

CITIES, FAIR HOUSING, AND GENTRIFICATION: A PROPOSAL IN PROGRESSIVE FEDERALISM

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INTRODUCTION

As gentrification becomes the central idea behind American urbanism, its contradictions raise what can be, but rarely are considered,

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problems of fair housing. Gentrification—understood as the heavily capitalized economic and often racial transformation of working-class, underdeveloped neighborhoods¹—is now a popular expectation for at least medium-sized cities. We ask whether gentrification has reached a particular neighborhood. We want to know how far along it has gotten. Our questions reflect how interested we are in the new amenities, social sorting, and perceived market openings that come with a very particular form of urban transformation. Our questions also reflect our subjectivity. Popular perceptions of gentrification see it as a good thing—a revitalizing force that “brings people back to cities” and solves budget woes. Yet local vernacular perceptions often view gentrification anxiously through the lens of vulnerability, in which questions by indigenous residents revolve around a central concern: Where will I go if this place is colonized by the “creative class”? This subjective diversity shows gentrification’s exclusionary character, in which making things nice also means keeping people out. We have come to accept the reality of divergent perspectives and consequences. Facts about displacement have caught up with narratives.² People really are priced out.³

¹ Bethany Li offers a helpful definition of contemporary gentrification as follows:

[A] systematic remake of the class composition of urban areas due to the displacement of low-income residents and businesses. Although many studies of gentrification primarily focus on direct displacement of residents as a measure of impact, this [definition] anticipates the direct and secondary displacement of residents and businesses that results from gentrification, and it also considers effects on community life and structures.

Bethany Y. Li, *Now is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 *FORDHAM L. REV.* 1189, 1195 (2016).

² In 2003, Freeman and Braconi’s studies casted doubt on the displacement effects of gentrification in Harlem. See generally Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 *J. AM. PLAN. ASS’N* 39 (2004); Lance Freeman & Frank Braconi, *Gentrification and Displacement*, 8 *URB. PROSPECT* 1 (2002). But more recent research has made clear that some gentrification processes have clear displacement effects on lower income residents. See Mark Davidson, *Spoiled Mixture: Where Does State-Led ‘Positive’ Gentrification End?*, 45 *URB. STUD.* 2385, 2388 (2008) (describing the indirect forms that displacement may take); Ingrid Gould Ellen & Katherine M. O’Regan, *How Low Income Neighborhoods Change: Entry, Exit, and Enhancement*, 41 *REGIONAL SCI. & URB. ECON.* 89 (2011); Kathe Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 *URB. STUD.* 23 (2006).

³ See NYU FURMAN CTR., STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS IN 2015 4–6 (2016), http://furmancenter.org/files/sotc/NYUFurmanCenter_SOCin2015_9JUNE2016.pdf [<https://perma.cc/LBY9-E47S>]; see also Ann-Marie Alcántara, *New Map Shows the Decline of SF’s Black Population*, *BOLD ITALIC* (Dec. 17, 2014), <http://thebolditalic.com/>

Neighborhoods really do take on the more expensive costs and tastes of much wealthier housing consumers. Revitalization-as-gentrification, therefore, presents real contradictions. This reality should trigger a fair housing concern as, over time, the relationship between gentrification and housing affordability indirectly defines who gets to participate meaningfully in cities.

From the standpoint of city power,⁴ I argue that the spatial vulnerability that arises for some from market contradictions has to be understood as a central problem of fair housing in our time. The fair housing idea has always been concerned with the lack of housing choice for housing consumers disadvantaged by varied forms of discrimination targeting various kinds of people, usually by race. The concern is reflected in the two primary interests protected by the federal Fair Housing Act (FHA):⁵ the interest in racial non-discrimination and the interest in reducing racial segregation.⁶ These interests are sometimes connected in that the Act uses the language of non-discrimination as a means of overcoming racial segregation.⁷ State fair housing laws often follow these two explicit federal interests, sometimes asserting race over class or including other protected groups, but the schemes are generally

new-map-shows-the-decline-of-sf-s-black-population-the-bold-italic-san-francisco-651aba4e199a [https://perma.cc/443P-X8E5] (summarizing demographic changes in census tract 158 according to maps available from the Anti-Eviction Mapping Project); *Loss of Black Population*, ANTI-EVICTION MAPPING PROJECT, <http://www.antievictionmappingproject.net/black.html> [https://perma.cc/3MYP-YRVA] (last visited Sept. 21, 2018).

⁴ In this regard, I join other local government law scholars who offer a particular context in which to argue the robustness of city power. I recognize, however, that such power is not merely defined by original state delegations of municipal authority, but by active efforts by conservative groups like the American Legislative Exchange Council (ALEC) to introduce new state legislative constraints on city power as part of an ongoing partisan struggle over the scope of government in the United States. See, e.g., Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 485 (2009) (arguing the more relevant issue of city powerlessness concerns “the political pathologies that arise from the city-business relationship”).

⁵ Fair Housing Act, 42 U.S.C. §§ 3601–19 (2018).

⁶ See, e.g., *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) (“Action must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”).

⁷ In addition, the Act and the Department of Housing and Urban Development (HUD) regulations occasionally reflect an anti-poverty interest in seeking de-concentration of the isolated poverty that results from segregation produced by discrimination in housing choice. See discussion *infra* Sections I.A, I.B.

consistent.⁸ If gentrification creates a distinct risk of residential exclusion and displacement that has a disparate impact on populations, the question is whether fair housing law can offer any kind of remedy. It should. What is needed is an understanding of fair housing that includes a third interest: housing stability. Therefore, this Essay explores how such a tripartite interest is asserted and its remedy accomplished, starting with an analysis of legislative purpose and ending with a proposal for implementation: a localized “affirmatively furthering fair housing” (AFFH) doctrine.

Creating a localized AFFH framework for housing policy and planning is a necessary act of progressive federalism. More pressing than the risk of displacement by gentrification is the risk of displacement by lack of affordability. Many more communities face the latter threat than the former—a fact that leads to confusion in distinguishing between the two. There simply is not enough of an incentive and/or political will to maintain or build an adequate supply of affordable housing in most job-rich parts of the country. Being rent burdened (i.e., paying more than a third of one’s household income on rent) is the norm in metropolitan America, and *extreme* rent burdens, where households spend more than fifty percent of their income on rent, are commonplace.⁹ Rather than consider this as an issue of access or economic justice, most cities treat the lack of affordability as an uncontrollable market dynamic (the goal of which might be actual gentrification). As a result, they do very little to retard exclusionary

⁸ See Fair Housing Act, N.J. STAT. ANN. § 52:27D-302 (West 2018); Unlawful Discrimination Because of Race, Color, Religious Creed, National Origin, Ancestry or Sex, MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2018); Fair Employment and Housing Act, CAL. GOV’T CODE § 12920 (West 2018).

⁹ See Amelia Josephson, *The Most and Least Severely Housing Cost-Burdened Cities in 2016*, SMARTASSET (May 31, 2018), <https://smartasset.com/mortgage/the-most-and-least-severely-housing-cost-burdened-cities> [<https://perma.cc/UK3L-E4W9>] (finding that Newark, NJ; Los Angeles, CA; New York, NY; Miami, FL; and Stamford, CT were the top five most housing cost-burdened cities in the United States, respectively, with over twenty percent of the top two cities’ households each spending more than fifty percent of their income on housing); PEW CHARITABLE TR., AMERICAN FAMILIES FACE A GROWING RENT BURDEN 4 (2018), https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden_report_v2.pdf [<https://perma.cc/EN5X-J454>] (finding that severely rent-burdened households in the United States increased by forty-two percent from 2001 to 2015); ZUMPER, ANNUAL RENTER SURVEY 2 (2d ed. 2017), <https://www.zumper.com/blog/uploads/2017/09/ZumperAnnualRenterSurvey2017.pdf> [<https://perma.cc/GUT5-PAGC>] (finding that rent is the largest expense for eighty-two percent of survey participants).

market effects. Often, they do the opposite. Most gentrification-based displacement is fueled by local governmental policies aimed at stimulating economic growth.¹⁰ Yet, federal policy offers scant hope. Federal fair housing participation is captive to the partisan philosophies of whoever the current president is. The current administration is opposed to fair housing.¹¹ Thus, the responsibility for applying local constraints on displacement dynamics and ensuring greater housing stability for vulnerable housing consumers falls to state and local governments. Doing so is a form of equitable growth made possible, I argue, through an affirmative framework of localized fair housing.

