See Section I.C

NEIGHBORHOOD UPZONING AND RACIAL DISPLACEMENT: A POTENTIAL TARGET FOR DISPARATE IMPACT LITIGATION?

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INTRODUCTION

In 2014, The New York Times profiled Tranquilina Alvillar,[1] a 50-year old Brooklyn resident who, due to her landlord's avarice, was pushed out of her apartment in the borough's trendy Williamsburg neighborhood. Ms. Alvillar—a low-income Mexican immigrant with a poor command of English—stood by with little recourse as her landlord gradually nudged her apartment into a state of disrepair, "removing building walls and tearing up floors" in hopes that she would leave of her own volition. He soon got his wish, and quickly began renovating the building to make room for tenants able to pay thousands more for the space she once called home.

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[1] Julie Satow, *In Twist, Tenant Who Was Forced Out Will Displace One Who Moved In*, N.Y. TIMES (Dec. 18, 2014), https://www.nytimes.com/2014/12/19/nyregion/in-twist-tenant-who-was-forced-out-will-displace-one-who-moved-in.html?_r=0 [https://perma.cc/ZLX6-KXV7].

It seems over the course of the decade prior, Williamsburg, once a haven for recent immigrants and lower-income minorities, had become a sought-after destination for young, highly educated, upwardly mobile professionals searching for homes close to Manhattan.[2] As generally occurs during this process, landlords, developers, and investors took note of the neighborhood's changing demographics and capitalized on it.[3] Residents like Alvillar were caught in their crosshairs.

However, The New York Times article depicts a bundled Alvillar standing triumphantly on the street in the heart of Williamsburg because, unlike most in her situation, Alvillar's story ended victoriously. After a protracted and contentious legal battle against the landlord, the Housing Court ruled that Alvillar had been "illegally locked out" and ordered that she be allowed to return.[4] But for many in Alvillar's situation, their stories do not end positively. Theirs are stories of displacement; tales becoming more common in New York neighborhoods like Williamsburg, Harlem, and Chinatown.[5] As residential patterns change, these once strong minority enclaves are growing whiter, richer, denser, and more expensive than at any point in recent history. With higher earners moving into these changing communities, long-time residents like Alvillar are being pushed out by forces that are not always as easily identified as an unscrupulous landlord. In those situations, little recourse exists to remedy their upheaval.

The literature on displacement—and its some-time precursor, gentrification[6]—is voluminous.[7] Countless scholars and social commentators have written about the recent wave of

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[2] *See* Ivan Pereira, *Williamsburg leads NYC in gentrification, Report Says*, AM NEW YORK (May 11, 2016), http://www.amny.com/real-estate/williamsburg-leads-nyc-in-gentrification-report-says-1.11786129 [https://perma.cc/6YT7-PZX9] (describing the various demographic metrics in which Williamsburg has changed in recent years); *see also* Tanvi Misra, *Inside Pre-Gentrification Williamsburg*, CITYLAB (Apr. 5, 2016), http://www.citylab.com/housing/2016/04/a-time-capsule-showing-pre-gentrification-williamsburg/476958/ [https://perma.cc/MRK2-EGG8] (reviewing a documentary that highlights the neighborhood's "Dominican-Puerto Rican" past).

[3] *See* Gavin Mueller, *Liberalism and Gentrification*, JACOBIN (Sept. 26, 2014), https://www.jacobinmag.com/2014/09/liberalism-and-gentrification/ [https://perma.cc/Q297-NGKN] ("Gentrification has always been a top-down affair, not a spontaneous hipster influx, orchestrated by the real estate developers and investors who pull the strings of city policy, with individual home-buyers deployed in mopping up operations.").

[4] Satow, *supra* note 1.

[5] For an analysis on gentrification in these neighborhoods, see TOM ANGOTTI & SYLVIA MORSE, ZONED OUT! RACE, DISPLACEMENT, AND CITY PLANNING IN NEW YORK CITY (2016).

[6] Despite providing fodder for countless think pieces and scholarly articles, the exact definition of gentrification is an unsettled topic. One of the more respected definitions comes from Professors Loretta Lees, Elvin Wyly, and Tom Slater, who describe gentrification as "the transformation of a working-class or vacant area of the central city into middle-class residential or commercial use." LORETTA LEES ET AL., GENTRIFICATION xv (2008). Additionally, for the purposes of this paper, we will assume *some* kind of causal link between gentrification and displacement. However, it is important to note that the relationship between gentrification and displacement is hotly contested, and even among scholars who agree that a causal relationship exists between the two phenomena, little consensus exists on how that relationship functions in practice. *See* Richard Florida, *The Complicated Link Between Gentrification and Displacement*, CITYLAB (September 8, 2015), http://www.citylab.com/housing/2015/09/the-complicated-link-between-gentrification-and-displacement/404161/ [https://perma.cc/LVK8-5KH3].

[7] *See, e.g.*, Rowland Atkinson, *Measuring Gentrification and Displacement in Greater London*, 37 URB. STUDIES 149 (2000) (finding evidence of displacement in gentrifying London neighborhoods); Kate Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 URB. STUDIES 23, 29 (2006) (estimating that between 6-10% of all moves out of New York City between 1989 and 2002 were due to gentrification-fueled displacement).

changing urban centers in cities like New York, Washington, D.C., Oakland, and Los Angeles. However, while commentary on this phenomenon abounds, little consensus exists on its precise causes. Some scholars present gentrification-fueled displacement as symptom of myriad economic forces that are hard to identify.[8] Others instead focus on the actors most clearly at fault for *particular instances* of displacement, including landlords and the developers of new luxury residences that have quickly come to characterize gentrifying neighborhoods.[9] Few scholars, however, have focused on the role that local governments can play in fueling gentrification and displacement. Cities, in their capacity as the chief architects of our country's zoning policy, certainly have an outsized role in shaping the development patterns of our urban centers. While much has been written about exclusionary zoning's ability to keep particular demographics *out* of neighborhoods,[10] few have fully explored the way that liberal zoning policies (i.e. upzoning[11]) can precipitate a demographic *influx* into a neighborhood (as well as the resulting wave of displacement that comes afterward).[12]

Similarly, while much has been written about the *policy* prescriptions for gentrification and displacement, little exists on *legal* solutions to these vexing challenges.[13] Interestingly, several scholars and advocates are now looking to a recent Supreme Court decision, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (*Inclusive Communities Project*),[14] as one possible avenue for legal redress.[15] In *Inclusive Communities*

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[8] *See, e.g.*, Adam Hengels, *Only 2 Ways to Fight Gentrification (you're not going to like one of them)*, MARKET URBANISM (Jan. 28, 2015), http://marketurbanism.com/2015/01/28/2-ways-to-fight-gentrification/ [https://perma.cc/3V7C-6TGE] ("Gentrification is the result of powerful economic forces. Those who misunderstand the nature of the economic forces at play, risk misdirecting those forces in ways that exasperate city-wide displacement. Before discussing solutions, it is important to accept that gentrification is one symptom of a larger problem.").

[9] *See, e.g.*, Mueller, *supra* note 3.

[10] *See, e.g.*, Andrew H. Whittemore, *The Experience of Racial and Ethnic Minorities with Zoning in the United States*, 32 J. PLAN. LITERATURE, 16, 17 – 20 (2017); Allison Shertzer et al., *Race, Ethnicity, and Discriminatory Zoning*, 8 AM. ECON. J. 217, 234 – 36 (2016).

[11] For a comprehensive definition of "upzoning," see Richard W. Bartke and John S. Lamb, *Upzoning, Public Policy, and Fairness - A Study and Proposal*, 17 WM. & MARY L. REV. 701, 702 n.10 (1976) ("'Upzoning' is a change in zoning classification from less intensive to more intensive; 'downzoning' refers to the opposite phenomenon. The change may be in the use (e.g., from single family to multiple residential use), bulk (e.g., from 15,000 sq. ft. minimum lot size to 7,500 sq. ft.), or height (e.g., from 30 ft. maximum height to 60 ft. maximum); occasionally upzoning may involve all three elements. Upzoning is most frequently a result of a map amendment, although a text amendment may also be involved.").

[12] *See* Whittemore, *supra* note 10, at 20 ("A limited amount of research to date has considered how minorities may be excluded (via displacement) from gentrifying neighborhoods by zoning decisions allowing construction of upmarket housing."). *But see* ANGOTTI & MORSE, *supra* note 5 (arguing that upzoning has caused gentrification and displacement in multiple New York neighborhoods); Melissa Checker, *Wiped Out by the "Greenwave": Environmental Gentrification and the Paradoxical Politics of Urban Sustainability*, 24 CITY & SOC'Y 210 (making the same argument, focused on Harlem).

[13] *But see, e.g.*, Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507 (1990) (arguing for the enforcement of "Eviction Free Zones" in gentrifying neighborhoods under the doctrine implied warranty of habitability).

[14] 135 S. Ct. 2507 (2015).

[15] *See* Tanvi Misra, *New York City Has Been Zoned to Segregate*, CITYLAB (Jan. 25, 2017), http://www.citylab.com/housing/2017/01/new-york-city-has-been-zoned-to-segregate/514142/ [https://perma.cc/SGZ5-

Project, the Court established that disparate impact claims were cognizable under the Fair Housing Act (FHA). Despite circuit court unanimity on the issue, until the *Inclusive Communities Project* decision, Supreme Court jurisprudence only recognized claims of housing discrimination grounded in actions that were *on their face* discriminatory.[16] With this ruling, the Court affirmed that it would also recognize housing discrimination claims brought against facially neutral actions that, nevertheless, had disparate negative impacts on a protected class. In the wake of this decision, several housing discrimination cases have brought disparate impact claims using the Court's guidance on the issue.[17] And yet, despite rumblings about the possibility of disparate impact litigation against municipal upzoning decisions, no litigant or scholar has explored this issue fully.

This paper aims to fill these existing gaps in the literature in two ways. First, this paper aims to tease out the relationship between liberal zoning policies and gentrification/displacement. By focusing on research done in several gentrifying New York neighborhoods, this paper looks to establish a framework of causality between upzoning decisions and displacement upon which a hypothetical disparate impact claim could rest. Second, this paper aims to explore the legal merits of such a claim. After outlining the Supreme Court's analysis in *Inclusive Communities Project*, this paper endeavors to show that, while potentially attractive, disparate impact claims against urban upzoning policies will likely not succeed, given the current state of Fair Housing jurisprudence.

