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# The Gentrification Trigger

## AUTONOMY, MOBILITY, AND AFFIRMATIVELY FURTHERING FAIR HOUSING

*Rachel D. Godsil*<sup>†</sup>

### INTRODUCTION

Gentrification polarizes. The term usually connotes a process where “outsiders” move into an area whose once-attractive properties have now deteriorated due to disinvestment. The outsiders moving in are often, though not always, white.<sup>1</sup> This migration can lead to arguably positive outcomes. Increased demand results in an increase in property values—which, from a pure market perspective, seems like a net positive. Indeed, those who currently own property acquire greater equity, and the tax base of the city containing the gentrified neighborhoods expands. Moreover, gentrification of affluent outsiders would seem also to further society’s collective interest in residential integration. Residential integration has enormous potential to address inequalities of other sorts, such as education, access to job networks, and an increase in amenities resulting from the political capital of the outsiders.<sup>2</sup> This too seems like a significant net positive.

Why then is there significant opposition to gentrification by in-place residents?<sup>3</sup> One concern is the possibility that the

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<sup>1</sup> See, e.g., John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”*: Gentrification and the K.O. of Impoverished Urban Dwellers of Color, 46 HOW. L.J. 433 (2003).

<sup>2</sup> Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261, 303-05 (2006).

<sup>3</sup> JACOB L. VIGDOR, DOES GENTRIFICATION HARM THE POOR? 1 (Sept. 2001) available at <http://www.marealtors.com/content/upload/AssetMgmt/Documents/Gov%20Affairs/QoL/doesgentrificationharmthepoor.pdf> (noting the negative reaction to gentrification, quoting a mayoral candidate in San Francisco who pledged in 1999 to declare “war on any and all gentrification”); cf. LANCE FREEMAN, THERE GOES THE

property-price increase will result in displacement—building owners will drastically increase rents or the increase in taxes may become too great for current property owners to bear.<sup>4</sup> There is some dispute as to the degree of direct displacement of individuals due to gentrification (that is, evictions, failure to pay property taxes),<sup>5</sup> but it is clearly the case that the economic and racial demographics of gentrifying neighborhoods often change dramatically.<sup>6</sup>

In-place residents fear that the newcomers will change the culture and practices of the neighborhood. According to one caricature, “Housing prices balloon; boutiques and bistros blossom; and before you know it, some bearded dudes in vests have bought the local bodega and opened a saloon festooned with taxidermied animals.”<sup>7</sup> While the caricatured image may be considered funny, the perceived loss to the in-place residents is not. Indeed, the pain of loss of community and the harm of lost autonomy have been well recognized in the eminent domain literature.<sup>8</sup>

Nevertheless, some commenters contest the idea that in-place residents of gentrifying neighborhoods suffer a loss. These scholars suggest that in-place residents should be grateful for the influx of affluent residents and the capital they bring.<sup>9</sup> Indeed, one could argue that gentrification has been the means by which our cities have avoided their predicted demise—for at various points during the twentieth century, scholars and public intellectuals have professed the “death” of the city and the “urban crisis.”<sup>10</sup> Therefore, if gentrification is

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‘HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP 4 (2006) (examining gentrification in Harlem and Clinton Hill in Brooklyn and finding no causal relationship between displacement and gentrification; rather, finding that the poor and those without a college degree are more likely to remain in a gentrified neighborhood).

<sup>4</sup> powell & Spencer, *supra* note 1, at 446.

<sup>5</sup> See FREEMAN, *supra* note 3, at 167; Lance Freeman & Frank Braconi, *Gentrification and Displacement*, 8 URB. PROSPECT 1, 2 (2002), available at <http://www.chpcny.org>.

<sup>6</sup> See, e.g., VICKI BEEN ET AL., FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, STATE OF NEW YORK CITY’S HOUSING AND NEIGHBORHOODS (2011), available at [http://furmancenter.org/files/sotc/SOC\\_2011.pdf](http://furmancenter.org/files/sotc/SOC_2011.pdf).

<sup>7</sup> Adam Sternbergh, *What’s Wrong with Gentrification*, N.Y. MAG. (Dec. 11, 2011), <http://nymag.com/news/intelligencer/62675>.

<sup>8</sup> See, e.g., Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Home Ownership*, 77 FORDHAM L. REV. 949, 978 (2008).

<sup>9</sup> See, e.g., J. Peter Byrne, *Rhetoric and Realities of Gentrification: Reply to powell and Spencer*, 46 HOW. L.J. 491, 494-95 (2003).

<sup>10</sup> See, e.g., Bruce London & J. John Palen, *Introduction: Some Theoretical and Practical Issues Regarding Inner-City Revitalization*, in GENTRIFICATION, DISPLACEMENT AND NEIGHBORHOOD REVITALIZATION 4 (J. John Palen & Bruce London eds., 1984).

understood as a market-driven mechanism that allows those with definable property interests to maximize the value of those interests, then our property system is working as it should. Although the result is increased rent—which may prevent some from remaining in gentrified areas—to many property scholars the degree of protection should increase with the significance of the property interest. A lease holder’s interest ends at the end of the lease. So while renters whose lease terms change may wish to remain, the interests of the fee simple holders in the gentrifying neighborhood are the only interests that matter from a legal perspective. And those who own their property have a choice either to remain or sell their properties for a significantly higher price.

But not all adhere to this alluringly simple formulation. Many commentators argue that property rights in the fee title holder are far from absolute and that the “public,” however constituted, has an interest in how land—private as well as public—is used. Indeed, when issues of land use changes arise, laws and regulations often provide particular protection to those considered part of the “community,” suggesting that realizing “community preferences” should be among the goals that public land use controls seek to achieve.

