Hip-Hop and Housing: Revisiting Culture, Urban Space, Power, and Law

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U.S. housing law is finally receiving its due attention. Scholars and practitioners are focused primarily on the subprime mortgage and foreclosure crises. Yet the current recession has also resurrected the debate about the efficacy of place-based lawmaking. Place-based laws direct economic resources to low-income neighborhoods to help existing residents remain in place and to improve those areas. Law-and-economists and staunch integrationists attack place-based lawmaking on economic and social grounds. This Article examines the efficacy of place-based lawmaking through the underutilized prism of culture. Using a sociolegal approach, it develops a theory of cultural collective efficacy as a justification for place-based lawmaking. Cultural collective efficacy describes positive social networks that inner-city residents develop through participation in musical, artistic, and other neighborhood-based cultural endeavors. This Article analyzes two examples of cultural collective efficacy: the early development of hip-hop in the Bronx and community murals developed by Mexican immigrants in Chicago's Pilsen neighborhood. These examples show that cultural collective efficacy can help inner-city residents mitigate the negative effects of living in a poor and segregated community and obtain more concrete benefits from urban revitalization in their communities. Cultural collective efficacy also provides a framework to examine important microdynamics in the inner-city that scholars and policymakers have ignored. Lastly, this Article devises new combinations of place-based laws that might protect cultural collective efficacy, such as: (1) historic districts with affordable housing protections secured through transferable development rights, (2) foreclosure prevention strategies, (3) techniques to mitigate eminent domain abuse, and (4) reinterpretations of the Fair Housing Act's "affirmatively furthering" fair housing mandate. These examples of place-based lawmaking may more effectively promote equitable development and advance distributive justice in U.S. housing law and policy.

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INTRODUCTION

U.S. housing law is rightfully at the center of national and global debates. The current Great Recession has renewed scholarly interest in housing, particularly with respect to the subprime mortgage and foreclosure crises.[1] But it has also resurrected debates about the best legal strategies for administering affordable housing subsidies. Champions of affordable housing implicitly embrace the normative goal of distributive justice,[2] recognizing that public subsidies are necessary to create viable, affordable, and sustainable housing for low-income people. There remains substantial debate, however, about how best to advance distributive justice under current conditions.[3] The growing disagreement between supporters of place-based lawmaking and advocates of people-based lawmaking is a primary example.[4]

Place-based lawmaking includes laws and policies that direct public subsidies to developers to create affordable housing and to improve urban neighborhoods.[5] Examples of place-based lawmaking include early urban-renewal efforts[6] and more recent federal programs, such as HOPE VI, the Low Income Housing Tax Credit ("LIHTC"), and Choice Neighborhoods.[7] While place-based lawmaking has always had its critics,

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1. *See, e.g.*, Colloquium, *Surveying the Damage: An Assessment of Legal and Policy Responses to the Subprime Mortgage Crisis*, 38 FORDHAM URB. L.J. 629 (2011); Symposium, *The North Carolina Banking Institute Symposium on the Foreclosure Crisis: Overview*, 14 N.C. BANKING INST. 191 (2010).

2. Distributive justice is defined as "[j]ustice owed by a community to its members, including the fair disbursement of common advantages and sharing of common burdens." BLACK'S LAW DICTIONARY 869 (7th ed. 1999).

3. *See, e.g.*, J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 531 (2007) (outlining the tensions between eight competing housing policy objectives: decent shelter, wealth creation, social integration, urban vitality, civic engagement, training, institution building, and efficient use of public funds); Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 WAKE FOREST L. REV. 511, 594–95 (2007) (describing the various conflicting and competing ethics that shape U.S. housing law and policy).

4. *See generally* Nestor M. Davidson, Essay, *Reconciling People and Place in Housing and Community Development Policy*, 16 GEO. J. ON POVERTY L. & POL'Y 1, 1 (2009) ("Arguments about the proper focus of policymaking in this arena continue unabated.").

5. *Id.* (defining place-based lawmaking).

6. Although the urban-renewal programs of the 1940s and 1950s allegedly were intended to revitalize urban neighborhoods and empower urban residents, the programs displaced, rather than empowered, low-income blacks and became known as a program of "Negro removal." *See, e.g.*, Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003).

7. The federal government's HOPE VI and Choice Neighborhoods revitalization grant programs provide public subsidies to public and private partnerships to demolish former public housing developments and to create new mixed-income developments in close proximity to improved schools. *See Choice Neighborhoods*, HUD, http://www.hud.gov/offices/pih/programs/ph/cn/ (last visited Feb. 14, 2012). HOPE VI was enacted in 1992 under section 24 of the Housing Act of 1937, ch. 896, § 24, 50 Stat. 888, 899, *amended by* Quality Housing and Work Responsibility Act of 1998 § 535, 42 U.S.C. § 1437v (2010). The Low Income Housing Tax Credit is a federal subsidy for the production of qualified low-income rental housing, available under section 42 of the Internal Revenue Code. *See*

it has long been a central tool in urban revitalization efforts.[8] Yet scholars and policymakers increasingly attack place-based lawmaking on both economic and social grounds.[9] Law-and-economists, such as Robert Ellickson, argue that place-based lawmaking is inherently inefficient[10] and that its social benefits do not outweigh its substantial costs.[11] Staunch integrationists, such as Owen Fiss, contend that place-based lawmaking fails to promote integration and exacerbates the social and economic isolation of low-income minorities in urban areas.[12] Fair housing advocates have sued federal, state, and local housing agencies for failing to "affirmatively further" fair housing goals in the implementation of place-based projects.[13] These suits generally allege that agencies which site most of their place-based projects in predominately low-income and minority communities violate the Fair Housing Act by failing to affirmatively further integration.[14]

I.R.C. § 42 (2010); Treas. Reg. § 1.42 (2010).

8. *See, e.g.*, GARY P. GREEN & ANNA HAINES, ASSET BUILDING & COMMUNITY DEVELOPMENT 5 (2d ed. 2008) ("Place-based approaches have been at the core of community development efforts for the past 40 years.").

9. *See, e.g.*, ALEXANDER POLIKOFF, WAITING FOR GAUTREAUX: A STORY OF SEGREGATION, HOUSING, AND THE BLACK GHETTO 374–75 (2006); Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 985 (2010); Owen Fiss, *What Should Be Done for Those Who Have Been Left Behind?*, *in* A WAY OUT: AMERICA'S GHETTOS AND THE LEGACY OF RACISM 3, 3 (Joshua Cohen et al. eds., 2003); Edward L. Glaeser & Joshua Gottlieb, *The Economics of Place-Making Policies* 2–4 (Harvard Institute of Economic Research, Discussion Paper No. 2166, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299046; *see also* Sara Aronchick Solow, Note, *Racial Justice at Home: The Case for Opportunity-Housing Vouchers*, 28 YALE L. & POL'Y REV. 481, 483–84 (2010).

10. *See, e.g.*, Ellickson, *supra* note 9, at 996–1002; Edward L. Glaeser, *Should the Government Rebuild New Orleans, or Just Give Residents Checks?*, 2 ECONOMIST'S VOICE 1, 1–7 (2005); Alice O'Connor, *Swimming Against the Tide: A Brief History of Federal Policy in Poor Communities*, *in* URBAN PROBLEMS IN COMMUNITY DEVELOPMENT 77, 80 (Ronald F. Ferguson & William T. Dickens eds., 1999); Edward L. Glaeser, *Can Buffalo Ever Come Back?*, N.Y. SUN (Oct. 19, 2007), http://www.nysun.com/opinion/can-buffalo-ever-come-back/64879.

11. *See, e.g.*, Ellickson, *supra* note 9, at 985 ("I contend that recent studies suggest that the benefits of social integration are seldom as great as advocates of mixed-income projects suppose.").

12. *See, e.g.*, Fiss, *supra* note 9, at 27; *see also* POLIKOFF, *supra* note 9, at 382–83; Solow, *supra* note 9, at 490.

13. *See*, *e.g.*, Thompson v. HUD, 348 F. Supp. 2d 398, 456–65 (D. Md. 2005) (holding that local defendants and Department of Housing and Urban Development ("HUD") violated the Fair Housing Act's duty to affirmatively further fair housing by failing to consider regional approaches to ameliorate segregation in public housing); *In re* Adoption of the 2003 Low Income Housing Tax Credit Qualified Allocation Plan, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004) (discussing the plaintiffs' claims that the Qualified Allocation Plan adopted by the New Jersey State Housing Mortgage Finance Agency perpetuated racial discrimination by concentrating the allocation of tax credits in low-income urban areas). In *Inclusive Communities Project, Inc. v. HUD*, the plaintiffs argued that HUD's practice of determining fair market rents for the Housing Choice Voucher program in Dallas, Texas, results in lower fair market rents for the Dallas rental housing market, thereby precluding voucher program participants from obtaining rental housing in more affluent Caucasian areas. No. 3:07-CV-0945-O, 2009 WL 3122610, at *2 (N.D. Tex. Sept. 29, 2009).

14. *See* 42 U.S.C. § 3608(d) (2010) (outlining the duty to "affirmatively further fair housing").

Many law-and-economists and staunch integrationists favor the alternative of people-based lawmaking.[15] People-based laws direct economic subsidies to poor *individuals*, so that such individuals can move to any place that might contain better housing, economic, and social resources.[16] Housing choice voucher programs are the most common examples of people-based lawmaking.[17] While people-based approaches are definitely needed, advocates of people-based lawmaking often tend to construct most inner-city neighborhoods as deficient and, thus, focus on what those neighborhoods *lack*, rather than what they *have*. This construction defines such spaces, by omission, as places of despair; it thereby justifies people-based strategies that move existing residents out of inner-city neighborhoods. This deficiency-oriented construction of the inner-city, however, is increasingly outdated.[18] It reflects an overly simplistic understanding of the actual dynamics occurring in some low-income, predominantly minority, inner-city neighborhoods.[19] It also ignores the positive social capital[20] that exists in some inner-city areas and how that social capital can be an asset to traditionally marginalized groups. These oversights create a false dichotomy between place-based and people-based approaches and fuel the growing chasm between advocates of either approach.[21]

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15. *See* discussion *infra* Parts I.A–B.

16. *See* Davidson, *supra* note 4, at 1 (defining people-based policies).

17. *See id.*

18. *See generally* Mario Luis Small, *Four Reasons to Abandon the Idea of "The Ghetto,"* 7 CITY & COMMUNITY 389 (2008) (arguing that strong conceptions of "the ghetto" ultimately undermine scholarly efforts to understand the complexity of poor black neighborhoods or their residents in the twenty-first century).

19. *See id.* at 395 ("The 1990s and early 2000s witnessed many transformations that call for a re-evaluation of the strong *ghetto* models and a closer look at differences between cities: the historic shift in responsibility for managing the welfare system from the federal government to the states; an almost unprecedented housing boom that gentrified some but not other poor neighborhoods; a subsequent housing bust whose consequences, still uncertain, depend on both national and local management by state actors; a dramatic rise in incarceration, fueled in part by adoptions in some but not other states of three-strike laws and mandatory sentencing; and the remarkable rise of the urban Latino population, which for the first time now surpasses (by more than 3 million) the non-Hispanic black population in metropolitan areas.").

20. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 18–19 (2000) (explaining that the core idea of social scientists' concept of social capital is that "social networks have value"); *see also* DAVID HALPERN, SOCIAL CAPITAL 1–45 (2004) (reviewing the extensive literature on social capital).

21. *See, e.g.*, Judith Browne-Dianis & Anita Sinha, *Exiling the Poor: The Clash of Redevelopment and Fair Housing in Post-Katrina New Orleans*, 51 HOW. L.J. 481, 486–87 (2008); Davidson *supra* note 4, at 1; Elizabeth K. Julian, *Fair Housing and Community Development: Time to Come Together*, 41 IND. L. REV. 555, 557–58 (2008) (explaining that both the fair housing and community development movements are progressive movements aimed at ameliorating poverty and injustice, but that "[t]he movements have seemed to operate in parallel universes and, at worst, have reflected tension and even conflict that belie their common commitment to social and racial justice"); Henry Korman, *Underwriting for Fair Housing? Achieving Civil Rights Goals in Affordable Housing Programs*, 14 J. AFFORDABLE HOUS. 292, 293 (2005) (describing the divide between community development

This Article reexamines the efficacy of place-based lawmaking through the underutilized prism of culture.[22] It is the first to develop a new concept of *cultural collective efficacy* as a justification for place-based lawmaking. Social scientists define collective efficacy as forms of neighborhood social cohesion and informal social-control capacity that regulate negative conditions (such as crime) in a neighborhood.[23] This Article argues that some low- and moderate-income minorities' participation in neighborhood-based musical, artistic, and other cultural endeavors can be an important source of collective efficacy. Cultural collective efficacy can help inner-city residents mitigate the negative effects of living in a poor and segregated community. It can also help them to stem gentrification in their communities and to obtain more concrete benefits from urban reform. Place-based lawmaking that protects cultural collective efficacy may, therefore, advance distributive justice and promote equitable development. Thus, cultural collective efficacy may be an important and overlooked normative justification for place-based lawmaking. This Article acknowledges that hyper-segregation and concentrated poverty continue to be realities in many inner-city neighborhoods; the recent economic downturn has in fact exacerbated such conditions in certain areas.[24] Consequently, policies that expand the options for residents who choose to move out of urban neighborhoods should remain an important part of U.S. housing law and policy. Yet place-based lawmaking that protects cultural collective efficacy in low-income communities and empowers existing residents should also retain prominence.[25]

Using a sociolegal approach, including a synthesis of new cultural sociology, biographies, newspaper reports, oral histories, and qualitative interviews with low- to moderate-income residents in New York and

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advocates and civil rights activists).

22. While culture is extensively discussed in academic circles, it has been understudied in this particular debate.

23. *See, e.g.*, NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING AND THE RESTORATION OF URBAN AMERICA 22–23 (2009); Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489, 505 (2010); Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 922–23 (1997); Nicole Stelle Garnett, *The People Paradox*, 2010 U. Ill. L. Rev. 43, 52–53 [hereinafter Garnett, *The People Paradox*] ("Collective efficacy is perhaps best understood as a form of applied social capital—it is a means by which communities harness the energy generated by 'social networks and the norms of reciprocity and trustworthiness that arise from them' for the purpose of addressing neighborhood problems." (internal citations omitted)).

24. *See generally* Daniel T. Lichter et al., *The Geography of Exclusion: Race Segregation and Concentrated Poverty* 3–24 (Nat'l Poverty Ctr., Working Paper Series No. 11-16, 2011), *available at* http://npc.umich.edu/publications/u/2011-16%20NPC%20Working%20Paper.pdf.

25. Given current resources and policies, many low-income, minority, inner-city residents may not be able to move to predominately white communities of opportunity. As such, place-based lawmaking to help existing residents benefit from improvements in areas where they now reside is necessary to advance distributive justice in U.S. low-income housing policy.

Chicago, this Article develops a theory of cultural collective efficacy. While inner-city residents can also develop collective efficacy through participation in church groups, block clubs, or community gardens,[26] this Article emphasizes informal artistic endeavors because affordable housing law scholars have understudied the importance of cultural networks to traditionally marginalized groups.[27] Given the history of the term "culture" in urban studies, a researcher discussing the interplay between culture, urban poverty, and law treads on treacherous terrain.[28] Culture is a term that is difficult to define properly; it has been used to ignore distributive outcomes and to justify punitive and hegemonic practices.[29] Unlike many prior studies, this Article does not suggest that all members of a particular racial or ethnic group who live in the same low-income neighborhood share all the same norms or values. Rather, this Article uses the term culture to describe "the micro-level processes of meaning making and decision making—that is, the way that individuals in particular groups, communities, or societies develop an understanding of how the world works and make decisions based on that

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26. *See generally* Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527 (2006) (using a case study of urban community gardens in New York City as an example of how positive social capital in urban communities is insufficiently recognized and protected by our current land-use laws).

27. While housing law scholars generally have understudied the significance of cultural networks to traditionally marginalized groups, some housing law scholars have discussed the role of culture in social capital. This work has focused largely on the importance of creative individuals, such as artists, intellectuals, and professional knowledge workers, for the economic development of post-industrial cities in the U.S. These individuals are thought to have high cultural and social capital and thus cities that attract the "creative class" will experience economic growth, as businesses will invest in cities with high numbers of creative people. *See generally* RICHARD L. FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE (2002) [hereinafter FLORIDA, THE CREATIVE CLASS]; RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS (2005) [hereinafter FLORIDA, CITIES]. However, this analysis of culture and social capital underemphasizes both the positive and negative effects of culture on traditionally marginalized groups.

28. Early researchers argued that residents in predominately minority, segregated, poor, urban neighborhoods shared a universal culture that consisted of common norms and values. *See* Michèle Lamont & Mario Luis Small, *How Culture Matters: Enriching Our Understanding of Poverty*, *in* THE COLORS OF POVERTY: WHY RACIAL AND ETHNIC DISPARITIES PERSIST 76, 76 (Ann Lin & David Harris eds., 2008). This understanding of culture led to the problematic argument that the norms and values of "ghetto" residents, such as their lack of work ethic, were the primary and continuing cause of their poverty and social dysfunction. Politically, this argument was used to suggest that legal and public policy interventions to mitigate poverty and racial segregation were unhelpful because such structural interventions could not change the cultural behavior patterns of "ghetto" residents. These arguments were discredited by liberal scholars throughout the 1960s and 1970s. However, during the 1980s conservative scholars and policymakers revived such arguments as a justification for decreased governmental spending for urban inner-cities and their residents. *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 5–6 (1993).

29. *See* Steven Gregory, *If Baldwin Could Speak*, *in* A WAY OUT, *supra* note 9, at 102, 104 ("Moreover, assertions of cultural and socio-structural difference, often based on less than rigorous social research have been used throughout history to explain, legitimate, as well as de-politicize social inequalities.").

understanding."[30] Instead of focusing on a generalized concept of culture based on race, it examines how individuals living in the same neighborhoods or interacting in similar communities of place, or of interest, may share similar cultural frames or "shared group constructions of reality."[31] These constructions can impact how low-income minorities respond to negative conditions in their communities, such as poverty or crime. These cultural frames, narratives, and group constructions can help some low- to moderate-income minorities to generate alternative understandings of their neighborhoods and their possibilities within those neighborhoods, such that they can succeed in environments where the demographic data would suggest otherwise. These frames, narratives, and group meanings can also provide the basis for effective community organizing that helps traditionally marginalized groups stem gentrification and extract concrete benefits from revitalization in their communities.

Part I of this Article outlines both law-and-economists' and staunch integrationists' criticisms of place-based lawmaking. Part II describes new realities such as suburban decline, the gradual gentrification and revitalization of some inner-city neighborhoods, global inner-city investment, and other phenomena that reveal a landscape of increased metropolitan variety. These new realities should force some law-and-economists and staunch integrationists to reassess their conceptions of the inner-city. Parts III and IV reexamine the relationship between culture, social capital, and urban poverty using the new sociology and examples of positive cultural collective efficacy in New York City and Chicago. These examples suggest that there is some positive social capital in the inner-city that might provide the basis for a positive revitalization foundation. Lastly, Part V explores place-based laws that might protect cultural collective efficacy, such as the creation of historic districts with affordable housing protections secured through transferable development rights, foreclosure prevention strategies, techniques to mitigate eminent domain abuse, and reinterpretations of the affirmatively furthering mandate under the Fair Housing Act. These examples can protect cultural collective efficacy and advance distributive justice in urban reform. Part V also summarizes the implications of these findings for the debate regarding the efficacy of place-based legal strategies.

30. 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, 202 (2010).

31. *Id.* at 203.

