Using Disparate Impact to Restore Housing Affordability and Property Rights

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Executive Summary

Hawaii has the least affordable housing in the nation. Median home prices are close to seven times median family incomes, whereas in many states they are only twice family incomes. Hawaii's high housing prices are not due to a shortage of land: more than 90 percent of the state is rural, and even Oahu, the most developed island, is more than 60 percent rural. Instead, they are a result of land-use restrictions that have created artificial housing shortages. This is due to Hawaii's 1961 land-use law, and subsequent amendments, that placed most of the state off limits to development.

Hawaiian housing was expensive before 1961 because most land in the state was owned by a few families or corporations. Democrats won power in the territorial legislature in 1954 by promising land reforms that would make it possible for more Hawaiians to own their own homes. Instead, they made it more difficult by classifying most of the state "agriculture," "conservation," or "rural" and forbidding most development in such areas.

Proponents of the land-use law say it is needed to protect Hawaiian agriculture. In fact, it has destroyed the state's agricultural economy by making it difficult for farmers to pay employees wages sufficient to allow those employees to find housing. Between 1982 and 2007, the amount of land used for growing crops in Hawaii declined by nearly 60 percent, or 175,000 acres, not because the land was developed—developed area grew by just 57,000 acres, less than half of

which was former cropland—but because farms couldn't compete with farms in Brazil, Costa Rica, and other countries that have little or no land-use regulation.

Attempts to mitigate the effects of the land-use laws on housing by subsidizing a few units of so-called affordable housing have done little to relieve the problem, and some have actually made the problem worse. Honolulu has an "inclusionary zoning" policy requiring developers to set aside 30 percent of the homes they build for moderate- to low-income people, but this has produced few affordable housing units and actually reduced housing affordability. Developers naturally pass the costs of the below-market units to buyers of the market units. This increases the price of new housing and, because sellers of existing homes raise their prices to take advantage of the increase in new home prices, makes the overall housing market less affordable.

These land-use restrictions have three negative effects on low-income minorities. First, they make housing more expensive. Second, they make housing prices more volatile, which makes buying a home riskier than in places that do not have such restrictions. Third, they are a major if not the major contributor to growing wealth inequality as barriers to homeownership have dramatically increased the share of families who cannot afford or must go deeply in debt to buy their own homes.

Fortunately, a June 2015 Supreme Court decision offers a legal remedy to this problem. This decision authorized the use of *disparate-impact* considerations in judging whether government agencies are following the Fair Housing Act. That act specifically forbids the *disparate treatment* of minorities—that is, intentional discrimination in housing sales and rentals. The disparate-impact doctrine asserts that policies such as zoning and land-use regulation that make it more difficult for minorities to obtain housing—even if the policies are not intended to do so—are equally in violation of the law unless the policies can be “justified by a legitimate rationale.”

According to disparate-impact regulations published by the Department of Housing and Urban Development in February 2013, prohibited conduct includes "enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin." Numerous land-use rules, ordinances, and policies increase housing costs. Since some protected minorities, such as blacks, are more likely to have lower-than-average incomes, any such rules or policies reduce their housing opportunities and therefore potentially violate the Fair Housing Act.

HUD's implementation, known as Affirmatively Furthering Fair Housing, focuses on ending income segregation of communities as a means of ending racial segregation. However, this will be a costly policy that will do little to make housing more affordable to most low-income minority families.

As an alternative, fair-housing advocates should question policies that increase housing costs by intruding on private property rights. These include growth-management tools such as urban-growth boundaries, the use of eminent domain for economic development, rent control, inclusionary zoning, and excessive impact fees, all of which benefit a few at everyone else's expense. In approving the disparate-impact doctrine, the Supreme Court has offered a tool to both affordable-housing advocates and property-rights advocates for undoing these rules and policies that make housing less affordable.

Introduction

Over the past 50 years, owners of private property have seen their rights steadily eroded by state and local land-use laws that increasingly restrict how both rural and urban property owners can use their land. On one hand, California, Hawaii, Oregon, and several other states have told

rural property owners that they cannot use their land for anything but farming and forestry even though the nation has a surplus of both farms and forest lands. On the other hand, some large cities have told urban property owners that they cannot charge rents at fair market value, and other cities have told urban homebuilders that they must sell 15 to 20 percent of the homes they build for less than cost in order to provide a few lucky people with "affordable" housing.

Unfortunately, the Supreme Court has granted local and state governments the right to impose such restrictions on property rights. In *Penn Central v. New York City*, the court ruled that a city could regulate away much of the value of someone's land solely for the benefit of others even though the proposed private use of that land would have no negative effects on their neighbors.[1] Although the issue in question was the modification of a historic building in Manhattan, the ruling has been used to justify the taking of property rights away from rural landowners to develop their land for urban or suburban uses.

Other Supreme Court rulings have further eroded property rights. In *Kelo v. City of New London*, the court ruled that a city could take land by eminent domain from one set of private landowners and give it to other private owners on the premise that the new owners would provide "public benefits" by paying more taxes for the land.[2] Fortunately, a new Supreme Court ruling offers the opportunity to reverse all of those losses of property rights.

The Supreme Court's Disparate Impact Decision

On June 25, 2015, the Supreme Court released its decision in *Texas Department of Housing v. Inclusive Communities Project.*[3] This decision authorized the use of "disparate impact" in judging the fair housing policies of cities and suburbs. While some people still believe that the 5–4 majority decided the case wrongly, the decision offers a way of restoring property rights in many states and regions where such restrictions have reduced housing affordability.

The Fair Housing Act of 1968 made it illegal for anyone to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." Such discrimination is known as "disparate treatment." The doctrine of disparate impact goes a step further. As the majority Supreme Court opinion written by Justice Anthony Kennedy noted, "In contrast to a disparate-treatment case, where a 'plaintiff must establish that the defendant had a discriminatory intent or motive,' a plaintiff bringing a disparate-impact claim challenges practices that have a 'disproportionately adverse effect on minorities' and are otherwise unjustified by a legitimate rationale."[4] In other words, a government body or other entity may have no intention of discriminating against minorities yet still be guilty of unfair housing if the result of its policy adversely affects minorities.