Doing so is also a necessary function of local governance and therefore an important consideration in the development of progressive federalism. If exercise of the police power to protect the general welfare meant only promulgating rules to maximize a city's tax base and ensure the welfare of only its wealthiest residents, then we would have no need for laws prohibiting discrimination and segregation. That has been the peculiar struggle of American suburbs, pitting police powers against notions of fair and inclusive housing. Gentrification focuses the issue on big (and medium) city policy. What the AFFH regulations require of cities seeking federal funds is to adopt formally or informally a housing-related plan for equitable living. The requirement recognizes that the structure of opportunity mirrors the structure of inequality; it is rooted in proximity to strong institutions and hindered by a lack of access to them. I will argue that this requirement should be co-extensive with the obligations of city power and that we do not actually need a federal system of incentives in order to do it. Cities should enact an urban AFFH framework because equitable access to the sources of opportunity

¹⁰ See, e.g., Chase M. Billingham, *The Broadening Conception of Gentrification: Recent Developments and Avenues for Future Inquiry in the Sociological Study of Urban Change*, 29 MICH. SOC. REV. 75, 92–93 (2015) (noting this effect and suggesting that it is indisputably “gentrification-induced displacement”); Edward Goetz, *Gentrification in Black and White: The Racial Impact of Public Housing Demolition in American Cities*, 48 URB. STUD. 1581 (2011) (noting gentrification driven by public investment efforts).

¹¹ See Glenn Thrush, *Under Ben Carson, HUD Scales Back Fair Housing Enforcement*, N.Y. TIMES (Mar. 28, 2018), <https://www.nytimes.com/2018/03/28/us/ben-carson-hud-fair-housing-discrimination.html>. See generally Ben Carson, Sec’y, U.S. Dep’t of Hous. & Urban Dev., Speech at the National Association of Home Builders Executive Board Meeting (May 23, 2018), https://www.hud.gov/press/speeches_remarks_statements/Speech_052318 [<https://perma.cc/EDY6-9DQJ>] (“[F]or every new regulation, two old regulations must be eliminated.”).

within them is a democratic obligation embedded in municipal authority and the historic role of cities.

This Essay divides in two Parts. In Part I, I will situate the three fair housing interests in the familiar AFFH planning environment, offering arguments to shape context. The harder task is implementation. What constitutes the specific laws and policies that indicate a city's commitment to fair housing? In Part II, I will draw upon some of the work that the center I direct at Rutgers Law School (the Center on Law, Inequality and Metropolitan Equity) has done in Newark, New Jersey, a working-class city experiencing an affordable housing crisis amid increasing economic development activity in the middle of one of the nation's most expensive metro areas. Newark is poised for gentrification. That Part of the discussion will focus on distinct areas for reform that attach to the three fair housing interests—anti-discrimination, anti-segregation, and housing stability. Thinking of fair housing in a city like Newark as an example may be counter-intuitive. After all, it is an overwhelmingly African American and Latino city, while most fair housing issues rely upon a dominant white presence. Yet, this is precisely why the Newark focus is instructive. It shows that forces within and without our cities can significantly impact housing opportunity for vulnerable populations *no matter what the immediate demographic make-up is*. Thus, my proposed framework of local fair housing reforms includes a civil right to counsel, rent regulation, inclusionary zoning, and increased enforcement against discrimination in housing voucher use and mortgage foreclosure. These are not tools available to cities on the basis of race, but rather re-tooled devices for belatedly addressing the housing crisis that has long reflected place-based inequality in metropolitan America.

I. ANALYSIS: THE THREE INTERESTS PROTECTED BY FAIR HOUSING AND THE DUTY TO AFFH

A. *The Rationale*

The rationale for an urban AFFH duty rests on four basic assumptions about current housing that contribute to the urban contest over gentrification: the democratic significance of urban living, its high costs, its perceived opportunity value, and the primarily local determination of both. First, cities are supposed to represent that

mutuality of interests. For generations, urban life has been seen as the anonymous intersection of human lives and opportunities, the messy being together of strangers. This is why cities are loved. Cities also represent the historical sites of difference—not only of lived multiculturalism, but of ghettos, immigrant slums, and tenements—and the very places to which the excluded were confined. This is why cities are hated. Urbanists have to worry about these two defining aspects of American cities. Fair housing comprehends them both on behalf of our democratic ideals. The risk of displacement becomes even more critical when we consider that gentrification threatens either the idea of integration uniquely practiced in cities or the place of last resort for racially and economically marginalized people. Therefore, what happens in city neighborhoods says a lot about whether a society's democratic and economic ideals can be realized.

Second, housing in most metropolitan areas simply costs more relative to income than it once did.¹² In addition to stagnant wage growth, numerous factors have driven up housing costs in and around cities, including scarcity, land use and environmental regulation, the price of land, and the price of labor.¹³ With the lessening of federal assistance for affordable housing development—a process that began in the 1980s but, with the notable exception of low-income housing tax credits, has not been corrected by subsequent administrations¹⁴—developers have increasingly focused on high-end development (condos and rentals) where returns on investment are considered greatest.¹⁵ This

¹² See generally CECILE MURRAY & JENNY SCHUETZ, BROOKINGS INST., HOUSING IN THE US IS TOO EXPENSIVE, TOO CHEAP, AND JUST RIGHT. IT DEPENDS ON WHERE YOU LIVE (2018), <https://www.brookings.edu/research/housing-in-the-u-s-is-too-expensive-too-cheap-and-just-right-it-depends-on-where-you-live> [<https://perma.cc/KNT8-JTW9>].

¹³ See EDWARD GLAESER, REFORMING LAND USE REGULATIONS (2017), <https://www.brookings.edu/research/reforming-land-use-regulations> [<https://perma.cc/KX5T-3CA2>]; Edward Glaeser & Joe Gyourko, *The Economic Implications of Housing Supply* (Nat'l Bureau of Econ. Research, Working Paper No. 23833, 2017), <http://www.nber.org/papers/w23833.pdf> [<https://perma.cc/N6X2-7BTR>]; Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation* (Nat'l Bureau of Econ. Research, Working Paper, 2018), <https://faculty.chicagobooth.edu/chang-tai.hsieh/research/growth.pdf> [<https://perma.cc/58EH-4TSG>].

¹⁴ See John M. Kerekes, *The Housing and Community Development Act of 1992: Affordable Housing Initiatives May Have Found a Home*, 18 SETON HALL LEGIS. J. 683, 705 nn.108–09 (1994).

¹⁵ See Daniel Denvir, *The Big, Big, Big Money Behind Tall Buildings*, CITYLAB (June 11, 2015), <https://www.citylab.com/equity/2015/06/the-big-money-behind-tall-buildings/395690> [<https://perma.cc/JC4W-8JHV>].

has contributed to an affordability crisis for more than the poor.¹⁶ Homeownership is increasingly out of reach for many younger people and the normalization of excessive rent burdens noted in the Introduction is responsible for a kind of metropolitan sprawl, raising median rents farther from the city as people who cannot afford to live there seek better deals on its periphery.¹⁷

Third, housing is not only expensive, but also is consistently valuable from the basic standpoint of access to opportunities and quality of life. The attractiveness of cities—a factor in their housing expense—is not just about culture and walkability. Cities attract jobs.¹⁸ In many fields, the best employment opportunities remain in cities for both professional careers and contingent work. Add in access to more robust health care options, better public transportation and, yes, culture and entertainment, cities provide more of the experiences that people value in terms of work, health, getting around, and feeling connected to others. Global real estate investors know this, which sustains the growth in value of urban housing.¹⁹

Fourth, the primary determinants of both housing cost and housing value are local. The federal government may control interest rates or provide mortgage insurance through a variety of programs on which Americans rely, but San Francisco is a hotter real estate market than St. Louis primarily because of local decisions that have interacted with those larger national and international factors. The residential and

¹⁶ See, e.g., Karen Zraick, *San Francisco Is So Expensive, You Can Make Six Figures and Still Be 'Low Income'*, N.Y. TIMES (June 30, 2018), <https://www.nytimes.com/2018/06/30/us/bay-area-housing-market.html>.

