

## EXCLUSIONARY ZONING'S CONFUSED DEFENDERS

DAVID SCHLEICHER\*

In both economic and legal scholarship, a broad consensus has formed that zoning and other land use laws and regulations in our richest and most productive regions have become too strict. Land use laws, in both suburbs and downtowns, have made it too hard to build housing in the areas with the most demand, leading to high prices and excluding many possible migrants. The lack of housing growth in our richest regions has created huge economic losses, as workers cannot move to the regions where they would earn the highest wages, and excessively high prices for renters and home buyers in these areas. Local land use regulations that limit housing growth also contribute substantially to economic inequality, racial and economic segregation, homelessness, and greenhouse gas emissions. Because local governments use land use regulations to exclude, most scholars in the field have called on state governments to take some action to limit local exclusionary zoning.

But scholars *abhor* consensus, no matter how much empirical evidence piles up in favor of it. In the last few years, several legal scholars have written articles challenging the scholarly consensus in favor of zoning reform. This Essay reviews their arguments and finds that the consensus . . . has little to fear.

Some of their criticisms are recycled versions of old theories, failing to consider huge changes in land use policy since the 1980s. These arguments also put a bizarrely heavy normative weight on the expectations of property owners about the built form of their neighborhood without providing a clear justification for doing so. Others display an undeclared but intense conservatism, viewing changes in development patterns as a cause for fear rather than as opportunities for growth and reform. They each uncritically embrace the regulatory authority of local governments while minimizing the demonstrated harms this power can have on economic growth, the environment, and racial and economic equality. These arguments fail to see that local regulation is fundamentally different from national-level regulation due to its capacity to not only regulate behavior but also who can enter and reside in jurisdictions and places.

The Essay concludes by assessing what effect a post-pandemic increase in working-from-home (WFH) due to technologies like Zoom and Slack would have on the case for land use reform. It argues that, if it does increase substantially, the form WFH takes (fully remote, hybrid, or something else) will have a big effect on which cities gain and lose. However, unless things change radically, zoning in rich cities and regions will remain a very substantial problem. Further, a world with more WFH would make zoning reform more pressing in one particular way. WFH may give the highest income workers even more of an opportunity to isolate themselves in low tax, high-service-quality jurisdictions and to use land use regulations to ensure that no one else can rely on their property tax base to pay for local services.

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#### INTRODUCTION: THE CASE AGAINST THE CASE AGAINST ZONING DEREGULATION

In local and, increasingly, in state politics, no type of political conflict is fiercer than fights over land use. Defenders of neighborhood status quos claim that developers are rapacious and out to make a quick buck at the expense of sturdy homeowners.<sup>1</sup> Pro-housing groups claim that these neighborhood defenders are preserving an intolerable regime of slow growth, high rents, and racial segregation.<sup>2</sup> Some tenant groups worry about gentrification, others about a lack of investment.<sup>3</sup> Environmental groups, depending on their slant, complain about trees knocked down by new development or increases in sprawl caused by failing to build infill.<sup>4</sup>

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1. Shelia R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 *YALE L.J.F.* 480, 485 (2017) (“Part of the reason for such restrictive land policies . . . is the vested interest of existing homeowners who favor policies that preserve the status quo and minimize the negative externalities of urban agglomeration, thus maintaining their home values.”).

2. See Statement, The White House, Fact Sheet: The American Jobs Plan (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/> [<https://perma.cc/CZG6-KPJ8>]; JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 12 (2018).

3. Richard Schragger, *The Perils of Land Use Deregulation*, *U. PA. L. REV.* (forthcoming 2021–22) (manuscript at 7, 20–21), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3821094](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3821094).

4. See Nathanael Johnson, *Enviros and Developers: A Love Story*, *GRIST* (Oct. 30, 2017), <https://grist.org/article/san-francisco-environmentalists-housing-development-fight/> [<https://perma.cc/3BK9-H8BU>] (describing fights inside environmental organizations over whether to support development).

Protests, placards and unhinged rants are par for the course.<sup>5</sup> Lawsuits, both threatened and real, are omnipresent.<sup>6</sup> There is little agreement to be found.

Land use politics is not for the meek.

