Fighting for a Place Called Home: Litigation Strategies for Challenging Gentrification

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ABSTRACT

Since the passage of the 1968 Fair Housing Act (FHA), there have been clear legal tools and strategies for combating segregation and promoting diverse cities and towns. While the FHA and zoning laws have been used successfully to ensure that formerly all-white city neighborhoods and towns are accessible to diverse residents, a new problem is emerging for those who value integrated neighborhoods: the reversal of white flight. The 2010 Census showed a strong demographic shift of white residents moving back to the core of cities while black and Hispanic residents are pushed to the cities' perimeters. This racialized displacement is called gentrification, and there has been little analysis of how legal strategies could be used to challenge it in order to ensure that minority communities receive the benefits of revitalizing city neighborhoods and remain in their homes.

This Comment will explain the role gentrification plays in many cities and the legal strategies available for ensuring that cities remain diverse and affordable. It explores how attorneys can use zoning laws to preserve or create more affordable housing in cities even before the gentrification of a neighborhood is underway, environmental impact statements to fight proposed luxury developments that often are built near the beginning or middle of the gentrification process, and the FHA to preserve affordable housing and to challenge the building of luxury developments in neighborhoods that have undergone significant gentrification.

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I am indebted to my coworkers at New York State Tenants & Neighbors and at the Mass Alliance of HUD Tenants for teaching me about the politics of gentrification; to the tenant leaders I worked with in Harlem, the Bronx, Brooklyn, Roslindale, Hyde Park, and Roxbury for graciously allowing me into their lives to witness the personal effects of gentrification; and to the tenacious legal services attorneys at the Legal Aid Society and Greater Boston Legal Services for piquing my curiosity in the topic of this Comment. I am also grateful to Professor Gary Blasi for guiding me throughout the research and writing of this Comment.

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INTRODUCTION[1]

The fight against housing segregation in America was one of the most important and contentious struggles in the Civil Rights Movement of the 1960s.[2] After decades of government-authorized segregation, the U.S. Congress passed the Fair Housing Act (FHA)[3] in 1968 to prohibit racial discrimination in housing.[4] In early judicial opinions interpreting the FHA, courts noted that the purpose of the statute was to encourage integrated housing patterns and to ensure that segregation did not hinder opportunities for racial minorities.[5] The FHA and similar laws have been used ever since to challenge segregation—especially the existence of all-white suburbs and towns.[6]

Today, the threat of segregation occurs not only in affluent suburbs and towns that hope to keep out low-income residents—especially low-income residents of color—but also in the inner city. Census data from 2010 shows that white residents are increasing in their share of the population in many city neighborhoods and are turning neighborhoods from majority-minority to majority-white.[7] The new white residents generally have higher incomes than the longtime residents of the neighborhood, and their greater household incomes allow them to pay more in property taxes or in rent.[8] These higher payments then drive up housing prices for their neighbors, and the increased cost of housing results in longtime residents being unable to afford to continue living in their homes.[9]

The process of higher-income residents displacing lower-income ones is called gentrification. Gentrification often has a racial component—usually white residents displace residents of color—which results in the resegregation of city neighborhoods. White, higher-income residents move into a low- or

1. The title of this Comment was inspired by *Tivoli: A Place We Call Home*, a 2010 exhibit at the Brooklyn Historical Society. *Exhibitions*, BROOKLYN HISTORICAL SOC'Y, http://brooklynhistory.org/sitearchive/exhibitions/tivoli.html (last visited Aug. 18, 2014). My former employer, New York State Tenants & Neighbors, helped organize the tenants at Tivoli Towers, the complex in Brooklyn the exhibition focused on.
2. Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PRO PUBLICA (Oct. 29, 2012, 12:00 AM), http://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law.
3. 42 U.S.C. §§ 3601–3631 (2006).
4. *Id.*
5. *See, e.g.*, Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973).
6. *See infra* note 100 and accompanying text.
7. *See infra* Parts II–III.
8. *See infra* Part II.
9. *See infra* Part II.

moderate-income neighborhood and drive up prices until the longtime residents of color are forced out by rising rents or property taxes, resulting in a heavily white and more expensive neighborhood.

Gentrification should worry social justice activists, housing advocates, and other city residents for a number of reasons. First, gentrification by definition devastates the economic and racial diversity of city neighborhoods.[10] For anyone who took the goals of the FHA's passage seriously or who cares about keeping cities as diverse enclaves full of opportunities for all types of residents, this homogenizing process is distressing. Second, gentrification harms the low- and moderate-income residents that are displaced during the process. They often suffer physical, mental, and financial setbacks from being unwillingly displaced. Additionally, displaced residents often end up living farther from the plethora of jobs in city centers, which makes it more difficult for them to pull themselves out of poverty.[11] Third, gentrification may increase general environmental pollution because displaced residents often have to travel farther to their jobs or to visit friends and family in the old neighborhood.[12] In sum, gentrification has the generalized effects of homogenizing cities and of contributing to pollution while also having the individualized effect of creating hardships for each person who has been forced out of her home.

For these reasons, it is important to challenge gentrification to ensure the continued diversity of American cities and the health and wellbeing of low- and moderate-income city residents. While organized residents, government officials, and other policymakers will play crucial roles in fighting gentrification, attorneys may also be able to use litigation in innovative ways to aid in the fight. This Comment focuses on litigation strategies for challenging gentrification, specifically on the sorts of strategies that could be utilized for preserving the affordable housing in gentrifying neighborhoods that many low- and moderate-income residents rely on to keep their housing costs in the city reasonable.

Part I of this Comment describes the types of affordable housing available in cities—housing that is both the target of gentrifying efforts and the focus of some antigentrification litigation strategies. Part II explains the gentrification process and the role of both individual choice and government or institutional actions in promoting gentrification. Part III details

10. *See infra* Part III.
11. *See infra* Part III.
12. *See infra* Part III.

gentrification's harmful effects, including the homogenization of city neighborhoods and the negative health outcomes for displaced residents.

Part IV explores certain legal strategies that can be used to protect low-income residents and avoid the resegregation of neighborhoods. These legal strategies include enforcing zoning laws to preserve or create more affordable housing in cities even before the gentrification of a neighborhood is underway, using federal and state environmental impact statements (EIS) to fight proposed luxury developments, and employing the FHA's prohibitions on actions that have an adverse impact on racial minorities or that perpetuate segregation to preserve affordable housing and to challenge the building of luxury developments in neighborhoods that have undergone significant gentrification.

I. THE CONTEXT: CITY-SITUATED AFFORDABLE HOUSING

To understand how this Comment proposes to challenge gentrification, it is necessary to know a bit about the affordable housing located in the low-income city neighborhoods that are often targeted for gentrification.[13] Affordable housing programs determine in part where low- and moderate-income families live, and the vast majority of buildings in affordability programs are located in urban areas.[14] These affordable housing programs keep rents lower than the market rate so that current residents can afford their rent, especially as rents rise around them. Therefore, the programs sustain the families who must necessarily be displaced for the process of gentrification to occur.[15] Additionally, the buildings in these programs are ripe for private redevelopment as more expensive residences once their affordability provisions expire, which is another component of gentrification discussed in this Comment.[16]

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13. In this paper, I use the term affordable housing to refer to housing that is a part of some government program or under some government regulation that keeps rents below what they would likely rise to in a system without such regulation. This does not necessarily mean that such housing is actually affordable for many individuals or families. For a beginner- and user-friendly explanation of affordable housing, see ROSTEN WOO & JOHN MANGIN, CTR. FOR URBAN PEDAGOGY, WHAT IS AFFORDABLE HOUSING? (Rosten Woo & John Mangin eds., 2009), *available at* http://welcometocup.org/file_columns/0000/0011/cup-fullbook.pdf.
14. *See, e.g.*, CTR. ON BUDGET & POLICY PRIORITIES, HUD RENTAL ASSISTANCE IN RURAL AND URBAN AREAS (2012), *available at* http://www.cbpp.org/files/RentalAssistance-RuralFactsheetandMethodology.pdf.
15. *See infra* Part II.
16. *See infra* Part II.

Affordable housing programs take place on national, state, and local levels.[17] The national affordable housing programs currently aid almost five million households.[18] National programs—overseen by the Department of Housing and Urban Development (HUD)—include conventional public housing that is owned and operated by government Public Housing Authorities,[19] Section 236 subsidized housing for which the federal government subsidizes the interest rates on mortgages of privately owned buildings that owners then reserve for low- and moderate-income tenants,[20] Section 8 vouchers that low-income residents may use to pay rent in any privately owned building,[21] and the Low-Income Housing Tax Credit Program (LIHTC) under which each state is provided tax credits to award to low-income housing developers.[22] For every national program, eligible tenants must be low-income, defined as making no more than 80 percent of the median income in their area.[23] Some programs target even more needy families: Tenants can only make 50 percent of their area's median income to be eligible.[24] Thus, these programs generally assist those who are working class and poor.

States also have affordable housing programs that may be especially prevalent in low-income city neighborhoods. For example, Massachusetts provides state-funded vouchers for low-income tenants,[25] and New York provides low-interest loans, tax exemptions, and government subsidies through the Mitchell-Lama program in exchange for landlords charging low rents to low-

17. *See* WOO & MANGIN, *supra* note 13, at 48–79. For example, in one neighborhood of New York City, there might be a federally funded housing project, a state-subsidized building, and a city-subsidized inclusionary zoning building with affordable units. *See id.* at 48, 64, 80.

18. CTR. ON BUDGET & POLICY PRIORITIES, NATIONAL: FEDERAL RENTAL ASSISTANCE FACTS (2012), *available at* http://www.cbpp.org/files/4-13-11hous-US.pdf.

19. NAT'L HOUS. LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS § 1.3.1 (3d ed. 2004).

20. *Id.* § 1.3.4.2.

21. *Id.* § 1.3.5.1.

22. *Id.* § 1.3.11.

23. *Id.* § 2.2.1.1. For example, in 2009 the median income for a family of four in the Los Angeles area was $62,100. WOO & MANGIN, *supra* note 13, at 22. Thus, if a family of four's combined income is $49,680, they will be eligible for housing subsidized by the Department of Housing and Urban Development (HUD). In Los Angeles, about 1.5 million households are eligible for HUD-assisted housing. *See USA Median Household Income (Mature Support)*, ARCGIS, http://www.arcgis.com/home/webmap/viewer.html?services=da76de09076b4959ad005e1dc2c48049 (last updated Jan. 10, 2014). To reach the 1.5 million households number, I added the roughly 793,000 households with an income between $0 and $24,999 in Los Angeles County to the roughly 795,000 households with an income between $25,000 and $49,999 in Los Angeles County.

24. NAT'L HOUS. LAW PROJECT, *supra* note 19, § 2.2.1.1.

25. Exec. Office of Hous. & Econ. Dev., *Massachusetts Rental Vouchers*, MASS.GOV, http://www.mass.gov/hed/housing/rental-assistance/mrv.html (last visited Mar. 23, 2014).

and moderate-income residents in privately owned buildings.[26] Finally, local governments additionally have affordability programs. Perhaps the most well-known examples are local rent control and rent regulation ordinances, which limit how much landlords can increase rent.[27] Rent regulation programs exist in California, New York, New Jersey, and Washington, D.C.[28] Although stories of millionaires living in such apartments receive much media attention, in reality it is low- and moderate-income individuals who rely heavily on rent-regulated apartments: In New York City, half of all tenants living in such housing make under $36,000 each year, and a quarter of all tenants in rent-regulated housing have an income below the federal poverty line.[29]

Thus, national, state, and local affordable housing programs are important sources of assistance for low- and moderate-income families and individuals living in cities. They make it possible for such residents to afford their homes within the city. But the affordability programs do not last in perpetuity,[30] and the fact that affordable housing programs regulate rents such that tenants are not paying the potential market-rate prices for their homes makes these apartments prime targets for gentrification. Part II addresses how gentrification targets these low- and moderate-income residents.