¹⁷ See generally Derek Thompson, *Why So Many Americans Are Saying Goodbye to Cities*, ATLANTIC (Apr. 4, 2017), <https://www.theatlantic.com/business/archive/2017/04/why-is-everyone-leaving-the-city/521844> [<https://perma.cc/MVS9-KP5V>]; Lydia DePillis, *This Could Be the Biggest Force Driving Gentrification*, WASH. POST: WONKBLOG (Nov. 19, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/19/this-could-be-the-biggest-force-driving-gentrification/?noredirect=on&utm_term=.e475c0280eb5 [<https://perma.cc/CEB4-ENA7>].

¹⁸ See JOE CORTRIGHT, CITY REPORT: SURGING CITY CENTER JOB GROWTH 11–17 (2015), <http://cityobservatory.org/wp-content/uploads/2015/02/Surging-City-Center-Jobs.pdf> [<https://perma.cc/5FWC-XJC5>].

¹⁹ See London, Los Angeles, New York Top Cities for Global Real Estate Investment, BUS. FACILITIES (Jan. 24, 2018), <https://businessfacilities.com/2018/01/london-los-angeles-new-york-top-cities-global-real-estate-investment> [<https://perma.cc/D3KC-JFH4>]; Global Cross Border Investors' Top Target Cities in the Next 12 Months, COLLIER'S INT'L: GLOBAL INVESTOR OUTLOOK (2016), <http://gio.colliers.com/colliers-gio-2016-4.pdf> [<https://perma.cc/Q4HW-KNT3>].

commercial gentrification of downtown Brooklyn,²⁰ to take another example, resulted from years of local governmental planning that included “up zoning,” the decision to offer specific subsidies and forego certain taxes, and other factors on which federal policy had no significant say.²¹ In fact, gentrification itself is a mostly local economic development strategy, the result of active²² and passive²³ market-making policy moves initiated primarily by local government decision-makers on behalf of the private sector.²⁴

Yet it is precisely because of these factors that the vast majority of Americans, especially those at greatest risk of being left out, might now look to the federal government to impose constraints on local government market-making in order to lower the costs and extend the

²⁰ See, e.g., BROOKLYN ARENA & ATLANTIC YARDS DESIGN GUIDELINES 4–110 (2006), https://cdn.esd.ny.gov/subsidiaries_projects/ayp/AtlanticYards/AdditionalResources/112006_AY_DesignGuidelineExhibit_B.PDF [<https://perma.cc/2374-A7T7>].

²¹ Audrey Wachs, *Downtown Brooklyn Partnership Releases New Report on Robust Development in Downtown Brooklyn*, ARCHITECT’S NEWSPAPER (Mar. 1, 2016), <https://archpaper.com/2016/03/downtown-brooklyn-partnership-releases-new-report-robust-development-downtown-brooklyn>.

²² Active gentrifying policies include: property tax abatements that artificially depress the price of high-end apartments; zoning changes that prefer certain developments in certain places; direct subsidies to developers, including promises of infrastructure improvements; use of redevelopment authority and eminent domain to declare low-income areas “blighted” and eligible for development financing; aggressive enforcement of public housing eligibility rules; condemnation of public housing developments and implosions; and institutional reforms, such as education lotteries for “gifted and talented” programs, stepped-up police patrols and police practices, improved sanitation, and enhanced public amenities investments.

²³ Passive gentrifying policies may include: non-enforcement of rent control rules or building inspections; lack of an affirmative policy on expiring housing affordability contracts; lack of legal protections for tenants at systematic risk of eviction; lack of monitoring the effects of federal housing assistance programs; establishment of local private conservatories that privatize public decision making and fundraising powers; and renaming neighborhoods on official city materials.

²⁴ See Davidson, *supra* note 2; Goetz, *supra* note 10; Loretta Lees, *Gentrification and Social Mixing: Towards an Inclusive Urban Renaissance?*, 45 URB. STUD. 2449, 2450–51 (2008). For evaluations of how federal and local agencies jointly use policy to promote gentrification, see these analyses of HUD’s HOPE VI programs, Patrick E. Clancy & Leo Quigley, *HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL’Y 527 (2001); Michael S. FitzPatrick, Note, *A Disaster in Every Generation: An Analysis of HOPE VI: HUD’s Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL’Y 421, 423 (2000). Some foreign cities have implemented policies designed to mitigate the displacement effects of national revitalization programs. See, e.g., Justus Uitermark & Maarten Loopmans, *Urban Renewal Without Displacement? Belgium’s ‘Housing Contract Experiment’ and the Risks of Gentrification*, 28 J. HOUS. & BUILT ENV’T 157 (2013).

benefits of housing opportunity in a more egalitarian way. Again, this is because local residential development policies have rarely, if ever, shown much initiative in pursuing the fair housing interest. When they have—such as 80/20 mixed-income development²⁵ or rent control—they have often regretted the decision and cut back, or they have been preempted from maintaining such regulation by state legislatures.²⁶ Instead, we look to the federal government for fair housing. Our look is not always returned. The agency in charge of fair housing enforcement, the Department of Housing and Urban Development (HUD), is either under political capture by a presidential administration that has simply chosen to ignore its congressionally-mandated role in fair housing regulation or it lacks the necessary regulatory tools to do the work. This is a structure issue that suggests a disconnect in 2019, though a solution was foreshadowed in 1968.

B. *The Three Supporting Statutory Interests*

The FHA began with two fairly explicit statutory interests—anti-discrimination and anti-segregation—and evolved in the AFFH regulations to indicate a third interest in housing stability. Thus, the first two are well known. The Act explicitly prohibits discrimination in the sale or rental of housing units and various housing-related transactions.²⁷ Early on, the Act's meager legislative history was read to include an interest in racial balance and integrated communities. Housing discrimination can frustrate this interest, both in discrete transactions and through broader policies. Hence, the two interests may interact: segregation is dependent upon discrimination, though the

²⁵ See Affordable New York Housing Program, N.Y. REAL PROP. TAX LAW § 421-a(2)(a)(ii)(C)(b) (McKinney 2018).

²⁶ See Lauren C. Wittlin, Note, *Access Denied: The Tale of Two Tenants and Building Amenities*, 31 TOURO L. REV. 615, 620–22 (2015). For a list of states with rent control regulations still in effect, see *Residential Rent Control Guide by State*, LANDLORD.COM, http://www.landlord.com/rent_control_laws_by_state.htm [<https://perma.cc/64F8-4GWH>] (last visited Sept. 23, 2018); see also NAT'L APARTMENT ASS'N GOV'T AFFAIRS, RENT CONTROL LAWS IN THE 50 STATES, <https://www.naahq.org/sites/default/files/naa-documents/government-affairs/protected/affordable-housing/Rent-Control-Chart.pdf> [<https://perma.cc/KJ6Z-D5ZV>] (last visited Sept. 23, 2018) (showing states that permitted rent control (five), those that preempted it by statute (thirty-two), and those that preempted it judicially (three)).

²⁷ 42 U.S.C. §§ 3604–05 (2018).

reverse is not always true. As of this writing, a series of early cases making this connection remain good law.²⁸

Housing stability as a third interest recognized by the Act takes a more circuitous path, beginning with the historical origins of the FHA that are eerily similar to displacement by gentrification today. The FHA was born of tumult, passed immediately following the assassination of Martin Luther King, Jr. and the riots that followed. By 1968, African Americans had long experienced displacement, not only as a result of overt racial discrimination but also as a result of covertly discriminatory urban renewal and interstate highway redevelopment policies that uprooted whole communities and tightened housing markets. Black urban neighborhoods routinely bore the brunt of highway construction policies;²⁹ urban renewal was dubbed “Negro Removal” in popular parlance because the racial burden fit a predictable pattern. Racially disparate displacement patterns that resulted from facially neutral redevelopment policies are no less impactful than later-occurring racial discrimination that limits where displaced residents could go. Yet this widespread housing instability caused by redevelopment policies’ disparate effects on Black residential areas was not recognized explicitly in the Act. Instead, such disparate impact has been the basis for litigation resting on a theory of discrimination and racial isolation.³⁰

Yet housing is business, and local real estate markets are central to the entire national economy. There is no divorcing housing discrimination and segregation from their economic effects. So, too, is housing instability, because it is inextricably linked to issues of affordability. HUD’s 2015 AFFH regulation sets forth an argument for recognizing this third interest without referring explicitly to gentrification, though it does discuss housing “displacement” caused by “economic improvement”³¹ as well as displacement concerns with

²⁸ See, e.g., *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973).

