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PREROGATIVE AND LEGISLATOR VETOES

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ABSTRACT—Prerogative is the devolution of power to a single legislator over decisions in her district. In cities with a prerogative regime, when the city council votes on an issue or an administrative agency makes a decision concerning a specific district, decision-makers defer to that district's legislator. This deference gives the legislator exclusive executive authority over her district. In Chicago and Philadelphia, legislators have infamously wielded prerogative and tied the practice to corruption. But in addition to corruption, prerogative gives rise to another, more pernicious issue. When applied to decisions related to affordable housing, prerogative perpetuates racial segregation through legislator vetoes. Prerogative empowers legislators to unilaterally block the land use and financing approvals necessary to develop affordable housing in their districts. As legislators from wealthy districts block affordable housing through prerogative, affordable housing remains concentrated in racially isolated communities, thereby further entrenching existing patterns of housing segregation.

Prerogative's opponents have proposed legislative reform to curb the practice, but these proposals do not sufficiently account for political inertia: legislators are unlikely to curtail their own power. In the absence of legislative reform, housing advocates should turn to the courts. Judicial intervention can serve as the catalyst to effectuate land use reform that constrains prerogative and promotes equitably sited affordable housing.

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INTRODUCTION

Following Chicago's 2019 municipal election, incoming mayor Lori Lightfoot marked her first day in office with ambitious executive action: curbing the influence of "aldermanic privilege."[1] The tradition of aldermanic privilege, also known as prerogative,[2] refers to the power Chicago aldermen hold over city governmental actions in their respective wards.[3] Prerogative enables aldermen to unilaterally approve or block decisions in their wards—including permitting, licensing, and zoning—through an unwritten policy of deference that effectively gives aldermen sole decision-making power.[4]

[1] Chi., Ill., Executive Order No. 2019-2 (May 20, 2019), https://chicityclerk.s3.amazonaws.com/s3fs-public/document_uploads/executive-order/2019/F2019-93.pdf [https://perma.cc/TR3S-P3YH] (reforming aldermanic prerogative); *see also* Sara Freund, *On Day One, Lori Lightfoot Takes Away Aldermen's Ability to Block Development*, CURBED CHI. (May 21, 2019, 10:09 AM), https://chicago.curbed.com/2019/5/21/18633475/lori-lightfoot-chicago-mayor-alderman-executive-order [https://perma.cc/K7XT-397A].

[2] *See* Chi., Ill., Executive Order No. 2019-2, *supra* note 1.

[3] *See generally* Christopher Thale, *Aldermanic Privilege*, ENCYCLOPEDIA OF CHI. (2005), http://www.encyclopedia.chicagohistory.org/pages/2197.html [https://perma.cc/W83Y-CET8] (overviewing aldermanic prerogative).

[4] *See* Patrick Sisson, *How Aldermanic Privilege Shaped Chicago*, CURBED CHI. (May 31, 2019, 1:42 PM), https://chicago.curbed.com/2019/5/31/18646174/chicago-politics-city-council-corruption-aldermanic-privilege [https://perma.cc/LP5M-CZRH].

While proponents of the practice argue it fosters local accountability,[5] it also creates opportunities for corruption given its discretionary nature. In the words of Lightfoot's Executive Order, prerogative "undermine[s] the legitimacy of government in the eyes of the public."[6]

Lightfoot had campaigned on a pledge to reform prerogative,[7] a critical issue sparked in part by the 2019 federal indictment of the longest-serving alderman in Chicago history,[8] and her Executive Order sought a turning point in the city's culture of corruption.[9] The Order directed city administrative agencies to end their deference to aldermanic privilege as soon as practicable.[10] But Mayor Lightfoot could not command the city council itself to change how its legislators honored an unwritten tradition.[11] Thus, city council decisions over land use policies like zoning remained subject to aldermanic prerogative.[12]

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[5] For example, 35th Ward Alderman Carlos Ramirez-Rosa said, "I do think that there is some measure of accountability through the aldermanic prerogative system that we have because it demystifies the zoning process for local residents." Tanvi Misra, *How Chicago's Aldermen Help Keep It Segregated*, BLOOMBERG CITYLAB (Aug. 2, 2018), https://www.citylab.com/equity/2018/08/how-chicagos-aldermen-help-keep-it-segregated/564983/ [https://perma.cc/YR4L-A6R3]; *see also* Bill Ruthhart, *In Tribune Meeting, Lori Lightfoot and Toni Preckwinkle Clash over Power of Aldermen, City Hall Corruption*, CHI. TRIB. (Mar. 12, 2019, 6:00 PM), https://www.chicagotribune.com/politics/elections/ct-met-chicago-mayors-race-lightfoot-preckwinkle-tribune-editorial-board-20190311-story.html [https://perma.cc/LW6A-K2KA] (describing a mayoral candidate who argued that prerogative enables aldermen to better serve their constituents).

[6] Chi., Ill., Executive Order No. 2019-2, *supra* note 1, at 1.

[7] *See* Ruthhart, *supra* note 5.

[8] For an overview of the indictment and Ed Burke's historical power, see *Chicago's Political System Is Set Up to Produce Corruption*, ECONOMIST (Jan. 12, 2019), https://www.economist.com/united-states/2019/01/12/chicagos-political-system-is-set-up-to-produce-corruption [https://perma.cc/D5PH-FWYL].

[9] As the *Chicago Tribune* editorial board eloquently described it: "To put it in Chicagoese, Da new mare don't like aldermanic privilege." Editorial Board, *Mayor Lightfoot and the Machine . . . Part 2: Aldermen, Limiting Your Privilege Will Help Fix City Hall*, CHI. TRIB. (May 15, 2019, 5:00 PM) [hereinafter Editorial Board, *Mayor Lightfoot and the Machine*], https://www.chicagotribune.com/opinion/editorials/ct-edit-lightfoot-aldermanic-privilege-prerogative-city-council-20190515-story.html [https://perma.cc/X2X9-ALWK] (describing Lightfoot's Executive Order aimed at curtailing aldermanic prerogative).

[10] Chi., Ill., Executive Order No. 2019-2, *supra* note 1, at 2.

[11] *See* Sisson, *supra* note 4 (noting prerogative is "an unwritten law of Chicago political power, an unspoken privilege long abused by power brokers").

[12] *See* Claudia Morell, *How Far Should Mayor Lightfoot Go to Curb Chicago Aldermen?*, NPR (July 1, 2019), https://www.npr.org/local/309/2019/07/01/737197413/how-far-should-mayor-lightfoot-go-to-curb-chicago-aldermen [https://perma.cc/9ZWT-DKZM].

While media coverage of Lightfoot's Order described prerogative as a local matter,[13] prerogative's influence reaches much further. Cities across the country—from San Francisco to Nashville to New York—have grappled with prerogative's hold on their respective decision-making processes.[14] For example, like Chicago, Philadelphia's own tradition of prerogative garnered significant political attention after federal prosecutors charged one of the city's council members with wire fraud for extorting developers in connection with zoning.[15] In Los Angeles, the growing homelessness crisis turned the spotlight on council members who exercised prerogative to block affordable housing developments.[16] Thus, while Mayor Lightfoot sought to constrain prerogative's influence in Chicago, prerogative's impact stretches coast to coast.

Despite Lightfoot's Executive Order, nearly one year later, prerogative still reigns in Chicago.[17] To Lightfoot's credit, aldermen no longer have total discretionary control over certain administrative permitting processes such as those pertaining to bikeshare dock stations and landscaping requests.[18] But, especially as it relates to issues of housing development, prerogative's grip on Chicago has only tightened: Lightfoot's aldermanic allies have advised her that she would lose a city council vote to eliminate prerogative over zoning.[19] Meanwhile, even the progressive, recently elected aldermen who most vocally support affordable housing have found prerogative's unfettered power too alluring to give up, and they have used prerogative to

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[13] This is an understandable media angle given aldermanic prerogative's roots in Chicago machine politics. *See* Sisson, *supra* note 4.

[14] *See infra* Section I.C.

[15] *See infra* notes 80–81 and accompanying text.

[16] *See infra* notes 121–126 and accompanying text.

[17] *See* Brianna Kelly, *Brendan Reilly on Aldermanic Privilege, Condo Deconversions and Development in the 42nd Ward*, THE REAL DEAL (Dec. 20, 2019, 1:00 PM), https://therealdeal.com/chicago/2019/12/20/ald-brendan-reilly-on-aldermanic-privilege-condo-deconversions-development-in-the-42nd-ward/ [https://perma.cc/3PZN-4722] (interviewing 42nd Ward Alderman Brendan Reilly on the viability of aldermanic privilege after Lightfoot's Order). *See generally* CITY OF CHI., SIXTY-DAY REPORT ON IMPLEMENTATION OF EXECUTIVE ORDER NO. 2019-2 (2019), https://www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2019/August/MLEL_SixtyDay_Rprt_FINAL.pdf [https://perma.cc/93PV-TBSR] (detailing the findings and implementation of Lightfoot's Executive Order on prerogative).

[18] *See* Morell, *supra* note 12.

[19] Fran Spielman, *Lightfoot's Most Powerful City Council Ally Urges Her to Abandon Threat to Abolish Aldermanic Prerogative over Zoning*, CHI. SUN-TIMES (Jan. 24, 2020, 2:37 PM), https://chicago.suntimes.com/city-hall/2020/1/24/21080478/aldermanic-prerogative-zoning-lori-lightfoot-lose-fight-scott-waguespack [https://perma.cc/35HF-EPNZ]. For a visual of prerogative's impact on Chicago's "splotchy" zoning pattern that "follows no larger logic," see Emily Badger (@emilymbadger), TWITTER (June 18, 2019, 7:58 AM), https://twitter.com/emilymbadger/status/1140967032000847874 [https://perma.cc/8R8N-JZ3B].

further their own pro-affordable housing agendas.[20] Consequently, local media have begun to spotlight prerogative's impact on housing, rather than just focusing on prerogative's traditional association with corruption.[21]

This narrative shift is long overdue. The continued segregation of American cities remains a glaring civil rights issue today.[22] This Note argues that the most pernicious aspect of aldermanic prerogative is its segregative impact. At its core, prerogative delegates control over development to a hyperlocal level, giving individual legislators total discretion over the construction of affordable housing in their districts. This tool of hyperlocal control, when coupled with constituencies that still mostly oppose affordable housing development in their midst, results in the consistent vetoing of such developments.[23] These legislator vetoes prove particularly problematic because affordable housing is critical to communities of color[24]—a reality

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[20] *See* Alby Gallun, *Progressive Aldermen Guard Their Privilege*, CRAIN'S CHI. BUS. (Dec. 6, 2019, 3:37 PM), https://www.chicagobusiness.com/government/progressive-aldermen-guard-their-privilege [https://perma.cc/B4F2-7LFH] (describing how Alderman Byron Sigcho-Lopez's use of prerogative to demand a greater percentage of affordable units has "create[d] a dilemma for Lightfoot"); Heather Cherone, *Controversial Plan to Turn Closed Humboldt School into Teacher-Focused Apartments Stalls Again*, CHALKBEAT (Nov. 21, 2019, 12:51 PM), https://chalkbeat.org/posts/chicago/2019/11/21/plan-to-turn-closed-humboldt-school-into-teacher-focused-apartments-stalls-again/ [https://perma.cc/ASZ8-PJLF] (describing how Alderman Daniel La Spata wielded prerogative in November 2019 to block Chicago's Plan Commission from voting on a redevelopment proposal because it was not sufficiently affordable); *see also* Misra, *supra* note 5 (reporting that Alderman Ramirez-Rosa has used prerogative to block redevelopment projects "to stave off displacement in his gentrifying neighborhood").

[21] *See* Sisson, *supra* note 4; *see also, e.g.*, Editorial, *A Great Way to Derail Progress on Affordable Housing*, CRAIN'S CHI. BUS. (Dec. 20, 2019, 2:49 PM), https://www.chicagobusiness.com/opinion/great-way-derail-progress-affordable-housing [https://perma.cc/V9GM-PEFB].

[22] Supreme Court cases on the desegregation of public schools, from *Milliken v. Bradley*, 418 U.S. 717, 721 (1974), to *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 709–10 (2007), starkly illustrate why housing patterns matter. For a searchable database exploring segregation's persistence as recently as 2016, see Aaron Williams & Armand Emamdjomeh, *America Is More Diverse than Ever—But Still Segregated*, WASH. POST (May 10, 2018), https://www.washingtonpost.com/graphics/2018/national/segregation-us-cities/ [https://perma.cc/4QKU-TTDC]. *See generally* JOHN R. LOGAN & BRIAN J. STULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 1 (2011), https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf [https://perma.cc/3DHN-T8C4] (discussing the slow decline of segregation in the United States even through the decade of 2000–2010, especially for Black Americans); Aldina Mesic, Lydia Franklin, Alex Cansever, Fiona Potter, Anika Sharma, Anita Knopov & Michael Siegel, *The Relationship Between Structural Racism and Black-White Disparities in Fatal Police Shootings at the State Level*, 110 J. NAT'L MED. ASS'N 106 (2018) (finding that segregation correlates with racial disparities in police shootings).

[23] *See infra* Section II.A.

[24] Recent WBEZ reporting on private mortgage lending in Chicago summed up the issue: "The private market works in white communities. The private market does not work effectively in black communities . . . ." Linda Lutton, Andrew Fan & Alden Loury, *Where Banks Don't Lend*, WBEZ CHI. (June 3, 2020), https://interactive.wbez.org/2020/banking/disparity/ [https://perma.cc/XS5L-L5E8] (internal quotation marks omitted); *see also* ANDREW AURAND, DAN EMMANUEL, DANIEL THREET, INKA

largely due to decades of deliberate government decision-making[25]—while opposition often forms in white, higher-income neighborhoods.[26] Consequently, developers rarely build affordable housing in the locations that might otherwise further economic and racial integration. Instead, as has traditionally been the case with public housing,[27] affordable housing remains largely confined to neighborhoods that perpetuate cities' segregated status quos.

This Note focuses on legislator prerogative at the local level—building on the work of previous scholars who have discussed prerogative both exclusively[28] and as part of broader arguments[29]—and provides the first comprehensive survey of prerogative's national prevalence. This Note argues that judicial intervention is likely necessary to compel legislative reform that curbs prerogative's segregative impact.

Part I introduces the mechanics of legislator prerogative, describes its longstanding function in Chicago and Philadelphia, and surveys the national landscape to demonstrate its widespread nature. Part II discusses prerogative's pernicious tendency to reinforce segregation through legislator vetoes of affordable housing developments. Part III describes existing ideas for legislative reform to curb prerogative and argues that these proposals fail to sufficiently address prerogative's entrenched nature. Finally, Part IV offers judicial intervention as an alternative solution and discusses the scant case law involving legal challenges to prerogative.

RAFI & DIANE YENTEL, NATIONAL LOW INCOME HOUSING COALITION, THE GAP: A SHORTAGE OF AFFORDABLE HOMES 13–17 (2020), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2020.pdf [https://perma.cc/WVW5-VSLM] (breaking down affordabl- housing access by race).

[25] For methodical expositions of government's role in segregating cities across the country and why this still matters today, see RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 17, 30–37 (2017).

[26] This antidevelopment resistance is frequently described as NIMBY, or "Not In My Backyard." For a background primer on NIMBYism and its effect on affordable housing, see Corianne Payton Scally, *The Nuances of NIMBY: Context and Perceptions of Affordable Rental Housing Development*, 49 URB. AFFS. REV. 718, 721–23 (2012). Importantly, NIMBYism manifests itself in even the most "progressive" of cities. Los Angeles Mayor Eric Garcetti aptly summarized this two-facedness: "If you keep saying, 'No, I'm for this in the abstract but I don't want it here,' or, 'This isn't the right location,' or 'I'm liberal but . . . ,' then we'll never solve the problem." RANDY SHAW, GENERATION PRICED OUT: WHO GETS TO LIVE IN THE NEW URBAN AMERICA 60–61 (2018); *see infra* Section I.B.

[27] *See* Scally, *supra* note 26, at 738–39.

[28] *See* Kate Walz & Patricia Fron, *The Color of Power: How Local Control over the Siting of Affordable Housing Shapes America*, 12 DEPAUL J. SOC. JUST. 1, 3 (2019).

[29] *See* Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 112–15 (2015) [hereinafter Hills & Schleicher, *Planning an Affordable City*] (arguing centralized, citywide planning would address the housing affordability crisis by, in part, solving the barriers posed by aldermanic prerogative).

I. PREROGATIVE'S REACH

At a conceptual level, legislator prerogative is the devolution of power to a single legislator over decisions in her district.[30] In a prerogative regime, this unilateral decision-making authority most frequently manifests in legislative deference—whenever the entire legislative body votes on an issue impacting a specific district, the body defers to the preference of the individual legislator representing that district.[31] Though less common, some prerogative regimes also enable unilateral authority through administrative deference—municipal administrative agencies making district-specific decisions seek the opinion of that specific district's legislator and defer accordingly.[32] In essence, prerogative regimes transform a legislator from a representative within the broader polity into an executive of her district.[33]

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[30] Local legislator prerogative is conceptually akin to the former U.S. Senate practice of honoring judicial blue slips, where the home state senators could veto a federal judicial nominee by withholding their blue slips from the Senate Judiciary Committee Chair. Carl Tobias, *Senate Blue Slips and Senate Regular Order*, 37 YALE L. & POL'Y REV. INTER ALIA 1, 1 (2018). Indeed, historical evidence suggests prerogative has roots in this appointments tradition. *See Fraud Too Easy.*, CHI. DAILY TRIB., Jan. 13, 1886, at 1 (describing how "aldermanic courtesy" gave Chicago aldermen the privilege of selecting the judges of their own elections, where—given hypothetical Aldermen Smith and Brown—"Smith allowed Brown to select his own judges and clerks one year and Brown allowed Smith to select his judges the next year"); *Two More Aldermen Brought In.*, CHI. TRIB., Mar. 27, 1892, at 4 ("As 'Senatorial courtesy' gives a Senator control over appointments in his State so does 'Aldermanic courtesy' give to the Alderman the profits arising from the sale of petty franchises within his own territory."); J.H. HOLLANDER, THE FINANCIAL HISTORY OF BALTIMORE 239 (1899) (describing how prerogative in Baltimore "permitted the practical appointment of Commissioners by the representatives of the ward within which the vacancy occurred"); CITIZENS' BUS. BUREAU OF MUN. RSCH., WHAT ABOUT ZONING? 502–03 (1922) ("[I]n Philadelphia there has developed 'councilmanic courtesy' the full implication of which is that appointments from a certain ward or district are somehow subject to the visé of the councilman from that bailiwick.").

