E3H7-JE9D>].

67. Others looking at these issues have similarly highlighted these broad areas of concern. See, e.g., Rachel D. Godsil, *The Gentrification Trigger: Autonomy, Mobility, and Affirmatively Furthering Fair Housing*, 78 BROOK. L. REV. 319, 334 (2013) ("In-place residents appear to have two separate but related bases to oppose gentrification: displacement and cultural change that reflects the interests of the incoming gentrifiers." (footnote omitted)).

existing residents often have a perception that new development will attract new amenities, drive up housing costs, and displace existing residents,⁶⁸ even if research suggests otherwise.⁶⁹

Neighborhood character is a somewhat amorphous concept, but this Article refers to those attributes that turn a particular geographic space into a place ascribed with specific meaning and importance for an individual or group.⁷⁰ One might distinguish between physical and interpersonal attributes of neighborhood character.⁷¹ The former might include the built form, aesthetics, and the types of businesses that serve the community.⁷² Interpersonal attributes of neighborhood character might include who lives in the neighborhood, the social networks they develop and perpetuate,⁷³ and the sense of community and common identity within a neighborhood.⁷⁴ These are by no means hard distinctions and many physical attributes, such as the types of businesses in a community, will have significant effects on the personal relationships formed in the community.⁷⁵

A third consideration, related to neighborhood character, also informs community opposition to new development: the sense that long-term residents of the neighborhood have a distinct stake in the neighborhood,

68. See Been, *supra* note 1, at 218 (“Increasingly, cities are experiencing substantial opposition to proposed new development, driven, in substantial part, by renters who fear that the development will make their homes less affordable and either cause them to have to leave the neighborhood or change the neighborhood to something less familiar and appealing to them.”).

69. See *infra* notes 83–87 and accompanying text.

70. See Patrick Devine-Wright, *Rethinking NIMBYism: The Role of Place Attachment and Place Identity in Explaining Place-protective Action*, 19 J. COMMUNITY & APPLIED SOC. PSYCHOL. 426, 427 (2009) (distinguishing between “place” and “space” and arguing that the former concept “describ[es] physical aspects of a specific location as well as the variety of meanings and emotions associated with that location by individuals or groups”).

71. The Author is grateful to Sarah Schindler for suggesting this distinction.

72. See Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 488–91 (1981) (examining the relationship between physical environment and city and neighborhood communities).

73. See Devine-Wright, *supra* note 70, at 428–29 (arguing that changes to a place affect not only physical aspects, but can also disrupt “the social networks that are sources of support to individuals, particularly in low-income communities”).

74. See Stephanie Brown, *Beyond Gentrification: Strategies for Guiding the Conversation and Redirecting the Outcomes of Community Transition 4* (Harvard Univ. Joint Ctr. for Hous. Studies, Working Paper No. W14-12, 2014), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w14-12_brown.pdf [<https://perma.cc/L2CD-KG6M>] (discussing how “subtle cultural and demographic shifts” can lead to a sort of “social displacement”).

75. See generally Sharon Zukin et al., *New Retail Capital and Neighborhood Change: Boutiques and Gentrification in New York City*, 8 CITY & COMMUNITY 47 (2009) (examining how changes to a neighborhood’s—such as Harlem and Williamsburg—commercial landscape can affect community identity).

which is at risk of loss.⁷⁶ This claimed stake can give rise to two separate (but not necessarily mutually exclusive) claims: the first for some degree of control (or enhanced voice) in relation to the pace and shape of new development in the area, and the second for some financial stake in that new development (and the upzoning that permits it).⁷⁷ This financial stake may take a number of forms, including demands for community benefits and calls for community preferences in the provision of new below-market-rate housing.⁷⁸ Finally, as noted earlier, neighborhood opposition to rezoning and new development in lower income neighborhoods is often informed by a sense that such neighborhoods are unfairly targeted for rezoning and that new density is inequitably distributed.⁷⁹

The first of these concerns, the potential for displacement as neighborhoods gentrify, often receives the most attention. However, as the next Section explores, empirical evidence suggests this concern is largely unmerited and that opposition to new development is likely to only exacerbate displacement and rising housing costs.

76. Rachel Godsil describes the interests of residents of gentrifying neighborhoods who remained in their neighborhoods during the suburban migration of the 1950s and 1960s and who “invested labor, time, and emotion in their neighborhoods.” Godsil, *supra* note 67, at 322. She argues “in favor of broadening our conception of ‘interest’ beyond those who hold definable property interests in the classic sense to include those who have invested in their homes and neighborhoods.” *Id.*; see also Bethany Y. Li, *Now is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 *FORDHAM L. REV.* 1189, 1240 (2016) (arguing that individuals residing in communities prior to gentrification should benefit from their contributions).

77. See Catherine Hart, Comment, *Community Preference in New York City*, 47 *SETON HALL L. REV.* 881, 905 (2017) (arguing that influx of high-income individuals into low-income communities “replaces local residents and deprives long-time residents of the stake they have built in their community”). A recent article discussing the demise of Senate Bill 50 in California quoted a board member from one of the leading groups opposing the measure, who asserted:

I’m not against development. I am just for communities navigating that development with a developer. We have community plans in South Los Angeles that we’ve been working on for 30 years that included a lot of input from a community that has historically been underrepresented in urban planning, and I think that’s important to protect.

Dougherty, *supra* note 19 (quoting Isaiah Madison).

78. Along these lines, the San Francisco Planning Department, in an analysis of Senate Bill 827, criticized the measure for significantly increasing the value of property without simultaneously seeking to capture some of that value for public benefits. Memorandum from AnMarie Rodgers & Joshua Switzky, S.F. Plan. Dep’t, to Members of the Planning Comm’n 4 (Feb. 5, 2018), <http://commissions.sfplanning.org/cpcpackets/SB%20827.pdf> [<https://perma.cc/U6YK-27P8>].

79. See *supra* note 49 and accompanying text.

B. *The Costs of Slowing New Development*

John Mangin coined the term “the New Exclusionary Zoning” to describe restrictive land use policies in high-demand urban areas (in contrast with the more traditional notion of exclusionary suburbs).⁸⁰ Mangin argues that anti-gentrification advocates seeking to block or slow new development or pursuing the downzoning of neighborhoods “use the same tactics—environmental lawsuits, say, or restrictive zoning laws—as exclusionary suburban NIMBY groups.”⁸¹ Such policies are counterproductive, leading to the “filter[ing] up” of housing as an undersupply results in wealthier individuals bidding up the price of existing housing in lower income neighborhoods.⁸² Beyond these problematic effects, those who seek to stop or slow new development in lower income neighborhoods often rely on empirical claims that are not supported by the best available evidence.

This Section briefly reviews the relevant research, which suggests that new development, even market-rate or luxury development, does not exacerbate high housing costs, cause gentrification, or significantly increase rates of displacement. One perceived mechanism through which all of this could occur is that higher income households who move into new units attract new restaurants, stores, and other amenities, increasing the pace of gentrification, which, in turn, leads to displacement.⁸³ Jon Dubin made an argument along these lines in the law review literature over twenty-five years ago:

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

80. Mangin, *supra* note 7, at 92.

81. *Id.* at 110.

82. *Id.* at 103. Empirical research supports this point. See C. Tsurriel Somerville & Christopher J. Mayer, *Government Regulation and Changes in the Affordable Housing Stock*, FED. RES. BANK N.Y. ECON. POL’Y REV., June 2003, at 45, 53 (2003) (“We find that regulation does matter: when new construction is more constrained, as measured either by a lower supply elasticity or the presence of certain regulations, affordable units are more likely to filter up and become unaffordable, relative to remaining in the affordable stock.”). In addition, the filtering down of older housing remains an important source of low-cost rental housing. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA’S RENTAL HOUSING 3 (2015).

83. See ASQUITH ET AL., *supra* note 15, at 1 (“If these amenity or reputation changes are large, they could increase demand for the neighborhood by enough to completely offset the increase in supply, causing rents to increase and accelerating gentrification.”).

the functional and psychological trauma of dislocation and perhaps homelessness.⁸⁴

Recent empirical research undermines this assertion. One study of new market-rate construction found “new buildings lower nearby rents by 5 to 7 percent relative to [the trend in comparable neighborhoods]” and increase the number of people from other low-income neighborhoods who move into the area.⁸⁵ The authors’ results, which accord with that of other research, suggest that the effect of new supply overwhelms any effect that improved amenities may have on inducing demand.⁸⁶ Moreover, their findings indicate “that rather than catalyzing demographic change in previously stable neighborhoods, new market-rate construction in low-income areas tends to follow neighborhood change, or gentrification.”⁸⁷

As for the question of whether gentrification (whatever its own cause might be) in turn causes the displacement of current residents, while there

84. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 742–43 (1993) (footnote omitted). Similar arguments persist. *See, e.g.*, RANDY SHAW, GENERATION PRICED OUT 218 (2018) (arguing that the de Blasio administration extended upzoning to neighborhoods not yet experiencing gentrification, which “would promote displacement and gentrification rather than prevent it”).

85. Brian J. Asquith et al., *Supply Shock Versus Demand Shock: The Local Effects of New Housing in Low-Income Areas 1* (W.E. Upjohn Inst. for Emp’t Research, Working Paper No. 19-316, 2019). The authors note that they “are only able to follow outcomes for three years after building completion, though [they] provide evidence that longer-run effects are likely similar to [their] estimates.” *Id.* at 4.

86. *See id.* at 1 (“If there is an endogenous amenity effect, it appears to be overwhelmed by the standard supply effect.”); *see also* XIAODI LI, DO NEW HOUSING UNITS IN YOUR BACKYARD RAISE YOUR RENTS? 2 (2019) (“[T]he amenity effect is dominated by the supply effect, given that rents and sales prices still fall on net.”). Li finds that “new high-rises cause nearby high-end and mid-range rental buildings’ rents and condo sales prices to decrease because new housing units alleviate demand pressure on existing housing units.” *Id.* at 36. *But see* Divya Singh, Do Property Tax Incentives for New Construction Spur Gentrification? Evidence from New York City 41 (unpublished manuscript), https://asit-prod-web1.cc.columbia.edu/econdept/wp-content/uploads/sites/41/2019/07/Singh_JMP.pdf [<https://perma.cc/PA3V-KH4T>] (“I find that an additional new tax-exempt rental unit within 150 meters in the time notch from an existing rental building increased its gross rental income by 2.3%. I hypothesize that the positive effect on gross rents can be explained by the fact that new tax-exempt investment attracted high-income individuals who increased the average income of the neighborhood, boosted local businesses, and therefore further increased the amenity value of nearby rental buildings.”).

87. Asquith et al., *supra* note 85, at 3; *see also* Leah Platt Boustan et al., *Does Condominium Development Lead to Gentrification?* 18 (Nat’l Bureau of Econ. Research, Working Paper No. 26170, 2019) (finding central city condo development follows existing demand for a neighborhood).

is some conflicting evidence, studies suggest the answer is no.⁸⁸ Some of the most well-known research, such as that by Lance Freeman and Frank Braconi, which found that levels of displacement in gentrifying neighborhoods were no different than in similar, non-gentrifying urban neighborhoods,⁸⁹ has been criticized in part on the grounds that it examined the phenomenon using data from the very earliest stages of the resurgence of urban neighborhoods and that—as gentrification has proceeded much more rapidly in recent years—there is reason to believe the pace of displacement has increased.⁹⁰ However, more recent studies accord with Freeman and Braconi’s work.⁹¹ One prominent example, by researchers at New York University, tracked children living in New York City between January 2009 and December 2015 using Medicaid records, which provide precise address information, allowing the researchers to control for whether a child lives in subsidized housing.⁹² They found that during a period of rapid gentrification, lower income children living in gentrifying neighborhoods—including only those children living in market-rate housing—were not more likely to move than similar children

88. See NYU FURMAN CENTER, GENTRIFICATION RESPONSE 5 (2016) (“Evidence is mixed on the question of displacement (and what counts as displacement), but there is little question that increased demand for housing in an area can put upward pressure on housing prices and rents, making neighborhoods less affordable.”); Hwang & Sampson, *supra* note 14, at 727 (noting that occurrence of displacement and racial turnover in gentrifying neighborhoods remain “widely debated empirical questions”).

89. Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS’N 39, 51 (2004); see also Ingrid Gould Ellen & Katherine M. O’Regan, *How Low Income Neighborhoods Change: Entry, Exit, and Enhancement*, 41 REGIONAL SCI. & URB. ECON. 89, 90 (2011) (noting that there is no evidence that neighborhood economic changes drive displacement); Jacob L. Vigdor, *Does Gentrification Harm the Poor?*, 2002 BROOKINGS-WHARTON PAPERS ON URB. AFF. 133, 135–36 (stating that gentrification does not necessarily lead to displacement of a neighborhood’s initial residents).

