FROM THE READING ROOM

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Evidence and Innovation in Housing Law and Policy
Lee Anne Fennell & Benjamin J. Keys, eds.
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The thirteen essays that appear in *Evidence and Innovation in Housing Policy* grew out of a conference convened in June 2016 by the Kreisman Initiative on Housing Law and Policy at the University of Chicago. Edited by Professors Lee Anne Fennell of the University of Chicago Law School and Benjamin Keys of the Wharton School at the University of Pennsylvania, the volume brings together scholars from multiple disciplines and methodologies to confront a range of issues related to housing. Early chapters concentrate on how land use regulations, including historic preservation, constrain new development, reduce supply, and drive up housing costs. The book then shifts to focus on community formation in relationship to both the individual home and urban redevelopment more broadly. Later chapters examine the relationship between housing and personal wealth, as well as the roles that financial regulation and access to credit play in this regard. Concern for housing affordability runs throughout most of the essays.

The experience of reading *Evidence and Innovation in Housing Policy*, particularly in the early chapters, can sometimes feel like being at a rather quirky dinner party with guests jostling for control of the conversation. William Fischel offers an historical account of the role of homeowners in stifling new development; David Schleicher then draws on agglomeration economics to critique land use regulations that undermine transportation innovation; Richard Epstein decries inclusionary zoning on both economic and constitutional grounds before suggesting that we blow the whole regulatory system up; and Lior Strahilevitz calms things a bit by sharing an intriguing story about a senior community in Florida, but then quickly turns the story into a profound critique of historic preservation that poses deeper questions about the formation and preservation of community identity. As the book proceeds, authors with a more empirical orientation join the con-

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versation and the result works well as a collection with various and at times unexpected connections between chapters. In reviewing this rather dense collection, I will briefly summarize each of the thirteen chapters before highlighting a few themes that run across the volume.

In the first chapter, economist William Fischel briefly summarizes his influential "homevoter hypothesis"[1] and its relationship to the restrictive land use regulations found in the most expensive regions of the United States. It was only during the inflationary period of the 1970s, Fischel observes, that homeownership became a strong investment vehicle, relative to stocks and bonds. Homeowners eager to defend the value of this investment became increasingly concerned with new development that might reduce their home values. Seeking some degree of cover, these homeowners worked with and within the burgeoning environmental movement of the 1970s to add layers of regulatory review that slowed new development. In Fischel's account, rapidly rising home prices are not simply the result of restrictive land use policies, but in fact lead to greater restrictions on new development.

Fischel notes another important dynamic at play during the 1970s—the move of middle-class whites to the suburbs in the aftermath of the desegregation of city schools. At the same time, the civil rights movement increasingly sought opportunities for low-income and minority households in the suburbs. According to Fischel, suburban homevoters turned against growth, reasoning, he speculates, "If we have to take blacks and the poor along with everyone else, maybe we would prefer to have no growth at all."[2] Reluctant to advocate for such exclusion publicly, an alternative rationale for resisting growth arose—"[p]reservation of the environment by preserving open space." This is a controversial claim, of course, but Fischel offers as evidence the fact that Massachusetts and New Jersey, the two states with the most significant requirements for local governments to accommodate low-income housing, "are also the states with by far the largest number of local initiatives to preserve farmland and other open space."[3] Ultimately, however, he hedges a bit on this provocative point, expressing reluctance to attribute too much to the backlash against civil rights and noting that politically liberal communities are often among the most resistant to housing growth.

Shifting from the cause of land use regulation to its effects, law professor David Schleicher argues that such regulations, and housing policies more generally, reduce the economic gains from a variety of transportation innovations—global positioning systems and real-time traffic information services like Google Maps, ride-sharing services like Uber and

1. William A. Fischel, The Homevoter Hypothesis (2001).

2. Evidence and Innovation in Housing Law and Policy 27 (Lee Anne Fennell & Benjamin J. Keys eds., 2017) [hereinafter Evidence and Innovation].

