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## ARTICLE

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### THE PERILS OF LAND USE DEREGULATION

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*Land use regulation and zoning have long been core functions of local governments. Critics of local land use practices, however, assert that local regulations are too restrictive and that “exclusionary zoning” ordinances increase housing costs, reduce mobility, entrench racial segregation, prevent the poor from accessing jobs and services, and reduce economic productivity. Spurred in large part by an affordable housing crisis in popular metropolitan areas, the YIMBY (“Yes in My Backyard”) movement has urged state and even federal action to override local land use regulations that raise barriers to the construction of market-rate housing. The conventional wisdom is that local governments cannot be trusted with land use policymaking and that striking down local regulatory barriers is necessary to address a whole range of ills.*

*This Article challenges that conventional wisdom. It does not contest the chief harms of exclusionary zoning, which have been recognized since the inception of Euclidean zoning in the 1920s. Instead, the Article argues that for those who share the goal of creating more equitable metropolitan regions, the rush to preempt local land use regulations and adopt market-favoring statewide reforms is a mistake. The history of centralized intervention in local land use suggests that preemptive state laws will more likely injure lower-income persons than help them. Indeed, states generally prevent local governments from adopting affordable housing policies. So too, deregulating the housing market can lead to higher costs and less control over development and displacement, often to the detriment of lower-income and minority*

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*communities. Though the “market” solution to housing affordability assumes that economic growth lifts all boats, the gains of growth tend to run to skilled labor and the already prosperous. Finally, the logic of land use preemption undermines cities’ other efforts to address economic inequality. Advocates for redistributive social welfare policies favor expanding city power, not limiting it. That is because urban-based economic justice efforts are regularly blocked by hostile state legislatures. Local land use exclusion can have pernicious effects. But preemptive state laws that further reduce or eliminate city power are not an answer.*

INTRODUCTION .....	126
I. THE REDISCOVERY OF EXCLUSIONARY ZONING .....	134
A. <i>What is Exclusionary Zoning?</i> .....	134
B. <i>What Explains the Rediscovery of Exclusionary Zoning?</i> .....	141
II. THE LIMITS OF CENTRALIZATION .....	149
A. <i>The Inherent Limitations of State Land Use Reform</i> .....	150
B. <i>The Problem of Preemption</i> .....	156
III. THE LIMITS OF DEREGULATION .....	162
A. <i>Location, Location, Location</i> .....	163
B. <i>Accounting for High and Low Demand Places</i> .....	170
IV. THE LIMITS OF MOBILITY .....	175
A. <i>Moving to Opportunity</i> .....	177
B. <i>Moving to Productivity</i> .....	183
V. THE CASE FOR CITY POWER .....	189
A. <i>Extracting Concessions from Mobile Capital</i> .....	190
B. <i>The False Choice Between Growth and No-Growth</i> .....	194
C. <i>Rebalancing Public and Private Power</i> .....	199
CONCLUSION .....	203

## INTRODUCTION

Land use reform has recently become the subject of contentious debate in the United States. Once a fairly obscure and technical topic, zoning has become hot, spurred in large part by an affordable housing crisis in increasingly popular cities and metropolitan areas—especially on the East and West Coasts.<sup>1</sup> The “Yes in My Backyard” (YIMBY) movement, most salient

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<sup>1</sup> See Benjamin Schneider, *The American Housing Crisis Might Be Our Next Big Political Issue*, CITYLAB (May 16, 2018), <https://www.bloomberg.com/news/articles/2018-05-16/how-to-make-americans-understand-the-new-housing-crisis> [<https://perma.cc/6GJQ-X98V>] (describing under-production of housing in coastal states and recent efforts to raise awareness of the crisis). The California legislature has considered a number of sweeping land use reform proposals since 2018. See, e.g., S.B. 827, 2017–2018 Reg. Sess. (Cal. 2018) (offering economic incentives and concessions for developers incorporating

in California,<sup>2</sup> has made the elimination of single-family zoning one of its central goals, and some jurisdictions have done so.<sup>3</sup> The 2020 presidential election brought additional attention to the issue<sup>4</sup> and the new Biden administration has made the elimination of “exclusionary zoning” a centerpiece of its housing agenda.<sup>5</sup> This attention to land use has coincided with a renewed appreciation for the role that zoning has played in reinforcing racial segregation and exacerbating poverty, and has combined with

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lower-income housing units into plans); S.B. 50, 2019–2020 Reg. Sess. (Cal. 2020) (proposing a streamlined approval process for multifamily housing projects); Conor Dougherty, *California, Mired in a Housing Crisis, Rejects an Effort to Ease It*, N.Y. TIMES (Jan. 30, 2020), <https://www.nytimes.com/2020/01/30/business/economy/sb50-california-housing.html> [<https://perma.cc/NP5H-DZHA>] (describing the latest of three failed reform efforts, that of S.B. 50). Two additional zoning reform bills, S.B. 9 and S.B. 10, have recently been signed by the Governor. See Nick Cahill, *California Lawmakers Approve Series of Upzoning Bills*, COURTHOUSE NEWS SERV. (Mar. 18, 2021), <https://www.courthousenews.com/california-lawmakers-approve-series-of-upzoning-bills> [<https://perma.cc/MKC5-WW6X>] (describing recent bills S.B. 10, S.B. 15, and S.B. 447); *Governor Newsom Signs Historic Legislation to Boost California’s Housing Supply and Fight the Housing Crisis*, OFF. OF GOVERNOR GAVIN NEWSOM (Sept. 16, 2021), <https://www.gov.ca.gov/2021/09/16/governor-newsom-signs-historic-legislation-to-boost-californias-housing-supply-and-fight-the-housing-crisis> [<https://perma.cc/PTP4-MM34>] (describing recent signing of S.B. 9 and S.B. 10).

<sup>2</sup> Alana Semuels, *From ‘Not in My Backyard’ to ‘Yes in My Backyard’*, ATLANTIC (July 5, 2017), <https://www.theatlantic.com/business/archive/2017/07/yimby-groups-pro-development/532437> [<https://perma.cc/CKC4-U3JL>] (profiling the movement); Erin McCormick, *Rise of the YIMBYS: The Angry Millennials with a Radical Housing Solution*, GUARDIAN (Oct. 2, 2017) <https://www.theguardian.com/cities/2017/oct/02/rise-of-the-yimbys-angry-millennials-radical-housing-solution> [<https://perma.cc/LZ53-29DW>] (describing the San Francisco Bay Area as “[t]he birthplace of the yimby movement”).

<sup>3</sup> See, e.g., Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html> [<https://perma.cc/MBN9-G4H3>] (describing Minneapolis as the first major U.S. city to eliminate single-family zoning); Chuck Slothower, *A New, Denser Era for Housing in Oregon*, DAILY J. OF COM. (Portland, Or.), July 3, 2019, GALE GEN. ONLINE, GALE | A592634110 (describing OR. REV. STAT. § 197.758 (2020), which requires certain local governments to permit higher densities in single-family zoned neighborhoods); Henry Grabar, *You Can Kill Single-Family Zoning, But You Can’t Kill the Suburbs*, SLATE (Sept. 17, 2021, 5:38 PM), <https://slate.com/business/2021/09/california-sb9-single-family-zoning-duplexes-newsom-housing.html> [<https://perma.cc/UR6T-9EEJ>] (observing that California has “effectively abolishe[d] single-family home zoning”).

<sup>4</sup> In particular, whether measures proposed by former President Trump would improve or exacerbate the housing crisis. Compare *President Donald J. Trump is Tearing Down Red Tape in Order to Build More Affordable Housing*, WHITE HOUSE (June 25, 2019), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-tearing-red-tape-order-build-affordable-housing> [<https://perma.cc/A2BU-VNMA>] (outlining former President Trump’s campaign plans to create more affordable housing opportunities), with Laura Kusisto, *Trump Administration Plans Roll Back of Low-Income Housing Rules*, WALL ST. J. (Jan. 6, 2020, 6:12 PM), <https://www.wsj.com/articles/trump-administration-to-roll-back-rules-designed-to-boost-low-income-housing-11578351989> [<https://perma.cc/4Q4S-775K>] (describing housing advocates’ opposition to Trump’s proposed changes), and Laura Figueroa Hernandez, *Donald Trump: Fair Housing Rules Having ‘Devastating’ Impact on Suburbs*, NEWSDAY (July 4, 2020, 5:37 PM), <https://www.newsday.com/news/nation/trump-housing-long-island-divided-hud-1.46344417> [<https://perma.cc/4GBG-UQS2>] (describing the Biden campaign’s opposition to the proposed rollback).

<sup>5</sup> See *The Biden Plan for Investing in Our Communities Through Housing*, BIDEN FOR PRESIDENT, <https://joebiden.com/housing> [<https://perma.cc/RGS8-ST9R>] (discussing then-candidate Biden’s plan to address the housing crisis, including the elimination of exclusionary zoning).

regionalism advocates' long-running distrust of local exclusionary land use policies.

Land use regulation generally and zoning, in particular, have long been core powers of local governments, and many land use reforms are occurring at the local level.<sup>6</sup> But an emerging conventional wisdom is almost uniformly hostile to local government control of land use policy. The new land use reformers take for granted that state (or even federal) laws are necessary to override local parochialism and that local governments cannot be trusted with land use policymaking and will abuse their zoning powers in predictable ways.<sup>7</sup>

This Article challenges that conventional wisdom, at least in part. It does not contest the main criticisms of exclusionary zoning and other restrictive housing policies—that they exacerbate troubling inequalities across our metropolitan regions.<sup>8</sup> Instead, the Article seeks to decouple the assumed connection between the exercise of local power and exclusionary land use policies. And it questions the rush to adopt state-level land use laws that preempt local planning and zoning.<sup>9</sup>

The Article is organized around critiques of three pillars of the emerging land use reform consensus: centralization, deregulation, and mobility. As to the first, I argue that YIMBYism's anti-localism is a mistake. State and federal interventions into local land use have, at best, a mixed history.<sup>10</sup> State forays into local land use decisionmaking have either failed to achieve meaningful gains or (in the case of urban renewal) have dramatically worsened the problems of socioeconomic segregation. To be sure, exclusionary zoning in

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<sup>6</sup> John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 825 (2019) (“Zoning is the quintessential local government power.”).

<sup>7</sup> See *infra* Part II.

<sup>8</sup> I have addressed those inequalities in prior work. See Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1115 (2008) [hereinafter Schragger, *Cities*] (“The use of zoning laws to restrict entry is a common phenomenon—the relative dearth of affordable housing in many suburbs is well-documented, as is the contribution of zoning to higher house prices.”) (citations omitted); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1826 (2003) [hereinafter Schragger, *Consuming Government*] (noting the “distributional consequences of a political economy that gives the homevoter almost unfettered control over who gets to move in next door” on the urban poor, racial minorities, families, and the elderly).

<sup>9</sup> For a recent, somewhat different defense of zoning, see Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 752 (2020), arguing that zoning “is primarily concerned with regulating the pace and costs of community change,” a goal which is achieved by “maintaining community character, enhancing property values, and allocating the costs of development between insiders and outsiders.” Other defenses of zoning include Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 742-43 (1993) (arguing that protective zoning is necessary to preserve the “safety, quality and integrity” of communities of color), and Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENV'T L. 45, 46 (1994) (“[Z]oning can be a rational and justifiable public policy response to very real problems and can be made to work at least as well as any of the alternatives the critics propose.”).

<sup>10</sup> See *infra* Section II.A.

the suburbs has detrimental effects, but there is no reason to believe that a state's land use regime—even one motivated by an affordability impulse—will not come to reflect similar political pathologies. Suburbanites dominate state legislatures. State-dictated policies have created the conditions under which residential socioeconomic and racial segregation have flourished. And state law regularly prevents local governments from adopting their own affordable housing policies, not to mention other policies intended to address economic inequality. Affordable, desegregated housing is a laudable—even essential—goal. But combining it with an anti-local agenda by further restricting cities' already-limited powers is a strategic mistake. In light of this history and the entrenched interests in the states, housing and poverty advocates should be demanding *more* local control over land use, not less.

The second pillar of the emerging land use reform consensus is deregulation. While supply-oriented reformers often combine land use reform with affirmative duties to subsidize or build low-income housing, much of current policy advocacy has a decidedly free market orientation, emphasizing in the first instance the elimination of barriers to the construction of new market-rate housing.<sup>11</sup> The coincidence of centralized policymaking and deregulation should raise concerns that state-level land use reform will mostly redound to the benefit of investors and developers and not to those residents with limited resources who seek to afford to remain in place. No doubt, those in the market for housing—including middle-class families, recent college graduates, and young families—are often priced-out of high-cost urban housing markets. But reformers should be careful not to equate their interests with those of the working-class and especially minority poor, who have always struggled with unstable and expensive housing regardless of the local or regional land use regime. Those communities have reason to be skeptical of land use policies that encourage (and often subsidize) market-rate development; “growth” policies have rarely worked for them before.<sup>12</sup>

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<sup>11</sup> See, e.g., Miriam Axel-Lute, *YIMBYS: Friend, Foe, or Chaos Agent?*, SHELTERFORCE (Feb. 19, 2019), <https://shelterforce.org/2019/02/19/yimbys-friend-foe-or-chaos-agent> [<https://perma.cc/Y6Q7-M2QX>] (describing “YIMBY talking points focused on lowering housing cost by building more of it,” and recounting the YIMBY arguments that restrictive zoning and conditional approvals “were to blame for slow rate of new housing creation”). But see Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25, 26 (2019) (arguing that subsidized housing is a necessary adjunct of market-rate housing).

<sup>12</sup> See *infra* Parts III–IV. For general critiques of neoliberal urban development, see JASON HACKWORTH, *THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM* 126–31 (2006) (arguing that neoliberalism has contributed to corporatized, state-sponsored gentrification); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 88 (2007) (discussing how neoliberalism resulted in “[c]utbacks in state welfare and infrastructural expenditures [which] diminished the quality of life for many,” leading to “an awkward mix of low growth and increasing income inequality”); TIMOTHY P.R. WEAVER, *BLAZING THE NEOLIBERAL TRAIL: URBAN POLITICAL DEVELOPMENT IN THE UNITED STATES AND THE UNITED KINGDOM* 161

To be sure, land use reform has been and currently is promoted as a means to address metropolitan-area inequalities, to break down the barriers that usually lock poorer and minority residents in neighborhoods far from jobs, in places with weak or failing schools.<sup>13</sup> It is notable that local land use—and single-family zoning in particular—has become a central focus for those pursuing this equal opportunity agenda.<sup>14</sup> But the strategy of dispersing and deconcentrating what would have been previously called the “ghetto” by opening up wealthier enclaves to low-income housing—though a legitimate regional equity concern—represents an up-by-your-bootstraps approach to poverty alleviation. Policymakers’ emphasis on land use reform and “moving to opportunity”<sup>15</sup> suggests that poverty alleviation is mostly about getting families out of poor jurisdictions and into richer ones, in large part so that poor children may take advantage of superior educational opportunities.<sup>16</sup>

This embrace of mobility is the third pillar of the new land use reform consensus, and it too should raise concerns.<sup>17</sup> Government efforts to address the problem of economic inequality are badly needed, but land use reform seems

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(2016) (noting that under neoliberal policies, despite “seven years of uninterrupted growth, Philadelphia’s median household income of \$30,055 had fallen by 7 percent” between 1990 and 2000); see also Megan French-Marcelin, *Doing Business New Orleans Style: Racial Progressivism and the Politics of Uneven Development*, in *NEOLIBERAL CITIES: THE REMAKING OF POSTWAR URBAN AMERICA* 98, 99 (Andrew J. Diamond & Thomas J. Sugrue eds., 2020) (“[P]olicies that marshaled public resources toward private ends—under the premise that generating growth and jobs were commensurate enterprises—were also shaped by the willingness of liberals, white and black, to subordinate appraisals of structural inequality to pro-growth visions of progress.”).

<sup>13</sup> See Chang-Tai Hsieh and Enrico Moretti, *How Local Housing Regulations Smother the U.S. Economy*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/opinion/housing-regulations-us-economy.html> [<https://perma.cc/C9U7-ABDT>] (calling for federal and state intervention to “keep municipalities from abusing land-use regulations to keep out newcomers” and to connect “high paying job markets to areas with lower-cost housing”); John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271, 1276 (2020) (arguing that residents of urban communities are “likely to benefit” from new development created by zoning reform).

<sup>14</sup> See 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/upshot/cities-across-america-question-single-family-zoning.html> [<https://perma.cc/LEZ8-SVXP>] (cataloging recent reform movements focused on ending single-family zoning); Farhad Manjoo, *Let’s Quit Fetishizing the Single-Family Home*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2020/02/05/opinion/california-single-family-housing.html> [<https://perma.cc/Y9DX-KPEE>] (calling for the eradication of single-family zoning in the name of equity).

<sup>15</sup> See *infra* Section IV.A; Karen Duffin, *Moving to Opportunity?*, NPR: PLANET MONEY (Aug. 30, 2019, 7:01 PM), <https://www.npr.org/2019/08/30/756028025/episode-937-moving-to-opportunity> [<https://perma.cc/4YDZ-6NN3>] (describing the mixed outcomes of the federal “move to opportunity” program of the 1990s).

<sup>16</sup> See David Imbroscio, *Urban Policy as Meritocracy: A Critique*, 38 J. URB. AFFS. 79, 80-81 (2016) [hereinafter Imbroscio, *Urban Policy as Meritocracy*] (“A central tenet of liberal urban policy is the belief that, without a proper formal education during a person’s youth, her or his abilities and talents will remain (perhaps forever) underdeveloped.”).

<sup>17</sup> See *id.* at 91-92 (criticizing relocation-based anti-poverty programs).

unlikely to meet the high aspirations set for it. Regionalists' efforts to break down barriers between suburbs and cities have produced little in the way of substantive gains over the last seventy-five years.<sup>18</sup> Perhaps that is because the massive demographic shifts required of such a program would be politically unpalatable, to both the poor minorities and middle-class white people forced to move or absorb new arrivals. It is also the case that the "suburbs" are no longer so monolithic in their whiteness and wealth; they have also not been immune to a decades-long austerity regime that has hollowed out the public sector everywhere.

The opportunity narrative's focus on reducing land use barriers is misplaced in another way. The question is not whether certain kinds of local land use restrictions are pernicious—in many cases, they are—but why in the first quarter of the twenty-first century, when rural, suburban, and urban inequality are all on the rise,<sup>19</sup> the preferred target of those seeking to address entrenched, racialized poverty is zoning.

Geographically inscribed inequality is a problem. But the rise in economic inequality in the last half-century may have little to do with individual families' inability to take advantage of educational opportunities, nearby jobs, or good public services.<sup>20</sup> Single-family zoning did not create the gap between rich and poor that is emblematic of this new gilded age, and access to the suburbs without more will not reduce that gap. The emphasis on breaking down barriers to mobility easily distracts from those substantive economic efforts like fair wage and hours reform; health care and paid leave; eviction and tenant protections; and labor rights—all of which can and have been pursued at the municipal level

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<sup>18</sup> See Richard C. Schragger, *The Political Economy of City Power*, 44 *FORDHAM URB. L.J.* 91, 111-14 (2017) (explaining why regional governments have had limited uptake in the U.S.). Canonical works on regionalism include MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 42-43, 45 (1997) (promoting regionalism as a means of metropolitan stabilization, but recognizing barriers to regional cooperation); DAVID RUSK, *CITIES WITHOUT SUBURBS* 33-37 (2d ed. 1995) (arguing that centralized regional governance is essential to combat housing and educational segregation).

<sup>19</sup> Mike Schneider, *Census: US Inequality Grew, Including in Heartland States*, ASSOCIATED PRESS (Sept. 26, 2019), <https://apnews.com/article/bfa51032ee27470c9f908914328eea99> [<https://perma.cc/8JCH-QDH2>] (reporting on the rise of income inequality across the United States from 2017 to 2018).

<sup>20</sup> See generally THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 395-97 (Arthur Goldhammer trans. 2017) (2017) (highlighting executive compensation and wage gaps between college and high school graduates as two primary drivers of inequality); Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation of the Recent Evolution of the American Economy 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020) (arguing that union weakness accounts for declining worker power and economic inequality). For another account that attributes declining growth to a lack of technological innovation, see ROBERT L. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* 605-06 (2016).

but which in too many cases are preempted by deregulatory state laws.<sup>21</sup> The anti-local thrust of the new zoning reform undermines those important efforts.

In this way, the new anti-zoning movement and the opportunity agenda run together—but at the cost of addressing some more salient features of an increasingly unequal economy. State-level land use preemption reduces locals' ability to extract concessions from mobile capital, undercuts local affordability efforts, and further constrains the ability for urban-based economic justice coalitions to exercise local power. The attraction of state-level reform is understandable, but its costs are high, and its benefits are questionable. Reformers would do better to focus on local policies and practices and pursue their affordable housing agenda in place. Public policy can be effectively made *in* cities, not simply to constrain them.

This Article has five remaining Parts. Part I describes the recent “rediscovery” of exclusionary zoning. Though reformers have long bemoaned suburban exclusion, the emerging anti-zoning consensus is a response to metropolitan area housing demand and is thus the mirror image of the mid-century suburban housing demand that drove the previous pro-zoning consensus.<sup>22</sup> The combination of white, middle-class need, property rights libertarianism, the renewed desirability of central city locations, and heightened racial justice concerns has seeded this current anti-zoning moment.<sup>23</sup> But this moment is not so different from the zoning revolution that preceded it: both zoning and anti-zoning emerge from similar demands to address housing shortages.

Part II considers and criticizes the push for centralized control of land use, arguing that blanket state-wide land use laws will likely do little to induce affordable housing in the suburbs while undermining the few remaining powers that progressive cities have to influence the type, direction, and speed of growth in their neighborhoods. Part III considers land use deregulation, arguing that market-favoring policies are likely to encourage displacement instead of ameliorating it. While supply-side policies might lower prices at the high-end of the income scale, they do not appear to be effective at providing housing beyond the top quartile.<sup>24</sup> And Part IV criticizes the mobility argument for land

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<sup>21</sup> Richard Briffault, *The Challenge of New Preemption*, 70 STAN. L. REV. 1995, 1999-2002 (2018) (describing the phenomenon of state legislatures passing legislation to preempt progressive municipal ordinances at the behest of the business community).

<sup>22</sup> See *infra* Section I.B.

<sup>23</sup> Some have described this confluence of ideas as “liberalitarian.” See Ganesh Sitaraman, Morgan Ricks, & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1770 (2021) (using the term to describe liberals who believe “it is possible to help people who are in left-behind places through policies that enable them to move to other, more economically vibrant, geographies”).

<sup>24</sup> Cf. Emily Badger, *A Luxury Apartment Rises in a Poor Neighborhood. What Happens Next?*, N.Y. TIMES (Feb. 18, 2020), <https://www.nytimes.com/2020/02/14/upshot/luxury-apartments-poor->



use reform. Dismantling land use barriers so that individuals and families can move to more productive places sounds plausible, even essential. But a mobility approach has its own costs: it accepts a state of affairs in which the poor chase the rich in an endless quest for good public services; it provides little recourse for those who are immobile because of age, personal circumstance, lack of skills, or lack of resources; and it provides no answer to those left behind in failing places.<sup>25</sup>

More importantly, the strategy assumes that economic growth will lift all boats, when in fact, growth often has negative effects on the resident poor. The YIMBY movement is a form of pro-growth politics; it is offered as an explicit rebuke to the “Not in My Backyard” (NIMBY) politics that often characterizes neighborhood opposition to development.<sup>26</sup> But using state law to preempt local NIMBY interests by reasserting the power of regional or statewide growth interests does not seem like the best strategy for promoting inter-local or socioeconomic equality. One might legitimately worry that market- and mobility-oriented solutions to the housing crisis are really just suburbanization in reverse—an accommodation to the (predominantly) white and middle- or upper-middle class now applied to the more-recently desirable city.<sup>27</sup>

Finally, Part V argues that affordable housing and racial justice advocates would do better to target their reforms in cities—a more promising site for pursuing an economic equality agenda.<sup>28</sup> Urban-based economic justice movements have had success; the municipal living wage movement is a model.<sup>29</sup> Local control over land use can provide useful leverage in these

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neighborhoods.html [<https://perma.cc/V2B4-QUPN>] (discussing various studies finding lower-income renters may not benefit from new housing construction).

<sup>25</sup> See, e.g., Michelle Wilde Anderson, *Losing the War of Attrition: Mobility, Chronic Decline, and Infrastructure*, 127 *YALE L.J. F.* 522, 526-29 (2017) (discussing barriers low-income residents face to leaving their communities).

<sup>26</sup> Timothy A. Gibson, *NIMBY and the Civic Good*, 4 *CITY & CMTY.* 381, 381 (2005) (describing the NIMBY phenomenon); William Marble & Clayton Nall, *Beyond “NIMBYism”: Why Americans Support Affordable Housing But Oppose Local Housing Development 1-2* (Apr. 3, 2017) (unpublished manuscript), [https://www.dropbox.com/s/bdo3riekpnywgot/MarbleNall\\_NIMBYPaper.pdf?dl=0](https://www.dropbox.com/s/bdo3riekpnywgot/MarbleNall_NIMBYPaper.pdf?dl=0) [<https://perma.cc/X2WF-G8CU>] (exploring why homeowners’ concerns about the housing crisis in the abstract do not lead them to support development in their neighborhoods).

<sup>27</sup> In opposing the California legislature’s sweeping land use reform proposals, S.B. 827 and S.B. 50, advocates for low-income and minority tenants repeatedly raised a similar concern. See Liam Dillon, *A Major California Housing Bill Failed After Opposition from the Low-Income Residents it Aimed to Help. Here’s How It Went Wrong*, *L.A. TIMES* (May 2, 2018, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-housing-bill-failure-equity-groups-20180502-story.html> [<https://perma.cc/7H9U-PTRK>] (describing low-income tenant activists’ opposition to a zoning reform bill over concerns about displacement).

<sup>28</sup> See Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 *HARV. L. & POL’Y REV.* 231, 232-33 (2013) (advocating for local government as a site for progressive, redistributive policies).

<sup>29</sup> See Jared Bernstein, *Making a Living: How the Living Wage Movement Prevailed*, *SHELTERFORCE* (May 1, 2002), <https://shelterforce.org/2002/05/01/making-a-living-how-the-living->

efforts, giving city officials and local residents a tool to force developers to respond to affordability and anti-displacement concerns. State preemption of local land use laws is likely to undermine those efforts to the chagrin of reformers concerned about zoning's effects on metropolitan-area inequality.

## I. THE REDISCOVERY OF EXCLUSIONARY ZONING

This Part begins by describing what is meant by reformers when they refer to “exclusionary zoning.” It also attempts to explain the emergence of the current anti-zoning moment. Zoning emerged in the first quarter of the twentieth century as cities were growing and housing needs were acute.<sup>30</sup> The adoption of zoning facilitated the suburban explosion. Anti-zoning has similarly emerged at a moment of increasing urbanization when housing needs are again acute. Anti-zoning facilitates and is a response to the urban resurgence.

These two moments—of zoning and anti-zoning—are not opposed. Although land use restrictions are often described as interventions in the market that suppress housing development, zoning initially promoted housing development.<sup>31</sup> And while the ills of exclusionary zoning have been known for some time, its recent rediscovery suggests that the anti-zoning impulse arises out of a similar housing urgency. Both the post-war suburban growth that gave birth to zoning and the twenty-first century urban resurgence that has given birth to its opposite are responses to housing demand.

### A. *What is Exclusionary Zoning?*

To what are reformers referring when they talk about exclusionary zoning? On one possible account, all policies that increase the costs of construction or that limit housing density are “exclusionary” because they interfere with the market in housing.<sup>32</sup> There are many policies, often having nothing to do with zoning per se, that could have these effects. For example, the cost of construction in a city might be high because of a local minimum

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wage-movement-prevalled [<https://perma.cc/W57H-YNBN>] (discussing the history of the living wage movement's local focus).

<sup>30</sup> See CHARLES M. HAAR & JEROLD S. KAYDEN, ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 39 (1989) (tracing the history of zoning ordinances to the early twentieth century as a response to the post-WWI housing shortage).

<sup>31</sup> WILLIAM S. WORLEY, J.C. NICHOLS AND THE SHAPING OF KANSAS CITY 121-22 (1990) (describing developers' support for zoning in the early 1900s). On the history of zoning, see generally PAIGE GLOTZER, HOW THE SUBURBS WERE SEGREGATED: DEVELOPERS AND THE BUSINESS OF EXCLUSIONARY HOUSING, 1890-1960 (2020) and HAAR & KAYDEN, *supra* note 30, at 41, describing the connection between zoning and segregation.

<sup>32</sup> See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 101, 114-22 (2017) (describing a large range of policies, including zoning, that limit housing construction and thus labor mobility).

wage or because of labor-friendly local or state laws. Basic building, environmental, and fire codes can increase costs and reduce density, as do set-back requirements, historic preservation ordinances, impact fees, permitting requirements, parking minimums, and nuisance laws. Tenant protections, like rent control or anti-eviction moratoriums, similarly might affect housing prices, if—as some economists contend—they reduce supply.<sup>33</sup> A number of these policies can be, and have been, criticized for raising the cost of housing,<sup>34</sup> though zoning reform advocates' primary focus has usually been classic Euclidean zoning: rules that disallow the mixing of industrial, residential, and commercial uses and that in other ways limit the amount of land available for multifamily construction. Single-family zoning is a particular target of the new land use reformers.<sup>35</sup>

Zoning is sometimes understood as a limit on “normal” market processes—a barrier to development imposed by governments on builders and housing consumers.<sup>36</sup> But this is a mistake. Land use rules—including the basic rules of property law—are not independent of the housing market, nor is it fair to assume that government regulations that affect individual landowners' ability to build suggest opposition to development. The most

<sup>33</sup> Michael Hendrix, *Issues 2020: Rent Control Does Not Make Housing More Affordable*, MANHATTAN INST. (Jan. 8, 2020), <https://www.manhattan-institute.org/issues-2020-rent-control-does-not-make-housing-more-affordable> [<https://perma.cc/J9WN-2KKR>] (arguing that regulating rents “does more harm than good overall”). Other studies, however, have found that rent control measures benefit low-income households. See FURMAN CTR. FOR REAL EST. & URB. POL'Y, *RENT STABILIZATION IN NEW YORK CITY* 4 (2012), [https://furmancenter.org/files/HVS\\_Rent\\_Stabilization\\_fact\\_sheet\\_FINAL\\_4.pdf](https://furmancenter.org/files/HVS_Rent_Stabilization_fact_sheet_FINAL_4.pdf) [<https://perma.cc/5R4E-HLLZ>] (finding that stabilized rent housing may be more beneficial for lower-income residents).

