

COMMENT

The Affirmative Duty to Disintegrate Concentrations of Impoverished Communities

THURSTON JAMES HAMLETTE*

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* J.D. Candidate, Howard University School of Law, Class of 2013; Senior Notes & Comments Editor, *Howard Law Journal*; B.A., Philosophy, Politics, and Economics, University of Pennsylvania, 2010. Thanks be to God, to whom all praise is due, and from whom all blessings flow. I am incredibly grateful for my parents, James and Shirley Hamlette, Jr., and for their boundless love, support, and expectations. I would also like to thank Professors W. Sherman Rogers, Andrew Taslitz, and Wyndell Banks, the editors of the *Howard Law Journal*, my dearest friends, mentors, and the catalysts of motivation to achieve. Many thanks to the Howard University School of Law for welcoming me with open arms and providing me with invaluable opportunities to grow as a person and a professional.

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INTRODUCTION

Upon scaling the steps of the Columbia Heights metro, I am both overwhelmed and surprised at the bustling activity swirling around me. I quickly reach into my left-chest jacket pocket to turn off my Ipod in efforts to both hear and feel the discourse, movement, and energy of the surrounding blocks. Turning to my immediate left, I am both saddened and discouraged to find four men, ages ranging from twenty-six to forty-five, in various states of fatigue and despair. Their sweatpants are heavily soiled, and their jeans in tatters. Their only comforts while napping and mumbling in their sleep at 3:30 p.m. are discarded beer cans and ratty blankets stowed behind garbage cans daily. After traversing their semi-circle of hopelessness, I am quickly comforted by the appearance of a small Latino family. A petite elderly woman no taller than five-foot -one inches is pushing an infant boy in a stroller while simultaneously encouraging a school-age girl to keep up with her frenetic pace. Thirty yards ahead of me, a group of eight teenage black boys and girls are gathered on the corner in school-issued khakis and polo shirts, boisterously horse playing and eating pizza obtained from the local 7-Eleven. After nodding to one of the youngsters, I view a cheerful college-age Caucasian couple enter my street walking a beagle. My block consists of multiple subsidized apartment buildings and a public recreation center accompanied by a motley collection of economy vehicles, mid-size luxury sedans,

and a BMW X3 with the vanity plate “YNVME.”¹ These now familiar scenes are no doubt, the result of changing economic and real estate patterns within Washington, D.C. Different communities are attracting persons of various backgrounds and economic circumstances, while forcing incumbent residents to reconsider and alter their former lifestyles and choices of residence. This change is welcomed by some and disparaged by others, often depending on their respective allegiance to the former composition and distribution of persons throughout Washington, D.C.² In Washington, the devastating fiscal crisis from the early to mid-1990s resulted in drastic reductions in public services and an erosion of public confidence in the District’s government.³ This development contributed to “a rapid out-migration of moderate- and middle-income black families, particularly into suburban Maryland counties to the east of the central city.⁴ The poor were left behind in economically isolated neighborhoods with increasing poverty rates.”⁵

Throughout Washington, D.C., from Anacostia to Shaw, from the H Street Corridor to Columbia Heights, middle- and upper-class people are moving into the city.⁶ Rich cities like Washington, D.C. are closely comparable to or even exceed the surrounding region in terms of per capita income, property values, poverty rate, and populations of color.⁷ In affluent cities, like Washington, the forces of gentrification combine with already tight housing markets, resulting in the pricing out and displacement of low-income residents from the central city into economically isolated pockets.⁸ Although gentrification induced displacement usually exacts a heavy toll on all dislocated families, black families priced out of their own residences are forced to endure

1. Read “Why Envy Me?”

2. This representation reflects the perceptions of the author alone and may or may not reflect the typical actions, activities, characteristics, or nature of the residents and neighborhood of Columbia Heights.

3. William Julius Wilson, *Why Both Social Structure and Culture Matter in a Holistic Analysis of Inner-City Poverty*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 200, 212 (2010).

4. *Id.*

5. *Id.*

6. *Hey D.C., It’s Not a Black and White Issue*, WASH. POST, Aug. 11, 2002, at B03 (presenting the changing economic and ethnic demographic of Washington, D.C. as an inevitable result of favorable city development with the ability to benefit young, new, and old residents).

7. 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, 446 (2003); see John A. Powell, *Sprawl, Fragmentation and the Persistence of Racial Inequality: Limiting Civil Rights By Fragmenting Space*, in URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY 95 (Gregory D. Squires ed., 2002).

8. Powell & Spencer, *supra* note 7, at 478.

further hardship seeking affordable relocation housing in a challenging and discriminatory private housing market.⁹

The blessing of states and municipalities has contributed greatly in fueling the process of gentrification.¹⁰ The government provides for and reinforces the development of city communities through code enforcement, zoning alterations, and historical designations.¹¹ Residential segregation is a long-standing characteristic of U.S. housing markets.¹² Three main theories are employed to explain residential segregation along racial lines: the discrimination theory, the socioeconomic class theory, and the self-segregation theory.¹³ The discrimination theory states people of color are denied access to white neighborhoods because of discriminatory housing market practices.¹⁴ The driving force behind the segregation theory is racial prejudice.¹⁵ The class theory states segregation is the result of the unequal socioeconomic distribution of racial groups.¹⁶

Although popularized as a “black” and “white” issue, gentrification is more properly understood as providing for clashes among eco-

9. Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 769 (1993) (“These obstacles are sometimes compounded by the efforts of the new residents or ‘gentry’ who, in the name of integration, obstruct the development of new subsidized housing which could permit displaced residents to resettle in their old neighborhoods.”).

10. *Id.*

11. *Id.*; Reginald Leamon Robinson, (book review) *Poverty, the Underclass, and the Role of Race Consciousness: A New Age of Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1389 (1992) (“[T]he state has played, and continues to play, a vital but non-exclusive role in the persistence of poverty. By state, I mean social structure, which in part means the manner in which social systems distribute resources like wealth, income, and property.”).

12. JAMES B. STEWART, *THE HOUSING STATUS OF BLACK AMERICANS* 32 (Wilhelmina A. Leigh & James B. Stewart eds., 1992).

13. *Id.*

14. *Id.*

15. *Id.* An explanation for this concept is as follows:

First, before 1900, racial segregation did not exist, and therefore we had to construct the ghetto. . . . After the Civil War, black-white living patterns changed not only because slavery no longer defined social roles, but also because employment patterns drove blacks into very poor housing stock. . . .

Supported by complex social forces, racial segregation begins with black ghettos. . . .

[W]hite racist tactics and structural factors were still at work in the north and south, keeping pace with economic factors like industrialization and urban development patterns.

Until post-WW II, America’s white racism arrayed formidable barriers like violence and neighborhood improvement associations to prevent blacks were integrating all white neighborhoods. . . . Basically, between 1940 and 1970, institutionalized racism operated not only with federal authorities and financial institutions, but also within local real estate boards and urban housing markets.

Robinson, *supra* note 11, at 1405-06.

16. *Id.* at 1405.

conomic classes.¹⁷ “The most pronounced negative effect of gentrification, the reduction in affordable housing, results primarily not from gentrification itself, but from the persistent failure of government to produce or secure affordable housing [for residents that need it the most].”¹⁸ It is imperative the federal government take responsibility for ensuring adequate housing opportunities for low-income residents *throughout* the district by seizing private residences and mandating the entrance of low-income persons therein. One must acknowledge and align the interests of all residents towards the attainment of safe schools, less crime, dependable services, and accessible business¹⁹ to all neighborhoods when devising remedies for marginalized city populations.

This Comment explores the debilitating effects of gentrification on concentrated neighborhoods of impoverished persons within Washington, D.C. Part I introduces gentrification and its effects on affluent and low-income residents, as well as the economic ramifications of gentrification for a developing city. Part II analyzes the benefits and flaws of multiple housing programs designed to improve housing opportunities for low-income residents. Part III introduces and analyzes three historic areas of poverty within Washington, D.C. and the effects of recent housing developments for new and old residents. Part IV discusses the affirmative duty of municipalities to provide adequate housing opportunities for low-income residents. Finally, Part V challenges the government to enter the housing market foray through eminent domain, in efforts to re-distribute low-income persons throughout the District while reserving adequate housing units for said persons. The government must become more active in employing a mobility or deconcentration approach, emphasizing the

17. See Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1, 29 (2006) (“The most troubling aspect of gentrification is that race, and secondarily, age and class are used to distinguish the new arrivals from the old occupants.”); Powell & Spencer, *supra* note 7, at 442 (“[Neighborhoods that are gentrifying] are ones in which racial and economic changes occur rapidly, often fueled by various governmental policies and actions.”).

18. J. Peter Byrne, *Two Cheers for Gentrification*, 46 How. L.J. 405, 406 (2003).

19. Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199, 1206 (2001) (“[S]egregated neighborhoods often lack access to job networks and transportation to available jobs [T]he value of a family’s home positively affects how much offspring work when they become adults, suggesting support for spatial (neighborhood) dynamics.”).

mobility of the concentrated poor out of inner-city²⁰ neighborhoods to more suburban locations where economic and social structures may be sounder within the District.²¹

I. EFFECTS OF GENTRIFICATION

Despite the attractiveness of economic development within American metropolitan areas, it is necessary to remain cognizant of the welfare of resident stakeholders throughout processes of city development. Gentrification describes trends in land development characterized by the “revitalization” of previously “underdeveloped” areas.²² Revitalized areas are more attractive to persons of higher incomes who consequently enter lower income urban areas with the intent to change the physical and social fabric of their new community to meet their needs and preferences.²³

Gentrification is best understood as manifesting in multiple waves.²⁴ From the 1950s through 1970s, public subsidies and urban renewal transformed major cities as sporadic reinvestment combated growing suburbanization.²⁵ The second great push occurred in the post-recession 1970s, driven by public-private partnerships and integration into national and global economic and cultural processes.²⁶ Finally, in the post recession 1990s, gentrification surged with growing capital investment and growing inner-city housing markets.²⁷

20. JAY MACLEOD, *AIN'T NO MAKIN' IT* 247 (1995) (“The relative success and security of the black middle class contrast sharply with the plight of poorer blacks who are trapped in the secondary labor market and in blighted inner cities.”).

21. Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 *STAN. L. & POL'Y REV.* 11, 12 (1997).

22. *Bus. Ass'n of Univ. City v. Landrieu*, 660 F.2d 867, 874 (3d Cir. 1981) (“Gentrification is a deceptive term which masks the dire consequences that ‘upgrading’ of neighborhoods causes when the neighborhood becomes too expensive for either rental or purchase by the less affluent residents who bear the brunt of the change.”).

23. Byrne, *supra* note 18, at 406.

24. Powell & Spencer, *supra* note 7, at 449.

25. *Id.*

26. *Id.*

27. *Id.*; Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell's Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities*, 2 *Nw. J. L. & SOC. POL'Y* 30, 53-54 (2007) (“Land in former or changing areas of concentrated poverty . . . are open territories for investment speculators, redevelopment agencies, and affluent professionals who reject the suburban form of living, but demand, and can easily pay for, luxury residential, commercial retail, entertainment, and other intangible spatial amenities.”) (internal quotations omitted).

A. Urban Economics

For some, the newly restructured city is the fulfillment of the post-modern American dream: a post-industrial, culturally hybrid entity that covets urban life while implicitly rejecting some of its “grittier” aspects.²⁸ For others, the restructuring signals a welcome change in community character from declining and impoverished to popular and affluent.²⁹ Local governments have direct economic incentives for stimulating the redevelopment of decaying city neighborhoods.³⁰ As a result of redevelopment, cities can increase property taxes and thereby raise the tax base.³¹ Additionally, the prevalence of tax delinquencies and tax lien foreclosures are likely to decline in revitalizing communities.³² Consequently, the revitalizing city is likely to collect taxes while incurring fewer administrative costs.³³ Improving the quality of a city’s infrastructure, residential areas, and business districts often assists in attracting commerce, tourism, and industry into a once blighted location.³⁴ Washington, D.C. is well suited to preserve the historical characteristics of its most prized districts, while benefiting from the private redevelopment of the same areas.³⁵ The economic and social benefits of gentrification are not to be ignored.