3. *Id.*

Lyft, and autonomous vehicles. The greatest gains from transportation innovations are achieved when they enable changes in land use and development patterns, but such changes are stymied by our existing regulatory regimes. Existing zoning regulations will result, Schleicher contends, in increasingly inefficient land use patterns in urban areas, reducing the gains from transportation innovations while simultaneously hindering further innovation. Schleicher's discussion of specific transportation innovations and their potential effects on urban land use is fascinating. But what is most relevant to concerns about housing supply and affordability is his suggestion that those seeking to reform land use regulation "should focus on changing the political structure of decision making or incentives for homeowners."[4] He provides a frustratingly brief overview of some of the policy innovations he has proposed in earlier writings, including the adoption of citywide "zoning budgets" to enable greater density.[5]

Part I concludes with law professor Richard Epstein's modestly titled "The Unassailable Case against Affordable Housing Mandates." Epstein begins by noting his strong preference for systematic reductions of zoning restrictions, which would enable an increase in housing supply, over additional direct public subsidy. But his focus is on a critique of inclusionary zoning policies. Reflecting his somewhat unconventional view of takings,[6] Epstein contends that if states want to impose affordable housing mandates on developers, they should "rent or purchase the units at market value, and then re-let or resell them at below-market prices" so as to ensure that public burdens are borne by the public as a whole.[7] Epstein offers both economic and constitutional critiques of inclusionary zoning. With regards to the former, he argues that inclusionary zoning programs are likely to exacerbate housing shortages by constricting supply.[8]

4. *Id*. at 54.

5. For more detailed discussions, readers should consult David Schleicher, *City Unplanning*, 122 YALE L. J. 1670 (2013), and Roderick Hills & David Schleicher, *Balancing the Zoning Budget*, 62 CASE W. L. REV. 81 (2011).

6. RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); *see also* Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279 (1986) (describing Epstein's account of the Takings Clause of the Constitution as "unconventional").

7. EVIDENCE AND INNOVATION, *supra* note 2, at 65.

8. Epstein relies exclusively on a single study of inclusionary zoning, Benjamin Powell & Edward Stringham, *The Economics of Inclusionary Zoning Reclaimed: How Effective Are Price Controls?*, 33 FLA. STATE U. L. REV. 471 (2005). While that work focused on San Jose and is therefore relevant to his discussion of *California Building Industry Association v. City of San Jose*, 351 P.3d 974 (Cal. 2015), it would have been nice to see him discuss in depth the broader empirical literature on inclusionary zoning, which can take many forms. For one recent literature review, see LISA A. STURTEVANT, CENTER FOR HOUSING POLICY, SEPARATING FACT FROM FICTION TO DESIGN EFFECTIVE INCLUSIONARY HOUSING PROGRAMS (May 2016). Moreover, as Sturtevant notes, Powell and Stringham's studies of inclusionary housing programs "have been

I admit to finding somewhat sympathetic Epstein's contention that an explicit allocation of general revenue is arguably fairer than a cross-subsidy in the form of inclusionary zoning, which imposes all costs on the market-rate residents or the developers of a new building (although in many instances these are offset by a density bonus that permits a larger development). But, Epstein acknowledges, such an explicit allocation of funds sufficient to achieve the same level of affordable housing development (and in the same locations) is highly unlikely in practical and political terms given the variety of demands on local government budgets. At the very least, as the book's editors note in the Introduction, Epstein's chapter brings to the fore the important question of how the costs and burdens of achieving particular housing goals through specific interventions and innovations should be distributed.

In Part II, the volume's focus shifts from land use regulation to the concept of community and the relationship between housing and community. In "Balancing the Costs and Benefits of Historic Preservation," urban economist Ingrid Gould Ellen and sociologist Brian McCabe continue the debate over constraints on housing supply, one perceived cost of historic preservation. Focusing on historic districts in New York City, the authors provide new evidence on how preservation constrains development, "ultimately limiting economic growth, heightening economic segregation, and contributing to concerns about housing affordability."[9] While the density of historic districts in New York is similar to surrounding neighborhoods (due in part to the fact that the buildings in such districts were developed when zoning was less restrictive), they find that less new construction and redevelopment occurs in such districts.[10] The authors conclude that the adverse effects of historic districts on citywide development will only grow more significant as new districts are established.

