NOTE

From "Hearing" to Listening: Access to Justice and Indirect Displacement

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When local government policies cause households and communities to become homeless, those affected are entitled to due process. Yet when the government displaces households through zoning-induced gentrification, it often acts as the perpetrator of the harm, adjudicator of disputes, and favored party on appeal. Regardless of the merits of such disputes, that process raises prohibitive access-to-justice barriers.

The threat of homelessness is undeniably a substantial private interest for due process purposes. When this threat arises from government-driven policies, due process becomes particularly critical. For that reason, while the existing access-to-justice discourse about direct displacement is important, this Note reveals that access-to-justice barriers in the context of indirect displacement through zoning-induced gentrification are perhaps even more fundamental.

To illustrate the necessity of such research, this Note examines a recent case in which Ms. Sharon Cole, a pro se litigant, navigated the entire available process—from the zoning hearing to the final appeal—to defend herself and her community against indirect displacement caused by zoning-induced gentrification. The facts and substantive law overwhelmingly supported her community's position, but Ms. Cole was denied a meaningful opportunity to be heard. By the end of the process, the government had initiated and subsidized the harm, and the legal system legitimated, facilitated, and—worst of all—erased it.

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INTRODUCTION

In June 2019, Washington, D.C.'s highest court ruled in favor of the government, unmoved by the petitioner's poignant and well-founded plea: "Is Washington, D.C. only for the rich?"[1] As a senior citizen, grandmother, and low-

1. Public Hearing at 80, 777 17th Street, LLC, 64 D.C. Reg. 2640 (D.C. Zoning Comm'n Mar. 10, 2017) (No. 15-31) (statement of Sharon Cole).

income renter in D.C.'s H Street neighborhood, the petitioner, Sharon Cole, represented herself.[2] As a result of the plans and incentives created by the D.C. Zoning Commission (Commission) to promote a sudden influx of investment into her neighborhood,[3] she and her community faced imminent financial pressures. These pressures, such as land value destabilization, rising costs of living, diminishing access to affordable goods and services, and poor rental housing conditions, would soon make it unaffordable for Ms. Cole and many of her neighbors to remain in their homes.[4] The court admitted that "the Commission's decision [did] not include an explicit discussion of" these contested issues but shrugged its shoulders.[5] The unelected Commission had free rein to make, interpret, and enforce the rules, the court concluded, even if it caused individuals to become homeless without even acknowledging their objections.[6]

The District's zoning practices in this case were an example of zoning-induced gentrification, and the H Street community's forced relocation due to the economic pressures of those practices was an example of indirect displacement. Displacement is usually defined generally as involuntary movement, but it happens in a variety of ways.[7] In the eighties and nineties, displacement research often focused on direct methods of displacement, such as evictions.[8] However,

2. Reply to Intervenor's Opposition to Motion for Summary Judgement, Cole v. D.C. Zoning Comm'n, 210 A.3d 753 (D.C. 2019) (No. 17-AA-0360) [hereinafter Reply to Intervenor's Opposition]; Motion for Summary Judgement, *Cole*, 210 A.3d 753 (No. 17-AA-0360).

3. Several D.C. agencies coordinated a plan to "support[] demand for new retail establishments" by "tak[ing] advantage of proximity to transit" in the H Street neighborhood and created incentives for private developers to carry it out. D.C. OFF. OF PLAN., BENNING ROAD CORRIDOR REDEVELOPMENT FRAMEWORK PLAN 13 (2008), https://planning.dc.gov/sites/default/files/dc/sites/op/publication/attachments/benningcom1.pdf [https://perma.cc/R38K-F5R3]. In this case, a private developer took advantage of these incentives with a luxury mixed-use Planned Unit Development (PUD) immediately adjacent to Ms. Cole's home. *See* Motion for Summary Judgement, *supra* note 2, at 2. The PUD was expressly designed to spark additional investment in the area, which is known to cause indirect displacement in low-income communities. *See* Application to the District of Columbia Zoning Commission for Review and Approval of a Consolidated Planned Unit Development and Amendment to the Zoning Map at 3, 777 17th Street, LLC, 64 D.C. Reg. 2640 (No. 15-31) [hereinafter Application].

4. *See* Public Hearing, *supra* note 1, at 81 (statement of Sharon Cole).

5. *Cole*, 210 A.3d at 762.

6. *See id.* ("[Ms. Cole] is correct that the Commission's decision does not include an explicit discussion of 'rising gentrification pressures.' However, . . . where issues were 'thoroughly analyzed during the development of the . . . Plan' for the area of the District in which a PUD is proposed, and where the Commission has been explicitly guided by an application's compatibility with the applicable small-area Plan, we 'cannot agree with [an] argument that the Commission failed adequately to consider the impact of th[e] project.'" (second, third, and fourth alterations in original) (footnote omitted)). The court found that by vaguely referring to the Comprehensive Plan, the Commission had implicitly concluded "that the pressures of gentrification [were] inevitable, but [could] be mitigated" through a general policy that did not accomplish its stated goals in this case. *Id.* at 762–63.

7. *See, e.g.*, Geoffrey DeVerteuil, *Evidence of Gentrification-Induced Displacement Among Social Services in London and Los Angeles*, 48 URB. STUD. 1563, 1564 (2011) (explaining that scholars usually "define displacement generally as involuntary movement").

8. *See, e.g.*, Rowland Atkinson, *Measuring Gentrification and Displacement in Greater London*, 37 URB. STUD. 149, 163 (2000).

more recent research has revealed that displacement often results from subtle and indirect processes, such as zoning-induced gentrification.[9]

Scholars have not yet reached a consensus about how to delineate between direct and indirect displacement,[10] but this Note distinguishes the two based on the transparency of the process and the extent of attenuation between cause and effect. The result—forced physical movement of a household—is the same, but the process is drastically different. Direct displacement results from processes such as evictions, foreclosures, deportations, and government takings, while indirect displacement results from complex, discrete processes such as gentrification.[11] Gentrification is a complex process that can vary widely,[12] so scholars from the mid-eighties to the early nineties described it as a "chaotic concept."[13] Modern scholars recognize that, due to its amorphous nature, "gentrification is contextually defined."[14] To its supporters, gentrification is the "process by which people of higher incomes move into lower income urban areas and seek to change its physical and social fabric to better meet their needs and preferences."[15] But others define it as "a policy-driven process that begins with targeting low-income, urban communities for discrimination and neglect and ends with 'improvements' that exacerbate vulnerabilities that culminate in displacement."[16]

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9. *See, e.g.*, Lisa Rayle, *Investigating the Connection Between Transit-Oriented Development and Displacement: Four Hypotheses*, 25 HOUS. POL'Y DEBATE 531, 539 (2015). There are methodological difficulties associated with conducting meaningful empirical studies about displacement, and the underwhelming amount of data at this stage has caused some scholars to push back on whether this socially recognized phenomenon is actually happening.

10. *Compare id.* at 538–39 (citing Peter Marcuse, *Gentrification, Abandonment, and Displacement: Connections, Causes, and Policy Responses in New York City*, 28 WASH. U. J. URB. & CONTEMP. L. 195 (1985) (finding that "direct displacement occurs when a household is forced to move either for economic reasons (e.g., landlord increases rent) or physical reasons (e.g., landlord ceases to maintain the building)")), *with* Donald C. Bryant, Jr. & Henry W. McGee, Jr., *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43, 65–66 (1983) ("[I]ndirect displacement occurs when tenants must move because they cannot afford rising rents caused by the speculator's increased property taxes and financing costs.").

11. *See* Geert Ent, Neighborhood Consumption Spaces and Their Representation: What and Who Should Be Visible and What and Who Should Not Be Visible in Gentrifying Neighborhoods?, at vi (June 2010) (master's thesis, Radboud Universiteit Nijmegen) (on file with the Radboud University Educational Repository) (describing the indirect displacement process as when the "urban 'better-off' becomes more and more included into the neighborhood, while the urban 'poor' becomes more and more excluded out of the gentrifying neighborhood").

12. Jan van Weesep, *Gentrification as a Research Frontier*, 18 PROGRESS HUM. GEOGRAPHY 74, 75 (1994) (describing gentrification as a "highly diversified process" that "can follow various trajectories").

13. *Id.*; *see also* Justin Graham, Comment, *Playing "Fair" with Urban Redevelopment: A Defense of Gentrification Under the Fair Housing Act's Disparate Impact Test*, 45 ARIZ. ST. L.J. 1719, 1724 (2013) (noting "empirical difficulties with assuming that gentrification necessarily displaces low-income minorities").

14. Van Weesep, *supra* note 12, at 78.

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

16. Sabiyha Prince, *Washington D.G.: The District of Gentrification*, NAT'L CMTY. REINVESTMENT COAL. (Mar. 18, 2019), https://ncrc.org/gentrification-dc/ [https://perma.cc/3C8D-GDXP].

Gentrification can be caused by private actors or local government policies,[17] but this Note focuses on zoning-induced gentrification. Through zoning, unelected governmental bodies often "use legal, albeit immoral, means to mobilize and legitimize the gentrification process on the surface," taking "building codes and zoning policies designed to shield poor residents and instead us[ing] those laws as a sword to force them out."[18] Because the power to zone is an exercise of police power delegated from states to local governments, local governments must comport with due process when zoning.[19] In theory, that is.

Zoning-induced gentrification most imminently threatens low-income households, which already face a relative disadvantage in the legal process.[20] Statistically, low-income people are both more likely to experience civil legal problems and less likely to avail themselves of the legal system.[21] At first blush, these statistics may appear paradoxical, but a 2016 empirical study found that some of this inaction is attributable to past negative experiences with the legal system.[22] A "fundamental precept of American law is that financial status should neither determine access to courts nor substantially alter the outcomes of cases,"[23] but in 2017, an estimated eighty-six percent of low-income Americans facing civil legal problems such as evictions, domestic violence, and disability access

17. Japonica Brown-Saracino, *Overview: The Gentrification Debates*, *in* THE GENTRIFICATION DEBATES 1, 1 (Japonica Brown-Saracino ed., 2010) (contrasting gentrification by which "individual or corporate real estate investors encourage the in-movement of the gentry by refurbishing buildings and marketing them to the middle class" and other instances where "local government encourages the gentrification of economically depressed neighborhoods through a variety of methods including, but not limited to, tax incentives, policing strategies aimed at creating a hospitable environment for newcomers, and the sale of city-owned property").

18. Ana Petrovic, *The Elderly Facing Gentrification: Neglect, Invisibility, Entrapment, and Loss*, 15 ELDER L.J. 533, 559 (2007).

19. *See, e.g.*, Andrew Bauman, *Legally Enabling a Modern-Day Mayberry: A Legal Analysis of Form-Based Zoning Codes*, 50 URB. LAW. 41, 54 (2019).

20. Not only are impoverished communities subject to a greater threat of displacement but sometimes displacement is the cause of poverty. *See, e.g.*, MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 296–99 (2016) ("Eviction is a cause, not just a condition, of poverty."). Poverty "as a lived experience is often characterized not just by low income, but by ill health, insecurity, discomfort, isolation, and lack of agency." RICHARD REEVES, EDWARD RODRIGUE & ELIZABETH KNEEBONE, BROOKINGS INST., FIVE EVILS: MULTIDIMENSIONAL POVERTY AND RACE IN AMERICA 2 (2016).

21. Low-income people are "significantly more likely to report experiencing civil legal problems than their higher income counterparts," yet much "less likely to resolve these problems through the legal system than are people of higher socioeconomic levels." Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1266 (2016). These data are skewed even more negatively among racial minority respondents. *Id.* In addition, "a recent survey found that non-whites are significantly more likely than whites to report experiencing civil legal problems," and poverty is strongly correlated with race. *Id.* Minority racial groups are more likely to experience multidimensional poverty than their white counterparts. *See* REEVES ET AL., *supra* note 20, at 7.

22. Greene, *supra* note 21, at 1263.

23. Rory K. Schneider, Comment, *Illiberal Construction of Pro Se Pleadings*, 159 U. PA. L. REV. 585, 590 (2011); *see* Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

received inadequate or no legal assistance.[24] There is a strong negative correlation between self-representation and success on the merits.[25] In other words, studies support the notion that "a man who is his own lawyer has a fool for a client," but for households facing indirect displacement caused by zoning-induced gentrification, self-representation is often the only option.

In response to these troubling data, the "access-to-justice" movement has stepped in over the past several decades to protect the due process guarantees of fundamental fairness and equality under the law.[26] Displacement, in general, has become a distinct subset of the access-to-justice movement based on the "simple proposition" that "people who face losing their homes in legal proceedings must have a right to be represented by counsel in those proceedings, whether or not they can pay for counsel."[27] Being forced to leave one's home is "simply too devastating and traumatic an event for the government not to provide adequate safeguards,"[28] and the Supreme Court has recognized that people have a significant property interest in "the right to continued residence in their homes."[29] This interest is paramount in the context of direct displacement,[30] but it is at equal risk when indirect displacement is driven by zoning-induced gentrification—a process the existing access-to-justice discourse has yet to address.

In Ms. Cole's case, the legal process for zoning-induced gentrification was infested with critical barriers to access to justice that, collectively, were not only unjust but unconstitutional.[31] The combination of bias, undue deference, and disproportionate burdens deprived Ms. Cole of a meaningful opportunity to be heard by an impartial tribunal in violation of her procedural due process rights.[32] Both

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24. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/HGC3-QP8Y].

25. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 744 (2015).

26. *See* Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 716–21 (2006).

27. *Id.* at 700.

28. *Id.* at 707.

29. Greene v. Lindsey, 456 U.S. 444, 451 (1982).

30. *See, e.g.*, Scherer, *supra* note 26, at 700; Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1509–18 (2004); Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 421 (1995); Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527, 538–53 (1991); Andrew Scherer, Gideon*'s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 558 (1988).

31. Access to justice is not simply called "access to procedural due process" because, although the two are closely intertwined, the former also encompasses a broader scope of systemic issues. *See* Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2083 (2005) (finding that "in a diverse society and legal profession an integration-and-learning perspective that openly acknowledges and manages [different] identit[ies] would far better promote excellent client representation and equal justice under law than the currently dominant commitment to color blindness").

32. *See generally* BENJAMIN H. BARTON, THE LAWYER–JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 3 (2011) ("[R]egardless of political affiliation, judicial philosophy, race, gender, or religion,

the court and the Commission relied on assumptions that were easily refutable based on the information in the record, but due to these barriers, the legal system silenced Ms. Cole's voice as she exhausted every available option to speak out about a life-shattering injustice.[33] These access-to-justice barriers unjustifiably disadvantaged the individual whose rights were at stake and served as a tool for the government to legitimate indirect displacement caused by zoning-induced gentrification.[34] Worst of all, the legal system entirely failed to acknowledge Ms. Cole's objections, meaning the government not only forced her out of her home without compensation but also denied her a meaningful opportunity to be heard.

To restore the right to a meaningful opportunity to be heard before households are indirectly displaced by zoning-induced gentrification—let alone remedy the harm—the legal community must first examine the process of indirect displacement caused by zoning-induced gentrification, an experience all too familiar to those afflicted with the burdens of poverty but ignored by those empowered to represent them.[35] This Note respects that it is wise to leave the outcome of the process as a malleable policy choice for individual cities.[36] To avoid further legitimating the suppression of vulnerable households' voices in the process of indirect displacement caused by zoning-induced gentrification, however, the legal

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every American judge shares a single characteristic: every American judge is a former lawyer. This shared background . . . has created the lawyer–judge bias." (footnote omitted)); Stuart Chinn, *The Meaning of Judicial Impartiality: An Examination of Supreme Court Confirmation Debates and Supreme Court Rulings on Racial Equality*, 2019 UTAH L. REV. 915, 921 ("[J]udicial impartiality is best understood as denoting a *consistent, good-faith engagement* with the claims and interests of those who lie outside the social groups that are aligned with a judicial actor.").

33. *See generally* GIRARDEAU A. SPANN, RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA 153 (1993) (finding that "[a]lthough the assumptions underlying the current system could be easily scrutinized and the unacceptable assumptions rejected if anyone ever thought to scrutinize and reject them, typically no one ever does"); *id.* at 9 (noting that under the "traditional model of judicial review" of the Constitution, "the function of the Supreme Court is to protect the rights of minorities who are unable to protect themselves effectively in the pluralist political process").

34. *See* Cole v. D.C. Zoning Comm'n, 210 A.3d 753, 760 (D.C. 2019) (describing the court's highly deferential standard of review, under which deference is a normative framework rather than the result of a rigorous application of the law); *id.* at 762–63 (surmising, from little more than thin air, that "the pressures of gentrification are inevitable").

35. This Note views the "legal system" or "legal community" broadly as a collection of individuals with various roles and identities. General references to the "legal system" or "legal community" refer to both "the system itself" and "constituent organizations such as law schools, law firms, courts, bar groups, and the profession as a whole." Pearce, *supra* note 31, at 2083–84.

36. The process of zoning-induced gentrification is complex, inconsistent, and volatile, so a generalized policy intervention would not be compatible with the variety of ways in which it occurs. *See* H. Shellae Versey, Serene Murad, Paul Willems & Mubarak Sanni, *Beyond Housing: Perceptions of Indirect Displacement, Displacement Risk, and Aging Precarity as Challenges to Aging in Place in Gentrifying Cities*, 16 INT'L J. ENV'T RSCH. & PUB. HEALTH (2019), https://doi.org/10.3390/ijerph16234633. Thus, even if there are arguments for why regulation of the public health, safety, and general welfare is not best left to the laboratories of democracy, the specific issue in this case can only be effectively addressed through local interventions.

community must begin by questioning its assumptions and listening to, not just "hearing," others' perspectives.[37]

Accordingly, this Note aims to bridge the gap between access-to-justice literature and the modern understanding of indirect displacement by analyzing indirect displacement caused by zoning-induced gentrification in D.C.'s H Street neighborhood. Part I briefly situates Ms. Cole's case within the historical background and existing literature. Part II describes the process of indirect displacement through zoning-induced gentrification in D.C.'s H Street neighborhood and foregrounds a deeper analysis of the process defects Ms. Cole experienced. Part III discusses the constitutional standards for procedural due process and identifies several access-to-justice barriers Ms. Cole experienced in this case, including: (1) bias, (2) undue deference, and (3) disproportionate burdens. Part IV emphasizes the constitutional significance of these issues based on procedural due process doctrine. Finally, Part V explains why further research about access to justice in the context of indirect displacement caused by zoning-induced gentrification would facilitate multidisciplinary approaches by generating pertinent information for access-to-justice, displacement, and gentrification research, thereby enabling policymakers and nongovernmental organizations to improve the efficacy of innovations. In sum, this Note concludes that Ms. Cole's case serves as an important reminder for the legal community that the right to a meaningful opportunity to be heard is a two-way street.