²⁹ See Alana Semuels, *The Role of Highways in American Poverty*, ATLANTIC: BUS. (Mar. 18, 2016), <https://www.theatlantic.com/business/archive/2016/03/role-of-highways-in-american-poverty/474282> [<https://perma.cc/YQ8U-ZFSR>].

³⁰ See, e.g., *Thompson v. HUD*, 348 F. Supp. 2d 398 (D. Md. 2005) (showing by disparate impact evidence of decades of public housing siting decisions that increased isolation and segregation).

³¹ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42277 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, 903) (describing a “balanced approach”). “Gentrification” is included in a comment, but not in HUD’s response. *Id.* at 42278–79.

respect to community participation in consolidated plans.³² The agency's discussion of legal authority for the rule begins by denying that Congress intended to limit the statute to prohibiting housing discrimination: "This is not only a mandate to refrain from discrimination but a mandate to take the type of actions that undo historic patterns of segregation and other types of discrimination and afford access to opportunity that has long been denied."³³ Courts have done the same.³⁴ According to the Act, in a system of open or fair housing, proximity to opportunity—the institutional assets associated with life chances—matters.³⁵ Under section 3608's duty to affirmatively further fair housing, the interest in living near opportunity is central to living without the constraints of racial segregation and "related barriers for groups with characteristics protected by the Act, as often reflected in racially or ethnically concentrated areas of poverty."³⁶

The question is whether this interest in non-segregated, non-discriminatory residential areas of opportunity further implies something about stability of tenure. Specifically, does it imply an interest in affordability that would be frustrated by displacement from processes like gentrification? It is certainly implied. Fair housing is "open housing," meaning there is some measure of "choice." But it is not just any kind of choice; it is choice linked to a norm of opportunity arising from connections to a place. Therefore, housing choice is meant to connote access to opportunity. A lack of affordable housing in a local housing market absolutely constrains choice for lower income housing consumers. This limits their access to opportunity and contributes to concentrated poverty. If AFFH means to promote housing policies that allow people of all means to pursue housing close to opportunity, then housing policies that limit affordability and prevent people from living there violates this fair housing interest. In particular, actions by local

³² 24 C.F.R. § 91.105(b)(1)(ii) (2018) ("The citizen participation plan also must set forth the jurisdiction's plans to minimize displacement of persons and to assist any persons displaced, specifying the types and levels of assistance the jurisdiction will make available (or require others to make available) to persons displaced, even if the jurisdiction expects no displacement to occur.").

³³ Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42274.

³⁴ *Id.* (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972)).

³⁵ *Id.* ("The Act recognized that 'where a family lives, where it is allowed to live, is inextricably bound up with better education, better jobs, economic motivation, and good living conditions.'" (quoting 114 CONG. REC. 2276–2707 (1968))).

³⁶ *Id.*

governments that induce gentrification without controlling for displacement effects might be unlawful.³⁷

Establishing the interest in housing stability under the FHA is not the same as establishing a basis for litigation under such a theory. A lawsuit alleging such a violation of the Act may also have to demonstrate racially segregative effects. Housing instability and a lack of affordability is the chief problem of gentrification, a process that also often (but not always) plays out in racial terms.³⁸ Suffice it so say, if we had to do it all over again today, housing choice would be fair if it did not discriminate, did not segregate, *and* did not suffer from a lack of affordability and a high risk of displacement. That is what people in need of legal protection want today. And that is really the point of an urbanized AFFH—to do it all over again with the assistance of the federal AFFH framework but without the textual constraints of cramped language.

Beyond the existence of the AFFH interest in housing stability is the exercise of that interest in the federal regulatory scheme. For that, the AFFH framework relies on a regular comprehensive information gathering and evaluation exercise called the Assessment of Fair Housing (AFH).³⁹ The periodic AFH requirement on federal funds recipients entails an even more thorough analysis of historical trends, demographic factors, litigation, and policy impacts on fair housing interests than its predecessor, the Analysis of Impediments (AI), did.⁴⁰ Where the AI required some elucidation of goals to overcome

³⁷ At least one group of plaintiffs have recently relied upon such a theory to sue the District of Columbia for zoning changes they argue have displacement, if not segregative, effects. See Complaint, Mathews v. D.C. Zoning Comm’n, No. 18-CV-872 (D.D.C. Apr. 13, 2018), <https://www.courtlistener.com/recap/gov.uscourts.dcd.195501/gov.uscourts.dcd.195501.1.0.pdf> [<https://perma.cc/AK46-EFML>]; see also J. Brian Charles, *Can Gentrification Be Illegal?*, GOVERNING (July 2, 2018, 3:00 AM), <http://www.governing.com/topics/urban/gov-washington-gentrification-lawsuit-lc.html>.

³⁸ See John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”*: *Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 436 (2003).

³⁹ 24 C.F.R. § 5.154 (2018).

⁴⁰ In the Rule’s summary, HUD makes clear that the AI was insufficient: “This rule refines the prior approach by replacing the analysis of impediments with a fair housing assessment that should better inform program participants’ planning processes with a view toward better aiding HUD program participants to fulfill this statutory obligation.” Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42272 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, 903). Dissatisfaction with the AI was a contributing factor in the decision to revamp the entire Rule. *Id.*

impediments, the AFH requires greater specificity and progress reports.⁴¹ A recipient municipality, for instance, can no longer merely note the presence of segregated neighborhoods and claim to wish them undone. It must demonstrate affirmative steps toward doing so in order to comply with the Rule.⁴² Further, HUD makes a reciprocal promise. It will amp up its data tools for use by recipients in fulfilling their AFH obligations.⁴³

This obligation is critical to a housing stability interest for at least two reasons. First, if you cannot “measure[] the invisible,”⁴⁴ this at least demands that cities try. Methodologies on tracking displacement are challenging, but we are better at it than we used to be. Compelling studied attempts by cities can only help. Second, fair housing is fundamentally a community planning exercise. At its core are questions of how markets can be sustained, influenced, or modified at multiple points of entry across a specific housing landscape. If greater economic and racial balance is to be an outcome alongside greater housing stability, cities must have, and use, the tools to identify pressure points and make policy adjustments.

Supplanting the federal scheme with a local one has pros and cons. One con may be the absence of an obvious penalty for non-compliance. Unless an urban AFFH contains a private right of action, there is no match for the threat of withdrawn or reduced federal funding by not complying with HUD.⁴⁵ Nor would non-compliance with a local ordinance serve the same deterrent effect on other cities and parties.

⁴¹ 24 C.F.R. § 5.154(d).

⁴² 24 C.F.R. § 5.162 (2018).

⁴³ 24 C.F.R. § 5.154(d)(2) (“Analysis of data. Using HUD-provided data, local data, local knowledge, including information gained through community participation, and the Assessment Tool, the program participant will undertake the analysis required by this section.”).

⁴⁴ See Newman & Wyly, *supra* note 2, at 27 (citing Rowland Atkinson, *Measuring Gentrification and Displacement in Greater London*, 37 URB. STUD. 149, 163 (2000)).

⁴⁵ States, however, could—and probably should—consider adopting an AFFH law that binds some or all municipalities, or for certain kinds of policy enactments, under threat of reduced state aid. Not only would this have a statewide deterrent effect, but it could serve as a powerful laboratory for other states’ laws.

C. *Trade-Offs in Going Local: Protected Class Limitations and Lack of Intersectionality*

The pros to a local, instead of a federal, AFFH may seem obvious—more tailored and predictable results in local context, more efficient and timely compliance mechanisms, and, perhaps, less politicized discretion to enforce the law. However, an urbanized AFFH has the added advantage of correcting for salient issues with which the FHA struggles awkwardly—namely, the limitation to protected classes and the problem of taking intersectionality into account.