I. The Case Against Place-Based Lawmaking

A. The Law and Economics School

Some law-and-economists critique place-based lawmaking as inefficient.[32] They maintain that directing economic subsidies to develop projects in low-income neighborhoods is expensive and generates high transaction costs.[33] They also assert that place-based lawmaking produces negative "spillover effects," which transfer the inefficiencies of developing subsidized projects to surrounding private, unsubsidized landlords and developers.[34] These spillover effects and high transaction costs are thought to suppress new private development and investment in neighborhoods with significant numbers of place-based projects.[35] Some law-and-economists also argue that place-based lawmaking creates negative "lock-in" effects.[36] These effects prevent tenants in subsidized buildings from using public subsidies to move to more desirable locations with better social networks and opportunities.[37]

These same scholars also contend that place-based lawmaking fails to deliver on its implicit promise of resident empowerment.[38] One example of place-based lawmaking is the mixed-income approach to urban redevelopment. Mixed-income development places low- to moderate-income renters and market-rate renters in the same multifamily buildings.[39] Proponents of the mixed-income approach presume that social mixing between residents at different income levels will result in improved social outcomes for the poor.[40] When analyzing mixed-income projects' record of success in this regard, some researchers have found that "the level of interaction between the income groups in [mixed-income] projects appears to be insignificant."[41] Based on this data, some

32. *See* Ellickson, *supra* note 9, at 995 ("[M]ost housing economists who have addressed the issue assert that, as a general matter, portable tenant-based subsidies are markedly more efficient and fairer than project-based subsidies.").

33. *See id.* at 997.

34. *See id.* at 1001.

35. *See id*.

36. *See id.* at 1000 ("In sum, project-based housing subsidies tend to have lock-in effects that are likely to worsen once a project ages.").

37. *See id.* at 1002 ("[P]lace-based policies may prevent a person from migrating to a more dynamic employment environment, and from creating valuable bridging social ties with the members of other population groups.").

38. *See, e.g.*, *id.* at 985 ("I contend that recent studies suggest that the benefits of social integration are seldom as great as advocates of mixed-income projects suppose.").

39. Paul K. Casey & Amy M. McClain, *Mixed-Finance Development of Public Housing*, *in* The Legal Guide to Affordable Housing Development 329, 337–39 (Tim Iglesias & Rochelle E. Lento eds., 2005).

40. *See* Ellickson, *supra* note 9, at 994 ("Many urban policy specialists, aware of the social pathologies associated with the early public housing projects, warm to the prospect of developments in which lower-class households mingle with middle-class role models.").

41. *Id.* at 1010.

law-and-economists conclude that the alleged social benefits of place-based lawmaking do not seem to outweigh the high economic costs.[42]

While law-and-economists do not assert that vouchers are a panacea for all social problems in the inner-city, some promote vouchers as preferable to place-based strategies[43] because vouchers, in theory, generate lower transaction costs, have fewer spillover effects, and enable residential mobility.[44] Law-and-economists also provide a social defense of vouchers. Some assert that voucher holders are far less likely than residents of place-based subsidized housing projects "to live in a neighborhood with a high rate of poverty."[45] Ellickson, for example, asserts that "[t]he relative invisibility of a voucher promises to help normalize a voucher holder's future relationships with neighbors."[46] This argument assumes that when voucher holders live in buildings with unsubsidized tenants, the source of their subsidy will be invisible to others and, thus, that they can avoid the stigma that often is assigned to subsidized tenants.[47]

However, this social defense of vouchers substantially overstates the number and quality of choices available to poor, minority voucher holders in practice.[48] In the private housing market, voucher holders face a number of both supply-side and demand-side constraints.[49] In many cities, particularly those with tight housing markets, there are often long waiting lists to obtain housing vouchers.[50] Landlords in higher opportunity neighborhoods with tight rental markets often refuse, or are reluctant, to rent to voucher holders because of the negative stigma attached to recipients of public assistance.[51] Landlords may assume that they can find other unsubsidized tenants to rent their properties and so

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42. *See id.*

43. *See id.* at 985 ("I contend that housing vouchers, in general, are far superior to mixed-income projects."); *see also* EDWARD L. GLAESER & JOSEPH GYOURKO, RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE 24–32 (2008); RICHARD GREEN & STEVEN MALPEZZI, A PRIMER ON U.S. HOUSING MARKETS AND POLICY 94 (2003); Rebecca Blank, *How to Wage the Next War on Poverty: Advising and Grading the Candidates*, PATHWAYS, Winter 2008, at 17.

44. *See* Ellickson, *supra* note 9, at 996, 1019 ("Compared to vouchers, project-based subsidies have a variety of shortcomings, some well-ventilated in the literature, others not . . . . Although hardly problem-free, vouchers confer greater benefits on recipients and avoid many of the pitfalls.").

45. *Id.* at 1011.

46. *See id.*

47. *Id.*

48. *See* XAVIER DE SOUZA BRIGGS ET AL., MOVING TO OPPORTUNITY: THE STORY OF AN AMERICAN EXPERIMENT TO FIGHT GHETTO POVERTY 227 (2010) (arguing that voucher supporters' assumption that voucher holders have unfettered choices in the private housing market "is an increasingly heroic assumption in tight, expensive housing markets").

49. *See id.* at 148.

50. *Housing Choice Vouchers Fact Sheet*, HUD, http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet (last visited Feb. 14, 2012).

51. *See* BRIGGS ET AL., *supra* note 48, at 76 (2010) (explaining that it is difficult to obtain apartments using housing choice vouchers in tight rental markets).

they do not want to rent to subsidized tenants.[52] Thus, the threat of exit assumed by many pro-voucher law-and-economists may not be a realistic option for many voucher holders.[53]

While some state and city fair housing statutes and ordinances prohibit discrimination against renters based on their source of income, these jurisdictions are in the minority.[54] Further, given that substantial numbers of voucher holders are racial and ethnic minorities,[55] landlords who discriminate on the basis of race or ethnicity may also discriminate against voucher holders. While law-and-economists' social justifications of vouchers are based upon some empirical studies,[56] their arguments are often based upon hypotheses about the behavior, choices, and preferences of low-income renters, their landlords, and neighbors that are not empirically grounded.[57] Lastly, while their criticisms of place-based lawmaking are not completely inaccurate, they tend to privilege the normative goal of short-term efficiency over the goal of redistribution by failing to analyze the long-term costs and distributive outcomes of voucher programs.

B. The Staunch Integrationists

Staunch integrationists also eschew place-based laws and policies. They critique place-based lawmaking primarily on social grounds. Staunch integrationists generally argue that place-based lawmaking keeps low-income minorities in segregated, inner-city neighborhoods and isolates them from predominately white, opportunity-rich, suburban neighborhoods.[58] William Julius Wilson's book, *The Truly Disadvantaged: The Inner-City, the Underclass and Public Policy*, was influential in shaping that view.[59] Wilson asserted that structural changes during the

52. *See id.* ("[I]n very tight markets . . . landlords appeared less willing to accept subsidized tenants, confident that they could find reliable, unsubsidized tenants and avoid the hassles of dealing with government required housing unit inspections, payment processing and eviction procedures.").

53. *See* Ellickson, *supra* note 9, at 999 ("This tenant possesses the same power as a market-paying renter to credibly threaten to leave, and might be similarly hard to replace.").

54. *See, e.g.*, Jenna Bernstein, Note, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 Cardozo L. Rev. 1407, 1412 (2010).

55. Martha M. Galvez, What Works Collaborative, What Do We Know About Housing Choice Voucher Program Location Outcomes? 6 (2010).

56. *See* Ellickson, *supra* note 9, at 1010.

57. *See id.* at 996–1000.

58. *See, e.g.*, Massey & Denton, *supra* note 28, at 18 ("The urban ghetto, constructed during the first half of the twentieth century and successively enforced thereafter, represents the key institutional arrangement ensuring the continued subordination of blacks in the United States."); James Rosenbaum et al., *New Capabilities in New Places: Low Income Black Families in Suburbia*, *in* The Geography of Opportunity: Race and Housing Choice in Metropolitan America 150, 150–51 (Xavier de Souza Briggs ed., 2005) (arguing that if housing is combined with residential-mobility strategies, it can also provide families with access to social and economic opportunities to improve their lives); *supra* note 12.

59. *See* Fiss, *supra* note 9, at 14–15. *See generally* William Julius Wilson, The Truly

1970s and 1980s, such as deindustrialization, the suburbanization of employment, and the growth of a low-wage service sector, created a predominately minority underclass in the inner-city, characterized by intense geographic concentrations of poverty, joblessness, and social isolation from positive middle-class role models.[60] Wilson also argued that those structural conditions led to a lack of positive social capital and solidified a culture of urban dysfunction in inner-cities.[61] Wilson concluded that the aim of public policies should be to dismantle neighborhoods with intense concentrations of poverty in an effort to connect residents with greater social opportunities.[62]

While Wilson rejected the classic "culture of poverty" arguments,[63] his work relied on a rather narrow construction of the relationship between structural conditions in poor neighborhoods and culture and social capital.[64] His work also underemphasized the differentiation that could exist in inner-city neighborhoods in different jurisdictions. His Chicago case studies were viewed as representative of the conditions in the average ghetto and, thus, his observations about the dynamics in Chicago were generalized to explain conditions in low-income, minority, inner-city neighborhoods throughout America.[65] While some scholars and policymakers interpret Wilson's work as supporting place-based mixed-income projects,[66] staunch integrationists use Wilson's work as support for people-based initiatives that move existing residents out of "the ghetto."[67]

The work of sociologists Douglas S. Massey and Nancy A. Denton, presented in *American Apartheid*, was also influential.[68] Massey and

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DISADVANTAGED: THE INNER-CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987).

60. *See* Wilson, *supra* note 59, at 49–62.

61. *See id.* at 60–62.

62. *See id.* at 157–59.

63. *See* MASSEY & DENTON, *supra* note 28, at 6 (explaining that liberal sociologists such as Wilson rejected the conservative culture of poverty argument).

64. *See* Mario Luis Small & Katherine Newman, *Urban Poverty After the Truly Disadvantaged: The Rediscovery of the Family, the Neighborhood, and Culture*, 27 ANN. REV. SOC. 23, 35 (2001) ("Wilson, generally known as a structuralist, argues that, though the lack of jobs was the ultimate cause behind the inner-city destitution, cultural and behavioral patterns perpetuate the conditions of the poor.").

65. *See* MARIO LUIS SMALL, VILLA VICTORIA: THE TRANSFORMATION OF SOCIAL CAPITAL IN A BOSTON BARRIO 131 (2004) ("Betraying the scarcity of ethnographic studies on this particular issue, Wilson's depiction of resource deprivation in high-poverty Chicago neighborhoods is often taken as indicative not merely of Chicago but of all poor neighborhoods.").

66. *See, e.g.*, Susan Bennett, *"The Possibility of a Beloved Place": Residents and Placemaking in Public Housing Communities*, 19 ST. LOUIS U. PUB. L. REV. 259, 281–84 (2000) (describing scholars' and policymakers' embrace of Wilson's deconcentration thesis as a justification for place-based mixed-income housing efforts).

67. *See* Fiss, *supra* note 9, at 27–29 (criticizing Wilson's support of place-based policies and supporting mobility programs using vouchers).

68. *See* MASSEY & DENTON, *supra* note 28, at 234–36.

Denton established that race exacerbated the poverty concentration and social isolation of poor blacks; they therefore asserted that race-conscious action aimed at remedying racial imbalances is also necessary.[69] Based upon this logic, steadfast integrationists advocated laws and policies designed to move predominately poor, black, urban inner-city residents to middle-class, predominately white, suburban neighborhoods that were viewed as areas of greater opportunity.[70] Such strategies seek to "invest in individuals, often with the explicit goal of allowing those individuals to move to a better life"[71] outside the ghetto.[72]

To the extent that staunch integrationists support place-based policies, they propose that agencies consider low-poverty, predominately white neighborhoods when determining the site selection for place-based public and affordable housing projects.[73] Fair housing advocates have recently brought a spate of lawsuits in various jurisdictions that sue housing agencies for failing to "affirmatively further housing" in the LIHTC program.[74] These suits essentially allege that housing agencies that allocate a substantial number of their housing subsidies to projects in predominately low-income, minority areas violate the Fair Housing Act by failing to "affirmatively further fair housing." While these efforts seek to promote integration by shifting place-based subsidies to predominately white, low-poverty areas of opportunity, a positive result in these cases would redirect subsidies for affordable housing from inner-city areas to other predominately suburban locations.

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69. *See id.* at 220.

70. *See id.* at 231 ("Given the reality of intense opposition to the construction of projects outside of the ghetto, significant desegregation is unlikely to occur by building new projects. More promise has been shown through the use of subsidized rental vouchers that enable poor blacks to obtain units through the private market.").

71. Davidson, *supra* note 4, at 1.

72. *See* James Rosenbaum et al., *supra* note 58, at 150 (explaining racial-mobility programs).

73. *See, e.g.*, Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL'Y 35, 80–82 (2002) (arguing that HUD should prioritize race consciousness and a regional perspective in order to address the problems of racial segregation and concentrated poverty in public housing); Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 388 (2003) (arguing that the HOPE VI public-housing legislation inadequately accounts for race in its site-selection processes and therefore reinforces "racially segregated housing patterns and communities' efforts to exclude 'undesirable' populations"); Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 U. MIAMI L. REV. 1011, 1031 (1998) (analyzing the fair housing mandates under the LIHTC and recommending strategies for the Treasury Department to satisfy them); Herbert R. Giorgio, Jr., Comment, *HUD's Obligation to "Affirmatively Further" Fair Housing: A Closer Look at HOPE VI*, 25 ST. LOUIS U. PUB. L. REV. 183, 217 (2006) ("HUD should also evaluate its selection criteria and consider its review and scoring processes in light of the Fair Housing Act mandate to affirmatively further fair housing.").

74. *See, e.g.*, Inclusive Cmyts. Project, Inc. v. HUD, No. 3:07-CV-0945-O, 2009 WL 3122610, at *2 (N.D. Tex. Sept. 29, 2009); Asylum Hill Problem Solving Revitalization Ass'n v. King, 890 A.2d 522, 524 (Conn. 2006); *In re* Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004).

Instead, staunch integrationists promote housing vouchers as the preferred tool to advance social mobility and racial integration.[75] Staunch integrationists recognize the limitations of vouchers described above,[76] but they also insist that, with proper governmental and policy interventions, racial-mobility programs are preferable to place-based efforts that house the poor in high-poverty, racially segregated areas.[77] Integrationists encourage voucher distribution agencies to provide voucher recipients with extensive counseling about the advantages of moving to opportunity-rich, usually suburban, and predominately white neighborhoods.[78]

Integrationists and fair housing advocates' support for people-based lawmaking is largely predicated upon the results of two famous studies, the Gautreaux Assisted Housing Program and the Moving to Opportunity experiment. The Gautreaux Assisted Housing Program was a remedial program that operated from 1976 through 1998.[79] The program enabled approximately 8000 Chicago public-housing residents to use housing choice vouchers to move to low-poverty, predominately white areas within the city of Chicago and 115 Chicago suburbs.[80] Northwestern sociologist James Rosenbaum, along with other scholars, conducted numerous studies, which showed that suburban movers experienced greater quality-of-life improvements than city movers.[81] Based upon these studies, staunch integrationists embraced racial-mobility programs as the preferred mechanisms to achieve racial integration and social uplift. Yet the Gautreaux program's success was based, in part, upon its selection of public-housing residents who were socially and economically well-positioned to make such moves.[82] Further, the number of residents who made successful moves was small in comparison to the 40,000 residents who were in the Gautreaux remedial class.[83]

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75. *See, e.g.*, POLIKOFF, *supra* note 9, at 382–83; Fiss, *supra* note 9, at 28–43; Rosenbaum et al., *supra* note 58, at 151 (arguing that if housing is combined with residential-mobility strategies, it can provide families with access to social and economic opportunities to improve their lives).

76. *See* BRIGGS ET AL., *supra* note 48, at 83 ("Like other forms of housing assistance, vouchers have often exacerbated, not mitigated, segregation in housing.").

77. *See id.* at 233; Owen Fiss, *A Task Unfinished*, *in* A WAY OUT, *supra* note 9, at 113–25.

78. *See* Sean Zielenbach, *Moving Beyond the Rhetoric: Section 8 Housing Choice Voucher Program and Lower-Income Urban Neighborhoods*, 16 J. AFFORDABLE HOUS. & CMTY. DEV. L. 9, 31 (2006) (reporting mobility counseling in Philadelphia).

79. *See The Gautreaux Housing Mobility Program*, BPI CHI., http://www.bpichicago.org/HousingMobilityPrograms.php (last visited Feb. 14, 2012).

80. *See id.*

81. *See, e.g.*, *id.*; *see also* LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA 189–90 (2000).

82. *See, e.g.*, POLIKOFF, *supra* note 9, at 249; *see also* Lisa T. Alexander, *A Sociolegal History of Public Housing Reform in Chicago*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 155, 185 (2008).

83. Alexander, *supra* note 82, at 157.

The Gautreaux program's success led the U.S. Department of Housing and Urban Development ("HUD") from 1994 to 1998 to pursue a broader federal mobility program called Moving to Opportunity ("MTO").[84] MTO was similar to the Gautreaux program in that it provided former public-housing residents with vouchers to move to areas of opportunity. Yet it was a nationwide program and did not consider race in its definition of opportunity areas.[85] MTO also did not provide movers with race-specific mobility programs that would help residents learn about the benefits of moving to predominately white, low-poverty, suburban areas.[86] The movers under MTO ultimately had less success than movers under the Gautreaux program, as MTO experiment's results were mixed. After five years, many of the families in the MTO's favored experimental group were once again living in high-poverty neighborhoods.[87] While the social benefits of mobility were significant for young female participants, on average most male participants did not experience benefits and even showed some signs of increased delinquency.[88]

Many attributed the differences in outcomes to MTO's lack of consideration of race in its definition of opportunity moves.[89] Others suggested that low-income movers' connections to their old neighborhoods and social networks often precluded them from flourishing in new communities of opportunity.[90] Yet the legacy of Gautreaux and MTO is that there is significant variation in the quality-of-life improvements achieved by low-income individuals participating in both racial- and economic-mobility programs. Further, metropolitan landscapes have changed significantly since these studies were conducted. More recent demographic and social shifts in metropolitan urban areas reveal a landscape of increased variability.[91] That variability may require affordable housing law scholars and practitioners to reassess whether suburban-focused racial-mobility programs should be the sole approach to integration, poverty alleviation, and social uplift.

84. *See* BRIGGS ET AL., *supra* note 48, at 5.
85. *See* Alexander, *supra* note 82, at 158.
86. *See id.*
87. *See* BRIGGS ET AL., *supra* note 48, at 14.
88. *See id.*
89. *See* Alexander, *supra* note 82, at 158.
90. BRIGGS ET AL., *supra* note 48, at 133–34.
91. *See* discussion *infra* Part II.A.

II. New Metropolitan Realities: Reflections on Urban Space, Power, and Law

A. Suburban Decline

Some law-and-economists and staunch integrationists overlook new demographic shifts and investment patterns that are slowly redefining some suburban spaces. The decline of the traditional city-suburb divide, shifting urban demographics, and the novel dynamics of globalization require people-based proponents to reexamine their presumptions about prosperous, white, suburban communities and declining minority urban areas.[92] Many suburban areas are in decline, and some formerly disinvested inner-city areas are on the cusp of revitalization. As Bernadette Hanlon, John Rennie Short, and Thomas Vicino argue in their book, *Cities and Suburbs: New Metropolitan Realities in the US*, new patterns of metropolitan development and investment have emerged.[93] Recently, there have been at least "three major cycles of investment into downtowns, selected inner-city areas, and favored suburban neighborhoods, and a major cycle of disinvestments from many inner suburbs."[94] These new patterns include a disinvestment in "inner areas of selected working-class and middle-class suburban neighborhoods as the demand for these neighborhoods [has] shrunk."[95] The loss of manufacturing jobs is one cause of the devalorization of such neighborhoods.[96] The recent subprime mortgage crisis and the current recession have exacerbated these processes of devalorization in many working-class white areas, as well as in minority areas, as people face foreclosure due to loss of jobs.[97]

In light of these new metropolitan realities, not all suburbs are the superior metropolitan space to which low-income, inner-city minorities should move.[98] Not all suburbs have the monolithic quality of

92. Some scholars increasingly recognize that new metropolitan realities force scholars, lawyers, and policymakers to rethink traditional conceptions and alignments. *See* john a. powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 Ind. L. Rev. 605, 609 (2008) ("A theme that has been emerging in the demographic profile of many major metropolitan areas in the United States suggests that we must retire some of our traditional views on city-suburban disparities.").