<sup>34</sup> See, e.g., Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE: J. POL'Y DEV. & RSCH., 139, 145-48 (2005) (providing overview of potential objections to impact fees); Hannah Hoyt & Jenny Schuetz, *Report: Parking Requirements and Foundations Are Driving Up the Cost of Multifamily Housing*, BROOKINGS INST. (June 2, 2020), <https://www.brookings.edu/research/parking-requirements-and-foundations-are-driving-up-the-cost-of-multifamily-housing> [<https://perma.cc/J65F-D7SN>] (recommending localities reduce the amount of parking required for residential developments in order to reduce building costs); REAL EST. BD. OF N.Y., *RENT STABILIZED UNITS ON LANDMARKED PROPERTIES* 1 (2015), [https://www.rebny.com/content/dam/rebny/Documents/PDF/News/Research/Policy%20Reports/REBNY\\_Report-Rent\\_Regulated\\_Units\\_in\\_Landmark\\_Districts.pdf](https://www.rebny.com/content/dam/rebny/Documents/PDF/News/Research/Policy%20Reports/REBNY_Report-Rent_Regulated_Units_in_Landmark_Districts.pdf) [<https://perma.cc/J65F-D7SN>] (noting a greater loss of rent regulated units in landmarked parts of New York City than in non-landmarked parts); see also Exec. Order No. 13,878, 84 Fed. Reg. 30,853 (June 25, 2019) (identifying zoning controls, historic preservation requirements, parking minimums, and environmental regulations as potential targets for reform to achieve affordable housing).

<sup>35</sup> See, e.g., Philip Kiefer, *Here Comes the Neighborhood*, GRIST (May 21, 2019), <https://grist.org/article/seattle-zoning-density-minneapolis-2040/> [<https://perma.cc/7RM6-6N7J>] (describing recent efforts to loosen single-family zoning in Seattle and Minneapolis).

<sup>36</sup> See Richard D. Kahlenberg, *The Walls We Won't Tear Down*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/opinion/sunday/zoning-laws-segregation-income.html> [<https://perma.cc/8TUK-AXVJ>] (“[C]urrent exclusionary policies create an artificial scarcity of housing, driving up prices beyond what the market would naturally dictate.”); see also Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 11 (2016) (finding that density restrictions lead to artificial concentration of affluence).

basic preconditions of urban growth are government-imposed. Consider, for example, the debate over whether a grid system of streets and lots or a less formal system of lot demarcation facilitates economic development.<sup>37</sup> Street layouts, building heights, the distribution of city lands for parks and civic buildings all limit or restrict how individual property owners use their land and consequently the value of individual and neighboring parcels.

The housing market is at the same time a land use market. And the long history of restrictive covenants and the more recent popularity of homeowners' associations suggests that housing consumers are fairly enamored of restrictive land use rules.<sup>38</sup> Even in the absence of government intervention, millions of housing consumers have opted for highly restrictive land use covenants. Developers have complied enthusiastically, presumably because those rules benefit them by providing what home seekers want. Restrictive land use rules have not been imposed on the market but are a feature of it.

Those rules have also historically arisen during spates of urbanization when cities and suburbs are growing. Consider the trajectory of residential racial exclusion. Racial zoning was adopted as agricultural and rural places were becoming more urban, initially as a mechanism to separate the races in place—in existing housing.<sup>39</sup> The statutes required segregation at the block level; homeowners and renters—white or Black—were required to move out of existing residencies to create a new status quo that would be enforced going forward.<sup>40</sup>

After *de jure* residential segregation was struck down by the Supreme Court in *Buchanan v. Warley*,<sup>41</sup> private racial covenants remained both legal and increasingly popular. Those covenants too were introduced to apply to current housing, though as cities and towns grew, restrictive covenants (racial and otherwise) were deployed in the main to assure home buyers that new housing developments would be congenial to their preferences. In other

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<sup>37</sup> Cf. Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 875 (2019) (describing the history of property boundaries in America).

<sup>38</sup> Homeowners associations, in fact, can impose far more restrictive land controls than governments at any level. See Ryan McCarl, *When Homeowners Associations Go Too Far: Political Responses to Unpopular Rules in Common Interest Communities*, 43 REAL EST. L.J. 453, 462 (2015) (nothing that land use restrictions imposed by homeowners' associations "leave less room for individual autonomy than most public land use laws.") (internal quotations omitted); cf. Robert C. Ellickson, *Stale Real Estate Covenants* 3-4 (Aug. 21, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3678927> (discussing the enduring power of covenants). In a recent survey experiment, Jessica Trounstone found that "across every demographic subgroup analyzed, respondents preferred single-family home developments by wide margins." Jessica Trounstone, *You Won't Be My Neighbor: Opposition to High Density Development*, URB. AFFS. REV., Dec. 6, 2021, at 1.

<sup>39</sup> See Christopher Silver, *The Racial Origins of Zoning in American Cities*, in URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS 23, 24 (June Manning Thomas & Marsha Ritzdorf eds., 1997) (describing the use of zoning to enforce racial segregation).

<sup>40</sup> See *id.*

<sup>41</sup> 245 U.S. 60, 61 (1917).

words, restrictive covenants—whether limiting the use of property to residential purposes, barring commercial establishments like gas stations, or preventing occupancy by Black or other races or ethnicities—were tools used by developers to attract buyers.<sup>42</sup> Restrictive covenants have been and continue to be handmaidens to development—not hindrances to it.

The purpose and history of Euclidean zoning—the division of a town or city into separate zones for residential, commercial, and industrial uses—reflects a similar pro-development impulse. Consider *N.A.A.C.P. v. Mount Laurel*, the 1975 New Jersey Supreme Court decision that famously struck down a township’s land use regime because it failed to provide sufficient land for the development of low- and moderate-income housing.<sup>43</sup> It is easy to forget that the restrictive zoning ordinance at issue in *Mount Laurel* was a byproduct of, and facilitated, growth.<sup>44</sup> In the early 1970s, Mount Laurel was growing.<sup>45</sup> As the Philadelphia metropolitan area expanded, formerly rural communities across the Delaware River in New Jersey were rapidly being turned into bedroom suburbs. Mount Laurel’s growth (and the growth of central New Jersey as a whole) was a response to the demand for more housing.

In other words, zoning accompanied increased supply. Between 1950 and 1960, Mount Laurel’s population had increased by over 86%; over the next decade, the township’s population grew by another 114%.<sup>46</sup> Meanwhile, the state’s population as a whole grew by 48% between 1950 and 1970.<sup>47</sup> Housing

<sup>42</sup> See RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 48-49 (2013) (noting the use of racially-exclusive covenants as a means of making a neighborhood attractive to buyers).

<sup>43</sup> *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713, 734 (N.J. 1975) [hereinafter *Mount Laurel I*]. The case was followed in 1983 with a second challenge to Mount Laurel’s exclusionary ordinance. *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390, 409-10 (N.J. 1983) [hereinafter *Mount Laurel II*].

<sup>44</sup> See *What is the Mount Laurel Doctrine?*, FAIR SHARE HOUS. CTR., <https://fairsharehousing.org/mount-laurel-doctrine> [<https://perma.cc/6374-PARB>] (last visited Sept. 18, 2020) (describing the rapid growth in Mount Laurel as a result of planned development as “fiscal zoning at its best, aimed at attracting the highest tax rateables, which translated into excluding the poor”).

<sup>45</sup> 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* 32-33 (2013) (noting that Mount Laurel nearly quadrupled in population between 1950 and 1970); J. Peter Byrne, *Are the Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2270 (1997) (reviewing CHARLES HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE AND AUDACIOUS JUDGES* (1996) and DAVID L. KIRP, JOHN P. DWYER, & LARRY A. ROSENTHAL, *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995)) (describing Mount Laurel as a “nondescript expanse of truck farms rapidly converting to pricey subdivisions”).

<sup>46</sup> N.J. DEP’T OF LAB. & WORKFORCE DEV., *LABOR PLANNING AND ANALYSIS APPLICATIONS: 1990 CENSUS* tbl.6, <https://www.nj.gov/labor/lpa/census/1990/poptrd6.htm> [<https://perma.cc/YZQ2-HVMT>].

<sup>47</sup> U.S. DEP’T OF COM., U.S. CENSUS BUREAU, *CHANGE IN RESIDENT POPULATION OF THE 50 STATES, THE DISTRICT OF COLUMBIA, AND PUERTO RICO: 1910 TO 2020* (Apr. 26, 2021),

supply was increasing across New Jersey. (Indeed, today New Jersey ranks first among all states in population density.<sup>48</sup>) The problem for the Black plaintiffs in the *Mount Laurel* case was not that they were barred from moving into the jurisdiction—a robust Black community had been in the rural township for over one hundred years.<sup>49</sup> Rather, the problem was that developmental pressures were pricing them out of their own community. Without access to rental properties for people of modest means, they would slowly lose their homes to dilapidation and higher taxes and be forced to move elsewhere. Housing costs in Mount Laurel were being driven up by demand. *Mount Laurel* is a case about the negative effects of development; it is a gentrification case.

*Mount Laurel* involved classic “fiscal zoning,” which is well described in that case. As the New Jersey Supreme Court observed, each locality “acts solely in its own selfish and parochial interest” to keep costs down and property values up.<sup>50</sup> To be sure, fiscal zoning is a growth control: the reason that the township limited multi-family housing and less expensive rentals was not because it was opposed to development, but because it sought development that would “pay for itself.”<sup>51</sup> This desire to attract and retain certain land uses is a byproduct of local government finance. To the extent that schools and other public services are mainly paid for through the local property tax, it is necessary to align the users of municipal services with their capacity to pay. That means that a local government is inclined to attract relatively wealthier residents and limit higher-cost users of municipal services—like large families with children.<sup>52</sup> Fiscal zoning is a rational strategy for local government officials seeking to keep taxes low and services high—which is why the township was quite candid in defending this strategy before the New Jersey Supreme Court.<sup>53</sup>

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<https://www.census.gov/data/tables/time-series/dec/popchange-data-text.html> [https://perma.cc/DH9F-REX3] (showing an increase from 4.8 million in 1950 to 7.2 million in 1970).

<sup>48</sup> *Population Density in the U.S., by State 2020*, STATISTA (Jan. 21, 2021), <https://www.statista.com/statistics/183588/population-density-in-the-federal-states-of-the-us> [https://perma.cc/Y4HB-YM2W].

<sup>49</sup> David L. Kirp, John Dwyer, & Larry Rosenthal, *A Suburb at Odds: The Epic Battle of Mount Laurel*, in DAVID L. KIRP, *ALMOST HOME: AMERICANS LOVE-HATE RELATIONSHIP WITH COMMUNITY* 60, 61 (2000).

<sup>50</sup> *Mount Laurel I*, *supra* note 43, at 723.

<sup>51</sup> *Id.*; Roderick M. Hills, Jr., Essay, *Saving Mount Laurel?*, 40 *FORDHAM URB. L.J.* 1611, 1614-18 (2013) (explaining how municipalities used exclusionary zoning to reduce the risk of “fiscal, political, and social costs” to the community).

<sup>52</sup> See Eric A. Hanushek & Kuzey Yilmaz, *Land-Use Controls, Fiscal Zoning, and the Local Provision of Education*, 43 *PUB. FIN. REV.* 559, 560 (2015) (“If . . . various zoning devices can be employed, it may be possible to exclude the households that create the fiscal burdens.”).

<sup>53</sup> Indeed, theorists of local government finance and public goods, building on the famous Tiebout hypothesis, have argued that zoning is an essential feature of a competitive inter-governmental system of public goods provision. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416, 424 (1956) (“[If] consumer-voters are fully mobile, the appropriate local governments, whose revenue-expenditure patterns are set, are adopted by the

One can distinguish fiscal zoning from “public goods zoning,” though they are related. While fiscal zoning is concerned with the residents’ ability to pay, public goods zoning is focused on the use of public services, regardless of who is paying. Congestion is a standard example. A local amenity like a beach loses its value if it is overcrowded—as do local roads, parks, swimming pools, or schools.<sup>54</sup> Local governments might also be concerned about how the quality of a certain amenity is affected by its users.<sup>55</sup> The quality of primary and secondary education, for example, might turn in part on the types of students consuming that education.<sup>56</sup> To the extent that those kinds of services are restricted to local residents, there is an incentive for local governments to adopt entrance controls in the form of land use restrictions that serve as proxies for “quality” users.<sup>57</sup>

By the early 1970s, the *Mount Laurel* court was well-aware that this strategy, coupled with white flight, was contributing to the decline of the post-industrial city. Mount Laurel was growing, but Camden—an industrial city a short drive away—was fast becoming depopulated and destitute. Indeed, the *Mount Laurel* court articulated most if not all of the current

consumer-voters.”); see also THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES 1, 11-14 (William A. Fischel ed., 2006) (describing modern applications of the zoning to the Tiebout model); Bruce W. Hamilton, *Tiebout Hypothesis*, in THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 640, 640 (John Eatwell, Murray Milgate, & Peter Newman eds., 1987) (describing Hamilton’s model, which builds on Tiebout’s model and postulates that “[c]itizens of a rich jurisdiction could safely tax themselves sufficiently to finance their demanded level of public services, secure in the knowledge that the zoning code would protect them from free riders.”). Zoning, they argue, is a necessary complement to the efficient provision of public services insofar as it permits housing consumers—consumer-voters—to select the bundle of taxes and services that most reflects their preferences. See WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 39 (2001) (arguing that zoning is crucial to motivating homebuyers to “vote with their feet” because it advances capitalization).

<sup>54</sup> The beach is Tiebout’s well-known example. See Tiebout, *supra* note 53, at 419 (calculating the optimum population for a beach of any given size based on the ideal amount of space allocated to each family).

<sup>55</sup> William A. Fischel, *Public Goods and Property Rights: Of Coase, Tiebout, and Just Compensation* 6 (Dartmouth Coll., Working Paper No. 00-19, 2000), <https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/6/2312/files/2021/03/00-19.pdf> [<https://perma.cc/869C-FQUA>] (describing the impact of congestion).

<sup>56</sup> See, e.g., Mary A. Burke & Tim R. Sass, *Classroom Peer Effects and Student Achievement*, 31 J. LAB. ECON. 51, 78 (2013) (“[T]he distribution of student ability may influence teaching strategies in ways that benefit some students but not others . . .”).

<sup>57</sup> Fischel, *supra* note 55, at 8-9 (describing zoning as a means to exclude “free riders”). I have been critical of both fiscal and public goods zoning because of their exclusionary effects. See Schragger, *Consuming Government*, *supra* note 8, at 1836 (“Local government works for the homevoter only because she has been empowered to keep lower-income, higher-cost newcomers out of her neighborhood: her incentives are explicitly defensive and separationist.”). I have also argued that Tiebout has been misapplied to support a competitive account of city or regional growth and decline, which it never was intended to be. RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 29-32, 34-43 (2016).

arguments against suburban-style fiscal zoning: the desperate need for moderate- and low-income housing throughout the state,<sup>58</sup> the effect on lower-income job seekers of being shut out of suburban development,<sup>59</sup> the racially discriminatory aspects of zoning,<sup>60</sup> and the effects of sprawling suburban development on nearby declining industrial cities.<sup>61</sup> These effects were well known in 1975, as they were when the concept of zoning was first introduced in the early part of the twentieth century. Fifty years before *Mount Laurel*, the trial court in *Village of Euclid v. Ambler Realty Co.* had made a similar observation about zoning's segregative effects, stating that "[i]n the last analysis, the result to be accomplished is to classify the people and segregate them according to their income or situation in life."<sup>62</sup> The U.S. Supreme Court reversed the lower court's decision in 1926, upholding the "Euclidean" single-family zoning that thereafter became ubiquitous throughout the United States—and which is now a chief target of the new land use reform movement.<sup>63</sup>

The important point is that 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. Housing costs were low enough in Mount Laurel to permit the middle-class to leave Camden—indeed, minimum lot sizes were relatively modest and the average price of a home was \$32,500<sup>64</sup>—but certainly not so low as to allow every poor person to leave. Mobile housing consumers had new options in the suburbs; immobile ones did not. The Levittowns of the 1950s,<sup>65</sup> and then the numerous Mount Laurels of the 1970s, were a “successful”

<sup>58</sup> *Mount Laurel I*, *supra* note 43, at 716 (“There is not the slightest doubt that New Jersey has been, and continues to be, faced with a desperate need for housing . . . suitable for low and moderate income families.”).

<sup>59</sup> *Id.* at 723 (“One incongruous result is the picture of developing municipalities rendering it impossible for lower paid employees . . . to live in the community where they work.”).

<sup>60</sup> *Id.* at 736 (Pashman, J., concurring) (“[E]xclusionary zoning practices are also often motivated by fear of and prejudices against other social, economic, and racial groups.”).

<sup>61</sup> *Id.* at 724 (noting the decline of Camden).

<sup>62</sup> *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926). Despite striking down the ordinance, the district court was aware of and seemed to embrace the racial purpose of zoning. See Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 605 (2001) (“It was so obvious to Judge Westenhaver that ‘colored’ people and certain groups of immigrants were nuisances that the Supreme Court’s refusal to approve racial zoning made it impossible to validate zoning for other purposes.”).

<sup>63</sup> For a historical account of *Village of Euclid v. Ambler Realty Co.*, see Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1611-13 (2021).

<sup>64</sup> *Mt. Laurel Homes Carry High Prices*, N.Y. TIMES (Mar. 25, 1975), <https://www.nytimes.com/1975/03/25/archives/mt-laurel-homes-carry-high-prices-zoning-prevented-purchase-by-less.html> [<https://perma.cc/36HM-WKX6>] (providing pricing data for 1971). On the zoning scheme at issue in Mount Laurel more generally, see *Mount Laurel I*, *supra* note 43, at 718-24.

<sup>65</sup> Crystal Galyean, *Levittown*, U.S. HIST. SCENE, <https://ushistoryscene.com/article/levittown> [<https://perma.cc/FP56-S24T>] (describing the development of “Levittown” planned communities).



response to the post-war housing shortage across the United States—just not for those worst off, and generally not for Black people or other minorities.<sup>66</sup>

The lesson for today’s anti-zoning moment is both historical and analytical. First, land use reform—whether zoning or anti-zoning—is driven by demand and generally accompanies economic growth. Euclidean zoning helped facilitate urbanization on a massive scale, just not in the city center. Second, both zoning and anti-zoning are creatures of the “market”—not departures from or exceptions to it.<sup>67</sup> Opposition to zoning is opposition to a certain *form* of market-driven development, not to interference in the market *simpliciter*.

### B. What Explains the Rediscovery of Exclusionary Zoning?

That both zoning and anti-zoning can be understood as facilitating housing development suggests an explanation for exclusionary zoning’s recent rediscovery. Critics have regularly bemoaned exclusionary land use policies, from zoning’s inception in the 1920s to the lead-up to *Mount Laurel* and since.<sup>68</sup> But the political energy for attacking those policies has only reached a critical mass recently. The most obvious explanation for this attitudinal shift is the renewed popularity of certain city centers and the increasing concentration of the U.S. population in sprawling metropolitan

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<sup>66</sup> James Wolfinger, “The American Dream—For All Americans”: Race, Politics, and the Campaign to Desegregate Levittown, 38 J. URB. HIST. 430, 431-32 (2012) (describing the racial homogeneity of new suburbs and tactics like lending discrimination used to maintain it); Bruce Lambert, *At 50, Levittown Contends with Its Legacy of Bias*, N.Y. TIMES (Dec. 28, 1997), <https://www.nytimes.com/1997/12/28/nyregion/at-50-levittown-contends-with-its-legacy-of-bias.html> [<https://perma.cc/J3HZ-MDN3>] (noting the legacy of racial exclusion in Levittown, NY).

<sup>67</sup> YIMBY discourse contrasts the state with the (free) market, implicitly criticizing the former, but the state/market distinction tends to collapse on close inspection. See David Imbroscio, *Race Matters (Even More Than You Already Think): Racism, Housing, and the Limits of The Color of Law*, 2 J. RACE, ETHNICITY, & CITY 29, 33-34 (2020) (questioning the “over-emphasis on public policies as the cause of segregation” when government policies were simply following the demands of preexisting racist market principles). See also LaDale C. Winling & Todd M. Michney, *The Roots of Redlining: Academic, Governmental, and Professional Networks in the Making of the New Deal Lending Regime*, 108 J. Am. Hist. 42, 44 (2021) (“[G]overnment redlining was private redlining and vice versa.”).

<sup>68</sup> Critiques predating *Mount Laurel* include: Robert L. Lineberry, *Mandating Urban Equality: The Distribution of Municipal Public Services*, 53 TEX. L. REV. 26, 30 (1974) (“Exclusionary zoning has become the principal target of liberals and civil rights groups who want to open the suburbs to all racial and economic groups.”); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 798-99 (1969) (advocating an equal-protection challenge to exclusionary zoning); Note, *Regional Impact of Zoning: A Suggested Approach*, 114 U. PA. L. REV. 1251, 1256-57 (1966) (proposing a method to determine whether a challenged zoning ordinance has a harmful regional impact). For critiques after *Mount Laurel*, see Richard Briffault, *Our Localism: Part II – Localism and Legal Theory*, 90 COLUM. L. REV. 346, 419 (1990) [hereinafter Briffault, *Our Localism: Part II*]. See generally Byrne, *supra* note 45.

areas.<sup>69</sup> That growth has been accompanied by rising housing costs and housing shortages—though mostly concentrated in coastal cities and some specific in-land metropolitan areas.<sup>70</sup> Sometimes described as a “demographic inversion,”<sup>71</sup> core cities are now increasingly desirable places to live. This “urban resurgence” is a global phenomenon; housing costs are high and rising in many metropolitan areas throughout the world.<sup>72</sup>

The present anti-zoning moment requires some further explanation, however, for two reasons. First, metropolitan-area housing pressure is not new. Returning GIs faced a severe housing shortage after World War II,<sup>73</sup> and there are many ways to respond to housing shortages and high housing costs. Depression-era and post-WWII housing development was made possible by the invention of the 30-year mortgage, federal support for mortgage finance, massive highway building, federal and state support for the American auto industry, the mortgage interest deduction, and many other policies that encouraged Americans to become homeowners.<sup>74</sup> The construction of public housing both during the New Deal and the War on Poverty was also a somewhat less successful effort to house the country.<sup>75</sup> As already noted, zoning facilitated these efforts, though it was arguably less important than these other forms of government fiscal and political support.

Second, the problems with exclusionary zoning had been well-known before *Mount Laurel* was decided and certainly in the decades since, though reformers’ efforts to do much about those problems usually failed. The *Mount Laurel* decision itself instigated a decades-long battle over affordable housing

<sup>69</sup> See Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1545-47 (2019) (tracing recent academic and policy emphases on cities and urbanization to the ongoing “urban resurgence”).

<sup>70</sup> Kyle F. Herkenhoff, Lee E. Ohanian, & Edward C. Prescott, *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown 2-4* (Nat’l Bureau of Econ. Rsch., Working Paper No. 23790, 2017) (noting housing shortages in New York and California); Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* 4-6 (Jan. 14, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3472145> (describing “astronomic” housing prices in Silicon Valley).

<sup>71</sup> See, e.g., ALAN EHRENHALT, *THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY* 3-4 (2013) (“Demographic Inversion is . . . the rearrangement of living patterns across an entire metropolitan area, all taking place roughly at the same time.”).

<sup>72</sup> See Richard Florida & Benjamin Schneider, *The Global Housing Crisis*, BLOOMBERG CITYLAB (Apr. 11, 2018, 9:35 AM), <https://www.bloomberg.com/news/articles/2018-04-11/the-housing-crisis-extends-far-beyond-superstar-cities> [<https://perma.cc/RAG2-MBR2>] (“Cities around the world are more economically powerful and essential than ever. This creates tremendous demand for their land, leading to escalating housing costs and competition.”).

<sup>73</sup> Alexander von Hoffman, *History Lessons for Today’s Housing Policy: The Politics of Low-Income Housing*, HOUS. POL’Y DEBATE 321, 331 (2012) (describing the postwar housing crisis and the federal response).

<sup>74</sup> See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 176-77, 191, 248 (1985).

<sup>75</sup> Hoffman, *supra* note 73 at 322-28 (describing the New Deal); *id.* at 340-52 (describing the War on Poverty).

in New Jersey, a battle that at best has had marginal effects on state-wide affordability or integration.<sup>76</sup> The decision did nothing to revive distressed New Jersey cities, nor was the New Jersey Supreme Court's approach emulated elsewhere to any significance.<sup>77</sup> Single-family zoning continued much as it had before. And the exodus to private homeowners' associations with their own even more restrictive land use rules has only accelerated.<sup>78</sup>

So, why land use reform now? Certainly, the housing crisis and return to the cities is a precipitating cause. But the deregulatory thrust of the new land use reform is also occurring at a moment of heightened awareness of the spatial and geographical features of inequality. Here, three strains of thought have coalesced around the idea that local land use barriers are the cause of a plethora of ills that can be addressed through zoning reform.

The first strain is a renewed appreciation of the effects of the dual housing market on the long-term economic fortunes of Black people.<sup>79</sup> It is well-known that over the course of the twentieth century, the government's housing policies created one housing market for Black people and another for white people.<sup>80</sup> Racially restrictive covenants, redlining, urban renewal, limited access to credit, and segregated public housing policies limited the housing supply for Black people, concentrated poor Black people in certain parts of the city, and in this way "built" the ghetto.<sup>81</sup>

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<sup>76</sup> See Prentiss Dantzer, *Exclusionary Zoning: State and Local Reactions to the Mount Laurel Doctrine*, 48 URB. LAW. 653, 660-64 (2016) (discussing the shortcomings of *Mount Laurel I*); Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 851-56 (2011) (documenting the political turmoil and eventual marginalization of the fair housing entities created in the wake of *Mount Laurel*); Daniel Meyler, Note, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 219, 251-52 (2010) (concluding that the New Jersey affordable housing framework is not working).

<sup>77</sup> Mallach, *supra* note 76, at 860-61, 865 (describing alternative legislative approaches used in Massachusetts, Connecticut, and Rhode Island, and noting the "grim" future prognosis for the *Mount Laurel* doctrine).

<sup>78</sup> See Gordon MacLeod, *Walling the City*, in CITIES & SOCIAL CHANGE: ENCOUNTERS WITH CONTEMPORARY URBANISM 135-45 (Ronan Paddison & Eugene McCann eds., 2014) (discussing the growing practice of building planned, exclusive communities); Barbara Coyle McCabe, *Homeowners Associations as Private Governments: What We Know, What We Don't Know, and Why It Matters*, 71 PUB. ADMIN. REV. 535, 536 tbl.1 (2011) (noting a roughly thirtyfold increase in the number of HOAs between 1970 and 2011).

<sup>79</sup> *How Public Policy Intentionally Segregated American Homeowners*, NISKANEN CTR. (Dec. 19, 2018), <https://www.niskanencenter.org/how-public-policy-intentionally-segregated-american-homeowners> [<https://perma.cc/QC3H-TM8X>] (noting increased discussion over redlining and "durable material, racial inequality").

<sup>80</sup> NAT'L ADVISORY COMM'N ON CIV. DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 10, 13 (1968) [hereinafter KERNER REPORT] (noting that federal policies had failed to provide housing to the disadvantaged, and warning of a "permanent . . . division of our country into two societies" should existing policies be continued).

<sup>81</sup> See generally, MITCHELL DUNEIER, GHETTO: THE INVENTION OF A PLACE, THE HISTORY OF AN IDEA (2016) (describing the intellectual history of the term "ghetto" and the origins

What might be called the *reparations* argument against zoning considers the continuing effects of that dual housing market. Recent academic and popular writing on racial injustice has pointed to the history of housing discrimination as an important cause of Black people's comparative failure to build wealth and transmit it to future generations.<sup>82</sup> Recent arguments for reparations have highlighted the history of land use policies that excluded Black people and, to a lesser extent, led to the expropriation of Black people's land.<sup>83</sup> And recent work seeks to connect the legacy of the dual housing market up with current ostensibly race-neutral land use policies, like single-family housing—arguing essentially that single-family zoning has perpetuated racial segregation despite fair housing laws.<sup>84</sup>

A second strand of thought that has raised the profile of land use reform also focuses on housing and the spatial determinants of inequality. Recent literature on the disparate life outcomes of those raised in poor places compared to those raised in richer ones has generated startling headlines about the life expectancies and differential economic attainments of children born only a few miles apart.<sup>85</sup> In the 1970s, reformers were well-aware that

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of policies meant to address it); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing how federal policy enforced housing segregation); BERYL SATTER, *FAMILY PROPERTIES: HOW THE STRUGGLE OVER RACE AND REAL ESTATE TRANSFORMED CHICAGO AND URBAN AMERICA* 4-6 (2009) (connecting the policy of redlining to the decline of black neighborhoods through the mechanism of contract selling). For a classic account of racial politics in Detroit and the origins of the city's economic decline, see THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT 181-207* (1996).

<sup>82</sup> Cf. Charisse Jones, *Race Matters: Gap Between Black and White Homeownership is Vast, New Report Finds*, USA TODAY (June 29, 2020, 3:09 PM), <https://www.usatoday.com/story/money/2020/06/29/black-homeownership-lags-whites-fueling-wealth-gap-report-finds/3244738001> [<https://perma.cc/J3D9-9MBK>] (“Homeownership is critical to the accumulation of wealth and a factor in the stark difference between the net worth of white families . . . versus Black families . . .”).

<sup>83</sup> Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/3SRZ-5RR5>] (citing “[t]hirty-five years of racist housing policy” among other justifications for reparations).

<sup>84</sup> See ROTHSTEIN, *supra* note 81; JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 205-08 (2018) (arguing that once racist policies are in place, they reinforce the interests of those who benefit irrespective of the racial animus of those individuals); Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 443 (2020) (“[E]ven facially race-neutral land use policies have contributed to racial segregation.”).

<sup>85</sup> David Brooks, *Who is Driving Inequality? You Are*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/23/opinion/income-inequality.html> [<https://perma.cc/KRY5-6QBB>] (describing a study showing disparate incarceration and mobility rates in demographically similar neighborhoods of Los Angeles); Harriet Torry, *Where You Live Could Determine How Long You Live*, WALL ST. J. (Apr. 11, 2016, 7:32 AM), <https://blogs.wsj.com/economics/2016/04/11/where-you-live-could-determine-how-long-you-live> [<https://perma.cc/953J-CX3R>] (“[G]eographic location plays an outsized role in life expectancy for lower earners.”); Esther Yoon-Ji Kang, *Chicago Owns America's Widest Racial Gap in Economic Mobility*, WBEZ CHICAGO (Sept. 26, 2019, 3:16 PM), <https://www.wbez.org/news/chicago-owns-americas-widest-racial-gap-in-economic-mobility>.

where one lived determined the quality of services—and education in particular—that one received. The *Mount Laurel* decision was decided against the backdrop of a failed (or failing) busing movement, state law challenges to unequal education funding—some of which succeeded and some of which did not—and constitutional efforts to recognize poverty as a suspect class.<sup>86</sup> The equality agenda of the time was focused on local housing and educational inequality, but it was turned back by a series of U.S. Supreme Court decisions that rejected cross-jurisdictional integration remedies,<sup>87</sup> equal educational funding as a federal right,<sup>88</sup> or fair share housing<sup>89</sup>—at least as a matter of federal law. States sought to fill the gap—as the New Jersey court did in *Mount Laurel*—but the political will to remedy segregation and place-based inequality had mostly dissipated by the late-1970s (and certainly by the Reagan revolution of the 1980s).<sup>90</sup>

Recent work on the effects of “moving to opportunity,” however, is reviving the rhetoric of geographical unfairness.<sup>91</sup> Examining outcomes for children living in different neighborhoods, economists make the case that life outcomes are being predetermined by place of birth, thereby undermining the American myth of mobility.<sup>92</sup> Single-family zoning appears to be a barrier to mobility

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[www.wbez.org/stories/chicago-owns-americas-widest-racial-gap-in-economic-mobility/dd207749-2d7a-4d45-9eda-ccodf967f79c](http://www.wbez.org/stories/chicago-owns-americas-widest-racial-gap-in-economic-mobility/dd207749-2d7a-4d45-9eda-ccodf967f79c) [<https://perma.cc/E8WS-HHGT>] (interviewing researcher Raj Chetty on his findings regarding spatial inequality in Chicago).