The FHA bars discrimination against people based on race, color, religion, sex, familial status, national origin, and “handicap.” For most of its history, the FHA has dwelled in the regions of race, sometimes using the construct as a proxy for class. Economic discrimination as a suspect basis would have opened up the Act to interest convergence among poorer whites and people of color. Not doing so (for reasons that seem jurisprudentially obvious) inadvertently meant that fair housing would forever be associated with Black people and, increasingly, brown people. In the notice and comment period prior to adopting the AFFH Rule, HUD was questioned about its statutory authority to extend coverage on the tacit basis of poverty.⁴⁶ Its response reads like a summary of decades-long fights about proxy categories and the problem of affordability that currently grips most of the country’s metropolitan areas:

HUD would note that the majority of its programs are meant to assist low-income households to obtain decent, safe, and affordable housing and such actions entail an examination of income. . . . Accordingly, it is entirely consistent with the Fair Housing Act’s duty to affirmatively further fair housing to counteract past policies and decisions that account for today’s racially or ethnically concentrated areas of poverty or housing cost burdens and housing needs that are disproportionately high for certain groups of persons based on characteristics protected by the Fair Housing Act.⁴⁷

⁴⁶ Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42272, 42283 (July 16, 2015) (to be codified at 24 C.F.R. pt. 5, 91, 92, 570, 574, 576, 903).

⁴⁷ *Id.*

This is a convoluted truth. HUD's program assistance to low-income households is a direct result of the persistent effects of historic discrimination in housing and beyond, many of the federal government's own doing.⁴⁸ But it would be more powerful and direct if the FHA had even a source-of-income bar like many states and cities already have.⁴⁹ An urban AFFH can end this limitation legislatively.

Another benefit of an urban AFFH is that its terms can be made available to an analysis of harms compounded by intersectionality. Intersectionality reflects the reality that harms for weak housing market participants often occur concentrically, where, for example, one's gender contributes to vulnerabilities that are then compounded or exploited because of one's race, source of income, *and* sexual orientation. In other words, the awkward term—intersectionality—elegantly sums up what really happens to many people in the world. Under the FHA, we make them choose an identity or two upon which to advance a theory of harm. When this dilemma was raised in comments to HUD, it responded by saying that, at least regarding data collection responsibilities under AFH, the rule contains the following: “Rule clarification. In section 5.154(d)(2), which pertains to the program participant's analysis of data, HUD clarifies that such analysis pertains to ‘each protected class.’”⁵⁰ Again, this awkwardness is the convolution of truths that newer policies, enshrined in new ordinances, can replace more clearly. This linguistic growth further represents what is “progressive” about progressive federalism.

In sum, I have argued that the groundwork for an urban fair housing policy rests on the FHA itself, which contains two explicit interests—anti-discrimination and anti-segregation—and a third—housing stability—that derives from them and is contained somewhat explicitly in the AFFH regulatory scheme. We do not know what will

⁴⁸ See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 171 (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (2006); DAVID D. TROUTT, *THE PRICE OF PARADISE: THE COSTS OF INEQUALITY AND A VISION FOR A MORE EQUITABLE AMERICA* (2013); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 754 (1993); David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 428–30 (2000).

⁴⁹ See *infra* note 64.

⁵⁰ Affirmatively Furthering Fair Housing, 80 Fed. Reg. at 42284.

happen to the federal scheme. Knowing what it means, however, offers critical guidance to cities in their obligations to the general welfare. In fact, these three fair housing interests help us to understand a lot about the functions of cities and the uses of municipal power in general. If exercise of the police power to protect the general welfare meant only promulgating rules to maximize tax rates and increase the wealth of the biggest resident consumer-voters, then we would have no need for laws to prohibit discrimination and segregation. Of course, this has been the fifty-year-old fight between fair housing and police power in American suburbs. Gentrification brings the issue squarely into the cross-hairs of big city policy. What the complex AFFH rules demand of cities seeking federal funds is little short of a housing-related plan for equitable living. The demand recognizes that the structure of opportunity mirrors the structure of inequality—that is, it is rooted in proximity to strong institutions and hindered by a lack of access. Since this demand should be co-extensive with the obligations of city power, it follows that we do not actually need a federal stick or carrot approach in order to do it. Cities should do this because equitable access to the sources of opportunity within them is a democratic obligation embedded in municipal authority and the historic role of cities.

II. PROPOSAL: AN URBAN AFFH REGIME WITH FOUR ILLUSTRATIVE REFORMS

But what would it actually look like to satisfy that democratic obligation under an urban AFFH regime? In short, it would entail several intersecting policy protections tailored to specific city characteristics but joined by a common fealty to the three FHA interests: non-discrimination, anti-segregation, and housing stability. It is worth noting here that not only do the three together constitute much of what we mean by “equity”; they also encompass common notions of inclusion.

This proposal for an urban or localized AFFH found expression in work my center has done on behalf of the city of Newark, New Jersey. The city’s mayor, Ras Baraka, sought recommendations on how to ensure that the benefits of nascent downtown development reached the most economically depressed of the outer ward neighborhoods and that any gentrification that occurred did not lead to displacement of current Newarkers. The request may be viewed as a fundamental question about

how cities do equitable growth in the age of gentrification. Its remedy requires an affirmative approach to fair housing interests.

Our supporting research—available in a study called *Making Newark Work for Newarkers*⁵¹ and related issue briefs—showed that Newark, like most American cities, is facing an affordability crisis—in its case, acute and longstanding. However, unlike cities like New York or San Francisco, or even nearby Hoboken, its population is squarely working class and poor, with a median income of below \$35,000.⁵² It lacks the wealth even of Detroit’s 7.2-mile inner ring of finance development. Foreclosures and real estate speculation have increased vacancy. The city has a substantial amount of subsidized housing (about twenty percent). Rare for many cities, it also has a substantial percentage of units that qualify under the city’s rent regulation law.⁵³ Evictions are common. Homelessness is rising.⁵⁴ Only a small percentage of its residents are middle class, though professional jobs in the city are held by commuters who live elsewhere. Newark employment for Newarkers is a significant problem, with less than one in five jobs held by a resident of the city.⁵⁵

Rather than view these features in plus or minus terms, we saw this as simply what is.⁵⁶ Our housing-based conclusions revolve around a

⁵¹ DAVID D. TROUTT, RUTGERS CTR. ON LAW, INEQUALITY & METRO. EQUITY, *MAKING NEWARK WORK FOR NEWARKERS: HOUSING AND EQUITABLE GROWTH IN THE NEXT BRICK CITY* (2018), <https://law.rutgers.edu/sites/law/files/CLiME%20Report%202018.pdf> [<https://perma.cc/Y6PM-P6CW>].

⁵² See Eric Kiefer, *Essex County Has Some of Worst Income Gaps in New Jersey: Census*, PATCH (Sept. 15, 2017, 8:00 AM), <https://patch.com/new-jersey/westorange/essex-county-has-some-worst-income-gaps-new-jersey-census> [<https://perma.cc/8LKP-Y464>].

⁵³ Although registration rates are uneven, making precise numbers difficult, more than half of all housing units in Newark are subject to rent control. TROUTT, *supra* note 51, at 11–12. For the ordinance itself, see NEWARK, N.J., RENT CONTROL CODE tit. 19, ch. 2 (2017).

⁵⁴ Even estimates of Newark’s homeless population are notoriously inaccurate, but the city has the highest number of homeless individuals and families of any other municipality in Essex County, which in turn has the highest in New Jersey. See MONARCH HOUS. ASSOCS., *ESSEX COUNTY’S POINT-IN-TIME ESTIMATES OF THE HOMELESS* 27 (2017), <https://monarchhousing.org/wp-content/uploads/njcounts17/2017PITReportEssex.pdf> [<https://perma.cc/QZ45-T7HD>].

⁵⁵ See N.J. INST. FOR SOC. JUSTICE, *BRIDGING THE TWO AMERICAS: EMPLOYMENT & ECONOMIC OPPORTUNITY IN NEWARK AND BEYOND* (2017), https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/Bridging_the_Two_Americas_rev._5-11a_Without_Crop_Marks.pdf [<https://perma.cc/DF8G-QUT8>].

