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### The Euclid Proviso

Ezra Rosser

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## THE *EUCLID* PROVISIO

Ezra Rosser\*

*Abstract:* This Article argues that the Euclid Proviso, which allows regional concerns to trump local zoning when required by the general welfare, should play a larger role in zoning's second century. Traditional zoning operates to severely limit the construction of additional housing. This locks in the advantages of homeowners but at tremendous cost, primarily in the form of unaffordable housing, to those who would like to join the community. State preemption of local zoning defies traditional categorization; it is at once both radically destabilizing and market responsive. But, given the ways in which zoning is a foundational part of the racial and economic status quo, it is time for scholars and policymakers to move away from traditional zoning and towards more permissive regional or state approaches to housing development.

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## INTRODUCTION

Nearly a century ago, state governments granted localities the power to zone.<sup>1</sup> Ever since, localities have used their zoning authority to shape community development and to isolate themselves from neighbors. Zoning traditionally is all about separation—residential in one area, commercial in another, with industrial far removed—and property investment depends in part on this separation. Through zoning, urban planners could be sure commercial properties remained commercial even if sold. But the central goal of zoning has always been the protection of the single-family home (SFH).<sup>2</sup> By protecting single-family neighborhoods from market forces, cities use zoning’s awesome power to favor particular communities and to disfavor others.<sup>3</sup>

For better or worse, exclusion is a core aspect of ownership.<sup>4</sup> Owners generally can exclude others from their property, but the exclusionary reach of ownership extends beyond lot boundaries. Many of ownership’s most significant advantages come from communal membership in the

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1. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (recognizing zoning as a valid exercise of state police power for the purpose of public welfare). States acted swiftly in the 1920s to delegate zoning authority to localities based on a model promulgated by the U.S. Department of Commerce. See ADVISORY COMM. ON ZONING, DEP’T OF COM., A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926); see also 1 SARA C. BRONIN & DWIGHT H. MERRIAM, RATHKOPF’S THE LAW OF ZONING AND PLANNING § 1:2 (4th ed. 2021) (“By the 1920s, many American cities, pursuant to state enabling statutes, had adopted comprehensive zoning codes regulating the use of land within their boundaries.”).

2. See Frank S. Alexander, *The Housing of America’s Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1258 (2005) (“Since the adoption of the earliest comprehensive zoning laws almost a century ago, use of property for purposes of the ‘single-family residence’ has been one of the most revered and protected activities.”).

3. See 2 BRONIN & MERRIAM, *supra* note 1, § 23:2 (“Use of the police power to protect the happiness, comfort, and general well-being of residents in single-family neighborhoods generally has been held to be an important and legitimate public purpose for either excluding or regulating land uses deemed incompatible with the family character of such areas.”); see also Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1058 (2019) (labeling this “zoning’s original sin”).

4. See Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C. L. REV. 1, 10–12 (2019) (summarizing the exclusionary theory of property); Andrea J. Boyack, *Limiting the Collective Right to Exclude*, 44 FORDHAM URB. L.J. 451, 456–58 (2017) (highlighting the central place of the right to exclude in property and collecting sources).

neighborhood. Put differently, when you buy (or rent) property in a good neighborhood, you are getting more than just four walls and a roof.<sup>5</sup> You are also buying access to quality schools, parks, strong city services, security, and even social opportunity.<sup>6</sup> But these benefits of living in wealthy areas are not free—society pays for them through economic and racial exclusion and inequality between communities.<sup>7</sup>

Zoning, “a pillar of residential racial segregation,”<sup>8</sup> creates imaginary lines on the map, carving out separate zones that permit neighboring communities to have dramatically different tax rates, social services, and characteristics.<sup>9</sup> In this way, local zoning contributes to divisions along class and racial lines—divisions that are too often accepted as permanent features of our society.<sup>10</sup> Wealthy white suburbs and gentrified sections of downtown too often exist alongside poor African-American or Latino neighborhoods that are much less privileged.<sup>11</sup> Zoning’s imaginary lines isolate these marginalized communities from neighboring wealthy

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5. See, e.g., Lee Anne Fennell, *Property Beyond Exclusion*, 61 WM. & MARY L. REV. 521 (2019) (emphasizing the complementarities of property ownership); Lee Anne Fennell, *Co-Location, Co-Location, Co-Location: Land Use and Housing Priorities Reimagined*, 39 VT. L. REV. 925 (2015) (arguing that a home’s value is determined primarily by its location relative to other land uses and land users).

6. See LaToya Baldwin Clark, *Education as Property*, 105 VA. L. REV. 397, 415 (2019) (observing that “parents who move into these [wealthy] districts and purchase homes see themselves as ‘purchasing’ their child’s education”).

7. In the education context, exclusion takes the form of residency enforcement and criminal punishment for enrolling children outside of their assigned school. *Id.* at 416–20. More generally, exclusionary zoning allows “the upper-middle class to protect its position and pass its status on to its children.” Steven J. Eagle, *Land Use Regulation and Good Intentions*, 33 J. LAND USE & ENV’T L. 87, 126 (2017).

8. Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1166 (2019).

9. See *infra* Part I.

10. See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 741 (1993) (“Minority communities, which were often established as separate communities as the result of discriminatory zoning and planning devices, are then frequently deprived of the land use protection basic to Euclidean zoning principles.”); see also *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924) (recognizing that the comprehensive zoning ordinance would discriminate based on class: “The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a straight-jacket. . . . [T]he result to be accomplished is to classify the population and segregate them according to their income or situation in life”), *overruled by Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926).

11. This was and is by design:

The ability to live in white, well-resourced neighborhoods was not an option for racial and ethnic minorities prior to the Fair Housing Act of 1968. . . . Fifty years after the passage of the Fair Housing Act, America remains nearly as segregated by race as it was in 1968.

Jeannine Bell, *The Hidden Fences Shaping Resegregation*, 54 HARV. C.R.-C.L. L. REV. 813, 814 (2019).

neighborhoods, despite both being part of the same metropolitan areas.<sup>12</sup> Deference to local authority has an intuitive appeal when it comes to zoning and planning.<sup>13</sup> After all, such deference fits the idea that decisions are best made at the local level.<sup>14</sup> Sadly, over the past century, the intuitive attractiveness of local control has provided cover for local governments to use zoning to exclude communities of color and the poor.<sup>15</sup> Although President Trump was rightly called out for his racist dog-whistling when he sent the following tweet—“I am happy to inform all of the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low-income housing built in your neighborhood”—traditional zoning as it is practiced in many communities is already all about protection of the “suburban lifestyle dream” and the racial and economic separation that such a dream involves.<sup>16</sup>

Trump’s tweet illustrates that zoning must be reclaimed from insular local governments. Just as zoning arose and has evolved over the last century, the law must continue to evolve in its understanding by recognizing the interdependence of neighborhoods within the same

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12. See *infra* section I.E.

13. See Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 238–40 (2008) (giving an overview of the autonomy-based argument for local zoning).

14. See Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 15–17 (2000) (providing a summary of arguments for local governance).

15. It remains the case to this day that deference to local sovereignty enables “colorblind end-runs around anti-segregation programs” and laws. David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5, 52 (2017). The Washington Post, tackling just one form of such exclusion, notes:

Across the country, American communities employ ‘snob zoning’ policies that forbid builders from constructing apartment buildings or impose minimum residential lot requirements. They are often presented as driven by concerns that building smaller units could change the character of a community. . . . Such rules effectively impose a price floor for the cost of housing, making it impossible for people who live below a certain means to afford them.

Elizabeth Winkler, *‘Snob Zoning’ Is Racial Housing Segregation by Another Name*, WASH. POST (Sept. 25, 2017, 6:48 AM), <https://www.washingtonpost.com/news/wonk/wp/2017/09/25/snob-zoning-is-racial-housing-segregation-by-another-name/> [<https://perma.cc/578H-DCLF>]; see also Sarah J. Adams-Schoen, *Dismantling Segregationist Land Use Controls*, ZONING & PLAN. L. REP. (Thomson Reuters, St. Paul, Minn.), Sept. 2020, at 1 (“Throughout the first half of the twentieth century, the racist scaffolding used to maintain racially segregated neighborhoods was, for the most part, overt.”).

16. As Matthew Yglesias observed, “realistically . . . Trump isn’t creating segregation. He’s simply saying that he will let America’s local governments maintain the land use regimes they have . . .” Matthew Yglesias, *Trump’s Tweets About Saving the “Suburban Lifestyle Dream,” Explained*, VOX (Aug. 3, 2020, 10:10 AM), <https://www.vox.com/2020/8/3/21347565/suburban-lifestyle-dream-trump-tweets-fair-housing> (last visited Aug. 22, 2021); see also Tessa Stuart, *Trump Is Happy to Inform Suburban Voters that He Is Still a Racist*, ROLLING STONE (July 29, 2020, 5:27 PM), <https://www.rollingstone.com/politics/politics-news/trump-suburban-voters-suburban-fair-housing-act-1032625/> [<https://perma.cc/3YTN-QLK6>] (quoting the tweet from Donald Trump and observing that it is racist).

region. Moving from local deference to state-level rules that constrain local zoning could offer a way to lessen our country's seemingly intractable economic and racial inequality. As the title of a 2019 report published by the Joint Center for Housing Studies at Harvard University declares, "Eliminating Exclusionary Land Use Regulations Should Be the Civil Rights Issue of Our Time."<sup>17</sup>

Before defining proposed changes, it is worth highlighting the cost of maintaining the status quo. A recurring finding of social science research is that place matters. In the 1980s, William Julius Wilson argued persuasively that children who grow up in areas of concentrated poverty do not have the same opportunities as children from wealthier areas.<sup>18</sup> Similarly, Raj Chetty's team of researchers recently showed that economic mobility varies dramatically between neighborhoods.<sup>19</sup> These studies highlight something that is intuitively known by renters and prospective homeowners alike: some locations offer a better life than others<sup>20</sup> Artificial boundaries, especially government-sanctioned ones, lead to dramatically divergent outcomes at the city and even block level.<sup>21</sup> The trend over zoning's first century, assisted by transportation advancements that opened up the suburbs to development, has been

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17. Michael A. Stegman, *Eliminating Exclusionary Land Use Regulations Should Be the Civil Rights Issue of Our Time* (Aug. 19, 2019) (unpublished manuscript) (on file with the Joint Center for Housing Studies of Harvard University), <https://www.jchs.harvard.edu/research-areas/working-papers/eliminating-exclusionary-land-use-regulations-should-be-civil-rights> [<https://perma.cc/TDH5-PAE2>].

18. WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 117 (1st ed. 1987).

19. For an interactive method of exploring local advantage and disadvantage, see *The Opportunity Atlas*, OPPORTUNITY ATLAS, <http://opportunityatlas.org> [<https://perma.cc/N52R-DRJ8>], for a continually updated collection of Raj Chetty's work, see Raj Chetty's personal website, RAJ CHETTY, <http://www.rajchetty.com/> [<https://perma.cc/2M2V-5YW8>]. See also Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* 42 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19843, 2014), <https://www.nber.org/papers/w19843.pdf> [<https://perma.cc/GSC2-28JS>] ("Intergenerational mobility is a local problem, one that could potentially be tackled using place-based policies.").

20. See WILSON, *supra* note 18 at 57 (describing how neighborhood effects can adversely affect children in poor areas); Chetty et al., *supra* note 19, at 3 ("Location matters more for children growing up in low income families . . .").

21. See, e.g., Raj Chetty, John Friedman, Nathaniel Hendren, Maggie R. Rogers & Sonya R. Porter, *The Opportunity Atlas: Mapping the Childhood Roots of Social Mobility* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25147, 2018), <https://opportunityinsights.org/paper/the-opportunity-atlas/> [<https://perma.cc/3C54-BHJK>] (highlighting the significance of geographic location even within the same neighborhood); see also Ezra Rosser, *Shelter, Mobility, and the Voucher Program*, BRIGHAM-KANNER PROP. RTS. J. (forthcoming 2021) (summarizing recent economic mobility and location studies).

towards a greater concentration of locally-defined geographic privilege.<sup>22</sup>

Deference to local zoning governance undermines even the hardest-fought progressive victories, as is shown in the Mt. Laurel “success” story. A wealthy, white suburb of Camden and Philadelphia, Mt. Laurel, New Jersey used restrictive zoning to block construction of affordable housing within its boundaries.<sup>23</sup> The NAACP, representing low-income African-American and Latino populations, challenged the town’s exclusionary practices—incredibly, they won.<sup>24</sup> The New Jersey Supreme Court, in a pair of decisions, held that localities could not use zoning to foreclose low-income housing<sup>25</sup> and that cities had an affirmative obligation to provide affordable housing.<sup>26</sup> In an associated case, builders won a right to bypass zoning limitations if their proposed development included sufficient affordable housing.<sup>27</sup> These outcomes show that progressive impact litigation cases can have transformative potential. But even these successes are limited by localism, which made it possible for local opposition to blunt the impact of these transformative decisions.<sup>28</sup> After

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22. For the canonical accounts of the rise of suburbs that emphasize transportation advancements, see SAM BASS WARNER, JR., *STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870–1900* (2d ed. 1978); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

23. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mt. Laurel I)*, 336 A.2d 713, 718, 720 (N.J. 1975) (“The general ordinance requirements, while not as restrictive as those in many similar municipalities, nonetheless realistically allow only homes within the financial reach of persons of at least middle income.”).

24. *Id.* at 723 (citing *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 290 A.2d 465, 473 (N.J. Super. Ct. Law Div. 1975)) (“The record thoroughly substantiates the findings of the trial court that over the years Mount Laurel ‘has acted affirmatively to control development and to attract a selective type of growth’ and that ‘though its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing, and has used federal, state, county and local finances and resources solely for the betterment of middle and upper-income persons.’”).

25. *Id.* at 731–32. (“As a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income.”).

26. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mt. Laurel II)*, 456 A.2d 390, 452 (N.J. 1983) (“We hold that where a developer succeeds in *Mount Laurel* litigation and proposes a project providing a substantial amount of lower income housing, a builder’s remedy should be granted unless the municipality establishes that because of environmental or other substantial planning concerns, the plaintiff’s proposed project is clearly contrary to sound land use planning.”).

27. See *Oakwood at Madison, Inc. v. Twp. of Madison*, 371 A.2d 1192 (N.J. 1977). For more on builder’s remedies, see Eric E. Stern, *A Federal Builder’s Remedy for Exclusionary Zoning*, 129 *YALE L.J.* 1516 (2020).

28. Paul Boudreaux, *Infill: New Housing for Twenty-First Century America*, 45 *FORDHAM URB. L.J.* 595, 631 (2018).

*Mt. Laurel I*,<sup>29</sup> it still took twenty-five years for the first phase of the Ethel Lawrence housing complex to be built, tucked into a non-descript plot of land, nestled behind a wooded patch in the township.<sup>30</sup> Despite the litigation, localities continue to resist the idea that communities should do more than just serve the wealthy.

Deference to local governance is so strong that we ignore the fact that localities are not sovereign. Questioning the primacy of local government zoning control creates space to challenge the laws that serve to perpetuate property-tied inequality. Deference to local governments allows not-in-my-backyard (NIMBY-ism) sentiments to run roughshod over the interests of poor communities. For example, decisions about the placement of homeless shelters or waste treatment centers typically burden communities already struggling under the weight of social stressors and disinvestment.<sup>31</sup> At the other end of the spectrum, privileged communities use local deference as a tool for further isolation.<sup>32</sup> Gated communities are a fine example and cannot be dismissed as inapplicable to questions of zoning simply because they also rely on private agreements.<sup>33</sup> While the walls that isolate wealthy communities from struggling ones are often imperceptible, they are undoubtedly constructed by local government zoning.

Previous efforts to break down these walls provide valuable lessons. In 1954, the Supreme Court declared “separate but equal” unconstitutional in *Brown v. Board of Education*,<sup>34</sup> but efforts to desegregate schools through busing and funding equalization programs were met with fierce resistance in the South and the North.<sup>35</sup> After a brief attempt at

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29. S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (*Mt. Laurel I*), 336 A.2d 713, 718, 720 (N.J. 1975).

30. Ezra Rosser’s observation of site, in Mt. Laurel Township, NJ (Sept. 15, 2012); see also *Ethel R. Lawrence Homes & Robinson Estates*, FAIR SHARE HOUS. DEV., <https://fairsharedevelopment.org/housing/development/ethel-lawrence> [<https://perma.cc/TVV9-FFU3>]. For an academic exploration and celebration of the Ethel Lawrence Homes project, see DOUGLAS S. MASSEY, LEN ALBRIGHT, REBECCA CASCIANO, ELIZABETH DERICKSON & DAVID N. KINSEY, *CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB* (2013).

31. For the canonical article on this topic, see Vicki Been, *What’s Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

32. See Briffault, *supra* note 14, at 27 (“Localism in practice is often less about efficiency, democracy, or community than about preserving existing political control over local resources, protecting residents of high-wealth localities from the needs of their lower-wealth neighbors, and providing opportunities for businesses to take advantage of interlocal competition for tax base.”).

33. See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994) (discussing the rise of gated communities and the public decisions that support such private enclaves).

34. 347 U.S. 483 (1954).

35. *Id.* at 488.



equalization, we allowed schools to partially resegregate, both within and across school districts.<sup>36</sup> Resegregation is excused because public education is funded primarily by local property taxes.<sup>37</sup> We pretend that the corresponding educational inequality is acceptable because the Supreme Court said it is,<sup>38</sup> even when the results of such economic inequality closely approximate those of explicit racial barriers.<sup>39</sup> We shrug when cities resist attempts to develop affordable housing. Though there is unquestionably the need for more affordable housing in places like Seattle and Washington, D.C., proposals to provide it are met with vocal opposition by current residents.<sup>40</sup> Under the linked banners of preserving a way of life and of protecting the city's unique character, NIMBY-ism thrives.<sup>41</sup> Those not fortunate enough to live in such favored communities must commute long distances to work or are kept out entirely.<sup>42</sup> These examples show that novel thinking about who controls zoning is required if we are to reduce the extent to which property rules contribute to structural inequality.

State-level limitations on local exclusionary zoning offer a concrete way of attacking entrenched inequality. We are living through the New Gilded Age, an era of rising inequality that is undermining the middle class and trapping too many families in poverty while a select few amass

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36. For discussion of resistance to desegregation and the ways aggressive localism is used to maintain racial separation in education, see Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139 (2016).

37. See Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1210 (2018) (noting that the local funding of public education “generally favors suburban jurisdictions over urban ones”).

38. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (leaving in place a system of inequitable educational funding).

39. As LaToya Baldwin Clark writes about post-*Brown* litigation, “the Court defeated desegregation efforts on two fronts: first, by allowing local communities to geographically restrict attendance in local schools; and second, by allowing those same communities to sequester educational money locally.” Clark, *supra* note 6, at 399.

40. See Roderick M. Hills, Jr. & David Schleicher, *Building Coalitions out of Thin Air: Transferable Development Rights and “Constituency Effects” in Land Use Law*, 12 J. LEGAL ANALYSIS 79, 105 (2020) (“Many American cities—particularly high-demand places like New York, San Francisco, and Washington—restrict development in ways that drive up rents and spur housing shortages. Our richest big cities today are run more by NIMBY coalitions of neighborhood groups than by growth machine coalitions.”).

41. See Wendell Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. CAL. L. REV. 467, 492 (2018) (“Neighbors frequently fight against projects that would increase density, affect parking availability, or change neighborhood aesthetics and culture. Their goal is to prevent or at least slow neighborhood development, and, overall, these efforts are successful.”).

42. See Michelle Wilde Anderson, *Cities Inside out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2008) (discussing the problems in the urban fringe, beyond the outer edge of metropolitan regions).

enormous fortunes.<sup>43</sup> The post-World War II period was marked by widely shared income gains across the socio-economic spectrum.<sup>44</sup> But since the oil crises of the 1970s, the median income of those without a college degree has stagnated, even though the larger economic pie has continued to grow.<sup>45</sup> Property plays an important role, allowing the upper-middle class and the rich to consolidate their gains and pass along tremendous lifelong advantages to their children.<sup>46</sup> Among the unearned advantages inherited by wealthy children, the characteristics and amenities of the neighborhood where they grow up are among the most significant.<sup>47</sup> Reclaiming elements of planning and zoning from local government, exercising the *Euclid* proviso, offers a realistic way of altering the current system of location-specific advantages that exclude all but the privileged.

The *Euclid* proviso serves as an important limitation on local zoning even though it remains a largely dormant concept.<sup>48</sup> In 1926, the Supreme Court signed off on local zoning but noted “the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”<sup>49</sup> The main rule, that localities have the power to zone, has gotten considerably more attention than the proviso’s limitation. But its dormancy does not mean that it cannot be triggered: general public interest supports limiting the authority of localities to make insular

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43. It was, arguably, an academic book, Thomas Piketty’s *Capital in the Twenty-First Century*, that did the most to focus the public’s attention on the problem of inequality. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014).

44. JOHN SCHMITT, ELISE GOULD & JOSH BIVENS, *AMERICA’S SLOW-MOTION WAGE CRISIS: FOUR DECADES OF SLOW AND UNEQUAL GROWTH* (2018), <https://files.epi.org/pdf/153535.pdf> [perma.cc/79C6-46SC].

45. ELISE GOULD, *STATE OF WORKING AMERICA: WAGES 2018* (2019), <https://www.epi.org/publication/state-of-american-wages-2018/> [https://perma.cc/F4TU-AJ45].

46. RICHARD V. REEVES, *DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT* 107–08 (2017) (“[T]hose of us with high earnings are able to convert our income into wealth through the housing market, with assistance from the tax code. We then become highly defensive—almost paranoid—about the value of our property and turn to local policies, especially exclusionary zoning ordinances, to fend off any encroachment by lower-income citizens and even the slightest risk to the desirability of our neighborhoods.”).

47. See generally Jonathan T. Rothwell & Douglas S. Massey, *Geographic Effects on Intergenerational Income Mobility*, 91 *ECON. GEOGRAPHY* 83 (2015) (exploring the effect on lifetime earnings of being raised in a wealthy neighborhood).

48. Though sometimes referred to as the Euclidian caveat, this Article refers to the Supreme Court’s limitation on deference to local zoning as the *Euclid* proviso, drawing upon the more familiar Lockean proviso. Since most writing about zoning simply uses *Euclid* for the proposition that zoning is constitutional, the hope is that by naming and focusing on the *Euclid* proviso, more attention will be paid to this built-in limitation.

49. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).

decisions that drive up the price of housing in an effort to exclude outsiders.

Local governance dominates areas where the interests of private property owners are most pronounced. Though most people think of property as the relationship a person has with a thing—my computer, our car, their bicycle—property is really about the relationship owners have with everyone else.<sup>50</sup> Simply stated, property rights allow people to form expectations in their dealings with others.<sup>51</sup> If, for example, I purchase a particular seat at a baseball game, it is reasonable for me to expect that someone sitting in my seat will quickly make way for me upon my arrival and that employees of the stadium will defend my right to the seat. Other purchases come with different expectations. For example, most people have a long list of expectations about their entitlements as homeowners, including reliable electricity, mail service, and even public funding of road maintenance. The larger point, which carries across these examples, is that property rights are best understood not as rights over objects but as the right to certain expectations when interacting with others. Many of the most important expectations that people have is who will live in their community, who will be their neighbors, and who will be excluded. Regionalism insists that localities broaden their circle of concern to take into account the larger region's needs, including the needs of struggling communities. By so doing, regionalism threatens the settled expectations—the property rights—of property owners. By insisting that localities broaden their circle of concern to take into account the larger region's needs, including the needs of struggling communities, regionalism threatens the settled expectations—the property rights—of property owners.

The zoning challenge of the next century is how to reorient property owners' expectations so that there is more space for inclusive planning. This Article explores how triggering the *Euclid* proviso could lessen the extent to which jurisdictionally bound property rights contribute to forms of inequality. Demographic changes have created a unique moment in which it is possible to imagine meaningful change to how we govern property and to the relationship between privileged and peripheral areas. For generations, urban growth has been outward facing. The rise of suburbs—propelled by white flight, public infrastructure investment, and

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50. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). But see Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012) (accepting the property as relationships framing as a descriptive matter but arguing that fails to account for the in rem nature of property rights and is therefore not a good theory of property).

51. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

rigid, enforced legal boundaries—is but an extreme example.<sup>52</sup> The outward movement of jobs and capital transformed metropolitan areas, creating rings of opportunity in the white suburbs.<sup>53</sup> Cities became populated primarily by African Americans and Latinos and were marked by the negative consequences of concentrated poverty.<sup>54</sup> Outsiders looked inward with fear at the hopelessness and violence that was partly a result of decades of “disinvestment in inner-city neighborhoods.”<sup>55</sup> But in many metropolitan areas, those fears, as well as the language previously used to discuss urban space, now seem dated.

In some cities, the problem today is not underinvestment in downtown but gentrification.<sup>56</sup> Young professionals who grew up in the suburbs have rediscovered the advantages of city living. They are putting down roots and demanding that local government provide a rich array of amenities and services. If local governance is not challenged now, suburbs could soon find themselves suffering the sort of downward spiral that central cities went through from the 1960s to the 1990s.<sup>57</sup> At the same time, many cities are quickly becoming areas reserved exclusively for the rich. The staggering rise in the price of housing in New York City, Boston, San Francisco, and Washington, D.C. has forced some workers farther and farther out.<sup>58</sup> If privilege simply relocates from the suburbs to the city, reproducing the same dynamics of place-based inequality in new locations, we will have squandered the opportunity offered by this

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52. White flight refers to the mass exodus of Whites following desegregation and in migration of African-Americans to central cities, select neighborhoods, and formerly racially segregated public schools. For more on the politics of white flight, see KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2005).

53. See WARNER, *supra* note 22, at 266–69 (describing the movement of jobs from central cities to deconcentrated suburbs).

54. For the seminal work on concentrated poverty, see WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* (1996).

55. Doug Smith, *Community Economic Development, Regionalism, and Regional Equity: Emerging Strategies and Changing Roles for CED Attorneys*, 21 J. AFFORDABLE HOUS. & CMTY. DEV. L. 315, 317 (2012).

56. Gentrification in this Article, and in legal scholarship in general, arguably is overemphasized. As Lee Fennell observes, “[d]espite receiving the lion’s share of attention, gentrification appears to be empirically overshadowed by stasis and decline, at least in cities like Chicago and Philadelphia.” Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349, 370 (2017).

57. The suburbs have not completely lost their appeal either, especially for dual income families with children. Currently, we are experiencing a moment in which the wealthy can imagine living in both the suburbs and the central city. See Schragger, *supra* note 37, at 1206 (acknowledging the “renewed popularity of the central cities” while also observing that “most development in the United States is still occurring outside the urban centers, in the suburban fringe.”).

58. See JENNY SCHUETZ, *COST, CROWDING, OR COMMUTING? HOUSING STRESS ON THE MIDDLE CLASS* (2019), <https://www.brookings.edu/research/cost-crowding-or-commuting-housing-stress-on-the-middle-class/> [<https://perma.cc/F9LQ-SBHH>] (noting that commutes are longer in expensive housing markets).

inflection point to break down the walls that separate communities within the same region.

The challenge is to find feasible interventions that can make a meaningful difference. Embracing regionalism in planning and zoning is one such intervention. Zoning and planning must become areas of political struggle; that they are not is a failure of progressive imagination to date. The zoning powers local governments exercise are state-delegated, which means that states have the authority to move to a regional or state-level model if the general public calls for it or if elected leaders are courageous. By reclaiming zoning, states can reduce inequality and extend the benefits of property to more communities. Selective state-level decision-making in zoning that favors inclusive growth would also help alleviate the spatial inequality and division that naturally flows from pairing zoning authority with small municipal boundaries. Municipal boundaries are arbitrary but take on added significance when states delegate to them the power to exclude, or in other words, the power to zone.

Short-term thinking defines any ambitious project as unobtainable or politically dead upon arrival. Accordingly, scholars, are quick to dismiss calls for aggressive state assertions of zoning authority as unrealistic utopian dreams.<sup>59</sup> Serious scholarship, so the thinking goes, accepts local insular governance and the NIMBY-ism of homeowners as insurmountable obstacles and focuses not on major change but on medium- to small-scale interventions.<sup>60</sup> This is not to dismiss such work: incremental change is important and, as this Article highlights, barriers to regional zoning are significant. But as we approach the century-mark on the Standard State Zoning Enabling Act,<sup>61</sup> it is also worth taking a broad view on what needs to change for zoning to become more inclusive. Operationalizing the proviso is not a panacea to the problems of

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59. See, e.g., Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002) (criticizing state intervention).

60. As Tim Iglesias notes, “for many reasons—including traditional policy reasons, local governments’ vested interests, and citizens’ lack of a regional vision—most states for the foreseeable future will continue to delegate substantial land use authority to local governments.” Tim Iglesias, *Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists*, 82 OR. L. REV. 433, 457 (2003); see also Alejandro E. Camacho & Nicholas J. Marantz, *Beyond Preemption, Toward Metropolitan Governance*, 39 STAN. ENV’T L.J. 125, 147 (2020) (arguing for an alternative to state preemption in part because “the political challenges associated with complete preemption of the field of land-use regulation by a state or regional entity are widely recognized”).

61. ADVISORY COMM. ON ZONING, DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1924); see also Michael Allan Wolf, *A Common Law of Zoning*, 61 ARIZ. L. REV. 771, 785–88 (2019) (providing a history of the creation and spread of the standard state enabling act).

inequality, but it could make a dent. The challenges associated with structural inequality call for a reexamination of traditional deference to local zoning. It is time to embrace a wider circle of concern and to be more ambitious about what zoning can accomplish. State intervention in zoning to check local governments provides a concrete way to explore what it would look like for property law to take race and class divisions seriously and to challenge the privileges tied to locally defined property rights.

This Article explores exclusionary zoning's impact on housing supply and the related need for state intervention zoning. While deference to local zoning causes numerous problems that states can mitigate, local zoning's exclusionary tendency is the most harmful. The Article, accordingly, uses housing as the primary lens through which to explore the direction zoning should change. Part I presents the emerging consensus that something needs to be done to reduce the extent to which exclusionary zoning constrains the supply of new housing. Progressives concerned about affordable housing have finally joined conservatives, who have long voiced concern about supply constraints, in pushing to check over-regulation of new housing construction. For too long, progressives focused on what proved to be smaller battles in the affordable housing wars and ended up glossing over the larger relationship between zoning regulations and housing supply. When it comes to exclusionary zoning, there is cause for optimism when even rival scholarly camps—progressive and conservative scholars—come together to push against the status quo.

Part II looks back at the first century of zoning and emphasizes the possibilities offered by the *Euclid* proviso. It highlights both the harms of local exclusionary zoning and the doctrinal levers that provide limited checks on unfettered local exclusionary practices. Even as the Supreme Court affirmed that cities have the power to zone in *Village of Euclid v. Ambler Realty Co.*,<sup>62</sup> the Court also indicated that such state-delegated authority could be limited if it was exercised in a way that did not comport with the general welfare. As Part II shows, ever since *Euclid*, public interest lawyers have attempted to fight back against exclusionary practices through assertions that local interests in keeping people out must give way to the state interest in permitting additional affordable housing. The *Euclid* proviso serves as a limitation on the power to zone and provides a justification for involving state authority in response to local parochialism.

Part III presents and responds to scholarly defenses of the zoning status quo. Deference to local zoning, especially in light of the ongoing prioritization of single-family home (SFH) zones, provides property

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62. 272 U.S. 365 (1926).

owners with considerable stability. And there is value in stability. State mandates could weaken the ability of progressive cities and municipalities to take care of the most vulnerable. Part III seriously examines the stability and slippery slope arguments but ultimately finds such arguments too tethered to and limited by existing inequalities to be convincing. It then considers perhaps the most powerful argument against increasing the housing supply through deregulation: that such moves will lead to gentrification. Here, too, the Article ultimately comes down on the side of increasing affordable housing through upzoning, based on studies that question the link between new construction and resident displacement.

Part IV looks forward and argues that zoning's second century should be marked by more assertive use of state-preemption of local zoning. Though past legal responses to local exclusionary zoning have been only marginally successful, this Part argues that there are reasons to be cautiously optimistic. Societal changes—the increasing attractiveness of the urban core to well-heeled younger adults and bipartisan awareness that too many people find themselves priced out of decent housing—have weakened local zoning's stranglehold on politics and development. While one can imagine negative consequences should deference to local zoning be undermined, there is no doubt that traditional zoning operates to exclude low-income people, especially people of color, from better off localities. Displacing existing local zoning barriers with regulations that take a more permissive approach to increasing the housing supply appropriately threatens entrenched interests by declaring that cities should welcome everyone, not just the elite.

## I. ZONING AND HOUSING SUPPLY

Signs that many parts of the country are at a breaking point in terms of housing supply are all around: record high prices for homes despite the coronavirus pandemic, workers forced to commute several hours just to get to work, and housing costs that leave even middle-class families struggling to pay ordinary non-housing expenses. Part I explores the limited supply of housing and the ways in which cities have used zoning to block new construction. Tackling the relationship between supply and high housing costs is neither a progressive nor a conservative issue but something that invites bipartisan cooperation. Reduction of housing supply constraints is particularly pressing in light of the renewed desirability of central cities. As Part I shows, cities have joined exclusive suburbs in making construction prohibitively expensive, locking in place large lot development and limiting housing density. Though increasing supply is viewed skeptically by some communities and advocates, supply matters. Fortunately, space is emerging for those on the left and the right

to recognize the shared responsibility of pushing for zoning change.

*A. Bipartisan Agreement*

In the closing months of the Obama administration, the White House released a remarkable report, *The Housing Development Toolkit*.<sup>63</sup> The report took aim at “local barriers to housing development,” which the report claimed have “reduced the ability of many housing markets to respond to growing demand . . . jeopardizing housing affordability for working families, increasing income inequality by reducing less-skilled workers’ access to high-wage labor markets, and stifling GDP growth by driving labor migration away from the most productive regions.”<sup>64</sup> The *Toolkit*’s first section highlighted the rise in local zoning restrictions since 1970 and argued that cumulatively these restrictions have made it difficult and prohibitively expensive to build new housing in areas with strong labor markets.<sup>65</sup> But what makes the report remarkable are its ten recommended “starting points for local efforts to modernize housing planning and development”:

- (1) Establish by-right development
- (2) Tax vacant land or donate it to non-profit developers
- (3) Streamline or shorten permitting processes and timelines
- (4) Eliminate off-street parking requirements
- (5) Enact high-density and multifamily zoning
- (6) Allow accessory dwelling units
- (7) Establish density bonuses
- (8) Employ inclusionary zoning
- (9) Establish development tax or value capture incentives
- (10) Use property tax abatements<sup>66</sup>

The pro-development, anti-regulatory bent of the *Housing Development Toolkit* makes it read like a Republican white paper, not like something produced by the Obama White House.<sup>67</sup>

The *Housing Development Toolkit* did not emerge out of thin air. Ten months earlier, Jason Furman, chairman of the White House Council of Economic Advisors at the time, gave a speech at the Urban Institute attacking “excessive or unnecessary land use or zoning regulations,”

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63. THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT (2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20f.2.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf) [https://perma.cc/Q6ZK-HE8N].

64. *Id.* at 2.

65. *Id.* at 5–8.

66. *Id.* at 14–19.

67. For extended discussion of the *Toolkit*’s recommendations, see Michael Lewyn, *The Obama Administration’s Parting Shot*, 45 REAL EST. L.J. 598 (2017).



which he argued “allow a small number of individuals to capture the economic benefits of living in a community, thus limiting diversity and mobility.”<sup>68</sup> Furman followed those remarks up with an op-ed, published by the *San Francisco Chronicle* the same day as the *Housing Development Toolkit* was released, in which he emphasized that regulations have led to supply constraints and that “more efficient policies can promote availability and affordability of housing.”<sup>69</sup> To a remarkable extent, with the exception advocating for inclusionary zoning, Furman’s arguments and the *Toolkit*’s recommendations largely reflect conservative talking points.<sup>70</sup> This was not lost on others. George Mason law professor Ilya Somin noted in a *Washington Post* op-ed following Furman’s speech that there was an “emerging consensus” among “economists and other public policy experts across the political spectrum . . . that zoning rules are a major obstacle to affordable housing and economic opportunity for the poor and lower middle class.”<sup>71</sup> Somin observed, “Libertarians and other free market advocates have criticized zoning on such grounds for decades,” then noted, “recently, however, the critique of zoning has been taken up by prominent left of center commentators.”<sup>72</sup>

The left-of-center critique is noteworthy because it comes with the risk of alienating environmentalists as well as urban progressives who stridently resist increased development in their communities.<sup>73</sup> NIMBY-ism enjoys strong support from many of the same urban communities that voted overwhelming in favor of Obama in both 2008 and 2012. After the *Toolkit* was published, Doug Trumm, publications director for *The Urbanist*, declared, “Obama Is A YIMBY,” (Yes In My Backyard) and concluded, “we as housing advocates welcome the rhetorical shift

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68. Jason Furman, Chairman, White House Council of Econ. Advisors, Remarks at the Urban Institute, Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents 1–2 (Nov. 20, 2015), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120\\_barriers\\_shared\\_growth\\_land\\_use\\_regulation\\_and\\_economic\\_rents.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120_barriers_shared_growth_land_use_regulation_and_economic_rents.pdf) [https://perma.cc/R9QP-XT2Z].

69. Jason Furman, *Reform Land Use, Promote Shared Growth of New Housing*, S.F. CHRON. (Sept. 25, 2016, 8:34 PM), <https://www.sfchronicle.com/opinion/openforum/article/Reform-land-use-promote-shared-growth-of-new-9283703.php> [https://perma.cc/DGM5-6RZR].

70. See, e.g., Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST.: POL’Y ANALYSIS (Oct. 18, 2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf> [https://perma.cc/UJ96-9VE7] (making a connection between an increase in land use restrictions and the housing affordability problem).

71. Ilya Somin, *The Emerging Cross-Ideological Consensus on Zoning*, WASH. POST (Dec. 5, 2015), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-consensus-on-zoning/> [https://perma.cc/5ADS-W75U].

72. *Id.*

73. Lorraine Woellert, *Obama Takes on Zoning Laws in Bid to Build More Housing, Spur Growth*, POLITICO (Sept. 26, 2016, 5:13 AM), <https://www.politico.com/story/2016/09/obama-takes-on-zoning-laws-in-bid-to-build-more-housing-spur-growth-228650> [https://perma.cc/LS7U-JZY8].

emphasizing the need for cities to pick up the pace of multifamily housing production and focus policy on affordability and equity rather than obstruction and ever-lengthening process. It helps to have friends in high places. So thanks, Obama.”<sup>74</sup> Also drawing on the “Thanks, Obama” meme,<sup>75</sup> the Urbanism Editor for *Curbed*, Alissa Walker, similarly celebrated the *Toolkit*, writing, “this is a very progressive document that is sure to inspire some changes and enrage NIMBYs everywhere. I think I speak for everyone priced out of big cities when I say thanks, Obama.”<sup>76</sup>

The problem in many big cities, as Cecilia Muñoz, Assistant to the President and Director of the Domestic Policy Council, and Luke Tate, Special Assistant to the President for Economic Mobility, note is that “too many of the communities with the most dynamic growth have pulled up those ladders [of opportunity] behind them—often unintentionally—by creating conditions that make it impossible for families to find affordable housing in the same communities where they can find jobs.”<sup>77</sup> That a report essentially calling for deregulation of urban space could be characterized as “very progressive” is a sign of both how intertwined zoning and NIMBY-ism are across much of the country and how far the left has shifted when it comes to housing supply considerations.

The progressive turn against zoning is significant enough that a recent article decided it merited its own label: “the elite liberalitarian consensus on zoning deregulation.”<sup>78</sup> As this label—and the shortened version, “elite liberalitarian consensus”—coined by professors Ganesh Sitaraman, Morgan Ricks, and Christopher Serkin suggests, the progressive turn against zoning combines strains of liberalism and libertarianism.<sup>79</sup> In their article, *Regulation and the Geography of Inequality*, the authors argue that “[i]t is quickly becoming conventional wisdom among elite policymakers that the inaccessibility of superstar cities because of out-of-control

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74. Doug Trumm, *Obama Is a YIMBY*, THE URBANIST (Sept. 27, 2016), <https://www.theurbanist.org/2016/09/27/obama-is-a-yimby/> [https://perma.cc/7VLZ-GWCR].

75. See Hunter Schwarz, ‘Thanks Obama.’ *The Evolution of a Meme that Defined a Presidency*, WASH. POST (Feb. 13, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/02/13/thanks-obama-the-evolution-of-a-meme-that-defined-a-presidency/> [https://perma.cc/4GNC-FE3K] (providing an overview of the “Thanks Obama” meme).

76. Alissa Walker, *Obama’s New Housing Toolkit Aims to Make Cities More Affordable*, CURBED (Sept. 28, 2016, 11:35 AM), <https://www.curbed.com/2016/9/28/13080630/obama-affordable-housing-zoning-nimbys> [https://perma.cc/DN7A-EV4K].

77. Cecilia Muñoz & Luke Tate, *When Communities Pull Up the Ladder of Opportunity*, MEDIUM (Sept. 26, 2016), <https://medium.com/@Cecilia44/when-communities-pull-up-the-ladder-of-opportunity-69c692540360#.sxmju5gxj> (last visited Aug. 22, 2021).

78. Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1810 (2021).

79. *Id.* at 1770, 1810.

housing prices is a critical public policy challenge.”<sup>80</sup> Serkin, one of the nation’s leading land use scholars, and his co-authors acknowledge the ways over-regulation can increase housing costs in select cities but argue against what they see as the emerging “liberal orthodoxy, at least among academics and elite policymakers, to promote density by removing zoning restrictions.”<sup>81</sup> Their position is that lessening zoning restrictions will not do enough to tackle geographic inequality and could lead to greater concentration of economic power in a few superstar cities, amounting to a policy choice to abandon of the rest of the country.<sup>82</sup>

These are valid concerns and the policy changes that the article offers up, reversing deregulation and laissez-faire approaches in transportation, communications, trade, and antitrust areas, are valuable.<sup>83</sup> What is unclear is why the article adopts an either/or approach to the article’s suggested changes and the dismissively labeled emerging “liberal orthodoxy?”<sup>84</sup> Both things can be true: excessive zoning regulations are making housing unaffordable in parts of the country with significant growth and more should be done to ensure growth is not limited to a few superstar cities. Given the infrequency of progressives and conservatives seeing eye-to-eye on something as significant as zoning, it is worth explaining and defending the “elite liberalitarian consensus on zoning deregulation.”<sup>85</sup>

### B. *The High Cost of Housing*

The emerging bipartisan sense that something needs to be done about zoning is driven by the high cost of housing. It is common knowledge (which is to say public perception and academic studies are in agreement) that housing is unaffordable to wide segments of the population.<sup>86</sup> Especially for the poor and lower middle class, housing is unaffordable

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80. *Id.* at 1811.

81. *Id.* at 1814.

82. *Id.* at 1810–17.

83. *Id.* at 1785–1809.

84. *Id.* at 1814.

85. *Id.* at 1810.

