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In Defense of Den-City.  
*Autonomy, Right to the City, and Local  
Democratic Failures*

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**Abstract**

This paper analyzes the role of local democratic processes in exacerbating urban housing crises. It proposes the concept of a "right to the city" as a critical framework for addressing housing shortages and ensuring access to urban areas and the benefits of density. We ground this right into a concern for autonomy, emphasizing that self-authorship requires access to the opportunities provided by dense urban environments. Through an analysis of California's housing debates, the paper highlights the conflict between local resistance to densification and the broader need for housing availability. Consequently, local communities' autonomy should be put in balance with the individuals' autonomy. This balance seeks to reconcile the property and voting rights of residents with the needs of non-residents, whose interests are usually disregarded. The paper concludes with recommendations for state-level policies that support urban density and counter exclusionary practices in local governance.

# 1 You can make it anywhere... but here!<sup>1</sup>

In times of persisting housing crises, proponents of densification efforts in urban areas have found their perfect nemesis in NIMBY ("Not-In-My-Backyard") movements, gathering opponents to a variety of development and infrastructure projects, generally in urban areas. These opponents mobilize diverse reasons to justify their protests, who are frequently mocked, in return, as being egoistic concerns, conceding that development and public goods are necessary but refusing them in their neighborhood (Gillroy, 1991). Indeed, the name itself ("Not-In-*My*-Backyard") encapsulates the contradictions of a reaction that may be legitimate ("the impact of this project on me is not acceptable") but fails to be justified by the contradiction it entails ("the cause is right, but its effects should just fall upon others than myself").

However, the fact that these motivations may sometimes be insincere or overstated is no reason to discard them automatically. In many cases, such protests are valuable to local governance and the democratic process, especially when they object to projects that have important adverse social effects on certain communities (e.g., expropriating a whole neighborhood to build a highway) or involve the unequal sharing of risks within the community (e.g., building waste deposits or coal-fired power plants). Nevertheless, these movements appear less warranted in the context of a crisis characterized by a persistent housing shortage and the corresponding soaring prices, which systematically and disproportionately affect the most vulnerable<sup>2</sup>. Considering the high negative impact of restrictive land use regulations on these prices<sup>3</sup> and how so-called NIMBYs consistently oppose or limit efforts to build more housing, they can be viewed as at least preventing the emergence of much-needed supply-oriented solutions to housing crises.

The defense of NIMBY's interests is justified by the right of local govern-

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<sup>2</sup>For example, in the US, one can see the connection between rising rents and low housing stock. See Joint Center for Housing Studies of Harvard University, "America's Rental Housing 2022" online (pdf): [www.jchs.harvard.edu/americas-rental-housing-2022?s=03](http://www.jchs.harvard.edu/americas-rental-housing-2022?s=03). Meanwhile, in the European Union, the percentage of people paying at least 40 percent of their income for housing is the highest among the poorest households, see See "Housing costs a challenge to many households" (20 May 2020), online: [europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200520-1](http://europa.eu/eurostat/web/products-eurostat-news/-/DDN-20200520-1).

<sup>3</sup>See Landis and Reina (2021) and Murray and Schuetz (2019) on this topic.

ments to exercise their autonomy through land use regulation<sup>4</sup>. However, the picture is incomplete because local democratic processes are, by definition, blind to the interests of non-residents, i.e., those who would benefit from accessing dense areas and the opportunities they offer. Local self-regulation gives their interests less weight, either because they are not owners, and therefore less influential politically, or simply because they are not there *yet*, precisely because insufficient housing is built to welcome them in a high-demand area. To this should be added the fact that local politicians are naturally incentivized to minimize or even neglect the interests of these outsiders. It may then be best, if not to drop the democratic process completely, to entrust "higher" levels of democratic institutions, such as regional or national parliaments, with the task of development in dense urban areas.

Our argument, striving to avoid both forms of bypass (complete or partial), builds on the NIMBYs' claim to self-government and thus relies on the concept of autonomy. However, a consistent commitment to autonomy does not only entail self-government for *communities* but also self-authorship for the *individuals*, i.e., the capacity for individuals to make defining choices and have access to a wide range of opportunities. When it comes to housing in times of crisis, these two views of autonomy are in tension: enhancing self-government within local communities may undermine the capacity of individuals, especially the most vulnerable, to access valuable opportunities. In this paper, we balance these two competing values, showing how self-government, without counterweights, may lead to wrongful regulations. To do so, we use recent legislative actions and court decisions from the state of California, United States, to illustrate how proper consideration for a "right to the city" (Lefebvre, 1967; King, 2019) provides guidelines to balance these imperatives.

While a conception of autonomy as individual self-authorship is the foundation of our argument, the idea of an *individual* and *liberal* right to the city is its keystone. It supports the ability of individuals to access the housing market in all its forms in dense urban areas (Dagan, 2018). As such, it is a deontic claim and, following Dagan's liberal theory of property (Dagan, 2021), it has direct consequences on how property relations are structured and creates duties for institutions to guarantee it. Our article therefore con-

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<sup>4</sup>Serkin provides such a defense of the right of local communities to control zoning rules. However, his argument goes beyond self-determination and also makes the convincing point that property rights must provide some degree of stability. See Serkin (2009, 2022).

tributes to the normative investigation on the limits of property rights claims made by the NIMBYs, within the burgeoning literature in the philosophy of housing (Quigley, 2023), which as not failed to notice that "more discussion of NIMBYism is needed" (Halliday and Meyer, 2024). In particular, we focus on the tension between a right to self-governance for communities and a right to autonomy for individuals in the context of a housing crisis.

Our demonstration is centered on the five main claims below:

1. We prioritize a conception of autonomy focused on individual self-authorship, compatible but distinct from the self-government of communities (Raz, 1986).
2. From this conception of autonomy stems a "right to the city" that might be defended side-by-side with a right to housing (Wells, 2019). There are indeed compelling reasons to protect a separate right to the city, given how city allow how housing in dense areas enlarges the opportunities offered to individuals and can be beneficial to individuals (Glaeser, 2012).
3. Following Scanlon's contractualist framework (Scanlon, 2000), the assessment of competing claims must be based on their justifiability to one another. We take the example of the opposition to the construction of student housing by the University of Berkeley, which was opposed by local residents as constituting a potential nuisance, as a paradigmatic example of how the interests of non-residents are structurally neglected in the context of local democratic processes. Integrating Public Choice arguments, we show that local democratic governments tend to favor residents over non-residents based on a restrictive conception of whose interests should be considered (Tullock, 1991). Therefore, opposition to urban densification often proves to be unacceptable because it stems from specific privileged interests and harms other individuals' rights to access the housing market and dense urban areas in particular.
4. Based on these considerations, we contend that a right to the city, instead of being a *material* right, i.e., guaranteeing the direct supply of a specific good, should be viewed as a *procedural* right, protecting the interest of those who do not, and probably should not, get a voice in the local democratic process. More precisely, it creates a *duty* for

administrations as it entails that governance structures should be designed to reflect a concern for how owners and local residents leverage their influence on the political process and the alleged extent of their property rights to prevent others from accessing the housing market in dense urban areas. Recent legislative efforts in the state of California illustrate that endeavor.