[31] *See* ED BACHRACH & AUSTIN BERG, THE NEW CHICAGO WAY: LESSONS FROM OTHER BIG CITIES 20–21 (2019). Every city's prerogative regime discussed in Part I features legislative deference save Los Angeles.

[32] *Id.* Chicago's prerogative regime notably features both legislative and administrative deference, while Los Angeles' prerogative regime only featured administrative deference. For further context on Los Angeles' practice, which has since been stricken, see *infra* notes 121–126 and accompanying text.

[33] *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1710–11 (2013) [hereinafter Schleicher, *City Unplanning*] (describing how a prerogative regime forces developers to lobby the local council member). Affecting the allocation of local power, municipal governance can take various structural forms, though the council–manager and mayor–council forms predominate. A key difference between these two systems is the separation of power, or lack thereof, between the legislative and executive branches, especially as it relates to administrative implementation. For more information on different types and configurations of local governments, see Benjamin Zimmermann, *Does the Structure of Local Government Matter?*, FELS INST. OF GOV'T, UNIV. OF PA. (Dec. 7, 2017), https://www.fels.upenn.edu/recap/posts/1475 [https://perma.cc/4UJT-YDQJ]; *Cities 101—Forms of Local Government*, NAT'L LEAGUE OF CITIES (Dec. 13, 2016), https://www.nlc.org/resource/cities-101-forms-of-local-government [https://perma.cc/JUZ2-82E9] (listing Chicago, Philadelphia, New York

In practice, legislator prerogative is hardly ever a formal element of the government's structure; rather, it is almost universally an unwritten tradition grounded in historical use.[34] The unwritten nature of these rules makes it difficult to discern when a legislative outcome or administrative decision is the result of prerogative,[35] posing visibility problems for outside observers, including courts.[36] In other words, differentiating between prerogative deference and a nonprerogative vote on the merits can be difficult.[37]

Legislators employ prerogative most frequently in the land use decision-making process, either through regulatory approvals (such as zoning) or financing.[38] Proponents of prerogative point to the normative benefits of granting outsized influence over land use decisions to the representatives of communities who feel the impact most directly,[39] such as fostering greater accountability between constituents and representatives.[40] Prerogative may also reduce costs for developers by limiting the number of political actors they must lobby.[41] Opponents most commonly point to its

City, Baltimore, Nashville, San Francisco, and Los Angeles as all employing the mayor–council form of local government).

[34] Every example in Part I save Los Angeles exemplifies unwritten prerogative.

[35] PEW CHARITABLE TRS., PHILADELPHIA'S COUNCILMANIC PREROGATIVE: HOW IT WORKS AND WHY IT MATTERS 2 (2015), https://www.pewtrusts.org/-/media/assets/2015/08/philadelphia-councilmanic-report--with-disclaimer.pdf [https://perma.cc/2UK9-5UT6] (describing the difficulties of recognizing prerogative because it "happens behind the scenes").

[36] *See infra* Section I.A.

[37] *Cf. In re* Hudson, No. 24-C-17-004307, slip op. at 1, 100 (Balt. City Cir. Ct. Dec. 20, 2019), https://s3.amazonaws.com/sfdev-bucket/rolandpark/wp-content/uploads/2019/12/Memo-Opinion-Overlook-at-Roland-Park-12.20.19.pdf [https://perma.cc/4SNN-D48M] ("The record shows one Councilmember giving a high degree, but not absolute deference to the sponsoring Councilmember. It also shows other Councilmembers either grappling with the issues or voting without explicit explanations of their reasoning.").

[38] *See infra* Section I.A.

[39] *See, e.g.*, Alan Greenblatt, *In Wake of Scandals, 2 Major Cities May Curb Politicians' Power*, GOVERNING (May 2019), https://www.governing.com/topics/politics/gov-chicago-philadelphia-corruption.html [https://perma.cc/R6F5-JH8Y] (pointing to the efficiency argument for prerogative when the entire city council does not have to deal with minor district-level issues); PEW CHARITABLE TRS., *supra* note 35, at 2 (noting prerogative can lead to development "more suitable for the neighborhood").

[40] *See* Misra, *supra* note 5.

[41] *See, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 408 n.60 (1977) ("One cannot be certain, a priori, if this [prerogative] system promotes 'influence' or 'majoritarian' control. On the one hand, it reduces homeowners' organization costs by, in effect, reducing the size of the political unit; on the other hand, it lowers the administrative cost to developers of acquiring influence by limiting the number of political decisionmakers who must be approached."); Nate Rau & Joey Garrison, *As Development Booms, Nashville Council Goes Against Planners More Often*, TENNESSEAN (Jan. 21, 2017, 5:12 PM), https://www.tennessean.com/story/news/politics/2017/01/21/development-booms-nashville-council-goes-against-planners-more-often/96585874/ [https://perma.cc/3ML6-SQ58] (quoting a local land use

potential for corruption, highlighting criminal convictions of city legislators based on the political clout enabled by prerogative.[42] But above all, the debate over prerogative reflects the tension between citywide interests and parochial preferences.

The following Sections describe traditions of legislator prerogative in cities across the country. The first two Sections focus on Chicago and Philadelphia, as they are the two cities with the most high-profile legacies of prerogative.[43] The third Section reviews prerogative in other cities to demonstrate its nationwide scope.

A. Chicago

Chicago's tradition of prerogative, locally known as "aldermanic privilege," is likely the most visible example nationally, in part because of the large size of the Chicago City Council. Whereas local legislators in New York and Los Angeles respectively represent 166,000 and 264,600 residents each, Chicago's fifty aldermen represent wards with only 54,000 residents.[44] This council size further enables prerogative's parochialism, where the legislature defers to the local alderman in the name of local accountability.[45]

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attorney who argued prerogative "give[s] developers a single point of contact to work with the community").

[42] *See, e.g.*, Greenblatt, *supra* note 39 (reporting how prerogative enables "sweetheart deals" where legislators "ensur[e] that their friends and campaign contributors get more than their share of the development action"); Austin Berg, *Prohibition, Prostitution and Chicago's Mini-Fiefdoms*, ILL. POL'Y (July 1, 2016), https://www.illinoispolicy.org/crony-chronicles-aldermanic-privilege-prohibition-prostitution-and-chicagos-mini-fiefdoms [https://perma.cc/9WJY-V8MQ] (pointing to the political clout enabled by prerogative as "one root cause of Chicago corruption"); Claire Bushey, *Chicago Aldermen Might Be Even More Powerful than You Think*, CRAIN'S CHI. BUS. (Jan. 30, 2019, 12:03 PM), https://www.chicagobusiness.com/government/chicago-aldermen-might-be-even-more-powerful-you-think [https://perma.cc/DFW7-9TSM] (describing aldermanic convictions arising from prerogative-enabled extortion).

[43] *See, e.g.*, Greenblatt, *supra* note 39 (describing the political impact of high-profile indictments in Chicago and Philadelphia on prerogative).

[44] For a history of Chicago's move to a fifty-ward single-district system, see Peter W. Colby & Paul Michael Green, *The Consolidation of Clout: The Vote Power of Chicago Democrats from Cermak to Bilandic*, ILL. ISSUES (Feb. 1979), https://www.lib.niu.edu/1979/ii790211.html [https://perma.cc/EYZ7-2TS3]. For a discussion of the potential democratic responsiveness due to smaller ward size, see Sisson, *supra* note 4, arguing: "In theory, the extremely low ratio of residents-to-representatives on Chicago's City Council promotes diversity, and allows for greater responsiveness to local neighborhood needs. Chicago aldermen represent roughly 54,000 residents each, where as representatives in New York (one for every 166,600 residents) and Los Angeles (one for every 264,600 residents) have much greater constituencies."

[45] *See* Alex Keefe, *Pregnancy Tests? Pigeon Poo? What Chicago Aldermen Really Do*, WBEZ CURIOUS CITY (June 11, 2013, 5:21 PM), https://www.wbez.org/shows/wbez-news/pregnancy-tests-pigeon-poo-what-chicago-aldermen-really-do/4d099e24-9b47-4b9d-8d39-fbbc92d379c0 [https://perma.cc/WZR7-TWJY] (noting Chicago's comparatively small constituency size per alderman

As one alderman recently opined, "I often liken the City of Chicago [to] a feudal system, where the mayor is sort of a de facto king. . . . And each alderman is the lord . . . of their individual fiefdom."[46] Chicago's version of legislator prerogative is so ingrained in the city's political culture that even city administrative agencies defer to aldermanic requests.[47] Some commentators have called the practice "sacrosanct,"[48] while others have likened it to "virtual dictatorial power."[49]

The local power of Chicago's aldermen dates back to the city's founding in the mid-nineteenth century,[50] when aldermen served as "trustees of the 'private affairs' of their propertied constituents,"[51] elected to ensure the passage of public improvement projects through special assessments.[52]

enables aldermen to "micro-manage their wards"). A *ProPublica* investigation found that more than 90% of Chicago ordinances from 2011 to 2018 were hyperlocal in nature, rather than pertaining to citywide issues. Mick Dumke, *At Chicago City Hall, the Legislative Branch Rarely Does Much Legislating*, PROPUBLICA ILL. (Feb. 25, 2019, 4:00 AM), https://www.propublica.org/article/chicago-city-council-aldermen-legislation-analysis-mayor-rahm-emanuel [https://perma.cc/5LFK-H2CZ]. In the words of 44th Ward Alderman Tom Tunney, "Take away the zoning power of the alderman in his or her community, that's not good. I don't think it's good because this building [City Hall] doesn't know what's going on in 50 wards, you know?" Morell, *supra* note 12 (alteration in original).

[46] Keefe, *supra* note 45 (alteration in original); *see also* Anthony Todd, *Cock Block: Chicago Alderman Blocks Opening of Chick-Fil-A in His Ward*, CHICAGOIST (July 25, 2012, 3:10 PM), https://chicagoist.com/2012/07/25/alderman_blocks_logan_square_chick-.php [https://perma.cc/Q7J5-FWED] (describing the use of aldermanic prerogative as a form of political protest rather than as boycotting business development).

[47] *See* Thale, *supra* note 3; John J. Betancur & Douglas C. Gills, *Community Development in Chicago: From Harold Washington to Richard M. Daley*, 594 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 99 (2004) ("Aldermen have gained so much power in their respective wards that no public action takes place there without their consent.").

[48] Edward McClelland, *Shutting Down Lincoln Yards Was Aldermanic Privilege at Its Finest*, CHI. MAG. (Jan. 15, 2019), http://www.chicagomag.com/city-life/January-2019/Shutting-Down-Lincoln-Yards-Was-Aldermanic-Privilege-at-its-Finest/ [https://perma.cc/P73M-MCS2].

[49] Patrick T. Reardon & William Gaines, *Council of Favors*, CHI. TRIB., Nov. 3, 1997 (§ 1), at 9.

[50] The earliest mention of aldermanic prerogative in the *Chicago Tribune* occurred in 1876, where the paper noted the city council had rejected a candidate for Bridewell (Chicago's city prison) Commissioner because "Aldermanic 'prerogative' was infringed upon." *Political Notes*, CHI. TRIB., Mar. 25, 1876, at 6. Throughout the late nineteenth century, prerogative in Chicago was frequently referred to as "aldermanic courtesy." *See Fraud Too Easy.*, *supra* note 30; *Two More Aldermen Brought In.*, *supra* note 30; *Repealing Special Assessments*, CHI. TRIB., Apr. 23, 1893; *Result of "Aldermanic Courtesy,"* CHI. DAILY TRIB., Apr. 4, 1892.

[51] ROBIN L. EINHORN, PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO, 1833–1872, at 90 (1991). This concept was known as segmentation, where Chicagoans at the time "demand[ed] that their government represent property interests organized on a segmented basis" and insisted "there was no such thing as a public interest that city government could pursue citywide." *Id.* at 144. *See generally* Thale, *supra* note 3 (describing the history of aldermanic privilege in Chicago).

[52] EINHORN, *supra* note 51, at 86–87; *see also Repealing Special Assessments*, *supra* note 50, at 28 (describing how special assessments were subject to aldermanic courtesy "[w]hen an improvement is confined to one ward and the Aldermen therefrom ask for the passage of a repealing ordinance").

By the 1890s, aldermen also commanded the power to revoke liquor licenses in their wards and controlled the appointment of election judges in their own districts.[53] Over the following decades, prerogative grew to encompass land use decisions affecting individual wards, such as zoning changes, sign permits, and landscaping requests.[54] Despite this far-reaching power, aldermanic privilege in Chicago has no textual grounding in the city's Code,[55] and courts have only recently started to formally acknowledge its existence.[56]

The public has long recognized prerogative's influence,[57] and nonprofit reports have also called for reform in Chicago.[58] Unchecked, prerogative lends itself to corruption in a city and state already infamous as models of poor governance.[59] In 2018, the editorial board of the *Chicago Tribune* published a stark condemnation of aldermanic privilege, calling out aldermen for enabling abuse by blindly affirming the preferences of their

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[53] *See* Sisson, *supra* note 4; *Two More Aldermen Brought In.*, *supra* note 30.

[54] *See* Sisson, *supra* note 4; Bushey, *supra* note 42 ("At least 11 of these day-to-day municipal tasks require aldermanic approval, notice or a council ordinance . . . ."). *See generally* Yue Zhang, *Boundaries of Power: Politics of Urban Preservation in Two Chicago Neighborhoods*, 47 URB. AFFS. REV. 511, 517–22 (2011) (summarizing aldermanic prerogative's development throughout the twentieth century).

[55] *See* Keefe, *supra* note 45.

[56] *See infra* Section I.A.

[57] For example, in 2008 the *Chicago Tribune* ran an eight-part series investigating aldermanic prerogative's wide grip on the city. *Neighborhoods for Sale*, CHI. TRIB. (Apr. 21, 2015, 1:31 PM), https://www.chicagotribune.com/investigations/chi-zoning-storygallery-storygallery.html [https://perma.cc/7SDS-D27E]; *see also Result of "Aldermanic Courtesy," supra* note 50, at 2 ("'Aldermanic courtesy' is, briefly, reciprocity; it's you help me and I'll help you."); *Traffic Control*, CHI. DAILY TRIB., Oct. 23, 1956, at 16 (arguing for a city ordinance that would shift traffic-control powers away from aldermen in part because "[a]ldermanic privilege has divided the city into 50 communities, in which local convenience and prejudices will always be given priority over the needs of the city as a whole"); Manuel Galvan, *Proposed Zoning Revamp Takes Aim at Aldermen*, CHI. TRIB., Oct. 29, 1987, at B1 (describing a proposed zoning ordinance where sponsor Alderman Danny Davis, who is now a Member of Congress, argued the ordinance would "diminish the possibility of abuse of aldermanic privilege").

[58] *See, e.g.*, THE CIVIC FED'N, FINANCIAL CHALLENGES FOR THE NEXT CHICAGO MAYOR AND CITY COUNCIL: OPTIONS AND RECOMMENDATIONS 63–64 (2019), https://www.civicfed.org/sites/default/files/chicagofiscalchallenges2019_full.pdf [https://perma.cc/U4N6-CNEV]; CHI. AREA FAIR HOUS. ALL., A CITY FRAGMENTED: HOW RACE, POWER, AND ALDERMANIC PREROGATIVE SHAPE CHICAGO'S NEIGHBORHOODS 3 (2018).

[59] Between 1976 and 2018, there have been 1,750 public corruption convictions in the Northern District of Illinois alone. DICK SIMPSON, THOMAS J. GRADEL, MICHAEL DIRKSEN & MARCO ROSAIRE ROSSI, UNIV. ILL. AT CHI., DEP'T POL. SCI., ANTI-CORRUPTION REPORT NO. 12, CHICAGO STILL THE CORRUPTION CAPITAL 2 (2020), https://pols.uic.edu/wp-zontent/uploads/sites/273/2020/02/Corruption.Rpt_12.Complete.pdf [https://perma.cc/WGN2-SVCY]; *see also* Chris Bentley & Jeremy Hobson, *How Chicago Politics Produced a Deeply Entrenched Culture of Corruption*, WBUR (Feb. 28, 2019), https://www.wbur.org/hereandnow/2019/02/28/chicago-politics-corruption [https://perma.cc/PP7T-FEJL].

colleagues.[60] The editorial board of *Crain's Chicago Business* similarly identified aldermanic privilege as "a toxin infecting Chicago's body politic."[61] But Mayor Lightfoot's reform efforts will likely still prove difficult to enact because even progressive aldermen elected alongside her "have discovered how to flex their muscles" through prerogative in pursuit of their own agendas.[62] Despite recent calls for reform, aldermanic privilege remains alive and well, demonstrating the difficulties of unrooting prerogative.[63]

B. Philadelphia

Philadelphia's practice of legislator prerogative, known locally as "councilmanic prerogative," is closest to Chicago's in terms of notoriety.[64] Philadelphia's city council consists of ten members elected by district and seven members elected at-large.[65] When it comes to land use decisions requiring full council votes, such as sale of city lots and zoning, the district-based legislators wield prerogative power—the rest of the council will defer to the decision of the council member where the land use decision is situated.[66] A Pew report on prerogative in Philadelphia summarized the tradition as "I won't mess with your turf if you won't mess with mine."[67] Just like Chicago, the practice is unwritten—nothing in the city charter or state law mentions prerogative or definitively gives council members unilateral

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[60] Editorial Board, *Aldermanic Privilege Run Amok*, CHI. TRIB. (July 13, 2018, 2:55 PM), https://www.chicagotribune.com/opinion/editorials/ct-edit-aldermanic-prerogative-privilege-affordable-housing-chicago-20180711-story.html [https://perma.cc/SW5G-LHP6].

[61] Editorial, *A Great Way to Derail Progress on Affordable Housing*, CRAIN'S CHI. BUS. (Dec. 20, 2019, 2:49 PM), https://www.chicagobusiness.com/opinion/great-way-derail-progress-affordable-housing [https://perma.cc/7R7P-B5RZ].