90. See Dragan et al., *supra* note 14, at 3 (“While existing studies provide little evidence of . . . displacement, those analyses generally focus on the 1980s and 1990s, when the pace of gentrification was slower, and rely on datasets that cannot identify where people settle after they move.”); Norman Oder, *Of-Quoted Studies Saying Gentrification Doesn’t Cause Displacement Are “Glaringly Stale,”* SHELTERFORCE (Jan. 2, 2018), <https://shelterforce.org/2018/01/02/gentrification-doesnt-cause-displacement-some-datas-gotten-stale/> [<https://perma.cc/X8HH-66DG>]. Dragan and her co-authors note that studies looking at a more recent period find slightly more evidence of displacement due to gentrification. See Dragan et al., *supra* note 14, at 7.

91. See, e.g., Quentin Brummet & Davin Reed, *The Effects of Gentrification on the Well-Being and Opportunity of Original Resident Adults and Children 3* (FRB of Phila., Working Paper No. 19-30, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421581 [<https://perma.cc/9TM5-DH32>] (finding only modest increases of mobility among those living in gentrifying neighborhoods).

92. Dragan et al., *supra* note 14, at 4; see also Kriston Capps, *Study: No Link Between Gentrification and Displacement in NYC*, CITYLAB (July 31, 2019), <https://www.citylab.com/equity/2019/07/gentrification-displacement-link-children-nyc-medicaid-data/594250/> [<https://perma.cc/H8ZB-6NCG>] (discussing the New York University research).

in non-gentrifying neighborhoods.⁹³ Moreover, “residing in subsidized housing reduces the probability of moving substantially, but the association between gentrification and residential mobility is no different for children living in subsidized housing than for those living in market-rate housing.”⁹⁴ Due to the experiences of those who remain in the neighborhood, the researchers also found “that children who start off in low-income neighborhoods that gentrify experience larger reductions in neighborhood poverty as compared to those who start off in persistently low-SES neighborhoods.”⁹⁵

The authors acknowledge that “[t]he lack of evidence for displacement is something of a puzzle as well as a frustration to many observers who are certain that they are witnessing low- and moderate-income households being displaced as their communities gentrify.”⁹⁶ They suggest this may be because “displacement is simply more salient in gentrifying areas” as forced moves and eviction may be less noticeable in non-gentrifying neighborhoods, where new tenants “more closely resemble those exiting.”⁹⁷ The authors caution that their results should not be generalized beyond New York City, given the more robust tenant protections provided in New York City and the application of rent regulation to approximately half of the city’s rental stock.⁹⁸

Nonetheless, a 2016 study of gentrifying neighborhoods in Philadelphia, which tracked where residents of these neighborhoods moved, accords with the New York City study.⁹⁹ It found that, overall, residents of gentrifying neighborhoods in Philadelphia “have slightly higher mobility rates than residents in low-income neighborhoods that did not gentrify,”¹⁰⁰ but that those who move “are more likely to be financially healthier residents moving to higher-quality

93. See Dragan et al., *supra* note 14, at 18 (finding “no difference in mobility rates between those living in gentrifying neighborhoods and those living in persistently low-SES neighborhoods” when controlling for individual and neighborhood characteristics). They also found no differences in mobility for children of any specific race. *Id.* at 22.

94. Dragan et al., *supra* note 14, at 23.

95. *Id.*

96. *Id.* at 6–7.

97. *Id.* at 7. Dragan and her coauthors acknowledge the possibility that “academic studies have failed to capture the phenomenon because of poor measures or inadequate data.” *Id.*

98. See *id.* at 24.

99. Ding et al., *Gentrification and Residential Mobility in Philadelphia*, 61 REGIONAL SCI. & URB. ECON. 38, 39 (2016) (discussing their study showing similar results to those found in the New York studies). The authors note that Philadelphia does not face the displacement pressures found in tighter housing markets such as New York City and San Francisco, but argue that as such it may have greater relevance for non-“superstar” cities. *Id.* at 40. Their definition of gentrification focuses on changes in median gross rent, home values, and share of college-educated residents. *Id.* at 42.

100. *Id.* at 39.

neighborhoods.”¹⁰¹ In contrast, “[r]esidents with low credit scores and without mortgages are generally no more likely to exit” their neighborhood than comparable residents in non-gentrifying neighborhoods.¹⁰²

Even if it were established that gentrification increases the rate of displacement, the relationship between gentrification and displacement must be distinguished from the merits of increased housing supply, unless new supply induces demand and accelerates gentrification. However, the available evidence does not support this theory.¹⁰³ Basic economic theory suggests that new supply instead will serve to mitigate housing price increases, and that the demand pressures contributing to gentrification would exist regardless of this new supply. Recent empirical research supports this, finding that neighborhoods where new housing is built have less displacement than those without new development.¹⁰⁴ One study found that “new market-rate development reduces (or slows the growth of) residential rents and residential property sales prices in the immediately surrounding area.”¹⁰⁵ Building more housing, by itself, will not solve the problem of increasing affordability, particularly for the lowest income households. Increasing supply is, instead, necessary, but by no means sufficient, “for fighting inequality and increasing affordability.”¹⁰⁶

To the extent that more housing supply will reduce (or slow increases in) the price of housing, restrictions that reduce supply or slow new

101. *Id.* at 50.

102. *Id.* at 39. Those individuals are, however, more likely to move to lower income neighborhoods when they do exit than their counterparts in non-gentrifying neighborhoods. *Id.*

103. See *supra* notes 84–87 and accompanying text.

104. See, e.g., BRIAN UHLER, CAL. LEGISLATIVE ANALYST’S OFFICE, PERSPECTIVES ON HELPING LOW-INCOME CALIFORNIANS AFFORD HOUSING 9 (2016) (“Our analysis of low-income neighborhoods in the Bay Area suggests a link between increased construction of market-rate housing and reduced displacement.”); Asquith et al., *supra* note 85, at 22 (finding that development of new market-rate buildings slows demographic changes in nearby area).

105. Li, *supra* note 86, at 36 (“Opposing such development may exacerbate the housing affordability crisis and increase housing cost burdens for local renters.”). Li found “that for every 10% increase in the housing stock within a 500-foot buffer, residential rents decrease by 1%.” *Id.* at 2. However, the impact was smaller, within a given neighborhood, for lower rent buildings. *Id.*

106. Michael Manville et al., *Zoning and Affordability: A Reply to Storper and Rodriguez-Pose 2* (May 17, 2019) (unpublished manuscript), <https://drive.google.com/file/d/1sHh6BJ8dPoN9VQj-PXTPK5ATa8mL8MP4/view> [<https://perma.cc/MVB9-DZUU>]. In separate work, Lens and Monkkonen have assessed the relationship between land use regulation and income segregation. Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS’N 6, 12 (2016). They find that density restrictions, greater levels of local involvement in permitting process, and multiple layers of review result in higher levels of income segregation for higher income, but not lower income, households. See *id.*

development, whether imposed in affluent or in lower income communities, will have comparable effects at the metropolitan level. If our primary concern is increasing supply so as to make housing more affordable (and, for that matter, to reduce displacement), this would suggest that exclusionary mechanisms imposed by lower income, gentrifying neighborhoods should be treated the same as exclusionary mechanisms in wealthier neighborhoods. If the state or city is upzoning certain property state or city-wide (based on proximity to transit or some other facially neutral criteria), then it should do so without regards to the characteristics of any particular neighborhood. Equitable considerations might support ensuring that new density is distributed fairly across all neighborhoods, but beyond that no neighborhoods should receive preferential treatment or some greater degree of deference.

Moreover, the positive benefits of gentrification for existing residents—including reduced exposure to neighborhood poverty, improved amenities, and increases in property values for homeowners—may outweigh any negative effects.¹⁰⁷ Allowing new development in neighborhoods that have historically been denied investment can serve to integrate those neighborhoods.¹⁰⁸ Redevelopment in such communities “might help redress prior neglect, discrimination, and segregative or expulsive land use policies.”¹⁰⁹ Developing new housing in lower cost areas can also make it possible to provide a larger number of affordable units than could be financed in more expensive areas.¹¹⁰ Finally, the perceived negative effects of gentrification may be inaccurate. For

107. See Brummett & Reed, *supra* note 91 at 20; see also Daniel Monroe Sullivan, *Assessing Residents’ Opinions on Changes in a Gentrifying Neighborhood: A Case Study of the Alberta Neighborhood in Portland, Oregon*, 17 HOUS. POL’Y DEBATE 595, 617 (2010) (finding, based on survey of residents in gentrifying neighborhood, majority of residents approved of neighborhood changes on net).

108. Ingrid Gould Ellen & Gerard Torrats-Espinosa, *Gentrification and Fair Housing: Does Gentrification Further Integration?*, 29 HOUS. POL’Y DEBATE 835, 836 (2018) (“[N]eighborhoods that became integrated through gentrification appeared to be more racially stable than those that integrated through households of color moving into predominantly white neighborhoods.”). Ellen and Torratt-Espinosa note, however, that some gentrifying neighborhoods are on the path from predominantly minority to predominantly white and that ensured long-term diversity requires place-based investments in subsidized housing. *Id.* at 1–2.

109. Been, *supra* note 48, at 176.

110. See Elizabeth Kim, *In SoHo, Talk of Rezoning Sparks Affordable Housing Battle Between Young and Old New Yorkers*, GOTHAMIST (Jan. 17, 2020, 9:44 AM), <https://gothamist.com/news/soho-talk-rezoning-sparks-affordable-housing-battle-between-young-and-old-new-yorkers> [<https://perma.cc/4FWE-5K84>] (“According to city officials, cheaper land costs can finance more affordable units, but the strategy has been criticized for overwhelming poorer neighborhoods with density and driving displacement.”).

example, as one recent study found, renters may not end up paying higher rents as their neighborhood gentrifies.¹¹¹

Displacement and rising housing costs are not, however, the only concerns driving opposition to new development. As mentioned, residents also express concerns about unwanted changes to neighborhood character and about the inequitable distribution of new density, as well as the belief that, as long-term residents, they have a distinct stake in the neighborhood that merits deference and perhaps some share of the increased property values generated by a zoning change.¹¹² The next Section further explores these three broad issues and begins to consider whether and how these concerns differ from similar sentiments in more affluent communities.

C. *Are All Demands for Local Control the Same?*

Concerns regarding neighborhood character expressed by lower-income urban residents might appear distinguishable from the stereotypical suburban NIMBY fear of new development—particularly affordable housing development—adversely affecting property values.¹¹³ An expressed concern with property values may simply cloak, or even explicitly parallel, a desire to keep out certain housing and the people (lower income households, families with children) that live in that housing. But if this is true it suggests, at least in part, a desire to maintain existing neighborhood character (to the extent that character is determined by the composition of residents or the typology of housing units). Those who resist new market-rate development in lower income neighborhoods also seek to maintain neighborhood character in part by keeping out certain types of housing (more expensive, market-rate units), perhaps in the hopes of thereby excluding middle or higher income households. Frequently, this is reflected in an expressed concern that new

111. Brummett & Reed, *supra* note 91, at 19 (“[S]omewhat surprisingly, gentrification has no effect on reported monthly rents paid by original resident less-educated renters.”). The same study found that those who move from a gentrifying neighborhood are no more likely than similar individuals who move from non-gentrifying neighborhoods “to end up in a higher poverty neighborhood, to become unemployed, or to commute farther than individuals moving from nongentrifying neighborhoods.” *Id.* at 18.

112. *See supra* notes 67–69 and accompanying text.

113. NIMBY (“not in my backyard”) is typically used pejoratively to refer to existing residents who resist new development in their community, typically due to concerns regarding home values or neighborhood character. *See* Stahl, *supra* note 5, at 491 (“NIMBYs are homeowners who vociferously oppose new developments in their communities—especially affordable housing or any other type of housing—and they have the political clout to get their way with local regulatory authorities.”).

development will change existing neighborhood amenities in a way that caters to the interests of new residents.¹¹⁴

Along these lines, Gerald Frug asserted twenty years ago that legislation restricting the conversion of rental housing into condominiums raises issues comparable to exclusionary zoning: “Both restrict an owner’s ability to control his property, and *both do so in order to preserve an existing community by excluding outsiders.*”¹¹⁵ While exclusionary zoning keeps lower income households out of suburbs, “condominium conversion legislation is an effort to protect low-income neighborhoods from gentrification.”¹¹⁶ According to Frug:

The prevention of gentrification, like exclusionary zoning, enables people to preserve comparatively homogenous communities and advances the interests that the members of the community have in common. Central-city and suburban residents thus have similar reasons to protect territorial identity: racial pride, feelings of community, fear of outsiders, and preference for their own way of life over that lived on the other side of the border.¹¹⁷

Frug criticized local government law for often being more accepting of suburban exclusionary zoning.¹¹⁸ In contrast, he contended, courts tend to limit the ability of local governments to prohibit the conversion of rental housing.¹¹⁹ Given the similar motivations for these efforts, Frug suggested that one would expect them to be treated similarly—either allowed or forbidden.¹²⁰

The next Part examines whether efforts to exclude or control new development can be differentiated in the other direction: allowing greater control and autonomy to lower income communities even as such power

114. See MARY PATILLO, *BLACK ON THE BLOCK* 107 (2007) (arguing that while new residents might give a neighborhood greater political power, they might wield that power to serve the demands of new residents for such amenities as public art and high-end recreational and commercial uses). Assessing opposition to new development in lower income neighborhoods and the concerns that motivate it is further complicated by the often-vocal opposition to new development by first-wave gentrifiers who seek to maintain a neighborhood’s authenticity (or at least their perception of it) in the face of later waves of gentrification. The Author thanks Ken Stahl for suggesting this point.