5. Finally, our argument has *legal* consequences for local residents and therefore does not stop at opposing a *moral* "right to the city" to the *political* weight they claim to exert by opposing developments. Before courts of law and legislators, it should undermine the justifiability of their claim that their property rights entitle them to be protected from the impact of so-called "nuisances" such as those new student housing would produce.

## 2 Autonomy and the right to the city

### 2.1 A right to access density

Developing a view of autonomy as self-authorship (Raz, 1986) implies that a right to access housing in the densest urban areas should be defended, as it increases freedom of choice, any restriction of which should be justified. This does not entail, however, that living in dense cities is the only way to live a good life. Some individuals *want* to stay in less dense areas or rural areas for good reasons (to have more space, because they value a different lifestyle, to rely on different types of social networks, etc.). For others, cities, because they are dense, provide exposure to other backgrounds and access to many important opportunities that should not be subtracted a priori from the range of options individuals have: social networks, work opportunities, access to vital services, cultural events, emancipation from close communities and the ability to enter new ones, greater anonymity, and so on.<sup>5</sup>

Conversely, not excluding others from accessing dense cities does not require granting everybody the privilege of having a house in the center of any

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<sup>5</sup>See, for example, Chetty et al. (2016) on the effect of the exposure of children to lower-poverty neighborhoods, Chetty et al. (2022) on the impact of economic connectedness on economic mobility.

big city. This implies that a defense of a right to the city along these lines is a market-based defense of the right to the city. Indeed, one of the normative justifications of the market and property rights regime is to foster autonomy and the possibility of choosing for oneself, because markets generate a variety of opportunities (Dagan, 2018). On the "flip side," property rights should not entitle residents to prevent others from accessing cities. As a consequence, we defend that this type of right to the city is obtained through a well-functioning housing market, based on a proper understanding of what a right to the city implies for housing regulations<sup>6</sup>.

We believe this focus on individual autonomy provides a self-standing argument for the right to access density. It must be distinguished, though not separated, from the argument that density is socially beneficial overall, because of the aggregate utility it produces and because the poor greatly benefit from it (Glaeser and Saiz, 2003). Glaeser is indeed known for making the point, supported empirically, that density is generally beneficial, which led him to argue, against local communities resisting densification efforts that "community control must unfortunately be limited because local communities often fail to consider the adverse city-wide consequences of banning building" (Glaeser, 2012, 162). One of Glaeser's other recommendations was for builders to pay for the social cost of their activity in exchange for streamlined permit processes.

While we agree with the need to limit the ability of local communities to prevent densification, we also consider that opposing the seemingly self-interested reactions of NIMBYs to the public good is not the most compelling version of that argument. Additionally, while the idea of simplifying permit processes in exchange for compensation is attractive, its systematization could signify losing the informational input coming from the opposition of local communities. For all these reasons, as well as the ones laid out before, we prioritize a contractualist method that would balance legitimate but diverging claims to autonomy, i.e., that of local communities and of individuals who are denied access to density. Nevertheless, not only is it understandable that Glaeser's work does not dwell on the philosophical normative foundations of his analysis, but we suggest that his work includes both a concern for social

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<sup>6</sup>Scanlon (2018) makes such an argument, defending, on the one hand, that a private housing market is justified for reasons of autonomy and, on the other, that private property rights are not justified unless the failures of that very same market are compensated by measures of distributive justice, funded by taxes on owners, such as a universal basic income (UBI) and the provision of social housing.

justice in the broadest sense and for the autonomy of specific individuals.

Efficiency gains (i.e., scale economies or reducing complexity in communication) and aggregation economies are not sufficient to explain the bounty that dense cities have to offer, as suggested by Glaeser and Gottlieb themselves (2009). Cities are characterized, instead, by the creativity, innovation, and flow of ideas that a multitude of connections between people from different backgrounds create. For example, Bangalore is presented by Glaeser as a success of density both because the place promotes an efficient market where employers and workers match and because workers are in an environment that maximizes the scope of their choices of work. Such a competitive environment enhances both the individual autonomy of workers and their economic prospects, leading to stronger wage increases in denser areas (Glaeser, 2012, 35). For the least advantaged, this makes cities strictly better in terms of social and economic outcomes than the alternative of maintaining a rural existence (Glaeser, 2012, 70). For all other individuals, it means access to a broader spectrum of options in the present, but to be also allowed to develop new preferences (Glaeser, 2012, 122 and 127), figure out their skills discovering new views of the good life, and being generally happier as a result, not just wealthier (Glaeser, 2012, 72 and 74).

Conversely, if density does not produce autonomy, then it loses a lot of its value: a city that becomes focused on one industry, with tremendous economic gains and higher wages for a long time but a drastic diminution in innovation, diversity, and autonomy, is a failing one and so is a city that would allow housing segregation, whether official or not (Glaeser, 2012, 49, 122, and 83). This whole argument is in line not only with a "simple" view of autonomy as requiring the widest set of valuable options in the present but also with a relational and narrative view of autonomy that would emphasize the part relations play in enabling individuals to be autonomous as well as how context, in the present of the future, is conducive to the autonomous formation of preferences (Christman, 1991). The faults in our cities can, however, trigger reactions to limit density or to promote urban sprawl, which deprives both societies and individuals of the benefits of dense urban areas and creates new challenges. A consistent right to the city, based on this view of autonomy, would thus guarantee that as many individuals as possible have access to the city's opportunities and the largest degree possible.<sup>7</sup>

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<sup>7</sup>Section 4 develops the baseline allowing us to specify how far this should bring us.



## 2.2 Right to the city and right to housing

Understanding the scope of our "right to the city" also means distinguishing it from a right to housing. We are not strictly interested in the case of individuals who are deprived of housing - even though our arguments may impact them too. Instead, we focus on the less clear-cut case of individuals who are priced out of the densest urban areas, and whether being priced out due to regulations forbidding or limiting new constructions is contrary to a "right to the city".