93. Bernadette Hanlon, John Rennie Short & Thomas J. Vicino, Cities and Suburbs: New Metropolitan Realities in the US 77 (2010).

94. *See id.*

95. *See id.* at 69.

96. *See id.* at 69–70 ("The decline of manufacturing jobs is so important in our story . . . . The decline meant a loss of these employment opportunities. This created a weakening in the power of organized labor in the private sector and ultimately a crack in the foundation of mass suburbanization.").

97. *See, e.g.*, Conor Dougherty, *Cities Grow at Suburbs' Expense During Recession*, Wall St. J., July 1, 2009, at A5 (analyzing census data showing that the recession curbed migration to the suburbs and increased growth in many urban areas); Les Christie, *Mounting Job Losses Fueling Foreclosures*, CNNMoney.com (Nov. 7, 2008, 5:18 AM), http://money.cnn.com/2008/11/04/real_estate/job_losses_fuel_foreclosure/index.htm (describing an increase in foreclosures due to job losses).

98. *See* William Julius Wilson, *Forward* to The Geography of Opportunity, *supra* note 58, at ix,

predominately white, high-opportunity neighborhoods.[99] Thus, housing-mobility programs that encourage moves to low-poverty, predominately white areas may encourage moves to devalorized suburban neighborhoods as they are in transition.[100] These may be the few areas in which landlords are willing to accept housing choice vouchers.[101] This Article acknowledges that many racially segregated, inner-city neighborhoods with high levels of poverty are still cause for concern. Thus, racial-mobility programs and efforts to site projects in more integrated areas should still be a part of U.S. low-income housing policy. However, scholars and practitioners need to think not only of the classic city-versus-suburb dynamic, but also of a growing new regional metropolis of great complexity and increasing segmentation of space.[102]

B. Gentrification and Revitalization

As some suburbs decline, global capital and wealthier individuals are rediscovering some inner-city areas.[103] Many inner-city neighborhoods are in close proximity to downtowns that are substantially revitalizing.[104] Globalization's restructuring of American industries from a manufacturing to a service emphasis has generated new demographic changes in some urban areas.[105] Groups of service workers in highly skilled and highly paid industries are attracted back to cities both to work and to live.[106] These new urban dwellers tend to have expensive tastes and needs that create a demand for unskilled, low-paid workers in the

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xi ("The familiar perception of a beleaguered urban core surrounded by prosperous suburbs is giving way to a new perception in which both urban and suburban communities suffer from too-rapid growth in outlying areas and slowed growth or even absolute decline in older, inner, areas.").

99. *See* powell, *supra* note 92, at 610 ("As a result, a suburban address does not necessarily indicate a neighborhood of 'high-opportunity,' which casts doubt on the rosy glow of statistics indicating the increasing suburbanization of minorities.").

100. Most housing-mobility programs define a low-poverty area as place with less than ten percent poverty, but suburban neighborhoods on the brink of devalorization and disinvestment can meet this definition. *See* john a. powell & Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 How. L.J. 433, 441–42 (2003) ("Displaced low-income families are given no other option in today's housing market than to relocate to other areas where affordable housing exists, areas which are more often than not, as a result of regional forces, also unstable, declining, and economically isolated from the opportunities of high performing schools, employment growth, and a strong municipal tax base.").

101. Briggs et al., *supra* note 48, at 77 (explaining that it is difficult to obtain apartments using housing choice vouchers in tight rental markets).

102. *See* Hanlon et al., *supra* note 94, at 77.

103. The present global fiscal crisis has slowed but not eradicated these dynamics. *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, 12–15 (2006) (explaining the reasons for renewed upper-middle-class interest in inner-cities).

104. *Id.* at 4.

105. *See id.* at 13 (describing the demographic shifts in urban areas caused by globalization).

106. *See* Florida, Cities, *supra* note 27, at 33.

city.[107] As noted economist Richard Florida explained in his work on the "creative class," many of these affluent service workers are in industries where "creativity [is] a key factor in [their] work," such as engineering, architecture, design, writing, law, art, or music.[108] These members of the "creative class" increasingly "find that the city meets their needs."[109] They tend to "delay[] marriage longer," "to purchase residences on their own," to reside next to public transportation, to like diverse, "funky eclectic places" with walkable, centrally located neighborhoods.[110] Downsizing seniors are also increasingly willing to move near revitalized downtowns.[111] In dense urban cities with tight rental markets, inner-city areas can be increasingly attractive sites for these young urban professionals ("yuppies"), black urban professionals ("buppies"),[112] seniors, urban pioneers, artists, and others who formerly may have sought residence only in suburbs during a period of expanded suburbanization.[113]

This pattern is not only the result of individualized market decisions, but also of government action.[114] State and local governments increasingly seek to attract private, global capital and wealthier residents to urban inner-city spaces.[115] Federal, state, and local governments may facilitate private revitalization and gentrification through tax incentives, land use, and zoning permissions, or through the use of eminent domain.[116] Cities increasingly improve parks, create charter schools, and develop more child-friendly urban spaces.[117] Governments are also facilitators of publicly subsidized, but privately financed and stewarded,

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107. *See* FLORIDA, THE CREATIVE CLASS, *supra* note 27, at 71; McFarlane, *supra* note 103, at 13.

108. FLORIDA, THE CREATIVE CLASS, *supra* note 27, at ix.

109. McFarlane, *supra* note 103, at 13; *see* Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275, 1275 (2006) (arguing that the resurgence of urban areas is due, in part, to increased demand for intense social interactions in dense cities and reductions in urban crime).

110. McFarlane, *supra* note 103, at 13–14 (citing FLORIDA, THE CREATIVE CLASS, *supra* note 27).

111. Rebecca Sohmer & Robert E. Lang, *Life at the Center: The Rise of Downtown Housing*, FANNIE MAE HOUS. FACTS & FINDINGS, Spring 1999, at 1, 2, *available at* http://www.knowledgeplex.org/kp/text_document_summary/article/relfiles/hff_0101_sohmer.html ("The population of 'empty-nesters' will continue to grow [and] empty-nesters often change their lifestyles in a way that favors downtowns . . . .").

112. MARK GOTTDIENER & RAY HUTCHISON, THE NEW URBAN SOCIOLOGY 161 (4th ed. 2011) ("As large numbers of African-American college graduates entered the labor force in the 1980s, the term *buppie* was used to identify the black urban professional.").

113. *See* McFarlane, *supra* note 103, at 15.

114. *See id*. at 16 ("State and local governments have deliberately intervened in development to attract the affluent to the cities."); *see also* GOTTDIENER & HUTCHINSON, *supra* note 112, at 88 (describing the government and politicians as principal factors in metropolitan change).

115. *See* McFarlane, *supra* note 103, at 16–17.

116. *See id*.

117. *See, e.g.*, *Mayor Michael Bloomberg, New York, New York*, LEADERSHIP FOR HEALTHY CMYTS., http://www.leadershipforhealthycommunities.org/content/view/353/82/ (last visited Feb. 14, 2012).

mixed-income and public-housing reform projects.[118] These projects can spur processes of revitalization and gentrification in previously disinvested areas.[119] Universities located in, or near, previously disinvested inner-city areas are often also stewards of revitalization efforts.[120] These place-based projects can have a long-term gentrifying and displacing effect, particularly if they do not include sufficient legal protections or benefits for existing low-income residents. As localities increasingly search for new sources of revenue, they may support tax incentives and development projects that do not advance the interests of the most marginalized stakeholders in a given area.[121]

C. Global Inner-City Investment

Through a symbiotic and dynamic process, this confluence of workforce changes, individual market preferences, and government- and university-sponsored revitalization further reinforces global capital's interest in inner-cities. Aware of trends that will make inner-cities more valuable sites in the future, global private equity funds,[122] real estate investment trusts,[123] and other large international developers are increasingly being attracted to previously disinvested inner-city areas *before* they substantially gentrify.[124] Global capital market investors may seek arbitrage or rent-gap opportunities that exist in low-income, minority areas.[125] Arbitrage is "[t]he simultaneous purchase and sale of an asset in order to profit from a difference in the price."[126] Rent gaps describe the discrepancy between the value or rent that can be extracted from a piece of property in its current state versus the value or rent that can be

118. *See* Casey & McClain, *supra* note 39, at 330 (explaining that the mixed-income approach to housing combines federal public-housing dollars with private dollars to develop public housing).

119. *See generally* Lynn E. Cunningham, *Islands of Affordability in a Sea of Gentrification: Lessons Learned from the D.C. Housing Authority's HOPE VI Projects*, 10 J. Affordable Housing & Cmty. Dev. L. 353, 360 (2001).

120. *See generally* The University as Urban Developer: Case Studies and Analysis (David C. Perry & Wim Wiewel eds., 2005); Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 Calif. L. Rev. 1999 (2007).

121. *See* McFarlane, *supra* note 103, at 6–8 (describing incentives used by state and local governments to revitalize the inner-city to attract affluent residents).

122. *Private Equity*, Investopedia.com, http://www.investopedia.com/terms/p/privateequity.asp (last visited Feb. 14, 2012).

123. *Real Estate Investment Trust—REIT*, Investopedia.com, http://www.investopedia.com/terms/r/reit.asp (last visited Feb. 14, 2012).

124. McFarlane, *supra* note 103, at 18 (explaining real estate investors' attraction to low-income disinvested areas); *see also* Ass'n for Neighborhood & Hous. Dev., Predatory Equity: Evolution of a Crisis 5 (2009).

125. *See* Neil Smith, The New Urban Frontier: Gentrification and the Revanchist City 67–69 (1996) (explaining that financial institutions and professional developers usually spark gentrification by seeking to take advantage of rent-gap opportunities).

126. *Arbitrage*, Investopedia.com, http://www.investopedia.com/terms/a/arbitrage.asp (last visited Feb. 14, 2012).

extracted from a piece of property if it is put to its highest and best use.[127] Global investors can invest in private equity or real estate funds that purchase buildings when they are cheap or before land costs substantially rise in a given area.

Notably, investors can achieve the greatest arbitrage or profit when inner-city communities are poor, segregated, and socially and politically disorganized. When communities contain fractionated land ownership, poor schools, and other conditions that suppress the value of existing improvements on the land, investors can obtain property at reduced rates. Local governments using eminent domain for economic development or to correct blight can also provide land cost write downs or other public subsidies to create conditions for increased global capital investment in the inner-city. Some real estate investors seek to profit from obtaining ownership of property in inner-city communities at a discounted price and then selling the property at elevated prices when the community gentrifies.[128] The recent recession may have decelerated the pace of gentrification in inner-cities, as some investors are increasingly skeptical about the profit potential of inner-city spaces.[129] Furthermore, many inner-city projects have stalled or entered foreclosure because they were overleveraged.[130] Nevertheless, new speculators and potential investors still exist.[131] Global capital's interest in some inner-city neighborhoods may have waned only temporarily, not ceased altogether.[132] Gentrification, and the often associated displacement of low-income minorities from inner-city areas, is still a possible threat that complicates the classic vision of disinvested cities and prosperous suburbs.[133]

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127. Neil Smith developed the rent-gap theory as an explanation for the gentrification of formerly disinvested areas. Smith argued that when the rent gap is significantly large, gentrification can occur, as investors have significant incentives to purchase structures cheaply, pay the relevant costs for builders' construction loans and mortgages, and then resell the product at a significant profit. SMITH, *supra* note 125, at 67–69.

128. *See* ASS'N FOR NEIGHBORHOOD & HOUS. DEV., *supra* note 124, at 5.

129. *See* Stephanie Fitch, *Real Estate: The End of Gentrification?*, FORBES.COM (June 3, 2009) http://www.forbes.com/2009/06/02/real-estate-panel-intelligent-investing-fitch.html.

130. *See infra* notes 264–66 and accompanying text.

131. *See* ASS'N FOR NEIGHBORHOOD & HOUS. DEV., *supra* note 124, at 20 (explaining that certain private equity funds are continuing the speculative model).

132. *See* Fitch, *supra* note 129.

133. Recently, a number of scholars have challenged the notion that gentrification leads to displacement of residents. They argue that gentrification can be "good" for low-income residents. *See* LANCE FREEMAN, THERE GOES THE 'HOOD: VIEWS OF GENTRIFICATION FROM THE GROUND UP 1 (2006) ("Residents of the 'hood are sometimes more receptive because gentrification brings their neighborhoods into the mainstream of American commercial life with concomitant amenities and services that others might take for granted. It also represents the possibility of achieving upward mobility without having to escape to the suburbs or to predominately white neighborhoods."); J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405–06 (2003) (arguing that gentrification tends to enhance "the political and economic positions of all" because a larger number of affluent and

D. The Missing Analysis of Power

Many staunch integrationists and law-and-economists discount how these new metropolitan realities influence the power dynamics of urban redevelopment. Wealthier and socially dominant groups can shape the direction of development to maximize their interests when there are still substantial numbers of low-income minorities, few whites, and when the census tracts still show evidence of disinvestment, poor job creation, and low educational attainment. Power may begin to shape urban space in a way that disadvantages existing residents even before wealthy interests, and the benefits they bring with them, arrive.[134] As a result, the interests of existing residents can be subordinated[135] in urban revitalization goal-setting and decisionmaking projects before a neighborhood has truly gentrified or integrated. This subordinating power dynamic occurs, in part, because localities and elected representatives often are conflicted regarding whose interests urban revitalization should promote.[136] As localities' interests in expanding the tax base coincides with global capital's interest in arbitrage opportunities, state and local officials often cannot be relied upon to ensure that development projects advance the long-term interests of low-income minorities. Localities may approve of private development projects or urban revitalization plans that do not include sufficient legal protections to ensure that low- or moderate-income individuals maintain a presence in their neighborhoods and obtain concrete benefits from urban reform.

Contrary to the older paradigm of local governments and housing agencies run primarily by whites beholden to a hostile white electorate, the "state" is now increasingly run by a diverse mix of leaders, including many working- and middle-class people of color.[137] These individuals do not necessarily advance the interests of their low- to moderate-income

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well-educated residents increases the cities' tax-bases, and because displacement of poor and ethnic minorities is not as extensive a problem as some would think); Kathe Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 Urb. Stud. 23 (2006). Many of these studies, however, do not sufficiently analyze the role of place-based low-income housing policies in helping existing residents remain in place to benefit from gentrification.

134. *Cf.* Gottdiener & Hutchinson, *supra* note 112, at 174 (describing how inner-city areas restructure to attract more affluent residents in a manner that ignores the needs of existing, less affluent residents and that privileges the needs of wealthier residents).

135. *See generally* Audrey G. McFarlane, *Rebuilding the Public-Private City: Regulatory Taking's Anti-Subordination Insights for Eminent Domain and Redevelopment*, 42 Ind. L. Rev. 97 (2009) (providing an excellent discussion of this subordinating dynamic).

136. *See id.* at 130–32; *see also* Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 Geo. J. on Poverty L. & Pol'y 117, 138–42 (2009).

137. *See generally* Celeste Watkins-Hayes, The New Welfare Bureaucrats: Entanglements of Race, Class, and Policy Reform (2009).

constituents merely because they are people of color.[138] These decisionmakers may be quite conflicted about whose interests to privilege in urban revitalization efforts. Even when governments are supportive of place-based projects that seek to preserve affordable housing for moderate- to low-income individuals, they may not include legal protections to ensure long-term benefits for the lowest-income residents.

Further, the process of urban inner-city reform decisionmaking has become increasingly decentralized and privatized.[139] Urban redevelopment projects are increasingly financed and stewarded by public-private partnerships represented by complex legal arrangements, such as multilayered limited partnerships ("LPs") or limited liability companies ("LLCs"), including syndicators and nonprofit community development corporations.[140] Governments are rarely the sole or the main protagonists on the urban redevelopment stage, and they must cater to increasing numbers of private investors and interests.[141] The affordable housing real estate development deals and negotiations also occur privately behind closed doors and involve complex legal, financial, and regulatory arrangements.[142] While regulatory requirements for public participation exist, those requirements are often minimal, or they can they be easily co-opted to reflect the interests of the more dominant, wealthy, and powerful interests in the redevelopment network.[143] Thus, the state alone cannot be relied upon to protect the interests of the most subordinated or traditionally marginalized stakeholders in the political arena of urban reform.

Low-income minorities in inner-city centers must increasingly navigate this complex political, economic, and social terrain of urban reform. In these contested environments, it is important to consider how they can best position themselves to benefit from current or future reform and revitalization. What role do social capital and collective efficacy play in helping low-income minorities mitigate the negative effects of living in a poor community before it improves? How do low-income minorities in some inner-city communities bolster their bargaining and advocacy positions to gain from, rather than be displaced by, gentrification and revitalization? Place-based laws, which protect cultural collective efficacy in inner-city neighborhoods, may strengthen

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138. Alexander, *supra* note 136, at 138–39.

139. McFarlane, *supra* note 135, at 130.

140. Rochelle E. Lento, *Federal Sources of Financing*, *in* THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT, *supra* note 39, at 215, 230–34.

141. *See* McFarlane, *supra* note 135, at 130.

142. *See id.* at 158.

143. *See, e.g.*, *id.*; *see also* Alexander, *supra* note 136, at 165; Patience A. Crowder, *"Ain't No Sunshine": Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 TENN. L. REV. 623, 639 (2007).

the negotiating, bargaining, and organizing positions of low-income minority groups before full-scale gentrification has occurred. Perhaps, under contemporary conditions, place-based laws can even further integration by giving low-income minorities a more solid legal and social footing in their communities before new, wealthier, and predominately white residents move in.

Notably, it is difficult to enact place-based laws and projects that benefit existing low-income residents when a community has substantially revitalized and integrated. The best time to enact place-based laws and policies is often before full revitalization. Distributive justice may be advanced by enacting place-based laws in low-income, minority, inner-city communities that have evidence of positive social capital before gentrification and integration occurs. Enacting place-based laws to protect positive social capital may be preferable to laws and policies that promote mobility and dispersion. Staunch integrationists' and law-and-economists' conceptions of most low-income inner-city areas as deficient does not sufficiently account for these new metropolitan realities and power dynamics. Consequently, their critiques of place-based lawmaking may need to be qualified and reexamined. Place-based lawmaking may be justified if it can advance distributive justice for low-income minorities under such conditions.

III. Cultural Collective Efficacy as Positive Bonding Social Capital

A. Positive Social Capital, Culture, and Urban Poverty

Some law-and-economists and staunch integrationists contend that most inner-city neighborhoods suffer from profound social-capital deficits.[144] As distinguished from other forms of capital, such as human capital (training) or physical capital (a tool, skill, or asset), social capital is formed through an individual's or an organization's web of social relations and ties.[145] The term "social capital" connotes that "social networks have value."[146] Based on extensive empirical research, social-capital theorists contend that people's social networks affect their

144. *See* Fiss, *supra* note 9, at 5 ("The only strategy with any meaningful chance of success is one that ends the ghetto as a feature of American life . . . . With the means to move, most will leave, and that will be enough to break the concentration of mutually reinforcing destructive forces—poverty, joblessness, crime, poorly functioning social institutions—that turn the ghetto into a structure of subordination. The physical space that once belonged to the ghetto quickly will be reclaimed by developers and transformed into a new, up-and-coming neighborhood."); *see also* Polikoff, *supra* note 9, at 367 ("[I]t would be difficult to find many features of American society that match the black ghetto's poisoning effect on attitudes, values, and conduct.").

145. *See* Putnam, *supra* note 20, at 19.