115. GERALD E. FRUG, *CITY MAKING* 81 (1999) (emphasis added).

116. *Id.* (“Indeed, condominium conversion legislation is one of the principal vehicles central cities use to preserve the neighborhood character of poor city neighborhoods.”).

117. *Id.* at 82.

118. See *id.* at 81.

119. See *id.* Frug’s only cited support for this claim is the Massachusetts Supreme Judicial Court. See *id.*

120. See *id.*

is denied or reduced in wealthier communities. One of the central texts of the Community Economic Development (CED) movement forthrightly acknowledged that this constitutes a bit of a double standard but argued that to enhance the autonomy of poor communities while restricting that of affluent communities can be reconciled on the grounds that those efforts are “defensive and remedial” in nature.¹²¹

The question of whether lower income communities should be granted a greater degree of local control is not merely a subject of academic interest. California’s recently defeated SB 50 would have provided special treatment to lower income communities facing gentrification pressures.¹²² Even as it sought to liberalize zoning and increase housing supply statewide, SB 50 treated lower income communities differently than more affluent ones.¹²³ The bill’s implementation would have been delayed in “sensitive communities” that are “vulnerable . . . [to] displacement” pressures.¹²⁴ Although the details were never fully developed prior to the legislation’s demise, the intent was to allow the local government in those areas to develop a plan in conjunction with the local community and through a process that engages local residents.¹²⁵ Those plans could not reduce the amount of added density the legislation would otherwise allow in the designated area. Rather, they would be required to allow development “consistent with the overall residential development capacity and the minimum affordability standards” in the bill.¹²⁶ SB 50 separately targeted displacement concerns statewide by not providing zoning relief to any property occupied by renters within the previous seven years.¹²⁷

Even as it proposed granting more local control to communities vulnerable to displacement pressures, SB 50 limited the ability of more affluent communities to undermine the goal of greater density by resisting public transportation.¹²⁸ These differing approaches might be attributed simply to political calculation and the effort to expand support for the

121. WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* 76 (2001).

122. S.B. 50, 2019-2020 Leg., Reg. Sess. (Cal. 2018); *see also* Wiener, *supra* note 45.

123. *See* Wiener, *supra* note 45.

124. Cal. S.B. 50. The bill relied on a number of different measurements of poverty, segregation, and relative increases in housing costs for designating “[p]otentially sensitive communit[ies].” *Id.* § 65918.50(i). One study of the provisions revealed that, even without the provision for additional designations, “43.9 percent of census tracts in California could be designated as sensitive communities.” *New Amendments to SB 50 Change Approach to Identifying “Sensitive Communities,”* TERNER CTR. FOR HOUSING INNOVATION (May 13, 2019), <https://ternercenter.berkeley.edu/blog/new-amendments-to-sb-50-sensitive-communities> [https://perma.cc/RUY2-WYFT].

125. *See* Cal. S.B. 50 § 65918.58(b).

126. *Id.* § 65918.58(c)(2).

127. *Id.* § 65918.52(c)(1).

128. *See supra* note 47 and accompanying text.

bill.¹²⁹ But they also suggest a calibration of state and local power based, in part, on an initial determination, by the state, of what local concerns merit consideration and justify a degree of local control and which types of neighborhoods should be granted such control. The next Part explores whether there are normative—and not just political—justifications for drawing such distinctions in this and other contexts.

II. IS THERE A JUSTIFICATION FOR DIFFERENTIAL TREATMENT OF CERTAIN EXCLUSIONARY TENDENCIES?

The specific reasons expressed for opposing or seeking to control new development can and do differ across neighborhoods, even if the effects of limiting development on regional housing supply are similar. However, do these reasons, and the underlying concerns and values that inform them, justify differential treatment of these neighborhoods? And, if so, what might that look like in practice? This Part draws on scholarship in both property and local government law to explore these questions and situates potential justifications for providing more control over development to certain communities within a set of overlapping historical, theoretical, and doctrinal considerations. It then critiques these claimed justifications, but nonetheless concludes that a modest case can be made for granting some form of preferential treatment to certain communities in narrow circumstances.

A. *Historical and Lingering Disparities in Power and Autonomy*

The historical treatment of lower income urban neighborhoods, including those now encountering gentrification, provides an initial basis for distinguishing calls for local control in such communities from those in their more affluent counterparts. As others have carefully documented, many neighborhoods now facing gentrification historically suffered from redlining, disinvestment, predatory lending, and subpar provision of municipal services.¹³⁰ Coupled with the subsequent period of Urban

129. Political calculation appears to have clearly shaped the bill's special treatment of certain counties, which would have been subject to less significant increases in permissible building height and density. See Liam Dillon, *High-profile California Housing Bill Clears Hurdle After Tense Debate over Local Control*, L.A. TIMES (Apr. 24, 2019), <https://www.latimes.com/politics/la-pol-ca-senate-bill-50-changes-20190424-story.html> [<https://perma.cc/6CAF-JDKZ>] (describing concession to a state senator who represents Marin County and chairs the Senate Governance and Finance Committee).

130. See, e.g., Emily Badger et al., *The Neighborhood Is Mostly Black. The Home Buyers Are Mostly White*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/interactive/2019/04/27/upshot/diversity-housing-maps-raleigh-gentrification.html> [<https://perma.cc/M2EH-6JKX>] (“In the places where white households are moving, reinvestment is possible mainly because of the disinvestment that came before it.”); Dubin, *supra* note 84, at 760–61 (“[G]overnments have . . . engaged in practices that diminish the quality of life for the residents

Renewal, the lingering effects of these experiences contribute to present wariness towards development and the forces behind it.¹³¹ Even as they limited opportunities for racial minorities in such neighborhoods, federal government programs during the middle of the twentieth century provided “unprecedented opportunities and autonomy” for white families.¹³² Discriminatory practices and legal barriers imposed by both government and private actors created, and continue to perpetuate, disparities in wealth, mobility, and housing choice.¹³³ In addition, racism and classism motivated various land use laws at the state and local level that remain in effect and that serve to exclude lower income residents from more affluent communities.¹³⁴ As Richard Ford notes, given the

within African-American communities. These practices include the provision of inferior municipal services, selective use of annexation and boundary line changes to disenfranchise and deny services to black residents, inequitable relocation or non-location of important public institutions, regressive and disparate property tax assessments, encouragement of mortgage and insurance redlining, and the disproportionate displacement of African-American families through urban renewal, highway, and local redevelopment projects.” (footnotes omitted)).

131. Mangin, *supra* note 7, at 110 (“[T]he political culture of community opposition to development traces back to the time of Urban Renewal, redlining, and blockbusting when the enemies most definitely *were* the developers, landlords, and financial institutions on the supply-side.”); cf. Paavo Monkkonen & Michael Manville, *Opposition to Development or Opposition to Developers? Experimental Evidence on Attitudes Toward New Housing*, 41 J. URB. AFF. 1123, 1134 (2019) (finding strong evidence, based on survey data, that perceptions regarding developer profits drive opposition to development).

132. Godsil, *supra* note 67, at 329 (“From the post-World War II period through the 1970s, the federal government engaged in programs enhancing the autonomy of white families to purchase homes and move to the suburbs, while simultaneously disinvesting in urban centers and contributing to the exclusion of black and Latino families from those same suburbs.”). Godsil highlights federal subsidies for highways that enabled white households to move to the suburbs, the Federal Housing Administration, and the Veterans Administration’s home ownership loan programs. *See id.* *See generally* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–218 (1985) (detailing federal programs that incentivized suburbanization among white families); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (discussing federal programs that contributed to racial segregation).

133. *See, e.g.*, Dubin, *supra* note 84, at 751–55 (reviewing history of federal government’s discriminatory land use policies); Ford, *supra* note 5, at 1848 (examining how “[e]xplicit governmental policy at the local, state, and federal levels has encouraged and facilitated racial segregation”); Godsil, *supra* note 67, at 327–31 (discussing history of racial restrictions and discrimination by both private and government actors); *see also* THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS 43 (1996) (describing the effect of discriminatory public and private housing policies in postwar Detroit); Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today.*, WASH. POST (Mar. 28, 2018, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/> [<https://perma.cc/8UMX-UVLJ>] (discussing research finding that many redlined neighborhoods remain poor and predominantly minority).

134. For example, Article 34 of the California Constitution, passed into law in 1950, requires voter approval for the construction of public housing in a municipality. CAL. CONST. art. XXXIV,

historical treatment of segregated minority neighborhoods and their lack of political power, “[t]oday’s laws and institutions need not be explicitly racist to ensure that this state of affairs continues—they need only to perpetuate historical conditions.”¹³⁵

Disparities in wealth are reinforced and perpetuated by stark differences in both scale and political power, which render urban neighborhoods within large cities less able to control their fortunes than suburban or small town communities.¹³⁶ Legal mechanisms, including zoning and subdivision approval processes, often better serve the preferences of small-town and suburban communities, while residents of lower income urban communities are frequently subject to the whims of more powerful neighborhoods within the municipality.¹³⁷ Not without evidence, lower income neighborhoods challenging new development often argue the city government is directing new development and increased density towards their frequently less politically powerful neighborhoods even as it restricts development—through downzoning or

§ 1; see also Liam Dillon, *A Dark Side to the California Dream: How the State Constitution Makes Affordable Housing Hard to Build*, L.A. TIMES (Feb. 3, 2019, 8:30 AM), <https://www.latimes.com/politics/la-pol-ca-affordable-housing-constitution-20190203-story.html> [<https://perma.cc/FY9P-A56A>] (“Article 34 . . . weakened efforts to integrate suburban communities across the state and led to a landmark U.S. Supreme Court case that had the effect of allowing government policies nationwide that discriminate against poor people.”). Daniel Kay Hertz has documented the early use of zoning to maintain the exclusivity of certain affluent Chicago neighborhoods. See DANIEL KAY HERTZ, *THE BATTLE OF LINCOLN PARK: URBAN RENEWAL AND GENTRIFICATION IN CHICAGO* 29–30 (2018).

135. Ford, *supra* note 5, at 1844.

136. See, e.g., FRUG, *supra* note 115, at 8 (“The legal system’s decision to build local power on the protection of local autonomy and associate autonomy with private values, in short, has had an unequal effect on metropolitan residents: it has enhanced the power of America’s prosperous suburbs at the expense of its central cities.”); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 505 (1997) (“In smaller units, individual citizens are likely to think they have a greater share of local power.”); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1194 (2018) (arguing that home rule protects a certain kind of localism “more readily enjoyed by suburban jurisdictions”); cf. Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 625 (1997) (“The present fractured state of local government . . . should come as no surprise. Its creation was not happenstance, but rather a deliberate attempt to empower the individual.” (footnote omitted)).

137. See Godsil, *supra* note 67, at 333–34 (arguing that in cities “the current residents have to counter the political might of the extant middle class of the city”). This dynamic appears particularly true in cities with at-large rather than district elections. See Michael Hankinson & Asya Magazinnik, *Aggregating Voters and the Electoral Connection: The Effect of District Representation on the Distributive Equity of the Housing Supply* 4, 20, 29 (Aug. 21, 2019) (unpublished manuscript) (on file with author) (finding that a switch from at-large to district elections in California cities resulted in a decrease in the permitting of multi-family housing, but in more equitable distribution of new development and less concentration in minority neighborhoods).

historic districting—in higher income, often more politically powerful neighborhoods.¹³⁸

The historical treatment of disadvantaged urban neighborhoods, coupled with the power imbalance attributable to the basic contours of local government law, suggest at least one basis for prioritizing the autonomy of lower income neighborhoods over their more affluent counterparts. Granting a greater degree of local control or some share of the value of new development to lower income neighborhoods or long-term residents within those neighborhoods might be justified as a partial remedy for the historical treatment of these communities. More affluent communities—and their predominantly white residents—have long been able to control their fortunes and the pace of development and change, as well as to accrue wealth. Efforts to eliminate exclusionary practices in wealthier communities can serve to provide choices to individuals who have long been excluded from those neighborhoods by discriminatory processes or economic constraints.¹³⁹ In contrast, lower income neighborhoods now confronted by new development were never closed to wealthier individuals and, in some instances, now feel forced to accept disproportionate burdens from new development that they did not choose.¹⁴⁰ On these accounts, while housing affordability concerns and the demand for increased housing supply might outweigh *most* calls for local control, those calls, when voiced by communities long denied such control, possess distinct salience.¹⁴¹ To the extent that they are

138. See *supra* note 49 and accompanying text; see also Kim, *supra* note 110 (“[M]ost of the city’s major rezonings under de Blasio had been in low-income, minority neighborhoods, such as East New York, East Harlem, and Inwood, where residents recently successfully fought and overturned the plan.”).

139. See Been, *supra* note 1, at 248.

140. *Id.* (“[D]evelopment in neighborhoods currently populated primarily by people excluded from other neighborhoods by racial and ethnic discrimination in the past (and in some places, still today) now threatens to impose burdens that the residents are not choosing to assume. That critical difference raises a host of legal and social justice issues that need to be confronted forthrightly.”).