Ellen and McCabe also find that historic preservation can exacerbate economic segregation as designated neighborhoods see drops in poverty rates and increases in neighborhood incomes.[11] As of 2012, the average household income in census tracts located entirely within a historic district was more than twice the income of neighborhoods entirely outside the districts. Ellen and McCabe's sophisticated empirical analysis provides new evidence of precisely how historic designation restricts devel-

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widely criticized for their lack of methodological rigor, and their results should be interpreted cautiously." *Id.* at 8.

9. Evidence and Innovation, *supra* note 2, at 94.

10. Specifically, they find that "lots located inside historic districts were slightly less than three percentage points less likely to experience new construction compared to lots outside those districts but located in the same community district." *Id.* at 98.

11. They explore this point in greater detail in Brian J. McCabe & Ingrid G. Ellen, *Does Preservation Accelerate Neighborhood Change?*, 82 J. Am. Planning Ass'n 134 (2016).

opment. Of equal value are the series of innovative suggestions they provide of mechanisms through which the historic designation process might be redesigned to allow more explicit consideration of potential effects on citywide planning and housing supply. Direct consideration of the effects of preservation on housing supply might, they suggest, lead a local government to try to mitigate these effects by upzoning nearby areas. While Ellen and McCabe's proposed reforms are focused on New York City, the procedural and substantive changes they outline provide insights that could be tailored to other jurisdictions.

Law professor Lior Strahilevitz continues the discussion of historic preservation, but changes directions in his intriguing account of "Historic Preservation and its Even Less Authentic Alternative." Taking as his starting point the dubious historical marker on the Trump National Golf Course commemorating the widely debunked "River of Blood" tale, Strahilevitz poses a provocative question: "[i]s authentic history, in the hands of imperfect human institutions, superior to the kind of fake history commemorated at the Trump National Golf Club?"[12] His conclusion is "not by much." For Strahilevitz, the selective preservation of authentic history, driven by contemporary preferences and achieved at significant cost is only marginally better than cheap and voluntary "contrived history." As such, he questions whether there is any significant state interest in the compelled preservation of historic property.

As an example of such "contrived history," Strahilevitz examines in depth the fake history that pervades The Villages, a Florida retirement community and the fastest-growing metropolitan area in the United States. He suggests that the community's contrived history, told in part through dozens of historic plaques that recount a complex set of stories about fictitious characters from a mythical past, might—in addition to shaping the community's identity—serve as a sort of "exclusionary amenity" that helps explain the overwhelmingly white population of The Villages, despite its location within a quite diverse region.

Strahilevitz is careful to note that he does not believe there is no distinction between such fake history and genuine history. Rather he suggests that the "problem is not that historical narratives are concocted; rather it's that when the preservation domain is scarce land, facts are preserved selectively and the value choices underlying that selection are often obscured."[13] Given the role of subjective contemporary judgments regarding whose history and lives are valuable and what is worth preserving—a point made even more clear in recent months with the controversies over Confederate monuments, which he discusses tangentially—Strahilevitz boldly suggests that "perhaps it would be much better to preserve buildings at random, to serve authenticity

12. Evidence and Innovation, *supra* note 2, at 109.
13. *Id.* at 117.

and fairness interests, and to leave space for future creativity."[14] The chapter raises thorny questions regarding how we assess the benefits of historic preservation and evaluate its effects on community identity.

Whether worthy of historic preservation or not, many urban church buildings have in recent years been converted into condominiums, a topic Georgette Chapman Phillips, a lawyer and business school professor, explores in "Losing My Religion: Church Condo Conversions and Neighborhood Change." Phillips focuses on the effects that the sale of such churches can have on a local community, particularly when that community loses important nonreligious activities—community centers, food pantries, and programs for at-risk youth—sponsored by the church. In this way church conversions potentially differ from other types of redevelopment because they threaten a loss of both social capital and of specific social services. To address this loss, Phillips suggests the imposition of a fee on either the church or the developer, which would go toward replacing the lost social services. As she notes, such a proposal could face scrutiny as an exaction and as such would need to be carefully devised.