Yet even among those who agree that the public has an interest in land use controls and that community preferences should be weighed particularly heavily, it is far from obvious what degree of intervention these propositions support and who constitutes the community whose preferences we seek to anticipate and realize.

Also salient is why community preferences ought to be important and what values we seek to recognize and conserve in honoring them. Without delving too deeply, I note that one of the foremost values legal recognition of private property seeks to serve is autonomy.<sup>11</sup> Autonomy is understood as critical to the successful implementation of a liberal democracy—which relies upon its citizens to be active participants in governance.

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<sup>11</sup> See D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J. L. & LIBERTY 36, 37 (2009) (citing *e.g.*, JAMES M. BUCHANAN, *PROPERTY AS A GUARANTOR OF LIBERTY* (1993); JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (1992); RICHARD PIPES, *PROPERTY AND FREEDOM* (1999); BERNARD H. SIEGAN, *PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION* (1997)). Two prominent works that justify property on the basis that it promotes individual freedom, both of which are discussed at length *infra* Part II, are Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) and MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

The voluminous discussions of how private property overcomes the tragedy of the commons<sup>12</sup> also provide some underpinning to autonomy's importance. If we hold land in common, the theory suggests, decision making about the land's uses becomes too disaggregated and the incentives to hoard too powerful for the commons holders to maximize the value of land.<sup>13</sup> By contrast, legally protected private-property rights are said to incentivize the individual property holder to maximize the value of her land through sound land use choices.<sup>14</sup>

The notion of granting communities a say in land use decisions may seem anathema to autonomy—it suggests that the “many” will be able to dictate uses to the individual property owner. And yet, this sort of interference occurs with great frequency—zoning being perhaps the most obvious example. Nevertheless, in some contexts, autonomy interests are at stake that existing legal tools fail to protect.

In this article, I focus on the gentrification of city neighborhoods that were abandoned during the government-sponsored suburban migration of the 1950s through the 1980s.<sup>15</sup> These neighborhoods generally became racially isolated and economically depressed during this same period. The residents who remained did not choose to have the middle class abandon their neighborhoods, nor did they have the option to leave for themselves.<sup>16</sup> Now, after decades where those who remained invested labor, time, and emotion in their neighborhoods,<sup>17</sup> outsiders are moving in, and the residents who remained (or their descendants) are denied both the autonomy to prevent these changes and the means to exit to more desired environs. Accordingly, I argue in favor of broadening our conception of “interest” beyond those who hold definable property interests in the classic sense to include those who have invested in their homes and neighborhoods.<sup>18</sup>

Although the notion of realizing community interests would seem to privilege in-place residents' interests, and thus counsel against any further gentrification, this view wrongly

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<sup>12</sup> See, e.g., Garret Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968); Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 *ENVTL. L.* 241 (2000).

<sup>13</sup> Hardin, *supra* note 12, at 1244-45.

<sup>14</sup> *Id.* at 1245.

<sup>15</sup> See *infra* notes 26-33 and accompanying text.

<sup>16</sup> See *infra* notes 30-35 and accompanying text.

<sup>17</sup> See DEBBIE BECHER, *THE INVESTMENT STATE: EVERYDAY ENCOUNTERS WITH EMINENT DOMAIN* (forthcoming 2013) (manuscript at 9) (on file with the author).

<sup>18</sup> *Id.*

assumes that the goal of realizing community preferences requires compositional stasis. Compositional stasis, needless to say, is neither possible nor normatively appealing. Residential change in neighborhoods is inevitable whether a neighborhood gentrifies or not.<sup>19</sup> The problem, however, is that gentrification currently causes nonconsensual exit—and, as such, threatens the *autonomy* of the displaced in a way that is unlike a choice to move. But, by recognizing a broad scope of community preferences, the autonomy of in-place residents can be revived.

The question that follows is how to protect the preferences of in-place residents. Often, these preferences are assumed to be simply to prevent gentrification from occurring. However, decrying or opposing gentrification is unlikely to halt the process of willing buyers purchasing property from willing sellers at increasing prices—which begins the cycle of gentrification. Nor will blanket opposition successfully ignite changes that confront the underlying challenges to autonomy and community that animate the deeply felt response to gentrification. A more nuanced approach is required.

Many in-place residents—particularly renters—currently lack the ability to choose to remain when gentrification occurs. The forced exit of sizable numbers of community members is harmful both to them and to those who remain. The ideal response, as this article describes, is a vehicle that allows in-place residents to remain but also allows them to *choose* whether to leave, rather than being involuntarily displaced. Such a vehicle would seem to blunt the criticism that gentrification is an illegitimate invasion by outsiders, and it would transform gentrification into a mechanism by which truly fair housing can be furthered.

This article, inspired by eminent domain remedies and federal government mobility programs operated by the Department of Housing and Urban Development (HUD), suggests the possibility of using rental vouchers or low-interest loans to restore the autonomy of in-place residents, providing them with viable, self-determining options to remain or exit the neighborhood. Indeed, the Fair Housing Act legally obligates HUD and its grantees to “affirmatively further fair housing,”<sup>20</sup> and HUD

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<sup>19</sup> Indeed, poor residents are more likely to move than wealthy residents, and therefore, there is often more residential change in poor neighborhoods than “gentrified” neighborhoods. FREEMAN, *supra* note 3, at 4-5; SULEIMAN OSMAN, *THE INVENTION OF BROWNSTONE BROOKLYN: GENTRIFICATION AND THE SEARCH FOR AUTHENTICITY IN POSTWAR NEW YORK* 276 (2011).