In contrast, there is broad agreement in economic and legal scholarship that land use controls in our richest regions and cities have gone much, much too far. Dubbed the “liberalitarian” or “elite consensus” by its critics, this agreement is informed by the widely accepted empirical finding that land use regulations in rich regions from 1980 to 2020 prevented housing growth to match growing housing demand, limiting access to hot job markets.<sup>7</sup> The result is a loss of economic output of staggering proportions, as workers have been unable to move to higher-paying jobs.<sup>8</sup> Further, in the presence of high demand, excessive land use regulations result in high housing costs, causing huge rent burdens, homelessness, and economic inequality through capital appreciation for homeowners.<sup>9</sup> Scholars also largely agree that land use regulations can be blamed for substantial environmental harms, since denser housing in coastal regions would lead to reduced greenhouse gas emissions.<sup>10</sup> And, as has been the case since the Supreme Court’s rejection of explicit racial zoning,<sup>11</sup> facially neutral land use restrictions are used to effectively further racial and income segregation, with rich, white neighborhoods and

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5. See Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, *FORDHAM L. REV.* (forthcoming 2021) (manuscript at 27–32), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3786306](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786306) (describing public meetings over land use changes).

6. See, e.g., M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, *ATLANTIC: IDEAS* (Mar. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/> [<https://perma.cc/79NF-VUC8>] (describing frequent use and threats of use of lawsuits under California’s environmental laws to challenge zoning changes); *Zoning and Land Use: Turning the World Right-Side Up Again*, *KRAMER LEVIN: PERSPECTIVES* (Sept. 9, 2020), <https://www.kramerlevin.com/en/perspectives-search/zoning-and-land-use-turning-the-world-right-side-up-again.html> [<https://perma.cc/UJB7-HYES>] (“City land use decisions that approve, or open the door to, substantial new development in residential neighborhoods often generate a high level of controversy, and it is not unusual for community opposition to lead to litigation.”)

7. See Christopher Serkin, *A Case for Zoning*, 96 *NOTRE DAME L. REV.* 749, 770 (2020) (“elite consensus”); Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 *DUKE L.J.* 1763, 1768, 1778 (2021) (“elite consensus,” “liberalitarian consensus”); Schragger, *supra* note 3 (manuscript at 45–46) (“emerging consensus”). See *infra* Part II for a discussion of these claims.

8. See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 *YALE L.J.* 78, 83–84 (2017) [hereinafter Schleicher, *Stuck!*].

9. See *infra* Part I.

10. Daniel Hoornweg, Lorraine Sugar & Claudia Lorena Trojos Gómez, *Cities and Greenhouse Gas Emissions: Moving Forward*, 23 *ENV’T & URBANIZATION* 207, 214 (2011).

11. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

towns excluding poorer and minority residents by keeping housing unaffordable through limits on new construction.<sup>12</sup>

This substantive belief about overreach in local zoning, in turn, has driven calls for reform that focus on the proper level of government to regulate land use.<sup>13</sup> While pro-growth coalitions operate at all political levels, scholars generally support state statutes that limit local zoning authority.<sup>14</sup> The central problem of land use, according to much of the scholarship, is that most land use controls are imposed by local governments and are heavily influenced by the concerns of homeowners rather than broader interests.<sup>15</sup> Rich suburbs limit building on their own behalf—and more particularly on behalf of the homeowners who dominate their politics—while ignoring the needs of renters and people outside the borders of their community.<sup>16</sup> Even in big cities, homeowners in neighborhoods where projects are proposed end up playing a dominant role in zoning decisions, giving them the power to exclude as well.<sup>17</sup>

Pro-housing growth beliefs have become dominant in national politics. Leading Democrats like President Barack Obama; Senators Elizabeth Warren, Bernie Sanders, and Cory Booker; and Representative James Clyburn have all endorsed federal measures that would provide incentives for local zoning reform.<sup>18</sup> Many leading Republicans agree,

12. See David Schleicher, *Constitutional Law for NIMBYs: A Review of 'Principles of Home Rule for the 21st Century' by The National League of Cities*, 81 OHIO ST. L.J. 883, 887 (2020) [hereinafter Schleicher, *Constitutional Law for NIMBYs*].

13. See *infra* Part II.

14. Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 233 (2008).