Before proceeding, it is important to address why an ostensibly unsuccessful litigation strategy warrants such extensive academic analysis. First, as stated previously, housing advocates are currently looking to disparate impact theory as a possible vehicle for addressing issues with urban upzoning.[18] This strategy therefore warrants a thorough vetting *before* public interest litigants expend considerable time, money, and energy into a case set for failure. Second, and perhaps most important, the urban upzoning hypothetical helps illustrate the ways in which the Court's decision in *Inclusive Communities Project* actually *limits* the reach of disparate impact claims under the FHA. By refining the test for how litigants prove disparate impact, the Court actually established how difficult a bar this is to clear. Urban upzoning presents a paradigmatic example of a policy that seems to cause a disparately discriminate impact, but does not reach the Court's strict requirements for what actually constitutes causation. In that way, this hypothetical could serve as a case study for all future disparate impact litigants interested in establishing a convincing prima facie showing of racial discrimination.

This paper will proceed in four parts. Part I explores the relationship between zoning and racial exclusion, briefly discussing the more traditional ways in which zoning policy has disadvantaged low income minorities (i.e. exclusionary zoning and expulsive zoning), before turning to a more in-depth discussion of the ways upzoning policies can potentially cause racially

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7ZX2] (interviewing Thomas Angotti and Sylvia Morse on their book *Zoned Out*, who mention that the inspiration for the book was a series of conversations with attorneys regarding the possibility of bringing a lawsuit against the city of New York for its upzoning policies under disparate impact theory).

[16] For a brief introduction to intentional discrimination jurisprudence, see S. Lamar Gardner, Note, *#BlackLivesMatter, Disparate-Impact, and the Property Agenda*, 43 S.U. L. REV. 321, 332 – 33 (2016).

[17] *See e.g.,* City of Los Angeles v. Wells Fargo & Co., No. 2:13–cv–09007–ODW, 2015 WL 4398858 (C.D. Cal. July 17, 2015); Dekalb Cnty., Georgia v. HSBC N. Am. Holdings, Inc., No. 1:12-cv-3640-AT, 2016 WL 3958732 (N.D. Ga. Jun. 29, 2016); City of Miami v. Bank of America Corp., 171 F.Supp.3d 1314 (S.D. Fla. 2016).

[18] *See* Misra, *supra* note 15.

discriminatory displacement. Part II then turns to the existing case law on the subject, recounting the ways that federal courts have historically viewed the relationship between zoning and racial discrimination, before shifting to a discussion of how that landscape has changed (or not changed) in a post-*Inclusive Communities* world. Part III bridges the content of the two previous sections by taking a hypothetical case against urban upzoning through the Supreme Court's current test for disparate impact discrimination. This Part will argue that, given the current case law on the topic, resting this kind of discrimination claim on disparate impact theory will likely prove unsuccessful. Part IV concludes with possible alternative mechanisms for addressing urban displacement, specifically focusing on potential policy changes to municipal zoning processes that might result in a more sensible and equitable housing landscape.

I. RACIAL DISCRIMINATION AND MUNICIPAL ZONING POLICY

In their seminal work on zoning law in the United States, Professors Charles Haar and Jerold Kayden describe American zoning policy as having its origins in the "idealist[ic]" social reform movements of the early 1900's.[19] According to Haar and Kayden, this movement pieced together a "ragtag group" of "the most diverse origins" to advocate for this groundbreaking reorientation of urban development.[20] However, this progressive and pluralistic description of American zoning policy's roots neglects to mention the more iniquitous passions that helped propel the policy to its current level of prominence. More specifically, many of the earliest zoning laws were not aimed at finding the perfect balance of building uses across urban space, but were instead targeted at codifying in law the unwritten lines of racial segregation.[21] As early as 1910, southern cities like Baltimore, Richmond, and Louisville were experimenting with ways to formalize the separation of races through their cities' zoning codes.[22] And although these more invidious zoning ordinances were eventually struck down by the Supreme Court's decision in *Buchanan v. Warley*,[23] these earliest pieces of legislation served as the intellectual precursors (and inspirations) for the second generation of zoning ordinances that proved more permanent.[24]

Indeed, while the expansive zoning ordinances that eventually came to pass in northern cities like New York had no mention of race, their facially neutral text was often used to discriminatory ends.[25] Judge Westenhaver, in his 1924 opinion in *Ambler Realty Co. v. Village of Euclid*,[26] recognized this truth, striking down a facially neutral Ohio zoning ordinance on the grounds that it aimed "to classify the population and segregate them according to their income or

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19 Charles M. Haar & Jerold S. Kayden, ZONING AND THE AMERICAN DREAM 339 (1989).

20 *Id.*

21 *See* Christopher Silver, *The Racial Origins of Zoning in American Cities*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY (Manning Thomas et al, eds., 1997).

22 *See id*. at 24.

23 245 U.S. 60 (1917).

24 *See* Silver, *supra* note 21; *see also* Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 740 – 41 (1993).

25 *See* Whittemore, *supra* note 10 at 17 ("[I]t is not surprising that behind the apparent rationality of defending home values and managing the quality of services and infrastructure, there is an extensive history of racial and ethnic hatreds informing zoning and its precedents, reminding us of the intertwined nature of markets and culture.")

26 297 F. 307 (N.D. Ohio, 1926).

situation in life."[27] Judge Westenhaver saw the exclusionary aims of the Village of Euclid's zoning ordinance as inimical to the Supreme Court's decision on racial segregation in *Buchanan*.[28] However, the Supreme Court disagreed, and in 1926 overruled Judge Westenhaver's decision, recognizing for the first time the legality of facially neutral zoning laws in the United States.[29] The sections that follow outline two ways in which facially neutral zoning laws have been (and still are) used to perpetuate racial segregation in U.S. cities: exclusionary and expulsive zoning provisions. This Part then closes with an exploration of a third zoning policy—urban upzoning—and evidence linking it to racial gentrification and displacement in cities like New York.

A. Exclusionary Zoning Policies

Courts have defined exclusionary zoning as the use of a local zoning code as a tool for preserving "enclaves of affluence and social homogeneity."[30] In practice, exclusionary zoning usually functions as a density restriction, with zoning boards or city councils limiting the lot sizes or floor area ratios for residential units.[31] For example, in order to preempt the construction of high-density, multi-family units in a neighborhood, a city council might amend the zoning code to prohibit residential units that fall below a minimum threshold of square footage (effectively precluding the construction of apartment buildings, which almost universally have smaller residential units than single-family homes). Alternatively, the city council in this hypothetical might simply restrict new construction to single family homes or limit the number of bedrooms allowed in apartments (thereby reducing the number of people that can live in them).

Each of these restrictions are, on their face, aimed simply at shaping a city's built environment by limiting the form and function of new construction. However, restrictions on a city's built environment have very real consequences for its socio-demographic make-up, directly influencing the numbers of low-income, minority, or young residents that can move into the newly restricted neighborhood.[32] For example, the construction of affordable housing in suburban or exurban areas generally requires developers to build multiple units in close proximity to each other to help reduce costs.[33] Apartment complexes or high-density, single-family units allow affordable housing developers to recoup in volume (i.e. number of units sold) what they are sacrificing in margins (i.e. profit off a single unit). By restricting the construction of these multi-family, high-density units, suburban officials are effectively shutting the door on the types of new residents who might otherwise not be able to afford homes in their city. In this way, a facially neutral zoning restriction, such as limiting lot sizes, has the second-order effect of preserving a community's racial or economic homogeneity.

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27 *Id.* at 316.

28 *Id.* at 312 - 16.

29 Village of Euclid v. Abler Realty Co., 272 U.S. 365, 397 (1926).

30 Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 736 (N.J., 1975) (Pashman, J., concurring).

31 *See* James J. Hartnett, Note, *Affordable Housing, Exclusionary Zoning, and American Apartheid: Using Title VIII to Foster Statewide Racial Integration*, 68 N.Y.U. L. REV. 89, 96 (1993).

32 See *id.* at 97 – 98.

33 *See id.* at 97.

It is generally undisputed that cities and their elected officials engage in these kinds of exclusionary practices.[34] Understanding why it occurs, however, is much more complicated. While it may be emotionally satisfying to blame racial animus for the existence of these tactics, the answer is rarely that easy. In truth, there is evidence to suggest that these kinds of exclusionary practices exist wealthy neighborhoods regardless of their original racial composition.[35] For example, in historically wealthy and predominately black Prince George's County, Maryland, research shows residents engaging in various forms of class-based exclusion typically attributed to white neighborhoods.[36]

Instead of leaning on race as the sole explanation for why these practices exist, scholars have put forth several other answers that help illuminate this troubling historical trend. According to economist William Fischel, homeowners' tendency to vote for exclusionary zoning provisions stems from their natural desire to preserve the perceived value of their home and their neighborhood.[37] If a suburban neighborhood's primary asset is its low-density, bucolic aesthetic, the addition of high-density apartment complexes threatens the community's comparative advantage, potentially imperiling the value of residents' homes in the process. Another explanation looks to local taxes as a possible answer. The theory posits that wealthy homeowners view an influx of low- and moderate-income residents as a potential tax burden.[38] Additional residents mean more crowded schools, more strained infrastructure, and more demand for social services that wealthy residents rarely require. By restricting a city's housing stock, residents may be engaging less in purposeful racial exclusion, and more in a form of economic protectionism.

Whatever the explanation, exclusionary zoning practices have proven enduring despite decades of court cases aimed at outlawing them. Part of the reason why these policies have proven so resilient in the face of discrimination claims has been the Supreme Court's notable ambivalence on the issue. Despite numerous federal district and circuit court decisions holding exclusionary zoning in violation of the FHA,[39] the Court has yet to give a full-throated endorsement of this position. Instead, the few Supreme Court cases on the issue have left litigants with little insight into the Court's current stance on the practice.

During the earliest cases against exclusionary zoning, the Supreme Court struck an ostensibly deferential posture toward local zoning ordinances. For example, in *Warth v. Seldin*[40] the Court held that a group of plaintiffs including low-income Rochester residents, Rochester

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34 *See* Whittemore, *supra* note 10 at 17 – 20 (providing examples of exclusionary zoning from its inception in the 1900's to the present).

35 *See, e.g.*, Susan Saulny, *On the Inside Looking Out*, WASH. POST. (July 8, 1996), https://www.washingtonpost.com/archive/politics/1996/07/08/on-the-inside-and-looking-out/4c4de690-832a-4a97-8059-d373c27c4e73/?utm_term=.528f7f4b1edf [https://perma.cc/M6NC-BUYH]

36 *See id.*

37 William Fischel, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001).

38 *See* Hartnett, *supra* note 31, at 97.

39 *See e.g.* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1294 (7th Cir. 1977) (holding that an ordinance prohibiting new construction to single family homes would violate the FHA if it precluded the development of new affordable housing within the city's limits); United States v. City of Black Jack, 508 F.2d 1179, 1188 (8th Cir. 1974) (determining that an ordinance preventing the construction of multi-family homes was prohibited by the FHA).