[62] *Id.*; *see also supra* note 20 and accompanying text (overviewing examples of progressive aldermen wielding prerogative).

[63] *See* Heather Cherone, *At 6-Month Mark, Lightfoot's Effort to Scale Back Aldermanic Prerogative a Work in Progress*, DAILY LINE (Nov. 20, 2019), https://thedailyline.net/chicago/11/20/2019/at-6-month-mark-lightfoots-effort-to-scale-back-aldermanic-prerogative-a-work-in-progress/ [https://perma.cc/3DKZ-ATLU] (acknowledging that Lightfoot's Executive Order did not strike "at the heart" of prerogative).

[64] *See* Greenblatt, *supra* note 39 ("In both Chicago and Philadelphia, members of the city council are facing criminal charges that stem from development decisions.").

[65] *How Is the City of Philadelphia Government Structured?*, MOVING PHILLY FORWARD, https://www.movingphillyforward.org/philadelphia-government-structure [https://perma.cc/JZ89-S78E].

[66] PEW CHARITABLE TRS., *supra* note 35, at 3.

[67] *Id.*

veto power.[68] And further like Chicago, council members have praised prerogative for fostering local accountability.[69]

Philadelphia's prerogative tradition dates back to at least 1919.[70] A recent examination of city votes demonstrates the tradition is stronger than ever: of the city council's votes on 1,342 total ordinances between 2008 and 2014, 730 ordinances were subject to prerogative.[71] Strikingly, legislators cast only six total nay votes within this latter subset.[72] Just four ordinances failed to receive unanimous support, and those four still passed.[73] Philadelphia has recently instituted land use reforms, including a new zoning code in 2011[74] and a new land bank in 2013.[75] The city specifically designed the land bank "to transform a dysfunctional system of property disposition"[76] and further reformed it as recently as October 2019.[77] But despite these attempts at reform, Philadelphia has not yet touched a major source of its problems—councilmanic prerogative still reigns.[78]

Courts in Pennsylvania have started acknowledging the practice, albeit only recently.[79] In January 2020, Philadelphia's prerogative tradition flared up when federal prosecutors indicted a council member for wire fraud,

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[68] *Id.*

[69] Council members argue "they can stop or alter projects that are not good fits for neighborhoods," and the city council president argues "[n]obody knows a community better than the district council person that represents it." *Id.* at 1.

[70] *Id.* at 3.

[71] *Id.* at 17–18.

[72] *Id.*

[73] *Id.*

[74] *See* Jake Blumgart, *Zoning (Philadelphia)*, THE ENCYCLOPEDIA OF GREATER PHILA. (2017), https://philadelphiaencyclopedia.org/archive/zoning-philadelphia/ [https://perma.cc/V9JP-FQY5].

[75] *See* Melissa Romero, *What You Need to Know About the Philadelphia Land Bank*, CURBED PHILA. (Dec. 10, 2015, 12:30 PM), https://philly.curbed.com/2015/12/10/9892464/philadelphia-land-bank-what-you-need-to-know [https://perma.cc/9P3X-3AUB].

[76] Tony Abraham, *Philadelphia Just Became the Largest City in America with a Land Bank*, GENEROCITY (Dec. 9, 2015, 3:30 PM), https://generocity.org/philly/2015/12/09/philadelphia-land-bank/ [https://perma.cc/H57U-UL82].

[77] Phila., Pa., Bill 190606-AA (Oct. 24, 2019); *see also* Press Release, Comm. of Seventy, City Council Passes Reform to Vacant Land Sale Process (Oct. 31, 2019), https://seventy.org/media/press-releases/2019/10/31/city-council-passes-reform-to-vacant-land-sale-process [https://perma.cc/B83B-WBWV].

[78] *See* Julia Terruso, *The Primary Election Issue Most Philly Voters Have Never Heard Of: Councilmanic Prerogative*, PHILA. INQUIRER (Feb. 27, 2019), https://www.inquirer.com/news/philadelphia/councilmanic-prerogative-city-council-darrell-clarke-development-kenyatta-johnson-gentrification-building-primary-20190227.html [https://perma.cc/6RC3-MB4Z]; Ernest Owens, Opinion, *Want to Reduce Political Corruption in Philly? End Councilmanic Prerogative Now.*, PHILA. MAG. (Feb. 5, 2020, 12:27 PM), https://www.phillymag.com/news/2020/02/05/kenyatta-johnson-indictment-councilmanic-prerogative/ [https://perma.cc/N4NZ-73LA].

[79] *See infra* Section I.A.

accusing him of abusing his prerogative for bribes in connection with zoning demands from a charter school.[80] Local media outlets, including the *Philadelphia Inquirer*, have called for prerogative's demise and an end to corruption.[81] But if history is any indication, the public outcry will dissipate, and prerogative will continue to loom over Philadelphia governance.[82]

C. National Prevalence

Although prerogative is most famous in Chicago and Philadelphia, many other cities across the country employ similar regimes. Prerogative is far more pervasive than commentators currently recognize, largely because other cities' traditions are less visible than prerogative in Chicago and Philadelphia. Nonetheless, the following cities illustrate prerogative's nationwide reach and demonstrate that it likely exists on an even broader scale than previously realized.

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[80] Press Release, U.S. Att'y's Off., E. Dist. of Pa., Philadelphia City Councilman Kenyatta Johnson and His Wife Indicted in Wide-Ranging Fraud and Bribery Case Also Involving Former Universal Company Executives (Jan. 29, 2020), https://www.justice.gov/usao-edpa/pr/philadelphia-city-councilman-kenyatta-johnson-and-his-wife-indicted-wide-ranging-fraud [https://perma.cc/5J5G-95R5]; Jake Blumgart, *Why Philly Can't Quit the Tradition at the Center of FBI's Kenyatta Johnson Case*, WHYY (Jan. 30, 2020), https://whyy.org/articles/why-philly-council-still-backs-the-tradition-at-the-center-of-kenyatta-johnsons-fbi-case/ [https://perma.cc/473C-6A57]; Ryan Briggs, *Philly Councilmember Kenyatta Johnson Corruption Trial Scheduled for 2021*, WHYY (Apr. 2, 2020), https://whyy.org/articles/philly-councilmember-kenyatta-johnson-corruption-trial-scheduled-for-2021/ [https://perma.cc/7E97-74JW] (Johnson's trial is scheduled for January 2021). Further demonstrating the connection between Philadelphia political corruption and prerogative, "all six City Councilmembers who have been criminally convicted since 1981 were charged over matters that concerned councilmanic prerogative." Owens, *supra* note 78.

[81] *See, e.g.*, Kyle Sammin, *Councilmanic Prerogative Is Philadelphia's Invitation to Corruption*, PHILA. INQUIRER (Feb. 17, 2020, 6:00 AM), https://www.inquirer.com/opinion/commentary/councilmanic-prerogative-kenyatta-johnson-philadelphia-20200217.html [https://perma.cc/Q9HM-UWKY]; Jon Geeting, *R.I.P Councilmanic Prerogative*, PHILA. CITIZEN (Feb. 2, 2020), https://thephiladelphiacitizen.org/councilmanic-prerogative-planning/ [https://perma.cc/4UUG-83WD]; Owens, *supra* note 78.

[82] *See* PEW CHARITABLE TRS., *supra* note 35, at 23.

New York City engages in a prerogative practice known as "member deference."[83] Dating back to at least the 1890s,[84] member deference consists of unwritten agreements where local legislators control land use decisions in their districts.[85] The city's Uniform Land Use Review Procedure partially enables member deference by requiring hyperlocal review of land use decisions. The city's planning department is required to forward any development materials to the affected borough president, community board, and borough board.[86] By giving these stakeholders formal but merely advisory review, their perspectives can inform the individual council member who actually wields member deference.[87]

For example, in fall 2019, New York City considered replacing the infamous Rikers Island jail with four borough-based alternatives.[88] The jail planned for Brooklyn faced opposition from both the borough president and the local community board.[89] Despite their opposition, the local council member supported the Brooklyn jail and specifically noted the power he wielded through member deference during a closed-door meeting with his

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[83] *See* Alec Schierenbeck, *End the Council's Land-Use Veto: The Path to a More Affordable, Fairer New York*, N.Y. DAILY NEWS (Oct. 22, 2019), https://www.nydailynews.com/opinion/ny-end-the-councils-land-use-veto-20191022-3mfmgfdbmfaflgmgtnovvbitdq-story.html [https://perma.cc/XQ2L-EZQT] (describing member deference and calling to end its use in New York City); Roderick M. Hills, Jr. & David Schleicher, *Building Coalitions out of Thin Air: Transferable Development Rights and 'Constituency Effects' in Land Use Law*, J. LEGAL ANALYSIS (forthcoming 2020) (manuscript at 56–58), https://papers.ssrn.com/a=3504372 [https://perma.cc/E7SH-RK4V] [hereinafter Hills & Schleicher, *Building Coalitions out of Thin Air*] (describing prerogative in New York City).

[84] Like Chicago, the historical predecessor of New York City's member deference was also called aldermanic courtesy. *See, e.g.*, *Busy Session of Aldermen*, N.Y. TIMES, Oct. 18, 1899, at 14; *"Aldermanic Courtesy" Reconsidered*, N.Y. TIMES, Apr. 12, 1893, at 9; *They Felt Like Rebuking*, N.Y. TIMES, Apr. 5, 1893, at 9.

[85] Samar Khurshid, *On Land Use, Johnson Promises 'Deference' to Members but 'No Veto,'* GOTHAM GAZETTE (Mar. 10, 2018), https://www.gothamgazette.com/city/7530-on-land-use-johnson-promises-deference-to-members-but-no-veto [https://perma.cc/8KBV-FWQF]; *see also* John Mangin, *Ethnic Enclaves and the Zoning Game*, 36 YALE L. & POL'Y REV. 419, 430 n.42 (2018) ("Though not formalized, the City Council typically defers to the member of the affected district when determining how to vote on an action.").

[86] N.Y.C. CHARTER § 197-c(b) (2004), http://www.nyc.gov/html/records/pdf/section %201133_citycharter.pdf [https://perma.cc/YM44-KMAM].

[87] Mangin, *supra* note 85, at 430 n.42 (describing the advisory versus deferential mechanics of the New York City Uniform Land Use Review Procedure).

[88] *See* Caroline Spivack, *Rikers Island Closure and Borough-Based Jail Plan, Explained*, CURBED N.Y. (Feb. 26, 2020, 12:47 PM), https://ny.curbed.com/2019/7/9/18307769/nyc-rikers-island-closure-borough-based-jails-plan-explained [https://perma.cc/K2AW-X6GE].

[89] Noah Goldberg, *What Happened with the Jail Plan This Year?*, BROOK. DAILY EAGLE (Dec. 30, 2019), https://brooklyneagle.com/articles/2019/12/30/what-happened-with-the-jail-plan-this-year/ [https://perma.cc/7XW9-AEAE].

colleagues from the Brooklyn delegation.[90] One month after his remarks, prerogative seemingly worked its magic when the city council approved the plan.[91]

Further down the coast in Maryland, the Baltimore City[92] and County[93] Councils each employ their own prerogative regimes, both called "councilmanic courtesy."[94] At the county level, prerogative remains such a fixture that council members publicly extol its virtues[95] despite public backlash.[96] At the city level, councilmanic courtesy proved influential when a local development company proposed redeveloping Baltimore's Port Covington and asked for the third largest tax-increment financing deal in the

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[90] The local *Brooklyn Eagle* obtained a recording of the meeting, where Council Member Levin said: "[I]f there's any issues that you have that are coming to mind through this process, please let me know . . . . [A]s you know, the way that with land-use there's some member deference." Brooklyn Eagle Staff, *Transcript: Councilmember Stephen Levin on 'Member Deference,'* BROOK. DAILY EAGLE (Sept. 10, 2019), https://brooklyneagle.com/articles/2019/09/10/transcript-councilmember-stephen-levin-on-member-deference/ [https://perma.cc/58XC-7EXU].

[91] Press Release, N.Y.C. Council, Council Votes on Historic Legislation to Close Rikers Island (Oct. 17, 2019), https://council.nyc.gov/press/2019/10/17/1818/ [https://perma.cc/DZ97-U9GX]. *See generally* Matthews Haag, *N.Y.C. Votes to Close Rikers. Now Comes the Hard Part.*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/nyregion/rikers-island-closing-vote.html [https://perma.cc/B4N7-8YQC] (describing the politics and consequence of closing Rikers).

[92] *See* Jeff Fraley, Opinion, *Transform Baltimore Must Not Eliminate Space for Industry*, BALT. BUS. J. (Sept. 23, 2016, 11:21 AM), https://www.bizjournals.com/baltimore/blog/real-estate/2016/09/opiniontransform-baltimore-must-not-eliminate.html [https://perma.cc/5BCK-GL97].

[93] *See* David Plymyer, *Time to Get Rid of a Relic of Baltimore County's Checkered Past*, FORWARD BALT. (Dec. 10, 2019), https://forwardbaltimore.com/2019/12/10/time-to-get-rid-of-a-relic-of-baltimore-countys-checkered-past/ [https://perma.cc/S3U3-LHLA]; Pamela Wood, *Baltimore County Council to Vote on Rezoning Decisions*, BALT. SUN (Aug. 28, 2016), https://www.baltimoresun.com/maryland/baltimore-county/bs-md-co-zoning-vote-20160828-story.html [https://perma.cc/J7XQ-CCBL].

[94] Councilmanic courtesy is also allegedly employed in other Maryland counties. *See* Terry v. Cnty. Council, No. 2756, 2019 WL 3453242, at *7 n.12 (Md. Spec. App. July 31, 2019) (finding an allegation of councilmanic courtesy in Bowie, the largest city in Prince George's County, unfounded); *Howard's Councilmanic Discourtesy*, BALT. SUN (May 18, 1992), https://www.baltimoresun.com/news/bs-xpm-1992-05-18-1992139203-story.html [https://perma.cc/Q9AC-QWXW] (describing councilmanic courtesy in Howard County); Ruth Marcus, *P.G. Proceeds with Caution on Development*, WASH. POST, Oct. 29, 1984, at A1 (describing councilmanic courtesy in Prince George's County).

[95] For example, Baltimore County Council Member David Marks pointed to the accountability justification: "If we did not have Councilmanic courtesy, you could have a situation where four Council members might override the district representative, and the voters would have no way to hold those four other Council members accountable." *See* Klaus Philipsen, *Interview with Councilman Who Wants to Pull Plug on Mighty Developer*, CMTY. ARCHITECT DAILY (June 29, 2017), https://communityarchitectdaily.blogspot.com/2017/06/interview-with-councilman-who-wants-to.html [https://perma.cc/V8Q7-42QE].

[96] *See* Plymyer, *supra* note 93 (concluding a discussion of councilmanic courtesy's impact by noting the "sooner this Baltimore County tradition dies, the better").

country's history—a request subject to major local controversy.[97] One former council member explicitly justified his support out of respect for councilmanic courtesy, explaining that he voted for the deal because the South Baltimore council member who represented Port Covington also favored it.[98]

A 2017 lawsuit filed by North Baltimore neighborhood groups further demonstrates prerogative's local impact. The neighborhood groups attacked councilmanic courtesy, arguing the city had impermissibly approved an upscale apartment project. The neighborhood groups cited to a Baltimore land use committee hearing transcript in which a council member would not even consider the merits of the project because it was located outside her district.[99] The council member deferred: "This particular project is in the Fifth District. It's the decision of the Fifth District Councilperson. And on that note, I'll stop here, and my vote is a yes."[100] In dicta, the judge characterized prerogative as "inconsistent" with a legislator's obligation to impartially decide.[101] Nonetheless, the record showed the difficulty of distinguishing between absolute deference and a decision on the merits, and the court declined to decide on prerogative's effect, vacating the project's approval on other grounds.[102]

Moving inland, Nashville's practice of prerogative is also called councilmanic courtesy and exists as an unwritten tradition dating back at least to the 1970s.[103] As a consolidated government with surrounding

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[97] *See, e.g.*, Ron Cassie, *Tomorrowland: Port Covington Will Be Like Nothing Baltimore Has Ever Seen. But at What Cost?*, BALT. MAG. (Dec. 4, 2017), https://www.baltimoremagazine.com/2017/12/4/tomorrowland-the-future-of-port-covington-in-baltimore [https://perma.cc/QU3C-FHP5].

[98] *Id.*

[99] *In re* Hudson, No. 24-C-17-004307, slip op. at 1, 44 (Balt. City Cir. Ct. Dec. 20 2019), https://s3.amazonaws.com/sfdev-bucket/rolandpark/wp-content/uploads/2019/12/Memo-Opinion-Overlook-at-Roland-Park-12.20.19.pdf [https://perma.cc/NF2V-P9LX]. *See generally* Ed Gunts, *Judge Rules the Controversial Overlook at Roland Park Apartment Project Can't Be Built*, BALT. FISHBOWL (Dec. 23, 2019), https://baltimorefishbowl.com/stories/judge-rules-the-controversial-overlook-at-roland-park-apartment-project-cant-be-built/ [https://perma.cc/W25N-N5DF] (describing the backdrop and community implications of the lawsuit).

[100] *Hudson*, No. 24-C-17-004307, slip op. at 44.

[101] *Id.* at 100; *see also* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 603 (2017) (describing how "some courts review individualized determinations by local legislative bodies as though the relevant action was actually 'quasi-judicial'").

[102] *Hudson*, No. 24-C-17-004307, slip op. at 100 ("Because the Court is reversing the decision on other grounds, the Court declines to decide in isolation whether this record requires reversal on the ground that the Committee's decision was improperly affected by councilmanic courtesy.").

[103] *See* Clariday v. State, 552 S.W.2d 759, 762–63 (Tenn. Crim. App. 1976) ("[T]his case undoubtedly was precipitated by the existence of a local practice known as 'councilmanic courtesy.' Under this practice, proposed zoning and sewer ordinance changes were subject to veto by the council member in whose district the proposed changes would be effected."); C.J. HEIN, JOYCE M. KEYS & G.M.