146. *See id*.

opportunities and life chances.[147] These theorists argue that a "socially well-connected" person has a kind of "resource," "currency," or "capital" that allows her to more easily connect to other positive economic and social resources.[148]

Scholars describe different dimensions of social capital: "Bonding social capital" connotes an inward-looking set of social relations or networks that bond an individual or an organization to a closely knit group of insiders.[149] "Bridging social capital" is bonding social capital's opposite—it indicates an inclusive form of networking that can connect an individual or an organization to external assets, broader networks, and diverse identities.[150] In analyzing the life chances of the poor, social-capital theorists contend that the poor can achieve greater social mobility with extensive, high quality, bridging social networks. As sociologist and social-capital theorist Xaiver de Souza Briggs explains, "bonding social capital is . . . good for 'getting by', but bridging social capital is crucial for 'getting ahead.'"[151]

According to some theorists, bridging social capital also has a spatial dimension.[152] Neighborhoods with concentrated poverty and racial segregation are viewed as having insufficient assets and positive bonding or bridging social capital to connect the poor to opportunity.[153] This conception is based, largely, upon extensive academic and policy research that shows that the structural conditions in such neighborhoods (for example, deindustrialization, high poverty levels, high segregation rates, high unemployment rates, extensive crime, and low educational attainment) make these locations highly undesirable places to live.[154] While these indicators accurately capture economic, educational, and other structural disadvantages in neighborhoods, some sociologists argue that census tracts may be "woefully inadequate proxies" for fully

147. Rosenbaum et al., *supra* note 58, at 152–53.

148. *Id.*

149. *See* PUTNAM, *supra* note 20, at 22.

150. *See id.* at 22–23.

151. *See id.* at 23 (footnote omitted) (quoting Xaiver de Souza Briggs).

152. *See* Small & Newman, *supra* note 64, at 32–34 (providing several scholars' descriptions of the effects of reduced social capital on adolescents raised in poor neighborhoods).

153. *See generally* EDWARD G. GOETZ, CLEARING THE WAY: DECONCENTRATING THE POOR IN URBAN AMERICA (2003).

154. *See, e.g.*, David M. Cutler & Edward L. Glaeser, *Are Ghettos Good or Bad*?, 112 Q.J. ECON. 827, 828 (1997) ("[W]e find strong, consistent evidence that black outcomes are substantially worse (both in absolute terms and relative to whites) in racially segregated cities than they are in more integrated cities."); Christopher Jencks & Susan E. Mayer, *The Social Consequences of Growing Up in a Poor Neighborhood*, *in* INNER-CITY POVERTY IN THE UNITED STATES 111, 117 (Laurence E. Lynn, Jr. & Michael G.H. McGeary eds., 1990). *See generally* SEGREGATION: THE RISING COSTS FOR AMERICA (James H. Carr & Nandinee K. Kutty eds., 2007) (offering a collection of essays describing how extreme residential segregation in housing markets has led to significant disparities in access to good jobs, high-quality education, homeownership attainment, and asset accumulation between minority and majority households).

understanding the distinct differences among residents living in the same geographic area.[155] Some sociologists attempt to replace census tracts with "smaller block groups,"[156] "neighborhood clusters,"[157] or "localities" that provide "a narrower geographic area of socialization"[158] and that reflect local individuals' perceptions about the boundaries of neighborhoods.[159] These newer analytical frameworks are important because individuals' perceptions of the "boundaries of their neighborhoods may be important determinants of how the neighborhoods affect them."[160] These newer sociological studies reveal that residents in poor neighborhoods exhibit substantial behavioral and cultural heterogeneity.[161] Poor individuals in impoverished, segregated neighborhoods can respond quite differently to negative structural conditions.

Some individuals may experience success, despite negative structural conditions, in part because of differences in their social networks, cultural frames, and cultural narratives. Sociologists of culture have conducted rich empirical studies, using both quantitative and qualitative measures, which suggest that cultural factors, developed through social interactions and networks, can influence how low-income residents respond to poverty.[162] In his groundbreaking study of the local participation patterns of residents in a Latino housing project in Boston, Mario Small demonstrated the importance of the different cognitive *cultural frames* that various groups used to understand their neighborhoods.[163] A cultural frame is a lens or viewpoint that structures how individuals interpret events and how they react to them.[164] In Small's study, those residents "who perceived themselves as living in a neighborhood with a significant history of political and social involvement continued that tradition by participating in local activities."[165] In contrast, those residents "who perceived the neighborhood as little more than the projects, a low-income area with no especially notable history, did not."[166] Thus, the different cultural frames that low-income Latino residents used

155. Small & Newman, *supra* note 64, at 31.

156. *See id.*

157. Sampson et al., *supra* note 23, at 919.

158. Small & Newman, *supra* note 64, at 31 (citation omitted).

159. *Id.*

160. *Id.*

161. *See* Lamont & Small, *supra* note 28, at 76.

162. *See generally id.* (surveying a range of qualitative empirical work done by cultural sociologists to develop a more "subtle, heterogeneous, and sophisticated picture of how cultural factors shape and are shaped by poverty and inequality").

163. *See generally* SMALL, *supra* note 65.

164. *See* Mario Luis Small et al., *Reconsidering Culture and Poverty*, 629 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 14–15 (2010).

165. Lamont & Small, *supra* note 28, at 80.

166. *Id.* at 80–81.

to understand their neighborhoods affected how they responded to their neighborhoods' conditions. Small's work showed that some residents' social networks and cultural frames helped them develop alternative positive understandings of their neighborhoods.[167] Those alternative positive constructions also motivated some residents to engage in positive social action.[168] His study also contradicted the notion that all poor individuals from the same ethnic group living in the same neighborhood share a "common culture."[169]

Small extended his analysis of cultural factors to include individuals' organizational networks. In his book *Unanticipated Gains*, Small investigated how the organizational and institutional networks in which individuals are involved affect the quantity and quality of their organizational ties.[170] Using a case study of low-income mothers and their interactions with neighborhood child-care centers in New York City, Small demonstrated that child-care centers often maintained ties to other organizations that benefited mothers and their children by providing access to information, services, and goods.[171] Notably, centers in poor neighborhoods often "maintained more, not fewer, [of] such ties because local governments and other powerful actors . . . intervened to this end."[172] Thus, people in poor neighborhoods might not always fare worse than individuals in less poor neighborhoods because "the negative effects of crime, poor schools, and other factors would be tempered by the positive effects of participating in better connected organizations."[173]

Sociologists of culture also use the concept of *cultural narratives* to explain variations in how groups respond to neighborhood poverty.[174] Narratives constitute a set of stories that have "a beginning, a middle, and an end and contain causally linked sequences of events."[175] Individuals use narratives to explain and to interpret their personal experiences.[176] Narratives can influence behavior because individuals often choose to act in a way that is consistent with their personal narratives and identities. For example, Alfred Young, Jr., studied the mobility narratives of young black men in one of Chicago's former west-

167. SMALL, *supra* note 65, at 145 (stating that some residents were more likely than others to get involved in neighborhood activities because of the cultural frames through which they understood their neighborhoods).

168. *Id*. at xv.

169. *Id*. at xvii.

170. MARIO LUIS SMALL, UNANTICIPATED GAINS: ORIGINS OF NETWORK INEQUALITY IN EVERYDAY LIFE 17–18 (2009).

171. *Id.* at 196.

172. *Id.*

173. *Id.*

174. *See* Small et al., *supra* note 164, at 17.

175. *Id.* at 16.

176. *Id.* at 17.

side housing projects.[177] He found that the men "who were most isolated from whites and had experienced the least involvement in the labor market were the most optimistic about equality of opportunity and the least likely to believe that racism affected their life chances."[178] Conversely, those who had "considerable experience with whites cited prejudice as an important barrier to economic advancement."[179] The cultural narratives insight illuminates how an individual's self-conception can influence action or inaction.[180] It also explains how self-conceptions can be influenced by individuals' social networks. Most importantly, the above-described studies demonstrate that residents in poor neighborhoods exhibit substantial behavioral and cultural heterogeneity. While negative social capital undoubtedly exists in many urban inner-city areas, affordable housing law scholars and practitioners have not sufficiently engaged this newer research, which develops a more nuanced and differentiated picture of social capital in the inner-city.

B. Cultural Collective Efficacy Defined

This Article asserts that cultural collective efficacy is an important type of positive social capital that exists in some low-income, segregated urban neighborhoods. Collective efficacy is a term devised by social scientists to describe the "ability of neighborhoods to realize the common values of residents and maintain effective social controls."[181] The concept was initially derived by researchers Robert Sampson and Felton Earls in studies of the effect of social disorder on crime in Chicago neighborhoods.[182] Researchers found, through multilevel statistical controls and qualitative interviews, that collective efficacy—that is, the ability of residents in poor neighborhoods to realize common goals and to engage in positive collective action—mitigated the negative correlations between poor neighborhoods and crime.[183] Communities with less disorder and high levels of collective efficacy were able to organize to combat crime and, thus, to mitigate the negative neighborhood effects of crime. Based on this and other research, scholars categorize collective efficacy as a positive form of social capital that can temper some negative neighborhood effects.[184]

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177. *Id.*
178. *Id.*
179. *Id.*
180. Lamont & Small, *supra* note 28, at 84.
181. Margaret F. Brinig & Nicole Stelle Garnett, *Catholic Schools, Urban Neighborhoods, and Education Reform*, 85 Notre Dame L. Rev. 887, 905 (2010) (citing Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 227 Science 918, 918 (1997)).
182. *See id*.
183. *See* Tracey L. Meares, *Praying for Community Policing*, 90 Calif. L. Rev. 1593, 1608 (2002).
184. Brinig & Garrett, *supra* note 181, at 905 ("[W]e assume that high levels of collective

Other scholars[185] observe a strong correlation between low-income communities' participation in *root cultural*[186] or *informal artistic and cultural* practices and collective efficacy.[187] The informal arts sector "is associated with minority, immigrant, and other out-of-the-mainstream communities."[188] It includes "hands-on creative activity in *informal settings* as well as the *informal economy* of under-employed professional and traditional artists."[189] Ethnographers in Chicago found that "Mexican immigrants in Chicago 'use artistic and cultural practices to break down social isolation, create new social networking relationships, strengthen . . . bonds among groups members, and . . . create local and transnational ties with [outside] institutions . . . .'"[190] Scholars Mark Stern and Susan Seifert, of the Social Impact of the Arts Project, studied Philadelphia neighborhoods and documented that "[r]esidents who participate in the arts and culture tend to engage as well in other types of community activities."[191] Stern and Seifert demonstrated a connection between cultural activities and collective efficacy.[192] Low-income block groups with high cultural participation also were found to be twice as likely to have low truancy and delinquency as were other neighborhoods.[193] Stern and Seifert explain: "Unlike most community activities, culture builds bridges across the divides of geography, ethnicity, and social class. By building social networks within and between neighborhoods, cultural engagement fosters collective capacity, especially in low-wealth communities."[194]

Inspired by these analytical approaches, this Article develops the concept of cultural collective efficacy as a justification for place-based lawmaking. Cultural collective efficacy is a form of positive bonding social capital generated through participation in cultural endeavors, which enables some low-income, inner-city residents to mitigate the negative effects of living in a poor, racially segregated, and disinvested community. Cultural collective efficacy can also be a source of power

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efficacy . . . correlate with high levels of social capital . . . .").

185. *See, e.g.*, MARK J. STERN & SUSAN C. SEIFERT, FROM CREATIVE ECONOMY TO CREATIVE SOCIETY (2008) [hereinafter STERN & SEIFERT, CREATIVE SOCIETY]; MARK J. STERN & SUSAN C. SEIFERT, UNIV. OF PA. SOC. IMPACT OF THE ARTS PROJECT, CULTURE AND URBAN REVITALIZATION: A HARVEST DOCUMENT 49 (2007).

186. *See* MARIA-ROSARIO JACKSON, *Rebuilding the Cultural Vitality of New Orleans*, URBAN INST., Feb. 2006, at 2–3 ("[R]oot cultural practices [are] formal and informal creative cultural expressions carried out in communities, often in moderate- and low-income districts or neighborhoods.").

187. STERN & SEIFERT, CREATIVE SOCIETY, *supra* note 185, at 3.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 4.

192. *Id.* (quoting public health researcher Felton Earls).

193. *Id.*

194. *Id.* at 5.

that enables existing inner-city residents who live in revitalizing communities to stem—or to obtain more long-term benefits from—urban revitalization. Place-based laws, which keep some existing residents in place and harness cultural collective efficacy, may be necessary to ensure that existing inner-city residents are long-term beneficiaries of urban reform.

This Article proceeds to describe two examples of cultural collective efficacy. First, it analyzes the early development of hip-hop amongst youth in New York City's Bronx neighborhoods. Several years later, when some of those youths became adults, their historical links to the development of early old-school hip-hop enabled them to fight new forces of gentrification in their neighborhoods.[195] Second, this Article describes cultural collective efficacy as it developed amongst Mexican immigrants in Chicago's Pilsen-area neighborhoods. During the 1960s and 1970s, some of Pilsen's Mexican residents created community murals on the sides of dilapidated buildings and stores, which served as sources of cultural and community pride.[196] Later, they resuscitated the community mural movement to combat gentrification in their communities.[197] Many Pilsen residents' strong cultural collective efficacy helped them stem, but not eradicate, gentrification in their communities.[198] It also helped them demand more concrete benefits from urban reform.

These examples should caution scholars and policymakers against proposals that seek to dismantle all urban inner-city spaces that have concentrations of poverty and segregation. Further, these cautionary tales suggest that place-based lawmaking may promote greater distributive justice in U.S. low-income housing policy under certain conditions. In some instances, there may be localized dynamics in the cultural realm that provide the basis for a positive revitalization foundation. Consequently, in some urban, inner-city neighborhoods, there may be something worth saving such that place-based legal strategies make sense.

IV. Cultural Collective Efficacy: Two Tales from the "Hood"

A. The Evolution of Old-School Hip-Hop in New York City's Bronx Neighborhoods

It is well accepted in music-industry circles and by scholars of hip-hop and urban culture that the birth of early "old-school" hip-hop

195. *See infra* Part IV.B.
196. *See infra* notes 297–300 and accompanying text.
197. *See infra* note 347 and accompanying text.
198. *See infra* notes 373–78 and accompanying text.

occurred in New York City's Bronx borough neighborhoods.[199] Hip-hop culture developed, in part, in the community rooms, basements, and playgrounds of moderate- and low-income housing projects.[200] For example, in 1973, DJ Kool Herc, widely known in music-industry circles as the first hip-hop DJ, threw his first parties in the community room at 1520 Sedgwick Avenue.[201] The building was a moderate-income housing project in the West Bronx, subsidized under New York State's Mitchell-Lama Housing Law (the "Mitchell-Lama Program").[202] Created in 1955, the Mitchell-Lama Program provided subsidies and property tax abatements to private owners of multifamily rental and co-op buildings in the state of New York.[203] The subsidies enabled participating landlords to keep the rents in their multifamily buildings affordable to working- and moderate-income renters.[204]

When analyzing hip-hop as a cultural movement whose participants share and construct common cultural frames and narratives, old-school hip-hop is understood to have at least nine common elements: break dancing, rapping, graffiti art, DJing, beatboxing, street fashion, street language, street knowledge, and street entrepreneurialism.[205] The DJ practice of using turntables as instruments to combine beats emerged as one of the first elements of hip-hop.[206] This practice was called "breakbeats." DJ Kool Herc is well-known in music-industry circles as the father of breakbeats and, as such, the father of hip-hop.[207] As a young child, Herc emigrated to the U.S. from Jamaica with his parents.[208] Like many Caribbean immigrants, his family settled in the Bronx.[209] His awareness of the sound systems used in Jamaica at that time came from his parents, who were involved in the Jamaican music scene.[210] By 1973, he had his own sound system, which was more powerful than many of the systems used by other neighborhood DJs.[211] However, he noticed that

199. *See* Dick Hebdige, *Rap and Hip-Hop: The New York Connection*, *in* THAT'S THE JOINT!: THE HIP-HOP STUDIES READER 223, 224 (Murray Forman & Mark Anthony Neal eds., 2004).

200. JEFF CHANG, CAN'T STOP WON'T STOP: A HISTORY OF THE HIP-HOP GENERATION 67–85 (2005) (describing the birth of hip-hop in Bronx borough neighborhoods).

201. *See id.* at 67.

202. *See* David Gonzalez, *Will Gentrification Spoil the Birthplace of Hip-Hop?*, N.Y. TIMES, May 21, 2007, at B1.

203. *Mitchell-Lama Housing Program*, N.Y. STATE DIV. HOUS. & CMTY. RENEWAL, http://www.dhcr.state.ny.us/programs/mitchell-lama/ (last visited Feb. 14, 2012).

204. *See id.*

205. *9 Elements of Hip Hop*, URB. DICTIONARY, http://www.urbandictionary.com/define.php?term=9%20Elements%20of%20Hip%20hop (last visited Feb. 14, 2012).

206. *Break (music)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Break_(music) (last visited Feb. 14, 2012).

207. *See* Gonzalez, *supra* note 202.

208. *See* Hebdige, *supra* note 199, at 224.

209. *See id.*

210. *See id.*

211. *See id*.

local crowds at his community room parties were not inspired by his extensive reggae collection.[212] So he began to mix elements of reggae records with other popular soul and disco beats and began to talk over the beats to keep people dancing.[213] Thus, the art of "break beats" and hip-hop DJing and MCing was first developed in the community rooms and playgrounds of the Bronx's subsidized multi-family affordable housing projects. Hip-hop author Jeff Chang explains:

> It has become myth, a creation myth, this West Bronx party at the end of the summer in 1973. Not for its guests—a hundred kids and kin from around the way, nor for the setting—a modest recreation room in a new apartment complex; not even for its location—two miles north of Yankee Stadium, near where the Cross-Bronx Expressway spills into Manhattan. Time remembers it for the night DJ Kool Herc made his name.[214]

Other early hip-hop protagonists living in the Bronx's subsidized housing projects were influenced by Herc. Afrika Bambaataa, another famous DJ of the period, lived in a public housing project known as the Bronx River Projects.[215] Amongst those projects was the Bronx River Community Center, a community space where Bambaataa "ran" a sound system.[216] Grandmaster Flash, another one of New York's famous early core DJs, also developed his art in the Bronx's public and affordable housing projects.[217] He explains how the early DJs' craft and fame were tied to specific geographic neighborhoods:

> We had territories. It was like, Kool Herc had the west side. Bam had Bronx River. DJ Breakout had way uptown past Gun Hill. Myself, my area was like 138th Street, Cypress Avenue, up to Gun Hill, so that we all had our territories and we all had to respect each other.[218]

While it may seem unremarkable that hip-hop unfolded in the Bronx's inner-city neighborhoods, hip-hop was not merely the product of an undifferentiated ghetto. There was ethnic and some socioeconomic diversity within these subsidized housing projects, even though there were few whites in these developments.[219] Some of the above-mentioned DJs were immigrants, or the children of immigrants, from various Caribbean islands such as Jamaica or Barbados.[220] Their foreign status contributed to the diversity of hip-hop as a musical and cultural art form. It was DJ Kool Herc's familiarity with the music and sound systems of

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212. *See id.*

213. *See id.*

214. *See* CHANG, *supra* note 200, at 67.

215. *See* Hebdige, *supra* note 199, at 225.

216. *See id.*

217. *See id.*

218. Murray Forman, *Represent*, *in* THAT'S THE JOINT, *supra* note 199, at 201, 202.

219. *See* Interview by Brian Purnell, Mark Naison, Princess Okieme & Dolores Munoz with Eric Hines (a.k.a. Cool DJ Clyde), Lance Armstrong & Joshua Wheeler, in Bronx, N.Y. (May 25, 2006).

220. *See* Hebdige, *supra* note 199, at 224, 230.