I. BACKGROUND

A. HISTORICAL CONTEXT

Far from an anomaly, Ms. Cole's case reflects a deeply entrenched history of disingenuous government-driven displacement processes motivated by privilege and oppression. Many modern Americans ignore the displacement phenomenon, whether wittingly or unwittingly, assuming the racial and social composition and concentration of local communities result from natural market forces.[38] But throughout American history, the government has been an integral part of the process of development and displacement, which continues to create rigid social divisions in land distribution through exclusion.

A defining feature of displacement is involuntariness.[39] Ever since the initial settlement of America, the process of redevelopment and displacement has

37. SPANN, *supra* note 33 (describing judicial legitimation as a "passive process that perpetuates the status quo largely through inertia").

38. James W. Loewen, *Sundown Towns*, *in* ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY, 1896 TO THE PRESENT: FROM THE AGE OF SEGREGATION TO THE TWENTY-FIRST CENTURY 403, 404–05 (Paul Finkelman ed., 2009). Indirect displacement through racial exclusion has "mostly escaped notice" despite existing in thousands of American cities. *Id.* at 404. "[T]heir whiteness was often dismissed as 'natural,' resulting from market forces." *Id.* "[U]pon being told that many American towns and suburbs kept out African Americans for decades and that some still do, many residents claim to be shocked." *Id.* at 405.

39. *See, e.g.*, DeVerteuil, *supra* note 7, at 1564–65 (explaining that scholars "define displacement generally as involuntary movement").

caused corresponding erasure.[40] Where "pioneering" is defined as "involving new ideas or methods," [41] the very concept of American conquest focused solely upon the settlers' perspectives, ignoring what those "new methods" replaced and assuming it was inferior. Finding or pursuing settled land is not enough to gain legal title to it, so the process of displacement and occupancy is necessary to formalize legal title.[42] Because displacement is, by nature, an involuntary process, it involves tools of subordination, legitimation, manipulation, and physical compulsion.

The displacement process almost always involves a blend of government and private actors.[43] Throughout history, some of these collaborative methods of displacement, such as restrictive covenants, have stemmed from private arrangements but required government legitimation and enforcement.[44] Other times, the government has initiated displacement through tactics such as "zoning and steering to keep out black would-be residents" and using "eminent domain to take blacks' property if they did manage to acquire a home."[45] After formal segregation became illegal, some towns indirectly displaced most racial minorities but made sure not to entirely finish the deed, keeping one or two racial minorities as "honorary white [men]" to serve as an "exception that exemplifies the rule."[46]

Legal and judicial processes have also contributed to indirect displacement since the initial settlement of America. Through the Indian Claims Commission, for instance, the government could pray for forgiveness rather than ask for permission by denying access to justice or structuring the legal process in such a way that "the thief actually gets to set the price that they will pay in compensation for something that they stole."[47] More recently, after segregation and discrimination became illegal, the Supreme Court established loopholes that allow local governments to discriminate and segregate communities so long as they hide the evidence.[48] By stacking the odds against displaced parties in the legal process or

40. WINONA LADUKE, *Who Owns America? Minority Land and Community Security*, *in* THE WINONA LADUKE READER: A COLLECTION OF ESSENTIAL WRITINGS 138, 143 (Margret Aldrich ed., 2002) ("The reality is that there is a direct relationship between the 'development' of the United States and the 'underdevelopment' of Native America.").

41. *Pioneering*, LEXICO, https://www.lexico.com/en/definition/pioneering [https://perma.cc/6F52-V7J2] (last visited Aug. 1, 2021).

42. *See* Pierson v. Post, 3 Cai. R. 175, 177–78 (1805) (requiring occupancy, not mere pursuit, for legal title in property).

43. *See, e.g.*, Loewen, *supra* note 38, at 404 ("By a variety of means, public and private, ["sundown towns"] maintained themselves [as] all-white for decades.").

44. *Id.* ("Some towns required developers to add a restrictive covenant to every lot deed in a new residential area.").

45. *Id.*; *see also* Pauline Lipman, *The Cultural Politics of Mixed-Income Schools and Housing: A Racialized Discourse of Displacement, Exclusion, and Control*, 40 ANTHRO. & EDUC. Q. 215, 220 (2009) ("Lubricated by city government, gentrification has become a pivotal sector in urban economies . . . and a critical factor in the production of spatial inequality, displacement, homelessness, and racial containment.").

46. Loewen, *supra* note 38, at 404.

47. LADUKE, *supra* note 40, at 146.

48. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18–19 (1973) (holding wealth discrimination not constitutionally protected despite relative inequality in the accumulation of

otherwise discouraging their participation, legal standards can be used as a tool to legitimate displacement by shifting legal blame to the victim.

B. DISPLACEMENT AND ACCESS TO JUSTICE

Direct displacement has become a distinct subset of the access-to-justice movement.[49] This discourse has already generated procedural reforms,[50] which have had the positive externality of producing vital information about the procedural fairness of direct displacement proceedings. Jurisdictions that have adopted a right to counsel in deportation and eviction proceedings, for instance, "are generating exactly the kind of data that has been missing or insufficient in prior right-to-counsel litigation."[51] These procedural experiments "make it possible to assess the actual value" of the Supreme Court's due process jurisprudence "based on what is happening day in and day out in jurisdictions where this kind of experimentation is taking place."[52] Because the factually intensive procedural due process inquiry requires parties to conduct a cost–benefit analysis and produce evidence of the risks involved, scholars suggest that bottom-up procedural interventions such as these share an important relationship with due process.[53]

Likewise, such information is already in demand among displacement scholars to improve our understanding of the relationship between indirect displacement and gentrification—a subject that the access-to-justice debate has yet to address.[54] Ironically, the reason such information is in demand is likely the same reason why the subject has yet to arise in the access-to-justice debate. The core problem

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generational wealth); Washington v. Davis, 426 U.S. 229, 240–41 (1976) (holding that plaintiffs must prove intent and causation, not just a racially disparate impact, despite the contrary understanding of how racism operates among most modern scholars); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (finding impact alone not determinative and suggesting that racial discrimination must be a but for cause for zoning to be considered discriminatory); *see also* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 86 (1997) (explaining that Justices believe that "for courts to engage in open-ended balancing of all acts [with racially disproportionate impacts] would invite too many inquiries that are too little determined by legal rules").

49. *See, e.g.*, Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1830 (2018); D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 910 (2013); Steinberg, *supra* note 25, at 744; Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1652 (1987).

50. Jason Parkin, *Dialogic Due Process*, 167 U. PA. L. REV. 1115, 1118 (2019) ("Cities have passed legislation guaranteeing government-funded lawyers for indigent people facing eviction and deportation.").

51. *Id.* at 1154.

52. *Id.*

53. *Id.* at 1154–55.

54. There have been calls for discussion about this issue before, but they remain unanswered in access-to-justice discourse. *See* Harold A. McDougall, *Gentrification: The Class Conflict over Urban Space Moves into the Courts*, 10 FORDHAM URB. L.J. 177, 213 n.260 (1982) ("Hearings are already required when direct displacement will result from urban renewal. Hearings also should be required when indirect displacement is likely because of gentrification (that is, the presence of a threat that a substantial net reduction in the supply of housing for minority and low income persons in the area would flow from project development).").

is the lack of consensus about what indirect displacement is.[55] Indirect displacement is often closely linked with gentrification, which is a "highly diversified process" that "can follow various trajectories."[56] For that reason, measuring displacement caused by gentrification is difficult. By attempting to track displacement through demographics and broad correlations, questions naturally follow, such as, "Are neighbourhoods being gentrified or is it simply that there are more of those people that we now view as gentrifiers? Are people displaced or are there simply fewer people working in blue-collar and manual positions?"[57] These unanswered questions have inhibited access to key information about the process of displacement and its consequences. Studying forced relocation requires finding a motive in a set of human choices when, of course, the array of factors that motivate human choices is immeasurable.

But across American society, people have overwhelmingly recognized that gentrification-induced indirect displacement is a problem.[58] Met with dozens of reports but little evidence, researchers' responses have varied. Some scholars support abandoning gentrification's role in empirical research on displacement altogether to preserve the integrity of existing data, noting "the difficulty of measuring displacement given that, where extensive gentrification has occurred, displacees are usually long gone and hard to track."[59]

Others, however, urge a greater emphasis on qualitative studies to supplement the existing research.[60] This is particularly important, scholars contend, because "gentrification is contextually defined."[61] "[F]urther research at a finer spatial scale using a more qualitative approach could usefully" clarify displacement research by accounting for variables that broad generalizations cannot.[62] In other words, because there are plenty of reports but little evidence, these researchers suggest that the legal system start by listening to the complainants. For that reason, this Note posits that access-to-justice studies similar to those researchers have already conducted for direct displacement would reveal whether this key information is being suppressed through the lack of a meaningful opportunity to be heard.

Urban policy choices about gentrification serve to "modify the *outcomes* of the process," but the process itself is a different question.[63] "Outside the debates of

55. Displacement, in general, "is difficult to track and is still not being adequately documented." Kate Shaw, *A Response to 'The Eviction of Critical Perspectives from Gentrification Research,'* 32 INT'L J. URB. & REG'L RSCH. 192, 192 (2008).

56. Van Weesep, *supra* note 12.

57. Rowland Atkinson, *Introduction: Misunderstood Saviour or Vengeful Wrecker? The Many Meanings and Problems of Gentrification*, 40 URB. STUD. 2343, 2343 (2003).

58. *See, e.g.*, Rayle, *supra* note 9, at 540 ("A broader conceptualization of displacement likely helps explain why community activism against gentrification is often strong even when evidence of physical displacement is weak.").

59. *E.g.*, Atkinson, *supra* note 57, at 2347.

60. *E.g.*, van Weesep, *supra* note 12, at 80.

61. *Id.* at 78.

62. Atkinson, *supra* note 8, at 163.

63. Van Weesep, *supra* note 12 (emphasis added).

what gentrification is (definitional), why it occurs (theoretical), who it affects and what should be done about it ([social and] political), the process has provided a significant theme in the field of urban studies that overstepped what some saw as a generally insignificant phenomenon."[64] The legal process for individuals facing indirect displacement as the result of zoning-induced gentrification is an issue legal academic discourse both can and should contemplate. This can be done without pushing any commonly raised boundaries by analyzing specific examples of indirect displacement claims and evaluating whether the legal processes available to indirectly displaced households impose access-to-justice barriers. The legal community *should* address this issue because doing so would reveal whether the available legal procedures comport with due process.

The remainder of this Note exemplifies one such analysis by evaluating indirect displacement caused by zoning-induced gentrification in D.C.'s H Street community, emphasizing critical access-to-justice issues that went unchecked throughout the entirety of the legal process.

II. THE PROCESS OF ZONING-INDUCED INDIRECT DISPLACEMENT IN D.C.'S H STREET NEIGHBORHOOD

> I believe the basic protections afforded to DC residents like me during considerations of redevelopment in our city are being thrown aside like the existing people and culture along Benning Road NE.
> —Sharon Cole[65]

> [T]he heart of America is felt less here [in Washington, D.C.,] than at any place I have ever been.
> —Huey Long[66]

This is a story about the dangerous combination of bias, deference, and unchecked government power over individual property and liberty. Perhaps the harm in this case was unintentional, but until the deed was done, the legal community failed to notice or listen. At its best, the government committed an irreparable constitutional violation of its victims' meaningful opportunity to be heard. Zoning-induced gentrification caused indirect displacement, but the perpetrator was cloaked with a dangerous concentration of unchecked government power and immunity. To prevent this from happening in the future, the legal system must restore access to justice for households that are indirectly displaced by zoning-induced gentrification, which begins with further research about the process.

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64. Atkinson, *supra* note 57, at 2344.

65. Request for Rehearing of Decision or Alternatively En Banc Review, Cole v. D.C. Zoning Comm'n, 210 A.3d 753 (D.C. 2019) (No. 17-AA-0360) [hereinafter Req. for Reh'g].

66. 75 CONG. REC. S10393 (daily ed. May 17, 1932) (statement of Sen. Long).

A. STEP 1: EMPTY PROMISES

> I laughed at the Lorax, "You poor stupid guy!/You never can tell what some people will buy."
> —The Once-ler in *The Lorax* by Dr. Seuss[67]

On March 31, 1968, Rev. Martin Luther King Jr. gave his last Sunday sermon at the National Cathedral in Washington, D.C. He called upon the nation's lawmakers to acknowledge that "we don't see the poor" and that "[p]oor people are forced to pay more for less."[68] He prayed for America to "be true to the huge promissory note that it signed years ago" and to "make the invisible visible."[69] Just days later, he was assassinated.

Across Washington, D.C., five days of civil rights demonstrations ensued as fires, riots, and looting caused more than thirteen million dollars in damages.[70] According to some of D.C.'s most popular development blogs, the H Street neighborhood's history ended there.[71] To them, the neighborhood remained idly dilapidated but "was bound to come back to life at some point."[72] In reality, however, its history only ended for affluent white people. The largest white exodus in D.C.'s history followed, and D.C. became known as the "Chocolate City."[73] During that time, the H Street neighborhood's commercial offerings primarily consisted of vintage clothing stores, mom-and-pop shops, and fast food.[74]

Then, "[i]n the early 2000s, an ambitious band of city officials set out to cut through the bureaucratic mire and launch a vast streetcar network" that would revitalize the Chocolate City.[75] The D.C. government was sure that its transit-oriented development plan would be revolutionary, but nine years later, it turned out

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67. DR. SEUSS, THE LORAX 26 (1971).

68. Rev. Martin Luther King Jr., Speech at the National Cathedral: Remaining Awake Through a Great Revolution (Mar. 31, 1968) (transcript available at https://kinginstitute.stanford.edu/king-papers/documents/remaining-awake-through-great-revolution-address-morehouse-college [https://perma.cc/4ERL-EQYG]).

69. *Id.*

70. *See* BEN W. GILBERT & THE STAFF OF THE WASHINGTON POST, TEN BLOCKS FROM THE WHITE HOUSE: ANATOMY OF THE WASHINGTON RIOTS OF 1968 (1968).

71. *See* Jim Hemphill, *The History of Northeast DC*, BISNOW (Mar. 15, 2016), https://www.bisnow.com/washington-dc/news/neighborhood/everything-you-need-to-know-about-ne-dc-57162?utm_source=CopyShare&utm_medium=Browser ("But the true demise of Northeast DC as a major commercial center came with the assassination of Martin Luther King Jr. Arson, looting and vandalism devastated the neighborhood, and many parts of the city, and it hasn't fully recovered since.").

72. Jon Banister, *A Look at the Keys to H Street's Revitalization*, BISNOW (Sep. 19, 2016), https://www.bisnow.com/washington-dc/news/neighborhood/h-street-hottest-corridors-pre-event-65319?utm_source=CopyShare&utm_medium=Browser.

73. *See generally* CHRIS MYERS ASCH & GEORGE DEREK MUSGROVE, CHOCOLATE CITY: A HISTORY OF RACE AND DEMOCRACY IN THE NATION'S CAPITAL (2017) (discussing D.C. as the "Chocolate City"); Craig Anthony Corl, Heal H Street 16 (May 6, 2014) (M.A. thesis, George Washington University) (available at https://scholarspace.library.gwu.edu/etd/3b591873w [https://perma.cc/R7Y4-QW7K]) (discussing the size of the Black population in D.C. peaking in 1970).

74. *See* Corl, *supra* note 73, at 18.

75. Michael Laris, *How D.C. Spent $200 Million over a Decade on a Streetcar You Still Can't Ride*, WASH. POST (Dec. 5, 2015), https://www.washingtonpost.com/local/trafficandcommuting/how-dc-

to be "a dysfunctional transit project that … cost the city $200 million."[76] Overall, the United States spent more than twenty-five billion dollars on these types of transit projects in major cities between 1970 and 2000,[77] but D.C. spent three to four times more than other cities on the maintenance facility for its system.[78] The city's excessive investment did not necessarily translate to higher returns, however. After years of watching the government spiral in excess and ruin, spending millions of taxpayer dollars on plans that never came to fruition, the community maintained its shared goals of revitalization and improvement, but the method of how to pursue those goals became contentious.[79]

Amidst the 2008 financial crisis, the D.C. government made a promise to revitalize its fragile neighborhoods and communities through a new transit-oriented development plan.[80] It was great, in theory. Many local residents were desperate for economic revitalization during those dismal times, and the policy promised "to, first and foremost, strengthen existing neighborhoods" and "realize the aspirations of a diverse group of local stakeholders."[81] D.C.'s Office of Planning (OP) described it as a plan that would bring an array of benefits to existing residents, such as more jobs and economic growth.[82] The local community was eager to see improvements as a result of the government's new redevelopment plan,[83] but as

spent-200-million-over-a-decade-on-a-streetcar-you-still-cant-ride/2015/12/05/3c8a51c6-8d48-11e5-acff-673ae92ddd2b_story.html.

76. *Id.*

77. Matthew E. Kahn, *Gentrification Trends in New Transit-Oriented Communities: Evidence from 14 Cities That Expanded and Built Rail Transit Systems*, 35 REAL EST. ECON. 155, 155 (2007).

78. Laris, *supra* note 75.

79. The broader framework, the Great Streets Initiative, was already in place prior to the financial crisis, but local bureaucrats obtained the Mayor's stamp of approval for the H Street and Benning Road corridor plan during this time. D.C. OFF. OF PLAN., *supra* note 3, at 6; DEP'T OF PUB. WORKS, A TRANSPORTATION VISION, STRATEGY, AND ACTION PLAN FOR THE NATION'S CAPITAL 7–12 (1997), http://www.dcstreetcar.com/wp-content/uploads/2013/10/DC_TransportationVision_1997.pdf.