In reaching this conclusion, the court relied on a precedent set by *Griggs v. Duke Power*, a fair employment case. Prior to 1964, Duke Power Co. had a policy of discriminating against hiring blacks for manual labor jobs. When the Civil Rights Act of 1964 made such discrimination illegal, Duke Power began requiring that manual laborers have high school diplomas and pass two intelligence tests—requirements that hadn't been imposed on its existing white laborers. Without finding that this policy was intended to discriminate against blacks, the court concluded that it had a disparate impact because blacks were less likely to have high school diplomas and there was no "business necessity" for laborers to have such diplomas.

Opponents of the disparate-impact doctrine, including the four dissenting members of the Court, argue that disparate impact opens the door to endless litigation. To use an example cited by Justice Samuel Alito's dissenting opinion, the City of St. Paul, MN passed an ordinance requiring landlords to deal with rodent infestations. Housing advocates argued that this would

increase the price of housing, and since minorities were more likely to be poor, they would be disproportionately affected by the resulting rent increases. "No one wants to live in a rat's nest," wrote Alito, yet under the disparate impact theory, "a city can't even make slumlords kill rats without fear of a lawsuit."[5] In fact it can, under the disparate-impact doctrine, if it can prove that it has a legitimate rationale for doing so, such as showing that rodent control reduces the spread of disease.

In the case that was actually before the court, the Texas Department of Housing allocated low-income housing tax credits to developers in various neighborhoods around the state. The Inclusive Communities Project (ICP) found that more than 90 percent of such credits in the city of Dallas "were located in census tracts with less than 50% Caucasian residents," and argued that this was an example of disparate impact because it promoted existing patterns of segregated housing. Based on ICP's statistical evidence, the District Court for the Northern District of Texas agreed.

On appeal, the Fifth Circuit Court of Appeals agreed that disparate impacts were *cognizable*, that is, subject to legal review, but reversed the lower court's decision, saying that ICP had failed to prove that an alternative method of allocating tax credits would have a less discriminatory effect. Despite winning the case, the Texas Department of Housing asked the Supreme Court to review the contention that disparate impacts were cognizable in the first place.

While the majority agreed that they were, Alito's dissent pointed out that this ruling opens up a rat's nest for public and private housing providers because any policy can be construed as having a negative effect on low-income minorities. For example, ICP challenged the Texas Department of Housing's allocation of tax credits to low-income neighborhoods, but if it had allocated more credits to high-income neighborhoods, as ICP wanted, the higher costs of

providing housing in those upscale neighborhoods would result in fewer housing units for a fixed amount of tax credits, which in itself would have a disparate effect on low-income minorities.[6]

Alito's dissent didn't rule out disparate impact entirely. "Disparate impact can be *evidence* of disparate treatment," agreed Alito. For example, the facts in the *Griggs v. Duke Power* case "created a strong inference of discriminatory intent," and "federal judges have decades of experience sniffing out pretext."[7]

Another part of the rat's nest is in determining which disparate impacts can be "justified by a legitimate rationale." The Texas Department of Housing, for example, argued that federal law requires that it give "preference" to giving tax credits in census tracts populated predominately by low-income residents.[8] At what point does the legal requirement for such a preference become illegitimate because of the overriding need to desegregate housing?

Some guidance is provided by a disparate-impact rule published by the Department of Housing and Urban Development (HUD) two years before the Supreme Court decision. The rule applies to just two classes of parties. First are banks and other financial firms offering loans or other financial assistance to prospective homeowners.[9] Second are government agencies "Enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin."[10] While there is no guarantee that other parties won't use disparate impact to challenge private landlord or homebuilder policies, HUD appears to be solely interested in the impact government land-use regulation and lenders' mortgage policies have on protected groups of people.

The Supreme Court's disparate impact ruling could effectively overturn numerous state and local laws, ordinances, and regulations that make housing more expensive. Since some

protected classes, such as African-Americans, are more likely than average to have lower incomes, anything that increase housing prices would have disparate impacts on these groups. To keep these laws and rules in place, state and local governments would have to prove that their laws and rules serve some other social value and that there is no other way of achieving that value that doesn't have an impact on low-income minorities.

HUD's disparate-impact rules explicitly prohibit "enacting or implementing land-use rules, ordinances, policies, or procedures that restrict or deny housing opportunities or otherwise make unavailable or deny dwellings to persons because of race, color, religion, sex, handicap, familial status, or national origin."[11] The rules add that, "A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[12]

HUD's rule on disparate impacts outlines a process to determine whether minorities may be suffering from illegal disparate impacts of state or regional land-use regulations. The process requires three steps:

1. A challenger must prove that a "practice results in, or would predictably result in, a discriminatory effect." This can often be done using statistics and analyses showing a causal relationship behind those statistics.
2. Once such proof is made, the defendant must "prove that the challenged practice is necessary to achieve one or more of its substantial, legitimate, nondiscriminatory interests."
3. Even if such proof is offered, the challenger "may still establish liability by proving that the substantial, legitimate, nondiscriminatory interest could be served by a practice that has a less discriminatory effect."[13]

Critics of disparate impact, including the dissenters in the Supreme Court case, believe that challengers must meet a fourth test showing that there was a discriminatory intent or motive behind the policies that led to unfair housing; in other words, that the policies are an example of disparate treatment, not just disparate impact. While this test might be more difficult to prove, many regional land-use policies meet all four tests.

The Disparate Impact of Growth Management

California, Hawai'i, Oregon, Washington, and several other states have passed laws aimed at managing growth, usually by controlling whether growth takes place at the urban fringe or by increasing densities inside of existing developed areas. These laws work by taking developmental rights away from existing landowners. For example, Hawaii has zoned 95 percent of the state as "agriculture," "conservation," or "rural," and heavily restricts property owners in these areas from building homes.[14] As a result of this zoning, the 2010 census found that 92 percent of Hawaii's residents lived on just 6 percent of the land in the state.[15]

There is no doubt in the minds of economists who have studied these rules that they make housing less affordable.