Jamaica, and with other, older forms of rock, jazz, and funk, that caused him to experiment by combining styles.[221] Similarly, Grandmaster Flash's parents were from Barbados; as a result his father had an extensive collection of Caribbean and black American records.[222] Flash's interest in his father's diverse record collection in combination with his own interest in electronics inspired the development of his art form.[223] Thus, in the South, West, and East Bronx, a poor and disinvested area during this time, there was extensive cultural and ethnic diversity that helped to create the forceful and important amalgamation that is hip-hop.[224]

These subsidized housing projects also contained gradations of socioeconomic diversity. The Mitchell-Lama housing projects were originally designed to be middle-income projects for working-class individuals, such as teachers, policeman, and firefighters.[225] While some marginally "well-off" minorities were able to secure rental units in these developments, other lower-income minorities were often relegated to New York City's public housing projects.[226] Often only those minorities whose parents had secure civil service jobs, such as police officers or teachers, could become tenants.[227] Yet New York City had a unique approach to siting its subsidized housing developments; many Mitchell-Lama buildings were situated near the public housing projects sharing common parks or community areas.[228] As Herc and Grandmaster Flash explain, hip-hop's early incarnations required DJs who could afford, or who could attain, extensive record collections and expensive sound systems.[229] This was before hip-hop was recorded music and before artists could receive substantial outside compensation for their work.[230] Often only the more working-class, young minorities living in Mitchell-Lama buildings could afford such collections and systems, or had parents who had access to such systems and records.[231]

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221. *See id.*

222. *See id*. at 225.

223. *See id.*

224. Steve Jones, *Can Rap Regain Its Crown?*, USA TODAY, June 15, 2007, at 1A (explaining that until recently, rap dominated album sales charts and was a driving creative and commercial force in American culture).

225. *See Mitchell-Lama Housing Program*, *supra* note 203.

226. *See* Interview with Eric Hines, *supra* note 219.

227. *See id.*

228. *See id.*

229. *See* Hebdige, *supra* note 199, at 224–25.

230. *See* Greg Dimitriadis, *Hip-Hop: From Live Performance to Mediated Narrative*, *in* THAT'S THE JOINT, *supra* note 199, at 421, 421 (explaining how early hip-hop went largely unrecorded and undocumented, depending exclusively upon face-to face contact and interaction); *see also* TRICIA ROSE, BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA 6–7 (1994) (describing hip-hop's trajectory from a marginalized black art form to a commercialized medium that compensated its prized artists).

231. *See* Nelson George, *Hip-Hop's Founding Fathers Speak the Truth*, *in* THAT'S THE JOINT, *supra* note 199, at 45, 48.

Other, poorer early hip-hop protagonists frequently obtained their records and sound systems through savings or through the use of "stick-up-kids" who would hold up others for money to obtain records.[232] However, those youths living in Mitchell-Lama buildings went to school and partied with youths from the area's public housing projects.[233] One less-renowned artist, named DJ Cool Clyde, explains that Bambaataa, a resident of the Bronx River Projects, would frequently come over to his Mitchell-Lama building, the Skyler House, because kids living in Mitchell-Lama buildings were considered "rich kids" who had greater access to pretty girls and other benefits.[234] Thus, hip-hop inspired social mixing between youth in different socioeconomic brackets.

This bonding social capital can be described as positive because, although many of hip-hop's early local DJs, MCs, and artists had connections to problematic criminal and other antisocial behavior prevalent in the Bronx, hip-hop also presented an alternative for many young people. Bambaataa, a resident of the Bronx River projects, was originally heavily involved in one of the Bronx's most notorious black gangs, the Black Spades.[235] He credits the hip-hop movement as his initial motivation to turn away from the perils of gang life and toward something more positive.[236] In 1975, he created an organization for funk and hip-hop loving kids, later called the Zulu Nation.[237] Bambaataa wanted to create "a crew" of hip-hop kids who could be feared, but also respected as a force for good.[238] Bambaataa used the existing social structure of the gangs as a basis for the Zulu Nation, but he oriented that structure toward more positive community interventions.[239] He took the name Afrika Bambaataa, which means "Affectionate Leader."[240] As Dick Hebdige explains:

> Bambaataa had himself been a member of the Black Spades—New York's biggest black gang in the 1960s and early 1970s. But he had seen how violence and heroin had destroyed the gangs. In the Zulu Nation he set out to replace "rumbles" (fights) and drugs with rap, dance and hip-hop style. He wanted to turn the gang structure into a positive force in the ghetto.[241]

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232. *See* Interview with Eric Hines, *supra* note 219.

233. *See id.*

234. *See id.*

235. David Toop, *Uptown Throwdown*, *in* THAT'S THE JOINT, *supra* note 199, at 233, 234.

236. *See* CHANG, *supra* note 200, at 96–97 (narrating Bambaataa's transformation from a gang member in the Black Spades to the leader of the Bronx River Organization, a community-based party and music organization that Bambaataa created).

237. *See* Hebdige, *supra* note 199, at 225.

238. *See id.*

239. *See* CHANG, *supra* note 200, at 101 (explaining the early positive interventions and accomplishments of the Zulu Nation).

240. *See* Hebdige, *supra* note 199, at 225.

241. *See id.*

DJ Cool Clyde agrees: "And when hip-hop was started, it was something that we used, hip-hop music, to escape the gangs and the violence."[242] Hip-hop also served as an alternative form of economic development for many of its participants.[243] Hip-hop made its early participants more entrepreneurial. As Bambaataa explains: "We was business men at like thirteen, fourteen. Making our own parties. We had payrolls. Picking the venues or the streets or the centers. Dealing with the politics, or deciding whether you needed police. We dealt with so much business at a young age."[244]

While old-school hip-hop fostered limited forms of bonding and bridging social capital for some of its younger participants, clearly it did not change the material or structural conditions in the Bronx's ghettos. Some of hip-hop's most famous artists used hip-hop to escape "the ghetto,"[245] yet many others remained tied to criminal activity and ended up in jail or did not experience forms of social progress.[246] Additionally, early hip-hop evolved during a period of sustained economic and material disinvestment in the Bronx.[247] Many hip-hop lyrics explain this material deprivation and its negative social consequences.[248] However, the informal hip-hop art form did enable its participants to develop alternative cultural frames and narratives through which to understand their lives and their possibilities. Hip-hop provided a discursive space in which youth could define their reality in their own terms and language. As DJs and MCs explain, many of them abandoned their "government names" to adopt alternative monikers that demonstrated their strengths or abilities, or uniqueness.[249] Hip-hop's pioneers derived a strengthened sense of alternative, positive identity and belonging from their involvement in hip-hop.

Hip-hop's pioneers also used cultural frames and narratives to redefine their relationship to their neighborhoods and places. The music helped them redefine their neighborhoods as places of pride, rather than mere spaces of material deprivation and social dysfunction. These youths were primarily the children of renters with no formal legal rights to Bronx territories. Yet through their music and parties, graffiti art, and

242. Interview with Eric Hines, *supra* note 219.

243. *See* DJ Kool Herc, *Introduction*, *in* CAN'T STOP WON'T STOP, *supra* note 200, at xi, xi ("Hip-hop has also created a lot of jobs that otherwise wouldn't exist.").

244. George, *supra* note 231, at 51.

245. *See*, *e.g.*, Clarence Lusane, *Rap, Race, and Politics*, *in* THAT'S THE JOINT, *supra* note 199, at 351, 353–54 (describing Bronx-born hip-hop artist and entrepreneur Russell Simmons' rise to success).

246. *See* Interview with Eric Hines, *supra* note 219.

247. ROSE, *supra* note 230, at 30–34 (describing the material and structural conditions that gave rise to hip-hop in the South Bronx during the 1970s).

248. *See id.* at 21 ("Situated at the cross-roads of lack and desire, hip-hop emerges from the deindustrialization meltdown where social alienation, prophetic imagination and yearning intersect.").

249. *See* Interview with Eric Hines, *supra* note 219.

alternative cultural entrepreneurism, they reclaimed and redefined their neighborhood territories as spaces of ownership and pride. For many of old-school hip-hop's earliest protagonists, it provided a form of cultural collective efficacy. Although this cultural collective efficacy did not transform the material and structural conditions of the ghetto, it did mitigate some of the negative neighborhood effects of poverty for many of its participants.

Hip-hop may no longer serve the same community-building function now that it is produced by external market forces, rather than through face-to-face interactions between low-income people in neighborhood centers. But there may be other informal cultural movements, institutions, and art forms in Bronx neighborhoods that serve a similar community-building function for new immigrants or other Bronx residents. Additional ethnographic and qualitative research may reveal new sources of cultural collective efficacy. However, for many of hip-hop's older protagonists, hip-hop generated an attachment to place and pride in the Bronx, which later became very important in their struggles to remain in place in the face of gentrification.[250]

B. Gentrification in the Birthplaces of Hip-Hop

Currently, some of hip-hop's earliest pioneers and fans struggle to remain in their neighborhoods. In 2007, residents of 1520 Sedgwick Avenue, the original birthplace of hip-hop music, faced an uncertain future as their landlords considered opting out of the Mitchell-Lama Program and selling the building to landlords who would charge above-market-rate rents.[251] As explained previously, the New York State Mitchell-Lama law grants state subsidies and tax abatements to private landlords of multifamily rental buildings to keep the rents affordable to moderate- and low-income residents.[252] However, the subsidized mortgage contracts between the landlords and the State expire after twenty to thirty years.[253] Many of the Mitchell-Lama subsidized mortgages were executed during the 1960s and 1970s.[254] Thus, Mitchell-Lama landlords have the option of exiting the program after the expiration of the mortgages.[255] While some Mitchell-Lama buildings after expiration are then regulated under New York State's rent-stabilization laws, many other private owners can opt out of the program.[256] Once landlords opt out, they can

250. *See infra* Part IV.B.

251. *See* Gonzalez, *supra* note 202.

252. The New York State Mitchell-Lama Program also includes limited-equity co-ops. *See Mitchell-Lama Housing Program*, *supra* note 203.

253. *See id.*

254. *See id.*

255. *See id.*

256. *See id.*

either raise their rents or sell their buildings to private investors interested in charging market-rate rents.[257] The expiration of Mitchell-Lama projects and the impending displacement of existing residents are a city-wide problem, yet it has manifested itself in particular ways in low-income neighborhoods in the Bronx.[258]

Prior to the recent economic downturn, when global markets were oriented towards housing as a prime commodity, many national and international private equity firms sought to take advantage of the rent gaps[259] that existed in many predominately minority, formerly disinvested New York City neighborhoods. The expiring affordable housing use for Mitchell Lama buildings created a rent-gap opportunity for global investors to purchase multifamily buildings in disinvested inner-city areas at a substantial discount and then to obtain higher cash flows by kicking out current affordable housing tenants and renting the units to market-rate tenants.[260] Once the buildings converted from predominately affordable to predominately market-rate tenants, the private equity funds could resell the buildings at a substantial profit.[261] This phenomenon of predatory private equity demonstrated the same market features of "irrational exuberance," arbitrage, and veiled exploitation that were at the root of the subprime mortgage crisis.[262] Several private equity investors sought to attain such Mitchell-Lama multifamily rental and co-op buildings in the Bronx and other New York City neighborhoods.[263] The phenomenon of predatory private equity in New York City is an example of the local manifestations of global capital investment that create gentrification pressures in former inner-city neighborhoods. These forces of gentrification threatened to bring in new market-rate renters and owners who would transform formerly disinvested Bronx neighborhoods in ways that might displace, rather than benefit, existing residents. Low- and moderate-income minority renters had to organize to ensure that they could remain in place to benefit from the new and future global flows of capital entering their once disinvested neighborhoods.

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257. *See* Gonzalez, *supra* note 202.

258. *See generally* Raymond H. Brescia, *Line in the Sand: Progressive Lawyering, "Master Communities," and a Battle for Affordable Housing in New York City*, 73 ALB. L. REV. 715, 749–50 (2010).

259. *See supra* note 127.

260. *See* ASS'N FOR NEIGHBORHOOD AND HOUS. DEV. INC., *supra* note 124, at 6–7; Brescia, *supra* note 258, at 722–23.

261. *See* ASS'N FOR NEIGHBORHOOD AND HOUS. DEV. INC., *supra* note 124, at 7; Brescia, *supra* note 258, at 749–50; Michael Mechanic, *When Private Equity Attacks Affordable Housing*, MOTHER JONES (Oct. 6, 2009, 2:30 PM), http://motherjones.com/mojo/2009/10/when-private-equity-attacks-affordable-housing.

262. *See* Brescia, *supra* note 258, at 716; Mechanic, *supra* note 260.

263. *See generally Predatory Equity*, TENANTS & NEIGHBORS (Nov. 7, 2007), http://www.tandn.org/predatory.html (explaining the phenomenon of predatory private equity in New York City).

The Great Recession temporarily stalled predatory private equity deals in New York City.[264] Many of the private equity funds that purchased these subsidized multifamily buildings are now defaulting on their mortgages due to insufficient projections about cash flows and market conditions.[265] The building at 1520 Sedgwick is one of several publicly subsidized Bronx buildings purchased by private equity investors that are overleveraged with significant debt and insufficient revenues to pay that debt.[266] Yet this setback in the pace of gentrification in the Bronx seems to be temporary. There are still substantial city-led efforts to revitalize the Bronx, as well as market pressures that will bring in new renters and perhaps owners into such neighborhoods in the future.[267] This may be particularly true in areas where crime has stabilized or in neighborhoods in close proximity to transportation or urban redevelopment projects.

The residents of 1520 Sedgwick Avenue, however, were able to use their building's connection to old-school hip-hop as a source of cultural collective efficacy to combat predatory private equity. Before the Great Recession, the residents organized around the building's historic legacy as the birthplace of hip-hop and tried to purchase the building from the existing landlord before the landlord opted out of the Mitchell-Lama Program.[268] The residents sought the help of DJ Kool Herc to raise awareness about the potential displacement of existing residents from the birthplace of hip-hop.[269] At that time, residents were unable to raise enough capital to purchase the building.[270] Subsequently, residents sought to have the building placed in the city, state, and national register of historic places, in the hope that the building's historic designation would also protect its existing use as an affordable rental building.[271] However, while the building was eligible to be listed on the National Register of Historic Places, such a designation does not protect its use as an affordable rental building.[272]

New York City's government officials became aware of the building's threatened status because of tenant organizing around the theme of the building as the birthplace of hip-hop.[273] In 2008 Mark Karasic, a prominent

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264. *See* Mechanic, *supra* note 260; *see also* ASS'N FOR NEIGHBORHOOD & HOUS. DEV., *supra* note 124, at 12–14.

265. Vinnie Rotondaro, *Foreclosure Fears Lead to Tenants' Conundrum*, CITY LIMITS (Nov. 23, 2009), http://www.citylimits.org/news/articles/3839/foreclosure-fears-lead.

266. *See* Sam Dolnick, *Problems Mount at a Bronx Building Bought in a Bubble*, N.Y. TIMES, Jan. 19, 2010, at A22.

267. Joseph Berger, *Exhilaration as Giant Mall Springs Up in a Strike Against Blight*, N.Y. TIMES, Sept. 5, 2009, at A15.

268. Interview with Amy Chan, Tenant Organizer, tenants & neighbors, in N.Y, N.Y. (Feb. 9, 2009).

269. *See id.*

270. *See id.*

271. DAVID GEST, *Preserving the Birthplace of Hip-Hop*, PANORAMA, Spring 2008, at 67, 67.

272. *Id.*

273. Interview with Amy Chan, *supra* note 268.

real estate investor whom many refer to as a predatory private equity investor, sought to purchase the building from its previous landlord.[274] The city rejected approval of the sale.[275] The city's approval of the sale was necessary because the building was still under the Mitchell-Lama mortgage contract.[276] The city rejected the sale based upon the purchase price, alleging that the proposed $14 million price was substantially above the $5 million or $6 million price projected based upon future rents that could be attained under current rent-stabilization laws.[277] Despite the city's rejection, however, the building was sold to Karasic later in 2008 when the original owner opted out of the Mitchell-Lama Program.[278]

Residents then complained that under Karasic's control, the building's maintenance deteriorated.[279] There were rats, uncollected garbage, and other maintenance problems.[280] Housing activists claim that lack of maintenance is a common occurrence in Mitchell-Lama buildings purchased by private equity investors because the investors want to encourage existing residents to move or to find a technical basis to evict them.[281] When the real estate bubble burst, conditions worsened and the building faced foreclosure.[282] Conditions in the building deteriorated substantially under the threat of foreclosure. As a result, the focus of the community organizing to save 1520 Sedgwick shifted to strategies for purchasing the unpaid debt owed to banks and for ensuring that the building was purchased by owners who would seek to keep rents affordable to existing residents.[283] Karasic sought to sell the building to other private investors, but the city provided a $5.6 million loan to a public-private partnership to purchase the debt and the building from the bank that held the delinquent mortgage.[284] Today, because the building is facing foreclosure, officials are optimistic that the public-private partnership will be able to purchase the building and manage it in a manner that preserves most existing tenants and improves the maintenance of the building.[285]

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274. *See* Sam Dolnick, *Hope for a Bronx Tower of Hip-Hop Lore*, N.Y. TIMES, Sept. 7, 2010, at A23.

275. *See* Lysandra Ohrstrom, *Bronx Birthplace of Hip Hop Saved—For Now*, N.Y. OBSERVER (Mar. 3, 2008, 5:43 PM), http://www.observer.com/2008/hpd-rejects-speculative-bid-birthplace-hip-hop-shout-out-mithchell-lama.

276. *See id.*

277. *Id.*

278. *See* Dolnick, *supra* note 274.

279. *Id.*

280. *Id.*

281. *See* Brescia, *supra* note 258, at 723–24 (noting the sales of Peter Cooper Village and Stuyvesant Town in Manhattan as prime examples).

282. Dolnick, *supra* note 274.

283. Telephone Interview with Dina Levy, Dir. of Org. and Policy, Urban Homesteading Assistance Bd. (July 20, 2011) (on file with the Author).

284. Dolnick, *supra* note 274.

285. *See id.* As of the writing of this Article, Workforce Housing Advisors, a group focused on

The tenants of 1520 Sedgwick were able to combat forces of gentrification in their neighborhood in part because of the cultural collective efficacy that the building's connection to old-school hip-hop provided. Instead of viewing themselves as powerless against gentrifying forces, the residents, with the help of strong community organizers,[286] viewed their building and its important connection to old-school hip-hop as an asset around which they could organize. They developed an alternative narrative that counteracted the notion that their building and their neighborhood were undesirable places to live. Their alternative framing was also accepted by city officials interested in preserving affordable housing and combating gentrification. The building's historic connection to old-school hip-hop served as a form of positive bonding and bridging social capital that influenced important city and public officials, such as Senator Charles Schumer, who supported them.[287]

FIGURE 1: DJ KOOL HERC, ON LEFT, AND RESIDENTS OF 1520 SEDGWICK, WITH SENATOR CHARLES SCHUMER[288]

purchasing overleveraged affordable housing projects to maintain them as quality affordable housing, purchased the 1520 Sedgwick Avenue building for $6.2 million with help from the city. The group pledges to keep the housing affordable and return the benefits of the building's historic significance to its existing residents. *See* Alice Speri, *For the Birthplace of Hip-Hop, New Life*, N.Y. TIMES, Nov. 8, 2011, at A24.

286. The residents of 1520 Sedgwick worked closely with organizers at Tenants & Neighbors, "a grassroots organization that harnesses tenant power to preserve at-risk affordable housing and to strengthen and expand tenants' rights in New York State" and the Urban Homesteading Assistance Board, an organization that works with renters to create affordable, resident-owned, housing cooperatives. *See What We Do,* TENANTS & NEIGHBORS, http://www.tenantsandneighbors.org/what_we_do.html (last visited Feb. 14, 2012); *About*, URB. HOMESTEADING ASSISTANCE BOARD, http://www.uhab.org/about (last visited Feb. 14, 2012).

287. *See, e.g.*, Curtis Stephen, *A Herculean Task: Keeping Mitchell-Lamas Affordable*, BROOKLYN BUREAU (Jan. 20, 2008), http://www.bkbureau.org/herculean-task-keeping-mitchell-lamas-affordable; *see also* Figure 1.