Considering that they could technically find housing somewhere else, i.e., in another, less dense, city, or far in the suburbs of a major metropolis, it seems like no essential interest is being harmed. On the contrary, the idea of a right to housing could be based on the interest theory of rights, for which a right can be justified when it makes some right-bearer better off in a fundamental way (Raz, 1986). For instance, it is because it is fundamentally in the interest of any individual not to be physically assaulted that a right to bodily integrity should be instituted. A right to housing can thus be defended with a similar argument, stating that individuals require housing to be full members of society because housing provides stability which allows them to plan their lives.

Considering that such a right to housing is already somewhat controversial, a right to access dense urban cities may rest on even shakier foundations.<sup>8</sup> This challenge is made more complex because our approach also differs from more traditional defenses of a right to the city, found in the seminal work of Henri Lefebvre (1967), and extended in recent years in opposition to "neoliberal urbanism" (Aalbers and Gibb, 2014). These approaches rely on strong normative commitments. For instance, Lefebvre relies extensively on the collective "oeuvre" concept, defending that a right to the city should encompass the right to shape one's environment and fight against bureaucratic alienation in modern capitalism. In contrast, our argument advocates for a more modest conception of a right to the city, based on autonomy, allowing individuals to participate in the housing market (King, 2019). We believe that even if more modest, this conception leads to many feasible pol-

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<sup>8</sup>Beyond traditional controversies around the existence and justification of socio-economic rights, there are debates about the necessity of a right to housing, Adams (2008), for instance, questions the necessity of a right to housing, in comparison with other rights which could realize the same function, i.e., a decent minimum wage, health care, and so on.

icy recommendations as described in detail in the fifth section of this paper.

Such a right to the city should be distinct but could be complementary to a right to housing. The latter was defended by Hartman (1998), who proposes a compelling defense of this right, on normative and empirical grounds. Not only is the deprivation of housing strongly correlated with an educational deficit, less involvement in the political process, and a net loss of human capital for society, but it also deprives individuals of a sense of dignity and self-esteem, because individuals do not "receive the full respect for the membership in one's community" (Hartman, 1998, 227).<sup>9</sup> Having access to a home is indeed strongly connected with the possibility of participating in the political community, and being recognized as an autonomous agent able to conduct its own life.

Wells (2019) recently strengthened this case, advocating that a set of basic rights should include a right to housing, based on the recognition of a fundamental human interest to have access to a stable living place allowing privacy. Housing is a pre-condition for other activities and active participation in social cooperation. Note here that this claim does not necessarily entail that individuals are entitled to ownership, although it could be encouraged for other normative compelling reasons or access to luxurious houses or housing in very demanded areas. Instead, given the importance of housing, they should have access to decent housing, where decency is defined as being above a threshold of reasonable acceptability.<sup>10</sup> Wells (2019) argues, moreover, that such a right generates a direct duty for the State to provide individuals with a supply of housing.

In sum, what scope should the right to dense urban areas have? On the one hand, the right to the city is less essential and less precise than the right to housing, understood as a fundamental interest and giving access to a stable living place that allows privacy. In comparison, a right to the city could not be based on a clear and identifiable need and even urgency, that could be satisfied by the provision of concrete material support. On the other hand, the right to the city, as it requires that individuals have access to the city, is more specific, as it is not satisfied with the "mere" supply of housing to all, and more comprehensive, in that it touches upon next to all aspects under

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<sup>9</sup>(Hartman, 1998, p. 227)

<sup>10</sup>Defining this threshold would require more extensive developments and could be controversial. It may depend, for instance, on the socio-economic level of development in a given society. However, we do not rest the arguments of this paper on the definition of such a threshold.

the category of "urbanism" that improve accessibility to density.

This does not mean that individuals must be guaranteed an enforceable right to live in the center of a city. Two reasons motivate this. First, there is a feasibility constraint, since granting an enforceable right to the center of dense cities would probably not be possible, as the demand for housing exceeds the offer (even with densification). Second, there is a normative constraint, namely that rights are to be put in balance, such that densification should be traded off with some other justifiable values advocating for controlled density (such as the preservation of some historical places, the identity of the city and some of its districts, the general quality of life, and so on).<sup>11</sup> Nevertheless, the right to the city can still be viewed as a claim right, in that it generates specific duties for others and the State. For the general population, this means a duty not to exclude others through legal and democratic from dense urban areas, *de facto* depriving them of the mere possibility to access these places. For the State, it generates a duty to ensure such exclusionary practices are not enforced by local democratic means. In sum, it implies that a fair *procedure* is respected.

Consequently, already-dense cities should be made as accessible as possible (and therefore denser) or that density should be expanded and enhanced (e.g., making suburbs denser). Additionally, while ownership is not required, it should be made as accessible as possible as part of an individual's range of options. The access requirement can be satisfied by accessible (not to say "affordable") renting options. To understand the exact boundaries of this right to have access to the city, we must then focus on how urban development policies are designed to either promote or conflict with such interests.

### 3 Overweighting property-owners interests: a Californian example

#### 3.1 Local Democracy, Imbalanced

To define the boundaries of our right to the city, we take up Scanlon's invitation to look into specific cases (Scanlon, 2000) to proceed "upward" to refine our understanding of what is right and wrong. The state of California in the

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<sup>11</sup>We have no a priori ways of assessing these trade-offs, but one has to consider the fact that rights are to be put in balance depending of empirical considerations and justifiable oppositions.

United States exemplifies the intensity of debates and legislative activity in recent years and on a recent court case involving residents opposing a plan, by the University of Berkeley, to develop more housing for its students, on its land<sup>12</sup> We believe this case exemplifies how the interests of those who are the most directly and adversely affected by housing crises can be disregarded in local democratic processes. There is indeed a gap that we hope to bridge between Scanlon's view that the contractualist process should enable one to get a clearer view of the reasons at play in a case, making one less likely to be affected by distorting factors, and what happens within the political and legal processes<sup>13</sup>.

This gap is not just the result of an overly optimistic view of the democratic debate, in which citizens, engaging in Scanlon's process of "intrapersonal aggregation" would realize that their objections are not warranted. Instead, it stems from two main issues:

1. a lack of consideration for the forms of clientelism that local governments can be tempted to engage in.
2. a lack of awareness of the way individuals and specific collectives can make strategic use of legal rules and procedures.

The first issue is the unintended consequence of the otherwise correct claim that local government is more legitimate and more efficient in managing local affairs along the line of subsidiarity. For that reason, broader frameworks (i.e., federal law and overriding judicial principles) remain necessary to prevent local government from exerting its power in a harmful way. The power of local government, like any form of power, is subject to abuse and requires checks and balances that can come from other institutions and

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<sup>12</sup>The case is MAKE UC A GOOD NEIGHBOR et al. v. REGENTS OF UNIVERSITY OF CALIFORNIA et al., A165451 (Alameda County Super. Ct. No. RG21110142).