15. See John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 879–81 (2019).

16. Schleicher, *Constitutional Law for NIMBYs*, *supra* note 12, at 900.

17. See *id.* at 887.

18. THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT (Sept. 2016), [https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20f.2.pdf](https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf) [<https://perma.cc/9SE5-CHJ5>] (describing problems created by excessively strict zoning and proposing a variety of policy responses); Press Release, Newsroom of Senator Elizabeth Warren, Warren and Colleague Reintroduce Historic Legislation to Confront America's Housing Crisis (Mar. 23, 2021), <https://www.warren.senate.gov/newsroom/press-releases/warren-and-colleagues-reintroduce-historic-legislation-to-confront-americas-housing-crisis> [<https://perma.cc/QYF4-7F9R>] (describing legislation cosponsored with Bernie Sanders and many other leading Democrats that would “[r]educ[e] the cost of housing across America by creating incentives for local governments to eliminate unnecessary land use restrictions that drive up costs”); Press Release, Senator Cory Booker, Booker, Clyburn Take Innovative, Two-Pronged Approach to Tackling Affordable Housing Crisis (Oct. 23, 2019), <https://www.booker.senate.gov/news/press/booker-clyburn-take-innovative-two-pronged-approach-to-tackling-affordable-housing-crisis> [<https://perma.cc/JP7J-SEZP>] (describing legislation introduced by Sen. Booker and Rep. Clyburn “pushing communities to adopt more inclusive zoning laws by making their surface transportation funding and community development block grants contingent on such zoning policies”).

pushing their own pro-housing supply ideas, although President Donald Trump began criticizing zoning reform late in his term in office.<sup>19</sup>

In proposing a competitive grant to jurisdictions that reduced zoning restrictions, President Biden stated, “For decades, exclusionary zoning laws—like minimum lot sizes, mandatory parking requirements, and prohibitions on multifamily housing—have inflated housing and construction costs and locked families out of areas with more opportunities.”<sup>20</sup>

That such beliefs are common at the national level does not mean zoning deregulation has had an easy path in state or local politics. While pro-housing groups have had victories in a number of states, they have lost repeatedly as well.<sup>21</sup> And at the local level, efforts at zoning deregulation have faced enormous pushback.<sup>22</sup> In the most relevant political arenas, the

19. Press Release, Newsroom of Senator Todd Young, *Young Introduces Yes In My Backyard Act to Encourage Communities to Cut Regulations and Increase Housing Supply* (June 20, 2019), <https://www.young.senate.gov/newsroom/press-releases/young-introduces-yes-in-my-backyard-act-to-encourage-communities-to-cut-regulations-and-increase-housing-supply> [<https://perma.cc/PM5W-LYN9>]; Brandon Fuller & Nolan Gray, *Where Are All the Republican YIMBYs?*, CITY J. (Apr. 17, 2019), <https://www.city-journal.org/republican-yimby-movement> [<https://perma.cc/YLH6-UZ9Q>] (describing increasing number of Republicans in favor of land use deregulation). President Trump’s administration originally shared this position before later reversing course. *Compare* Ben Carson (@SecretaryCarson), TWITTER (Sept. 12, 2018, 3:55 PM), <https://twitter.com/SecretaryCarson/status/1039965760012132358?lang=en> [<https://perma.cc/YXA5-LQBS>] (“@HUD is taking on the #NIMBYs . . . Zoning laws are holding back America’s cities.”), *with* Donald J. Trump & Secretary Ben Carson, *We’ll Protect America’s Suburbs*, WSJ: OPINION (Aug. 16, 2020, 4:02 PM), <https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133> [<https://perma.cc/8XG4-W8UZ>] (“It would be a terrible mistake to put the federal government in charge of local decisions—from zoning and planning to schools.”).

20. The White House, *supra* note 2.

21. For summaries of recent statewide land use fights, see Infranca, *supra* note 15, at 846–75, and Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79 (2019).

22. On local pro-growth victories, see, for example, Phillip Keifer, *Here Comes the Neighborhood*, GRIST (May 21, 2019), <https://grist.org/article/seattle-zoning-density-minneapolis-2040/> [<https://perma.cc/98V2-K5BV>]; Michael Hendrix, *YIMBY, Please*, CITY J. (2019), <https://www.city-journal.org/cities-housing-policies> [<https://perma.cc/VK8R-TX3E>]; and Andrew Nelson, *Sacramento City Council Votes To Change Single-Family Zoning*, SF YIMBY (Jan. 21, 2021, 5:00 AM), <https://sfyimby.com/2021/01/sacramento-city-council-votes-to-change-single-family-zoning.html> [<https://perma.cc/CS76-J64N>]. On pushback, see, for example, Erin McCormick, *‘Declaration of War’: Liberals Divided as California Mulls Housing Push*, GUARDIAN (Feb. 14, 2018, 8:00 AM), <https://www.theguardian.com/us-news/2018/feb/14/california-housing-crisis-laws-homelessness> [<https://perma.cc/6DYD-W6AX>]; Elizabeth Kim, *In SoHo, Talk Of Rezoning Sparks Affordable Housing Battle Between Young And Old New Yorkers*, GOTHAMIST (Jan. 17, 2020, 2:44 PM), <https://gothamist.com/news/soho-talk-rezoning-sparks-affordable-housing-battle-between-young-and-old-new-yorkers> [<https://perma.cc/7YF8-F9FT>]; and Ellie Anziolotti, *Welcome to Housing Twitter, the Shoutiest Debate on the Internet*, FAST CO. (Aug. 19,

suburbs and downtowns of our richest regions, opponents of housing growth largely remain in charge, even though there has been important progress in recent years.