288. Photo by Richard Caplan. Stephen, *supra* note 287.

C. Pilsen's Community Murals vs. Cultural Commodification

Some may characterize the story of 1520 Sedgwick as a mere anecdotal aberration that could only occur in a dense, tenant-friendly city like New York. Yet there are other examples of cultural collective efficacy in urban centers. Mexican immigrants in Chicago's Pilsen neighborhoods also participated in root cultural activities to engender ethnic pride and to resist gentrification in their communities.

Otherwise known as the Lower West Side of Chicago, Pilsen is an area close to Chicago's downtown.[289] During the 1800s and 1900s, Pilsen was an ethnic enclave for many white, working-class, Eastern European immigrants.[290] White ethnics left Pilsen in significant numbers during the 1940s and 1950s, a period of white flight.[291] By 1970, "Pilsen became the first majority Latino community in Chicago."[292] The significant influx of Mexicans in Pilsen was partially the result of "a history of racially-based urban planning that had dislocated them from the neighboring Near West Side."[293] Early urban-renewal programs, federal expressway projects, and the University of Illinois's Chicago Circle Campus led to the displacement of many Mexican residents from their Near West Side neighborhoods.[294] As a result of this initial displacement, many Pilsen residents longed for an attachment to place.[295]

Art and ethnic festivals became central to many Pilsen residents' sense of place and community.[296] Inspired by the earlier Mexican mural movement of the 1930s,[297] the American Chicano mural movement of the 1960s,[298] and local African American artist William Walker,[299] many Pilsen residents painted community murals on the sides of once-deteriorating local buildings, restaurants, and billboards.[300] A form of

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289. John Betancur, Gentrification *Before* Gentrification?: The Plight of Pilsen in Chicago 5 (2005).

290. *Id.* at 6.

291. *See id.*

292. *Id.* at 7.

293. *See* Lilia Fernández, *From the Near West Side to 18th Street: Mexican Community Formation and Activism in Mid-Twentieth Century Chicago*, 98 J. Ill. Hist. Soc'y 162, 163 (2005).

294. *See id.*

295. *See id.* at 170–71.

296. Betancur, *supra* note 289, at 36 ("This form of expression has enabled Pilsen's Mexican population to confirm its active local presence and portray a sense of activism and pride."); John Betancur, *Gentrification and Community Fabric in Chicago*, 48 Urb. Stud. 383, 397 (2011) [hereinafter Betancur, *Community Fabric*] ("[G]roups used art and ethnic celebrations (for example, murals, festivals and parades) to build and defend community.").

297. *See* Betancur, *supra* note 289, at 36. *See generally* Victor Margolin, *Viva Mexico: Graphic Identity in Chicago's Pilsen Neighborhood*, 17 AIGA J. of Graphic Design 1 (1999).

298. *See* Allison Clark, *Some Fear Pilsen's Murals, Once a Political Statement, Fading as Art Form*, Medill Reports Chi. (Jan. 21, 2010), http://news.medill.northwestern.edu/chicago/news.aspx?id=154199.

299. *See* Margolin, *supra* note 297, at 1.

300. Jeff Huebner, *The Outlaw Artist of 18th Street: Marcos Raya, His Life, His Work, His Demon*, Chi. Reader (Feb. 1, 1996), http://www.chicagoreader.com/chicago/the-outlaw-artist-of-18th-street/

public art, the 1960s and 1970s murals contain symbols of Mexican cultural pride and heritage, and document periods of disinvestment and social neglect in Pilsen.[301] Later, the murals depicted the twin threats of gentrification and displacement. As researchers note, the murals illustrate a range of themes "from cultural heritage and political history to anti-discrimination, anti-displacement and resistance to assimilation."[302] Pilsen residents also developed an annual street festival called "Fiesta del Sol."[303] Fiesta del Sol is a free, community-based event that enables Pilsen residents to sell items and display their cultural heritage to outside visitors each year.[304] It is a significant event in Chicago's ethnic history and a source of tourism for the Chicago area.[305] Pilsen's commitment to ethnic art is also reflected in the Mexican Fine Arts Museum.[306] The museum opened in Pilsen in March of 1987, largely because of Pilsen's large Mexican community and its historic celebration of Mexican culture.[307] It was the first museum in the Midwest devoted to Mexican art and it is now the largest Latino museum in the U.S.[308]

These cultural works and celebrations fostered a sense of community pride during periods of disinvestment and neglect in Pilsen.[309] These informal artistic activities were also a positive form of social capital and community building that mitigated some of the negative effects of living in a poor and segregated neighborhood.[310] While some community mural artists did engage in substance abuse or even criminal activity,[311] the mural projects kept many others engaged in positive endeavors. Further, the representations in the murals helped some residents resist the negative constructions of their neighborhoods developed by outsiders.[312] Consequently, the murals and other cultural activities have been central to Pilsen residents' struggles for community self-determination and control. While these cultural activities were also

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301. Margolin, *supra* note 297, at 1–3.

302. *See* BETANCUR, *supra* note 289, at 36 (citing Margolin, *supra* note 286).

303. Fiesta del Sol initially began as a celebration to commemorate the Pilsen Neighbors Community Council's role in securing the city's commitment to building the Benito Juarez Leadership Academy. *See* Pilsen Neighbors Cmty. Council, *History*, FIESTA DEL SOL, http://fiestadelsol.org/about/history/ (last visited Feb. 14, 2012).

304. *See* BETANCUR, *supra* note 289, at 24 (noting that as of 2005, 1.5 million visitors attended Fiesta Del Sol each year).

305. *See id.*

306. Karen Mary Davalos, *Mexican Fine Arts Center Museum*, ENCYCLOPEDIA CHI., http://www.encyclopedia.chicagohistory.org/pages/823.html (last visited Feb. 14, 2012).

307. *See id.*

308. *Id.*

309. *See* Clark, *supra* note 298.

310. Huebner, *supra* note 300.

311. *Id.*

312. BETANCUR, *supra* note 289, at 21.

part of a larger history of social and political activism in Pilsen,[313] as one local leader stated, "[I]f there had not been a cultural movement in Pilsen, none of the other accomplishments could have occurred."[314]

Cultural collective efficacy has also been central in Pilsen residents' struggles to foster development without displacement.[315] First, in 1973, the city of Chicago and a group of downtown business leaders developed the Chicago 21 redevelopment plan.[316] This urban-renewal plan described Pilsen, and several other low-income ethnic communities, as places with "low civic pride." The plan slated Pilsen for redevelopment with minimal community input.[317] In response, Pilsen activists formed the Pilsen Community Planning Council to resist the plans.[318] A key narrative developed by the Pilsen Community Planning Council described Pilsen as a valuable Mexican enclave that the Chicago 21 Plan would destroy.[319] This trope counteracted the city administration's framing of Pilsen as a "blighted" community lacking in "civic pride and value."[320] In street protests and town hall meetings, Pilsen residents drew on their heritage of art, culture, and community organizing to force resident participation in development planning.[321] Pilsen was one of only two communities that successfully forced the city to include residents in the planning process.[322]

Second, in addition to fighting city-led revitalization, Pilsen residents also organized to stem the gentrifying effects of private development in Pilsen. John Podmajersky I and his wife moved to Pilsen in 1914 from their native Slovakia.[323] White working-class ethnics, they remained in East Pilsen during the period of white flight. During a trip home in the 1960s, Podmajersky's son, John Podmajersky II, was concerned about the deterioration of the East Pilsen neighborhood after construction of the Dan Ryan Expressway.[324] He began to buy up inexpensive and dilapidated buildings in the area.[325] Given Pilsen's devalorization, the rental market was weak and Podmajersky II did not

313. *See id.* at 36; Fernández, *supra* note 293, at 174–75.

314. BETANCUR, *supra* note 289, at 36.

315. *Id.* at 23 ("Originally developed as part of the Chicano movement, these murals and celebrations were part of the initiative to claim and mark place under the motto 'we shall not be moved.' As such, they stated the community's right to stay and a strong spirit of self-determination.").

316. *See id.* at 37.

317. *See id.*

318. *See id.* at 37.

319. *See id.* at 65.

320. *See id.* at 37.

321. *See id.* at 65.

322. *See id.* at 38.

323. Emily Bernhard, *Trouble in Paradise: The Principality of Podmajersky*, STOCKYARD (Nov. 4, 2009), http://www.stockyardmagazine.com/menagerie/trouble-in-paradise-the-principality-of-podmajersky/.

324. BETANCUR, *supra* note 289, at 32; Bernhard, *supra* note 323.

325. BETANCUR, *supra* note 289, at 32.

want to rent to local residents.[326] The combination of Pilsen's old industrial buildings, affordable rents, and history of ethnic art and culture made it attractive to many artists. Podmajersky II, therefore, decided to gut the buildings and make them into affordable loft and live/work spaces for artists.[327] Podmajersky II became a very successful developer of artist colonies in East Pilsen.[328] However, these spaces were not rented to local Pilsen artists, but mainly served "outsiders without any major ties to the larger [Pilsen] community."[329] The Podmajersky art colonies marked the beginning of a gradual process of gentrification in Pilsen and of commodification of Pilsen's cultural and artistic heritage.

John Podmajersky III inherited and stewards the expanded Podmajersky empire.[330] Under his leadership, the company has not maintained its commitment to keeping rents affordable for struggling artists.[331] Rather, Podmajersky III is interested in courting higher-end artistic entrepreneurs.[332] Once again, Pilsen residents engaged in a partially successful campaign of cultural community protection to resist Podmajersky III's expansion to other communities in Pilsen. Framing Podmajersky III, and the residents he courted, as expropriators, many Pilsen residents used activist tactics to intimidate builders and prospective artists.[333] Podmajersky III acknowledged that some of the aggressive tactics Pilsen residents used could make private development projects economically unfeasible.[334] Further, Podmajersky III noted that these tactics might make substantial gentrification outside of East Pilsen difficult and that "[m]any of my ilk . . . have turned away from Pilsen towards places like Bucktown and Wicker Park because of Pilsen's current political climate."[335]

Third, in 1996, during the ascendancy of a neoliberal approach to urban redevelopment,[336] Chicago's Mayor Richard M. Daley appointed Danny Solis as local alderman and president pro tempore of the City

326. Bernhard, *supra* note 323 ("Who am I gonna rent to? I realized the local residents weren't the ones . . . because I've had experience with them before . . . you rent seven rooms to four people, and before long there's another four, and then before two months are gone there are like fifteen of them.").

327. BETANCUR, *supra* note 289 at 32; Bernhard, *supra* note 323.

328. BETANCUR, *supra* note 289, at 32.

329. *Id.*

330. *See id.*; Bernhard, *supra* note 323.

331. *See* Bernhard, *supra* note 323.

332. *Id.*

333. David Wilson et al., *Successful Protect-Community Discourse: Spatiality and Politics in Chicago's Pilsen Neighborhood*, 36 ENV'T & PLAN. A 1173, 1184 (2004).

334. *See id.*

335. *Id.*

336. *See, e.g.*, Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 426–27 (2001) (describing the neoliberal turn in housing and community development law).

Council.[337] Solis was a strong Latino supporter of the city's administration and a former CEO of the United Neighborhood Organization, a prodevelopment nonprofit in Pilsen.[338] In keeping with the stated goals of city officials, Solis wanted to redevelop Pilsen into a cultural tourist attraction similar to Chicago's Greektown or Chinatown.[339] Solis sought city subsidies for place-based projects in Pilsen, yet his approach to redevelopment sought to commodify the culture developed by Pilsen's low-income Mexican immigrants without ensuring that the progenitors of that culture would be the primary beneficiaries of their labor.[340] This approach to urban redevelopment focuses on the exchange value of Pilsen's cultural assets for individuals external to the community, rather than its use value for current or future low-income Pilsen residents. Some argue that the Mexican Fine Arts Museum in Pilsen has been used by developers and others, in a similar manner, as a cultural tourist attraction, rather than a community resource.[341] As part of the Solis-led commodification approach to redevelopment, Pilsen was designated an industrial Tax Increment Financing District ("TIF") in 1998, to operate until 2021.[342] TIF legislation is designed to capture future increases in property taxes, generated by proposed development, to finance current redevelopment in "blighted" areas.[343] However, the long-term benefits of TIF legislation do not always accrue to existing residents.[344] Creation of the TIF spurred private investment in Pilsen and activated a gradual process of gentrification.[345]

In response to the commodification-of-culture approach to redevelopment, more activist Pilsen residents formed a coalition called the Pilsen Alliance in 1997 to fight for development without displacement.[346] Working in conjunction with Casa Aztlan, a community-based organization that has served as a cultural center in Pilsen since the 1970s, the coalition revived the community mural movement.[347] Through murals and other tactics, the organizers and artists explained the new development initiatives to existing residents and associated those efforts

337. BETANCUR, *supra* note 289, at 28.

338. *Id.*

339. *Id.*

340. Betancur, *Community Fabric*, *supra* note 296, at 396 ("Art went from an initial component of community building/defense to a magnet and component of commodification.").

341. BETANCUR, *supra* note 289, at 23–24.

342. *See* EUAN HAGUE ET AL., CONTESTED CHICAGO: PILSEN AND GENTRIFICATION/PILSEN Y EL ABURGUESAMIENTO: UNA LUCHA PARA CONSERVAR NUESTRA COMUNIDAD 37 (2008).

343. Dina Schlossberg, *Tax Increment Financing*, *in* BUILDING HEALTHY COMMUNITIES: A GUIDE TO COMMUNITY ECONOMIC DEVELOPMENT FOR ADVOCATES, LAWYERS AND POLICYMAKERS 129, 129 (Roger A. Clay, Jr. & Susan R. Jones eds., 2009).

344. *See id.* at 136–38.

345. *See* HAGUE ET AL., *supra* note 342, at 37.

346. BETANCUR, *supra* note 289, at 42.

347. *See* Wilson et al., *supra* note 333, at 1185.

with the twin threats of gentrification and displacement.[348] Local Pilsen artist Hector Durate and other local residents painted Pilsen's Anti-Gentrification Mural on 1805 South Bishop Street.[349] The mural, displayed in Figure 2, depicts an eagle symbol of the United Farm Workers, which represents the plight of low-income Mexican workers.[350] It also depicts the city's past efforts to regulate and restrict pushcart vendors who sell native Mexican produce and foods. It identifies the creation of a TIF in Pilsen as a source of ethnic cleansing and community destruction. The mural displays picketers holding signs that say "Stop Gentrification in Pilsen" in both English and Spanish:

FIGURE 2: PILSEN'S ANTI-GENTRIFICATION MURAL[351]

Inspired by this mural, and by others in Pilsen, many residents created other artistic representations to describe and to combat gentrification in Pilsen that could lead to displacement.[352] The art helped empower and reinvigorate existing Pilsen residents threatened by gentrification to articulate a claim to the spaces they inhabited and made beautiful during periods of neglect. While the majority of Pilsen residents are renters with no formal property right to remain, existing low-income

348. HAGUE ET AL., *supra* note 342, at 43.

349. *Murals in Pilsen*, CHI. PUB. SCH., UNIV. CHI. INTERNET PROJECT, http://cuip.uchicago.edu/~jwhite/pilsen/ (last visited Feb. 14, 2012).

350. *Id.*

351. *Alto al Desplazamiento Urbano de Pilsen 1997/Stop Gentrification in Pilsen*.

352. HAGUE ET AL., *supra* note 342, at 37.

residents developed a narrative about their right to enjoy the economic and social benefits of Pilsen's revitalization. Through art and protest, they asserted that Pilsen was "theirs" because of their suffering and surviving during difficult periods. They claimed a right to the place because, through their artistic works, they provided a cultural character to the neighborhood that was part of its appeal. Their labor, in part, made Pilsen a prime commodity for global capital investment and city-led revitalization.[353]

While this narrative did not stop gentrification in Pilsen, it did help to stem certain development projects that did not include sufficient benefits for existing residents. Pilsen residents' cultural collective efficacy did help them redirect the potential future benefits of development to a greater number of existing residents and future low-income people. In 2003, Concord Homes, Inc., introduced plans to build a high-end housing development in Pilsen.[354] The developer wanted to create a mixed-income community with a starting price for market-rate two bedrooms of $280,000. The plan did include a ten-percent set-aside for affordable housing, but some Pilsen residents were concerned that the price of affordable housing would be prohibitive for many existing Pilsen residents.[355]The Pilsen Alliance, and others, engaged in community organizing to oppose the development.[356] They successfully stopped the project due to "lack of community support."[357] The Pilsen Alliance also launched a successful effort to pass a referendum indicating community support for Solis holding "public hearings on zoning changes in Pilsen."[358] While referenda are not binding under Illinois law, the process did send a message to the Alderman about the need for community input and support for development projects.[359]

In response to the organizing tactics of the Pilsen Alliance and others, Solis did include slightly more protections for existing residents in future development efforts. In 2006, Solis created the Pilsen Historic District, which added an area of Pilsen to the National Register of Historic Places.[360] The Pilsen Historic District extends from Halsted Street and Western Avenue, and from 16th Street to Cermak Avenue.[361] The Pilsen Historic District is the largest historic district in Illinois.[362] It

353. BETANCUR, *supra* note 289, at 27–29.
354. *Id.* at 42.
355. *Id.*
356. *Id.*
357. *Id.* at 43.
358. *Id.*
359. *Id.*
360. Elizabeth Duffrin, *Pilsen Historic District Can Bring a Tax Freeze*, PILSEN PORTAL (July 14, 2009), http://www.pilsenportal.org/news/78.
361. *See id.*
362. *See id.*

also provides a property tax freeze to owners of properties that have six units or fewer and that require rehabilitation work expected to cost at least twenty-five percent of the county's estimated market-rate value for the building.[363]An owner's property taxes are frozen for eight years at the assessed value of the property prior to rehabilitation and then are gradually adjusted to the property's market-rate value over the subsequent four years.[364] The property tax freeze benefits only those property owners who make investments in preserving and upgrading their property.[365] Tying the concept of a historic-preservation district to some measures that preserve affordable housing is a novel step that is likely related to pressure the Alderman received from some of his constituents for development without displacement.

Also in 2006, Solis voted to allow for a special planned-development zoning status for a public-private development project, called Centro 18, that would construct 387 condominiums and commercial projects in thirteen buildings ranging from townhouses to ten-story towers.[366] Solis did negotiate to have at least twenty-one percent of the buildings' units set aside for affordable housing.[367] Market rates at that time, however, would not have made the units affordable to Pilsen's lowest-income residents.[368] On the other hand, the Alderman's agreement to a set-aside of twenty-one percent was a significant shift from an approach to development that provided for little, if any, affordable housing.[369] Some Pilsen residents and organizations assert that more recently, Solis did press for more affordable housing guarantees from private developers.[370] Others, however, still equate Solis with a gentrification-and-displacement approach to Pilsen's redevelopment.[371]

Pilsen residents did not win every battle against gentrification. The University of Illinois's Chicago campus successfully completed University Village, an expansion of its campus, which includes market-rate housing and mixed-use commercial development.[372] While University Village did contain a set-aside of approximately twenty percent for affordable housing, many of the set-asides were for one-bedroom units at prices of $170,000, leaving the condominiums out of

363. *See id.*
364. *Id.*
365. *See id.*
366. HAGUE ET AL., *supra* note 342, at 37.
367. *See id.*
368. *See id.*
369. *See id.*; Web Behrens, *Pilsen Gentrification: Can Pilsen Pull Off Responsible Development?*, TIMEOUT CHI. (Feb. 16, 2009), http://timeoutchicago.com/things-to-do/62175/pilsen-gentrification.
370. Behrens, *supra* note 369.
371. *Id.*
372. BETANCUR, *supra* note 289, at 16.

reach for large low-income families in Pilsen.[373] Further, prior to the recession East Pilsen gentrified significantly, due in part to city-supported development and the efforts of private developers such as Podmajersky III.