- "Government regulation is responsible for high housing costs where they exist," say Harvard economist Edward Glaeser and Wharton economist Joseph Gyourko.[16]
- University of North Carolina real-estate economists Donald Jud and Daniel Winkler found that rapid growth in housing prices is strongly "correlated with restrictive growth management policies and limitations on land availability."[17]
- Canadian real-estate analysts Tsuriel Somerville and Christopher Mayer found that "Metropolitan areas with more extensive regulation can have up to 45 percent fewer

[housing] starts and price elasticities that are more than 20 percent lower than those in less-regulated markets."[18]

- Federal Research economist Raven Malloy found that "in places with relatively few barriers to construction, an increase in housing demand leads to a large number of new housing units and only a moderate increase in housing prices," while "places with more regulation experience a 17 percent smaller expansion of the housing stock and almost double the increase in housing prices."[19]
- Research by economists Henry Pollakowsi and Susan Wachter concluded that "land-use regulations raise housing and developed land prices."[20]
- Three economists from the University of California, Berkeley found that "regulatory stringency is consistently associated with higher costs for construction, longer delays in completing projects, and greater uncertainty about the elapsed time to completion of residential developments."[21]
- University of Washington economist Theo Eicher compared a database of land-use regulations with housing prices and found that high housing prices are "associated with cost-increasing land-use regulations (approval delays) and statewide growth management."[22]

Growth-management and other land-use regulation has several other negative impacts on low-income families. First, the "reduction in price elasticities" mentioned by Somerville and Mayer mean that regulation makes housing prices more volatile, in turn making homeownership a riskier investment. Supply price elasticity measures the response of supply to a change in demand; a low elasticity means the supply doesn't respond as much, so small increases in demand can lead to large increases in price while small decreases in demand can lead to large decreases in price.

As a result, confirm economists Haifang Huang and Yao Tang, “More restrictive residential land use regulations and geographic land constraints are linked to larger booms and busts in housing prices.” Their comparison of land-use regulations and housing prices in more than 300 cities in the United States found that, “The natural and man-made constraints also amplify price responses to an initial positive mortgage-credit supply shock, leading to greater price increases in the boom and subsequently bigger losses,” in other words, a bigger bubble.[23]

The increased volatility in housing prices that results from land-use restrictions is harmful in many ways. Such volatility "transfers asset values between groups; creates financial instability. . . ; makes monetary policy more difficult. . . [and] create oscillating wealth effects feeding through to consumption spending," say economists from the London School of Economics.[24]

Second, high housing costs have been associated with higher unemployment rates. In regions where housing is affordable, neighborhoods with high homeownership rates tend to have lower unemployment rates than neighborhoods with high renter rates. The reverse is true in regions where housing is unaffordable because people who own their own homes have a harder time moving when they become unemployed.[25] This is partly because of the volatility of housing prices (which means that conditions likely to render someone unemployed are also likely to reduce their home value) and partly because higher home prices mean the transaction costs of moving are higher. The realtor fee for selling a home may be about 5 percent and the downpayment on a new home may be 10 to 20 percent. Both of these are far more affordable if median home prices are about $100,000 than if they are about $300,000.

A third effect of land-use regulation is rising wealth inequality. Thomas Piketty’s book, *Capital in the Twenty-First Century,* finds that inequality is growing because returns on capital

are greater than the rate of economic growth. But a refinement of Piketty's work by MIT researcher Matthew Rognlie reveals that housing is the main source of growing inequality.

Looking closely at Piketty's and other data, Rognlie found that "a single component of the capital stock—housing—accounts for nearly 100 percent of the long-term increase in the capital/income ratio, and more than 100 percent of the long-term increase in the net capital share of income."[26] In other words, were it not for housing, inequality would not be growing. Moreover, the reason why housing capital stock is growing is that urban areas in most developed nations, including nearly every country in Europe, Australia, and many states, provinces, and major urban areas in the United States and Canada, have adopted policies intended to limit urban sprawl.

It may be no coincidence that American inequality (as measured by the Gini index) reached its lowest level in 1968, before urban areas outside of Hawaii had adopted growth-management plans.[27] American homeownership rates rapidly grew between 1940 and 1970, after which they leveled off. California and Oregon adopted growth-management planning in the early 1970s, leading homeownership rates in those cities to decline after that time. Over the next three decades, more states would adopt some form of growth-management planning including Washington, Florida, New Jersey, and most New England states. This was followed by the stifling of homeownership and growing income inequality.

Since it has the oldest and in some ways the strictest land-use laws in the nation, Hawaii has one of the lowest homeownership rates in the nation. In 2015, only 59 percent of Hawaiian households owned their own homes, compared with up to 75 percent in some other states. Only California, Nevada, and New York states have lower homeownership rates than Hawaii.[28]

All of these effects lend special urgency to the need to repeal the land-use regulations that have made housing unaffordable in the first place. These regulations have had a particularly dramatic effect on minorities in Hawaii, the first state to begin practicing growth management in the 1960s.

Between 2000 and 2010, the population of the Honolulu Urbanized Area grew by 11.7 percent, yet the number of black residents in the area declined by 3.6 percent. Other communities on Oahu also lost black residents; overall, the island's population grew by 8.8 percent while its black population declined by 6.6 percent.[29]

Hawaii's land-use restrictions significantly increased the population density of urban areas. In 1960, the Honolulu urbanized area contained 3,520 people per square mile.[30] In 2010, that had increased to 4,716 people per square mile.[31] Such increased densities are a prescription for increased land and housing costs as there is more competition for any given parcel of land.