Despite this persistent conflict, though, there remains a broad consensus among legal scholars, economists, and political scientists that local land use controls have become too strict in many rich regions and cities.<sup>23</sup> Perhaps a Zoom-enabled future will reduce the demand to live in high-priced cities somewhat. But as I will discuss in Part V of this Essay, this will not eliminate—and may even in some ways exacerbate—the problems created by zoning regulations.

Of course, scholars abhor agreement, and contrarians always emerge no matter how substantial the empirical evidence. In the past two years, legal scholars Morgan Ricks, Richard Schragger, Christopher Serkin, and Ganesh Sitaraman have offered some overlapping arguments against the consensus that zoning has become excessively restrictive in many cities and metropolitan areas and have called for “caution” when considering reforms to local control.<sup>24</sup>

Having read their work, I can report that the consensus . . . has little to fear. Some of their criticisms are recycled versions of old theories, failing to consider huge changes in land use policy since the 1980s. These arguments also put extremely heavy normative weight on the expectations of property owners about the built form of their neighborhoods without clear justification for doing so.<sup>25</sup> Others display an undeclared but intense conservatism, casting changes in population flows and development patterns as causes for fear and alarm rather than as opportunities for

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2019), <https://www.fastcompany.com/90384931/welcome-to-housing-twitter-the-shoutiest-debate-on-the-internet> [<https://perma.cc/S67M-FARP>].

23. It is worth noting that the exact contours of this consensus are not shared. Few scholars have suggested abandoning zoning entirely; it is rare today to see arguments in favor of reversing *Village of Euclid v. Amber Realty Co.* or repealing state zoning enabling acts, though this has not always been the case. 272 U.S. 365 (1926) (upholding constitutionality of zoning); cf. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 780, 781 (1973) (suggesting that zoning be replaced by an enhanced law of nuisance and administrative “nuisance boards”). There is no general agreement about exactly what a good land use regime would look like other than that we are far from it today. Further, there are active debates about *how* state governments should intervene and how local governments should reform their own practices. See, e.g., Infranca, *supra* note 15, at 825–30; Elmendorf, *supra* note 21, at 82–90; Schleicher, *Stuck!*, *supra* note 8 (discussing possible federal policy responses). Similarly, there is little agreement about how the government can best spend money to support housing for the poor other than that restrictive zoning both makes subsidizing affordable units more costly and makes housing voucher dollars less effective. See *infra* Part II.

24. See Serkin, *supra* note 7, at 752; Sitaraman, Ricks & Serkin, *supra* note 7, at 1825; Schragger, *supra* note 3 (manuscript at 31).

25. See *infra* note 77.

growth and reform.<sup>26</sup> They uncritically embrace the regulatory authority of local governments while minimizing the demonstrated harms this power can have on economic growth, the environment, and racial and economic equality.<sup>27</sup>

While these critics' failings differ, the roots of their flaws are the same. Each of them is just horrified at the thought of reducing regulations of any sort, treating local regulations like zoning as equivalent to federal regulations that they seem broadly to support.<sup>28</sup> But it is a mistake to think about regulations that govern small subsets of metropolitan regions using the same analytic framework one uses to think about regulations that govern the entire country. It is an even worse mistake to think about land use regulations that directly regulate entry into labor markets and political jurisdictions using those tools.

Land use regulations are mostly enacted by local governments and are often the product of neighborhood-level politics.<sup>29</sup> Most entities that have the power to pass zoning regulations are very small relative to the size of metropolitan areas and commuter sheds.<sup>30</sup> As scholars like Richard Briffault and Richard Thompson Ford have argued, the central questions of contemporary local government law are often not about conflicts between states and localities over regulatory authority, but instead about exclusion and boundaries—who is in and who is out.<sup>31</sup> Local regulations not only dictate behavior, but also determine who can live in a jurisdiction, who can have jobs in particular labor markets, and from and to whom resources are provided and redistributed.<sup>32</sup> Local regulations are products of local democracy and have value as such, but aggregating preferences using existing local governmental boundaries necessarily leaves people with important interests out of the decision-making process.