<sup>86</sup> See generally ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION 20-21 (1997) (describing the Supreme Court’s rejection of a constitutional right to welfare).

<sup>87</sup> *Milliken v. Bradley*, 418 U.S. 717, 752 (1974). More recently, the Court continued its retreat from (some would say its attack on) integration remedies by invalidating race-conscious integration strategies. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 709-11 (2007) (rejecting school district’s plan which used race as a criterion to determine which school a child attends). On the long-term effects of the *Milliken* decision, including ongoing white flight and suburban resegregation, see Myron Orfield, Milliken, Meredith, and *Metropolitan Segregation*, 62 UCLA L. REV. 364, 428-41 (2015).

<sup>88</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 6 (1973).

<sup>89</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254-55 (1977).

<sup>90</sup> See RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 4 (Bruce J. Schulman & Julian E. Zelizer eds., 2008) (explaining the impact of the political conservatism movement of the 1970s that influenced conservative social values and regulatory oversight in the 1980s, 1990s, and 2000s). For a description of the waning political will to desegregate since the 1960s, see Matthew Delmont, *The Lasting Legacy of the Busing Crisis*, ATLANTIC (Mar. 29, 2016), <https://www.theatlantic.com/politics/archive/2016/03/the-boston-busing-crisis-was-never-intended-to-work/474264> [<https://perma.cc/6ND9-T9KF>].

<sup>91</sup> The most well-recognized study in the “moving to opportunity” literature is the Chetty study. See Raj Chetty, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016) (researching long-term impacts of a move to a lower-poverty neighborhood on young children in poor communities).

<sup>92</sup> Raj Chetty, Nathaniel Hendren, Patrick Kline, Emmanuel Saez, & Nicholas Turner, *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104 AM. ECON. REV. 141, 141 (2014) (“[T]he consequences of the ‘birth lottery’ . . . are larger today than in the past.”).

from low-income places to higher-income places, and so has become a central target for reformers.<sup>93</sup> Fair housing advocates in previous eras had, of course, sought to “open up” the suburbs for similar reasons—the *Mount Laurel* court certainly understood the relationship between housing restrictions and inequitable public services. The *moving to opportunity* argument against zoning, however, seems to have gained increased traction recently.<sup>94</sup>

These two spatial inequality concerns intersect with a third set of ideas, again led by economists, who argue that land use laws—by limiting in-migration to high-housing-cost metropolitan areas—are responsible for reducing overall economic growth.<sup>95</sup> These claims can be quite dramatic. Some theorists have argued that zoning has cost the economy over 50% in lost aggregate growth.<sup>96</sup> These numbers are large and have led policymakers to place land use reform at the center of debates over economic growth and wealth creation.

This *productivity* argument against zoning is grounded in a renewed appreciation for the benefits of agglomeration economies. Agglomeration theorists assert that co-location in physical space is a chief source of economic innovation and growth.<sup>97</sup> The concept is as old as cities themselves: agglomeration provides an explanation for both cities’ existence and urbanization’s positive relationship to economic development. Perhaps unsurprisingly, claims about the productivity gains attributable to agglomeration have coincided with the global urban resurgence. The literature serves as both an explanation of and justification for the return to the cities and underwrites a celebration of increased urban development. Because land use restrictions like zoning seem to be hostile to agglomeration, they are immediately suspect: by limiting density and raising the cost of housing, zoning reduces spatial proximity and therefore the productivity of regional economies.<sup>98</sup> Fixing land use by

<sup>93</sup> See *infra* Part IV.

<sup>94</sup> See, e.g., Gareth Cook, *The Economist Who Would Fix the American Dream*, ATLANTIC (July 17, 2019, 3:47 PM), <https://www.theatlantic.com/magazine/archive/2019/08/raj-chettys-american-dream/592804> [<https://perma.cc/RL2L-YZ6P>] (describing recent research by Raj Chetty seeking to validate the moving to opportunity experiment, and discussing the government’s dilatory approach to relocating families to opportunity-rich neighborhoods).

<sup>95</sup> Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, AM. ECON. J.: MACROECONOMICS, Apr. 2019 at 1, 2 (“Instead of increasing local employment, productivity growth in housing-constrained cities primarily pushes up housing prices and . . . lowers aggregate output . . .”).

<sup>96</sup> *Id.* at 2; see also Schleicher, *supra* note 32, at 103 n.101 (collecting different articles studying the effects of land use regulations on national economic growth).

<sup>97</sup> See generally EDWARD L. GLAESER, CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM (2008).

<sup>98</sup> Herkenhoff et al., *supra* note 70, at 3 (describing land use policies which “reduce[] factor reallocation and depress[] output and productivity”); Hsieh & Moretti, *supra* note 95, at 1 (“Misallocation arises because the constraints on housing supply [due to land use restrictions] effectively limit the number of workers who have access to such high productivity.”); Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply* 1, 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 20536, 2014) (examining land use regulation as “the single most important influence on the

eliminating zoning and lifting other restrictions on housing development would, on this account, be a boon to the national economy.<sup>99</sup>

The *productivity* argument against zoning has combined with the *moving to opportunity* and *reparations* arguments, linking land use reformers with free-market inclinations to those who are interested in remedying historic spatial inequality.<sup>100</sup> The resulting coincidence of racial justice and libertarianism, spatial redistribution and market freedom, has found a ready target in land use and developmental restrictions of all kinds. Indeed, combined with existing critiques of zoning, it would appear that restrictive land use laws are responsible for almost every conceivable social ill: racial segregation, intergenerational inequality, gender inequity, sprawl, climate change, and reduced or stagnant economic growth.<sup>101</sup>

To be sure, this seemingly universal distaste for land use restrictions among reform-minded scholars and policymakers is ultimately being given political momentum by housing need. In this way, the current anti-zoning consensus mirrors the pro-zoning consensus that obtained in the Progressive Era and for generations thereafter. The realization of zoning's adverse effects was not enough to eliminate it during another period of reform in the late 1960s and early 1970s. In large part that is because in 1975, when *Mount Laurel* was decided, the political energy of the middle class pointed squarely in the direction of suburban development. By contrast, today, though suburban-style development still dominates in many places, the middle class's political energy is starting to point toward the central city instead of away from it—especially in coastal cities.

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supply of homes”); Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 89-90 (2017) (concluding that restrictions in housing supply explains the decline in income convergence across states); Robert C. Ellickson, *The Zoning Strait-Jacket: The Freezing of American Neighborhoods of Single-Family Houses* 3-6 (Jan. 30, 2020) (unpublished manuscript), <https://ssrn.com/abstract=3507803> (describing a “zoning strait-jacket” that impairs “attainment of agglomeration efficiencies”).

<sup>99</sup> See Andrés Rodríguez-Pose & Michael Storper, *Housing, Urban Growth and Inequalities: The Limits to Deregulation and Upzoning in Reducing Economic and Spatial Inequality*, 57 URB. STUD. 223, 225 (2020) (describing this consensus as the “housing-as-opportunity” view of inter-regional inequality).

<sup>100</sup> See David Imbroscio, *Rethinking Exclusionary Zoning or: How I Stopped Worrying and Learned to Love It*, 57 URB. AFFS. REV. 214, 216-17 (2019) (describing this convergence of socioeconomic inequities).

<sup>101</sup> See Kahlenberg, *supra* note 36 (racial and economic segregation); 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* 96-106 (2017) (intergenerational inequality); Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 HARV. L. REV. 1683, 1735-45 (2021) (gender inequity); William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1525 (2010) (reviewing LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009)) (urban sprawl); Scott Wiener & Daniel Kammen, *Why Housing Policy Is Climate Policy*, N.Y. TIMES (Mar. 25, 2019), <https://www.nytimes.com/2019/03/25/opinion/california-home-prices-climate.html> [<https://perma.cc/H5X9-LECH>] (climate change).

Multiple other factors contribute to inequality and therefore housing insecurity at the turn of the twenty-first century. The hollowing out of the middle class, deindustrialization, a set of social welfare, tax, and anti-union policies since the 1970s and 80s that slowly (and then more quickly) redistributed income from the bottom to the top are arguably more responsible for inequality.<sup>102</sup> But land use reform responds to an immediate concern that is widely shared, especially by the white middle class: affordable housing.

In this way, the anti-zoning movement is predictably responsive to emerging political forces. Certain metropolitan-area housing markets are equally out of reach for middle-class white people and poor Black people. Eliminating 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>103</sup>

This confluence suggests that the current anti-zoning moment may be an example of what Derrick Bell famously described as “interest convergence.”<sup>104</sup> Bell claims that Black people only obtain rights or reforms when those rights or reforms also serve the interests of white people. Anti-zoning rhetoric often sounds in the register of racial equality—and rightly so—but what is driving land use reform is, unsurprisingly, middle-class white people’s desire for housing.

The historical arc of land use reform supports this hypothesis. Well before *Mount Laurel* was decided, policymakers were aware that discriminatory housing policies restricted Black people to overcrowded and underserved neighborhoods. The Kerner Commission Report was clear-eyed about the effects of segregated housing policies on Black opportunity. But the land use project that could have been sparked by the New Jersey Supreme Court’s decision never materialized. As long as there was plentiful cheap housing in the suburbs, the land use reform project stalled. As Bell observes, the scope

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<sup>102</sup> Much research has detailed reasons for middle-class decline. See Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?* 37-38 (Nat’l Bureau of Econ. Rsch., Working Paper No. 24085, 2017) (middle-class debt levels following the great recession); PIKETTY, *supra* note 20, at 382 (identifying education and technology mismatch); Anderson, *supra* note 25, at 526-27 (highlighting the opioid crisis and predatory landlords); Stansbury & Summers, *supra* note 20, at 9 (attributing the decline to weakened union power).

<sup>103</sup> This may explain conservative support for removing barriers to development. See, e.g., Emily Badger, *Trump Wants to Cut Regulations That Block New Housing*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/upshot/trump-regulations-build-new-housing.html> [<https://perma.cc/Q8PA-97RV>] (“[T]he case for building more housing is bipartisan . . .”); Charles Marohn, *It’s Time To Abolish Single-Family Zoning*, AM. CONSERVATIVE (July 3, 2020, 12:01 AM), <https://www.theamericanconservative.com/urbs/its-time-to-abolish-single-family-zoning/> [<https://perma.cc/VYN5-K699>] (“[T]he conservative thing for suburban leaders to do here is to . . . show those progressives running the big cities that we live by our principles, that we embrace vibrant markets and free people, by preemptively repealing single-family zoning.”).

<sup>104</sup> Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).



and nature of racial justice reforms are always limited by the degree of convergence with white people's interests.<sup>105</sup> That is an important lesson when considering the limitations of the anti-zoning reform project.

## II. THE LIMITS OF CENTRALIZATION

The current zoning reform project makes two main claims: first, that eliminating barriers to construction will lower housing costs (the “build, build, build”<sup>106</sup> imperative); and second, that such reforms are likely to be resisted by local governments and therefore should be undertaken statewide or nationally. Anti-zoning reformers are willing to pursue reform locally. But most are skeptical that NIMBY homeowners and their NIMBY local governments will act anything other than parochially. Local land use restrictions must be policed by a higher-level entity—either by a court striking down land use restrictions or by the state legislature preempting them—or the politics of local exclusion will invariably prevail.<sup>107</sup>

This Part and the next critiques these two arguments, starting with the argument for centralization.<sup>108</sup> While reformers should not, of course, “stop worrying and learn to love [exclusionary zoning],”<sup>109</sup> they should be realistic about the limits of state land use reform and the significant downsides of the

<sup>105</sup> *Id.* Notably, the political limits of that convergence were evident in the defeat of California's first attempt at a sweeping land use reform bill in 2018. S.B. 827 was opposed by numerous progressive groups representing low-income and minority tenants. See Dillon, *supra* note 27 (describing the debate around the bill).

<sup>106</sup> The phrase has been made famous by British Prime Minister Boris Johnson and his government's promise to “build, build, build.” Finn Williams & David Chipperfield, *Opinion, Boris Johnson Is Wrong to Blame the Housing Crisis on Overregulation*, *GUARDIAN* (July 11, 2020, 7:00 AM), <https://www.theguardian.com/commentisfree/2020/jul/11/boris-johnson-wrong-housing-crisis-overregulation> [https://perma.cc/SK2N-FSEY].

<sup>107</sup> This claim has become conventional wisdom among reformers. See, e.g., Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 *HASTINGS L.J.* 79, 129-30 (2019) (proposing intergovernmental compacts to preempt restrictive land use laws); Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 *N.C. L. REV.* 293, 345-48 (2019) (arguing that pro-development groups will be more successful at the state level); Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 *URB. LAW.* 179, 209-12 (2020) (cautioning against a California ballot measure to preserve local control against preemption); Kenneth A. Stahl, “Yes in My Backyard”: Can a New Pro-Housing Movement Overcome the Power of NIMBYs?, 41 *ZONING & PLAN. L. REP.*, Mar. 2018, at 1, 8 (2018) (suggesting YIMBYs focus reform efforts at the state level); Ezra Rosser, *The Euclid Proviso*, *WASH. U. L. REV.* (forthcoming 2021) (manuscript at 48) (on file with author) (advocating state or regional regulation of local zoning).

<sup>108</sup> For a brief but relevant related critique arguing that centralized anti-poverty efforts are a mistake, see Gerald E. Frug, *Against Centralization*, 48 *BUFF. L. REV.* 31, 33-34 (2000).

<sup>109</sup> See Imbroscio, *supra* note 100 (paying homage to *Dr. Strangelove: Or, How I Stopped Worrying and Learned to Love the Bomb*). For critical responses to Imbroscio's essay, see generally *Urban Colloquy on Exclusionary Zoning*, 57 *URB. AFFS. REV.* 214, 252-97 (2021). For Imbroscio's replies to the critiques in the Colloquy, see *Stop Worrying (So Much) About Exclusionary Zoning and Fight Our Real Enemies: A Reply to my Critics*, 57 *URB. AFFS. REV.* 298, 299-311-311 (2021).

broader anti-localism of a state-led land use reform project. That is because, first, state-led land use reform is likely to disappoint, and second, it will undercut important city-based efforts to pursue economic equality.

#### A. *The Inherent Limitations of State Land Use Reform*

At the outset, it is important to note that most states have not adopted any significant affordable housing or fair share housing mandates. A few states—New Jersey, California, and Oregon are examples—adopted state-level housing or land use provisions in the 1970s and early 1980s, but these remain outliers.<sup>110</sup> So, too, despite decades of advocacy meant to advance regional government and encourage city-county consolidation—in large part to limit the effects of exclusionary zoning—there are relatively few true regional governments in the United States.<sup>111</sup> States are much more likely to preempt local affordable housing efforts rather than to encourage them.<sup>112</sup> As a result, any headway on affordable housing in most states will have to take place at the local level.

The fact that most states are absent from or affirmatively hostile to policies targeting exclusionary zoning is meant to illustrate a larger point. For decades—and certainly since *Mount Laurel* was decided in 1975—land use reformers have argued that local governments are unable and unwilling to jettison exclusionary zoning practices and that state intervention is therefore necessary, for two reasons. First, local governments are trapped in a collective action problem: because they are each competing for high-paying, low-cost residents, they cannot forgo exclusionary policies without risking their fiscal health.<sup>113</sup> But each local government's exclusionary policies exacerbate regional housing shortages, leading to reduced welfare overall. Second, local governments—especially suburban local governments—are dominated by homeowners, whose investment in residential real estate makes them wary of development that might lead to a decline in their property values.<sup>114</sup> Without

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<sup>110</sup> See John R. Nolon, *Golden and Its Emanations: The Surprising Origins of Smart Growth*, 23 PACE ENV'T L. REV. 757, 812 (2006) (noting that “New Jersey’s aggressive, state-mandated fair share housing policy has been emulated timidly in just a few states” and that in most states neither regionalism nor reform movements have succeeded in controlling local planning outcomes); Jessie Agatstein, *The Suburbs’ Fair Share: How California’s Housing Element Law (and Facebook) Can Set a Housing Productions Floor*, 44 REAL EST. L.J. 219, 219-20 (2015) (describing how fair share programs have only been “implemented in a half-dozen states around the country”).

<sup>111</sup> See Schragger, *supra* note 18, at 112 (“American localism is deeply entrenched and the idea of regional government has never been popular.”).

<sup>112</sup> See *infra* Section II.B and sources cited in note 141.

<sup>113</sup> See Hills, *supra* note 51, at 1614-18 (“Exclusionary zoning is a rational way for individual municipalities to reduce the risks of these fiscal, political, and social costs.”).

<sup>114</sup> See Lemar, *supra* note 107, at 346 (“Because most homeowners concentrate their wealth in a single asset, their home, they are extremely motivated to oppose any development that might decrease

state intervention, there is no way to generate the local political will to increase construction, especially of low- to moderate-income housing.

These arguments are well-rehearsed in the literature. But few have sought to explain why, if local governments are unwilling to jettison their exclusionary tendencies, state elected officials would do it for them.<sup>115</sup> State legislators do not represent separate “state” citizens nor a government apparatus detached from the local political economy. Just like local officials, state officials represent their “local” citizens—who are often single-family homeowners residing in suburban jurisdictions.<sup>116</sup> To the extent that suburban homeowners dominate local politics, they are also likely to dominate state politics.

The general unwillingness of state legislatures to entertain land use reform suggests that the politics of exclusion are powerful at the state level.<sup>117</sup> New Jersey is a case in point. Unconstrained by electoral demands, the New Jersey Supreme Court struck down exclusionary zoning by fiat. But it could not turn that ruling into the necessary administrative and legislative momentum because it could not gain more than the begrudging cooperation of the state legislature.

Indeed, the saga of land use reform in New Jersey is a cautionary tale. Resistance immediately followed the *Mount Laurel* court’s initial decision; ensuing decades of litigation and legislative bargaining repeatedly undercut its force. In the last decade, Governor Chris Christie attempted to completely dismantle the state’s affordable housing regime, though the courts resisted.<sup>118</sup> Although some amount of affordable housing has been produced in New

the value of that asset . . . .”); FISCHER, *supra* note 53, at 39 (“Local voters need to feel the financial pain or gain of local decisions.”); cf. Katherine Levine Einstein, Maxwell Palmer, & David M. Glick, *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSPS. ON POL. 28, 29 (2019) (noting that participation in land use processes can amplify the voices of those who feel “concentrated costs”).

<sup>115</sup> An exception is Anika Singh Lemar, who describes the willingness of state legislatures to override local opposition to family day cares, manufactured housing, group homes, and alternative energy infrastructure. See Lemar, *supra* note 107, at 305-45 (“[Housing] manufacturers and employers are highly persuasive lobbies in state capitols.”).

<sup>116</sup> Richard Florida, *The Politics of Homeownership*, BLOOMBERG: CITYLAB (Aug. 28, 2018, 9:52 AM), <https://www.bloomberg.com/news/articles/2018-08-28/how-homeownership-contributes-to-political-divides> [<https://perma.cc/CDW9-9C4B>] (“[T]he political clout of homeowners goes beyond local NIMBYism and zoning politics, extending to politics at the national level.”).

<sup>117</sup> See, e.g., Dougherty, *supra* note 1 (describing the defeat of multiple zoning reform bills in California). The recently adopted Connecticut land use reform package, which fell significantly short of YIMBY advocates’ expectations and has been described as “tame” and of limited threat to local land use autonomy, is an example. See Cate Hewitt, *Few See ‘Win,’ as House Approves Less Far-Reaching Housing Law*, CONN. EXAM’R (May 21, 2021), <https://ctexaminer.com/2021/05/21/few-see-win-as-house-approves-less-far-reaching-housing-law> [<https://perma.cc/P5B5-CSDH>] (noting lukewarm reactions to the reform package).

<sup>118</sup> Maddie Hanna, *40 Years Later, N.J. Courts, Towns Still Wrestling with Affordable Housing*, PHILA. INQUIRER (Oct. 13, 2017), <https://www.inquirer.com/philly/news/40-years-later-n-j-courts-towns-still-wrestling-with-affordable-housing-20171013.html> [<https://perma.cc/Z8JZ-N9Q9>] (recounting the aftermath to and recent developments in the *Mount Laurel* doctrine).

Jersey after almost half of a century,<sup>119</sup> it seems likely that the political cycling will continue. There is no reason to believe that New Jersey suburbanites will not push back on housing mandates should they begin to chafe too tightly, especially if critics are right about the amount of land-based wealth that zoning laws appear to protect.<sup>120</sup>

Other states, too, have seen few gains from state-wide land use reform efforts, many of which began in the 1970s. In California and Oregon, state-level land use regimes have been in place since the mid- to late-1970s,<sup>121</sup> but housing prices have continued to increase dramatically over that period.<sup>122</sup> And despite a long history of progressive state politics and a forward-looking regional government, metropolitan Minneapolis/St. Paul has moved backwards in terms of integration and affordability.<sup>123</sup> Zoning reform seems

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<sup>119</sup> The number of affordable units that have actually been constructed is difficult to determine, but it is estimated between 30,000-80,000. See Laura Denker, *At Stake in Hearing: How Many Affordable Houses N.J. Must Provide*, FAIR SHARE HOUS. CTR. (June 22, 2016), <https://fairsharehousing.org/blog/entry/at-stake-in-hearing-how-many-affordable-houses-n.j.-must-provide> [<https://perma.cc/4U2H-5E6X>] (“New Jersey has built about 80,000 housing units for low- and middle-income households since 1985, [Fair Share Housing Center Executive Director Kevin] Walsh said.”); Richard H. Chused, *Mount Laurel: Hindsight Is 20-20*, 63 RUTGERS L. REV. 813, 823 n.42 (2011) (noting claims that 40,000 units have been built that, while significant, are “only a small fraction of the actual need for such housing in New Jersey”); John M. Payne, *The Paradox of Progress: Three Decades of the Mount Laurel Doctrine*, 5 J. PLAN. HIST. 126, 134 (2006) (estimating that the *Mount Laurel* doctrine has accounted for 30,000 units). During that period the state’s population increased by over 2.1 million. U.S. DEP’T OF COM., *supra* note 47 (recording a population of 7.1 million in 1970 and 9.2 million in 2020).

<sup>120</sup> At the extreme end, some economists have attributed upwards of 75% of land values across the country to restrictive land use ordinances. Others have argued that this percentage is grossly overstated. For the debate, see *infra* Part IV. If true, however, eliminating those land use restrictions would eliminate trillions of dollars of property wealth, something no level of government would ever be inclined to do.

<sup>121</sup> See Randal O’Toole, *The Planning Tax: The Case Against Regional Growth-Management Planning*, POL’Y ANALYSIS (Cato Inst., D.C.), Dec. 6, 2007, at 5-6, <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-606.pdf> [<https://perma.cc/BJ5K-L9VY>] (describing regional growth-management schemes in Oregon and California).

<sup>122</sup> See FED. RSRV. BANK OF ST. LOUIS, *All-Transactions House Price Index for California*, <https://fred.stlouisfed.org/series/CASTHPI> [<https://perma.cc/UT9T-UYD4>] (showing a sevenfold increase in house prices in California since 1975); FED. RSRV. BANK OF ST. LOUIS, *All-Transactions House Price Index for Oregon*, <https://fred.stlouisfed.org/series/ORSTHPI> [<https://perma.cc/63JA-BMJ3>] (showing a sixfold increase in house prices in Oregon since 1975).

<sup>123</sup> See UNIV. MINN. L. SCH., INST. ON METRO. OPPORTUNITY, *WHY ARE THE TWIN CITIES SO SEGREGATED?* 1 (2015), <https://www.minnpost.com/wp-content/uploads/sites/default/files/attachments/WhyAretheTwinCitiesSoSegregated22615.pdf> [<https://perma.cc/6YZV-E5DP>] (“Since the start of the twenty-first century, the number of severely segregated schools in the Twin Cities area has increased more than sevenfold; the population of segregated, high-poverty neighborhoods has tripled.”).

likely to do just enough to assuage some relevant constituencies, but not enough to produce real gains.<sup>124</sup>

The troubled history of state and federal involvement in local land use provides another reason for centralization skepticism. Even when seemingly well-intentioned, state and federal policies have often caused more harm than good. Indeed, central governments have done affirmative damage with their land use and development policies—at least to minority and poor populations. Euclidean zoning itself was a product of a national law reform process.<sup>125</sup> While implemented locally, zoning was developed and promoted centrally. So, too, as already noted, the suburban century was underwritten by massive federal dollars: federal highway funds, mortgage guarantees, urban renewal monies, and federal public housing, all of which were administered in discriminatory and suburb-favoring ways.<sup>126</sup> Redlining of poor and Black communities was a result of federal lending standards, not local ones.<sup>127</sup> Urban renewal monies that financed the displacement of thousands of Black citizens were spent locally and with local input, but federal monies provided the means for redevelopment.<sup>128</sup> And federal place-based investment tax incentives continue to be designed to foster gentrification instead of poor relief, as Michelle Laysyer has pointed out.<sup>129</sup>

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<sup>124</sup> To be sure, states sometimes override local exclusionary ordinances that target vulnerable populations, see Lemar, *supra* note 107, at 305-31, though the circumstances in which legislatures are willing to do so have thus far been fairly narrow. Connecticut's 2021 effort at wholesale land use reform, which resulted in comparatively modest changes to local zoning rules, is instructive. See Hewitt, *supra* note 117 (describing the law as “a compromise that satisfied neither housing advocates . . . nor opponents of state-mandated zoning”).

<sup>125</sup> See Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 916-17 (2016) (describing the development of the model zoning code); Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1, 13-19 (2003) [hereinafter *Public Menace*] (describing how the national rhetoric around “urban blight” facilitated urban renewal and the use of eminent domain by national planning organizations).

<sup>126</sup> See *supra* Section III.B.

<sup>127</sup> See Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018, 6:00 AM), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today> [<https://perma.cc/AEY3-ZXE6>] (“The Federal Housing Administration institutionalized the system of discriminatory lending in government-backed mortgages, reflecting local race-based criteria in their underwriting practices and reinforcing residential segregation in American cities.”).

<sup>128</sup> Cf. *Public Menace*, *supra* note 125, at 47 (“In cities across the country, urban renewal came to be known as ‘Negro removal.’”) (internal citation omitted).

<sup>129</sup> See Michelle D. Laysyer, *The Pro-Gentrification Origins of Place-Based Investment Tax Incentives and a Path Toward Community Oriented Reform*, 2019 WISC. L. REV. 745, 771-84 (highlighting the role of place-based incentives in gentrification).

Moreover, pro-market housing policies cannot readily address the structural factors that have led to the fiscalization of land use.<sup>130</sup> State law dictates the boundaries of local jurisdictions, limits the ability for cities to annex adjoining territory and expand their tax base, provides that local schools will be funded with predominantly local dollars, constrains cities' taxing authority by imposing tax and expenditure limitations, and provides distressed municipalities with little support in providing for the basic municipal needs of their citizenry.<sup>131</sup> Land use has become a chief instrument of local fiscal policy because local governments often have few other ways to generate revenue. Local officials must be attentive to their tax base, which is entirely a product of what taxable entities happen to reside in the jurisdiction. Attracting those taxable entities and keeping them thus becomes local governments' central fiscal mission. These structural state-created forces push against inclusionary housing, but they are rarely on the table when legislatures consider zoning reform.

All of which is to say that centralization of land use authority is unlikely to produce fairer outcomes than what can be obtained in particular cities. Advocates of state reform either romanticize state majoritarianism or seek to take advantage of the supposedly superior deal-making opportunities available in the state legislature. Both approaches treat local lawmaking as inferior, but as compared to what and for whom?

Consider first the suggestion that state lawmaking is more representative than local lawmaking. Studies of local government land use processes document the disproportionate participation of white and relatively wealthier citizens, who have the time, inclination, and resources that enable them to attend local meetings and influence outcomes.<sup>132</sup> But the disproportionate

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<sup>130</sup> Hanushek & Yilmaz, *supra* note 52, at 560 (detailing how zoning laws can be used to segregate lower-income residents from wealthier neighborhoods); Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1085 (2019) (noting that market forces in land use fail to account for other positive externalities); Robert W. Wassmer, *Fiscalisation of Land Use, Urban Growth Boundaries and Non-Central Retail Sprawl in the Western United States*, 39 URB. STUD. 1307, 1308 (2002) (“[A] purely market-based approach to defining excessive spatial growth ignores the institutional environment in which economic actors in a metropolitan area make land-use decisions.”).

<sup>131</sup> Schragger, *supra* note 69, at 1564-77 (describing the conflict between state and city land use policies).

<sup>132</sup> See, e.g., KATHERINE LEVINE EINSTEIN, DAVID M. GLICK, & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 95-114 (2020) (explaining how the active participants in neighborhood meetings present an unrepresentative sample of the city's residents as a whole); Emily Badger, *The Pandemic has Pushed Aside City Planning Rules. But to Whose Benefit?*, N.Y. TIMES (July 20, 2020), <https://www.nytimes.com/2020/07/20/upshot/pandemic-city-planning-inequality.html> [https://perma.cc/QQN9-RQCK] (“The people who show up for such meetings, thus shaping what kind of housing is built, tend to be older, whiter, higher-income and homeowners.”).

influence of educated or moneyed interests is not confined to local governments. State and national politics are equally, if not more, afflicted by an imbalance between those who have the means to exercise influence and those who do not.<sup>133</sup> State legislatures' political pathologies—including minoritarian control, capture by corporate interests, and failures of statewide plebiscitary processes<sup>134</sup>—are by now well-known. Yet, as Miriam Seifter argues, state legislatures are still often viewed as majoritarian correctives to local parochialism, when in fact state legislatures are in many ways “the least majoritarian branch.”<sup>135</sup>

Taking advantage of these state-level political process failures, however, might be the point for market-favoring land use reformers. A second view holds that state legislatures are better sites for legislative deal-making than are local governments. Affordable housing advocates can and should therefore form strategic statewide alliances with developers, large landowners, real estate investors, and the building trades, as those groups predictably enjoy significant influence in state capitols and may have the resources and interests to overcome local homeowner/NIMBY resistance.

This strategy, however, has a substantial flaw—the resulting state legislation will reflect the interests of those powerful groups. Any convergence with the goals of low-income housing advocates seems likely to be limited and temporary, if not destructive.<sup>136</sup>

Indeed, the outcome of a strategic state land use reform process will likely result in legislation that does little to encourage low-income housing in exclusionary suburbs while providing developers significant power to override opposition in newly popular cities and in the lower-income communities that are under significant development pressure. As the history

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<sup>133</sup> On plutocratic governance in states, see generally ALEX HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESS, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION* 10-15 (2019).