80. D.C. OFF. OF PLAN., *supra* note 3, at 6. Transit-oriented development is a global phenomenon that exceeds the scope of this paper, but, significantly, it almost always occurs in low-income neighborhoods, causes "[b]oth residential and commercial rents [to] increase sharply" and leads to rapid zoning-induced gentrification. Peter Marcuse, *To Control Gentrification: Anti-Displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931, 933 (1985); *see* KAREN CHAPPLE & ANASTASIA LOUKAITOU-SIDERIS, TRANSIT-ORIENTED DISPLACEMENT OR COMMUNITY DIVIDENDS?: UNDERSTANDING THE EFFECTS OF SMARTER GROWTH ON COMMUNITIES 16 (2019). Commercial gentrification can be described as an increase in "businesses catering to the newcomer's tastes and income, while businesses catering to the traditional residents diminish." Corl, *supra* note 73.

81. D.C. OFF. OF PLAN., *supra* note 3, at 5.

82. Press Advisory, Office of the Deputy Mayor for Planning and Economic Development, District Launches Creative Economy Initiative DCs Focus on Idea People Can Transform Neighborhoods (Sept. 6, 2007), https://dmped.dc.gov/release/district-launches-creative-economy-initiative-dcs-focus-idea-people-can-transform [https://perma.cc/YP45-AHWP] ("'The good news is that we already have pockets of creative communities that, with a little help and focus, can grow into robust, appealing neighborhoods that attract more creative people, jobs and economic growth[]' . . . ." (quoting Harriet Tregoning, Director, Office of Planning)).

83. DEP'T OF PUB. WORKS, *supra* note 79, at 5 (noting that "there was broad support for investments in the transportation and information systems [to] improve tourists' experience, as well as that of local residents").

the newly approved framework itself ominously warned, "This [was] just the beginning . . . ."[84]

B. STEP 2: FURTIVE PLANNING

> Nowadays people know the price of everything and the value of nothing.
> —Oscar Wilde[85]

> Expedients are for the hour, but principles are for the ages.
> —Henry Ward Beecher[86]

Unbeknownst to the community, the plan they had approved was a mere parchment guarantee—a historical term for an empty promise[87]—empowering the District to capitalize on vulnerability and abuse its newfound authority for decades to follow.[88] After checking authorization off the list, D.C.'s local government closed the blinds and started planning. Next on its agenda was a strategy known to attract new wealthy residents and tourists into the area at the expense of indirectly displacing the existing community: zoning-induced gentrification.[89]

The available research recognized several ways to pursue zoning-induced gentrification through transit-oriented development without causing indirect displacement,[90] but the least expensive approach had proven dangerous.[91] Still, the government chose to harm the existing community rather than prioritizing it, subverting the letter of the law behind closed doors. It concocted an ostensibly

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84. D.C. OFF. OF PLAN., *supra* note 3, at 5.

85. OSCAR WILDE, THE PICTURE OF DORIAN GRAY 49 (Lerner Publ'g Grp. 2015) (1891).

86. HENRY WARD BEECHER, PROVERBS FROM PLYMOUTH PULPIT 100 (William Drysdale ed., 1887).

87. *See* Antonin Scalia, Opening Statement on American Exceptionalism to a Senate Judiciary Committee (Oct. 5, 2011), https://www.americanrhetoric.com/speeches/antoninscaliaamericanexceptionalism.htm (discussing comparative politics and defining the term "parchment guarantee" as "just words on paper").

88. The D.C. government has previously violated "clearly defined, publicly stated preference[s]." *See, e.g.*, Alex Baca, *To Start Addressing Displacement, Let's Start with Better Reporting on Gentrification*, GREATER GREATER WASHINGTON (Apr. 18, 2019), https://ggwash.org/view/71750/to-start-addressing-displacement-lets-start-with-better-reporting-on-gentrification [https://perma.cc/N3Z5-QF7A].

89. *See* Marcuse, *supra* note 80, at 933; *see generally* Richard T. LeGates & Chester Hartman, *Gentrification-Caused Displacement*, 14 URB. LAW. 31 (1982) (discussing gentrification patterns throughout the country).

90. *See* Marcuse, *supra* note 80, at 933–34.

91. Although this strategy had consistently caused harmful effects, such as indirect displacement, it was "far from clear that outcomes [were] uniform, inevitable, or predetermined." CHAPPLE & LOUKAITOU-SIDERIS, *supra* note 80, at 41. Governments throughout the world had applied this strategy to low-income neighborhoods, which are vulnerable to indirect displacement without mitigating measures. *See id.* at 39–41. By targeting one of these areas without bothering to implement one of the various mitigation tools available, D.C.'s plan could reliably be expected to produce precisely the opposite effect of what the law allowed for when applied in specific cases like Ms. Cole's. For a discussion of mitigation tools, see generally *id.* at 243–66 (first detailing "four categories of antidisplacement strategies" with "examples of strategies at five different scales: local, regional, state, federal, and international," then discussing "the effectiveness of antidisplacement strategies and of early warning systems that have been developed to help communities prevent displacement").

innocuous plan that, in fact, would not strengthen existing neighborhoods but replace them with bait for affluent tourists and consumers who were eying an upgrade.[92]

Young, white, and educated prospective homeowners were looking "for bargains in popular neighborhoods when they c[ould] capitalize on the temporarily low prices."[93] Several local agencies, led by OP, planned to attract precisely these prospective residents and consumers, using the local community's taxpayer dollars to attract the "creative class," which primarily consists of knowledge workers in fields such as technology, art, and design.[94] Alone, this was perhaps no more than an opportunistic strategy, but without measures to offset the corresponding displacement pressures on a community that was struggling amidst a national financial crisis, OP's plan would result in indirect displacement.[95]

OP's plan became the first domino in an extensive chain leading all the way to Ms. Sharon Cole and her community. OP crafted elaborate instructions to create a new environment in Ms. Cole's neighborhood as part of its design for "national[] pioneering."[96] Occupied or not, specific parcels of property such as local bars, nightclubs, businesses, and even peoples' homes became targets for elaborate, higher-density establishments OP designed to draw in more people with more money.[97]

What about the vulnerable local residents? OP said the plan was only intended to set forth the "big picture goals" toward the process of "revitalization."[98] It cautioned that it could not "anticipate all of the details and decisions that [would] need to be made to implement the vision" and that those later decisions would be made in close coordination with the community.[99] Yet it detailed specific instructions to "achieve maximum impact" in Ms. Cole's neighborhood by coordinating the "resources and initiatives of multiple District agencies like the Department of Housing and Community Development, the Department of Transportation and the Office of the Deputy Mayor for Planning and Economic Development."[100]

C. STEP 3: HAZARDOUS EXECUTION

> The instant I'd finished, I heard a ga-Zump!/I looked./I saw something pop out of a stump of the tree I'd chopped down. It was sort of a man./Describe him? . . . That's hard. I don't know if I can.
> —The Once-ler in *The Lorax* by Dr. Seuss[101]

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92. *See* Press Advisory, *supra* note 82; *see also* D.C. OFF. OF PLAN., *supra* note 3.

93. Candace Coleman, Gentrification in the Wake of the Subprime Mortgage Crisis 23 (Apr. 18, 2012) (master's thesis, Duke University) (on file with the Sanford School of Public Policy).

94. *See* Press Advisory, *supra* note 82.

95. *See* Marcuse, *supra* note 80.

96. DEP'T OF PUB. WORKS, *supra* note 79 (letter from Marion Barry, Jr., Mayor, Washington D.C., & Cellerino C. Bernardino, Acting Director, Department of Public Works).

97. *See* D.C. OFF. OF PLAN., *supra* note 3, at 3 (identifying "opportunity redevelopment sites" and implementation plans).

98. *Id.* at 3, 5.

99. *Id.* at 5.

100. *Id.* at 3.

101. SEUSS, *supra* note 67, at 20.

When implemented, the zoning-induced gentrification process caused indirect displacement. Instead of strengthening the existing community, OP's "revitalization" plan[102] was followed by an economic downturn that "created new groups of individuals facing difficult circumstances and reinforced the vulnerabilities of some groups who historically lived in poverty."[103] This was not a bad policy; it was an unauthorized veto. The community authorized the D.C. government to do one thing, and it did the opposite. Not coincidentally, a recent study found that D.C. had "the highest 'intensity' of gentrification of any U.S. city" between 2000 and 2013 and, more importantly, that over 20,000 Black residents were displaced.[104]

How? By taking advantage of the zoning process and building a Planned Unit Development (PUD), developers could receive benefits from the Commission in exchange for making OP's plan a reality.[105] On December 17, 2015, the used car lot and plot of land immediately next door to Ms. Cole and her neighbors became "the first of the sites along Benning Road to move forward with redevelopment," a decision the Commission applauded as "leading the way to effectuating a vision for development that was put into motion by OP eight years ago."[106]

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102. Corl, *supra* note 73, at 18. In 2005, Mayor Anthony Williams implemented the Great Streets Initiative, which brought the Office of Planning, District Department of Transportation, and the Deputy Mayor for Planning & Economic Development together to coordinate transit-oriented development along seven of the District's major corridors. Office of the Deputy Mayor for Planning and Economic Development, *Great Streets: Avenues of Opportunity*, DC.GOV, https://web.archive.org/web/20070210112814/http://dcbiz.dc.gov/dmped/frames.asp?doc=/dmped/lib/dmped/pdf/AboutGreatStreets.pdf [https://perma.cc/JZ72-P59S] (last visited Aug. 2, 2021).

103. Anne Dannerbeck Janku, *Poverty and Legal Problems: Examining Equal Access to Justice in Missouri*, TRENDS ST. CTS. (Nat'l Ctr. for State Cts., Williamsburg, VA), 2013, at 8, 8. Impoverished households could not withstand the economic downturn while the young, white, and educated market that D.C.'s revitalization plan targeted was able to take advantage of the low prices. As Ross and DeRenzis explain, many low-income residents were "left out of the city's revitalization," and this came at the worst possible time when such residents were at peak vulnerability. MARTHA ROSS & BROOKE DERENZIS, BROOKINGS INST. GREATER WASH. RSCH. PROGRAM, REDUCING POVERTY IN WASHINGTON, DC AND REBUILDING THE MIDDLE CLASS FROM WITHIN 1 (2007); *see* Coleman, *supra* note 93, at 24 ("[F]indings suggest that gentrifying cities before the year 2000 did not experience significant levels of de-gentrification as a result of the Subprime Mortgage Crisis and subsequent fallout in the global capital markets.").

104. Katherine Shaver, *D.C. Has the Highest 'Intensity' of Gentrification of Any U.S. City, Study Says*, WASH. POST (Mar. 19, 2019), https://www.washingtonpost.com/transportation/2019/03/19/study-dc-has-had-highest-intensity-gentrification-any-us-city/.

105. Bauman, *supra* note 19, at 53 (noting PUDs "have a more lenient development approval process and can be implemented in several different formats," but "are subject to case-by-case negotiation," meaning "they are prone to lacking uniformity, which can cause legal issues in light of the common statutory requirement that zoning be uniformly applied"). A PUD is a "project specific zoning action intended to allow a project that is better than could be built by-right." DC Office of Planning, *Planned Unit Developments*, DC.GOV, https://perma.cc/4ZW3-DD8Z. The PUD program is "[d]esigned to encourage high quality developments that provide public benefits." *Id.*

106. 777 17th Street, LLC, 64 D.C. Reg. 2640, 2650 (D.C. Zoning Comm'n Mar. 10, 2017) (order). The proposed PUD would take the place of two existing lots at the intersection of H Street NE, Benning Road, and 17th Street, replacing one used car sales lot and one vacant lot. *See* Application, *supra* note 3, at 1. It would be just two blocks away from two stops along the H Street/Benning Road streetcar line, adjacent to Hechinger Mall. *Id.* at 1, 5, 12.

The government initiated and facilitated the process, using its authority to attract private investment.[107] OP's plan specifically designated the former used car lot as one of its "opportunity sites," specifying that it would be appropriate for redevelopment as a mixed-use residential and retail project.[108] The developer, 777 17th Street, LLC, was one of Capital City Real Estate's many affiliates. Founded in 2006 by Scott Zimmerman, Capital City Real Estate claims that "every project begins with realizing the potential of a property and its impact on the neighborhood."[109] With over forty projects since 2006, including another H Street condominium, "Capital City is no stranger to H Street."[110] Developers are not too fond of the PUD process, however, because it requires making concessions and taking risks.[111] Developers bought in when the government made a tempting offer, but this was zoning-induced gentrification.

Consistent with OP's plan and most transit-oriented development projects, the developer proposed to build a luxury mixed-use commercial and high-rise property in one of D.C.'s few remaining low-income neighborhoods.[112] The developer made elaborate plans to build a ninety-foot luxury mixed-use building with a "façade . . . carefully composed with rigorous rhythm and dramatic visual punctuations that [would] reveal details with rich color [and] textures,"[113] which was next to a mall that housed a Safeway, Ross Dress for Less, and Modell's, and accompanied by some "low-rise garden-style apartments, a drycleaner, [a] low-rise office and a McDonald's."[114] The developer explained that the PUD was expressly designed to spur additional transit-oriented development[115] along a

107. The initiative would redevelop these corridors "by using public actions and tools to attract private investment." D.C. OFF. OF PLAN., *supra* note 3, at 6.

108. *See id*. at 42.

109. CAP. CITY REAL EST., https://capcityre.com/ [https://perma.cc/ASQ2-FEBQ] (last visited Aug. 3, 2021).

110. *Id*.; *180-Unit Residential Project Coming East of the H Street Corridor*, URBANTURF (Dec. 18, 2015), http://dc.urbanturf.com/articles/blog/180-unit_apartment_project_coming_east_of_the_h_street_corridors/10706 [https://perma.cc/P3LV-VUVQ].

111. "[A]n untold number of units will never see the light of day as developers begin to shy away from the process that allows them to build more density while exposing them to more legal appeals." Jon Banister, *When Public Approval Means Naught: How Federal Judges Are Delaying 4,000 Units of D.C. Housing*, BISNOW (July 18, 2017), https://www.bisnow.com/washington-dc/news/multifamily/broken-process-why-4000-units-of-dc-housing-are-stuck-in-federal-court-76657-76664?utm_source=CopyShare&utm_medium=Browser; *see also id*. ("[D]evelopers and city officials are calling [the PUD approval process] a flawed process with harmful consequences.").

112. *See* CHAPPLE & LOUKAITOU-SIDERIS, *supra* note 80, at 13 (defining the transit-oriented development concept as "a moderate to high-density development (either new construction or redevelopment) within an easy walk of a major transit stop, with a mix of residences, employment, and shops").

113. Application, *supra* note 3, at 2.

114. Michael Neibauer, *Developer Hopes to Extend 'Attraction' of H Street NE to the East with 180-Unit Project*, WASH. BUS. J. (Dec. 18, 2015, 6:29 AM), https://www.bizjournals.com/washington/breaking_ground/2015/12/developer-hopes-to-extend-attraction-of-h-street.html.

115. Application, *supra* note 3, at 4 ("The Project also strives to extend the success and attraction of the H Street corridor . . . .").

corridor that was home to predominately black, low-income families—the first step toward zoning-induced gentrification.

In exchange for building the new PUD, the Commission would provide certain benefits. OP's plan recognized the PUD site as having potential for redevelopment as a mixed-use consolidated PUD, and because one of the parcels was vacant and underutilized, the developers would qualify for reduced tax rates.[116] Prospective commercial tenants could take advantage of grants and subsidies from the D.C. government's Great Streets Initiative.[117] Furthermore, the developer would receive incentives including flexibility in the zoning standards for features like height, parking, and square footage.[118] For instance, the proposed height was ninety feet, which is the maximum height allowed for PUDs,[119] although its height otherwise could not exceed sixty-five feet. In addition, the applicant requested a variance to allow for occupiable rooftop space and a transparent guardrail—a glass barrier that would be installed on the roof at a requested height and distance that deviated from the requisite setback.[120]

D. STEP 4: CONSCIOUS SUPPRESSION

> I am the Lorax. I speak for the trees./I speak for the trees, for the trees have no tongues./And I'm asking you, sir, at the top of my lungs"—/he was very upset as he shouted and puffed—/"What's that THING you've made out of my Truffula tuft?
> —The Lorax in *The Lorax* by Dr. Seuss[121]

> Hi. My name is Sharon Cole and I live at . . . one of the insignificant, inornate structures that are existing. . . . This is a community and our homes. . . . We've raised children here.
> —Sharon Cole[122]

On September 29, 2016, the Commission held a public hearing. Jerry Zayets, who represented Capital City Real Estate and 1701 H Street at the hearing,[123] began by sharing, "[W]hat we envision is more of a gateway project and we hope [the PUD] will spark additional investments in the area that will extend the vibrancy and the success of the H Street corridor east to our site."[124] After more

116. *See* D.C. OFF. OF PLAN., *supra* note 3, at 14; Fiscal Year 2011 Budget Support Act, 57 D.C. Reg. 6242 (July 23, 2010).

117. *See Great Streets*, DC.GOV, https://greatstreets.dc.gov/ [https://perma.cc/6N29-RFLK].

118. 777 17th Street, LLC, 64 D.C. Reg. 2640, 2643–45 (D.C. Zoning Comm'n Mar. 10, 2017). To spoil the ending, see *id*. at 2649–50.

119. *Id*. at 2643–44.

120. *See* Application, *supra* note 3, at 3.

121. SEUSS, *supra* note 67, at 23.

122. Public Hearing, *supra* note 1, at 79.

123. *Id*. at 10.

124. *Id*. at 11.

than an hour and a half of discussion between the developer and the Commission,[125] the commissioners allowed a few neighbors to speak.