Davidson County, courtesy in Nashville is particularly critical to zoning votes because of the council's size at forty members—the third largest in the country.[104] Although the region has a Metropolitan Planning Commission tasked with maintaining a development plan and providing zoning recommendations in adherence to that plan,[105] prerogative's inherent parochialism regularly overrides the Commission's regional approach to planning.[106] One council member opined in a 2018 interview that he could not think of a single zoning bill where he did not receive deference.[107] Tennessee journalists have called councilmanic courtesy "as strong today as ever,"[108] leading to "pre-ordained" outcomes in zoning decisions.[109]

On the West Coast, San Francisco's Board of Supervisors wields "supervisorial prerogative."[110] San Francisco's prerogative impacts land use decisions ranging from housing construction[111] to bikeshare expansion.[112] Although supervisorial prerogative has only emerged in recent years,[113] it has quickly become a focal point in the city's housing plight. For example, a local coalition supporting affordable housing called YIMBY, or "Yes In My

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ROBBINS, REGIONAL GOVERNMENTAL ARRANGEMENTS IN METROPOLITAN AREAS: NINE CASE STUDIES 178 (1974) ("Within the council a ritual known as councilmanic courtesy provides a piecemeal decision-making tool in zoning decisions. . . . Among the thirty-five district council members, zoning matters are automatically decided on the basis of the position of that district's council representative."). *See generally* Ola Johansson, Changing Governance, Business Elites, and Local Regulation in Nashville 92, 104, 121–22 (Aug. 2004) (Ph.D. dissertation, University of Tennessee, Knoxville) (on file with journal) (describing the historical relevance of councilmanic courtesy on Nashville's development).

104 *See* Michael Karlick, *Interview #78: Nashville, TN Councilman Colby Sledge*, CITY COUNCIL CHRONS. (Jan. 14, 2018), https://councilchronicles.com/2018/01/14/interview-78-nashville-tn-councilman-colby-sledge-with-podcast/ [https://perma.cc/NY76-S7HB] ("[W]hen you have a legislative body that's this large dealing with land-use issues, it tends to be the unwritten rule.").

105 NASHVILLE, TENN., CODE § 11.504(h) (Oct. 4, 1988).

106 *See* Rau & Garrison, *supra* note 41 ("Davis has managed to pass the zoning bills in the face of opposition from the commission by evoking a longstanding tradition of councilmanic courtesy.").

107 Karlick, *supra* note 104.

108 Rau & Garrison, *supra* note 41.

109 Peter White, *Gentrification in North Nashville*, TENN. TRIB. (Mar. 7, 2019), https://tntribune.com/investigative-stories/gentrification-in-north-nashville [https://perma.cc/AQS3-JL35].

110 *See* Randy Shaw, *The Failure of District Elections*, BEYOND CHRON (Jan. 7, 2020), http://beyondchron.org/the-failure-of-district-elections/ [https://perma.cc/HK9E-4KC4].

111 Mike Ege, *How San Francisco's District Boundaries Keep Housing Scarce*, BAY CITY BEACON (July 22, 2018), https://www.thebaycitybeacon.com/politics/how-san-francisco-s-district-boundaries-keep-housing-scarce/article_cf0a8306-8dfc-11e8-b2a9-5f7463e49399.html [https://perma.cc/87TQ-Z2MA].

112 Jane Natoli, *Show, Don't Tell*, MEDIUM (Aug. 13, 2018), https://medium.com/@wafoli/show-dont-tell-9d1872240c31 [https://perma.cc/9SJW-5KYX].

113 Ege, *supra* note 111 (describing supervisorial prerogative as an "emerging practice" and sourcing its "behind-the-scenes" practice).

Backyard" Action asked supervisor candidates if they would adhere to supervisorial prerogative and received responses ranging from full to conditional support.[114] Prerogative also recently sparked controversy in the city's Mission neighborhood when a developer wanted to build a seventy-five-unit tower in place of an existing laundromat he owned.[115] The city first forced him to spend $23,000 conducting a historical study of the laundromat, though there was little reason to believe it merited landmark status.[116] Then, the Board of Supervisors voted to indefinitely delay the project to analyze its shadow impact on an adjacent school playground.[117] The developer sued, arguing the Board of Supervisors had effectively delegated approval authority to the local supervisor as a matter of prerogative, a claim further substantiated by the San Francisco Planning Department's prior approval of the project.[118] The suit heightened public attention to the "sheer ridiculousness"[119] of the process, which in turn prompted city officials to quietly push the project through and moot the suit.[120]

Los Angeles city council members do not wield prerogative on land use decisions like zoning, but they previously exercised a rare codified form of prerogative through a "letter of acknowledgment" requirement.[121] Whereas

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[114] *Compare Gordon Mar: Candidate – San Francisco District 4 Supervisor*, YIMBY ACTION, https://yimbyaction.org/questionnaire/gordon-mar/ [https://perma.cc/Z2EA-HN2V] ("[S]upervisorial prerogative . . . speaks to the core value of district elections: that communities and neighborhoods should have a voice in the decisions that directly impact them."), *with Rafael Mandelman: Candidate – San Francisco District 8 Supervisor*, YIMBY ACTION, https://yimbyaction.org/questionnaire/rafael-mandelman/ [https://perma.cc/A4S5-38Z3] ("[S]ome matters . . . [should] outweigh so-called 'supervisorial prerogative.' The siting of an affordable housing development is one obvious example.").

[115] Julian Mark, *Is the Wash Club Building a Historic Resource to SF's Mission?*, MISSION LOCAL (Feb. 21, 2018), https://missionlocal.org/2018/02/is-the-wash-club-building-a-historic-resource-to-sfs-mission/ [https://perma.cc/7ZD4-DUTW].

[116] Joe Eskenazi, *The Strange and Terrible Saga of San Francisco's 'Historic Laundromat' Represents the Worst of Planning and Development in This Town*, MISSION LOCAL (June 26, 2018), https://missionlocal.org/2018/06/the-strange-and-terrible-saga-of-san-franciscos-historic-laundromat-represents-the-worst-of-planning-and-development-in-this-town/ [https://perma.cc/3BTY-9L9F].

[117] One anonymous city official commented that the city's demand for a shadow study was "ludicrous." *Id*.

[118] Complaint at 2–3, RRTI, Inc. v. City of San Francisco, No. CPF-18-516301 (Cal. Super. Ct. Aug. 20, 2018), https://www.docdroid.net/wJNkdqI/sf-1088649-v1-rrti-verified-petition-for-writ-of-mandate-complaint-for-damages-injunctive-and-declaratory-relief.pdf#page=3 [https://perma.cc/NXF5-A4P9].

[119] Eskenazi, *supra* note 116.

[120] *See* Julian Mark, *How the Developer of SF's 'Historic' Laundromat Quietly Won*, MISSION LOCAL (Feb. 4, 2019), https://missionlocal.org/2019/02/how-the-developer-of-sfs-historic-laundromat-quietly-won/ [https://perma.cc/Z9Z3-FEFU].

[121] These city-level public financing options include its Affordable Housing Managed Pipeline Program and Proposition HHH Loan program. *See Council District Office Letter of Acknowledgement*, L.A. HOUS. & CMTY. INV. DEP'T (2017), https://hcidla.lacity.org/council-office-letter-acknowledgement [https://perma.cc/5YRP-WSG6].

many prerogative regimes consist of the legislative body deferring to a single legislator, Los Angeles' regime consisted of an administrative body deferring.[122] In this case, the municipal agency that administered public financing for housing developments deferred to the legislator, and if a council member withheld the letter of acknowledgment—a requirement to access the city's public financing for affordable housing developments—the project would not be financed.[123] Rather than relying on an unwritten tradition, the city council codified the letter of acknowledgment requirement in an ordinance.[124] But, after much public consternation, state-level legislative pushback, and potential legal liability, the city council voted to curtail this prerogative practice by striking the letter requirement in 2018.[125] As further detailed in Part IV, Los Angeles represents one of the only instances where legislators have curbed their own prerogative power.[126]

While these cities illustrate prominent examples of prerogative, this Section's overview only scratches the surface. In cities like St. Louis,[127] Milwaukee,[128] Cleveland,[129] and Springfield, Illinois,[130] prerogative is hardly

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[122] Emily Alpert Reyes, *L.A. Lawmakers Can Block Homeless Housing Projects by Simply Withholding a Key Letter*, L.A. TIMES (Mar. 12, 2018, 4:00 AM), https://www.latimes.com/local/lanow/la-me-ln-council-power-20180312-story.html [https://perma.cc/F852-GSW6].

[123] *Id.* City administrators have argued the letters "ensure that Council [member] Offices are aware of the agencies applying in their District," paralleling similar accountability justifications across the country. Memorandum from Richard H. Llewellyn, Jr., Interim City Admin. Off., to Mayor & City Council 8 (May 16, 2017), https://clkrep.lacity.org/onlinedocs/2017/17-0090_rpt_CAO_05-16-2017.pdf [https://perma.cc/9LKR-6E5Y].

[124] *See* SHAW, *supra* note 26, at 61.

[125] Emily Alpert Reyes, *L.A. Will Eliminate 'Veto' Provision for Homeless and Affordable Housing to Keep State Funding*, L.A. TIMES (Oct. 16, 2018, 12:40 PM), https://www.latimes.com/local/lanow/la-me-ln-homeless-letter-20181017-story.html [https://perma.cc/4CDC-UVBN].

[126] *See infra* Section I.B.

[127] *See* Sarah Harney, *Are City Councils a Relic of the Past?*, GOVERNING (Apr. 2003), https://www.governing.com/topics/politics/Are-City-Councils-Relic-Past.html [https://perma.cc/PAZ7-9AVB] (describing how St. Louis's tradition of aldermanic privilege has enabled parochialism).

[128] *See* State v. Tronca, 267 N.W.2d 216, 218 (Wis. 1978) (challenging the denial of a liquor license due to prerogative); JASON ADKINS, UNHAPPY DAYS FOR MILWAUKEE ENTREPRENEURS: BREW CITY REGULATIONS MAKE IT HARD FOR BUSINESSES TO ACHIEVE THE HIGH LIFE 14–17 (2010) (describing how aldermanic privilege "allows aldermen to act like petty despots in their districts"); Dave Begel, *Common Council Should Get Out of Liquor License Business*, ONMILWAUKEE (Jan. 14, 2013, 3:09 PM), https://onmilwaukee.com/bars/articles/liquorlicences.html [https://perma.cc/8MPS-HAEP] (describing aldermanic privilege in conjunction with granting liquor licenses).

[129] WILLIAM E. NELSON, JR. & PHILIP J. MERANTO, ELECTING BLACK MAYORS 356 (1977) (describing how Cleveland's chairmen of council committees invoked councilmanic courtesy to block legislation).

[130] Editorial, *Our Opinion: City Council's Inconsistency Is Troubling*, ST. J.-REG. (Oct. 29, 2009, 7:51 PM), https://www.sj-r.com/x1717113033/Our-Opinion-City-council-s-inconsistency-is-troubling

noted, but occasional media coverage suggests it exists. Due to prerogative's typically unwritten nature, commentators have little to reference beyond media stories or legislators' public comments. Furthermore, because prerogative is conceptually only a matter of deference, it is not necessarily apparent to outsiders—distinguishing between a legislator exercising prerogative and a unanimous nonprerogative vote on the merits can be a tall order.[131] Nonetheless, the foregoing survey demonstrates prerogative's national grasp on local political decision-making.

II. LEGISLATOR VETOES

While the prerogative regimes just reviewed have long been associated with heightened risk of corruption, prerogative also enables legislators to perpetuate existing patterns of racial segregation by blocking the development of affordable housing—a phenomenon that should be associated with the term "local veto." Extensive scholarship has discussed local governments' efforts to block affordable housing development, often describing municipalities as exercising local vetoes.[132] For example, Professor Stacy Seicshnaydre described a 2007 housing bill proposal in Louisiana that required approval from a parish governing authority to allocate tax credits as creating a local veto.[133] In 2016, the Internal Revenue Service (IRS) used the term in a formal ruling when it announced that it "neither requires nor encourages" state housing agencies to "honor local vetoes" when allocating low-income housing tax credits.[134] In short, this term

[https://perma.cc/8HT9-4HDB] (reporting a "classic case of aldermanic privilege" when the city council made a liquor-licensing exception).

[131] On the issue of legislative intent writ large, Justice Antonin Scalia aptly noted that "discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite." Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting).

[132] *See, e.g.*, Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J.L. & POL'Y 209, 217 (1994) (describing a requirement for a locality to document its need for low-income housing as "a standardless local veto over federally funded public housing"); Leonard S. Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 U. MICH. J.L. REFORM 625, 629 (1973) (describing local governments' failure to act when implementing federal subsidy programs as a "local veto"); Herbert M. Franklin, *Federal Power and Subsidized Housing*, 3 URB. LAW. 61, 63–64 (1971) (describing how every metropolitan area, save Honolulu, has a low-income housing operation with a "local veto").

[133] Stacy E. Seicshnaydre, *How Government Housing Perpetuates Racial Segregation: Lessons from Post-Katrina New Orleans*, 60 CATH. U. L. REV. 661, 688 (2011).

[134] The implication is that state administrators would no longer necessarily defer to municipalities if the municipality exercised a local veto over affordable housing projects seeking LIHTC financing. Rev. Rul. 2016-29, 2016-52 I.R.B. 6; *see* Alan D. Viard, *Low Income Housing Tax Credits and the Concentration of Poverty*, AEIDEAS (Jan. 10, 2017), https://www.aei.org/economics/low-income-housing-tax-credits-and-the-concentration-of-poverty [https://perma.cc/W8DR-34NT] ("The [IRS]

has largely been used in an intermunicipal context—cities exercising local vetoes to block affordable housing within their boundaries.[135] The term's relevance, however, is just as applicable in an intramunicipal context—local legislators exercising sublocal vetoes *through prerogative* to block affordable development within their districts.[136]

This Part discusses this relationship between prerogative and local vetoes, describing the interaction at the microlocal level as a "legislator veto." The first Section describes the mechanics of how financing and land use approval enable legislator vetoes. The second Section then traces a brief history of antidevelopment sentiment and its connection to segregation, which explains why a local legislator might exercise the veto in the first place.

A. Affordable Housing and Hyperlocal Control

Federal housing policy today can be divided between promoting homeownership and assisting low-income renters.[137] Whereas the former dominates in terms of federal expenditures,[138] the latter serves a higher need population—homeowners' median income is roughly double the income of renters.[139] This Note focuses on the rental-assistance component of federal housing policy.[140] A massive shortage of affordable units exists today: only

ruling points out that a local opportunity to comment is not the same as a local veto."). Because the IRS ruling is not a mandate, some state agencies still defer to local vetoes in Low-Income Housing Tax Credit (LIHTC) allocation. *See, e.g.*, Inclusive Cmtys. Project, Inc. v. Dep't of Treasury, 946 F.3d 649, 656–57 (5th Cir. 2019) (finding "it's entirely speculative" that eliminating the local veto criteria would result in LIHTC allocation to integrative projects).

[135] *See, e.g.*, Jacqueline Rabe Thomas, *Separated by Design: Why Affordable Housing Is Built in Areas with High Crime, Few Jobs and Struggling Schools*, PROPUBLICA (Nov. 25, 2019, 5:00 AM), https://www.propublica.org/article/separated-by-design-why-affordable-housing-is-built-in-areas-with-high-crime-few-jobs-and-struggling-schools [https://perma.cc/5CXV-Z55V] (reporting how Connecticut state agencies disproportionately award LIHTC funding to high-poverty areas); *infra* notes 287–291 and accompanying text (describing the disparate allocation of low-income housing tax credits in the Baltimore region).

[136] *See, e.g.*, Walz & Fron, *supra* note 28, at 15–17 (describing a Chicago alderman effectively killing a fifty-five-unit affordable housing development in Portage Park by withdrawing his support).

[137] *See* John D. Landis & Kirk McClure, *Rethinking Federal Housing Policy*, 76 J. AM. PLAN. ASS'N 319, 320 (2010).

[138] *Id.* (estimating the federal government spent $6 assisting homeowners for every $1 assisting low-income renters in 2008).

[139] JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., AMERICA'S RENTAL HOUSING 2017, at 10 (2017), https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_americas_rental_housing_2017_0.pdf [https://perma.cc/5KM5-WX5H] (contrasting the 2016 cash-renter median income of $37,300 to the homeowner median income of $73,100).

[140] This Note does not intend to pick a side in affordable housing's longstanding preservation-versus-mobility debate. Rather, this Note attempts to draw attention to prerogative and legislator vetoes insofar

thirty-six affordable rental units are available for every one hundred extremely low-income renter households.[141] Furthermore, access to affordable rental housing disproportionately impacts communities of color, especially Black Americans, who account for 12% of all households, yet also account for 26% of all low-income renters.[142] To be sure, race and class are not proxies.[143] But "address[ing] the full range of discriminatory and segregationist factors influencing people of color in American housing markets" necessarily requires discussing income-based restrictions on housing because of the overlap between race and poverty.[144] Accordingly, the location of affordable-housing development can shape the racial makeup of the neighborhoods and cities in which this housing is sited.[145]

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as they constrain the supply of affordable housing options that might otherwise be available for mobility advocates. *See generally* SHEILA CROWLEY & DANILO PELLETIERE, AFFORDABLE HOUSING DILEMMA: THE PRESERVATION VS. MOBILITY DEBATE (2012), https://nlihc.org/sites/default/files/affordablehousingdilemmareportmay-2012.pdf [https://perma.cc/V7YM-253A] (finding that "over time the pendulum in the debate . . . has swung back and forth between poverty dispersal and place-based strategies that seek to help poor people in their current neighborhoods").

[141] Where "extremely low-income" is defined as at or below the poverty guideline or 30% of the area median income (whichever is higher). AURAND ET AL., *supra* note 24, at 1.

[142] "[N]on-Hispanic white households account for 65% of all U.S. households (including homeowners and renters), 50% of all renters, and 43% of all extremely low-income renters. Black households account for 12% of all households, yet they account for 19% of all renters and 26% of all extremely low-income renters. Hispanic households account for 12% of all U.S. households, 19% of all renters, and 21% of extremely low-income renters." *Id.* at 13; *see also* Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction*, 22 FAST FOCUS 1, 1 (2015) (arguing rental affordability disproportionately impacts Black-American and Hispanic households); JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 139, at 17 (finding the median household income of Hispanic renters approximately 15% lower and Black renters 30% lower than white renters, holding age constant).