⁵⁶ Nevertheless, it is not a stretch to note that many of Newark’s most troubled indicators are the legacy of almost total white flight after the 1967 Uprising. Since the major *Mount Laurel*

policy of housing stability and non-displacement. They can be summarized as follows. First, the city needed to preserve, if not expand, its inventory of income-restricted housing. Newark, like most cities, lost significant amounts of public housing. Second, the rent control ordinance and operations must function at a very high level. Third, anti-eviction reforms are critical. Low-income tenants were especially vulnerable to court-ordered evictions because only landlords, and rarely tenants, were represented by counsel in court proceedings.⁵⁷ Fourth, systemic anti-discrimination reforms had to be installed to prevent the kind of predatory lending that ravaged cities like Newark in the early 2000s.⁵⁸ Finally, Newark had to encourage the kind of development the city wanted, rather than simply offer generous subsidies and redevelopment packages that fostered only high-end residential growth. Cities need business development in order to grow and sustain a substantial middle class. Unlike many cities that gentrified rapidly, however, economic growth had to follow an inclusive plan to ensure that the benefits of greater resources—tax base, schools, infrastructure, cultural amenities—redound to the benefit of *all* Newarkers, present and future. In other words, as our work showed, Newark has to become a model of affirmatively furthering fair housing policy with or without significant federal help.

But, that is Newark. Its lessons join other cities to provide a broader paradigm for equitable inclusion. For starters, the urban AFFH

decisions announced by the New Jersey Supreme Court from 1975 to 1983, there has been a *de facto* statewide expectation that affordable housing in New Jersey will be based disproportionately in urban areas. See Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 861–62 (2011). See generally DAVID L. KIRP, JOHN P. DWYER & LARRY A. ROSENTHAL, *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1997).

⁵⁷ For an authoritative study of Newark tenants' need for representation in landlord-tenant court, see Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1 (2016).

⁵⁸ For an analysis of foreclosures affecting Newark since before the Great Recession, see *Newark Homewrecker: The Impact of the Foreclosure Crisis on Newark*, N.J. COMMUNITIES UNITED (Apr. 2013), https://d3n8a8pro7vhmx.cloudfront.net/unitednj/pages/68/attachments/original/1366224689/Newark_Homewrecker_Final_Report.pdf?1366224689 [https://perma.cc/4W3K-NKA5]. For an analysis of the continuing problem of foreclosures in New Jersey and Essex County, see Erin Petenko, *N.J. leads the Nation in Foreclosures*, NJ.COM (Jan. 25, 2018, 7:39 AM), https://www.nj.com/data/2018/01/foreclosure_rates_in_all_21_counties_rankeddddddd.html [https://perma.cc/CVG8-PFEJ].

idea *qua* policy would be greater than the sum of its parts. For example, cities that adopt such a policy would have to incorporate its interests into zoning approvals for residential construction and theoretically could be challenged (depending on the legislative language) for failing to do so. The same can be said for decisions to offer subsidies to developers for projects that have the probable effect of increasing segregation in a given city neighborhood. In other words, the dual functions of cities to protect the general welfare of residents while revitalizing the economic operations of business would duel. However, this particular analysis focuses on the former while recognizing the importance of the latter. In order to offer a more concrete sense of reform, the remainder of this Essay illustrates four component housing reforms of a prospective urban AFFH program and describes some of the reasons these particular reforms are especially relevant to a broader program of equitable inclusion in a growing city. They are:

- (A) Inclusionary zoning;
- (B) Civil right to counsel in landlord-tenant cases;
- (C) Rent control; and
- (D) Voucher discrimination and foreclosure prevention.

A. *Inclusionary Zoning*

Inclusionary zoning is broadly defined as zoning that conditions approvals for public funding and/or variances in exchange for a certain number of affordable units located either within a project or paid for off-site through a housing trust fund. This mixed-income development idea depends on its existence for growth.⁵⁹ If developers are not building residential construction at a certain pace and magnitude, the ordinance sits dormant. During periods of growth, inclusionary zoning ordinances ensure that areas attractive to market-rate developers—often, but not only, gentrifying areas—will accommodate the housing needs of lower-

⁵⁹ See OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* 621–22 (3d ed. 2009); Jay M. Zitter, *Validity, Construction, and Application of Inclusionary Zoning Ordinances and Programs*, 22 A.L.R. 6th 295, § 2 (2007); *Inclusionary Zoning and Mixed-Income Communities*, U.S. DEP'T HOUSING & URB. DEV. (Spring 2013), <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html> [<https://perma.cc/SU5L-LFD8>] (describing generally inclusionary zoning or housing programs). *But see* Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 1001–03 (2010) (arguing that only a minority of tenants benefit as ordinances raise surrounding market rents).

income residents. Therefore, this reform targets the FHA interest in anti-segregation, though it may provide other benefits for inclusive growth. The ordinances vary greatly in conditions, requirements, and in lieu provisions.⁶⁰

Even the most stringent inclusionary zoning ordinances probably do more to signal a city's policy preference for economic inclusion than to substantially increase the supply of affordable housing or economically integrate neighborhoods. Newark's ordinance was passed recently and is considered aggressive in making in lieu payments for off-site housing more difficult.⁶¹ However, it is worth noting that developers who pay a substantial price into a housing trust fund, rather than build on-site affordable units, may make feasible housing development in less costly areas of the city. When that is the case, cities have the opportunity to mature local developers, insist on minority labor and equity participation, work with educational and vocational anchors, enlist trade unions, and build both affordable housing and employment capacity for residents and struggling developers.

B. *Civil Right to Counsel*

The greatest single expression of housing instability is losing one's home to eviction. Nationally, eviction rates have risen in part because landlords in gentrifying markets want to replace lower paying tenants with higher paying ones. Thus, rising rents may ultimately put pressure on tenants in areas where owners believe they can earn greater profits. Of course, there are other reasons people are evicted from their homes, including simple nonpayment of the rent obligation. Yet, research consistently shows a fault line in the system that enables eviction as a tool of displacement: it is legal one-sidedness. Tenants who go to landlord-tenant court without a lawyer almost always lose, and indigent tenants are almost never represented by counsel. The slow movement

⁶⁰ At least ten percent of all units in new residential construction must be made affordable based on the criteria in Napa, California's ordinance. NAPA, CAL., MUN. CODE § 15.94.050 (2011). San Jose, California's ordinance requires fifteen percent affordability for new construction with twenty units or more, though waiver provisions exist. SAN JOSE, CAL., MUN. CODE § 5.08.400 (2018).

⁶¹ Newark, N.J., Ordinance Amending Title 41 of the Municipal Code of the City of Newark New Jersey, To Establish a New Chapter Entitled "Inclusionary Zoning For Affordable Housing." Deferred 6PSF-c 092017 (Oct. 4, 2017).

for a civil right to counsel in eviction proceedings⁶² recognizes this imbalance and offers the civil *Gideon* remedy that courts have already recognized in other civil proceedings⁶³ where, like liberty, unrepresented litigants face the loss of “consequences of magnitude.”⁶⁴

There are many challenges associated with a civil right to counsel.⁶⁵ It is expensive, not only in paying counsel, but in the collateral effect on landlord-tenant courts where the vast majority of cases never go to trial. Represented tenants will be more apt to try cases. And by whom? New York City, the first jurisdiction to pass such a law,⁶⁶ will rely primarily on its considerable infrastructure of Legal Services and Legal Aid Society housing lawyers in a geographic roll-out across the five boroughs. Yet a local government’s decision to put a right up for bid by providers of legal services may attract providers who lack the expertise in handling such cases, thereby undermining the right. And what role do courts play

⁶² See AM. BAR ASS’N, MODEL ACCESS ACT 104: RECOMMENDATION AND REPORT (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_104_revised_final_aug_2010.authcheckdam.pdf [https://perma.cc/B2GT-G6B5].

⁶³ See, e.g., *Lassiter v. Dep’t of Soc. Servs. of Durham Cty, N.C.*, 452 U.S. 18 (1981) (indigent parents’ right to appointed counsel in termination proceedings).

⁶⁴ Since 1998, New Jersey’s rules for the practice of law in the municipal courts have established this criterion for determining when an indigent litigant is entitled to appointed counsel. John H. Klock, *Second Appendix to Part VII. Guidelines for Determination of Consequence of Magnitude*, 2A N.J. PRAC., COURT RULES ANN. (2018 ed.) (Rule 7:3-2 of that Comprehensive Revision provides for the assignment of counsel “[i]f the court is satisfied the the defendant is indigent and that the defendant faces a consequence of magnitude or is otherwise constitutionally or by law entitled to counsel . . .”). The right to counsel has been applied in civil actions involving both sides to domestic violence disputes by joint resolution, see Assemb. J. Res. 115, 218th Leg., 1st Sess. (N.J. 2018), and to indigent parents in adoption proceedings involving termination of parental rights, see *In re Adoption of J.E.V.*, 141 A.3d 254, 264–65 (N.J. 2016).