<sup>134</sup> See generally *id.* at 12; JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 2-3 (2019). For a recent treatment, see Miriam Seifter, *Countermajoritarian Legislatures*, *COLUM. L. REV.* (forthcoming) (manuscript at 1, 3, 8, 21) (“[M]any state legislatures either are under minority party control or afford bare majority parties significant (even supermajority) cushions. Both of these distortions are on prominent display in many states today, where patterns of geographic settlement and deliberate gerrymandering exacerbate the inherent skews of districted elections.”).

<sup>135</sup> Seifter, *supra* note 134, at 32.

<sup>136</sup> Consider mobile homes. As Lemar notes with approval, *supra* note 107, at 318, the manufactured housing industry has successfully lobbied to preempt restrictive local zoning bans in thirty states. But tenant protections for mobile home residents are also extremely weak. As one commentator has observed, “The vulnerability of these residents is part of the business model. . . . This is a captive class of tenant.” Sheelah Kolhatkar, *Trailer-Park Trades*, *THE NEW YORKER*, March 15, 2021, at 32, 33. See generally ESTHER SULLIVAN, *MANUFACTURED INSECURITY: MOBILE HOME PARKS AND AMERICANS’ TENUOUS RIGHT TO PLACE* 10-30 (2018).

of Euclidean zoning illustrates, developers are not opposed to zoning, in large part because housing consumers in suburban locales are generally in favor of it. What developers tend to disfavor are mandates: local inclusionary zoning ordinances, rent control, and other tenant-based protections are a popular target of developers and market-oriented land use reformers,<sup>137</sup> so one might predict that statewide preemptive legislation will bar local governments from adopting those types of ordinances.

Centralization of decision-making is theoretically a solution to spillovers—the assumption is that enlarging the sphere prevents local anti-development factions from foisting costs onto their neighbors.<sup>138</sup> But the fact is that internal neighborhood interests and political divisions are always present, no matter how large the unit. Regional governments, for example, still spend less on certain neighborhoods within the jurisdiction and still locate less desirable land uses in politically weaker communities.<sup>139</sup> State governments still compete with other states to attract desirable mobile capital and deflect undesirable and costly users of state services. Indeed, in larger political units, minority interests are often less likely to prevail.<sup>140</sup> While one might technically solve the spillover effect of certain policies across jurisdictions by extending the political sphere, the problems inside the borders still remain. Exclusion can happen just as easily inside the gates of the jurisdiction as it does between jurisdictions.

### B. *The Problem of Preemption*

The denigration of local power has another effect: it countenances state preemptive intervention of those cities that would otherwise adopt progressive housing policies. Many more states preempt local affordable housing efforts than permit them—and even fewer mandate such policies. But this is part of a more widespread trend in state-local relations. State hostility to local policymaking, especially policies intended to address

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<sup>137</sup> See Benjamin Schneider, *CityLab University: Inclusionary Zoning*, BLOOMBERG: CITYLAB (July 17, 2018, 4:15 PM), <https://www.bloomberg.com/news/articles/2018-07-17/inclusionary-zoning-everything-you-need-to-know> [<https://perma.cc/2JNL-NDGU>] (noting that “While builders and developers express a range of opinions on IZ, they are usually the primary opponents of these policies.”).

<sup>138</sup> See Been et al., *supra* note 11, at 26 (suggesting that a “potential localized spillover effect[] from newly constructed housing” could be that “new housing will increase rents and trigger displacement” in surrounding neighborhoods); John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 113-20 (2014) (“Increasing supply in high-demand, high-cost neighborhoods . . . will reduce demand and moderate housing cost increased in outlying lower-cost neighborhoods.”).

<sup>139</sup> Schragger, *supra* note 18, at 111-14 (explaining how wealthy suburban communities use their political capital to steer desirable land uses away from politically weaker communities).

<sup>140</sup> See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994).



economic inequality, has been increasing.<sup>141</sup> Skepticism of localism in the land use arena easily morphs into state dominance across all fields, and that exercise of state power is increasingly anti-redistributive.

Consider the epidemic of state preemption. State legislatures have been keen to preempt local laws across large swaths of public policy. Recent examples include bans on local minimum wage ordinances, sugary soft drink taxes, plastic bag regulations, fracking restrictions, LGBTQ anti-discrimination laws, employment and labor regulations, green building codes, police defunding, and sanctuary city provisions.<sup>142</sup> State officials have preempted local mask ordinances, eviction moratoria, and business closing laws, as well.<sup>143</sup> In many states, local affordable housing regulations of various kinds are also barred by state law, including rent control, inclusionary zoning, and affordable housing impact fees;<sup>144</sup> the eviction crisis has highlighted the many ways in which state law prohibits local efforts to protect vulnerable tenants.<sup>145</sup>

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<sup>141</sup> There is an already large literature on the rise of hostile and punitive state preemption. For a sample of the literature, see Briffault, *supra* note 21, at 1997-99; Paul A. Diller, *The Political Process of Preemption*, 54 U. RICH. L. REV. 343 (2020); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018); Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361 (2020); and Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133 (2017). For cases and commentary, see RICHARD BRIFFAULT, NESTOR M. DAVIDSON & LAURIE REYNOLDS, *THE NEW PREEMPTION READER* (2019).

<sup>142</sup> See Schragger, *supra* note 141, at 1163 (“State-city conflicts over the municipal minimum wage, LGBT antidiscrimination, and sanctuary city laws have garnered the most attention, but these conflicts are representative of a larger trend toward state aggrandizement.”).

<sup>143</sup> See, e.g., Scott Neuman, *Georgia’s Governor Issues Order Rescinding Local Mask Mandates*, NPR (July 16, 2020, 3:11 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/16/891718516/georgias-governor-issues-order-rescinding-local-mask-mandates> [<https://perma.cc/7J68-CBQ2>] (discussing how Georgia’s governor is overruling local mask mandates in favor of the state’s guidelines, which are more relaxed).

<sup>144</sup> See Press Release, Nat’l League of Cities, *State Preemption of Local Authority Continues to Rise, According to New Data From the National League of Cities* (Apr. 5, 2018), <https://www.nlc.org/article/state-preemption-of-local-authority-continues-to-rise-according-to-new-data-from-the> [<https://perma.cc/8SLS-FKD4>] (“As preemption proliferates, local leaders are prevented from keeping people safe, expanding rights, building stronger economies, and promoting innovation.”); *State Preemption of Local Equitable Housing Policies*, LOC. SOLS. SUPPORT CTR., <https://www.supportdemocracy.org/equitablehousing/> [<https://perma.cc/WN36-J872>] (discussing four types of state preemption policies that interfere with local laws).

<sup>145</sup> On evictions, see Jessica Lussenhop, *Coronavirus: Why US Is Expecting an ‘Avalanche’ of Evictions*, BBC NEWS (Aug. 7, 2020), <https://www.bbc.com/news/world-us-canada-53088352> [<https://perma.cc/M83A-PWJE>]. On state preemption of eviction and tenant protections, see LOC. HOUS. SOLS., *JUST CAUSE EVICTION POLICIES*, <https://www.localhousingsolutions.org/act/housing-policy-library/just-cause-eviction-policies-overview/just-cause-eviction-policies> [<https://perma.cc/2X6N-Z7KY>] (last visited Sept. 18, 2021); Nestor M. Davidson & Kim Haddow, *State Preemption and Local Responses in the Pandemic*, AM. CONST. SOC’Y: ACS BLOG (June 22, 2020), <https://www.acslaw.org/expertforum/state-preemption-and-local-responses-in-the-pandemic> [<https://perma.cc/L4EM-F83S>].

This explosion of state preemptive laws has been driven by a number of factors: the increasing policy distance between cities and state legislatures; gerrymandered state legislative districts that reduce urban representation; the aggressive preemptive efforts of corporate and industry interests; the nationalization of state and local political cultures; and the rural/urban cultural and political divide.<sup>146</sup> While sometimes attributed to the red-state/blue-city divide, with Republican-dominated state governments seeking to “rein-in” Democratic-leaning cities, preemption is also common in states that do not fit that pattern. Deregulatory preemption—in which the state simply bars locals from regulating without adopting its own statutory framework—has become more widespread. Punitive preemption is also on the rise, as states seek not only to override local laws but to punish local officials with removal from office and local communities with loss of state funding.<sup>147</sup>

State legislators have long used local governments—and cities in particular—to advance their own political, financial, and personal aims. State legislative overreach in the nineteenth and early twentieth centuries often involved state laws that committed city funds to particular franchises, monopolies, and utilities.<sup>148</sup> These abuses generated Progressive Era efforts to protect a local sphere of “home rule” from corrupt state intervention. Constitutional reform was aimed at protecting cities from state-level political machines. Once freed from state machines, the idea was that cities could at least tackle their own problems of internal governance without interference.

The rise of hyper-preemption<sup>149</sup> in the states—which most often targets city governments—suggests that jettisoning home rule is both premature and unwise. In an era of urban decline, home rule may have protected exclusionary suburbs from redistributive efforts. But suburban decline and the urban resurgence have switched the balance of regional power in many places. Cities now enjoy more economic clout. The spike in preemptive state laws is in part a reflection of this new urban assertiveness and the gap between city and state interests. That gap suggests that a significant threat to affordable housing policymaking is state legislative overreach.

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<sup>146</sup> See Schragger, *supra* note 141 (discussing various forms of cultural and political anti-urbanism). See generally HERTEL-FERNANDEZ, *supra* note 133 (describing how corporate interest groups have captured the state legislative process); RODDEN, *supra* note 134 (ascribing city-state conflict to the concentration of Democratic votes in urban areas).

<sup>147</sup> See, e.g., Briffault, *supra* note 21, at 1997 (“Several states have adopted punitive preemption laws that do not merely nullify inconsistent local rules—the traditional effect of preemption—but rather impose harsh penalties on local officials or governments simply for having such measures on their books.”)

<sup>148</sup> Cf. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2281-85 (2003) (discussing the role of city governments in raising and distributing revenues during the nineteenth century).

<sup>149</sup> Scharff, *supra* note 141, at 1494 (formulating the concept of hyper-preemption).

Preemptive state land use laws have a number of concerning effects. First, by definition, they limit or eliminate city leverage in regulating and negotiating with property owners, creating by-right development baselines that cannot be avoided. Nestor Davidson and Timothy Mulvaney have recently cataloged the panoply of state restrictions on the exercise of local property regulation.<sup>150</sup> Those limits include liability for regulations that reduce the value of property, absolute bans on the exercise of eminent domain, restrictions on local impact fees, limits on development moratoria, and constraints on local historic preservation or environmental protection ordinances.<sup>151</sup> Davidson and Mulvaney argue that the balance between local democratic control of development and individual property rights protection is currently and already distorted in favor of the latter.<sup>152</sup>

Second, and relatedly, preemptive land use laws can make it difficult for locals to address racially discriminatory siting. As already noted, low-income, minority communities tend to be underrepresented in land use decision-making processes.<sup>153</sup> They are also the cheapest to harm because they often occupy the least expensive land.<sup>154</sup> But it is no solution to the problem of local underrepresentation to give property owners by-right entitlements. The lack of zoning in places like Houston, for example, has not benefited low-income communities, who have no effective means to protect themselves from the discriminatory siting of undesirable land uses.<sup>155</sup>

Third, developer-favoring preemptive land use laws will make local affordable housing regulations even more difficult to adopt. As Davidson and Mulvaney observe, states already place limits on local rent control or affordable housing linkage ordinances, impact fees, and other policies that protect low-

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<sup>150</sup> See Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 218 (2021) (“[S]tate statutes impose significant procedural burdens on local governments . . .”).

<sup>151</sup> See *id.* at 231 (“[L]ocal governments play[] the primary regulatory role not only on questions of zoning, subdivision regulation, development permitting, and other foundational matters of land-use law, but also—more controversially—in housing law, rent regulation, environmental protection, historic preservation, and the like.”).

<sup>152</sup> *Id.* at 221.

<sup>153</sup> See *supra* note 132 and accompanying text.

<sup>154</sup> See EINSTEIN ET AL., *supra* note 132, at 149 (observing that low-income communities are under-represented in the land use process and that they “receive a disproportionate share of housing development” in high-demand markets).

<sup>155</sup> See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1403-06 (1994) (noting the disproportionate siting of landfills and garbage incinerators in Black neighborhoods in Houston and suggesting the siting process as a partial cause).

income populations<sup>156</sup> or that seek to drive land values downward.<sup>157</sup> The push to build more and faster will only further undercut those efforts.

Finally, the 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. The virulent anti-city posture of the Trump administration—mimicked in many cases by hostile governors and legislatures—resulted in federal orders that purported to control city decisions across a range of areas, including immigrant sanctuary, Confederate monument removal, and violence prevention.<sup>158</sup> The Biden administration has moved to revisit or rescind these orders. But the point remains: the inevitable political cycling in state and national governments means that they are unreliable partners in pro-equity land use reform.

Indeed, the deregulatory thrust of current preemption trends coupled with the history of state interference in city affairs suggests that statewide land use legislation would be used to further weaken the already limited influence of minority and poor urban constituencies in favor of large-scale business or corporate capital.<sup>159</sup> Those effects are especially acute during periods of city growth when developer interests are particularly keen to gain

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<sup>156</sup> Davidson & Mulvaney, *supra* note 150, at 215; *cf.* *State Preemption of Local Equitable Housing Policies*, *supra* note 144 (“But, just as cities are innovating, some states have been passing legislation that takes away—’preempts’—local authority over critical areas of equitable housing policy.”); Maria Diss, *Bill Prohibiting Inclusionary Zoning Becomes Law*, NBC MONTANA (Apr. 21, 2021), <https://nbcmontana.com/news/local/bill-prohibiting-inclusionary-zoning-becomes-law> [<https://perma.cc/GY3W-DCY5>] (“Inclusionary zoning refers to municipal ordinances that require a given share of new construction be set aside for people with low to moderate incomes.”); Celine Castronuovo, *Iowa Governor Signs Law Allowing Landlords to Refuse Section 8 Vouchers*, HILL (May 1, 2021, 1:10 PM), <https://thehill.com/homenews/state-watch/551315-iowa-governor-signs-law-allowing-landlords-to-refuse-section-8-vouchers> [<https://perma.cc/GJ2C-38KG>] (describing Iowa’s efforts to subvert a HUD housing program for low-income renters).

<sup>157</sup> *See, e.g.*, PATRICK M. CONDON, *SICK CITY: DISEASE, RACE, INEQUALITY AND URBAN LAND* 100 (2d ed. 2021) (“Municipal taxes on land already exist and can be used to lower land [r]ents.”).

<sup>158</sup> *See Protecting American Monuments, Memorials, and Statues and Combating Recent Criminal Violence*, Exec. Order No. 13,933, 85 Fed. Reg. 40,081 (June 26, 2020) (protecting monuments during riots); *Enhancing Public Safety in the Interior of the United States*, Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017) (condemning sanctuary jurisdictions); *cf.* S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017) (barring local jurisdictions and officials from adopting any law, rule, or practice that limits enforcement of federal immigration law).

<sup>159</sup> HERTEL-FERNANDEZ, *supra* note 133, at 13 (describing corporate influence in state capitols); *cf.* EINSTEIN ET AL., *supra* note 132, at 97 (concluding that poor minorities are underrepresented in local land use decision making). Notably, in California, groups representing low-income household successfully opposed recent state legislative land reform efforts. *See, e.g.*, Gabrielle Canon, *California’s Polarizing Housing Bill SB 50 Has Died in the State Senate*, USA TODAY (Jan. 30, 2020, 5:11 PM), <https://www.usatoday.com/story/news/politics/2020/01/30/californias-controversial-housing-bill-sb-50-fails/4614387002> [<https://perma.cc/LGP8-J84P>] (describing efforts by “a diverse group of advocates” in California to defeat SB 50).

from urban development. The increasing wealth of cities is an attractive target for interests that exercise outsized power in state capitols.

At the same time, even in the absence of local land use authority, wealthier neighborhoods within the city or in suburban jurisdictions would likely find ways to protect their advantage. Privatizing restrictive land use is one way that could occur. As Christopher Serkin has argued recently, the wealthy tend to have better means to protect themselves through covenants, homeowners associations, or nuisance litigation. Even in “unzoned” places, the retreat to homeowners associations does most of the work that zoning would otherwise accomplish.<sup>160</sup> Another way that a wealthy suburban community can avoid compliance with affordable housing rules would be to go slow on development processes—easily done when local officials are tasked with the implementation of state mandates.

As the history of the *Mount Laurel* litigation illustrates, even aggressive statewide efforts to undermine suburban exclusionary tactics are likely to produce only modest results.<sup>161</sup> But the costs in terms of the loss of local authority are high. Anti-zoning reformers may have their sights set on the rich suburbs, but to the extent that their reforms are accompanied by anti-home-rule rhetoric, their arrows will likely fall disproportionately on progressive cities or struggling suburbs seeking to address affordability concerns.<sup>162</sup> Those communities are generally responsive to affordable housing proposals, including increasing supply, and many would do more if permitted by state law. Indeed, as a strategic matter, this political moment

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<sup>160</sup> See Serkin, *supra* note 9, at 754 (arguing that banning zoning will only induce increased privatization of land use); David Montgomery, *HOAs Are Popular Where Prejudice Is Strong and Government Is Weak*, BLOOMBERG: CITYLAB (June 4, 2019, 11:22 AM), <https://www.bloomberg.com/news/articles/2019-06-04/do-homeowners-associations-replace-local-law> [<https://perma.cc/93WF-MD8N>] (suggesting that individuals prefer HOAs, and are willing to pay costly fees, because HOAs can operate as a form of exclusionary “private government.”).

<sup>161</sup> Cf. BEN METCALF, DAVID GARCIA, IAN CARLTON & KATE MACFARLANE, TERNER CTR. FOR HOUS. INNOVATION, WILL ALLOWING DUPLEXES AND LOT SPLITS ON PARCELS ZONED FOR SINGLE-FAMILY CREATE NEW HOMES? 2 (2021) (“Relatively few new single-family parcels are expected to become financially feasible for added units as a direct consequence of [SB9].”).

<sup>162</sup> John Infranca has argued that some forms of land use exclusion, namely those practiced by low-income communities of color as compared to wealthier enclaves, may be normatively justifiable. Infranca, *supra* note 13, at 1323-24. A targeted state law could arguably distinguish the exclusion practiced by those more “sensitive” or “vulnerable” communities, as one modified version of California’s S.B. 50 sought to do after low-income tenant groups raised objections. Infranca, as well as others who favor market-based reforms, however, oppose differential entitlements to exclude, favoring some form of compensation instead. *Id.* at 1317. Though Infranca emphasizes distributional justice concerns, most proposed payment schemes are focused on inducing locals to support development by giving them a financial stake in its success—a kind of bribe for not opposing new development. For a description of various proposals, see *id.* at 1319-26.

appears similar to the Progressive Era insofar as it points toward increasing local power across the board, not decreasing it.<sup>163</sup>

### III. THE LIMITS OF DEREGULATION

In the current land use reform discourse, arguments for land use centralization are regularly linked with calls for deregulation. Land use protectionism is understood as a necessary feature of localism (“in my backyard”); from the perspective of reformers, NIMBY and YIMBY represent opposites: localism, regulation, and parochialism versus centralization, deregulation, and cosmopolitanism. This part turns to the second pillar of the zoning reform consensus—deregulation—and urges caution as well. To be sure, some anti-zoning reformers recognize that lifting supply constraints is not sufficient to provide affordable housing.<sup>164</sup> Nevertheless, the major thrust of state law housing proposals in those states considering them is directed toward increasing supply by eliminating barriers to market-rate development, and the current land use reform movement strongly emphasizes local supply constraints and the supposedly beneficial impact of a deregulated housing market on regional housing prices.<sup>165</sup>

Is this faith in markets generally—and the housing market in particular—warranted? The theory of land use deregulation is that it will lead to the construction of more housing, which will lower prices for all housing consumers.<sup>166</sup> But recall that in 1970’s Mount Laurel, eliminating the local ban on multi-family housing did not on its own provide housing to the township’s low-income, minority residents.<sup>167</sup> Mount Laurel’s restrictive zoning laws were redundant for low-income households, who could never afford market-rate housing in that location regardless of land use restrictions. Those plaintiffs required subsidized housing, not market-rate housing.<sup>168</sup> Likewise, eliminating exclusionary zoning in Mount Laurel did little to help stabilize the neighboring city of Camden or assist the vast bulk of its low-income, minority residents.

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<sup>163</sup> Cf. NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 5 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/C9AG-FENP>] (“At this critical juncture, the need to empower cities, towns and villages is clear . . .”).

<sup>164</sup> See Been et al., *supra* note 11, at 26.

<sup>165</sup> See *infra* Section III.A.

<sup>166</sup> See *infra* Section III.A.

<sup>167</sup> See *supra* note 76 and accompanying text.

<sup>168</sup> See *Mount Laurel I*, 336 A.2d 713, 717 (N.J. 1975) (describing the plaintiffs as low-income and noting that they “still cannot afford the only kinds of housing realistically permitted in [Mount Laurel] . . .”).

These observations are important for two reasons. The first is that the supply-lowers-cost argument does not effectively address the problems of the lower half of the housing market. And second, in asserting that supply should always follow demand, the supply-lowers-cost claim does not address the relationship between high-demand and low-demand places but rather reinforces existing regional, inter-city hierarchies—again to the detriment of lower-income communities.

#### A. *Location, Location, Location*

As to the first point, the housing market, even in the absence of legal restrictions, does not usually (and may never) respond to the needs of low-income or even moderate-income consumers in high-demand cities or regions.<sup>169</sup> Market advocates argue that increasing the supply of market-rate housing will lower or at least stabilize housing prices overall, but at what price point? The construction of more luxury housing in New York City may arguably hold down or reduce luxury housing costs in New York City (though the reductions might be small). But the claim that opening the door to more market-rate housing (i.e., very expensive housing) in an already high-demand city will generate more “affordable” housing depends on a filtering theory of housing that provides limited assurance to those who are displaced by market processes.<sup>170</sup>

The problem is that the effects of filtering can be quite attenuated while the housing market generates market-rate units. In downtown San Diego, for example, an estimated 10,000 units of affordable housing were lost while the amount of market-rate housing stock doubled over the course of the last decade.<sup>171</sup> Indeed, the problem of housing expense is not at the high-end; studies show that housing costs in high-demand areas have fallen for the top quartile of the national income distribution but have at the same time risen rapidly for the bottom half.<sup>172</sup>

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<sup>169</sup> The *Mount Laurel* court recognized this as well. *Id.* at 729, 722 n.8 (noting that some form of subsidy is required to build affordable housing).

<sup>170</sup> For a critique, see Rodríguez-Pose & Storper, *supra* note 99, at 240 (“There is also virtually no evidence that substantially lower costs trickle down to the lower two-thirds of households or provide quality upgrading of their neighborhoods.”). See also Laura S. Underkuffler, *In Search of Affordable Housing: How Deregulatory Strategies Fail the Poor*, 9 BRIGHAM-KANNER PROP. RTS. J. 227, 237 (2020) (“Despite their reputation as ‘affordable housing’ initiatives, zoning abolition schemes generally contain no guarantee that they will result in the creation of any truly affordable units for the urban poor.”).

<sup>171</sup> See MURTAZA BAXAMUSA, A NEW MODEL FOR HOUSING FINANCE 7-8 (2020).

<sup>172</sup> See Rodríguez-Pose & Storper, *supra* note 99, at 240 (“Housing costs have actually fallen for the top quartile of the national income distribution in virtually all metro areas, but they have strongly risen for the bottom half.”); see also Jared Brey, *Housing in Brief: Rents Rise for the Poor, Drop for the Rich*, NEXT CITY (Mar. 26, 2021), <https://nextcity.org/daily/entry/housing-in-brief-rents-rise-for-the-poor>

Moreover, the filtering process is unlikely to address affordability in a particular location, even if it might eventually work its way across the regional housing market. The filtering theory asserts that new market-rate housing will be filled by those leaving older housing which in turn will become available to those in lower income brackets, as housing moves down the income line.<sup>173</sup> But consider a study by Miriam Zuk and Karen Chapple finding that it would take fifteen years for a moderate-income unit to filter down to a low-income household in the San Francisco Bay area, and close to fifty more years for such a unit to filter down to a very-low-income household.<sup>174</sup> Even the most optimistic filtering models take years to show effects.<sup>175</sup>

There are also mixed studies on the effects of new market-rate housing on rents in specific locations. Some studies indicate a decrease in overall rents from increased market-rate housing,<sup>176</sup> but there are others that indicate the opposite or very limited effects overall.<sup>177</sup> Yonah Freemark's oft-cited study

drop-for-the-rich [<https://perma.cc/6JWR-GNPA>] (describing a pattern in various metropolitan areas of rents increasing for low-income households and decreasing for wealthier households).

<sup>173</sup> See John M. Quigley & Steven Raphael, *Is Housing Unaffordable? Why Isn't It More Affordable?*, 18 J. ECON. PERSPS. 191, 205 (2004) (describing the filtering process); JOHN C. WEICHER, FREDERICK J. EGGERS, & FOUAD MOUMEN, *THE LONG-TERM DYNAMICS OF AFFORDABLE RENTAL HOUSING* 159-60 tbl.6-3 (2017), <https://s3.amazonaws.com/media.hudson.org/files/publications/AffordableRentHousing2017.pdf> [<https://perma.cc/9NHC-MJG3>] (identifying between 20-50% of affordable housing in eight major metro areas as having filtered); 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, 691-92 & tbl.1 (2014) (presenting data supporting the filtering theory); Liyi Liu, Doug McManus, & Elias Yannopoulos, *Geographic and Temporal Variation in Housing Filtering Rates 1* (Mar. 2020) (unpublished manuscript) (finding significant geographic differences in filtering rates).

<sup>174</sup> MIRIAM ZUK & KAREN CHAPPLE, *BERKELEY INST. OF GOV'TAL STUD., HOUSING PRODUCTION, FILTERING AND DISPLACEMENT: UNTANGLING THE RELATIONSHIPS* 4 (2016), [https://www.urbandisplacement.org/sites/default/files/images/udp\\_research\\_brief\\_052316.pdf](https://www.urbandisplacement.org/sites/default/files/images/udp_research_brief_052316.pdf) [<https://perma.cc/6FEL-BEJW>] (estimating 15 years for units to filter to people earning 80% of the median income, and 50 years to filter to those at 50%).

<sup>175</sup> See Been et al., *supra* note 11, at 29 (citing WEICHER ET AL., *supra* note 173) (arguing that filtering effects on housing value occurs over the long run and citing a study showing a filtering effect occurring over roughly 30 years). *But see* Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market* 24 (W.E. Upjohn Inst. for Emp. Rsch., Working Paper No. 19-307, 2019), [https://research.upjohn.org/cgi/viewcontent.cgi?article=1334&context=up\\_workingpapers](https://research.upjohn.org/cgi/viewcontent.cgi?article=1334&context=up_workingpapers) [<https://perma.cc/2MWG-E4JD>] (describing how this shift may occur in less than five years); Cristina Bratu, Oskari Harjunen & Tuukka Saarimaa, *City-Wide Effects of New Housing Supply: Evidence from Moving Chains* 3 (VATT Inst. for Econ. Rsch. Working Papers, Paper No. 146, 2021), <https://ssrn.com/abstract=3929243> (describing shift in under two years).

<sup>176</sup> See, e.g., Brian J. Asquith, Evan Mast & Davin Reed, *Supply Shock Versus Demand Shock: The Local Effects of New Housing in Low-Income Areas* 1 (W.E. Upjohn Inst. for Emp. Rsch., Working Paper No. 19-316, 2019) (“[N]ew buildings lower nearby rents by 5 to 7 percent relative to trend . . .”).

<sup>177</sup> Compare XIAODI LI, N.Y.U. FURMAN CTR., *DO NEW HOUSING UNITS IN YOUR BACKYARD RAISE YOUR RENTS?* 2 (2019), [https://72187189-93c1-48bc-b596-fc36f4606599.filesusr.com/ugd/7fc2bf\\_2fc84967cfb945a69a4df7baf8a4c387.pdf](https://72187189-93c1-48bc-b596-fc36f4606599.filesusr.com/ugd/7fc2bf_2fc84967cfb945a69a4df7baf8a4c387.pdf) [<https://perma.cc/5S5C-M3CL>] (finding that, for every 10% increase in the housing stock within 500 feet, rents are held down by a mere 1%), and



concludes that a neighborhood upzoning in Chicago increased the price of existing nearby units.<sup>178</sup> Upzonings generally raise land values by unlocking development potential. If the high cost of land is the primary impediment to affordable housing, as some commentators argue,<sup>179</sup> then adopting policies that increase underlying land values, rather than decrease them, is a mistake.

Reducing land use restrictions in an already moderately priced suburb may be a more plausible way to increase regional affordability—there is evidence that increasing supply across a region lowers regional house prices (though the evidence on rents is less well established).<sup>180</sup> Builders of

Elliot Anenberg & Edward Kung, *Can More Housing Supply Solve the Affordability Crisis? Evidence from a Neighborhood Choice Model*, 80 REG'L SCI. & URB. ECON., Jan. 2020, at 1, 2 (finding that increasing housing stock in expensive cities by 5% at most reduces rents by 0.5%), with Divya Singh, *Do Property Tax Incentives for New Construction Spur Gentrification? Evidence from New York City 2* (Jan. 20, 2020) (unpublished manuscript), [https://asit-prod-web1.cc.columbia.edu/econdept/wp-content/uploads/sites/41/2019/07/Singh\\_JMP.pdf](https://asit-prod-web1.cc.columbia.edu/econdept/wp-content/uploads/sites/41/2019/07/Singh_JMP.pdf) [<https://perma.cc/9Y8L-RCRC>] (arguing that, as new development increases average neighborhood income, it also “increases local amenities, such as sidewalk cafes, and allows incumbent landlords to charge higher rents”), and Anthony Damiano & Chris Frenier, *Presentation on Housing Submarkets and the Effects of New Construction on Existing Rents 23* (Feb. 12, 2020), <https://www.tonydamiano.com/project/new-con/supply-ppt.pdf> [<https://perma.cc/Z7EN-N928>] (finding that new development decreased rents for high-priced rental units marginally, but increased rents for nearby lower-priced rental units significantly).

<sup>178</sup> Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 URB. AFFS. REV. 758, 783 (2020); see also Nicolás González-Pampillón, *Spillover Effects from New Housing Supply*, 92 REG'L. SCI. & URB. ECON. 103759, at 2 (2022) (new housing supply increased local house prices by 12%).

<sup>179</sup> See, e.g., CONDON, *supra* note 157, at 38 (arguing that the housing prices continue to rise despite new development because of the cost of land).