<sup>20</sup> Fair Housing Act of 1968, 42 U.S.C. § 3608.

has funds available to fulfill this mandate. The current absence of true autonomy and choice for in-place residents of gentrifying neighborhoods threatens the legitimacy of any integration that may occur as a result of the influx of new residents.

This article is divided into two sections. Part I explains why gentrification is different from other neighborhood changes, arguing that the cause and effect of modern gentrification weighs in favor of government intervention. Part II argues that the existing land use legal toolkit is unavailable to in-place residents facing gentrification and offers alternative legal mechanisms to protect community interests. This section specifically examines the circumstances that would trigger government intervention and discusses the HUD funds available to implement these proposals.

#### I. WHY IS GENTRIFICATION DIFFERENT?

Many neighborhoods undergo significant change. A suburban neighborhood of small homes will become popular, and individuals with greater resources will purchase the homes with the goal of tearing them down and rebuilding on a significantly grander scale. A small town will see an influx of chain stores that threaten extant businesses as well as the distinctive culture of the town.

Like gentrification, these changes are often hotly contested by residents other than the individual property owner who stands to benefit from the change. The “community” prefers the existing scale of homes over McMansions, and it prefers a certain aesthetic that the signage and visual impact of chain stores will disrupt. But this opposition to change differs in two respects from the opposition associated with gentrification. First, there is a strong argument to be made that our legal system has adequate mechanisms in place, such as zoning and subdevelopment permitting requirements, to address community interests in the context of a suburb or small town.<sup>21</sup>

Second, as discussed in greater detail below, the in-place residents in neighborhoods subject to gentrification consider their neighborhoods to have been intentionally abandoned and allowed to deteriorate by both governmental actors and the forebears of the people now seeking to “gentrify.” The in-place residents who oppose gentrification tend to be

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<sup>21</sup> See *infra* notes 62-71.

residents who lived through the period of abandonment and deterioration—or their children. For in-place residents, then, the notion that they will be displaced now has an extreme—and often racialized—resonance.

A. *Defining Gentrification*

Gentrification generally refers to a process where a once-affluent area, which has been abandoned and is now occupied by working-class or poor people, is rediscovered by the affluent. Typically, neighborhoods that are gentrified possess the following characteristics at a particular point in time: deteriorating housing, generally low property values, high crime, few amenities, and substandard schools.<sup>22</sup>

The term “gentrification,” perhaps not surprisingly, was initially used in England by sociologist Ruth Glass in the mid-1960s to describe changes in coastal villages and London neighborhoods.<sup>23</sup> Glass’s interest stemmed from the changes she observed initially in her own London neighborhood as Victorian lodging houses were rehabilitated and sold to single families, displacing the working-class renters.<sup>24</sup> Her characterization of the phenomenon of an upgrading housing stock and the influx of higher income homeowners is now the common nomenclature and is used internationally in both academic literature and cultural conversation.

The popularity of the term is interesting since “gentry” is a descriptor rarely used in the United States; it refers to a class status—landed aristocracy or nobility—that was expressly rejected by the Founding Fathers, even if some lived lives that closely replicated this class.<sup>25</sup> And despite the rare use of the term, the phenomenon is the same in the United States, where gentrification is used to describe the “process of upper-status groups replacing lower-status groups in inner-city neighborhoods that had previously experienced ‘decline.’”<sup>26</sup>

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<sup>22</sup> Tom Slater, *Gentrification of the City*, in *THE NEW BLACKWELL COMPANION TO THE CITY* 572, 573 (Gary Bridge & Sophie Watson eds., 2011).

<sup>23</sup> London & Palen, *supra* note 10, at 7.

<sup>24</sup> Slater, *supra* note 22, at 571.

<sup>25</sup> *Id.*

<sup>26</sup> London & Palen, *supra* note 10, at 7.



B. *Who Lives in Gentrifying Neighborhoods and What Level of Autonomy Do They Have?*

In the late twentieth and early twenty-first centuries in the United States, the neighborhoods ripe for gentrification are most often inhabited by black and Latino families and individuals in urban areas.<sup>27</sup> The phenomenon is not race specific, however, and can occur wherever poor and working-class residents live in neighborhoods possessing certain characteristics.<sup>28</sup> The unifying features of neighborhoods likely to be subject to gentrification are a high rate of renters, housing stocks with high architectural value, ease of access to job centers, vibrant culture and street life, comparatively low housing prices, and perhaps ironically, racial and ethnic diversity.<sup>29</sup>

The arguable difference between the first wave of gentrification—where artists and bohemians, followed by the middle and upper class, moved into neighborhoods at one time comprised of white ethnics—and the second—where the affluent are moving into neighborhoods that have become predominantly Black and Latino—is the role of choice or autonomy available to the in-place residents. Some white ethnics had options to remain in gentrifying neighborhoods—and often saw their property values increase exponentially—while others migrated to the suburbs.

The story of white ethnics' migration to the suburbs is an old one—as is the resultant abandonment and disinvestment of urban centers to blacks and Latinos.<sup>30</sup> White ethnic groups and new white immigrant groups in the early twentieth century were likely to congregate in neighborhoods with others who shared their origins; however, most neighborhoods contained multiple ethnic groups. More significant, the children of white ethnic

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<sup>27</sup> MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES 2 (Apr. 2001), available at [http://www.policylink.org/atf/cf/%7B97C6D565-BB43-406D-A6D5-ECA3BBF35AF0%7D/DealingWithGentrification\\_final.pdf](http://www.policylink.org/atf/cf/%7B97C6D565-BB43-406D-A6D5-ECA3BBF35AF0%7D/DealingWithGentrification_final.pdf).