86. See, e.g., Jared Bernstein, Jim Parrott & Mark Zandi, *The Conundrum Affordable Housing Poses for the Nation*, WASH. POST (Jan. 2, 2020), [https://www.washingtonpost.com/realestate/the-conundrum-affordable-housing-poses-for-the-nation/2020/01/01/a5b360da-1b5f-11ea-8d58-5ac3600967a1\\_story.html](https://www.washingtonpost.com/realestate/the-conundrum-affordable-housing-poses-for-the-nation/2020/01/01/a5b360da-1b5f-11ea-8d58-5ac3600967a1_story.html) [<https://perma.cc/C44L-Y9X3>] (highlighting the problem of affordable housing); Carey L. Biron, *Unaffordable Rental Housing May Be ‘New Normal’ in the United States*, REUTERS (Jan. 30, 2020, 10:03 PM), <https://www.reuters.com/article/us-usa-housing-rents/unaffordable-rental-housing-may-be-new-normal-in-the-united-states-idUSKBN1ZU0IC> [<https://perma.cc/N53W-8HGZ>] (same).

nationwide.<sup>87</sup> Wealth and income obstacles put homeownership out of reach for many young families.<sup>88</sup> Moreover, according to calculations based on HUD's fair market rent figures and a 30% cap on housing costs as a percentage of total household income, by the National Low-Income Housing Coalition, the 2020 National Housing Wage is \$23.96 per hour for a modest two-bedroom rental home, meaning one would have to make that amount per hour in a full-time job in order to afford such a home.<sup>89</sup> Given that the federal minimum wage is only \$7.25 per hour, many tenants are not making enough to afford decent housing even with steady employment.<sup>90</sup> Even taking account state and municipal mandates that raise the minimum wage above the federal floor,<sup>91</sup> "the average minimum wage worker must work nearly 97 hours per week (more than two full-time jobs) to afford a two-bedroom rental home."<sup>92</sup> It is perhaps not surprising that California has a housing affordability problem, with nine of the ten most expensive metropolitan counties (Honolulu County is number ten).<sup>93</sup> But even in Iowa, it takes more than two full-time jobs at minimum wage in order to afford a modest two-bedroom unit.<sup>94</sup> As the report notes, "[i]n no state, metropolitan area, or county in the U.S. can a worker earning the federal or prevailing state or local minimum wage afford a modest two-bedroom rental home at fair market rent by working a standard 40-hour work week."<sup>95</sup>

If rental costs are prohibitive for those at the bottom of the labor market, homeownership is even more so. Not only can it be difficult to save for a down payment on a low wage, but house prices seem to be moving ever

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87. For a more extensive elaboration of the affordability crisis than is found in this Article, see Andrea J. Boyack, *Responsible Devolution of Affordable Housing*, 46 FORDHAM URB. L.J. 1183, 1189–1209 (2019).

88. A. Mechele Dickerson, *Millenials, Affordable Housing, and the Future of Homeownership*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 435, 442–56 (2016).

89. NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2020, at 2 (2020), [https://reports.nlihc.org/sites/default/files/oor/OOR\\_BOOK\\_2020.pdf](https://reports.nlihc.org/sites/default/files/oor/OOR_BOOK_2020.pdf) [<https://perma.cc/Q43N-W56W>].

90. See Jeff Andrews, *Affordable Housing for Minimum Wage Workers Doesn't Exist*, CURBED (June 18, 2019, 1:00 PM), <https://archive.curbed.com/2019/6/18/18683501/affordable-housing-rent-minimum-wage-out-of-reach-nlihc-2019> [<https://perma.cc/7C92-3YQQ>].

91. See *State Minimum Wage Laws*, U.S. DEP'T OF LAB. (July 1, 2021), <https://www.dol.gov/agencies/whd/minimum-wage/state> [<https://perma.cc/WF26-KBXV>]; *Inventory of U.S. City and County Minimum Wage Ordinances*, U.C. BERKELEY LAB. CTR. (July 2, 2021), <http://laborcenter.berkeley.edu/minimum-wage-living-wage-resources/inventory-of-us-city-and-county-minimum-wage-ordinances/> [<https://perma.cc/4DQ4-ZH4V>].

92. NAT'L LOW INCOME HOUS. COAL., *supra* note 89, at 2.

93. *Id.* at 17.

94. *Id.* at 19.

95. *Id.* at 4; see also Matthew Desmond & Monica Bell, *Housing, Poverty, and the Law*, 2015 ANN. REV. L. & SOC. SCI. 15, 16 (2015) (noting "the majority of poor renting families in America devote over half of their income to housing; almost a quarter dedicate more than 70%").

upward. The median sales price of a house in the United States at the end of 2019 was \$327,100 and the average price was \$384,600.<sup>96</sup> But buyers looking for a two-bedroom home in the Washington, D.C. area will be hard-pressed to find one at those price points. Although such observations are quickly dated, consider the cost of housing in late July 2020. Options included a \$330,000 apartment in the Columbia Heights neighborhood which squeezes in two bedrooms, living room and kitchen, and bath into 618 square feet.<sup>97</sup> Additionally, the apartment included a \$245 monthly Homeowners Association (HOA) fee.<sup>98</sup> The unit was listed as an affordable housing unit, for which only households making between roughly \$78,000 and \$130,000 are eligible to apply to purchase the unit.<sup>99</sup> There were other options, of course, but notably only two units west of Rock Creek Park (the park is a traditional dividing line in the city between the expensive upper northwest and the less expensive eastern part of Washington, D.C.) that cost less than \$350,000.<sup>100</sup> The most attractive, a 1350 square foot two-bedroom co-op apartment located near the National Cathedral, was deceptively priced right at \$350,000 but in the fine print was the kicker, a \$1,486 monthly HOA fee.<sup>101</sup> Moving further out does not help much. It is not until one looks to Southeast, D.C., below the Anacostia River, that one could find duplex units and standalone single-family homes for less than \$350,000.<sup>102</sup> But even in an area long feared by Washington, D.C.'s white residents,<sup>103</sup> signs of market-spillovers from the more privileged parts of the D.C. region (and of gentrification)

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96. *Median Sales Price of Houses Sold for the United States*, FED. RES. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/MSPUS> [<https://perma.cc/MKZ2-XRJN>]; *Average Sales Price of Houses Sold for the United States*, FED. RES. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/ASPUS> [<https://perma.cc/G66V-9ZLP>].

97. *1225 Fairmont St NW #105, Washington, D.C. 20009*, REDFIN (Mar. 10, 2020), <https://www.redfin.com/DC/Washington/1225-Fairmont-St-NW-20009/unit-105/home/55188161> (last visited Aug. 22, 2021).

98. *Id.*

99. *Id.*

100. *See generally Two-Bedroom Listings in Washington, D.C.*, REDFIN, <https://redfin.com> (last visited Sept. 12, 2021) (search "Rock Creek Park;" then add filters: "max price: \$350k" and "min beds: 2").

101. *4000 Cathedral Ave NW Unit 538B, Washington, D.C. 20016*, REDFIN (Oct. 22, 2020), <https://www.redfin.com/DC/Washington/4000-Cathedral-Ave-NW-20016/unit-538B/home/172029468#property-details> (last visited Aug. 22, 2021).

102. *See generally Two-Bedroom Listings in Southeast Washington, D.C.*, REDFIN, <https://redfin.com> (last visited Sept. 12, 2021) (search "Southeast Washington, D.C.;" then add filters: "max price: \$350k" and "min beds: 2").

103. *See* Eddie Dean, *A Brief History of White People in Southeast*, WASH. CITY PAPER (Oct. 16, 1998), <https://washingtoncitypaper.com/article/275849/a-brief-history-of-white-people-in-southeast/> [<https://perma.cc/WPB8-WNME>] (discussing "the fears and misperceptions of white people" related to crime and race that surround the Anacostia neighborhood).

abound, with renovated houses priced in the \$450,000-\$700,000 range.<sup>104</sup>

If Washington, D.C. is bad, San Francisco is even worse. During the same time period, there was not a single two-bedroom unit in the city that cost less than \$350,000.<sup>105</sup> Indeed, even after coronavirus hit the economy, only three two-bedroom units were available in late July 2020 that cost less than half a million dollars.<sup>106</sup> The two market rate units, one priced at \$399,000 and the other at \$449,499, both came with roughly \$1000 a month HOA fees.<sup>107</sup> The below market rate dwelling unit, which came with a cap on household income and could only be sold to first-time homebuyers, cost \$499,500 for 610 square feet in an area far removed from downtown.<sup>108</sup> Things were not much better in the rest of the Bay Area. To find a comparable house for less than half a million south of San Francisco, one had to drive all the way to Redwood City, where two were available, one of which was a trailer home.<sup>109</sup> Across the Bay Bridge, not a single two-bedroom unit was available in Berkeley for less than half a million and only three such units cost less than \$350,000 in Oakland.<sup>110</sup> The same basic observations about the price of housing can be made about cities across the country, from Boston and New York to Denver and Portland.<sup>111</sup>

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104. See generally *Listings in Washington, D.C.*, REDFIN, <https://redfin.com> (last visited Sept. 12, 2021) (search “Washington, D.C.”).

105. See generally *Two-Bedroom Listings in San Francisco, CA*, REDFIN, <https://redfin.com> (last visited Sept. 12, 2021) (search “San Francisco, CA;” then add filters: “max price: \$350k” and “min beds: 2”).

106. See generally *Two-Bedroom Listings in San Francisco, CA*, REDFIN, <https://redfin.com> (last visited Sept. 12, 2021) (search “San Francisco, CA;” then add filters: “max price: \$500k” and “min beds: 2”).

107. *1535 Buchanan St #5, San Francisco, CA 94115*, REDFIN (Nov. 2, 2020), <https://www.redfin.com/CA/San-Francisco/1535-Buchanan-St-94115/unit-5/home/12401127> (last visited Sept. 10, 2021) (significantly, the HOA fees for this property include “Water, Gas, Electricity, Heat, Garbage, Ext Bldg Maintenance, Grounds Maintenance, [and] Homeowners Insurance.”); *501 Beale St Unit 11F, San Francisco, CA 94105*, REDFIN (Apr. 6, 2021), <https://www.redfin.com/CA/San-Francisco/501-Beale-St-94105/unit-11F/home/22854534> (last visited Sept. 10, 2021) (notably, the list price for the unit was later lowered to \$399,499).

108. *323 29th St Unit C101, San Francisco, CA 94131*, REDFIN (Mar. 11, 2021), <https://www.redfin.com/CA/San-Francisco/323-29th-St-94131/unit-C101/home/1615871> (last visited Sept. 10, 2021).

109. See generally *Two-Bedroom Listings in Redwood City, CA*, REDFIN, <https://redfin.com> (last visited Sept. 12, 2021) (search “Redwood City, CA;” then add filters: “max price: \$500k” and “min beds: 2”).

110. See generally *Two-Bedroom Listings in Berkeley, CA*, REDFIN, <https://redfin.com> (last visited Sept. 12, 2021) (search “Berkeley, CA;” then add filters: “max price: 500k” and “min beds: 2”); *Two-Bedroom Listings in Oakland, CA*, REDFIN, <https://redfin.com> (last visited Sept. 12, 2021) (search “Oakland, CA;” then add filters: “max price: \$350k” and “min beds: 2”).

111. See J.P. MORGAN, DOES THE U.S. RISK ANOTHER HOUSING MARKET FALL? (2020),

### C. *Supply Constraints*

The problem of housing affordability is a story not just about renter income but also about supply. As *The State of the Nation's Housing 2019* reports, residential construction is not keeping up with demand growth and “the housing that is being built is intended primarily for the higher end of the market.”<sup>112</sup> As the report notes, not only are we not seeing a trickling down of units to the low end, but half of all metropolitans “posted declines of more than 10 percent” in the supply of low-cost (below \$800 per month) units over the 2011–2017 period.<sup>113</sup> Supply constraints, low inventory, and a construction industry still reeling from the Great Recession are pushing up housing prices.<sup>114</sup> As a Freddie Mac report noted in December 2018, combining housing starts and housing depreciation with demand factors such as household formation “reveals a large and persistent shortfall in recent years.”<sup>115</sup> Although downward filtering is the primary mechanism through which housing reaches poor people, supply shortfalls in a dynamic city can lead to reverse filtering, through which existing housing moves from a less well off to a better off household.<sup>116</sup> Indeed, with demand at the low end of the market substantially outpacing supply, housing prices appreciated faster between 2000 and 2019 at the lower end of the housing market (126.2% appreciation) than at the high end (86.4% appreciation).<sup>117</sup>

Neoclassical economic theory suggests that the market will solve the

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<https://www.jpmorgan.com/global/research/us-housing-risk> [<https://perma.cc/MC2L-GRJL>] (special report from J.P. Morgan's Economic Research Team, 2020) (providing an interactive map that demonstrated that despite the expanding supply, areas such as Denver, Portland, and Boston are still experiencing high prices).

112. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *THE STATE OF THE NATION'S HOUSING 2019*, at 2 (2019), [https://www.jchs.harvard.edu/sites/default/files/Harvard\\_JCHS\\_State\\_of\\_the\\_Nations\\_Housing\\_2019.pdf](https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf) [<https://perma.cc/BEX8-A7C6>].

113. *Id.* at 4.

114. *Id.* at 7–10; Asha Bharadwaj & Charles S. Gascon, *Slowing U.S. Housing Sector Still Shaped by Great Recession*, FED. RES. BANK OF ST. LOUIS: REG'L ECONOMIST (Apr. 8, 2019), <https://www.stlouisfed.org/publications/regional-economist/first-quarter-2019/slowng-us-housing-sector> [<https://perma.cc/9C69-N4T8>].

115. FREDDIE MAC, *THE MAJOR CHALLENGE OF INADEQUATE U.S. HOUSING SUPPLY 3* (2018), <http://www.freddiemac.com/fimac-resources/research/pdf/201811-Insight-06.pdf> [<https://perma.cc/F4KM-4N8K>].

116. See Vincent J. Reina, *Affordable Housing, but for How Long? The Opportunity and Challenge of Mandating Permanently Affordable Housing*, 46 *FORDHAM URB. L.J.* 1267, 1272 (2019); C. Tsurriel Somerville & Christopher J. Mayer, *Government Regulation and Changes in the Affordable Housing Stock*, 9 *ECON. POL'Y REV.* 45, 50 (2003).

117. JUNG HYUN CHOI, JOHN WALSH & LAURIE GOODMAN, *URB. INST., WHY THE MOST AFFORDABLE HOMES INCREASED THE MOST IN PRICE BETWEEN 2000 AND 2019*, at 1 (2020), [https://www.urban.org/sites/default/files/publication/102216/why-the-most-affordable-homes-increased-the-most-in-price\\_2.pdf](https://www.urban.org/sites/default/files/publication/102216/why-the-most-affordable-homes-increased-the-most-in-price_2.pdf) [<https://perma.cc/YD5R-BYTJ>].

housing supply problem; in other words, the observed imbalance is temporary and will self-correct.<sup>118</sup> When demand outpaces supply, developers will get extraordinary profit. That will encourage existing firms to expand and new entrants to enter the construction market. With time, the housing market will stabilize. Housing prices will approximate the cost of construction, taking into account ordinary profit margins, and supply will expand to meet demand in cities undergoing economic growth.<sup>119</sup> It is still the case that the low end of the housing market will need subsidies because the monthly financing and maintenance expense of a modest unit is more than those at the bottom of the income spectrum can cover,<sup>120</sup> but, with time, downward filtering should fill some of that gap.<sup>121</sup> As Matthew Desmond's Pulitzer Prize-winning book *Evicted* shows, there is money to be made even at the low end of the market so long as the costs incurred by landlords are kept low.<sup>122</sup> Though the Milwaukee rental market depicted in *Evicted* is different from the experience of poor people in booming cities in the midst of reverse filtering, the vast majority of poor people nationwide do not get public housing support, residing instead in units provided solely by the private market.<sup>123</sup> Put differently, for people in all income brackets, not just those

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118. See Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS INST. (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations/> [https://perma.cc/TM2D-Z7VC] ("How do we know that high housing costs have anything to do with artificial restrictions on supply? Perhaps the most compelling argument uses the tools of Economics 101. If demand alone drove prices, then we should expect to see places that have high costs also have high levels of construction.").

119. John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 96–97 (2014); see David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1692 (2013).

120. See ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 47 (3d ed. 2015); Miriam Axel-Lute, *Trickle Up Housing: Filtering Does Go Both Ways*, SHELTERFORCE (Nov. 2, 2017), <https://shelterforce.org/2017/11/02/time-for-trickle-up-housing/> [https://perma.cc/2ZZJ-K2A4].

121. See Stuart S. Rosenthal, *Are Private Markets and Filtering a Viable Source of Low-Income Housing? Estimates from a "Repeat Income" Model*, 104 AM. ECON. REV. 687, 704 (2014) (arguing that downward filtering of rental units occurs faster than the rate for owner-occupied units and that housing advocates should "take seriously the market's ability to generate lower-income housing, especially among rental units").

122. See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016); see also Ezra Rosser, *Laying the Foundation: The Private Rental Market and Affordable Housing*, 44 FORDHAM URB. L.J. 499, 504–16 (2017) (providing a summary of the book); EVA ROSEN, *THE VOUCHER PROMISE: "SECTION 8" AND THE FATE OF AN AMERICAN NEIGHBORHOOD* (2020) (exploring the low end of the rental market and how tenants and landlords benefit from the voucher program). For an exploration of whether the landlords in *Evicted* were exploiting their tenants, see Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability*, 126 YALE L.J.F. 458 (2017).

123. Alicia Mazzara, *Federal Rental Assistance Provides Affordable Homes for Vulnerable People in All Types of Communities*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 9, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/11-9-17hous.pdf> [https://perma.cc/5C6T-EL5L] (noting that "[f]or every assisted household in the United States, roughly three renter households pay half or more



with higher incomes who can afford a newly constructed unit, a lot is riding on the housing market successfully increasing supply when there are demand shocks.

Unfortunately, in many of the country's economically dynamic cities, land use regulations effectively block increases in the supply of housing.<sup>124</sup> The generational push outward from the cities to the suburbs that followed World War II, driven by white flight from desegregated areas, subsidized credit, and public infrastructure investment, resulted in the then familiar patterns of white, wealthier suburbs and darker, poorer urban centers.<sup>125</sup> Though the central city retained many of the jobs, whites retreated at night to the suburbs and suburban governments resisted development as a way to protect the high level of services, particularly in terms of K-12 education, that their residents expected.

Given that education is funded largely through local property taxes, suburbs sought to maximize tax revenue and minimize demands on city services.<sup>126</sup> This practical calculus, combined with a desire to keep out communities of color, meant privileged suburbs blocked denser, more affordable housing that predictably would have housed poorer families whose tax contributions would not cover the public service expenses

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of their income for housing across urban, suburban, and rural areas"); see also CTR. ON BUDGET & POL'Y PRIORITIES, UNITED STATES FEDERAL RENTAL ASSISTANCE FACT SHEETS (2021), <https://www.cbpp.org/research/housing/federal-rental-assistance-fact-sheets#US> [<https://perma.cc/B547-CGWN>] ("24 million low-income American renters pay more than half their income for housing. Most don't receive rental assistance due to funding limitations.").

124. See generally Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289 (Gilles Duranton, J. Vernon Henderson & William C. Strange eds., 2015) (reviewing theories and studies on why regulations arise and discussing the implications of those regulations).

125. In 1967, President Lyndon Johnson appointed the National Advisory Commission on Civil Disorders to investigate the underlying forces behind the riots of the 1960s. The commission released what is known as the Kerner Report which noted that the continued segregation in American cities was reinforced by white flight. See NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 5 (1968) ("White racism is essentially responsible for the explosive mixture which has been accumulating in our cities since the end of World War II. Among the ingredients of this mixture . . . [is]: Black in-migration and white exodus, which have produced the massive and growing concentrations of impoverished Negroes in our major cities, creating a growing crisis of deteriorating facilities and services and unmet human needs."); see also Leah Platt Boustan, *Was Postwar Suburbanization "White Flight"? Evidence from the Black Migration*, 125 Q.J. ECON. 417, 438 (2010). ("My estimates suggest that the change in racial diversity associated with black migration resulted in a 17% decline in urban population.").

126. See Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665, 668-69 (1987) ("Each municipality has an individually rational motive for implementing noncompetitive policies like exclusionary zoning: protection of its fiscal base.").

associated with them.<sup>127</sup> What was true of privileged suburbs is now also true of many cities that have become attractive places to work *and* live. Once interest in living in the cities rebounded, prohibitive land use practices—exclusionary regulations, expensive and uncertain permitting processes, and local opposition to new development—moved from privileged suburbs to the urban core.<sup>128</sup> As a result, in dynamic metropolitan regions, the same basic exclusionary approach is now common to both the central city and their surrounding suburbs. This alignment of restrictive land use practices is tragic for a number of reasons and it is worth exploring what led to this point.

#### D. *The Rebound of the City*

Cities are on the rise. One explanation for their rise focuses on agglomeration effects, the ways in which physical proximity can catalyze economic growth. The classic modern example is a would-be entrepreneur with some computer skills. Such a person might be able to use those skills in a rural part of the country or in places like Columbus, Ohio but will have a much richer experience in Silicon Valley.<sup>129</sup> There the would-be entrepreneur will find a peer group actively engaged in similar work.<sup>130</sup> The chance that such a person will find out about new opportunities, learn new relevant skills, and even be in a position to take a chance on a new

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127. Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1127–28 (1995). Suburbs unable to engage in these exclusionary practices can find that expenses can rise faster than revenue, creating ongoing political difficulties. See Angela Marie Simms, *Power, Privilege, And Peril: Governing in a Suburban Majority Black and Middle Class County—A Regional Perspective* (2019) (Ph.D. dissertation, University of Pennsylvania) (ScholarlyCommons) (exploring the challenges facing Prince George County, a majority Black suburban area outside of Washington, D.C.).

128. Intense anti-development sentiment in local districts, combined with municipal governance processes that limit attention to particular proposals, arguably help explain why cities are replicating the exclusionary practices of suburbs. See Schleicher, *supra* note 119, at 1670. One possible solution would be for cities to adopt a proactive approach to urban planning and zoning rather than merely reacting to proposals piecemeal. See Sara C. Bronin, *Comprehensive Rezoning*, 2019 BYU L. REV. 725 (2019); Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015).

129. For a particularly influential account of what draws educated people to superstar cities, see RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS* 36 (2005) (explaining that the creative class looks for communities that have “abundant high-quality experiences,” are open to “diversity of all kinds,” and that “validate their identities as creative people”).

130. Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL’Y REV. 215, 232 (2016) (“Finally, cities increase productivity as proximity facilitates the rapid transmission of ideas. . . . [W]hen individuals engaged in the same skilled trade live in close proximity ‘[t]he mysteries of the trade become no mysteries; but are as it were in the air, and children learn many of them unconsciously.’” (quoting ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 271 (8th ed. 2013))).

product is much higher. There is a positive feedback loop to proximity.<sup>131</sup> This is true whether the city is San Francisco (tech), New York (finance and fashion), Los Angeles (film), Hartford (insurance), or Boston (health and education).<sup>132</sup> Attention to agglomeration effects entered the legal scholarly literature primarily through the work of a few prolific professors but has since become a widely-accepted way of understanding urban economies.<sup>133</sup> As they and others have shown, agglomeration enables some cities in the United States, so-called “superstar cities,” to go on an economic tear while others continue to decline.<sup>134</sup> The economic potential unleashed through proximity and concentration effects helps explain why the Bay Area produces almost 20% of the nation’s patents and how “[t]he New York metropolitan area generates more economic output than Australia or Spain.”<sup>135</sup>

Societal changes also played a role in elevating cities. Those who grew up in the suburbs following the middle and upper-class rush to the suburbs in the mid-twentieth century arguably understand the downsides of living in the endless meandering streets and endless cul-de-sacs and tract-home suburbia better than others, including their parents.<sup>136</sup> Especially as the urban frontier pushed ever outward in search of developable land, more

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131. David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1515–28 (2010) (highlighting reduced transportation costs, market depth, and information spillovers as economic advantages associated with urban proximity).