26. TENANTS & NEIGHBORS, A FEW FACTS ABOUT MITCHELL-LAMA RENTAL HOUSING, *available at* http://tandn.org/pdf/Mitchell-Lama%20Rental%20Housing.pdf (last visited Aug. 21, 2014).

27. *See, e.g.*, *Rent Stabilization Ordinance*, L.A. HOUSING & COMMUNITY INVESTMENT DEPARTMENT, http://lahd.lacity.org/lahdinternet/RSO/tabid/263/language/en-US/Default.aspx (last updated June 25, 2014).

28. *See* Dennis Keating & Mitch Kahn, *Rent Control in the New Millennium*, SHELTERFORCE, May/June 2001, *available at* http://www.nhi.org/online/issues/117/KeatingKahn.html.

29. Patrick Markee, *FACT VS. SPIN: Who REALLY Lives in Rent-Regulated Housing?*, COALITION FOR THE HOMELESS (May 27, 2010), http://www.coalitionforthehomeless.org/fact-vs-spin-who-really-lives-in-rent-regulated-housing-2.

30. *See, e.g.*, Amy Clark, *Affordable Rental Housing: How It Works*, NAT'L LOW INCOME HOUSING COALITION (Mar. 27, 2013), http://nlihc.webfactional.com/article/affordable-rental-housing-how-it-works ("[T]he existing stock of affordable rental housing is disappearing due to deterioration and the exit of private owners from the affordable housing market. According to the National Housing Trust, our nation loses two affordable apartments each year for every one created.").

II. WHAT IS GENTRIFICATION?

There is much debate about how to define gentrification.[31] Scholars such as Rolf Goetze simply state that gentrification occurs when higher-income households move into neighborhoods that currently cater to lower-income households.[32] Other scholars define gentrification not only as the movement of higher-income residents into lower-income neighborhoods but also the displacement[33] of lower-income residents from the neighborhood that occurs as a result of this movement.[34] They state that the term gentrification only applies in circumstances where there is displacement whereas the term revitalization applies to situations where reinvestment (including the arrival of higher-income residents) occurs in a neighborhood without significant displacement of current residents.[35] For clarity, I use gentrification as these latter scholars do—to refer to situations in which higher-income residents move into a neighborhood currently housing lower-income residents and ultimately displace them—because this Comment concerns itself with fighting displacement caused by the arrival of higher-income tenants.[36] Thus, when I use the term gentrification throughout this Comment, I mean a process that leads to displacement of lower-income households in the neighborhood in question.

Gentrification causes displacement through a few different mechanisms.[37] As higher-income residents move to a neighborhood, rehabilitate

31. MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 5 (2001).

32. *See, e.g.*, ROLF GOETZE, UNDERSTANDING NEIGHBORHOOD CHANGE: THE ROLE OF EXPECTATIONS IN URBAN REVITALIZATION 24 (1979).

33. Scholars such as Rolf Goetze are skeptical of including displacement in the definition of gentrification because displacement itself is not a well-defined concept. *See, e.g.*, *id.* at 25 (arguing that displacement could be alternatively defined as when families are forced to move because of sharply increased tax bills or hiked rents, when households of two replace households of four, or when households with better income prospects replace poor households). In this Comment, I use displacement to mean that lower-income households feel pressured to move by the increase of higher-income households in a neighborhood. Reasons for such pressure could include increased rent or tax bills, lack of neighborhood businesses targeted to the lower-income household's income bracket, or targeted evictions and arrests of lower-income residents.

34. *See, e.g.*, KENNEDY & LEONARD, *supra* note 31, at 5; NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY 33 (1996) (noting that the word "gentrification" was termed by sociologist Ruth Glass in 1964 as part of her critical analysis of displacement occurring in London).

35. *See, e.g.*, KENNEDY & LEONARD, *supra* note 31, at 6.

36. *See infra* Parts III–IV.

37. *See, e.g.*, Peter Marcuse et al., *Off-Site Displacement: How the Changing Economic Tide of a Neighborhood Can Drown Out the Poor*, 22 CLEARINGHOUSE REV. 1352, 1353 (1989)

housing, and increase the values of their own and surrounding houses, higher property taxes are levied against existing residents who may be unable to afford such an increase and thus must move.[38] Analogously, as landlords see the opportunity to charge increased rents in a neighborhood, existing tenants who cannot afford an increase in rent may be forced to move and the higher-income tenants who can afford such an increase replace them.[39] In the alternative, when landlords see the opportunity to charge increased rents they may stop maintaining and repairing the units of current tenants so that the tenants are forced to move by the poor condition of their housing.[40] Then landlords rehabilitate the units and rent them for much more to higher-income tenants.[41] Displacement, whatever its specific impetus, can have a significant effect on a neighborhood. For example, a 1981 study of Seattle found that gentrification displaced 25 percent of tenants in certain neighborhoods over a five-year period.[42]

Even when using a common definition of gentrification that incorporates displacement, scholars have varying theories about why gentrification takes place in some neighborhoods but not in others. Goetze focuses on an individual choice-based theory of gentrification in which risk-oblivious so-called pioneers[43] find an affordable neighborhood and take advantage of mortgage opportunities and cheap housing in order to move to it.[44] These

("[D]isplacement occurs when changes produced by a particular development affect the neighborhood surrounding it, whether by increasing prices so that housing becomes unaffordable, by changing the social composition of an area to make it unattractive to former residents, or by creating blight in the physical environment that makes continued occupancy hazardous.").

38. GOETZE, *supra* note 32, at 103.

39. *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, 455 (2003).

40. *See* Marcuse et al., *supra* note 37, at 1357.

41. *See* SMITH, *supra* note 34, at 65.

42. *See* DAVID LEY, THE NEW MIDDLE CLASS AND THE REMAKING OF THE CENTRAL CITY 66 (1996).

43. For a fascinating and critical discussion of the use of "pioneer" and other frontier vocabulary in gentrification scholarship, see SMITH, *supra* note 34, at 17 ("Insofar as gentrification infects working-class communities, displaces poor households, and converts whole neighborhoods into bourgeois enclaves, the frontier ideology rationalizes social differentiation and exclusion as natural, inevitable.").

44. GOETZE, *supra* note 32, at 100–01. It is clear that Goetze believes gentrification is mainly due to individuals' initiative because he writes that policymakers must guide and diffuse gentrification, implying that policymakers are not involved in the initial occurrence of gentrification in a neighborhood. *See id.* at 7. For a more recent and nuanced analysis of individual choice-based theory as part of the explanation for gentrification, see Jackelyn Hwang & Robert J. Sampson, *Divergent Pathways of Gentrification: Racial Inequality and the Social Order of Renewal in Chicago Neighborhoods*, 79 AM. SOCIOLOGICAL REV. 726 (2014), which

pioneers, through word of mouth and local media stories, cause a rippling effect in which risk- and gain-conscious higher-income households then move to the neighborhood with mainstream residents following later.[45] Other scholars, while acknowledging the role that the choices of individual higher-income households play in gentrifying a neighborhood, situate their analyses in the institutional actions that make gentrification possible.[46] Private financial institutions play a role in encouraging gentrification of a neighborhood by reversing redlining policies so that capital becomes available to reinvest in the lower-income neighborhood[47] and by providing mortgage assistance in such a neighborhood for only households with an income higher than the median.[48] Public government institutions also play an enormous role in encouraging gentrification. Local governments grant private financial institutions tax write-offs for building in certain neighborhoods in order to incentivize the injection of capital into these neighborhoods[49] and then support infrastructure development and beautification in the neighborhoods.[50] The government may then target drug crackdowns,[51] arrests of the homeless[52] and of youth of color,[53] and selective code enforcement against rundown housing[54] in these neighborhoods to rid them of perceived undesirable elements, making the neighborhoods more attractive to the higher-income residents moving in. These private and public institutions often select certain neighborhoods for these gentrification-prone policies when an adjacent neighborhood is higher-income or has gentrified,[55] triggering a

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discusses individuals' implicit racial biases in shaping the decision of whether to move into a gentrifying neighborhood.

45. GOETZE, *supra* note 32, at 100–02.

46. *See, e.g.*, SMITH, *supra* note 34, at 57 ("To explain gentrification according to the gentrifier's preferences alone, while ignoring the role of builders, developers, landlords, mortgage lenders, government agencies, real estate agents—gentrifiers as producers—is excessively narrow. A broader theory of gentrification must take the role of the producers as well as the consumers into account . . . .").

47. *Id.* at 68 ("[W]ith private-market gentrification, one or more financial institutions will reverse a long-standing redlining policy and actively target a neighborhood as a potential market for construction loans and mortgages.").

48. Isis Fernandez, Note, *Let's Stop Cheering, and Let's Get Practical: Reaching a Balanced Gentrification Agenda*, 12 GEO. J. ON POVERTY L. & POL'Y 409, 423 (2005).

49. SMITH, *supra* note 34, at 128.

50. John J. Betancur, *The Politics of Gentrification: The Case of West Town in Chicago*, 37 URB. AFF. REV. 780, 787–88 (2002).

51. SMITH, *supra* note 34, at 24.

52. *Id.* at 218–27.