For the final few minutes, two neighbors testified in opposition to the project: one presented the Commission with eleven more opposition letters she had collected, and another submitted a letter of opposition independently.[126] One of the community members who testified, Sharon Cole, prepared a statement voicing concerns about the impacts of zoning-induced indirect displacement. Ms. Cole, who had lived in a home next door to the newly approved PUD site for many years, was worried about the impact this project would have on her life as an elder and her ability to remain in her home. Among other things, she testified:

> MS. COLE: Hi. My name is Sharon Cole and I live at . . . one of the insignificant, inornate structures that are existing. . . . This is a community and our homes. Some of us have been here for 15 years or more. We've raised children here. . . . Where will we go? There is no housing available for low-income residents. . . . We would also like to be a part of the new Washington, D.C. Is Washington, D.C. only for the rich?
>
> . . . .
>
> . . . Do you know, every year we give a community barbeque picnic for the children for back to school . . .? We do a lot of things and take care of each other. . . . [E]verything has become a high-rise apartment that is so unaffordable to the people that have worked here and lived here . . . .[127]

Ms. Cole's opening remark that she lives in one of the "insignificant, inornate structures that are existing" was a reference to the following exchange between Sean Stadler, the principal architect for the PUD, and the Commission earlier that evening:

> [COMMISSIONER] TURNBULL: . . . [Y]ou've described the residences next to them, this building, as insignificant structures. Is that correct?
>
> MR. STADLER: Sorry if they - - I don't think I intended it to be insignificant, I was just saying that - -
>
> [COMMISSIONER] TURNBULL: You said insignificant structures.
>
> MR. STADLER: The facades are not ornate.[128]

Upon hearing Ms. Cole's objection, the room grew silent with confusion. First, a commissioner expressed his experience with the developer's personal background, suggesting that they talk it out. "I will tell you, his track record with me

125. DC Office of Zoning, *Zoning Commission Public Hearing of September 29, 2016*, EARTHCHANNEL, http://view.earthchannel.com/PlayerController.aspx?PGD=dczoning&iID=3982.

126. *Id.* at 1:32:33; Letters in Opposition, 777 17th Street, LLC, 64 D.C. Reg. 2640 (D.C. Zoning Comm'n Mar. 10, 2017) (No. 15-31).

127. Public Hearing, *supra* note 1, at 79–81.

128. *Id.* at 42.

is, he's batting 100 . . . . [T]hey have resolved a lot of issues and I really think . . . that conversation always helps."[129] He asked if Ms. Cole had a chance to speak with the developer, but she said that contrary to the developer's earlier representation, she had "[n]ever seen them. Not once."[130] The commissioner replied, "Well, they see you tonight," and asked Ms. Cole to have a conversation with the developer.[131] "I can tell you, he's batting 100 with me," he went on to reiterate, "[h]e did it already in Ward 1 and I believe he can probably - - might not get everything, but we can try to see how we can co-exist. Okay?"[132]

Afterward, another commissioner asked how close Ms. Cole lived to the project. "I live right next door to the car lot," she replied, "[w]ell, I think we're going to be not there. . . . I think they're going to demolish our building."[133] Shock and perplexity rang throughout the room.[134] Yet one of the commissioners insisted, "There's no imminent [sic] domain in this - - at least I - - okay. There is no imminent [sic] domain in this."[135]

"What does that mean to me? I don't understand," Ms. Cole asked.[136]

"It means acquiring a property, the taking of property," the commissioner replied.[137]

"Well, they would sell the property to them if I'm not mistaken. Would that be the case?"[138] Ms. Cole asked with unfaltering resilience.

"Are you buying the property?" the commissioner asked the developer.[139] "Okay. No. . . . [S]ee, that's why - -"[140]

"Yeah. . . . The landlord is here. . . . It would sell,"[141] Ms. Cole retorted, struggling to explain the concept of indirect displacement to an audience of powerful people, resolute in their faulty assumptions about displacement.[142]

"That's why I'm saying - - well," one commissioner began until another interrupted, "[T]he applicant can talk to that question,"[143] reminding him that at the present moment, they were playing the role of judges, not interested parties. The commissioner cleared his throat:

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129. *Id.* at 82–83.
130. *Id.* at 83
131. *Id.*
132. *Id.* at 84.
133. *Id.* at 84–85.
134. DC Office of Zoning, *supra* note 125, at 1:42:42 (author's observation).
135. Public Hearing, *supra* note 1, at 85.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. She later recalled, "[T]hat room was intimidating with the Commissioners sitting above us and all the high powered lawyers." Req. for Reh'g, *supra* note 65. "As perplexing as this context for someone like me with no zoning experience was, I did my best with absolutely no help from the ANC, no guidance from staff at the Office of Planning or any city attorneys dealing with land use to put on the record the most obvious planning issues that I could." Reply to Intervenor's Opposition, *supra* note 2.
143. Public Hearing, *supra* note 1, at 85–86.

> Yeah, I think that you all - - again, it goes to the conversation so you can get all the information and get it correctly.
>
> . . . .
>
> So after this is over, we may have some follow ups. We're probably going to follow up with that and they can testify on the record. But I think it would be better if you all have a conversation. And I'll be looking forward to seeing what the results are after that, before we move forward. Okay?[144]

"Oh, I don't," Ms. Cole began.[145]

The commissioner interjected, "I want to make sure you get all the information and get it correct. And then we can operate on it."[146]

"I do have a quick question," she asked: "Will you be taking a vote tonight on this issue, tonight?"[147]

"You've been here the whole - - I think you've heard our conversations. We're looking for some stuff too. . . . And we usually don't vote until we get this stuff. Okay?" he replied.[148]

"Okay," she responded,[149] but her suspicions were right. The Commission was unaware of the concept of indirect displacement caused by zoning-induced gentrification, but Ms. Cole had every reason to believe that it was right before their eyes.

Usually turned out to be an empty assurance, as there is no evidence that the Commission ever sought testimony on this material, contested issue before deciding against Ms. Cole. Misunderstanding the concept of indirect displacement caused by zoning-induced gentrification, the Commission simply asked the developer to reiterate its irrelevant assurance that there would be no direct displacement and supplement the record with a post-hearing submission confirming that it spoke to the neighbors.[150] After concluding that there would be no direct displacement, the Commission leaped through the fallacy of deductive reasoning, finding no displacement of any kind.[151] Thus, on March 10, 2017, the Zoning Commission approved the PUD application and related map amendment by a vote of 4-0-1: four in favor, zero against, and one not present or voting.[152] When

144. *Id.* at 86.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See* Post-Hearing Submission at 3–4, 777 17th Street, LLC, 64 D.C. Reg. 2640, 2650 (D.C. Zoning Comm'n Mar. 10, 2017) (No. 15-31).
151. *See* Cole v. D.C. Zoning Comm'n, 210 A.3d 753, 761 (D.C. 2019); Hans Hansen, *Fallacies*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 2, 2020), https://plato.stanford.edu/entries/fallacies/ [https://perma.cc/9LVP-KZ4P] (summarizing Aristotle's *Topics*, and explaining that "dialectical deductions" are "propositions acceptable to most people, or to the wise" and "[d]eductions that start from premises which only *appear* to be dialectical, are fallacious deductions because of their starting points" (emphasis added)).
152. 777 17th Street, LLC, 64 D.C. Reg. at 2689–90.

three community members petitioned for reconsideration, the Commission stood with unwavering disregard.[153]

E. STEP 5: LEGITIMATION

> You come here to tell us lies, but we don't want to hear them. . . . If we told you more, you would have paid no attention. That is all I have to say.
> –Sitting Bull[154]

On April 3, 2017, Ms. Cole filed an administrative appeal in the D.C. Court of Appeals—*Cole v. District of Columbia Zoning Commission*.[155] Initially, she was joined by two additional pro se litigants, but the court dismissed those parties *sua sponte* for failure to timely file briefs, leaving Ms. Cole as the sole pro se petitioner against 777 17th Street, LLC, the Intervenor.[156] Ms. Cole faced numerous health complications and family tragedies during the lawsuit but persevered in standing up for her community even when offered a $10,000 settlement.[157]

On appeal, Ms. Cole acknowledged her limitations as a pro se litigant, explaining, "I want to express to the Court my gratitude in being able to be part of something I've never known or heard about before – 'zoning.'"[158] Ms. Cole conducted research to familiarize herself with the relevant legal terminology and argued that the Commission erred in failing to consider the adverse impacts the PUD would have on its immediate neighbors before concluding that it would be of substantial value to the community.[159] In response, the developer argued the project *would* be valuable enough to warrant preferential treatment as a PUD and alleged that the Commission had adequately addressed Ms. Cole's concerns.[160]

The developer, but really the Commission, won.[161] After going through the motions of reciting the unambiguous requirement that "[i]n deciding a PUD application, the Commission shall judge, balance, and reconcile the relative value of the project amenities and public benefits offered, the degree of development incentives requested, and any potential adverse effects according to the specific circumstances of the case," the court applied a rational basis standard of review,[162] revealing its erroneous supposition that the government always follows

153. *See* Request to Accept an Untimely Filing or to Reopen the Record, 777 17th Street, LLC, 64 D.C. Reg. 2640 (No. 15-31).

154. ROBERT M. UTLEY, THE LANCE AND THE SHIELD 196 (1993).

155. 210 A.3d at 753.

156. Order, *Cole*, 210 A.3d 753 (No. 17-AA-0360) (filed Jan. 26, 2018).

157. *See* Attachment B to Motion for a Reasonably Short Extension of Time to File Opening Brief, *Cole*, 210 A.3d 753 (No. 17-AA-0360); Motion for a Additional Extension of Time, *Cole*, 210 A.3d 753 (No. 17-AA-0360).

158. Req. for Reh'g, *supra* note 65.

159. Pro Se Petitioner's Opening Brief, Proceeding Informa Pauperis at 2, *Cole*, 210 A.3d 753 (No. 17-AA-0360) [hereinafter Pet'r's Brief].

160. *See* Brief of Intervenor at 1, *Cole*, 210 A.3d 753 (No. 17-AA-0360).

161. *See Cole*, 210 A.3d at 757 (ruling in favor of the government, and allowing the project to go forward against Ms. Cole's objections).

162. *See id*. at 760.

the law. It affirmed the Commission's decision, blindly deferring to its determination that the PUD would "provide public benefits of 'exceptional quality' and of 'substantial value to the community.'"[163]

To whose community was it substantially valuable? The court answered this tacitly, conceding "that the Commission's decision does not include an explicit discussion of 'rising gentrification pressures'" but, nevertheless, finding that "the concerns noted by those who testified in opposition to the application were adequately addressed."[164] The law conferred a specific right to a specific process by which the Commission was required to resolve contested issues, but the court found that right was not really worth insisting upon. Waving its hand over a proverbial crystal ball, the court read the Commission's collective mind.[165] Preparing to enlighten us all, the court miraculously pronounced that the Commission's "references to the proposed PUD's compatibility with the Upper Northeast Area Element development policy and with the Benning Road Plan enable us to *discern the agency's path*: a recognition that the pressures of gentrification are *inevitable*, but can be mitigated"[166] through two policies that in fact did not serve their objectives as applied to this case.

Hearing but not listening as Ms. Cole rationally explained the process of indirect displacement, D.C.'s highest court shook hands with her imminent perpetrator. The developer rebuffed Ms. Cole's valid objection as "illogical and unsupportable,"[167] and in ruling against her, the court agreed. Ms. Cole, a guest to our legal system, endured a long and arduous journey to meet us. But oh my, the court said, she really came? That was only a *courtesy* invitation. Displacement has always been the government's manifest destiny.[168]

F. STEP 6: THE UNSUNG TRUTH

> [S]uch is the irresistible nature of truth, that all it asks, and all it wants, is the liberty of appearing.
> —Thomas Paine[169]

Throughout the entirety of the (purportedly) legal process, Ms. Cole and her neighbors resisted the pressure to leave their homes and neighborhoods, pleading with the government and the justice system not to legitimate and subsidize their indirect displacement. "We would also like to be a part of the new Washington,

163. *Id.* at 758; *see id.* at 767.

164. *Id.* at 758, 762.

165. *Cf.* Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 527 (2016) (explaining that in statutory interpretation cases, the emerging conventional wisdom holds that although "[i]ndividual legislators may have intentions and purposes, . . . the legislature as a whole has no collective intent or purpose").

166. *See Cole*, 210 A.3d at 762–63 (emphasis added) (footnote omitted).

167. Brief of Intervenor, *supra* note 160, at 17.

168. "[O]ur manifest destiny [is] to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty . . . ." Julius W. Pratt, *The Origin of "Manifest Destiny,"* 32 AM. HIST. REV. 795, 796 (1927) (emphasis omitted) (quoting John L. O'Sullivan, Editorial, *The True Title*, N.Y. MORNING NEWS, Dec. 27, 1845).

169. THOMAS PAINE, RIGHTS OF MAN. PART THE SECOND. COMBINING PRINCIPLE AND PRACTICE. 1 (1792).

D.C.," Ms. Cole explained, asking, "Is Washington, D.C. only for the rich?"[170] Ms. Cole repeatedly emphasized that she would be "displaced by the . . . rising housing costs, and overcrowding of population the Applicant's PUD project represents,"[171] and eleven other neighbors raised the same objection.[172] For example, one neighbor wrote, "I have lived here for 16 years. I am now disabled and unabled [sic] to rent anywhere else because I only get $10,000 a year, and for 16 years have not been given a section 8 certificate."[173] But not one member of the "legal" community would hear it.

In its 2008 plan, OP insisted that "[t]he Hechinger Mall area can be developed to create a gateway and an identity to the Benning Road corridor."[174] The community had relied on Hechinger Mall's affordable goods and services for the past thirty-eight years,[175] but the government decided that higher-priced establishments and luxury condominiums would more effectively serve its goal to attract wealthier residents. A community coalition informed the Commission of their "concern[] about the immediate repurposing or demolition of . . . Hechinger Mall (a long standing local retail space which currently houses affordable and necessary shops that serve the community)."[176] The applicable regulations said these concerns would take the driver's seat, but the government neglected the promise it signed its name to, and the legal system never caught the distinction between law and practice.

In sum, every avenue of the legal process—from democratic accountability, to representation in court, to the so-called justice system—failed to provide Ms. Cole and her community with any meaningful opportunity to be heard before the government indirectly displaced them through zoning-induced gentrification. We cannot right past wrongs, but we can do better. That is why access-to-justice legal scholars should choose to start listening.

G. STEP 7: DEVASTATING RESULTS

> And deep in the Grickle-grass, some people say,/if you look deep enough you can still see, today,/where the Lorax once stood/just as long as it could/before somebody lifted the Lorax away.
> —Narrator in *The Lorax* by Dr. Seuss[177]

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170. Public Hearing, *supra* note 1, at 80 (statement of Sharon Cole).

171. Pet'r's Brief, *supra* note 159, at 15.

172. *See* Letters in Opposition, *supra* note 126.

173. *Id.*

174. D.C. OFF. OF PLAN., *supra* note 3, at 43.

175. Thirty-eight-year old Hechinger Mall held a Dollar Tree, Safeway, Ross Dress for Less, and other affordable retailers. *See* Jon Banister, *Developers Under Contract to Buy Hechinger Mall, Potentially Setting Up Huge H Street Corridor Project*, BISNOW (Aug. 21, 2019) https://bisnow.com/washington-dc/news/retail/developers-under-contract-to-buy-hechinger-mall-potentially-setting-up-huge-h-street-corridor-project-100466; Comments from Equitable and Respectful Reinvestment, 777 17th Street, LLC, 64 D.C. Reg. 2640, 2650 (D.C. Zoning Comm'n Mar. 10, 2017) (No. 15-31) (describing Hechinger Mall as "a long standing local retail space which currently houses affordable and necessary shops that serve the community").

176. Comments from Equitable and Respectful Reinvestment, *supra* note 175 (statement of unnamed resident near Benning Road).

177. SEUSS, *supra* note 67, at 2.

> [M]y building is being demolished, one displaced family at a time. My home is only [one of] a handful inhabited adjacent to this PUD site. . . . I am calling out from from [sic] surrounds of neglected & unsafe empty units.
> —Sharon Cole[178]

"Nearly one-third of our nation's population lives in rental housing . . . ."[179] Studies show that when zoning-induced gentrification occurs in low-income renters' neighborhoods without mitigation measures, it causes displacement.[180] Contrary to the court's assumption in this case,[181] the zoning-induced gentrification of D.C.'s H Street community was no exception.

How does indirect displacement happen through zoning-induced gentrification? Often, low-income renters "experience displacement pressure when property values rise, old neighbors move away, long-time businesses are replaced by new ones oriented toward a different clientele, and public services become less supportive."[182] Even in jurisdictions with rent-control policies in place, landlords capitalize on rising land values in a variety of ways, and some of the most egregious include allowing the property to fall into such a state of disrepair that existing residents suffer health problems.[183]

During the pendency of this lawsuit alone, the Department of Consumer and Regulatory Affairs charged Ms. Cole's landlord with two wrongful housing violations.[184] By June, when the court had rejected her claims, Ms. Cole poignantly explained that her building was rapidly emptying out and that hers was one of just two families remaining. "I am calling out from from [sic] surrounds of neglected & unsafe empty units," she pled.[185] "My landlord said on record that he wasn't selling or demolishing the building," she recalled, but by then, she figured it was only a matter of time before her family became "another in growing statistics of black families being uprooted from the land here in DC and in [her] neighborhood specifically."[186]

The departure of many of Ms. Cole's neighbors is not only telling about those households themselves, but it means more than a subjective loss of a sense of community for Ms. Cole—"[a]s residents exit a gentrifying area, they take with them support for local organizations and businesses."[187] For low-income

178. Req. for Reh'g, *supra* note 65.

179. Randy G. Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 770 (1993).

180. *See, e.g.*, Rayle, *supra* note 9, at 538–39; CHAPPLE & LOUKAITOU-SIDERIS, *supra* note 80, at 63–89.

181. *See* Cole v. D.C. Zoning Comm'n, 210 A.3d 753, 759, 761 (D.C. 2019) (presuming, despite her contrary statement, that Ms. Cole was "apparently satisfied by the assurance from the applicant's counsel, acknowledged by the Commission, that the PUD 'will not displace any residential uses'").