<sup>13</sup>The mere goal of "testing" contractualism could be viewed as unfair to Scanlon's theoretical intent. Indeed, Scanlon repeatedly states that the contractualist process is not meant to emulate a real-life democratic discussion (Scanlon, 2000, 169) One may even be tempted to argue that there is not much room for democracy in that theory: the process of weighing one's reasons with other people's reasons to determine whether they are good reasons is one of "intrapersonal aggregation", and can be done in isolation. It is, in fact, more of a moral inquiry than a political one. Nevertheless, there is absolutely no reason to oppose democratic deliberation with others, from deliberation within oneself. On the contrary, there is a likely feedback loop between the two, as argued by Landemore (2012) in section 2.2 of her book.

"higher" levels of political representation, especially when it leads to raising the entry barriers to some domains and wrongfully extends residents' property claims.

The second issue may come from a lack of concern for the intersection of the legal with the political. While there is at least some awareness of how politicians can weaponize the law, there seems to be less concern for the way individuals and collectives of individuals push private agendas, using not only the law itself but its (long) procedures under cover of a defense of the public good. This second problem underlines an issue for (but not an issue of) Scanlon's contractualism since legal reasoning and the "open texture" of the law,<sup>14</sup> as well as plain blind spots, can be used to disguise otherwise "unreasonable" objections into justified and even overriding reasons.

As will be argued below, we believe that both issues - potential abuses of power from local governments and strategic uses of the law and especially of legal procedures - contribute greatly to letting the interest of some individuals (the so-called NIMBYs) be over-represented in what we will later describe as a case of rent-seeking. As a consequence, both issues lead to the exclusion of some individuals from cities, through constant opposition to housing supply. However, discarding the democratic process should not be the solution: instead, protecting a right to the city involves striking a balance between multiple layers of government and representation. Recent battles over the state of California's efforts to combat its housing crisis provide an excellent example of the issue, of its legal-political nature, and enable us to suggest implementable solutions to guarantee a right to the city.

### 3.2 Are students a nuisance?

The lack of concern for the interests of some populations may be illustrated by the situation of students. To make this argument, we focus on the very recent case brought against the University of Berkeley, *Make UC A Good Neighbor et al. v. Regents of University of California*. In the context of a continuing housing crisis striking the state of California, the University of Berkeley, pressed by the state of California, included in its Long Range Development Plan the project of building student housing, amounting to approximately 12,000 beds with facilities, part of which would be built in People's Park,

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<sup>14</sup>We refer to the general meaning given to this expression regarding law in (Hart, 1994, 123, 128-136)

known for being a meeting spot for activists in the 1970s and 1980s. Opposition to the project originally relied on the justification that the Park's historical nature warranted its preservation, despite the University's plan to minimize the impact on the area and preserve the memory of the Park's history via a memorial<sup>15</sup>. More recently, neighbors adjusted their strategy and objected to the project using the California Environmental Quality Act (CEQA) of 1970<sup>16</sup>, to argue that the noise made by students would amount to a form of pollution that should have been assessed by preliminary studies. Noise pollution from factories or the like had been considered as such harm to the environment, but not noise from inhabitants until that time.

Among all vulnerable populations, students at elite institutions may appear more fortunate. Nevertheless, because they are a transient population by definition, we believe their case exemplifies our argument that local democratic processes not only disregard but can actively neglect the interest that external elements would have to access a dense area and the interest they would have in its further densification. In addition, they are a perfect example of the invisible yet enduring damage caused by reduced educational opportunities and, therefore, of autonomy as we understand it. Studies have repeatedly shown the general effects of housing shortages on the access of students to college education, underlining that this effect is the most significant for students coming from lower-income households<sup>17</sup>. One should also not forget that the University of Berkeley is part of California's public education system. An increase in its student population, following general demographic trends, means expanding access to high-quality education at a lower cost to exceptional students. Similar oppositions to the University's plans had already led to a temporary freezing of its student enrollment, mandated then undone by courts.<sup>18</sup>

Regarding the Make UC A Good Neighbor case, lower courts had agreed with the residents's claim that the University of Berkeley had failed to evaluate for noise pollution and was therefore not CEQA compliant. Understandably, this delayed the project's development and, therefore, the provision of student housing. The provocative argument of this case - that students are a *nuisance* that needs assessing - raised the question of which interests should

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<sup>15</sup>The University's plan can be read in detail here: [peoplesparkhousing.berkeley.edu/](http://peoplesparkhousing.berkeley.edu/).

<sup>16</sup>California Environmental Quality Act (CEQA) CA Pub Res Code §21000 et seq.

<sup>17</sup>See Lovenheim (2011); Lovenheim and Reynolds (2013); Charles et al. (2018).

<sup>18</sup>See the final decision in *Save Berkeley's Neighborhood v. Regents of University of California*, A163810 Cal. Ct. App.

be represented and protected in designing the rules that regulate housing provision. While the lower courts did not take a position on this nuisance issue itself but focused rather on the one that the potential pollution should have been evaluated in preliminary impact studies as CEQA requires, the structure of such claims is particularly compatible with Scanlon's framework. Indeed, it requires balancing claims to use one's property that are both legitimate but incompatible with one another to a certain extent.<sup>19</sup>

Here, the fact that the students' interest in benefiting from housing is only prospective brings additional difficulty because they are not tenants yet. The local political and legal processes are not built to protect or even account for their interests, which are represented only indirectly via Berkeley's claim to use its property to build housing for them. Nonetheless, presented with this issue, Scanlon's contractualism would already provide a partial answer. The objection that students are a nuisance could be a form of disrespect for their interests that is revealing of the lack of "reasonableness" of the NIMBY's claim. Indeed, the NIMBY's objection is typical of what Scanlon describes as a "judgment-sensitive attitude" (Scanlon, 2000, 20). This objection should disappear ("extinguish") while examining its justifiability. This process is not meant to be a "real deliberation" (Scanlon, 2000, 169) made in ideal conditions of knowledge or information. Nevertheless, gaining better information, in part but not only via the consideration for the interests of others, is essential to see if the claim stands as justifiable (Scanlon, 2000, 20 and 169).

Thus, a clear parallel could be drawn between the Berkeley case and how Scanlon frames conflict over the boundaries of property rights.<sup>20</sup> Scanlon's double question, adapted to it, would be :

1. *if Berkeley is allowed to build housing on its land, what kind of nuisance does it impose on the local environment and its residents? How much does it impair their freedom of choice?*
2. *if Berkeley is not allowed to build housing on its land, what kind of limitations does it place on the future students' ability to find housing in the area? How much does it impair their freedom of choice?*

While it is undeniable that a denser neighborhood near your home is likely to create some disturbances, it is also clear that the economic harm future

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<sup>19</sup>See *Antonik v. Chamberlain*, 81 Ohio App. 465, 78 N.E.2d 752 (Ohio Ct. App. 1947).