[143] *See generally* Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711 (2020) (using intergenerational economic data to explain racial disparities in income). One group of scholars responded to the Chetty et al. research with the following: "One of the most popular liberal post-racial ideas is the idea that the fundamental problem is class and not race, and clearly this study explodes that idea . . . ." Emily Badger, Claire Cain Miller, Adam Pearce & Kevin Quealy, *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html [https://perma.cc/A3RU-QFAF] (providing data visualizations for the Chetty et al. research).

[144] EDWARD G. GOETZ, THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE IN AMERICAN CITIES 19 (2018). *See generally* ROTHSTEIN, *supra* note 25, at 177–88 (analyzing race, economic status, and housing); PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013) (same).

[145] *See* Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 878 (2006) ("[S]tructural racism that restricts affordable housing to ghettoized areas of the urban core intensifies racial segregation and perpetuates poverty."); DOUGLAS S. MASSEY, LEN ALBRIGHT, REBECCA CASCIANO, ELIZABETH DERICKSON & DAVID N. KINSEY, CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY

Originally, the federal government attempted to address the lack of affordable rental units with public housing projects,[146] but such projects have declined over recent decades.[147] Instead, federal housing policy now primarily consists of subsidizing private sector development,[148] either through vouchers or tax credits.[149] An affordable housing development has two key elements that require signoff from local government actors: financing and land use approval. Financing subsidies include low-income housing tax credits, tax-increment financing, and other special municipal funding opportunities.[150] Land use approval includes zoning changes, permitting requirements, historical district compliance, environmental impact review, and more.[151]

IN AN AMERICAN SUBURB 6, 21 (2013) (arguing housing-mobility programs, including subsidized affordable housing and rental vouchers, "constitute an efficacious way" to decrease racial and class segregation); MARGERY AUSTIN TURNER & LYNETTE RAWLINGS, URB. INST., PROMOTING NEIGHBORHOOD DIVERSITY: BENEFITS, BARRIERS, AND STRATEGIES 11 (2009), https://www.urban.org/sites/default/files/publication/30631/411955-Promoting-Neighborhood-Diversity-Benefits-Barriers-and-Strategies.PDF [https://perma.cc/5DUQ-3X3C] (arguing for expanding affordable housing options in affluent white jurisdictions to challenge "the persistence of racial and ethnic exclusion").

[146] Affordable housing is definitionally distinct from public housing, although they are often conflated. U.S. Department for Housing and Urban Development (HUD) defines the former as any housing that costs less than 30% of post-tax income, whereas the latter is a federal program that contracts with quasi-governmental public housing authorities at the local level. MAGGIE MCCARTY, CONG. RSCH. SERV., R41654, INTRODUCTION TO PUBLIC HOUSING 1, 19 (2014), https://fas.org/sgp/crs/misc/R41654.pdf [https://perma.cc/SS3W-TWUT].

[147] *See* Landis & McClure, *supra* note 137, at 321–23 (overviewing the history of federal housing policy); Matthew Yglesias, *Everything You Need to Know About the Affordable Housing Debate*, VOX (May 11, 2015, 11:43 AM), https://www.vox.com/2014/4/10/18076868/affordable-housing-explained [https://perma.cc/RZ5G-CGEY] ("Over the past two decades, housing policy trends have been toward reducing the amount of public housing."). For a comprehensive history, see generally Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 HOUS. POL'Y DEBATE 489 (2000).

[148] *Cf.* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 255 (2019) (arguing the political untenability of public housing preceded the state growing "dependent on private sector forces to produce, manage, and own the nation's housing stock").

[149] *See* Landis & McClure, *supra* note 137, at 331–34 (contrasting public housing, vouchers, and tax credits—the latter two subsidizing private housing).

[150] *See generally* Joe Cortright, *A Solution for Displacement: TIF for Affordable Housing*, CITY COMMENT. (Nov. 6, 2019), http://cityobservatory.org/a-solution-for-displacement-tif-for-affordable-housing/ [https://perma.cc/RRM8-755G] (overviewing financing options); Kathleen Kane-Willis, *Closing the Gap: Financing Affordable Housing in the Chicago Area*, *in* AFFORDABLE HOUSING IN THE CHICAGO REGION: PERSPECTIVES AND STRATEGIES 58, 69–73 (Phil Nyden, James Lewis, Kale Williams & Nathan Benefield eds., 2003) (describing the mechanics of "closing the financing gap" for affordable housing developers).

[151] *See generally* PACE LAND USE L. CTR., BEGINNER'S GUIDE TO LAND USE LAW, https://law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf [https://perma.cc/9GUQ-RGJW] (overviewing land use law).

Every city approaches these approvals differently, often depending on the size of the municipality; some place decision-making in the hands of unelected administrators, while others require full legislative council signoff.[152] In either case, support from the local legislator remains integral, inevitably necessitating political support subject to local pressures.[153] These conditions give rise to legislator vetoes.

For example, if city administrators who handle financing defer to a local legislator's disapproval, the project will fail no matter how beneficial it may be or how much the local community may desire it. Similarly, if land use approval hinges on a majority vote in the city council but the council always defers to the legislator's prerogative, the project is doomed from the outset without her support. Prerogative exacerbates the necessity of local political support by effectively giving a veto to the legislator of the district in which the affordable housing will be built.

B. Historical Antidevelopment Sentiment

Prerogative equips a local legislator with a tool to veto development, but this does not explain when and why she uses it. Constituency pressures provide the explanation. Antidevelopment sentiment today, unfortunately, builds upon an American history of segregation that has fundamentally intertwined race and housing. Modern housing patterns embody this connection.[154] Although some jurists blame the market for segregation today,[155] scholars have exposed the government's comprehensive role in both shaping and perpetuating these housing patterns in far greater detail than this Note can.[156] Accordingly, the following two examples—racially restrictive covenants and public housing—merely illustrate the underlying systemic racism that motivates antidevelopment sentiment today.

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[152] *See* Zimmermann, *supra* note 33 (overviewing local government structures).

[153] *See* Katherine Levine Einstein, Maxwell Palmer & David M. Glick, *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSPS. ON POL. 28, 37–39 (2019) (describing the oppositional pressure from older, home-owning citizens exerted on lawmakers).

[154] *See* Lutton et al., *supra* note 24 (mapping the lack of private mortgage lending to Black and Latino neighborhoods in Chicago); Williams & Emamdjomeh, *supra* note 22; LOGAN & STULTS, *supra* note 22.

[155] *Compare* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 750 (2007) (finding racial disparities resulted from de facto segregation "including voluntary housing choices"), *with id.* at 806 (Breyer, J., dissenting) (finding the distinction between de jure and de facto segregation "meaningless").

[156] As previously mentioned, for an excellent historical account, see ROTHSTEIN, *supra* note 25. For a more quantitatively driven account, see JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES (2018).

Racially restrictive covenants historically epitomized local hostility to integration.[157] Primarily used throughout the first half of the twentieth century, these covenants precluded the future sale of properties to African-American homebuyers and ran with the land.[158] Courts across the country justified their constitutionality by deeming the covenants private agreements.[159] In 1948, the Supreme Court forbade these covenants in *Shelley v. Kramer*.[160] Nevertheless, their impact persisted. The Federal Housing Administration (FHA) continued financing subdivision developments that openly excluded African-American homebuyers until 1962.[161] Following *Shelley*, the FHA also continued insuring properties with covenants that required neighbor or community approval before authorizing a sale, functionally skirting *Shelley*'s proscription.[162] Although the courts eventually curtailed these evasive post-*Shelley* tactics,[163] these deeds still implicitly signaled that those formerly restricted would be shunned as outsiders.[164]

Public housing policies have similarly evinced and instituted strong anti-integrationist impulses. As originally conceived and funded by the federal government during the New Deal, public housing addressed middle-class housing shortages based on income rather than race.[165] Federal officials, however, condoned segregated public housing in the 1949 Housing Act,

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[157] For a comprehensive overview of racial covenants and their legacy today, see RICHARD R. W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013).

[158] *See id.* at 3–4.

[159] *See, e.g.*, *id.* at 81 (discussing the Maryland Supreme Court's 1938 decision in *Meade v. Dennistone*, 196 A. 330 (Md. 1938), which upheld racially restrictive covenants as neighborhood agreements).

[160] 334 U.S. 1 (1948). The *Shelley* decision was decided by only six Justices—three Justices recused themselves because their own properties contained such covenants. *Id.* at 23.

[161] ROTHSTEIN, *supra* note 25, at 88.

[162] *Id.*

[163] *Id.* at 90–91.

[164] *See* BROOKS & ROSE, *supra* note 157, at 4, 177–82. Scholars argue new signaling devices have taken their place, also enforced by the courts, which continue to indicate hostility to nonwhite homebuyers. *See, e.g.*, Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019) (arguing crime-free housing ordinances enable racial discrimination); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437 (2006) (arguing that "embedding costly, demographically polarizing amenities," such as golf memberships, into covenants signals homebuyers' racial preferences and excludes undesired races).

[165] ROTHSTEIN, *supra* note 25, at 17. For a brief overview of the history of public housing, see MCCARTY, *supra* note 146, at 1–9.

thereby setting in motion a vicious cycle of racial isolation.[166] Using federal funding from the Housing Act, city housing authorities selected public housing sites that maintained segregation.[167] As the housing shortage following World War II eased, the real estate lobby successfully advocated for a strict income limit for public housing eligibility, forcing out middle-class families.[168] Conditions deteriorated as the lack of "middle-class rents resulted in inadequate maintenance budgets," transforming "public housing into a warehousing system for the poor."[169] By the 1970s, the Nixon Administration decried these conditions and announced that public housing should not be forced on white communities.[170]

The results of these and other policies are stark. Whereas in 1890, the average city-dwelling African American lived in a neighborhood that was 27% Black, by 1990, that number had shot up to 56%.[171] Racially segregated housing patterns that historically existed on a block-by-block basis now manifest across neighborhoods and even entire cities.[172] Segregation has become an ingrained characteristic of the American city.[173]

The traditional hostility to integration that previously generated racially restrictive covenants and federal public housing policies now animates

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[166] *See* ROTHSTEIN, *supra* note 25, at 30–34. Even after *Brown v. Board of Education* in 1954, "President Eisenhower's housing administrator told a congressional committee that the government should not 'move too precipitously' to eliminate racial segregation from federal programs." *Id.* at 33.

[167] *Id.* at 34–35. For one of the most famous examples of segregated public housing, see *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969).

[168] ROTHSTEIN, *supra* note 25, at 36.

[169] *Id.* at 37; *see also* TAYLOR, *supra* note 148, at 254–55 (arguing the combination of physical decline and decreasing income limits transformed public housing into "housing of last resort").

[170] ROTHSTEIN, *supra* note 25, at 37. In a report to Congress, President Richard Nixon described public housing projects as "monstrous, depressing places—run down, overcrowded, crime-ridden, falling apart." President Richard Nixon, Special Message to the Congress Proposing Legislation and Outlining Administration Actions to Deal with Federal Housing Policy (Sept. 19, 1973), https://www.presidency.ucsb.edu/documents/special-message-the-congress-proposing-legislation-and-outlining-administration-actions [https://perma.cc/8ZAC-FQJV].

[171] David M. Cutler, Edward L. Glaeser & Jacob L. Vigdor, *The Rise and Decline of the American Ghetto*, 107 J. POL. ECON. 455, 456 (1999); *see also id.* at 497–99 (using wards as proxies for neighborhoods from 1890 to 1940 and census tracts as proxies for neighborhoods post-1940).

[172] TROUNSTINE, *supra* note 156, at 3.

[173] Segregation's impact today reaches beyond just housing, shaping, for example, the racial disparities in police fatally shooting unarmed victims. *See* Mesic et al., *supra* note 22, at 113 (finding "racial residential segregation was the most robust indicator associated with state-level racial disparities in police shootings of unarmed victims" where a ten-point increase in the state racial segregation index correlated with a 67% increase in the state's ratio of police shootings of unarmed Black victims to police shootings of unarmed white victims).

neighborhood opposition to affordable housing.[174] While these opponents tend to use coded language like "neighborhood character" and "property value preservation," such concerns often mask an underlying discriminatory purpose, whether conscious or not.[175] Even the current President has employed this racially implicit rhetoric, attacking affordable housing because it "bring[s] who knows into your suburbs, so your communities will be unsafe and your housing values will go down."[176] Further compounding this hostility, the loudest participants at local government meetings tend to be those who overwhelmingly oppose new development, thereby placing further pressure on local legislators to oppose such projects.[177] Although

[174] *See, e.g.*, Walz & Fron, *supra* note 28, at 13–15 (describing opposition to a development that would trigger affordable housing requirements in Chicago's Edison Park neighborhood); *see also* TAYLOR, *supra* note 148, at 259–60 ("The conflation of race and risk to property value has been fully absorbed into the popular culture and real estate acumen of the United States."); Patrick Sharkey, *To Avoid Integration, Americans Built Barricades in Urban Space*, ATLANTIC (June 20, 2020), https://www.theatlantic.com/ideas/archive/2020/06/barricades-let-urban-inequality-fester/613312/ [https://perma.cc/Z2VK-9H23] (connecting the history of racially restrictive covenants to urban housing policy today).

[175] *See* BRIAN J. MCCABE, NO PLACE LIKE HOME: WEALTH, COMMUNITY & THE POLITICS OF HOMEOWNERSHIP 100 (2016); Paavo Monkkonen & Will Livesley-O'Neill, *Overcoming Opposition to New Housing*, UCLA LEWIS CTR. FOR REG'L POL'Y STUD. (2017), https://www.lewis.ucla.edu/opposition-to-new-housing/ [https://perma.cc/33MF-2659] (identifying motivations and methods for opposition to new housing); Chrishelle Palay, Opinion, *It's Time to Retire This Scapegoat for Segregation*, NEXT CITY (May 31, 2017), https://nextcity.org/daily/entry/houston-affodable-housing-scapegoat-segregation-nimby [https://perma.cc/6B5J-3KFV] (describing the coded language in discriminatory, NIMBY (Not In My Backyard) responses to affordable housing). For examples of responses to such coded language, see Josh Lapp, Opinion, *Preservation Efforts Should Be Used for Progress, Not NIMBYism*, COLUMBUS UNDERGROUND (Oct. 8, 2019, 12:30 PM), https://www.columbusunderground.com/opinion-preservation-for-progress-not-nimbyism-jl1 [https://perma.cc/T6UX-DCH7]; Marian Mumford, Letter to the Editor, *Objections Have Coded Language*, ITHACA J. (July 16, 2015, 2:10 PM), https://www.ithacajournal.com/story/opinion/readers/2015/07/16/letter-project-objections-coded-language/30246187/ [https://perma.cc/LJ4V-54HW].

[176] Danielle Kurtzleben, *Seeking Suburban Votes, Trump to Repeal Rule Combating Racial Bias in Housing*, NPR (July 21, 2020, 1:38 PM), https://www.npr.org/2020/07/21/893471887/seeking-suburban-votes-trump-targets-rule-to-combat-racial-bias-in-housing [https://perma.cc/LMQ8-TPBV]; *see also Remarks by President Trump in Press Conference*, THE WHITE HOUSE (July 14, 2020, 5:29 PM), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-press-conference-071420/ [https://perma.cc/QYM8-V4UE] ("I've been watching this for years in Westchester, coming from New York. They want low-income housing built in a neighborhood. Well, I'm ending that rule. . . . Mothers aren't happy about that. Fathers aren't happy about that. They worked hard to buy a house, and now they're going to watch the housing values drop like a rock, and that has happened.").

[177] Einstein et al., *supra* note 153, at 29–30; *see also* Asad R. Khan, *Decentralized Land-Use Regulation with Agglomeration Spillovers: Evidence from Aldermanic Privilege in Chicago* 1–2 (Dec. 2019) (Job Market Paper, University of Illinois at Urbana-Champaign), https://drive.google.com/file/d/1d3E7kTF_1U71FRImdfUQ-YwjEOd9bLhV/view [https://perma.cc/7YTS-YJDV] (finding "strong political effects on zoning" and that "homeownership significantly predicts fewer and smaller zoning changes" in Chicago).

individuals express commitment to the ideal of integration in the abstract, they consistently resist integration in their own neighborhoods, especially in higher-income communities.[178] Thus, in a prerogative regime today, if either the legislator or her constituency wants to block an affordable-housing proposal, the development will not proceed.

III. LEGISLATIVE SOLUTIONS

Prerogative exists in cities across the entire country, its prevalence much wider than commonly realized. And though prerogative is not inherently problematic—indeed, some proponents have defended the practice as increasing legislator accountability to constituents[179]—the segregative costs driven by legislator vetoes of affordable housing bear addressing. Recognizing the need for reform, both academics and community advocates have offered various legislative proposals to curb prerogative. These proposals fit under two broad categories: electoral reform and land use reform. Electoral reforms propose changing the structure of local government such that prerogative's influence diminishes. Land use reforms more narrowly target the specific procedures prerogative controls. The following Sections overview these two categories before ultimately discussing the challenges of both and the ensuing need for judicial intervention.

A. Electoral Reform

Some commenters propose reforms that target the very governmental structures that enable prerogative. These structural reforms rely on a theory that altering a legislator's constituency will diminish prerogative's

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[178] *See, e.g.*, Jacqueline Rabe Thomas, *Separated by Design: How Some of America's Richest Towns Fight Affordable Housing*, PROPUBLICA (May 22, 2019, 5:00 AM), https://www.propublica.org/article/how-some-of-americas-richest-towns-fight-affordable-housing [https://perma.cc/W3GY-BXWM] (describing how residents in high-income communities bemoan the potential development of affordable housing and use coded language). This resistance is not a new phenomenon either. For example, resistance to socioeconomic integration motivated the Austin neighborhood's forced annexation to Chicago in 1899 after Austin residents voted to expand the "L" public transit "to the chagrin of Oak Park residents, who feared the arrival of inexpensive transportation would encourage working-class migration" into the neighboring communities. Michael Romain, *Austin's Strange Plight*, AUSTIN WKLY. NEWS (Oct. 22, 2019, 4:12 PM), https://www.austinweeklynews.com/News/Articles/10-22-2019/Austin's-strange-plight-/ [https://perma.cc/CSW6-JBQC].