Table 1

State Value-to-Income Ratios in 1969 and 2013

State	1969	2013	State	1969	2013
Alabama	1.7	2.3	Montana	1.6	3.2
Alaska	1.8	3.1	Nebraska	1.4	2.0
Arizona	1.8	3.0	Nevada	2.1	3.2
Arkansas	1.7	2.2	New Hampshire	1.7	2.9
California	2.2	5.8	New Jersey	2.1	3.5
Colorado	1.8	3.4	New Mexico	1.7	2.9
Connecticut	2.2	3.0	New York	2.1	3.9
Delaware	2.1	3.2	North Carolina	1.6	2.7
D.C	1.8	5.8	North Dakota	1.7	2.2
Florida	1.8	2.8	Ohio	1.7	2.1
Georgia	1.8	2.5	Oklahoma	1.4	2.0
Hawaii	3.0	6.7	Oregon	1.6	3.8
Idaho	1.7	2.8	Pennsylvania	1.4	2.4
Illinois	1.8	2.4	Rhode Island	1.9	3.3
Indiana	1.4	2.0	South Carolina	1.7	2.5

Iowa	1.5	2.0	South Dakota	1.5	2.1
Kansas	1.4	2.0	Tennessee	1.7	2.6
Kentucky	1.7	2.3	Texas	1.4	2.2
Louisiana	1.9	2.5	Utah	1.8	3.2
Maine	1.6	2.8	Vermont	1.8	3.2
Maryland	1.7	3.2	Virginia	1.9	3.2
Massachusetts	1.9	3.9	Washington	1.8	3.6
Michigan	1.6	2.0	West Virginia	1.5	2.0
Minnesota	1.8	2.4	Wisconsin	1.7	2.5
Mississippi	2.4	2.1	Wyoming	1.7	2.8
Missouri	1.3	2.3	United States	1.8	2.7

Median home values of owner-occupied homes divided by median family incomes. Sources: 1969 median home values from *1970 Census: Housing Characteristics for States, Cities, and Counties, Volume 1, Part 1 United States*, table 1; 1969 median family incomes from "Historical Income Tables," table S2, "Median Family Income by State, 1959, 1969, 1979, and 1989," Census Bureau, tinyurl.com/StateMFI59-89; 2013 median family incomes from table B19133 and and median home values from table B25077 of the 2014 American Community Survey.

Growth-management supporters often claim that it is demand, not supply, that has made housing expensive. This is belied by the relative equality of housing affordability across the continental United States in 1969, when few states or regions were practicing growth management and developers and homebuilders could meet any demand for new housing (table 1). Hawaii was the only state to implement growth-management planning before 1970, and not coincidentally it also had the least-affordable housing in 1969. Every other state had fairly affordable housing.

Outside of Hawaii, zoning before 1970 was almost non-existent outside of city limits, and even in cities that had zoning, the time required to get construction permits was fairly brief. San Jose remained very affordable in 1969 despite having been the nation’s fastest-growing urban area for two decades, while Atlanta, Denver, Los Angeles, Miami, Orlando, Phoenix, and other urban areas doubled or even tripled in population between 1950 and 1970 without any stress on housing prices.

Since 1970, California, Oregon, Washington, and most states in New England and on the eastern seaboard, except Georgia and the Carolinas, have implemented some form of growth management either regionally or on a statewide basis. While housing affordability has declined everywhere, it has declined the most in growth-management states. Oregon was slightly more affordable than average in 1969; today, it is far less affordable. The nation's fastest-growing urban areas over the past two decades have been Houston, Dallas-Ft. Worth, and Atlanta, and they remain affordable because of a lack of growth management.

In response to housing affordability problems, many cities have either promoted the construction of more multifamily housing or subsidized such housing. But even the most lavish subsidies produce far too few new units of housing to improve the overall level of housing affordability. For example, according to the state of California, such subsidies have added no more than about 7,000 new housing units per year, or just 5 percent of all new housing built in that state.[32] Since at least some of those 7,000 units would have been built even without the subsidies, the impacts of those programs on the general level of housing affordability have been negligible. Nor is there any guarantee that those programs particularly benefit low-income minorities, as the housing units they provide are often open to half the households in a region, that is, anyone whose income is no higher than median household incomes for their city or region.

Lack of Justification

Under HUD's disparate impact rule, growth-management policies that make housing less affordable can still be justified if they are "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent . . . or defendant."[33] The entity

imposing those rules has the burden of proof to show that they are legally justified, and such justification "must be supported by evidence and may not be hypothetical or speculative."[34]

When Hawai'i, California, Oregon and other states adopted these policies, they initially justified them based on the supposed need to protect farms and open spaces. More recently, they have focused on the alleged benefits in the form of reduced driving, pollution, and energy consumption. Close scrutiny reveals that these purported justifications are either imaginary or provide too few benefits to justify the huge impacts on housing affordability and protected classes.

Growth boundaries are hardly needed to protect prime farm lands. Nationwide, says the United States Department of Agriculture, the contiguous 48 states have more than 900 million acres of agricultural land (including cropland, pastureland, and rangeland), not counting lands owned by the federal government. Less than 40 percent of those acres are used for growing crops.[35] Moreover, the number of acres needed for crop production has been declining because the per-acre productivities of most major crops, including barley, canola, corn, cotton, flax seed, peanuts, potatoes, rice, sorghum, soybeans, sugar beets, sunflowers, sweet potatoes, and wheat, have been growing faster than the nation's population.[36]

Hawaii, as of 2007, had nearly 1.3 million acres of agricultural land and more than 1.6 million acres of forest land. By comparison, says the same Department of Agriculture study, all developed lands in Hawaii, including urban areas, rural roads, and other rural developments larger than a quarter acre in size, covered just 218,000.[37] According to the 2010 census, which uses a different definition of "urban," urban areas in Hawaii, including parks and open spaces within those areas, cover about 252,000 acres, leaving 3.86 million acres in rural areas.[38]

Despite oft-made claims that Hawaii's land-use laws are designed to protect the state's agricultural industry, the opposite has occurred. High housing costs translate to high labor prices, and Hawaiian farmers and producers can't pay those labor costs and still compete with farms elsewhere. According to the United States Department of Agriculture, the number of acres used for growing crops in Hawaii declined from more than 300,000 in 1982 to less than 127,000 in 2007.[39] Once the dominant part of Hawaii's economy, today agriculture contributes only about 1 percent to the state's economic activity.[40] As University of Hawaii agricultural historian Duane Bartholomew and his colleagues observed with respect to Hawaii's once-world-dominant pineapple industry, "The decline occurred mainly because foreign-based canneries had labor costs approximately one-tenth those in Hawaii."[41]

In short, growth boundaries and other growth-management policies are hardly needed to protect farms. Considering the nation has such an abundance of farmland and uses only a third of it for growing crops, the protection of such lands cannot justify policies that cause housing prices to rise by 50 to 300 percent or more, making housing unaffordable to many protected minorities. As the Department of Agriculture itself concludes, "urbanization is not considered a threat to the nation's food production."[42]

Most state and local land-use policies aimed at protecting farms and open spaces depend on taking property rights away from private landowners. Owners of land outside of urban-growth boundaries in California, Hawaii, Oregon, and other states find that it is almost impossible to develop their land. Growth management thus takes property rights from rural land owners mainly to protect scenic views for upper-class urban residents. Rural property owners and low-income urban residents both lose from these policies.