Local land use regulations are the subset of local regulations that most directly regulate who can and cannot be a member of a local political community or economy. Opposition to state laws that police the most aggressive actions by local governments to limit entry—such as bans on

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26. See discussion *infra* Part III.

27. See *id.*

28. See *infra* Part II.

29. See Schleicher, David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1704 (2013) [hereinafter Schleicher, *City Unplanning*].

30. *Id.* at 1675–78.

31. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 349 (1990) (arguing that differences among local governments and their resources determine the importance and meaning of local authority in different places); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1861 (1994) (showing that even formally neutral rules about local governmental authority have differential effects based on boundaries and racially segregated populations).

32. See Ford, *supra* note 31, at 1847–48 (discussing the impact localities have on individuals' lives and livelihoods).

small apartment buildings or granny flats or effective moratoria on building entirely—is an endorsement of the use of local government by existing property owners to keep others out. The recent calls against zoning deregulation ignore or underrate the incentives of locals to exclude and the greater efficacy of that exclusion by richer neighborhoods and towns.

This pro-regulation-no-matter-who-does-it stance is built on a reflexive skepticism about markets—in this case, the market for building houses and apartments—that is not attached to any other particular normative claim. Markets are powerful tools that produce important goods but also sometimes fail to yield desirable social ends.<sup>33</sup> But the existence of market failures does not justify indiscriminately casting aside their successes, particularly where existing regulations systematically and predictably cause substantial amounts of harm. In this case, these critics simply ignore how places with relatively liberal housing markets like Houston or Tokyo have been able to satisfy demands for decent accommodations with access to strong labor markets at relatively reasonable prices.<sup>34</sup> They miss how limits on homebuilding enacted by many small jurisdictions can undermine broader values like freedom of movement and socioeconomic mobility.<sup>35</sup>

Such mistakes lead these critics to embrace political stances that are at once somewhat funny and quite troubling. Each of their pieces makes at least some gesture toward egalitarianism.<sup>36</sup> But all end up implicitly defending the ability of existing residents in the richest, most exclusive places on the planet—places like Darien, Connecticut, or Atherton, California—to keep out apartment buildings and limit change more broadly. Their market skepticism leads them to embrace even those regulations that are enacted to help rich homeowners protect their property values and that have the effect of denying poorer people access to well-funded schools. Similarly, their broader fear of change causes them to link arms with those most benefited by the status quo, our contemporary rentiers, owners of property who use land use policy to control who lives and works in our richest regions and labor markets.

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33. See Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1829 (2003).

34. See Edward L. Glaeser, *Behind the Population Shift*, N.Y. TIMES: ECONOMIX (Dec. 28, 2010, 6:00 AM), <https://economix.blogs.nytimes.com/2010/12/28/behind-the-population-shift/> [<https://perma.cc/37LD-SBVU>]; Robin Harding, *Why Tokyo Is the Land of Rising Home Construction but Not Prices*, FIN. TIMES (Aug. 3, 2016), <https://www.ft.com/content/023562e2-54a6-11e6-befd-2fc0c26b3c60> [<https://perma.cc/Y3JS-YXAA>].

35. William A. Fischel, *The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day*, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 13, 13 (Lee Anne Fennell & Benjamin J. Keys eds., 2017).

36. See, e.g., Serkin, *supra* note 7, at 750–51; Sitaraman, Ricks & Serkin, *supra* note 7, at 1765–68.

Whether the existence of an “elite consensus” among scholars and national politicians will influence state legislatures to reduce the power of the Dariens and Athertons of the country to exclude is still uncertain. The pieces by Ricks, Schragger, Serkin, and Sitaraman will surely aid homeowners in these areas in their efforts to stave off state override or local reform. Hopefully, though, political figures and other scholars will see that their criticisms have little merit.

Part I of this Essay will briefly sketch the contours of the pro-land use reform consensus. Part II will analyze Serkin’s piece, *A Case for Zoning*. Part III will discuss the Ricks, Serkin, and Sitaraman piece, *Regulation and the Geography of Inequality*. Part IV will discuss Schragger’s piece, *The Perils of Land Use Deregulation*. Part V will discuss whether all of this should change due to Zoom. Part VI is a conclusion.