182. *See, e.g.*, Rayle, *supra* note 9.

183. *See id.* at 538–39 ("[D]irect displacement occurs when a household is forced to move . . . [for] physical reasons (e.g., landlord ceases to maintain the building).").

184. DEP'T OF CONSUMER & REGUL. AFFS., 2018 CA 8517, INSPECTION SUMMARY REPORT (2019).

185. Req. for Reh'g, *supra* note 65.

186. *Id.* at 6.

187. Rayle, *supra* note 9, at 540.

residents, this can include social services and establishments that provide affordable necessities.[188] When services and establishments that low-income renters rely on are displaced, the cost of living rises beyond feasibility.[189] In recent years, studies have highlighted "links between residential gentrification and the decline in some areas of small, ethnically owned businesses, calling into question the market such development seeks to serve and who benefits from the new commercial activity."[190]

In August 2019, two months after the court's decision, developers purchased Hechinger Mall, and a local neighborhood organization supported the endeavor, explaining that "[t]he bottom line is [the owners] should either do something with it or sell it and let someone else do something, because this area is deserving of something much better than what Hechinger Mall has been for years."[191] Although this was a private transaction and took place separately from the PUD at issue, the two were tied with the common thread of government encouragement. The D.C. government expressly mapped out this transaction and offered incentives for private developers to replace these affordable establishments with more expensive ones.[192] Doing so would make up for its excessive spending on transit-oriented development by attracting wealthier taxpayers and kicking lower-income taxpayers to the curb.[193] That was the government's policy. After blindly applying it to this controversy, informed predications nosedived into concrete reality, confirming what the District's oppressed residents diagnosed early: indirect displacement caused by zoning-induced gentrification.

Contrary to the court's conclusion, the project's inclusionary zoning (IZ) measures did not offset these indirect displacement pressures. The court, like the Commission, was satisfied that "the applicant is providing opportunity for low-income families [including, presumably, some existing residents of the neighborhood around the PUD] to live in the building and have access to the same amenities as the market rate units."[194] Ignoring the case before it, the court, again, pointed to what the Commission had previously promised to the general public, reading from the Commission's long list of (broken) promises to "increas[e] the amount and expand[] the geographic distribution of adequate, affordable housing available to current and future residents," while also "'mitigat[ing] the impact of market-rate residential development on the availability and cost of housing available and affordable to low- and moderate-income households,' and '. . . creat[ing] a stock of housing that will be affordable to low- and moderate-income residents

188. *See, e.g.*, *id.*
189. *See, e.g.*, *id.*
190. CHAPPLE & LOUKAITOU-SIDERIS, *supra* note 80, at 167–68.
191. Banister, *supra* note 175.
192. *See* D.C. OFF. OF PLAN., *supra* note 3, at 7.
193. *See id.* (describing a plan to spark a sudden influx of investment and attract wealthier taxpayers). The plan described would help with the costly transit plan but also raise costs of living and make the area prohibitively expensive for existing low-income residents.
194. Cole v. D.C. Zoning Comm'n, 210 A.3d 753, 762 (D.C. 2019) (alteration in original).

over a long term.'"[195] The Commission was required to, so it must have. Deciphering zoning regulations can cause headaches, but in this case, the court needed only avert its attention from the paper to the person standing before it to realize it was making a mistake. Even that, it never did.[196]

The court went on to praise the PUD's valuable benefits, distracted by the government's inconspicuous "inclusionary zoning" label on a noxious vial of indirect displacement caused by zoning-induced gentrification. Poison passed muster as medicine. Not only were there few "affordable units" in this PUD, but the advertised "affordability" was a thin veil for exorbitant pricing. Only about 14 of the 180 total units would purportedly be "affordable housing."[197] Who could qualify for these competitive homes was based not on actual socioeconomic status but on a drastically inflated formula through which objectively rich households could qualify,[198] lining up for bread while snacking on caviar. Based on the time of filing, half of the "affordable housing" was available to people earning more than $10,000 higher than most Americans' annual income.[199] As of six months after the court's decision, half of the "affordable units" will be available to people making $11,938 more than most Americans earn annually.[200] Through the rosiest lens, "affordable housing" was a misnomer.

More importantly for this case and controversy,[201] the purported affordability benefit was irrelevant to the parties in this case. Under the Commission's Inclusionary Zoning Regulations, people like James Cooper—who objected to this project on the record and was initially a party to this appeal before the court dismissed his claims *sua sponte* when he missed a deadline—are not even eligible

195. *Id.* at 761–62.

196. Not only did the court fail to meaningfully consider her objections, but in a sense, Ms. Cole was denied a true day in court.

197. *See* Application, *supra* note 3, at 15 (proposing to create "approximately 180 new residential units," where "[e]ight percent of the residential floor area [would] be set aside as affordable housing").

198. *See id.* When the developer submitted its application (requesting that all fourteen units be set aside for households earning up to 80% of the area median income), D.C. and Maryland had the highest median incomes in the nation. Perry Stein, *D.C. and Maryland Have the Highest Median Incomes in the Country*, WASH. POST (Sept. 15, 2016, 10:47 AM), https://www.washingtonpost.com/news/local/wp/2016/09/15/d-c-and-maryland-have-the-highest-median-incomes-in-the-country/.

199. *Compare* KIRBY G. POSEY, U.S. CENSUS BUREAU, HOUSEHOLD INCOME: 2015, at 3 (2016), https://www.census.gov/content/dam/Census/library/publications/2016/acs/acsbr15-02.pdf [https://perma.cc/NWW2-57DD] (reporting that the 2015 national median income was $55,775), *with The District of Columbia Mandatory Inclusionary Zoning Maximum Household Income Limits*, DC.GOV, https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/Inclusionary%20Zoning%20Income%20Limits%20-%202015.pdf [https://perma.cc/Q83G-F8R6] (last visited Aug. 8, 2021) (indicating that, in 2015, 80% of the area median income for a two-person household in D.C. was $69,888).

200. Eighty percent of the area median income was $77,650, compared with the national median income of $65,712. *Compare* Inclusionary Zoning Program: 2019 Maximum Income, Rent and Purchase Price Schedule, 66 D.C. Reg. 7827, 7828 (June 28, 2019) (reporting the area median income for a two-person household), *with 2019 Median Household Income in the United States*, U.S. CENSUS BUREAU (Sept. 17, 2020), https://www.census.gov/library/visualizations/interactive/2019-median-household-income.html [https://perma.cc/NL7W-3MET].

201. *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to . . . Cases [and] Controversies . . . .").

to apply to live in these "affordable units."[202] The Commission has established a minimum income for households to qualify for IZ, which excludes people like Mr. Cooper.[203] Even without rent, utilities, or anything else at all, his $10,000 annual salary is not enough to cover the average annual cost of food, healthcare, and transportation in D.C. today.[204] As a result of zoning-induced gentrification, he could no longer afford to live in his home and would be ineligible to apply for housing in this new PUD. Unless Mr. Cooper could afford to pay the costs of moving out of the now-unaffordable region,[205] he would become homeless.

These factors, among others, convey some of the tangible ways in which zoning-induced gentrification caused indirect displacement, removing the possibility that this case is one of the "many cases" in which "gentrification c [ould] benefit low-income persons."[206] That is not to suggest that gentrification always—or even often—causes indirect displacement, but in this case, it did. This could be part of a broader trend. While 16.2% of the population along the H Street corridor was below the poverty level in 1990, followed by 15.5% in 2000, D.C.'s government did not publish any statistics on households below the poverty level for the year 2010.[207] What it did publish was that the average household income had nearly doubled and that the percentage of Black families plummeted from 76.6% in 1990 and 73% in 2000 to just 45.2% in 2010.[208]

Was deference to the Commission's "expertise" really deference to majoritarian biases? Or, as a more straightforward matter, does the U.S. Constitution allow this? Part III provides background about procedural due process, then explains how the lethal combination of bias and deference suppressed Ms. Cole's meaningful opportunity to be heard in this case.

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202. *Compare* Letters in Opposition, *supra* note 126 (stating that James Cooper has a $10,000 annual income), *with* Inclusionary Zoning Program: 2019 Maximum Income, Rent and Purchase Price Schedule, 66 D.C. Reg. at 7828 (establishing that for a studio set aside for those making 50% of the AMI, the minimum household income is $24,500).

203. *See* Inclusionary Zoning Program: 2019 Maximum Income, Rent and Purchase Price Schedule, 66 D.C. Reg. at 7828.

204. For a single person, the average annual budget for food, healthcare, and transportation is $12,918. *See Family Budgets in Washington, D.C.*, ECON. POL'Y INST. (Mar. 2018), https://www.epi.org/resources/budget/budget-factsheets/ [https://perma.cc/25E3-9HPX] (measuring the monthly income a person "needs in order to attain a modest yet adequate standard of living").

205. Moving can be extremely costly and may even require more than his annual salary. *See, e.g.*, Sarah Schmalbruch, *16 Hidden Costs of Moving*, BUS. INSIDER: PERS. FIN. (July 10, 2018, 5:35 PM), https://www.businessinsider.com/hidden-costs-moving-2018-7#buying-furniture-to-fill-your-new-space-16 [https://perma.cc/BK8S-RRYF].

206. Graham, *supra* note 13.

207. *H Street Corridor Profile*, H ST. MAIN ST., https://hstreet.org/wp-content/uploads/2018/06/H-Street-Corridor-Profile.pdf [https://perma.cc/T772-7HU3] (last visited Aug. 8, 2021).

208. *Id.* Studies have shown that "forces of structural racism—even if subtle—interact with market dynamics to accelerate the displacement of individuals from" communities facing indirect displacement pressures. CHAPPLE & LOUKAITOU-SIDERIS, *supra* note 80, at 88.

III. ACCESS TO JUSTICE & INDIRECT DISPLACEMENT

This Part provides background about procedural due process and identifies several barriers to Ms. Cole's meaningful opportunity to be heard. It begins by describing how the access-to-justice movement connects with procedural due process and what procedural due process requires. Then, it illustrates how access-to-justice barriers such as bias, undue deference, and disproportionate standards interfere with the right to a meaningful opportunity to be heard.

A. PROCEDURAL DUE PROCESS

Over the past several decades, the access-to-justice movement has pushed for—and implemented—reforms such as the expansion of pro bono legal services, judicial interventions, and educational resources for pro se litigants. "[D]espite being delinked from constitutional litigation and the development of due process doctrine," many scholars agree that this "new wave of innovation remains fundamentally connected to the Constitution's due process guarantee."[209] The Supreme Court has established that due process is an evolving concept[210] by consistently recognizing that the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[211] The procedures must be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard."[212] As the Supreme Court reiterated in *Turner v. Rogers*, the complexity of the issues involved and a person's relative disadvantage without representation are important considerations.[213]

In *Mathews v. Eldridge*, the Supreme Court pronounced a three-prong balancing test for procedural due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[214]

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209. Parkin, *supra* note 50.

210. *See, e.g.*, Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (noting that "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances" (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring))); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (noting that "due process is flexible and calls for such procedural protections as the particular situation demands"); Parkin, *supra* note 50, at 1117. This is consistent with the original meaning of the Due Process Clause, derived from the Magna Carta's "law of the land," which encompasses common law, statutory law, and custom. *English Translation of Magna Carta*, BRITISH LIBRARY (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation [https://perma.cc/3E29-4RBM]; *see also* J. C. HOLT, MAGNA CARTA (3d ed. 2015) (analyzing the Magna Carta).

211. Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

212. Goldberg v. Kelly, 397 U.S. 254, 268–69 (1970).

213. *See* 564 U.S. 431, 448–49 (2011).

214. 424 U.S. at 335.

The gravity of the private interest at stake can have profound influence. In many contexts, the legal system has historically developed "more numerous and more effective mechanisms to protect members of society from grievous loss."[215] For instance, the Supreme Court has determined that due process requires the right to counsel in all criminal cases, explaining that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."[216]

Similarly, given the gravity of the interest, the Supreme Court has recognized a due process right to a meaningful hearing before government benefits are terminated.[217] Given the critical importance of the right to remain in one's home, some jurisdictions have already mandated a right to counsel in direct displacement proceedings such as evictions.[218]

Secondly, there is a higher risk of erroneous deprivation for pro se litigants when the proceedings are especially complex or opposing counsel has a relative advantage. The Supreme Court recently held in *Turner* that the Due Process Clause does not require a right to counsel in all civil contempt cases even when up to one year of incarceration is at stake, but it was careful to emphasize that in that context, the risk of erroneous deprivation was low.[219] It explicitly noted that the decision did not address other contexts in which "[t]he government is likely to have counsel or some other competent representative."[220] In those cases, the "average defendant does not have the professional legal skill to protect himself" because "the prosecution is presented by experienced and learned counsel."[221] Moreover, the Court cautioned, "Neither do we address what due process requires in an unusually complex case where a defendant 'can fairly be represented only by a trained advocate.'"[222]

B. MEANINGFUL OPPORTUNITY TO BE HEARD OR THE RIGHT TO SPEAK WITHOUT BEING INTERRUPTED

> I deserve protecting and the law agrees.
> —Sharon Cole[223]

A careful review of the administrative record in Ms. Cole's case reveals that despite doing everything in her power to prevent her household's displacement,

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215. Scherer, *supra* note 30, at 561.

216. Powell v. Alabama, 287 U.S. 45, 68–69 (1932), *quoted in* Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

217. *See* Scherer, *supra* note 30, at 561; *see also Goldberg*, 397 U.S. at 264.

218. *See, e.g.*, Parkin, *supra* note 50, at 1137 (discussing examples of jurisdictions that have adopted a right to counsel in deportation and eviction proceedings, such as New York).

219. 564 U.S. at 448.

220. *Id.* at 449.

221. *Id.* (emphasis omitted) (quoting Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938)).

222. *Id.* (quoting Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973)).

223. Req. for Reh'g, *supra* note 65.

her pleas for help were likely doomed ex ante due to several access-to-justice barriers. Her case serves as a prime example of why research is necessary to ascertain whether the process of zoning-induced gentrification protects indirectly displaced households' procedural due process rights. This Section identifies several examples of bias in this case, which suppressed the truth of the matter and legitimated Ms. Cole and her neighbors' indirect displacement. Then, it discusses how the court's application of a deferential legal standard allowed these biases to preclude Ms. Cole's meaningful opportunity to be heard.

1. Bias

> People generally see what they look for and hear what they listen for.
> —Judge John Taylor in *To Kill a Mockingbird*[224]

> You think the only people who are people/Are the people who look and think like you[,]/But if you walk the footsteps of a stranger[,]/You'll learn things you never knew[,] you never knew.
> —*Colors of the Wind*, Walt Disney's *Pocahontas*[225]

In 2017, Judge Richard Posner famously resigned from his seat on the Seventh Circuit due in part to disagreement with his judicial colleagues' attitude toward pro se litigants and concern about "widespread judicial hostility to them" because "they are thought by many judges unworthy of the attention of the judiciary."[226] Apprehension toward pro se litigants' arguments may be justifiable in some if not many instances. However, as scholars have begun to emphasize, the dramatic increase in the number and types of self-represented litigants has called into question the generalization that all pro se litigants fall into the same category of unsophisticated "'pests' and 'nuts,' who are an 'increasing problem' clogging our courts."[227] Most importantly for present purposes, this stereotype does not fairly extend to this case. Whether due to explicit or implicit bias against pro se litigants, in favor of represented parties, in favor of legal complexities, or against minority experiences with poverty and displacement,[228] judicial bias caused the court to overlook several legitimate and weighty arguments in this case.

Determinative biases eviscerate the core due process requirement of a meaningful right to be heard by an impartial tribunal,[229] yet bias is a prevalent concern

224. HARPER LEE, TO KILL A MOCKINGBIRD 198 (Harper Perennial Modern Classics, 2002) (1960).

225. JUDY KUHN, *Colors of the Wind*, *on* POCAHONTAS: AN ORIGINAL WALT DISNEY RECORDS SOUNDTRACK (Walt Disney Records 1995).

226. RICHARD A. POSNER, JUSTICE FOR PRO SE'S 27 (2018).

227. *See, e.g.*, Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1548 (2005); *see also* Jessica K. Phillips, Note, *Not All Pro Se Litigants Are Created Equally: Examining the Need for New Pro Se Litigant Classifications Through the Lens of the Sovereign Citizen Movement*, 29 GEO. J. LEGAL ETHICS 1221, 1222 (2016) (complicating generalizations about pro se litigants).

228. *See, e.g.*, BARTON, *supra* note 32; Chinn, *supra* note 32.

229. The Due Process Clause requires a judge to recuse him or herself when there is a serious risk of actual bias. A serious risk of actual bias exists when "under a realistic appraisal of psychological

in the process of indirect displacement caused by zoning-induced gentrification. In this context, litigants often seek to avail themselves of the legal process because of gentrification's threat to their financial security, but the risks involved in the process make it financially irrational to incur the costs of a lawyer. Studies indicate that pro se litigants often struggle to establish ethos, or personal credibility, before judicial or administrative tribunals: "Even in courts where pro se litigants are the rule rather than the exception, judges and other court players routinely disregard the narrative-style testimony of unrepresented litigants," and "deem their stories legally irrelevant."[230]

For example, a seminal study of Baltimore's housing court found "systemic silencing of unrepresented tenants, who are primarily female and black, and who are often denied even a basic opportunity to present their side of the case."[231] Further, two recent randomized experiments with civil judges and attorney-mediators revealed that "perceptions of case merit are strongly influenced by a litigant's counseled status" and that pro se litigants are often "underestimated before their cases are even heard."[232] When bias pervades or precedes consideration of a legal issue, "the decisionmaker has abandoned the course shaped by the law in her reliance on illegitimate considerations."[233]

In Ms. Cole's case, pervasive bias throughout the process precluded an accurate assessment of the facts. Counsel for the developer, the Commission, and the court all erroneously found that when Ms. Cole and eleven other neighbors expressed "a fear that they would lose their homes, it was because they mistakenly believed [the developer] was redeveloping their property" immediately, causing direct displacement.[234] On the contrary, Ms. Cole's fear of losing her home was based on the threat of indirect displacement.