141. Justin Steil and Laura Humm Delgado have made an analogous argument in the urban planning literature, contending that the principle of anti-subordination, rather than diversity, should drive planning in cities more generally: “An anti-subordination approach incorporates social inclusion and civil rights; it identifies how particular groups have been systematically discriminated against and prioritizes redress of the resulting durable socio-economic inequalities.” Justin P. Steil & Laura Humm Delgado, *Limits of Diversity: Jane Jacobs, the Just City, and Anti-Subordination*, 91 *CITIES* 39, 39 (2019). They suggest that anti-subordination complements values of equity and democracy by seeking ways “to actually address persistent group disparities in a social system in which some are systemically disadvantaged.” *Id.* at 42.

largely remedial in nature, such calls for local control might be distinguished from the parochialism of more affluent communities.¹⁴²

There are, however, reasons to be cautious about the implications drawn from this historical argument. First, if local control is exercised to exclude or slow new development, it is likely to both have negative effects on lower income communities and exacerbate existing problems.¹⁴³ Second, it is not necessarily the case that current residents of gentrifying communities or those demanding greater local control are the same individuals who suffered the injustices society might seek to remedy. Over the ensuing decades, many residents will have moved away and will in no way benefit from any special treatment accorded their former neighborhood.¹⁴⁴ Neither of these critiques is fatal. As to the first, special treatment might be afforded to such neighborhoods—with the goals of preserving neighborhood character and the stakes of long-term residents—without imposing or maintaining restrictions that stifle new development. This Article discusses some possibilities in Part III. As to the second, measures that preserve neighborhood character are less of a concern in this regard compared to any mechanism that benefits individuals because of their stake in the neighborhood. However, while a proposal that confers benefits on individuals raises targeting challenges and should be approached with caution, it is not evident that potential under inclusiveness necessitates barring benefits for those who did remain in the neighborhood.

B. *Property and Individual Identity*

Calls for local control in wealthier communities and those in lower income neighborhoods that fear gentrification and displacement might also be distinguished based upon the identity-forming and independence-conferring attributes of property. A rich literature explores the relationship between property and personal identity, with Margaret Radin's personhood theory of property providing perhaps the strongest statement of this relationship.¹⁴⁵ Radin draws upon a Hegelian notion of property to argue for an understanding of property entitlements grounded

142. See SIMON, *supra* note 121, at 76 (arguing that efforts in the Community Economic Development (CED) community to enhance autonomy of poor communities while restricting that of affluent communities can be reconciled on grounds that "CED is defensive and remedial").

143. See *supra* Section I.B.

144. The Author thanks Chris Elmendorf for highlighting this point.

145. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 994 (1982); see also C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 747 (1986) ("The personhood function of property is to protect people's control of the unique objects and the specific spaces that are intertwined with their present and developing individual personality or group identity.").

in the concept of personhood.¹⁴⁶ This perspective, Radin contends, suggests a need to place property rights along “a continuum from fungible to personal,” depending upon their relationship to personhood, with entitlements “closely connected [to] personhood” entitled to stronger protection.¹⁴⁷ On Radin’s account, fungible property rights “can be overridden in some cases in which . . . personal property rights” cannot be overridden.¹⁴⁸

Applying this theory to residential rent control, Radin argues that it makes sense to favor current tenants over those who are new to the market and thus lack a personal connection to property.¹⁴⁹ The intuition that drives this preference for current residents is that an individual who has resided in a particular space for a significant time finds their identity and personality “intertwined” with that space.¹⁵⁰ For such individuals, it is no longer simply a fungible property interest with sole exchange value but instead possesses distinct personal value.¹⁵¹

146. See Radin, *supra* note 145, at 977–78, 992–94; see also Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 128 (2009) (“The nexus between theories of property and community is perhaps tightest in Hegelian property theory, where property practically stands in the place of the individual herself.”).

147. Radin, *supra* note 145, at 986.

148. *Id.* (“This is to argue not that fungible property rights are unrelated to personhood, but simply that distinctions are sometimes warranted depending upon the character or strength of the connection.”).

149. See Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362 (1986) (“Property that is ‘personal’ in this philosophical sense is bound up with one’s personhood, and is distinguishable from property that is held merely instrumentally or for investment and exchange and is therefore purely commercial or ‘fungible.’ One way to look at this distinction is to say that fungible property is fully commodified, or represents the ideal of the commodity form, whereas personal property is at least partially noncommodified.”); see also *id.* at 371 (“I conclude that there is sometimes a case for rent control because of the importance of the personhood interest in the home and the appropriateness of preserving established communities.”). But see Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 950–53 (1991) (critiquing Radin’s defense of rent control); Dan Greenberg, *Radin on Personhood and Rent Control*, 73 MONIST 642, 643–44 (1990) (same).

150. Radin, *supra* note 149, at 362; see also D. Mark Austin & Yoko Baba, *Social Determinants of Neighborhood Attachment*, 10 SOC. SPECTRUM 59, 62 (1990) (discussing the relationship between residential longevity and neighborhood attachment).

151. See Radin, *supra* note 149, at 362; cf. Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1114 (1981) (discussing, in context of anti-eviction statutes, how tenants with expired leases who face eviction “have interests at stake of the sort that the constitutional property clauses are meant to serve” and observing that “[t]hey, after all, are the ones who stand to be uprooted and displaced from their homes and neighborhoods unless the law intervenes on their behalf”). A similar logic is reflected in the community preferences that sometimes apply, albeit not without controversy, to certain subsidized housing programs—granting a preference for local residents in the selection of tenants for a new development. See *Discussion 17: Community Preferences and Fair Housing*, NYU FURMAN CTR. (Nov. 2015), <https://furmancenter.org/research/iri/discussions/community-preferences-and-fair-housing>

Even if they are not displaced, undesired changes to neighborhood character can significantly affect existing residents and the identity they derive from their existing neighborhood. As Carol Rose argued:

[T]he most serious spillovers or externalities of land use fall within the vague field of aesthetics: the way the area looks, sounds, feels, smells. Reactions to matters of the senses are likely to be limited in physical range; such externalities are most deeply felt within the neighborhood. But there they may be felt very deeply indeed, for the look of the place may affect the social self-definition of the residents and their sense of control of their lives.¹⁵²

It is worth distinguishing between displacement from a particular housing unit and displacement from a neighborhood. Stephanie Stern, in reviewing psychology research on the relationship between property and identity, notes that “an enormous body of empirical work establishes that [it is] social interactions and ties” rather than “possessions,” including a particular dwelling, that are more closely linked to self and identity.¹⁵³ This implies that changes to a neighborhood and the effects of these changes on social networks merit particular attention. Of course, the loss of a specific housing unit, absent access to replacement housing within the same area, is likely to lead to a loss of access to neighborhood social networks. But this distinction suggests that some of the concerns raised by the relationship between property and identity can be addressed through mechanisms that enable a household to remain within a neighborhood even if not within the same unit.

Admittedly, both higher and lower income individuals are likely to develop strong ties to the property where they reside and the broader neighborhood where it is situated. However, rapid changes to a neighborhood, whether they disrupt social networks or change neighborhood amenities, might adversely affect the identity of lower income residents—who, due to financial or political constraints, are more likely to lack adequate opportunities for exit and voice—in ways that are

[<https://perma.cc/V88Z-38TN>] (providing multiple perspectives on the merits of community preferences); *Should Affordable Housing Prioritize Those Already Living in the Neighborhood?*, WBUR (July 18, 2019, 7:59 AM), <https://www.wbur.org/onpoint/2019/07/18/public-housing-segregation-new-york> [<https://perma.cc/CBH2-QLU3>] (discussing whether community preferences deepen segregation or prevent displacement).

152. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 911 (1983) (footnote omitted).

153. Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1109–10 (2009).

not true for more mobile residents in wealthier communities.¹⁵⁴ In fact, the lack of neighborhood choice and limited capacity to exit a neighborhood may, as Richard Schragger has suggested in a different context, deepen neighborhood ties and lend “claims for autonomy additional force.”¹⁵⁵

Pushing this point further, Richard Ford has criticized Charles Tiebout’s famous framing¹⁵⁶ of “communities . . . as marketplace commodities into which anyone with enough cash can buy entry.”¹⁵⁷ Ford contends that Tiebout’s model “ignores the fact that the marketplace is spatially located and spatially segregated. Racially identified spaces make movement across boundaries much more costly than Tiebout’s model acknowledges. With boundaries racially less permeable, racial groups have fewer choices in the community marketplace.”¹⁵⁸ To the extent that a greater proportion of lower income residents in gentrifying neighborhoods tend to be members of minority racial groups, these factors pose distinct challenges for maintaining desired neighborhood connections or finding comparable neighborhoods to which one can move.¹⁵⁹ In addition, the interests of members of a particular ethnic community, such as Latino immigrants, might merit greater priority to the extent that they have more to gain from maintaining an ethnic community with a shared culture and language.¹⁶⁰ In contrast, middle-class whites within a larger society in which they are the majority and

154. See Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 866 (2019) (“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 . . .”).

155. Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 395 (2001).

156. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 421 (1956) (describing how communities “will then send their buyers to market to purchase the goods for the consumer-voters in their community”).

157. Ford, *supra* note 5, at 1889.

158. *Id.*; cf. GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY* 159 (1997) (arguing that the vision of property as a commodity rests in part on a notion that “in the unconstrained market all individuals would be equally free from formal social hierarchies and thereby create their own destinies”).

159. See Dubin, *supra* note 84, at 769 (“African-American families priced out of their own housing must confront the additional obstacles involved in seeking affordable relocation housing in a scarce and discriminatory private housing market.”).

160. The Author is grateful to Ingrid Ellen for suggesting this point. For further discussion of the relationship between ethnic communities and land use policies, see generally John Mangin, *Ethnic Enclaves and the Zoning Game*, 36 YALE L. & POL’Y REV. 419 (2018). Mangin examines housing and land use in the enclaves of three distinct immigrant and ethnic groups in New York. *Id.*

dominant culture have comparatively less to lose from changes to the particular community in which they live.¹⁶¹

Collectively, these considerations suggest justifications for greater local control over development in lower income urban neighborhoods as a mechanism for protecting relatively more vulnerable personhood interests in neighborhood character.¹⁶² On the other hand, the very challenge of exit from lower income urban neighborhoods may counsel less local, neighborhood-level control; for residents of a given neighborhood are not likely to have uniform views regarding desirable development. Lacking the potential for exit, individuals who dissent from the dominant view may be more prone to majoritarian exploitation if greater power devolves to the neighborhood level. Moreover, as the next Section explores in further detail, there are significant challenges to identifying and articulating a concept of group identity at the neighborhood level.

C. Property and Group Identity

Separate from their effects on individual identity and notions of personhood, neighborhood changes might be understood to interfere with a collective or communal property right in the neighborhood. In a recent article, Nestor Davidson and Dave Fagundes examine conflicts over neighborhood identity, and in particular neighborhood names, through the lenses of both property theory and local government law.¹⁶³ They argue that a neighborhood's name might be understood as a form of "cultural property" and those who seek to preserve an existing name "as expressing a collective property interest."¹⁶⁴ The three conditions that

161. See Briffault, *supra* note 136, at 506 ("Movement from the city to the suburbs may result in a greater lifestyle change than movement from one suburb to another, and, thus, may constitute a greater disruption in the private life of the city resident."); see also Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN ST. L. REV. 647, 673 (2014) ("Generally speaking, suburbanization and the suburban identity are organized around the notion of exit—the decision to leave the formal boundaries of the city for the purpose of relocating on its outskirts.").

162. Anika Singh Lemar makes a similar point in a forthcoming article: "There may be reasons why low-income communities merit public participation rights, even when such rights are inappropriate in wealthy communities. Low-income communities may be heavily reliant of spatially-constrained social capital." Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes* 43 (unpublished manuscript) (on file with author); see also *id.* at 48 ("Low-income residents have less ability to exit both because of irreplaceable social capital and because they lack wealth.").

163. Nestor M. Davidson & David Fagundes, *Law and Neighborhood Names*, 72 VAND. L. REV. 757, 799–817 (2019).

164. *Id.* at 799–800. For further discussion of the relationship between cultural property and group identity, see Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022, 1028 (2009). "[C]ertain lands, resources, and expressions are entitled to legal protection as cultural

Davidson and Fagundes deem necessary for cultural property—“a coherent people that can claim ownership,” the thing that is the “object of the property relation,” and “a relationship whereby the thing is constitutive of the people’s identity”—helpfully extend the personhood framework to group identity.¹⁶⁵

Nonetheless, there are significant challenges to applying the notion of cultural property to residents of gentrifying neighborhoods seeking to control new development.¹⁶⁶ First, the existence of a “coherent people” can prove difficult to establish.¹⁶⁷ Frug has gone so far as to declare that “the concept of neighborhood provides no stable basis for either personal or group identity.”¹⁶⁸ The challenge of determining group identity at the neighborhood level can be attributed in part to the rapid residential turnover that marks urban areas, particularly lower income neighborhoods (whether gentrifying or not). As Georgette Poindexter contends: “Community definition is the sum of the aggregate individual self-definitions. It changes with the residents of the community.”¹⁶⁹ This understanding of a geographic community’s identity as “but a reflection of its residents’ individualities,”¹⁷⁰ differs from thicker conceptions of group identity associated with racial, ethnic, or religious groups, among others.¹⁷¹

Davidson and Fagundes acknowledge these challenges, suggesting a neighborhood might more readily define a community when a significant number of residents are from a particular ethnic, cultural, or racial

property because they are integral to the group identity and cultural survival of indigenous peoples.” *Id.*

165. Davidson & Fagundes, *supra* note 163, at 801.

166. *See id.* at 800 (noting that a definable group, such as a nation or ethnic community, typically asserts ownership interest in a particular piece of cultural property); *see also* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 566 (1995) (“[C]ultural property embodies the physical manifestation of a group’s identity . . .”).