I. A VERY BRIEF LITERATURE REVIEW: WHERE THE “ELITE,”  
“LIBERALTARIAN” CONSENSUS IN FAVOR OF ZONING DEREGULATION  
COMES FROM

The basic case for zoning deregulation has been made many times, so I will not dally too much here. But I will provide a quick version of the last fifty years of the argument. In the 1960s and 1970s, there were many fights over zoning, but they were largely about segregation, both racial and economic.<sup>37</sup> The central challenge was that rich suburbs used zoning to keep apartments, poorer people, and racial minorities out.<sup>38</sup> Zoning interacted with federal homeownership subsidies to encourage the development of homogenous communities; reformers sought to break down the barriers land use regulations created.<sup>39</sup> This issue became particularly pressing as economic changes (and social and policy ones, too) led to the decline of the economies of central cities. Charles Haar, the leading land use scholar of the period, captured the claims of reformers: Americans, he argued, should have a “constitutional right to live in the suburbs.”<sup>40</sup> This period of zoning fights crested with the famous New

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37. See Schleicher, *Constitutional Law for NIMBYs*, *supra* note 12, at 900; ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973).

38. TROUNSTINE, *supra* note 2, at 8–9.

39. See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); Robert J. Reinstein, Gerald McFadden, Susan A. Feder & Robert E. Kerper, Jr., *A Case of Exclusionary Zoning*, 46 *TEMP. L.Q.* 7 (1972).

40. CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 133–36 (1996).

Jersey Supreme Court opinions in *Mount Laurel I*<sup>41</sup> and *Mount Laurel II*,<sup>42</sup> which handed down an aggressive set of remedies that other courts did not follow.<sup>43</sup> In a number of states, there remain state laws aimed at this problem, most famously Massachusetts's Section 40B "antisnob zoning" act.<sup>44</sup>

Notably, the problem of the zoning politics from this period never went away. Rich suburbs continue to use land use restrictions to keep local property tax bases large on a per capita basis, allowing them to maintain both low property tax rates and high-quality services.<sup>45</sup> Excluding apartments and townhouses allows homeowners to ensure that their property taxes are not used to pay for schools and services for the less well-off.<sup>46</sup> As scholars like Jessica Trounstine show, zoning has always been a tool to ensure racial segregation.<sup>47</sup> After the Supreme Court barred explicit racial zoning,<sup>48</sup> use and density zoning took off in its place, largely to segment white neighborhoods and then predominantly white towns from racial and economic diversity. To this day, strict zoning regulations correlate with segregation, both racial and economic.<sup>49</sup>

In the 1970s and 1980s, however, something changed. Prior to this period, scholars believed that land use restrictions might affect prices in particular towns but would not do so at the regional level.<sup>50</sup> Housing could always be built in exurbs and pro-growth suburbs. Further, big cities were thought to be run by "growth machine" coalitions of developers, unions,

41. *South Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I)*, 336 A.2d 713 (N.J. 1975).

42. *South Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel II)*, 336 A.2d 713 (N.J. 1975).

43. See J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2266 (1997) ("No state has statutorily barred exclusionary zoning, nor have many state courts expressed any apprehension about it. A few states have hedged the practice with restrictions, or offered limited remedies to the excluded. And then there is New Jersey."); *Mount Laurel I*, 336 A.2d at 731–34; *Mount Laurel II*, 456 A.2d at 489–90.

44. See Infranca, *supra* note 15, at 837–42; MASS. GEN. LAWS. ch. 40B, § 21 (2021).

45. DOWNS, *supra* note 37, at 8.

46. See Serkin, *supra* note 7, at 787–88.

47. TROUNSTINE, *supra* note 2, at 12.

48. See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

49. See Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 791 (2009) (showing that anti-density zoning increases residential segregation between Black and white neighborhoods); Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 447–50 (2020) (showing that cities that were whiter than their metropolitan areas in 1970 were more likely to have restrictive land use patterns over time).

50. See Schleicher, *Constitutional Law for NIMBYs*, *supra* note 12, at 900–01.

and big business in favor of endless development, helping keep urban housing plentiful.<sup>51</sup>

But as technological and social changes in the 1970s and 1980s encouraged economic growth in some regions—particularly those along the West Coast and in those surrounding some of the big cities in the Northeast—the old assumption that housing markets at the regional level would always respond broke down. We saw the rise of booms without boomtowns. Population did not increase very much in the regions seeing the fastest economic growth, even as property prices increased substantially.<sup>52</sup> Silicon Valley lost population during the second half of the 1990s and only increased marginally in the 2000s, even as it served as the center of a huge localized economic expansion.<sup>53</sup> The same was true in some central cities. Prices exploded in places like Boston and San Francisco, but population numbers only moved marginally.<sup>54</sup>