132. Edward L. Glaeser & Matthew G. Resseger, *The Complementarity Between Cities and Skills*, 50 J. REG’L SCI. 221, 241–42 (2010) (Figures 3 and 4 demonstrating that the primary indicator of increased information spillover is population density and level of education, showing similar levels across highly educated cities with varied industries like San Francisco, Boston, Hartford, and New York).

133. See, e.g., Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 262–63 (2010) (providing a summary of the proximity advantages associated with urban clustering). See generally Edward L. Glaeser & Joshua D. Gottlieb, *The Wealth of Cities: Agglomeration Economies and Spatial Equilibrium in the United States*, 47 J. ECON. LIT. 983 (2009) (discussing agglomeration economics and comparative advantages of cities).

134. Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENV’T L. 217, 230 (2018) (“The value of agglomeration is substantial. While New York City, San Francisco, and San Jose, for example, have 4% of the nation’s population, they are responsible for 12.6% of the nation’s gross national product.”); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 96 (2017) (“[L]ocation matters. When people and capital congregate in particular cities and regions, they learn and trade more easily, and this creates wealth and generates economic growth.”).

135. Eduardo Porter, *Coronavirus Threatens the Luster of Superstar Cities*, N.Y. TIMES (July 21, 2020), <https://www.nytimes.com/2020/07/21/business/economy/coronavirus-cities.html> [<https://perma.cc/29LZ-TYKZ>].

136. See Amir Efrati, *The Suburbs Under Siege*, WALL ST. J. (June 2, 2006, 12:01 AM), <https://www.wsj.com/articles/SB114921327859169468> [<https://perma.cc/W6M3-5U8B>] (“The influx of homes in the suburbs, and the traffic they bring, has become the chief concern of planners across the nation, many of whom are struggling to mitigate the impact of car culture.”).

people came to understand the toll that the long commutes and need to drive everywhere can have on happiness and health.<sup>137</sup> Since the early 1990s, the combined effect of declining crime rates and sustained economic growth has made cities safer and more attractive, contributing to the increased interest in city living.<sup>138</sup> With cities are no longer perceived as sites of danger, the upper middle class could imagine life outside of sealed off, isolated suburbs.

Race emerged as a complicating factor rather than as an all-determinative one. Over time, desegregation and laws such as the Fair Housing Act cracked open the suburbs to minority households.<sup>139</sup> Wealthy whites could still expect their suburb would remain majority white, but African-Americans and Latinos were now part of these once racially exclusive communities. As historically excluded racial groups entered inner ring suburbs, white flight continued but in new forms.<sup>140</sup> And in the city, young white professionals (including members of the LGBT community) moved into—gentrified—neighborhoods adjacent to existing communities of color.<sup>141</sup> Racism did not go away, but in taking on new forms and finding new outlets (including the war on crime), it changed in

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137. See Eagle, *supra* note 7, at 126 (highlighting “a reduced tolerance for commuting” as a contributing factor for urban gentrification).

138. Mangin, *supra* note 119, at 92; WILLIAM A. FISCHER, *ZONING RULES! THE ECONOMICS OF LAND USE REGULATION* 298 (2015) (observing that “the crime decline is durable and has made big cities more attractive to residents who in former times would have headed for the suburbs”); see also RACHEL E. MORGAN & BARBARA A. OUDEKERK, U.S. DEP’T OF JUST., *CRIMINAL VICTIMIZATION*, 2018, at 1–3 (2019), <https://www.bjs.gov/content/pub/pdf/cv18.pdf> [<https://perma.cc/77T8-ZDRN>]; John Gramlich, *What the Data Says (and Doesn’t Say) About Crime in the U.S.*, PEW RSCH. CTR. (Nov. 20, 2020), <https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/> [<https://perma.cc/K2JL-TCAN>].

139. For more on efforts to open up the suburbs to non-white households, see CHRISTOPHER BONASTIA, *KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT’S ATTEMPT TO DESEGREGATE THE SUBURBS* (2006).

140. See Lindsay Haines, *The Effects of White Flight and Urban Decay in Suburban Cook County*, 18 PARK PLACE ECONOMIST 18, 25 (2010) (“[T]he models support the idea that the suburbs are experiencing urban decline similar to inner-cities in that white flight produces negative economic and social outcomes.”); see also Greta Kaul, *White Flight Didn’t Disappear—It Just Moved to the Suburbs*, MINNPOST (Mar. 21, 2018), <https://www.minnpost.com/politics-policy/2018/03/white-flight-didn-t-disappear-it-just-moved-suburbs/> [<https://perma.cc/WNX3-NATQ>] (discussing white flight from racially-integrating suburbs); cf. Samuel H. Kye, *The Persistence of White Flight in Middle-Class Suburbia*, 72 SOC. SCI. RES. 38, 49 (2018) (arguing that white flight continues even after minorities have moved into suburban neighborhoods: “Ultimately, results show virtually no evidence supporting the racial proxy hypothesis. Instead, findings demonstrate that the odds of white flight are significantly *greater* for all groups in middle-class neighborhoods, rather than their poorer counterparts. Additionally, predicted probabilities provide strong evidence confirming the independent effects of non-white racial/ethnic group presence—most notably for Hispanic and Asian residents—in driving white flight in middle-class neighborhoods”).

141. See, e.g., DEREK S. HYRA, *RACE, CLASS, AND POLITICS IN THE CAPPUCINO CITY* 65, 67 (2017) (discussing how these pressures played out in the gentrification of Washington, D.C.).

ways that opened up the cities for a return migration of upper middle class white households while simultaneously eroding the suburb's status as a protected racial enclave.<sup>142</sup>

*E. Closing the Gates to the City*

As society and demographics changed, how cities approach development changed as well. The model for how scholars understand suburban and urban land use regulation broke down. For decades, property scholars relied on Professor William Fischel's "homevoter hypothesis" to explain the exclusionary zoning practices of suburbs.<sup>143</sup> According to the homevoter hypothesis, homeowners, intent on protecting their single largest investment, their homes, dominate suburban politics.<sup>144</sup> New development threatens their home values, so they fight against things like new apartment buildings or the construction of affordable housing units. Having made it into the suburbs, homeowners do their best to lock the gate behind them, shutting out any late arriving groups.<sup>145</sup> Indeed, homeowners do more than just cut off supply—they also increase the value of their homes using zoning tools such as minimum lot size requirements and time-consuming review processes to make it prohibitively expensive to build anything other than high-end housing.<sup>146</sup> A combination of rational self-interest and racial animus sealed off the suburbs from the linked threats of growth and of an influx of less wealthy, often African-American or Latino, households.<sup>147</sup>

Scholars contrasted suburban exclusion with the generally pro-development orientation of central cities.<sup>148</sup> If politics in the suburbs were

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142. See Norrinda Brown Hayat, *Urban Decolonization*, 24 MICH. J. RACE & L. 75, 98 (2018) ("[A]s a result of reurbanization, elite enclaves expand into historically Black neighborhoods, the new occupants have displaced the old occupants to varying degrees.").

143. See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

144. *Id.* at 18 (arguing that "mercenary concern with property values, especially that of homeowners, motivates citizens to organize and make personal sacrifices for such things as public schools and amenable environments").

145. *But see* FISCHEL, *supra* note 138, at 197–99 (pushing back on this explanation of suburban growth controls).

146. As a Brookings Institution report highlights, formal restrictions as well as long or uncertain permitting processes can raise the price of housing. JENNY SCHUETZ, BROOKINGS INST., *IS ZONING A USEFUL TOOL OR A REGULATORY BARRIER?* (2019), <https://www.brookings.edu/research/is-zoning-a-useful-tool-or-a-regulatory-barrier/> [https://perma.cc/CZZ7-EDQ9].

147. See Nicole Stelle Garnett, *Planning for Density: Promises, Perils and a Paradox*, 33 J. LAND USE & ENV'T L. 1, 6 (2017) (laying out the regionalist argument against suburbs, which includes racism as a motivating factor in the exit to the suburbs).

148. For an extended discussion of this contrast and an argument that homevoters are powerful

driven by the homevoter hypothesis, city politicians were understood as beholden to “the growth machine,” developers, real estate professionals, and bankers, who were actively engaged in city elections and who benefited from urban growth.<sup>149</sup> Cities, according to the growth machine understanding of urban land use, were more welcoming of everything from commercial and industrial activities to apartment buildings and, even, affordable housing.<sup>150</sup> Cities therefore provided an escape valve for some of the pent-up regional development demand that otherwise would have been built in the suburbs. Notably, the homevoter hypothesis and the growth machine were linked, two sides of the same coin. The breakdown occurred when cities started closing their own gates, following the suburban model in blocking off new development that threatened their emerging exclusivity.<sup>151</sup> High-end retail and white-collar jobs were still welcome, but cities would no longer be growth machines when it came to housing.

The political power of tenants and communities of color already living in the city helped push cities from the growth machine norm to an exclusionary approach. The anti-growth mindset normally associated with homevoters found expression in the urban space through the concern that development would harm tenants, especially communities of color. Advocates and community activists believed that new development would displace existing communities, resulting in gentrification and displacement.<sup>152</sup> Community groups fought against market-supported construction because they believed current residents would not benefit from new high-end apartment complexes and retail spaces catering to the

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even in urban spaces, see Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL L. STUD. 227 (2014).

149. See Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309 (1976); Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENV'T L. & POL'Y 293, 335 (2002) (“The growth machine model also correlates well with certain empirical observations about local government practices. For example, observers have noted evidence of some bias in municipal planning bodies toward development, while other commentators have periodically suggested that the real estate industry unduly influences the land use decision making process.”).

150. But see Been et al., *supra* note 148, at 259 (arguing that “the land-use politics of large cities are not as different from those of the suburbs as theorists, policymakers, and judges have assumed”).

151. See generally Been, *supra* note 134.

152. See, e.g., John A. Powell & Marguerite L. Spencer, *Giving Them the Old “One-Two”*: *Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433, 469–76 (2003) (highlighting studies that found that gentrification leads to displacement); Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1190 (2016) (differentiating revitalization from gentrification with the key difference being that gentrification is associated with displacement).

upper middle class.<sup>153</sup> The anti-growth argument could take on deterministic elements: the arrival of a Whole Foods, an upscale gym, or a new loft-style apartment building thought to signal that an area had been gentrified and the area was now claimed by young urban professionals (yuppies) returning to the city.<sup>154</sup> The notion that existing communities might benefit from such amenities, increase in economic activity, and additional supply of housing was rejected.<sup>155</sup> Consequently, the fight against gentrification and displacement became a fight against growth; cities, often led by progressive coalition governments, responded by making development more difficult just as cities surged in popularity and demand.

Cities did not shut down the growth machine entirely. Even as it became progressively harder for housing at any price point to be built, cities and regions continued to seek out and permit business expansion within city limits.<sup>156</sup> But for active efforts by cities and their surrounding suburbs to block new construction, economic booms that make a region attractive to in-movers should lead to only a temporary increase in the cost of housing. Seeing surging demand and the potential for above average returns, the market should respond with a corresponding increase in new housing starts. Although housing prices at the start of a regional growth spurt might be elevated over the combined cost of land and construction expenses, with time the market correction should limit both the duration and the extent of extraordinary price increases. With time, regional population and regional housing supply should increase to reflect that relative attractiveness of the employment opportunities available in these dynamic cities. But that is not what is happening. Instead, layers of land

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153. See, e.g., Kathe Newman & Elvin K. Wyly, *The Right to Stay Put, Revisited: Gentrification and Resistance to Displacement in New York City*, 43 URB. STUD. 23, 44–49 (2006) (explaining how community organizers support the informal housing market as a way of resisting displacement in New York); Hannah Weinstein, *Fighting for a Place Called Home: Litigation Strategies for Challenging Gentrification*, 62 UCLA L. REV. 794 (2015) (detailing tools such as litigation using inclusionary zoning laws, environmental impact statements, FHA prohibitions on adverse impact on racial minorities to halt gentrification).

154. For a bit of humor about gentrification, see (literally), Michael Che, *White Women Took Brooklyn*, YOUTUBE (Oct. 5, 2018), [https://www.youtube.com/watch?v=if\\_sEUffzjE](https://www.youtube.com/watch?v=if_sEUffzjE) [<https://perma.cc/NB8W-2QPP>].

155. But see Adam Sternbergh, *What's Wrong with Gentrification?*, N.Y. MAG. (Oct. 30, 2009), <https://nymag.com/news/intelligencer/62675/> (last visited Sept. 10, 2020) (defending gentrification as better than blight or abandonment).

156. See, e.g., MADELINE BARON, MARLEY BUCHMAN, MIKE KINGSELLA, RANDALL POZDENA & MICHAEL WILKERSON, HOUSING UNDERPRODUCTION IN CALIFORNIA 5 (2018), [https://www.upforgrowth.org/sites/default/files/2018-12/UFG\\_CA\\_HousingUnderproduction\\_Proof\\_12.12.18.pdf](https://www.upforgrowth.org/sites/default/files/2018-12/UFG_CA_HousingUnderproduction_Proof_12.12.18.pdf) [<https://perma.cc/3G9M-X98J>] (highlighting how California's "unprecedented economic growth over the last decade" has led to upwards spiraling housing costs because of the "severe underproduction [of housing] over time").

use regulations are effectively preventing the housing market from responding to increased demand, resulting in spiraling housing costs and little population growth in cities, regions, and entire states that are otherwise booming.<sup>157</sup>

*F. Permanent Single-Family Zoning*

Two recent linked articles by Professor Robert Ellickson, a tireless critic of land use regulations that impose costs on housing developers, illustrate the profound impact zoning has on the urban housing market.<sup>158</sup> Starting with the observation that municipal zoning “is arguably the most consequential regulatory program in the United States,” Ellickson shows how large lot zoning and other zoning hurdles severely limit housing construction in urban areas.<sup>159</sup> Taking a regional approach, *Zoning and the Cost of Housing* focuses on the thirty-seven suburbs and four localities in Silicon Valley, the greater New Haven area, and the greater Austin region.<sup>160</sup> Ellickson found that the suburbs in his study “set aside 91.0% of their residentially zoned land (70.7% of their total land area) exclusively for detached single-family use.”<sup>161</sup> Large minimum lot sizes, ranging from more modest 5,000 square feet minimum in East Palo Alto to Guilford, Connecticut’s whopping four acre minimum that applies to 61% of its residentially zoned land, exacerbate the problem of pervasive SFH zoning.<sup>162</sup> As Ellickson shows, even when the area is undergoing tremendous growth, as Silicon Valley has for several decades, zoning regulations make it nearly impossible for the market to respond to the

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157. See, e.g., Eric Kober, *The Bay Area: The Land of Many Jobs and Too Few Homes*, ECONOMICS21 (Mar. 25, 2020), <https://economics21.org/bay-area-the-land-of-many-jobs-and-too-few-homes> [<https://perma.cc/92PX-ADY8>] (presenting the widening gap between increases in non-farm labor and new housing permits in the San Francisco and San Mateo Counties between 2010 and 2019); BARON ET. AL., *supra* note 156, at 9 (noting that “[d]espite a robust and growing economy, California has experienced the slowest population growth rate of any state on the west coast from 2010 to 2017—about the same rate as Montana and half the rate of growth of Utah”).

158. Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* 5 (Jan. 13, 2020) (unpublished manuscript) (on file with author) [hereinafter Ellickson, *Zoning and the Cost of Housing*]; Robert C. Ellickson, *The Zoning Strait-Jacket: The Freezing of American Neighborhoods of Single-Family Homes*, 96 IND. L.J. 395, 418 (2021) [hereinafter Ellickson, *The Zoning Strait-Jacket*].

159. Ellickson, *Zoning and the Cost of Housing*, *supra* note 158, at 5; see also Bronin, *supra* note 128, at 727 (“Of all powers given to local governments, the power to zone is one of the most significant.”).

160. Ellickson, *Zoning and the Cost of Housing*, *supra* note 158, at 6.

161. *Id.* at 15–16.

162. *Id.* at 17–20. See generally Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1 (2016) (discussing the problem of large lot sizes nationwide).



increased demand for new housing.<sup>163</sup> The result: stagnant population growth, sky-high housing costs, and mega-commutes for those locked out.<sup>164</sup> In contrast, regions like the Greater Austin have kept both the exclusionary impulse and housing prices in check because they are more open to development, facilitate utility connections, and historically granted the central city broad annexation authority.<sup>165</sup>

*The Zoning Strait-Jacket*, Ellickson's companion article, highlights the extent to which single-family housing zones become fixed zones, frozen in time and immune to regional development pressures.<sup>166</sup> Neighborhoods, Ellickson argues, "remain virtually unchanged," partly as a result of the initial investment but also because land use regulation "almost invariably works to freeze land uses in a neighborhood of houses."<sup>167</sup> When it comes to existing areas zoned for single family detached houses, "with rare exception, local zoning rules forbid construction of denser residential structures, even duplexes."<sup>168</sup> The zoning strait-jacket described by Ellickson functions in much the same way as a SFH restrictive covenant, securing to homeowners a great deal of security and certainty that their neighborhood will remain zoned solely

163. Ellickson, *Zoning and the Cost of Housing*, *supra* note 158, at 31–47.

164. See *San Francisco, California Population 2021*, WORLD POPULATION REV. (2021), <https://worldpopulationreview.com/us-cities/san-francisco-ca-population> [<https://perma.cc/HE7U-PZ7L>] (finding that between 2010 to 2020, the San Francisco metro area grew at an annual rate between zero and one-and-a-half percent); Sunaina Kathpalia, *The District's Population Grows for the 14th Year in a Row, but at a Weaker Rate*, D.C. POL'Y CTR. (Apr. 15, 2020), <https://www.depolicycenter.org/publications/districts-population-grows-14th-year-row-weaker-rate/> [<https://perma.cc/G3EG-X47S>] (finding that net outmigration for D.C. began in 2018 and investigating immigration and emigration in the neighboring metropolitan area); William H. Frey, *Even Before the Coronavirus, Census Shows U.S. Cities' Growth Was Stagnating*, BROOKINGS INST. (Apr. 6, 2020), <https://www.brookings.edu/research/even-before-coronavirus-census-shows-u-s-cities-growth-was-stagnating/> [<https://perma.cc/B8HL-G3M3>]; MAC TAYLOR, LEGIS. ANALYST'S OFF., CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 7–9 (2015), <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> [<https://perma.cc/SUPS-NSG3>] (presenting data that "California's [h]ome [p]rices and [r]ents [h]ave [r]isen [f]aster [t]han [the] U.S. [a]verage [s]ince the 1940s" among other housing issues); Sydney Bennet, *Rise of the Super Commuters: 1 in 36 American Commuters Travel 90+ Minutes to Work Each Day*, APARTMENT LIST (Apr. 24, 2018), <https://www.apartmentlist.com/research/increase-in-long-super-commutes> [<https://perma.cc/5AVM-BU7X>] (reporting that "[o]f the ten cities with the most super commuters, eight of them fall into three regions close to the superstar cities of San Francisco, Los Angeles and New York City" while presenting plenty of data on the increase of super-commuters around metropolitan areas).

165. See Ellickson, *Zoning and the Cost of Housing*, *supra* note 158, at 68–78.

166. See Ellickson, *The Zoning Strait-Jacket*, *supra* note 158.

167. *Id.* at 3. For more on the investment reason, the ways in which investments in an initial time period can work to fix or limit the uses of land in future time periods, see Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 829–32 (2009) (discussing land's "memory," which refers to the ways land development decisions have lasting consequences).

168. Ellickson, *The Zoning Strait-Jacket*, *supra* note 158, at 47.

for SFHs.<sup>169</sup> The difference is that the ossification of zoning—its permanence when it comes to areas of residential detached homes even in cities experiencing increasing demand—involves the exercise of state power supposedly for the public welfare. This is not a small problem with minor consequences, for this “zoning strait-jacket binds a large majority of urban land in the United States.”<sup>170</sup> Combined, *Zoning and the Cost of Housing* and *The Zoning Strait-Jacket* convincingly demonstrate that land use regulations, often in the form of excessive protection of the SFH, in practice operate to permanently lock up land across metropolitan regions. In regions experiencing economic growth, these regulations contribute significantly to the problems of undersupply and unaffordability that plague urban housing markets.

For those familiar with Ellickson’s past work, his conclusion in these two articles—that over-regulation has (wrongly) depressed housing supply—is hardly surprising. A prolific scholar, Ellickson’s previous targets for attack include inclusionary zoning,<sup>171</sup> rent control,<sup>172</sup> public housing’s move towards mixed-income housing,<sup>173</sup> and even the idea that people should have a right to shelter.<sup>174</sup> One way to view Ellickson’s scholarship is a tireless focus, spanning several decades, on the ways in which policies designed to help the poor when it comes to housing paradoxically harm them by undermining how markets work.<sup>175</sup> This law and economics approach and the particular conclusions Ellickson reached on inclusionary zoning, rent control, and the like are an anathema to the left and Ellickson’s career has inspired a whole response literature.<sup>176</sup> As

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169. For a classic case on the power of SFH-restrictive covenants to protect homeowners even in the face of neighborhood changes, see *W. Land Co. v. Truskolaski*, 495 P.2d 624, 625–28 (Nev. 1972) (acknowledging growth and development changes in the area immediately surrounding a covenant protected SFH community in Reno but holding in favor of enforcing the SFH restriction).

170. Ellickson, *The Zoning Strait-Jacket*, *supra* note 158, at 4.

171. See Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167 (1981).

172. See Robert C. Ellickson, *Rent Control: A Comment on Olson*, 67 CHI.-KENT L. REV. 947 (1991).

173. See Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2010).

174. See Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J. L. & PUB. POL’Y 17 (1992).

175. There is nothing new to this move: it is arguably the default law and economics response to progressive policies in property law and in other areas of the law. See Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 432–33 (2015) (describing this move in more detail).