53. Betancur, *supra* note 50, at 804.

54. *Id.*

55. SMITH, *supra* note 34, at 209; Betancur, *supra* note 50, at 786–87.

realization that far more rent could be extracted from these neighborhoods with the conversion of neighborhood building stock to higher quality and better use.[56] This so-called rent gap[57] between current and potential rents exists in neighborhoods within cities that have tight housing markets, that have other more expensive neighborhoods, and that are close to a growing job center.[58]

It is challenging to determine the prevalence of gentrification, such as the number of neighborhoods and cities in which it occurs and the number of people who are being displaced. It simply is quite difficult to find compiled and adequate data on the subject.[59] Nonetheless, data from the 2010 census supports the inference that gentrification is affecting many cities. One census report notes that in metropolitan areas with a population over five million, there was a population increase of 13.3 percent within two miles of the largest city's city hall; and in metropolitan areas with a population of between two-and-a-half and five million, there was a population increase of 6.5 percent within two miles of the largest city's city hall.[60] Since areas closest to city hall are usually more expensive than outlying areas of a city, these neighborhoods attract higher-income residents.[61] At the same time, income inequality within large cities continues to be significant.[62] This data suggests that higher-income

56. SMITH, *supra* note 34, at 193. "Better use" is clearly subjective. Reasonable minds could differ regarding whether it is better to tear down a tenement building and replace it with condominiums (which would displace the current residents and change the socioeconomic makeup of the neighborhood) or make no changes to the building.
57. Neil Smith uses this term to label the difference between current and potential rents in a neighborhood. *See id.*
58. *See* KENNEDY & LEONARD, *supra* note 31, at 8, 10–11.
59. *Id.* at 7–8.
60. STEVEN G. WILSON ET AL., U.S. CENSUS BUREAU, PATTERNS OF METROPOLITAN AND MICROPOLITAN POPULATION CHANGE: 2000 TO 2010, at 27 (2012).
61. For example, the zip code 10012 (Soho, New York City) is the sixth most expensive in the country. Morgan Brennan, *America's Most Expensive Zip Codes*, FORBES (Oct. 12, 2011, 11:54 AM), http://www.forbes.com/sites/morganbrennan/2011/10/12/americas-most-expensive-zip-codes. Google Maps calculates the distance from that zip code to New York City Hall as just 1.5 miles. Driving Directions from New York City Call to Zip Code 10012, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; then input "New York City Hall" in "Starting Point" and input "10012" in "Destination"). The zip code 90402 is the most expensive zip code in the city of Santa Monica. *America's Most Expensive ZIP Codes*, FORBES, http://www.forbes.com/lists/2011/7/zip-codes-11_rank.html (last visited Oct. 16, 2014). Google Maps calculates the distance between that zip code and Santa Monica City Hall as just 2.5 miles. Driving Directions from Santa Monica City Call to Zip Code 90402, GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; then input "Santa Monica City Hall" in "Starting Point" and input "90402" in "Destination").
62. *See* ADAM BEE, U.S. CENSUS BUREAU, HOUSEHOLD INCOME INEQUALITY WITHIN U.S. COUNTIES: 2006–2010, at 4 (2012), *available at* http://www.census.gov/prod/2012pubs/acsbr10-18.pdf.

residents may be moving into the center of many large cities and displacing (at least some) low- and moderate-income residents to outer-city neighborhoods, thus heightening the income inequality within the city as a whole. Gentrification, then, is not a theoretical or future problem but one that is borne out from census findings.

III. THE EFFECTS AND HARMS OF GENTRIFICATION

In a vacuum, gentrification does not appear to be a particularly concerning phenomenon. In fact, many consider the movement of capital and of higher-income residents into a neighborhood as an important revitalizing source for neighborhoods that have long been under-resourced ghettos[63] for low-income households.[64] As Neil Smith has written, "[w]ithout private rehabilitation and redevelopment, the neighborhood's housing stock [would] remain severely dilapidated . . . ."[65] Yet the displacement inherent in this Comment's understanding of gentrification should give us pause. Who is being displaced? Where are they going?

As defined here, gentrification displaces lower-income residents.[66] In comparatively rich cities where few census tracts contain high proportions of households living in poverty and where housing markets are tight, gentrification may lead to the pricing out of low-income residents from the central city or from the region as a whole.[67] Middle-class workers also may be unable to afford rent increases in gentrifying neighborhoods and so gentrification may price them out of their homes.[68] Gentrification of a neighborhood slowly squeezes out all residents except the rich and "portends a class conquest of the city . . . [by] scrub[bing] the city clean of its working-class geography and history."[69] One clear harm of gentrification, then, is that it begins to strip cities of their socioeconomic diversity and pushes low- and

63. I recognize that the term ghetto is charged. In this Comment, I use it to underscore that the inner-city neighborhoods being gentrified are generally monolithic in their class (low-income) and racial makeup (black or Latino). For a general discussion of the term ghetto in its current American context, see Elijah Anderson, *The Iconic Ghetto*, 642 ANNALS AM. ACAD. POL. & SOC. SCI. 8 (2012).
64. *See, e.g.*, KENNEDY & LEONARD, *supra* note 31, at 14; Powell & Spencer, *supra* note 39, at 446 (noting that poor cities, such as Cleveland and Detroit, need the influx of middle-class gentrifiers to attain economic viability).
65. SMITH, *supra* note 34, at 163.
66. *See supra* note 34 and accompanying text.
67. Powell & Spencer, *supra* note 39, at 446.
68. *See id.* at 456 (noting that gentrification has priced out middle-class residents from Oakland and Cambridge).
69. SMITH, *supra* note 34, at 26–27.

moderate-income households farther from the jobs and transit found closest to city centers.[70] A readily available example of such a city is Cambridge, Massachusetts. While internationally known as the home to Harvard University, for many years Cambridge was an economically diverse city with a significant number of blue-collar residents.[71] But its gentrification over the past decade is clear from data published on the Cambridge Community Development Department's website. In 2000, the median household income for the city was $47,979 with the poorest census tract within the city having a median household income of $23,750.[72] By 2009, the median household income for the city had jumped to $64,420 with the poorest census tract from 2000 now having a median household income of $45,496—an income almost double that of nine years earlier.[73]

Some retort that even if gentrification causes lower-income households to be forced from a neighborhood, in the end the city overall benefits from the increased property taxes that gentrifiers pay.[74] But such a benefit is not borne out by the data: Many gentrifiers are actually moving from within the city (and so were already a part of the tax base) or are politically savvy enough to ensure that the assessed value of their new property remains low;[75] further, cities sometimes reduce property taxes for long-time residents to buttress against displacement, resulting in a wash regarding whether there is an increase in a city's revenues.[76] Thus, gentrification does not create clear financial benefits to the city, and it certainly harms those who are displaced.[77]

70. Powell & Spencer, *supra* note 39, at 441–42.
71. *See id.* at 456.
72. *2000 Census Tract Income Characteristics*, CAMBRIDGE COMMUNITY DEVELOPMENT DEPARTMENT, http://www.cambridgema.gov/CDD/factsandmaps/populationdata/censustract/2000ctincome.aspx (last visited Mar. 30, 2014). In 2000, a household income of $23,750 was 1.4 times the federal poverty line for a household of four or about two times the federal poverty line for a household of two. *See The 2000 HHS Poverty Guidelines*, U.S. DEPARTMENT HEALTH & HUMAN SERVICES (Jan. 29, 2010), http://aspe.hhs.gov/poverty/00poverty.htm.
73. *2005–9 Census Tract Income Characteristics*, CAMBRIDGE COMMUNITY DEVELOPMENT DEPARTMENT, http://www.cambridgema.gov/CDD/factsandmaps/populationdata/censustract/20059ctincome.aspx (last visited Mar. 30, 2014). A household income of $45,496 was 2.1 times the federal poverty line for a household of four or 3.1 times the federal poverty line for a household of two. *See The 2009 HHS Poverty Guidelines*, U.S. DEPARTMENT HEALTH & HUMAN SERVICES (Feb. 3, 2011), http://aspe.hhs.gov/poverty/09poverty.shtml.
74. *See, e.g.*, SMITH, *supra* note 34, at 137.
75. *Id.*
76. *See* Timothy Williams, *Cities Mobilize to Help Those Threatened by Gentrification*, N.Y. TIMES, http://www.nytimes.com/2014/03/04/us/cities-helping-residents-resist-the-new-gentry.html?_r=0 (Mar. 3, 2014).
77. For example, some studies have found that 86 percent of those displaced by gentrification move into substandard housing. *See* Powell & Spencer, *supra* note 39, at 470. Additionally,

Nothing suggests that gentrification of a few neighborhoods within a city is economically worth the displacement of an entire enclave of low- and middle-class residents.

Beyond the class-based component of gentrification, there is a decidedly racial component as well. Usually in gentrifying neighborhoods, higher-income white residents displace lower-income residents of color.[78] For example, in a study of gentrification in Chicago, one scholar found that between 1980 and 1990 the ratio of black to white residents fell from 6:1 to 3:1.[79] More recently, census data has shown that "[a] common theme for the non-Hispanic White alone population from 2000 to 2010 was growth—both in number and in share of total population—in the central areas of many of the largest principal cities . . . ."[80] For instance, as downtown Washington, D.C. has gentrified over the past ten years,[81] the white population has increased by more than 10 percent in most of the census tracts making up the area.[82] As a result, the people of color displaced by gentrification are forced to the outer perimeters of the city and may ultimately be forced into lesser-resourced suburban rings.[83] As gentrification continues over time, the central neighborhoods of cities become monochromatically white while outer neighborhoods and suburban rings become diversified or majority-minority. Thus, gentrification causes cities to become not only socioeconomically but also racially monolithic.

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cities generally offer more upwardly mobile economic opportunities for the poor than rural areas do. *See* EDWARD GLAESER, TRIUMPH OF THE CITY 79–81 (2011).

78. KENNEDY & LEONARD, *supra* note 31, at 5; Powell & Spencer, *supra* note 39, at 436–37. *But see* SMITH, *supra* note 34, at 143–61 (noting that white gentrifiers are at least initially "less squeamish" about moving into majority-white neighborhoods and that gentrifiers in majority-black Harlem were at first middle-class black households); Hwang & Sampson, *supra* note 44.

79. *See* SEAN ZIELENBACH, THE ART OF REVITALIZATION: IMPROVING CONDITIONS IN DISTRESSED INNER-CITY NEIGHBORHOODS 115 (2000).

80. WILSON ET AL., *supra* note 60, at 54.

81. The upward climb of the household median income in Washington, D.C. over the past ten years can be found on www.city-data.com. *Washington, District of Columbia (DC) Income Map, Earnings Map, and Wages Data*, CITY-DATA.COM, http://www.city-data.com/income/income-Washington-District-of-Columbia.html#mapOSM?mapOSM[zl]=14&mapOSM[c1]=38.9080 66206441182&mapOSM[c2]=-77.04977989196777&mapOSM[s]=4 (last visited Mar. 30, 2014). For an example of the increase of median household incomes in gentrifying areas, click on the census tracts around U Street Northwest, a popular area with young professionals.

82. WILSON ET AL., *supra* note 60, at 65.

83. *See* SMITH, *supra* note 34, at 161–63 (noting that continued gentrification of Harlem might force the low-income African American community into the suburbs); *see also* Matthew Bloch et al., *Mapping the 2010 U.S. Census*, N.Y. TIMES, http://projects.nytimes.com/census/2010/map (last visited Mar. 30, 2014) (showing that the black population has decreased in Washington, D.C. proper and has increased in areas east of the city, such as Kettering and Greater Upper Marlboro in Maryland).

In summary, various analyses of gentrifying neighborhoods and cities show that gentrification leads to the displacement of lower-income households and nonwhite households. As two public policy commentators have written, "[g]entrification is not only attracting higher income households who replace lower income households in the neighborhood; it is attracting a sufficiently large number such that the unique social fabric of the neighborhood is changed."[84] In effect, gentrification causes the community character[85] to change. The process of gentrification poses a major challenge to the continuing diversity within American cities and to the protection and preservation of longstanding communities within them.