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tendencies and human weakness," the judge's interest poses such a risk of "actual bias or prejud[ice]" that it must be forbidden. Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 883–84 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). Despite not having a particularized interest apart from that of other judges in this instance, judges have a serious risk of actual bias against minorities who live in impoverished communities based on a realistic appraisal of psychological tendencies and human weakness. *See, e.g.*, Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013) (discussing the ramifications of implicit socioeconomic bias on the bench); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 961 (2006) ("[E]vidence that implicit attitudes produce discriminatory behavior is already substantial and will continue to accumulate." (footnote omitted)).

230. Steinberg, *supra* note 25, at 756.

231. *Id.*

232. Kathryn M. Kroeper, Victor D. Quintanilla, Michael Frisby, Nedim Yel, Amy G. Applegate, Steven J. Sherman & Mary C. Murphy, *Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases*, 26 PSYCH. PUB. POL'Y & L. 198, 198, 202 (2020).

233. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 486 (1986); *see generally id.* at 468–75 (suggesting that the Supreme Court's exacting formulation of the first prong of due process, whether it applies, has detracted from the more crucial question of what process is due).

234. Intervenor's Opposition to Petitioner Cole's Motion for Summary Judgement, and Cross-Motion to Dismiss Appeals of Petitioners Williams and Cooper at 8, Cole v. D.C. Zoning Comm'n, 210 A.3d 753 (D.C. 2019) (No. 17-AA-0360).

Ms. Cole repeatedly emphasized that her concern about displacement was tied to indirect land value destabilization and gentrification. For instance, she explained, "The threat of displacement is imminent – either by way of nuisance from unevaluated noise, pollution, pedestrian safety, and other quality of life impacts, and from land value destabilization by such a large new unaffordable luxury project."[235]

Moreover, she elaborated that:

> I raised in person what was the most pertinent issue – displacement both by quality of life nuisance and by gentrification. For example, I believe on its face that the minimal affordable units provided in this project will far be outpaced by gentrification and displacement of the existing volume of vulnerable affordable housing units in the neighborhood now, like mine.[236]

After each tribunal failed to grapple with this central part of her objection, Ms. Cole followed the appropriate procedure and requested a rehearing, pleading, "I ask for a rehearing on the facts, especially those that the Panel misunderstand or misstates, as outlined above."[237] She was already facing imminent indirect displacement pressures by this time and articulated that to the court, yet the court maintained its plainly erroneous conclusion that the PUD would not cause Ms. Cole to be indirectly displaced.[238]

By rejecting that plea, the court solidified the tragic reality that after four years of cumbersome legal commitments, not one tribunal ever acknowledged or expressed any understanding of Ms. Cole's primary objection. This gap in understanding is unfortunately a common experience for pro se litigants regardless of the tribunal or legal issue,[239] but with indirect displacement, the legal process expects pro se litigants to convey a widely misunderstood phenomenon to an apprehensive listener. Without greater understanding and awareness from judges, it is not feasible for litigants in such circumstances to overcome that expectation.

Second, the court failed to meaningfully address Ms. Cole's legitimate due process concerns. Ms. Cole explained that "[a] comprehensive development review has not happened . . . in contravention of the law and basic humane treatment in planning that protects and advances the public health, safety, welfare, and convenience," and argued that the Commission's arbitrary action deprived her of due process.[240] "Without identifying and evaluating adverse project affects

235. Reply to Intervenor's Opposition, *supra* note 2.

236. *Id.* at 3–4.

237. Req. for Reh'g, *supra* note 65.

238. *See* Order, *Cole*, 210 A.3d 753 (No. 17-AA-0360) (filed Aug. 6, 2019).

239. *See, e.g.*, Steinberg, *supra* note 25, at 755.

240. Reply to Intervenor's Opposition, *supra* note 2; Pet'r's Brief, *supra* note 159, at 8–12. Ms. Cole not only made a procedural due process claim but also a substantive due process claim that the Commission's action did not have a rational relationship with a legitimate government purpose. *See generally* Frederic S. Schwartz, *The Postdeprivation Remedy Doctrine of* Parratt v. Taylor *and Its Application to Cases of Land Use Regulation*, 21 GA. L. REV. 601, 627 (1987) (explaining that substantive due process is the constitutional requirement that "governmental actions have a rational

[sic], the Commission could not balance and reconcile these impacts with any of the much-lauded benefits, thus capriciously pushing aside their statutory role to protect me and my community," she argued.[241]

Again, the court took no time to acknowledge the factual and legal bases for Ms. Cole's concern, dismissing this tenable argument with just two sentences:

> Finally, we cannot agree with petitioner's assertion that the Commission "[d]ismiss[ed] [d]ue [p]rocess." The record shows that petitioner was "'afford[ed] . . . an opportunity to present [her] objections'" during the public hearing, and was permitted to make the points she wished to make without interruption.[242]

The quoted authority, which alone was enough to preclude the court's consideration of Ms. Cole's constitutional right to due process of law, did not purport to state the comprehensive rule for what due process requires but merely discussed one element of due process as it pertains to constructive notice.[243] By contrast, the issue in this case was whether Ms. Cole had a meaningful opportunity to be heard. Reducing the constitutional right to a meaningful opportunity to be heard to a right to be permitted to "make the points [one] wishe[s] to make without interruption" would require unwriting decades of jurisprudence—far more than one misconstrued quote.[244] But due to apparent bias, whatever its source, the court rebuffed this otherwise sound constitutional argument based on a single misleading citation. The court was certainly entitled to selectively respond to the arguments it found most worthy of judicial time and resources when writing the opinion, but the court's trite response to Ms. Cole's due process argument only revealed its utter failure to meaningfully consider this indisputably critical right, which she had done everything in her power to protect.

Finally, although the list could certainly go on, the court exhibited bias—whether against Ms. Cole, in favor of the developer, or in favor of the government—by inventing an implausible explanation for why the developer would do something costly that it was not required to do and for which it would not be held accountable. Ms. Cole tactfully emphasized that one of her concerns about the PUD was that, due to permissive rather than mandatory language in the

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relationship to a legitimate governmental purpose, that is, a 'purpose based on promotion of the public welfare, health or safety'" (footnote omitted)). However, the court only addressed the procedural due process issue.

241. Reply in Lieu of a Reply Brief, *Cole*, 210 A.3d 753 (No. 17-AA-0360).

242. *Cole*, 210 A.3d at 766–67 (alteration in original) (footnote omitted).

243. *See* Quincy Park Condo. Unit Owners' Ass'n v. D.C. Bd. of Zoning Adjustment, 4 A.3d 1283, 1289 (D.C. 2010) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)); *Cole*, 210 A.3d at 767 n.19.

244. *Cole*, 210 A.3d at 767; *see, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965))); Sniadach v. Fam. Fin. Corp., 395 U.S. 337, 339–40 (1969) (declaring that the requisite opportunity must be meaningful in fact as well as in theory).

Commission's order, it was not required to contain any family-sized units.[245] If she or her neighbors were indirectly displaced and forced to move, she explained, the availability of family-sized units would be both more accommodating and more affordable. In a footnote, the court conceded that the PUD was not required to include any family-sized units based on the plain language of the Commission's order but scoured the hearing transcript for a conversational use of the word "and" rather than "or" to justify assuming otherwise.[246]

The court's far-reaching rationale on that issue can be explained by nothing but apparent bias, because the Commission's order plainly does not require the developer to include family-sized units regardless of whether any individual's colloquial language at the hearing can be legally scrutinized.[247] If family-sized units were required for the PUD, as Ms. Cole emphasized, that requirement would have improved the affordability and mitigated the harmful effects of the neighbors' impending indirect displacement, as the Commission was required to do.[248] Simply revising a single word would have resolved these concerns, but the court's reluctance to disagree with the Commission was stronger than its inclination to listen to Ms. Cole's valid objections. It is impossible to know the court's subjective thoughts and motives, but this apparent bias reflects a trend that research has shown: courts are less scrupulous in applying legal standards when deciding against pro se litigants.[249]

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245. As approved, the developer needed only ensure that half of the inclusionary units are two- *or* three-bedroom units, and that sixty percent of the units set aside for households earning up to fifty percent of the area median income are two- *or* three-bedroom units. 777 17th Street, LLC, 64 D.C. Reg. 2640, 2659 (D.C. Zoning Comm'n Mar. 10, 2017). The court noted that the "Comprehensive Plan appears to assume that family-sized units are those with three or more bedrooms." *Cole*, 210 A.3d at 758, n.7 (citing D.C. Mun. Regs. tit. 10-A, § 505.4 (2021)).

246. The court reasoned that during a meeting, a commissioner mentioned

> without objection, the applicant's "modifi[cation of] its proffer to provide more two *and* three-bedroom units at affordable levels" . . . . [The Commissioner] also said that, in light of the public testimony on the PUD application, it was "important to note" the applicant's representation that "the only three-bedroom units in the project are affordable units."

Cole, 210 A.3d at 758–59 n.7 (first and second alterations in original). It is at best unclear how the developer's assurance that 166 of the PUD's units would *not* be family-sized supports the inference the court drew.

247. *See* 777 17th Street, LLC, 64 D.C. Reg. at 2659.

248. The Commission was only authorized to approve the PUD application if it found that any adverse impact of the project on the surrounding area and the operation of city services and facilities was "capable of being mitigated, or acceptable given the quality of public benefits in the project." D.C. Mun. Regs. tit. 11-X, § 304.4(b) (2021). Moreover, the stated goals of the Commission's IZ regulations include to "increase[] the amount and expand[] the geographic distribution of adequate, affordable housing available to current and future residents," "[t]o mitigate the impact of market-rate residential development on the availability and cost of housing available and affordable to low- and moderate-income households," and "[t]o create a stock of housing that will be affordable to low- and moderate-income residents over a long term." D.C. Mun. Regs. tit. 11-C, § 1000.1(a), (d), (h) (2021).

249. *See* Kroeper et al., *supra* note 232, at 207.

2. Undue Deference

> In reality, I wonder if it mattered that I was at the hearing at all. . . .
> —Sharon Cole[250]

The court's highly deferential standard of review further stacked the odds against Ms. Cole and legitimated the biases described in Part I.[251] In this case, this standard either caused or permitted the court to rely on erroneous assumptions made by an interested adverse party, meaning Ms. Cole did not have a meaningful opportunity to be heard. Jurisdictions across the nation apply this standard to zoning-induced gentrification appeals,[252] yet the Supreme Court disapproves of the type of blind deference the court afforded the Commission in this case.[253] Here, deference facilitated the government's indirect displacement of households through zoning-induced gentrification, imposed a relative disadvantage upon the aggrieved parties, discouraged participation in the legal process among indirectly displaced households, and operated as a stamp of approval on unjust and unconstitutional practices.

In D.C., as is customary, a person aggrieved by an agency decision is entitled to judicial review in accordance with D.C. Code § 2-510(a)(3)(E), which empowers the court to set aside agency findings or conclusions if "[u]nsupported by substantial evidence in the record."[254] In this case, the court deferred to the Commission's factual determination that the PUD would not cause displacement. However, the *only* support for the Commission's finding that the PUD would not result in displacement was the developer's assurance that it would not.[255] The Commission did not obtain an impact study, did not coordinate with the Department of Housing and Community Development, did not credit the developer's statement since it was not under oath, and did not even bother to have the developer sign an affidavit. Therefore, this conclusion was not grounded in substantial—or any—evidence and did not deserve deference.

Under its highly deferential standard of review, however, rather than setting this finding aside or remanding the issue to the Commission, the court circumvented § 2-510(a)(3)(E) and offered its own explanation for the Commission's determination—far more forgiving treatment than the short fuse with which it treated Ms. Cole.[256] "Petitioner is correct that the Commission's decision does

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250. Reply in Lieu of a Reply Brief, *supra* note 241.

251. These burdens are common in cases of indirect displacement caused by gentrification because "[g]iven the breadth of deference that the courts . . . extend to local land use agencies, judicial review of their decisions are quite narrow." PATRICIA E. SALKIN, 4 AMERICAN LAW OF ZONING § 42:38, Westlaw (database updated December 2020).

252. *See id.*

253. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) ("[A] court must 'carefully consider[]' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." (quoting Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting))).

254. D.C. CODE § 2-510(a)(3)(E) (2021).

255. *See* 777 17th Street, LLC, 64 D.C. Reg. 2640, 2653 (D.C. Zoning Comm'n Mar. 10, 2017).

256. *See* Cole v. D.C. Zoning Comm'n, 210 A.3d 753, 767 (D.C. 2019).

not include an explicit discussion of 'rising gentrification pressures,'" the court acknowledged, yet it reasoned that the Commission indirectly addressed the core issues in this case in two ways: (1) by citing the Upper Northeast element of the Comprehensive Plan, which "declares a policy of development that will include 'persons of low and very low income as well as those of moderate and higher incomes' and avoidance of 'further concentration of poverty,'" and (2) by engaging in the practice of IZ.[257] Not only did the court reach beyond the record to hypothesize why the Commission failed to acknowledge the issues before it but neither of these indirect references supported the court's conclusion.

First, deference to the Commission's mere citation of the Comprehensive Plan was unjustified in the Commission's adjudication of this specific case. Under the court's logic, the Commission's job description is simply to copy, paste, and sign. According to the court, vague, generalized assertions that the PUD complies with the Comprehensive Plan are enough to withstand all legal scrutiny. But the Supreme Court disagrees.[258]

Second, as discussed in Part II, the court reasoned that because the stated purpose of the Commission's IZ regulation is to mitigate the effect of gentrification, IZ must be deemed sufficient.[259] Such reasoning is equivalent to saying that because conduct is forbidden by law, a person must not have engaged in it. That is not the court's role.[260] Deference to the Commission's adjudication in this context is an example of what Justice Scalia called "a dangerous permission slip for the arrogation of power."[261] A core part of IZ's stated purpose is to include "persons of low and very low income," but as applied in this case, it contravened that purpose.[262] Based on a purely objective reading of the facts in the record, the IZ measures for this project could not even potentially have included "persons of low and very low income."[263]

257. *Id.* at 762.

258. *See Kisor*, 139 S. Ct. at 2415 ("If genuine ambiguity remains, moreover, the agency's reading must still be 'reasonable.'"); *see also* D.C. Off. of Hum. Rts. v. D.C. Dep't of Corr., 40 A.3d 917, 923 (D.C. 2012) ("[W]e defer to the agency's interpretation of the statute and regulations it is charged by the legislature to administer, unless its interpretation is unreasonable or is inconsistent with the statutory language or purpose.").

259. *Cole*, 210 A.3d at 762.

260. *See* U.S. CONST. art. III § 2 (describing judicial authority over cases and controversies); *see also* D.C. Appleseed Ctr. for L. & Just., Inc. v. D.C. Dep't of Ins., Sec., & Banking, 54 A.3d 1188, 1199–2000 (D.C. 2012) ("Although Congress established the courts of the District of Columbia under Article I of the Constitution, we generally have adopted the constitutional requirement of a case or controversy and the prudential prerequisites of standing applicable to the federal courts under Article III." (internal quotation marks omitted)).

261. Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) (stating that "*Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power"). This, of course, is the District of Columbia rather than the federal government, but the same principle applies when the court unduly defers to an unelected body that exercised both quasi-judicial and quasi-legislative powers.

262. D.C. Mun. Regs. tit. 10-A, § 2408.3 (2021).

263. *See id.*

As a result, like the Commission's IZ regulations, the reality of the court's decision directly conflicted with its stated rationale. The court opined that "[w]hile we appreciate that petitioner (and others) may believe" that the affordable units were not sufficient, "we have no authority to second-guess the Commission's judgment on such policy matters."[264] But the court did have authority under D.C. Code § 2-510(3), specifically subsections (A), (C), and (E).[265] More importantly, because the court determined that Ms. Cole was "correct that the Commission's decision does not include an explicit discussion of 'rising gentrification pressures,'" one of the core material, contested issues in this adjudication, it should have remanded the issue to the Commission rather than blindly surmising that it must have been because "the pressures of gentrification are inevitable."[266]

By instead interjecting its own assumptions, D.C.'s highest court made its own uninformed policy decision under the guise of deference. The IZ regulations declared that city planning should include "persons of low and very low income,"[267] but the court effectively found that it need not. Likewise, the framework expressly provided that the priority when promoting development was "to, first and foremost, strengthen existing neighborhoods," [268] yet the court found that when applying it, the Commission could instead destroy and replace them. The Comprehensive Plan acknowledges the problem of gentrifying neighborhoods and dictates "channel[ing] a greater share of the revenues being created by the strong housing market into new programs that preserve affordable units."[269] But the court, with astounding omniscience, found that what all of the Commissioners were collectively thinking when entirely ignoring the issue of gentrification was that "the pressures of gentrification are inevitable" but could be mitigated through measures that did nothing to protect the aggrieved parties in this case.[270] In other words, to promote D.C.'s express policy objectives, the

264. *Cole*, 210 A.3d at 762, n.12.

265. D.C. CODE § 2-510(3)(A), (C), (E) (2021).

266. *Cole*, 210 A.3d at 762–63.

267. D.C. Mun. Regs. tit. 10-A, § 2408.3 (2021).

268. D.C. OFF. OF PLAN., *supra* note 3, at 5. The plan also notes "concerns relating to the affordability of new housing developments, which has become increasingly problematic for a large portion of the population." *Id.* at 13. It then states, "To respond to this situation and to minimize the negative economic, social, and environmental consequences that are likely to result from these issues, District agencies must work to identify private and public sector initiatives, partnerships, and investments to increase the supply and quality of affordable housing across the District." *Id.*

269. D.C. Mun. Regs. tit. 10-A, § 509.1 (2021).

270. *Cole*, 210 A.3d at 762–63 ("The Commission's references . . . enable us to discern the agency's path: a recognition that the pressures of gentrification are inevitable, but can be mitigated through inclusionary zoning and through the types of programs discussed in the Benning Road Plan . . . ." (footnote omitted)). *See generally* CHAPPLE & LOUKAITOU-SIDERIS, *supra* note 80, at 40; Ryan Cohen, *Shelter-in-Place: Reducing Displacement and Increasing Inclusion in Gentrifying Neighborhoods*, 13 HARV. L. & POL'Y REV. 273, 307 (2018) ("Contrary to common belief that little can be done to halt gentrification or its effects while advancing development and economic growth, cities around the country have proposed and implemented a number of laws and policies to do just that."). It is not clear what "types of programs discussed in the Benning Road Plan" the court is referring to because none applied to accomplish the stated objective in this case.

indirect displacement in this case both should and could have been avoided; it was not inevitable.