B. Economically Disadvantaged Persons

Unfortunately, economically marginalized residents bear a considerable burden from city development. Gentrification, through conversion and rehabilitation, exacerbates existing shortages of

28. McFarlane, *supra* note 17, at 5.

29. *Id.* (“All recognize that affluent people bring business and government attention and improved services to their neighborhoods. On the other hand, the changes are also viewed with a sense of foreboding as . . . the changes signal ominously that the residents’ departure from the community is imminent.”).

30. James Geoffrey Durham & Dean E. Sheldon, III, *Mitigating the Effects of Private Revitalization on Housing for the Poor*, 70 MARQ. L. REV. 1, 8 (1986); see also Donald Bryant & Henry W. McGee, *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43, 48 (1983); Peter L. MacDonald, Note, *Displacement in Gentrifying Neighborhoods: Regulating Condominium Conversion Through Municipal Land Use Controls*, 63 B.U. L. REV. 955, 959 (1983).

31. Ray Telles, Comment, *Forgotten Voices: Gentrification and Its Victims*, 3 SCHOLAR 115, 118 (2000); see also James Mosher, *Baltimore Officials Consider Tougher Standards on Developers*, THE LEGAL LEDGER, Feb. 20, 2006 (“‘They seem to be leaving the door open for commercial’ development A desire to increase tax revenue may be part of the answer. ‘There is the need to maintain a tax base.’”) (citations omitted).

32. Telles, *supra* note 31, at 118.

33. *Id.*

34. *Id.*; see also John J. Betancur, *Can Gentrification Save Detroit? Definition and Experiences from Chicago*, 4 J.L. SOC’Y 1, 9 (2002).

35. Telles, *supra* note 31, at 118.

affordable housing for low-income persons by removing existing low- and moderate-income housing from the rental market.³⁶ As competition among persons seeking suitable housing increases, property values also increase.³⁷ Property taxes may spike whether property is improved or not because rising property values of areas around it make said property a more likely candidate for rehabilitation.³⁸ Unfortunately, for low-income residents, property owners may opt to pass on the result of higher property taxes onto the rents of tenants.³⁹

Tenants may suffer displacement because of eviction or through “voluntary” abandonment of their residences.⁴⁰ Voluntary abandonment is often driven by rising rents, deteriorating housing conditions, or intimidation from landlords or other housing personnel.⁴¹ The poor become marginalized externalities ejected from their former neighborhoods to reside in prematurely decaying areas where their concerns for low-income housing, economic advancement, and social welfare go unbeknownst to gentrifiers.⁴² A troubling result of out-mover displacement is clustering.⁴³ All studies have shown movers generally relocate to within their former neighborhood, or resettle in a nearby community.⁴⁴ Poor persons are least likely to have the reserve funds necessary to conduct an extensive housing search.⁴⁵ This may help explain the mixed satisfaction and limited housing opportunities exercised by out movers.⁴⁶

36. MacDonald, *supra* note 30, at 961.

37. Durham & Sheldon, *supra* note 30, at 8; see also Frank DeGiovanni, *An Examination of Selected Consequences of Revitalization in Six U.S. Cities*, in GENTRIFICATION, DISPLACEMENT AND NEIGHBORHOOD REVITALIZATION 73 (J. Palen & B. London eds., 1984).

38. Durham & Sheldon, *supra* note 30, at 8.

39. *Id.*

40. Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 507 (1991).

41. *Id.*

42. See also RICHARD PLUNZ, *A HISTORY OF HOUSING IN NEW YORK* 339 (1990). See generally Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Postmodernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 818 (1993) (describing how certain shifts in the aesthetic ideology of urban planners and architects affected suburban and urban spatial distribution in the United States during the nineteenth and twentieth centuries).

43. Durham & Sheldon, *supra* note 30, at 16.

44. *Id.*; see also Benjamin Zimmer, *A Deregulatory Framework for Alleviating Concentrated African-American Poverty*, 9 HASTINGS RACE & POVERTY L.J. 555, 585 (“The problem is that the displaced residents of public housing projects need somewhere to live, and as long as the overall structure of governmental regulations continues to entrench concentrated poverty, they are likely to remain in poor neighborhoods.”).

45. Durham & Sheldon, *supra* note 30, at 16.

46. *Id.*

II. INSTRUMENTS INFLUENCING LOW-INCOME HOUSING

A. HOPE VI Program

Congress responded to the recommendations of the National Commission on Severely Distressed Public Housing in 1992 with the creation of the Urban Revitalization Demonstration Program (URD), better known as Housing Opportunities for People Everywhere (HOPE VI).⁴⁷ The HOPE VI program is designed to renovate deteriorating public housing communities of highly concentrated impoverished persons with modern, mixed-income, low-density neighborhoods.⁴⁸ HOPE VI assists public housing authorities in improving the living environment of the poor through the removal, rehabilitation, reconfiguration, or replacement of obsolete housing projects.⁴⁹ Additionally, HOPE VI regulations allow for up to fifteen percent of a HOPE VI grant to be used to fund economic and social support activities.⁵⁰ The tenets of this program drive the efforts to deconcentrate and disperse low-income persons throughout Washington, D.C.⁵¹

The program was designed to attract private investment to long-isolated communities.⁵² Dollars funneled through the U.S. Department of Housing and Urban Development pay for demolition of deteriorated public housing and give private investors help in building the homes.⁵³ The goal is for urban wastelands to give way to more stable neighborhoods where market-rate and subsidized houses stand side-by-side.⁵⁴ The federally funded HOPE VI program is extremely com-

47. Edward Bair & John M. Fitzgerald, *Hedonic Estimation and Policy Significance of the Impact of HOPE VI on Neighborhood Property Values*, 22 REV. OF POL'Y RESEARCH 6, 3 (2005).

48. Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned From the D.C. Housing Authority's HOPE VI Projects*, J. AFFORDABLE HOUS. & CMTY. DEV. L., 353, 353.

49. *Id.* at 355.

50. Dana L. Miller, Comment, *HOPE VI and Title VIII: How a Justifying Government Purpose Can Overcome the Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277, 1290 (2003); see also Fiscal Year 1993 Appropriation Act, Pub. L. No. 102-389, 106 Stat. 1571 (1992) (explaining that the Hope Program initially allowed for the use of up to 20% of the total grant to be used to fund economic and social support activities); Notice of Funding Availability for Revitalization of Severely Distressed Public Housing HOPE VI Revitalization Grants, 67 Fed. Reg. 49, 766, 49,778 (July 31, 2002) (cutting the percentage allowance to 15%).

51. Cunningham, *supra* note 48, at 355.

52. Debbi Wilgoren, *Housing Program Chalks Up Win; New Residences Replace Blighted Complexes*, WASH. POST, Oct. 22, 2003, at B01 [hereinafter Wilgoren, *Housing Program*].

53. *Id.*

54. *Id.*

petitive.⁵⁵ In 2001, the national budget of \$565 million provided for a total of approximately twenty to thirty major projects a year.⁵⁶ This comes to one project per major city.⁵⁷ Public Housing Authority applicants must meet certain threshold criteria including the “severe distress” of the targeted property, submission of a housing market centered proposal, and involvement of the community residents.⁵⁸

1. Forced Relocation

Positive Results

Tenant leaders working towards the implementation and realization of HOPE VI revitalization of public housing are not deterred by the necessary, albeit temporary displacement of community residents.⁵⁹ Although families will be forced to relocate for at least two years while neighborhoods are rebuilt, hundreds of senior citizens are provided the option to remain in their home while new housing is constructed for them.⁶⁰ D.C. public housing officials claim all displaced families can benefit if they participate in the social programs and job opportunities HOPE VI projects are designed to offer.⁶¹ HOPE VI is supposed to include supportive and community services for residents such as childcare, job training and counseling, education, substance abuse treatment, and recreation centers.⁶² Official studies of HOPE VI outcomes have consistently reported people feel safer.⁶³ D.C. Public officials declare that persons returning to the rebuilt neighborhoods experience positive life transformation.⁶⁴ The following unanswered question remains, whether former residents of the public housing complexes will forge bonds with their market-rate neighbors,

55. *Id.*; Lini S. Kadaba, *Blighted Chester Housing Project Being Razed*, PHILA. INQUIRER, Mar. 4, 2008, at B01 (“It also won three of the highly competitive federal Hope VI revitalization grants to help fix an additional 615 units . . .”).

56. Wilgoren, *supra* note 52, at B01.

57. *Id.*

58. *Id.*

59. Debbi Wilgoren, *D.C. Gets Grant to Redo Area; Public Housing to Be Replaced With Mixed-Income Dwellings*, WASH. POST, Oct. 20, 2001, at B02 [hereinafter Wilgoren, *D.C. Gets Grant*].

60. *Id.*

61. Wilgoren, *Housing Program*, *supra* note 52, at B01.

62. Sheila Crowley, *HOPE VI: What Went Wrong*, in FROM DESPAIR TO HOPE: HOPE VI AND THE NEW PROMISE OF PUBLIC HOUSING IN AMERICA’S CITIES 236 (Henry G. Cisneros & Lora Engdahl eds., 2009).

63. *Id.* at 233.

64. Wilgoren, *Housing Program*, *supra* note 52, at B01.

who ultimately will make up a substantial percentage of residents within new developments.⁶⁵

Negative Results

Forced relocation, under any conditions, always causes trauma to those who are displaced.⁶⁶ Place attachment describes the deep connection felt between residents and their dwellings within a neighborhood populated with familiar people and reliable services.⁶⁷ Despite being dismissed as dysfunctional by policymakers and the general public, poor communities are comprised of intricate webs of social connections offering communal support for numerous members throughout trying times.⁶⁸ Elderly people are among the most vulnerable to physical and emotional damage when they are uprooted from their homes and respective support systems.⁶⁹ Relocation is especially problematic for school-age children, who risk falling behind in their studies when moving during the school year.⁷⁰ Interestingly, the health status of many residents displaced by HOPE VI may have actually deteriorated.⁷¹

Since their inception, public housing programs have included more than housing—they have also focused on creating communities with the encouragement and support of tenant councils and other forms of resident participation.⁷² Although this goal was reaffirmed in the HOPE VI rules, which require residents to be active participants in the decision to apply for a HOPE VI grant and application preparation,⁷³ actual involvement of residents was weak.⁷⁴ Outreach to residents with the purpose of informing them of their resident housing

65. *Id.*

66. Crowley, *supra* note 62, at 230.

67. *Id.*; Wilgoren, *Housing Program*, *supra* note 52, at B01 (“One national study found that 11.4 percent of public housing residents displaced by HOPE VI projects had returned or were expected to return.”).

68. Crowley, *supra* note 62, at 231.

69. *Id.* at 232.

70. *Id.*

71. *Id.*

72. *Id.* at 234.

73. *Id.*; Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 392 (2003) (“In addition to evaluating the overall strength of an applicant’s proposal, Housing Authorities must also demonstrate that affected residents and members of the surrounding community have meaningful involvement in the planning and implementation of the revitalization effort.”).

74. Crowley, *supra* note 62, at 232.

authority's interest in applying for a HOPE VI application is characteristically sporadic and haphazard.⁷⁵

2. Housing Supply in Washington, D.C. After HOPE VI

The HOPE VI Program produced mixed results in providing low-income residents with adequate housing options within the booming Washington, D.C. housing market.⁷⁶ For example, the Townhomes on Capitol Hill were designed to replace conventional public housing units with approximately 134 mixed-income cooperative units.⁷⁷ The units are internally subsidized to permit low-income persons to own nearly one-third of the co-op units.⁷⁸ Unfortunately, the surrounding neighborhood has transformed greatly due to gentrification, and pushed housing prices outside of the reach of targeted low-income persons.⁷⁹ Nearly 20,000 low-income households remain on the waiting list for District of Columbia Housing Authority housing or Section 8 vouchers while able gentrifiers occupy the limited units.⁸⁰ Similarly, the East Capitol Dwellings HOPE VI project will demolish 577 units of public housing townhomes and apartments and two additional public housing high-rises for the elderly, providing 530 units, totaling 1,107 units.⁸¹ The new site will include only 555 units, containing 196 units of public housing rentals and only 150 units for elderly and assisted care.⁸² The obvious reduction in housing options for low-income and elderly persons is a worrisome product of multiple HOPE VI projects in Washington, D.C.⁸³

Housing built for middle- and upper-income homebuyers may be desirable for the advancement of the city's finances, but it is com-

75. *Id.*

76. Cunningham, *supra* note 48, at 357.

77. *Id.*

78. *Id.*

79. *Id.*; Matthew H. Greene, *The HOPE VI Paradox: Why Do HUD's Most Successful Housing Developments Fail to Benefit the Poorest of the Poor*, 17 J.L. & POL'Y 191, 209 (2008).