<sup>28</sup> See, e.g., Justyna Goworowska, Gentrification, Displacement in the Ethnic Neighborhood of Greenpoint Brooklyn 5-6 (2008) (unpublished M.A. thesis, University of Oregon), available at [https://scholarsbank.uoregon.edu/jspui/bitstream/1794/7764/1/Goworowska\\_Justyna\\_MA\\_spring2008.pdf](https://scholarsbank.uoregon.edu/jspui/bitstream/1794/7764/1/Goworowska_Justyna_MA_spring2008.pdf).

<sup>29</sup> KENNEDY & LEONARD, *supra* note 27, at 9-12; see also generally JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961) (a classic account of the harm of suburban homogeneity, top-down planning, and a celebration of mixed use land use patterns which create dynamic and diverse communities).

<sup>30</sup> See, e.g., DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 77 (1993).

immigrants typically assimilated quickly and purchased homes outside of the “ethnic ghetto,” usually within a generation or two.<sup>31</sup>

The experience of black people in the Northeast and Midwest and Latinos in the West was different in kind. Rather than being able to enjoy the social mobility granted to white ethnics, “blacks were trapped behind an increasingly impermeable color line.”<sup>32</sup> This trap was double-edged. Black families were prevented from moving to the suburbs or white neighborhoods within cities and simultaneously denied resources to maintain the inner-city neighborhoods abandoned by whites.<sup>33</sup>

Black families (and Latinos in the West) were denied housing choice through both legal and extralegal means. The extralegal barriers consisted of the once-tolerated and now-deplored harassment and violence that arose when a black family sought to move to a white neighborhood.<sup>34</sup> The legal barriers consisted of the use of racially restrictive covenants as well as “exclusionary” zoning that created significant class barriers to suburban migration.<sup>35</sup> In the 1940s, the real estate

<sup>31</sup> See Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Lines: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1840 (2004); MASSEY & DENTON, *supra* note 30, at 32. For example, in what was referred to as the “Irish ghetto,” the majority of the residents were not, in fact, Irish, and only 3% of Chicago’s Irish population lived there. MASSEY & DENTON, *supra* note 30, at 33. By contrast, in the black ghetto, blacks constituted 82% of the population and 93% of Chicago’s black population lived there. *Id.* at 32-33; see STANLEY LIEBERSON, *ETHNIC PATTERNS IN AMERICAN CITIES* 44-58, 182-90 (1963) (providing a rich description of the residential movement of different white ethnic groups).

<sup>32</sup> MASSEY & DENTON, *supra* note 30, at 33.

<sup>33</sup> Godsil, *supra* note 31, at 1838-40.

<sup>34</sup> *Id.* at 1840. The violence took the form of harassment of black families who moved into white neighborhoods that sporadically escalated into rock throwing, gun shots, cross burnings, and physical attack. *Id.* If the black family refused to move, the last step was bombing. *Id.* In Chicago, a black home in a white neighborhood was bombed once every twenty days between 1917 and 1921—in all, fifty-eight homes were bombed. *Id.* at 35. This violence recurred during the Civil Rights Movement’s attempt to open housing. In the “Open Housing Campaign” that was waged in Chicago in the summer of 1966, marchers in working class white neighborhoods were confronted by

[w]hites shouting “white power!” [who] threw bricks and bottles at the marchers, striking civil rights leader Jesse Jackson and injuring more than fifty demonstrators. When marchers made for the cars they had left in the park under police supervision they found that two had been pushed into the lagoon, over ten had been set on fire, and many more had broken windows and slashed tires . . . .

Sarah Asrat & Philip Tegeler, Poverty & Race Research Action Council, *Launching the Fair Housing Debate: A Closers Look at the 1966 Chicago Freedom Movement* (2005), PRRAC.ORG, available at [http://prrac.org/full\\_text.php?text\\_id=1047&item\\_id=9645&newsletter\\_id=0&header=Current%20ProjectsSeparationofPowers](http://prrac.org/full_text.php?text_id=1047&item_id=9645&newsletter_id=0&header=Current%20ProjectsSeparationofPowers).

<sup>35</sup> Godsil, *supra* note 31, at 1843, 1864. Racially restrictive covenants typically prohibited property owners from selling, occupying, or leasing their property. *Porter v. Johnson*, 115 S.W.2d 529 (Mo. Ct. App. 1938). Of course the Supreme Court

industry actively and successfully promoted the use of racially restrictive covenants.<sup>36</sup> A standard covenant stated that a property “shall not be used or occupied by any person or persons except those of the Caucasian race.”<sup>37</sup> In certain areas, “restrictive racial covenants were inserted in [as many as] eighty percent of . . . deeds.”<sup>38</sup> Civil rights groups brought legal challenges to restrictive covenants, and enforcement of such covenants was held to be unconstitutional in 1948.<sup>39</sup> Despite the successful legal challenge, the covenants often remained an impediment to housing choice for blacks and Latinos because white homeowners continued to honor them and many contractors found it impossible to obtain financing to build homes in newly developing suburban subdivisions for minority residents.<sup>40</sup> Realtors were also reluctant to violate deed restrictions for fear of “risk[ing] the wrath of . . . homeowners and jeopardiz[ing] their businesses.”<sup>41</sup>

In addition to express racial restrictions, other covenants regulating the size and aesthetics of new homes also had the effect of excluding many black and Latino families.<sup>42</sup> These restrictions—which included preventing the construction of multifamily housing, requiring large lots and square footage, and specifying architectural standards—“subtly preserved social homogeneity”<sup>43</sup> but were rarely challenged with success in courts.<sup>44</sup>

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held that the enforcement of racially restrictive covenants was unconstitutional in *Buchanan v. Warley*, 245 U.S. 60 (1917). The Court decided this case not on equality grounds, but rather on property rights grounds: “The right which the ordinance annulled was the civil right of a white man to dispose of his property . . . to a person of color, and of a colored person to make such a disposition to a white person.” *Buchanan*, 245 U.S. at 81; 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, 776 (1993). They were also used in some areas against Jews, Catholics, and the Irish. See KAREN BRODKIN, *HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA* 47-48 (1998). However, their use was most widespread against blacks. See generally THOMAS LEE PHILPOTT, *THE SLUM AND THE GHETTO: NEIGHBORHOOD DETERIORATION AND MIDDLE-CLASS REFORM, CHICAGO, 1880-1930*, at 189-93 (1978).