In applying its highly deferential standard, the court abdicated its judicial duty, denied Ms. Cole a meaningful opportunity to be heard, and allowed a vulnerable community to suffer irreparable harm. These impacts could have been avoided by simply applying the existing legal standards more rigorously and recognizing that deference is the result of a legal test, not a foregone conclusion.[271] Instead, the court's highly deferential standard of review legitimated the Commission's biases and denied Ms. Cole a meaningful opportunity to be heard on the merits.

3. Disproportionate Standards

> The [developer] notes my foibles at the hearing in contemplating jargon and trying to understand the nuance in land use language, but despite these hurdles my neighbors and I tried to represent as best we could.
> —Sharon Cole[272]

On appeal from an administrative decision, arguments not raised before the administrative tribunal are generally waived.[273] When a court unduly defers to a biased administrative decision, however, it can erroneously determine that a litigant waived certain arguments simply because the administrative tribunal misunderstood or failed to acknowledge them. That is precisely what happened in Ms. Cole's case. Ms. Cole raised several legitimate arguments about land value destabilization, gentrification, and indirect displacement at the hearing, but the Commission ignored those arguments. Then on appeal, the court did too. This issue is pertinent because it enables a single unelected governmental body to control the entire policymaking and adjudicatory process, denying litigants' rights to a meaningful opportunity to be heard by an impartial tribunal. Moreover, on a more basic level, it shows how the legal system can discourage access to justice for households facing indirect displacement through disproportionate standards.

Despite how transparent Ms. Cole was about her concerns before the Commission, the court somehow concluded that she did not preserve her arguments for review.[274] Ms. Cole "did not raise before the Commission the issues she now raises relating to gentrification, land value destabilization, and displacement," the court incorrectly admonished.[275] It is unclear why the court chose to

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271. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997) (an agency's interpretation of its own regulation is given controlling weight "*unless* 'plainly erroneous or *inconsistent with the regulation*'" (emphasis added) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989))).

272. Reply in Lieu of a Reply Brief, *supra* note 241.

273. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 143 (1967) ("[E]ven constitutional objections may be waived by a failure to raise them at a proper time, but an effective waiver must . . . be one of a 'known right or privilege.'" (footnote omitted) (citations omitted) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938))).

274. *Cole*, 210 A.3d at 761.

275. *Id.* (noting that "the issues of 'gentrification' in the community" where the proposed PUD was located and "the associated 'displacement of low-income residents' were raised by" another opponent on the record). Additionally, "where the Comprehensive Plan specifically addresses certain topics, the

add insult to injury because it claimed to overlook Ms. Cole's purported failure,[276] but she, in fact, did raise these concerns before the Commission. As a reminder, Ms. Cole testified before the Commission:

> MS. COLE: . . . . My name is Sharon Cole and I live at [the building next door], one of the insignificant, inornate structures that are existing. . . . This is a community and our homes. Some of us have been here for 15 years or more. We've raised children here. . . . Where will we go? There is no housing available for low-income residents. . . . We would also like to be a part of the new Washington, D.C. Is Washington, D.C. only for the rich?
>
> . . . .
>
> . . . Do you know, every year we give a community barbeque picnic for the children for back to school . . .? We do a lot of things and take care of each other. . . . [E]verything has become a high-rise apartment that is so unaffordable to the people that have worked here and lived here . . . .[277]

Several other neighbors reiterated the same objection in the petitions Ms. Cole collected and presented to the Commission, explaining, for instance, "I have lived here for 16 years. I am now disabled and unabled [sic] to rent anywhere else because I only get $10,000 a year, and for 16 years have not been given a section 8 certificate."[278] All of these objections plainly comport with our modern understanding of indirect displacement caused by zoning-induced gentrification, yet for some undisclosed reason, the court found that it was not enough to preserve the argument.

The court repeatedly faulted Ms. Cole for this, but the fault was its own. The transcript and recording show that Ms. Cole preserved these arguments by raising them before the Commission in plain English, yet the court went out of its way to criticize the quality of her self-advocacy. Upholding what it politely called "a decision of less than ideal clarity" based on its finding that "the [Commission's] path may reasonably be discerned" from a vague footnote, the court held Ms. Cole to a markedly different standard.[279] In doing so, the court invalidated and erased Ms. Cole's primary objections.

For example, the court remarked that Ms. Cole's "comments were limited" at the Commission's hearing but declined to acknowledge by whom.[280] After Ms.

Commission 'must appropriately address those topics when deciding whether a PUD is consistent with the Comprehensive Plan and whether a PUD would have adverse effects'" and the Comprehensive Plan addresses all three of these issues. *Id*. at 764.

276. Another opponent on the record adequately preserved these arguments, so the court reached these issues despite Ms. Cole's purported failure. *Id*. at 761.

277. Public Hearing, *supra* note 1, at 79–81.

278. Letters in Opposition, *supra* note 126.

279. *Cole*, 210 A.3d at 761–62.

280. *Compare id*. at 759 ("During the September 29, 2016, public hearing, petitioner Cole's comments were limited."), *with* Public Hearing, *supra* note 1, at 86–89 (demonstrating that the Commission directed Ms. Cole to "have a conversation" with the developer after the hearing to "get all the information and get it correctly").

Cole recalled being "intimidat[ed] with the Commissioners sitting above [her] and all the high powered lawyers" during the hearing,[281] the court mocked her language and dissected her testimony with exacting specificity that erased all intended meaning, noting for instance, that she "complained that traffic in the neighborhood was already 'very heavy'" and "sa[id] that the height [was] 'a lot.'"[282] What the court did not quote was the thrust of Ms. Cole's valid objections, a choice that created rhetorical symmetry with the court's characterization of her important arguments as trivial "complaints" but conveyed a fundamental misunderstanding of the material facts.[283]

Stylistically fashioned to mock Ms. Cole, the opinion reveals the court's own lack of awareness. For instance, the court wrote:

> In her brief to this court, [Ms. Cole] no longer asserts that her building will be demolished (apparently satisfied by the assurance from the applicant's counsel, acknowledged by the Commission, that the PUD "will not displace any residential uses"). However, petitioner has *expanded her objections* to the PUD and *now* argues that the Commission's action was faulty in several respects.[284]

Contrary to these characterizations, Ms. Cole was far from satisfied that the PUD would not cause displacement, her brief did not "expand" her objections but merely reiterated them, and her objections consistently centered on indirect displacement. The court's condescending and misleading characterization of her argument further demonstrates the dangers of bias, deference, and waiver in the context of indirect displacement caused by zoning-induced gentrification. It suggests that despite Ms. Cole's extraordinary efforts to represent herself in this process, the court's primary concern was not to afford both parties a meaningful opportunity to be heard. The notion that Ms. Cole had "apparently" given up on the displacement claim or waived this core objection, though ostensibly not the reason for the adverse outcome, validated the Commission's prejudicial interpretation of Ms. Cole's position while subordinating her own well-informed perspective.

It is unclear what else, if anything, Ms. Cole could have possibly done to alert the legal system to the truth of the matter. The developer and the Commission, by contrast, got away with ignoring it. For example, several neighbors argued that the sudden installation of costly retail establishments and a luxury condominium would impose additional indirect displacement pressures on the existing community.[285] Studies support the notion that the costliness of the PUD's commercial

281. Req. for Reh'g, *supra* note 65.

282. *Cole*, 210 A.3d at 759.

283. *See, e.g.*, *id.*; *see also* Req. for Reh'g, *supra* note 65 ("Besides getting some [of] the facts wrong as shown above, the Panel also inadvertently sets a new standard for what can be considered a benefit without knowing or understanding all the facts.").

284. *Cole*, 210 A.3d at 759 (emphasis added).

285. *See id.* at 766 n.18.

offerings would have been highly material to the Commission's assessment of whether it would cause indirect displacement through zoning-induced gentrification, but the court forgave what the law did not.[286] Even though both the spirit and the language of the regulations required the Commission to make findings on this material contested issue, the court called no foul and instead picked up the Commission's slack and redirected blame toward Ms. Cole.[287]

IV. BRIDGING THE GAP BETWEEN LAW AND PRACTICE

This Part contextualizes Ms. Cole's case within due process principles to show how Ms. Cole's right to a meaningful opportunity to be heard was violated. First, it discusses the private interests at stake for households indirectly displaced by zoning-induced gentrification. Second, it elaborates on the risk of erroneous deprivation and practical barriers that exacerbate that risk in this context. Finally, it explains that the government's interest is relatively minor when balanced against the first and second factors.

A. PRIVATE INTEREST

> Where will we go? There is no housing available for low-income residents.
> —Sharon Cole[288]

> Where will they go?. . ./I don't hopefully know.
> —The Lorax in *The Lorax* by Dr. Seuss[289]

The access-to-justice movement, displacement literature, the Zoning Commission, and the courts all already recognize the gravity of the private interest at stake when a household is displaced. The Supreme Court has found that people have a significant property interest in "the right to continued residence in their homes."[290] In the context of direct displacement, the D.C. Court of Appeals itself recognizes a presumption that a tenant suffers harm, explaining that this "is consistent with reason and common sense" because "in most cases, a tenant who has been denied access to his home and to his belongings for a significant period of time . . . is likely to have suffered, at least, inconvenience, discomfort, and some measure of mental suffering."[291]

These and other consequences are necessarily at stake with indirect displacement caused by gentrification unless, as some scholars suggest, gentrification

286. *See id.* (reasoning that it was "required to make findings only on *material* contested issues" (emphasis added)); *see also* Rayle, *supra* note 9, at 539 ("[R]esidents experience displacement pressure when property values rise, old neighbors move away, long-time businesses are replaced by new ones oriented toward a different clientele, and public services become less supportive.").

287. *See Cole*, 210 A.3d at 766 n.18 (dispelling the Commission's burden by suggesting that the issue Ms. Cole raised was not material).

288. Public Hearing, *supra* note 1, at 80 (statement of Sharon Cole).

289. SEUSS, *supra* note 67, at 43.

290. Greene v. Lindsey, 456 U.S. 444, 451 (1982).

291. Henson v. Prue, 810 A.2d 912, 915 (D.C. 2002).

does not cause displacement.[292] But Ms. Cole's case shows that zoning-induced gentrification can cause indirect displacement. Moreover, there is no way to assess the merits of the private interest in avoiding displacement without access to justice. Regardless of whether displacement would in fact result, one's interest in the ability to remain in their home is enough to invoke due process protections.[293]

When applying the *Mathews v. Eldridge* balancing test, however, the gravity of the private interest in remaining in one's home is significant.[294] No matter what form it takes, displacement has profound consequences.[295] The United Nations has recognized housing as a fundamental international human right.[296] Despite its recognition as one of the three most basic needs for human life, "shelter is negotiated as a commodity in the marketplace."[297] When displacement occurs, those with less financial bargaining power are often forced out of one of their core human needs by those with more financial bargaining power.

In many parts of the United States, affordable housing is widely unavailable, leaving displaced residents with few, if any, alternatives to their present homes.[298] Low-income areas, which are often the first target for development,[299] "contain[] many households with few other choices," and those households "have often been displaced through rent increases and have been unable to secure another local dwelling."[300] In addition to the many shattering effects homelessness has on adults, "[h]omeless children are 50% more likely to die before their first birthday than are housed low-income children," and "[t]he average family stays in the [homeless] shelter system for about eleven months."[301] These stakes overwhelmingly support finding a profound private interest under the *Mathews* balancing test.[302] Thus, the Supreme Court has stated that the "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance that weighs heavily in the *Mathews* balance."[303]

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292. *See, e.g.*, Byrne, *supra* note 15, at 405–06.

293. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 266 (1970) (holding that Due Process requires an evidentiary hearing certain government welfare benefits can be terminated).

294. Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976).

295. *See* Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1332–33 (1966); Jeffrey M. Mandell, Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J.L. REFORM 554, 558 (1976). Although there is no right to counsel in civil cases as a matter of federal constitutional law, some jurisdictions have adopted a right to counsel in eviction and deportation proceedings. *See, e.g.*, Parkin, *supra* note 50, at 1137 (discussing examples of jurisdictions that have adopted a right to counsel in deportation and eviction proceedings, such as New York).

296. Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMPAR. L. REV. 119, 120 (1997).

297. Scherer, *supra* note 30, at 559.

298. *Id.*

299. *See supra* Section I.B.

300. Atkinson, *supra* note 57, at 2345.

301. Scherer, *supra* note 26, at 709.

302. *See* Mathews v. Eldridge, 424 U.S. 319, 332–35 (1976).

303. United States v. James Daniel Good Real Prop., 510 U.S. 43, 44 (1993) (citation omitted).

B. RISK OF ERRONEOUS DEPRIVATION

> [P]overty makes participating difficult . . . .
> —Sharon Cole[304]

Next, in addition to the dangerous combination of bias, deference, and waiver, the risk of erroneous deprivation is higher due to the practical burdens the legal process imposes on households facing indirect displacement due to zoning-induced gentrification. The Supreme Court has recognized that the disadvantage a private party faces relative to the government and the complexity of the legal and administrative proceedings can further aggravate the risk of erroneous deprivation.[305] In the context of the legal process for households facing indirect displacement caused by zoning-induced gentrification, these issues are pervasive.

As previously noted, most litigants facing indirect displacement caused by zoning-induced gentrification are self-represented because there is generally no right to counsel in the context of civil and administrative proceedings, and the issue itself is often closely connected with poverty.[306] Self-represented litigants prevail far less often than represented litigants in all types of cases, even with piecemeal legal assistance,[307] and some scholars attribute this to the "complex interplay of procedural and substantive rights."[308] Access-to-justice literature on direct displacement has already noted that displacement proceedings are often complex and opposing counsel often has a relative advantage.[309] Given the variety of technical, legal, and procedural rules involved, Ms. Cole's case shows that this is perhaps even more true of the legal proceedings for indirect displacement caused by zoning-induced gentrification.

For those facing indirect displacement, defending oneself in the legal process of zoning-induced gentrification can be grueling, and yet, exhaustion and waiver requirements command it. Participating in the legal process can be a cumbersome commitment even with a lawyer, but without a lawyer, it is even more onerous. In a recent study about access to justice, one pro se litigant "acknowledged honestly

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304. Reply in Lieu of a Reply Brief, *supra* note 241.

305. *See* Turner v. Rogers, 564 U.S. 431, 447–49 (2011) (explaining that the complexity of the proceedings and relative disadvantage of parties are relevant considerations under the risk of erroneous deprivation prong).

306. *See id* at 448–49.; Scherer, *supra* note 30, at 559–60; Janku, *supra* note 103, at 12 (surveying respondents, more than half of whom were below the poverty line, and finding that "[t]he most common reason for not using an attorney, reported by 48 percent of respondents, was that it would be too expensive").

307. Greiner et al., *supra* note 49, at 958–59 (finding that unbundled legal assistance is less effective than representation by counsel in eviction proceedings); Levy, *supra* note 49; Steinberg, *supra* note 25 ("It is well-documented that unrepresented litigants secure far fewer victories in court than their represented counterparts. Regardless of the subject matter of the litigation, pro se parties routinely flunk basic procedural entrance exams, which they must pass in order to reach a judge who will hear the merits of their case.").

308. Scherer, *supra* note 30, at 571 n.58.

309. *See generally* Kim, *supra* note 49 (describing how pro se civil litigants' "right to be heard" may be meaningless because they lack skills and knowledge necessary for litigation).

that 'doing things yourself is just another burden of being poor.'"[310] Likewise, Ms. Cole emphasized that "poverty makes participating difficult."[311]

> [W]hat if I wasn't able to get childcare the night of the hearing? What if I was sick? What if my neighbors couldn't get there? Its [sic] impossible to think the [Commission] believes that any potential affects [sic] not spoken about or testified to can be ignored, no matter how obvious and basic.[312]

In this case, taking part in the legal process consumed four years of Ms. Cole's life. As a disabled grandmother working six days a week, Ms. Cole faced health problems, work commitments, and deaths in the family while struggling to keep up with the legal requirements to defend herself against displacement.[313] All of these issues are corollaries with poverty, meaning that they are common practical disadvantages that the households most susceptible to indirect displacement caused by zoning-induced gentrification must face while struggling to participate in the legal process alone.[314] Not only was Ms. Cole responsible for learning and applying the rules of civil and administrative procedure as her own advocate amidst these struggles, but she was also responsible for learning highly technical and complex areas of substantive law, including zoning, property, and constitutional law, without legal assistance.[315]

Yet as is often the case, the court held Ms. Cole and her initial coplaintiffs to the same procedural standards as represented parties. Ms. Cole was initially joined by two other pro se litigants, but the court dismissed those parties *sua sponte* for failure to file briefs in a timely manner.[316] The struggles of poverty themselves, which are common among those facing indirect displacement caused by zoning-induced gentrification, can impose practical barriers to participation that complex procedural and substantive laws exacerbate.[317]

Even without the relative disadvantage caused by the burdens of poverty, however, the complexity of the procedural and substantive rules in the context of indirect displacement caused by zoning-induced gentrification can be overwhelming.

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310. Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 499 (2010).

311. Reply in Lieu of a Reply Brief, *supra* note 241.

312. Req. for Reh'g, *supra* note 65.

313. Motion for a Reasonably Short Extension of Time to File Opening Brief, Cole v. D.C. Zoning Comm'n, 210 A.3d 753 (D.C. 2019) (No. 17-AA-0360); Reply to Intervenor's Opposition, *supra* note 2; Public Hearing, *supra* note 1, at 81; Motion to Postpone Oral Argument Scheduled for December 20, 2018, *Cole*, 210 A.3d 753 (No. 17-AA-0360); Motion for an Extension of Time to File Brief, *Cole*, 210 A.3d 753 (No. 17-AA-0360).