40 422 U.S. 490 (1975).

taxpayers, and the Rochester Homebuilder's Association lacked standing in their case against a Rochester suburb's (Penfield) exclusionary zoning provisions.[41] According to the Court, none of the plaintiffs could point to an addressable injury caused by Penfield's housing policy, and therefore no controversy existed on which the Court could rule. Similarly, in the 1977 case, *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[42] the Supreme Court overturned a Seventh Circuit decision striking down a local provision against multi-family units.[43] The Court held that disparate impact claims were not cognizable under the Equal Protection Clause, and that plaintiffs had not carried their burden of illustrating a discriminatory purpose for the policy. However, in the 1988 case, *Town of Huntington v. Huntington Branch, NAACP*, the Court inched back in the other direction on the issue by providing a tepid per curium affirmance of a Second Circuit decision, which found disparate impact in an exclusionary zoning battle.[44] Taken together, these decisions paint an unclear picture of the Supreme Court's exclusionary zoning jurisprudence. Given this lack of clarity, it is little wonder that cities have marched forward with these ostensibly discriminatory provisions undeterred.

B. Expulsive Zoning Policies

Unlike exclusionary zoning, which uses the zoning code as a mechanism to keep particular demographics out of a city, expulsive (also known as "intensive") zoning uses the code to reshape the living conditions for low-income minority residents *within* a city. Expulsive zoning typically occurs by liberalizing use-based restrictions in particular neighborhoods, pushing industrial or commercial buildings into minority residential communities.[45] Imagine, for example, a completely residential municipality split evenly between low-income minority and upper-income white residents. Years after incorporation, the city decides that, in an effort to diversify its tax base, it will allocate some of its land for industrial uses. However, the city has to put this new industrial land somewhere, and the white residents soon mobilize to ensure this new zoning designation does not encroach upon their neighborhood. Left with little alternative, the city chooses to rezone part of the minority neighborhood for industrial use, allowing a bevy of highly pollutant companies to set up shop in the once exclusively residential area. Gradually, the minority neighborhood spirals into a state of neglect, as residents uncomfortable with the new nuisances leave for somewhere more palatable.

As this example illustrates, expulsive zoning practices turn on the unequal distribution of political power between upper-income white communities and their lower-income minority neighbors. White residents within cities generally have more access to political capital than their minority counterparts, possibly due to superior fundraising ability, better understanding of local government infrastructure, and more experience with political mobilization.[46] Whatever the

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41 *Id.* at 493.

42 429 U.S. 252 (1977).

43 *Id.* at 254 – 255.

44 488 U.S. 15, 18 (1988) (per curiam) (refusing to decide on whether the lower courts use of the disparate impact test was appropriate).

45 *See* Dubin, *supra* note 24, at 742 (citing Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, *in* ZONING AND THE AMERICAN DREAM 101 (Charles M. Haar & Jerold S. Kayden eds., 1989)) (describing the practice of expulsive zoning as "superimposing incompatible zoning on communities of color").

46 *See generally* Sidney Verba et al., *Race, Ethnicity and Political Resources: Participation in the United*

reason, this access buys well-heeled neighborhoods protection from unwanted use-designations, forcing city officials to either forgo this additional source of tax revenue, or find somewhere else to put it. Too often these unwanted zoning designations get shunted onto the residents with the smallest voice in the political arena. Research on this practice supports this assertion: scholars studying this issue over the course of the 20th century have shown evidence of expulsive practices in cities like Birmingham,[47] Baltimore,[48] and Charlotte,[49] just to name a few.[50]

Similar to discrimination claims against exclusionary zoning, successful litigation against expulsive zoning practices has been hard to come by. Unfortunately, in the case of expulsive zoning, this stems in part from a sheer lack of cases on the topic, successful or otherwise.[51] While courts have historically recognized that minority neighborhoods tend to have more incompatible land-use designations than their white counterparts,[52] few cases have turned on this disparity. One notable exception to the judiciary's deafening silence on the issue was the California appellate court's decision in *O'Rourke v. Teeters*.[53] In *O'Rourke*, a black electrician challenged the city of Los Angeles' zoning ordinance designating his neighborhood exclusively residential.[54] According to him, this designation prevented him from opening up an electrical shop near his home, which, ironically, was the only neighborhood not closed off to him due to private racial covenants.[55] Irrespective of these restrictions, the court sided against the plaintiff,[56] and, in doing so, provided possibly the only decision unequivocally rejecting expulsive zoning practices in the country.[57] Given the unusual circumstances of this case (a black business owner attempting to locate in a black residential neighborhood during the era of *de jure* racial segregation), it is unsurprising that future courts have not looked to this case as a source of precedent.

It is unclear why courts have heard so few cases on the issue of expulsive zoning. One possible explanation is that the harm associated with expulsive zoning decisions occurs gradually, and therefore plaintiffs struggle to find the opportune moment to bring a case.[58] A zoning board or

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States, 23 BRIT. J. POL. SCI. 453 (1993) (illustrating how varying levels of political participation by race can be attributed to unequal access to political resources such as education).

47 *See* CHARLES CONNERLY, THE MOST SEGREGATED CITY IN AMERICA: CITY PLANNING AND CIVIL RIGHTS IN BIRMINGHAM, 1920 – 1980 (2005).

48 *See* Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, *in Zoning and the American Dream: Promises to Keep*, in ZONING AND THE AMERICAN DREAM 107 – 8 (Charles M. Haar & Jerold S. Kayden eds., 1989).

49 *See* THOMAS HANCHETT, SORTING OUT THE NEW SOUTH CITY: RACE, CLASS, AND URBAN DEVELOPMENT IN CHARLOTTE 1875–1975 116 (1998).

50 For a more fulsome discussion of expulsive zoning and its implications, see Whittemore, *supra* note 10, at 20 – 23.

51 *See* Dubin, *supra* note 24, at 761.

52 *See, e.g.*, West Bros. Brick Co. v. City of Alexandria, 192 S.E. 881, 884 (1937) (describing a non-residential neighborhood as being characterized, in part, by the presence of "colored settlement[s]").

53 146 P.2d 983 (Cal. Ct. App. 1944).

54 *Id.* at 984 & n.1.

55 *Id.* at 984.

56 *Id.* at 985.

57 *See* Dubin, *supra* note 24, at 762.

58 For examples of the impacts of expulsive zoning on African American communities, see Whittemore, *supra* note 10, at 21 - 22.

city council's decision to change a neighborhood's zoning designation will not automatically mean that an incompatible entity will set up shop in that community. Indeed, it may sometimes take years for industry to respond to a zoning change by moving into a neighborhood. At that point residents may no longer attribute the company's unwanted arrival to the decision their elected officials made years prior. Another potential explanation is that residents (and courts) might not view the changed designation as an unmitigated harm. After all, changing a neighborhood's zoning designation to allow for industrial or commercial uses might result in the arrival of new job opportunities or sorely needed commercial amenities. In these cases, fighting the unwanted designation might not be worth it, if it results in a loss of public goods on which the community has come to rely.[59]

C. Upzoning Policies

As stated previously, upzoning is defined as a "change in zoning classification from less intensive to more intensive," typically effectuated through zoning map amendments allowing for taller and denser units than those previously occupying the space.[60] Although upzoning changes generally occur by loosening density restrictions, these changes often co-present with use amendments changing a neighborhood from a purely residential to "mixed-use" categorization.[61] Given this description, it might not be immediately clear why residents would object to upzoning policies on racial discrimination grounds. After all, the primary criticism of exclusionary zoning tactics is that municipalities are *too* restrictive with their density regulations, precluding the development of new affordable housing. By that logic, would equity advocates not laud a city's decision to *loosen* these restrictions, allowing for the development of more units? Similarly, criticism of expulsive zoning focuses on the addition of noxious disamenities to low-income, minority neighborhoods. Should we not then celebrate cities trying to use their zoning codes to make neighborhoods more livable for more people?

While the chorus of critics against upzoning is not yet as loud as those against exclusionary or expulsive zoning practices, the arguments against these trends are actually grounded in a similar theory. In order to better understand this theory, recall Fischel's argument that exclusionary zoning tactics are not grounded in racial prejudice, but in the desire to protect (and potentially grow) an economic asset.[62] In the suburban hamlets where exclusionary zoning typically occurs, that economic asset is a large, single family home in a bucolic, low-density, homogenous neighborhood. The land in that neighborhood has become valuable precisely because it can offer consumers the idyllic environment that they so desire. Therefore, in order to protect the land's value, residents do what they can to prevent changes that might abrogate this desirable aesthetic (i.e. preventing the development of affordable housing and multifamily units). Land in neighborhoods like Williamsburg, however, derives its primary market value from a different quality. For land in the urban core, demand is driven by its ability to allow consumers access to the city's "agglomorative" effects.[63] Urban centers are valuable because they put residents in close

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59 *C.f. id.* at 22 – 23 (noting that many of these incompatible industries might be drawn to low-income, minority neighborhoods not simply because of their zoning designations, but for non-prejudicial economic reasons).

60 Bartke & Lamb, *supra* note 11.

61 *See* ANGOTTI & MORSE, *supra* note 5, at 23.

62 *See* Fischel, *supra* note 33.

63 Urban economist Edward Glaeser defines agglomeration as the "benefits that come when firms and

proximity to jobs, commerce, culture, recreation, infrastructure, and most importantly, other people. It therefore makes sense that, in order to maximize its value, urban residents and officials would push for zoning changes that maximize (or at least protect) the land's agglomorative value (i.e. upzoning).

In this way, upzoning changes are taking part in the same underlying activity as exclusionary zoning tactics: maximizing the value of land in the hopes of attracting or retaining mobile capital.[64] The perhaps not so obvious corollary to this activity is that, by maximizing the value of land, residents and elected officials are gradually pricing out consumers who can no longer afford this product. In the case of exclusionary zoning, these consumers are the low-income minorities who, but for the cost, would move to the desirable suburb. In the case of upzoning, these consumers are often the low-income minority renters already living in the neighborhood who are gradually pushed out (i.e. displaced) due to higher rents and pricier surrounding amenities.