167. Davidson & Fagundes, *supra* note 163, at 801.

168. FRUG, *supra* note 115, at 101; *see also id.* at 69 (discussing challenges of identifying coherent “collective identity,” particularly within particular territorial boundaries).

169. Poindexter, *supra* note 136, at 622; *see also* Ford, *supra* note 5, at 1887 n.136 (“The notion of associational communities is individualist because it assumes the ontological priority of the individual: it is the individual who associates and once she associates the association she forms with others deserves recognition.”).

170. Poindexter, *supra* note 136, at 622.

171. For a discussion of “thick” and “thin” communities, *see* Glen O. Robinson, *Communities*, 83 VA. L. REV. 269, 275 (1997). “[S]ociologists have distinguished groups of individuals bound together by kinship, ethnic, or religious affinities from the looser relationships that individuals form for utilitarian advantage, both commercial and political.” *Id.*

group.¹⁷² Defining coherent people with a group identity tied to a particular neighborhood might, therefore, be possible in some places—such as long-standing immigrant communities—but it is difficult in many, if not most, low-income neighborhoods, particularly given the transitory nature of residence in such neighborhoods, even when they are not facing development pressures. This suggests that group identity may not justify calls for local control in many, if not most, gentrifying neighborhoods. Moreover, to the extent that a community wishes to assert control over and derives its identity from the built environment (rather than a neighborhood name), the costs to outsiders are significantly higher. Neighborhood names may be important to those who live within a given community, but the costs for others if an existing name is maintained are far less consequential. Real estate agents may be unable to rename a neighborhood and garner the benefits—perceived or real—of some new appellation. In contrast, neighborhood control poses the risk of stifling new development, with significant costs for both individual property owners and for housing supply and affordability that reverberate for existing and potential residents. It also may impose greater costs on those who depart from the view of the majority or loudest voices in the community.

Regardless of whether group or communal identity based on geographic boundaries can be sensibly defined, and despite the fact that legally enforceable group rights are nonexistent in this context, the rhetoric of property rights informs group claims by geographic communities.¹⁷³ These claims function in a manner akin to how Christopher Tyson has described claims to municipal identity and autonomy that arise in debates over metropolitan boundaries.¹⁷⁴ Tyson's framing of "[m]unicipal identity as property" metaphorically

172. Davidson & Fagundes, *supra* note 163, at 801–02. For further discussion of geographic communities in the context of election districting, see Nicholas O. Stephanopoulos, *Redistricting and the Territorial Community*, 160 U. PA. L. REV. 1379, 1430–34 (2012). Stephanopoulos argues that meaningful communities develop based on geography and should be represented in legislatures. *Id.*

173. Given the realities of development processes and local politics, even when those resisting development in their neighborhood lack a formal property right, they may wield significant power nonetheless. In fact, they may have as much or more power over what use a parcel of land is put to as the actual owner. *Cf.* Lee Anne Fennell, *Options for Owners and Outlaws*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 239, 258 (2012) (“[I]nformal arrangements and de facto rights, along with tolerated forms of illegality, can make property rights look quite different on the ground than they might appear in formal legal descriptions.”).

174. See Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN ST. L. REV. 647, 653 (2014). Tyson defines “municipal identity” as “all of the devices of local government law that allow territorially defined groups to establish formal or quasi-governments that ultimately demarcate separate territory, establish separate and often oppositional identity, formalize autonomous governance structures, and limit the redistributive impact of their tax dollars.” *Id.*

characterizes the ways in which the desire for separate local government has come to be popularly understood as a fundamental right.”¹⁷⁵ Tyson contends that “municipal identity” allows for groups to claim ownership over territory and to “govern it in a manner that not only allows them to exclude dissimilarly situated others, but also confers upon them status and reputational benefits which translate into market value.”¹⁷⁶ These claims to a fundamental right in municipal identity operate, with significant effect, through popular and legal rhetoric even when formal legal rights do not exist.¹⁷⁷ However, the opportunity to claim identity at the municipal level by formulating a separate jurisdiction is largely unavailable to urban residents in gentrifying neighborhoods—a reality that again surfaces the distinct vulnerability of such communities when compared to wealthier suburban enclaves.

Equally unavailable is any sort of private ordering, such as through common interest communities. Common interest communities—homeowners associations of single-family houses or condominiums—represent perhaps the paramount mechanism through which groups constitute themselves via property. These

associations are the governance entities for territorial groups that are constituted with respect to particular assets, some of which are individually owned, others owned in common by group members. In this sense, these property restrictions are tied to group existence, for maintaining the character of the group requires that the association be able to enforce these property restrictions.¹⁷⁸

Courts have long been deferential to the decisions of common-interest communities or residential associations.¹⁷⁹ However, such communities are rare in lower income urban neighborhoods and, where they do exist,

175. *Id.* Tyson focuses his analysis on “the manner in which social developments and the law have reified and legitimated broadly held expectations about the ability of individuals and groups to withdraw from the redistributive obligations and legacy burdens of cities.” *Id.* at 654. Such withdrawal is a more apt description of the actions of certain suburban communities that resist annexation or seek incorporation.

176. *Id.* at 677–78.

177. *Id.* at 678; *see also id.* at 652 (“Whether through resisting annexation or calling for new municipal incorporations, local interest groups often use the tool of local government boundary law to express what they perceive as a fundamental right to protect their property values and express individual or collective self-determination through forming or moving to (or preventing their being subsumed by) a separate location or territorially based identity.”).

178. *See* Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 12 (1989).

179. *See id.* at 6.

tend to be relatively homogenous.¹⁸⁰ They are also difficult to create in an existing neighborhood.¹⁸¹

The discussion to this point suggests that the relationship between property and identity is a particularly fragile one for lower income individuals. They are more vulnerable to displacement than wealthier individuals (regardless of whether they live in gentrifying neighborhoods or in persistently low-income neighborhoods), and they are less likely to be able to readily access comparable alternatives. Moreover, residents of lower income communities, particularly neighborhoods within larger cities, tend to have less recourse to either public or private land use controls that might allow them to preserve desirable neighborhood characteristics. At the same time, the rapid turnover in lower income neighborhoods can pose difficulties for determining shared group interests and defining neighborhood identity. In light of these considerations, the next Part suggests that the ideal response to some of the concerns delineated in Part I may be to focus more on individual autonomy. Before moving to that discussion, the next Section examines the concept of subsidiarity—a concept that informs understandings of the vertical allocation of power in multiple legal contexts—and argues that, properly understood, subsidiarity can support differential treatment of local and sublocal communities and their residents.

180. See, e.g., TRACY M. GORDON, PUB. POLICY INST. OF CAL., *PLANNED DEVELOPMENTS IN CALIFORNIA*, at vii (2004) (“Planned developments are less diverse with respect to race and ethnicity than other neighborhoods.”); Elena Vesselinov et al., *Gated Communities and Spatial Inequality*, 29 J. URB. AFF. 109, 114 (citing literature supporting the claim that gated communities, in particular, “remain largely homogeneous enclaves”). Their presence also tends to exacerbate segregation. Rachel Meltzer, *Do Homeowners Associations Affect Citywide Segregation? Evidence from Florida Municipalities*, 23 HOUSING POL’Y DEBATE 688, 705 (“Results . . . suggest that changes in the presence of HOAs do influence racial/ethnic segregation. Specifically, a 10% increase in the number of HOA units (approximately 240, based on the sample mean) can cause up to a 2% increase in the indexed level of black–white segregation and a 1% increase in the indexed level of Hispanic–white segregation (depending on the measure).”).

181. See Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 866 (1999). Robert Nelson proposed establishing legislation to facilitate neighborhood associations in existing neighborhoods—allowing them to take advantage of collective controls over the neighborhood that would replace zoning and function akin to a common interest community. See *id.* In a slightly different vein, Bob Ellickson proposed “Block Improvement District[s]” that would constitute “mandatory-membership associations of property owners” and function akin to Business Improvement Districts, levying assessments to provide supplementary services. Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 77 (1998) (emphasis omitted).

D. *Subsidiarity and Solidarity*

The principle of subsidiarity calls for problems to be addressed, and decision-making to be lodged, at the lowest practicable level of social organization.¹⁸² When possible, this will be non-governmental actors: “Families, neighborhoods, churches, or community groups.”¹⁸³ When those groups cannot adequately address a given problem, local and state governments, and then finally the federal government, are justified in intervening.¹⁸⁴ As Erin Ryan has argued: “Subsidiarity directs that if the most local level of government lacks the capacity to address [a problem], citizens should be entitled to expect that the next level up with capacity should at least be authorized to try.”¹⁸⁵

This Article confronts the overarching problem of inadequate housing supply, particularly in high-demand locations, and its effect on housing affordability. As I argued at length in an earlier article, “The current housing crisis, its broader implications, and the systemic factors that render local governments incapable (or unwilling) to address it justify aggressive forms of state intervention in local land use regulation.”¹⁸⁶ The same might be said for cities: individual neighborhoods are unable (or unwilling) to address the problem of an undersupply of housing and as such the problem should be resolved at the city.¹⁸⁷ On this account, lower levels of government simply lack the capacity to address the issue (as well as, in most instances, the political will).

The analysis grows more complex when acknowledging the existence of other concerns, including those delineated in Part I: displacement, significant changes to neighborhood character, and protection of the distinct stake in the neighborhood claimed by long-term residents

182. See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 190 (2005). In American legal scholarship, subsidiarity is often discussed in the context of federalism. See, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1008 n.218 (2007) (defining “subsidiarity” as “the principle that decision-making and political power should be devolved to the lowest practicable level of society, including private organizations and individuals”); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 511 (2007) (arguing that “the federalism premise of as-localized-as-possible governance (or ‘subsidiarity’) . . . implies the most local level with *capacity*—or the most local level of government that may actually be able to solve the problem”).

183. Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 103 (2001).

184. *Id.*

185. Ryan, *supra* note 182, at 624.

186. Infranca, *supra* note 3, at 836.

187. Roderick M. Hills, Jr. and David N. Schleicher have made this argument in a number of articles. See, e.g., Hills, Jr. & Schleicher, *Affordable City*, *supra* note 1, at 113–15 (arguing that citywide planning can help counter neighborhood opposition to development).

(whether by means of greater control over development or some form of financial compensation). With regards to displacement, a strong argument could be made that a higher level of government—whether the city or state level—is best situated to address the problem. The most effective solutions will demand either legal interventions in the form of tenant protections, which only city or state governments (and not individual neighborhoods) can institute, or financial assistance that cities and even more likely state and federal governments are best positioned to provide. Threats to neighborhood character are trickier: local expertise is arguably more important and local actors are likely more aware of and responsive to community concerns.¹⁸⁸ In addition, calls for local control suggest a concern not just with the results of decision-making and their effects on individual and communal welfare, but also with the processes through which decisions are reached.

As noted above, residents of wealthy suburbs also have an interest or stake in their community and personhood interests tied to the preservation of its existing character. Given that addressing one problem (preserving neighborhood character) might call for situating power at the local level in a way that undermines efforts to address another problem (housing supply and affordability), does the principle of subsidiarity provide any insight on how we might allocate control in an intellectually consistent manner?

This Article suggests that subsidiarity, upon deeper reflection, offers a way out of this seeming dilemma. Subsidiarity, which is a prevalent component of European law,¹⁸⁹ originated in Catholic social doctrine.¹⁹⁰

188. For examples of arguments along these lines, see Eric T. Freyfogle, *The Particulars of Owning*, 25 *ECOLOGY L.Q.* 574, 580 (1999). “Sensible land use decisions require knowledge of the land itself, in its many variations. . . . Local people typically know the land better than outsiders. For land planning to prove successful, their knowledge is needed just as much as their cooperation.” *Id.*; see also Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 *MINN. L. REV.* 231, 238 (2008) (“Scholars have argued that localities should have sole decision-making powers over land use because local individuals understand the unique characteristics of their land better than outsiders do and can therefore make fairer or more competent decisions. By the same logic, outsiders lack an understanding of how decisions about land use could impact the aesthetic character, property values, and demographic makeup of the local community.” (footnote omitted)).

189. See generally Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary*, 20 *BERKELEY J. INT’L L.* 359 (2002). For discussion of the role of subsidiarity in international law more generally, see Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 *AM. J. INT’L L.* 38, 38 (2003).