<sup>36</sup> See THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 44 (1996).

<sup>37</sup> *Id.*

<sup>38</sup> Abraham Bell & Gideon Parchomovsky, *The Integration Game*, 100 COLUM. L. REV. 1965, 1978 (2000).

<sup>39</sup> See *Shelley v. Kraemer*, 334 U.S. 1, 19-23 (1948) (holding that judicial enforcement of racially restrictive covenants constituted impermissible state action violating the Equal Protection Clause of the Fourteenth Amendment).

<sup>40</sup> SUGRUE, *supra* note 36, at 45; Godsil, *supra* note 31, at 1844.

<sup>41</sup> SUGRUE, *supra* note 36, at 45.

<sup>42</sup> SUGRUE, *supra* note 36, at 45; Godsil, *supra* note 31, at 1848.

<sup>43</sup> SUGRUE, *supra* note 36, at 45.

As a result of these legal and extralegal mechanisms, blacks and Latinos were forced to remain in urban centers and did not have the choice to transition to suburban living. Thus, an unwilling population continued to inhabit the urban neighborhoods that are now desirable as people begin to choose city living again and seek affordable properties in emerging neighborhoods.

C. *The Role of Government in Property-Value Decline in Urban Communities*

If gentrification occurs when an area experiences increased property values as a result of outsiders who identify undervalued property, it is important, as a preliminary matter, to note what caused the initial undervaluation. If the causes of decline and renewal are simply a result of individual preferences and consensual market exchanges, the argument in favor of a laissez-faire approach seems strong. It is exceedingly clear, however, that in the context of urban neighborhoods, declining property values are a direct consequence of decisions made by the federal government, bankers, and real estate brokers.<sup>45</sup> Historian Thomas Sugrue has shown that the boundaries between these three groups were blurred as bankers, real estate executives, and developers moved back and forth from government service to private practice.<sup>46</sup> The private hand of the market was consciously manipulated to cause a decline in property values and the quality of life in urban neighborhoods.

From the post-World War II period through the 1970s, the federal government engaged in programs enhancing the autonomy of white families to purchase homes and move to the suburbs, while simultaneously disinvesting in urban centers and contributing to the exclusion of black and Latino families from those same suburbs. In particular, three federal programs combined to provide unprecedented opportunities and autonomy for even middle-class white families: the federal subsidization of highways, the Federal Housing Administration (FHA), and the Veterans Administration (VA) home ownership loan programs. Moreover, some of these same programs resulted in massive displacement of poor people and the destruction of established neighborhoods.

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<sup>44</sup> Cf. *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713 (N.J.), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

<sup>45</sup> SUGRUE, *supra* note 36, at 43.

<sup>46</sup> *Id.*

In every major city, highway construction destroyed working-class neighborhoods as homes were leveled to make way for expressways, on and off ramps, and overpasses.<sup>47</sup> These neighborhoods were comprised of many ethnic groups; however, the white ethnics were able to benefit from the highway construction because it enabled easy commutes to and from the suburbs.<sup>48</sup>

These moves to the suburbs were subsidized by the government through the FHA and VA loan programs.<sup>49</sup> These loan programs guaranteed loans made by private banks to prospective homebuyers, allowing new buyers to purchase homes with only a 10-percent down payment. Before the advent of the federal programs, banks generally required “at least 33% and often 50% down payment.”<sup>50</sup> The federal programs also allowed buyers twenty-five- to thirty-year repayment periods, lowering monthly payments significantly.<sup>51</sup> Finally, the loan guarantee reduced risk to banks and thus resulted in lower interest rates. “The combination of lower down payments, lower interest rates, and longer repayment periods made home ownership a ‘mass phenomenon for the first time in American history.’”<sup>52</sup>

This phenomenon did not extend to black and Latino families. The Federal Home Loan Bank Board, working with real estate brokers and lenders, created Residential Security Maps and Surveys to determine eligibility for mortgage guarantees and home loans.<sup>53</sup> These maps subdivided metropolitan areas into sections ranked from A (which were shown on the map as green) to D (which were shown as red), with green as the safest investment and red as the riskiest.<sup>54</sup> The rankings took into account indicators such as the age and condition of buildings and the amenities in the neighborhood. But most important in the classification “was the level of racial, ethnic, and economic

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<sup>47</sup> See Mike Jones, *Public Roads: We're on the Eve of Construction*, 62 PUB. ROADS, Nov. 1998, available at <http://www.fhwa.dot.gov/publications/research/.../pavements/.../publicroads/98novdec/eve.cfm> (discussing the displacement of families by federally funded highway projects).

<sup>48</sup> Godsil, *supra* note 31, at 1846-47.

<sup>49</sup> The National Housing Act of 1937 created the FHA program. “[T]he VA [loan] program was authorized by the Serviceman’s Readjustment Act of 1944.” See MASSEY & DENTON, *supra* note 30, at 52-53. The FHA established standards and procedures that were subsequently adopted by the VA. See *id.*

<sup>50</sup> Godsil, *supra* note 31, at 1848.