80. Cunningham, *supra* note 48, at 357; Greene, *supra* note 79, at 210-11 ("From the perspective of the approximately 20,000 low-income households on the waiting list for DCHA housing or Section 8 vouchers, it looks like another tool in the hands of the area's gentrifiers to reduce the number of affordable units.")

81. Cunningham, *supra* note 48, at 358.

82. *Id.*

83. Philip Langdon, *Unlocking Dutch Point: A Recent Federal Grant Will Allow Hartford to Demolish the Dutch Point Public Housing Project and Replace it with Mixed-Income Housing. That Can't Happen Soon Enough*, THE HARTFORD COURANT, Apr. 6, 2003, at C4 ("Nationally, some low-income housing advocates have complained that HOPE VI creates fewer new public housing units than are being demolished.")

pletely beyond the reach of public housing tenants.⁸⁴ Mixed-income communities will hopefully encourage the retention of upwardly mobile families, who still unable to afford Washington's high-priced housing, have too often moved to Prince George's County.⁸⁵ These families could support many of the troubled neighborhoods that are devoid of persons with the disposable income, valuable cultural capital,⁸⁶ and humanity necessary to cultivate the children populating Washington's communities.⁸⁷

B. Housing Choice Voucher Program (Formerly Known as Section 8)

The Section 8 program is named for the portion of the Federal Housing and Community Development Act that created the program in 1974.⁸⁸ The law states that the program was developed "for the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing."⁸⁹ Section 8 assists tenants of yet to be constructed apartments, existing residences, and older buildings undergoing rehabilitation.⁹⁰ Section 8 vouchers are easier to implement effectively on a massive scale.⁹¹ Typically, tenants qualify because of income and pay twenty-five percent of their incomes, before deductions, in rent and Department of Housing and Urban Development (HUD) pays the difference.⁹² This program provides builders with guaranteed payment from HUD for new apartments prior to construction.⁹³ The program helps tenants of existing

84. Cunningham, *supra* note 48, at 361.

85. William Raspberry, *THE FUTURE: If Washington Is to Become the City it Can Be During the Next 30 Years, the Achievements of its African American Middle Class Must Somehow be Passed to the Next Generation*, WASH. POST, Feb. 1, 1998, at W24.

86. MACLEOD, *supra* note 20, at 13 ("By embodying class interests and ideologies, schools reward the cultural capital of the dominant classes and systematically devalue that of the lower classes.").

87. Raspberry, *supra* note 85, at W24.

88. *Program Designed to Aid Needy*, WASH. POST, July 20, 1978, at 3. Although the Section 8 program is now referred to as the Housing Choice Voucher Program, this comment will refer to the program as Section 8. See Housing Choice Vouchers Fact Sheet, HUD. GOV., <http://portal.hud.gov> (follow "Topic Areas" hyperlink; then follow "Housing Choice Voucher Program (Section 8)" hyperlink) (last visited Oct. 13, 2012).

89. *Id.*

90. *Id.*

91. Zimmer, *supra* note 44, at 587.

92. *Program Designed to Aid Needy*, *supra* note 88, at 3; Zimmer, *supra* note 44, at 587 ("[The Section 8 Program] essentially allows poorer households earning less than half the median income in an area to rent something close to the median-price apartment in their area without having to spend more than 30% of their own income in the process.").

93. *Program Designed to Aid Needy*, *supra* note 88, at 3.

apartments meet unpaid portions of their rent after an agreement is reached between the Housing Opportunities Commission and their respective landlords.⁹⁴ Unfortunately, although the Section 8 program has contributed positively to poverty deconcentration on the margins, it has failed⁹⁵ to spur systematic change over nearly four decades of existence.⁹⁶

C. Mixed Finance Development

Mixed financing leverages private and public funds in efforts to create mixed-income communities including both affordable and market-rate housing.⁹⁷ Housing authorities are responding to possible cuts in government funding for community planning endeavors by delving into real estate finance.⁹⁸ Fortunately, traditional sources of public funding from the HUD can be used for mixed-finance purposes. Housing authorities secure their private funding from the sale of tax credits and bonds through their state's housing finance agency.⁹⁹ This combination of public and private funds enables housing authorities to revive substantial urban swaths with modern construction and infrastructural improvements despite fluctuating government funding.¹⁰⁰ Mixed-finance projects are subject to the mixed-finance amendment, which secures the delivery of HUD capital dollars to the authority for the units within the mixed-finance development.¹⁰¹ This document ensures the units are operated according to public housing regulations.¹⁰²

94. *Id.*

95. Deborah Kenn, *Paradise Unfound: The American Dream of Housing Justice for All*, 5 B.U. PUB. INT. L.J. 69, 87 (1995) ("Another major shortcoming of the Section 8 program is its woefully inadequate ability to accommodate even a small percentage of those eligible for the program.").

96. Zimmer, *supra* note 44, at 588.

97. Carl R. Greene, *Reshaping the Landscape: Mixed-Finance Development Could Bring About an Urban Housing Renaissance*, NAT'L L. J., Feb. 14, 2005; see Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 458 (2004).

98. Greene, *supra* note 97.

99. *Id.*; Peter W. Salsich, Jr., *Does America Need Public Housing?*, 19 GEO. MASON L. REV. 689, 689-90 (2012) (discussing public housing authority reform movement utilizing public and private investment in efforts to produce a more inclusive socioeconomic mix of residents).

100. Greene, *supra* note 97.

101. *Id.*

102. *Id.*

D. Rent Control

Historically, housing policy makers have regarded rent control with some suspicion, rarely making it the central focus of their activity.¹⁰³ Price regulation has been enacted and implemented primarily at the federal and state levels of government.¹⁰⁴ Residential rent control operates within a political and organizational framework that is largely local, rarely turning on great issues of economic efficiency dominating the larger regulatory debates.¹⁰⁵ Rent control is not limited to people who are priced out of decent housing.¹⁰⁶ Rent control, like price controls, results in a systematic gap between the large quantity of goods demanded (because the price is low) and the small quantity of goods supplied.¹⁰⁷ Rent control often exacerbates the problem by decreasing the market incentive to increase the housing stock.¹⁰⁸

Positive Results

Residents of controlled units perceive the increased affordability of said units as the primary benefit of rent control.¹⁰⁹ In addition to rent savings, District tenants value the sense of security provided by the rent controls.¹¹⁰ Residents reported rent control provided them with the security to remain in their apartments, if they so desired.¹¹¹ Although affordability problems in the District are still severe, a much larger number of renter households would have had excessive rent burdens in the absence of rent control.¹¹² Unfortunately, the rent savings generated by controls were not evenly distributed among D.C. renters.¹¹³ Since the majority of renters are middle and upper income by any reasonable definition, they surely receive the bulk of the bene-

103. W. DENNIS KEATING ET AL., *RENT CONTROL: REGULATION AND THE RENTAL HOUSING MARKET* 1 (1998).

104. *Id.* at 2.

105. *Id.*

106. Edgar O. Olsen, *Is Rent Control Good Social Policy?*, 67 *CHI.-KENT L. REV.* 931, 933 (1991).

107. Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 *BROOK. L. REV.* 761, 767 (1988).

108. Alex Kozinski, *The Dark Lessons of Utopia*, 58 *U. CHI. L. REV.* 575, 588 (1991).

109. KEATING ET AL., *supra* note 103, at 112.

110. *Id.*

111. *Id.*

112. *Id.* at 114; *see also* RICHARD J. DEVINE, *WHO BENEFITS FROM RENT CONTROL* 74 (1986) (“[R]ent control has done little to alleviate the affordability problems faced by one out of every three renters. But it has just about guaranteed that those who could easily pay more will never have to.”).

113. KEATING ET AL., *supra* note 103, at 114.

fits in the years immediately after the imposition of controls.¹¹⁴ Over time, the distribution of benefits depends upon how long these persons stay in their controlled units.¹¹⁵ The households experiencing the greatest rent savings were those remaining in their controlled units for six or more years.¹¹⁶

Negative Results

Unfortunately, for low-income residents, the most recent economic downturn, coupled with the District's booming rental development market, has provided developers with an incentive to move away from rent-controlled housing.¹¹⁷ While D.C. renters enthusiastically support rent control, landlords generally perceive it as a significant deterrent to investment in rental housing.¹¹⁸

A majority of owners viewed the administrative costs of rent control as a significant factor in their operations.¹¹⁹ Approximately 80.5% of owners of District-controlled units reported they did not plan on investing in D.C. rental housing in the future.¹²⁰ From the landlord's perspective, these findings confirm that controls reduce the profitability of investment in rental housing.¹²¹ Apartment building owners say the ability to change market rents for newly vacant units has allowed them to renovate and improve their buildings and preserve low rents for existing tenants.¹²² Strict rent controls, they argue, have forced many smaller owners to sell or convert their properties.¹²³ Despite the steep rent increases, low-income tenants have stayed in their apartments and fought change.¹²⁴ This resistance is not met with

114. Olsen, *supra* note 106, at 939.

115. *Id.*

116. KEATING ET AL., *supra* note 103, at 115.

117. Derek Kravitz, *Fight a Sign of D.C. Rent-Control Issues*, WASH. POST, Sept. 22, 2010, at B08.

118. KEATING ET AL., *supra* note 103, at 113; see also Jorge O. Elorza, *Absentee Landlords, Rent Control and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in Urban America*, 17 CORNELL J. L. & PUB. POL'Y 1, 51 (2007); Epstein, *supra* note 107, at 770 ("Instead, [rent control] is used as a substitute for what could be a highly, though surely not perfectly, competitive market.").

119. KEATING ET AL., *supra* note 103, at 113.

120. *Id.*

121. *Id.*

122. Kravitz, *supra* note 117, at B08.

123. *Id.*; Richard F. Muth, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691, 695 (1983) ("[A]fter Washington, D.C., adopted rent controls in the post Vietnam era previously rented units began to be converted to condominium ownership. Since the real returns to rental property tend to decline because of controls, it becomes profitable to their owners to seek out alternative uses for them where possible.").

124. Kravitz, *supra* note 117, at B08.

speedy adjudication. The appeals process with the D.C. Housing and Community Development may take years to conclude.¹²⁵

Rent Control in Washington, D.C.

The District of Columbia's rent control program was established in 1975 in response to rapid inflation in rent levels during the early 1970s.¹²⁶ The central objective of the District's rent control program was to protect tenants from excessive rents and rent increases.¹²⁷ The District's rent control regime is a moderate one, explicitly seeking to maintain the profitability of investment in rental housing.¹²⁸ Like other rent control programs implemented in the 1970s, the District's system provides incentives for landlords to maintain their existing rental properties and to produce new ones.¹²⁹ Approximately three-quarters of the District's rental housing stock is covered by rent controls.¹³⁰ In 2000, about 100,000 rental units in the District were rent-controlled.¹³¹ A decade later, according to various estimates, there are between 10,000 and 25,000 fewer rent-controlled units.¹³²

The Rental Housing Act of 1985 was designed to protect tenants from rising costs and provide incentives for new construction and improvements.¹³³ The Rental Housing Act of 1985 was set to expire in 2011, and more recently, the D.C. Council considered making the city's rent control laws permanent.¹³⁴ The aim is to codify rent-control regulations so tenants are empowered to fight cases filed on constitutional grounds.¹³⁵ The Rental Housing Act Extension

125. *Id.*

126. KEATING ET AL., *supra* note 103, at 113.

127. *Id.*

128. *Id.*

129. *Id.* See generally Richard Muth, *supra* note 123, at 695 (discussing the propensity of owners to withdraw capital from dwellings, thus worsening housing shortages, without rent control related incentives).