The explanation lies in land use law. In the face of new demand, cities and suburbs failed to adequately loosen, and in some cases actively tightened, rules governing building capacity. Zoning regulations on heights, permissible uses, and allowable densities; minimum lot size requirements; environmental regulations; parking requirements; and historic preservation measures were all used to limit housing growth.<sup>55</sup> The combined effect of high demand and restrictions on building in many regions was exploding prices.<sup>56</sup> Notably, other less restrictive areas that saw high demand experienced huge increases in population but not in prices.<sup>57</sup> The financial crisis of 2008 led to all sorts of disruptions, but this basic dynamic continued. Demand to live in coastal regions and certain other restrictive areas was reflected in increasing prices, but limits on housing growth meant that there was little new access to their booming job

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51. See Schleicher, *City Unplanning*, *supra* note 29, at 1698, 1709 n.151.

52. See *id.* at 1674–75; Edward L. Glaeser, Joseph Gyourko & Raven E. Saks, *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005) [hereinafter Glaeser, Gyourko & Saks, *Why Have Housing Prices Gone Up?*]; Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 265 (2008); Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 331–33 (2005) [hereinafter, Glaeser, Gyourko & Saks, *Why is Manhattan So Expensive?*].

53. Schleicher, *City Unplanning*, *supra* note 29, at 1675.

54. Glaeser, Gyourko & Saks, *Why is Manhattan So Expensive?*, *supra* note 52, at 331–35.

55. See, e.g., Schleicher, *City Unplanning*, *supra* note 29, at 1695–96, 1707 (reviewing literature).

56. *Id.* at 1695.

57. See Edward L. Glaeser, Joseph Gyourko & Albert Saiz, *Housing Supply and Housing Bubbles*, 64 J. URB. ECON. 198 (2008) (discussing housing bubble in heavily zoned and less heavily zoned areas).

markets.<sup>58</sup> Demand to live in places like Houston and Atlanta led to lots of home building and population inflow but not to the same kind of price increases.<sup>59</sup>

Scholars had long understood that zoning could lead to local economic dislocations and that “homeowner cartels” would use their control over zoning to try to boost the value of their real estate.<sup>60</sup> But limits on growth at the regional level led to new problems. The fact that not enough new housing was being built in or around places like New York or Los Angeles harmed the national economy. Workers in these regions earned higher wages and had higher productivity, but people could not or would not move there due to high housing prices and low supply.<sup>61</sup> Economists like Chang-Tai Hsieh and Enrico Moretti; Kyle Herkenhoff, Lee Ohanian, and Edward Prescott; David Albouy and Gabriel Ehrlich; and Devin Bunten, among a number of others, estimated the effect of reducing excessively restrictive zoning rules on both output and welfare, net of externalities and congestion, using a variety of empirical methods and assumptions.<sup>62</sup> The estimates they developed beggar the mind, ranging

58. EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 183–93 (2011).

59. *Id.*

60. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400, 510 (1977) (describing “homeowner cartels”).

61. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1527–28, 1543 [hereinafter Schleicher, *The City*].

62. Kyle F. Herkenhoff, Lee E. Ohanian & Edward C. Prescott, *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown*, 93 J. MONETARY ECON. 89, 90 (2018) (“U.S. labor productivity would be 12.4% higher and consumption would be 11.9% higher if all U.S. states moved halfway from their current land-use regulation levels to the current Texas level.”); David Albouy & Gabriel Ehrlich, *Housing Productivity and the Social Cost of Land-Use Restrictions*, 107 J. URB. ECON. 101, 101 (2018) (“Observed land-use restrictions raise housing costs by 15 percentage points on average, reducing average welfare by 2.3% of income on net.”); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J. 1, 25–27 (2019) (finding that perfect mobility would lead to an increase in growth rates of 87% and an 8.9% higher GDP and that simply reducing New York, San Francisco, and Silicon Valley’s zoning restrictiveness to the national median would lead to 3.7% higher GDP); Bryan Caplan, *Hsieh-Moretti on Housing Regulation: A Gracious Admission of Error*, ECONLIB (Apr. 5, 2021), <https://www.econlib.org/a-correction-on-housing-regulation/> [<https://perma.cc/6URZ-QPZX>] (showing that Hsieh and Moretti’s growth calculation should have led to an estimate of 36% higher annual GDP under full mobility and 14% higher in the three-city estimate); Devin Bunten, *Is the Rent Too High? Aggregate Implications of Local Land-Use Regulation 1* (Fed. Rsrv. Bd., Working Paper No. 2017-064, 2017), <https://www.federalreserve.gov/econres/feds/is-the-rent-too-high-aggregate-implications-of-local-land-use-regulation.htm> [<https://perma.cc/HK25-LUG4>] (finding that “[w]elfare and output would be 1.4% and 2.1% higher, respectively, under the planner’s allocation” than under existing land use regulations).