<sup>51</sup> *Id.* at 1846-47.

<sup>52</sup> Godsil, *supra* note 31, at 1848 (quoting MASSEY & DENTON, *supra* note 30, at 53).

<sup>53</sup> SUGRUE, *supra* note 36, at 43.

<sup>54</sup> *Id.*

homogeneity,” and whether the neighborhood contained “a lower grade population.”<sup>55</sup> In other words, the mere presence of black and Latino residents caused a neighborhood to be considered high risk and coded red. This practice led to the term “redlining.”<sup>56</sup>

The effect of the redlining was acute. Residents in neighborhoods ranked C or D were unable to obtain loans either to purchase or upgrade their homes, and developers had great difficulty finding financial support for building in such neighborhoods.<sup>57</sup> For example, FHA lending in suburban Long Island was approximately sixty times greater than in the Bronx and eleven times greater than in Brooklyn.<sup>58</sup> Redlining also prevented black and Latino families from obtaining financing for homes in suburban neighborhoods—lest the neighborhood in which they sought to purchase become heterogeneous and thus subject to a C or D ranking. FHA redlining practices sometimes resulted in whole cities being “declared ineligible” for FHA-guaranteed loans because of their minority presence.<sup>59</sup> Indeed, in 1966, the FHA had no loans at all in the city of Camden.<sup>60</sup> The FHA redlining policies were not income-based; middle-income blacks and Latinos were also denied loan guarantees. The result was a massive capital disinvestment in inner cities. The lack of mortgage capital in minority communities made it exceedingly difficult for people to sell or repair their homes, causing a downward spiral of “disrepair, deterioration, vacancy, and abandonment.”<sup>61</sup>

The federal government did not act alone. Decisions about where to place highways and other unwanted land uses—such as the concentration of large public housing projects—all were made at the local level.<sup>62</sup> The central role of government in creating the deteriorating conditions that now lend themselves to gentrification and reduced autonomy for in-place residents suggests that it is appropriate for the government to now play a role in addressing gentrification and enhancing such autonomy.

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<sup>55</sup> *Id.* at 44.

<sup>56</sup> Godsil, *supra* note 31, at 1849.

<sup>57</sup> See SUGRUE, *supra* note 36, at 44; Godsil, *supra* note 31, at 1849.

<sup>58</sup> KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 211 (1985).

<sup>59</sup> *Id.* at 213.

<sup>60</sup> *Id.*

<sup>61</sup> MASSEY & DENTON, *supra* note 30, at 55.

<sup>62</sup> See Godsil, *supra* note 31, at 1848 n.240.

D. *Explaining the Racialized Opposition to Gentrification*

Prominent civil rights scholars who promote racial and economic housing integration simultaneously critique gentrification.<sup>63</sup> In light of the fact that gentrification has led to greater racial and economic heterogeneity in neighborhoods, this opposition may seem paradoxical. Once gentrification is contextualized as part of the continuum that includes exclusion from suburbs, denial of resources, and white abandonment of cities, the paradox is explained. Gentrification of predominantly black and Latino neighborhoods, like housing discrimination and exclusion, denies autonomy to the in-place residents. Accordingly, the housing patterns that result are not experienced as “integration,” but instead like an invasion.<sup>64</sup> In an article entitled *Gentrification; Personal Reflections*, reporter Julianne Malveaux asks, “Will those who see the neighborhood as gleaming and upscale now try to get rid of others who see the neighborhood, simply, as the place where they live and survive?”<sup>65</sup> Scholars assert that “gentrification has a very clear racial component,”<sup>66</sup> some using language such as “ethnic cleansing” to refer to change in racial composition of places such as Maxwell Street in Chicago.<sup>67</sup> In the city of Oakland, 75 percent of those evicted since 1998 have been people of color—and the eviction rate rose 300 percent.<sup>68</sup> Dramatic changes in racial composition can also be found in neighborhoods in Brooklyn, Washington, D.C., and Minneapolis over the last decade.<sup>69</sup> Particularly distressing is the argument that gentrification that displaces poor people of color has been encouraged by federal housing policy and can be likened to *reverse* redlining, as financing has allowed newcomers to purchase in inner-city neighborhoods.<sup>70</sup>

The history of displacement helps explain why the influx of whites to urban neighborhoods is less likely to be seen as a

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<sup>63</sup> Compare John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 758 (1996), with Powell & Spencer, *supra* note 1, *passim*.

<sup>64</sup> See Powell & Spencer, *supra* note 1, at 456-57.

<sup>65</sup> *Id.* at 433 (quoting Julianne Malveaux, *Malveaux at Large: Gentrification; Personal Reflections*, SUN REPORTER, Aug. 23, 2001, at 6) (internal quotation marks omitted).

<sup>66</sup> *Id.* at 436.

<sup>67</sup> *Id.* at 438.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 437-38; see also Vicki Been et al., *FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, STATE OF NEW YORK CITY'S HOUSING & NEIGHBORHOODS 2010*, at 61, 65 (2010).

<sup>70</sup> Powell & Spencer, *supra* note 1, at 453.

promising new advent of integration. Residents of urban neighborhoods lived through the experience of neighborhood decline as their white neighbors moved to the suburbs—an option unavailable to them. The move of suburbanites back to cities may be seen as continuing a cycle in which others exercise autonomy, while poor people of color often lack a corresponding choice.