<sup>180</sup> The literature on the regional effects of land use restrictions is large and points to a positive correlation between land use regulation and average or median home values, though it cannot identify causal effects and there is less certainty about how land use regulation affects rents. See Raven Molloy, *The Effect of Housing Supply Regulation on Housing Affordability: A Review*, 80 REG'L SCI. & URB. ECON., Jan. 2020, at 1, 2 (2020) (“A large volume of empirical research documents a positive correlation between regulation and average or median house values.”); see also Been et al., *supra* note 11, at 28 (stating that land use restrictions cause units affordable to lower-income residents to actually filter up rather than down). One of the earliest and most influential studies is Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 FRBNY ECON. POL'Y REV. 21, 23 (2003) (describing zoning regulations as one of the causes of higher housing prices); see also Edward L. Glaeser, Joseph Gyourko, & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331, 361-66 (2005) (tracing the role of zoning regulations in driving up prices). That work has been more recently criticized for vastly overstating the impact of land use regulations on land values. See Cameron K. Murray, *Marginal and Average Prices of Land Lots Should Not Be Equal: A Critique of Glaeser and Gyourko's Method for Identifying Residential Price Effects of Town Planning Regulations*, 53 ENV'T & PLAN. A: ECON. & SPACE 191, 194 (2021) (“Major problems with [Glaeser and Gyourko's] method involve the theoretical assumptions they rely upon to interpret the gap between the average land prices of a housing lot as being due to taxes on new housing or restrictions on land subdivision.”) According to Glaeser and Gyourko, the share of residential land value due to land use restrictions is incredibly high (close to 90% in some cases) and the land value in Detroit attributable to restrictive land uses (91%) is higher than that of San Francisco (88%). Those findings are puzzling. Detroit is experiencing a long-term population decline with average land values of \$5.10 per square foot; it has

moderate-income housing do not generally attempt to build housing in high-demand cities anyway.<sup>181</sup> It can be more expensive to build in urban areas regardless of the zoning rules, in large part because of higher land values, but also because greenfield development is often easier.<sup>182</sup>

But here too, there will likely be a mismatch between supply and demand, as those outlying areas with developable land are going to be farther from the urban core. Such housing may have little effect on prices in more centrally desirable locations, such as downtown San Francisco or Manhattan. Those locations are scarce to begin with, even setting aside land use restrictions.<sup>183</sup> That is because each central city location is unique; there is no real substitute for San Francisco or New York City. Demand for *place* cannot be solved by simply increasing housing capacity when that demand is a function of the numerous attributes that make a place uniquely desirable.

Housing shortages are all about (in the old realtor's saying) "location, location, location."<sup>184</sup> This leads to another important caveat concerning the effects of encouraging market-rate housing by eliminating local land use regulations: housing is a bundled good, collectively consumed. The housing unit itself is not all-that-important in relation to the other features of the

too much housing. By contrast, San Francisco is experiencing a population boom with average land prices of \$63.72 per square foot. *See id.* at 205 tbl.4.

<sup>181</sup> *See* WILLIAM H. LUCY & DAVID L. PHILLIPS, CONFRONTING SUBURBAN DECLINE: STRATEGIC PLANNING FOR METROPOLITAN RENEWAL 38 (2000) (describing how developers tend to be risk-averse investors, thus affordable housing is difficult to find in high-demand areas); TONY BIDDLE, TONY BERTOIA, STEPHEN GREAVES & PETER STOPHER, INST. TRANSP. & LOGISTICS STUD., THE COSTS OF INFILL VERSUS GREENFIELD DEVELOPMENT—A REVIEW OF RECENT LITERATURE 1 (2006) (noting that greenfield development provides low-cost housing).

<sup>182</sup> *See* WILLIAM H. LUCY & DAVID L. PHILLIPS, TOMORROW'S CITIES, TOMORROW'S SUBURBS 11-12 (Routledge 2017) (2006) (noting that greenfield sites facilitate "easy development decisions"); Jenny Schuetz, *Who's to Blame for High Housing Costs? It's More Complicated than You Think*, BROOKINGS (Jan. 17, 2020), <https://www.brookings.edu/research/whos-to-blame-for-high-housing-costs-its-more-complicated-than-you-think> [<https://perma.cc/6HHS-MLU4>] (noting that large housing construction firms primarily build in exurban areas).

<sup>183</sup> *See* J.K. Dineen, *Scarce Land in SF Forces City to Seek Creative Housing Solutions*, S.F. CHRON. (May 13, 2017, 5:36 PM), <https://www.sfchronicle.com/politics/article/Scarce-land-in-SF-forces-city-to-see-creative-11144317.php> [<https://perma.cc/R9RF-DSNM>] (referring to the "scarcity of land" in San Francisco and the "high cost of purchasing it"); Diana Sabau, *Does NYC Still Have Room for Growth? A Study on Undeveloped Land in Major US CBDs*, PROPERTYSHARK (June 21, 2018), <https://www.propertyshark.com/Real-Estate-Reports/2018/06/21/does-nyc-still-have-room-for-growth-a-study-on-undeveloped-land-in-major-us-cbds> [<https://perma.cc/3GAU-GUJ3>] (reporting that New York City has approximately sixteen acres of undeveloped land left).

<sup>184</sup> Harold Samuel is often credited with coining the famous phrase, though this origin story is apocryphal at best. *See* William Safire, *Location, Location, Location*, N.Y. TIMES (June 26, 2009), <https://www.nytimes.com/2009/06/28/magazine/28FOB-onlanguage-t.html> [<https://perma.cc/2BAW-S27X>]; *cf.* Greg Howard & Jack Liebersohn, *Why is the Rent So Darn High? The Role of Growing Demand to Live in Housing-Supply-Inelastic Cities*, 124 J. URB. ECON., July 2021, at 1, 13 (arguing that location demand explains a large portion of nationwide rent increases and that "local expansions of housing supply will have negligible effects on local rents in the long run").

housing's location: access to jobs, family, amenities, transportation, safety, and schools—not to mention one's neighbors.<sup>185</sup>

Consider the not-so-hypothetical demand for an integrated neighborhood with decent schools, a relatively low cost of living, moderate density (a small yard), and walkable amenities. That few places meet those specifications might indicate that there is limited demand for such locations. Alternatively, the absence of supply might indicate that it is very hard, if not impossible, to coordinate all those aspects of a given housing bundle.<sup>186</sup> Construction alone cannot induce the creation of a neighborhood, town, or city that meets even some of the most basic features of a community that are important to housing consumers. To supply those characteristics requires significant coordination, a form of coordination that is beyond the capacity of the housing market to supply.<sup>187</sup>

Indeed, the very features of a neighborhood or city that attract housing consumers are easily undermined by increasing the supply of housing.<sup>188</sup> Places with a relatively low cost of living may lose that attribute once enough wealthier people move in, thus causing prices across a range of goods and services to increase: the Army Navy store closes and is replaced with the high-end restaurant.<sup>189</sup> Open Alexandria, Virginia to skyscraper development and the features that made that place attractive to housing consumers may well

<sup>185</sup> See Lee Anne Fennell, *Co-Location, Co-Location, Co-Location: Land Use and Housing Priorities Reimagined*, 39 VT. L. REV. 925, 926 (2015) (“Your home encompasses a profusion of elements that surround the property itself and affect its value.”).

<sup>186</sup> For example, integrated communities are difficult to find. See THOMAS C. SCHELLING, *MICROMOTIVES AND MACROBEHAVIOR* 135-66 (2006) (detailing how individual preferences to have neighbors of the same race can lead to segregated populations).

<sup>187</sup> That the value of land is a result of collective enterprise and should be shared with the community is the basis for Georgist economics and present-day efforts to limit speculative increases in land value by taxing the “unearned increment.” See generally CONDON, *supra* note 157 at 9-10, 63-64 (describing the 19th-century Georgist movement); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 115-19 (1981) (proposing a method to capture the “unearned increment” of land value appreciation).

<sup>188</sup> Positional goods are responsible for attracting high-income demand and (arguably) driving up housing prices. See Imbroscio, *supra* note 100, at 230 (noting that these goods are “inherently scarce” as overcrowding diminishes their quality). Unlike material goods, positional goods can only be provided to a limited number of individuals. *Id.* Scarcity is a feature rather than a bug of positional goods, since overabundant supply would place a strain on the qualitative advantages positional goods have. More importantly, the quality of positional goods is closely tied to both its scarcity and exclusiveness, so an increase in supply should undermine the quality of the positional good. *Id.*; cf. Heather Schwartz, *Integrating Schools Is a Matter of Housing Policy*, SHELTERFORCE (Mar. 30, 2011), [https://shelterforce.org/2011/03/30/integrating\\_schools\\_is\\_a\\_matter\\_of\\_housing\\_policy](https://shelterforce.org/2011/03/30/integrating_schools_is_a_matter_of_housing_policy) [<https://perma.cc/4ZC3-X29W>] (“As anticipated, the academic returns from economic integration diminished as school poverty levels rose.”).

<sup>189</sup> See, e.g., Serena Solomon, *Rent Hike Could Force Houston Street Army Navy Store to Close, Manager Says*, DNAINFO (Aug. 28, 2013, 4:11 PM), <https://www.dnainfo.com/new-york/20130828/lower-east-side/rent-hike-could-force-houston-street-army-navy-store-close-manager-says> [<https://perma.cc/LA4L-TGU8>] (“Other tenants along the block include the pricey new restaurant Preserve 24 . . .”).

be eliminated.<sup>190</sup> Supply arguments often treat housing demand as an accurate proxy for location demand, but they are not the same.

Moreover, supply-side solutions to housing shortages cannot differentiate between legitimate and illegitimate consumer demands. If housing consumers want to live among neighbors who look like them or who consume public and private goods in similar ways, then the location market will put a premium on socioeconomic and racial homogeneity—as it already seems to do.<sup>191</sup> As observed in Part I, restrictive land use rules are themselves a response to consumer demand.<sup>192</sup>

The housing market, *even in the absence* of legal barriers, tends toward racial and socioeconomic segregation and has historically embraced it.<sup>193</sup> Market-rate development will reflect that phenomenon and exacerbate it.<sup>194</sup> Indeed, the filtering process itself appears to require neighborhood decline as older housing becomes occupied by lower-income groups: Camden's formerly middle-class housing is "filtered" to the poor as new middle-class housing is built in Mount Laurel. That process invites income and racial homogeneity by neighborhood, as existing housing ages, especially to the extent that race

<sup>190</sup> See also *infra* Section IV.A.

<sup>191</sup> See W.A.V. Clark, *Residential Preferences and Neighborhood Racial Segregation: A Test of the Schelling Segregation Model*, 28 DEMOGRAPHY 1, 1 (1991) (noting neighborhood composition preferences as a "critical variable" explaining segregation); Randall P. Walsh, *Segregation and Tiebout Sorting: The Link Between Place-Based Investments and Neighborhood Tipping*, 74 J. URB. ECON. 94 (2013) (finding that group-based sorting across communities increases when public goods in each community are comparable); Patrick Bayer & Robert McMillan, *Tiebout Sorting and Neighborhood Stratification* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 17364, 2011) (suggesting that Tieboutian sorting can lead to increased segregation).

<sup>192</sup> See *supra* Section I.A; see also Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 492 (2006) ("The presence of strong and broad consumer demand for segregated environments will, by the same token, reward developers who cater to that demand.").

<sup>193</sup> See SCHELLING, *supra* note 186, at 147-55 (modelling a "self-forming neighborhood" which segregates over time based on individual preferences). Indeed, one could make the even stronger claim that the market itself is constituted by race. See DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 399 (2007) (arguing that approaching segregation as a problem of market access "assumes a model of analysis in which a pure, discrete market for housing exists, a market that operates outside of people's assumptions about color and property").

<sup>194</sup> That legal barriers to housing market access are the primary cause of racial and socioeconomic segregation has been newly popularized by ROTHSTEIN, *supra* note 81, and others. This view may overstate the effects of regulation on housing markets, which already embrace racial and socioeconomic separation. "[W]ould the market have allocated housing differently in the United States without state intervention?," asks Jeff Spinner-Halev. *The Trouble with Diversity*, in CRITICAL URBAN STUDIES: NEW DIRECTIONS 107, 110 (Jonathan S. Davies and David L. Imbroscio eds., 2010). His answer, "hot by very much," *id.*, suggests the limits of deregulatory, market access approaches to racial integration. *But cf.* RICHARD H. SANDER, YANA A. KUCHEVA, JONATHAN M. ZASLOFF, MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING 423-44 (2018) (advocating access strategies to encourage mobility and facilitate integration).

and income are correlated or that housing consumers believe that race and income are correlated.<sup>195</sup>

Recall again that when *Mount Laurel* was decided in the mid-1970s, the supply of housing (and the white population) was increasing as its lowest-income (and Black) residents were being priced out.<sup>196</sup> Again, this is unsurprising. Market-rate development pressure without stabilization efforts can easily displace low-income housing in a particular neighborhood, even if the new construction may eventually modestly lower prices across a region.<sup>197</sup> That is why some cities have adopted construction and rehabilitation moratoria: to prevent the continued loss of affordable housing units to higher-end redevelopment.<sup>198</sup>

Consider also the effort to legalize accessory dwelling units (ADUs) in high-cost cities. While ADUs are heavily promoted by supply-side advocates, in Vancouver—where the ADU experiment is furthest along—many of the

<sup>195</sup> We might expect socioeconomic and racial segregation to decrease during periods of transition as low-income communities gentrify. See Ingrid Gould Ellen & Gerard Torrats-Espinosa, *Gentrification and Fair Housing: Does Gentrification Further Integration?*, 29 HOUS. POL'Y DEBATE 835, 844 (2018) (“[I]n some instances, gentrification leads to racial integration in the short term”). But that state of affairs seems likely to be short-lived unless low-income housing preservation, rent stabilization, or other renter protection efforts are adopted. *Id.* at 836.

<sup>196</sup> See *supra* Section I.A.

<sup>197</sup> The literature on the effects of new market-rate housing on displacement is extensive, see Infranca, *supra* note 13, at 1290-92 (collecting studies), and reveals mixed results, see N.Y.U. FURMAN CTR., GENTRIFICATION RESPONSE 5 (2016) (“Evidence is mixed on the question of displacement . . .”). Much depends on whether the introduction of market-rate housing reduces or increases nearby rents and over what time frame. See *supra* note 177. Market-rate housing may induce gentrification, but it also seems plausible that market-rate housing construction is a response to, rather than a cause of, gentrification. Compare Dubin, *supra* note 9, at 742-43 (arguing that construction of higher-cost housing causes gentrification and involuntary displacement of low-income residents), and J. Revel Sims, *Measuring the Effect of Gentrification on Displacement: Multifamily Housing and Eviction in Wisconsin's Madison Urban Region*, 31 HOUS. POL'Y DEBATE 736, 753 (2021) (finding that new multifamily housing development is associated with increased eviction rates in Madison neighborhoods), with Infranca, *supra* note 13, at 1288-89 (noting research suggesting new market-rate housing “tends to follow,” rather than catalyze, neighborhood change). If market-rate housing is erected on the site of previously existing low-income housing, the displacement effect seems obvious.

A recent study of New York City found “no difference in mobility rates between those living in gentrifying neighborhoods and those living in persistently low-SES [socioeconomic status] neighborhoods,” see Kacie Dragan, Ingrid Gould Ellen, & Sherry Glied, *Does Gentrification Displace Poor Children? New Evidence from Medicaid Data in New York City*, 83 REG'L SCI. & URB. ECON. 1, 7 (2020), though there are substantial caveats. See *id.* at 6, 9 (acknowledging New York City's robust tenant protections and rental regulations, as well as the already-high mobility rates of the low-income children being studied). A more apt comparison would be between gentrifying and less transient low-income neighborhoods, but low-SES, low mobility neighborhoods just do not seem to exist for poor children. It also seems plausible that displacement pressure will increase over time, as transition from a low-income neighborhood to a higher-income neighborhood accelerates. See Infranca, *supra* note 13, at 1290.

<sup>198</sup> Haisten Willis, *Building Bans and Affordable Housing: A Construction Conundrum*, WASH. POST (Sept. 3, 2020, 8:00 AM), [https://www.washingtonpost.com/realestate/building-bans-and-affordable-housing-a-construction-conundrum/2020/09/01/132c63fc-e93f-11ea-970a-64c73a1c2392\\_story.html](https://www.washingtonpost.com/realestate/building-bans-and-affordable-housing-a-construction-conundrum/2020/09/01/132c63fc-e93f-11ea-970a-64c73a1c2392_story.html) [<https://perma.cc/SVD7-7V8M>] (describing moratoria in Atlanta and Chicago).

new units are simply adding to the already expensive rental and AirBnB market.<sup>199</sup> So, too, the attack on single-family zoning may have untoward effects in places where the affordable housing stock consists of predominantly small single-family residences.

Increasing the supply of market-rate housing in a high-demand location can benefit some home seekers, but without limits on market processes, those who benefit are likely to be the ones who already enjoy high incomes. Moreover, the scale—neighborhood, citywide, regional, statewide—at which supply-side efforts will reduce housing costs has to be identified with specificity. Otherwise, the distributional consequences of new supply in any given neighborhood, city, or region will be obscured.<sup>200</sup>

### B. Accounting for High and Low Demand Places

That housing is a bundled good leads to another important caveat to the supply-lowers-costs logic: the supply/demand story does not account for the reasons that a neighborhood, city, or region is experiencing increased housing demand. Why a particular neighborhood, city, or region is high demand while other neighborhoods, cities, or regions are low demand is often left undertheorized. Once consumer preferences are assumed, then the answer to problems of increased demand seems obvious: increase supply.

In order to understand the effects of restrictive land use on housing costs, however, one needs an account of why cities grow and decline that is not simply a recitation of the heightened demand for housing. Such an account is likely to be location specific.

Consider first a jobs-driven account of why cities grow or decline. On such a theory, in-migration of the residential population follows employment opportunities,<sup>201</sup> and housing costs reflect the underlying labor market. Urban economists Andres Rodríguez-Pose and Michael Storper adopt this account, arguing that San Francisco's high housing costs are attributable to demand

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<sup>199</sup> See Alan Ehrenhalt, *Is Our Love Affair with the Single-Family Home Over?*, GOVERNING (Oct. 16, 2020), <https://www.governing.com/assessments/Is-Our-Love-Affair-with-the-Single-Family-Home-Over.html> [<https://perma.cc/EQ6Q-GSDR>] (noting that of 2,000 ADUs built between 2010 and 2016, many wound up as “posh and profitable rentals”).

<sup>200</sup> See, e.g., Keith A. Spencer, *Despite Thorough Debunking, Neoliberal Housing Politics Prevail in the Bay Area*, SALON (Nov. 4, 2018, 2:00 PM), <https://www.salon.com/2018/11/04/despite-thorough-debunking-neoliberal-housing-politics-prevail-in-the-bay-area> [<https://perma.cc/K8GK-E87G>] (noting that despite an overall increase in the San Francisco housing supply, several districts saw net losses in affordable housing units, and that resulting drops in housing cost accrued mostly to wealthier renters).

<sup>201</sup> Although such a theory seemingly undergirds most agglomerationist critiques of local land regulations, it is seldom made explicit. See, e.g., Schleicher, *supra* note 32, at 111-14 (attacking local regulations that reduce inter-state mobility without endorsing or supporting a jobs-driven theory of city growth). For a general jobs-driven account, see MICHAEL STORPER, KEYS TO THE CITY: HOW ECONOMICS, INSTITUTIONS, SOCIAL INTERACTION, AND POLITICS SHAPE DEVELOPMENT 224-25 (2013).

driven by highly skilled and educated labor.<sup>202</sup> They observe that a different employment picture is presented by cities like Orlando and Phoenix,<sup>203</sup> two places that are also growing rapidly but without the same rapid rise in housing prices,<sup>204</sup> and they conclude that increasing the supply of market-rate housing in a high-demand, high-skills market is unlikely to improve affordability because it will not alter the underlying features of the labor market.<sup>205</sup>

According to Rodríguez-Pose and Storper, upzoning in a place like San Francisco may make rich cities marginally more affordable at the high end but will increase prices for housing at the moderate to low end.<sup>206</sup> The benefits of zoning reform will thus accrue mainly to the already wealthy and wealthy-to-be, who are being driven to the region by its particular employment portfolio; meanwhile, land use deregulation will likely encourage gentrification and displacement of poorer communities, who can be easily outbid for favorable locations.<sup>207</sup> They conclude that “policies such as blanket upzoning principally unleash market forces that serve high-income earners, therefore reinforcing the effects of income inequality rather than tempering them.”<sup>208</sup>

Rodríguez-Pose and Storper’s conclusions have sparked a contentious debate, one that has tracked the polarized tenor of the YIMBY-NIMBY debate more generally.<sup>209</sup> For my purposes, two features of the jobs-driven account are attractive: (1) the recognition that not all urban housing demand is created equal, and (2) the emphasis on the nature of the regional labor market as a driver of land price inflation. It seems unsurprising that high-income, high-productivity places will have higher housing costs, while low-income, low-productivity places will have the opposite, notwithstanding the

<sup>202</sup> Rodríguez-Pose & Storper, *supra* note 99, at 234-35; cf. Josh Gordon, *The ‘Supply Crisis’ in Canada’s Housing Market Isn’t Backed up by the Evidence*, GLOBE & MAIL (Sept. 13, 2020), <https://www.theglobeandmail.com/opinion/article-the-supply-crisis-in-canadas-housing-market-isnt-backed-up-by-the> [<https://perma.cc/B8HT-ZG77?type=image>] (“Housing form is basically irrelevant to the affordability challenges in an urban area.”).

<sup>203</sup> Rodríguez-Pose & Storper, *supra* note 99, at 230 (“The difference . . . is the type of jobs and the point in industrial maturity that generated them.”).

<sup>204</sup> *Id.* at 230-32.

<sup>205</sup> *Id.* at 231, 234 (citing David H. Autor, *Work of the Past, Work of the Future*, 109 AEA PAPERS & PROC. 1 (2019)).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 239-42.

<sup>208</sup> *Id.* at 240.

<sup>209</sup> See, e.g., Michael Manville, Michael Lens, & Paavo Mönkkönen, *Zoning and Affordability: A Reply to Rodríguez-Pose and Storper*, 2020 URB. STUD. J. 1, 2 (contesting Rodríguez-Pose and Storper’s findings and suggesting that they “pick many fights”); Andres Rodríguez-Pose & Michael Storper, *Dodging the Burden of Proof: A Reply to Manville, Lens, and Mönkkönen*, 2020 URB. STUD. J. 1, 3-4 (describing the vitriolic response to their article); see also Richard Florida, *How Housing Supply Became the Most Controversial Issue in Urbanism*, BLOOMBERG: CITYLAB (May 23, 2019, 11:49 AM), <https://www.bloomberg.com/news/articles/2019-05-23/why-urbanists-are-arguing-about-housing-supply> [<https://perma.cc/RRA3-YUH9>] (summarizing the debate).

stringency of their land use regulations.<sup>210</sup> Indeed, high-demand cities in countries throughout the world are experiencing housing affordability challenges regardless of density, urban form, history of racial segregation, nature of local government authority, or current stringency of land use rules.<sup>211</sup> That U.S. cities are not unique in this regard suggests that U.S.-style land use regulations are less important than other factors in explaining the cost of housing in those places.<sup>212</sup>

Consider, along these lines, another theory of city growth and decline that may drive demand for specific places. This account begins with amenities first, with jobs following in-migrants who move to a city because of its various attractive attributes—its climate, natural beauty, nightlife, density, or cultural offerings.<sup>213</sup> Importantly, amenity-driven city growth by definition favors those in the housing market who are already mobile, and certainly not the immobile poor. Increasing housing supply in such a place will only increase

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<sup>210</sup> For example, the New Haven region's housing prices are below the national median despite highly restrictive land use laws while Austin's housing prices are above the national median despite Texas's more favorable development climate. See Ellickson, *supra* note 70, at 7 (noting land use restrictions); *id.* at 51 (noting housing prices). Even absent zoning, Houston saw house prices increase twenty-seven percent between 2013 and 2018. CONDON, *supra* note 157, at 48.

<sup>211</sup> See, e.g., Gordon, *supra* note 202 (describing Canada's housing crisis); Choe Sang-Hun, 'The Den of Thieves': South Koreans Are Furious Over Housing Scandal, N.Y. TIMES (Mar. 23, 2021), <https://www.nytimes.com/2021/03/23/world/asia/korea-housing-lh-scandal-moon-election.html> [<https://perma.cc/HBA9-BGQJ>] (describing the housing crisis in the Seoul metropolitan area). Vienna, one of the few high-demand cities that has successfully pursued housing equity, has notably not adopted a free market strategy, but rather embraces strict rent control and the provision of social housing on a scale unimaginable in the U.S. See CONDON, *supra* note 157, at 87-96 (arguing that Vienna is the only "advanced city" to have solved its housing equity problem and noting the use of rent control, public housing, and regulatory policy).

<sup>212</sup> Measuring land use stringency is itself quite difficult. Commentators have noted that leading measurements of local land use restrictiveness in the U.S., such as the Wharton Residential Land Use Regulatory Index, are flawed in important ways, either dramatically overstating the level of local building restraint, Rodríguez-Pose & Storper, *supra* note 99, at 237, or understating it, Christopher S. Elmendorf, Eric Biber, Paavo Mönkkönen, & Moira O'Neill, *State Administrative Review of Local Constraints on Housing Development: Improving the California Model*, 64 ARIZ. L. REV. (forthcoming 2021) (manuscript at 7 n.23, 11), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3614085](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3614085). See generally Joseph Gyourko, Jonathan S. Hartley, & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index*, 124 J. URB. ECON. 103337 (2021) (presenting the most recent Wharton Index survey results).

<sup>213</sup> See Edward L. Glaeser, *Growth: The Death and the Life of Cities*, in MAKING CITIES WORK: PROSPECTS AND POLICIES FOR URBAN AMERICA 22, 52-58 (Robert P. Inman ed., 2009) (describing the importance of amenities to attracting skilled workers); Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275, 1275 (2006) (noting raising demand for high-end urban amenities driving growth). But see STORPER, *supra* note 201, at 224 (arguing that "[c]ities are workshops, not playgrounds," and describing the "playground" model as misguided).



the population of amenity-seekers, a group that already has some degree of choice about where to live.<sup>214</sup>

Alternatively, if housing demand is driven by a location's amenities, then local land use rules might be important to sustaining that demand. A city's decision to create a waterfront park, to set aside downtown land for small businesses, restaurants, or artist lofts, or to adopt mixed-used zoning that limits housing in favor of commercial space, would all arguably influence amenities-induced demand. Restrictive land use laws—indeed, all the various developmental decisions made by a city—are not exogenous to housing demand. Those land use decisions may in some cases create demand. And those decisions will likely track the “market” to the extent that cities generally seek to offer amenities that appeal to housing consumers. Consider that, one year after Minneapolis reformed its zoning laws to allow property owners to construct duplexes or triplexes by right, only three triplexes had been approved in the city.<sup>215</sup> This suggests that the general demand for housing did not necessarily translate into the specific demand for triplexes. It should not be surprising that existing zoning laws reflect consumer demand.

Whether city population growth is driven by jobs or amenities, both, or neither,<sup>216</sup> those same forces might also be responsible for *reducing* demand. Reduced housing demand—i.e., population loss—has been the main characteristic of old-line industrial and Rust Belt cities during the mid- to late-twentieth century; those cities have not lost population because of high housing costs, but because migration patterns changed, as people moved to the suburbs and to the West and South.<sup>217</sup> So, too, the more recent urban

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<sup>214</sup> Cf. Rebecca Diamond, *The Determinants and Welfare Implications of US Workers' Diverging Location Choices by Skill: 1980-2000*, 106 AM. ECON. REV. 479, 480 (2016) (arguing that amenity improvements further fueled the sorting of highly skilled, college-educated workers into high skill cities further increasing rent pressures).

<sup>215</sup> See Ehrenhalt, *supra* note 199 (citing Daniel Takash, *The Great Suburban Showdown, Part I: The Lay of the Land*, NISKANEN CTR. (Oct. 2, 2020), <https://www.niskanenctr.org/the-great-suburban-showdown-part-i-the-lay-of-the-land> [<https://perma.cc/G4ME-7TCP>]). For another account of the Minneapolis zoning change, see CONDON, *supra* note 157, at 112-13, pointing to the city's failure to loosen density restrictions and to require affordable units as reasons for the lackluster results.

<sup>216</sup> On different theories of city growth, see SCHRAGGER, *supra* note 57, at ch.1, ch.7. See also Michael Storper & Michael Manville, *Behaviour, Preferences, and Cities: Urban Theory and Urban Resurgence*, 43 URB. STUD. 1247, 1249-61 (2006) (highlighting various theories and their shortcomings).

<sup>217</sup> See Michael B. Sauter, *These 5 Cities Have Lost Half or More of Their Populations Since 1950*, USA TODAY (June 11, 2019, 3:15 PM), <https://www.usatoday.com/story/money/2019/06/11/5-cities-have-lost-half-or-more-of-their-populations-since-1950/39557461> [<https://perma.cc/NJN6-5J95>] (reporting that St. Louis, Detroit, Cleveland, Buffalo, and Pittsburgh—all former industrial hubs—have lost over half of their populations since 1950); see also Michelle Wilde Anderson, *Needing and Fearing Billionaires in Cities Abandoned by Wealth*, 35 YALE L. & POL'Y REV. 235, 236-38 (2016) [hereinafter *Needing and Fearing Billionaires*] (describing population loss and property foreclosure in Detroit after automakers moved to the suburbs); Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1138-39 (2014) [hereinafter *New Minimal Cities*] (describing population loss in Cleveland, Detroit, and Hamtramck,

resurgence has not occurred because of the comparative costs of housing in the suburbs and cities. Neighborhoods in many cities had and continue to have relatively low-cost housing compared to the suburbs; other neighborhoods in newly resurgent cities have consistently had higher-cost housing than the suburbs even before the more recent spike in demand.

Housing supply and demand are often out-of-whack in both directions: there is too much housing in depopulating places and too little in populating ones.<sup>218</sup> Instead of increasing supply in popular places, one could instead engage in policy interventions that increase demand in unpopular ones.<sup>219</sup> Migration patterns are responsive to the availability of economic opportunities at home in comparison with those opportunities elsewhere. Housing costs certainly figure in any given mover's economic calculus. But it is good to remember that those movers are coming from somewhere: out-migration and in-migration are two sides of the same coin.

Recall that the suburban explosion that gave rise to demand in Mount Laurel was in part a function of the lack of demand in nearby Camden. When *Mount Laurel* was decided, Camden had plenty of inexpensive (if sometimes low quality) housing; New Jersey similarly had a large supply of cheap land for building.<sup>220</sup> California currently has sufficient land for housing construction, as does the country as a whole.<sup>221</sup> In fact, like Camden, many declining cities have too much housing; those cities are struggling with how to shrink their housing footprints, not expand them.<sup>222</sup>

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Michigan); Jeremy Nemeth, Justin B. Hollander, Eliza D. Whiteman, & Michael P. Johnson, *Planning with Justice in Mind in a Shrinking Baltimore*, 42 J. URB. AFFS. 351, 356-57 (2020) (noting suburbanization leading to population loss in Baltimore).

<sup>218</sup> See *New Minimal Cities*, *supra* note 217, at 1138-39 (describing the burden of excess housing in depopulating cities as a "self-perpetuating cycle" that lowers tax revenues).

<sup>219</sup> This—as is to be expected—is rejected out of hand by anti-zoning commentators as "inefficient" or even wasteful. See, e.g., Edward L. Glaeser & Joshua D. Gottlieb, *The Wealth of Cities: Agglomeration Economies and Spatial Equilibrium in the United States* 36-37 (Nat'l Bureau of Econ. Rsch., Working Paper No. 14806, 2009) (arguing that government policy should not induce movement to disadvantaged areas); Patrick Kline & Enrico Moretti, *People, Places and Public Policy: Some Simple Welfare Economics of Local Economic Development Programs* 32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19659, 2013) ("Subsidizing poor or unproductive places is an imperfect way of transferring resources to poor people.").