130. KEATING ET AL., *supra* note 103, at 111.

131. Kravitz, *supra* note 117, at B08.

132. *Id.*; see also Anny Shin, *Low Rents in D.C. Vanish as Downscale Goes Upscale*, WASH. POST, May 7, 2012, at A01 ("As a result, low-cost rental housing is disappearing at a faster rate than it was during the height of the housing boom, according to a new analysis of census data by the D.C. Fiscal Policy Institute.").

133. Kravitz, *supra*, note 117, at B08; see also *What You Should Know About Rent Control in the District of Columbia*, DHCD.DC.GOV, <http://och.georgetown.edu/uploadedfiles/rentcontrofactsheet0409.pdf> (last visited Apr. 3, 2012).

134. Kravitz, *supra* note 117, at B08.

135. *Id.* But see, George F. Will, *Rent Control's Absurdity*, WASH. POST, Feb. 16, 2012, at A19 ("Rent control is unconstitutional because it is an egregious and uncompensated physical occupation of property.").

Amendment Act of 2010 amended the Rental Housing Act of 1985, extending the sunset provision to December 31, 2020.¹³⁶

In 2006, the city made the most sweeping changes to its rent-control statutes in more than two decades, capping yearly rent increases, changing the way vacant rent-controlled apartments are priced, and making it easier for tenants to form tenant associations and to receive information on how rents are computed.¹³⁷ These changes manifested as a response to the city's rapidly shrinking, and increasingly expensive, rental housing stock.¹³⁸ In the last meeting of 2010, the D.C. Council approved a bill extending rent-control laws that limit annual increases to about two percent, plus inflation, and no more than ten percent a year in most cases for ten years.¹³⁹ Increases for the elderly and disabled are limited to five percent a year and rents on vacant units are limited to no more than thirty percent rise by this legislation.¹⁴⁰

Evidence from the District of Columbia shows that a carefully balanced program of rent control can make a positive difference on a city's renters without causing serious adverse effects on either housing maintenance or new rental housing production.¹⁴¹ Investors adding to the supply of rental housing in the District of Columbia are not subject to regulatory restrictions on the rents they charge.¹⁴² The only rental units exempt from rent regulation are: (1) units held by owners of fewer than five D.C. rental units; (2) units added to the rental stock since 1975; (3) units in continuously vacant buildings; (4) cooperative units; and (5) publically subsidized rental housing.¹⁴³ The District's rent control program allows owners of units properly registered and in compliance with the city's housing code to increase rents annually by the lower of ten percent or the rate of increase in the Consumer Price Index.¹⁴⁴

136. Rental Housing Act Extension Amendment Act of 2010, D.C. CODE § 42-3509.07 (2011).

137. Kravitz, *supra* note 117, at B08.

138. *Id.*

139. *Bills Passed by D.C. Council at Final 2010 Meetings*, WASH. POST, Dec. 22, 2010, at B10.

140. *Id.*

141. KEATING ET AL., *supra* note 103, at 110.

142. *See id.* at 111; Muth, *supra* note 123, at 696 (describing potential investor apprehension due to the possibility that new units may be made subject to controls).

143. KEATING ET AL., *supra* note 103, at 111.

144. *Id.*

III. REMAINING LOCALES OF POVERTY

It is helpful to take a critical eye to recent transformative areas of Washington currently manifesting the effects of gentrification and municipal development. The following section introduces three notorious areas of Washington and subsequent developments within each community, focusing on the availability of respective affordable housing opportunities and qualities of life. In the early 2000s, Washington identified fourteen “hot spots,” communities where open-air drug dealing had taken over neighborhoods.¹⁴⁵ The identified “hot spots” were located just outside the gentrification bubble.¹⁴⁶ The targeted areas of despair are dubbed “New Communities.”¹⁴⁷ The New Communities initiative follows and builds upon the foundation left by the HOPE VI federally funded program by getting residents involved in planning the development.¹⁴⁸ Four housing projects¹⁴⁹ have been identified as the first New Communities.¹⁵⁰ Columbia Heights and two of the four-targeted housing projects are examined below.

A. Barry Farm

The delayed arrival of gentrification east of Anacostia is no surprise.¹⁵¹ This sector was the District of Columbia’s last to settle, occurring well into the 20th Century.¹⁵² For decades, working-class whites largely populated this region.¹⁵³ World War II led to the doubling of Anacostia’s population, but after the war, conditions worsened due to poor housing policy.¹⁵⁴ These white residents eventually

145. Nikita Stewart, *Gentrification, With a Difference City Hopes a Mix of High and Low Incomes Will Stamp Out Drug Havens*, WASH. POST, July 20, 2006, at T01.

146. *Id.*

147. *Id.*

148. *See id.*; John W. Fountain, *Old Law Used in New Attack on Crack Houses; Neighbors, Lawyers Document Nuisances*, WASH. POST, Feb. 13, 1998, at B03 (“The residents, most of them seniors, came to the recent meeting at Community United Methodist Church to help make their streets cleaner and safer as part of the District’s new community policing program. High on the agenda was the eradication of drug dens in the Trinidad neighborhood . . .”).

149. Stewart, *supra* note 145, at T01 (“The city has chosen four housing projects as its first New Communities: Northwest One/Sursum Corda in Northwest, Lincoln Heights in Northeast, Barry Farm in Southeast and Park Morton in Northwest.”).

150. *Id.*

151. Eugene L. Meyer, *A Comeback Story Decades in the Making*, N.Y. TIMES, Jan. 30, 2008, at C7.

152. *Id.*

153. *Id.*

154. Roger K. Lewis, *Museum Offers Lessons From Thousands of Years in Anacostia*, WASH. POST, Oct. 27, 2007, at F05.

moved to the suburbs after school integration in the 1950s.¹⁵⁵ From the late 1940s to the 1970s, the area east of the river became the only option for the mostly black D.C. residents displaced by urban renewal and others unable to afford housing elsewhere.¹⁵⁶ This region, isolated from the core of the District, was considered ideal for concentrating developments of high-density, low-income, subsidized apartments.¹⁵⁷ Poor blacks quickly filled these vacancies, occupying the same garden apartments and public housing units now characterized as “crime-ridden slums.”¹⁵⁸

In the 1960s, predominantly white and predominantly black civic associations petitioned the local government for the services they deserved.¹⁵⁹ These associations combined with churches and various fraternal organizations to help craft viable communities, even in economically depressed communities.¹⁶⁰ Private developers were hesitant to enter this market – apparently concerned about reports of drive-by shootings and other crimes.¹⁶¹ “[Ward 8 is] a depressed area . . . the unavailability of goods and services causes an economic and psychological depression where people begin to feel helpless and hopeless,” said John Kinard, director of the Smithsonian’s Anacostia Museum.¹⁶² Ward 8 residents chiefly hope the people living in the area will be able to benefit tangibly from any and all economic revitalization.¹⁶³

Barry Farm is an extremely aged¹⁶⁴ community within southeast Washington, D.C. best known for violent crime,¹⁶⁵ poverty, and dilapidated housing opportunities.¹⁶⁶ Barry Farm skirts Anacostia in south-

155. *Id.*; Lewis, *supra* note 154, at F05 (“In 1950, white families were 82 percent of Far Southeast’s population. By 1980, that percentage had dwindled to 14 percent.”).

156. Lewis, *supra* note 154, at F05.

157. *Id.*

158. *Id.*

159. Raspberry, *supra* note 85, at W24.

160. *Id.*

161. Meyer, *supra* note 151, at C7.

162. Lynne Duke, *Opportunity and Suspicion; Some in Ward 8 Wary of Development*, WASH. POST, Aug. 18, 1988, at D1.

163. *See id.*; Bruce Duffy, *Across the River; A Novelist’s Anacostia Discovery*, WASH. POST, July 23, 1995, at C01 (“Even the beautiful river view worries residents, who fear Anacostia may go the way Georgetown did 40 years ago, when black working people were systematically moved out of townhouses that now fetch \$500,000. ‘Ain’t just paranoia,’ says one Ward 8 resident. ‘Get the poor folks out and there’s gold in these hills.’”).

164. Stewart, *supra* note 145, at T01.

165. Duffy, *supra* note 163, at C01.

166. Serge F. Kovaleski, *Problems Grow Worse for D.C.’s Public Housing; During Kelly Years, Program Slips to Bottom of HUD Ratings*, WASH. POST, May 23, 1994, at A1 (“Some tenants have taken maintenance into their own hands. Tenant leaders at Barry Farms recently

east Washington and contains approximately 430 housing units.¹⁶⁷ Barry Farm continues to lag behind various District communities in commercial property value.¹⁶⁸ In 1993, the complex was characterized as a “four-square block killing ground,” where thirty-nine people were murdered.¹⁶⁹ From 2006 to 2008, the commercial property value of Barry Farm improved from \$18,906,590 to a recorded value of \$39,336,170.¹⁷⁰ For comparison sakes, the commercial property value of Columbia Heights jumped from \$231,821,510 to \$405,810,860 during the same period.¹⁷¹

In 1981, Mayor Marion Barry¹⁷² pledged to spend approximately \$61.4 million to renovate one-third of the city’s public housing units within three years.¹⁷³ Construction historically lagged, sometimes years, behind schedule for this needy housing project.¹⁷⁴ Additionally, significantly more units became vacant rather than rehabilitated.¹⁷⁵ Change is abounding in areas of Anacostia.¹⁷⁶ Approximately 1,000 units of assisted and subsidized housing, private, and public were in the process of being demolished in 1998.¹⁷⁷ Additionally, a number of requests for proposals were submitted to refurbish another 600 units for rent or sale.¹⁷⁸ The groundwork for mixed-income housing is manifesting in Anacostia, with the support of some residents seeking a greater quality of life.¹⁷⁹

received a \$2,000 grant from the D.C. Urban Forestry Council to fix up the grounds around their development.”); see also Serge F. Kovaleski, *D.C. Public Housing: Life Amid the Ruins; ‘Survivors’ Find Safety in City’s Failure*, WASH. POST, Mar. 27, 1994, at A1.

167. Rochelle Riley, *At 80, She Fights the Battles of Barry Farms*, WASH. POST, Dec. 10, 1987, at J1.

168. *Feeling Their Pain: How Commercial Assessments Rise*, WASH. POST, July 26, 2007, at DZ03 [hereinafter *Feeling Their Pain*].

169. Ruben Castaneda & Philip P. Pan, *Homicides in D.C. Fell 10% Last Year; Drop Brings Killings to Lowest Level in 8 Years*, WASH. POST, Jan. 16, 1996, at B01.

170. *Feeling Their Pain*, *supra* note 168, at DZ03.

171. *Id.*

172. Virginia Mansfield, *Public Housing Pledge Unmet; Renovation Work Falls Behind; City Cites Relocation Problems*, WASH. POST, July 11, 1985, at D1; Sylvia Moreno, *Spreading a Message of Peace in Troubled Barry Farm*, WASH. POST, Jan. 27, 2008, at C04; see also Yolanda Woodlee, *Bus Brings Job Search Close to Home; City Initiative Helps Expand Opportunities*, WASH. POST, May 13, 2004, at T10 (discussing that former Mayor Barry is the current councilmember for Ward 8, which contains Barry Farms).