## II. LEGAL MECHANISMS TO PROTECT COMMUNITY INTERESTS

If the in-place residents of a small town or suburb feel strongly about the scale and design of homes, the tacky signage of a chain store, or even the intensive development of open space, there are a range of legal and regulatory options available. The primary mechanism, of course, is zoning. Standard zoning tools of maximum height requirements, setback rules, and floor area ratios—supplemented by modifications such as “cubic content ratio”—are readily available to protect against certain changes, so long as the residents can garner sufficient political support.<sup>71</sup> Some communities have also imposed aesthetic zoning requirements and design review as part of the permitting process.<sup>72</sup> Other powerful existing tools are requirements for permits for subdivision with associated design conditions, historical districts, and emerging open-space requirements.<sup>73</sup>

The “up-scaling” of reasonably stable urban neighborhoods shares many of the same characteristics of standard new developments: it alters the current aesthetic and uses norms of a particular area. The existing land use legal toolkit, however, is rarely at play to protect community interests. The reasons are myriad. A simple, but important, difference is scale and political power. Most of the cities where gentrification has already occurred or where it is currently underway are fairly large, and even during the nadir of American cities, most retained a financial base of middle-class residents, wealthy residents, and job sources. New York, San Francisco, Philadelphia, Boston, and Chicago all saw significant decline in the post-World War II period through the 1970s, but they never were abandoned to the degree of cities like Detroit, Newark,

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<sup>71</sup> Needless to say, these zoning devices are subject to the standard comprehensive plan requirements, and may not be imposed *ex post*.

<sup>72</sup> Timothy Bates, *McMansions and Geometry of Zoning*, 66 PLANNING COMM’RS J., Spring 2007, at 1, available at [http://www.rc.com/documents/McMansions\\_and\\_Geometry\\_of\\_Zoning\\_PCJarticle.pdf](http://www.rc.com/documents/McMansions_and_Geometry_of_Zoning_PCJarticle.pdf).

<sup>73</sup> See, e.g., THOMAS JEFFERSON PLANNING DIST. COMM’N, DESIGN MANUAL FOR SMALL TOWNS (Jan. 2004), [http://www.tjpd.org/pdf/rep\\_comm\\_designManual.pdf](http://www.tjpd.org/pdf/rep_comm_designManual.pdf).



Hartford, or Camden. Accordingly, when “gentrification” begins—when outsiders with more capital move into abandoned neighborhoods—the current residents have to counter the political might of the extant middle class of the city.

In addition, gentrification often does not result in changed use in the traditional sense. The brownstones or old Victorian mansions that were used for housing in the pre-gentrification period are being used for housing now. The difference is only who is living in the house. The bodegas, small hardware stores, and social clubs are replaced by other retail uses—boutiques, upscale restaurants, and cafes. None of these require zoning changes. This means that in-place residents of gentrifying neighborhoods lack many of the current land use controls that others utilize to protect their autonomy, and new devices are needed to afford that protection.

In-place residents appear to have two separate but related bases to oppose gentrification: displacement<sup>74</sup> and cultural change that reflects the interests of the incoming gentrifiers. Displacement of both residents and businesses is a result of increased demand for housing and commercial space, which results in higher rental and purchase prices. Cultural change is caused in part by the newly arriving upscale retail stores, the loss of long-known retail proprietors, and the different habits and norms of the gentrifiers. Without access to existing land use tools, in-place residents must look elsewhere to address these concerns. But in order for these new devices to take shape, two threshold matters must be resolved. First, governments will need to decide what level of gentrification warrants intervention, and second, they will need metrics to determine which residents qualify for protection. To the extent that any intervention requires expenditures, in these budgetary times, governments will also need to identify sources of funds.

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<sup>74</sup> The literature addressing the harm from the loss of a home is voluminous. For an overview, see Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 279 (2006) (citing *e.g.*, Marc Fried, *Grieving for a Lost Home*, in *THE URBAN CONDITION* 151 (Leonard J. Duhl ed., 1963)) and Mindy Thompson Fullilove, *Psychiatric Implications of Displacement: Contributions from the Psychology of Place*, 153 AM. J. PSYCHIATRY 1516, 1517 (1996) (“The main proposition presented here is that the sense of belonging, which is necessary for psychological well-being, depends on strong, well-developed relationships with nurturing places. A major corollary of this proposition is that disturbance in these essential place relationships leads to psychological disorder.”).

A. *The Gentrification Trigger*

The first issue in structuring protection for in-place residents is how to determine when gentrification is occurring. The two phenomena most often mentioned are increased housing and retail prices, and a higher percentage of high-income whites becoming homeowners (although some omit the racial designation). Needless to say, for constitutional and other reasons, linking the trigger for gentrification to the percentage of people of a particular race is a nonstarter. The same concerns, however, do not apply if the trigger is a particular increase in prices. For ease of example, I presume that gentrification occurs when rental and home purchase prices have increased by 25 percent over a two-year period.

Addressing displacement would be fairly straightforward. One option is simply to reinstate rent control in its most stringent form to prevent any further increase in rent. As has often been argued, however, this regulatory approach has the effect of imposing all the costs of preserving community interests on property owners, and it creates other perverse incentives, where people who could reasonably afford higher rents remain in apartments they would ordinarily leave, artificially constricting supply.<sup>75</sup>

A second option that spreads the cost more evenly, and which could be more carefully calibrated, would be to issue a voucher to cover the increased rental costs to all renters able to establish that they had lived or operated a business in the neighborhood for a set number of years. Arguably, those entitled to the voucher would include the grown children of people who had lived in the neighborhood for the set number of years, since they would have inherited the home had their parents been homeowners rather than renters. The voucher would be available for a set number of years; five years is the number that is often given when eminent domain is at issue.<sup>76</sup> An additional option would be to offer these same residents a very low-cost guaranteed loan with a minimal down payment to allow for purchase of a home.<sup>77</sup>

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<sup>75</sup> See Richard A. Epstein, *Rent Control Revisited: One Reply to Seven Critics*, 54 BROOK. L. REV. 1281, 1293-94 (1989).