[179] *See, e.g.*, Misra, *supra* note 5 (Alderman Carlos Ramirez-Rosa of Chicago's 35th Ward arguing that aldermanic prerogative provides local accountability); Ruthhart, *supra* note 5 (2019 Chicago mayoral candidate Toni Preckwinkle arguing for prerogative's local accountability); Morell, *supra* note 12 (Alderman Tom Tunney of Chicago's 44th Ward arguing for prerogative's local accountability); PEW CHARITABLE TRS., *supra* note 35, at 1 (Philadelphia City Council President Darrell L. Clarke arguing for prerogative's local accountability).

salience.[180] One argument specifically looks to constituency size as a proxy for the breadth of pressures a legislator faces.[181] If prerogative is a means of encouraging government to submit to hyperlocal pressures, decreasing the number of legislators would necessarily increase the number of constituents each legislator represents, thus increasing the breadth of pressures they face and "forcing council members to focus more on citywide interests."[182] Accordingly, numerous commentators, including Ed Bachrach and Austin Berg, have proposed council contraction—reducing the number of legislators on the local legislative body.[183] For example, for every one of St. Louis's twenty-eight aldermen, there are roughly 10,500 residents,[184] making the city's number of representatives per capita one of the highest in the country.[185] This fragmentation has led aldermen to focus on narrow decision-making at the expense of citywide interests.[186] Legislators increasingly weigh a policy's impact on "smaller and smaller patches of turf."[187] Aldermanic

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[180] *See* BACHRACH & BERG, *supra* note 31, at 31 (arguing that replacing Chicago's aldermanic ward system with a smaller city council will allow the council to tackle "big-picture, citywide policies"); *see also* METRIC GEOMETRY & GERRYMANDERING GRP., STUDY OF REFORM PROPOSALS FOR CHICAGO CITY COUNCIL 1 (2019), https://mggg.org/Chicago.pdf [https://perma.cc/H6WP-TZ59] [hereinafter MGGG STUDY] (explaining how prerogative combined with carefully crafted districts entrenches local legislators, rendering them unaccountable).

[181] *See* THE CIVIC FED'N, *supra* note 58, at 69 ("A large council tends to focus more on constituent services and localized interests than on functioning as a legislative body that emphasizes policymaking and oversight. Smaller bodies are more focused on traditional legislative functions.").

[182] BACHRACH & BERG, *supra* note 31, at 21. For a discussion of contraction in relation to charter reform, see Ed Bachrach & Austin Berg, Opinion, *Time to Reform Chicago Governance with a City Charter*, LAW360 (Jan. 25, 2019, 1:14 PM) [hereinafter Bachrach & Berg, *Time to Reform*], https://www.law360.com/articles/1122004/time-to-reform-chicago-governance-with-a-city-charter [https://perma.cc/63ZK-7YJL].

[183] BACHRACH & BERG, *supra* note 31, at 21; *see also* MGGG STUDY, *supra* note 180, at 1. City council contraction usually comes up in the fiscal context, but relatedly often hinges on issues of accountability, as demonstrated by the current debate in Cleveland. *See* Robert Higgs, *Cleveland's City Council Has More Members and Higher Pay than Most Comparable Cities*, CLEVELAND PLAIN DEALER (Sept. 19, 2019), https://www.cleveland.com/news/erry-2018/11/9288790e0f7622/clevelands-city-council-has-mo.html [https://perma.cc/E5YD-AWSP]. *See generally* Douglas Muzzio & Tim Tompkins, *On the Size of the City Council: Finding the Mean*, 37 PROC. ACAD. POL. SCI. 83 (1989) (summarizing the effects of different local legislature sizes on representation and values like accountability and participation).

[184] This is based on an estimated current population of 293,792. *St. Louis, Missouri Population 2020*, WORLD POPULATION REV., http://worldpopulationreview.com/us-cities/st-louis-population/ [https://perma.cc/3JUS-8MZH].

[185] Scott Ogilvie, Comment, *Reduce the Size of the Board of Aldermen*, ST. LOUIS BUS. J. (May 10, 2018, 6:00 AM), https://www.bizjournals.com/stlouis/news/2018/05/10/commentary-reduce-the-size-of-the-board-of.html [https://perma.cc/3NQ9-E3WQ].

[186] *Id.*

[187] Harney, *supra* note 127.

contraction may loosen prerogative's hold by making each legislator accountable to a larger number of constituents.

Another theory argues that single-member districts enable prerogative.[188] In single-member districts, a city council or administrative agency can defer to an individual legislator since a lone representative creates a singular point of accountability.[189] Academics therefore suggest—sometimes in conjunction with contraction—that cities adopt multimember districts.[190] Because prerogative only arises in single-member contexts, switching to a multimember structure would promote shared accountability since councils could no longer defer to a single legislator.[191] Furthermore, like contraction, such a change would "provide a jolt to the system" by changing the constituents and potential coalitions of long-serving incumbents.[192] In short, such reform would ideally end the fiefdom-like nature of prerogative.[193]

Though they might provide other normative benefits, none of these electoral-reform proposals would necessarily eliminate prerogative's deep-rooted grip. Aldermanic contraction might incentivize legislators to advocate for a broader geographical constituency, but it will not undermine prerogative itself. Even if a city like St. Louis halved its number of aldermen to fourteen, those legislators might still exercise prerogative, just on behalf of a larger constituency.[194] Similarly, multimember district representatives could still wield their veto power collectively. Or legislative bodies could

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[188] *See* Michael Hankinson & Asya Magazinnik, *Aggregating Voters and the Electoral Connection: The Effect of District Representation on the Distributive Equity of the Housing Supply* 2 (Working Paper, 2019), chriswarshaw.com/lpe_conference/draft_190820.pdf [https://perma.cc/57DU-H2AZ]; *see also* James C. Clingermayer, *Electoral Representation, Zoning Politics, and the Exclusion of Group Homes*, 47 POL. RSCH. Q. 969, 979 (1994) (arguing that at-large representatives "may be more open to the influence of interests that may or may not be in tune with the preferences of their voters").

[189] *See* Hankinson & Magazinnik, *supra* note 188, at 2.

[190] *See, e.g.*, MGGG STUDY, *supra* note 180, at 2.

[191] *Id*. at 21; *see also* Hankinson & Magazinnik, *supra* note 188, at 28 (finding that shifting from at-large to district elections makes it harder to permit multifamily housing, but creates housing that is more affordable and less concentrated, in part because "local interests have greater influence at the expense of collective, citywide outcomes"). *But see* Craig M. Burnett & Vladimir Kogan, *Local Logrolling? Assessing the Impact of Legislative Districting in Los Angeles*, 50 URB. AFFS. REV. 648, 664 (2014) (finding that while council members in single-member districts defer to their colleagues, their deference is conditional and legislators will still consider citywide interests, especially on more contentious matters).

[192] MGGG STUDY, *supra* note 180, at 21.

[193] *Id.* at 22.

[194] Similarly, if the city council in a large city like Chicago was cut in half to twenty-five aldermen, nothing would prevent a single alderman representing twice as many residents from exercising prerogative. To this point, each New York City council member represents a constituency roughly three times the size of a Chicago alderman. *See supra* note 44 and accompanying text.

adopt a policy of rejecting proposals that fail to command support from all representatives of a particular multimember district, thus enabling legislators to still exercise an individual veto.

Modifying the multimember proposal to instead switch some district-specific seats to at-large representation similarly does not specifically address prerogative. Although at-large representation may provide an initial systemic jolt and promote shared accountability, the presence of at-large legislators would not necessarily remove veto power from district-specific representatives. Philadelphia, for instance, has both at-large and district-based council members, yet prerogative still thrives.[195] Moreover, such redistricting also fails to account for the historical structural exclusion of racial minorities within at-large electoral systems, which in some jurisdictions legally prompted the shift to single-member districts.[196]

Pragmatic concerns also caution against electoral reform. For one, electoral reform sweeps far more broadly than land use reform. Both aldermanic contraction and shifting to multimember districts involve major rebalancing of electoral power directly impacting incumbents, which is one reason why contraction rarely occurs: few legislators will vote to eliminate their own seat.[197] Alternatively, reforming the land use planning process is narrower. Land use reform does not implicate incumbency, one of the foremost concerns of legislators.[198] More promising legislative reform likely targets legislators' decision-making processes at a more granular level.

B. Land Use Reform

Academics and community advocates have thus offered ideas for legislative reforms that strike more surgically at the logrolling—i.e., the

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[195] *See supra* Section I.B.

[196] *See, e.g.*, Bolden v. City of Mobile, 542 F. Supp. 1050, 1077 (S.D. Ala. 1982) (holding that "one of the principal motivating factors for the at-large election system for the Mobile City Commission was the purpose (intent) to discriminate against blacks"); Melissa J. Marschall, Anirudh V.S. Ruhil & Paru R. Shah, *The New Racial Calculus: Electoral Institutions and Black Representation in Local Legislatures*, 54 AM. J. POL. SCI. 107, 122 (2010) (finding that increasing city council size can increase Black representation and finding a lower threshold of Black representation in single-member districts than in multimember districts). *But see* MGGG STUDY, *supra* note 180, at 3 (warning of the potential for plurality voting to lead to vote-splitting).

[197] *See* Muzzio & Tompkins, *supra* note 183, at 88 ("Legislatures, when left to their own devices, almost always expand rather than diminish in size.").

[198] *See* Rebekah Herrick, Michael K. Moore & John R. Hibbing, *Unfastening the Electoral Connection: The Behavior of U.S. Representatives when Reelection Is No Longer a Factor*, 56 J. POL. 214, 225–26 (1994) (finding that legislator activity is motivated by a reelection agenda).

mutual exchange of deference—inherent in prerogative.[199] One can construe prerogative as a prisoner's dilemma of distributive politics: legislators defer to other legislators out of fear that their own preferences will not be honored. Accordingly, one reform proposal is for cities to engage in binding centralized planning.[200] Professors Roderick Hills, Jr. and David Schleicher argue that binding planning would consist of one-time, citywide land use determinations with onerous procedures for future alteration, thereby "deter[ring] parcel-specific deals from causing the multi-neighborhood bargain over land uses to unravel."[201] The appeal of central planning is that it overcomes the prisoner's dilemma: legislators would no longer face multiple land use votes where failure to defer could jeopardize their own prerogative.[202] Furthermore, a centralized plan could account for the historical inequities in development, encouraging legislators to act with citywide interests in mind, even when specific constituencies oppose affordable development.[203]

Professors Hills and Schleicher have also argued for the use of transferrable development rights (TDRs), which allow property owners to sell their unused development rights—such as building higher or at increased density—to other property owners.[204] Although not addressing prerogative head on, these scholars argue that TDR programs can transform the constituency pressures that motivate a local legislator to wield her prerogative.[205] First, TDRs can enlarge the constituency base that actively supports housing growth by appealing to both developers and preservationists alike—two constituencies normally at odds with each other.[206] TDRs provide political cover for both camps, since they can each herald the benefits of new development at the recipient parcel while also applauding the preservation of the sending parcel.[207] Second, TDRs can

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[199] *See* Editorial Board, *Mayor Lightfoot and the Machine*, *supra* note 9 (describing prerogative as "akin to Washington, D.C., logrolling but murkier").

[200] *See* Hills & Schleicher, *Planning an Affordable City*, *supra* note 29, at 108–15; CHI. AREA FAIR HOUS. ALL., *supra note* 58, at 68–69; Walz & Fron, *supra* note 28, at 18–19.

[201] Hills & Schleicher, *Planning an Affordable City*, *supra* note 29, at 110.

[202] *Id.* at 112–14 ("[M]embers of a party-less legislature 'distribute' goods broadly across electoral districts to minimize their risk of being excluded from the necessarily fluid and unpredictable winning coalition.").

[203] CHI. AREA FAIR HOUS. ALL., *supra* note 58, at 69; *see also* Walz & Fron, *supra* note 28, at 18 (describing how a centralized city plan should work to rectify historical inequities).

[204] Hills & Schleicher, *Building Coalitions out of Thin Air*, *supra* note 83, at 4.

[205] *See id.* at 40–42.

[206] *Id.* at 4, 42–43; *see also* CROWLEY & PELLETIERE, *supra* note 140 (overviewing the debate between preservation and mobility among affordable housing advocates).

[207] Hills & Schleicher, *Building Coalitions out of Thin Air*, *supra* note 83, at 43.

diminish the political power of those who oppose development by undermining the "entitlement to zoning restrictions" that these opponents rely on when arguing for maintaining the status quo.[208] In short, TDR programs can—in a perfect world—"transcend the acrimony of growth control politics,"[209] thereby reducing the likelihood that a legislator would exercise a veto through prerogative. Nonetheless, while TDRs potentially expand the coalition supporting affordable housing development, the underlying incentives for developers still remain—namely the bottom line.[210]

A third proposal targets prerogative's grip on committee procedure. One of the ways in which legislative bodies honor prerogative is through inaction: when an ordinance is referred to committee, if the legislator exercising her prerogative does not want the ordinance to move forward, parliamentary procedure allows the committee to indefinitely table the ordinance, effectively killing it.[211] Thus, Chicago housing advocates, including Patricia Fron, Marisa Novara, and Kate Walz, propose transforming inaction into approval for affordable developments in districts without sufficient affordable housing and further requiring vetoes to include transparent explanations.[212] Additionally, these advocates propose creating a review process for committee decision-making to increase transparency.[213]

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[208] *Id.* at 44.

[209] *Id.* at 4.

[210] *Id.* at 30 ("Requiring developers to buy both TDRs and, say, build affordable housing may mean that developments will not 'pencil' (that is, be profitable enough to build).").

[211] *See* Walz & Fron, *supra* note 28, at 13; *see also, e.g.*, Maya Dukmasova, *Lost Battle on Affordable Housing Means War on Aldermanic Prerogative Will Continue*, CHI. READER (June 26, 2018, 5:49 PM), https://www.chicagoreader.com/Bleader/archives/2018/06/26/lost-battle-on-affordable-housing-means-war-on-aldermanic-prerogative-will-continue [https://perma.cc/K7UZ-A737] (describing an affordable development effectively blocked when "the zoning committee indefinitely tabled a vote").

[212] SHRIVER CTR. ON POVERTY L. & CHI. AREA FAIR HOUS. ALL., WORKING TOWARD A HEALED CITY: HOW CHICAGO CAN BUILD EQUITABLE COMMUNITIES FROM THE GROUND UP 11 (2019), https://www.povertylaw.org/wpcontent/uploads/2019/10/2019_09_24_Working_Toward_A_Healed_City-1.pdf [https://perma.cc/N3KS-8474]. For a proposed ordinance illustrating this reform, see Chi., Ill., O2018-6119, Affordable Housing Equity Ordinance (July 25, 2018). For background on this proposal, see Marisa Novara, *When Local Control Goes Wrong*, METRO. PLAN. COUNCIL (Apr. 3, 2018), https://www.metroplanning.org/news/8552/When-Local-Control-Goes-Wrong [https://perma.cc/4MY4-MZJG], for an explanation that the proposal would avoid "forcing developers to abandon their plans without ever actually being told no." See Charles Isaacs, *Environmental Justice in Little Village: A Case for Reforming Chicago's Zoning Law*, 15 NW. J.L. & SOC. POL'Y. 357, 400 (2020), for arguments that Chicago agencies and legislators should publish the "rationale for decisions on rezoning applications."

[213] Chi., Ill., Affordable Housing Equity Ordinance, *supra* note 212 (mandating that any appeal decision "must be accompanied by written findings of fact specifying the reasons for the decision"); METRO. PLAN. COUNCIL, OUR EQUITABLE FUTURE: A ROADMAP FOR THE CHICAGO REGION 12 (2018), https://www.metroplanning.org/uploads/cms/documents/cost-of-segregation-roadmap.pdf [https://perma.cc/LSX7-HHMU] (recommending that "when a residential development with at least 10

Transparency and accountability underlie these reforms—ideally, objectivity would displace prerogative's subjectivity.[214]

Lastly, Professor Nestor Davidson has shown how city charter revision can be a mechanism for systemic change.[215] Revising a city's charter would not necessarily change the city's land use determinations with regard to any particular parcel.[216] Revised charters, however, could enshrine ideals such as equitable housing and transparent governance, thereby providing a hook for judicial review if legislative bodies fail to live up to these ideals.[217] Like centralized planning, city charters necessarily focus on citywide issues rather than hyperlocal issues. Charter revision therefore avoids the prisoner's dilemma of prerogative.[218] But unless city legislators specifically revise their charters to prohibit prerogative—a potentially impossible task when prerogative exists as an unwritten tradition given its quid-pro-quo nature—prerogative's more pernicious tendencies may continue.

One difficulty with reforming land use processes is that these changes may not sufficiently account for dynamic reactions.[219] Across all proposals—centralized planning, TDR zones, committee accountability, and charter revision—market and political actors can shift their responsive timeframe to an earlier point in the decision-making process.[220] For example, rather than exercising prerogative at the time of a zoning decision, legislators may instead exercise prerogative at the adoption of the plan.[221] Furthermore,

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percent affordability is proposed in a ward with less than 10 percent affordable housing, the proposed development can no longer be rejected or delayed indefinitely by the Alderman alone").

[214] Walz & Fron, *supra* note 28, at 20.

[215] Nestor M. Davidson, *Local Constitutions*, 99 TEX. L. REV. (forthcoming 2020) (manuscript at 20–23) (on file with journal) (describing how some charters address governance processes and individual rights like housing opportunity). Such a proposal requires a city charter, which would exclude Chicago. Of the fifteen most populous cities, only Chicago and Indianapolis do not have charters. For a discussion of charter creation and governance reform, see Bachrach & Berg, *Time to Reform*, *supra* note 182.

[216] Davidson, *supra* note 215, at 48 (arguing that communities should only address "charter-worthy" issues in their charters, like "[c]ore questions of structure and political process").

[217] *Id.* at 38, 42 (arguing charters can enshrine provisions that "reflect a community's deepest values" that courts can subsequently afford "greater deference").

[218] *Id.* at 38.

[219] Just as omnibus appropriations legislation that consolidates most government spending into a one-time vote faces interest group lobbying, so too would centralized land use decision-making. *See* Schleicher, *City Unplanning*, *supra* note 33, at 1717.

[220] *See* John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 100–02 (2014) (describing the "multiple pressure points for anti-development activists to block developments"). For example, in Baltimore County, the council banned campaign contributions during the one-year period when the county's zoning map is adopted in an effort to diminish the "pay to play" culture enabled by prerogative; however, "a would-be developer seeking to gain favor with a council member simply has to make a campaign contribution before the formal process begins." Plymyer, *supra* note 93.