In their book *Zoned Out*, Professors Tom Angotti and Sylvia Morse put forth a similar thesis for the causes of displacement in Manhattan and Brooklyn, arguing that "[u]pzoning increases the future value of land, and land value increases are what drives new development."[65] According to the authors, upzoning in New York influences displacement through an opaque yet consistent four step process. First, developers, searching for a neighborhood for new construction, target "underutilized" areas and begin assembling parcels of property on which to build. This initial sign of economic movement from large developers often precipitates a "buying frenzy," and might also result in landlords gradually ending leases with low-income tenants in anticipation of new rental demand.[66] Second, developers will appeal to the Department of City Planning (DCP) for a rezoning of their targeted neighborhood.[67] The DCP will engage in a series of studies to determine if the proposed development requires a new zoning designation, and if there is enough demand to warrant such a change.[68] As word gets around that the DCP is considering a neighborhood for a revised zoning designation, a second flurry of speculative purchasing often occurs with similar disruptive effects on the low-income, minority communities who already call this "underutilized" neighborhood home.[69]

Next, the planning board and developers will submit a formal rezoning proposal to the City Planning Commission (CPC).[70] It is worth noting that these kinds of proposals are almost invariably initiated by well-resourced parties (i.e. government entities or corporate developers).[71]

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people locate near one another together in cities and industrial clusters." According to Glaeser, these benefits ultimately derive from the decrease in transportation costs brought about by proximity. Goods, people, and ideas can move more quickly and cheaply in urban centers, ultimately resulting in greater economic output than exists in places where capital is more dispersed. EDWARD L. GLAESER, AGGLOMERATION ECONOMICS 1 (2010).

64 For a better understanding of the way cities tailor their policies to attract mobile capital, see generally Richard Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482 (2009).

65 ANGOTTI & MORSE, *supra* note 5, at 29.

66 *Id.* at 29 – 30.

67 *Id.* at 30.

68 *Id.*

69 *Id.*

70 *Id.* at 31.

71 *Id.*

This is due in no small part to the capital intensive nature of the New York zoning process.[72] Lower-income community members who may have similar interests in rezoning a neighborhood to fit their needs will rarely have the time or money necessary to see that process to completion. This ensures that when zoning changes do occur, they are disproportionately beneficial to the parties with the most access and capital. Finally, the process closes with a formal Uniform Land Use Review Procedure (ULURP).[73] Through this process, the mayor, city council, CPC, borough president, and local community boards all vote on the proposed zoning map amendment after a series of hearings on the issue.[74] Again, it is worth noting that although the local community boards have a nominal say in the process, their votes carry the least weight and almost never dispositively influence a zoning decision.[75]

Angotti and Morse marshal convincing evidence to back up their assertion that upzoning and minority displacement are causally linked. The authors note that in a study of 76 rezonings between the years of 2003 and 2007, upzoned lots were disproportionately located in "areas [with] higher concentrations of African American and Hispanic residents than the city median."[76] The authors go on to illustrate that these upzonings have exerted upward pressure on everything from property values and taxes, to rental costs and the types of small businesses that are able to operate in the neighborhood.[77] The rest of the book chronicles how this process has played out in the New York neighborhoods of Williamsburg, Harlem, and Chinatown.[78] In each of these neighborhoods, conscious decisions by the city government and developers to upzone particular areas resulted in an increase in average rents,[79] a reduction in affordable housing units,[80] an increase in white residents, and a noticeable reduction in the neighborhood's minority populations.[81]

Before closing this section, it is worth addressing the fact that Angotti and Morse's depiction of the relationship between zoning, gentrification, and displacement is not universally accepted. Instead, these scholars write primarily as voices dissenting against the litany of free-market, pro-growth advocates pushing a supply-side theory of urban development. These "trickle-down" economists, as Angotti and Morse coin them, advance a competing vision for the relationship between zoning and displacement. According to this theory, low-income residents in neighborhoods like Williamsburg and Harlem are not displaced because there is too much upzoning, but because there is not enough of it.[82] In these high-demand areas, housing is a scarce

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72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* at 33.

77 *Id.* at 37 – 40.

78 *Id.* 72 – 141.

79 *See, e.g.*, *id.* at 85 (describing how a rezoned area of Williamsburg experienced "residential and commercial property values increas[ing] nearly 250 percent" and "median monthly gross rents swell[ing] from $949 to $1603.").

80 *See, e.g.*, *id.* at 86 (noting that the rent-stabilized/subsidized percentage of the Greenpoint-Williamsburg housing stock dropped from 64% to 51.7% in the years after upzoning occurred).

81 *See, e.g.*, *id.* at 87 ("The white population in the rezoning area increased by 44 percent, compared to a 2 percent decline citywide. The Hispanic/Latino population declined by 27 percent, compared to a 10 percent increase citywide.").

82 For examples of this argument, see Matthew Yglesias, *You Can't Talk Housing Costs Without Talking*

good. Based on the laws of simple supply and demand, as demand for a scarce good rises, the price of that good will also rise so long as the supply of said good does not rise at a commensurate rate. Therefore, the supply-siders argue, the best way to counteract this trend is to increase the supply of the scarce good (housing) by easing some of the barriers to new development (i.e. zoning restrictions). These pro-growth advocates also marshal compelling evidence to support their position[83] and have received powerful endorsements from policymakers as influential as President Obama.[84] Although resolving this conflict is well beyond the scope of this paper, it is important to recognize the contours of this debate, as it will likely influence the way judges will interpret future claims against urban upzoning activity.

II. DISPARATE IMPACT THEORY AND THE FHA: AN ANALYSIS OF PRE- AND POST-*INCLUSIVE COMMUNITIES PROJECT* JURISPRUDENCE

The FHA provides that "it shall be unlawful [t]o refuse to sell or rent after the making of a bona fide offer, 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, color, religion, sex, familial status, or national origin."[85] Since the law's inception, there has been little debate that it protected against the most blatant and invidious forms of discrimination.[86] However, at the time of its passage, it was unclear if the text stating " . . . or otherwise make unavailable" also prohibited more subtle forms of discrimination: actions that, though they did not carry discriminatory intent, nevertheless carried clear discriminatory effects (i.e. facially neutral actions with disparate impacts).[87] As stated previously, it was not until 2016, in *Inclusive Communities Project*, that the Supreme Court decided conclusively that this language did in fact protect against disparate impact discrimination.[88] However, *Inclusive Communities Project* was the last in a long line of federal cases finding disparate impact theory cognizable under the FHA. Indeed, at the time *Inclusive Communities Project* was decided, every federal circuit court had already reached a similar decision.[89] In this way, the Supreme Court's holding in *Inclusive Communities Project* was not

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About Zoning, SLATE (Dec. 10, 2013, 8:50 AM), http://www.slate.com/blogs/moneybox/2013/12/10/housing_costs_it_s_the_zoning_stupid.html [https://perma.cc/UM9B-HJGV]. *See also* Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability*, HARVARD INSTITUTE OF ECONOMIC RESEARCH (March 2002), https://law.yale.edu/system/files/documents/pdf/hier1948.pdf [https://perma.cc/A7S2-ZZQX] (arguing that housing costs in places like Manhattan and many Californian cities have been inflated due to restrictive zoning laws).

83 *See e.g.*, Glaeser & Gyourko, *surpa* note 79, at 19 – 21 (illustrating the strong correlation between housing prices and intensity of zoning regulations in various cities).

84 *See* Lorraine Woellert, *Obama Takes on Zoning Laws in Bid to Build More Housing, Spur Growth*, POLITICO (Sept. 26, 2016, 5:13 AM), http://www.politico.com/story/2016/09/obama-takes-on-zoning-laws-in-bid-to-build-more-housing-spur-growth-228650 [https://perma.cc/U9TP-MJEW].

85 42 U.S.C. § 3604(a).

86 *See* Trafficante v. Metro Life, 409 U.S. 205 (1972) (finding intentional discrimination in a housing dispute under the FHA just four years after the law's passage). *See also* Hartnett, *supra* note 31, at 94 ("[The FHA's] immediate effect was to eliminate the most blatant discriminatory practices of realtors, lenders, and landlords.").

87 *Cf.* Hartnett, *supra* note 31, at 94 (arguing that the FHA's passage might have pushed "both private and public parties to employ more subtle devices, such as exclusionary zoning").

88 *See* 135 S. Ct. 2507 (2015).

89 *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49 (1st Cir. 2000); Mountain Side Mobile Estates

actually charting much new territory, but was instead solidifying a determination that the lower courts had already reached.

Part II of this paper briefly outlines the history of disparate impact litigation since the FHA's inception. Part II.A discusses the pre-*Inclusive Communities Project* disparate impact cases decided at the federal circuit level. This section tracks the evolution of this jurisprudence, highlighting some of the cases that first found this form of discrimination cognizable under the FHA, as well as a few cases exploring the outer limits of disparate impact theory. Part II.B discusses the Supreme Court's decision in *Inclusive Communities Project*, including the test established by Justice Kennedy for determining the existence of disparate impact discrimination. Part II.C closes with a brief discussion of the post-*Inclusive Communities Project* cases, highlighting the ways in which Kennedy's new test has raised the bar for proving disparate impact discrimination, fundamentally changing the landscape for this type of litigation.

A. Pre-Inclusive Communities Project Cases

One of the first cases finding disparate impact discrimination cognizable under the FHA was *United States v. City of Blackjack* in 1974.[90] In the years leading up to this case, the nonprofit organization Inter Religious Center for Urban Affairs (ICUA), established an ambitious plan to address the dual crises of racial segregation and substandard housing in predominantly black St. Louis neighborhoods by providing an "alternative housing opportunit[y] for persons of low and moderate income . . . in the form of 108 units of two-story townhouses."[91] Aware of the nonprofit's affordable housing campaign, the newly incorporated suburb of Blackjack, Missouri quickly put in place a set of zoning restrictions aimed at preventing the ICUA's intended construction.[92] The nonprofit sued, claiming in part that the city's new zoning ordinance had a discriminatory impact on black residents locked into substandard neighborhoods by a ring of all-white suburbs walled off by land-use prohibitions.[93]

The Eighth Circuit agreed.[94] In reaching its decision, the court analogized to a set of employment discrimination cases where disparate impact claims had already been recognized as

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P'ship v. Sec'y of Hous. & Urban Dev., 56 F.3d 1243, 1250-51 (10th Cir. 1995); Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988); Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986); Arthur v. City of Toledo, Ohio 782 F.2d 565, 574-75 (6th Cir. 1986); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (9th Cir. 1982); Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1065 (4th Cir. 1982); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) [hereinafter Arlington Heights I]; Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146 (3d Cir. 1977); United States v. City of Black Jack, Mo., 508 F.2d 1179, 1184-85 (8th Cir. 1974).

90 508 F.2d 1179 (8th Cir. 1974).

91 *Id.* at 1182.

92 *Id.* at 1183.