176. See, e.g., Robert Deal, *The Judicial Invention of Property Norms: Ellickson’s Whalemen Revisited*, 63 U. TORONTO L.J. 73 (2013) (critiquing Ellickson’s argument that whaling customs became the law of whaling); Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589 (1982) (arguing that Ellickson’s celebration of homeowners associations is primarily ideological, not empirical).

Ellickson excoriated land use regulations that add to development costs, the mainstream left played at the margins. Hoping that by providing a layer of rights to poor people—in the form of everything from eviction defense and court reform to the implied warranty of habitability and anti-condo conversion rules—the law could alter urban growth patterns, the left fought a rear-guard action.<sup>177</sup> There is tremendous value to this work and this section should *not* be considered a critique of it, but it is work largely premised on a fixed or shrinking pie.

*G. Supply Neglect and Denial*

When it comes to discussing the housing market, the academic left generally has not taken increases to supply through new construction seriously. Thus, for example, when debates about the implied warranty of habitability raged in the 1970s and 1980s between liberals or critics (those we now know as progressives or retired Marxists) and conservatives or law and economics scholars (those we now know as conservatives or law and economics scholars), the hostile political environment meant that the best the left could do was argue that in some cities, with some market conditions, the implied warranty of habitability (IWH) would not necessarily, in all circumstances, reduce supply.<sup>178</sup> Left-leaning scholars showed that the implied warranty can prevent the premature destruction of some units by landlords “milking” rental properties (allowing units to deteriorate by not maintaining them as a way to maximize returns on rental investments).<sup>179</sup> They also demonstrated that the implied warranty of habitability arguably can be imposed on a very hot market without

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177. As Professor David Super notes about the signature doctrinal shift in support of the rights of tenants, the implied warranty of habitability, “[t]he narrow lesson of the failure of the implied warranty of habitability is that direct subsidies have far more potential than regulatory action to improve low-income tenants’ housing conditions.” David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 461 (2011).

178. See, e.g., Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: “Milking” and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987) (showing that in some circumstances the implied warranty could protect units against decay and abandonment); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971) (arguing that code enforcement can redistribute income from landlords to tenants in a way that landlords will not always be able to recover from tenants); see also Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 GEO. J. ON POVERTY L. & POL’Y 33, 40–42 (2006) (describing the debate and collecting sources). For a well-done documentary on the rise and fall of critical legal studies, see Jeannie Suk Gersen, *The Critics* (2021), <https://today.law.harvard.edu/book-review/the-influence-of-critical-legal-studies/> [<https://perma.cc/6QJG-GSSX>].

179. See Kennedy, *supra* note 178, at 489–98 (defining “milking”).

necessarily altering developer investment decisions.<sup>180</sup>

Even recognizing the significant contributions these arguments made at the time, these are more nuanced and less powerful arguments compared to the right's rhetorical position that added costs inevitably will reduce the supply of new housing. With the exception of advocating for government housing subsidies and pushing for housing on a piecemeal basis for particular projects or as part of community economic development program at the neighborhood level, the left traditionally has had very little to say about how the law might be changed at a structural level to allow for new construction that could increase the supply of private housing.<sup>181</sup>

Indeed, rather than being indifferent to supply, a segment of the affordable housing advocacy community rejects the idea that market additions to the housing stock supply can help ordinary people.<sup>182</sup> Most poor people live in market supplied housing, not in public housing.<sup>183</sup> Because the amount that the poor can pay for housing is not enough to cover construction and maintenance costs, the market cannot build new units for the poor without subsidies.<sup>184</sup> But through downward filtering,

180. See Ackerman, *supra* note 178, at 1117 (presenting an argument that the code enforcement would not discourage new housing construction).

181. See Mangin, *supra* note 119, at 93–94 (noting that the housing advocacy community tends to focus on policies “that can actually prevent new development and end up increasing housing prices” and arguing that the housing advocacy community should “abandon its reflexively anti-development sentiments and embrace an agenda that accepts and advocates for increased housing development of all types” (emphasis omitted)).

182. See, e.g., Ana Aguirre, Bishop David Benke, Michelle Neugebauer & Robert Santiago, *CityViews: For East New York's Housing Crunch, Supply Is Not the Solution*, CITYLIMITS (Feb. 18, 2016), <https://citylimits.org/2016/02/18/cityviewsfor-east-new-yorks-housing-crunch-supply-is-not-the-solution/> [<https://perma.cc/M5J4-W5UJ>] (“Simply put, inviting significantly more building in low-income communities without guarantees that most or all of the new housing will be affordable to current residents may increase, not reduce the risk of displacement. The only increase in housing supply that will help to alleviate New York’s affordable housing crisis is housing that is truly affordable to low-income and working-class people. Opening the floodgates to new market-rate development is not the way to build a more equitable city, and we urge the city to reject this strategy for East New York and citywide.” (emphasis omitted)).

183. See Andrew Flowers, *Why So Many Poor Americans Don't Get Help Paying for Housing*, FIVETHIRTYEIGHT (Sept. 16, 2016, 7:00 AM), <https://fivethirtyeight.com/features/why-so-many-poor-americans-dont-get-help-paying-for-housing/> [<https://perma.cc/A3Y2-EY58>] (“[T]he vast majority of low-income families don’t receive any housing support. . . . 15 percent [of families at or below the poverty line] live in public housing . . . .” (emphasis omitted)).

184. See Elizabeth A. Graddy & Raphael W. Bostic, *The Role of Private Agents in Affordable Housing Policy*, 20 J. PUB. ADMIN. RES. & THEORY, i81, i83 (2010) (“The basic challenge to providing affordable housing is that in the places it is needed most, the rents and sale prices required to make a residence affordable for lower income households do not support financially feasible projects. Put another way, in places facing affordable housing challenges, the rents and sales prices needed for a development project to cover construction and other development costs typically far

the trickling down of units originally built for middle and upper class buyers, some market rate housing eventually becomes available at lower price points.<sup>185</sup> The trickle-down description of the housing market—relying as it does on the same basic mechanism for benefits to reach ordinary people—sounds and functions like the largely discredited trickle-down theory of economics.<sup>186</sup>

Additional luxury condos in a gentrifying part of downtown or in an exclusive suburb, according to some housing advocates, are not going to

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exceed those that can be afforded by lower income (and some middle-income) households.”); FRANCISCO NICCO-ANNAN, FANNIE MAE, MULTIFAMILY MARKET COMMENTARY—MARCH 2017 (2017), <https://www.fanniemae.com/media/23036/display> [https://perma.cc/7C7K-3B6M] (presenting data on the rising cost of constructing multifamily-housing). There are some forms of housing, including trailers and informal housing in colonias, that arguably are affordable to those with low socio-economic status, but they are often marked by low quality construction and infrastructure problems. See, e.g., Katherine MacTavish, Michelle Eley & Sonya Salamon, *Housing Vulnerability Among Rural Trailer-Park Households*, 13 GEO. J. ON POVERTY L. & POL’Y 95 (2006) (discussing the challenges of living in mobile home communities); Peter M. Ward, Flavio de Souza, Cecilia Giusti & Jane E. Larson, *El Título en la Mano: The Impact of Titling Programs on Low-Income Housing in Texas Colonias*, 36 L. & SOC. INQUIRY 1 (2011) (exploring the inequities of limited forms of ownership in colonias).

185. For background analysis on the theory of downward filtering in the housing market, see *S. Burlington Twp. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 741 (N.J. 1975) (Pashman, J., concurring) (“The brunt of this shortage is, of course, borne by persons with low or moderate incomes. . . . In theory, low and moderate income families should benefit even from construction of new housing which they themselves cannot afford because such housing creates vacancies which ‘filter down.’ In reality, however, most of these vacancies are absorbed by the enormous lag between population growth and new housing construction. The housing which does ‘filter down’ to persons with low or moderate incomes is often badly dilapidated and in deteriorating neighborhoods.” (citations omitted)); Boudreaux, *supra* note 28, at 635–38 (providing an extended, celebratory overview of filtering); Mangin, *supra* note 119, at 102–03 (describing downward and upward filtering); Ira S. Lowry, *Filtering and Housing Standards: A Conceptual Analysis*, 36 LAND ECON. 362, 363 (1960) (“I propose to define ‘filtering’ simply as a change in the real value (price in constant dollars) of an existing dwelling. . . . By this definition the dwelling unit can filter up in value as well as down; occupancy may change as a consequence, or it may not; other units may be similarly affected, or not.” (emphasis omitted)); Andrew G. Dietderich, *An Egalitarian’s Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 43–45 (1996) (“Conceptually, the filter theory sees the housing market as two ladders. On the supply ladder are houses, arranged according to quality. On the demand ladder are housing consumers, arranged according to income. When a new house is built at the top of the supply ladder, the highest person on the demand ladder moves into it, leaving an old house vacant. Since this vacant house is better than the house belonging to the second highest family on the demand ladder, that family sells and moves into the now second best house on the supply ladder. The process continues, and every consumer eventually moves up a notch.”).

186. For more on the failure of the trickle-down theory of economics, see Daphne T. Greenwood & Richard P. F. Holt, *Growth, Inequality and Negative Trickle Down*, 44 J. ECON. ISSUES 403, 408–09 (2010) (arguing that concentrated income growth has not trickled down in the United States and instead has lowered many people’s well-being, lowered provision of public goods, and increased competition for limited housing resources); and Shu-Chun Susan Yang, *Do Capital Income Tax Cuts Trickle Down?*, 60 NAT’L TAX J. 551, 551–53 (2007) (demonstrating that welfare gains from capital income tax cuts—alone—do not trickle down, to highlight that “tax liability changes are a poor proxy for welfare changes”).

improve the housing market experience of lower income households.<sup>187</sup> Taking a particularly hostile view of supply, some advocates go so far as to argue that additional high-end housing *harms* those already dealing with unaffordable housing. By making an area more attractive to the wealthy, advocates argue that new construction can induce additional demand, leading to greater displacement pressure on existing residents.<sup>188</sup> According to this view, new market rate housing reduces the land available for subsidized housing in areas that are already substantially developed.<sup>189</sup> By rejecting the basic economic principle that increased supply should lead to price decreases in all but extreme circumstances marked by perfect inelasticity, some affordable housing and community advocates have painted themselves into a corner. They now find themselves simultaneously embracing urban NIMBY-ism when it comes to market rate construction while also decrying the undersupply of affordable housing.

#### H. *Supply Matters*

Ultimately, progressive hostility to the notion that supply matters is not

187. It is worth noting that gentrification can lead to improved services and amenities that may benefit lower-income residents. See Lance Freeman & Frank Braconi, *Gentrification and Displacement: New York City in the 1990s*, 70 J. AM. PLAN. ASS'N 39, 51 (2007) (“[G]entrification brings with it neighborhood improvements that are valued by disadvantaged households, and they consequently make greater efforts to remain in their dwelling units, even if the proportion of the income devoted to rent rises.”); J. Peter Byrne, *Rhetoric and Realities of Gentrification: Reply to Powell and Spencer*, 46 HOW. L.J. 491, 494–95 (2003) (“I see gentrification creating new opportunities for existing low-income residents in terms of jobs, shopping, and education . . . [B]oth common sense and available data suggest that for many poor residents, increased job opportunities, personal safety, and amenities provide a context in which they can improve their economic standing and claim their citizenship.”).

188. See James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENV'T L. & POL'Y 45, 67 (2003) (“Under gentrification, a consumer preference for urban living causes developers to increase rents, displacing the poor into a dwindling supply of decent housing, resulting in landlord exploitation, excessive rent costs, overcrowding, or the outright expulsion from the city or entry into homelessness.”); Dietderich, *supra* note 185, at 97 (discussing gentrification and noting that “the total amount of space possessed by the wealthy increases, while the total amount of space possessed by the poor decreases”); Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 798 (1993) (“As new units were created on the high-end of the ladder, older units at the bottom depreciated until they were abandoned.”).

189. See also Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 CITYSCAPE 217, 227 (2017) (detailing how new higher-market-rate housing together with limited land availability creates strains on low- and moderate-income households); J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 551 (2007) (arguing that “[m]aintaining affordable units may stem the tide or mitigate the displacement effects of gentrification[] in an appreciating neighborhood, [and that] maintaining subsidized housing may be the only way to maintain economic diversity”).

well grounded. As Vicki Been, Ingrid Gould Ellen, and Katherine O'Regan show in *Supply Skepticism: Housing Supply and Affordability*, there is no empirical support for the anti-development position of supply skeptics.<sup>190</sup> Their article notes that “[d]espite the arguments raised by supply skeptics, there is a considerable body of empirical research showing that less restrictive land-use regulation is associated with lower prices.”<sup>191</sup> The article methodically responds to the arguments of supply skeptics. The article shows that even with land constraints, housing supply can expand and should lead to price decreases.<sup>192</sup> Furthermore, new construction at the top end of the housing market can have a cascade effect across multiple market segments; by relieving high end demand pressure, fewer units should filter upward, helping with general affordability even for those not able to afford the new units.<sup>193</sup> Though new construction might induce additional demand, the market effects of additional supply overwhelm any induced demand effects.<sup>194</sup> Similarly, while the article concedes that new construction could lead to higher rents, what little empirical work has been done on the issue has reached the opposite conclusion, that additional market supply reduces displacement in the immediate area.<sup>195</sup> “In sum,” the authors argue, “the preponderance of the evidence shows that restricting supply increases housing prices and that adding supply would help to make housing more affordable.”<sup>196</sup> The article’s analysis is restrained: even as it marshalled study after study to show that supply skeptics are wrong, it does not treat the intuitions behind supply skepticism dismissively.

Others are less restrained in their criticism of supply skeptics. Professor Michael Lewyn likens supply skepticism to climate change denial: “Just as a place where climate change denialism is rampant is likely to adopt anti-environmental policies, a city pockmarked with supply-and-demand denialism is likely to adopt anti-supply policies such as restrictive zoning and laws that discourage people from becoming landlords.”<sup>197</sup> Sonja

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190. Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25 (2019).

191. *Id.* at 26.

192. *Id.* at 28.

193. *Id.* at 28–29.

194. *Id.* at 30.

195. *Id.* at 31.

196. *Id.* at 27.

197. Michael Lewyn, *Supply and Demand Denialism*, PLANETIZEN (Feb. 10, 2015, 2:00 PM), <https://www.planetizen.com/node/73728/supply-and-demand-denialism> [<https://perma.cc/QZ8G-C9VM>]; see also Michael Lewyn, *Supply-and-Demand Denial and Climate Change Denial*, MARKET URBANISM (Apr. 12, 2016), <https://marketurbanism.com/2016/04/12/supply-and-demand-denial-an>

Trauss, founder of San Francisco Bay Area Renters' Federation (SF BARF), used her organization to push for lower zoning and environmental regulations in order to increase supply of both market rate and subsidized housing.<sup>198</sup> As the *New York Times* reported, SF BARF members "can be hard to label politically" given their combination of a pro-development agenda and left political positions on most other issues.<sup>199</sup> In some respects members of SF BARF reflect internal tensions between two generations of liberals: "a generally older group of progressives who worry that an influx of corporate techies is turning a city that nurtured the Beat Generation into a gilded resort for the rich . . . [and who] oppose almost every new development except those reserved for subsidized affordable housing."<sup>200</sup> Explaining why supply matters so much to Yes-In-My-Backyard (YIMBY) advocates in the Bay Area like her, Trauss noted, "We just flat out ran out of housing . . . There's not enough to go around, and as with any kind of shortage if there's not enough to go around, rich people get what's there."<sup>201</sup>

### I. Possibility of a Collective Scholarly Push

Although theory is not the primary focus of this Article, the emerging consensus that housing supply matters and that regulatory barriers contribute to the affordable housing crisis presents an opportunity to bridge competing strains of property theory. Whether dismissively labeled as an "elite libertarian consensus"<sup>202</sup> or categorized as an example of the left finding some truth in things that the right has said for decades, joint appreciation by conservatives and progressives of the impact zoning can have on housing supply is exciting. It creates space to break through the various barriers that until now have allowed local governments near dynamic cities to severely limit the supply of new housing. Such barriers are largely political and will be torn down through political movements not legal theory. But an academic consensus, even or perhaps especially

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d-climate-change-denial/ [https://perma.cc/643P-BDVQ] (listing similarities between supply skeptics and those who deny climate change).

198. For more on the origins of SF BARF and on Sonja Trauss, see CONOR DOUGHERTY, GOLDEN GATES: FIGHTING FOR HOUSING IN AMERICA 15–38 (2020).

199. Conor Dougherty, *In Cramped and Costly Bay Area, Cries to Build, Baby, Build*, N.Y. TIMES (Apr. 16, 2016), <https://www.nytimes.com/2016/04/17/business/economy/san-francisco-housing-tech-boom-sf-barf.html> [https://perma.cc/R7MP-PUT9].

200. *Id.*

201. Katy Murphy, 'Homes for Human Beings': Millennial-Driven Anti-NIMBY Movement Is Winning with a Simple Message, MERCURY NEWS (Nov. 13, 2017, 3:10 AM), <https://www.mercurynews.com/2017/11/12/homes-for-human-beings-millennial-driven-anti-nimby-movement-is-winning-with-a-simple-message/> (last visited Aug. 7, 2021).

202. Sitaraman et al., *supra* note 78, at 1810.



an “elite” consensus, could serve as a lever to help unfreeze zoning and to force zoning to account for state or regional, as opposed to purely local, needs. Within the property theory space, such a consensus provides a way for scholars to move beyond some of the trench warfare between conservatives and progressives that has filled law review pages in the last decade and that has left scholars talking past one another.

The emerging consensus, to the extent to which it facilitates scholarly engagement with how people experience property or a lack thereof, may have a theoretical payoff as well. The ongoing (polite) battle between progressive and conservative property scholars over at least the last decade has allowed academics to reconsider the very nature of property and to question many of the high-level rules within the system.<sup>203</sup> The battle has also, for better or worse, sucked the air out of more pragmatic and grounded scholarly explorations of property. It is beyond the scope of this Article to rehash the opposing positions of conservatives and progressive property folks,<sup>204</sup> but those on both sides view their work as important in improving how property rules operate in the real world. There are some areas—the relative significance of the right to exclude and the extent to which clear rules are fundamental to the system—where the disagreements between conservative and progressive scholars is not likely to shift much. But the emerging elite consensus that it is time to lessen the extent to which land use regulations prevent housing development is an area inviting a rapprochement in the form of a collective scholarly push.

Unaffordable housing has not been ignored by progressive antipoverty advocates. They have been on the frontlines, supporting residents facing displacement, eviction, and predatory practices by landlords.<sup>205</sup> The same is true of many professors and, as a consequence, law review pages are filled with stories of fights against gentrification, public housing rules,

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203. See, e.g., Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917 (2010) (describing the battle between progressives and conservatives).

204. Partial summaries of these positions can be found in previous articles by the author, though it is worth noting that information theory so far has tended to focus on broad understandings of property and not on zoning. See Rosser, *supra* note 175, at 407–28 (providing a summary of information theory and of responses to such work); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 115–26 (2013) (providing a summary of the first batch of progressive property works); see also Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 256–60 (2019) (providing a summary of progressive property theory); Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183 (2017) (providing an overview of conservative property thought and progressive responses).

205. See, e.g., CITY LIFE VIDA URBANA, <http://www.clvu.org> [<https://perma.cc/YE6J-EDJW>] (a Boston area organization fighting displacement); *The All-In Cities Anti-Displacement Policy Network*, ALL-IN CITIES, <https://allincities.org/where-we-work/anti-displacement-policy-network> [<https://perma.cc/T9AC-FCH7>] (a multi-city effort to fight displacement).

rent increases, and poor housing conditions that are built around the humanity of those impacted by unaffordable housing.<sup>206</sup> For those in the housing justice community, these fights transcend individual clients and have systematic significance. And they are noble fights, grounded in a way that is only possible when advocates get to know the poor and their struggles. But such attention to individual struggles arguably leaves many housing justice advocates either blind to the importance of supply or without the time and resources to engage in broader policy pushes.

The difficulty balancing individual representation and advocacy for systematic change is not unique to those operating in the housing space, for similar critiques have long been leveled against direct legal services for the poor. That these critiques are often penned by insiders seeking to challenge the social-political system writ large, compelled to write out of frustration or exhaustion with the endless parade of individual indignities, is a sign that even those whose lives are dedicated to individual representation recognize the limits of one-off fights.<sup>207</sup> No wonder that Matthew Desmond, at the end of both *Evicted* and in a recent op-ed on evictions in the coronavirus pandemic, calls on Congress to meet the challenges of eviction with massive rental assistance.<sup>208</sup> For as much as *Evicted* brought needed attention to the problem of eviction, in many ways the poor do not have an eviction problem, they have a rent problem or a rent-versus-income problem. Some evictions occur because landlords do not want to deal with a tenant who complains about conditions or want to renovate a unit to meet demand at the top of the market, but the main driver is that tenants cannot afford to pay rent and fall behind. Their household income cannot keep up with market rent even for run down units and government programs do not provide funding to close the income-rent gap for most low-income households. A similar story can be told about many of the progressive housing fights over the past fifty years.

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206. See, e.g., Yxta Maya Murray, *The Takings Clause of Boyle Heights*, 43 N.Y.U. REV. L. & SOC. CHANGE 109, 144–46 (2019) (discussing gentrification); Leah Goodridge & Helen Strom, *Innocent Until Proven Guilty?: Examining the Constitutionality of Public Housing Evictions Based on Criminal Activity*, 8 DUKE F.L. & SOC. CHANGE 1, 1–2 (2016) (writing about public housing evictions); Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity Among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY L. & POL'Y 59, 73–74 (2016) (highlighting eviction harms); Li, *supra* note 152 (discussing the problem of displacement associated with gentrification).

207. See, e.g., Gary F. Smith, *Poverty Warriors: A Historical Perspective on the Mission of Legal Services*, 45 CLEARINGHOUSE REV. 34 (2011) (critiquing the day-to-day work of legal aid lawyers as not likely to lead to structural change); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970) (same).

208. DESMOND, *supra* note 122, at 308–13; Matthew Desmond, *The Rent Eats First, Even During a Pandemic*, N.Y. TIMES (Aug. 29, 2020), <https://www.nytimes.com/2020/08/29/opinion/sunday/coronavirus-evictions-superspreader.html> [<https://perma.cc/7A62-C2P6>].