<sup>76</sup> See BECHER, *supra* note 17, at 291 n.13.

<sup>77</sup> While this may seem exceedingly generous, in negotiated redevelopment plans, residents have been granted "self-amortizing mortgages" for the difference between the price of their homes and the price of newly built homes. They would gain title and the new mortgage would be paid in full if the family stayed in the residence. *Id.* at 253.

Devising the number of years required to receive the voucher would be challenging. If the goal is to essentially recognize and compensate for the governmental failures that resulted in the conditions of the neighborhood deteriorating, a rather long residential requirement might be warranted. A long requirement would both reflect the period after which the government ceased to engage in explicit wrongdoing, and also recognize those who have truly invested in the neighborhood through their continued presence.<sup>78</sup> In the eminent domain context, however, tenants who have rented for lesser periods of time—eight years, in one example—have been eligible for relocation benefits.<sup>79</sup>

The rental voucher or low-cost loan would directly address the displacement concerns. Any long-term resident (or their children) would have the option of remaining in the neighborhood. And while perhaps paradoxical, I argue that such a voucher or loan option should also be transferable out of the neighborhood, which would offer true choice and autonomy for in-place residents. When long-term residents or business owners and their children have choice and autonomy, the anger over any change to the culture of the neighborhood would seem to be quelled.

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

If most voucher holders remain, one presumes the gentrification cycle would either slow down considerably or halt altogether. Gentrifiers tend to come in waves—artists and others seeking low rent and an “authentic” community, families seeking diverse neighborhoods, and then, as amenities follow,

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<sup>78</sup> *See id.* Some might argue that such a residency requirement would benefit only a few and, as I noted earlier, many low-income people relocate fairly frequently—perhaps due to job demands, or for other reasons. Those who have lived in neighborhoods like the particular gentrifying neighborhood for the same number of years would be denied any recompense for the various deteriorated neighborhoods in which they lived. However, as Becher convincingly argues, we tend to value those who have invested in their communities—and if this investment is not financial, it may be time and energy expended. *Id.* at 9.

<sup>79</sup> *Id.* at 291-92.

wealthier families whose capital drives the housing costs and retail demands even higher. If most in-place residents remain, however, a lack of supply would prevent the subsequent waves. Although this harms the economic interests of landlords, in gentrifying neighborhoods, rental properties were among those that were devalued by the disinvestment and abandonment, and so landlords would have been able to buy very cheaply initially, which mitigates any equity concerns.<sup>80</sup>

*B. Affirmatively Furthering Fair Gentrification*

In the Fair Housing Act of 1968, Congress required HUD and its grantees to do more than combat private housing discrimination. In recognition of HUD's own legacy of segregation, HUD has a mandate to actively promote integration.<sup>81</sup> The obligation to "affirmatively further fair housing" has been integrated by HUD in its 2010–2015 strategic plan, which includes the pledge that HUD will operate its programs "with an eye toward ensuring choice and opportunity for all people pursuing the promise of a better life."<sup>82</sup> HUD has included these goals in the criteria by which it will judge applications for grants from cities and regional development offices.<sup>83</sup>

Government played a significant role in creating the conditions that led to the harms of in-place residents; therefore, government at the city and federal levels ought to lead the effort to eliminate the aspects of gentrification that generate the most intense opposition. And given HUD's mandate, cities experiencing gentrification have the option of seeking HUD funds to counter the current dynamic, which continues the cycle of denying autonomy to residents of urban neighborhoods.

Neighborhoods undergoing gentrification generally experience significant influxes of private wealth and political clout. This combination tends to generate increased commercial activity and governmental services and amenities. If in-place residents have the financial means to remain, they will ideally be able to benefit from the employment opportunities, educational opportunities, and other quality of life improvements that are

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<sup>80</sup> See KENNEDY & LEONARD, *supra* note 27, at 11.

<sup>81</sup> See POVERTY & RACE RESEARCH ACTION COUNCIL (PRRAC), AFFIRMATIVELY FURTHERING FAIR HOUSING AT HUD: A FIRST TERM REPORT CARD 1 n.2 (Jan. 2013) [hereinafter PRRAC], available at <http://www.prrac.org/pdf/HUDDocFirstTermReportCard.pdf>.

<sup>82</sup> U.S. DEP'T OF HOUS. & URBAN DEV., HUD STRATEGIC PLAN, FY 2010–2015, at 4 (May 2010), available at [http://portal.hud.gov/hudportal/documents/huddoc?id=DOC\\_4436.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_4436.pdf).

<sup>83</sup> PRRAC, *supra* note 81, at 3.

precisely the qualities HUD seeks to incentivize in its pursuit of “Mixed-Income Communities of Opportunity.”<sup>84</sup> Accordingly, the federal government should be encouraged to expend funds to transform gentrification into a strategy for affirmatively furthering fair housing, rather than allow it to continue as yet another racialized dynamic that denies autonomy to the black and Latino families that remained in neighborhoods that were hard hit by the policies of last century.

#### CONCLUSION

In this article, I suggest a modified market model as among the potential responses to the politically contentious process of gentrifying neighborhoods. My goal is to illuminate what true autonomy or choice would look like for in-place residents of gentrifying neighborhoods and to suggest that supporting such autonomy should have the result of fulfilling one of HUD’s underenforced mandates to promote integration.

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<sup>84</sup> *Id.*