93 *Cf. id.* (referencing the district courts findings that "the concentration of blacks in the city and in pockets in the county [was] accompanied by the confinement of a disproportionate number of them in overcrowded or substandard accommodations." The court went on to note that "the average cost of a home in the City of Black Jack in 1970 was approximately $30,000, and that the average income of Black Jack families [was] approximately $15,000 per year," effectively precluding most black residents from purchasing a home in this newly incorporated suburb).

94 *Id.* at 1188.

cognizable forms of discrimination.[95] The court argued that, in the same way Congress prohibited "artificial, arbitrary, and unnecessary barriers to employment" based on race, similar barriers to housing must also be held impermissible.[96] It went on to contend that while localities certainly had the latitude and autonomy to craft particularized zoning policy, that authority could be cabined in cases "where the clear result of such discretion is the segregation of low-income [b]lacks from all [w]hite neighborhoods."[97] The court made clear that the critical feature of this instance of discrimination was not the city's' invidious intent, but instead the racially discriminatory *effects* their actions had on the black residents unable to acquire housing in their town.[98] In so holding, the Eighth Circuit broke new ground by becoming one of the first federal circuit courts to recognize the legal legitimacy of disparate impact claims.

One of the most frequently cited disparate impact cases is *Metropolitan Housing Development Corp. v. Village of Arlington Heights*. Here, a nonprofit religious organization partnered with a local developer to build nearly 200 units of affordable multifamily housing in the Village of Arlington Heights.[99] At the time, an Arlington Heights zoning ordinance prohibited the construction of multifamily homes on the parcel of property aimed for development.[100] After being denied their request to rezone the parcel of land in question, the developers sued the city on the grounds that their restrictive zoning code had a discriminatory impact on low-income minorities in surrounding neighborhoods.[101] As stated previously, the Seventh Circuit originally decided this case not under the FHA, but instead on equal protection grounds. It was this equal protection argument that eventually was granted certiorari by the Supreme Court, and was ultimately overruled.[102]

One remand, the Seventh Circuit took a different tack, instead siding with the plaintiffs on grounds that the FHA protected against the kind of disparate impact caused by Arlington Heights's zoning ordinance.[103] In so doing, the court recognized that discriminatory intent was not necessary for a legally cognizable claim under the FHA, and outlined a four-part balancing test for determining if plaintiffs had reached the requisite burden of proof for establishing a disparate impact claim. This balancing test considered 1) the plaintiff's showing of disparate impact (i.e. discriminatory effect); 2) any evidence of discriminatory intent; 3) the defendant's justification for the discriminatory action; and 4) whether the plaintiff was seeking to compel the defendant to construct additional housing, or simply requesting that the defendant not interfere in the provision of housing that was already underway.[104] Although the Seventh Circuit ultimately remanded the

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95 *Id.* at 1184 (citing the employment decision Griggs v. Duke Power Co., 401 U.S. 424, finding disparate impact claims cognizable under Title VII).

96 *Id.*

97 *Id.*

98 *Id.* at 1185 ("The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated.").

99 Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1286 (7th Cir. 1977).

100 *Id.*

101 *Id.* at 1285.

102 *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 367 – 68 (2013).

103 *Id. See also* Village of Arlington Heights, 558 F.2d at 1287 – 88.

104 Village of Arlington Heights, 558 F.2d at 1290.

case to the district level to determine an appropriate remedy,[105] this decision signaled a watershed moment for the court in that the Seventh Circuit had definitively aligned itself with the Eighth and Third[106] Circuits in recognizing the cognizability of disparate impact claims.

The most recent federal appellate court decision recognizing the legality of disparate impact housing discrimination claims was the First Circuit's *Langlois v. Abington House Authority*. In this case, eight suburban housing authorities, in an effort to retool their Section 8 voucher application process, established a centralized lottery system for processing future applicants.[107] A defining feature of this lottery system was that it preferenced the local residents of each municipality where the housing authorities were located over nonlocal applicants residing outside those municipalities.[108] In practice, because the eight housing authority municipalities were considerably whiter than their surrounding areas, this lottery system often favored white applicants to the detriment of blacks and Latinos.[109]

A team of plaintiffs, which included minorities from the surrounding areas as well as the Massachusetts Coalition for the Homeless, sued the eight housing authorities, claiming that the system of local preferences violated the Equal Protection Clause as well as the FHA.[110] The district court agreed, and granted an injunction against the lottery system on the grounds that it had a disparate discriminatory impact on minority lottery participants.[111] On appeal, although the First Circuit was skeptical of the lower court's rationale for finding disparate impact *in this case*,[112] it nevertheless fell in line with the other ten circuits, holding that disparate impact claims were in fact cognizable under the FHA.[113]

While all circuit courts have recognized disparate impact claims as cognizable under the FHA, it appears not all disparate impact claims are created equal. In fact, while the courts have been mostly amenable to disparate impact claims in cases where institutions have erected *barriers* to the construction of new affordable housing (e.g. exclusionary zoning laws), they have been more skeptical of claims against perceived housing *improvements* that have nonetheless caused discriminatory effects.[114] For example, in *Catanzaro v. Weiden*, plaintiffs sued the city of Middletown, NY for its decision to demolish two low-income buildings after they had been damaged in a car accident.[115] The plaintiffs argued that the demolition was part of a "calculated campaign" to destabilize affordable housing in the city and drive away minority residents.[116] The

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105 *Id.* at 1294.

106 *See* Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977).

107 Langlois v. Abington Hous. Auth., 207 F.3d 43, 46 (1st Cir. 2000).

108 *Id.*

109 *Id.* at 47.

110 *Id.* at 46.

111 *Id.* at 47.

112 *Id.* at 51.

113 *See id.* at 49 ("[T]he consensus among the circuits that have discussed this issue in the housing context is that the Fair Housing Act prohibits actions that have an unjustified disparate racial impact, and we find their reasoning persuasive.").

114 *See generally* Seicshnaydre, *supra* note 102 (arguing that the thrust of federal jurisprudence on FHA disparate impact claims illustrates a bias against housing improvement cases as compared to housing barrier cases).

115 188 F.3d 56, 57 – 58 (2d Cir. 1999).

116 *Id.* at 60.

Second Circuit, however, sided with the defendants, arguing that "[p]laintiffs have failed to provide sufficient evidence from which it can be reasonably inferred that Defendant's housing policies have a discriminatory effect."[117] Similarly, in *Armendariz v. Penman*, the Ninth Circuit rejected plaintiffs' claims that the City of San Bernardino had disparately impacted Hispanic residents through a series of code enforcement sweeps.[118] According to the court, the plaintiffs had not established sufficient evidence to illustrate that the code enforcement sweeps were part of a broader racially discriminatory housing policy, and therefore the disparate impact claims were unavailing.[119] In fact, in her 2013 article *Is Disparate Impact Having any Impact?*, Professor Stacy Seicshnaydre illustrates that over the past 40 years of FHA disparate impact litigation, "plaintiffs succeeded twice as often in housing barrier cases (42%) than in housing improvement cases (21%)."[120]

Why the courts would view housing improvement cases differently is less clear. A review of the case law on the topic illustrates that, in many housing improvement cases, plaintiffs have simply failed to establish a *prima facie* showing of discriminatory effect.[121] Many courts seem to struggle with the fact that while the challenged housing improvement initiatives (e.g. targeted revitalization efforts, blight demolition, code enforcement, etc.) clearly impacted a set of minority residents *in that particular instance*, little evidence exists to suggests that these actions presage a broader policy of discrimination against the larger minority community.[122] Indeed, just because a city decided to demolish a set of homes that happened to have minority residents does not indicate that they have established a policy that will consistently disadvantage minority residents in a similar way. Additionally, courts also seem to struggle with the types of initiatives targeted in these housing improvement cases. Blight demolition and neighborhood revitalization efforts are, at least superficially, promoted as ameliorative tactics aimed at helping the targeted communities.[123] While few would dispute the spotty history of these efforts in actually achieving their stated goals, it seems a particularly strong indictment to go the next step and charge them with racial discrimination.[124]

B. The Inclusive Communities Project Decision

Through the Low Income Housing Tax Credit program (LIHTC), the federal government encourages private investment in affordable housing by offering investors tax credits in exchange for immediate capital provisions to low-income housing developments.[125] Although this a

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117 *Id.* at 65.

118 31 F. 3d. 860, 868-869 (9th Cir. 1994).

119 *Id.*

120 Seicshnaydre, *supra* note 102, at 363.

121 *See id.* at 404 – 05.

122 *Id.*

123 *See* Andy Kitsinger, *How Cities are Taking on Blight*, PlannersWeb (May 21, 2014), http://plannersweb.com/2014/05/cities-take-blight/ [https://perma.cc/X24D-4SDJ] (describing maintenance and demolition strategies aimed at ameliorating blight in low income neighborhoods).

124 *Cf. id.* at 406 (recognizing that while "housing improvement plans have operated in particular cases to prevent the return of minorities to the 'improved' area' their justification is still a matter of "great[ ] dispute").

125 Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2513 (2015).

federally funded program, LIHTC credits are distributed to developers by state entities more familiar with local affordable housing needs.[126] In Texas, the Department of Housing and Community Affairs (the Department) allocates these credits based on a particular set of preferences including that "low-income housing units 'contribut[e] to a concerted community revitalization plan' and be built in census tracts populated predominantly by low-income residents."[127]

Between 1999 and 2008, the Department approved credits for 49.7% of the proposed developments in areas where whites made up less than 10% of the population, and 37.4% of the proposed developments in places where whites made up more than 90% of the population.[128] According to the *Inclusive Communities Project* plaintiffs, this disparate allocation of credits resulted in an uneven distribution of low-income units funded with LIHTC credits: 92.29% of Dallas's LIHTC units were built in majority minority census tracts.[129] Plaintiffs, led by the nonprofit housing equity organization Inclusive Communities Project (ICP), sued the Department, alleging, in part, that they had created a disparately discriminatory impact in violation of the FHA.[130]

The district court sided with the plaintiffs, arguing that although the government had a sound justification for its credit allocation scheme, the Department "failed to meet [its] burden of proving that there [were] no less discriminatory alternatives."[131] The Fifth Circuit reversed and remanded, but in doing so declined to overturn the court's long-standing precedent that disparate impact claims were cognizable under the FHA.[132] Instead, the appellate court advised that the lower court reassess the case in light of HUD's newly provided burden-shifting framework, which required the following analysis:

> (1) The charging party . . . has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.
>
> (2) Once the charging party or plaintiff satisfies the burden of proof set forth in [the previous paragraph] of this section, the respondent or defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant.
>
> (3) If the respondent or defendant satisfies the burden of proof set forth in [the previous paragraph] of this section, the charging party or plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a