While sympathetic to a greater recognition of the valuable role religious institutions can play for non-adherents within the local community, I fear the practical challenges for such a proposal would be too significant. To impose the fee on the church, based on a valuation of the social and community services it provides (which must be adequately distinguished from activities that might mix religious formation and community service) could prove both difficult and controversial. More promising is the suggestion of requiring developers to contribute a set fee to local social service agencies. But of course such a fee would have to be considered in light of other benefits a local government might wish to exact from the new development, such as affordable housing. I am also not convinced that one could ensure that such a fee, if paid by a developer to an existing non-profit, would necessarily benefit the community within which the development occurs, perhaps raising questions for whether an adequate "nexus" exists for the exaction to pass muster.

Perception of one's local community takes center stage in sociologist Matthew Desmond's contribution, "How Housing Dynamics Shape Neighborhood Perceptions." As Desmond notes, it is widely recognized that a variety of factors, including race, influence how individuals perceive urban neighborhoods. Nonetheless, there has been little study of how housing dynamics might also shape such perceptions. Desmond, drawing on a survey of Milwaukee renters, studies three such dynamics: the reasons for a residential move, the strategies used to find housing, and the quality of an individual's dwelling. He examines how these dynamics affect two main outcome variables: renters' trust of neighbors and perception of suffering within their neighborhood. Desmond finds that "city

14. *Id.* at 118.

dwellers who relocated to their neighborhood after an eviction, who found their apartment through a nonprofit or government agency, and who experienced long-lasting housing problems harbored lower evaluations of their neighborhoods."[15]

In light of his findings, which suggest that individuals who exercise greater control over their housing and neighborhood choice are more likely to perceive their neighborhood favorably and more likely to be participate actively in their community, Desmond offers a pair of suggestions for policy makers. First, increasing the supply of temporary housing at the city level may allow for more deliberate housing searches, boosting levels of community trust. Second, the implementation and enforcement of source-of-income discrimination laws would also expand housing and neighborhood options.

Shifting from the community back to the household level, Part III turns to mechanisms through which housing might enable wealth building. In "Behavioral Leasing: Renter Equity as an Intermediate Housing Form," law professor Stephanie Stern explores a modest step towards providing renters with some of the benefits of homeownership, including asset building. Renters at four affordable housing developments in Cincinnati are able to earn "renter equity credits" by paying rent on time, actively participating in the residential community association, and completing an assigned property upkeep task. They can earn up to $10,000 in savings credits over a ten-year period; the money cannot be accessed during the first five years. The program requires no additional subsidy, but is instead funded through higher occupancy and reduced turnover and maintenance costs at the developments. Stern notes that the renter equity program has been limited to just a few sites and there are questions regarding whether it is "scalable." However, as she suggests, its most significant contribution might be in providing a blueprint for further innovations in housing forms between homeownership and rentals. Furthermore, as Stern's careful case study reveals, such innovations might arise organically through the work of local service providers.

Homeownership has long been seen as a source of stability and financial security in retirement, but as economist Christopher Mayer observes, the finances of older Americans are increasingly precarious amid growing debt, low savings, and fewer households with defined benefit retirement accounts. The U.S. Census Bureau reports that in 2011 the median net worth, excluding home equity, for individuals aged 65 to 69 was only $43,921. The vast majority of the elderly own their home and rely upon it to face expenses. However, Mayer's research finds a significant increase in the number of individuals with a mortgage at or near retirement age. In addition, households aged 66–71 had an average mortgage debt of $55,000 in 2013, nearly the triple the amount in 1992, despite minimal change in

15. *Id.* at 152.

real home equity. These and other alarming findings suggest that households are entering retirement with significantly more debt, raising concerns for their long-term financial stability.

In "The Rise and (Potential) Fall of Disparate Impact Lending Litigation," law professor and economist Ian Ayres, lawyer Gary Klein, and economist Jeffrey West explain how discriminatory lending practices can undermine opportunities to build wealth through homeownership. They note that disparate impact theory provides litigants with a mechanism for combating the effects of implicit racial basis in the context of discretionary decision-making. It is, they argue, "especially well suited for application to loan transactions, because it can be thoroughly investigated based on the lender's own data records."[16] Lenders apply algorithms to specific underwriting variables, but the lender's policies often allow a final price to be set based on additional non-objective factors, left to the discretion of loan brokers. Because the lender's datasets are designed to capture those variables relevant to setting loan terms, determining whether the exercise of discretion results in a disparate impact relies on ascertaining "after controlling for the variables that the lenders themselves have gathered and evaluated, whether minority borrowers were more likely than non-minority borrowers to be charged higher credit costs."[17] Lenders themselves might then be liable for creating a system that allowed for the exercise of discretion to disproportionately impose high costs and predatory terms on minorities.