<sup>20</sup>See Scanlon, 2000, 191

students will have to face if no housing is built, in addition to an existing and dire housing crisis, is, by any reasonable standard, disproportionately more significant. The objection residents raise against the project is difficult to justify, as they cannot reject the opposing reason defending the students' interest in having housing built for them based on a better-informed discussion. However, following Scanlon's method, the reasons these residents oppose the project do not disappear during the process. They are not canceled in that process of "interpersonal aggregation," where they persist as potential objections but do not prevail in this specific case (Scanlon, 2000, 50).

In the context of this suit and before the Supreme Court of California issued its final ruling, the government of California had passed Assembly Bill (AB) 1307, adding sections 21085 and 21085.2 to the Public Resources Code to state that:

1. the "effects of noise generated by project occupants and their guests on human beings are not a significant effect on the environment"
2. "institutions of public higher education, in an EIR for a residential or mixed-use housing project, are not required to consider alternatives to the location of the proposed project if certain requirements are met."<sup>21</sup>

The legislator's reaction to such use of CEQA seemed to come from the intuition that this trial constitutes a sort of abuse of procedure, based on the neighbors' advantage as knowledgeable stakeholders, who are legally better empowered as they have easier access to lawyers and courts. Considering AB 1307 was aimed at reducing the scope of the "open texture of the law" in such a case, the Supreme Court reversed the Court of Appeal's decision and ruled in favor of the University.<sup>22</sup>

This kind of legal and political battle calls for further discussion of some limitations of Scanlon's framework, focusing specifically on how the political process gives unwarranted weight to some interests. The next section also explores the justification we propose to weigh the interests of the students more than the interests of the residents, and beyond this specific case, the

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<sup>21</sup>2023 Cal. Legis. Serv. Ch. 160 (A.B. 1307) (West).

<sup>22</sup>Make UC a Good Neighbor v. Regents of Univ. of Cal. 88 Cal.App.5th 656 (Cal. Ct. App. 2023).



interests of the individuals not living in dense cities compared with residents of these cities.

## 4 What is the relevant *demos* for the housing market?

The Californian case raises the crucial question of whose interest should be considered, i.e., who should be the *demos*. Local democracy in Berkeley hardly represents everyone affected by public decisions. Potential inhabitants, such as students, do not have a say in the discussion. Even when their interests are potentially represented by the University, they cannot actively participate in the decision-making process or vote. Yet housing policy depends on local officials, who are inclined to prioritize the interests of its residents for, among other reasons, electoral reasons.

Is this legitimate? One principle might justify this situation: local democracy's legitimacy would be grounded implicitly in the All-Subjected Principle (ASP), stating that only individuals subjected to a specific authority should get a voice in its decision-making process. Within a city, only the people living there should see their interests represented in the political process. This principle empowers citizens to decide what rules they abide by and allows self-governance. The ASP gives a strong advantage to the people already living in some places against the interests of others, especially wannabe residents. This is not necessarily problematic. On the contrary, the ASP is often perfectly fitting: it would seem dangerously invasive to allow non-subjected people to have a say in a decision, e.g., if French people choose how they should lead their local policies for Indonesian people. French people's rights are not significantly harmed when applying the ASP to this situation.

Nevertheless, in the case of housing policies, this criterion fails. It allows a subset of the population to gain economic and social privileges based on their domination over the political process. In doing so, they exclude all the individuals who *could be* subjected to the local authority to enter the political process and hence gain an advantage compared with the counterfactual situation of a free entrance. Understanding this process as a rent-seeking process allows us to see what is pernicious with the problem. What is wrong with local housing policies restricting housing supply is that they reduce the entry of other individuals into the market to extract an advantage from the

situation.

This does not mean that local democracy is inherently flawed, but that it can be captured by local interests if not balanced by supra-local institutions defending other interests. To abolish a wrongful rent situation, we propose to ground housing policy in an enlarged conception of democracy based on the All-Affected Interest Principle (AAIP).<sup>23</sup>

First, let us define what is a rent, and explain why it is wrongful:

*RENT SITUATION: When an individual or a community increases their wealth without creating new wealth while taking advantage of a political process, to the disadvantage of others.*

Buchanan and Tullock (1965); Tullock (1991, 1993) and Tollison (2004) offer various analyses of how such a phenomenon can occur through the democratic process. A necessary and sufficient condition is that an interest group can be decisive in public decision-making (by sheer number, influence pending, or vote-trading), such that they can impose costs on others to their advantage. The typical example offered by Tullock (1975) is licensing, i.e., when a group pressures the political process to lower or suppress competition, granting itself a monopoly and privileges to the detriment of competitors and consumers - since the monopoly drives the equilibrium price above the previous equilibrium, reducing the consumer surplus. Such a rent situation is harmful because it amounts to inter-group exploitation: they impose a cost on others (consumers and wannabe competitors) to secure an advantage (the monopoly surplus extracted by granted privileges).

Does this correspond somehow to the Berkeley case? Two things must be explained : (i) What gains do the inhabitants receive from their behavior when they pressure local governments not to build new houses and object densification? Conversely, what are the costs for non-inhabitants?; (ii) how does the situation relate to a monopoly situation, and what baseline allows us to talk about rent? If we can specify these two aspects, the rent-seeking analysis can apply to our Berkeley case.

The gains constituting the rent can be identified pretty easily. The availability and supply of real estate in a district or a neighborhood depends on local housing policies, such as zoning, and other regulations like CEQA. Two factors are important in this specific case. First, more housing implies more

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<sup>23</sup>Goodin (2007), Owen (2012) and Angell and Huseby (2020) develop the AAIP and its implications on a range of possible issues.

offers on the housing market, potentially decreasing the price of real estate and rents. Reducing the housing supply helps preserve the value of real estate and secures gains in the long term. Second, as described in the Californian case, individuals value a calm neighborhood with few nuisances. Density entails proximity with others, therefore potential inconveniences. The lesser dense a district or a city with high demand, the higher the rent and real estate prices, *ceteris paribus*, favoring property owners. The costs are even more obvious: for students - or more generally prospective residents - the cost is either not being able to live in the desired place or to rent above the price of what they could with more housing supply.