126 *Id.*
127 *Id.*
128 *Id.* at 2514.
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.* at 2515.

less discriminatory effect [133]

The Department appealed and the Supreme Court granted certiorari.[134] Justice Kennedy, writing for the majority, affirmed the lower courts' decisions that disparate impact claims were cognizable under the FHA.[135] Analogizing to *Griggs v. Duke Power Co.* (finding disparate impact claims cognizable in employment discrimination cases) and *Smith v. City of Jackson* (finding disparate impact claims cognizable in age discrimination cases),[136] Kennedy argued that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions."[137] He contended that the FHA's provision against actions that "otherwise make [housing] unavailable" due to race addressed discriminatory consequences in the same way as similar language in employment and age discrimination legislation.[138] According to Kennedy, this similarity, combined with Congress's choice not to change this language with the FHA's 1988 amendments, illustrates the legislature's acceptance of the judiciary's disparate impact interpretation.[139]

After establishing the cognizability of disparate impact claims under the FHA, Kennedy declined to intrude on the burden-shifting test established by HUD and implemented by the Fifth Circuit. Instead, the Justice made a point to stress that this disparate impact doctrine required limitations to "avoid the serious constitutional questions that might [otherwise] arise."[140] He went on to emphasize that a showing of disparate impact could not simply rely on "statistical disparity" but must instead illustrate "robust causality" linking the defendant's policies to the alleged injustice.[141] He closed by warning against the possibility that disparate impact-liability might grow so "expansive as to inject racial considerations into every housing decision."[142]

In reaching this decision, the Court provided the capstone to the decades' long march toward unanimous recognition of disparate impact liability. But although this decision was initially heralded by antidiscrimination advocates as a victory,[143] it is important to recognize just how much (or how little) changed with this opinion. By declining to provide an alternative to the burden-shifting test adopted by the Fifth Circuit, the Court ostensibly provided room for diversity in the way lower courts establish burden of proof in disparate impact cases. However, the court placed an important limitation on that lower court discretion: the "robust causality" requirement.

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133 Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, 747 F. 3d 275, 282 (citing 24 C.F.R. § 100.500(c) (2013)).

134 *Inclusive Communities Project*, 135 S. Ct. at 2515.

135 *Id.* at 2525.

136 *Inclusive Communities Project*, 135 S. Ct. at 2516 – 19.

137 *Id.* at 2518.

138 *Id.* at 2518 – 19.

139 *Id.* at 2519 – 2521.

140 *Id.* at 2522.

141 *Id.* at 2523.

142 *Id.* at 2524.

143 *See* Lawrence Lanahan, *Supreme Court Preserves Tool for Fighting Housing Discrimination*, ALJAZEERA AMERICA (June 25, 2015, 12:45 PM), http://america.aljazeera.com/articles/2015/6/25/supreme-court-sides-with-fair-housing-advocates-against-texas1.html [https://perma.cc/FXC2-PPRH] (commenting on how the decision was celebrated by fair housing advocates).

Prior to the Court's *Inclusive Communities Project* decision, the Fifth Circuit only required that the prima facie showing "raise[ ] the inference of discrimination."[144] After the Court's decision, however, that showing conclusively required more than statistical evidence of disparate impact. Just how much more is still a hotly debated topic that will likely define the contours of the disparate-impact debate for years to come.

C. Post-Inclusive Communities Project Cases

As of now, few federal courts have had occasion to decide a disparate-impact claim in light of the Supreme Court's *Inclusive Communities Project* decision. However, the few that have ventured into this new territory are beginning to illustrate the ways that the landscape has changed in the post-*Inclusive Communities Project* world. Indeed, in the few federal cases that have since addressed this issue, none have found that the plaintiff reached its burden of proof in establishing a prima facie case for disparate impact liability.[145] Instead, each of these cases have held, in part, that the plaintiff failed to fulfill Justice Kennedy's "robust causality" provision, ending the discussion before it could reach the latter prongs of the burden-shifting test.

For example, in perhaps the most thorough disparate impact opinion since the Supreme Court's ruling—*Inclusive Communities Project Inc. v. Texas Department of Housing and Community Affairs* (*ICP VII*)—the District Court for the Northern District of Texas reassessed ICP's disparate impact claim in light of the Supreme Court's guidance.[146] In doing so, the court walked through a newly modified burden-shifting test, shaped both by Justice Kennedy's opinion and guidance provided by the Fifth Circuit on remand.

First, the court asked if the plaintiff had "identif[ied] a facially-neutral policy that has resulted in the disparate impact."[147] According to the court, because disparate impact litigation aims to "remove impermissible barriers", the burden lies with ICP to point to a specific policy that created the barrier in the first place.[148] On this question, the district court held that ICP failed at meeting its burden.[149] ICP, the court argued, had simply pointed to the Department's use of discretion in allocating credits as its discriminatory offense.[150] But a policy of discretion encompasses numerous smaller decisions particular to each applicant. That the cumulative effect of these various decisions was racial segregation does not point to a "constitutionally sound remedy" that the court could order to address the inequity.[151] Discretion, as it turns out, is not a policy; therefore, it does not fall under the purview of the court's *disparate impact* jurisprudence. Instead, a discretionary decision actually suggests *disparate treatment*, which requires

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144 Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs, No. 3:08-CV-0546-D, 2016 WL 4494322, at *1, *3 (N.D. Tex. Aug. 26, 2016).

145 *See, e.g.*, *id.*; City of Miami v. Bank of America Corp., 171 F. Supp. 3d 1314, 1320 (S.D Fla. 2016); City of Los Angeles v. Wells Fargo & Co., No. 2:13–cv–09007–ODW(RZx), 2015 WL 4398858, at *1, *8 (C.D. Cal. July 17, 2015); Ellis v. City of Minneapolis, No. 14–cv–3045 (SRN/JJK), 2015 WL 5009341, at*1, *10 (D. Minn. Aug. 24, 2015).

146 *Inclusive Communities Project,* WL 4494322, at *1.

147 *Id.* at *6.

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.* at *7.

discriminatory intent.[152] If the Department really was looking at each new application *de novo* and assessing its individual merits, the fact that the decisions have cumulatively resulted in segregation evinces a purposeful (or at least conscious) strategy on the part of the government.

Even though the court found that ICP had failed the policy identification prong, it went on to assess, *arguendo*, the plaintiff's case on the test's second prong: did the identified policy *cause* the discriminatory disparity?[153] On this question, the court also found that ICP failed to meet its burden of proof.[154] According to the court, although ICP illustrated a statistical disparity in the allocation of public housing credits, it did not "account[ ] for other potential causes of the statistical disparity."[155] For example, actions by "Congress, the Texas Legislature, developers, and local communities" all could have had an equal or greater impact on the distribution of LIHTC units throughout the city.[156] That ICP simply attributed all of the statistical disparity to the Department's discretion without much justification fell short of Justice Kennedy's "robust causality" standard.

Several other cases completed since the Supreme Court's decision have all also failed to prove disparate impact for similar reasons. In *City of Miami v. Bank of America Corp.* and *City of Los Angeles v. Wells Fargo & Co*., plaintiffs alleged that the defendant banks created a disparate impact through lending policies that saddled low-income minorities with subprime mortgages prior to the recession.[157] While this practice has been well documented,[158] both courts held that the defendants had not convincingly established a prima facie case of disparate impact.[159] Part of the courts' reasoning for their decisions stemmed from an argument employed by the district court in *ICP VII*: that the plaintiffs were actually making an argument for disparate treatment. The courts argued that if, as the plaintiffs alleged, the banks had targeted blacks and Latinos for subprime mortgages, this suggested conscious disparate treatment on the part of the banks, which required a showing of discriminatory intent.[160] These cases illustrate how blurry the distinction between disparate impact and disparate treatment actually is in practice. The Supreme Court recently issued a consolidated opinion ruling on both of these cases, but did not comment on the disparate impact issue.[161]

Similarly, the court in *Inclusive Communities Project v. United States Department of*

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152 *Id.*

153 *Id.* at *8.

154 *Id.*

155 *Id.* at *9.

156 *Id.*

157 City of Miami v. Bank of Am. Corp., 171 F. Supp. 3d 1314, 1316 (S.D Fla. 2016); City of L.A. v. Wells Fargo & Co., No. 2:13–cv–09007–ODW(RZx), 2015 WL 4398858 *1 (C.D. Cal. 2016).

158 *See, e.g.*, Nick Carey, *Racial Predatory Loans Fueled U.S. Housing Crisis: Study*, REUTERS (Oct. 4, 2010), http://www.reuters.com/article/us-usa-foreclosures-race-idUSTRE6930K520101004 [https://perma.cc/UU35-CGBB]; Larry Schwartztol, *Predatory Lending: Wall Street Profited, Minority Families Paid the Price*, ACLU (Sept. 16, 2011), https://www.aclu.org/blog/predatory-lending-wall-street-profited-minority-families-paid-price [https://perma.cc/QX33-XYXR].

159 *See, e.g.*, City of Miami v. Bank of Am. Corp., 171 F. Supp. at 1320.

160 *See, e.g.*, *id.*

161 *See* Bank of Am. Corp. v. Miami, 581 U.S __ (2017). It is curious that the Court chose not to comment on the disparate impact claim, even though the issue was mentioned in the City of Miami's brief. Brief in Opposition at 10, Bank of America Corp. v. Miami, 581 U.S __ (2017) (No. 15-1111).

Treasury (*Department of Treasury*) held that the plaintiffs failed to establish their prima facie case of discrimination.[162] In this case, ICP argued that the U.S. Department of Treasury, in facilitating the LIHTC program, had a direct hand in causing the disparate impact underlying the previously discussed cases against the Texas Department of Housing and Community Affairs.[163] The court once again sided with the defendants, this time leaning heavily on Justice Kennedy's "robust causality" requirement to dismiss the plaintiff's claims.[164] According to the court, the Treasury's relationship to the distribution of public housing in Texas was far too attenuated to establish the requisite causal link for a disparate impact claim.[165] While the Treasury certainly had a role in the eventual developments, its part in the LIHTC saga had long passed by the time the choice was made as to where the units should reside. In the interim, numerous third parties had a hand in the process, including the Texas Department of Housing and Community Affairs, the state legislature, the local government, the developer, and the various community interests on the ground. To pin the resulting segregation on just one party ignores the complexity of the real estate development process. Even the Supreme Court alluded to this complexity, noting that it might "be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units."[166]

III. UPZONING AND DISPARATE IMPACT LIABILITY – A COGNIZABLE CAUSE OF ACTION?

Given the evidence gathered by scholars like Angotti and Morse on upzoning's harmful effects on low-income minority communities, at first glance it would appear that this kind of policy would be ripe for a claim of disparate impact. During the early 2000's, the Bloomberg mayoral administration employed a conscious policy of liberalizing the zoning restrictions in a handful of neighborhoods around the City. Almost invariably, as these once diverse areas grew in density, they shrank in their numbers of minority residents. As bodegas and corner stores gave way to Starbucks and cross-fit gyms, few would argue with the notion that the apparent result of these upzoning policies was to transfer the neighborhoods' agglomorative resources from the historically disadvantaged to the historically advantaged. Though this may not have been the administration's conscious aim, it was no doubt a conscious policy resulting in disparately discriminatory impact. In that way, upzoning and disparate impact liability seem made for each other.