314. *See* REEVES ET AL., *supra* note 20.

315. Affordable legal services are among those establishments likely to be affected by indirect displacement. *Cf.* Rayle, *supra* note 9, at 538–40 ("[R]esidents experience displacement pressure when property values rise, old neighbors move away, long-time businesses are replaced by new ones oriented toward a different clientele, and public services become less supportive . . . .").

316. *See* Order, *supra* note 156.

317. *See generally* REEVES ET AL., *supra* note 20 (discussing how poverty is multidimensional and makes the disadvantages multidimensional as well).

In this case, even ascertaining which of many different procedural rules applied was demanding and unclear, and a mistake would have been outcome-determinative. After the developer submitted its application and before the public hearing, the Commission promulgated new regulations.[318] Thus, in the formal notice of public hearing, a Commissioner announced a transition:

> Because the case was set down for hearing prior to the September 6, 2016 effective date of the replacement version of Title 11 ("2016 Regulations")[,] all of the substantive requirement[s] of the Zoning Regulations in effect as of September 5, 2016 ("1958 Regulations") will continue to apply to this application and any construction authorized by the Commission. However, because the hearing has been scheduled after the effective date, all applicable procedural requirements of the 1958 Regulations will apply to this application until September 5, 2016, after which the applicable procedural rules set forth in the 2016 Regulations will apply.[319]

As a pro se litigant, Ms. Cole was responsible for knowing, understanding, and seamlessly responding to this complex normative decision.[320] These expectations are aspirational for even the average law student, but they are inordinate for people who are already struggling with the pressures of poverty and displacement. Still, only after the game was over and the score was counted did the court blow the whistle in this case: Ms. Cole's misunderstanding about the rules of the game precluded consideration of several of her arguments on the merits.[321]

The law exists to protect, not to oppress. The question of whether the government should be able to get away with depriving people of their property and liberty without compensation in some cases (and if so, which ones) is perhaps debatable.[322] But what is beyond reasonable debate is that if the government does

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318. Notice of Public Hearing at 1, 777 17th Street, LLC, 64 D.C. Reg. 2640 (D.C. Zoning Comm'n Mar. 10, 2017) (No. 15-31).

319. *Id.*; *see also* Regular Public Meeting at 52, 777 17th Street, LLC, 64 D.C. Reg. 2640 (No. 15-31).

320. *See* Cole v. D.C. Zoning Comm'n, 210 A.3d 753, 763–64 (D.C. 2019) (explaining that the court would "not reach the issue of whether [other agencies'] reports were required in the wake of the 2016 Zoning Regulations").

321. "No one in attendance at the public hearing, including petitioner Cole, objected when the Commission Chair announced that the Commission would proceed under the revised procedural rules" after September 5, 2016. *Id.* at 764. "We therefore conclude that petitioner waived [several of her arguments based on the alternative regulations]." *Id.* Importantly, this also relies on the assumption that the question of whether the Commission needed to consider impact studies when approving a PUD was procedural rather than substantive. *See id.*

322. Some have argued that "increas[ing] . . . the number of affluent and well-educated residents is plainly good for cities." Byrne, *supra* note 15, at 405–06. These scholars find that the "most negative effect of gentrification, the reduction in affordable housing, results primarily not from gentrification itself, but from the persistent failure of government to produce or secure affordable housing more generally." *Id.* at 406.

deprive individuals of their property and liberty, it is not entitled to strip away their voices too.[323]

C. GOVERNMENT INTEREST

> The cost of liberty is less than the price of repression.
> —W.E.B. DuBois[324]

Finally, *Mathews* requires an analysis of "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[325] Accordingly, the government's interest in avoiding additional procedural safeguards varies depending on the nature of those safeguards. However, this Note does not advocate for the imposition of new procedural requirements. For the sake of evaluating the government's interest, this Section assumes that proposed procedural interventions would aim to correct the main deficiencies this Note identifies, such as by applying existing legal standards such as deference more rigorously. It can be said that doing so is necessary to supply the minimum due process threshold of a hearing by an impartial decisionmaker because the administrative tribunal serves as both the accused and the adjudicator in this context.[326]

Uniquely, such responses would not require the government to make any specific policy decisions or expenditures. Instead, these procedural safeguards would stem from the judiciary and the legal community. Such responses would occur

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323. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."). Only in rare and extreme circumstances may a government even allow private individuals to deprive one another of property without a right to a meaningful pre-deprivation hearing. *See* Fuentes v. Shevin, 407 U.S. 67, 91–93 (1972). The Supreme Court has "allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of a national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food." *Id.* at 91–92 (footnotes omitted). Absent these critical extenuating circumstances, however, people facing the deprivation of property are entitled to due process protections. *See id.* at 92–93 (invalidating two state statues that allowed for pre-judgment replevin of chattels, emphasizing that the statutes "allow[ed] summary seizure of a person's possessions when no more than private gain [was] directly at stake" and private individuals could use state authority to legitimate their deprivation of property while "[t]he State acts largely in the dark"); *see also id.* at 87 (explaining that the "right to be heard does not depend upon an advance showing that one will surely prevail at the hearing," meaning the issue of whether displacement would, in fact, result has no significance to the applicability of due process protections).

324. W. E. B. DuBois, *Evolution of the Race Problem*, *in* PROCEEDINGS OF THE NATIONAL NEGRO CONFERENCE 142, 155 (1909).

325. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

326. Although "[p]ersonal bias or prejudice 'alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause,'" there "are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 877 (2009) (first quoting Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986); and then quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). The Court has held that there is impermissible bias when the same person serves as both "accuser" and "adjudicator" in a case, so it follows that the same should apply when the same entity serves as both the accused and adjudicator. *See* Williams v. Pennsylvania, 136 S. Ct. 1899, 1903 (2016).

within the existing procedural framework and would not require the government to implement any new processes such as additional hearings.[327] The only resulting cost for the government would be the incidental effect of courts conducting more extensive inquiries, including added delay, litigation costs, and administrative inconvenience in the PUD process.

Due to these incidental burdens, the government would likely emphasize its interest in efficiency because developers already shy away from the PUD process due to the risk of delay from appeals. Adding more procedural protections, it follows, may chip away at what little incentive remains for private developers to participate in this program, thereby interfering with the efficacy of the government's PUD program and the underlying policies that its program advances.[328] However, it is unclear whether the rigor of the legal standards courts apply on appeal would have any bearing on developers' caution toward the PUD process beyond that which stems from the appeal itself.

Moreover, when real property is the private interest at stake, the Court has required the government to show exigent circumstances supporting a finding that the existing, less restrictive procedures are "justified by a pressing need for prompt action."[329] The government may have an interest in advancing zoning-induced gentrification policies without delay,[330] especially if it could show that additional delays would be likely to cause projects to fall through entirely. However, the prospective interest in receiving a benefit sooner pales in comparison with households' vested interests in remaining in their homes. Additionally, the government has no need to expedite the PUD approval process in contested cases because PUD approval is expressly conditioned on a determination that the PUD offers "a commendable number or quality of public benefits."[331] The underlying policies of the PUD program do not support approving contested PUDs

327. *Cf.* City of Los Angeles v. David, 538 U.S. 715, 718–19 (2003) (reversing the Ninth Circuit, which had held in favor of a procedural intervention that "presumably would require the city to schedule annually 1,000 or more hearings, instead of 50 hearings, within a 48-hour (or 5-day) time limit").

328. This is particularly so because determinations like the "public benefit" are subjective policy choices that are inherent in the PUD scheme itself. *See* Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1143–44 (1984) ("Procedural controls limit government discretion. Thus, if a perfectly valid adjudicative action is based on grounds that are difficult or counterproductive to articulate, procedural controls may render the action unsupportable. If the difficulty with articulation is inherent in the administrative scheme as a whole, rather than being attributable to certain decisional grounds, the imposition of procedural controls will not only preclude certain actions, but will discourage the entire program.").

329. United States v. James Daniel Good Real Prop., 510 U.S. 43, 56, 62 (1993) ("Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.").

330. It would be economically efficient for PUDs to move forward without the delay of litigation, which is somewhat relevant to the government's interest in expediting the PUD process without holdups. However, litigation delays already exist, and it is not clear whether strictly applying legal standards such as deference would greatly exaggerate the already long appeal process. *See* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1649, 1656 (2018) ("Because these 'rich-biased' policies are ubiquitous, efficient policymaking places a heavy thumb on the scale in favor of the rich.").

331. D.C. Mun. Regs. tit. 11-X, § 300.1(b) (2021).

faster when delays arise from the issue of whether this prerequisite has been satisfied.

Furthermore, this is a context in which the involvement of private actors backfires rather than absolving the government of responsibility. In *Fuentes v. Shevin*, a case involving repossession of personal property, the Supreme Court found that "state intervention in a private dispute hardly compares" to the substantial government interests the Court has found persuasive in the past, such as public health and war efforts.[332] Like in *Fuentes*, where "no more than private gain [was] directly at stake," no more than private gain is directly at stake in cases in which the government supports a private developer's PUD and it is contested by neighboring private citizens.[333] If such an interest was not enough to overcome the private interest in personal property in *Fuentes*, it certainly is not enough to overcome the neighbors' private interest in real property in this case. Thus, the government's interest in avoiding delay of a private developer's project is uncompelling.

Another possible concern is that creating too many procedural protections in this context would expose the government to cases in which causation is too attenuated to fairly attribute back to the government, thereby heightening its interest in avoiding the incremental costs of a flood of litigation.[334] Importantly, however, typical protections against frivolous claims remain available,[335] so any potential "flood" would primarily consist of gravely important claims with demonstrable viability. Additionally, procedural interventions may be as minimal as applying the existing legal standards more rigorously, and it is not clear that doing so would have any effect on the number of claims brought. It may create a greater incentive to bring a claim by leveling the playing field, but the entire community, including those facing legitimate harm, should not lose procedural protections due to the potential for abuse by some. Such a claim is better suited for the

332. Fuentes v. Shevin, 407 U.S. 67, 93 (1972).

333. *Id.* at 92.

334. Consider the implications of that argument. In the context of indirect displacement caused by zoning-induced gentrification, the government can manipulate the extent of attenuation between cause and effect through its own planning and implementation. In fact, it already has an incentive to do so to avoid the direct taking of private property, hence the commissioners' focus on ensuring there was no eminent domain in this case. But, such as in this case, repurposing existing privately owned property may be an explicit part of the government's development plans. To effectuate such plans without eminent domain, the government instead needs to drive out the existing owners indirectly over time, and it can do so through zoning-induced gentrification. This attenuation between cause and effect is precisely what characterizes the result as indirect displacement rather than direct displacement through eminent domain. So, if this argument prevails, then the government can use this attenuation between cause and effect (which it has full control over) to escape not only just compensation under the Fifth Amendment but also the implementation of effective procedural safeguards for indirectly displaced households seeking to avail themselves of protections that the jurisdiction's development policies provide.

335. *See, e.g.*, D.C. CT. APP. R. 13(a) ("The court, *sua sponte* or upon motion of the appellee, with or without notice, may dismiss an appeal for failure to comply with a rule of this court *or where otherwise warranted*." (emphasis added)).

substantive law, not procedural protections, unless the government could show a strong likelihood that this possibility would prove costly.

Even then, costs alone are unlikely to overcome the other two factors. The Supreme Court has recognized that courts must weigh the government's interest in conserving fiscal and administrative resources as a factor, but "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."[336] Applying deference more rigorously is not unheard of; in fact, some jurisdictions have already abolished deference entirely, so there is reason to doubt that such a change would be prohibitively costly for the government.[337]

Ultimately, these potential government interests are not enough to overcome the magnitude of the first and second factors. Households facing indirect displacement caused by zoning-induced gentrification are constitutionally entitled to a more rigorous application of legal standards such as deference, because without such application, these standards create a profound risk of prejudice in favor of the government and against individual rights.

V. RESEARCH ABOUT THE LEGAL PROCESS OF INDIRECT DISPLACEMENT CAUSED BY ZONING-INDUCED GENTRIFICATION AS AN ACCESS-TO-JUSTICE TOOL

> Education . . . means emancipation. It means light and liberty. It means the uplifting of the soul of man into the glorious light of truth, the light only by which men can be free.
> —Frederick Douglass[338]

Particularly given the reality that indirect displacement caused by zoning-induced gentrification is rarely publicized or popularized and predominately affects minorities in the United States today, an important first step to reducing prejudice in the legal process is education and awareness.[339] While additional policy efforts such as a right to counsel may also be valuable,[340] the most egregious

336. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

337. *See, e.g.*, Daniel M. Ortner, *The End of Deference: The States That Have Rejected Deference*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 24, 2020), https://www.yalejreg.com/nc/the-end-of-deference-the-states-that-have-rejected-deference-by-daniel-m-ortner/ [https://perma.cc/HJH4-4G34] ("At least seven state supreme courts have issued decisions that decisively reject *Chevron* or *Auer* like deference. And two more states have rejected deference via legislation or referendum.").

338. Frederick Douglass, Blessings of Liberty and Education (Sept. 3, 1894) (transcript available at https://teachingamericanhistory.org/library/document/blessings-of-liberty-and-education/ [https://perma.cc/F2LE-MT7F]).

339. *Cf.* Loewen, *supra* note 38 (explaining that American culture, such as Hollywood movies, have focused on racism of the deep south and have contributed the public's low awareness of northern, racially-exclusive "sundown towns").

340. Studies have shown that the mere presence of a lawyer is more likely to result in rigorous application of the applicable law, suggesting that "due process happens when lawyers are present to enforce it." Lisa Foster, *Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts*, 33 GA. ST. U. L. REV. 695, 713 (2017); *see also id.* ("The more significant issue is Professor Sandefur's conclusion that the presence of a lawyer in a civil courtroom causes judges to follow the rules.").

issue in this case was not Ms. Cole's self-representation strategy but the legal system's lack of receptiveness both in form and in effect. It is critical to highlight that regardless of whether policymakers decide to adopt additional access-to-justice policy interventions, mere research about access-to-justice barriers in the legal process of zoning-induced gentrification would be a key step toward protecting indirectly displaced households' rights.

The primary reason mere research and awareness would be valuable is to prevent or detect biases, such as the court's and the Commission's biases in this case. Bias suppresses information. When a court overlooks key details about a case based on false assumptions, its opinion conveys an inaccurate view of the case. This has a profound ripple effect on research, litigants' view of the legal process, and future indirectly displaced households.[341] When households decide not to participate in the process due to access-to-justice barriers such as these, they forego the opportunity to prevent the harm or even put the issue on the legal system's radar. This perpetuates indirect displacement, distorts understanding about the problem, and suppresses key information necessary to stop it.[342]

Second, researching access-to-justice issues involved with the process of indirect displacement caused by zoning-induced gentrification would serve an evidentiary function and facilitate multidisciplinary efforts to mitigate process defects. As discussed in Part IV, the court dismissed Ms. Cole's due process concern without meaningfully addressing it. Studies have found that what the public perceives to be due process issues are "key to creating and sustaining trust and confidence in the courts."[343] A pro se litigant's "experience during the process" affects "willingness to accept the outcome," "the feeling that 'justice was done,'" and "opinions that those involved in the [legal] system form about judges, lawyers, the courts, and the legal system."[344] As access-to-justice scholars have recognized in the past, pro se litigants' experiences can convey critical lessons about the American legal system and how the principles and theories behind our legal and procedural rules translate into practice.[345] Research about the local legal processes available to households facing indirect displacement caused by zoning-induced gentrification would provide key information about access-to-justice issues, enabling both policymakers and nongovernmental entities, such as legal services organizations, to tailor their interventions to the circumstances.

In addition, contextually specific research about instances of indirect displacement caused by zoning-induced gentrification would serve an evidentiary function for gentrification and displacement scholarship. Scholars around the world are in search of more information about the qualitative experiences of gentrification and

341. *See, e.g.*, DeVerteuil, *supra* note 7, at 1563–64; Zimerman & Tyler, *supra* note 310, at 474; Stephen L. Pepper, *Access to What?*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 269, 269 (1999).

342. *See, e.g.*, DeVerteuil, *supra* note 7, at 1563–64.

343. Zimerman & Tyler, *supra* note 310, at 485.

344. *Id.* at 480.

345. *See, e.g.*, *id.*

displacement.[346] "[V]ery little research has been done on the residents' experiences of living under the threat of displacement, or on displacement experiences in general," and "case studies on the residents' experiences of displacement" are necessary to provide critical insight about the complex, varying process of indirect displacement caused by gentrification.[347] Research about access to justice in the context of indirect displacement caused by zoning-induced gentrification is uniquely equipped to fill this void by providing information about the process, signaling potential sources of information before displacement happens, and providing precisely the type of case studies that displacement and gentrification scholars are seeking.

CONCLUSION

In sum, Ms. Cole's case reveals that defects in the legal process may facilitate and legitimate indirect displacement through zoning-induced gentrification. Access-to-justice barriers such as biases, undue deference, and practical burdens denied Ms. Cole a meaningful opportunity to be heard and enabled unelected government agencies to exercise unchecked power over her individual property and liberty interests. To avoid further denial of due process rights for indirectly displaced households in such circumstances, the first step is for the legal community to conduct studies such as this one, analyzing specific local community experiences with the process. Such studies would promote awareness, mitigate the impact of bias, facilitate access-to-justice interventions among policymakers and nongovernmental organizations, and foster a more accurate understanding of the relationship between gentrification and displacement. Without such interventions, the government can continue to indirectly displace households like Ms. Cole's through zoning-induced gentrification without protecting the due process right to a meaningful opportunity to be heard.

346. *See, e.g.*, Rayle, *supra* note 9, at 540 (suggesting that further qualitative research would help advance our understanding of indirect displacement, and asserting that "[a] broader conceptualization of displacement likely helps explain why community activism against gentrification is often strong even when evidence of physical displacement is weak").

347. BAHAR SAKIZLIOĞLU, A COMPARATIVE LOOK AT RESIDENTS' DISPLACEMENT EXPERIENCES: THE CASES OF AMSTERDAM AND ISTANBUL 38–39 (2014).