173. Mansfield, *supra* note 172, at D1.

174. *Id.*

175. Kenneth Bredemeier, *City Plagued by Deserted Buildings*, WASH. POST, July 8, 1984, at A1.

176. Raspberry, *supra* note 85, at W24.

177. *Id.*

178. *Id.*

179. See *id.*; Debbi Wilgoren, *From 8th Street, a Walk Through Time; New Trail Marks Hill District’s Long Heritage*, WASH. POST, Dec. 12, 2004, at C08; Debbi Wilgoren, *Funding Sought to*

In 2005, the D.C. Council approved former Mayor Anthony Williams's "New Communities" Program.¹⁸⁰ Barry Farm was selected as one of four New Communities, during the Williams administration¹⁸¹ making it the focus¹⁸² of a proposed public-private development partnership.¹⁸³ Barry Farm activists initially rejected the Fenty administration's efforts to implement the redevelopment process, but did not prevail.¹⁸⁴ The first phase of the \$550 million development plan is currently underway.¹⁸⁵ A total of sixty replacement units are planned to come online at Sheridan Station on Sheridan Road SE, and Matthews Memorial Terrace on Martin Luther King, Jr. Avenue SE, within the next six months for Barry Farm residents.¹⁸⁶ The redevelopment of Barry Farm is expected to produce approximately 1,500 total mixed-income units.¹⁸⁷ Recently, the current mayor, Mayor Vincent C. Gray announced the relocation of a new ink-jet manufacturing plant within the Washington Highlands neighborhood of Southeast Washington, which will bring 300 new jobs to Ward 8; several new

Replace Three SE Housing Projects; New Development is Step in Anacostia Waterfront's Rebirth, WASH. POST, May 10, 2001, at T03.

180. *Renewal or Removal*, WASH. POST, May 17, 2005, at A20.

181. Stu Kantor, *Former D.C. Mayor Anthony Williams Joins the Urban Institute's Board of Trustees*, URBAN INSTITUTE (Dec. 18, 2009), <http://www.urban.org/publications/901311.html> (discussing Anthony A. Williams's membership on the Urban Institute's Board of Trustees after serving as mayor of the District of Columbia from 1999 to 2006).

182. *For Whom the Cranes Toll*, WASH. POST, Nov. 11, 2007, at B08.

What is the difference between what the Williams administration promised and what the Fenty administration has delivered? What is the difference between 35 percent and 60 percent for the rich? . . . Under the Williams plan the city would have devoted \$169 million to building the first "New Community," but Mayor Adrian M. Fenty's administration is willing to spend only \$74 million.

Id.

183. John Miller, *Is Barry Farm Going Dutch*, GREATER GREATER WASHINGTON (Nov. 18, 2011, 11:58 AM), <http://greatergreaterwashington.org/post/12777/is-barry-farm-going-dutch/>.

184. David Nakamura & Robert E. Pierre, *The Promise of Poplar Point; As D.C. Mayor, Developer Forsee Prosperity, Anacostia Residents Fear Exclusion*, WASH. POST, Apr. 8, 2007, at C01.

Three Years ago, Williams announced a 20-year plan to redevelop both sides of the Anacostia River . . . During his campaign, Fenty had heard demands for more government investment east of the Anacostia River and pledged to redirect public resources On January 20th, three weeks after Fenty's inauguration, city planners held a public workshop at a high school in Ward 8. The goal was to refine options for Poplar Point Appalled residents, confronted with an apparent fait accompli, lined up at a microphone and mocked the stadium, demanding to know how they would benefit.

Id.

185. *Id.*

186. *Id.*

187. *Id.*

restaurants and shops will augment further development in this area.¹⁸⁸

B. Sursum Corda

Sursum Corda, once a notorious crime and drug-infested low-income housing complex, is located just north of the U.S. Capitol.¹⁸⁹ Sursum is a manifestation of a progressive plan to provide affordable, quality housing to poor residents displaced due to the razing of a sprawling slum on the site bounded by K, M, and North Capitol streets during the urban renewal of the time.¹⁹⁰ Sursum started out in the late 1960s as a rental project sponsored by the Department of Housing & Urban Development.¹⁹¹ This horseshoe-shaped urban village developed into a fortified enclave of illicit drug activity after the onset of crack cocaine in the 1980s.¹⁹² In 1992, the Sursum Corda Housing project was turned over to the tenants as a private cooperative.¹⁹³

In this housing development, where more than a third of residents reside below the poverty line, disgruntled residents fought spiritedly against a District of Columbia redevelopment program.¹⁹⁴ Prior to former Mayor Adrian Fenty's first term, the District government proposed a \$556 million, 1,600-unit redevelopment scheme for the Sursum Corda neighborhood.¹⁹⁵

188. Nikita Stewart & Jonathan O'Connell, *Plant to Bring 300 New Jobs to Ward 8*, WASH. POST, June 28, 2011, at B01.

189. Lori Montgomery & Sue Anne Pressley, *Sursum Corda Residents' Faith in Developer's Vision Runs Low*, WASH. POST, Dec. 5, 2005, at A01.

190. Serge F. Kovaleski & David A. Fahrenthold, *NW Housing Complex a Tangle of Drugs, Despair*, WASH. POST., Feb. 1, 2004, at A01 (explaining the goals driving the development of Sursum Corda and the social ills currently plaguing residents).

191. Robert H. Nelson, *Privatizing the Inner City*, FORBES, Dec. 12, 2005, at 48.

192. Kovaleski & Fahrenthold, *supra* note 190, at A01 ("Dealers can quickly disperse and hide in townhouses that line Sursum Corda's horseshoe, off the unit block of M Street NW, or lose themselves in the tangle of alleyways and courtyards. Or they work 'the backside'—K Street—where, police say, much of the dealing occurs in the Temple Courts apartment building.").

193. Robert H. Nelson, *Postmodern Politics in Action*, REASON.COM (Apr. 2006), <http://reason.com/archives/2006/04/02/postmodern-politics-in-action>.

194. Marc Fisher, *At the Sursum Corda Housing Project, a Standoff Awaits the Mayor-Elect*, WASH. POST, Nov. 14, 2006, at B01 ("'Yes, I asked them to go,' says David Chestnut, who was hired by the project's resident board to manage Sursum Corda. City officials 'were coming here to say that we are unfairly raising rents, inciting rather than informing. They want this population scattered to the winds. But these 167 families living here now are in control. They own this piece of land, and they demand more than the city is offering.'") (citations omitted).

195. *Id.*

In October 2005, after the opening of a nearby Metro stop, the board of directors voted to sell the entire project to leading developer, KSI, in the Washington area.¹⁹⁶ The 167 low-income families residing in Sursum Corda received approximately \$80,000 per unit, a share in KSI's development profits, and an option to purchase a discounted home in the new 500-unit project to be constructed on the premises.¹⁹⁷

Later, in December 2007, Mayor Fenty announced that two Washington developers were selected to tear down the low-income Sursum Corda Cooperative and Temple Courts housing complex in efforts to redevelop the area with high-density housing, retail and office space.¹⁹⁸ The development partnership, called "One Vision," is led by William C. Smith & Co. and the Jair Lynch Cos. and includes Banneker Ventures and Community Preservation Development, a provider of affordable housing.¹⁹⁹ The project, called "Northwest One"²⁰⁰ will hold 40,000 square feet of retail space, 220,000 square feet of office space, and a 21,000 square-foot health clinic providing a new facility for the already existing Unity Health Clinic.²⁰¹ Receiving the support of Sursum Corda residents who own the complex was a factor in the city's selection of the developers.²⁰² Affordable-housing rates are set for families earning thirty to sixty percent of the median income, \$56,000, for a family of four in the District.²⁰³ Three hundred sixty units will be set at the thirty percent of median income level, about \$16,800.²⁰⁴ The remaining units will be available for families earning up to sixty percent of the median, about \$33,600.²⁰⁵ The development is slated for completion by 2014.²⁰⁶

196. Nelson, *supra* note 193.

197. Nelson, *supra* note 193.

198. Joshua Zumbrun, *Partnership Chosen for Mixed-Income Redevelopment*, WASH. POST, Dec. 14, 2007, at B04 ("[Discussing an] ambitious strategy to attract mid- and upper- income families to help revitalize a struggling and once crime-ridden neighborhood without displacing residents.").

199. *See id.*; Marc Fisher, *The Man in the Backdrop of Sursum Corda's Rebirth*, WASH. POST, Dec. 18, 2007, at B03.

200. Lori Montgomery, *Sursum Residents Fear Loss of Homes; D.C. Seeks Use of Eminent Domain in Area North of Capitol*, WASH. POST, Mar. 16, 2006, at B09.

201. Zumbrun, *supra* note 198, at B04.

202. *See id.*; *see also* Lori Montgomery & Lindsay Ryan, *Residents Decry Plan to Replace NW Park; Site Would Get Mixed Housing*, WASH. POST, Aug. 15, 2005, at B01 ("The development plan grew out of four days of meetings in July with residents of Sursum Corda and of the surrounding neighborhood.").

203. Zumbrun, *supra* note 198, at B04.

204. *Id.*

205. *Id.*

206. *Id.*

C. Columbia Heights

In their heyday—from the 1940s through the early 1960s—the 7th Street NW, 14th Street NW, and H Street NE corridors were bustling shopping strips, primarily for Washington’s black middle-class.²⁰⁷ By April 1968, a largely poor, working class black population inhabited the neighborhoods from Seventh and Fourteenth and H streets.²⁰⁸ This poor population endured rat-infested housing and low-paying jobs.²⁰⁹ The children attended dysfunctional decaying, public schools, where three of every four students read below the national average.²¹⁰ Riots swept Washington on Thursday, April 4, 1968²¹¹ after the assassination of Dr. Martin Luther King, Jr., manifesting in approximately 200 fires burning simultaneously throughout the city.²¹²

By the 1990s, wealthy investors descended on the riot corridors, spurred in part by the District’s offer of tax incentives.²¹³ Columbia Heights’s stately Victorian row houses and proximity to downtown became attractive again to home buyers and investors in Washington as a real estate boom began in 1999.²¹⁴ From 1998 to 2004, more than a dozen high-end residential and commercial projects were spawned on Fourteenth Street.²¹⁵ In Columbia Heights, groups such as Jubilee Housing, Washington Inner City Self Help (WISH) and the Development Corporation of Columbia Heights (DCCH) developed housing, shopping, and social service centers.²¹⁶ These nonprofit groups entered a vacuum left by disinterested private investors.²¹⁷

Community development accompanied an average median family income of just \$20,905 in 1998.²¹⁸ Rising property values, and consequently, the average price for homes in the area forced lower-income families to look for housing opportunities elsewhere.²¹⁹ Residents

207. Paul Schwartzman & Robert E. Pierre, *From Ruin to Rebirth in D.C.: Condos and Cafes Have Replaced Guttered Shops, but Who’s Profiting?*, WASH. POST., Apr. 6, 2008, at A01.

208. *Id.*

209. *Id.*

210. *Id.*

211. Cindy Loose, *The Power Brokers of 14th Street; Since 1968 Riots, Nonprofits Have Taken Charge of Corridor’s Renewal*, WASH. POST., Apr. 4, 1993, at A01.

212. Schwartzman & Pierre, *supra* note 207, at A01.

213. *Id.*

214. Carol D. Leonnig, *Columbia Heights Joins Forces to Save Community*, WASH. POST., Dec. 4, 2005, at C06.

215. Schwartzman & Pierre, *supra* note 207, at A01.

216. Loose, *supra* note 211, at A01.

217. *Id.*

218. *Id.*

219. Larry N. Kaggwa, *Digging in to Fight Blight; Low-Cost Housing Project Aims to Revive Columbia Heights*, WASH. POST., Aug. 5, 1993, at J5.

working in the service industries, the secretaries, clerks, hotel workers—in other words, the stable, unhip middle class family—was locked out of adequate housing opportunity.²²⁰

In response, the Development Corporation of Columbia Heights launched the “Nehemiah Project,” to build fifty-seven middle-income housing units and a commercial strip on the formerly bleak corner of Florida Avenue and 14th Street.²²¹ A new Metro stop in 1999 was followed by an influx of retail development, including the city’s first Target store, followed by the predictable barrage of luxury condos.²²² The blocks surrounding the Metro are now reminiscent of a suburban mall, while chain restaurants and independent businesses revitalize the previously desolate Eleventh Street Corridor.²²³

D. Three Troubled Neighborhoods and Greater Washington, D.C.

Between 1990 and 2000, the number of census tracts of concentrated poverty—where forty percent or more of the residents are below the poverty line—more than doubled in the District.²²⁴ The tract containing Barry Farm is one that contributed to those counter-trends, becoming poorer over that period.²²⁵ As a result of HOPE VI Anacostia development projects, Barry Farm is the host of numerous transplants.²²⁶ Consequently, Barry Farm’s 432 units stand ninety-nine percent occupied on any given day, according to the D.C. Housing Authority.²²⁷ As of 2011, Barry Farm remained one of the poorest neighborhoods in D.C., with a median household income of \$18,500.²²⁸ Drug and gun-related crimes continue to occur within the violence plagued Barry Farm apartment complex.²²⁹ Unfortunately, innocent persons complying with the judicial system are not immune

220. Juan Williams, *Mrs. Kelly’s Neighborhoods; How Can the City Save Them?*, WASH. POST, Oct. 11, 1992, at C1.

221. *Id.*

222. Carla Dorsey, *It Takes a Village: Why Community Organizing is More Effective Than Litigation Alone at Ending Discriminatory Housing Code Enforcement*, 12 GEO. J. POVERTY LAW & POL’Y 437, 453 (2005) (“At the time . . . Columbia Heights . . . was on the road to gentrification by upper-income whites along with other nearby neighborhoods.”); Brendan Spiegel, *Surfacing: A Hip Strip in Washington*, N.Y. TIMES, Feb. 20, 2011, at 11.