The question to disentangle is: Is there sufficient ground to object to local democratic decisions based on a right to access dense areas, our "right to the city"? The claims of so-called NIMBYS to oppose the project must not be systematically disregarded. Hermansson (2007) argues convincingly that in some cases Nimbysm is not necessarily egoistic and irrational, especially if (i) the public good's burden is not fairly shared and (ii) if the public good imposes too many risks on the neighborhood. (i) is often violated, for instance when most waste treatment devices are disproportionately concentrated in black and poor neighborhoods, or, less dramatically, when one city only has to build a lot of social housing when others are left free to block projects. (ii) implies, for Hermansson (2007) that risk exposure is not above some threshold set by collective agreement.

In all the cases above, individuals are entitled to (at least) compensation. Granted that (i) and (ii) do not obtain (so that the housing is somewhat fairly distributed depending on the demand) and new housing does not introduce important risks above a reasonable threshold. Here, it should be noted that new housing may introduce some *real* risks, e.g., risks of real estate prices and rents decrease. Nevertheless, it is dubious that any individual should be shielded against the possibility of lesser returns than expected, like for any investment. We may grant that individuals must be shielded against some risks - disease, unemployment in their private life, but certainly also health risks associated with public goods provision - but the case rests on a weaker foundation if it must establish they should be shielded against market fluctuations depending on other individuals' free and lawful decisions. We may say that the owners do not "deserve" the price decrease associated (hypothetically) with higher density, but they did not "deserve" the antecedent increase either. If this were so, everyone should be shielded from losses in the financial markets, which seems absurd. In particular, when put in

the balance with the interests of wannabe residents being harmed, risks of real estate value decrease, and the potential of noise, even when taken into consideration, is insufficient to negate the right to density to students. Furthermore, and more importantly, the status quo is certainly not the proper baseline to assess the legitimacy of the claims. The baseline to assess the relative weights of the claims is the counterfactual situation in which non-residents *could* have access to housing facilities, i.e., the situation without legal and political constraints on the housing supply. Let us call that the no interference situation :

THE NO INTERFERENCE SITUATION: *For rent to exist, there should be another possible world  $W_2$ , characterized by the absence of privilege and the possibility of mutually advantageous trades below the prices of  $W_1$ , the current situation.*

If we do not specify this condition, then speaking of rent is impossible because there is no counterfactual situation in which some individuals would be better off: one cannot talk of rent extraction if there exists no alternative state of the world where this does not happen without worse effects.<sup>24</sup> We may describe the California case as wrongful rent-seeking behavior because there is a possible situation of non-interference allowing students' interests to be considered properly without wronging residents. This counterfactual situation establishes a baseline to evaluate the real-life situation.<sup>25</sup>

In this counterfactual scenario, we can say that more housing is available, benefiting more individuals while creating more wealth for the community. Conversely, when this counterfactual situation is prevented from happening, not only do individuals gain undue privilege through the political process, establishing a monopoly, but it does so at the cost of sacrificing other individuals' interests. It is therefore objectionable on both the grounds of utility maximization and individual autonomy. First, it means efficiency loss because the land can see more efficient use. This is already a problem of distributive justice. Second, this outcome is objectionable primarily for

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<sup>24</sup>This explains why some licensing cannot be defined as rent-seeking, since they signal a competence that would be costly to verify otherwise, i.e., for doctors, or other specialized professions.

<sup>25</sup>For Tullock (1975) This counterfactual is offered by the situation that would occur if the entry to the market was free, and prices set at the level of a competitive equilibrium. This is an analogous solution to what we propose here.

autonomy-related reasons. Indeed, such a situation within the housing market directly negates the right to access the city and thereby undermines their autonomy, as developed in Section 2.

At this point, it would seem that democracy has to be bypassed or that the right to the city would conflict with the autonomy of local democracies. It needs not to be the case. In our view, the perverse effect of rent-seeking is the result of a narrow understanding of democracy. The main problem is that local democracies are easily captured by specific interest groups whose interests are contrary to other potential interests and may negate their mere existence, as is the case when cities' residents refuse new housing. In short, they deny equal footing to the interests of other individuals. The ASP is not a good ground for such a problem, and we propose relying instead on the All-Affected Interests Principle (AIIP), a wider alternative to constitute the relevant demos for housing policies. This principle states that every individual should have a say in a decision if their interests are affected<sup>26</sup>. While it is the subject of many discussions, it is sufficient for us to state that this principle requires consideration for the interests of individuals who are *not currently living in the city but could be*, as with the students in the Berkeley case. Indeed, the students are clearly affected by a shortage of housing, and their interests would be better served without the interferences of local democracy.

In short, opposing the construction of new housing often equates to a rent-seeking activity, which is objectionable above all because it denies the fundamental interests of others, their right to the city, based on a privilege gained through the political process. It is grounded on a dubious claim that current residents possess a right to object to such projects based on the fact that they are currently the ones subjected to the local authority and that their property rights extend beyond their property but should be shielded against potential losses. A proper understanding of the right to the city allows us to defend that such a right imposes duties not to support policies with the direct or indirect effect of preventing new individuals from coming, i.e., reducing the housing supply. This right entails that the interests of non-residents should be considered in housing policy regulations, most notably through other levels of democratic governance.

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<sup>26</sup>Goodin (2007), Owen (2012), Näsström (2011) all developed central arguments based on the AIIP, criticizing or defending specific versions of the principle.

## 5 How should we implement a right to the city?

### 5.1 The Californian example: an unstable equilibrium between local and state government

To summarize them, our reflections have so far led us to the following observations:

1. Within Scanlon's contractualist framework, the reasons that residents have to oppose the densification of housing in at least some cases no longer appear as good justification when other interests are examined.
2. While these objections are legitimate from the point of view of autonomy and self-determination, they can nevertheless defend their interests via their disproportionate influence over the local democratic process and practice forms of "reason-laundering", claiming the right of local self-determination and legality in the courts.
3. This leads to a situation of rent-seeking, which can be demonstrated as wronging other individual interests, in particular their autonomy.
4. The consequence is the failure to guarantee a "right to the city", i.e., the right not to be actively excluded from entering the housing market in dense urban areas, based on a broad concern for autonomy.
5. This right to the city, creating a procedural and not a material claim, is better enforced by providing guarantees that set boundaries to the local communities' right to self-determination and enable control by higher levels of government in the name of the interests of those excluded from dense urban areas.

While remaining in California, we propose to zoom out to examine the outcome of several years of proactive legislative reform aimed at the housing market by the state's chambers. In the last few years, the government of California, through the promotion and passing of many Assembly and Senate bills, has indeed been attempting to boost the construction of housing via upzoning measures which, despite their rather moderate nature, were met with stark opposition both at the level of local governments and from collectives of concerned citizens. What the Californian case reveals is the tensions between local and state governments, the former relaying concerns

from inhabitants and the latter claiming to represent a broader public interest in solving the housing crisis, justifying limitations on the power of local government to regulate construction.