As well-meaning as they are, they are attacks on the follow-on consequences of low supply and low income, and as such amount to rearguard actions that respond to market pressures but rarely drive market outcomes.

If the challenge on the left is an inability to see the forest through the trees, to take supply at least as seriously as the endless series of related battles, the challenge on the right is recognizing that deregulation alone is insufficient. Some people will not be housed without state support. And an even larger number of people will remain severely rent burdened, paying well beyond 30% of their income, if the United States does not dramatically increase the breadth and depth of rental subsidies.<sup>209</sup> Sudden deregulation that made it much easier for developers to build more units likely would have an effect across the market but getting additional supply online takes time, as does downward filtering. Deregulation alone will not be enough to house the most needy, because even with extremely generous assumptions about the power of the market, it still depends on ability to pay. Getting the poor housed will require increased public investment in public housing, whether in the form of vouchers, traditional public housing, shelters, housing first programs, public-private tax-credit partnerships, or utility support. Though this Article focuses on the need to lessen the impact of land use regulations on housing supply, market-oriented conservatives should be careful to not let their deregulatory rhetoric take on an overly optimistic, panglossian air. When it comes to increasing the housing supply, the state still matters and market alone will not solve the problem, especially for those with the least ability to pay.

Increasing housing supply should be a priority for those committed to the values of an ownership society as well as for those concerned about increasing inequality and housing affordability. For such a collective push to occur, progressive scholars might have to accept a bit of “I told you so” ribbing from conservatives who have a longer track record of being concerned about increasing supply through new construction. And for their part, conservative scholars might have to demonstrate that they do in fact care about the poor and vulnerable and were not using expressions of concern as merely a rhetorical tool.

## II. THE *EUCLID* PROVISIO

Though the first century of zoning was marked by deference to

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209. For more on the definition of rent burden and the rise in rent burdened households, see PEW CHARITABLE TRUSTS, *AMERICAN FAMILIES FACE A GROWING RENT BURDEN* (2018), [https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden\\_report\\_v2.pdf](https://www.pewtrusts.org/-/media/assets/2018/04/rent-burden_report_v2.pdf) [<https://perma.cc/B4L8-RHDC>].

traditional exclusionary zoning, the seeds for a less insular understanding of zoning were planted from the moment the Supreme Court first upheld local zoning. Part II argues that the *Euclid* proviso—which limits local authority if zoning is counter to the larger public interest—merits greater attention from scholars and policymakers. Parochial local zoning contributes to both geographic inequities and high housing costs. Part II ends by showing that state preemption of local zoning not only is possible but can further the general welfare.

*A. Local Zoning and the Larger Public Interest*

In 1926, the Supreme Court held that zoning was a constitutionally permitted use of the police power.<sup>210</sup> Though the case required a second oral argument and multiple briefs,<sup>211</sup> the Court in *Village of Euclid v. Ambler Realty Co.* adopted a highly deferential standard for judicial review of municipal zoning.<sup>212</sup> Justice Sutherland, writing for the Court, declared that cities can put in place zoning restrictions unless they “are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>213</sup> This loose standard gave localities tremendous authority and a great deal of leeway to decide for themselves what growth to permit and what forms of development to block. But the *Euclid* opinion was not wholly blind to the dangers of entrusting such unfettered discretion to local governments.

In what might be called the *Euclid* proviso, Sutherland noted that the holding was not meant “to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.”<sup>214</sup> In the century that followed *Euclid*, there were only occasional whispers heard from the proviso. Instead, cities flexed their muscles and trumpeted their Supreme Court-affirmed zoning powers to exclude undesirable uses and low-income people from their territory.<sup>215</sup> But just

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210. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

211. For an excellent history of *Euclid*, including a play-by-play of the strategies used by the lawyers on both sides, see MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* (2008). See also Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001) (providing a history that emphasizes racial and economic exclusion as central to the case).

212. *Euclid*, 272 U.S. at 395–97.

213. *Id.* at 395.

214. *Id.* at 390.

215. As Audrey McFarlane notes, “When the Supreme Court ratified zoning in *Village of Euclid v. Ambler Realty Co.*, it enshrined economic segregation and exclusion as a constitutional, if not sensible, exercise of the police power.” McFarlane, *supra* note 8, at 1166; see also FISCHEL, *supra*

as the Court observed that societal changes in the half-century preceding *Euclid* changed the line on what is permissible for cities to regulate,<sup>216</sup> so too, circumstances have sufficiently changed since *Euclid* that it is once again time to reevaluate the appropriate level of judicial deference when it comes to local zoning regulations.

So far, the record is mixed when it comes to judicial checks on local governance decisions that run counter to the larger public interest. In the canonical zoning case, *Mount Laurel I*, the New Jersey Supreme Court ruled that every “municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.”<sup>217</sup> The court held that cities “cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need therefor.”<sup>218</sup>

In *Mount Laurel II*<sup>219</sup>, the judicially-imposed requirement on localities was expanded to include an affirmative obligation to build low-income housing. Tired of excuses and delays by municipalities, the New Jersey Supreme Court held that “[t]he municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity provided must, in fact, be the substantial equivalent of the fair share.”<sup>220</sup> The court noted that it “may require more than the elimination of unnecessary cost-producing requirements and restrictions” for cities to meet their fair share obligations; more demanding “[a]ffirmative governmental devices,” including cooperation with federal housing subsidy programs, may be

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note 138, at 171 (“*Euclid*’s victory cleared the way for zoning in almost all of the state courts, which had been about evenly split on the constitutionality of zoning up to 1926.”). For a brief, well-written history of zoning, see Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 754–70 (2020).

216. *Euclid*, 272 U.S. at 387 (“Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation.”).

217. *Id.* at 724.

218. *Id.*

219. *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983).

220. *Id.* at 419.

required.<sup>221</sup> Unfortunately, the promising language in *Mt. Laurel I* and *Mt. Laurel II* did not result in radical transformation in New Jersey. Localities continued to drag their heels and to look for ways to avoid having to provide housing for low-income (and often racially-defined or racially-stereotyped) people.<sup>222</sup> More importantly, the *Mt. Laurel* approach, which imposed affordable housing obligations on local zoning as part of cities' obligations to the general welfare, did not escape the Garden State; it remained a one-off that garnered attention but not followers.<sup>223</sup>

### B. *Localized Inequities*

Two zoning adjacent cases, *Javins v. First National Realty Corp.*<sup>224</sup> and *San Antonio Independent School District v. Rodriguez*,<sup>225</sup> help illuminate how courts respond to locally-supported inequities. In *Javins*, Judge J. Skelly Wright invented a novel doctrine, the implied warranty of habitability (IWH), to deal with the poor conditions tenants faced in a Washington, D.C. apartment building.<sup>226</sup> Under the common law, tenants had few protections against conditions that developed during the tenancy, but, through the IWH, tenants could use poor conditions—lack of heat, water damage, etc.—as a defense against eviction.<sup>227</sup> Though the IWH has been weakened over time,<sup>228</sup> the *Javins* decision inspired localities across the country to pass IWH statutes. What began with a single federal court opinion swept the nation, fundamentally altering the landlord-tenant relationship by significantly increasing (without compensation) the obligations associated with residential rental ownership.<sup>229</sup>

*San Antonio Independent School District v. Rodriguez*—a case involving a challenge to inequitable spending on public education in a

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221. *Id.*

222. For an in-depth exploration of local resistance to the demands of the *Mt. Laurel* decisions, see Joseph Marsico, Comment, *A Forty-Year Failure: Why the New Jersey Supreme Court Should Take Control of Mount Laurel Enforcement*, 41 SETON HALL LEGIS. J. 149 (2016).

223. WOLF, *supra* note 211, at 143 (“While a few other states cautiously followed the Garden State’s lead in the courts and legislative chambers—notably Pennsylvania, New York, California, and Massachusetts—for the most part in those and the remaining states, local governments are given great leeway in erecting zoning barriers to outsiders from the lower rungs of the socioeconomic ladder.”); Boudreaux, *supra* note 28, at 631 (noting that “the rancor of the debate[ in New Jersey] has arguably dissuaded other states from following a similar path”).

224. 428 F.2d 1071 (D.C. Cir. 1970).

225. 411 U.S. 1 (1973).

226. *Javins*, 428 F.2d at 1077.

227. *Id.* at 1079–80.

228. See Super, *supra* note 177.

229. The only state without the IWH is Arkansas. Desmond & Bell, *supra* note 95, at 21.

single school district that had a racially disparate impact<sup>230</sup>—shows the promise as well as the downside of impact litigation meant to challenge artificial boundaries. The Supreme Court acknowledged the inequities involved in Texas' system of local funding of education but rejected the idea that education was a fundamental right under the Constitution.<sup>231</sup> Not only was San Antonio allowed to keep in place the structures that advantaged schools and children in wealthy areas and disadvantaged schools and children in poor areas, but the same was true across the country.<sup>232</sup>

Although the Court demonstrated in *Brown v. Board of Education*<sup>233</sup> that when it came to egregious forms of racial discrimination it could put the general welfare above local educational policies,<sup>234</sup> the *San Antonio v. Rodriguez* Court was unwilling to consider wealth a suspect classification nor intervene in local policies that create structural educational inequities tied to wealth.<sup>235</sup> While not a zoning case, the Supreme Court's deference to inequitable government policies in this case contributed to an arms race across the nation, with wealthy areas using a combination of exclusionary zoning and the strength of their now protected public schools to lock in local advantage.<sup>236</sup> The *Javins* decision shows how courthouse victories can lead to legislative change protective of vulnerable groups. However, the inverse is also true: after *San Antonio v. Rodriguez* extended localities wide latitude in how they shape the costs and benefits of life within their territories, local governments knew they could count on judicial deference to shield their policies from meaningful challenges.

### C. *The General Welfare*

At least in theory, the *Euclid* proviso provides a way of responding to parochial localism, providing policymakers with guidance as to when states should intervene in local affairs. As Nestor Davidson argues in a

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230. *Rodriguez*, 411 U.S. at 1.

231. *Id.* at 18–37.

232. Camille Walsh, *Erasing Race, Dismissing Class: San Antonio Independent School District v. Rodriguez*, 21 BERKELEY LA RAZA L.J. 133, 167–69 (2011) (arguing that the *San Antonio v. Rodriguez* holding limits the ability of advocates to challenge education inequities and highlighting the continued economic and racial segregation in public education).

233. 347 U.S. 483 (1954).

234. *See id.*

235. Walsh, *supra* note 232, at 170–71; Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 558–59 (1999).

236. *See* Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 878 (2006) (faulting governance fragmentation for both “fragmented school districts that institutionalize the racial segregation of students” and exclusionary zoning).

recent Article, when localities exercise state delegated powers, “that plenary authority must advance the actual, general welfare of the people of the state.”<sup>237</sup> Consequently, “[t]his spatially inflected understanding of general welfare thus supplies an operative principle to translate normative commitments into the structural terms of state/local conflicts.”<sup>238</sup> If general welfare is indeed a limitation, then the structural question—should something be done at the local or at the state level—can be answered in part by looking at whether a locality is doing something that offends state values. Davidson explains:

When local governments exercise their authority as a means of racial, economic, or similar exclusion, their parochialism has an inherently normative dimension. That exercise can offend the values of the state as a whole and can therefore in turn justify state intervention. Explicitly considering the general welfare of the state in evaluating the boundaries of local power provides a mechanism for limiting the most pernicious externalities that can be produced by local parochialism at the margins.<sup>239</sup>

The challenge with Davidson’s use of the general welfare as a limitation on local authority is that it assumes that “racial, economic, or similar exclusion” runs counter to “the values of the state as a whole.”<sup>240</sup> But what if the state also values such exclusion? This possibility is not far-fetched; indeed, exclusion can be a normative commitment at both the state and local level, which can be seen in state resistance to additional supply of affordable housing in wealthy states such as California, Connecticut, and New Jersey.

If “the general welfare” is going to limit localities, there has to be more to “the general welfare” than simply moving up a political level and allowing the state a carte blanche to supply the definition. Davidson answers the problem of definitional source by turning to the *Mount Laurel I* decision.<sup>241</sup> “Looking to the concept of general welfare alone was not sufficient to delineate the limits on local authority,” Davidson continues, “rather, the court needed an underlying normative concern to give content to the relevant terms of the broader welfare at issue.”<sup>242</sup> The concern that drove the New Jersey Supreme Court in *Mount Laurel* was the connection between the fundamental human need for shelter and the general

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237. Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 991 (2019).

238. *Id.*

239. *Id.* at 992.

240. *Id.*

241. *Id.* at 993–96.

242. *Id.* at 994.



welfare.<sup>243</sup> Taking a broad reading of what the New Jersey Supreme Court was doing, Davidson argues that “the doctrine can be read as allowing courts to distinguish between more or less normatively valid grounds for the assertion of local autonomy in state/local conflicts.”<sup>244</sup> This is an attractive vision of courts to be sure, but one that relies heavily on alignment between the progressive/academic vision of the general welfare and that of courts for it to work.<sup>245</sup> Put differently, what if judges have a different understanding of what constitutes valid grounds for deferring or not deferring to local autonomy? Ultimately, even though Davidson’s article is only a partial step along the path towards “a coherent, textually grounded, implementable conception of the outer boundaries of localism,”<sup>246</sup> it does a great job elevating the fact that there is “a normative valence to localism”<sup>247</sup> that cannot be avoided.

#### D. State Preemption

Transitioning from theory to practice, the (limited) examples of state interventions in local zoning provide a way of understanding the practical reach of “general welfare” in the *Euclid* proviso. Though “state and federal courts for the most part have ignored this Euclidian caveat,”<sup>248</sup> states are beginning to be more assertive in adding content to the general welfare. While select cities have made similar moves,<sup>249</sup> in 2019, Oregon became the first state to essentially prohibit SFH zoning in urban areas.<sup>250</sup> Drawing on state level efforts to expand the default development rights of owners and to require cities to permit higher density construction, John

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243. *Id.*

244. *Id.* at 995.

245. To be fair, Davidson acknowledges and responds to this counterargument. *See id.* at 998–1000.

246. *Id.* at 996.

247. *Id.* at 997.

248. WOLF, *supra* note 211, at 147; *see also* *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (ruling against a local zoning ordinance because the ordinance “d[id] not bear a substantial relation to the public health, safety, morals, or general welfare”).

249. In December 2018, for example, the Minneapolis City Council voted to upzone their entire city to allow duplexes and triplexes on lots formerly limited to single family housing. For coverage of the Minneapolis upzoning, *see* Richard D. Kahlenberg, *How Minneapolis Ended Single-Family Zoning*, THE CENTURY FOUND. (Oct. 24, 2019), <https://tcf.org/content/report/minneapolis-ended-single-family-zoning/> [https://perma.cc/3E7S-52WX]. *See also* The Editorial Board, *Americans Need More Neighbors*, N.Y. TIMES (June 15, 2019), <https://www.nytimes.com/2019/06/15/opinion/sunday/minneapolis-ends-single-family-zoning.html> [https://perma.cc/NQV6-2552] (celebrating and contextualizing the Minneapolis move).

250. *See* Jeff Andrews, *Oregon Just Effectively Banned Single-Family Zoning*, CURBED (July 1, 2019, 5:52 PM), <https://archive.curbed.com/2019/7/1/20677502/oregon-yimby-single-family-zoning-nimby-rent-control> (last visited Sept. 10, 2021).

Infranca argues that states are engaged in a new form of statehouse-driven zoning changes.<sup>251</sup> Following *Mount Laurel I*, the first wave of state efforts piggybacked on local zoning regulations by imposing additional requirements but did not displace the local governance prerogative.<sup>252</sup> The emerging state zoning initiatives, in contrast, are less deferential and impose states' preferences for density and greater development directly on localities—using state authority to knock down, rather than increase, permitting process barriers.<sup>253</sup>

This new wave of statehouse zoning is best exemplified by the state-level lowering of barriers homeowners face when they want to build and rent out accessory dwelling units (ADUs).<sup>254</sup> Though ADUs can take the form of a new detached structure, they need not be separate from the main house. The appeal of ADUs to housing advocates is simple: if homeowners in areas zoned for SFHs had a right to build and rent out an ADU on the land they already own, market forces would predictably result in additional housing. The statutory allowances for ADUs vary and are often flexible, allowing for everything from newly constructed standalone backyard structures built onsite to tiny homes placed on driveways.<sup>255</sup> In some cases, providing homeowners with a right to rent out a separate unit will not result in an additional unit of housing in the area, it will simply convert an existing illegal rental arraignment into an officially sanctioned one.<sup>256</sup> Not every house will have an ADU, but for many homeowners, the right to have an ADU will mean they can create space for an elderly relative to live comfortably or can use the right to generate income from tenants. The political appeal of ADU allowances crosses partisan lines in part because it costs states little more than the effort to change the zoning regulations. Though ADUs will not solve the supply problem by

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251. John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823 (2019).

252. *Id.* at 875–76.

253. *Id.*

254. *Id.* at 857–75. For extended discussion of ADUs, see John Infranca, *Housing Changing Households: Regulatory Changes for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53 (2014) [hereinafter *Housing Changing Households*]. See also Vicki Been, Benjamin Gross & John Infranca, *Responding to Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units* 26–29 (Jan. 2014) (unpublished working paper), [https://furmancenter.org/files/NYUFurmanCenter\\_RespondingtoChangingHouseholds\\_2014\\_1.pdf](https://furmancenter.org/files/NYUFurmanCenter_RespondingtoChangingHouseholds_2014_1.pdf) [<https://perma.cc/5VGV-SWC7>] (detailing the regulatory barriers that often limit ADU construction).

255. For overviews of city and state ADU regulations, including discussion of different approaches, see Lisa T. Alexander, *Community in Property: Lessons from Tiny Homes Villages*, 104 MINN. L. REV. 385, 453–54 (2019); and *Housing Changing Households*, *supra* note 254, at 67–70.

256. Cities can, for example, run programs “that allow[] property owners to formally register and rent” previously illegal units. *Legalize Your Illegal Units Today*, CITY OF S.F. DEP'T OF BLDG. INSPECTION: KEY PROGRAMS, <https://sfdbi.org/UnitLegalization> [<https://perma.cc/PNM7-W5MV>].

themselves, they can help.

State overrides of local zoning is not limited to the ADU context. As an insightful article by Anika Lemar shows, state legislatures are willing to use their authority to supersede local zoning limitations when there are political or bureaucratic reasons for doing so.<sup>257</sup> Lemar argues that replacing local obstruction or barriers with more permissive state-level regulation allows states to selectively displace local zoning that either operates against state interests or the interests of lobbying groups which can operate effectively at the state but not the local level.<sup>258</sup> As Lemar notes, “opponents of state interventions routinely complain that the state seeks to encroach on local power. They never concede that the state is simply reassuming authority that it originally granted to local governments.”<sup>259</sup> Lemar identifies family day care homes, manufactured housing, small-scale alternative energy infrastructure, and group homes as areas where a significant number of states have enacted legislation that displaces local zoning.<sup>260</sup> Two of these—manufactured housing and group homes—are not unfamiliar to zoning scholars as examples of (limited) national and state intervention.<sup>261</sup> There is a long history of local opposition to the siting of manufactured housing and group homes and of interventions to tamper down such opposition.<sup>262</sup> Family day care homes and small-scale alternative energy infrastructure are relatively underappreciated but likewise involve matters that can generate intense hyper-local opposition even though they can be valuable for society at large. Drawing on all four examples, Lemar argues that with the right lobbying and pressure—originating from external interest groups or from internal regulatory interests—states can and do displace local zoning rules that are too parochial or that run counter to state regulatory interests.<sup>263</sup>

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257. Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293 (2019).

258. *Id.* at 297.

259. *Id.* at 305.

260. *Id.* at 305–44.

261. Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 233 (2016); Tim Iglesias, *Defining “Family” for Zoning: Contemporary Policy Challenges, Legal Limits and Options*, ZONING & PLAN. L. REP. (Thomson Reuters, St. Paul, Minn.), May 2014, at 1.

262. For more on local opposition to manufactured housing and state interventions in the name of affordable housing, see Tim Iglesias, *State and Local Regulation of Particular Types of Affordable Housing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 113, 116 (Tim Iglesias & Rochelle E. Lento eds., 2005).

263. Lemar, *supra* note 257, at 344–50.

### III. DEFENDING TRADITIONAL ZONING

Infranca and Lemar's scholarship shows that concern for the general welfare can lead states to displace local zoning limitations.<sup>264</sup> But should states go down that path? Should states further displace local zoning and aggressively attack SFH zoning and other exclusionary forms of zoning to increase the supply and affordability of housing? Part III addresses these questions by considering the downsides of undermining traditional zoning. Two recent articles answer this in the negative, arguing that it would be a mistake to undermine respect and deference for local zoning.<sup>265</sup> A third looks at perhaps the most difficult issue when it comes to state allowances that open up cities for additional development: gentrification.<sup>266</sup> While this third article ultimately comes down on the pro-growth, anti-exclusionary side of the spectrum, it is worth closely considering these three works. Together they show the danger of overselling what zoning changes acting alone can accomplish and the risks associated with state intervention in the zoning space.

#### A. *Valuing the Status Quo*

In *A Case for Zoning*, Christopher Serkin defends traditional zoning by arguing that it serves an important role "regulating the pace and costs of community change . . . by maintaining community character, enhancing property values, and allocating the costs of development between insiders and outsiders."<sup>267</sup> Serkin begins his article by noting that "zoning is under more sustained attack than at any time in the last seventy-five years" and "[t]here is a growing call for a massive deregulatory project with respect to zoning."<sup>268</sup> Serkin's defense of zoning is a celebration of stability. As Serkin and others observe, property law plays an important role in creating and protecting stable expectations while also allowing for gradual change.<sup>269</sup> When someone buys a home, the purchase has both a physical

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264. Although beyond the scope of this Article, it is worth noting that the Religious Land Use and Institutional Persons Act of 2000 (RLUIPA) can similarly work to displace local zoning. For more on the RLUIPA, see John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 CARDOZO L. REV. 1693 (2013).

265. Serkin, *supra* note 215; Richard C. Schragger, *The Perils of Land Use Deregulation*, 171 U. PA. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3821094](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821094) [<https://perma.cc/SM47-2JVU>].