<sup>220</sup> About 41.2% of New Jersey's land was still developable over a decade after *Mount Laurel I* was decided. Tim Evans, *New Jersey's Supply of Developable Land is Shrinking—As a Result of Both Development and Preservation*, N.J. FUTURE BLOG (Feb. 17, 2020), <https://www.njfuture.org/2020/02/17/new-jerseys-supply-of-developable-land-is-shrinking-as-a-result-of-both-development-and-preservation> [https://perma.cc/S23U-VLD2]. In 2015, about 14% of New Jersey's land was still developable. *Id.*

<sup>221</sup> See Dave Merrill & Lauren Leatherby, *Here's How America Uses Its Land*, BLOOMBERG (July 31, 2018), <https://www.bloomberg.com/graphics/2018-us-land-use> [https://perma.cc/E3BP-AD3P] (illustrating that "urban areas make up just 3.6 percent of the total size of the 48 contiguous states," while "41 percent of U.S. land in the contiguous states revolves around livestock").

<sup>222</sup> See *supra* note 217.

Theoretically, a growth boundary that prevented the development of an alternative to Camden would have forced residents to stay there. But housing options in the suburbs gave those out-migrants a place to go. Today, resurgent cities are arguably having the same effect on declining rural areas and inner-ring suburbs, many of which are losing their populations.<sup>223</sup> If that is so, then encouraging more construction in high-demand places will just further depopulate low-demand ones. Building more housing in the city will injure the declining suburbs by giving their residents a place to flee, just as building more housing in Mount Laurel in the 1970s contributed to the depopulation of Camden.

I am not advocating restricting supply to lock people into certain geographies. My point is simply that “demand” is a function of available alternatives. Providing better public services in one place is going to have effects on housing demand in others. Equalizing tax burdens and public services across jurisdictions, especially in areas like education and public safety, would eliminate some of the forces inducing residents to relocate.<sup>224</sup> Instead of “build, build, build,” why not “invest, invest, invest” to eliminate the “push” factors inducing significant geographical dislocation?<sup>225</sup>

Indeed, the supply-side market solution to the problem of uneven housing demand is quite myopic when considering the range of alternatives. And its consequences for low- and moderate-income housing provision are at best uncertain and in many cases negative.<sup>226</sup> The emphasis on lifting supply constraints in high-demand areas will enforce the current regional hierarchy of poor and rich places and may just as readily exacerbate inequality as ameliorate it.

#### IV. THE LIMITS OF MOBILITY

This critique of deregulation leads naturally to a consideration of the third leg of the anti-zoning stool: the argument for mobility. Opening the suburbs to

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<sup>223</sup> See Richard Florida, *The New Suburban Crisis*, BLOOMBERG: CITYLAB (May 2, 2017, 10:05 AM), <https://www.bloomberg.com/news/articles/2017-05-02/inside-the-new-suburban-crisis> [<https://perma.cc/U58K-GNC6>] (reporting on shrinking inner-ring suburbs and growing cities and suburban peripheries). *But see* Whitney Airgood-Obrycki, *Are the Suburbs Losing Status?*, JOINT CTR. FOR HOUS. STUD. (Feb. 4, 2019), <https://www.jchs.harvard.edu/blog/are-the-suburbs-losing-status> [<https://perma.cc/KE3L-YDYZ>] (“[The] common narrative overstates the nature and extent of suburban decline.”).

<sup>224</sup> See SCHRAGGER, *supra* note 57, at 247-59.

<sup>225</sup> Anenberg & Kung, *supra* note 177, at 2, for example, argue that improving amenities in lower-priced neighborhoods will do more to reduce rents in higher-priced neighborhoods than increasing housing supply in higher-priced neighborhoods. *See also* Sitaraman et al., *supra* note 23, at 1765-72 (advocating federal policy to ameliorate geographical inequality as an alternative to mobility-favoring policies).

<sup>226</sup> *Cf.* CONDON, *supra* note 157, at 97 (describing failures of supply-side efforts); Underkuffler, *supra* note 170, at 247 (“[T]he redevelopment that [zoning-abolition] laws accomplish is less likely to benefit [poor] communities, than to hurt them.”).

low-income housing has long been a goal for those concerned with socioeconomic and racial segregation; the argument is that exclusionary zoning increases housing costs and raises barriers to entry, thus reducing mobility.<sup>227</sup> Mobility, it is further claimed, is a chief mechanism for reducing socioeconomic and racial segregation, for getting poor people access to better municipal services, and for increasing their access to jobs in productive places.<sup>228</sup>

It is helpful to distinguish two kinds of mobility claims. The first argument for mobility—what I have called the *moving to opportunity* argument against zoning—attacks local land use rules that prevent people from moving from high poverty, low service jurisdictions into lower poverty, higher service jurisdictions.<sup>229</sup> This claim is based on the commonsense notion that individuals living in jurisdictions with better access to public goods, like public safety and schools, will have better life outcomes. So, too, this argument is based on the old idea that living in a segregated neighborhood with high levels of poverty itself undermines life chances.<sup>230</sup> Traditional objectors to exclusionary zoning have long argued that the problem with local land use restrictions is that they contribute to racial and socioeconomic segregation.<sup>231</sup>

The second mobility claim is what I describe above as the *productivity* argument against zoning. This argument attacks restrictive local land use laws on the ground that they prevent people from moving out of low-productivity places into high-productivity places—from rural to urban communities or from small towns to the big city.<sup>232</sup> This type of claim assumes a connection between urbanization and productivity;<sup>233</sup> it asserts that the co-location in

<sup>227</sup> See REEVES, *supra* note 101, at 103.

<sup>228</sup> See, e.g., SANDER ET AL., *supra* note 194, at 423-35 (advocating mobility policies as a solution to economic and racial segregation). Much research has been done on spatial mismatch. See generally Fredrik Andersson, *Job Displacement and the Duration of Joblessness: The Role of Spatial Mismatch*, 100 REV. ECON. & STAT. 203 (2018) (finding support for the hypothesis); Edward L. Glaeser & Naomi Hausman, *The Spatial Mismatch Between Innovation and Joblessness*, 20 INNOVATION POL'Y & ECON. 233 (2020) (connecting spatial mismatch to rates of joblessness); Laurent Gobillon, Harris Selod, & Yves Zenou, *The Mechanisms of Spatial Mismatch*, 44 URB. STUD. 2401 (2007) (describing the theory); John F. Kain, *The Spatial Mismatch Hypothesis: Three Decades Later*, 3 HOUS. POL'Y DEBATE 371 (2010) (reviewing the literature on spatial mismatch).

<sup>229</sup> See *supra* Section I.A.

<sup>230</sup> Douglas S. Massey, Gretchen A. Condran, & Nancy A. Denton, *The Effect of Residential Segregation on Black Social and Economic Well-Being*, 66 SOC. FORCES 29, 53 (1987) (“At least partly because of racial segregation, and possibly largely because of it, middle class blacks are subjected to higher rates of crime, less healthy environments, and more dilapidated surroundings than their white counterparts.”). See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

<sup>231</sup> See generally MASSEY & DENTON, *supra* note 230; *infra* Section IV.A.

<sup>232</sup> See *supra* Section I.B; *infra* Section IV.B.

<sup>233</sup> Sometimes there is not such a link. See Remi Jedwab & Dietrich Vollrath, *Urbanization Without Growth in Historical Perspective*, 58 EXPLS. IN ECON. HIST. 1, 18 (2015) (cautioning against presuming “that urbanization and industrialization or development are synonymous”); Marianne

space of industries, businesses, and residents—agglomeration—is a chief driver of economic innovation and growth.<sup>234</sup>

The opportunity and productivity claims are not the same, though they share a commitment to mobility as an anti-poverty strategy. That commitment implicitly depends on an assumption that economic growth is a tide that lifts all boats. But there are a number of reasons to worry about an anti-poverty or opportunity program that emphasizes cross-border mobility. The demands of mobility are inherently unequal: mobility policies require certain people to move to obtain basic life opportunities but do not make the same demand on others. And mobility exacerbates the challenges faced by the places, neighborhoods, and people who are left behind.

### A. *Moving to Opportunity*

Consider first the emerging consensus that state-level land use reform is necessary to permit individuals and families to “move to opportunity”—to access quality housing and improved municipal services, like schools and public safety. This approach, modeled on the “Moving to Opportunity” (MTO) pilot project sponsored by the Department of Housing and Urban Development in the mid-1990s,<sup>235</sup> focuses on inter-jurisdictional barriers to

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Fay & Charlotte Opal, *Urbanization Without Growth: A Not-So-Uncommon Phenomenon 2* (World Bank, Pol’y Rsch. Working Paper No. 2412, 2000) (exploring Africa’s urbanization without growth). See generally MIKE DAVIS, *PLANET OF SLUMS* (2017).

<sup>234</sup> See, e.g., GLAESER, *supra* note 97, at 116; MASAHISA FUJITA, PAUL KRUGMAN & ANTHONY J. VENABLES, *THE SPATIAL ECONOMY: CITIES, REGIONS, AND INTERNATIONAL TRADE* 4 (1999) (“[S]patial concentration itself creates the favorable economic development that supports further or continued concentration.”); Edward L. Glaeser, *Are Cities Dying?*, 12 J. ECON. PERSPS. 139, 140 (1998) (listing ways in which cities are more productive than other areas); Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 38 (1988) (positing productivity benefits from proximity to others).

<sup>235</sup> The program provided housing vouchers to assist low-income families in moving from high-poverty housing to low-poverty housing. See LISA SANBONMATSU, JENS LUDWIG, LAWRENCE F. KATZ, LISA A. GENNETIAN, GREG J. DUNCAN, RONALD C. KESSLER, EMMA ADAM, THOMAS W. MCDADE, & STACY TESSLER LINDAU, NAT’L BUREAU OF ECON. RSCH., *MOVING TO OPPORTUNITY FOR FAIR HOUSING DEMONSTRATION PROGRAM: FINAL IMPACTS EVALUATION* (2011), [https://www.huduser.gov/publications/pdf/MTOFHD\\_fullreport\\_v2.pdf](https://www.huduser.gov/publications/pdf/MTOFHD_fullreport_v2.pdf) [<https://perma.cc/Q3MG-4WNC>] (describing the program). Initial analysis of the MTO program indicated mixed results. *Id.* at xv-xvi (finding that ten to fifteen years after families enrolled in the MTO program, families experienced lower poverty and better health outcomes and felt safer in their neighborhoods, but they experienced no better education, employment or income outcomes); Xavier de Souza Briggs & Margery Austin Turner, *Assisted Housing Mobility and the Success of Low-Income Minority Families: Lessons for Policy, Practice, and Future Research*, 1 NW. J.L. & SOC. POL’Y 25, 45-46, 51 (2006) (finding that the MTO program provided low-income families gains in health, but not in employment, income or education attainment; yet noting that families who lived longer in low-poverty housing experienced better outcomes in work and school); see also Sheila R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, YALE L.J. F. 480, 491 (2017) (describing how federal programs like the MTO program “produced decidedly mixed results”). More recent studies indicate that while adults do not

entry, mainly the city/suburb divide. That divide has long been a target of anti-poverty reformers. The Kerner Commission Report famously described the “two societies”<sup>236</sup> that divided Black people and white people into separate geographic spheres; President Johnson’s War on Poverty sought to dismantle the ghetto.<sup>237</sup> Today there is little doubt that economic inequality is exacerbated by spatial isolation and unequal access to public services.<sup>238</sup>

Preemptive land use laws that target suburban exclusion and emphasize mobility across jurisdictional lines, however, are likely to have limited effect. As already noted above, the politics of land use are such that it is difficult to make a “fair share” housing regime stick, even in places like New Jersey and Minnesota that have adopted progressive land use regimes.<sup>239</sup> But there are other reasons that a mobility approach to economic inequality is likely to be unavailing.

A basic problem, which a number of commentators have pointed out, is that an anti-poverty program that emphasizes relocation requires demographic shifts on an enormous scale.<sup>240</sup> Granted, the federal government’s MTO pilot program saw some mixed successes giving a small number of families vouchers to move to low-poverty neighborhoods.<sup>241</sup> But what is possible in a pilot project and what can occur across a large population are two different things. Scaling-up mobility programs is an almost

generally gain from moves from high to low poverty neighborhoods, their children do, particularly if they move before age thirteen. See Chetty, *supra* note 91, at 141. For a critical discussion of the Chetty study, see EDWARD G. GOETZ, *THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE IN AMERICA CITIES* 44-46 (2018).

<sup>236</sup> KERNER REPORT, *supra* note 80, at 1. See generally Susan T. Gooden & Samuel L. Myers Jr., *The Kerner Commission Report Fifty Years Later: Revisiting the American Dream*, 4 RUSSELL SAGE FOUND. J. SOC. SCIS. 1, 1-2 (2018) (providing a retrospective overview of the Kerner Commission Report).

<sup>237</sup> See generally DAVID ZAREFSKY, *PRESIDENT JOHNSON’S WAR ON POVERTY: RHETORIC AND HISTORY* 21-56 (1986).

<sup>238</sup> See MASSEY & DENTON, *supra* note 230, at 149-53 (exploring relationships between social and spatial mobility). The classic work on this is WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

<sup>239</sup> See *supra* note 123 and accompanying text (noting increasing segregation in Minneapolis); Dantzler, *supra* note 76, at 657-64 (discussing the “shortcomings” of *Mount Laurel I*); Mallach, *supra* note 76, at 851-56 (explaining the backlash to the affordable housing push in New Jersey); Meyler, *supra* note 76, at 240-47 (noting that affordable housing efforts “aroused the ire of many New Jersey municipalities”); see also Byrne, *supra* note 45, at 2279-84 (describing the backlash that *Mount Laurel* engendered). See generally MASSEY, *supra* note 45, at 184-96.

<sup>240</sup> Imbroscio, *Urban Policy as Meritocracy*, *supra* note 16, at 91-92 (objecting to the “dispersal consensus” on the grounds that it would require “many people, including many of the most vulnerable urban residents . . . to move from their current neighborhood”); see also PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 11, 172 (2013) (raising a similar objection); Anderson, *supra* note 25, at 526-32 (“Why keep putting resources into an area where people are getting more poor, and more stuck, as time goes by? The biggest answer, I think, is that we do not have a serious alternative—too many people live in such areas.”).

<sup>241</sup> See *supra* note 235 and accompanying text.

insurmountable challenge. Certainly, citizens should have the ability and right to live in every community in the metropolitan area, should they choose to do so. But for many residents of poor communities, relocation is not desirable or even feasible in light of existing attachments to family, home, neighborhood, and community.<sup>242</sup> And there is certainly little political appetite for the “massive sociospatial reordering of the urban population”<sup>243</sup> that would be required to move significant numbers of residents out of poor communities and into richer ones.

To be sure, the concept of “moving to opportunity” is appealing. Suburban land use restrictions that lock poor families into underperforming places are undoubtedly problematic. But the mobility project is also invariably accompanied by a narrative of uplift, focused in large part on giving poor children access to better educational opportunities.

As David Imbroscio has argued, this “meritocratic paradigm” misses the point.<sup>244</sup> By focusing on reducing barriers to opportunity, reformers place far too much demand on an already overburdened education system to remedy profound structural economic ills. And reformers misidentify the source of urban poverty as inadequate social services or weak social ties when the origins of economic inequality run much deeper. Imbroscio agrees that resources are inequitably distributed, but he criticizes the emphasis on giving individuals in poor places the ability to achieve upward mobility by “dint of their own merit.”<sup>245</sup> As already noted, moving to opportunity policy experiments have had mixed success.<sup>246</sup> But more importantly, while they may produce a few “merit-worthy” winners—the “deserving poor”—these interventions do not help to restructure an economy that continues to produce much larger swaths of economic losers.

Another reason to doubt a land use reform project targeting suburban-style land use barriers is that—as noted above—even affordable housing is out of reach of many of the urban poor. As recent work on evictions has shown, housing instability is an almost permanent state of affairs for a significant portion of urban residents.<sup>247</sup> Land use barriers are not the main

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<sup>242</sup> See Naomi Schoenbaum, *Stuck or Rooted? The Costs of Mobility and the Value of Place*, 127 *YALE L.J.F.* 458, 464-74 (2017) (arguing that policies encouraging mobility overlook its human costs).

<sup>243</sup> Imbroscio, *Urban Policy as Meritocracy*, *supra* note 16, at 93.

<sup>244</sup> See *id.* at 82-83.

<sup>245</sup> *Id.* at 79.

<sup>246</sup> See *supra* note 235 and accompanying text; Imbroscio, *Urban Policy as Meritocracy*, *supra* note 16, at 88-92 (“Studies of mixed-income communities seem to suggest . . . that benefits for their disadvantaged inhabitants may not materialize.”). See generally ROBERT J. SAMPSON, *GREAT AMERICAN CITY: CHICAGO AND THE ENDURING NEIGHBORHOOD EFFECT* 424-25 (2012) (arguing that community place-based policies are more likely to be successful than individual mobility policies).

<sup>247</sup> See MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 20-31 (2016) (describing the effects of urban deindustrialization on housing instability).

cause for the eviction crisis, and eliminating suburban land use restrictions is not going to change the underlying causes of housing instability. Uneven employment; lack of housing, mental health, addiction, and other forms of government support; the absence of public transportation; inadequate legal representation; and urban fiscal decline are all determinative factors.<sup>248</sup>

Moreover, a mobility strategy that hinges on access to the suburbs assumes that the suburbs are currently or will remain relatively economically stable over time. But that is simply not true: many suburban areas are struggling economically. The suburban decline has long been in the making, even prior to the recent urban resurgence—especially in old line suburbs.<sup>249</sup> Regionalists have long argued that city/suburb unification can reduce fiscal and public service gaps.<sup>250</sup> But as cities have become somewhat richer and suburbs have become somewhat poorer, that prescription has become less appealing. Moreover, regional governments are no panacea for racial education gaps, which persist in unified school districts.<sup>251</sup>

To be sure, migration can be a solution to a lack of local opportunity. But the costs of migration can be high both for those who move and those left behind, who may be made worse off from the out-migration.<sup>252</sup> The beneficial effects of migration can also dissipate as the numbers of movers increase, either because the original benefits were a function of deconcentration or

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<sup>248</sup> See *id.*

<sup>249</sup> BERNADETTE HANLON, ONCE THE AMERICAN DREAM: INNER-RING SUBURBS OF THE METROPOLITAN UNITED STATES 1-11 (2010) (“[M]any older inner-ring suburban communities . . . have declined into places of desolation and decay.”); ELIZABETH KNEEBONE & ALAN BERUBE, CONFRONTING SUBURBAN POVERTY IN AMERICA 1-12 (2013) (“[T]he suburbanization of poverty has redrawn the contemporary American landscape.”).

<sup>250</sup> See Matthew J. Parlow, *Equitable Fiscal Regionalism*, 85 TEMP. L. REV. 49, 70-83 (2012) (describing a potential model for regional governance); Georgette C. Poindexter, *Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses*, 47 J. URB. & CONTEMP. L. 3, 24-29 (1995) (“To counteract fiscal inequality and to match regional revenue with regional expenditures, a model must link the suburban tax base with the city budget.”); see also Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 115 (2013) (advocating for regionalism as a response to Tieboutian sorting).

<sup>251</sup> See Kristen E. Murray, *The Problem of Intradistrict Inequality*, 5 BELMONT L. REV. 85, 86-101 (2018) (describing the existence and causes of inequality within school districts); *The Education Opportunity Monitoring Project*, STAN. CEPA, <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/#first> [<https://perma.cc/475P-Y4Y2>] (last visited July 21, 2020) (providing figures on “racial achievement gaps—differences in the average standardized test scores of white and black or white and Hispanic students”).

<sup>252</sup> Anderson, *supra* note 25, at 531-32 (describing the costs of long-term population loss in Flint, Michigan); Foster, *supra* note 235, at 482-87 (discussing costs that low-income and disadvantaged groups experience when they relocate); Imbroscio, *Urban Policy as Meritocracy*, *supra* note 16, at 90-92 (same).



because inward migration induces outward migration by existing residents.<sup>253</sup> This may make it impossible to “move to opportunity.”<sup>254</sup>

There is also a very limited guarantee of success. Studies show that the original MTO program had only a 48% “lease-up” rate, meaning less than half of the recipients of vouchers were able to use them to move to another neighborhood.<sup>255</sup> So too, when given the opportunity, poor residents often relocated to neighborhoods similar in socioeconomic make-up to the ones they left or returned to their old neighborhoods over time.<sup>256</sup> A recent study has shown (unsurprisingly perhaps) that Black boys will enjoy better outcomes as adults if they grow up in low-poverty neighborhoods with high rates of stable families and low levels of racial bias.<sup>257</sup> But there are not enough of those neighborhoods; even if there were, moving the 95% of Black boys who do not currently live in such places<sup>258</sup> is simply not plausible. Those neighborhoods have to be *made*.

In other words, while “opportunity hoarding”<sup>259</sup> in the suburbs or other high service jurisdictions should not be ignored, for many residents of low-productivity and low-opportunity places, the effort to break down mobility barriers is secondary to addressing economic decline, social dislocation, and affordable housing in place. Robert Sampson, in his magisterial study of Chicago, cautions against the methodological individualism that underpins a moving to opportunity strategy, arguing that in important ways

<sup>253</sup> See, e.g., Schwartz, *supra* note 188 (“As anticipated, the academic returns from economic integration diminished as school poverty levels rose.”); Ellora Derenoncourt, *Can You Move to Opportunity? Evidence from the Great Migration* 35-36 (Jan 25, 2019) (unpublished manuscript), [https://scholar.harvard.edu/files/elloraderenoncourt/files/derenoncourt\\_jmp\\_2018.pdf](https://scholar.harvard.edu/files/elloraderenoncourt/files/derenoncourt_jmp_2018.pdf) [<https://perma.cc/7L2Y-GNRX>] (finding that gains from Black people moving from the South to Northern cities in the twentieth century were offset by the policies adopted by the host cities).

<sup>254</sup> See Derenoncourt, *supra* note 253, at 35-36 (“[T]he persistent gap in upward mobility among black and white boys . . . raises the question of whether [MTO] policies can be effective at reducing racial gaps . . .”).

<sup>255</sup> GOETZ, *supra* note 235, at 45.

<sup>256</sup> See *id.* at 45-46 (noting that many MTO study participants returned to higher-poverty neighborhoods); Jae Sik Jeon, *Moving Away from Opportunity? Social Networks and Access to Social Services*, 57 URB. STUD. 1696, 1710-11 (2020) (examining factors that cause voucher recipients to relocate to their original or other high-poverty neighborhoods); see also SAMPSON, *supra* note 246, at 377 (“[T]he city can thus be said to possess an enduring higher-order structure of stratification and accompanying processes of social organization that are quite persistent despite individual fluidity and neighborhood change.”).

<sup>257</sup> Raj Chetty, Nathaniel Hendren, Maggie R. Jones, Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711, 711 (2020).

<sup>258</sup> See *id.* (finding that only 5% of Black boys grow up in favorable neighborhoods).

<sup>259</sup> “Opportunity hoarding” is a sociological concept first introduced by Charles Tilly to describe “when members of a categorically bounded network acquire access to a resource that is valuable, renewable, subject to monopoly, supportive of network activities, and enhances by the network’s modus operandi.” CHARLES TILLY, *DURABLE INEQUALITY* 16 (1998).

“neighborhoods choose people,” not the other way around.<sup>260</sup> Sampson emphasizes *immobility* policies to keep social capital inside low-income neighborhoods—the “collective efficacy” that appears essential to low-income, minority neighborhoods that are stable and have positive outcomes.<sup>261</sup> Patrick Sharkey, after reviewing the long-running debate over the merits of mobility versus place-based anti-poverty policies, concludes that “moving families out of the ghetto, en masse, . . . would likely have harmful consequences for many eligible families and would have unanticipated consequences for urban communities.”<sup>262</sup>

Instead of contributing to collective efficacy, mobility-enhancing policies place the burden of uplift on individuals and families and undercut efforts to strengthen the neighborhoods that are integral to improving individuals’ life chances. Mobility policies also generally treat poor Black neighborhoods as inherently inferior and require that Black people integrate into white neighborhoods to gain basic municipal services instead of providing those goods directly.<sup>263</sup>

In other words, MTO is an old-fashioned dispersal and deconcentration approach to poverty alleviation. While it may provide benefits to a select few, it is unlikely to result in long-term, stable low-income communities.<sup>264</sup> A set

<sup>260</sup> SAMPSON, *supra* note 246, at 377.

<sup>261</sup> Robert J. Sampson, *Individual and Community Economic Mobility in the Great Recession Era: The Spatial Foundations of Persistent Inequality*, in *ECONOMIC MOBILITY: RESEARCH & IDEAS ON STRENGTHENING FAMILIES, COMMUNITIES & THE ECONOMY* 259, 283 (Alexandra Brown, David Buchholz, Daniel Davis, & Arturo Gonzales eds., 2016), [https://www.stlouisfed.org/~media/Files/PDFs/Community-Development/EconMobilityPapers/EconMobility\\_Book\\_508.pdf?la=en](https://www.stlouisfed.org/~media/Files/PDFs/Community-Development/EconMobilityPapers/EconMobility_Book_508.pdf?la=en) [<https://perma.cc/CTB4-H5UP>] (discussing organizational capacities and community knowledge that is left intact when people stay in their community); *see also* SAMPSON, *supra* note 246, at 377; Kenneth A. Stahl, *Mobility and Community in Urban Policy: An Essay on Great American City by Robert J. Sampson*, 46 *URB. LAW.* 625, 626-27 (2014) (highlighting arguments in favor of place-based policies using empirical evidence).

<sup>262</sup> SHARKEY, *STUCK IN PLACE*, *supra* note 240, at 172; *see also* Timothy Bartik, *Using Place-Based Jobs Policies to Help Distressed Communities*, 34 *J. ECON. PERSPS.* 99, 113 (“Subsidizing out-migration from distressed communities may often create as many problems as it solves.”).

<sup>263</sup> *See, e.g.*, GOETZ, *supra* note 235, at 10-11 (pointing out that integrationist policies are often dependent upon limiting the mobility of Black people); *cf.* Mary Pattillo, *The Problem of Integration*, N.Y.U. FURMAN CTR. (Jan. 2014), <https://furmancenter.org/research/iri/essay/the-problem-of-integration> [<https://perma.cc/XXB3-9YR2>] (discussing how the integrationist narrative stigmatizes Black people and Black spaces); Edward G. Goetz, Anthony Damiano, & Rashad Williams, *Opportunity Areas Shouldn’t Just be Places with a Lot of White People*, SHELTERFORCE (Jan. 4, 2021), <https://shelterforce.org/2021/01/04/opportunity-areas-shouldnt-just-be-places-with-a-lot-of-white-people> [<https://perma.cc/Z4KR-35JK>] (describing the “White Proximity Model” which found that opportunity was often associated with whiteness).

<sup>264</sup> Importantly, statewide land use reform might also undermine the wealth of Black homeowners in majority-Black suburbs. Those suburbs are likely to bear the brunt of the state-wide elimination of single-family zoning, as they already tend to absorb more poor minorities than white suburbs further afield. Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 *CORNELL L. REV.* 729, 755-62 (2001).

of policies that encourages the poor to chase the rich around in an unending cycle of growth and decline is not very promising. It seems to be premised on the view that there are few means to remedy local economic instability or to obtain basic public goods other than moving. And it accedes to a permanent state of spatial inequality.

### B. *Moving to Productivity*

The *productivity* argument against restrictive land use practices is also premised on individuals and families moving—but on an even larger scale. That argument maintains that by raising housing prices, supply constraints like zoning prevent individuals from moving from less productive regions of the country to more productive regions, thus depressing overall economic growth.<sup>265</sup> At bottom, this is an argument for increasing national labor mobility. According to this account, housing prices reflect regional productivity, labor should follow capital, and land use deregulation will encourage large-scale internal migration.

Similar to the moving to opportunity approach, the productivity argument favors mobility as a solution to economic opportunity. The same objections, already outlined above, apply as well. The demand that labor follow capital wherever it decides to invest is not a recipe for economic or political stability.

But whether increasing overall labor mobility is a good or bad idea, there is a prior question concerning the assumed link between agglomeration and local land use constraints. Agglomeration theorists argue that economic growth is a function of density, of people co-locating in productive places like lower Manhattan or its nearby environs.<sup>266</sup> Urban growth, on this account, represents productivity gains; those gains are limited when land use barriers raise housing costs, thus preventing beneficial co-location.<sup>267</sup> If people cannot afford to move into Manhattan or San Francisco or the metropolitan areas within commuting distance of those places, they and the economy as a whole will be less productive.<sup>268</sup>

This account, however, might be wrong about what causes innovation and therefore economic growth. The productivity claim assumes that co-location in space is the most important feature of agglomeration: getting people together in denser places will generate economic gains.<sup>269</sup> But what if the

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<sup>265</sup> See, e.g., Schleicher, *supra* note 32, at 150.

<sup>266</sup> See *id.* at 150–51; see also *supra* notes 97–99 and accompanying text.

<sup>267</sup> See *supra* note 99 and accompanying text.

<sup>268</sup> See Hsieh & Moretti, *supra* note 95, at 1 (explaining how housing constraints lowered aggregate productivity growth).

<sup>269</sup> GLAESER, *supra* note 97, at 116.

gains from agglomeration turn on the *nature* of the uses of the urban land, not merely their co-location?

Jane Jacobs argued in *The Death and Life of Great American Cities* that it is the character of the built environment, not simply its density, that produces economic gains.<sup>270</sup> Agglomeration theorists like to cite Jacobs for the idea that cities are fertile places for the transmission of knowledge across industries on account of their density and diversity.<sup>271</sup> But the density claim that underpins the opposition to local land use ignores her more important insight: it is the diversity of urban land uses, not mere co-location, that produces knowledge spillovers and thus contributes to innovation and ultimately to growth.<sup>272</sup>

Throughout her work, Jacobs argues that economic growth is a function of a specific kind of urbanism. The city flourishes because of the diversity of land uses in space, block by block, and neighborhood by neighborhood.<sup>273</sup> To this end, Jacobs argues that cities can and should use local land use regulations to preserve a variety of types of uses of urban land: “zoning for diversity.”<sup>274</sup> This form of zoning is fine-grained and in many cases requires limiting development, controlling density, and preserving historical structures.<sup>275</sup> In addition, land use controls are necessary because of a central problem that occurs when a neighborhood becomes too popular: it loses the character that made it economically and socially vital in the first place, what Jacobs calls the “self-destruction of diversity.”<sup>276</sup> “Self-destruction” occurs when the features of a location that create housing demand are eliminated by fulfilling that demand—as when new high-rise residential construction replaces smaller, older mixed-used buildings.<sup>277</sup>

Indeed, some would say that Jacobs was the consummate NIMBY, famous for her opposition to development in lower Manhattan, including the building of a highway through Washington Square Park and the razing of older buildings

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<sup>270</sup> JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 143-51 (1961) [hereinafter JACOBS, *DEATH AND LIFE*] (describing how the diversity of enterprise in cities, rather than mere density, is the driver of their growth and sustainability).