⁶⁵ Mark C. Brown, Comment, *Establishing Rights Without Remedies? Achieving an Effective Civil Gideon by Avoiding a Civil Strickland*, 159 U. PA. L. REV. 893, 916–17, 926–27 (2011); Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMP. POL. & C.R. L. REV. 697, 717–18 (2006); John Pollock, *Walk Before Running: Implementation of a Right to Counsel in Civil Cases*, 14 MGMT. INNOVATION EXCELLENCE J. 6 (2010). For a list of 2018 bills that address the right to counsel in civil cases, see *2018 Civil Right to Counsel Bills*, NAT’L COALITION CIV. RIGHT COUNS., http://civilrighttocounsel.org/legislative_developments/2018_civil_right_to_counsel_bills [https://perma.cc/PYF9-KCWZ] (last visited Dec. 24, 2018).

⁶⁶ N.Y.C. Council No. 2017/136 (2017) (amending Title 26 of the NYC administrative code by adding a new chapter entitled “Chapter 13: Provision of Legal Services in Eviction Proceedings”).

in the administration of such a right? Are they honest brokers of a reform that will greatly increase burdens on them, and how does a municipal executive and/or legislative branch cooperate with a judicial branch that may be county- or state-based in determining the best way to balance those added burdens? Finally, how is eligibility determined? New York City, for instance, will begin with free counsel to those defendants whose incomes fall within 200 percent of the poverty level (expected to expand to 500 percent in years to come) primarily because New York law requires mandatory care for the homeless. The cost of preventing evictions is predicted to offset greater costs of sheltering. Many states do not impose such costs on cities, which may affect eligibility rules.

C. *Rent Control*

Rent control or rent stabilization is one of the earliest expressions of regulatory localism to promote housing stability. Even more than inclusionary zoning, rent control has enjoyed a checkered history, with several states having banned it entirely. From an equity and affordability perspective, the strongest support for banning rent control comes from studies in mature real estate markets like New York City and San Francisco where, despite preventing displacement of rent control tenants, regulation has the effect of driving up non-controlled rents.⁶⁷ Once again, a city like Newark offers a counter-weight. Almost half of residential units in the city are subject to an ordinance that mandates rent increases of no more than four percent per year,⁶⁸ with other significant restrictions on increases even for rehabilitated but occupied units. For substantially (i.e., equal in cost to at least a year's rent) rehabilitated vacant units, the ordinance permits only a maximum ten percent rent increase, thus discouraging evictions for the sake of higher rents to subsequent tenants.⁶⁹ We found no evidence that rent control

⁶⁷ See STOUT RISIUS ROSS, INC., THE FINANCIAL COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL IN EVICTION PROCEEDINGS UNDER INTRO 214-A 19 (2016), https://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf [https://perma.cc/G9UP-73RR].

⁶⁸ Newark, N.J., Ordinance to Amend and Replace Title 19, Rent Control, Chapter 2: Rent Control Regulations; Rent Control Board by Public Initiative Ordinance (Sept. 5, 2017).

⁶⁹ *Id.* § 19:2-18.4.

(or public housing) caused market rents to rise. However, the system is only as good as its organization, communications, and enforcement. Controlling rent is a substantial government function. The system's beneficiaries are usually low- to moderate-income people, many of whom would have little leverage over owners on their own. They have to have relatively easy access to rules, the agency must be accessible to both tenants and landlords, and enforcement has to be regular and consistent. For these reasons, a city with a tax base limited by the low wages of its residents has the least resources to manage the greatest needs.

D. *Voucher Denial and Foreclosure Prevention*

The refusal of landlords to accept housing choice vouchers that pay a portion of the HUD-stated fair market rent of a low-income tenant's rent is a common practice of housing discrimination⁷⁰ and a significant contributor to segregated neighborhoods.⁷¹ A federal program deliberately designed for inclusion⁷² has morphed into a stamp of inferiority in many parts of the country where voucher holders are shunned. Although the FHA itself does not contain a prohibition on source of income, many states have passed such laws.⁷³ Many gentrifying urban neighborhoods were de facto Section 8 zones where

⁷⁰ See Jenna Bernstein, Note, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1412 (2010); Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 159 (1996).

⁷¹ See Erin Graves, *Rooms for Improvement: A Qualitative Metasynthesis of the Housing Choice Voucher Program*, 26 HOUSING POL'Y DEBATE 346, 352-53 (2016); *Continuing Barriers to Housing Choice and Integration in HUD's Section 8 Voucher Program*, POVERTY & RACE RES. ACTION COUNCIL (Dec. 14, 2010), www.prrac.org/pdf/Section_8_fair_housing_barriers_12-15-10.pdf [<https://perma.cc/LSD4-T69C>].

⁷² 42 U.S.C. § 1437f (2018).

⁷³ See N.J. STAT. ANN. § 2A:42-100 (West 2002), *repealed by* L.2002, c. 82 § 7; *Franklin Tower One, L.L.C. v. N.M.*, 725 A.2d 1104 (N.J. 1999). For a state-by-state analysis, see *State and Local Source-of-Income Nondiscrimination Laws: Protections that Expand Housing Choice and Access to Healthy, Stable Homes*, POVERTY & RACE RES. ACTION COUNCIL, https://prrac.org/state-and-local-source-of-income-nondiscrimination-laws_protections [<https://perma.cc/8RWF-2PVR>] (last visited Jan. 11, 2019).

vouchers were traditionally accepted, if not sought, by landlords.⁷⁴ Gentrification changes this willingness, and discrimination against voucher holders becomes one more exercise by owners hoping to profit from markets with rising rents.⁷⁵ Tenants and prospective tenants can always sue under their state's law, if the states have one, or, if the facts permit, on a theory of racially disparate impact under the FHA itself.⁷⁶ As we have seen in the right to counsel discussion, however, tenants do not often sue to enforce legal rights because they cannot. The very lack of resources that makes them eligible for public housing subsidies cripples their capacity to become private attorneys general.

A city with a policy of AFFH need not wait for individual tenants to sue to prevent a practice in violation of its laws. Recognizing the imbalance of power and resources between owners and low-income tenants, cities can address these fair housing interests by creating an "Office of Housing Equity" (or Discrimination) whose primary function is to monitor rental practices, advise tenants directly, and pursue complaints.

The latter role suggests that the city itself has standing to vindicate housing discrimination within its borders, an assertion that is also behind preventing mortgage foreclosures. Complicated by the range of reasons that give rise to defaults, foreclosure crises have ravaged working-class cities like Newark's in part because of the imbalance of resources between borrowers and lenders, but also because of discrimination.⁷⁷ The need to finance the repair of an old roof often coincides with the difficulties of finding reputable lenders in particular

⁷⁴ See Alana Semuels, *How Housing Policy Is Failing America's Poor*, ATLANTIC: BUS. (June 24, 2015), <https://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650> [<https://perma.cc/KGS4-2YCT>].

⁷⁵ See MERYL FINKEL & LARRY BURON, STUDY ON SECTION 8 VOUCHER SUCCESS RATES (Nov. 2001), http://www.huduser.org/Publications/pdf/sec8success_1.pdf [<https://perma.cc/5BW2-LL2C>]; Manny Fernandez, *Bias Is Seen as Landlords Bar Vouchers*, N.Y. TIMES, Oct. 30, 2007, at A1.

⁷⁶ See Tamica H. Daniel, Note, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination Under the Federal Fair Housing Act*, 98 GEO. L.J. 769, 779–87 (2010).