266. John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271 (2020).

267. Serkin, *supra* note 215, at 752.

268. *Id.* at 750–51.

269. Stability and change are major themes, for example, in Hanoch Dagan's recent theoretical account of a utopian vision of property law in wealthy democracies. See HANOCH DAGAN, A LIBERAL

dimension (the lot, the walls, etc.) and a social one (the neighborhood, the local school, etc.). Part of the purchase is “membership in a community with a particular character.”<sup>270</sup> Warning that the good schools that attracted people “will degrade” if more people become part of the community than the school system can handle, Serkin highlights that “one of zoning’s central roles today is to protect consumer preferences by preserving community character.”<sup>271</sup> Zoning also protects property values by preventing overly fluid movements of capital, limiting the extent to which the wealthy are asked to subsidize the less wealthy.<sup>272</sup> Traditional zoning is “a regulatory barrier that helps to preserve the relative homogeneity of the community,” and “benefits in-place property owners at the expense of excluded outsiders.”<sup>273</sup> When change does take place, zoning restrictions help allocate the costs of growth, transferring wealth “from newcomers to in-place property owners” directly, through exactions, or indirectly, through regulatory burdens.<sup>274</sup>

Serkin’s argument becomes more speculative when he switches from describing zoning abstractly to making predictive claims. Serkin observes that zoning restrictions helped cities compete with suburbs and break free from the urban growth machine-suburban exclusion binary.<sup>275</sup> Cities escaped the death spiral they were on in the 1970s and 1980s and once more became attractive, in part, because they imposed exactions on developers and limited housing supply.<sup>276</sup> Within the city, local “neighborhood-level control over land use, in particular, stabilized communities and property values, making investments in urban real estate appealing again.”<sup>277</sup> If traditional local restrictions are undone, investors might “rush for the exits” because of the resulting uncertainty associated with urban ownership.<sup>278</sup> Zoning protects cities from this sort of instability.

Serkin’s second predictive claim is that if zoning protections were

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THEORY OF PROPERTY (2021); *see also* Serkin, *supra* note 3, at 1055 (noting that “[f]or decades, zoning created a relatively stable and predictable system defining development rights and also neighbors’ expectations about what could be built nearby”); Nestor M. Davidson, *Property’s Morale*, 110 MICH. L. REV. 437, 439–61 (2011) (discussing arguments grounded on stability and arguments critiquing an overemphasis on stability).

270. Serkin, *supra* note 215, at 771.

271. *Id.* at 772, 775.

272. *Id.* at 777.

273. *Id.* at 778.

274. *Id.* at 782.

275. *Id.* at 786–93.

276. *Id.* at 792.

277. *Id.*

278. *Id.* at 793.

lessened, local regulations would be replaced by private ordering that is at least as restrictive.<sup>279</sup> As Serkin warns, “[i]f local governments—and particularly cities—cannot satisfy property owners’ desire for community stability, then homeownership may increasingly retreat to private suburban enclaves.”<sup>280</sup> Collectively, buyers seem to want restrictions and HOAs can serve as private substitutes for zoning.<sup>281</sup> State-level efforts to displace local exclusionary zoning could perversely lead to an increased buyer preference for common interest communities even though these “[p]rivate land use regulations in HOAs come with many of the same problems as municipal zoning. They tend to impose even greater limits on density, prohibit multifamily housing, and are geared specifically to keep housing prices high.”<sup>282</sup> Notably, Serkin’s second predictive argument is not that exclusionary zoning is good, just that a rise in private ordering should zoning restrictions be lifted would be worse.<sup>283</sup>

*A Case for Zoning’s* conclusion is worth quoting in its entirety:

Zoning’s future is in doubt. Its original justifications appear weak and insufficient to defend current practices against a growing affordability crisis. But there are other justifications for zoning beyond simply separating incompatible uses of land. Zoning is better seen as a tool for moderating the pace of community change and, in so doing, allocating costs between insiders and outsiders. These are more complex goals that require a more nuanced assessment of the competing pressures of stability and dynamism in our communities. Zoning no doubt has an ugly history, but when evaluated and utilized correctly, it could have a beautiful future.<sup>284</sup>

What is notable about this conclusion is how tentative it is. Indeed, one could agree with Serkin’s entire article—the history of zoning it gives, its account of what zoning does, and the possible negative consequences of deregulatory moves—and write a very similar conclusion to an article favoring state intervention. As Serkin explains, “Ultimately, zoning represents a tradeoff between stability and dynamism. Stability generally favors the interests of in-place property owners, dynamism the interests

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279. *Id.* at 793–98.

280. *Id.* at 794.

281. *Id.* at 794–96.

282. *Id.* at 797.

283. *Id.* at 798. But see Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1293 (2006) (noting that exclusionary zoning and restrictive covenants are not perfect substitutes because “it is nearly impossible to accomplish private land use control in areas that are already built up”).

284. Serkin, *supra* note 215, at 798.

of outsiders seeking entry.”<sup>285</sup> Serkin provides a strong argument in favor of the status quo, or at least of accounting for the costs of change, but in doing so also lays out the reasons why scholars and policymakers might reach opposite conclusions.<sup>286</sup> As Wendell Pritchett and Shitong Qiao observe, “Property owners do have a legitimate claim to preserving their particular living styles and values through land use controls. But such controls should be evaluated in a larger social context, beyond property owners’ interests and values.”<sup>287</sup>

### B. *Protecting Localism*

The second article, *The Perils of Land Use Deregulation*, offers a different criticism of state intervention in local zoning. Richard C. Schragger argues that displacing local exclusionary zoning with state-level zoning is a mistake because it will hurt the less well-off.<sup>288</sup> If Serkin’s article makes a lukewarm case for zoning, *The Perils of Land Use Deregulation* turns on the heat. Schragger argues that state-level zoning will weaken the ability of cities to enact progressive policies that help low-income communities, especially low-income communities of color.<sup>289</sup> Moreover, he cautions that the zoning changes done through state-level preemption of local governments will be those supported by powerful elites for purely self-interested reasons.<sup>290</sup> The article is informed by a healthy skepticism of trickle-down economics and of the recent rhetorical embrace of zoning deregulation.<sup>291</sup>

Schragger’s article begins in much the same way as Serkin’s does, with an acknowledgment of the harms of exclusionary zoning.<sup>292</sup> Although zoning is often characterized as a limitation on development, Schragger argues that exclusionary zoning itself reflects a pro-development

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285. *Id.* at 784. It is important to not overstate the value of stability: “Any defensible conception of stability must accommodate the federal mandate to make figurative and literal room for an increasingly diverse America.” Shayak Sarkar & Josh Rosenthal, *Exclusionary Taxation*, 53 HARV. C.R.-C.L. L. REV. 619, 626 (2018) (discussing tax policies that operate similarly to exclusionary zoning in favoring existing property owners over in-movers).

286. After describing the ways the law protects homeowners against change, Kenneth Stahl, for example, concludes “that municipalities’ charge to protect homeowners’ reliance interests is a self-defeating enterprise, and unworthy of the judicial deference it has been granted.” Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 956.

287. Pritchett & Qiao, *supra* note 41, at 485.

288. Schragger, *supra* note 265.

289. *Id.* at 56–67.

290. *Id.* at 26.

291. *Id.* at 32–39.

292. *Id.* at 8–14.

impulse.<sup>293</sup> Using the quintessential affordable housing and zoning case to illustrate the point, Schragger writes, “when *Mount Laurel* was decided, the problem was not that there was too little housing being built, but rather that there was too much—of a certain kind.”<sup>294</sup> He continues, “the numerous Mount Laurels of the 1970s were a ‘successful’ response to the post-war housing shortage across the United States, just not for those worst off, and generally not for Blacks or other minorities.”<sup>295</sup> Setting up zoning in this way allows Schragger to make a bigger claim, namely that “land use reform—whether zoning or anti-zoning—is driven by demand and generally accompanies economic growth . . . [B]oth zoning and anti-zoning are creatures of the ‘market’—not departures from or exceptions to it.”<sup>296</sup> It is this equivalence that drives Schragger’s analysis and conclusions.<sup>297</sup>

If exclusionary zoning and anti-zoning are essentially the same—tools for the better-off to get what they want—then the supposed benefits in terms of housing affordability of state-level displacement of local zoning might be illusory. Schragger attributes the rise in anti-zoning sentiment to three factors: increasing attention to racial disparities, especially those impacting the fortunes of African-Americans;<sup>298</sup> “the spatial determinants of inequality”;<sup>299</sup> and the ways in which zoning restrictions can harm overall economic output by making high-growth cities prohibitively expensive for in-migration.<sup>300</sup> Certainly, the phenomenal work of Richard Rothstein,<sup>301</sup> Raj Chetty,<sup>302</sup> and others<sup>303</sup> is helping drive the conversation around zoning, but as Schragger notes, these academic reasons are “ultimately being given political momentum by housing need.”<sup>304</sup>

With the middle class priced out of cost of housing in high growth cities, anti-zoning has become a bipartisan rallying cry: “Eliminating

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293. *Id.* at 10.

294. *Id.* at 13.

295. *Id.*

296. *Id.* at 14.

297. *See also id.* at 62–63 (“[W]hile the growth machine and the homevoter appear to represent contrasting political economies roughly corresponding to ‘growth’ and ‘no-growth,’ they are both concerned with protecting and maximizing land-based wealth.”).

298. *Id.* at 16.

299. *Id.* at 17.

300. *Id.* at 18–20.

301. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

302. *See supra* note 19 (referencing Chetty’s work).

303. *See* Schleicher, *supra* note 134, at 96–104 (discussing and citing the literature on agglomeration economics).

304. Schragger, *supra* note 265, at 19.



development barriers fits into a political space that can be increasingly occupied by both the political left and the right: removal of barriers to entry, increasing opportunity, and freeing the market for development.”<sup>305</sup> Schragger is skeptical about this political alliance, arguing that it will be captured by those same market forces that in earlier periods benefited from exclusionary zoning.<sup>306</sup> As Schragger highlights, even if anti-zoning advocates succeed in expanding state preemption of local zoning regulation limiting new housing construction, it will “not effectively address the problems of the lower half of the housing market.”<sup>307</sup> And to the degree to which it succeeds, it will exacerbate the split between surging metropolitan areas and struggling areas.<sup>308</sup>

At its core, Schragger’s defense of traditional localism in zoning is based on a belief that local solutions are likely to work out better for the disempowered. Not only is there no reason to think states are more supportive of the poor,<sup>309</sup> but state preemption in the zoning space could also weaken cities generally, allowing states more space to block progressive moves by cities in other spheres.<sup>310</sup> Schragger argues that deference to local zoning permits cities to extract value from developers and mobile capital—in the form of fees as well as labor concessions—that benefit the local community.<sup>311</sup> Moreover, “embrace of growth will likely reproduce existing metropolitan-area inequalities,” according to Schragger, with suburb decline no better than previous urban decline and labor stuck chasing mobile capital across the country.<sup>312</sup> Rather than this dystopia, Schragger offers up municipal living wage efforts to argue that “city power is a necessary predicate for the success of urban economic equality movements.”<sup>313</sup>

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305. *Id.* at 20.

306. *See also* JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT (1992) (presenting a theory of property rights evolution that emphasizes how elites set up rules that benefit themselves rather than setting up rules based on efficiency or other values). The downside of this argument is that it proves too much. If elites have captured local zoning and elites would capture state-level zoning, the capture explanation of legal power does little to answer whether states should or should not preempt local zoning. It merely suggests that some of the same problems will exist regardless of which level of government is engaged in zoning.

307. Schragger, *supra* note 265, at 32.

308. *Id.* at 35–40.

309. *Id.* at 22–26; *see also* Richard C. Schragger, *The Political Economy of City Power*, 44 *FORDHAM URB. L.J.* 91, 114 (2017) (making a similar point about regional governance proposals).

310. Schragger, *supra* note 265, at 30 (“[T]he denigration and dilution of the principle of local autonomy will further expose the city to hostile state control across a range of policies—many of which would otherwise be redistributive.”).

311. *Id.* at 56–60.

312. *Id.* at 63.

313. *Id.* at 65.

*C. Contextualizing the Case for Traditional Zoning*

The arguments made by Serkin and Schragger in defense of traditional zoning and against state zoning are powerful and should not be treated dismissively. They show that any YIMBY projections suggesting that increasing supply alone will solve housing affordability are overly optimistic. A substantial increase in housing assistance is required if any zoning approach is to reach those in the lower economic classes.<sup>314</sup> They also exemplify the law of unintended consequences: state displacement of local zoning could lead the wealthy to rely even more on restrictive covenant protections against density and could weaken cities generally. On the other hand, both Serkin and Schragger are largely engaged in a defense of the status quo. They might want localities to do more to help the poor when it comes to land use, but after a century of deference to local authority, that hope seems unwarranted absent state intervention. So, while Schragger refers to the anti-zoning position as the “emerging conventional wisdom,”<sup>315</sup> it is fair to ask if *emerging* conventional wisdom is even a thing. Similarly, Serkin writes that a consensus against zoning is “building . . . among academics and elite activists,”<sup>316</sup> but examples of states reclaiming zoning authority or sharply curtailing local zoning choices remain the exception.<sup>317</sup> Both the law and conventional wisdom still strongly support deference to local governments on zoning. Put differently, Serkin and Schragger are out in front of a threat to local zoning that is only starting to take shape.

Traditional zoning hardly needs champions rising in its defense. As Schragger notes, concerns about exclusionary zoning have been around since the 1920s, with little success in resisting its power.<sup>318</sup> It is only because cities have become so unaffordable that such arguments are gaining traction.<sup>319</sup> But rather than seeing a moment of interest convergence as an infrequent opportunity that should be taken advantage

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314. For an argument that public funding for low-income housing should increase, see CAMPAIGN FOR HOUS. & CMTY. DEV. FUNDING, *A PLACE TO CALL HOME: THE CASE FOR INCREASED FEDERAL INVESTMENTS IN AFFORDABLE HOUSING* (2017), <https://nlihc.org/sites/default/files/A-Place-To-Call-Home.pdf> [<https://perma.cc/4NCU-2Y9B>].

315. Schragger, *supra* note 265, at 3.

316. Serkin, *supra* note 215, at 751.

317. *See supra* notes 248–264 and accompanying text.

318. Schragger, *supra* note 265, at 14; *see also* Note, *supra* note 127, at 1128 (“Planners, policymakers, and legal commentators have struggled for decades to find solutions to the problem of exclusionary zoning.”).

319. Schragger, *supra* note 265, at 2.

of,<sup>320</sup> Schragger imagines this moment as more powerful than it is, threatening to undermine cities generally.<sup>321</sup> Left unaddressed is the possibility of making a change in one area with a long history of racism and exclusion—local zoning—without necessarily sliding down the slippery slope in other areas where cities traditionally enjoy an expectation of home rule.<sup>322</sup> Enlightened city governments could learn from the past and make piecemeal changes, cracking open their communities to those currently excluded, but often “a single, sweeping edit to these maps may be politically easier than block-by-block tweaking.”<sup>323</sup> The state option is worth pursuing.

Peeling away local zoning barriers will not solve the housing affordability crisis. Even in the absence of those additional expenses associated with zoning restrictions, the market cannot produce new units at a price point that families lower on the socio-economic spectrum can afford without being subsidized. Affordable housing for all requires a commitment to fully housing the population that this country has never shown.<sup>324</sup> But the fact that zoning deregulation will not magically result in full housing for all is hardly a reason to reject deregulatory moves. It is not a case of this (affordable housing) or that (de-zoning), but rather of this *and* that.<sup>325</sup> Both should be pushed. It is true that in *this* moment, perhaps because academics sense the possibilities raised by interest convergence,

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320. See GLAESER, *supra* note 118 (“Reforming local land use controls is one of those rare areas in which the libertarian and the progressive agree. The current system restricts the freedom of the property owner, and also makes life harder for poorer Americans. The politics of zoning reform may be hard, but our land use regulations are badly in need of rethinking.”).

321. See Schragger, *supra* note 265, at 68.

322. The idea of “home rule” is that cities are the proper site of governance affecting the city and that states should defer to cities rather than preempt them. For a history and defense of home rule, see CTR. FOR CITY SOLS., NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/55NX-VUZ7>].

323. Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/ushot/cities-across-america-question-single-family-zoning.html> [<https://perma.cc/92GN-BF9B>].

324. As Andrea Boyack observes, “[t]he federal government could very quickly at least double or triple its investment in affordable housing solutions merely by reallocating resources from one category of housing expenditures, namely, those benefiting wealthy homeowners that do not improve housing affordability, to expenditures that do address housing cost burdens.” See Boyack, *supra* note 87, at 1243; see also Lance Freeman, *America’s Affordable Housing Crisis: A Contract Unfulfilled*, 92 AM. J. PUB. HEALTH 709, 711 (2002) (“Seriously addressing the issue of affordability would require a major expansion of resources devoted to affordable housing. Some estimates suggest HUD’s budget would have to be doubled. The most equitable policy would be to treat affordable housing as an entitlement, rather than rationing it on a first come, first served basis as is done today.”).

325. Tellingly, Serkin observes elsewhere, “Odd political alliances dot the landscape of local land use disputes, with—for example—affordable housing advocates working alongside for-profit developers to resist restrictive zoning ordinances.” Serkin, *supra* note 3, at 1060.

more space is being dedicated to fight against traditional exclusionary zoning.<sup>326</sup> This Article is a good example of that. But that does not mean that affordable housing is unimportant nor that advocates for zoning deregulation do not realize that many housing problems cannot be solved through deregulation alone. Put differently, the need for additional housing subsidies to reach the poor should be acknowledged by both sides in any debate over zoning deregulation.<sup>327</sup> That being said, the imperative of expanding such subsidies should not be accepted as a rhetorical device to protect traditional exclusionary zoning. Treating the need for affordable housing in such a way is akin to the move by law and economics scholars to use the possibility of tax-and-transfer solutions as an overly convenient trump card to block meaningful consideration of other policy changes that have redistributive consequences.<sup>328</sup>

#### D. *Gentrification and Development*

The strongest argument against using state authority to increase allowable density in order to increase the supply of housing is that it will lead to gentrification. In *Differentiating Exclusionary Tendencies*, John Infranca takes on the question of gentrification directly, ultimately concluding that there is a “modest case” for treating opposition to new development in lower income urban neighborhoods differently than opposition to new development in wealthier communities.<sup>329</sup> But he is quick to add that “any preferential treatment [with regards to development opposition in poorer neighborhoods] must avoid undermining broader efforts towards reducing regulatory and procedural obstacles to denser development and increased housing supply.”<sup>330</sup> Infranca allows that such a preference may be appropriate “to address concerns about unwanted changes to neighborhood character and the claims of long-term residents to a distinct stake in the neighborhood that merits deference and perhaps

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326. For a theoretical elaboration of regional interest convergence arguing that such convergence can be a tool for helping the poor across a region, see Patience A. Crowder, *(Sub)Urban Poverty and Regional Interest Convergence*, 98 MARQ. L. REV. 763 (2014).

327. Indeed, they are intimately linked, with opponents of affordable housing projects often using zoning tools as the mechanism to defeat otherwise viable proposals. See Jacqueline Rabe Thomas, *Separated by Design: How Some of America's Richest Towns Fight Affordable Housing*, CONN. MIRROR (May 22, 2019), <https://ctmirror.org/2019/05/22/separated-by-design-how-some-of-america-s-richest-towns-fight-affordable-housing/> [<https://perma.cc/LNX9-WHLA>] (providing an in-depth exploration of exclusionary practices in southern Connecticut).

328. See Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051 (2016) (discussing and critiquing this tax-and-transfer line of law and economics arguments).

329. Infranca, *supra* note 266, at 1297–1301.

330. *Id.* at 1278.

some share of the increased property values generated by a zoning change.”<sup>331</sup> But Infranca is quick to add, “[o]ther local concerns, most notably concerns regarding displacement and rent increases, do not justify special treatment in the form of greater local control.”<sup>332</sup> A preference might be appropriate, in other words, but Infranca does not imagine a very strong preference.

As Infranca highlights, residents in poorer neighborhoods slated for new development often fear displacement and changes to the neighborhood’s character.<sup>333</sup> Yet, fear of displacement as a result of new development “is largely unmerited,” Infranca argues, adding that “opposition to new development is likely to only exacerbate displacement and rising housing costs.”<sup>334</sup> In his review of the literature on gentrification, Infranca highlights studies finding that “during a period of rapid gentrification, lower income children living in gentrifying neighborhoods—including only those children living in market-rate housing—were not more likely to move than similar children in non-gentrifying neighborhoods.”<sup>335</sup>

The question still remains whether gentrification is spurred along by new development. Empirical evidence does not support this, and research finds that “neighborhoods where new housing is built have less displacement than those without new development.”<sup>336</sup> These findings seem to run counter to people’s lived experiences of seeing rents increase following new construction in a gentrifying neighborhood, and counter to the supply-side understanding of gentrification held by “[m]ost in the housing advocacy community.”<sup>337</sup> But if gentrification is taken as a given, it is easy to see how increased supply generally can lessen displacement.<sup>338</sup> Exclusionary practices—zoning limitations on new development and on density—push up the rental rate for existing units in

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331. *Id.*

332. *Id.*

333. *Id.* at 1284.

334. *Id.* at 1287.

335. *Id.* at 1290–91.

336. *Id.* at 1292; *see also* Boudreaux, *supra* note 28, at 638 (“[I]f the law allows for construction of appealing *new* market-rate housing. California data show that new construction correlates with *less* displacement of existing residents.” (emphasis in original)).

337. Mangin, *supra* note 119, at 108.

338. As John Mangin explains,

[i]f a high-demand, high-cost neighborhood won’t build, developers and people looking for housing will be diverted to the nearest low-cost neighborhoods. That increases demand and development and leads to gentrification. (Don’t blame in-movers or developers for gentrification—they’d rather be in the high-cost neighborhoods. Blame the exclusionary practices of people in the high-cost neighborhoods.)