<sup>271</sup> See, e.g., Lucas, *supra* note 233, at 38-39 (1988) (arguing for the theories of human capital discussed in JANE JACOBS, *THE ECONOMY OF CITIES* 50 (1970)). See also SCHRAGGER, *supra* note 57, at 24-25 (discussing “Jane Jacobs’s externalities,” the benefits of sharing across industries which occurs in cities).

<sup>272</sup> JACOBS, *DEATH AND LIFE*, *supra* note 270, at 143-51, 241-56 (describing how the diversity of streets in major American cities contributes to enterprise and productivity).

<sup>273</sup> *Id.* at 250-51.

<sup>274</sup> *Id.* at 252.

<sup>275</sup> *Id.* at 252-53.

<sup>276</sup> *Id.* at 242.

<sup>277</sup> *Id.* at 253-55.

there.<sup>278</sup> To critics, nostalgia drove Jacobs's vision of the urban environment.<sup>279</sup> But she turned out to be right when she organized to prevent the destruction of Washington Square and its environs, for both aesthetic and economic reasons.<sup>280</sup>

Jacobs's emphasis on the diversity of uses leads to another reason to question the moving to productivity argument against local land use. In *Death and Life* and her later works, Jacobs sought to describe and defend the features of urbanism that provide for social and economic stability.<sup>281</sup> That effort is mostly rejected by productivity theorists. For those theorists, some geographies are unproductive and others are productive; policy should encourage those living in the former to move to the latter.<sup>282</sup> This reification of "productive" and "unproductive" geographies fails to recognize—and even promotes—economic and spatial cycling. The agglomeration literature often is too quick to counsel abandonment of cities, suburbs, and rural locations that are in decline, urging individuals and families to "move to productivity" and counseling against trying to improve economic opportunities in place.<sup>283</sup>

To be sure, the flow of economic activity to high-productivity places is often overwhelming. As I have counseled elsewhere, competitive business-attraction strategies adopted by low-productivity places in an effort to increase local growth are mostly unavailing.<sup>284</sup> But abandonment of the

<sup>278</sup> See Nolan Gray, *How Should We Interpret Jane Jacobs?*, MKT. URBANISM (July 30, 2018), <https://marketurbanism.com/2018/07/30/how-should-we-interpret-jane-jacobs> [<https://perma.cc/3YCE-2N5C>] (noting that some have argued that Jacobs created the framework for modern NIMBYism).

<sup>279</sup> See Libby Nelson, *Jane Jacobs Believed Cities Should Be Fun—And Changed Urban Planning Forever*, VOX (May 4, 2016, 4:30 PM), <https://www.vox.com/2016/5/4/11583342/jane-jacobs-100th-birthday> [<https://perma.cc/QH3X-PA4D>] ("[Jacobs'] love for old buildings can turn into a fetishization of historic preservation that stops new construction . . .").

<sup>280</sup> Jonathan Glancey, *The Woman Who Saved Old New York*, BBC: CULTURE (May 12, 2017), <https://www.bbc.com/culture/article/20170509-the-woman-who-saved-old-new-york> [<https://perma.cc/MQF4-V5LY>] (detailing Jacobs's opposition to Robert Moses's projects that could have destroyed Washington Square Park).

<sup>281</sup> See, e.g., JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* 205 (1984) (discussing how cities promote access to jobs and play an important role in the economy); JACOBS, *supra* note 271.

<sup>282</sup> See GLAESER, *supra* note 97. See generally Schleicher, *supra* note 32, at 149-54 (providing policy suggestions for reviving labor mobility).

<sup>283</sup> See, e.g., Schleicher, *supra* note 32, at 82-84; see also Kline & Moretti, *supra* note 219, at 32 ("Subsidizing poor or unproductive places is an imperfect way of transferring resources to poor people."). This suggestion has not escaped critique. See Anderson, *supra* note 25, at 530 ("Proponents of mobility too rarely acknowledge . . . difficult quandaries about what to do for the land and people in struggling regions, and the questions of whether and how to stimulate and protect investment there."); Schoenbaum, *supra* note 242, at 461 (arguing that the "aim of moving people from low-productivity to high-productivity places relies on mistaken premises about the significance of both mobility and place" in terms of social ties and happiness); cf. MINDY THOMPSON FULLILOVE, *ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT* 52-107 (2009) (describing the significant social costs of displacement).

<sup>284</sup> Schragger, *supra* note 28, at 232-33 (2013) (arguing that pro-growth policies that attract developers and business reinforce existing inequalities); see also Richard C. Schragger, *Decentralization*

residents who live in lower productivity places is not a viable social welfare strategy for large swaths of the population, nor does it anticipate the possibility of cyclical return.<sup>285</sup>

This latter point is centrally important when considering the YIMBY “build, build, build” demand. Our inability to see the future leads us to assume that current housing demand predicts future housing demand.<sup>286</sup> But consider the dramatic shifts in housing patterns in the past century. In 1900, most Americans lived in rural areas or small towns.<sup>287</sup> By 1920, a large percentage were living in the growing industrial cities, mainly in the North.<sup>288</sup> That was followed by significant population shifts to Sunbelt cities and the suburbs, and the rapid decline of industrial cities.<sup>289</sup> In the last two decades, however, out-migration from central cities has reversed and many central city populations have rebounded.<sup>290</sup>

Cyclical changes in the nature of employment and in the tastes of housing consumers suggest that migration patterns (especially within metropolitan areas) are unpredictable.<sup>291</sup> Consider, for instance, the effects of a large-scale

*and Development*, 96 VA. L. REV. 1837, 1894 (2010) (“Attempts by cities or regions to jump-start their economies are likely to fail if the city or region is already running against the tide of agglomeration forces.”).

<sup>285</sup> Indeed, the most influential study in the productivity genre predicts that if all housing restrictions were removed, New York would gain 787% in employment, San Francisco’s employment would increase fivefold, and Flint, Michigan, would lose 98% of its jobs. Rodríguez-Pose & Storper, *supra* note 99, at 238. According to Hsieh and Moretti’s model, the economic gains of land use reform are a result of millions of people relocating primarily to three large metropolitan areas and abandoning most others. *See id.* at 238-39 (describing the implications of Hsieh & Moretti’s model).

<sup>286</sup> MICHAEL STORPER, *supra* note 201, at 28-29 (2013) (“The geography of production drives the geography of urban development today . . .”); *see also* SCHRAGGER, *supra* note 57, at 41-43 (noting the difficulty in predicting the success or decline of given places).

<sup>287</sup> *Rural Life in the Late 19th Century*, LIBR. CONG., <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/riseind/> [<https://perma.cc/4Z87-4JZA>] (last visited Sept. 20, 2021) (“Still, a majority of Americans lived in rural areas in 1900.”).

<sup>288</sup> *Urban and Rural Areas*, U.S. CENSUS BUREAU, [https://www.census.gov/history/www/programs/geography/urban\\_and\\_rural\\_areas.html](https://www.census.gov/history/www/programs/geography/urban_and_rural_areas.html) [<https://perma.cc/JTP9-XWCX>] (last visited Sept. 20, 2021) (“The 1920 census marked the first time in which over 50 percent of the U.S. population was defined as urban.”).

<sup>289</sup> EDWARD L. GLAESER & KRISTINA TOBIO, A. ALFRED TAUBMEN CTR. FOR STATE & LOC. GOV’T, PB-2007-5, *THE RISE OF THE SUNBELT 1* (2007) (explaining the boom in internal migration to the Sunbelt).

<sup>290</sup> *See* EHRENHALT, *supra* note 71, at 3-4 (chronicling this rebound); Mario Polèse, *Why (Some) Downtowns Are Back*, CITY J., Winter 2014, <https://www.city-journal.org/html/why-some-downtowns-are-back-13622.html> [<https://perma.cc/R79B-LRSJ>] (stating that many central cities have experienced population growth between 2000 and 2010).

<sup>291</sup> The COVID-19 pandemic has disrupted local housing markets around the country, for example. Justin Fox, *Covid Has Made Orlando Less Affordable than San Francisco*, BLOOMBERG (May 6, 2021, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2021-05-06/covid-has-made-orlando-less-affordable-than-san-francisco> [<https://perma.cc/WAK9-F9UL>]; *see also* Debra Kamin, *The Market Tectonics of California Real Estate*, N.Y. TIMES (May 28, 2021), <https://www.nytimes.com/2021/05/28/realestate/california-real-estate.html> [<https://perma.cc/V3HD-5DST>] (describing how internal migration patterns in California, amplified by the pandemic, have created unpredictable changes in real

pandemic-induced shift to remote work, which would certainly reduce housing demand in coastal cities.<sup>292</sup> That housing and other features of the built environment are durable makes planners' jobs even more difficult. If an undersupply of housing today could turn into an oversupply tomorrow (a story that describes Detroit's twentieth century trajectory<sup>293</sup>) what should a city's present-day housing policy attempt to accomplish? Increasing supply may be a short-term solution that causes long-term damage.

Finally, it is not at all clear that moving to a highly productive region will increase social mobility and decrease inequality.<sup>294</sup> Moving to productivity assumes that the problem for the unskilled is the location of employment. Unskilled laborers (janitors seem to be the favorite example<sup>295</sup>) are supposed to follow skilled labor into productive regions. But what if the problem for unskilled labor is not barriers to moving to productive places but rather a lack of jobs once they get there? Silicon Valley has lots of coding positions, but far fewer janitorial positions, and obtaining them may be difficult for all kinds of reasons, including skills gaps, automation, racial and other forms of discrimination, or competition from international immigrants.<sup>296</sup>

Or consider again Camden and Mount Laurel, which are part of the same Philadelphia-centered regional job market. Camden residents *already* live in a productive region, just as the working class and poor who live in Chicago, New York, or Detroit already live in economically productive regions. Those residents do not suffer from being excluded from a productive regional labor

estate markets). Climate change, too, is significantly affecting migration. See Jayla Lundstrom, *Climate Change Is Altering Migration Patterns Regionally and Globally*, CTR. FOR AM. PROGRESS (Dec. 3, 2019, 9:04 AM), <https://www.americanprogress.org/issues/immigration/news/2019/12/03/478014/climate-change-altering-migration-patterns-regionally-globally> [<https://perma.cc/C654-HJ7W>] (arguing that climate change is a driving increased immigration from Central America to the United States).

<sup>292</sup> Derek Thompson, *The Remote Work Revolution Will Be Bigger than We Think*, ATLANTIC, (Feb. 2, 2021), <https://www.govexec.com/workforce/2021/02/remote-work-revolution-will-be-bigger-we-think/171761> [<https://perma.cc/HP73-QPD8>] (predicting that long-term shifts to remote work prompted by the pandemic will reduce housing demand in coastal cities).

<sup>293</sup> *Timeline: A Brief History of Detroit's Fiscal Problems*, REUTERS (July 18, 2013, 8:48 PM), <https://www.reuters.com/article/us-usa-detroit-timeline/timeline-a-brief-history-of-detroits-fiscal-problems-idUSBRE96102420130719> [<https://perma.cc/74JC-B9LR>] (showing that a period of development in Detroit preceded a collapse of the city's economy); Scott Beyer, *Why Has Detroit Continued to Decline?*, FORBES (July 31, 2018, 11:58 PM), <https://www.forbes.com/sites/scottbeyer/2018/07/31/why-has-detroit-continued-to-decline> [<https://perma.cc/DJQ5-SPB9>] (emphasizing the role of existing, unused infrastructure in making Detroit's recovery more difficult).

<sup>294</sup> Cf. Derenoncourt, *supra* note 253, at 36 (discussing how the migration of Black Americans to the north did not necessarily lead to decreases in inequality).

<sup>295</sup> See Ganong & Shoag, *supra* note 98, at 78 (discussing how janitors even in productive locations still face vast disparities in quality-of-life compared to their skilled counterparts).

<sup>296</sup> Cf. Eric Chyn & Lawrence F. Katz, *Neighborhoods Matter: Assessing the Evidence for Place Effects* 23 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28953, 2021) (observing that adults do not appear to benefit from intra-metropolitan moves to high-opportunity neighborhoods and suggesting that macroeconomic policies are required to address those challenges).

market,<sup>297</sup> but more likely suffer from a lack of unskilled jobs or other barriers to employment. Moving to productivity does not address the precipitous decline in industrial employment, the prevalence of racially discriminatory hiring practices, or the systematic over-incarceration of the Black male population. If a spatial mismatch between jobs and housing for these groups is not the problem, then land use reforms are not going to solve it.<sup>298</sup>

For skilled and educated labor, moving from a small town to a big city can generate productivity gains, which should redound to the benefit of the mover.<sup>299</sup> But for others, inequality could increase. High-productivity regions, like coastal metropolitan areas, can, and do, have many neighborhoods with high levels of poverty.<sup>300</sup> New York City, the most economically productive place in the U.S. by GDP, appears to have a bifurcated economy: a highly skilled workforce that is serviced by a much less skilled service class.<sup>301</sup> In New York, as in almost all global cities, high levels of productivity coincide with high levels of inequality.<sup>302</sup> And while low-skill workers have traditionally enjoyed a wage premium by moving to a denser and more productive urban area, that effect seems to be weakening in many places. High rates of population growth in metropolitan areas have not been linked with reductions in poverty among metropolitan-area minority populations.<sup>303</sup>

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<sup>297</sup> An implicit mismatch theory appears to underlie the moving to productivity argument. However, there is mixed evidence on whether spatial mismatch actually occurs. See Michelle D. Laysner, *How Place-Based Tax Incentives Can Reduce Geographic Inequality*, TAX L. REV. 16-18 (forthcoming) (“[S]ome researchers [have] fail[ed] to find evidence that special mismatch exists in poor communities.”).

<sup>298</sup> See *id.*

<sup>299</sup> But see Rodríguez-Pose & Storper, *supra* note 99, at 234-35 (“[T]he hourly wages of less-skilled adults in the US, which formerly rose steeply with density, no longer do so . . . .”); Richard Florida, *Why Americans Are Moving Less: New Jobs Aren’t Worth It*, BLOOMBERG: CITYLAB (Apr. 28, 2014, 7:00 AM), <https://www.bloomberg.com/news/articles/2014-04-28/why-americans-are-moving-less-new-jobs-aren-t-worth-it> [<https://perma.cc/WR2Y-6SFV>] (describing the findings Raven Molloy, Christopher L. Smith, & Abigail Wozniak reached that Americans are moving less due to negative economic outcomes in *Declining Migration Within The U.S.: The Role of the Labor Market* (Nat’l Bureau of Econ. Rsch., Working Paper No. 20065, 2014)).

<sup>300</sup> See Aimee Picchi, *9 American Cities with the Worst Income Inequality*, CBS NEWS (Feb. 8, 2018, 5:30 AM), <https://www.cbsnews.com/media/9-american-cities-with-the-worst-income-inequality> [<https://perma.cc/ERD5-826J>] (listing New York City, Boston, Washington, D.C., Atlanta, and San Francisco among the cities with the worst level of income inequality).

<sup>301</sup> *Id.*

<sup>302</sup> Katie Honan, *New York City’s Income-Inequality Gap Hasn’t Changed, Report Says*, WALL ST. J. (Sept. 11, 2019, 12:01 AM), <https://www.wsj.com/articles/new-york-citys-income-inequality-gap-hasnt-changed-report-says-11568174460> [<https://perma.cc/USL9-B684>].

<sup>303</sup> See SHARKEY, *supra* note 240, at 171 (“[H]igh rates of economic growth are no longer linked with reductions in poverty among minority populations . . . .”); see also J.B. Wogan, *Population Growth Means a City is Thriving, or Does It?*, GOVERNING (Aug. 29, 2017), <https://www.governing.com/archive/gov-population-city-growth-thriving.html> [<https://perma.cc/WNC7-G5HN>] (arguing that the growth in a city does not necessarily mean prosperity for all).



In other words, moving to productivity assumes that housing demand and productivity are synonymous—but they might not be. Population growth need not be accompanied by increases in productivity, but rather by decreases.<sup>304</sup> If that is the case, then inviting market-rate housing construction will only further help those who are already productive and relatively well-paid.<sup>305</sup>

The conclusion is fairly obvious: mobility strategies favor the mobile.<sup>306</sup> The opportunity ideology works in conjunction with a productivity regime to generate a certain kind of housing, especially in extremely desirable markets: housing for those who participate in the knowledge economy. For those who are relatively unproductive from an economic perspective or who do not have the wherewithal to take advantage of the opportunities provided by good schools, the mobility strategy is irrelevant. Such is certainly the case for the elderly, disabled or mentally ill, as well as the chronically homeless. But it is also the case for the relatively low-skilled, including the non-college-educated working class, immigrant laborers, the Black poor, and rural whites.<sup>307</sup> For those groups, moving to opportunity or productivity is not a particularly robust option. For them, state-level land use reform is somewhat beside the point.

## V. THE CASE FOR CITY POWER

The critique of the anti-zoning consensus is driven by skepticism of the three legs of the land use reform stool: centralization, deregulation, and mobility. To this point, I have argued that whatever the gains of state law land use reform, they will be offset by significant costs, will have limited effects on the housing crisis for the least well-off, and will likely exacerbate economic inequality more generally.

There is a positive case for maintaining city power over land use, however, informed by the same economic inequality concerns. As already noted, Jane Jacobs made one such argument, arguing that urban land use regulation could be used to preserve a diversity of uses, encourage economic innovation, and allow the poor to grow into the middle class while remaining in place.<sup>308</sup>

This Part extends those claims, arguing that reformers should focus less on what the suburbs should be forbidden from doing and more on what the

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<sup>304</sup> See *supra* note 233; cf. Rodríguez-Pose & Storper, *supra* note 99, at 234-35 (noting that increases in density no longer correlates to increased hourly wages for low-skill workers).

<sup>305</sup> See Rodríguez-Pose & Storper, *supra* note 99, at 235 (indicating that addressing housing prices is a boon for skilled labor and does not necessarily benefit the poor).

<sup>306</sup> See Sitaraman et al., *supra* note 23, at 1770 (criticizing the mobility consensus).

<sup>307</sup> But cf. Gaetano Basso & Giovanni Peri, *Internal Mobility: The Greater Responsiveness of Foreign-Born to Economic Conditions*, J. ECON. PERSPS., Summer 2020, at 77, 78 (2020) (confirming declining internal mobility overall but noting that foreign-born natives with less than ten years in the United States are much more mobile than natives).

<sup>308</sup> See *supra* Section IV.B.

city can do. The regulation of land use is one of the few remaining tools available to cities to pursue meaningful redistribution, especially in those places experiencing a dramatic influx of development capital.<sup>309</sup> By regulating capital in-flows, the city can pursue economic equality goals and avoid the pitfalls of unregulated growth.

#### A. *Extracting Concessions from Mobile Capital*

First, consider land use as a bargaining tool. Because cities are highly vulnerable to market fluctuations and often have limited taxing authority, their capacity to redistribute is constrained.<sup>310</sup> The land use development process can be an alternative means to redistribute the city's locational wealth from mobile residents and firms to relatively less mobile residents and labor.<sup>311</sup>

Examples have proliferated, including what I have elsewhere called "land use unionism": the deployment of the land use permitting process to hold specific developers or incoming industries to higher wage and labor standards.<sup>312</sup> Benjamin Sachs describes some instances of this kind of "local labor law."<sup>313</sup> He recounts how hospital employees working for the Yale-New Haven Hospital system used the hospital's building expansion as leverage to extract a deal granting a union election outside of federal guidelines.<sup>314</sup> The hospital's expansion plans required numerous city land use approvals, including permits for demolition and construction and the creation of a new city zoning category.<sup>315</sup> That process required mayoral and city council approval, which could be leveraged into a series of agreements exchanging

<sup>309</sup> For a list of such tools, which include rent control, exactions, development fees, and other efforts to tax land value, see CONDON, *supra* note 157, at ch. 6. Many of these tools are rejected by market-oriented anti-zoning advocates.

<sup>310</sup> GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 75-83 (2008) (emphasizing that cities often lack the fiscal autonomy that is normally attributed to them).

<sup>311</sup> Consider, for instance, the concept of Land Value Capture (LVC)—common in England—whereby developers regularly pay for public goods through taxes on the increased value of upzoned land. See, e.g., Alexander Lord, Chi-Wan Cheang & Richard Dunning, *Understanding the Geography of Affordable Housing Provided Through Land Value Capture: Evidence from England*, 2021 URB. STUD. 1, 2-3 (discussing cash contributions provided by development firms in exchange for local resident cooperation).

<sup>312</sup> See Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 517-18 (2009) (listing means by which incoming businesses may be restricted when opening in a new location); cf. Andrew Elmore, *Labor's New Localism* 35-49 (unpublished manuscript) (on file with author) (describing how a shifting focus to city-level lawmaking has improved labor conditions, even in regions historically hostile to unions).

<sup>313</sup> Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1173 (2011) (outlining four examples of tripartite labor lawmaking involving local government).

<sup>314</sup> *Id.* at 1174-79.

<sup>315</sup> *Id.* at 1175 (describing the required permits and approvals).

land use permissions for labor concessions.<sup>316</sup> Scott Cummings's recent book describes similar processes in Los Angeles where the local labor movement has leveraged the land use developmental process to push pro-labor agendas.<sup>317</sup> Similar efforts have been made to use the land use process to gain wage, labor, or health care concessions from big-box and chain stores seeking development go-aheads.<sup>318</sup>

Urban labor movements have resorted to the municipal planning and zoning process for two reasons. The first reason is that cities cannot adopt their own labor laws—federal law preempts state and local laws.<sup>319</sup> State law in many cases also preempts local wage, hours, or employee-friendly regulations.<sup>320</sup> The second reason is that cities are increasingly desirable locations for investment. The land use process provides groups like the Yale-New Haven hospital employees some traction in pursuing labor-friendly ends.<sup>321</sup>

The rise of community benefits agreements (CBAs) is another example of the use of the land use process to pursue redistributive ends. CBAs are individually negotiated deals with developers seeking land use approvals; community support is often a necessary precondition for such approvals.<sup>322</sup> A CBA can include a range of commitments, such as agreements to limit displacement, provide resettlement support, add additional low-income units, pay a living wage, hire locally, or provide for sustainable or environmentally friendly development practices.<sup>323</sup> CBAs began informally, as agreements between community groups and developers made in the shadow of the leverage that the local land use process provides.<sup>324</sup> However, a handful of

<sup>316</sup> *Id.* at 1174-79.

<sup>317</sup> See SCOTT L. CUMMINGS, AN EQUAL PLACE: LAWYERS IN THE STRUGGLE FOR LOS ANGELES 9-12 (2021) (describing organizing of low wage workers in Los Angeles).

<sup>318</sup> See Schragger, *supra* note 312, at 516-18 (describing one such attempt in Chicago); Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1091 n.466 (2005) (discussing how local legislatures used influence on land use policy to address the development of chain stores).

<sup>319</sup> See generally Labor Management Relations Act, 29 U.S.C. §§ 141-97 (regulating the labor force); National Labor Relations Act, 29 U.S.C. §§ 151-69 (regulating employee collective bargaining rights); *Machinists v. Wis. Emp' Rel. Comm'n*, 427 U.S. 132 (1976) (establishing that federal law preempts state policy in regulating the labor force); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959) (indicating that the Supreme Court has long held that the federal government has exclusive jurisdiction over labor disputes).

<sup>320</sup> See *supra* Section II.B.

<sup>321</sup> This is especially important as other legal avenues have narrowed or failed. See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1569-87 (2002) (describing state preemption and the “deconstitutionalization” of labor law).

<sup>322</sup> See Schragger, *supra* note 312, at 509 (explaining that CBAs are agreements that trade community support for resident benefits).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

cities have themselves adopted community benefit ordinances, including Detroit, Houston, Ypsilanti, and Pontiac.<sup>325</sup>

CBA's have been highlighted as potential mechanisms for addressing structural economic inequality through community control of productive capital.<sup>326</sup> But they are only possible in those cities that retain significant powers over land use. In the absence of local land use authority, developers have very little reason to agree to a CBA.<sup>327</sup> The city's authority over land use is one of the few ways that locals can control the cross-border movement of mobile capital.

That authority is increasingly important as global finance capital moves rapidly into both rising and declining cities. Consider the growing concern about the global "financialization of housing": the use of housing as an investment vehicle by large-scale investors who hold urban land for

<sup>325</sup> Anne Choike, *A New Urban Front for Shareholder Primacy*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 79, 110-18 (2019).

<sup>326</sup> K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CAL. L. REV. 679 (2020) (summarizing the main community control movements in U.S. cities).

<sup>327</sup> It is instructive to compare CBA processes with more recent proposals to compensate locals for housing development in their neighborhoods. See Infranca, *supra* note 13, at 1319-24 (providing examples of financial benefits to local residents, such as vouchers, loans, and tax increment transfers). For some, compensation is simply a payoff, a political strategy to make locals less adverse to incoming development; those advocates would prefer to preempt restrictive land use rules altogether. See, e.g., David Schleicher, *City Unplanning*, 122 YALE L. J. 1670, 1727 (2013) (discussing how compensation to local residents can reduce resistance to development).

For other scholars, however, compensation is meant to capture the increased wealth generated through upzonings by distributing some portion of that wealth to the community—an acknowledgement that land use permissions regularly result in higher land values. See Infranca, *supra* note 13, at 1319 (discussing how compensation relates to the value of the land under development); Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RES. L. REV. 513, 532 (2020) (proposing a method of value capture of parcel auctions). Compensation may also be intended to off-set negative externalities associated with new development, rising house prices attributable to gentrification, or the costs of displacement. See Infranca, *supra* note 13, at 1322 (explaining how a transferrable development rights program could ameliorate the negative ramifications of land development). The concept of land value capture is not new. See *supra* note 187 (discussing Georgism).

This leads to two observations related to the scale of decision-making. The first observation is that local governments already bargain over growth, either by using rezonings and property tax incentives to "buy" development or by using exactions, impact fees, proffers, and CBAs to extract concessions from it. See Edward W. De Barbieri, *Lawmakers as Jobs Buyers*, 88 FORDHAM L. REV. 15, 25 (2019) (listing some of the tools state and local governments can use to "buy" jobs); Rahman & Simonson, *supra* note 326, at 681 (suggesting that economic development is a priority for many communities). Whether one favors these existing exercises of local power or more recent proposals to "sell" or "auction" local land use regulations depends on what one believes local governments should be buying or selling (e.g., jobs, development, housing, public goods). The second observation is that in circumstances when costs to locals are very high, such as is the case with displacement, compensation is likely to be insufficient. See, e.g., THOMPSON FULLILOVE, *supra* note 283, at 52-107 (citing national priorities as justification for significant displacement resulting from economic development).

speculative purposes.<sup>328</sup> In Detroit, capital has rapidly flowed into the distressed housing market, not with the aim of renting or selling those properties in the short term, but as an investment vehicle awaiting the next economic upturn.<sup>329</sup> These purchases—and the holding of foreclosed properties by banks that do not sell or rent them—take housing off the market. Between 2011 and 2013, hedge funds purchased more than 350,000 properties nationally.<sup>330</sup> In Detroit alone, nearly 25% of all properties have passed through speculation-related sales pipelines in the last decade.<sup>331</sup> Many of those units are empty,<sup>332</sup> even as rents have increased for those who can least afford them.<sup>333</sup>

The parking of global finance capital in unused or “ghost” luxury apartments is another feature of the financialization of housing; the construction of mostly unoccupied luxury housing units in high-demand cities does little to increase the supply of affordable housing.<sup>334</sup> Similarly,

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<sup>328</sup> For a more extensive definition, see MANUEL B. AALBERS, *THE FINANCIALIZATION OF HOUSING: A POLITICAL ECONOMY APPROACH 1-2* (2016) (attempting to define the term). *See also* U.N. Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*, ¶¶ 1-10, U.N. Doc. A/HRC4/18 (Feb. 5, 2007) (prepared by Miloon Kothari, *Special Rapporteur*) (describing the implementation of the right to adequate housing); *cf.* CONDON, *supra* note 157, at 71-86 (providing a history of financialization of land in the U.S.).

<sup>329</sup> *See* Margaret Dewar, *Reuse of Abandoned Property in Detroit and Flint: Impacts of Different Types of Sales*, 35 J. PLAN. EDUC. & RSCH. 347, 353-54 (2015). *See generally* John Accordini & Gary T. Johnson, *Addressing the Vacant and Abandoned Property Problem*, 22 J. URB. AFFS. 301 (2002) (addressing the problem of property abandonment and the efforts by cities to remedy this problem).

<sup>330</sup> Joshua Akers & Eric Seymour, *The Eviction Machine: Neighborhood Instability and Blight in Detroit's Neighborhoods 5* (Poverty Sols. U. of Mich., Working Paper No. 5-19, 2019).

<sup>331</sup> *See id.* at 3.

<sup>332</sup> Dewar, *supra* note 329, at 353-54 (“Nearly 80 percent of this property remained vacant lots with no evidence of use.”).

<sup>333</sup> JULIE CASSIDY, MICH. LEAGUE FOR PUB. POL’Y, *DETROIT: THE EVOLUTION OF A HOUSING CRISIS 1-2* (2019), <https://mlpp.org/detroit-the-evolution-of-a-housing-crisis> [<https://perma.cc/853U-63SW>] (“[T]he average rent in Detroit increased by 26% from 2005 to 2016.”); *see also* Julie Mah, *Gentrification-Induced Displacement in Detroit, Michigan: An Analysis of Evictions*, 31 HOUS. POL’Y DEBATE 445, 447 (2020) (“[A] weak housing market, with high vacancy rates does not necessarily mean increased housing affordability for residents, especially low-income residents . . . Revitalization efforts to improve the housing stock can create even more housing precarity, as these efforts typically attract wealthier in-movers and result in increased competition . . .”).

<sup>334</sup> *See* Jake Wegmann, *Residences Without Residents: Assessing the Geography of Ghost Dwellings in Big U.S. Cities*, 42 J. URB. AFFS. 1103, 1104 (2020) (describing the ghost dwelling phenomenon and noting that “[i]n 37 of the 50 largest U.S. cities, ghost dwelling growth has outpaced housing growth”). Estimates have put the number of ghost apartments in New York City at over 4,000. N.Y.C. CHAPTER OF THE RIGHT TO THE CITY ALL., *PEOPLE WITHOUT HOMES & HOMES WITHOUT PEOPLE: A COUNT OF VACANT CONDOS IN SELECT NYC NEIGHBORHOODS 5-6* (2010). A similar phenomenon seems to be occurring in Los Angeles. *See* ALEXANDER FERRER, TERRA GRAZIANI, JACOB WOOCHER & ZACHARY FREDERICK, *THE VACANCY REPORT: HOW LOS ANGELES LEAVES HOMES EMPTY AND PEOPLE UNHOUSED* at vi, <https://www.acceinstitute.org/thevacancyreport> [<https://perma.cc/X8ZP-T3YJ>] (asserting that 97% of new rental

cities that have experienced high demand in short-term rentals have witnessed increased housing costs;<sup>335</sup> in certain cities and certain neighborhoods, the short-term rental demand is high enough to crowd out other land uses.<sup>336</sup>

In some cases, that process could be accelerated by eliminating single-family zoning. Apartment units may be more marketable for short-term rentals. And accessory dwelling units—as already noted—may become for-profit short-term rentals rather than permanent moderate-income housing.<sup>337</sup> Indeed, where demand is overwhelming, as it might be in places like New York and other tourist destinations, many additions to the housing supply will never become permanent housing.<sup>338</sup>

### B. *The False Choice Between Growth and No-Growth*

The problem of housing financialization leads to a more general point about the efficacy of growth as a strategy for both poverty alleviation and affordable housing provision. As previously observed, U.S.-style growth-oriented development policy<sup>339</sup> does not have a very good track record.<sup>340</sup> Urban renewal was a massive subsidy to downtown real estate interests that ended up destroying numerous low-income, minority neighborhoods, providing little housing in return.<sup>341</sup> Tax increment financing (TIF) is

housing construction in Los Angeles is luxury housing, that 46,000 units are held in a state of “non-market vacancy,” and that 67% of residential units are owned by investment entities).