190. “Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do.” See Pope Pius XI, *Quadragesimo Anno*, *HOLY SEE*

Importantly, and often lost in the course of the term's translation to the American context and debates over federalism and local control, subsidiarity "is linked in Catholic thought to ideas of social solidarity and the importance of mediating institutions in order for people to lead good and fulfilled lives."¹⁹¹ As Pope Benedict XVI wrote in his Encyclical Letter *Caritas in Veritate*: "The principle of subsidiarity must be closely linked to the principle of solidarity and vice versa, since the former without the latter gives way to social privatism, while the latter without the former gives way to paternalist social assistance that is demeaning to those in need."¹⁹² Relatedly, subsidiarity, as originally understood, functions in service to both individual flourishing *and* the common good.¹⁹³ Pope John Paul II weaved together these ideas, remarking that in "exceptional circumstances" a "community of a higher order" may be justified in intervening in the functioning of a "community of a lower order" for "urgent reasons touching the common good."¹⁹⁴ Collectively, then, the concept of subsidiarity suggests a set of three interrelated principles. First, social institutions, including government, exist for the purpose of enabling individuals to flourish. Second, individuals are most likely to flourish to the extent that they can actively participate in decision-making, something they are more likely to do when power is placed at a lower level, closer to the individual. Third, the complementary

(May 15, 1931), http://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadagesimo-anno.html [<https://perma.cc/799F-GH6M>].

191. Vicki C. Jackson, *Subsidiarity, the Judicial Role, and the Warren Court's Contribution to the Revival of State Government*, in *FEDERALISM AND SUBSIDIARITY* 190, 192 (James E. Fleming & Jacob T. Levy eds., 2014). A similar link is explicit in the European Union's use of the concept. The Preamble of the Treaty on European Union speaks of the member states' desire "to deepen the solidarity between their peoples" shortly before resolving "to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity." Treaty on European Union prmb., Feb. 7, 1992, 1992 O.J. (C 191) 1.

192. Pope Benedict XVI, *Caritas in Veritate*, HOLY SEE (June 29, 2009), http://www.vatican.va/content/benedict-xvi/en/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate.html [<https://perma.cc/A2F5-NVRK>].

193. Pope Leo XIII, *Rerum Novarum*, HOLY SEE (May 15, 1891), http://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html [<https://perma.cc/6CQM-P5ZP>] ("[T]he State must not absorb the individual or the family; both should be allowed free and untrammled action so far as is consistent with the common good and the interest of others."); see also Jerome M. Organ, *Subsidiarity and Solidarity: Lenses for Assessing the Appropriate Locus for Environmental Regulation and Enforcement*, 5 U. ST. THOMAS L.J. 262, 265 (2008) ("Because the principle of subsidiarity is ordered toward promoting the common good, questions of solidarity also must be considered when determining the best level of decision-making.").

194. Pope John Paul II, *Centesimus Annus*, HOLY SEE (May 1, 1991), http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus.html [<https://perma.cc/7W6X-24TD>].

principles of solidarity and the common good temper subsidiarity, providing a limit on tendencies towards privatization and exclusion.

There are echoes of this to be found in certain strands of legal literature on local government. In his influential book *City Making*, Frug argues for the decentralization of power, while also rejecting an overemphasis on individual autonomy.¹⁹⁵ Frug emphasizes interlocal connections, both between a city and its neighbors within a metropolitan area and between individual residents and those in other cities.¹⁹⁶ This conception of decentralized power, he argues, would enable cities to “act together to solve interlocal problems rather than define themselves against each other.”¹⁹⁷ Speaking specifically of the power of local communities to exclude, Andrea Boyack has argued that

[t]he question of whether a community can exclude certain uses and residents from its midst should be determined by balancing not only purported community benefits against the autonomy impact of limitations on a particular owner’s right to use, but should also weigh the broader societal harms caused by a collective right to exclude, including ill-effects on non-owners, including would-be residents, and on the housing market as a whole.¹⁹⁸

And writing nearly forty years ago, during a very different period for cities, Peter Marcuse argued for “greater local participation in decision making.”¹⁹⁹ Acknowledging that decentralization had the potential to permit local discrimination against poor and minority households, he asserted that “[a]ll powers need not be delegated to all communities.”²⁰⁰ Marcuse suggested that “[t]he criterion of potential displacement” be used to separate those communities where “local power will help to maintain integration from those where it can lead to segregation.”²⁰¹

195. FRUG, *supra* note 115, at 10.

196. *See id.*

197. *Id.* Although he does not use the term subsidiarity, Frug’s discussion of the medieval town emphasizes how “the protection of town autonomy was thought to enable the town’s inhabitants to contribute to the functioning of the society at large.” *Id.* at 30. The autonomy of the medieval town reflected then, not a careful demarcation of separate interests, but instead a merging of “the town as a collection of individuals and the town as a collective whole.” *Id.*

198. Andrea J. Boyack, *Limiting the Collective Right to Exclude*, 44 *FORDHAM URB. L.J.* 451, 452 (2017).

199. Peter Marcuse, *To Control Gentrification: Anti-displacement Zoning and Planning for Stable Residential Districts*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 931, 943 (1985).

200. *Id.* at 943 n.31.

201. *Id.* Marcuse’s articulated criterion may not actually justify greater control in lower income, gentrifying urban neighborhoods; however, the criterion may justify how gentrification can serve to integrate neighborhoods. *See supra* note 108 and accompanying text.

The relationship between subsidiarity, solidarity, and the common good also reflects central themes of progressive property theory, particularly its concern with human flourishing.²⁰² What this suggests, for our purposes, is that a commitment to subsidiarity provides a further basis for justifying differential treatment of lower income urban neighborhoods and wealthy suburban communities, particularly with regard to the degree of local control that is protected. If solidarity shapes our understanding of subsidiarity local control that tends to further the exclusion of particular groups of people—particularly racial and ethnic minorities long subject to discriminatory housing practices—should be understood as a form of “social privatism” antithetical to the deeper concerns with human flourishing at the foundation of the principle of subsidiarity.²⁰³ In contrast, grants of local control that vindicate the rights of those historically disadvantaged economically and politically furthers the value of subsidiarity without rejecting solidarity. At the same time, those grants of local control must consider the common good (or general welfare), which, in this context, is the provision of an adequate supply of relatively affordable housing at the municipal or regional level.²⁰⁴

III. GETTING LOCAL CONTROL RIGHT

The analysis to this point suggests modest grounds for distinguishing between resistance to new development and the desire for greater local control in lower income communities and in more affluent locales. Drawing on that discussion, this Part considers potential policy responses in light of the normative and political considerations delineated in Parts I and II.

A. *Why More Participation is Not the Right Response*

If one concludes that certain communities—whether to remedy historical injustices or for other reasons—should be granted greater local control over development, one way to go about this is to reform the process and expand opportunities for more inclusive participation.²⁰⁵ But

202. See Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009) (“Values promoted by property include life and human flourishing . . .”).

203. Benedict XVI, *supra* note 192, at 58.

204. *Cf.* S. Burlington Cty. NAACP v. Twp. of Mount Laurel, 456 A.2d 390, 415 (N.J. 1983) (“When the exercise of [the police] power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare—in this case the housing needs—of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality.”).

205. As some state statutes do in the context of environmental justice. See MATTHEW A. BEATON, ENVIRONMENTAL JUSTICE POLICY OF THE EXECUTIVE OFFICE OF ENERGY AND

that risks bringing us back to the problem with which we started—too much process is slowing new development, restricting supply, and exacerbating housing affordability problems.²⁰⁶ And, as discussed in Part II, it is not clear that such process will necessarily further the community's interests, given the challenges of defining the community and identifying consensus concerns.²⁰⁷ Put simply, it is not evident that more or broader dialogue can solve the problem in a way that identifies and vindicates local interests, while still allowing for needed development to occur.

There is, however, a risk that limiting discretionary review (and the public participation it typically entails) will negatively impact more vulnerable and less empowered residents.²⁰⁸ In the absence of macro-level planning, the public hearings required by discretionary review processes can constitute the only mechanisms for community participation.²⁰⁹ As noted, individual neighborhoods in larger cities often lack the direct control over zoning exercised by suburban municipalities. Nonetheless, community participation at the development stage may be less representative of community concerns than is imagined.

ENVIRONMENTAL AFFAIRS 9–10 (2017) (providing for enhanced public participation in environmental justice communities); DEVAL L. PATRICK, EXEC. ORDER NO. 552 §§ 3, 5 (2014); *Commissioner Policy 29, Environmental Justice and Permitting*, N.Y. DEP'T ENVTL. CONSERVATION (Mar. 19, 2003), <http://www.dec.ny.gov/regulations/36951.html> [<https://perma.cc/6LYA-3KPM>] (same).

206. Hankinson, *supra* note 9, at 484 (“When institutions shift power from the macroscale to the microscale, they empower NIMBY opposition. Neighborhood planning boards provide a forum where local opponents with much to lose from each project often outnumber citywide supporters with little to gain from any one development. Even if most residents support new supply citywide, the ability to oppose specific developments grows when microscale institutions do not have a macroscale counterweight.”).

207. *See supra* notes 166–171 and accompanying text.

208. MOIRA O'NEILL ET AL., CTR. FOR LAW, ENERGY & THE ENV'T, BERKLEY LAW, GETTING IT RIGHT: EXAMINING THE LOCAL LAND USE ENTITLEMENT PROCESS IN CALIFORNIA TO INFORM POLICY AND PROCESS 18 (2018).

209. *Id.* One commentator has gone so far as to argue that

the use of state preemption to abrogate or greatly weaken the power of grassroots groups to shape land use in their communities would no doubt have its most harmful impact *not* on these affluent communities, who will always find ways to exclude, but instead on many of the most vulnerable, usually minority neighborhoods struggling to fight the growth machine and slow gentrification as well as, more generally, extract benefits from both city hall and developers.

David Imbroscio, *Rethinking Exclusionary Zoning or: How I Stopped Worrying and Learned to Love It*, 56 URB. AFF. REV. (forthcoming 2019) (manuscript at 20–21) (footnote omitted). The Author disagrees that this outcome is certain as, for reasons discussed in Part I, it is not the case that “fight[ing] the growth machine” is an effective means of slowing gentrification. *Id.*

Recent empirical research on neighborhood participation in local land use processes suggests that those who participate are not representative of the general population in their communities.²¹⁰ Researchers studying community meetings regarding new housing development in ninety-seven cities and towns in Massachusetts found that meeting participants “are more likely [than the broader public] to be older, male, longtime residents, voters in local elections, and homeowners.”²¹¹ Participants in such meetings overwhelmingly oppose new housing development.²¹² The authors conclude that “institutions designed to enhance democratic responsiveness may have perverse consequences on participation and the views that policymakers hear.”²¹³ Reinforcing these findings, a survey (conducted by the same authors) of mayors in 115 cities across the country found that most respondents believed a “small group with strong views” had a more significant influence on housing development than “majority public opinion.”²¹⁴

Beyond the specifics of who participates, public participation processes in the land use context are often highly dysfunctional, as Anika Singh Lemar argues in a forthcoming article.²¹⁵ As Lemar observes, participation is not inherently inclusive “[a]nd the political sphere often replicates the inequities apparent in the economic sphere.”²¹⁶ It is also not clear that discretionary review of each proposed new project is the necessary or most efficient mechanism for community participation. A better option would be requiring binding planning—with adequate levels of participation—at the neighborhood level, where the broader effects of

210. Einstein et al., *supra* note 12, at 29. Einstein and her coauthors “assembled a novel data set of all citizen participants in planning board and zoning board meetings between 2015–2017 in 97 cities and towns in metropolitan Boston.” *Id.* at 31. Given reporting requirements in Massachusetts, the assembled data included the names and addresses of all speakers, which they then merged with voter files to obtain participant demographics. *Id.* at 31–32. *See generally* KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS 97 (2020). The authors note that even in less wealthy communities the voices represented at meetings are often those of more privileged residents. *Id.* at 149.

211. Einstein et al., *supra* note 12, at 29; *accord id.* at 33–34.

212. *See id.* at 34. This was the case even in communities where voters opposed a referendum to repeal Chapter 40B, a state law that allows developers of certain affordable housing to bypass local zoning regulations. *See id.* at 35 (“While voters in these towns supported affordable housing construction in the abstract, a significant majority of those who attended development meetings opposed the development of specific project proposals.”).

213. *Id.* at 30.

214. *Id.* at 39; *cf.* SIMON, *supra* note 121, at 176 (discussing low levels of participation in governance of most Community Development Corporations).

215. Lemar, *supra* note 162, at 6 (“Often times, however, when it comes to land use decision-making, public participation is utterly dysfunctional and poor people bear the brunt of that dysfunction.”).

216. *Id.* at 49.

the decisions being made may garner more widespread participation.²¹⁷ The next Section discusses potential mechanisms for granting circumscribed local control over land use. Then the remainder of this Part evaluates responses that focus instead on granting direct economic benefit or some form of entitlement to individual residents. Such entitlements would create an incentive for individual residents who might not otherwise take interest to become engaged in a comprehensive neighborhood planning process, potentially broadening and diversifying participation.