That awareness of the local government's capacity to act arbitrarily in terms of housing policy is not new. The Housing Accountability Act (HAA) was precisely passed in 1982 by the government of California to protect development projects from abuses of discretionary power by local government.<sup>27</sup> The main disposition of the HAA is to constrain local government to approve projects that meet preexisting local regulations (mainly zoning ordinances and general plan). Exceptions can be made if the local government can prove that the project will have a specific, adverse impact on public health and safety, and that mitigation is not available. Otherwise, the Act protects density bonuses that may allow developments to bypass local regulations, and affordable housing developments are granted exemptions. The HAA thus provides grounds for suits against local governments.

However, the exact boundaries of this division of jurisdiction are still in the process of being defined, especially since the state of California stepped in to correct what it viewed as a failure of local government to address the housing crisis. This recently led to the 2021 ruling of the Court of Appeal of California (1st appellate district) to confirm the power of the HAA in the 2021 case *CaRLA v. Education Fund v. City of San Mateo*.<sup>28</sup> The case discussed the constitutionality of the state's ability, through the HAA, to prevent the city of San Mateo from using design guidelines to deny approval of a ten-unit apartment building project. The ruling validated the HAA's constitutional ability to check the otherwise legitimate right of local governments to home rule in defense of a statewide interest in new housing development. The case also revolved around the more technical question of defining what an "objective" standard for housing is, since the HAA denies validity to non-objective standards, meaning standards that leave room for personal judgments by public officials.

More importantly, the purpose of the HAA is almost in open contradiction with the California Environmental Quality Act (CEQA) of 1970. The two pieces of legislation have both acquired claims of supremacy that put them in direct conflict (Elmendorf and Duncheon, 2022). While CEQA strives

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<sup>27</sup>Housing Accountability Act (HAA) Cal. Gov. Code § 65589.5.

<sup>28</sup>*California Renters Legal Advocacy & Education Fund v. City of San Mateo*, 68 Cal. App. 5th 820 (Cal. App. 2021-09-10).

to guarantee "the fullest protection to the environment",<sup>29</sup> assuming that construction is not environmentally friendly by definition and should only be done at a slow pace allowing long democratic deliberation, the HAA, since 2017, aims at giving "the fullest possible weight to the interest of, and the approval of and provision of, housing",<sup>30</sup> considering densification as an ecological endeavor that should be as swift as possible, and viewing local governments as a force to be constrained.<sup>31</sup>

## 5.2 California's open fight against the housing crisis... and local governments

This movement towards asserting the state's ability to support the construction of housing is aligned with our claim that higher levels of government should enforce a "right to the city" by protecting the interests of those excluded from the decisions of local governments. Similarly, the last few years have seen a plethora of bills passed into law by both the Californian Assembly and Senate, many with the direct support of the state's governor. We believe that this legislative activity and the obstacles it was met with (including bills that were never passed) provide valuable insights into the way a "right to the city" could be protected following the All-Affected Interests Principle, insights from which we attempt to draw normative claims in the next sub-session. While a complete account of all bills is rendered impossible by the sheer number, we isolate some of the major tendencies in what follows.

In line with the HAA's commitment to giving the interest of housing its fullest weight statewide while respecting the right of local communities to self-rule, the Senate and Assembly of California proposed and passed bills that curtailed their ability to enforce downzoning measures or to oppose density

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<sup>29</sup>Friends of Mammoth v. Bd. of Supervisors, 104 Cal. Rptr. 761, 768 (1972); No Oil, Inc. v. City of Los Angeles, 118 Cal. Rptr. 34, 38 (1974); Wildlife Alive v. Chickering, 132 Cal. Rptr. 377, 381 (1976).

<sup>30</sup>S.B. 167, 2017 Leg., Reg. Sess. (Cal. 2017).

<sup>31</sup>See Elmendorf and Duncheon (2022) for a complete analysis of the two acts' antithetic scopes, of the history behind that "clash" and proposal to harmonize their contradictions in favor of active densification and the environment.



bonuses,<sup>32</sup> while facilitating the increase of density via upzoning.<sup>33</sup> Urban sprawl was tackled, for example by requiring cities to zone land for moderate-income housing in existing neighborhoods rather than through additional sprawl.<sup>34</sup>

Many of the bills that were eventually enacted strove to densify existing lots via the building of duplexes, triplexes as well as extensions. The most popular example of this trend is the facilitation of the construction ADUs, or Additional Dwelling Units, both by limiting the ability of local governments to deny these projects approval (e.g, by requiring the replacement of a garage replaced by an ADU) and by empowering owners to build more and more additions.<sup>35</sup>

Several bills made it more difficult for cities and local governments not to comply with state-level housing goals and regulations<sup>36</sup>. In the meantime, many bills aimed to curtail the ability of local governments to put developments through lengthy and costly permit approval procedures, as well as

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<sup>32</sup>SB 330 in 2019 amended and repealed several sections of the Government Code to limit the downzoning abilities of local governments; SB 478 of 2021 added Section 4747 to the Civil Code, and amended Section 65585 of and added Section 65913.11 to the Government Code to limit the use of floor area ratios and minimum lot size requirements to prevent the construction of multi-family buildings; SB 713 of 2023 amended Section 65915 of the Government Code to provide that statewide density bonus laws override local counter-initiatives.

<sup>33</sup>AB 1763 in 2019 amended Section 65915 of the Government Code to facilitate the granting of density bonuses; SB 10 in 2021 added Section 65913.5 to the Government Code allowing local governments to zone for up to ten homes per parcel in transit-rich areas, or urban infill site; SB 330 in 2019.

<sup>34</sup>See AB 725, amending Section 65583.2 of the Government Code in 2020.

<sup>35</sup>A striking example of this trend is SB 13 which, enacted in 2019, amended Section 65852.2 of the Government Code and Section 17980.12 of the Health and Safety Code.