Alternative, Less Discriminatory Practices

In contrast to the farmland justification for growth-management policies, air pollution, energy consumption, and traffic congestion are real issues. Yet growth management has minimal impact on these issues. Thanks to urban-growth boundaries imposed in the 1970s, for example, the average population densities of the San Francisco-Oakland and San Jose urban areas have increased by more than 60 percent since 1980. Despite that increase, per capita transit ridership has fallen by a third and per capita driving has increased.

In 2008, the Transportation Research Board asked University of California, Irvine, economist David Brownstone to review claims that growth management would reduce energy consumption and greenhouse gas emissions. After a thorough review of the literature, he found that there is a "statistically significant link" between urban form and driving, but that "the size of this link is too small to be useful" in reducing energy consumption or greenhouse gas emissions.[43]

To the extent that there is a link between growth management and measures of environmental quality such as air emissions and energy consumption, other policies, such as more stringent air pollution standards and (because most pollution takes place in congested traffic) measures to relieve congestion such as traffic signal coordination, can be far more effective at saving energy and reducing pollution while having no disparate impacts on protected classes of people. HUD's disparate impact rule states that, even if a defendant can prove that the challenged rules or policies might be justified based on other considerations, such policies may still violate fair housing rules if "the challenged practice could be served by another practice that has a less discriminatory effect."[44]

Rules that reduce the energy consumption and emissions of individual cars can have a far greater effect on the environment than rules that attempt to reduce per capita driving by manipulating urban form. In 1970, many American cities had serious air quality problems, leading Congress to pass the Clean Air Act and create the Environmental Protection Agency (EPA). The EPA attempted to address air quality issues using a two-pronged approach: first by requiring auto manufacturers to build new cars that would meet increasingly stringent emissions rules; and second by encouraging cities to invest in urban transit and reshape themselves to favor alternatives to driving.

Since then, total transportation-related emissions have declined by more than 80 percent. Virtually all of this decline was due to reduced emissions from new cars. Today, many new cars produce as little as 1 percent as much toxic emissions as new cars in 1970, and the average car on the road produces less than 8 percent as much as the average in 1970. On the other hand, efforts to promote transit and change urban form have had almost no effect. Despite spending hundreds of billions of dollars subsidizing transit since 1970, transit ridership has declined from about 50 trips per urban resident per year in 1970 to 40 trips per year today. As already noted, large increases in urban densities in the San Francisco Bay Area have failed to reduce per capita driving.

Intent

Hawaiian growth-management policies clearly meet the disparate-impact tests set by the Supreme Court majority. But at least some of those policies also meet the test set by the minority, as city officials have openly stated that they adopted the policies in order to attract high-income people to their region. Thus, these policies are actually examples of *disparate treatment*, since they are discriminating against low-income people who are disproportionately

black or other protected minorities. However, proving intent may be much more difficult than proving disparate impacts, which may be one reason why the Supreme Court majority believed that no such proof was needed.

Zoning and land-use regulation have always been a way of excluding undesirable people and uses from some neighborhoods. "The basic purpose of suburban zoning was to keep Them where They belonged—Out," says Rutgers planning professor Frank Popper. "If They had already gotten in, then its purpose was to confine Them to limited areas. The exact identity of Them varied a bit around the country. Blacks, Latinos, and poor people always qualified. Catholics, Jews, and Orientals were targets in many places."[45]

In general, zoning was a tool used by the middle class to create neighborhoods suitable for middle-class homeownership. Before the development of zoning, working-class families in American cities were actually more likely to own their own homes than middle-class families; the middle class preferred to rent so they could easily move if any working-class families moved in next door.[46] In this context, *middle class* refers to college-educated people with knowledge-oriented jobs while *working class* refers to non-college-educated people with labor-oriented jobs. Currently, about 30 percent of working-age Americans have bachelor's degrees or better, suggesting that about 30 percent of American families are in the middle or upper classes while 70 percent are in the working or lower classes.

After Henry Ford made mass-produced automobiles affordable to the working class, working-class families priced out of housing in the cities by zoning could find low-cost land and build homes in unincorporated areas outside of the cities. When states began allowing, and in some cases requiring, counties to zone land, housing affordability again became a problem for many working-class families. It is worth noting that no one complained about urban sprawl when

wealthy families began moving to the suburbs in the mid-19th century or when middle-class families began moving to the suburbs around 1890. It was only when working-class families began moving to the suburbs in large numbers after World War II that urban sprawl became an issue and middle-class planners began promoting urban-growth boundaries and other policies to curb such sprawl by making single-family homes unaffordable to low-income and working-class families.

The Rise of the Creative Class, a 2002 book by urbanologist Richard Florida, argued that cities should promote economic growth by attracting members of the "creative class," which he defined to include scientists, engineers, artists, and other "creative professionals." Florida estimated that about 30 percent of working-age Americans were members of the creative class.[47] Not coincidentally, this happens to equal the percentage of working-age Americans with college degrees. In other words, Florida's creative class is identical to the middle class, and Florida's prescription calls for cities to attract a higher percentage of middle-class workers than the national average, to the exclusion of working-class workers. His book might have been far less popular if he had used to terms middle class and working class instead of creative class and (by implication) non-creative class.