⁷⁷ Jonathan Herschaff, Karl Russo & Susan M. Wachter, *Subprime Lending: Neighborhood Patterns Over Time in US Cities* (Univ. of Pa. Inst. for Law & Econ., Research Paper No. 06-19, 2006), <https://ssrn.com/abstract=920847>; Emily Badger, *The Dramatic Racial Bias of Subprime Lending During the Housing Boom*, CITYLAB (Aug. 16, 2013), <https://www.citylab.com/equity/2013/08/blacks-really-were-targeted-bogus-loans-during-housing-boom/6559> [<https://perma.cc/9AFV-4FUM>].

city neighborhoods. During the housing boom that led to the Great Recession, predatory lenders targeted these zip codes.⁷⁸ Balloon payments, variable interest rates, and other features of subprime loans were disproportionately made to moderate- and middle-income homeowners of color regardless of credit-worthiness.⁷⁹ Newark's foreclosure crisis dramatically eroded what little middle-class wealth the city had; it continues today.⁸⁰ What we have found in working on these issues of discrimination and housing instability is a lack of public and privately accessible resources for borrowers with potential discrimination claims. I have recommended various potential actions the city could take, such as bringing claims under the FHA or engaging in reverse eminent domain to modify mortgages in default.⁸¹ However, these again are attractive but expensive and lengthy efforts that carry significant risks for cities. A more direct course would be to endow a newly created Office of Housing Equity (or Discrimination) with the expertise and capacity to keep effective records, conduct its own audits, and bring enforcement actions against unscrupulous lenders in a context of more equal power.

⁷⁸ Badger, *supra* note 77.

⁷⁹ See Justin P. Steil & Dan Traficonte, *A Flood—Not a Ripple—of Harm: Proximate Cause Under the Fair Housing Act*, 40 CARDOZO L. REV. 1237 (2019).

⁸⁰ See, e.g., MIKE LITT & EDMUND MIERZWINSKI, U.S. PUB. INTEREST RESEARCH GRP., PREDATORY LOANS & PREDATORY LOAN COMPLAINTS: THE CFPB'S CONSUMER COMPLAINT DATABASE SHOWS THE NEED TO STOP PAYDAY DEBT TRAPS (2016), <https://uspirg.org/sites/pirg/files/reports/USPIRG%20Payday%20Report.pdf> [https://perma.cc/PUR6-8LYA] (chronicling the move among predatory lenders to payday lending) (last visited July 23, 2018).

⁸¹ In *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017), the Court ruled that cities may have standing to sue in their own right for harms arising from predatory lending practices against their citizens. Robert Hockett argues persuasively for cities to consider a program of "reverse eminent domain" under which cities would exercise eminent domain to take underwater mortgages that servicers refused to modify and then, through a financial intermediary, extend them back to borrowers at their fair market price. See Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121 (2012). When the Richmond, California City Council began consideration of such a move, they were promptly sued by several banks. See Complaint, Wells Fargo Bank, N.A. v. City of Richmond, No. 13-CV-03663 (N.D. Cal. Aug. 7, 2013).

E. *Enforcement: Carrots and Sticks in an Urban Garden*

The last, but most important, element in an urban fair housing policy is—like all civil rights laws—enforcement. Section 3608's command to "affirmatively [] further fair housing" has been in the Act for fifty years, mostly as a regulatory paper tiger. The attention it has gotten in recent years is in part a recognition of its untapped powers. Those powers come with enforcement threat. Under the 2015 Rule, HUD recipients, including municipalities, now risk a determination that their AFH is insufficient or their efforts incomplete.⁸² They could lose millions of dollars of federal funding that recipients often see as basic operating expenses. Without that threat, what deterrent power does an urban AFFH have to enforce its terms?

Any system of incentives associated with fair housing compliance has to begin by pulling back, as we have here, and seeing fair housing as an integral part of urban governance—although one with distinct principles of equity attached. I have argued that the displacement effects of widespread gentrification have reignited the need for cities to take into account housing stability as a third interest intrinsic to fair housing policy. However, gentrification arose as a neoliberal policy response to the very real fiscal threats faced by cities amid post-industrialization and the withdrawal of substantial federal support. One person's gentrification is merely another person's revitalization. This is the fundamental tension in enforcing an interest in housing stability upon an entrenched neoliberal approach to municipal finance that is based in significant part on real estate development. Cities need the growth that gentrification represents.

But cities might also get the growth they want. Development is conditioned on all kinds of rules, fees, and metrics. Therefore, the broad answer to the question of how cities enforce the policies I argue for here is two-fold. First, many of the provisions above already contain their own enforcement mechanisms. An Office of Housing Equity (or Discrimination) must be built upon certain inherent enforcement power. The same is true for rent control operations. A civil right to counsel is largely self-executing, as long as it is solvent and administratively efficient. Even reforms not discussed here, such as

⁸² See 24 C.F.R. § 5.154 and discussion *supra* note 39.

community planning boards as a specific step toward enhancing community participation in development decisions, contains a measure of enforcement by the terms of its existence. In other words, urban fair housing policy, if designed right, can embed enforcement mechanisms in its structure, rather than making it a separate thing.

Second, sometimes enforcement has to be a separate thing in order to be truly structural. That is, the overall policy itself must be accountable to the idea. The sum must be at least as good as its parts. How would we know? If measures of displacement showed that Newark, for instance, was losing lower income residents (or effectively barring new ones) despite making all the specific reforms I outline here, then we could not say that it had adequately protected the interest in housing stability—even if it could somehow show that discrimination was down and integration was up.

This sounds like an equality-of-outcomes problem, but it is really an issue of policy sustainability. Cities *must* remain places not only of jobs and economic growth, but also of racially and economically inclusive living arrangements, radical integration, and pluralist democracy. As the stratification of suburbs has shown and the disenfranchisement of both rural and exurban areas,⁸³ there is no other place to do this. Therefore, this suggests three general principles of fair housing enforcement. First, opportunities must abound to reward good institutional behavior. Developers, landlords, non-profits, and city agencies whose work or policies demonstrably and affirmatively further the goals of fair housing should be regularly identified and rewarded with greater opportunities for growth. This sets new norms of excellence to which others may aspire. It may be publicized through an “equity score card” of sorts, as long as its administration is viewed as rigorous, independent, and objective.

Second, violators must risk business losses. The institutions that consistently underperform by undermining fair housing (e.g., by being successfully sued for discriminatory patterns and practices or the target of attorneys general investigations) must lose eligibility for subsidies, consideration for city-funded projects, and even face voiding of

⁸³ For two of the most authoritative accounts of rural, exurban, and unincorporated area disenfranchisement, see Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008), and Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010).

contracts with city agencies. Within the bounds of due process, their violative conduct should also be made public for scrutiny, transparency, and, most importantly, deterrence. Again, an urban fair housing policy must establish governing norms whose violations carry public consequences.

Third, states should get involved and condition funding on AFFH compliance. Progressive federalism, a norm-based version of regulatory localism, is the central power I advance in this Essay. Yet there is no question that these principles and their enforcement would be far more effective if exercised at the state rather than at the city level. Adopting this proposal as state law has the advantages of greater reach and uniformity while preempting evasion by exit to non-participating municipalities. State enforcement mechanisms tied to funding could be as significant as federal funding. However, statewide adoption also opens up the policy to a greater diversity of political interests, including non-urban opponents, where legislative compromises may render key provisions less effective. This is a hard tension to resolve in the abstract. Assuming a state would pass such a law—and I recognize that is no small assumption—the statehouse battles may be just the public reckoning with urban fair housing the country has needed for fifty years.

CONCLUSION

Though gentrification has been an issue in the redevelopment of American cities for at least thirty years, only now—in light of its effects on displacement, affordability, and wealth inequality—has it become a key feature of urbanism. Given what it says about inclusion, exclusion, and housing dynamics, gentrification also necessarily brings fair housing policy to the fore of urban governance and local government law. I have argued in this Essay that the 2015 AFFH Rule promulgated under the federal Fair Housing Act offers particular guidance for cities in considering such policy, even though the Act's fiftieth anniversary also marks the low point in federal interest in its terms. Cities should recognize the framework as protecting three interests urgently relevant to equitable economic expansion: anti-discrimination, anti-segregation, and housing stability. Cities can adapt AFFH as an urban fair housing rubric by specifically implementing reforms such as inclusionary zoning, rent control, right to civil council, and voucher and foreclosure

discrimination enforcement. This, I have argued, is a fundamental responsibility of municipal law, which, in an era of increasing experimentation with progressive federalism, must navigate the often contradictory demands of urban economic growth with that of pluralistic democracy.