223. Spiegel, *supra* note 222, at 11.

224. Monte Reel, *The Bleak View from Barry Farm; D.C. Prosperity Bypasses Complex*, WASH. POST, May 25, 2003, at C01.

225. *Id.*

226. *Id.*

227. *Id.*

228. Shemar Woods, *Barry Farm’s Summer Vacation*, WASH. POST, June 30, 2011, at A01.

229. Paul Duggan, *10 Alleged SE Gang Members Are Indicted for Additional Crimes; New Charges Filed in Alleged Gang Case*, WASH. POST, Sept. 11, 2010, at B03.

from falling prey to violent practices undertaken by self-serving criminals.²³⁰

A few blocks up Martin Luther King Avenue, simply “The Avenue” for many, the picture brightens.²³¹ Near the Anacostia, the census tract’s main commercial strip sits on the edge of a multibillion-dollar plan that aims to revitalize the waterfront.²³² The plan envisions a waterfront full of hotels, restaurants, monuments and residential areas, where public housing comingles with market-rate dwellings.²³³ Residents of Barry Farm will concede positive changes near the river, but they say that has little or no impact on their lives.²³⁴ Nearby construction projects including the building of a new St. Elizabeth’s, do not normally provide many of the public housing residents – few of whom have had job skills training, with employment.²³⁵

In Sursum Corda, despite gains in establishing improved housing opportunities for residents of a range of incomes, the area is still characterized as a poor, crime-ridden neighborhood.²³⁶ Sursum Corda is located within walking distance of the highly esteemed Jesuit institution, Gonzaga College High School.²³⁷ Privileged Gonzaga students continue to be surprised by encounters with the pervasive poverty of Sursum Corda, just blocks away from the school, a pillar of social and economic hope for all enrolled.²³⁸ On the fringes of Capital Hill, a fleeting memorial of a youth slain sums up the sentiment of some Sursum Corda residents.²³⁹ A pile of stuffed animals and a poem is placed; the refrain of the poem reads: “I HURT.”²⁴⁰

Columbia Heights is currently characterized as a mixed-income neighborhood in the midst of an economic transformation.²⁴¹ New-

230. *Id.*

231. Reel, *supra* note 224, at C07.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Samia Fam & Avis. E. Buchanon, *Sursum Corda Has Rights, Too*, WASH. POST, June 13, 2010, at C06.

237. Michelle Boorstein, *Jesuits Spread Ideals as Their Ranks Decline*, WASH. POST, Apr. 24, 2011, at C06 (discussing the decline in the number of Jesuit priests within the District).

238. Susan Kinzie, *An Advanced Education in Life; At the District’s Elite Gonzaga College High, Many Students Get Their First Exposure to Poverty—and Their First Chance to Help*, WASH. POST, Apr. 27, 2010, at B01.

239. Lonnae O’Neal Parker, *Streets of the Dead; When Washington Youths Get Killed, Memorials Pay Testament to the Victims — and to the Grim Realities of Life in the District*, WASH. POST, Mar. 16, 2008, at W20.

240. *Id.*

241. Luke Jerod Kummer, *Welcome to DC!*, WASH. POST, Mar. 5, 2011, at E03.

comers to Columbia Heights immediately meet persons living in subsidized housing along Fourteenth Street, in addition to individuals residing in market-rate housing along the same stretch.²⁴² Low-income and high-income people live side by side, but integration among those substantially disparate means is lacking.²⁴³

From July 2008 to July 2009, a net of 6,550 people migrated to D.C. according to a Census Bureau analysis of Internal Revenue Service data.²⁴⁴ According to the D.C. Fiscal Policy Institute, which examines the city's rental housing market, rents have increased more in the District than they have in most major cities, and renters are spending a larger portion of their paychecks to keep a roof over their heads.²⁴⁵ Despite the District's rent-control laws, the number of less-expensive rentals has decreased significantly.²⁴⁶ There were 23,700 fewer apartments that cost \$750 or less a month in 2007 than in 2000, a decrease of more than thirty-three percent.²⁴⁷ During that same period, the number of units that cost in excess of \$1,500 more than doubled from 12,200 to 27,400.²⁴⁸ The median monthly rent for an apartment in the District rose from \$630 to \$930 from 2000 to 2007.²⁴⁹ The median household income rose from \$49,300 to \$54,300.²⁵⁰ During the same period, rental-housing prices rose faster in the District than in most other large cities in the country, including New York, Boston, Chicago, Los Angeles, and Atlanta.²⁵¹ The circumstances for Barry Farm, Sursum Corda, and Columbia Heights represent the plight suffered by many low-income residents that have not experienced the benefits of gentrification within Washington, D.C. The experiences of current and former residents of these areas, are characterized by disappointment, isolation, and unmet expectations for quality of life.²⁵²

242. *Id.*

243. *Id.*

244. *Id.*

245. Ovetta Wiggins, *Digging Deeper to Pay the District's Rising Rents; Prices up 23% Since 2000; Affordable-Housing Supply Hurt, Study Finds*, WASH. POST, Feb. 6, 2010, at B01.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. Lewis M. Simons, *Cities Within Washington; And White Immigration Increases It Project Dwellers Feel Isolation; Public Housing Dwellers Feel Isolation; And It Increases as Whites Return to D.C.*, WASH. POST, May 5, 1978, at C1.

IV. AFFIRMATIVE DUTIES OF MUNICIPALITIES

The Constitution does not guarantee access to dwellings of a particular quality to all citizens.²⁵³ The Constitution fails to provide judicial remedies for every social and economic ill.²⁵⁴ Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.²⁵⁵

In 1975, a reformist New Jersey Supreme Court announced a new doctrine founded on the state constitution that became the first step in the articulation of extensive requirements for creating statewide low- and moderate-income housing opportunities.²⁵⁶ The *Mount Laurel* doctrine holds municipalities, developing or not, responsible for providing adequate housing opportunities to low-income citizens.²⁵⁷ The *Mount Laurel* doctrine is derived from underlying concepts of fundamental fairness in the exercise of government power.²⁵⁸ The *Mount Laurel* decisions establish a foundational obligation for the exercise of the police power: municipalities must design and administer their local land use regulations while taking into consideration regional needs for reasons of class equity and economic and racial integration.²⁵⁹ The Sovereign controls the use of *all* of the land.²⁶⁰ In exercising this control, the State is prohibited from favoring the affluent over the improv-

253. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding the purpose of the Oregon Forcible Entry and Wrongful Detainer Statute constitutionally permissible and the challenged classification rationally related to that purpose, thus the statute is not repugnant to the Equal Protection Cause of the Fourteenth Amendment).

254. *Id.*

255. *Id.*

256. *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 728 (N.J. 1975); Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437, 465 (2003).

257. *S. Burlington Cnty. v. Twp. of Mount Laurel*, 456 A.2d 390, 423, 441-50 (N.J. 1983); Peter W. Salsich, Jr., *Displacement and Urban Reinvestment: A Mount Laurel Perspective*, 53 U. CIN. L. REV. 333, 366 (1984).

258. *Twp. of Mount Laurel*, 456 A.2d at 415.

259. McFarlane, *supra* note 17, at 54-56 (“The first obligation is for affordable housing [A] second obligation [of] the police power: [a strong principle of socio-economic and racial integration] The third related obligation implicit in Mt. Laurel II is a principle of community preservation”).

260. *Twp. of Mount Laurel*, 456 A.2d at 415; John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365, 371-372 (2001) (“But . . . the state’s sovereign power to regulate the use of land is so frequently and thoroughly passed through to the local level of government . . . it makes sense to treat local governments as a distinct entity for purposes of constructing a practical and effective approach to Mount Laurel compliance.”).

erished.²⁶¹ The State cannot legislatively set aside dilapidated housing in urban areas for the poor, while simultaneously providing quality housing opportunities for everyone else.²⁶² Although the State may not have the ability to eliminate poverty, it cannot use that condition to further disadvantage certain citizens.²⁶³ Consequently, municipalities are delegated the same responsibility of the States by the Constitution to represent all citizens in the realm of residential opportunities.²⁶⁴

The constitutional power to zone, delegated to the municipalities subject to legislation, is one component of the police power – and therefore, must be exercised for the general welfare.²⁶⁵ The general welfare includes more than that of the municipality and its residents, but includes the welfare of the housing needs of those within and outside the municipality.²⁶⁶ Municipal land use regulations conflicting with the general welfare abuse the police power provided by the Constitution and must be deemed unconstitutional.²⁶⁷ Regulations that have failed to provide the requisite opportunity for a fair share of the region's need for low- and moderate-income housing conflict with the general welfare and violate state constitutional requirements of substantive due process and equal protection.²⁶⁸

261. *Twp. of Mount Laurel*, 456 A.2d at 415; Dennis J. Coyle, *Taking Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U.L. REV. 817, 838 (1993).

262. *Twp. of Mount Laurel*, 456 A.2d at 415; Salsich, Jr., *supra* note 257, at 369 (“[M]unicipalities should not be permitted to disregard the interests of citizens of the state who may not be able to competently [sic] in an unregulated marketplace or one that is skewed in favor of higher income persons.”).

263. *Twp. of Mount Laurel*, 456 A.2d at 415; Salsich, Jr., *supra* note 257 at 366.

264. *Twp. of Mount Laurel*, 456 A.2d at 415; Salsich, Jr. *supra* note 257, at 366 (“[T]he same applies to the municipality, to which this control over land has been constitutionally delegated.”).

265. *Twp. of Mount Laurel*, 456 A.2d at 415; McFarlane, *supra* note 17, at 54.

266. *Twp. of Mount Laurel*, 456 A.2d at 415.

267. *Id.*

268. *Id.* at 415; see also John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Future Housing Supply and Demand Analysis for the Greater Washington Area*, 33 U. BALT. L. REV. 153, 157 (2004); Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539, 612-613 (1995).

Courts use two general standards in reviewing challenges under the equal protection clause of the 14th Amendment: “strict scrutiny” and “rational basis.” . . . Economic regulations and land use regulations thus continue to be measured against the rationality standard. The use of this standard has been justified because: [m]ost zoning and land ordinances affect population growth and density As commentators have observed, to insist that such zoning laws are invalid unless the interests supporting the exclusion are compelling in character, and cannot be achieved by an alternative method, would result in wholesale invalidation of land use controls and endanger the validity of city and regional planning.

Id. (citations omitted).