<sup>36</sup>AB 2339 in 2022 amended Section 65863 of the Government Code provide that unmet state-imposed housing goals are carried over across planning cycles; AB 2653 of 2022 amended Sections 65400 and 65585 of the Government Code to enable the state of California to reject cities' housing element annual reports that do not meet such guidelines. AB 1485 of 2023 added Section 65585.01 to the Government Code to expand the Attorney General's ability to enforce housing laws; SB 423 of 2023 amended Section 65913.4 of the Government Code to make approval for permits faster in cities and counties that did not meet their building goals; SB 684 in 2023 added Sections 65852.28, 65913.4.5, and 66499.41 to the Government Code to give faster approval for projects with up to 10 homes; SB 341 in 2023 amended Section 65589.9 of the Government Code and Section 53559 of the Health and Safety Code to allow developers access to competitive state funding even in cities preventing development out of compliance with state law.

increasing state-level oversight.<sup>37</sup>

Several forms of density bonuses were also added to the state's regulations, as well as other advantages such as shorter approval times, allowing projects to be denser against local regulation, provided they included higher ratios of affordable or social housing.<sup>38</sup>

To foster cooperation and overcome divisions among local entities, regional or cross-municipal initiatives for affordable housing and other developments were either created or encouraged, with the examples of the Bay Area Housing Finance Authority created in 2019, the creation of multiple housing trust funds, and housing agencies for the production of affordable housing in the last years. In 2023, SB 20 added Section 6539.1 to the Government Code to extend the powers of such housing trusts, created by the gathering of local agencies.

As we have suggested in previous sections of this paper, a "right to the city" can also be enforced against some citizens who may abuse their knowledge and influence to block projects temporarily or permanently. This is

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<sup>37</sup>In 2021, AB 215 amended Section 65585 of the Government Code to reinforce the state's oversight in housing matters against non-compliant municipalities; AB 571 added Section 65915.1 to the Government Code, prohibiting affordable housing impact fees; AB 602 amended Sections 65940.1 and 66019 of, and added Section 66016.5 to, the Government Code, and added Section 50466.5 to the Health and Safety Code to require transparency and proportionality for housing impact fees, as well as keeping them from applying to projects benefiting from density bonuses; in 2022, AB 2234 amended Section 65589.5 of, and to add Sections 65913.3 and 65913.3.5 to, the Government Code, established criteria for the clarity and accessibility of applications for the approval of development projects; AB 2006 added Chapter 9 (beginning at Section 50260) to Part 1 of Division 31 of the Health and Safety Code to simplify the compliance monitoring of affordable multifamily rental housing developments by state agencies; in 2023 AB 356 amended Section 21081.3 of the Public Resources Code to specify that agencies are not required to assess the aesthetic impact of development projects regarding existing buildings; AB 1633 amended Section 65589.5 of the Government Code to ban cities from delaying developments by not issuing CEQA exemptions to entitled applicants.

<sup>38</sup>AB 1763 of 2019 amended Section 65915 of the Government Code and increased the density bonus to 80 percent for projects that are 100 percent affordable at the low and very low-income levels, granted height increases for projects within one-half mile of a major transit stop and eliminated local parking requirements for projects that qualify as a special needs or supportive housing development; AB 1551 of 2022 added Section 65915.7 to the Government Code to grant density bonuses to commercial developments including affordable housing; AB 2334 of 2022 added Section 65915.7 to the Government Code to give added height and unlimited density to projects located in lower driving areas and dedicated solely to lower and moderate income households.

why, in 2023, SB 439 looked to enable interested parties to ask courts to strike part or the entirety of a civil action brought against them regarding development projects, if the court considers that the suit has no chance of success at all. It did so claiming, in line with what motivated the passing of AB 1307 in the context of the Berkeley case,<sup>39</sup> that "it is in the public interest to encourage affordable housing development and ensure such developments are not delayed or caused to fail through abuse of the judicial process".<sup>40</sup> With all these measures and the way they redefined the balance between different levels of government, the Assembly and State of California seem to have effectively enforced a "right to the city" via the defense of the interest of those who are excluded from accessing dense urban areas, either by local authorities or by their citizens.

## 6 An autonomy-based right to density

Our autonomy-based right to the city is more modest than other defenses of rights related to housing. The "right to the city", if understood as an enforceable right, for individuals, to live in the heart of the densest of cities, does not seem to be a reasonable demand. In our view, it should be put on the side of *procedural* rights, i.e., rights ensuring that a fair procedure is followed to defend individuals' interests, rather than material rights, granting individuals a right to some sets of goods at low prices. Nevertheless, such a right must guarantee, in a broader fashion, that policies related to housing, and in particular to housing development, are designed in a way that favors inclusionary access to density. It might first be best described in *negative* terms, as preventing "unreasonable" exclusionary policies from blocking development and other forms of infrastructure (public transportation being a core issue) *that further the autonomy-based interest of individuals to access density, its benefits, and opportunities*. Formulated as such, it limits the scope of the political power that local stakeholders draw from their sway over the political process, and in particular the political power that property owners derive from their legal status. In the legal realm, this means our "right to the city" should *counterbalance the claim of local residents to*

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<sup>39</sup>AB 1307 added Section 21085 to the Public Resources Code to specify that the noise of occupants was not to be evaluated according to CEQA.

<sup>40</sup>SB 439 amended Section 904.1 of and added Section 425.19 to the Code of Civil Procedure.

*a negative right to be immune from all interference to their property rights.*

This can, however, lead us to state some *positive* principles for the organization of the political and legal process. As stated in the previous analysis, our aim is not to call for bypassing local democracy, as it is essential to protect local interests and discover legitimate objections to development projects. It is also necessary, to a certain extent, to favor acceptance among local populations. Only its capture by what we see as rent-seeking practices must be prevented. This can be done, following the general principles of polycentricity,<sup>41</sup> by *entrusting the protection of a collective interest in providing sufficient and valuable housing opportunities in dense areas to multiple centers of decision*, articulating different layers of governance, from the most local to the most distant. This allows finding a balance between a legitimate right-to-home rule supported by the All-Subjected Principle, and state-level guarantees, supported by the All-Affected Principle against arbitrary and exclusionary local practices that favor the interest of some, against the interests of those who are not and cannot be represented at the local democratic level.

We found this to be generally exemplified in the state of California's legislative endeavors of the past few years. The right to local rule and the autonomy of local communities was never negated but only qualified by the State's constitutional ability to protect the autonomy of non-residents and non-owners from practices excluding them from dense urban areas or making it so costly to access them that it became unreasonable. Some measures protected development projects from arbitrary decisions and excessively long legal battles, providing certainty. These projects were allowed to be denser provided they served the interest of the most vulnerable while respecting minimal local, state, and federal regulations. Overall, regional and inter-municipal coordination were empowered and additional institutional actors like universities were granted more autonomy in their development projects, following patterns of nested governance.<sup>42</sup> This suggests that a right to the city should provide guidelines on how to distribute power on housing policies in a way that is both sensitive to scale and promotes the autonomy of multiple actors, under the supervision, but limited intervention, of the highest levels of administration and legislation.

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<sup>41</sup>See for instance Ostrom (2010), Ostrom (2014), Aligica and Tarko (2012) for classical presentations on polycentricity.

<sup>42</sup>Van Zeben (2019) offers a survey of the literature on polycentricity, nested governance, and multi-level governance

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