*Id.* at 95.

an area experiencing heightened demand.<sup>339</sup> More permissive zoning “might slow, not accelerate, the phenomenon of gentrification” because allowing new construction on a broad scale will provide an outlet for demand that otherwise competes with the residential interests of the pre-existing community.<sup>340</sup>

Though Infranca rejects displacement as a justification for differentiating exclusionary tendencies in poor communities from exclusionary impulses in wealthy areas, he concludes that concerns about changes to community character can support the idea that “lower income communities should be granted a greater degree of local control.”<sup>341</sup> Additional local control or mechanisms for the community to capture “some share of the value of new development . . . might be justified as a partial remedy for the historical treatment of these communities.”<sup>342</sup> As Infranca observes, calls for additional control, “when voiced by communities long denied such control, possess distinct salience.”<sup>343</sup> Local control as a way to protect community character can help protect resident’s neighborhood-tied personhood interests,<sup>344</sup> but even these “grants of local control must consider the common good (or general welfare), which, in this context, is the provision of an adequate supply of relatively affordable housing at the municipal or regional level.”<sup>345</sup>

Though *Differentiating Exclusionary Tendencies* is attentive to the harms of gentrification, it never loses sight of increasing the supply of affordable housing as primary public good. Accordingly, elevating the participatory rights for poor communities is rejected<sup>346</sup> and only in “extremely limited cases” should localities be able to restrict density.<sup>347</sup> Building on the work of others,<sup>348</sup> the article suggests that some form of

339. Boudreaux, *supra* note 28, at 619 (“It is a simple microeconomic formula: legal restraints on the supply of housing combine with greater demand to increase rental costs.”).

340. *Id.* at 653. “Moreover,” Infranca notes, “the positive benefits of gentrification for existing residents—including reduced exposure to neighborhood poverty, improved amenities, and increases in property values for homeowners—may outweigh any negative effects.” Infranca, *supra* note 266, at 1293.

341. Infranca, *supra* note 266, at 1296.

342. *Id.* at 1300.

343. *Id.*

344. *Id.* at 1305.

345. *Id.* at 1314.

346. *Id.* at 1314–17; see also Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. (forthcoming 2021) (detailing problems with public participation in land use matters).

347. Infranca, *supra* note 266, at 1319.

348. See *id.* at 1319–27 (discussing the work of David Schleicher, Rachel Godsil, Emily Hamilton, Salim Furth, Lance Freeman, Chris Elmendorf, Darien Shanske, Vicki Been, and Rick Hills).

transferable development right (TDR) given to those in areas that might experience gentrification could help ameliorate, or at least counter-balance, some of the political opposition to upzoning.<sup>349</sup> A hot topic in property theory, TDRs and other methods of separating property rights into use, investment, and other distinct rights are attractive in part because such division of interests offers a way to recognize the rights of tenants, not just owners, when it comes to distributing the gains associated with new construction.<sup>350</sup> Resident-tied TDRs, however, remain more thought experiments than real at this point.<sup>351</sup> Infranca's overall conclusion is that even lower-income communities should not have "the power to exclude or control new development" because "exercise of such power is likely to prove detrimental not only to the community itself, but also to the broader cause of adding much needed new housing to the benefit of those outside the community as well."<sup>352</sup> Increasing the supply of housing must be prioritized over even well-meaning efforts to prevent new development.

Acknowledging the limits of what we know about gentrification is essential to understanding its relationship to large-scale zoning changes designed to expand the supply of housing. The gentrification that lower-income urban areas currently experience, even if it takes the form of additional development in those areas, is a consequence primarily of exclusionary policies and not of permissive zoning. This is a crucial point and worth pausing on. Meaningful state displacement of traditional zoning and state-led deregulatory moves would be experienced over the entire metropolitan region. Gentrification's stereotypical sequence—wealthier and whiter residents moving into an area that previously had lower economic resources and a larger less white population followed by displacement of some original residents—is partly a consequence of demand pressure that cannot be satisfied elsewhere in the metropolitan region because of exclusionary limits on new construction. Although at a

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349. *Id.* at 1323.

350. Lee Fennell, in particular, has been at the forefront in pushing for and discussing the possibilities associated with splitting traditional ownership interests into smaller bites that serve different purposes. See LEE ANNE FENNEL, *SLICES AND LUMPS: DIVISION AND AGGREGATION IN LAW AND LIFE* (2019); LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009); see also Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RES. L. REV. 513 (2020) (exploring a particularized way of severing development rights).

351. For a comprehensive exploration of the possibility of TDRs to overcome local opposition to increased development, see Hills Jr. & Schleicher, *supra* note 40. See also VICKI BEEN, JOHN INFRANCA, JOSIAH MADAR & JESSICA YAGER, N.Y.U. FURMAN CTR. FOR REAL EST. & URB. POL'Y, *UNLOCKING THE RIGHT TO BUILD: DESIGNING A MORE FLEXIBLE SYSTEM FOR TRANSFERRING DEVELOPMENT RIGHTS* (2014), [https://furmancenter.org/files/FurmanCenter\\_UnlockingtheRighttoBuild.pdf](https://furmancenter.org/files/FurmanCenter_UnlockingtheRighttoBuild.pdf) [<https://perma.cc/PW3Q-TH6U>].

352. Infranca, *supra* note 266, at 1327.

micro level gentrification seems to follow on the heels of new construction, removing zoning barriers in a more comprehensive way could *lessen* the depth and power of gentrification in any particular neighborhood.

Washington, D.C., which has undergone extensive gentrification over the last two decades, provides a good example of how broad growth allowances could reduce gentrification pressures. The city allowed greater density along the metro's green line, from Shaw to U Street to Columbia Heights, and, consequently, new apartment building and businesses that catered to yuppies sprung up in that same area.<sup>353</sup> But the gentrification in a transitional part of D.C. cannot be separated from the linked decision to keep in place exclusionary SFH zoning rules in wealthier areas such as Spring Valley and Chevy Chase. Switching from a policy of neighborhood-by-neighborhood adjustments of what is allowed (adjustments that encourage development in lower income areas while protecting wealthy areas) to a more comprehensive allowance would lessen demand intensity in transitional areas.<sup>354</sup> Whether this allowance applies generally to the entire region or makes distinctions based on public transportation infrastructure or proximity to zones that already allow apartments, systematic upzoning can protect low-income communities of color from rapid, concentrated gentrification by opening up space citywide for investment in additional housing. This can protect low-income communities of color from the sort of rapid gentrification in one area that can happen when exclusionary zoning blocks new housing in the rest of the city.

The conclusion that even subordinated local communities, areas marked by disadvantages tied to race, class, and their intersection, should not be empowered to block regional or state-level measures designed to increase residential density can be hard to swallow. Such communities have well-founded reasons to be skeptical about market-oriented solutions,<sup>355</sup> and it seems unfair to deny them the use of exclusionary tools long enjoyed by the white suburban middle class just when the city is making a comeback after having passed through a long period of neglect. But the lens needs to widen to include not only current residents but also

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353. See Kate Rabinowitz, *A Decade of Demographic Change in D.C.: Which Neighborhoods Have Changed the Most?*, D.C. POL'Y CTR.: DATALENSDC (Mar. 2, 2017), <https://www.dcpolicycenter.org/publications/demographic-change-d-c-neighborhoods/> [<https://perma.cc/3372-BYV4>].

354. Lee Fennell makes a similar argument about racial integration and gentrifying neighborhoods, observing, "[i]f more neighborhoods were stably integrated, property value increases and demographic changes would likely occur more evenly and organically across a larger set of neighborhoods." Fennell, *supra* note 56, at 372.

355. See Schragger, *supra* note 265, at 4.



would be in-movers locked out of the community because of traditional exclusionary zoning. Those kept out of growing urban areas will often be members of the same racial groups and low-income community as those potentially harmed by gentrification, but they are differently situated.

Given that empirical studies suggest that new residential construction does not necessarily lead to displacement,<sup>356</sup> scholars can appropriately move from focusing primarily on the ways gentrification harms a geographically-defined subset of the poor experience to the ways in which failure to increase the housing supply harms the poor generally. While existing residents may have a slightly greater claim to space in a city than in-movers (a debatable proposition but one that is often assumed without justification), it is both shortsighted and inequitable to focus only on the harms associated with growth. Those concerned about gentrification should also have to reckon with the needs of those people, often subordinated along race and class lines, unable to move into the community because of the exclusionary impact of deferring to local preferences that limit growth.<sup>357</sup>

Ultimately, affordable housing must be front-and-center in any discussion of whether to stick with or move away from traditional zoning. Since zoning restrictions and deference to local zoning traditionally have been used to exclude others and limit entrance, it is time to consider alternatives that put fewer barriers in front of the housing sector and take a wider perspective on what the general welfare means when it comes to zoning.

#### IV. REVISITING THE *EUCLID* PROVISIO

Societal changes—the increasing attractiveness of the urban core to well-heeled younger adults and bipartisan awareness that too many people find themselves priced out of decent housing—have weakened local zoning’s stranglehold on politics and development. Thriving metropolitan areas are at an inflection point: it is possible for the well-off to imagine living comfortably and raising children in either the city or the suburb. Strong economic growth in the privileged regions of the country supports this delicate balance, but the relationship between these high growth cities and their suburbs is inherently precarious. Many suburbs now face the real or perceived danger of a lower tax base coupled with increased demand

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356. See *supra* footnotes 190–196 and accompanying text.

357. See also Boyack, *supra* note 4, at 477–82 (highlighting the costs of collective exclusion accomplished through zoning and NIMBY-ism).

for public services that once plagued central cities.<sup>358</sup> The shared solution—the de facto policy at all levels—is to limit new residential construction. Antipathy to apartments pre-dates zoning,<sup>359</sup> and continues into the present. With SFH zones largely untouchable<sup>360</sup> and severe restrictions on the places where density and height are allowed,<sup>361</sup> entire regions are trying to seal themselves off from the poor and lower-middle class.

This inflection point presents a window of opportunity to broaden the scale of zoning away from local dominance. But it could be only a brief window. As cities transition from embracing in-movers to excluding—taking on either an antagonistic relationship with the suburbs or acting in concert with a few privileged suburbs to create a bubble of exclusion—their interests and the interests of the elite they seek to attract will likely coalesce around exclusion. Though others have noted similar changes—the rise of exclusionary zones around entire superstar cities and their suburbs—in the lived environment, the takeaways so far have been largely academic, which is to say overly determined and pessimistic. Although it may be dismissed as a utopian fantasy, using this inflection point as an opportunity for state-level zoning interventions provides a way to ensure that the general welfare, which is supposed to govern the imposition of zoning restrictions, takes into account those lower on the socio-economic scale.

Before defending state preemption of local zoning, it is worth acknowledging that there is nothing new to the idea that traditional local zoning is exclusionary and the law should transition to state or regional approaches.<sup>362</sup> As a 1971 article notes, the fact that zoning is a delegated form of the police power makes it “logical to turn to the state” as a way to remedy exclusionary zoning.<sup>363</sup> Scholars have urged zoning regionalization for decades. Faced with endless local obstructionism and deliberate exclusionary practices, it seems intuitive that corrective

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358. See, e.g., Crowder, *supra* note 326, at 775 (“[T]he exodus to the exurbs resulted in disinvestment in the inner-ring suburbs similar to that experienced by the central cities decades earlier.”).

359. See Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609 (2021).

360. See Ellickson, *Zoning and the Cost of Housing*, *supra* note 158, at 11; Ellickson, *The Zoning Strait-Jacket*, *supra* note 158.

361. See Boudreaux, *supra* note 28, at 626 (observing that “tall apartment buildings are forbidden throughout many American metropolitan areas—in cities as well [as in] suburbs”).

362. Arguably, the most important expression of the idea that states should reclaim land use authority is nearly half a century old. See FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

363. Paul Davidoff & Neil Newton Gold, *Exclusionary Zoning*, 1 YALE REV. L. & SOC. ACTION 56, 62 (1970).

“policies should be statewide, or at least regional, in scope.”<sup>364</sup> Yet, despite such extensive scholarship, deference to local zoning remains the norm.<sup>365</sup> The predicted quiet revolution that was expected to sweep in an era of state-level land use planning “failed to materialize.”<sup>366</sup>

There are several reasons, however, to think that now is an opportune time to push. First, the housing affordability crisis is reaching an ever-widening segment of the population. What previously could be dismissed as a problem affecting only the poor is being felt in some cities by even the upper middle class. Second, exclusion and anti-development have been so successful that they inspired the YIMBY counter-movement.<sup>367</sup> YIMBYism is but the highest profile example of the shifting politics surrounding density. Third, cracks in the localism’s monopoly have appeared. States are using their authority to grant property owners additional development rights that in practice will increase density within areas zoned locally for single family homes. Finally, in zoning, as in property law in general, “[e]ven first principles are up for grabs.”<sup>368</sup> The current contested status of zoning, driven by the affordability crisis, makes it important to consider ways in which traditional exclusionary zoning might be effectively undercut even though arguments for a regional or state approach to zoning might ordinarily seem a bit stale.

Academics and policymakers should join in the fight against local dominance of zoning. It is tempting for academics to see the many roadblocks faced by this and other revisionary zoning proposals and simply proclaim that nothing can be done, that local zoning is politically

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364. Orfield, *supra* note 236, at 879; *see also* Note, *supra* note 127, at 1128 (“Because local control of land-use planning leads naturally to exclusionary ordinances that harm the region as a whole, state or regional override of local zoning decisions is a logical solution to the problem of exclusionary zoning.”).

365. *See, e.g.*, WOLF, *supra* note 211, at 149 (“[D]espite a great deal of rhetoric and numerous supporting studies over the last few decades, there have been no significant steps taken toward effective and widespread regional planning and governance.”). *But see* Gerald E. Frug, Rick T. Su & David J. Barron, *Let Towns Have More Power and Regional Planning May Follow*, COMMONWEALTH MAG. (Jan. 1, 2004), <https://commonwealthmagazine.org/politics/let-towns-have-more-power-and-regional-planning-may-follow/> [<https://perma.cc/EXJ3-AM58>] (arguing that state limitations on local power (not local power itself) are to blame for local resistance to change and efforts to preserve the status quo); David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261 (2005) (same); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257 (2003) (arguing that if local authority were expanded, cities could do more to address issues such as sprawl and exclusion).

366. Bronin, *supra* note 13, at 232.

367. For more on the rise of YIMBYism, see Kenneth A. Stahl, “*Yes in My Backyard*”: *Can a New Pro-Housing Movement Overcome the Power of NIMBYs?*, ZONING & PLAN. L. REP. (Thomson Reuters, St. Paul, Minn.), March 2018, at 1.

368. Serkin, *supra* note 3, at 1056.

untouchable, “as a way of life . . . almost impervious to legal remedy.”<sup>369</sup> There is a whole literature on regionalism informed by this sort of pessimism. Even scholars who think local dominance of zoning is a bad thing seem resigned to it and dismiss contrary proposals as utopian.<sup>370</sup> Such views are informed by at least a half century of advocates continually butting their heads against the local nature of zoning and, as such, this negative take has some justifiable confidence behind it. Regional approaches undermine the interests homeowners have in exclusion and often will be “wildly unpopular.”<sup>371</sup> But just because something is hard and the end is not fully defined does not mean there is no value in staking out a direction for long-term change.

Every proposal is subject to linked critiques, either that it is so narrow as to be inconsequential or it is too ambitious and thus utopian, but as Roberto Mangabeira Unger argues, “[t]he direction is what matters.”<sup>372</sup> Whatever the success of local YIMBY campaigns, for the country as a whole ensuring that zoning is done in a way that prioritizes the general welfare requires that states exercise greater control over zoning. So, while local exclusionary zoning seems to be an insurmountable obstacle to a more inclusive society and regional zoning a utopian fantasy, academics, in ways big and small, should nevertheless pursue such a goal. The second century of zoning calls for waging the big fight for inclusion and not conceding defeat when it comes to local zoning before the battle has been fought. There is space politically to nudge the future of zoning away from local dominance, but only if a push is made.

This Article has highlighted some of the academic work involved in a push. Drawing out the harms of traditional exclusionary zoning helps lay the foundation, and even if some of the examples are dated, the work of informing successive generations of the long shadow of past harms unfortunately never ends.<sup>373</sup> Showing how states have used their authority to limit local zoning is crucial if advocates are going to push back against

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369. David D. Troutt, *Inclusion Imagined: Fair Housing as Metropolitan Equity*, 65 BUFF. L. REV. 5, 58–59 (2017).

370. David Barron, for example, labeled regionalism proposals as reliance on a “*deus ex machina*” solution. David J. Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 732 (2003).

371. Mangin, *supra* note 119, at 117.

372. ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 29 (1998).

373. Richard Rothstein’s *The Color of Law* is a prime example of such work: it combined beautiful writing with in-depth historical research of both better and lesser-known examples of the way the law advantaged whites and disadvantaged African-Americans and in so doing helped open up space to challenge traditional property structures. ROTHSTEIN, *supra* note 301.

the false notion that zoning is necessarily local.<sup>374</sup> Details matter and at some point nuanced discussion on what should be regional and what should be done at the state-level will be important as well.<sup>375</sup> One-size-fits-all approaches are not likely to succeed; political and scalar differences across states mean that what is best handled through regional zoning in one state should be done at a state-level in another and done by localities subject to state imposed constraints in others. But it is important that the momentum for change not get thwarted before it even gets a chance to pick up steam. For now, it is enough to point in the general direction: namely, that zoning's second century should be marked by increased state-preemption of local zoning.

Like most major changes, these are matters that are challenging. Moving away from local zoning would introduce considerable uncertainty and instability, but that may not be a bad thing.<sup>376</sup> Most significantly, even though the evidence so far suggests otherwise, across the board deregulation to increase the supply of housing could lead to increased gentrification in some areas. These are real concerns. But in light of the existing economic and racial inequalities—acknowledged even by supporters of the status quo—properly attributed to traditional zoning, the burden of persuasion should be on those defending the traditional zoning not on those challenging it.

The *Euclid* proviso provides a legal hook with which to correct for the exclusionary nature of traditional zoning. In September 2020, the Open Communities Alliance and Yale Law School's Jerome N. Frank Legal Services Organization filed a 145-page application for a zoning regulation amendment to the town plan and zoning commission of Woodbridge, Connecticut.<sup>377</sup> The application formally is part of an effort to force Woodbridge to allow the construction of an apartment building that would provide affordable housing to residents seeking to live in the greater New Haven area. But the submission, to the extent to which it challenges the exclusionary heart of Woodbridge's zoning plan, is more than that. The work of Anika Singh Lemar and others, it is more accurately described as a frontal assault on traditional zoning which relies, in part, on the *Euclid*

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374. See Infranca, *supra* note 251; Lemar, *supra* note 257.

375. See Camacho & Marantz, *supra* note 60 (exploring the sorts of power reallocations between state, regional, and local that are politically feasible); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79 (2019) (arguing that state and local compacts can push states to open up more space for development).

376. See Rosser, *supra* note 175.

377. Letter from Erin Boggs, Open Cmty. All., & Anika Singh Lemar, Jerome N. Frank Legal Servs. Org., to Robert Klee, Town Plan & Zoning Comm'n Chair, Town of Woodbridge (Sept. 29, 2020) [hereinafter Woodbridge Zoning Application] (on file with author) (Subject: Application to Amend Woodbridge Zoning Regulations and Plan of Conservation and Development).

proviso. As the submission notes, in 1991, the Supreme Court of New Hampshire used “the general welfare provision” of the state’s zoning enabling act to block regulations that “placed an unreasonable barrier to the development of affordable housing.”<sup>378</sup> The Pennsylvania Supreme Court, the New York Court of Appeals, and the Supreme Judicial Court of Massachusetts similarly have drawn on the *Euclid* proviso to strike down overly restrictive local zoning.<sup>379</sup> As the Massachusetts high court noted, “[the] general welfare transcends one town’s ‘parochial interests.’”<sup>380</sup>

The beauty of the *Euclid* proviso is that, in theory, its limitation on local authority works in multiple directions. Today, the best hope for adding vitality and bite to the proviso lies in statehouses, through legislative action that preempts local exclusionary zoning and provides landowners with greater density as a matter of right and simplifies development permitting. But state-level legislative action need not foreclose greater emphasis on the proviso by courts or even by local government officials concerned that their exclusionary zoning practices are leaving the locality vulnerable to legal challenge. In other words, though the focus of this Article is on top-down rewriting of the zoning bargain reached by states when they delegated authority to localities, local governments should also pay attention to the proviso. There are hints that some cities are starting to do just that.<sup>381</sup> Exclusionary use dominated the last century of zoning. It will take a broader view of general welfare from all levels and branches of the government to increase the supply of housing.

## CONCLUSION

Ultimately, a progressive and ambitious approach to zoning must place racial and economic desegregation front and center. While zoning plays a significant role in how and where people live and work, it is too frequently treated as an unimportant topic, a relative backwater of the law. By elevating the relative attention given to zoning, making policymakers and the public aware of its tremendous impact on peoples’ lived experiences, there is more space to attack the exclusionary features of local zoning.

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378. *Britton v. Town of Chester*, 595 A.2d 492, 494–96 (N.H. 1991).

379. *Woodbridge Zoning Application*, *supra* note 377, at 55–56.

380. *Zuckerman v. Town of Hadley*, 813 N.E.2d 843, 850 (Mass. 2004) (quoting *Johnson v. Town of Edgartown*, 680 N.E.2d 37, 39 (Mass. 1997)).

381. See Laura Bliss, *The Upzoning Wave Finally Catches Up to California*, BLOOMBERG: CITYLAB (Mar. 1, 2021, 5:00 AM), <https://www.bloomberg.com/news/articles/2021-03-01/california-turns-a-corner-on-single-family-zoning> [https://perma.cc/SX4V-EGS2] (reporting that Berkeley and Sacramento are moving away from single-family zoning and eliminating bans on multi-unit residences).

There is growing awareness among academics and policymakers that rising inequality is tearing society apart and limiting the lives of large parts of the population. State-level approaches to zoning, while radical in light of the last century's deference to locally-defined zoning, offer a concrete way of fighting back against racial and class separation. That is not to say that pushing the needle towards recognition of broader needs as a way of combatting inequality will be accomplished immediately or easily. The existing structure of locally-protected property rights provides distinct advantages to privileged communities and they will have little interest in moving towards a regional planning and zoning approach. But to the extent to which society is at an inflection point as far as the balance of power between suburbs and central cities, it is possible to advance alternative approaches that reflect the fact that elites can reasonably see both the city and suburb as attractive options. It will not be easy to lessen the extent to which zoning is seen as a local prerogative but moving towards a greater emphasis on the general welfare when it comes to zoning and lowering the presumption in favor of local zoning is worth pursuing as a theoretical and practical response to inequality.