The municipal obligation to provide a realistic opportunity for low- and moderate-income housing is not satisfied by a good faith attempt.²⁶⁹ The provided housing opportunity, must, in fact, be the substantial equivalent of the fair share.²⁷⁰ Determination of fair share requires resolution of three separate issues: identifying the relevant region, determining its present and prospective housing needs, and allocating those needs to the municipality or municipalities involved.²⁷¹ A municipality's fair share should include both low- and moderate-income housing in a proportion that reflects consideration of all relevant factors, including the proportion of low and moderate income housing that make up the regional need.²⁷² Municipalities' affirmative obligation to provide a realistic opportunity for the construction of low- and moderate-income housing includes the use of inclusionary devices, such as density bonuses and mandatory set-asides, as well as the elimination of unnecessary cost-producing land use requirements and restrictions.²⁷³

Several state and local governments have adopted inclusionary zoning techniques that involve the use of zoning and land use regulation to encourage the development of affordable housing.²⁷⁴ The following techniques include legislation that changes the process for appeals of zoning decisions, provides incentive to developers of affordable housing, and mandates that developers provide for affordable housing in exchange for permission to build.²⁷⁵ Incentive zoning is the practice of offering optional "economic incentives to developers by relaxing various restrictions in the zoning requirements applicable to the land in exchange for the development of desired types of projects or amenities within projects."²⁷⁶

269. *Twp. of Mount Laurel*, 456 A.2d at 419.

270. *Id.*; Salsich, Jr., *supra* note 257, at 365.

271. *Twp. of Mount Laurel*, 456 A.2d at 436 ("The most troublesome issue in *Mount Laurel* litigation is the determination of fair share. It takes the most time, produces the greatest variety of opinions, and engenders doubt as to the meaning and wisdom of *Mount Laurel*.").

272. *Id.* at 419; McFarlane, *supra* note 17, at 56 ("The *Mount Laurel* decisions therefore establish a foundational obligation for the exercise of the police power: municipalities must design and administer their local land use regulations while taking into consideration regional needs for reasons of class equity and economic and racial integration.").

273. *Twp. of Mount Laurel*, 456 A.2d at 441-50; Salsich, Jr., *supra* note 257, at 366.

274. Jennifer M. Morgan, Comment, *Zoning For All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 369 (1995) ("Thus, these governments have adopted inclusionary zoning techniques which involve the use of zoning and land use regulation to encourage the development of affordable housing.").

275. *Id.*

276. *Id.* at 377.

Localities can encourage the development of affordable housing by granting zoning variances to developers of such projects.²⁷⁷ A common form of zoning variance granted in this type of incentive program is an allowance of higher density development, frequently termed a “density bonus.”²⁷⁸ A density bonus allows a developer to build the same number of units originally intended on a smaller parcel of land, thereby lowering land costs per unit and allowing the developer to realize a larger profit.²⁷⁹

A mandatory set-aside ordinance requires each new housing development covered by the ordinance to include a minimum number of units for sale or rental to low- or moderate-income households.²⁸⁰ Such an ordinance is beneficial because it causes a dispersal of low-income housing amongst conventionally priced units.²⁸¹ In addition to possible sociological benefits of economic integration, this dispersal allows low-income individuals access to better educational and employment opportunities.²⁸² A mixed project encourages better quality construction of affordable units because the marketability of conventional units is likely to be affected by the appearance of nearby low-income units.²⁸³ The provision of affordable housing to low- and

In 1969, Massachusetts adopted zoning appeals legislation which applies to low and moderate income housing . . . [and] aids the development of low and moderate income housing by simplifying the process for obtaining permits to build such housing. The Act allows a public agency, limited dividend corporation, or nonprofit organization proposing to build affordable housing to apply to the local zoning board of appeals for a comprehensive permit, in lieu of the usual requirement of filing separate applications seeking approval from several local boards.

Id. at 370.

277. *Id.* at 377.

278. *Id.*; Mark Bobrowski, *Affordable Housing v. Open Space: A Proposal for Reconciliation*, 30 B.C. ENVTL. AFF. L. REV. 487, 494-95 (2003); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2039-40 (2007).

They began to investigate inclusionary zoning as a means of combating secondary displacement. Under this approach, city government allows a developer to build more on a given footprint (by building higher than on more of the area) only if the developer sets aside for permanently affordable housing a percentage of the floor area it gains through this density bonus.

Id.

279. Morgan, *supra* note 274, at 377; Padilla, *supra* note 268, at 550 (“This is justified because any lost profits resulting from the provision of housing at below market rates will be offset by income from extra units allowed by the density bonus.”).

280. Jane E. Schukoske, *Housing Linkage: Regulating Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1017 (1991); Morgan, *supra* note 274, at 379.

281. Morgan, *supra* note 274, at 379.

282. *Id.*

283. *Id.*; see also Thomas Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432, 1461-62 (1974).

moderate-income households is a legitimate state interest,²⁸⁴ and a mandatory set-aside ordinance directly advances this state interest by requiring the development of affordable housing units.²⁸⁵

Housing linkage ordinances require private developers to construct affordable housing or to contribute money for the creation of such housing in order to obtain approval for nonresidential development.²⁸⁶ The requirement that nonresidential developers provide for affordable housing is justified on the basis that nonresidential development will attract employees, some of whom will need lower income housing.²⁸⁷ Linkage ordinances are similar to mandatory set-asides in that they require private developers to provide for a public problem.²⁸⁸ If, however, a linkage cost is so high when the ordinance is applied to a particular proposed development that it makes development economically infeasible, the ordinance may be found unconstitutional.²⁸⁹

V. GOVERNMENT TAKING OF PROPERTY

The Constitution provides two ways for governments to control land-use under its “eminent domain” power and under its “police power.”²⁹⁰ Under the Fifth and Fourteenth Amendments of the Con-

284. Serena M. Williams, *The Need for Affordable Housing: The Constitutional Viability of Inclusionary Zoning*, 26 J. MARSHALL L. REV. 75, 101 (1992).

To show that providing affordable housing is a legitimate state interest, the municipality need look no further than the programs and policies of the federal government. The nation has had a housing policy for over fifty years. Since the United States Housing Act of 1937, the federal government has provided housing assistance to low-income persons. Section 23 of that Act stated that public housing agencies were to provide low-rent housing which “will aid in assuring a decent place to live for every citizen.”

Id. (citations omitted).

285. Morgan, *supra* note 274, at 380 (“In order to survive a takings challenge, a land use regulation must substantially advance a legitimate state interest, showing a clear nexus between the state interest and the regulation.”).

286. *Id.* at 381; Schukoske, *supra* note 280, at 1022.

287. Morgan, *supra* note 274, at 381-82.

In 1985, San Francisco adopted a linkage ordinance entitled the Office Affordable Housing Production Program (OAHPP). The ordinance explicitly states that it was enacted in response to the “causal connection between [large-scale office] developments and the need for additional housing . . . particularly housing affordable to households of low and moderate income.”

Id.; see also Schukoske, *supra* note 280, at 1019-20.

288. Morgan, *supra* note 274, at 382; see also *Holmdel Builders Ass’n v. Twp. of Holmdel*, 583 A.2d 277, 290 (N.J. 1990) (“[Expressing] a preference for mandatory set-asides because that device serves to ensure the provision of affordable housing.”); Rachel M. Janutis, *Nollan and Dolan: “Taking” A Link Out of the Development Chain*, 1994 U. ILL. L. REV. 981, 1002 (1994).

289. Morgan, *supra* note 274, at 383.

290. Martin H. Belsky, *The Public Trust Doctrine and Takings: A Post-Lucas View*, 4 ALB. L.J. SCI. & TECH. 17, 18 (1994).

stitution, a person or private entity may have his, her, or its property taken for a public purpose provided adequate compensation is paid.²⁹¹ Contrasted with this eminent domain power is the inherent “police power” of government to regulate, without compensation, to protect the public.²⁹²

In *Kelo v. City of New London*, ten residences and five other properties were condemned as part of a 2000 development plan in New London, Connecticut.²⁹³ Planners intended to transfer the property to private developers for the stated purpose of promoting economic growth in the area.²⁹⁴ The U.S. Supreme Court, upheld the economic development rationale of the New London takings, and mandated broad judicial deference to government decision-making on public use issues.²⁹⁵ The Court rejected the property owners’ argument that the transfer of their property to private developers rather than to a public body required any heightened degree of judicial scrutiny.²⁹⁶ The *Kelo* majority noted merely pretextual purposes do not satisfy the public use requirement, but also failed to define the term “mere pretext.”²⁹⁷

Fortunately, Professor Daniel Kelly identified four criteria that courts can use to determine whether a private-to-private taking is pretextual: (1) the magnitude of the public benefit created by the condemnation,²⁹⁸ if the benefits are large, it seems less likely that they are merely pretextual; (2) the extensiveness of the planning process that led to the taking; (3) whether or not the identity of the private beneficiary of the taking was known in advance; if the new owner’s identity was unknown to officials at the time they decided to use eminent domain, it is hard to conclude the government undertook the

291. Susan Bayerd, Comment, *Inverse Condemnation and the Alchemist’s Lesson: You Can’t Turn Regulations into Gold*, 21 SANTA CLARA L. REV. 171, 171 n.1 (1981); Travis E. Booth, Comment, *Compensatory Mitigation: What is the Best Approach?*, 11 U. BALT. J. ENVTL. L. 205, 206 (2004).

292. Belsky, *supra* note 290, at 18.

293. Ilya Somin, *The Judicial Reaction to Kelo*, 4 ALB. GOV’T L. REV. 1, 5 (2011).

294. *Id.*

295. *Id.* at 6; Michele Alexandre, “*Love Don’t Live Here Anymore*”: *Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1, 8 (2008) (“The government . . . usually argues that eminent domain is necessary to solve holdout problems that market inefficiencies create The use of eminent domain is designed to be a tool of last resort . . .”).

296. Somin, *supra* note 293, at 6; *see also Kelo v. City of New London*, 545 U.S. 469, 487-88 (2005).

297. Somin, *supra* note 293, at 24.

298. Ilya Somin, *Let There Be Blight: Blight Condemnations in New York After Goldstein and Kaur*, 38 FORDHAM URB. L.J. 1193, 1211 (2011).

condemnation in order to advance his or her interests; and (4) the subjective intent of the condemning authorities.²⁹⁹ Under this approach, courts would investigate the motives of government decision-makers to determine the true purpose of the taking.

In *Kelo*, New London was not planning to open the condemned land—at least not in its entirety—to use by the general public.³⁰⁰ The Supreme Court long ago rejected any literal requirement that condemned property be put into use for the general public.³⁰¹ Not only did the “use by the public” test prove difficult to administer (e.g., What proportion of the public need have access to the property? At what price?), but it proved to be impractical.³⁰² As the Court began applying the Fifth Amendment to the States at the close of the 19th Century, it embraced a broader and more natural interpretation of public use as “public purpose.”³⁰³ The Court has consistently rejected the narrow test ever since. Providing indigent populations with adequate housing opportunities in efforts to improve their welfare and the social and economic advancement and stability of the Washington region surely will satisfy the aggressive governmental taking of private housing units. Private development plays a critical role in uplifting depressed communities by providing direct public benefits including new jobs and affordable housing for residents, increased tax dollars for the municipality, increased property values, and improved facilities and public areas for the community.³⁰⁴

The first part of the Takings Clause, the Public Use Clause, bars the government from seizing an individual’s property unless the property is put to a public post-condemnation use.³⁰⁵ The second part, the Just Compensation Clause, requires the government to pay for the property it acquires from private owners, which is typically defined as the fair market value of the acquired property.³⁰⁶ For the purposes of

299. *Id.*

300. *Kelo*, 545 U.S. at 478.

301. *Id.*; Alexandre, *supra* note 295, at 9 (“In recent years, the Supreme Court has embraced the more expansive notion of takings for public use purposes, culminating in a broader notion of public purpose announced in *Kelo*.”).

302. Olga V. Kotlyarevskaya, “Public Use” Requirement in Eminent Domain Cases Based on Slum Clearance, Elimination of Urban Blight, and Economic Development, 5 CONN. PUB. INT. L.J. 197, 209 (2006).

303. *Kelo*, 545 U.S. at 480.

304. Asher Alavi, Note, *Kelo Six Years Later: State Responses, Ramifications, and Solutions for the Future*, 31 B.C. THIRD WORLD L.J. 311, 314 (2011).