B. *Circumscribed Local or Sublocal Control*

One potential approach would be to empower certain sublocal neighborhoods by granting them limited control over zoning (or, in the context of a statewide measure, granting specific local communities a limited capacity to diverge from the state law).²¹⁸ As noted earlier, California’s SB 50 would have done so (although the details were never fully delineated) for designated “sensitive communities.”²¹⁹ Such communities would have been able to both develop their own plans for rezoning and impose measures to address displacement, but those plans would have been required to satisfy some minimum standard in terms of the new development they would allow.²²⁰ If communities failed to do so within some period of time (or their measures were inadequate), the state law would take effect without any local modifications.²²¹ Such a measure essentially sets a zoning envelope for each area, leaving it to local officials to determine the precise placement and relative scale of new development.²²²

217. Lemar contends that public participation should occur not at the stage of approving individual projects but instead during comprehensive planning and the adoption and revision of zoning. *Id.* at 54. Cf. Einstein et al., *supra* note 12, at 167 (suggesting that city-level processes may be “more representative of broader community interests” than neighborhood-level institutions).

218. Cf. Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 954 (2013) (“Neighborhood zoning districts permit a percentage of neighboring landowners to keep out (or be paid to allow in) an undesirable new entrant that presumptively causes them disproportionate harm as a result of its proximity . . .”).

219. *Supra* notes 122–124 and accompanying text.

220. *See supra* notes 125–126 and accompanying text.

221. *See* S.B. 50 § 65918.58(c), 2019-2020 Leg., Reg. Sess. (Cal. 2018).

222. As Chris Elmendorf notes, subsequent revisions to SB 50 expanded local flexibility, and would have allowed all local governments a limited period in which to either accept “a default zoning ‘envelope’” or instead “propose an alternative ‘local flexibility plan’ that creates an equivalent amount of developable space in the aggregate, while also scoring well on certain transit and fair-housing metrics.” Christopher S. Elmendorf, *Growing Cities Up: California’s SB 50 Is a Model for Addressing the Urban Housing Crisis*, CITY J. (Jan. 14, 2020), <https://www.city-journal.org/sb50-local-flexibility-plan> [<https://perma.cc/P958-R8YP>].

Another approach would be to expressly identify, in state law, the specific local conditions and concerns that justify departure from a state-imposed rule, significantly cabining local discretion to reject development otherwise permitted. For example, recent reforms to California's Accessory Dwelling Unit (ADU) laws impose a presumption in favor of detached ADUs statewide, allowing local jurisdictions to exclude them from certain areas only for specified reasons, narrowly limited to traditional zoning concerns of water and sewer service adequacy and public safety and traffic flow.²²³ Similarly, influential model ADU legislation prepared by the American Planning Association on behalf of AARP,²²⁴ which establishes a state policy encouraging ADUs and authorizes localities to adopt their own ordinance, also "sets the terms for what communities can and cannot do in regulating ADUs."²²⁵ The model state act requires municipalities that prohibit ADUs to provide findings to support this decision and to receive certification from the state's housing office that their ordinance conforms to the model act's intentions.²²⁶ State "antisnob" zoning legislation, such as Massachusetts's Chapter 40B, which provides for state-level review of local decisions involving affordable housing development, similarly shifts the burden of proof to local governments, which must "establish valid reasons for rejecting or restricting such proposals."²²⁷

A state or local government that chooses to upzone a large area (or its entire jurisdiction) might permit local residents to challenge the upzoning decision (or particular local communities to diverge from it), but only if they can establish that they satisfy specific conditions delineated in the state or local law that merit a departure. The allowable grounds for such departures should be devised at the state level through a combination of careful reflection on the merits of local concerns (along the lines of the

223. See CAL. GOV'T CODE § 65852.2(a)(1)(A) (West 2020). A predecessor bill, which did not pass into law, would have gone even further, requiring "clear findings that are supported by substantial evidence" in order for a jurisdiction to exclude ADUs from designated areas. See Infranca, *supra* note 3, at 863–64 (emphasis omitted) (quoting S.B. 831, 2017–2018 Leg., Reg. Sess. (Cal. 2018)) (discussing proposed measures).

224. RODNEY L. COBB & SCOTT DVORAK, PUB. POLICY INST., AARP, ACCESSORY DWELLING UNITS 5 (2000); see also Wendy Koch, *In-law Units Help Homeowners Pay Bills, Care for Relatives*, USA TODAY (Aug. 19, 2011), https://usatoday30.usatoday.com/money/economy/housing/2011-08-17-real-estate-in-law-suites_n.htm [<https://perma.cc/X87D-K7AQ>] (noting that many local ADU laws "are modeled after one advocated by the AARP and passed by Santa Cruz, Calif., in 2003 that prompted other cities in California and the Pacific Northwest to follow").

225. COBB & DVORAK, *supra* note 224, at 11.

226. *Id.* at 21.

227. Peter Salsich, *State and Local Regulation Promoting Affordable Housing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 83, 89 (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011).

discussion in Part II) and an evidence-based analysis of the likely effects on those concerns of specific policies.

Enhancing local control in limited instances and carefully circumscribing that control has the virtue of allowing for public deliberation and communal decision-making. It also subjects those decisions to higher level review, which may limit decisions with adverse effects.²²⁸ But, as noted, it also raises significant concerns—including determining who represents “the community,” where the geographic lines of the community are drawn, and how to avoid additional processes simply exacerbating the problem and stifling development.²²⁹ As noted earlier, empirical studies suggest more development is likely to alleviate pressure on existing housing and reduce the likelihood of displacement, so any grant of local power that permits neighborhoods to “limit new construction in an attempt to prevent gentrification may be counterproductive.”²³⁰ As such, local control over planning should largely be limited to planning that allows for a determination of the precise placement of some minimal required amount of additional density. Local efforts that would restrict density should only be permitted in extremely limited cases, along the lines of the laws discussed above.²³¹ While it significantly constrains local control, such an approach would provide some mechanism for addressing concerns about neighborhood character and some heightened protection of local voice in designated communities.

C. *Harnessing and (Re)distributing the Value of New Development*

Multiple commentators have proposed models for providing financial benefits to local residents in areas of new development, either to address historic injustices or to garner public support for development. Rachel Godsil has proposed addressing gentrification by providing a means for existing residents to choose either to remain in or leave a neighborhood.²³² Invoking the Fair Housing Act of 1968’s directive that recipients of HUD funding act to “affirmatively further fair housing,” Godsil argues that—in light of the role governments played in creating

228. See Stahl, *supra* note 218, at 999 (proposing grant of certain zoning power to neighborhoods but asserting that cities “will have tremendous incentives to closely monitor neighborhood zoning to ensure that neighborhoods do not unduly burden other areas of the city with externalities or impair citywide planning objectives”).

229. See *supra* Section II.C.

230. Brian Asquith et al., *Does Luxury Housing Construction Increase Rents in Gentrifying Areas?*, IUPUI SCH. PUB. & ENVTL. AFF. (Nov. 10, 2018), https://appam.confex.com/data/extendedabstract/appam/2018/Paper_25811_extendedabstract_1729_0.pdf [<https://perma.cc/UEH3-2S7U>].

231. See *supra* notes 223–226 and accompanying text.

232. Godsil, *supra* note 67, at 336–37.

and fostering disparities in wealth and local control—they should now take steps to remedy them.²³³ Her approach, which includes the provision of vouchers or low-interest loans enabling residents to either move or pay an increase in rent, draws on federal housing mobility programs and remedies for eminent domain.²³⁴ It focuses less on neighborhood control of new development and more on individual autonomy by allowing residents to decide whether to stay or to go. However, Godsil does suggest that existing residents, given a certain degree of power by the ability to remain that a voucher provides, might wield some greater control over changes to the neighborhood.²³⁵ But it is not entirely clear where this greater degree of power would derive from or how it would be exercised. Moreover, as others have noted, funding vouchers to support housing costs in gentrifying neighborhoods with escalating prices may prove financially unrealistic.²³⁶ The proposal outlined in the next Section addresses this challenge by tying the funding needed to support and empower long-term urban residents to the very forces bringing new development to the neighborhood and providing a potential mechanism for residents to bundle the entitlements they are granted, so as to more effectively influence local development.

Another possible response might take a form akin to David Schleicher's concept of Tax Increment Local Transfers (TILTs).²³⁷ Schleicher's work suggests transferring the tax increment—the increase in tax revenue produced by new development—to local property owners as a means of gaining their support for new development.²³⁸ Drawing on this concept, Emily Hamilton has proposed a system that directs additional funds from new development not towards property owners alone, but also towards housing vouchers.²³⁹ Salim Furth has suggested

233. *Id.* at 337 (quoting U.S. DEP'T OF HOUS. & URBAN DEV., HUD STRATEGIC PLAN, FY 2010–2015, at 4 (2010)).

234. *See id.* at 323, 335.

235. *See id.* at 336 (“Once current residents have a choice of whether to stay or move, there is the potential for residents to organize and persuade other residents and business owners to stay. If many current residents and business owners were to remain, the retail offerings and street life would likely not change in any meaningful way. Or if they did, the change would occur on the residents’ own terms. If too few people stayed, those who remained might feel a sense of loss but not, presumably, a sense that outsiders pushed out their neighbors.”).

236. *See* Brad Lander, *It’ll Take More Than a Voucher*, NYU FURMAN CTR. (May 2014), <https://furmancenter.org/research/iri/essay/itll-take-more-than-a-voucher> [<https://perma.cc/M48V-V5N4>] (“[I]’ts too expensive—and even self-defeating—to offer subsidies that would affirm and fuel the speculative increases in land prices that are driving displacement.”).

237. *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1727 (2013).

238. *See id.* at 1729.

239. *See* Emily Hamilton, *TILTs for Income Mobility*, MKT. URBANISM (Aug. 29, 2017), <http://marketurbanism.com/2017/08/29/tilts-for-income-mobility/> [<https://perma.cc/27ZX-YZ8T>] (discussing TILT ideas in relation to addressing displacement concerns).

granting renters, again not limited to a particular type of neighborhood, a “development dividend.”²⁴⁰ This would provide beneficiaries with a payment if a project were successfully completed, giving them incentive to support it.²⁴¹

These three approaches focus on blunting opposition to new development rather than on furthering distributive justice or providing some form of reparation for past injustices experienced by long-standing residents of historically disadvantaged neighborhoods. In fact, Furth’s proposal would not match participating renters to proposed projects near their residence but would instead randomly match them with registered projects.²⁴² Rather than focus on buying off nearby opponents of development, it seeks to nudge potential supporters—renters who refuse a diffuse benefit from new development—to more actively engage in supporting projects citywide.²⁴³ However, Furth notes that his development dividends proposal might allow for sharing gains from land use reforms with the disproportionately lower income and minority communities that did not benefit from increases in housing wealth over the prior two decades (and in many cases are not currently facing development pressures).²⁴⁴

Freeman has also suggested a model that would harness the increase in property values and taxes resulting from new development.²⁴⁵ Freeman proposes using such funds to finance a community-based organization that would provide affordable housing—either in the form of new units or vouchers—in the local neighborhood.²⁴⁶ In contrast with Godsil’s proposal, Freeman’s proposal would not be limited to existing residents of the neighborhood.²⁴⁷ Chris Elmendorf and Darien Shanske developed an innovative model to encourage local government to rezone for greater density by permitting them to auction off, and therefore profit from, new development capacity.²⁴⁸ They suggest the possibility of combining their model with a measure giving designated lower income communities

240. SALIM FURTH, MERCATUS CTR., GEORGE MASON UNIV., DEVELOPMENT DIVIDENDS 1 (2019).

241. *See id.*

242. *See id.* at 5.

243. *Id.* at 3.

244. *See id.* at 4. Furth concedes this benefit should not be overstated and that even if the proposal were successful, only a small share of renter households would likely benefit. *Id.*

245. *See* Lance Freeman, *Creating Integrated Communities Is More than Preventing Displacement*, NYU FURMAN CTR. (May 2014), <https://furmancenter.org/research/iri/essay/creating-integrated-communities-is-more-than-preventing-displacement> [<https://perma.cc/ETF7-UUFA>].

246. *See id.*

247. *See id.*

248. Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RES. L. REV. 513, 532 (2020).

“control over expenditure of auction revenues.”²⁴⁹ This might serve to reduce opposition to an upzoning, while also undermining the claim that upzoning constitutes a giveaway to developers.²⁵⁰

Each of these proposals addresses some of the community concerns discussed in Parts I and II, particularly those around displacement (in the case of Godsil, Hamilton, and Freeman) and around enabling local residents to obtain some stake in the value generated by new development (in the case of Schleicher, Furth, and Elmendorf and Shanske). To the extent that they enable some share of existing residents to remain in the neighborhood or preserve a mix of below-market-rate and market-rate housing, they are also responsive to certain concerns implicating community character. Elmendorf and Shanske’s proposal, as well as Freeman’s, also offer some mechanism for addressing concerns regarding neighborhood voice in the development process, at least with regards to how the financial benefits from new development are expended. The remainder of this Article briefly outlines another set of possibilities that draw on the concept of Transferable Development Rights (TDRs) to address these concerns by granting individual residents in gentrifying neighborhoods a distinct entitlement.