[221] *Id.*

especially for centralized planning, changes to procedure almost always create processes for variances that can be exploited—rules beget exceptions. Committee accountability similarly does not guarantee a solution, as legislators can always explain votes with pretextual reasoning. But above all, like electoral reform, political inertia animates the most pressing concern. Even targeted land use reform faces the uphill battle of stripping legislators of historically wielded power that purportedly fosters accountability.

IV. JUDICIAL SOLUTIONS

Electoral and land use reforms could indeed improve upon the status quo, but their passage faces strong political headwinds. A legislative body will hesitate to voluntarily curb its own power, especially when the body can always invoke local expertise and accountability as justifications for the power.[222] Judicial intervention as an alternative solution, particularly in the wake of legislative inaction, therefore merits serious consideration. Basic principles of majoritarian government normally dictate against judicial intervention. Our system of government commands that decisions be made according to the democratic process.[223] Still, it has long been recognized that courts must intervene to ensure the soundness of the democratic process when that process grows distorted as a structural matter.[224] Intervention to curtail prerogative regimes satisfies this justification.

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[222] "Any proposal to change prerogative is sure to face stiff opposition within City Council, which considers the practice as fundamental a duty as passing an annual budget . . . . It is not going away anytime soon. The question is whether prerogative can be made a more open process so that the public can better examine the way it is used and its impact on Philadelphia's future." PEW CHARITABLE TRS., *supra* note 35, at 23; *see also* Cate Plys, *Council Whores*, CHI. READER (July 17, 1997), https://www.chicagoreader.com/chicago/council-whores/Content?oid=893889 [https://perma.cc/6XNR-6KVL] (examining Chicago's efforts at ethics reform in the '90s).

[223] In principle, the democratic process ought to self-correct since unfavored legislation elicits a negative public response. David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1256–57; *see also* JONATHAN SUMPTION, TRIALS OF THE STATE: LAW AND THE DECLINE OF POLITICS 41–42 (2019) (arguing the judicial resolution of policy disputes "undermine[s] the single biggest advantage of the political process, which is to accommodate the divergent interests and opinions of citizens").

[224] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Though secondary to structural distortion, the case might also be made for justification under the *Carolene Products* discrete and insular minority rationale. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–36 (1980); ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA 6–8 (2020) (overviewing the historical consideration of socioeconomic status qualifying as a discrete and insular minority when poor people "were often physically segregated, in urban ghettos or on the 'wrong' side of the tracks"). If one construes prerogative as a civil rights issue—a minor inferential jump given prerogative's segregative impact—then the idea of judicial intervention seems even less remarkable, as advancing civil rights has long required judicial intervention as a precursor to legislative action, even when the latter might be considered a more

Prerogative threatens the democratic process in two ways. First, legislators subvert the democratic participatory process when they wield prerogative at the behest of an entrenched majority—where wealthier, whiter districts consistently reject the development of affordable housing in their midst.[225] Second, addressing prerogative necessarily implicates reform of the legislative process itself, which often does not proceed even when a majority supports it.[226] Thus, turning to the courts becomes appropriate, either as a temporary solution or as an external catalyst for legislative action.[227]

Although judicial intervention holds promise, few suits have challenged prerogative at all, and even fewer have targeted its segregative impact. This dearth of case law poses challenges for litigators and activists seeking to challenge prerogative. The following Sections explore this limited case law, thereby laying the groundwork for future research and litigation efforts. The first Section examines recent legal claims brought by individual developers and businesses upset with a specific local decision guided by prerogative. These cases highlight the difficulty of challenging prerogative when it exists as an unwritten tradition. The second Section discusses burgeoning legal efforts to challenge prerogative at a systemic level, particularly in relation to its impact on affordable housing development. A lawsuit in Los Angeles successfully prompted legislators to curb their own prerogative, though prerogative there existed in codified form. Conversely, in Chicago, one legal

legitimate means of lasting change. *See generally* David S. Meyer & Steven A. Boutcher, *Signals and Spillover:* Brown v. Board of Education *and Other Social Movements*, 5 PERSPS. ON POL. 81 (2007) (juxtaposing the social movements of education integration and marriage equality in their respective uses of litigation as a means of pressuring legislative change).

225 *See* Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1386 (2014) (describing an entrenched majority where policies fail to "reflect[] the balanced aggregate preferences of residents, because the preferences of some will always be kept outside the decision-making calculus"); *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997) (arguing for judicial review in the case of "cross-temporal" majority entrenchment, where political majorities seek to perpetuate their power beyond their time in the majority).

226 For example, the proposed Affordable Housing Equity Ordinance in Chicago failed to pass out of committee despite having twenty-seven sponsors—a majority of the City Council. *See* Chi., Ill., Affordable Housing Equity Ordinance, *supra* note 212. *See generally* Ittai Bar-Siman-Tov, *Mending the Legislative Process – The Preliminaries*, 3 THEORY & PRAC. LEG. 245 (2015) (summarizing challenges to reforming legislative processes).

227 *See* Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance*, 13 COLUM. J. EUR. L. 565, 570–75 (2007) (arguing judicial review of majoritarian decision-making processes can prompt nonjudicial action); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 846–48 (1990) (describing the judiciary's capacity to "unlock organizational stasis" in the prison context).

challenge has failed, another administrative complaint remains ongoing, and legislative action has thus far stalled.[228]

A. Individual Challenges

Most case law discussing prerogative consists of individuals challenging singular land use decisions that resulted from prerogative deference, rather than systemic challenges to prerogative regimes in their entirety. Nonetheless, these individual legal challenges still remain few and far between. One theme that emerges after analyzing these cases is the difficulty of finding municipal liability through a § 1983 claim, as first established by *Monell v. Department of Social Services*.[229] Section 1983 exists to vindicate the violation of constitutional rights, but *Monell* and its progeny have protected municipalities by creating a high bar for liability.[230] Accordingly, not only must a plaintiff prove a land use decision violated their constitutional rights, but to hold the municipality liable, she must also prove the legislator wielded prerogative with final policymaking authority or acted pursuant to an official city policy or custom.[231] The typical unwritten nature of prerogative makes these *Monell* claims particularly difficult to prove. The following cases illustrate this tension and include claims based on equal protection, substantive due process, procedural due process, and First Amendment violations.

In 2009, Chicago's Congress Hotel sued Second Ward Alderman Bob Fioretti.[232] The hotel alleged Fioretti had impermissibly refused to issue permits to operate a sidewalk cafe in violation of the Fourteenth Amendment's guarantee of equal protection by wielding his aldermanic prerogative.[233] The court's opinion grappled with whether Fioretti's actions

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[228] *See* Chi., Ill., Affordable Housing Equity Ordinance, *supra* note 212; *infra* notes 277–303 and accompanying text.

[229] 436 U.S. 658, 694–95 (1978). These claims against municipalities under § 1983 are often called *Monell* claims.

[230] *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 914–20 (2015) (overviewing local government liability in *Monell* claims).

[231] *Id.* at 914–16. Justice Stephen Breyer has noted *Monell* liability "is neither readily understandable nor easy to apply." Bd. of the Cnty. Comm'rs v. Brown, 520 U.S. 397, 433 (1997) (Breyer, J., dissenting).

[232] 520 S. Mich. Ave. Assocs. v. Fioretti (*520 S. Mich. Ave. II*), No. 07 C 4245, 2009 WL 3151794, at *1 (N.D. Ill. Sept. 28, 2009). One of the other earliest recognitions of prerogative by a court in Chicago occurred in the bankruptcy context. *See In re* J.S. II, L.L.C., No. 07 B 3856, 2007 WL 4233090, at *4 (Bankr. N.D. Ill. Nov. 29, 2007) (detailing the existence of aldermanic privilege and its alleged relationship to the real estate involved in the bankruptcy).

[233] *520 S. Mich. Ave. II*, 2009 WL 3151794, at *1. The hotel also alleged a due process violation, which was dismissed because of a lack of a property interest, as well as a National Labor Relations Act (NLRA) violation because it believed Fioretti had improperly used his aldermanic authority to force the

could be attached to the city as a matter of final policymaking authority.[234] The court recognized that a strict textual reading of the city Code meant aldermen did not have absolute permitting power.[235] But given the immense evidence of prerogative's impact—historical examples of permitting additions to committee meeting agendas conditional on aldermanic support,[236] expert testimony from a veteran land use attorney,[237] and testimony from Fioretti about the deference he received[238]—the court found the city council had effectively delegated final policymaking authority to the alderman.[239] Nonetheless, the hotel lost on the equal protection claim because it failed to prove that Fioretti had intentionally treated the hotel differently than other businesses with sidewalk cafes.[240]

In *Waterfront Renaissance Associates v. City of Philadelphia*, a development company challenged a building-height-restriction ordinance as an unconstitutional violation of its substantive due process rights.[241] Like Chicago in the Congress Hotel case, Philadelphia argued that it could not be held liable for the actions of a single council member because he was not acting pursuant to a city policy or custom as required by *Monell*, but the court disagreed.[242] In denying the motion to dismiss, the court held the height-restriction ordinance had passed because of councilmanic prerogative, a finding that cited a Pennsylvania Supreme Court decision from three years earlier that had grappled with whether "deliberate inaction" could result from

hotel to settle its union dispute. 520 S. Mich. Ave. Assocs. v. Fioretti (*520 S. Mich. Ave. I*), No. 07 C 4245, 2008 WL 4831730, at *1–3, *8 (N.D. Ill. Nov. 5, 2008).

234 *520 S. Mich. Ave. II*, 2009 WL 3151794, at *1–2.

235 *Id.* at *2 (finding aldermanic "power is ostensibly limited by the Municipal Code's admonition that aldermen 'not unreasonably with[o]ld' approval and its requirement that the City Council vote on all permit ordinances" (quoting CHI., ILL., MUN. CODE § 10–28–805)).

236 *Id.* at *3–4.

237 *Id.* at *6–7.

238 *Id.* at *7.

239 *Id.* at *10. More recently, in a 2018 case concerning retaliatory downzoning, the Northern District of Illinois entertained the notion that aldermanic privilege gave the defendant alderman de facto final policymaking authority; however, the court dismissed the claim because the rest of the complaint contradicted this notion of de facto authority. Strauss v. City of Chicago, 346 F. Supp. 3d 1193, 1209 (N.D. Ill. 2018).

240 *520 S. Mich. Ave. I*, 2009 WL 3151794, at *11. The plaintiff did, however, win on its NLRA claim, receiving an injunction enjoining the city from interfering with the hotel's labor negotiations. *Id.* at *19.

241 701 F. Supp. 2d 633, 637–38 (E.D. Pa. 2010).

242 *Id.* at 641.

prerogative.[243] Thus, because prerogative represented official policy, the *Waterfront Renaissance Associates* court held that the city could be liable for the actions of council members acting pursuant to prerogative.[244]

In a rare case challenging prerogative outside of Chicago or Philadelphia, a Tennessee developer sued Nashville, the region's housing agency, and relevant council members when the defendants refused to grant a necessary zoning change.[245] The plaintiff's procedural due process claim argued that the regional housing agency refused to grant necessary permissions until it first received approval from the property's local council member.[246] Furthermore, the plaintiff argued the agency withdrew the zoning request without an opportunity for the plaintiff to be heard.[247] In granting the agency's motion to dismiss, the court held the plaintiff had failed to establish a property interest.[248] The court pointed to the metropolitan council's "discretionary" power over the zoning process as laid out in the city Code, meaning no property interest existed.[249] The court, however, failed to consider whether prerogative might undermine that "discretionary" power at the council level, such that the zoning process could potentially entail a cognizable property interest.

Developers have also relied on First Amendment retaliation claims to challenge prerogative as applied to their land use requests.[250] One of the most

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[243] *Id.* at 642 n.8 (citing HSP Gaming, LP v. City Council, 939 A.2d 273, 283 (Pa. 2007)); *see also* Phila. Ent. & Dev. Partners L.P. v. City Council, 943 A.2d 955, 965 (Pa. 2008) (supporting the councilmanic courtesy finding in *HSP Gaming*).

[244] 701 F. Supp. 2d at 642 n.8. Ultimately, the court dismissed the claims as moot after an amendment removed the height restrictions. CMR D.N. Corp. v. City of Philadelphia, 703 F.3d 612, 617 (3d Cir. 2013).

[245] Vision Real Est. Inv. Corp. v. Metro. Gov't of Nashville & Davidson Cnty., No. 3:18-cv-00014, 2019 WL 4748386, at *3 (M.D. Tenn. Sept. 30, 2019).

[246] *Id.* at *9.

[247] *Id.*

[248] *Id.* This failure, notably, was based on the city's ability to exercise discretion in rescinding a benefit through the rezoning process, rather than being based on the existence of the benefit itself. *Cf.* Bayview-Lofberg's, Inc. v. City of Milwaukee, 905 F.2d 142, 146 (7th Cir. 1990) (denying a procedural due process claim based on a liquor-license denial associated with prerogative because there was no conferred benefit).

[249] *Vision Real Est.*, 2019 WL 4748386, at *9.

[250] These claims assert that "the government's exercise of an ostensibly neutral power has been undertaken in retaliation for the exercise of First Amendment rights." 1 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3:14 (1994). One of the earliest cases challenging aldermanic prerogative in Chicago also consisted of a First Amendment retaliation challenge. Norflo Holding Corp. v. City of Chicago, No. 00 C 6208, 2002 WL 453605 (N.D. Ill. Mar. 25, 2002). The court's decision in that case highlighted a difficulty in challenging prerogative: because the alderman never actually exercised her prerogative, the practice's mere existence as a threat was insufficient to establish municipal liability. *Id.* at *6.

recent cases illustrating this type of claim is *Feibush v. Johnson*.[251] A Philadelphia developer argued that a council member retaliated against him by exercising prerogative to block the sale of two city-owned lots.[252] The developer claimed that the retaliation was political: both men were running for the same council seat.[253] Notably, the parties stipulated that councilmanic prerogative is an official custom in Philadelphia.[254] The court found that the plaintiff had sufficiently proven the retaliation claim;[255] however, the decision hinged on whether prerogative itself was the source of the injury, a finding necessary for liability to attach.[256] The council member, Johnson, argued that prerogative did not cause the injury because his retaliation constituted a solely personal decision.[257] The court rejected Johnson's argument, relying on evidence demonstrating the ironclad nature of prerogative in Philadelphia.[258] Although any council member could introduce the requisite resolution for the sale of a city-owned lot, prerogative's grip was so strong that the executive director of the city's development authority testified that he "could not recall any instance in which a Councilmember other than Johnson introduced a resolution to approve the sale of City-owned land in Johnson's district."[259] Thus, because prerogative ensured the defendant's colleagues' deference, the retaliation that injured the plaintiff was rooted in a government policy.[260]

B. Systemic Challenges

In recent cases in Los Angeles and Chicago, plaintiffs have levied systemic claims against prerogative. While the Los Angeles suit successfully induced legislators to curb their own prerogative, Chicago plaintiffs have had less success, demonstrating the difficulty of challenging prerogative at a systemic level when it exists as an unwritten tradition. In July 2018, a coalition called the Alliance of Californians for Community Empowerment

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[251] 203 F. Supp. 3d 489 (E.D. Pa. 2016). The defendant in this case is also the same council member recently indicted by federal prosecutors at the beginning of 2020. *See supra* notes 79–82 and accompanying text.

[252] *Feibush*, 203 F. Supp. at 491.

[253] *Id*.

[254] *Id.* at 496. It is possible this stipulation was driven by the *HSP Gaming* decision. *See supra* note 243 and accompanying text.

[255] *Feibush*, 203 F. Supp. at 496.

[256] *Id.* at 496–97.

[257] *Id.* at 497.

[258] *Id.* at 498.

[259] *Id*.

[260] *Id.*

(ACCE Action) filed a lawsuit in California's Superior Court for the County of Los Angeles challenging a codified version of prerogative in Los Angeles.[261] The complaint alleged that city council members exercised prerogative in a segregative manner by withholding their support from the award of city financing for affordable housing development in their districts.[262] The complaint grounded these allegations in seven specific causes of action, most of which were based on noncompliance with state law.[263] But one claim stood out as potentially applicable beyond California: impermissible delegation of police and municipal powers to individual council members.[264]

Because the city agency administering public funding for affordable developments required letters of acknowledgment signed by the council member of the district in which the proposed development sits, the administrative agency's deference to hyperlocal control created the conditions for a "pocket veto," i.e., legislator veto.[265] In short, prerogative exercised through the letters of acknowledgment "provide[d] a mechanism by which discriminatory sentiments [could] . . . influence, obstruct, and prevent the siting of affordable and supportive housing in the City."[266] ACCE Action sought to enjoin the practice.[267] The coalition argued the city had "maintain[ed] racial and economic residential segregation throughout Los Angeles by permitting individual councilmembers to limit mobility of low income individuals into the neighborhoods they represent."[268]

The lawsuit built upon mounting pressure for the city to curb its council members' hyperlocal control.[269] Just a few months prior to the case's official filing, the *Los Angeles Times* editorial board called for an end to the

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[261] Complaint at 2–4, All. of Californians for Cmty. Empowerment v. City of Los Angeles, No. BS174427 (L.A. Super. Ct., July 26, 2018) [hereinafter ACCE Action Complaint], http://www.publiccounsel.org/tools/assets/files/1043.pdf [https://perma.cc/3VZR-RQWL].

[262] The lawsuit cited both affordable housing as well as "supportive housing"—a Los Angeles city initiative, Proposition HHH, approved by voters in 2016 to address the homelessness crisis. *Id.* at 2–3.

[263] ACCE Action pled two counts of noncompliance with California nondiscrimination law, two counts of noncompliance with California's Housing Element Law, one count of impermissible police and municipal powers delegation, one count of violating the state constitution's equal protection guarantee, and one count of violating the state's Fair Employment and Housing Act. *Id.* at 38–45.

[264] *See id.* at 42–43; *see also infra* notes 307–308 and accompanying text (discussing the viability of future challenges to prerogative).

[265] ACCE Action Complaint, *supra* note 261, at 3–4.

[266] *Id.* at 24.

[267] *Id.* at 45.

[268] *Id.* at 4–5.