Yet compared to other Chicago neighborhoods facing gentrification prior to the Great Recession, Pilsen was one of only a few majority-minority and low-income communities that successfully contested and stemmed mass gentrification.[374] Pilsen's residents and community-based organizations also created significant affordable housing on vacant lots that otherwise might have been purchased by market-rate developers.[375] Gentrification in Pilsen has declined significantly since the advent of the subprime mortgage crisis, the foreclosure crisis, and the Great Recession.[376] The rapid pace of gentrification in East Pilsen has stalled as artists in Podmajersky's Chicago art district leave for Bridgeport and other neighborhoods in Chicago.[377] Pilsen residents also were affected by the subprime mortgage and foreclosure crises, stemming rapid private investment in Pilsen.[378] It is unclear whether this reversal is temporary. But Pilsen is still located near Chicago's Loop and the city is still focused on its mission to remain a key global city in the future.[379]

V. Place-Based Lawmaking to Protect Cultural Collective Efficacy

A. Lessons Learned

Pilsen and the South, East, and West Bronx remain predominately low-income, majority-minority communities.[380] Yet the stories of cultural collective efficacy in Pilsen and in some of New York City's Bronx neighborhoods demonstrate that some positive social capital does exist in

373. *See id.* at 16–17.

374. *See* Betancur, *Community Fabric*, *supra* note 296, at 396–97.

375. Behrens, *supra* note 369.

376. Katherine Koster, *What's the Matter with Pilsen?: The Chicago Arts District Falls on Hard Times as Artists Head South to Bridgeport*, Chi. Weekly (Nov. 24, 2009), http://chicagoweekly.net/2009/11/24/whats-the-matter-with-pilsen/.

377. *See id.*

378. Ashley Barnes, *Due to Recession, A Possible Pause in Pilsen Gentrification*, Adentro de Pilsen (Sept. 27, 2010), http://adentrodepilsen.com/adentrodepilsen/Latest_News/Entries/2010/9/27_Due_to_Recession,_A_Possible_Pause_in_Pilsen_Gentrification.html.

379. *See* Koster, *supra* note 376; *see also* Kathy Bergen, *Chicago Gains in Global Cities Ranking*, Chi. Trib. Breaking Bus., (Aug. 17, 2010, 4:29 PM), http://archive.chicagobreakingbusiness.com/2010/08/chicago-gains-in-global-cities-ranking.html.

380. *See Pilsen (Lower West Side) Maps and Data*, LISC Chi.'s New Communities Program, http://www.newcommunities.org/communities/pilsen/maps.asp (last visited Feb. 14, 2012) (describing the demographics of the Pilsen community); *see also* Furman Ctr. for Real Estate and Urban Policy, N.Y. Univ., State of New York City's Housing and Neighborhoods 2010, at 44–57 (2010) (providing demographic data for the Bronx borough, which shows that Bronx residents continue to be the poorest in New York City and that a majority of Bronx residents are minorities).

the inner-city. These examples may assuage critics' concerns that all inner-city neighborhoods are places of despair that residents should abandon. These tales also reveal that residents in low-income, segregated communities can develop positive social assets that provide the basis for positive revitalization. An unfettered and unrestrained marketplace does not return the economic value of these assets to the broad communities that produced them.[381] Rather, the marketplace often commodifies and, arguably, exploits these community assets for the benefit of groups and individuals external to the community. Renters or leasehold tenants who suffered through periods of discrimination or disinvestment should be able to benefit from future revitalization and reform. Further, renters who contributed value to communities through their artistic and cultural labors should have some recompense, in the form of legal entitlements to remain in place and to share in the benefits of future reform.

Cultural collective efficacy, combined with effective community organizing and protected by place-based legal supports, can help existing residents curtail gentrification and capture a greater portion of the benefits of new development. As such, law-and-economists and staunch integrationists, who prefer people-based lawmaking, must reassess their understandings of the power dynamics of the inner-city. In particular, they must recognize the positive contributions of low-income, non-property, non-commons owners to the inner-city, as well as the role of law in helping residents remain in place to benefit from future investment and revitalization. This requires reassessing the deficiency-oriented construction of the inner-city, as well as the ways of identifying and measuring opportunity and disadvantage. It also requires scholars, lawyers, and policymakers to reconceptualize the more limited traditional division of property rights into only three types—"private, commons, and state forms."[382] Instead, they must consider how laws and policies can redirect the benefits of revitalization to those who suffered during hard times and to those who contributed value to communities that is not recognized in our traditional conceptions of property ownership. They must also envision a more dynamic role for government and the third sector[383] in ensuring a more equitable distribution of the benefits of urban reform.[384]

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381. Note here that while individuals may receive compensation, the communities that produced those artists or cultural protagonists do not.

382. Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQ. L. 79, 80 (2001).

383. The term "third sector" describes private, but not solely market-oriented, organizations that steward, finance, and protect affordable housing, such as nonprofits, philanthropic organizations, and blended enterprises that combine aspects of nonprofit and for-profit forms. *See* John Emmeus Davis, *Homemaking: The Pragmatic Politics of Third Sector Housing*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 233–58 (Charles Geisler & Gail Daneker eds., 2000) (describing the third-sector's role in housing). *See generally* Dana Brakman Reiser, *Governing and*

B. Graphic Information Systems and Social Capital Impact Assessments to Identify Cultural Collective Efficacy

Given the potential importance of cultural engagement for distributional equity in urban revitalization, scholars and policymakers should consider strategies that may uncover whether positive cultural collective efficacy and engagement exists in a given community. Strategies to identify cultural collective efficacy include Graphic Information Systems ("GIS") mapping and Social Capital Impact Assessments ("SCIAs") that include qualitative interviews. These mechanisms should accompany quantitative and demographic indicators that seek to measure opportunity.

Law professor john a. powell and others at the Ohio State University's Kirwan Institute for the Study of Race and Ethnicity have developed an innovative approach to mapping communities of opportunity.[385] Using GIS, they identify a range of data points to develop a graphical depiction of the location of opportunities throughout a metropolitan region, including cities and suburbs.[386] Data points include, but are not limited to, vacancy rates, neighborhood poverty rates, homeownership rates, crime indexes, unemployment rates, rates of public assistance, job trends, test scores, and overall educational attainment of the population.[387] Community development and fair housing advocates in numerous regions have used these maps to identify communities of opportunity in which to locate place-based projects.[388]

Financing Blended Enterprise, 85 Chi.-Kent L. Rev. 619 (2010) (describing the term "blended enterprise").

384. The two examples of cultural collective efficacy described in Part IV demonstrate that community organizers and nonprofit community organizations played a robust role in helping low-income, minority residents combat gentrification and claim "rights" to the benefits of revitalization. Scholars, lawyers, policymakers, and administrators that seek to harness the benefits of revitalization for existing residents can draw insights from these examples about new roles for third-sector organizations.

385. *See GIS Mapping*, Kirwan Inst., Ohio State Univ., http://www.kirwaninstitute.org/research/opportunity-communities/mapping/ (last visited Feb. 14, 2012) (describing the institute's opportunity-mapping research tool).

386. Jason Reece et al., Kirwan Inst., Ohio State Univ., The Geography of Opportunity: Review of Opportunity Mapping Research Initiatives 5 (2008) (describing opportunity mapping).

387. *See id.*

388. Notably, this approach has been used in the remedial stage of several important fair housing lawsuits. In 1995, the ACLU of Maryland filed a fair housing discrimination lawsuit on behalf of a class of current, former, and prospective tenants of Baltimore public housing. In January of 2005, the district court found HUD and other defendants in violation of the Fair Housing Act and other statutes for failing to take a city and suburb regional approach to implement fair housing in the region. In the remedy phase of the lawsuit, john a. powell and the Kirwan Institute used opportunity mapping throughout Baltimore's 615 census tracts to identify communities of opportunity. Housing choice vouchers with racial-mobility counseling are now being used to connect former public-housing residents to suburban and city-wide areas of opportunity. This opportunity-mapping approach has also been used in several states and cities such as Detroit, Michigan; Columbus, Ohio; Chicago, Illinois; Austin, Texas; and Madison, Wisconsin. *See generally* john a. powell et al., Kirwan Inst., Ohio

However, this approach has some limitations. The GIS-mapping approach relies heavily on quantitative indicators.[389] While this data does give a snapshot of opportunities within an area, it is insufficient to understand the more microlevel cultural dynamics in a neighborhood. The model may not capture cultural assets that are hard to quantify such as informal root cultural practices or positive collective efficacy. Therefore, opportunity geographers need to add additional sociological and cultural data into the opportunity model. This data may be largely qualitative and ethnographic, rather than merely quantitative. Qualitative data may include neighborhood surveys and ethnographic interviews that indicate what existing residents view as the important informal, cultural, and social resources in a given neighborhood. Researchers at the University of Pennsylvania's Social Impact of the Arts Project have developed such models in their research in North Philadelphia's Camden neighborhoods.[390] Researchers in the Urban Institute's Culture, Creativity, and Communities Program are also developing such indicators.[391] These measures may help policymakers develop a more nuanced understanding of the positive networks and social capital that may exist in a community whose quantitative and demographic indicators might otherwise indicate a neighborhood of disadvantage.

Other mechanisms to measure the social and cultural impacts of urban redevelopment projects do exist. Thomas Sander and Lew Feldstein, scholars with Harvard University's Saguaro Seminar: Civic Engagement in America initiative, are developing SCIAs that would enable lawyers and policymakers to assess how a proposed project might affect a community's social capital.[392] The concept is similar to that of the environmental-impact statements required under the National Environmental Policy Act of 1969.[393] Environmental-impact statements assess the positive or negative impact of a proposed project on the environment.[394] However, as Sheila Foster eloquently explains, courts'

STATE UNIV., COMMUNITIES OF OPPORTUNITY: A FRAMEWORK FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE FOR ALL (2007).

389. *See* REECE et al., *supra* note 386, at 3.

390. *See Completed Projects, Community Partners in Arts Access Evaluation, 2005–2009*, UNIV. OF PA. SOC. IMPACT OF THE ARTS PROJECT, http://www.sp2.upenn.edu/siap/completed_projects/community_partners.html (last visited Feb. 14, 2012).

391. *See* JACKSON, *supra* note 186, at 7.

392. *See, e.g.*, Lew Feldstein & Thomas Sander, *Social Capital Impact Assessment*, SAGUARO SEMINAR: CIVIC ENGAGEMENT IN AMERICA, HARVARD UNIV., http://www.hks.harvard.edu/saguaro/pdfs/skimpactassessment.pdf (last visited Feb. 14, 2012); *Social Capital Community Benchmark Survey Executive Summary*, SAGUARO SEMINAR: CIVIC ENGAGEMENT IN AMERICA, HARVARD UNIV., http://www.cfsv.org/communitysurvey/docs/exec_summ.pdf (last visited Feb. 14, 2012) (surveying approximately 30,000 Americans regarding civic engagement and social capital in the U.S.).

393. *See* National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370 (2010).

394. *See* Foster, *supra* note 26, at 546.

interpretations of the Act's impact-assessment requirement have been characterized by physical determinism.[395] Courts focus on projects' "physical" impacts on the environment, rather than on social or cultural impacts.[396] In order for social impacts to rise to the level of significance that requires an environmental-impact statement, the "[s]ocial and economic changes must result directly from primary physical impacts on the environment."[397] Further, the Act's environmental-impact statements requirement is mainly a procedural mandate that produces information but that does not "impose a substantive duty to mitigate."[398] While an environmental-impact statement can produce information that is useful to community organizers, it will rarely prevent a project from proceeding.[399]

However, through surveys and qualitative interviews, SCIAs would allow agencies to identify correlates of social capital (that is, things that are strongly or negatively correlated with social capital) and then assess how a project would impact those correlates. SCIA surveys could ask community residents direct questions about how the proposed project or policy would affect their cultural collective efficacy and other existing positive social networks.[400] This tool could be used in addition to the standard opportunities to attend hearings or participate in community meetings, which are the main forms of participation currently required by housing and community development programs. Universities or nonprofit institutions could be enlisted to conduct such studies. One scholar recommended requiring judicial review of SCIAs in eminent domain cases to better address the public impacts of proposed projects on ordinary citizens who may lack the political power to stop a project.[401]

SCIAs could also be required as a condition of receiving federal funding for publicly subsidized, but privately financed and stewarded, urban-redevelopment projects. The results of the SCIAs would have to be made public. SCIAs could be combined with GIS mapping to identify areas where cultural collective efficacy or positive social capital exists. In such instances, community groups could use the SCIA to identify areas where a proposed project might undermine or thwart existing cultural

395. Sheila Foster explains that NEPA impact-assessment requirements "tend to elevate physical impacts over all other impacts, which can obscure the degree to which land use decisions affect the social assets of impacted communities." *Id.*

396. *See id.* at 550 ("The primary concern of impact assessment is with the 'physical' impacts on the environment. Social or economic effects alone, courts have said, cannot trigger the 'significant impact' hurdle to require preparation of an environmental impact statement.").

397. *See id.*

398. *See id.* at 557.

399. *See id.*

400. *See* Asmara Tekle Johnson, *Correcting for* Kelo*: Social Capital Impact Assessments and the Rebalancing of Power Between "Desperate" Cities, Corporate Interests, and the Average Joe*, 16 CORNELL J.L. & PUB. POL'Y 187, 222–23 (2006).

401. *See id.* at 224–25.

collective efficacy. Grassroots groups could use SCIAs to press city officials to encourage developers to negotiate a community benefits agreement that might include more affordable housing protections in new projects. However, federal grant programs and state enabling legislation that incorporate SCIAs would have to include a private right of action to enable local residents to enforce at least the procedural guarantees that an SCIA process would allow. While this might invite some obstructionism and present a constraint on the development process, it would ensure a more equitable distribution of benefits from place-based projects in inner-city areas.

C. Place-Based Lawmaking to Support Cultural Collective Efficacy

There are a number of normative justifications for laws and policies that keep existing, and future, low- to moderate-income minority residents in inner-city communities. Place-based lawmaking can promote socioeconomic, racial, and ethnic diversity in high-cost rental markets and it can provide housing for working-class people who work in service industries that are valuable to cities. The cultural collective efficacy insight provides an additional justification for place-based lawmaking because it illustrates that laws which keep low-income minorities in place, where there is significant evidence of positive social capital, may have long-term social, political, and distributional benefits for traditionally marginalized groups. These long-term distributional benefits may outweigh place-based lawmaking's high short-term costs. Further, the cultural collective efficacy argument should make scholars and policymakers less reticent about laws that direct resources to inner-city communities. The following sections describe examples of place-based laws that may help protect cultural collective efficacy and advance distributive justice in urban reform. These ideas seek to balance the normative objective of equitable development with the goals of efficiency and integration. There are many other justifiable place-based laws besides those outlined. Yet the ideas outlined below demonstrate that place-based laws that protect cultural collective efficacy can advance social mobility and community uplift as much as can ideas that promote dispersion from the inner-city.

1. Historic-Preservation Districts and Affordable Housing Preservation

Historic-preservation districts that contain affordable housing protections secured through the use of transferable development rights may be one meaningful place-based legal solution to protect cultural

collective efficacy. Ironically, historic-preservation law traditionally has been in tension with the preservation of low-income communities.[402] Cities often create historic districts in low-income communities as "a lever for revitalization."[403] The historic designation often calls "attention to the underlying quality of the structures" in the area.[404] The architectural controls attract more middle-class buyers with expensive aesthetics.[405] They also ensure that only purchasers who can afford to comply with the rehabilitation requirements will invest in the area.[406] Rehabilitation of formerly dilapidated historic structures through historic-preservation tax credits often improves property values in the area and thereby gradually raises rents.[407] These factors can make historic areas unaffordable for low-income renters.[408] While low-income homeowners can benefit from historic protections in theory, they may also gradually leave the area because they receive attractive offers for their properties or because they are unable to afford their rapidly escalating property taxes.[409]

To combat the potential displacement effects of historic districts on low-income people, some states and localities increasingly have aligned the creation of historic-preservation districts with efforts to either create or preserve affordable housing.[410] Many jurisdictions combine the federal historic-rehabilitation tax credit with the LIHTC for new construction of affordable housing.[411] In state competitions for allocations of federal tax credits, some states give priority to LIHTC projects that utilize historic buildings.[412] Others give state tax incentives for the rehabilitation of income-producing historic buildings.[413] Some localities enact property tax freeze or abatement ordinances to protect owners who rehabilitate their historic properties, as Alderman Solis did in Pilsen.[414] However, most of

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402. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 478, 512 (1981); *see also* Michael deHaven Newsom, *Blacks and Historic Preservation*, 36 LAW & CONTEMP. PROBS. 423, 423–24 (1971) (explaining that black history is rarely the history that historic preservationists seek to preserve).

403. Rose, *supra* note 402, at 512.

404. *Id.*

405. *Id.*

406. *Id.* at 473.

407. *Id.* at 512–13.

408. *Id.* at 513.

409. *Id.* at 514.

410. *See generally BCCLT Housing*, BAHAMA CONCH CMTY. LAND TRUST OF KEY WEST, INC., http://bahamaconchclt.org/bcclthousing.htm (last visited Feb. 14, 2012); Office of Housing, *Transferable Development Rights (TDR)*, CITY OF SEATTLE, WASH. http://www.seattle.gov/housing/incentives/TDRbonus.htm (last visited Feb. 14, 2012).

411. *See* HUD, AFFORDABLE HOUSING AND HISTORIC PRESERVATION 3 (2007).

412. *See* DONOVAN D. RYPKEMA, NAT'L TRUST FOR HISTORIC PRESERVATION, HISTORIC PRESERVATION AND AFFORDABLE HOUSING: THE MISSED CONNECTION 15 (2002).

413. *Id.*

414. *See supra* Part V.A.

these efforts encourage private developers or homeowners to focus on rehabilitating historic structures to preserve architectural integrity, rather than preserving the people and communities that used those structures in a manner that gave them historical significance. As such, existing low-income owners do not benefit from traditional historic protections because they cannot afford rehabilitations. Renters in multifamily buildings with owners that do not combine historic rehabilitation with long-term affordable housing protections can be displaced.

Instead, this Article suggests that some low-income, inner-city areas, such as the Bronx or Pilsen, create historic districts with affordable housing protections secured through the use of transferable development rights. Transferable development rights ("TDRs") are land-use mechanisms that "compensate owners of low-income housing and historic landmarks in exchange for a promise to forgo further development of their land."[415] TDR programs allow owners of particular buildings to transfer their unused development potential to other buildings they own or to another site in a receiving area. As part of a comprehensive land-use plan, a city planning commission designates "sending areas" that are to be preserved from development and "receiving areas" that can accommodate the increased density or nonpermitted uses.[416] The sending-area owners receive compensation by selling their unused development rights.[417] Receiving-area owners obtain increased permission to develop.[418] A TDR program is executed through three important legal documents: an easement or deed restriction from the sending owner, restricting the development of the sending parcel by however many rights are transferred; a deed transferring the rights to the receiving purchaser; and a plat map of the receiving parcels that indicates the use of the rights.[419]

In the seminal case *Penn Central Transportation Co. v. City of New York*, the Supreme Court established the validity of TDR programs.[420] The Court recognized that historic-landmark preservation laws that restrict owners' rights to develop property but that provide them with some compensation under a TDR scheme do not constitute a taking under the Fifth Amendment of the Constitution.[421] As such, TDR

415. Jennifer Frankel, Comment, *Past, Present, and Future Constitutional Challenges to Transferable Development Rights*, 74 WASH. L. REV. 825, 825 (1999).

416. *See id.* at 827–28 (describing sending and receiving areas).

417. *See* BARLOW BURKE, UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS 201 (2009).

418. *See id.* at 200–01.

419. *See id.* at 203.

420. 438 U.S. 104, 137–38 (1978).