Among other things, one of the factors that Florida believes can attract members of the creative class is density. Based on an analysis showing that "creative" workers tend to work in dense areas (but without showing any causal relationships), Florida concludes that "density is a key component of knowledge spillovers and a key component of innovation."[48]

The problem is that policies that promote density also make housing less affordable. As Harvard economist Edward Glaeser observes, such policies will make a region "less diverse and instead evolve into a boutique city catering only to a small, highly educated elite."[49]

Florida's ideas have become popular among urban planners and city officials who want to increase local tax revenues by attracting higher-income residents. Numerous cities, including Austin, El Paso, Miami, Newark, and Seattle, have hired Florida to help them attract more creative workers. Florida has influenced even more cities by his work for the United States Conference of Mayors, National League of Cities, and various chambers of commerce and economic development groups.[50]

Florida himself has admitted that his policies harm low-income and working-class families. "Talent clustering provides little in the way of trickle-down benefits," he says. He specifically points to higher housing costs eroding away any wage benefits enjoyed by working-class workers living in regions that have tailored themselves for the creative class. "There is a rising tide of sorts," says Florida, "but it only lifts about the most advantaged third of the workforce, leaving the other 66 percent much further behind." One result of such high housing costs, he continues, is that lower-income workers are often forced to migrate away from "knowledge-based metros."[51]

The difficulty for those concerned about disparate treatment is in proving that the policies cities or regions adopt are aimed at attracting creative workers at the expense of others. While city officials may listen to, quote, and even hire Florida for his advice, their written plans usually contain more generic terms and only mention Florida's ideas indirectly. According to the disparate-impact doctrine, such proof isn't necessary to show that cities, metropolitan regions, and states may be guilty of policies that have disparate impacts on low-income minorities. But, for those who believe such proof should be required, in may cases there may be enough circumstantial evidence to allow Justice Alito and other judges to "sniff out pretext."

Inclusionary Zoning: Making the Problem Worse

In response to Hawaii's housing crisis, Oahu, Maui, and Hawaii all have inclusionary zoning ordinances that require that homebuilders build or fund affordable housing. Under Honolulu's ordinance, for example, builders must either build or subsidize 30 "affordable" housing units for every 100 market-rate units they build.[52] It is a measure of how unaffordable Hawaii's housing is that at least some of these units are meant to be affordable to families that earn between 120 percent and 140 percent of median family incomes.[53]

Like other subsidies, inclusionary zoning results in too few units to make the overall housing market more affordable. In the four years from 2011 to 2014, just 612 new housing units were built under Honolulu's inclusionary zoning ordinance.[54] While a few lucky people benefit from those units, such ordinances have been proven to harm all other renters and homebuyers.

First, inclusionary zoning leads builders to build fewer new homes overall. Second, it forces builders to charge more for the market-rate units they build. This in turn leads sellers of existing homes to raise their prices, thus reducing overall housing affordability.[55] Even if these weren't true, the fact that no more than 30 percent of new homes would be sold or rented at "affordable" rates means there will never be enough affordable housing to go around, as—by definition—more than half of Honolulu families earn less than 140 percent of median family income.[56]

In short, inclusionary zoning and similar measures that impose added costs on homebuilders, like the growth-management policies whose impacts they is supposed to remedy, actually have their own disparate impacts on low-income minorities. As such, they violate the Fair Housing Act just as much as the state's urban-growth boundaries.

Remedies

While individual communities can subsidize (or force others to subsidize) the construction of a limited number of units of affordable housing, this won't help most low-income families. Instead, the key to maintaining housing affordability is to allow builders unlimited access to vacant lands near the urban fringe. As soon as such access is limited, through growth boundaries, urban service boundaries, inflexible large-lot zoning, or other policies, housing prices climb even if there is supposedly plenty of vacant land within the urban area. This is because developing vacant parcels within the urban area is often more expensive with lengthy permitting processes, and because when access is limited builders quickly buy all lands available for future development, thus driving up land prices within the urban area.

Simply expanding urban-growth boundaries is not sufficient to make housing affordable. The purpose of an urban-growth boundary is to prevent "leap-frog development" in which a new development is built several miles away from the urban fringe. Supposedly, such development is inefficient because services must be extended further than to a development closer in. Yet in many cases leap-frog development is actually more efficient than development next to the urban fringe because large parcels of land are easiest to develop while land parcels near the urban fringe tend to be small and more expensive to develop.

In addition, the very existence of a boundary is going to keep land prices high, so a small expansion is not going to lead those prices to fall to what they were before the boundary was put in place. Finally, small expansions of a boundary do not necessarily allow developers to escape from the stringent regulation and high system development charges imposed by cities within the boundary.

For these reasons, the only way to truly make Hawaiian housing affordable again is to eliminate all state and county land-use regulation. Giving landowners outside of the urban areas the freedom to develop their land with minimal regulation would put pressure on cities inside the current boundaries to reduce their regulation as well.

Challenging Land-Use Policies

Numerous state and local laws, ordinances, regulations, and policies make housing less affordable, and in most if not all cases there is no legitimate rationale for those policies. Many of the reasons used to justify these policies, such as farmland preservation, are not legitimate because, for example, there is no shortage of farmland and urbanization does not present a threat to farm productivity. Other justifications, such as the need to save energy or reduce pollution, fail the "alternative practice" test in that an alternative policy could serve those needs just as well without have disparate impacts on minorities.

As such, Hawaiian land-use rules that limit development outside of urban zones should be repealed. Cities and counties must apply minimal land-use regulation and impact fees to undeveloped lands in their jurisdictions. The inclusionary zoning law should also be repealed.

If the legislature and other legislative bodies are unlikely to do this themselves, those who support more affordable housing must turn to the courts. The first step is to file a complaint with the Department of Housing and Urban Development. The department then has 100 days to investigate the complaint. If the department takes no action after that time, the challenger can go to court.[57]

A primary target of such a complaint and lawsuit would be the state, whose rules limit development outside of urban zones. A second target could be cities and counties for their

excessive system impact fees, design ordinances, inclusionary zoning, and other rules that make new developments more expensive.