Even if one is not concerned about socioeconomic and racial diversity of cities per se, gentrification—or at least the displacement it causes—has been shown to harm low-income residents on an individual basis. Harvard sociologist Robert J. Sampson has extensively analyzed the federal program Moving to Opportunity (MTO) under which some low-income affordable housing residents were randomly selected to receive vouchers so they could move to less-impoverished neighborhoods if they so desired.[86] His and others' work shows that even though residents were voluntarily moving to less-impoverished neighborhoods within the same city, such moves were "associated with declines in academic performance and educational attainment as well as with increased levels of drug use, sexual activity, and other risky behaviors" for adolescents.[87] Such risks increased because parents were moving into neighborhoods that were often still violent, segregated, and underresourced,[88] but because the families were now living in new neighborhoods, parents lacked familiarity with how to navigate the school system and children were less equipped to navigate new environments and to avoid trouble.[89] If Sampson's findings of negative social outcomes—such as

84. KENNEDY & LEONARD, *supra* note 31, at 5–6.
85. This was the term used by the court in *Chinese Staff & Workers Ass'n v. City of New York*, a case whose context involved the gentrification of Chinatown in New York City. *See* Chinese Staff & Workers Ass'n v. City of New York, 68 N.Y.2d 359, 366 (1986).
86. *See* Robert J. Sampson, *Moving to Inequality: Neighborhood Effects and Experiments Meet Social Structure*, 114 AM. J. SOC. 189, 202 (2008).
87. Patrick Sharkey & Robert J. Sampson, *Destination Effects: Residential Mobility and Trajectories of Adolescent Violence in a Stratified Metropolis*, 48 CRIMINOLOGY 639, 644 (2010).
88. *See, e.g.*, Sampson, *supra* note 86, at 217 (noting that whites and Latinos flee neighborhoods into which black families are moving, thus resulting in segregated neighborhoods); Sharkey & Sampson, *supra* note 87, at 640, 645 (noting that when public housing residents moved to higher-income neighborhoods, their children were still entangled in violence and their children's school environments did not improve).
89. Sharkey & Sampson, *supra* note 87, at 645.

declining academic performance and greater likelihood of drug use and sexual activity—are present when a family proactively moves to a less-impoverished neighborhood with federal assistance, a fortiori such negative effects will exist when rising rents displace unwilling families who may not have any government support to assist in their move.

Although Sampson's research has shown that when low-income families move out of a city altogether they do not experience the same sorts of negative effects as when they move to another city neighborhood,[90] moving out of the city introduces a whole new host of problems for these families. Low-income African Americans who move out of high-poverty urban areas into small, majority-white towns "may experience health-demoting stressors as a result of their immersion in predominantly white communities."[91] Moreover, work by other organizations suggests that there are negative health outcomes for those displaced by gentrification, whether they have been pushed out to the suburbs or just to the edges of cities.[92] Additionally, whenever low-income individuals are pushed farther from the city's center, they are then farther from the inner-city jobs that most often employ them[93] and contribute to negative environmental effects such as pollution as a result of their longer commutes to and from work.[94] Finally, "[c]ities don't just connect capital-less workers with capital-rich employers; they offer a huge variety of job opportunities that allow poor people (indeed, everybody) to find talents they

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90. *See id.* at 661.

91. Danya E. Keene & Mark B. Padilla, *Race, Class and the Stigma of Place: Moving to "Opportunity" in Eastern Iowa*, 16 HEALTH & PLACE 1216, 1217 (2010).

92. *The Other Side of Gentrification: Health Effects of Displacement*, INT'L MAKING CITIES LIVABLE LLC, http://www.livablecities.org/blog/other-side-gentrification-health-effects-displacement (last visited Mar. 30, 2014) ("The Centers for Disease Control and Prevention (CDC) highlight [that] . . . [w]hen neighborhoods change rapidly, pushing existing residents to the margins, disparities in health often widen. This becomes evident in health outcomes such as cancer rates, incidence of asthma, diabetes, and cardiovascular disease, as these marginalized residents are often priced out of neighborhoods with healthy housing, healthy food[,] and healthy urban environments. In their new neighborhoods on the margins they are more likely to experience food deserts, less walkable streets, further distances to drive, and industrial pollutants near housing.").

93. *See* GLAESER, *supra* note 77, at 87. This proximity to jobs—both high- and low-paying—is one of the reasons that certain neighborhoods tend to gentrify. *Id.* at 180 ("In many cities, like New York, once-poor neighborhoods, like Tribeca, that can offer fast commutes on foot to core business districts have come back, spurred by the same increasing value of time that pushed Americans out of public transit into cars.").

94. *See* Ben Adler, *Pushing Poor People to the Suburbs Is Bad for the Environment*, GRIST (Dec. 13, 2013, 4:56 PM), http://grist.org/cities/pushing-poor-people-to-the-suburbs-is-bad-for-the-environment (discussing that some low-income families displaced from New York City have moved to the Poconos, a rural area in Pennsylvania, and commute to their jobs in New York, which "is not environmentally efficient").

might otherwise never know they had."[95] Displacement from core city neighborhoods not only has negative health effects on low-income individuals and on our environment but also has negative financial effects as well.[96]

All the data shows that gentrification is harmful on a number of levels. For those who value socioeconomic diversity within cities and neighborhoods, gentrification creates disvalue by diminishing such diversity. For those who value racial diversity within cities and neighborhoods, so too gentrification diminishes such diversity. For those who care about the environment, gentrification's displacement results in pollution and possibly other harmful environmental results. Finally, the sort of displacement that gentrification causes negatively affects the well-being—financially, mentally, academically, health-wise, and more—of the low-income individuals displaced. Therefore, it is clear that even if gentrification has certain positive effects, its harmful ones are potent and significant.

IV. THE TOOLS TO HALT GENTRIFICATION

Even if the effects of gentrification on a neighborhood or an entire city are harmful, gentrification is such a multilayered process that it can be difficult to determine how best to challenge or arrest it. As discussed in Part II, the displacement caused by gentrification can occur because of landlords' raising of rents, financial institutions' mortgage policies, or individuals' rehabilitation of new homes. Individuals, private institutions, and government actors may all encourage gentrification in varying ways. Thus, it can seem impossible to determine how to halt the gentrification process and ensure that a neighborhood remains relatively socioeconomically and racially diverse.

While community organizing[97] and policymaking[98] play instrumental roles in fighting gentrification, this Comment considers lawyers' part in

95. GLAESER, *supra* note 77, at 79.
96. *See id.*
97. For example, the Coalition for Economic Survival in Los Angeles, National Alliance of HUD Tenants, and New York State Tenants & Neighbors all organize to preserve affordable housing and fight gentrification. *See* COALITION FOR ECONOMIC SURVIVAL, http://www.cesinaction.org (last visited June 15, 2013); NATIONAL ALLIANCE OF HUD TENANTS, http://www.saveourhomes.org (last visited Mar. 30, 2014); TENANTS & NEIGHBORS, http://www.tandn.org (last visited Mar. 30, 2014).
98. For example, the National Housing Law Project and National Low Income Housing Coalition work on policy issues surrounding the preservation of low-income housing and neighborhoods. *See* NATIONAL HOUSING LAW PROJECT, http://www.nhlp.org (last visited Mar. 30, 2014); NATIONAL LOW INCOME HOUSING COALITION, http://www.nlihc.org (last visited Mar. 30, 2014).

preserving the diversity of American cities. I use as my inspiration a brief 1989 article by Peter Marcuse, Raun Rasmussen, and Russell Engler that proposed three legal tools for fighting gentrification: affordability-friendly zoning laws, environmental impact reviews, and the FHA.[99] In the following subsections, I expand on their hypotheses in light of the continuing gentrification of the past quarter of a century.

A. A Preemptive Strike: Litigating Zoning Regulations to Ensure Affordability

Advocates for socioeconomic and racial integration have long used litigation based on zoning regulations as one tool for achieving their goals. Usually, however, advocates have used zoning litigation to create affordable housing in lily-white affluent suburbs rather than using it to create or preserve affordable housing in the inner city.[100] Nonetheless, it seems possible to use the exact sort of zoning litigation often used to integrate suburbs to instead keep gentrifying city neighborhoods integrated.[101] Specifically, attorneys could use litigation to enforce inclusionary zoning legislation requiring a certain number or percentage of affordable units in new developments or to force states to recognize affordable housing, or zoning friendly to it, as a constitutional right. Both types of litigation have been applied to create affordable housing in the suburbs but could now be used to create or preserve affordable housing in city neighborhoods. Because this litigation would be based on enforcing existing zoning regulations or finding a new right in state constitutions, such litigation could be brought preemptively before there were any definitive signs of gentrification, or early in the gentrification process, as soon as rehabilitated buildings' rents began to rise or there were plans for new higher-end developments.

Concerning the first type of litigation, attorneys in states with inclusionary zoning laws could bring suits in gentrifying neighborhoods to enforce those regulations in the city. A number of states have inclusionary zoning legislation that, at least initially, was directed at the socioeconomic

99. *See* Marcuse et al., *supra* note 37, at 1364–70.

100. *See generally* Bernard K. Ham, Comment, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the* Mount Laurel *Doctrine*, 7 SETON HALL CONST. L.J. 577, 577–90 (1997).

101. *See* Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333, 368 (1984) ("Reinvestment displacement raises the same question as exclusionary zoning although the view is from a different angle.").

and racial segregation of well-to-do white suburbs.[102] For example, the Massachusetts Low and Moderate Income Housing Act (sometimes called the Anti-Snob Zoning Act) requires that 10 percent of "the housing stock within every city and town be subsidized with or by a federal or state subsidy."[103] When an economically or racially homogenous town or city has denied permits for the creation of affordable housing, attorneys have argued and established that the denial violates the Act since the 10 percent threshold has not yet been met.[104] One example of this sort of case is *Town of Middleborough v. Housing Appeals Committee*,[105] in which a town more than twenty miles from any major city in the state[106] denied a permit to a developer trying to create affordable housing in a rural residential district of the town.[107] By relying on the Act, the developer was able to appeal and ultimately gain a permit to build affordable housing in the town.[108] Overall, it was a very straightforward case—the town tried to wiggle out of having more affordable housing, but the Massachusetts Low and Moderate Income Housing Act ultimately required it to give a permit to the affordable housing developer.

Applying the Act (or a similar inclusionary zoning statute in another state) to create or preserve affordable housing in a gentrifying city neighborhood might not result in such clear-cut litigation, but in certain situations it might succeed. Examples are intuitive: If a neighborhood in Boston, Massachusetts has never had much affordable housing and looks like it is on the cusp of gentrification, an attorney could bring a claim under the Massachusetts Low and Moderate Income Housing Act to require that a developer be allowed to create more affordable housing there before pricey condominiums overrun the neighborhood. Or if during the early stages of gentrification the loss of a

102. *See* Lisa C. Young, *Breaking the Color Line: Zoning and Opportunity in America's Metropolitan Areas*, 8 J. GENDER RACE & JUST. 667, 699 (2005) ("The Massachusetts Low and Moderate Income Housing Act, enacted in 1969, was an attempt to 'open up the suburbs' to low and moderate-income families."). Other states with inclusionary zoning programs are California, Colorado, Connecticut, Hawaii, New Jersey, Rhode Island, and Virginia. Gerald S. Dickinson, *Inclusionary Eminent Domain*, 45 LOY. U. CHI. L.J. 845, 872 n.122 (2014); Young, *supra*, at 691, 694. For a critique of the state-mandated integration of the suburbs, see Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 526 n.78 (2003).

103. Witten, *supra* note 102, at 527.

104. *See, e.g.*, Zoning Bd. of Appeals v. Sugarbush Meadow, LLC, 981 N.E.2d 690 (Mass. 2013); Bd. of Appeals v. Hous. Appeals Comm. in Dep't of Cmty. Affairs et al., 204 N.E.2d 393 (Mass. 1973).

105. 845 N.E.2d 1143 (Mass. App. Ct. 2006).

106. *See About Middleborough*, TOWN MIDDLEBOROUGH MASS., http://www.middleborough.com/about.html (last visited Mar. 30, 2014).