[269] *See generally* SHAW, *supra* note 26, at 60–62 (describing public reaction to the letter-of-acknowledgement requirement).

practice.[270] The editorial recognized the benefits of local input from the city council, noting that "a developer would be foolish not to consult with a council member throughout the process."[271] But the editorial nonetheless concluded the costs outweighed the benefits since prerogative enables "unlimited discretion" by allowing a legislator "to scuttle a project up front for whatever reasons the member chooses."[272] Just days after ACCE Action filed the complaint, the editorial board wrote again, calling on city officials to act "before a judge makes them."[273] The California state legislature added to this pressure by passing legislation permitting certain affordable housing projects to bypass local approval processes, such as Los Angeles' letter-of-acknowledgement requirement.[274] Because of this pressure, the Los Angeles city council voted to formally end the letter-of-acknowledgment requirement only six months after the lawsuit began.[275] The city council's vote therefore achieved what ACCE Action's lawsuit initially set out to do: curb prerogative giving rise to a legislator veto.[276]

In *United States ex rel. Hanna v. City of Chicago*, a resident sued the city using a whistleblower statute, alleging Chicago had violated the False Claims Act (FCA) by wrongfully certifying compliance with federal civil rights requirements when it had increased, rather than reduced, racial segregation in the city.[277] Under Title VI of the Civil Rights Act of 1964 and the Fair Housing Act, the plaintiff alleged the city did not meet its federal obligation to affirmatively further fair housing when it knowingly

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[270] Editorial Board, *L.A. City Council Members Shouldn't Have the Power to Veto Homeless Housing Projects at a Whim*, L.A. TIMES (Mar. 17, 2018, 4:05 AM), https://www.latimes.com/opinion/editorials/la-ed-homeless-housing-hhh-letter-20180317-story.html [https://perma.cc/ZAB7-ZE9V].

[271] *Id.*

[272] *Id.*

[273] Editorial Board, *L.A. City Council Members Don't Deserve Unilateral Veto Power over Homeless Projects They Don't Like*, L.A. TIMES (Aug. 1, 2018, 4:10 AM), https://www.latimes.com/opinion/editorials/la-ed-homeless-housing-letter-lawsuit-20180801-story.html [https://perma.cc/8EDB-GE5Y].

[274] *See* Assem. B. 2162, 2018 Leg., Reg. Sess. (Cal. 2018); Katy Murphy, *California Bill to Speed Housing for the Homeless Signed into Law*, MARIN INDEP. J. (Sept. 26, 2018, 5:43 PM), https://www.marinij.com/2018/09/26/california-bill-to-fast-track-housing-for-the-homeless-signed-into-law/ [https://perma.cc/S9F3-KHUZ].

[275] L.A., Cal., Ordinance 18-0955 (Oct. 9, 2018) (motion); L.A., Cal., Ordinance 18-0955 (Oct. 17, 2018) (council file), https://cityclerk.lacity.org/lacityclerkconnect/index.cfm?fa=vcfi.dsp_CFMS_Report&rptid=99&cfnumber=18-0955 [https://perma.cc/PUW2-QCA8].

[276] *See Lawsuit Successfully Halts Illegal Pocket Veto Used to Block Supportive and Affordable Housing Projects in Los Angeles*, ROSEN BIEN GALVAN & GRUNFELD LLP (Jan. 22, 2019), https://rbgg.com/lawsuit-successfully-halts-illegal-pocket-veto-used-to-block-supportive-and-affordable-housing-projects-in-los-angeles/ [https://perma.cc/4LAY-63JE].

[277] 834 F.3d 775, 776 (7th Cir. 2016).

perpetuated existing patterns of racial segregation when siting affordable housing.[278] The plaintiff argued that prerogative gave aldermen "full authority to determine whether and where affordable, multifamily rental housing" would be built in their wards and noted that, from 2006 to 2011, 93% of the 2,600 approved affordable units were sited in low-income areas.[279]

The Seventh Circuit affirmed the district court's decision to grant the city's motion to dismiss for insufficient particularity in the pleadings.[280] While the district court held that the plaintiff failed to prove intent on the city's part,[281] in reviewing the decision de novo, the Seventh Circuit upheld the decision on slightly different grounds, holding Hanna had not pleaded specifics such as the time, place, and method of the city's alleged fraud.[282] In a statement that might undermine the future use of FCA legal challenges to prerogative, the Seventh Circuit also questioned whether citizens with only publicly accessible information can bring such claims, since "the FCA is meant to encourage whistleblowing by insiders."[283] Thus, despite the plaintiff's compelling data, the city prevailed.

More recently, in November 2018 a coalition of fair housing organizations called the Chicago Area Fair Housing Alliance (CAFHA) partnered together to challenge aldermanic prerogative insofar as it perpetuates segregation through legislator vetoes.[284] Rather than filing a traditional lawsuit in court, the coalition instead has chosen to pursue an administrative complaint through the U.S. Department for Housing and Urban Development (HUD).[285] This type of complaint allows HUD to investigate the merits of a claim and share those findings while attempting to mediate the dispute through voluntary compliance or a conciliation

[278] *Id.* at 776–77.

[279] *Id.* at 777–78.

[280] *Id.* at 776. Because Hanna brought a claim under the FCA, his complaint did not fall under the typical notice-pleading standard of Rule 8, but instead fell under the particularity standard of Rule 9(b). *Id.* at 778–79.

[281] United States *ex rel.* Hanna v. City of Chicago, No. 11-CV-04885, 2015 WL 5461664, at *3 (N.D. Ill. Sept. 16, 2015), *aff'd sub nom.* 834 F.3d 775, 776 (7th Cir. 2016).

[282] *Hanna*, 834 F.3d at 779–80.

[283] *Id.* at 780.

[284] HUD Administrative Complaint at 3, Chi. Area Fair Hous. All. v. City of Chicago (Nov. 15, 2018) [hereinafter CAFHA Complaint], https://www.povertylaw.org/wp-content/uploads/2019/11/CAFHA-et.-al-v.-City-of-Chicago-HUD-Administrative-Complaint.pdf [https://perma.cc/9WBM-QUAW].

[285] *Id.* at 19.

agreement.[286] This strategy mirrored a successful HUD complaint in Maryland, where a regional coalition of fair housing organizations alleged that cities in the Baltimore metropolitan area used their local control over Low-Income Housing Tax Credit (LIHTC) funding to block affordable housing development, such that affordable housing was only built in predominantly minority areas.[287] The Baltimore coalition eventually reached a conciliation agreement with Maryland, where the state agreed to equitably site and finance 1,500 affordable housing units.[288] This settlement, however, only occurred after the Maryland state legislature amended its state law to eliminate the local veto in LIHTC allocation,[289] an amendment that foreshadowed the IRS guidance previously discussed.[290] Accordingly, the HUD settlement also included a provision mandating the state never reinstate the local-approval requirement.[291]

Drawing on the Maryland HUD action, the CAFHA complaint invokes Chicago's history of aldermen abusing their prerogative in the context of siting public housing.[292] Like *Hanna*, the complaint also relied on statistical evidence demonstrating prerogative's segregative influence. The complaint stated that from 1992 to 2017, Chicago approved loans for 3,394 affordable units, but 90% (3,052) of all those units were located in areas that were already predominantly nonwhite.[293] Moreover, just five of Chicago's fifty

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[286] If a violation is found, in some cases HUD will also bring a subsequent legal action. LIBBY PERL, CONG. RSCH. SERV., R44557, THE FAIR HOUSING ACT: HUD OVERSIGHT, PROGRAMS, AND ACTIVITIES 3–4 (2018), https://fas.org/sgp/crs/misc/R44557.pdf [https://perma.cc/2RE2-ASER].

[287] HUD Administrative Complaint at 3, Balt. Reg'l Hous. Campaign v. Maryland (Aug. 30, 2011) [hereinafter BRHC Complaint], https://www.prrac.org/pdf/BRHC_Complaint_2011.pdf [https://perma.cc/9VLH-CBPJ].

[288] Letter from Melody Taylor, Dir., Region III, Off. of Fair Hous. & Equal Opportunity, to Kenneth Holt, Sec'y, U.S. Dep't for Hous. & Cmty. Dev. (Sept. 28, 2017) [hereinafter BRHC Settlement Letter], https://assets.documentcloud.org/documents/6406181/Maryland-LIHTC-settlement-with-HUD.pdf [https://perma.cc/3H2W-HLXE]. *See generally* Sarah Gantz, *Maryland Reaches Fair Housing Agreement with Federal Government*, BALT. SUN (Oct. 3, 2017), https://www.baltimoresun.com/business/bs-bz-fair-housing-maryland-20171003-story.html [https://perma.cc/Z7LS-X495] (summarizing the settlement).

[289] *See* Multifamily Rental Housing Programs Efficiency Act, H.B. 453, Reg. Sess., § 4–213(b) (Md. 2014), https://legiscan.com/MD/text/HB453/id/1012387/Maryland-2014-HB453-Chaptered.pdf [https://perma.cc/RJZ5-XYFU]; Lawrence Lanahan, *A Significant Victory: State Settles Maryland Housing Discrimination Complaint, Hundreds of Affordable Homes Promised*, BALT. SUN (Oct. 11, 2017, 12:26 PM), https://www.baltimoresun.com/citypaper/bcp-101117-mob-housing-settlement-20171010-story.html [https://perma.cc/6U5C-PG52] (discussing events surrounding the settlement).

[290] *See supra* note 134 and accompanying text.

[291] BRHC Settlement Letter, *supra* note 288, at 5.

[292] *See, e.g.*, Gautreaux v. Chi. Hous. Auth., 296 F. Supp. 907, 910 (N.D. Ill. 1969); CAFHA Complaint, *supra* note 284, at 7–8.

[293] CAFHA Complaint, *supra* note 284, at 12–13.

wards accepted 59% of all units; conversely, twenty-seven wards did not accept a single unit.[294] Unsurprisingly, those latter wards are disproportionately white and high-income.[295] To further substantiate the data, CAFHA submitted multiple FOIA requests to the city seeking evidence of any affordable housing project that received funds without aldermanic support, and the city could not provide any proof.[296] Given the practice's segregative impact, CAFHA has alleged violations of the Fair Housing Act, Title VI of the Civil Rights Act of 1964, and § 109 of the Housing and Community Development Act of 1974.[297]

Today, CAFHA's complaint has yet to yield a settlement or any municipal legislation, as HUD continues to investigate. Notwithstanding this lack of action, in February 2020, state representatives in the Illinois General Assembly introduced a bill called the "End Aldermanic Privilege Law,"[298] similar to California's legislation curtailing prerogative in Los Angeles.[299] The bill would curb aldermanic privilege in zoning approvals by giving developers a legal cause of action and imposing fines on Chicago.[300] The bill's future, however, is murky at best.[301] Months after its introduction, the bill had yet to receive a cosponsor from the General Assembly's Chicago

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294 *Id.*

295 *Id.*

296 *Id.* at 12.

297 *Id.* at 19–20.

298 End Aldermanic Privilege Law, H.B. 4484, 101st Gen. Assemb. (Ill. 2020). On June 23, 2020 the bill was re-referred to the Rules Committee where, as of October 1, 2020, it remains. *Bill Status of HB4484*, ILL. GEN. ASSEMBLY, http://www.ilga.gov/legislation/BillStatus.asp?DocNum=4484&GAID=15&DocTypeID=HB&LegId=124034&SessionID=108&GA=101 [https://perma.cc/J4KB-C8UC].

299 *See* Murphy, *supra* note 274 and accompanying text.

300 *Bill Status of HB4484*, *supra* note 298 ("[I]n the City of Chicago, a property owner, or a developer or contractor having the written permission of the property owner, shall not have any approvals under the Zoning Division denied because of an aldermanic hold, objection, extra-judicial or extra-legal request . . . . Allows suit against the State or the City of Chicago that seeks to enforce or impose a more restrictive law, regulation, ordinance, or resolution against the property owner, developer, or contractor and allows for a $5,000 civil penalty and other damages if the property owner's, developer's, or contractor's claim is successful.").

301 *See* Heather Cherone, *Suburban Lawmaker Introduces Bill to End Aldermanic Prerogative in Chicago*, DAILY LINE (Feb. 5, 2020), https://thedailyline.net/chicago/02/05/2020/suburban-lawmaker-introduces-bill-to-end-aldermanic-prerogative-in-chicago [https://perma.cc/XF8H-BWJF] (describing the difficult path the bill faces).

delegation.[302] The equitable development of affordable housing remains a spark plug in Chicago politics, and prerogative persists.[303]

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Because legislators have not shown themselves eager to curb their own prerogative, judicial intervention merits consideration as an alternative solution. But ultimately, judicial intervention often is most effective as a temporary fix and external catalyst for legislative action.[304] The challenge is to craft a lawsuit that not only provides immediate relief to plaintiffs, but also overcomes the legislature's inertia and spurs the passage of the promising legislative solutions discussed above. With this goal in mind, which of the legal challenges just reviewed materializes as most promising?

Individual challenges might prove most useful in setting up systemic challenges. A recurring issue of individual challenges is the difficulty of holding municipalities liable through *Monell* claims. Especially when prerogative exists as an unwritten tradition, cases in jurisdictions without precedent recognizing prerogative as a legislative custom or de facto policy can make this a complicated task. As to identifying the best legal theory, the cases above suggest no silver bullet exists and that plaintiffs will have to make particularized determinations.[305] Furthermore, insofar as individual

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[302] *Illinois House Bill 4484*, LEGISCAN, https://legiscan.com/IL/sponsors/HB4484/2019 [https://perma.cc/SQ95-ZVFD]. Mayor Lightfoot's City Council floor leader, Alderman Gilbert Villegas, has called the proposed legislation a "publicity stunt tailor-made to capitalize on the burgeoning corruption scandal that has spread from City Hall and the south suburbs to Springfield." Fran Spielman, *Lightfoot Gets Unlikely Assist with Potential End-Run Around City Council on Aldermanic Prerogative*, CHI. SUN-TIMES (Feb. 6, 2020, 4:36 PM), https://chicago.suntimes.com/city-hall/2020/2/6/21127063/aldermanic-prerogative-chicago-city-council-zoning-wards-deanne-mazzochi-lightfoot [https://perma.cc/UN2C-4AX4].

[303] *See, e.g.*, *As Lightfoot Touts Poverty Initiative, Ideas from People Actually Experiencing Poverty Were Left Out, Groups Say*, CHI. COAL. FOR HOMELESS (Feb. 26, 2020), https://www.chicagohomeless.org/as-lightfoot-touts-poverty-initiative-ideas-from-people-actually-experiencing-poverty-were-left-out-groups-say [https://perma.cc/NCL7-PCXF]; Jay Koziarz, *Will New Legislation Fix Chicago's Affordable Housing Crisis, or Stymie Development?*, CURBED CHI. (Dec. 12, 2019, 3:14 PM), https://chicago.curbed.com/2019/12/12/21011062/affordable-housing-development-for-all-ordinance [https://perma.cc/PY8S-82NB]; Joe Cahill, *A Better Remedy for Chicago's Affordable Housing Shortage*, CRAIN'S CHI. BUS. (Jan. 21, 2020, 4:10 PM), https://www.chicagobusiness.com/joe-cahill-business/better-remedy-chicagos-affordable-housing-shortage [https://perma.cc/H9YD-A3HY].

[304] *Cf.* Ramsin Canon, *Chicago* Journal *on Aldermanic Privilege*, GAPERS BLOCK (July 16, 2009), http://gapersblock.com/mechanics/2009/07/16/chicago-journal-on-aldermanic [https://perma.cc/69VM-678N] (discussing the uneasy balance required between judicial intervention and legislative action).

[305] Asking, for example, whether there are similarly situated comparators for an equal protection claim, a cognizable property interest for a due process claim, or retaliatory grounds for a First Amendment claim.

litigants challenge prerogative's segregative impact, successful individual challenges unfortunately can only impact one affordable development at a time.

Conversely, systemic challenges have greater potential for sweeping change. But this route can be just as, if not more, difficult. One of the major issues with pursuing an administrative complaint is that these proceedings are wholly controlled by the current presidential Administration, subject to its policy priorities.[306] The Los Angeles litigation offers an alternative—and likely more promising—avenue in state court. ACCE Action based one of its claims on state nondelegation doctrine,[307] which could also be litigated in other municipal contexts. Though the California state court never actually decided the case, this nondelegation claim was the only count generalizable beyond California since the nondelegation doctrine remains viable at the state level.[308] Accordingly, opponents of prerogative in other cities might consider similarly grounding their claims in nondelegation principles.

CONCLUSION

Prerogative's most pernicious evil is its capacity to perpetuate segregation. But uprooting regimes of prerogative is an uphill battle, especially when these regimes date back decades and exist as unwritten traditions. City councils, of their own accord, are loath to curtail their own power. Although one might hope that connecting prerogative to segregative legislator vetoes would spur change, prerogative's entrenched, national reach suggests that the injustice of segregation is still likely insufficient for internally motivated change. Legislators, concerned with their own reelection, will hesitate to depart from the status quo. Accordingly, even when a local legislative body agrees on the need for equitably located affordable housing, majoritarian beliefs about structural power and prerogative swallow the housing agenda. Fortunately, as a growing number of cases suggest, counter-majoritarianism expressed through judicial

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306 For example, the Trump Administration promulgated a rule reinterpreting the Fair Housing Act's disparate impact theory of liability, thereby making the law more hostile to plaintiffs. Kriston Capps, *With Rule Changes, Trump Launches 'an Attack on Fair Housing From All Sides'*, BLOOMBERG CITYLAB (Sep. 10, 2020, 12:09 PM), https://www.bloomberg.com/news/articles/2020-09-09/how-hud-rewrote-the-rules-on-fair-housing [https://perma.cc/6TMQ-2QQ2]. While Baltimore's administrative complaint led to a successful outcome for fair housing advocates, that dispute was filed and decided during the Obama Administration; CAFHA filed its complaint in 2018 and its outcome remains uncertain.

307 *See* ACCE Action Complaint, *supra* note 261, at 42–43.

308 *See* Edward H. Stiglitz, *The Limits of Judicial Control and the Nondelegation Doctrine*, 34 J.L. ECON. & ORG. 27, 30–34 (2018) (noting that "even if the doctrine is essentially silent at the federal level . . . it continues to thrive in many states").

intervention may provide an alternative avenue to spur legislative action that meaningfully constrains prerogative.