However, despite the initial appeal of this litigation strategy, several factors cut against its potential for success. As stated above, in our post-*Inclusive Communities Project* world, plaintiffs in disparate impact cases are required to establish a heightened ("robust") burden of proof to even put forth a prima facie showing of discrimination. Given this heightened standard, bullishness regarding any claim of disparate impact would be manifestly unwise. Moreover, upzoning policies, in particular, share many characteristics with policies that have failed in past disparate impact cases. These commonalities may doom any upzoning case before it starts and

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162 Inclusive Communities Project v. United States Dept. of Treasury, No. 3:14-CV-3013-D, 2016 WL 6397643 *11 - *12 (N.D. Tex. 2016).

163 *Id.* at *1.

164 *Id.* at *12.

165 *Id.*

166 Texas Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2523 – 24 (2015).

caution against embracing litigation as a strategy against upzoning.

Part III of this paper explores the various contours of a hypothetical case against New York City's upzoning policies under disparate impact theory. Using a four-part burden-shifting test derived, in part, from the HUD standards, the *Inclusive Communities* opinion, and successive disparate impact cases, this portion of the paper will argue that while bringing a disparate impact claim against the City's upzoning policies may seem wise, this litigation strategy is likely to fail for numerous reasons.

A. Did the Plaintiff Identify a Facially-Neutral Policy that Has Resulted in Disparate Impact?

One of the first steps plaintiffs must reach in establishing their prima facie showing of disparate impact is identifying a facially neutral policy that caused the alleged harm.[167] As stated previously, this step ensures that the court has a specific, identifiable policy upon which it can graft an appropriate remedy to ameliorate the racial disparity. On its face, it would appear that any claimant against the City of New York's upzoning strategy would easily be able to identify a facially neutral policy on which to craft a case. After all, the choices to upzone areas like Williamsburg, Chinatown, and Harlem were much more than a series of one-off decisions, but were instead part of a conscious and purposeful strategy employed by the Mayor to revitalize particular "underutilized" portions of the city and ready them for commercial investment.[168] However, upon deeper inspection, multiple factors actually make this a much harder claim to establish than it initially appears.

First, as stated previously, although it may appear that the decisions to upzone a neighborhood are presented as faits accompli, in reality each of these choices is the result of contemplated, individualized assessments exploring the appropriateness of upzoning for the area in question. Policymakers study the environmental effects of the rezoning, the demand for new housing, the possibility of increased commercial activity, the neighborhood's connectivity to public transit, and (although it may not seem like it) the impact this decision will have on existing residents. After taking those factors (and many others) into account, the city proposes a finely tailored rezoning package for the neighborhood, based on the information gathered from its study, as well as the political considerations attendant to any large policy decision. In addition to the upzoning changes, this package will likely include downzonings in some other areas, as well as measures aimed at historical preservation.

In this way, it is likely that no two rezoning packages will look alike. Instead, the decision to rezone a neighborhood more closely resembles the Department's discretionary decisions in *Inclusive Communities Project*. In that series of cases, the decision of how to allocate LIHTC credits was also a highly particularized, discretionary decision based off the best judgement of the expert agency and the information it gathered on the ground. In that case, the court decided that the Department's discretionary decision-making process was not a "facially neutral policy" for the purposes of the disparate impact test. According to the court, simply identifying a policy of discretion leaves the judge in the difficult position of having to propose a remedy to a multi-faceted and ever-changing process.

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[167] Inclusive Communities Project, Inc. v. Texas Dep't of Housing and Cmty. Affairs, No. 3:08-CV-0546-D, 2016 WL 4494322 *6 (N.D. Tex. 2016).

[168] *See* ANGOTTI & MORSE, *supra* note 5 at 13 (explaining that Mayor Bloomberg's rezoning strategy was part of a larger effort to promote New York as a "luxury city").

What, in this case, would an appropriate judicial remedy look like? A judge could not in good faith tell the city to not ever rezone another majority minority neighborhood. The minority residents likely would not even support that! Similarly, telling the city to avoid upzoning majority minority neighborhoods seems an equally blunt tool that might not achieve its stated end. Indeed, given the complicated relationship between zoning and housing prices, it is possible that a policy of no longer upzoning gentrifying neighborhoods would actually have the unintended consequence of raising housing prices even more than they would have under the upzoning regime.[169] Although the evidence is far from conclusive on this matter, it is not hard to imagine that courts may be receptive to the "trickle-down" theory of housing supply given their historic receptiveness to traditional housing barrier cases (as opposed to housing improvement cases).[170]

Moreover, as stated previously, a disparate impact claim against a discretionary policy seems a bit contradictory. If the policy is indeed discretionary—i.e., the policymakers are actually assessing the merits of each individual case before reaching a finely tailored decision—does that not suggest that their ultimate decision was, in fact, intentional? If, as Angotti and Morse illustrate, the City is actually targeting "underutilized" minority neighborhoods for upzoning changes, that would actually suggest disparate *treatment* on the part of the government, which requires a showing of discriminatory intent. While that discriminatory intent may exist, the appropriate vehicle for proving it is not a disparate impact claim. For these reasons, plaintiffs would likely fail at establishing a facially neutral policy on which they could ground their disparate impact claim.

B. Does the Plaintiff's Disparate Impact Claim Meet Justice Kennedy's "Robust Causality" Requirement?

Assuming, for the sake of argument, that the plaintiff was able to establish a facially neutral policy upon which they could sustain their disparate impact claim, they would still have to satisfy the second requirement of their prima facie case: establishing causality.[171] Once again, on its face, a claim of disparate impact against New York City's upzoning policies seems to easily reach this standard. Angotti and Morse have illustrated that since the Mayor's upzoning initiative took place, in Williamsburg alone property values increased by almost 250%, median monthly rents grew from $949 to $1603, the neighborhood's subsidized housing stock dropped from 64% to 51.7%, and the area's white population increased by 44%, while its Latino population declined by 27%.[172] But, as Justice Kennedy warned, "statistical disparity" alone does not a disparate impact make.[173] Instead, plaintiffs are admonished to establish a clear and convincing causal link between the offending policy and the resulting disparity.[174] By this standard, plaintiffs bringing a disparate impact claim against the City's upzoning policies would likely fail.

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169 For further evidence of the potential link between restrictive zoning and rising housing prices, *see generally*, LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES (Mar. 17, 2015) (illustrating the link between California's high housing costs and restrictive zoning/environmental review policies).

170 *See* Seicshnaydre, *supra* note 102.

171 *Inclusive Communities Project,* 2016 WL 4494322 at *8.

172 ANGOTTI & MORSE, *supra* note 5 at 85 – 86.

173 *Inclusive Communities Project*, 135 S. Ct. at 2522.

174 *Id.*

The reality is that development choices are complicated, multifaceted, multimember decisions that cannot be sufficiently distilled into one policy or practice. While the City may have made the ultimate call as to whether it should rezone a neighborhood, that decision was influenced by developers' opinions, housing and economic trends, and conversations with residents on the ground. Additionally, a simple rezoning cannot alone gentrify a neighborhood. Indeed, the City could have made the most sweeping zoning ordinance changes in history and it would have resulted in no changes to the built environment, without private parties taking the initiative to act on that reform. Developers had to choose to build the luxury buildings that warped the neighborhoods' housing markets. High-end retailers had to choose to move into ground-floor spaces and cater to the new professional demographic. Unscrupulous landlords, like Tranquilina Alvillar's, had to choose to push their current tenants out of the apartment to make room for upper-income renters. And, perhaps most crucially, well-heeled professionals had to choose to move into the neighborhood, altering its demographics and precipitating all of the attendant changes that come with gentrification. Like the federal government in the *Department of Treasury* case,[175] the City's decision was simply the first in a long line of necessary ingredients for urban gentrification and displacement.

This upzoning hypothetical clearly illustrates Seicshnaydre's aforementioned argument[176]—home improvement policies do not make for strong disparate impact claims. Code enforcement cases, blight demolition, LIHTC allocation, and upzoning decisions all share the common attribute of being additive or ameliorative policies as opposed to simple barriers to new developments. The reality of these kinds of policies is that they often implicate multiple parties and independent decisions before their full force is realized. This leaves judges in the difficult position of having to disambiguate causal links and appropriately mete blame where blame is due. While the City's zoning policies might carry some of the blame for the resulting displacement, determining how much blame and the appropriate remedy is a tall order. Courts might simply not be up to the challenge.

C. Was the Defendant's Action Necessary to Achieve One or More Substantial, Legitimate, Nondiscriminatory Interests?

Although none of the most recent disparate impact cases have reached this stage of the burden shifting analysis, assuming a claim against upzoning did survive the prima facie showing of discrimination, the next task would be for the defendant to provide a legitimate justification for the offending action.[177] On this question, the City of New York would likely have a compelling answer.

First, the City would likely argue that the upzoning decisions were necessary for economic development purposes. Although this may seem like the kind of rent-seeking behavior that the plaintiffs are trying to enjoin, the reality is that courts have long held that urban economic development is a sufficient justification for intrusive government policies. Indeed, in numerous cases, the courts have rejected plaintiffs' calls for relief from actions more pernicious than upzoning on the grounds that the government had a legitimate interest in fostering economic

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[175] Inclusive Communities Project v. United States Dep't. of Treasury, No. 3:14-CV-3013-D, 2016 WL 6397643 *12 (N.D. Tex. 20116).

[176] *See* Seicshnaydre, *supra* note 102.

[177] Inclusive Communities Project, Inc. v. U.S. Dep't. of Treasury, WL 6397643 *10 (N.D. Tex. 2016).

development in whatever manner it deems most appropriate.[178] Whether or not the policy will actually result in economic development (or the right kind of economic development) is not an issue with which the courts typically concern themselves.