107. *Housing Appeals Committee*, 845 N.E.2d at 1145–46.

108. *Id.* at 1151–53.

particular affordable complex would cause a neighborhood to dip below the required percentage of affordable housing, an attorney could bring a claim arguing that the Act mandated the preservation of that complex.

The biggest obstacle to this sort of litigation might be that some states include a self-limiting exemption in their inclusionary zoning statutes for municipalities that already have reached a certain threshold of affordable housing (for example, 10 percent of the housing in the municipality already is deemed affordable).[109] Thus, if a city as a whole had a certain number or percentage of affordable housing units, it would not necessarily violate the inclusionary zoning statute to not build affordable housing in, or to remove affordable housing, from a gentrifying neighborhood. In such a situation, litigation using the requirements of the inclusionary zoning statute to argue for the creation of more of, or the continued preservation of, such affordable housing would likely fail. And even if there was no self-limiting principle included in the statute, it is sometimes a larger logical leap to apply inclusionary zoning requirements to affordable housing in gentrifying city neighborhoods than in segregated suburbs. Attorneys could still easily bring litigation in neighborhoods that never had the requisite affordable housing, but it would be more difficult to bring inclusionary zoning litigation to preserve affordable housing. Rather than simply showing that there is little or no affordable housing (which would automatically violate the statute), an attorney would have to show that the closure of affordable housing in a certain neighborhood would bring the level of affordable housing under the legally mandated minimum for the entire city. This certainly isn't an impossible showing, but there is an extra step of analyzing the effects of the closure of affordable housing in the neighborhood and making a strong showing that the closure of a specific building or program will result in fewer overall affordable units. While this sounds simple, a savvy defendant could argue that the specific closure being litigated would affect the housing market of the neighborhood in a way in which affordable housing would be built elsewhere in the area, and so there would be no violation of the zoning statute.[110] Thus, inclusionary zoning litigation appears on its face applicable

109. *See* Young, *supra* note 102, at 691.

110. While not completely on point, an analogous argument was made in *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276 (11th Cir. 2006). In that case, the court held that it was "inherently speculative" to find a violation of the Fair Housing Act (FHA) because the plaintiffs could not definitively prove what would happen after the closing of the affordable housing project. *Id.* at 1287. In an inclusionary zoning litigation case, a defendant might convincingly use the logic that since the plaintiff could not definitively prove whether more

to attempts to create and preserve affordable housing in gentrifying neighborhoods, but litigation regarding preservation might ultimately depend on whether the plaintiffs can definitively show the effects of the loss of the building or program on the housing market in the neighborhood.

Concerning the second type of litigation based on a constitutional right to affordable housing, attorneys could try to follow New Jersey's lead in its *Mount Laurel* cases[111] and argue that state constitutions require municipalities to provide housing for all their citizens, including low-income citizens.[112] In the first *Mount Laurel* case, the New Jersey Supreme Court held that its state constitution required state police power—including the oversight of zoning regulations—to promote the general welfare.[113] It then held that the town of Mount Laurel's zoning ordinance, which only permitted single-family houses, did not promote the general welfare because it summarily excluded affordable multifamily housing for low-and moderate-income individuals, and the court thus found the zoning ordinance unconstitutional.[114] In the follow-up case to the initial litigation, the New Jersey Supreme Court clarified that municipalities had the affirmative duty to take measures that would, in practice rather than in theory, create greater affordable housing.[115] The court

affordable housing would be built after the closing of a building or program, the plaintiffs could not ex ante assume there would be a violation of the zoning regulations.

111. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*]; S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*].

112. Some scholars have argued that a right to affordable housing might also be found in the U.S. Constitution. *See, e.g.*, Shelby D. Green, *Imagining a Right to Housing, Lying in the Interstices*, 19 GEO. J. ON POVERTY L. & POL'Y 393 (2012). This is a difficult case to make, considering that the Supreme Court has strongly implied that there is no constitutional right to housing:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.

Lindsey v. Normet, 405 U.S. 56, 74 (1972). Nonetheless, there might be some creative arguments to be made in federal court around a right to housing. For example, Shelby Green has argued that there might be an Equal Protection Clause violation if a city gives tax breaks or subsidies to developers as part of a revitalization scheme but does not offer similar help to tenants. *See* Green, *supra*, at 428.

113. *Mount Laurel I*, 336 A.2d at 725.

114. *Id.* at 729–32.

115. *Mount Laurel II*, 456 A.2d at 442.

required the state to incentivize or require the use of housing subsidies and the use of inclusionary zoning.[116]

No other state has made as strong of a statement as New Jersey in the *Mount Laurel* cases by finding an affirmative constitutional requirement for affordable housing.[117] Nonetheless, some states, including Pennsylvania and New York, have found that their constitutions do require that zoning regulations not exclude low-income residents.[118] Indeed, it is not difficult to make the argument that most state constitutions might, if questioned, require some sort of protection for affordable housing through local zoning regulations.[119] The section of the state constitution that the New Jersey Supreme Court in the *Mount Laurel* cases found required affordable housing simply reads: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."[120] In New Jersey and Pennsylvania, the finding of a constitutional right to the availability of affordable housing was based on arguments that zoning regulations are an instantiation of police power and that a state's police power must promote the general welfare of its citizens. By using arguments based on a relatively straightforward understanding of police power or on almost innocuous state constitutional language, advocates fighting gentrification might win a state right to affordability-friendly zoning laws without needing the ex ante existence of pro-affordability statutes. Such arguments would surely be applicable to the availability of affordable housing in gentrifying neighborhoods where the

116. *Id.* at 443.

117. *See, e.g.*, Asian Ams. for Equal. v. Koch, 514 N.Y.S.2d 939, 950 (App. Div. 1987) ("[The lower court] concedes in its opinion that *Mount Laurel* is not the law in New York. We go further. Not by the widest stretch of the imagination, could the fact pattern in *Mount Laurel* be applicable to New York City's record for providing for low and moderate income housing. . . . We carefully note that the *Mount Laurel* holdings are solely based upon an interpretation of the provisions of the law and Constitution of the State of New Jersey.").

118. *See, e.g.*, Suffolk Hous. Servs. v. Town of Brookhaven, 511 N.E.2d 67, 69 (N.Y. 1987) (finding that exclusionary zoning regulations are not a legitimate use of a state's police power); Twp. of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466, 468 (Pa. 1975) (finding that zoning only 80 acres out of a total of 11,589 for possible affordable housing was exclusionary and so violated the Pennsylvania constitution).

119. But some states have come to the opposite conclusion. *See* Precision Equities, Inc. v. Franklin Park Borough Zoning Hearing Board, 646 A.2d 756, 760 n.4 (Pa. Commw. Ct. 1994) (declining to follow the expansive *Mount Laurel* mandate for affordable housing in Pennsylvania); San Telmo Assoc. v. City of Seattle, 735 P.2d 673 (Wash. 1987) (finding an inclusionary zoning ordinance in Seattle could violate the Washington Constitution's takings clause).

120. N.J. CONST. art. I, § 1.

state was supporting the gentrification through various policies such as zoning regulations or, perhaps more relevantly, tax breaks to developers.[121] If progentrification policies were causing a reduction in or elimination of affordable housing, the reduction or elimination would have a negative effect on the welfare of a state's residents, and the state could be found to be in violation of its constitution for using its police power in a way that fails to protect the welfare of its citizens.[122]

Litigating for the protection of affordable housing under a state constitution or for the enforcement of inclusionary zoning laws are both employable strategies when there is a threat to affordable housing in gentrifying neighborhoods. In fact, bringing these sorts of suits might be particularly successful in the gentrification context as compared to the suburban integration context. Although courts may have been reluctant to open up middle- and upper-class suburbs to low-income families on the theory that local municipalities should be able to zone or regulate affordable housing however they believe is appropriate, there might be greater willingness to protect low-income families who are pushed out of neighborhoods in the city they once could afford. The narrowing of neighborhoods available to low-income individuals might be more worrisome to courts than the exclusion of low-income individuals from neighborhoods they had never been a part of anyway, which might lead the courts to begin interpreting state constitutions and zoning regulations in a more protective manner.

Even though such zoning-related litigation may be a helpful tool in the fight to challenge gentrification, it is likely the most limited of the three strategies discussed in this Comment. Litigation surrounding the enforcement of inclusionary zoning laws will only be able to succeed in the several states that have such laws—and even in those states, housing advocates are wary of the power of inclusionary zoning to keep neighborhoods socioeconomically diverse.[123] Additionally, zealous litigation for the enforcement of inclusionary zoning might result in backlash litigation questioning whether such zoning violates the Takings Clause, Due Process Clause, or Equal Protection Clause of the U.S. Constitution.[124] Litigation surrounding whether state constitutions

121. *See supra* notes 46–56 and accompanying text.

122. *Cf.* Salsich, *supra* note 101, at 367 (noting that if a government helps to fund progentrification projects without also addressing the effect of resident displacement, the welfare of these residents will not be protected, resulting in a "questionable" exercise of police power).

123. *See, e.g.*, Samuel Stein, *De Blasio's Doomed Housing Plan*, JACOBIN MAG., Fall 2014, *available at* https://www.jacobinmag.com/2014/10/de-blasios-doomed-housing-plan/.

124. There are persuasive arguments that inclusionary zoning regulations do not violate any aspects of the U.S. Constitution. *See, e.g.*, Laura M. Padilla, *Reflections on Inclusionary Housing and a*

mandate that zoning regulations protect affordable housing must be brought on a state-by-state basis under state law, and so it would be difficult for successes in one jurisdiction to be applied when a similar case is brought elsewhere. Additionally, no state has found a constitutional right to affordable housing or to affordable housing-friendly zoning practices in decades.[125] While this may not be determinative of whether to apply such a strategy (perhaps attorneys simply are not bringing these cases, or courts would be more amenable to friendly rulings with the facts from a gentrification case), it does not engender much confidence in such potential litigation. Thus, zoning-related litigation strategies are vulnerable to a number of critiques. To buttress against this vulnerability, I turn to other possible litigation strategies for challenging gentrification.

B. Fighting Luxury Development: The Use of Environmental Impact Statements

Although zoning law has a long history of being used to fight for diverse neighborhoods, advocates have used national or state EIS requirements less often when challenging gentrification. Despite the infrequent reliance on these statements, they could be powerful tools in antigentrification litigation.

In 1969, Congress passed the National Environmental Policy Act (NEPA),[126] which requires federal agencies to prepare an EIS in order to consider the environmental impact of any of their proposed actions.[127] Many states have followed suit with some variation in how closely their statutes follow the federal one.[128] NEPA requires the government to consider the impact on human health and welfare of any project proposed by a federal agency.[129] Nonetheless, the statute often does not have much force because it is procedural only—it "requires the government to consider alternatives to proposed actions and to consider measures that will mitigate the impacts of

Renewed Look at Its Viability, 23 HOFSTRA L. REV. 539, 588–625 (1995). Nonetheless, broadcasting litigation to enforce inclusionary zoning might strategically be a bad move since it could result in counterarguments or backlash litigation that would undermine the ability to have inclusionary zoning laws at all.

125. *Mount Laurel I* was decided in 1975, *Township of Willistown v. Chesterdale Farms, Inc.* was decided in 1975, and *Suffolk Housing Services v. Town of Brookhaven* was decided in 1987.

126. 42 U.S.C. §§ 4321–4370h (2006).