421. The Court articulated an ad hoc, three-prong, factual balancing test for evaluating a whether governmental regulation constituted a taking: (1) the character of the governmental action, (2) the economic impact of the regulation on the owner, and (3) the extent to which the regulation interferes

programs prevent municipalities that enact ordinances which restrict development rights from having to pay just compensation to private owners.[422] Since *Penn Central*, several TDR programs have withstood constitutional challenge under the takings clause.[423] Thus, TDRs have been used to preserve historic landmarks in New York City, to preserve farmland against urbanization in Maryland, to preserve wetlands in Florida,[424] and, most creatively, to preserve low-income housing in Seattle, Washington.[425] As Barlow Burke notes, TDRs are most often "used in conjunction with a land use scheme that has become, due to market forces, highly restrictive."[426] TDRs create a market for unused development potential and thus mitigate the economic impacts of governmental regulations that limit a property owner's development rights in the name of preservation.[427] While both mandatory and voluntary "TDR programs are constitutional, a less than fully developed TDR program may result in a taking."[428] If there are insufficient receiving areas to which owners of sending parcels can transfer their development rights, then an owner may be given a very low price for their TDR.[429] Thus, several municipalities have created TDR banks that have the authority to purchase and hold development rights when there is "no ready buyer."[430] These TDR banks ensure that sending owners have liquidity and receive a reasonable return on their investment.[431]

This Article proposes that low-income, predominately minority inner-city communities with cultural collective efficacy of historical significance should create historic districts with affordable housing protections. Within the districts, private owners of formerly publicly subsidized multifamily housing who agree to keep their buildings affordable to working-class and low-income renters could sell their unused market-rate development rights either to another purchaser or to a city-run TDR bank. The city would have to have sufficient capital to

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with the owner's investment backed expectations. *Id.* at 123–28. Applying these factors to the facts of the case, the Court found that the Landmarks Law did not constitute a per se physical taking of Penn Central's total use of the property, interfere with the Terminal's present uses, or prevent Penn Central from realizing "a reasonable return" on its investment. *Id.* at 128–38. Finally, the New York City Planning Commission's scheme of transferable development rights helped mitigate whatever financial burdens Penn Central incurred. *Id.* at 137–38; *see* BURKE, *supra* note 417, at 201–03.

422. *See* BURKE, *supra* note 417, at 201–03.

423. *See id.*

424. *See id.* at 201.

425. *Transferable Development Rights*, *supra* note 410.

426. BURKE, *supra* note 417, at 201.

427. *See* ROBERT ELLICKSON & VICKI BEEN, LAND USE CONTROLS: CASES AND MATERIALS 165 (3d ed. 2005) (describing *Penn Central's* tortured use of TDRs).

428. BURKE, *supra* note 417, at 202.

429. *See id.*

430. *See* Frankel, *supra* note 415, at 829.

431. *See id.*

purchase these rights if there were no willing buyers. Both private purchases and city purchases would require a TDR agreement to be executed between the owner of the sending TDR site and the city. Within the TDR agreement, cities could require that renters in such buildings comprise a part of a decisionmaking council that oversees implementation of the TDR agreement.

This program would have to be voluntary to withstand a constitutional challenge.[432] Yet given the current economic downturn, banks that are owed significant debt on overleveraged multifamily buildings facing foreclosure may agree to a price for their debt that would enable future owners to keep the buildings affordable and to improve living conditions for existing tenants.[433] The purchasers of those buildings could then receive some economic compensation for their unused market-rate development potential in exchange for the promise to keep the housing affordable for more than thirty years. If speculators are still willing to pay exorbitant prices for mortgages on these distressed properties, then a TDR program may face significant obstacles. However, bank regulators could become involved to encourage banks to adopt an effective real estate appraisal and evaluation process that might encourage banks to sell to purchasers interested in keeping the buildings affordable and participating in a TDR program.[434] For owners of small, owner-occupied homes, localities could enact a historic homeownership assistance property-rehabilitation tax credit that would create an incentive for owners of owner-occupied residences in historic districts to make certain expenditures to rehabilitate their homes. Conceivably, owners could receive a property tax abatement for up to ten years. The abatement would be most significant in the early years and could decrease gradually over time. The assessed value of the property would have to increase at least ten percent after the improvements have been made in order to qualify for the abatement. Additionally, existing businesses in historic districts could receive time-limited tax abatements and economic development funds in order to remain in place and serve existing low-income populations.

These affordable housing protections in historic districts are some examples of place-based lawmaking that would more effectively preserve the individuals and communities that gave these locations historic significance than would traditional measures. These solutions give property owners who recognize and protect low-income residents'

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432. *See id.* at 841 ("By making participation in the program voluntary, Seattle's TDR system has avoided the takings and due process challenges that plagued earlier systems. If landowners do not want to limit the development of their land, they are not forced to do so.").

433. *See* Daniel Massey, *Bronx Debt Sale Triggers Storm of Protest*, CRAIN'S N.Y. BUS. (May 18, 2011, 1:30 PM), http://www.crainsnewyork.com/article/20110518/REAL_ESTATE/110519865.

434. *See id.*

cultural collective efficacy some reasonable return on their investment. These solutions also recognize the human and social, not just architectural and aesthetic, contributions that low-income residents make to their communities. Historic districts with cultural collective efficacy and affordable housing preservation protections would keep a significant number of buildings affordable and allow existing and future low-income residents to remain in place as a community gradually revitalizes. Thus, historic-preservation districts with affordable housing protections are examples of place-based lawmaking that might advance distributive justice in urban reform by keeping inner-city residents in place where there is evidence of cultural collective efficacy. While the process of designating historic districts may cause some social fissures among community groups seeking the economic benefits of these historic districts, it will also force communities to identify and articulate their contributions. Communities with greater organization and positive social capital garnered through participation in historic cultural activities may be better positioned to benefit from such an idea. The process of defining a community's historical cultural collective efficacy could, itself, be a social capital-building exercise. This process would also better ensure that the gentrifying benefits of culture accrue to existing residents, rather than those external to the community.

Notably, reserving the use of TDRs to historic areas where there is some evidence of cultural collective efficacy means that many affordable housing units whose subsidies are expiring would not be protected. A voluntary TDR program to protect and create low-income housing could also be used outside of historic districts. This would be an inclusionary zoning type of measure that would provide incentives to developers and owners who set aside a certain portion of their new construction for affordable housing. The percentage would have to be set based upon local market conditions. Since the recommended TDR program is a voluntary effort, other affordable housing preservation techniques are necessary in order to truly preserve a significant amount of affordable housing in existing inner-city neighborhoods. Federal affordable housing preservation incentive legislation is necessary to continue protections at the federal level. Additionally, state-wide rent-stabilization laws that would protect residents in multifamily buildings whose subsidies are expiring are the best way to keep residents in place. Enacting rent-stabilization laws in areas outside of New York may be difficult, as rent controls raise substantial efficiency concerns. It is also unclear that there is sufficient political will to enact these place-based laws on the federal and state levels, but such protections are necessary to ensure distributive equity to the greatest number of low-income communities.

2. *Foreclosure Prevention Laws*

Foreclosure mitigation and prevention laws are another important example of place-based lawmaking to protect cultural collective efficacy. The U.S. is currently in the midst of a foreclosure crisis of historic proportions.[435] The foreclosure crisis threatens both owners' and renters' attachments to place. Federal efforts to stem the crisis have focused primarily on homeowners.[436] However, the Obama administration's Home Affordable Modification Program has been criticized for failing to substantially modify the mortgages of underwater borrowers and stem foreclosures.[437] Some scholars also recommend an expansion of the unemployment-insurance program and the use of housing choice vouchers.[438] The idea is to attach a housing voucher to unemployment insurance.[439] The amount of the voucher would be based on the fair market rent for the area.[440] Such a subsidy may provide financial assistance to homeowners who increasingly cannot make their mortgage payments due to job losses. This program could be temporary until the unemployment rate returns to more normal levels. This use of vouchers has the potential to help existing homeowners facing foreclosure due to job losses remain in place. It will not help homeowners who do not receive unemployment insurance and, thus, might not help the most low-income residents, but it could help existing homeowners in working-class and low-income communities remain in place during this crisis. As such, this solution transforms voucher payments into a place-based legal mechanism. This idea should be pursued in inner-city areas where homeowners are struggling.

The impact of the foreclosure crisis on renters has received significantly less attention.[441] Yet in cities with high-rise apartment buildings, such as New York, significant numbers of multifamily

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435. *See, e.g.*, Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 566–67 (explaining that at no time since the Great Depression have so many Americans lost their homes and that many millions more are in jeopardy of foreclosure).

436. *See* Vicki Been & Allegra Glashausser, *Tenants: Innocent Victims of the Nation's Foreclosure Crisis*, 2 ALB. GOV'T L. REV. 1, 2 (2009) ("Until lately, the national discussion on the foreclosure crisis largely focused on owner-occupied homes, but recent analysis reveals that the crisis is significantly impacting renters across the country.").

437. *See* Murrey Jacobson, *Obama's Foreclosure Program Slammed Anew for Ineffectiveness*, PBS NEWSHOUR (Mar. 2, 2011, 8:18 PM), http://www.pbs.org/newshour/rundown/2011/03/obamas-foreclosure-prevention-program-has-bullet-on-its-back.html.

438. *See The Wisconsin Foreclosure and Unemployment Relief Plan (WI-FUR)*, WISC. SCH. OF BUS. (Oct. 2, 2009), http://bus.wisc.edu/mba/Real-Estate/news/2009/10/2/The-Wisconsin-Foreclosure-and-Unemployment-Relief-Plan.

439. *See id.*

440. *See id.*

441. *But see generally* Creola Johnson, *Renters Evicted En Masse: Collateral Damage Arising from the Subprime Foreclosure Crisis*, 62 FLA. L. REV. 975 (2010) (exploring the problem of renters living in properties undergoing foreclosure, and devising solutions).

apartment buildings in low-income neighborhoods are going into foreclosure.[442] This phenomenon creates significant instability in these neighborhoods and threatens low- and moderate-income residents' attachments to place. It can also lead to overcrowding in affordable and low-income neighborhoods, deteriorating building maintenance, and vacant buildings.[443] To stem this crisis, bank regulators may need to enforce their requirements for fair appraisals in order to ensure that affordable multifamily housing with overleveraged debt is bought by purchasers who might keep at least some of the housing affordable. Additionally, federal efforts such as the Protecting Tenants at Foreclosure Act, which gives renters ninety-day protections from eviction or protections from eviction for the term of their lease, should be continued to ensure that renters are not evicted in significant numbers from multifamily buildings in foreclosure.[444]

The Obama administration should also rehabilitate and convert foreclosed homes owned by government-supported entities into affordable rental properties.[445] Government-supported entities such as Fannie Mae, Freddie Mac, and the Federal Housing Administration own at least 290,000 foreclosed homes that are difficult to sell due to a limited market.[446] These properties could be retrofitted and rehabilitated into more energy-efficient properties (thereby lowering rental costs) and then sold to affordable housing investors who could earn a significant return from the rental income.[447] These "scattered site" rental homes could reduce the number of foreclosed properties that generate negative externalities in communities, while also providing needed affordable housing.[448] If significant numbers of foreclosed homes are in working-class and low-income minority communities that still have significant positive social capital, then this solution would provide a way for renters displaced from owner-occupied homes or other multifamily buildings to

442. *See generally* FURMAN CTR. FOR REAL ESTATE AND URBAN POLICY, *supra* note 380, at 5; Izabela Rutkowski & Erin Durkin, *Foreclosures Surge and Tenants Paying the Price*, N.Y. DAILY NEWS, July 19, 2011, at 29.

443. llya Marritz, *Foreclosure Notices Up for Owners of NYC Rental Buildings*, WNYC NEWS (June 17, 2011), http://www.wnyc.org/articles/wnyc-news/2011/jun/17/foreclosure-notices-owners-nyc-rental-buildings/.

444. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22 § 701–704, 123 Stat. 1632, 1660–62 (codified as amended at 12 U.S.C. § 5220 note (2010)); *see* Johnson, *supra* note 441, at 975–80.

445. *See* David Min et al., *Renting Our Way Past the Home Foreclosure Crisis*, CTR. FOR AM. PROGRESS (Aug. 11, 2011), http://www.americanprogress.org/issues/2011/08/reo_bundles.html (discussing the Obama administration's announcement that it will consider proposals to sell off large numbers of government-supported-entity owned foreclosed properties and proposing that those properties be converted to affordable rentals).

446. *See id.*

447. *See id.*

448. Scattered-site rental housing describes homes that are located near each other but that are scattered throughout a neighborhood and, thus, do not share land, amenities, or utilities. *See id.*

remain in or near their neighborhoods.[449] This solution could mitigate the negative effects of the foreclosure crisis in some low-income minority communities while helping to maintain some of the positive social networks that exist in such communities by keeping people in place. Lastly, the measures of cultural collective efficacy described above could also help local leaders in administering federal Neighborhood Stabilization Program ("NSP") grants, which are designed to stabilize communities that have suffered from foreclosures and abandonment.[450] These measures could help local leaders receiving NSP grants to identify areas in which foreclosures could damage existing positive social capital and therefore have devastating neighborhood effects. Administrators could then direct federal NSP dollars to neighborhoods that have evidence of positive social capital or cultural collective efficacy.

3. Eminent Domain Abuse

The measures of cultural collective efficacy and positive social capital described above could also be useful in defining blighted communities for purposes of mitigating eminent domain abuse.[451] The Supreme Court's decision in *Kelo v. City of New London* sparked a firestorm of debate over the proper use of eminent domain.[452] The case also created strange bedfellows by highlighting the extent to which governments could use eminent domain to take property owned and valued by one private party in the name of economic development.[453] Many low-income minority communities have long chided local governments' definitions of "blighted" communities.[454] Determinations of

449. *See* Catherine Dunn, *Foreclosure Crisis Fades to Black and Brown*, CITY LIMITS (Aug. 15, 2011), http://www.citylimits.org/news/articles/4363/foreclosure-crisis-fades-to-black-and-brown (explaining that the twin crises of foreclosures and joblessness continue to affect New York's neighborhoods of color disproportionately).

450. *Neighborhood Stabilization Program Grants*, HUD, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs/neighborhoodspg (last visited Feb. 14, 2012).

451. While the Author does not believe in complete vindication of private property rights under all circumstances, the term "eminent domain abuse" can be useful to highlight how local eminent domain powers can be used to disadvantage, rather than benefit, existing communities. To the extent that minority communities have historically been disproportionately disadvantaged by the use of eminent domain for redevelopment, the term "eminent domain abuse" is a useful term for purposes of this discussion. *See* DICK M. CARPENTER II & JOHN K. ROSS, INST. FOR JUSTICE, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN ABUSE 1–14 (2007) (defining eminent domain abuse and describing its historic and current disproportionate use on vulnerable, low-income, minority communities).

452. 545 U.S. 469 (2005); *see* Ilya Somin, *The Judicial Reaction to* Kelo, 4 ALB. GOV'T. L. REV. 1, 2 (2011).

453. Nicholas Confessore, *An Intriguing Yards Alliance*, N.Y. TIMES (Nov. 21, 2006, 10:51 AM), http://empirezone.blogs.nytimes.com/2006/11/21/an-intriguing-yards-alliance/ (describing the strange bedfellows made by the battle over eminent domain in Brooklyn).

454. *See, e.g.*, Pritchett, *supra* note 6, at 3.

blight have become increasingly suspect as they have moved from "slum clearance, to urban redevelopment, then to economic development projects."[455] In states that have adopted a more restrictive definition of blight, measures of cultural collective efficacy could be used to mitigate a determination that an inner-city neighborhood is blighted.

4. Place-Based New Construction

The place-based legal solutions described above focus primarily on preserving existing affordable and low-income housing in inner-city neighborhoods with evidence of cultural collective efficacy and positive social capital. In cities such as New York or Chicago, where there is a scarcity of affordable housing, preservation initiatives are insufficient to address the full scope of the problem. Place-based lawmaking must also include initiatives to create new, sustainable, and affordable housing in inner-city neighborhoods. Thus, programs such as the LIHTC and Choice Neighborhoods, which provide subsidies for new construction of affordable housing, must continue. These programs should be designed to provide significant housing for lower-income families to live in improved neighborhoods.[456] However, place-based projects must combine efforts to build sustainable affordable housing with efforts to improve schools and other neighborhood resources. Place-based projects for new construction that combine improved affordable housing with improved schools and additional commercial mixed-used development are also necessary if positive social capital in the inner-city is to be properly harnessed.[457] Identifying where cultural collective efficacy exists in the inner-city could provide a basis for determining good locations for new construction of sustainable housing with long-term affordability protections.

5. Reinterpreting the "Affirmatively Furthering" Fair Housing Mandate

Lastly, fair housing advocates may want to revisit the wisdom of lawsuits that encourage agencies to redirect most of their subsidies for place-based projects outside of the inner-city. Section 3608(e)(5) of the

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

456. *Via Verde/The Green Way: Bronx, New York*, JONATHAN ROSE COS., http://www.rose-network.com/all-projects/via-verde-the-green-way (last visited Feb 14, 2012).

457. While some empirical studies have highlighted that mixed-used development in urban areas exacerbates crime, studies have found, conversely, that mixed-used commercial and other development in urban neighborhoods is actually more helpful than harmful in reducing crime and improving inner-city areas. *See* Garnett, *The People Paradox*, *supra* note 23, at 45. Thus, mixed-use, place-based developments combined with school improvements should remain an important part of improving areas with evidence of significant positive social capital and cultural collective efficacy.

Fair Housing Act requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter."[458] This mandate requires HUD to take affirmative steps to promote integration, not only to refrain from discrimination.[459] HUD has also promulgated regulations that further interpret the mandate to affirmatively further fair housing.[460] Courts have applied this mandate to other federal government agencies and to HUD's grantees.[461] Yet traditional fair housing advocates argue that several agencies fail to fulfill this mandate in practice.[462] In response, HUD is reforming its guidelines.[463] As HUD develops new guidelines, the duty to affirmatively further fair housing should not be interpreted simply as a mandate to integrate low-income minorities into predominately white communities. Under certain circumstances, agencies that allocate some of their subsidies to low-income, segregated communities that exhibit some forms of positive cultural collective efficacy or social capital should be considered to be in compliance with the mandate.[464]

Perhaps it is a question of degree. Courts could find state or local agencies that allocate substantially high percentages of their subsidies to place-based projects in high-poverty and segregated neighborhoods to be in violation of the affirmatively furthering mandate. However, courts should not always find that agencies which allocate some of their subsidies to place-based projects in low-income, segregated communities to be in violation of the mandate. Courts should give some deference to agencies that allocate credits to low-income segregated areas that have evidence of positive social capital or cultural collective efficacy. Further, in communities with small minority populations, some allocations of LIHTC tax credits or Community Development Block Grant funds should be permitted depending on the circumstances. Under certain conditions, significant place-based subsidies for low-income minority neighborhoods may be justified as they may promote future integration and protect existing positive social capital.[465]

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458. 42 U.S.C. § 3608(e)(5) (2010); *see* THE OPPORTUNITY AGENDA, PUBLIC POLICY BRIEF: REFORMING HUD'S REGULATIONS TO AFFIRMATIVELY FURTHER FAIR HOUSING 4 (2010).

459. *See* 42 U.S.C. § 3608(e)(5).

460. Exec. Order No. 12892, at Sec. 1 (1994).

461. *See* 42 U.S.C. § 5309(b) (2010); Exec. Order No. 12892, at Sec. 1 (1994).

462. *See* THE OPPORTUNITY AGENDA, *supra* note 458, at 5–10.

463. *See id.* at 1.

464. *See* HUD, FAIR HOUSING PLANNING GUIDE 5–6 (1996).

465. *But see* Robert D. Putnam, *E Pluribus Unum: Diversity and Community in the Twenty-First Century*, 30 SCANDINAVIAN POL. STUD. 137, 137–38 (2007) (arguing that increasing levels of racial and ethnic diversity tend to reduce both intra- and intergroup social capital). However, it is unclear if Putnam's study considered whether groups where low-income minorities developed positive social capital were better able to maintain that social capital as their communities diversified better than were low-income minority communities that did not contain positive social capital or cultural