Normally, only people who are harmed by a policy that has disparate impacts on low-income minorities or other protected classes will have standing to sue under the Fair Housing Act. Generally, that means members of those protected classes would have to be plaintiffs in such a lawsuit. However, the Supreme Court has granted standing to whites who argue that policies that have disparate results affect "the very quality of their daily lives."[58] The court has also granted standing to local residents who are presumably white but who believe that discriminatory policies "injure the stability" of their community.[59] This means practically anyone who is concerned about housing affordability can bring a disparate-impact case to court, though certainly a challenge would be stronger if one or more plaintiffs were members of a protected class. Winners of fair housing cases are eligible to receive attorney fees.[60]

In addition to bringing a lawsuit based on fair housing laws, challengers could also bring a *qui tam* claim under the Federal False Claims Act. Under the False Claims Act, anyone who has accepted federal funding under false pretenses is subject to double or even triple damages. *Qui tam* is short for the Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning "he who sues in this matter for the king as well as for himself." A private party who makes a winning qui tam claim will be eligible for up to 25 percent of the damages paid by the defendant who committed fraud.[61]

The fraud in this case would be perpetrated by government agencies that accept federal housing funds. In order to be eligible for the funds, these agencies must declare that none of their policies violate fair housing rules. Both the state of Hawaii and several Hawaiian cities have received federal housing grants, and the state mandate for urban-growth boundaries and city

design codes, impact fees, or other policies that make housing more expensive may undermine claims that the state or cities did not violate the disparate impact rule.

To be eligible for the qui tam award, the person bringing the lawsuit must be an "original source" of information showing that the city or other unit of government has defrauded the federal government.[62] That could be satisfied by either finding previously undisclosed documents showing that the city or other entity was aware that its policies were making housing more expensive or submitting original proof of that claim. If the evidence that the policies were increasing housing prices was publicly known, then the suit could not be a qui tam suit.

Conclusion

Thanks to state and local land-use regulations, Hawaii has gone from being only slightly unaffordable in 1969 to terribly unaffordable today. The laws, ordinances, and rules that have made housing unaffordable have disparate impacts on low-income blacks and other low-income minorities, and these impacts have been revealed by declining populations of blacks in the city of Honolulu and Oahu between 2000 and 2010.

While expansion of lands in the urban zone could provide some relief, the only real relief would come from complete elimination of those boundaries and repeal of local ordinances that make housing more expensive. If the state and local governments are not willing to do that, then fair housing advocates should file a complaint with the Department of Housing and Urban Development and be prepared to follow that complaint with a lawsuit.

A successful challenge to the land-use laws that have made housing unaffordable could impose a large cost on people who already own or are buying homes as they would likely see the value of their homes fall. This is an unavoidable result of correcting the artificial shortages imposed by misguided laws and regulations. The ones who would be hurt the most would be

recent buyers who paid significantly more than homes should really cost. While it is tempting to argue that the government that caused the problem should offer some sort of compensation, the reality is that anyone who purchased a home did so knowing that there is no guarantee that home prices would be stable or growing.

Against this cost, the benefits of holding the state accountable for housing affordability problems would be enormous. Housing prices would fall, and would thus take a much smaller share of the incomes of both renters and future homebuyers. Low-income families would especially benefit by gaining access to better quality housing at a lower cost. Moreover, housing is a bellwether for other sectors of the economy, so businesses would also see their rents decline. Homeownership would rise, giving more people access to the equity that comes with homeownership, equity that is often used to start new businesses. Between that equity and the lower cost of renting business properties, fixing Hawaii's housing affordability problems would lead to a surge in economic growth. Income inequality would tend to decline, partly because most of the costs would fall on relatively wealthy people while many of the benefits would be enjoyed by the less well off. All in all, these benefits vastly outweigh the costs.

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[1] 438 U.S. 104 (1978).

[2] 545 U.S. 469 (2005).

[3] Texas Department of Housing v. Inclusive Communities Project, No. 13-1371, 576 U.S. ___ (2015).

[4] Justice Anthony Kennedy, No. 13-1371, p. 1.

[5] Justice Samuel Alito dissent, No. 13-1371, p. 1.

[6] Alito, p. 30.

[7] Alito, p. 33.

[8] Kennedy, p. 2.

[9]. 24 CFR 100.130

[10] 24 CFR 100.70(d)(5).

[11] 24 CFR 100.70(d)(5).

[12] 24 CFR 100.500(a).

[13] "Implementation of the Fair Housing Act's Discriminatory Effects Standard; Final Rule," *Federal Register*, February 15, 2013, p. 11460.

[14] "Land Use Division," Hawaii Office of Planning, 2016, http://planning.hawaii.gov/lud/.

[15] "Percent Urban and Rural in 2010 by State and County" (spreadsheet), Census Bureau, Washington, 2012, www2.census.gov/geo/docs/reference/ua/PctUrbanRural_County.xls.

[16] Edward L. Glaeser and Joseph Gyourko, *The Impact of Zoning on Housing Affordability*, Cambridge, MA: Harvard Institute of Economic Research, 2002, p. 3.

[17] G. Donald Jud and Daniel T. Winkler, "The Dynamics of Metropolitan Housing Prices," *Journal of Real Estate Research* 23 (January–February 2002): 29–45.

[18] C. Tsuriel Somerville and Christopher J. Mayer, "Government Regulation and Changes in the Affordable Housing Stock," *FRBNY Economic Policy Review*, June 2003, p. 53.

[19] Raven E. Saks, "Job Creation and Housing Construction: Constraints on Employment Growth in Metropolitan Areas," Working Paper no. W04-10, Harvard University Joint Center for Housing Studies, Cambridge, MA, December 2004, p. iv.

[20] Henry O. Pollakowski and Susan M. Wachter, "The Effects of Land-Use Constraints on Housing Prices," *Land Economics* 66, no. 3 (August 1990): 323.

[21] John M. Quigley, Steven Raphael, and Larry A. Rosenthal, "Measuring Land-Use Regulations and Their Effects in the Housing Market," in *Housing Markets and the Economy: Risk, Regulation, and Policy*, ed. Edward L. Glaeser and John M. Quigley (Cambridge, MA: Lincoln Institute, 2009), p. 296.