127. Kathleen Codey, Note, *Convenience and Lower Prices, but at What Cost?: Watching Closely as Discount Superstores Creep Into Manhattan*, 13 J.L. & POL'Y 249, 270–71 (2005).

128. *Id.* at 272.

129. Stephen M. Johnson, *NEPA and SEPA's in the Quest for Environmental Justice*, 30 LOY. L.A. L. REV. 565, 579 (1997).

the action, but it does not require the government to implement those alternatives or mitigation measures."[130] For this reason, many states that have passed EIS statutes have included substantive requirements, such as a requirement that the government agency mitigate any harmful environmental effects as much as is feasible.[131] Some of these local statutes have also expanded the reach of the EIS so that an EIS is required for most new construction—including that done by private actors, not just governmental agencies.[132] Thus, depending on the state in question, an EIS may apply to the majority of new developments. This means that an EIS requirement would apply to new construction or to extensive rehabilitation that private developers undertake in gentrifying neighborhoods.

The hurdle in using an EIS to challenge a new development being contemplated in a gentrifying area is whether such a development would in fact violate an EIS requirement. There are two ways to argue that new construction in gentrifying areas violates an EIS requirement: The first would be that the EIS quashes the development simply because the development encourages gentrification. The second would be that, even if an EIS could not be used to challenge gentrification per se, gentrification has enough negative environmental effects that the EIS can quash any gentrifying development based on those gentrification-related effects.

The first argument is certainly the harder one but there is some precedent for it. In *Chinese Staff & Workers Association v. City of New York*,[133] the state's highest court was asked to interpret how the State Environmental Quality Review Act (SEQRA)[134] should be applied to a proposal to build a luxury high-rise in New York City's Chinatown.[135] The court took a strong stance that SEQRA's requirement that there be a study of the development's impact on the environment included an assessment of the impact on the

130. *Id.* at 597.
131. *See id.* at 597–98. *See, e.g.*, City of Walnut Creek v. Cnty. of Contra Costa, 101 Cal. App. 3d 1012, 1017–18 (1980) (finding that the county properly mitigated the environmental damage of a project by reducing the density of the project).
132. *See* GLAESER, *supra* note 77, at 212 ("In 1973, an environmentally activist California Supreme Court interpreted [the 1970 California Environmental Quality Act (CEQA)] to mean not only projects undertaken by local governments, but also projects permitted by local government, which means pretty much any large construction in the state."). States where it appears the EIS requirement applies to private developments include California, Hawaii, Minnesota, South Dakota, and Washington. *See* Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience With SEQRA*, 13 CARDOZO L. REV. 2041, 2043 n.7 (1992).
133. 68 N.Y.2d 359 (1986).
134. N.Y. ENVTL. CONSERV. LAW §§ 8-0101–8-0117 (McKinney 2012).
135. *Chinese Staff & Workers Ass'n*, 68 N.Y.2d at 362.

human environment, which included an assessment of the displacement of current residents and businesses.[136] The court reasoned that "the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment."[137] The court went on to state that SEQRA required a consideration of "long-term secondary displacement of residents and businesses in determining whether a proposed project may have a significant effect on the environment."[138] In short, the court held that the state's EIS required an assessment of whether a development would change the community character—which, intuitively, could include the socioeconomic and racial makeup—of the neighborhood and whether a development might cause long-term displacement from the neighborhood. It is not a stretch to state that the court held that SEQRA required an assessment of a project's gentrification impact before it could go forward.

While *Chinese Staff & Workers Association* at first glance is a powerful precedent that could change when gentrifying developments can go forward, its value is a bit questionable. The reasoning from *Chinese Staff & Workers Association* may not be applicable to all state EIS requirements (for example, if a state does not require an assessment of the "human environment" in its EIS, then the New York court's reasoning is not on point),[139] and there has been some backtracking even in New York to make clear that the far-reaching analysis used in *Chinese Staff & Workers Association* is not to be applied to all cases.[140] Additionally, in order for a private development to come under the

136. *See id.* at 366–68.
137. *Id.* at 366 (footnote omitted).
138. *Id.* at 368.
139. In the alternative, a state simply might not interpret "human environment" as expansively as was done in *Chinese Staff & Workers Ass'n*. Even New York courts have not always stuck with the definition or considerations applied in *Chinese Staff & Workers Ass'n*. *See* Katherine Ghilain, Note, *Improving Community Character Analysis in the SEQRA Environmental Impact Review Process: A Cultural Landscape Approach to Defining the Elusive "Community Character*," 17 N.Y.U. ENVTL. L.J. 1194, 1198–99 (2009) (noting that the State Environmental Quality Review Act (SEQRA)'s "community character" is not defined and has been used inconsistently).
140. *See* Long Island Pine Barrens Soc'y, Inc. v. Planning Bd. of Brookhaven, 606 N.E.2d 1373, 1379 (N.Y. 1992) (finding that the determinative factor in *Chinese Staff & Workers Ass'n* was that the high-rise was going to be built in a special urban zoning district, not that the determinative factor was simply the overall effects of the development). Additionally, even in other states with expansive EIS statutes, those statutes do not always apply to situations often relevant for gentrification. *See* Sean Stuart Varner, Note, *The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas for Necessary Reforms*, 19 PEPP. L. REV. 1447, 1463 (1992) (noting that California courts have held that the California

authority of an EIS requirement, it usually must go through a zoning board process—yet zoning regulations often attach to a development only when it is part of a greater plan and not when it is being constructed on just one lot that has been deemed an as-of-right development.[141] This means, for example, that the EIS might not be required if a landlord was simply pushing up rents or turning units in an apartment building from affordable to market rate. Thus, there are many states and situations in which using an EIS statute to fight a development simply because it contributes to gentrification is not feasible.

For these reasons, it is important to consider the second way to use an EIS to challenge gentrification: whether there are specific environmental effects of a gentrifying development that will usually trigger the application of an EIS. This argument can be thought of in a few different ways. First, a development that is advancing gentrification will ultimately cause displacement, and displaced individuals may have to travel farther to work and to visit friends and family.[142] Such increased travel could heighten pollution, a clearly harmful environmental effect.[143] Second, when low-income families of color are forced to move, there are often negative mental and physical health impacts on those individuals.[144] Even being displaced to areas with more economic opportunity and less violence may cause headaches, weight gain, emotional distress, and insomnia.[145] An EIS usually must take account of the

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EIS statute, the California Environmental Quality Act (CEQA), does not apply to the displacement of renters). In *Topanga Beach Renters Ass'n v. Department of General Services*, 58 Cal. App. 3d 188 (1976), in which a California court held that CEQA, did not apply to renters, the court stated:

> Adverse effect on persons evicted from Topanga Beach cannot alone invoke the requirements of CEQA, for all government activity has some direct or indirect adverse effect on some persons. The issue is not whether demolition of structures will adversely affect particular persons but whether demolition of structures will adversely affect the environment of persons in general.

Id. at 195.

141. Codey, *supra* note 127, at 296–97.
142. *See* GLAESER, *supra* note 77, at 87.
143. One of the purposes of the National Environmental Policy Act (NEPA) is to "fulfill the responsibilities of each generation as a trustee of the environment for succeeding generations." 42 U.S.C. § 4331(b)(1) (2006). Causing more air pollution would clearly identify a development as violating this purpose.
144. *See* Jason Corburn, *Reconnecting With Our Roots: American Urban Planning and Public Health in the Twenty-First Century*, 42 URB. AFF. REV. 688, 699 (2007) (referencing a study that "suggested that residential upheaval and lack of resettlement from urban renewal programs continue to have mental and physical health impacts on African-Americans").
145. Keene & Padilla, *supra* note 91, at 1221.

health impact it will have on individuals,[146] and so pointing to the health impacts of displacement that gentrification causes may trigger the application of an EIS statute. While both of these strategies do not automatically attach to any new development in a gentrifying area—an attorney challenging the development would likely have to show how the development would ultimately cause greater pollution or negative health outcomes for those displaced—as long as such data about the impact of the development was accessible, a court could find the need for an EIS.

Additionally, using these one-step-removed arguments to require an EIS for a development in a gentrifying neighborhood addresses the most common counterargument made against this legal strategy. Critics of a more expansive use of an EIS (in which gentrification per se would be seen as an environmental impact that should trigger an EIS) argue that "decisionmakers use the environmental review process to delay, recast, or kill development projects for ends unrelated to environmental goals"[147] and that "[d]efining the environment too broadly results in requiring impact statements . . . [that impose] dead-weight social losses . . . [and that enable] interested parties to use environmental statutes to serve nonenvironmental ends."[148] But if an attorney is focusing on the fact that a development will cause displacement that will result in an increase in air pollution and in negative health outcomes, then it seems completely appropriate for an EIS to take into account the gentrification (or more specifically, the displacement) the development might cause over time.

146. Even NEPA, which is usually considered the most conservative of the EIS statutes, requires an assessment of the health impact of a development. *See* 42 U.S.C. § 4331(b)(2) ("In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means . . . to the end that the Nation may . . . assure for all Americans safe, *healthful*, productive, and esthetically and culturally pleasing surroundings . . . . " (emphasis added)). *But see* Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 773 (1983) (holding that "although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment"). Even though in *Metropolitan Edison* the Court focused on the importance of the negative effects on the physical environment as a prerequisite for a NEPA claim, in that case the negative effects asserted by the plaintiffs were the psychological harms of living near a nuclear plant. *Id.* at 769. Thus, there still seems to be room to argue that if a development had effects that caused physical rather than psychological harms to individuals, NEPA could be invoked. *See* Friends of Boundary Waters Wilderness v. Dombeck, 164 F.3d 1115, 1126–1127 (8th Cir. 1999) (finding that in certain situations, even under the precedent of *Metropolitan Edison*, NEPA can be used to address the health concerns of residents).

147. Sterk, *supra* note 132, at 2055.

148. *Id.* at 2060.

Thus, an attorney could use NEPA or a state EIS requirement to fight new developments that landlords are attempting to build in gentrifying neighborhoods. While an EIS often is only a procedural tool that may not ultimately stop the development from being built, it can help slow down gentrification, giving community members more time to organize to stop the development. The community then can assess whether the benefits of a new development[149] would outweigh possible costs, such as subsequent rising rents in the surrounding area and displacement. This puts control back in the hands of the residents affected by the new development rather than in the hands of developers who likely care more about their profits than their long-term effects on a community.

C. Preserving Community Through Litigation: Novel Use of the Fair Housing Act

The FHA, also known as Title VIII,[150] bans discrimination on the basis of race in the sale or rental of housing, in housing preferences, in blockbusting, and in lending.[151] The FHA was originally passed in 1968, within days of the assassination of Martin Luther King, Jr. and of the release of a presidential commission's report blaming housing segregation for the 1967 race riots.[152] As a result of the quick passage of the bill, there is little legislative history that courts can look to when interpreting the statute.[153] Courts have mostly referenced supportive legislators' comments from the Senate floor, such as Senator Jacob Javits's statement that "the whole community" can be the victim of discriminatory housing practices and Senator Walter Mondale's statement that the law's purpose is to replace ghettos with "truly integrated and balanced living patterns."[154] Thus, courts tend to interpret the statute by focusing on whether the challenged action encourages or undermines integration. Because gentrification often has a racial element, attorneys could challenge the gentrification of a neighborhood through claims under the FHA to preserve affordable housing inhabited by low-income residents of color and to prevent resegregation.