The chapter traces the history of disparate impact litigation, providing a careful analysis of the evidence plaintiffs put forth in notable cases establishing that the exercise of discretion led to less favorable mortgage terms for African American and Hispanic borrowers. But the authors caution that recent decisions have limited such claims. The Supreme Court, in *Wal-Mart Stores, Inc. v. Dukes*,[18] made it exceedingly difficult, in situations involving discretionary decision-making, to establish commonality and to bring a class action. While the Court affirmed the availability of disparate impact claims under the Fair Housing Act in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*,[19] Ayres, Klein, and West argue that it severely limited such claims via robust causation requirements and that it expanded the scope of available defenses.[20] As

16. *Id.* at 232.
17. *Id.*
18. 564 U.S. 338 (2011).
19. 135 S. Ct. 2507 (2015).
20. There is significant ongoing debate regarding the implications of *Inclusive Communities*. *See, e.g.*, Amy M. Glassman & Shanellah Verna, *Disparate Impact One Year After* Inclusive Communities, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 11 (2016) ("[I]t appears that courts are focusing on the 'robust causality requirement,' dismissing cases that cannot identify a causal link between a practice and a harmful impact against a protected class."); Lauren Clatch, Inclusive Communities *and*

such, although they contend that litigation remedies are necessary to address new forms of discrimination in the provision of housing credit, the authors concede that there is significant uncertainly regarding whether such claims can still be successfully pursued. As such, they suggest, government regulators "especially the CFPB" are the most likely source for the "disparate impact discipline of lenders." Given the current leadership of the Consumer Financial Protection Bureau, this is hardly a reassuring premise.

Part IV of the volume focuses on the relationship between housing and the financial system. In "Household Debt and Defaults from 2000 to 2010: The Credit Supply View," economists Atif Mian and Amir Sufi provide a careful and detailed empirical defense of the argument, which continues to face some criticism, that the expanded availability of credit helped fuel the housing boom and bust. After examining new evidence in support of "the credit supply view," which contends that "an increase in credit supply unrelated to fundamental improvements in income or productivity was the shock that initiated the household debt boom and bust,"[21] they identify a few remaining open questions regarding the rise in house prices in the early 2000s. In particular, it is not entirely clear to what extent originators of mortgage credit either preyed on home buyers with full knowledge the bubble was unsustainable or whether they believed house prices would continue to rise. Mian and Sufi also suggest the need for additional research regarding the feedback effects through which house prices drove further consumption and aggressive borrowing.

Mian and Sufi's discussion of the role of credit supply is nicely complemented by the next chapter, which focuses on the role that representations and warranties made by loan originators played in this expansion of credit. Focusing on the securitization process, law professor Patricia McCoy and economist Susan Wachter, in "Representations and Warranties: Why They Did Not Stop the Crisis," examine why the representations and warranties made by originators failed to prevent a significant deterioration in underwriting standards. In principle, violation of these representations and warranties subjects originators to put-back risk—the forced repurchase of a securitized mortgage. Following a quick review of the history of mortgage securitization and the role and scope of representations and warranties, McCoy and Wachter examine why these mechanisms failed to prevent mortgage loan defaults and the financial crisis. They contend that in years leading up to 2008, "representations and warranties contributed to the overheating of the cycle by giving false assurances to

the Question of Impact, 101 Minn. L. Rev. (2016) ("In a survey of the cases that cite *Inclusive Communities*, is it notable that courts treat the 'robust' causation requirement very differently, some not even citing it as a concern and others citing it as their primary concern that justifies granting defendant's motion to dismiss.").