In addition to the economic development argument, the City will likely deploy a whole host of smaller—but similarly convincing—claims. For example, the City will likely argue that adding density serves a clear environmental benefit. Residents in dense cities have less need to own a car, walk more, commute shorter distances, and leave smaller carbon footprints. A government interested in combating the harmful effects of climate change would likely encourage cities to add density in exactly the way New York has in these gentrifying neighborhoods. Additionally, the City will likely argue that these upzoning concessions are actually *furthering* its affordable housing agenda. In many cities like New York, governments grant developers upzoning concessions in exchange for promises that these developers will preserve a particular percentage of their new units as affordable housing.[179] These "inclusionary zoning" policies aim to fill the gaps left by decreasing state and federal funds for affordable or public housing. Inclusionary zoning is appealing to cities because it does not require that they allocate any additional funds to the construction of these new affordable units. Instead, by leveraging their power over zoning policy, cities can exact these financial concessions from developers interested in building as many units as possible. While it is unclear how a court would assess this inclusionary zoning justification, it is not outside the realm of possibility that they would receive it positively.

D. Can the Challenged Practice be Served by Another Practice that has a Less Discriminatory Effect?

The final question in the burden-shifting test advocated by HUD is for the plaintiff to suggest to the court alternative, less-discriminatory mechanisms by which the government could achieve its stated justifications.[180] Here, although the plaintiffs will likely suggest numerous alternatives to the government's zoning policies (many of which will be discussed in Part IV), the reality is that these policy suggestions will likely extend beyond the reach of a court-sanctioned remedy. Ideas like community-based planning, community land trusts, and robust public housing investment are policies that require political input—not the kinds of remedies that could be handed down by a court. Additionally, many of these policies require complicated, multiparty input processes to stand a chance of success. Courts are often reluctant to mandate that cities undertake these kinds of complicated alternatives given their resource intensive nature.

IV. POTENTIAL POLICY ALTERNATIVES AND CONCLUSION

Just because the City's upzoning policy would likely survive a disparate impact claim does not diminish the very real inequities these policies can cause for many of New York's most vulnerable citizens. The law is often an unfortunately blunt tool, and is not necessarily the best mechanism for effecting change in every case. Instead, lawmakers and housing advocates should focus their attention on creative *policy* solutions to the multifaceted problems of gentrification and displacement. By championing reforms that reframe the way we think about housing and

178 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 483 – 84 (2005).

179 *See* ANGOTTI & MORSE, *supra* note 5 at 69 – 70.

180 Inclusive Communities Project, Inc. v. U.S. Dep't. of Treasury, WL 6397643 *10 (N.D. Tex. 2016).

encourage neighborhood-level development decisions, concerned policymakers may be able to inject a modicum of equity into our otherwise unequal national housing policy.

One potential reform, championed by authors Angotti and Morse, is an unequivocal reaffirmation of housing as a public good.[181] Historically, for example, the primary mechanism for providing affordable housing in cities like New York was through units owned, operated, and maintained by the *public*.[182] Municipal housing authorities across the country each housed tens of thousands of people in units that were permanently affordable for low-income and working-class residents.[183] Changes in neighborhood demographics or land use designations did not threaten that permanence—those units were guaranteed by the government and therefore largely insulated from any economic tumult occurring in the traditional housing market.

Today the distinction between public and private housing is falling apart. Many of the substantive reforms in the affordable housing world are occurring under the guise of "public-private partnerships."[184] These privately facilitated policies, like inclusionary zoning, lack many of the protections and advantages inherent in a more traditional public housing regime. For example, while inclusionary zoning programs aim to counteract the lack of new affordable public housing units, in practice they often end up serving a demographic noticeably wealthier than the intended recipients of the original public housing programs.[185] While the lack of affordable middle-income housing is certainly an issue in places like New York,[186] simply replacing much needed low-income units with middle-income units does little to stem the tide of displacement blanketing many urban neighborhoods.

Skeptics will no doubt argue that truly affordable public housing is simply not a financial reality for most cities. With federal and state governments curbing many of their traditional investments in those types of programs,[187] cities have no choice but to turn to the private sector for a suboptimal alternative. However, this ostensibly pragmatic resignation ignores many of the encouraging innovations succeeding at securing permanently affordable housing around the

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181 ANGOTTI & MORSE, *supra* note 5 at 156 – 61.

182 *See, e.g.*, *id.* at 157.

183 *Cf. id.* (noting that the NYCHA houses 400,000 people); *see also* D. Bradford Hunt, *What Went Wrong with Public Housing in Chicago*, 94. J. ILL. ST. HISTORICAL SOC. 96 (2001) (noting that in 1962, the Robert Taylor Homes held 27,000 individuals); Ryan Briggs, *Bidding Farewell to Queen Lane, Looking Ahead for PHA*, HIDDEN CITY (Sept. 12, 2014), https://hiddencityphila.org/2014/09/bidding-farewell-to-queen-lane-looking-ahead-for-pha/ [https://perma.cc/67W9-DVPK] (noting that, at its peak, Philadelphia had over 6,000 *units* of public housing in the city).

184 *Id.*

185 *See, e.g.*, Aimee Curtis, *DC's Inclusionary Zoning Could Start Serving Poorer Households*, GREATER GREATER WASHINGTON (Jan. 11, 2016), https://ggwash.org/view/40422/dcs-inclusionary-zoning-could-start-serving-poorer-households [http://perma.cc/FU37-9T6D] ("Inclusionary zoning tends to best serve below-market, but not extremely below-market households. In other words, it helps people for whom housing is too expensive, but not way too expensive.").

186 *Cf.* Abigail Savitch-Lew, *Do NYC's Middle-Class Families Really Need Affordable Housing?*, CITYLIMITS (Nov. 1, 2016), http://citylimits.org/2016/11/01/do-nycs-middle-class-families-really-need-affordable-housing/ [http://perma.cc/RT9Z-MD32] (discussing the relative rent burdens of low vs. moderate income families).

187 *See, e.g.*, Maya Rao, *Affordable housing advocates fear HUD cuts proposed by President Donald Trump*, Star Tribune (Apr. 20, 2017), http://www.startribune.com/affordable-housing-advocates-fear-hud-cuts-proposed-by-president-donald-trump/419912173/ [http://perma.cc/R73H-ZRV9].

country. For example, community land trusts in cities like Boston,[188] Durham,[189] and Albuquerque[190] have illustrated that local, pubic control of traditionally private assets can go a long way to providing meaningful homeownership opportunities for low-income Americans. Under this model, locally managed community organizations retain ownership of neighborhood land that they then use to build and sell homes at significantly lower-than-market prices.[191] By removing the cost of land from the construction equation,[192] these organizations have been able to develop an ecosystem of truly affordable housing in some of the most desirable urban locations. Community land trusts have shown that by returning to a model centered on public ownership, cities are still making good on the promise of economic inclusivity.

Another potential avenue for reform seeks to empower local voices in the zoning process. At its core, the community-based planning movement simply asserts that residents living in areas slated for change ought to have some real say in how their neighborhoods develop.[193] Achieving this admittedly modest goal requires two formal concessions from city governments. First, it requires that large city governments create neighborhood planning councils with real power to drive zoning change. Although some form of neighborhood planning council exists in most major American cities, these bodies often exercise little more than advisory powers in the zoning process.[194] While full veto power almost certainly is not appropriate, the ability to cast votes of consequence over the changes occurring in their neighborhoods is necessary for ensuring that municipal policies do not completely trample local considerations.

Second, true community-based planning requires community plans with actual teeth. New York is one of the few major American cities without an overarching comprehensive plan.[195] While many neighborhoods have local plans for how they want to structure future development, these plans do not carry the force of law and amount to little more than "wish lists" for

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188 *See* Kaid Benfield, *Why Community-Based Planning Works Better Than Anything Else*, CITYLAB (Mar. 26, 2012), http://www.citylab.com/design/2012/03/why-community-based-planning-works-better-anything-else/1587/ [http://perma.cc/NA8G-JNM8].

189 *See History*, DCLT, DURHAM COMMUNITY LAND TRUSTEES, https://www.dclt.org/about-dclt/history/ [http://perma.cc/H69Q-HEK2] (last visited Apr. 27, 2018).

190 *See History*, SAWMILL COMMUNITY LAND TRUST, http://www.sawmillclt.org/about-us/history/ [http://perma.cc/H2KL-3DNB] (last visited Apr. 27, 2018).

191 *See* Miriam Axel-Lute & Dana Hawkins-Simons, *Community Land Trusts Grown from Grassroots*, LINCOLN INSTITUTE OF LAND POLICY (July 2015) https://www.lincolninst.edu/publications/articles/community-land-trusts-grown-grassroots [http://perma.cc/7KHA-VQTC].

192 For an explanation of the economics behind the community land trust model, see David M. Abromowitz, *An Essay on Community Land Trusts: Towards Permanently Affordable Housing*, 61 MISS. L.J. 663, 665 – 76 (1991).

193 *See* ANGOTTI & MORSE, *supra* note 5, at 149 – 56.

194 *See, e.g.*, David Whitehead*, You Could be an ANC Commissioner, and as a Reader of this Blog, you Really Should Think About it*, GREATER GREATER WASHINGTON (July 28, 2016), https://ggwash.org/view/42316/you-could-be-an-anc-commissioner-and-as-a-reader-of-this-blog-you-really-should-think-about-it [http://perma.cc/EWV6-WQ2K].

195 *See* Noah Kazis*, Planning Experts Call for an Overhaul of NYC Zoning Rules*, STREETSBLOG NYC (Oct 18, 2011), http://nyc.streetsblog.org/2011/10/18/planning-experts-call-for-an-overhaul-of-nyc-zoning-rules/ [http://perma.cc/ELF9-5WJG].

policymakers to ignore.[196] For community-based plans to carry any real consequence, courts and city leaders should follow Professor Haar's advice and treat them as "impermanent constitution[s]" that trump parcel-level zoning designations when conflicts arise.[197] This ensures that the overarching vision for a neighborhood (and a city) remains intact as policymakers go about the business of making isolated zoning decisions.

Neither of these changes will, by themselves, be able to reshape our unequal and unstable housing market. Nor will securing either of these changes prove easy. Enacting change through the political branches invariably requires time, money, and energy for the mere hope of success. Part of the seduction of sweeping judicial decisions is that they allow us to avoid the messiness of politics: crafting a sound argument, presenting it to the right judge, and waiting for change to follow. But, as I hope this paper illustrates, not all change is best served by judicial action. While addressing the inequities in urban land use policy through disparate impact litigation may seem attractive, that vehicle is not likely to secure the kind of changes we seek. Instead, lawmakers and housing advocates should prepare to put in the hard work of effecting *political* change in our cities' zoning systems. We should not settle for anything less.

196 *See* ANGOTTI & MORSE, *supra* note 5, at 149.

197 *See* Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROBS. 353 (1955).