149. As discussed above, a new development in a neighborhood may contribute to the revitalization of an underresourced neighborhood without being a harbinger of gentrification, or at least the sort of gentrification that will cause widespread displacement. *See supra* Part II.
150. 42 U.S.C. §§ 3601–3631 (2006).
151. *See* DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 445 (6th ed. 2008).
152. Hannah-Jones, *supra* note 2.
153. *See* ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 5:2 (2012).
154. *E.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 211 (1972).

The most promising FHA provision for challenging gentrification is § 3604(a), which makes it unlawful "[t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race . . . ."[155] This broad language has been interpreted to cover any practice that denies housing or negatively affects its availability "because of" race.[156] Circuit courts have ruled that this language refers to intentional discrimination in housing transactions, to mixed motive housing transactions in which intentional discrimination is one among several reasons for a party's actions, and to housing transactions that cause disparate effects on the groups the FHA protects.[157] It is doubtful that evidence of intentional racial discrimination will exist in the progentrification policies or actions of landlords and developers (and when such evidence exists, it will be much easier to prove a violation of the FHA), so this Comment assesses how attorneys could use the disparate effects cause of action to challenge gentrifying policies and actions.

In disparate effects cases, plaintiffs can make their claim based on one or both of two theories: (1) that the housing transaction in question will have a greater adverse impact on a protected class (such as racial minorities) or (2) that the housing transaction in question perpetuates segregation.[158] Under the adverse impact theory, the plaintiff must be challenging an entire practice or policy rather than an act targeting only one individual and must show the statistical significance of the action on protected class members.[159] Under the

155. 42 U.S.C § 3604(a) (2006). There has also been recent interest in using § 3608 of the statute in novel ways in order to preserve or create affordable housing. *See* Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Further" Mandate*, 100 KY. L.J. 125 (2012). This section of the statute mandates that governmental departments and agencies must administer their programs in a manner that affirmatively furthers fair housing. 42 U.S.C § 3608(d) (2006). I will not discuss this provision in this Comment because it only applies to the actions of governmental agencies, and could not be used to challenge the actions of private landlords and developers that foster gentrification. Additionally, it might be difficult to bring cases under § 3608 because there is no private right of action under that provision, at least as understood in some circuits. *See* Latinos Unidos de Chelsea en Accion (LUCHA) v. Sec'y of Hous. & Urban Dev., 799 F.2d 774, 792 (1st Cir. 1986).

156. SCHWEMM, *supra* note 153, § 13:4.

157. *See, e.g.*, Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1042 (2d Cir. 1979) (stating that conduct for which discrimination is just one of the motivating factors violates the FHA); United States v. City of Black Jack, 508 F.2d 1179, 1184–85 (8th Cir. 1974) (finding that an FHA violation may be shown by conduct that has a discriminatory effect/impact); Seaton v. Sky Realty Co., 491 F.2d 634, 635–36 (7th Cir. 1974) (upholding a district court's finding that intentional discrimination violates the FHA).

158. SCHWEMM, *supra* note 153, § 10:5.

159. *Id.* § 10:6.

perpetuation of segregation theory, the plaintiff may challenge one discriminatory act or an entire practice or policy and must present evidence of the segregative effect the housing transaction would have.[160] Both of these theories seem applicable to challenging gentrification. When removing housing from affordability programs in gentrifying neighborhoods has an adverse effect on residents of color in many instances,[161] attorneys could challenge such an action under the adverse impact theory. And when a broader array of actions—not only removing housing or units from affordability programs, but also building luxury developments—causes resegregation of a neighborhood through white residents replacing residents of color, attorneys could challenge such actions under the perpetuation of segregation theory. The next two subsections address each of these possible claims in greater detail.

1. The Adverse Impact Theory

The first cause of action under § 3604 of the FHA, challenging an act that causes an adverse impact on residents of color, could be used to preserve affordable housing in gentrifying neighborhoods. Because people of color disproportionately reside in affordable housing,[162] taking a building out of an affordable housing program would likely have the sort of adverse impact against racial minorities that the FHA prohibits since a disproportionate

160. *Id.* § 10:7. The segregative effect must be shown within a substantially discrete community. So, while plaintiffs have successfully been able to show impermissible segregative effects on a building- or neighborhood-wide scale, plaintiffs' claims may be rejected if they are trying to argue that the segregative effect will take place across an entire city. *Compare* Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 113-114 (1979) (finding standing for plaintiffs in a FHA case who were challenging the housing practice by referencing changes to a 12-by-13 block neighborhood), *with* Havens Realty Corp. v. Coleman, 455 U.S. 363, 377 (1982) (finding it implausible to argue in a FHA case that the discriminatory actions could have palpable effects throughout an entire city).

161. Generally, residents of color disproportionately occupy affordable housing. For example, in project-based Section 8 housing (buildings in which a private landlord contracts with the federal government to provide affordable housing), 42 percent of tenants are black while only 13 percent of the U.S. population overall is black. U.S. DEP'T OF HOUS. & URBAN DEV., RESIDENT CHARACTERISTICS REPORT (2014), *available at* https://pic.hud.gov/pic/RCRPublic/rcrmain.asp (choose "Project Based Certificate and Project Based Voucher" as the selected program type, then click on "National," and finally click on the "Race/Ethnicity" tab to retrieve data); KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2011), *available at* www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

162. *See supra* note 161. People of color also disproportionately utilize public housing (government-owned affordable housing). SOC. SEC. ADMIN., OFFICE OF RESEARCH, EVALUATION & STATISTICS, SOCIAL SECURITY PROGRAMS IN THE UNITED STATES 100 (1997), *available at* http://www.socialsecurity.gov/policy/docs/progdesc/sspus/sspus.pdf.

number of people of color would lose their housing from such an action. There are already some FHA cases that show that vacating, demolishing, or not renewing the contract of affordable housing complexes violates the law under the adverse impact theory. While this cause of action applies just as directly in gentrifying neighborhoods as in nongentrifying ones, it could be utilized strategically in gentrifying neighborhoods to ensure that minority residents aren't displaced from their homes.

Attorneys could rely on a few key precedents that have found that removing a building from affordability violates the FHA. For example, in *Owens v. Charleston Housing Authority*,[163] a district court in Missouri held that the decision to vacate and demolish an affordable housing complex violated the FHA because of the disparate racial impact those actions would have.[164] Remarkably, the court ordered an injunction directing the landlord to continue operating the complex as affordable housing,[165] and the Eighth Circuit later affirmed the district court's order and its analysis of the FHA.[166] This is exactly the sort of outcome that community members might desire when challenging gentrification: a ruling that not only establishes that forcing low-income residents out of an affordable housing complex violates the FHA, but also requires the landlord to continue to provide affordable housing for those residents. A similarly helpful precedent is *Cole v. Lynn*,[167] in which a Washington, D.C. district court held that the FHA prohibits landlords from withdrawing their complexes from affordability programs if there are other economically feasible options available—such as switching to a different affordability program or selling the complex.[168] Advocates in gentrifying neighborhoods could argue that preserving affordable housing units is economically feasible—after all, if a landlord has been operating an affordable building or unit for a number of years, it seems economically feasible that he could continue to do so—and so removing buildings or units from affordability programs violates the FHA. This is an especially persuasive argument when used to preserve federally assisted affordable housing because

163. 336 F. Supp. 2d 934 (E.D. Mo. 2004).
164. *Id.* at 943.
165. *Id.* at 949.
166. Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 741–42 (8th Cir. 2005).
167. 389 F. Supp. 99 (D.D.C. 1975).
168. *Id.* at 103–05. But it appears that if it is not economically feasible to keep a building in an affordability program, there is no duty under the FHA to do so. For example, in *Sadler v. 218 Housing Corp.*, 417 F. Supp. 348 (N.D. Ga. 1976), the affordable housing was uninhabitable and needed significant and expensive rehabilitation to remain open, and in part based on these reasons the court held that the landlord did not violate the FHA by demolishing the building. *Id.* at 357–59.

usually the federal government is willing to pay a landlord market-rate rents as part of a subsidy to keep the building or unit in the affordability program.[169]

Of course, some courts have been less willing to preserve affordable housing under the adverse impact theory of the FHA. One of the most convincing pro-landlord arguments is from *Hallmark Developers, Inc. v. Fulton County*[170] in which the Eleventh Circuit held that it was speculative to presume the racial makeup of who would move into yet-to-be-built housing, and thus the court couldn't assume that the county's refusal to provide a permit for affordable housing would have a disparate racial impact (and thus violate the FHA).[171] While it is well-argued that it is quite speculative to assume the effect on racial demographics a housing decision will have down the line, even the Eleventh Circuit found that there was a difference between refusing to build affordable housing and preserving existing affordable housing. The court referenced two seminal FHA cases, *Huntington Branch, NAACP v. Town of Huntington*[172] and *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[173] and noted that an FHA disparate effects claim could succeed when it was known that there was a shortage of housing for the defined group of residents who needed the sort of affordable housing already in existence.[174] Considering that fewer than one in four families who qualify for affordable housing programs actually utilize them,[175] and that residents of color disproportionately live in affordable housing, it is practically a known rather than speculative fact that not preserving affordable housing will have an adverse effect on people of color. If people of color disproportionately live in affordable housing as compared to market-rate housing and a building or unit is converted from affordable housing to market-rate housing, then the conversion more likely than not has the effect of displacing a resident of color and replacing that resident with a white individual. Thus, the removal of

169. For example, the federal government will allow landlords of project-based Section 8 buildings to go through the "Mark Up to Market" program, which renews their contracts with the federal government to reflect competitive market-rate rents. *See Section 8 Contract Renewals*, NAT'L HOUSING L. PROJECT, http://nhlp.org/resourcecenter?tid=120 (last visited Mar. 30, 2014).
170. 466 F.3d 1276 (11th Cir. 2006).
171. *Id.* at 1286–87.
172. 844 F.2d 926, 929 (2d Cir. 1988) (using an analysis of the shortage of affordable housing in the town to ultimately support the finding of an FHA violation).
173. 558 F.2d 1283, 1288 (7th Cir. 1977) (implying there is a need for more affordable housing in the town before ultimately finding the possibility of an FHA violation).
174. *Hallmark Developers, Inc.*, 466 F.3d at 1287.
175. *See* WILL FISCHER, CTR. ON BUDGET & POLICY PRIORITIES, CONVERTING FUNDING OF SOME PUBLIC HOUSING DEVELOPMENTS TO SECTION 8 SUBSIDIES WOULD HELP PRESERVE NEEDED UNITS 2 (2011), *available at* http://www.cbpp.org/files/3-25-11hous.pdf.

housing from affordability programs certainly seems to violate the adverse impact cause of action of the FHA.

Although it may be straightforward enough (armed with the right data about the racial demographics of the residents of affordable housing) to argue that removing housing from affordability programs violates the FHA because of its disparate effects on racial minorities, it is less clear how to remedy such potential removal. In *Owens v. Charleston Housing Authority*, as discussed above, the court ordered the landlord to remain in the affordability program—but the court may have felt justified to put forth such an order because, at that moment in the building's history, a governmental agency was the owner and landlord of the building[176] and so such an order did not interfere with the property rights of a private individual. But in *People to End Homelessness v. Develco Singles Apartments Ass'n*,[177] the First Circuit held that the FHA, by its plain meaning, could not force a private owner to preserve the long-term affordability of his complex.[178] There is some tension between the fact that removing a building or unit from affordability may violate the FHA and mandating that a landlord remain in the affordability program may violate his property rights.