21. Evidence and Innovation, *supra* note 2, at 258.

investors while failing to deter the race to the bottom in lending standards."[22] Following the crisis, enforcement of representations and warranties resulted in an overtightening of credit and a reduction in the demand for housing, slowing the recovery. As such, they suggest a number of procedural and systemic reforms to representations and warranties designed to "right-size the enforcement of these provisions while endowing them with deterrent effect," thereby reversing this procylicality.[23] McCoy and Wachter's account is both intriguing and convincing,

The volume's concluding chapter, "When the Invisible Hand Isn't a Firm Hand: Disciplining Markets That Won't Discipline Themselves," outlines a series of regulatory reforms designed to better discipline markets and deter bad behavior. In a book focused on innovation in housing policy, economists Raphael Bostic and Anthony Orlando suggest caution and propose mechanisms for checking potentially dangerous financial innovations. Bostic and Orlando frame their chapter by recounting the history of Black Friday in September 1869, when a speculative bubble led to a nationwide financial crisis. In the process, they examine the early development of credit rating agencies and the evolution of the model through which issuers pay the rating agencies, leading to rather obvious conflicts of interest. Bostic and Orlando glean lessons from this historical account regarding how and why markets failed to discipline themselves at the level of investors, boards of directors, and customers. They propose a series of reforms at each of these levels, including reforming credit rating agencies to remove the existing conflict of interest; returning investment banks to the partnership form and rendering owner-managers personally liable for losses; and expanding financial literacy programs and government support for community banks, which can better provide access to safe loans. Bostic and Orlando's chapter is illuminating for two reasons. As noted, it provides a final word of caution regarding the dangers of innovation in housing, particularly financial innovation. In addition, it deftly invokes an historical account to both critique gaps in the regulatory reforms that followed the recent housing crisis and to propose further reforms.

The volume's chapters are incredibly rich and offer countless other theoretical and empirical insights too numerous to detail in this brief review. The twin themes of evidence and innovation appear throughout the book in various guises. Chapters offer evidence in the form of both quantitative empirical analyses and detailed case studies. The chapters address innovation in a variety of ways. A number suggest innovative policies, such as Ingrid Ellen and Brian McCabe's chapter proposing ways in which historic preservation decisions might better take into account the costs of preservation, Georgette Chapman Philip's suggestions for addressing the loss of neighborhood social services when churches are converted

22. *Id.* at 305.
23. *Id.*

into condos, and Stephanie Stern's discussion of renter equity programs. David Schleicher warns that existing land use regulations diminish the benefits of certain innovations and potentially stymie further innovation. Richard Epstein suggests greater attention must be given to distribution of the costs and burden associated with policy innovations. Other chapters provide innovative analyses, such as Matthew Desmond's examination of how residents' housing search experiences, and the quality of their own housing, can affect their perceptions of the neighborhood in which they live. And still others, like the final chapter by Raphael Bostic and Anthony Orlando, sound notes of caution regarding the dangers of financial innovation and efforts to skirt existing law.

Much as this volume seeks to break down disciplinary and methodological silos, it suggests that policy makers will benefit from efforts to break down their own silos. As Ellen and McCabe recommend, preservation commissions should be in dialogue with planning commissions to better ascertain the potential costs of preservation decisions; or as Schleicher asserts, those focused on transportation innovation would benefit from thinking more carefully about land use regulation.

Overall, the authors' diverse disciplinary backgrounds and methodological approaches result in a collection that blends, both among and within individual chapters, historical, economic, legal, and empirical analyses. One criticism of the volume is that while connections between the chapters exist, the reader largely must make them herself. The collection would benefit from more cross references between chapters (there are a few), as well as more sustained discussion, either in an extended introduction or a concluding chapter, of the connections between chapters. Relatedly, given the volume arose out of a conference, it would have been helpful to have some discussion of the broader lessons participants drew from the convening. Those caveats aside, this excellent volume will prove a worthwhile addition to the library of academics and policy makers alike. As it provides in one place an introduction to the work of many of the leading scholars writing on housing issues, all or part of the book would also be very useful as a text in a law, urban economics, or housing policy seminar. And one welcome innovation is that the entire book is open access and therefore available free to all via Cambridge University Press.[24]

True to its title, *Evidence and Innovation in Housing Law and Policy*, provides evidence that should inform and innovations that might inspire both legal reforms and new housing policies. It leaves to its readers the challenging task of making evidence-based policy innovations a reality.

24. EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY (Lee Anne Fennell & Benjamin J. Keys eds., 2017), *available at* https://www.cambridge.org/core/books/evidence-and-innovation-in-housing-law-and-policy.