<sup>335</sup> See Dayne Lee, Note, *How Airbnb Short-Term Rentals Exacerbate Los Angeles’s Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL’Y REV. 229, 229, 234-40 (2016) (noting a 7.3% rent increase in Los Angeles in 2014 and tracing the impact of short-term rentals on housing prices); Hans R.A. Koster, Jos van Ommeren & Nicolas Volkhausen, *Short-Term Rentals and the Housing Market: Quasi-Experimental Evidence from Airbnb in Los Angeles*, 124 J. URB. ECON. 103356, at 1, 18 (2021) (finding impacts of Airbnb on rents and property values in Los Angeles).

<sup>336</sup> See Junfeng Jiao & Shunhua Bai, *Cities Reshaped by Airbnb: A Case Study in New York City, Chicago, and Los Angeles*, 52 ENV’T & PLAN. A: ECON. & SPACE 10, 12 (2020) (detailing the role of short-term rentals in driving out other forms of land use).

<sup>337</sup> See *supra* note 199 and accompanying text.

<sup>338</sup> Tom Vanderbilt, *Did Airbnb Kill the Mountain Town?*, OUTSIDE (July 11, 2017), <https://www.outsideonline.com/2198726/did-airbnb-kill-mountain-town> [https://perma.cc/4RAA-XWAF] (describing the negative impact of short-term rentals on housing supply in tourist destinations).

<sup>339</sup> See generally Tore Sager, *Neo-Liberal Urban Planning Policies: A Literature Survey 1990–2010*, PROGRESS PLAN., Nov. 2011, at 147, 152 (2011) (outlining the history of American neo-liberal urban planning policies and their underlying goals).

<sup>340</sup> For city-level case studies, see Julia Conte & Janet Li, *Neoliberal Urban Revitalization in Chicago*, U. CHI. ADVOC. F. 19 (2013), studying Chicago; Ute Lehrer & Jennefer Laidley, *Old Mega-Projects Newly Packaged? Waterfront Redevelopment in Toronto*, 32 INTL. J. URB. & REG’L RSCH. 786 (2008), studying Toronto; and Christopher Mele, *Neoliberalism, Race and the Redefining of Urban Redevelopment*, 37 INTL. J. URB. & REG’L RSCH. 598 (2012), studying Chester, Pennsylvania.

<sup>341</sup> See *Public Menace*, *supra* note 125, at 47-52 (describing bipartisan critiques of urban renewal). Perhaps for this reason, poor, minority residents tend to be skeptical of market-rate, supply-side housing proposals and have pointed out that YIMBYs are predominantly young, white,

intended to subsidize urban revitalization efforts, but in Chicago, where TIF has been deployed extensively, developers have used the monies to construct luxury housing that would likely have been built regardless of any subsidy.<sup>342</sup> Opportunity Zones, the most recent version of federally-funded, place-based financial assistance, has been criticized on the grounds that it is a giveaway to real estate interests<sup>343</sup>—unsurprising considering the “pro-gentrification” history of federal place-based tax incentives.<sup>344</sup> Meanwhile, Amazon’s high-profile auction of its second headquarters to the highest government bidder is only the most visible example of a subsidy competition that underwrites real estate markets in cities across the country.<sup>345</sup> CBAs and other local efforts to control capital flows seem like a small but necessary corrective to these much larger forces favoring developmental capital—a mechanism for ensuring what Olatunde Johnson and others have called “accountable development.”<sup>346</sup>

The anti-zoning debate tends to obscure this “accountability” alternative, as it often seems to present only diametrically opposed options: growth or no-growth, free markets or protectionism, cosmopolitanism or parochialism. NIMBYism has been equated with the local political economy of the “homevoter”—home-owning residents resistant to development out of

and well-educated. See Fernando Marti, *YIMBY, White Privilege, and the Soul of Our Cities*, SHELTERFORCE (Feb. 19, 2019), <https://shelterforce.org/2019/02/19/yimby-white-privilege-and-the-soul-of-our-cities> [<https://perma.cc/74HA-KY88>] (criticizing YIMBYs for ignoring diverse activists, especially activists of color); Dillon, *supra* note 27 (“The scene of predominantly white protestors shouting over people of color fed a criticism that has dogged backers of recent legislative efforts to boost home building.”); Underkuffler, *supra* note 170, at 243-46 (describing how predominantly minority and poor communities in New York and Boston have objected to upzoning plans, arguing in some cases that rezoning is “ethnic cleansing”).

<sup>342</sup> SCHRAGGER, *supra* note 57, at 212; see also Jared F. Knight, Note, *Is Tax Increment Financing Racist? Chicago’s Racially Disparate TIF Spending*, 101 IOWA L. REV. 1681, 1712 (2016) (“TIF dollars sometimes fund projects like car dealership relocations, luxury condominiums, and tourist attractions.”).

<sup>343</sup> Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Sept. 27, 2020), <https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html> [<https://perma.cc/LAZ6-FJWT>] (“[T]he Trump administration’s signature plan to lift them—a multibillion-dollar tax break that is supposed to help low-income areas—has fueled a wave of developments financed by and built for the wealthiest Americans.”).

<sup>344</sup> See Laysner, *supra* note 129, at 747-48 (arguing that the gentrifying effect of Opportunity Zones and other place-based incentives is a “feature” rather than a “flaw”).

<sup>345</sup> Derek Thompson, *Amazon’s HQ2 Spectacle Isn’t Just Shameful—It Should Be Illegal*, ATLANTIC (Nov. 12, 2018, 10:10 AM), <https://www.theatlantic.com/ideas/archive/2018/11/amazons-hq2-spectacle-should-be-illegal/575539> [<https://perma.cc/2PjX-GNCU>] (decrying Amazon’s leveraging its economic benefits to cities to extract vast tax and regulatory concessions and linking it to a broader phenomenon of municipal subsidies to corporate interests).

<sup>346</sup> See Olatunde C.A. Johnson, *Unjust Cities? Gentrification, Integration, and the Fair Housing Act*, 53 U. RICH. L. REV. 835, 865 (2019) (defining accountable development as asking for concrete public benefits in exchange for pro-development municipal policies).

concern for protecting their property values and exclusive public services.<sup>347</sup> These homevoter interests are contrasted with an alternative local political economy—that of the “growth machine”<sup>348</sup>—representing the interests of developers and city boosters in generating wealth through urban development.<sup>349</sup> Though often treated as opposing forces, these two accounts are actually variations on a theme: they represent different strategies for enhancing and preserving land-based wealth.

Consider first the city as a “growth machine,” a socio-political claim about who benefits from urban development and economic growth generally.<sup>350</sup> In his original formulation, Harvey Molotch famously observed that

[t]he desire for growth provides the key operative motivation toward consensus for members of politically mobilized local elites, however split they might be on other issues, and that a common interest in growth is the overriding commonality among important people in a given locale—at least insofar as they have any important local goals at all.<sup>351</sup>

Consistent with this original account, urban theorists have explained the dominance of business interests in city politics as a function of the city’s dependence on private economic activity.<sup>352</sup>

Importantly, Molotch’s original growth machine thesis noted the drawbacks of economic growth for non-elites and less economically mobile residents. He pointed out that job growth in cities is potentially associated with unemployment; because urban growth induces regional in-migration, current residents may face competition from newcomers.<sup>353</sup> Though the benefits of growth are touted as broadly lifting all boats, Molotch observed that those benefits are not evenly distributed.<sup>354</sup> Growth machine interests

<sup>347</sup> FISCHER, *supra* note 53, at 4 (2001); see Vicki Been, Josiah Madar, & Simon McDonnell, *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 231-33 (2014) (summarizing Fischer’s hypothesis and describing the economic and racial implications of the theory).

<sup>348</sup> Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309, 309-10 (1976) (coining the term).

<sup>349</sup> Been et al., *supra* note 347, at 230-34 (summarizing and contrasting the “growth machine” and “homevoter” theories).

<sup>350</sup> Molotch, *supra* note 348, at 309-10.

<sup>351</sup> *Id.* at 310.

<sup>352</sup> See, e.g., CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA 1946-1988* (1989) (describing the business-city regime in Atlanta).

<sup>353</sup> See Molotch, *supra* note 348, at 320-21 (“[T]he tendency is for rapid growth to be associated with higher rates of unemployment.”). Molotch specifically refuted the idea that growth leads to more jobs, often touted as the primary reason for courting private investment and unfettered economic (and housing) development. *Id.* at 320.

<sup>354</sup> *Id.* at 320 (“[L]ocal growth is a transfer of quality of life and wealth from the local general public to a certain segment of the local elite.”).



also explain the city's subsidization of the already-rich. Though it has been repeatedly shown that they rarely work, location incentives in the form of tax breaks and direct cash subsidies are regularly distributed to corporations, developers, and owners of professional sports teams—all while being sold to voters as necessary to maintain the city's economic and fiscal health.<sup>355</sup>

The “homevoter hypothesis,” by contrast, describes the microeconomic incentives of homeowners and their relationship to the financing of local public goods. William Fischel's original formulation is a modification of Charles Tiebout's concept of the consumer voter: the citizen resident “shopping” for a local government that fits her preferred tax-and-spend bundle and whose location decision turns on how well the local government delivers local public goods.<sup>356</sup> Fischel's contribution was to add homeownership as the mechanism by which the consumer voter might gain from her “investment” in a particular local government.<sup>357</sup> The homevoter's primary asset is the family home; she will therefore act to defend that home's value, purportedly by favoring local government investments (such as schools) that increase the value of that asset while disfavoring municipal policies that might decrease that value. The key assumption here is that local taxing and spending decisions are capitalized into the value of the home.<sup>358</sup> Local government leaders in jurisdictions dominated by homevoters will thus limit newcomers so as to keep costs down, but not enough to undermine the local tax base on which existing services depend.<sup>359</sup>

Thus, while 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.<sup>360</sup> In the case of an urban jurisdiction with a mixed economy, the need for ongoing investment in the local economy leads to policies favoring mobile capital: keeping the economy strong and stable requires “growth.”<sup>361</sup> In the case of a suburban jurisdiction, the preservation of wealth—keeping relatively mobile homeowners from fleeing—may take precedence. In both cases,

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<sup>355</sup> See Andrew Zimbalist & Roger Noll, *Sports, Jobs, & Taxes: Are New Stadiums Worth the Cost?*, BROOKINGS (June 1, 1997), <https://www.brookings.edu/articles/sports-jobs-taxes-are-new-stadiums-worth-the-cost> [<https://perma.cc/89PR-CPGK>] (explaining how team and corporate relocations are often detrimental to municipal finances).

<sup>356</sup> Tiebout, *supra* note 53, at 419-20; see also FISCHEL, *supra* note 53, at 70-71.

<sup>357</sup> FISCHEL, *supra* note 53, at 39-51.

<sup>358</sup> *Id.* at ch.3.

<sup>359</sup> *Id.*

<sup>360</sup> *Cf.* CONDON, *supra* note 157, at ch. 2 (connecting the issues of political power and capital to land-based wealth).

<sup>361</sup> See SCHRAGGER, *supra* note 57, at 118-20; Molotch, *supra* note 348, at 313 (“[T]he organized effort to affect the outcome of growth distribution is the essence of local government as a dynamic political force.”).

however, the relatively well-off, or at least somewhat mobile (be they residents or businesses) exercise outsized influence in local politics.

Growth-oriented YIMBYism and homevoter-oriented NIMBYism thus share convergent interests. Both require local jurisdictions to chase and then retain land-based investment. Both favor the skilled and relatively wealthy over the unskilled and relatively poor. Instead of focusing on providing for the public service or social welfare needs of existing residents, both growth and no-growth politics are concerned mainly with the characteristics of newcomers and whether they bring a positive or negative return to the local economy. The commonality is the local jurisdictions' subservience to mobile capital—the need ultimately to encourage in-migration or prevent out-migration of mobile wealth, whether in the form of residents or businesses.<sup>362</sup>

That subservience means that the embrace of growth will likely reproduce existing metropolitan-area inequalities. As I have already observed, the anti-zoning moment arrives on-cue historically, as cities become increasingly desirable places and a new generation of relatively mobile home-seekers begins to move back to the cities from which their parents or grandparents once fled. An economic inversion whereby cities are newly popular and suburbs stagnate is not going to be addressed by embracing a state-wide growth agenda. Declining suburbs will still decline despite their low housing costs, just as Camden declined fifty years ago despite its low-cost housing. If mobile capital dictates local fiscal health, a land use reform agenda that primarily embraces the market will simply accelerate the cyclical processes of spatial disinvestment.

More importantly, in a political economy driven by the imperative of economic growth, the community's interest in economic stability or the individual's interest in remaining in place is subsumed by the national interest in macro-economic efficiency. Capital is utterly footloose. Labor chases capital around the country. In this ideal of frictionless movement, the geographic allocation of capital is presumed to be efficient. Encouraging labor to become more mobile—to physically follow that allocation—becomes the goal of national policy regardless of the destabilization costs to local communities.<sup>363</sup>

As previously noted, those costs are high. A peripatetic and uprooted labor force provides some obvious benefits to capital. But as a matter of political economy, a service class that is required to relocate every generation or so is a recipe for extreme political instability. Neither the growth machine

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<sup>362</sup> See Schragger, *Cities*, *supra* note 8, at 1096 (noting that cities can be “both too protectionist and not protectionist enough” in relation to mobile capital).

<sup>363</sup> See, e.g., Schleicher, *supra* note 32, at 84, 135-39 (disfavoring homeownership and other practices that limit mobility, and suggesting that new housing stock be built so that it can be easily demolished to facilitate the “graceful” decline of unproductive cities).

nor the homeowner interrogates why capital goes where it does, nor demands that capital assume obligations to the places in which it locates or leaves.<sup>364</sup> Growth is identified with locational preferences as reflected in the market for land—which is another way of saying with the preferences and choices of those who are mobile.

### C. *Rebalancing Public and Private Power*

The alternative to a strategy of chasing growth is to provide cities with the capacity to respond to their citizens' economic and social welfare needs in place. Local housing, land use, and development policies need not only be deployed to either enable or restrict mobile capital; local policies can also be deployed to alter the terms on which capital invests and disinvests, especially in low- and moderate-income communities.

Political opportunities are available. Increasing evidence suggests that urban constituencies are willing to adopt local redistributionist policies.<sup>365</sup> Affordable housing coalitions are not shut out of municipal politics—they are already exercising power there.<sup>366</sup> What they and other housing reformers often need is independence from hostile state legislatures.

The municipal living wage movement provides a template. In the absence of state and federal action, cities were among the first governments to respond to the demand by labor activists to embrace a living wage.<sup>367</sup> Numerous cities have done so.<sup>368</sup> Skeptics believed, and continue to argue, that local minimum wages will lead to capital flight.<sup>369</sup> Not only have cities that have adopted local

<sup>364</sup> Joseph Singer makes such a claim, however. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 640-41 (1988) (arguing that industrial siting decisions should be constrained by community reliance interests in stable employment).

<sup>365</sup> Michael Crow, *Deciding to Provide: Local Decisions on Providing Social Welfare*, 54 AM. J. POL. SCI. 906, 918 (2010) (“[L]ocal governments facing lower exit costs are significantly more likely to provide social welfare functions.”); Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 605 (2014) (describing liberal cities as having less regressive tax systems and larger social welfare expenditures).

<sup>366</sup> See, e.g., CONOR DOUGHERTY, *GOLDEN GATES: FIGHTING FOR HOUSING IN AMERICA* (2020) (describing pro-housing coalitions in San Francisco).

<sup>367</sup> Kamal Muilenburg & Gangaram Singh, *The Modern Living Wage Movement*, 39 COMP. & BENEFITS REV. 21, 26 (2007) (describing pioneering living wage laws in Baltimore; Sonoma, California; Sacramento; Santa Monica; and elsewhere); David Reynolds, *Living Wage Campaigns as Social Movements: Experiences from Nine Cities*, 26 LAB. STUD. J. 31 (2001) (discussing the impact of grassroots campaigns on local living wage legislation).

<sup>368</sup> *Minimum Wage Tracker*, ECON. POL'Y INST., <https://www.epi.org/minimum-wage-tracker> [<https://perma.cc/BG77-C28S>] (last visited Sept. 21, 2020) (listing forty-five localities with minimum wages above the state minimum).

<sup>369</sup> See generally DONALD DEERE, KEVIN M. MURPHY, & FINIS WELCH, *SENSE AND NONSENSE ON THE MINIMUM WAGE* (1990).

minimum wages not seen significant outflows of capital or jobs, but research suggests that such ordinances reduce urban poverty.<sup>370</sup>

The living wage movement provides some important lessons to affordable housing advocates. The first lesson is that despite the dominant race-to-the-bottom narrative, cities are willing to, and capable of, engaging in significant social welfare provision and labor-friendly redistribution. The conventional view has been that the redistributive functions of government are appropriately undertaken at the federal or state scale and that local governments must, by necessity, adopt a relatively low-tax and non-redistributive approach.<sup>371</sup> The urban resurgence, however, has altered the relative economic strength of cities—at least in certain parts of the country. Because of their locational advantages, high-demand cities have more capacity to charge the wealthy without encouraging capital flight. For this reason, cities have become important sites for organizing low-wage workers, especially in the healthcare, hospitality, and service industries.<sup>372</sup>

The second lesson is that city power is a necessary predicate for the success of urban economic equality movements. Twenty-five states prevent cities from adopting local minimum wage ordinances.<sup>373</sup> As previously discussed, state and federal laws also prevent cities from adopting family leave policies, health care mandates, wage theft and fair hours laws, labor protections, and employment anti-discrimination laws.<sup>374</sup> Cities can adopt their own fair- and affordable-housing plans, impose taxes to fund those plans, and can use their land use and zoning authority to implement them,<sup>375</sup> but only if they have the legal authority to do so. It is for that reason that many policy reformers have come to the same realization that animated the Progressive Era push for home rule early in the last century:<sup>376</sup> building local

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<sup>370</sup> David Neumark & Scott Adams, *Do Living Wage Ordinances Reduce Urban Poverty?* 28 (Nat'l. Bureau of Econ. Rsch., Working Paper No. 7606, 2000) (“Our findings indicate that living wage ordinances boost wages of low-wage workers.”).

<sup>371</sup> See, e.g., Wallace E. Oates, *An Essay on Fiscal Federalism*, J. ECON. LITERATURE 1120, 1125-26 (1999) (“[S]uch programs are not well suited to use at decentralized levels of government, [and] are best employed by higher levels of government.”).

<sup>372</sup> See, e.g., CUMMINGS, *supra* note 317, at 9-10 (describing the city as a “tool . . . of struggle” for the low-wage worker movement in Los Angeles).

<sup>373</sup> LAURA HUIZAR & YANNET LATHROP, NAT'L. EMP. L. PROJECT, FIGHTING WAGE PREEMPTION: HOW WORKERS HAVE LOST BILLIONS IN WAGES AND HOW WE CAN RESTORE LOCAL DEMOCRACY 3 (2019), <https://s27147.pcdn.co/wp-content/uploads/Fighting-Wage-Preemption-Report-7-19.pdf> [<https://perma.cc/D3LY-RFVC>].

<sup>374</sup> *Id.* at 10 (describing the growth of state preemption statutes across a number of subjects).

<sup>375</sup> See, e.g., Johnson, *supra* note 346, at 858-61 (2019) (describing Los Angeles' Assessment of Fair Housing (“AFH”), enacted pursuant to HUD requirements, presenting a framework for the city to address affordable housing).

<sup>376</sup> See generally FREDRIC C. HOWE, *THE CITY: THE HOPE OF DEMOCRACY* (1905) for such an account.

reform coalitions is useless if state power can readily override local gains. Combating state law preemption is thus a necessary precondition for pursuing an economic reform agenda.<sup>377</sup> Progress on substantive policy changes first requires municipal independence.<sup>378</sup>

City independence is necessary for another reason. The lack of affordable housing is just one symptom of an era of increasing and persistent economic inequality. High-demand cities with average housing prices in the millions have become embodiments of that inequality. But cities are also repositories of enormous land-based wealth that can be more fairly distributed if given the opportunity.<sup>379</sup>

The city's status as a subordinate government, however, serves as a barrier to effective structural economic reform. As Gerald Frug observed over four decades ago, the city's economic and political weakness is a function of the nineteenth century distinction between public and private corporations and the dominance of the latter over the former.<sup>380</sup> Municipal corporations are understood to be creatures of the state, limited in the exercise of their autonomy, and in need of restraint lest they invade private rights, especially of property. By contrast, the private business corporation is understood to be an association of like-minded citizens, expansive in its sphere of authority, and protected in its rights from invasion by the government.

The list of city disabilities is long.<sup>381</sup> A city cannot generally run businesses or operate banks; it cannot regulate mortgage lenders.<sup>382</sup> Often it cannot dictate what should be done with its own property. The city is responsible in the first instance for its residents' basic needs but the city's ability to tax and spend is highly constrained. The city cannot readily develop revenue sources beyond its borders or even within them;<sup>383</sup> it often cannot expand its territorial footprint; and it cannot effectively resist disinvestment

<sup>377</sup> Cf. NAT'L LEAGUE OF CITIES, *supra* note 163, at 5 ("At this critical juncture, the need to empower cities, towns and villages is clear . . .").

<sup>378</sup> For the original, Progressive Era version of this argument, see generally HOWE, *supra* note 376.

<sup>379</sup> See CONDON, *supra* note 157, at ch. 6, for proposals to do so, including a land value tax.

<sup>380</sup> Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1107 (1980) (describing this bifurcation).

<sup>381</sup> For a list of city disabilities, *see id.* at 1062-67 ("American cities today do not have the power to solve their current problems or to control their future development."); SCHRAGGER, *supra* note 57, at 78-79 (arguing that federalism deeply marginalizes and constrains cities and municipalities from wielding power effectively).

<sup>382</sup> *See, e.g.*, *Am. Fin. Servs. Assn. v. City of Oakland*, 104 P.3d 813, 823-28 (Cal. 2005) (reserving the right to regulate mortgage lending to state legislatures).

<sup>383</sup> Christine, Yuanshuo Xu, Yunji Kim, & Mildred E. Warner, *Starving Counties, Squeezing Cities: Tax and Expenditure Limits in the US*, 23 J. ECON. POL'Y REFORM 101, at 9-13, 19 (2020) (providing data on how state-imposed local Tax and Expenditure Limits (TELS) restrict local government's revenue raising ability).

except by promising tax incentives to “footloose” corporations.<sup>384</sup> Cities must justify most of their policies with reference to a grant of state authority, or else restrict their operations to a narrow sphere. And ultimately, whatever the city chooses to do is subject to state override, except in extremely narrow circumstances. The city’s capacity to control its economic fate turns in large part on what the state permits it to do, and that is very little.<sup>385</sup>

A core concern for reformers during both the Progressive Era and again during the decline of the industrial city in the late twentieth century was how to bring public, democratic power to bear on private actors’ decisions to (dis)invest in the city—to make mobile capital responsive to public power.<sup>386</sup> In the wake of the suburban century, as old-line cities entered a steep economic decline, those concerns shifted to suburban exclusion.

As Frug and others have argued, however, city power need not be synonymous with defensive land use-based localism.<sup>387</sup> Advocates of city power seek to champion the exercise of public, democratic power, not to support a privatized version of local autonomy in a suburban enclave not appreciably different from a homeowners’ association.<sup>388</sup> Understood as an alternative to corporate control, city power is distinguishable from suburban, defensive homeowner-based localism.<sup>389</sup>

Importantly, state constitutional home-rule grants only address state-local relations. They have no bearing on this one-sided relationship between public and private power. Critics of localism are right to raise concerns about what kind of local autonomy is protected by those grants. But in doing so, they have jettisoned the pre-suburban conception of home rule that animated the Progressive Era reformers—the version of home rule that sought to right the

<sup>384</sup> FRUG & BARRON, *supra* note 310, at 148-49 (noting that state-imposed limits and the threat of capital flight lead global cities to offer tax and other incentives); see SCHRAGGER, *supra* note 57, at ch. 4 (providing further examples of incentives used by cities, with a particular emphasis on land use, as well as encouraging “footloose” capital).

<sup>385</sup> See FRUG & BARRON, *supra* note 310, at 75 (“[S]tate law exerts significant control over nearly every aspect of the local budget.”); Frug, *supra* note 380, at 1144 (“[N]either corporations nor cities in their current form are truly organized to protect property rights.”); SCHRAGGER, *supra* note 57, at 247.

<sup>386</sup> For a summary of the literature, see SCHRAGGER, *supra* note 57, at 56-65.

<sup>387</sup> GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 54-61, 143-64 (1999) [hereinafter FRUG, CITY MAKING] (advocating regional negotiations going beyond land use to education, crime, and municipal services).

<sup>388</sup> Compare Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1519 (1982) (criticizing Frug’s *The City as a Legal Concept* for not considering the private homeowners association as the “obvious private alternative to the city”) with Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1591 (1982) (responding to and rejecting Ellickson’s critique).

<sup>389</sup> See FRUG, CITY MAKING, *supra* note 387, at 59-60 & ch. 6 (making this distinction clear throughout an extended discussion of city power).

imbalance between private and public power<sup>390</sup> and provide the city with the means to promote ends other than the promotion of private capital.<sup>391</sup>

To be sure, city leaders may not act to do so. They may in fact act contrary to their citizens' interests across a range of policies. Or, more accurately, city politics might be pluralistic,<sup>392</sup> reflecting the tensions and interest coalitions that form for good and for ill. If one is skeptical of the exercise of local power, land use policy in this respect is not unique. One would oppose most forms of local power in favor of centralized policymaking, or perhaps no policymaking at all. Not much can be said about the blanket dismissal of city power if one deems the exercise of government power generally to be unattractive.

If, however, one is sympathetic to the notion that cities are appropriate—and in many cases, superior—sites for the exercise of participatory, democratic governance,<sup>393</sup> the problem of local land use parochialism should not dictate the scope of that governance. This is certainly so if one understands city power as a potential counterweight to private-side economic domination.

#### CONCLUSION

Land use regulation can be deployed in pernicious ways. But the current attacks on the local zoning power, which emphasize preempting local power, deregulating housing markets, and encouraging mobility across jurisdictional lines to access basic public goods, have significant drawbacks.

To be sure, renewed attention to the spatial barriers that exacerbate racial and socioeconomic inequality is welcome. The identification of those barriers with local power, however, may have the unfortunate effect of undermining the city's potential role in building economic resilience. Inviting state preemption of local land use laws removes a useful tool in the city's toolkit—one of the few that remain at a time of increasing state hostility to the exercise of city power, including city efforts to redistribute. At the same time,

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<sup>390</sup> Frug, *supra* note 380, at 1128-36.

<sup>391</sup> A growth-centered regime tends to treat cities as platforms for private economic activity. Paul Peterson famously associated the health of the city with the health of its export industries. See PAUL E. PETERSON, *CITY LIMITS* 22-24 (1981) (“[E]conomists have gone so far as to suggest that the welfare of a city is identical to the welfare of its export industry.”).

<sup>392</sup> See ROBERT DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* 89-98 (2008) (offering an account of pluralistic municipal politics).

<sup>393</sup> See, e.g., SCHRAGGER, *supra* note 57, at 247-55 (summarizing how city power can be a means to democratic governance); Nicholas Bowie, *The Constitutional Right of Self-Government*, 130 *YALE L.J.* 1652, 1740-45 (2021) (discussing the ways in which a city could reasonably justify expanding its power to act on behalf of its citizens); Robert Dahl, *The City in the Future of Democracy*, 61 *AM. POL. SCI. REV.* 953, 963-67 (advocating for the city as an advantageous unit for democratic government); Frug, *supra* note 380, at 1149-50 (advocating for the city as an “alternative form of decentralized power” necessary to achieve “public freedom,” or the right to participate in social decisions that affect one’s life).

eliminating or reducing suburban land use controls is likely to yield relatively limited and likely temporary benefits, as the rich flee further afield or adopt private agreements that take the place of zoning. The declining suburbs will not be aided by eliminating local land use controls. And in high-demand cities, market-oriented reforms—which tend to increase land values—can lead to higher, not lower, prices, especially for those outside the top third of the housing market.

This is not an argument against land use reform, which is in many cases essential. It is instead an argument against imposing land use reform from above. The YIMBY movement has already shown that affordable housing coalitions can exercise power in cities. Whether advocates of fair and affordable housing can agree on an approach is a matter of local politics. The interests served by a “build, build, build” program will be contested. Hardcore YIMBYs, who urge a deregulatory approach that emphasizes lowering costs, will not readily welcome anti-displacement provisions or environmental, historic preservation, or inclusionary zoning mandates that could potentially raise costs. Opening the door to market-rate housing will conflict with other values, in particular the value of stabilizing low-income communities.

The history of land use reform in the U.S. is instructive. The current anti-zoning moment is a product of the global urban resurgence. As such, it is the mirror image of the pro-zoning moment that preceded it, which facilitated the massive influx of population into the suburbs. In both instances, housing demand is a function of regional economic development. And in both instances, market-rate development contributes to displacement. The New Jersey Supreme Court’s *Mount Laurel* decision is normally understood as a case about racial and socioeconomic exclusion. It is certainly that. But it is also a case about the right to remain in place, to be poor in a developing metropolitan region.

Centralized deregulation in aid of market-led growth while urging families and workers to “move to opportunity” is a peculiarly American response to addressing uneven economic development. That approach has never been congenial to the poor and working class, even as the middle-class American housing market has been heavily subsidized by the federal government. Meanwhile, equitable regional economic growth has been elusive. In the U.S., cities, towns, and suburbs—entire regions—rise and fall, boom and bust. Cities are left to fend for themselves once the economic train has passed; abandonment seems to be the default policy response to decline. But internal migration is not a long-term solution to local social and economic failure. It discounts the harms of social dislocation, produces an unmoored and weakened labor force, leaves behind “unproductive” places, and contributes to political polarization.



Housing is too scarce in many places. In other places, however, housing is too plentiful. The growth imperative does not address this underlying imbalance, and state-mandated land use reform will not fix it. Both the NIMBY and YIMBY movements are expressions of economic vulnerability: to changes in consumer preferences, large-scale dislocations in the labor market, and rapid shifts in the location and concentration of productive enterprises. Further restricting the city's power to address those larger vulnerabilities is a mistake.

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