Yet even while recognizing this potential problem, it seems possible that housing advocates could successfully litigate an adverse impact claim against a private landlord. Courts have upheld other types of regulations in landlord-tenant relations (such as allowing the government to regulate the rents that landlords can charge and forcing landlords to accept tenants they would not otherwise), and the government generally has the power to regulate private discrimination.[179] Additionally, the justification put forth by landlords for why they would want to remove buildings or units from affordability programs—that they could make more money from the units if they were not a part of an affordability program—can be defeated. When courts have allowed a cost-justification argument to succeed, it has only been when the landlord put forth a clear estimate about why complying with the

176. Owens v. Charleston Hous. Auth., 336 F. Supp. 2d 934, 939, 949 (E.D. Mo. 2004).

177. 339 F.3d 1 (1st Cir. 2003).

178. *Id.* at 5.

179. Nat'l Hous. Law Project, *Fair Housing Litigation to Prevent the Loss of Federally Assisted Housing: The Duties of Public Housing Authorities and Project Owners—Part Two of Two Articles: Obtaining Data, Formulating Claims and Anticipating Objection*s (pt. 2), 31 HOUSING L. BULL. 157, 170–71 (July/Aug. 2001). *See generally* Pennell v. City of San Jose, 485 U.S. 1, 11–15 (1988) (finding a rent control ordinance that restrains by how much a landlord can raise rents facially valid under the U.S. Constitution); United States v. Page Props., Inc., 198 F.3d 252, 1999 WL 475563, at *1 (8th Cir. July 6, 1999) (upholding a district court's order that a landlord choose its tenants in compliance with the FHA).

nondiscrimination mandate would be prohibitively costly.[180] A general assertion that it is financially more advantageous for the landlord to remove his building from an affordability program probably would not win in court.[181] Thus, litigation based on the FHA cause of action concerning adverse impact on minority residents likely could successfully challenge the removal of affordable housing from gentrifying neighborhoods.

2. The Perpetuation of Segregation Theory

The other cause of action under the FHA disparate effects claim, that a policy or an action is perpetuating segregation, is particularly powerful in the context of a neighborhood that has already gone through enough gentrification to significantly affect its racial demographics. Some courts have not found violations of the FHA when the proposed action, such as removing housing from affordability programs, takes place in a minority-majority neighborhood that is so racially monolithic that higher-income white individuals moving in would result in greater integration.[182] But if a neighborhood has gentrified to the extent that the affordable housing houses a significant proportion of the minority residents because the other residents of color have already been displaced by higher-income white residents, then the loss of such affordable housing will clearly result in a whiter—that is, resegregated—neighborhood. Additionally, this cause of action is not dependent on a building being removed from its affordability program. Any action that would ultimately resegregate the neighborhood, such as building a new luxury development, could act as the catalyst to bring this sort of FHA claim.

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180. *See, e.g.*, United States v. Weiss, 847 F. Supp. 819, 831 (D. Nev. 1994) (finding that requiring a landlord to spend $1.63 million dollars to upgrade the hot water capacity so that the landlord would not have to limit the number of families with children—a protected class under the FHA—in the building was unwarranted under the FHA); Sadler v. 218 Hous. Corp., 417 F. Supp. 348, 358 (N.D. Ga. 1976) (finding that HUD considered all other economic options before deciding to remove the building from affordability).

181. This hypothesis is bolstered by the fact that when interpreting Title VII law, which sometimes is imported when interpreting the FHA, courts have generally not upheld a cost justification defense (when an employer tries to defend a discriminatory practice by noting the practice reflects real costs to the employer). *See, e.g.*, UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991); City of L.A. v. Manhart, 435 U.S. 702 (1978).

182. *See, e.g.*, *Sadler*, 417 F. Supp. at 357–59 (holding that there was no FHA violation when a landlord wanted to remove a building from an affordability program and give minority tenants portable vouchers because the neighborhood in which the building existed was racially monolithic, and so having minority residents move to new neighborhoods would promote integration more successfully than having them stay).

Like with the adverse impact cause of action, attorneys have not often used the perpetuation of segregation cause of action to challenge further gentrification of a neighborhood although there are a few examples of such litigation. In 1983, minority residents living near downtown Boston challenged the development of a huge commercial complex, Copley Place, which they argued would ultimately cause rents to rise in their neighborhoods, displacing them and resulting in resegregation of their neighborhoods as more white residents moved in.[183] The court held that the residents whose neighborhoods would be resegregated as a result of rising rents and displacement had standing to go forward with the case.[184] In 1987, tenants in Washington, D.C. challenged the conversion of their affordable housing into high-rent units in *Brown v. Artery Organization, Inc.*[185] While the court worried that assessing such conversions under the adverse impact theory of the FHA would always lead to the halting of upgrades or conversions of affordable housing, which it argued was not the intent of Congress in passing the FHA,[186] it did hold that under the perpetuation of segregation theory such conversions could be stopped when they would cause resegregation of the neighborhood, and so the court denied the defendant's motion to dismiss.[187] Another example is *Pleune v. Pierce*[188] in which minority residents in Brooklyn challenged the building of Atlantic Terminal, a huge development including office space, retail space, a cinema, a supermarket, and residential units for moderate-income families.[189] Again, the court found that the residents did not have a cognizable claim under the adverse impact theory, but they could bring an action against the new development under the theory that the project would result in the loss of an integrated neighborhood.[190]

Ultimately, these cases and others established fairly early in the FHA's history that the FHA should be used to prevent segregated ghettoes and to

183. Munoz-Mendoza v. Pierce, 711 F.2d 421, 426–28 (1st Cir. 1983).
184. *Id.* at 429. Interestingly, the court ruled that the plaintiffs representing Chinatown—which had a population that was 80 percent Asian and Asian American—did not have standing under the perpetuation of segregation claim under the FHA because more white residents in Chinatown would lead to more, rather than less, integration in that neighborhood. *Id.* at 428–29.
185. 654 F. Supp. 1106, 1108–09 (D.D.C. 1987).
186. *Id.* at 1116.
187. *Id.* at 1118.
188. 697 F. Supp. 113 (E.D.N.Y. 1988).
189. *Id.* at 114.
190. *Id.* at 117.

guard against lack of opportunity for minority racial groups.[191] Thus, the perpetuation of segregation cause of action under the FHA is particularly well suited for challenging acts that have a gentrifying effect on a neighborhood. Under the FHA, a plaintiff should be able to sue for any actions that will resegregate a neighborhood, which includes many actions that take place during gentrification, such as the removal of housing from affordability programs and the building of luxury developments. This cause of action is especially useful when a neighborhood has already undergone a significant amount of gentrification. If a neighborhood has been gentrified to the point where it is relatively integrated (that is, the neighborhood was majority-minority but because of gentrification has come to have a significant white population), then this cause of action can stop further gentrification that would result in a mostly white neighborhood. Additionally, the fact that courts sometimes point out that the FHA was supposed to protect against lack of opportunities for racial minorities might be especially helpful in gentrification cases since most people being displaced have to move farther away from city centers—and thus from an area dense with job opportunities and public transit. For these reasons, bringing lawsuits under the perpetuation of segregation theory of the FHA could be a powerful and particularly successful tool in challenging gentrification.

Unfortunately, the greatest drawback with asserting both perpetuation of segregation and adverse impact claims in the fight against gentrification is that it seems quite likely the Supreme Court will soon restrict the breadth of disparate impact FHA claims or prohibit them altogether. In the last few years the Court has thrice granted a writ of certiorari to assess whether disparate impact claims are cognizable under the FHA—for *Magner v. Gallagher*[192] in 2011, for *Township of Mount Holly v. Mount Holly Gardens Citizens In Action, Inc.*[193] in 2013, and for *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*[194] in 2014. The only reason the Court has not yet ruled on the permissible breadth of FHA claims is because the parties in *Magner* and *Township of Mount Holly* voluntarily

191. *See, e.g.*, Williamsburg Fair Hous. Comm. v. N.Y.C. Hous. Auth., 450 F. Supp. 602, 606 (S.D.N.Y. 1978) (noting that the goal of the FHA is to promote "open, integrated residential housing patterns and to prevent the increase of segregation, in ghettoes, of racial groups whose lack of opportunities the Act was designed to combat" (quoting Otero v. N.Y.C. Hous. Auth., 484 F.2d 1122, 1134 (2d Cir. 1973))).
192. 132 S. Ct. 548 (2011).
193. 133 S. Ct. 2824 (2013).
194. 747 F.3d 275 (5th Cir. 2014), *cert. granted in part*, 82 U.S.L.W. 3686 (U.S. Oct. 2, 2014) (No. 13-1371).

dismissed their cases before a decision was rendered.[195] Considering the conservative bent of this Supreme Court,[196] the Court may restrict or prohibit disparate impact FHA claims if given the chance. While claims based on the FHA make the most traditional legal arguments and have the strongest existing precedent for fighting gentrification, they soon may not be a tool that housing attorneys can rely on.

CONCLUSION

As data from the 2010 census shows, gentrification is a growing phenomenon in American cities. Higher-income residents—who are usually white—are moving into affordable inner-city neighborhoods. They drive up property taxes and rents, ultimately forcing out the low-income residents who cannot afford such increases in their housing payments. Even tenants living in affordable housing, whose rent is subsidized or regulated by the government, are often pressured by their landlords to move so that landlords can charge new higher-income tenants the rapidly rising market rate for residency.

Such gentrification is a complex, multifaceted process. Public officials, organizers, policy makers, and low-income residents are key in addressing if, when, and how gentrification should occur in the inner city. Attorneys may also be able to play an important role in challenging gentrification. Three sorts of litigation seem particularly ripe for fighting gentrification. First, litigation could be used to enforce inclusionary zoning laws or to push state constitutions to incorporate a right to affordability-friendly zoning regulations. Second, litigation based on federal and state EIS requirements could challenge new luxury developments proposed in gentrifying neighborhoods by noting the sorts of environmental harms gentrification causes. Third, litigation based on the FHA's prohibitions on housing actions that have an adverse impact on racial minorities and that perpetuate segregation could be used to preserve affordable housing in gentrifying areas and to halt the building of luxury developments in gentrifying areas.

195. Twp. of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc., 134 S. Ct. 636 (2013); Magner v. Gallagher, 132 S. Ct. 1306 (2012).

196. *See* Michael Keegan, *We Have the Most Conservative Supreme Court in Decades. Why Do Americans Think It's Liberal?*, HUFFINGTON POST (July 24, 2013, 5:12 AM), http://www.huffington post.com/michael-b-keegan/we-have-the-most-conserva_b_3333337.html.

The socioeconomic and racial diversity of cities is being decimated as higher-income white residents occupy more space in these cities. Civil rights advocates and their followers who fought for integration of suburbs should be just as concerned with the current resegregation of cities as they were with the existence of all-white suburbs and towns. Attorneys can and should develop novel ways to assist in ensuring integration in the inner city. This Comment hopes to contribute to the dialogue among housing attorneys concerning litigation tools that can aid low-income residents who challenge the gentrification occurring in their neighborhoods.