305. Alberto B. Lopez, *Revisiting Kelo and Eminent Domain’s “Summer of Scrutiny”*, 59 ALA. L. REV. 561, 566 (2008).

306. *Id.*

this Comment, the government would be required to compensate private dwelling owners for units obtained throughout the District for the occupation of low-income residents at reduced rents. Instead of solely advocating the government taking of blighted³⁰⁷ areas, often leading to corruption and land grabbing,³⁰⁸ I am most interested in the government taking of more highly regarded housing units within affluent enclaves throughout Washington.³⁰⁹

The government could successfully wrest control of an adequate number of units to provide for improved housing for displaced District citizens. This government activity, combined with the razing of various “blighted” housing areas within Washington, theoretically, would redistribute poor populations throughout the District producing a considerably less homogeneous economic distribution of city residents. The pitfalls of the discretion reserved to indigent residents seeking housing could be avoided with a government mandate. This government mandate would empower residents with the opportunity to locate housing on the open market or occupy reserved units within formerly privatized developments, seized and offered by the government through eminent domain.³¹⁰

VI. SOCIAL EFFECTS OF DECONCENTRATION

A. Benefits

Research suggests that concentrated poverty increases the likelihood of social isolation; joblessness; dropping out of school; lower educational achievement; involvement in crime; unsuccessful behavior development and delinquency among adolescents; non-marital child-

307. Martin E. Gold & Lynne B. Sagalyn, *The Use and Abuse of Blight in Eminent Domain*, 38 *FORDHAM URB. L.J.* 1119, 1127 (2011).

Blight is less an objective condition than it is a legal pretext for various forms of commercial tax abatement that, in most settings, divert money from schools and country-funded social services. Redevelopment policies originally intended to address unsafe or insufficient urban housing are not more routinely employed to subsidize the building of suburban shopping malls.

Id. (citation omitted).

308. Alavi, *supra* note 304, at 337.

309. *Id.* at 311.

310. Alexander Polikoff, *Racial Inequality and the Black Ghetto*, 1 *Nw. J. L. & Soc. POL'Y* 1, 19 (2006).

Where government assists the redevelopment process, the assistance should be conditioned on housing for the poor as part of the mix. Where it does not (although usually some form of assistance will be involved), inclusionary zoning can mandate that some low-income housing be included in all new residential development above a threshold number of units.

Id.

birth; and unsuccessful family management.³¹¹ Public housing in the United States remains segregated by race.³¹² Unlike their white counterparts, a majority of black public housing residents live in neighborhoods populated by large concentrations of poor blacks.³¹³ Based on the 2000 Census, the rate of desegregation has slowed in comparison to the desegregation rate of past generations.³¹⁴ For example, the decline in segregation for blacks between 1980 and 1990 was 6.8%, while the decline from 1990-2000 was 5.6%.³¹⁵

The successful movement and settlement of impoverished persons of color within historically white enclaves has the potential of encouraging further integration throughout the city.³¹⁶ Participants in mobility programs generally prefer their neighborhoods, citing a greater feeling of safety and improved public schools and services.³¹⁷ Integrated people of color are likely to look more favorably upon the possibility of entering a previously ethnically homogenous neighborhood after becoming aware of other successful transplants.³¹⁸ Formerly apprehensive low-income residents will be less inclined to remain in their dilapidated neighborhood as the number of desperate neighbors opt into residential opportunities elsewhere.³¹⁹ As integration becomes more widespread, affluent members of increasingly diverse communities will be less likely to flee their transforming neighborhoods, expecting similar trends to take place throughout the municipality.³²⁰

There are notable benefits of integrating predominantly white middle- and upper-class neighborhoods with displaced persons of

311. Denton, *supra* note 19, at 1208 (“Living in segregated neighborhoods thus constrains a group’s average class standing, which, in turn, limits estate size. Both of these phenomena are both reflected in the lower net worth of the most segregated group, African Americans.”); Wilson, *supra* note 3, at 206.

312. Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY LAW & POL’Y 35, 53 (2002).

313. *Id.*

314. Michael Selmi, *Race in the City: The Triumph of Diversity and the Loss of Integration*, 22 J.L. & POL. 49, 58 (2006) (“Moreover, to the extent that segregated housing is the product of attitudinal barriers, one would expect a softening of those barriers with time, thus creating the greater possibility of integration with each passing decade.”).

315. *Id.*

316. Richard H. Sander, *Individual Rights and Demographic Realities: The Problem of Fair Housing*, 82 NW. U. L. REV. 874, 929 (1988).

317. Hendrickson, *supra* note 312, at 60.

318. *Id.*

319. OWEN FISS A WAY OUT: AMERICA’S GHETTOS AND THE LEGACY OF RACISM 34 (Joshua Chen et al., eds., 2003).

320. *Id.*

color suffering from residential displacement.³²¹ Economic integration would likely enhance access to employment opportunities, better schools and social services, quality housing, and higher-quality retail establishments.³²² Adults would be posed with more fruitful career options within environments conducive to further developing personal social and intellectual capital.³²³ Children of low-income transplants would also be provided with safer surroundings and greater institutional resources that are essential to advancing personal growth outside of the home and classroom.³²⁴ There is some evidence that low-income minority in-movers that stay in stable housing in new neighborhoods, can generate positive, supportive ties resting on shared norms.³²⁵ Making poorer neighborhoods more mixed and making affluent neighborhoods more accessible to the poor and minorities should reduce spatial inequalities over time.³²⁶ To accomplish this, municipalities and the nation will have to *protect* housing choices—by enforcing fair housing rights as patterns of discrimination change—but also *expand* those choices and *encourage* a wide variety of people to make new kinds of locational choices.³²⁷

B. Community Responses to Deconcentration

Courts have often employed “mobility relief” to remedy racial discrimination in public housing.³²⁸ These efforts most commonly manifest as interdevelopment or interproject transfers or the provi-

321. *Id.* at 29.

322. *Id.*; see also Xavier de Souza Briggs, *Entrenched Poverty, Social Mixing and the “Geography of Opportunity”*: *Lessons for Policy and Unanswered Questions*, 13 *GEO. J. ON POVERTY LAW & POL’Y* 403, 412 (2006).

323. FISS, *supra* note 319, at 28.

324. *Id.* at 29.

325. Briggs, *supra* note 322, at 409.

326. *Id.* at 412 (“Old prejudices of place, stigmas attached to images of decline and people who live in poor neighborhoods, create clear patterns of neighborhood avoidance by households that have the widest choices.”).

327. *Id.* at 413.

Although conventional wisdom in low-income housing policy emphasizes helping the persistently poor move out of very poor and racially segregated places or upgrading places where the poor live through community development, reducing the housing *instability* of low-income households over time—especially that of low-income black households—is an important piece of this policy puzzle. For now it is a largely unrecognized one.

Id.

328. Michelle Adams, *Separate and Unequal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 *TUL. L. REV.* 413, 447 (1996) (“Mobility relief refers to efforts to make housing available for black or Hispanic victims of discrimination in the federally subsidized housing program in areas where their race does not predominate.”).

sion of Section 8 certificates or vouchers.³²⁹ The first effort provides a tenant with the opportunity to move into a new or vacant unit in a development in which the tenant's ethnicity does not predominate.³³⁰ The latter program provides tenants with an opportunity to secure federally assisted housing in nonracially impacted areas.³³¹ It may be necessary to mandate the movement and economic interaction of low-income persons within more affluent residential areas.³³²

Studies suggest when black movers³³³ are free to choose a new neighborhood, they move to "areas with large black populations compared to those census tracts to which Hispanics move, and vice versa."³³⁴ All residents may not take to relocating immediately due to affinity for one's neighbors and the community in general, despite its pitfalls.³³⁵ Many black mobility participants are conflicted about moving from a predominantly black or mixed-race neighborhood to a predominantly white neighborhood.³³⁶ Program participants who move often do so in order to flee unsafe neighborhoods rather than per se segregation, and exhibit ambivalence about leaving their homes.³³⁷

Although increasing numbers of whites support residential integration in principle,³³⁸ resistance to significant number of black re-

329. *Id.* ("Some advocates of mobility relief have also argued that this relief should be provided so that victims of housing discrimination may secure housing in better served areas, even if those areas are predominantly minority.").

330. *Id.*

331. *Id.*

332. *See id.* ("As a solution to housing discrimination, mobility relief attempts to alleviate the isolation caused by segregation by moving victims of discrimination closer to better schools and a better supply of jobs in safer areas.").

333. *See* Wilson, *supra* note 3, at 211.

"When we consider that the vast majority of black families living in America's poorest neighborhoods come from families that have lived in similar environments for generations . . . continuity of the neighborhood environment, in addition to continuity of individual economic status, may be especially relevant to the study of cultural patterns and social norms among disadvantaged populations."

Id. (citation omitted).

334. Adams, *supra* note 328, at 452-53 ("Many movers had difficulty relocating to the suburbs because they experienced 'significant discrimination in the process of finding apartments,' as well as increased levels of racial discrimination and harassment.") (citation omitted).

335. Fiss, *supra* note 319, at 33; *see also* Adams *supra* note 328, at 453 ("While mobility programs have unquestionably offered some concrete improvements to participants, they also require some sacrifice, as participants must uproot themselves and their families in order to seek equality in housing and attendant services.").

336. Adams, *supra* note 328, at 450.

337. *Id.*

338. *Id.* at 456.

sidents in white neighborhoods is still extremely widespread.³³⁹ Whites have embraced³⁴⁰ the lack of a contemporary civil rights agenda advocating for greater integration of people of color within their communities.³⁴¹ Many white residents view the entry of blacks and various low-income persons as harbingers of declines in property values increases in crime, drug abuse, and violence.³⁴² Such brash generalizations about the lifestyles and characteristics of communities of color are directly tied to whites' and affluent residents' desire to maintain the status quo of residential demographics.³⁴³ This discrimination manifests in housing-market transactions, evidencing the prejudices maintained by realtors, lenders, and others acting on their beliefs on what the housing market requires.³⁴⁴ Despite the probable push back and challenges inherent in a newly mixed-income community, such developments could be positive locations for low-income families—safer, better served, and more prosperous than areas of concentrated poverty—even if these places rarely function as the most social of worlds.³⁴⁵

CONCLUSION

The economic benefits of gentrification on a sizable municipality are not to be considered in isolation. Indigent city residents are deserving of more care from local and national government in the preservation of housing opportunities. A *laissez faire*³⁴⁶ approach to the economic and residential welfare of city residents is ineffective and ultimately denigrating to those with little perceived and actual control over their living conditions. A government acting under a broad interpretation of “public purpose”³⁴⁷ may provide the ultimate remedy

339. *Id.* at 455; see also Reynolds Farley et al., *Stereotypes and Segregation: Neighborhoods in the Detroit Area*, 100 AM. J. SOC. 750, 755-61 (1994).

340. Wilson, *supra* note 3, at 203 (“The idea that the federal government ‘has a special obligation to help improve the living standards of blacks’ because they ‘have been discriminated against for so long’ was supported by only one-fifth of whites in 2001 and never has been supported by more than one-quarter of whites since 1975.”).

341. Selmi, *supra* note 314, at 66.

342. Adams, *supra* note 328, at 456; see also Farley et al., *supra* note 339, at 760-61.

343. Adams, *supra* note 328, at 456; see also Farley et al., *supra* note 339, at 774-76.

344. Adams, *supra* note 328, at 456.

345. Briggs, *supra* note 322, at 411.

346. MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/laissez-faire> (last visited Sept. 3, 2012) (“[*Laissez faire* is] a doctrine opposing governmental interference in economic affairs beyond the minimum necessary for the maintenance of peace and property rights.”).

347. *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

through mandated movement of poor persons in concentrated locales of poverty, to characteristically affluent areas through condemnation and just compensation to owners of formerly private residences. This plan of action promises to challenge transplanted persons, private parties, and economic stakeholders in various ways. The imminent conflict concerning the compensation of private parties in lieu of government seizure should not, and must not dissuade the government from making good on its promise to represent *all* citizens in the realm of residential opportunities.³⁴⁸

348. *S. Burlington Cnty. v. Twp. of Mount Laurel*, 456 A.2d 390, 415 (N.J. 1983).

The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted.

Id.