D. *Transferable Development Rights in Gentrifying Neighborhoods*

TDR programs permit owners of property built below the allowable maximum size (typically measured by floor area ratio) to transfer some or all of this unused capacity to another property.²⁵¹ The receiving property may be immediately adjacent or some distance away, depending on the specifics of a particular program.²⁵² In the urban context, TDRs have been used most extensively in New York City.²⁵³

Granting TDRs in the context of lower income neighborhoods facing gentrification would accord with many of the initial justifications for the creation of TDR programs. As Vicki Been and I remarked in an earlier article, the scholars who first developed the legal and conceptual framework for TDRs viewed these programs “as a tool to help resolve tensions between development and preservation goals.”²⁵⁴ While their focus was on historic preservation and the protection of individual

249. *Id.* at 55 & n.221.

250. *See id.*

251. *See, e.g.,* Vicki Been & John Infranca, *Transferable Development Rights Programs: “Post Zoning”?*, 78 BROOK. L. REV. 435, 435–36 (2013). For an explanation of FAR, see *id.* at 441–42.

252. *Id.* at 446.

253. *See id.* at 436. *See generally* N.Y.C. DEP’T OF CITY PLANNING, A SURVEY OF TRANSFERABLE DEVELOPMENT RIGHTS MECHANISMS IN NEW YORK CITY (2015) (providing a report on New York City TDRs and beginning to look at possible reform).

254. Been & Infranca, *supra* note 251, at 455.

landmarks, it is not difficult to extend this logic to the preservation of affordable housing and community character more generally.²⁵⁵

Early TDR proponents viewed “unused development potential as a community resource, rather than as a solely private one—an idea that shaped their proposals for how municipalities could structure the transfer of development rights.”²⁵⁶ This conception of zoning, which resembles the treatment of property rights in the progressive property literature, also accords with the popular understanding of development in many urban neighborhoods—where long-term residents assert a stake in the community that entitles them to some of the benefit of new development.²⁵⁷ Moreover, it is responsive to at least some concerns expressed by opponents of rezoning measures, such as SB 827, who argue that such rezoning should provide more direct benefits to the surrounding community.²⁵⁸

In a forthcoming article, Rick Hills and David Schleicher convincingly critique the traditional justifications for TDRs and contend that TDRs frequently serve to limit rather than promote development.²⁵⁹ They argue that the best way to understand TDRs is not as a “technocratic tool” to solve land use dilemmas but rather as a “political tool” that can aid in strategically organizing pro-development coalitions.²⁶⁰ The TDR proposals articulated below push back on this characterization to the extent that they are framed as a response to the myriad concerns expressed by disadvantaged communities in the context of a city or statewide rezoning. At the same time, these TDRs might also serve—in

255. See Lisa T. Alexander, *Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law*, 63 HASTINGS L.J. 803, 857–60 (2012) (suggesting use of TDRs to preserve affordable housing in certain low-income urban areas).

256. Been & Infranca, *supra* note 251, at 455. Costonis asserted that TDR “stands squarely upon a principle which has been implicit in American land use practice since the *Euclid* decision: The development potential of privately-held land is in part a community asset that government may allocate to enhance the general welfare.” John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 85 (1973).

257. See *supra* notes 76–78 and accompanying text.

258. For example, the San Francisco Planning Department, in an analysis of Senate Bill 827, criticized the measure for significantly increasing the value of property without simultaneously seeking to capture some of that value for public benefits. See Rodgers & Switzky, *supra* note 78, at 4.

259. Roderick M. Hills Jr. & David Schleicher, *Building Coalitions out of Thin Air: Rethinking Transferable Development Rights and “Constituency Effects” in Land Use Law*, 12 J. LEGAL ANALYSIS 79, 82, 93, 100–02 (2020). The TDR proposal developed in this section was originally devised and presented prior to Hills and Schleicher’s piece. However, as this Article argues their helpful framing of TDRs suggests additional potential virtues of the proposal.

260. *Id.* at 82.

the face of resistance to such a rezoning—to help achieve what Hills and Schleicher term “a justifiable political compromise.”²⁶¹

TDRs could be provided either at the residential or commercial unit level or at the building level in specific designated neighborhoods (neighborhoods analogous to SB 50’s sensitive communities). Designated neighborhoods would be a subset of a larger number of neighborhoods subject to a broader city or state rezoning of land. The next two Sections suggest the broad outlines of two potential models, which would require significant additional elaboration and tailoring to local conditions.

1. Individual TDRs

One model would be to provide individual TDRs (I-TDRs) to all residents (both owners and tenants) and all commercial entities (again, both owners and tenants) within a designated neighborhood. The value of an I-TDR grant (measured by the number of square feet of development it permits) would be based upon a valuation of the property interest held by its recipient (whether an ownership interest or a tenancy).²⁶² This valuation could consider both duration and type (ownership or tenancy) of tenure. I-TDR holders would be able to sell their interest to designated recipient sites (which may include all or just a subset of parcels in the neighborhood).²⁶³ The size of the area within which transfers are permitted to occur should be chosen in a manner that provides a thick market with multiple sets of sending and receiving sites, so as to make it easier to obtain and use I-TDRs for new development. I-TDRs would provide existing residents with a financial stake in development (and an incentive towards supporting new development). This might help them to either remain in the neighborhood or move to a desired alternative neighborhood, addressing some of the concerns discussed in Part II.B regarding the personhood interests of existing residents.²⁶⁴ Residents within a neighborhood could also bundle their I-TDRs, enabling a

261. *Id.* at 93. This Article departs from Hills and Schleicher’s account in that it sees TDRs serving both a political purpose and to advance distributive justice, at least in the context of this proposal. *See id.* at 101 (arguing that compensation “must be justified for its political benefits rather than its advancement of distributive justice”).

262. *Cf.* Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1492, 1505 (2008) (suggesting, in the context of a proposal related to eminent domain, that tenants and owners be allocated voting power “based on the relative size of their property holdings,” including the “term[] and value” of the tenant’s leasehold).

263. Depending on market conditions within a neighborhood there may be multiple sets of sending and receiving sites. Or the number of I-TDR credits required for a square foot of development may differ across multiple designated districts.

264. *See supra* notes 145–153 and accompanying text (discussing the relationship between property and personhood and noting that the strongest relationship may be in the context of social relationships at the neighborhood level).

broader and more representative set of local residents to negotiate with potential developers and to pursue particular neighborhood concerns.

2. Preservation TDRs

Alternatively, or in conjunction with I-TDRs, TDRs could be granted at the building level for the purpose of helping preserve existing housing or neighborhood businesses. The use of these Preservation TDRs (P-TDRs) would be subject to the acceptance of certain restrictions on redevelopment of the sending site. For example, in designated communities the entire area might be rezoned to allow greater density, but rental properties prohibited from redevelopment (as they were under SB 50). The owner of such a property would be able to sell and transfer any unused development capacity (both that created by the rezoning and any previously existing) to designated recipient properties in exchange for a commitment to maintain the sending property as affordable for some set period of time.²⁶⁵ This would allow for denser development and more housing at the neighborhood level, while simultaneously helping to preserve non-subsidized below-market-rate housing at sites that sold away their unused development rights. It is also likely to build support among owners of rental buildings who—assuming a prohibition on the redevelopment of their property—would otherwise see no benefit from an upzoning.

Some version of these approaches—with significant further elaboration—might serve to address displacement concerns by either maintaining existing rental properties or allowing those who wish to move to do so. Their effect on neighborhood character is less clear. It is possible that the proposals would permit development to a maximum desired capacity at the neighborhood level while still preserving older properties. Those properties—once they transferred their unused development capacity—would in a sense be naturally preserved in their current state as the owner would have little incentive to redevelop.²⁶⁶ And as mentioned, the compensation for P-TDRs could come with a restriction requiring the property's rents to remain at a certain level for a designated period of time. A similar requirement could apply to commercial properties, allowing for a form of commercial rent regulation to preserve existing community businesses.

265. As such, this model would operate in a manner akin to New York City's individual landmark TDR program and West Chelsea and Theater District TDR programs. *See generally* Been & Infranca, *supra* note 251 (discussing the use of TDR programs in New York City); Michael Kruse, *Constructing the Special Theater Subdistrict: Culture, Politics, and Economics in the Creation of Transferable Development Rights*, 40 *URB. LAW.* 95 (2008) (presenting a case study about TDRs in New York City).

266. *Cf.* JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 152–77 (1961) (discussing benefits of a mix of buildings of different typologies and ages).

3. A Brief Note on Potential Challenges and Criticisms

This TDR discussion is intended merely to provide a broad set of ideas for elaboration in subsequent work. Nonetheless, it is worth touching briefly on likely critiques of such a program. A TDR proposal, of either type, would grant power to individuals rather than to a community. As such, it jettisons direct community engagement and consensus decision-making, replacing it with the empowering of autonomous individual actors. This approach arguably strikes a better balance between the need for development and local concerns. Researchers have shown that opponents of new development are more likely to participate in public processes.²⁶⁷ Granting all local residents an entitlement and potential financial benefit from new development would encourage greater participation by individuals with an incentive to support new development. I-TDR holders also need not function as completely autonomous agents. Recipients could pool their I-TDRs and sell them as a group. They could use the process of negotiating such sales to shape development in a manner consistent with collective goals or desires for the neighborhood. They might also be permitted to make certain side deals (beyond compensation for their I-TDRs) with the goal of facilitating contributions to community resources. In some ways, the proposed model, while relying less on collective deliberation, offers local residents a more significant form of participation in and influence on the development process.²⁶⁸

There is a danger that the cost of obtaining these TDRs for new development will make it difficult for local governments to impose additional requirements (such as inclusionary housing or other exactions) without deterring development. This calls for careful program design in light of local conditions. But to the extent that these TDRs are only available (or in demand) in neighborhoods with significant development pressure, and therefore where local governments are typically able to extract the most from developers, this concern may be mitigated. It might also have a secondary benefit of forcing residents to directly confront these potential tradeoffs.

A related concern is that TDR programs more generally may serve to reduce rather than increase development. This depends, of course, on the program design and how that design accounts for the role of TDRs. Envisioning an area with an existing floor area ratio (FAR) of 2.0 that is rezoned to a FAR of 5.0, with TDRs made available in a manner akin to

267. See *supra* notes 210–214 and accompanying text.

268. Cf. Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 922 (2001) (“[P]articipation is meaningful only to the extent that one has the power to affect the outcome of the development process.”).

the second proposal above, then total development could be more than under the final version of SB 50. Buildings with tenants, which cannot be redeveloped (and such a concession is likely a political necessity for any broad rezoning measure to succeed) could now transfer unused development capacity, allowing for development at receiving sites at densities above a FAR of 5.0. The concern would be that, with this possibility in mind, a program might be designed in such a way that the base FAR after rezoning is only 3.0 or 4.0, on the expectation that potential developers will obtain, via a TDR transfer, additional development capacity sufficient to build to an FAR of 5.0. This would likely both increase the cost of development and lead to less total development than under a plain vanilla rezoning to a FAR of 5.0 without any TDR program. As such, program design is crucial and would require planning and thinking more carefully about desired and likely density at the neighborhood level as well as existing market conditions.²⁶⁹

Addressing the myriad concerns raised by residents of low-income communities confronted with new and denser housing development will require creative thinking and further refinement of the proposals discussed above. Whatever form policy responses take, however, they should focus—to the extent that they grant special treatment or greater power to particular communities and the residents of those communities—on concerns related to neighborhood character and the considerations this Article has collectively referred to as the stakes of long-term residents. The issue of displacement, while a significant concern for residents of low-income communities, does not merit giving such communities the power to exclude or control new development. For the exercise of such power is likely to prove detrimental not only to the community itself, but also to the broader cause of adding much needed new housing to the benefit of those outside the community as well.

269. See John Infranca, *Slicing (and Transferring) Development*, U. CHI. L. REV. ONLINE (Mar. 30, 2020), <https://lawreviewblog.uchicago.edu/2020/03/30/slicing-and-transferring-development-by-john-infranca/> [<https://perma.cc/NQ9F-USJY>] (arguing that TDRs suggest the need to reconsider the unit at which development is regulated).

CONCLUSION

Rising housing costs in high-demand regions have elicited calls for greater housing density. The steps taken to permit greater density are likely to either directly displace or significantly circumvent local and sublocal control of zoning. At the same time, residents in long-neglected, lower income neighborhoods make strong demands for some degree of local control over neighborhood land uses. While the motivations driving these demands are, in some ways, akin to those behind suburban exclusionary zoning, the historical treatment of these communities, the more fragile personhood interests at stake, and the structure of local government law collectively justify distinct treatment. The treatment should not, however, take the form of granting greater control to a difficult to define and potentially fleeting local community. Rather, the response should be to grant carefully circumscribed local control over planning to the community and some form of property entitlement to individual residents. This will encourage a broader and more representative set of local residents to engage in the development process, contribute to the preservation of desired elements of existing community character, and derive some economic benefit from new development.