[22] Theo S. Eicher, "Growth Management, Land Use Regulations, and Housing Prices: Implications for Major Cities in Washington State," working paper, University of Washington, Seattle, 2008, tinyurl.com/3ol4u5k.

[23] Haifang Huang and Yao Tang, "Residential Land Use Regulation and the US Housing Price Cycle Between 2000 and 2009," University of Alberta working paper, 2011, p. 1, tinyurl.com/3nzecs9.

[24]. Paul C. Cheshire, Max Nathan, and Henry G. Overman, *Urban Economics and Urban Policy: Challenging Conventional Policy Wisdom* (Northhampton, MA: Edward Elgar, 2014), pp. 83–84.

[25] Andrew Oswald, "Theory of Homes and Jobs," preliminary paper, 1997, tinyurl.com/2pfwvv.

[26] Matthew Rognlie, "A Note on Piketty and Diminishing Returns to Capital," MIT working paper, 2014, tinyurl.com/ntutcha.

[27]. "Gini Ratios for Families" and "Gini Ratios for Households," Census Bureau, tinyurl.com/GiniHouseholds and tinyurl.com/GiniFamilies

[28]. "Housing Vacancies and Homeownership: Annual Statistics," Census Bureau, 2016, table 15, "Homeownership by State," tinyurl.com/HObyState84-15.

[29] 2000 census, table P003; 2010 census, table P1, for selected urbanized areas.

[30]. *Census of Population: 1960, Volume 1, Part A* (Washington: Bureau of the Census, 1961), p. 1-43.

[31]. "Changes in Urbanized Areas from 2000 to 2010," Census Bureau, tinyurl.com/UZAs2000-2010.

[32]. California's High Housing Costs: Causes and Consequences (Sacramento: Legislative Analyst, 2015), p. 7.

[33]. 24 CFR 100.500(b)(1)(i)

[34]. 24 CFR 100.500(b)(2).

[35] *2012 National Resources Inventory, Summary Report* (Washington: Natural Resources Conservation Service, 2015), p. 3-39; *Alaska Summary Report, 2007 National Resources Inventory*, Washington, DC: Natural Resources Conservation Service, 2009, p. 7.

[36] According to *Crop Production Historical Track Records*, Washington, DC: Department of Agriculture, 2014, the per-acre yields of most crops grew faster than the population between 1980 and 2010.

[37] *2012 National Resources Inventory, Summary Report* (Washington: Natural Resources Conservation Service, 2015), p. 3-39; *Alaska Summary Report, 2007 National Resources Inventory*, Washington, DC: Natural Resources Conservation Service, 2009, p. 7.

[38]. "Percent Urban and Rural in 2010 by State and County" (spreadsheet), Census Bureau, Washington, 2012, www2.census.gov/geo/docs/reference/ua/PctUrbanRural_County.xls.

[39]. *Hawaii Summary Report 2007 National Resources Inventory* (Ames, IA: Natural Resources Conservation Service, 2009), p. 1.

[40]. "Housing Problems and the Needs of Native Hawaiians," Department of Housing and Urban Development, Washington, DC, p. 22, tinyurl.com/HUDHIHousing.

[41]. Duane P. Bartholomew, Richard A. Hawkins, and Johnny A. Lopez, "Hawaii Pineapple: The Rise and Fall of an Industry," *HortScience*, October 2012, vol. 47, no. 10, pp. 1390-1398.

[42] Natural Resources Inventory: Highlights (Washington, DC: USDA, 2001), p. 1.

[43]. David Brownstone, "Key Relationships Between the Built Environment and VMT," Transportation Research Board, 2008, p. 7, tinyurl.com/y9mro58.

[44]. 24 CFR 100.500(c)(3).

[45] Frank Popper, *The Politics of Land-Use Reform*, Madison, WI: University of Wisconsin Press, 1981, p. 54.

[46] Randal O'Toole, American Nightmare: How Government Undermines the Dream of Homeownership, Washington, DC: Cato Institute, 2012, p. 40.

[47] Richard Florida, "Cities and the Creative Class," *Cities & Community* 2:1 (March 2003), p. 8.

[48] Brian Knudsen, Richard Florida, Gary Gates, and Kevin Stolarick, "Urban Density, Creativity, and Innovation," creativeclass.com, 2007, p. 1, tinyurl.com/5dsanj.

[49] Edward Glaeser, *The Economic Impact of Restricting Housing Supply* (Cambridge, MA: Rappaport Institute, 2006), p. 2, tinyurl.com/6zsovh.

[50] "Clients: Economic Dev. & Government," creativeclass.com/clients.

[51] Richard Florida, "More Losers Than Winners in America's New Economic Geography," *The Atlantic Citylab*, January 30, 2013, tinyurl.com/p3kjddc.

[52]. A. Bernard Bays and Michelle DeRosa, "The Scramble to Protect the American Dream in Paradise: Is Affordable Housing Possible in Hawaii?" *Hawaii Bar Journal*, vol. 10, no. 3, p. 20.

[53]. Carl Bonham, "The Unintended Consequences of Affordable Housing Policy," *Economic Currents*, September 18, 2013, tinyurl.com/InclZoninginHawaii.

[54]. Anita Hofschneider, "Honolulu's Affordable Housing Rules Only Produced 33 Units in FY 2014," *Civil Beat*, September 10, 2015, tinyurl.com/33Unitsin2014.

[55] Tom Means, Edward Stringham, and Edward Lopez, *Below-Market Housing Mandates as Takings: Measuring their Impact* (Oakland, CA: Independent Institute, 2007), p. 1.

[56] American Community Survey, Census Bureau, table S1901 for Portland urbanized area.

[57]. Fair Housing Act, section 810 (42 U.S.C. 3610).

[58]. Trafficante v. Metropolitan Life Insurance, 409 U.S. 205 (1972).

[59]. Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

[60]. Fair Housing Act, section 812(p) (42 U.S.C. 3612(p)).

[61]. False Claims Act. 31 U.S.C. 3729-3733.

[62]. United States v. Bank of Farmington, 166 F. 3d 853, 859 (7th Cir. 1999).