from around 2% of GDP (enormous!)<sup>63</sup> to 36% of GDP (hard to comprehend!).<sup>64</sup>

Notably, while there are reasons to think the highest of these estimates overstate the real economic effects of zoning, there is an important way in which they understate its effects as well. These estimates are static, focusing on how much more money and how much more productivity workers would realize today if they could move to better job markets. Dense areas are known to increase wage levels but also to increase wage growth and the development of new ideas.<sup>65</sup> Limits on housing construction in Silicon Valley or Boston can decrease the development of technology; workers unable to participate in labor markets in Los Angeles or Washington, D.C., may lose out on the gains from spillovers, leading to lost potential human capital development.<sup>66</sup>

The theoretical link between these findings is what economists call agglomeration economies.<sup>67</sup> Co-locating in dense areas increases market depth for both labor and services; creates opportunities for knowledge spillovers, or learning from people nearby; and reduces shipping costs.<sup>68</sup> Changes in transportation costs and the nature of the economy in the 1980s made certain agglomeration economies, particularly those related to information flows and services, relatively more valuable.<sup>69</sup> As Saskia Sassen notes, technology made running large corporations from one location more possible, increasing returns to knowledge-based types of work and to tools, like urban location, that could improve productivity for high-level service workers.<sup>70</sup> Land use restrictions in rich cities and regions reduce the gains from agglomeration economies by reducing the

63. Buntin, *supra* note 62, at 4.

64. Caplan, *supra* note 62.

65. See Schleicher, *The City*, *supra* note 61, at 1523–28 (discussing literature on information spillovers); Edward L. Glaeser & David C. Maré, *Cities and Skills*, J. LAB. ECON. 316, 316–19 (2001) (empirically showing urban wage growth through learning and specialization); Enrico Moretti, *The Effect of High-Tech Clusters on the Productivity of Top Inventors* 1–4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26270, 2021), <http://www.nber.org/papers/w26270> [<https://perma.cc/8BVJ-MJUD>] (showing the effect of density on patenting behavior).

66. See Schleicher, *The City*, *supra* note 61, at 1527–28, 1543.

67. *Id.* at 1509–10.

68. See *id.* at 1515–28 (reviewing literature).

69. *Id.*; Edward L. Glaeser & Giacomo A. M. Ponzetto, *Did the Death of Distance Hurt Detroit and Help New York?*, in AGGLOMERATION ECONOMICS 303, 305 (Edward L. Glaeser ed., 2010) (arguing that changing transportation costs and changes in the economy harmed Detroit but helped New York) [hereinafter Glaeser & Ponzetto, *Death of Distance*].

70. SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* xix–xxi (2d ed. 2001).

number of people who can participate in deep labor markets or learn from spillovers.<sup>71</sup>

From 1970 to 2020, we largely saw slow growth rates relative to the hundred years before then.<sup>72</sup> Land use reform is one of the few policy levels that can partially reverse this trend, as Hsieh and Moretti show.<sup>73</sup>

Land use restrictions have a huge effect on economic inequality, both in the United States and abroad. As Matthew Rognile has shown, a significant amount of the famous “R>G” finding in Thomas Piketty’s work is due to returns to housing.<sup>74</sup> Today’s rentiers, like old feudal barons, own access to the most valuable land, but today that value is contained in access to the deepest and richest labor markets.<sup>75</sup> This is true globally as well. Land use restrictions are very severe not just in many American cities, but also in other “global cities” like London, with similar effects on output (although cities with more liberal land use policy, like Tokyo, have not seen similar increases in housing prices in recent years).<sup>76</sup>

Today, land use restrictions enacted by local governments lead to higher housing prices across whole regions.<sup>77</sup> This matters for all residents,

71. Schleicher, *The City*, *supra* note 61, at 1512.

72. See generally ROBERT J. GORDON, *THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR* (2016); TYLER COWEN, *THE GREAT STAGNATION: HOW AMERICA ATE ALL THE LOW-HANGING FRUIT OF MODERN HISTORY, GOT SICK, AND WILL (EVENTUALLY) FEEL BETTER* (2011).

73. Hsieh & Moretti, *supra* note 62, at 32–33.

74. Matthew Rognile, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, BROOKINGS PAPERS ON ECON. ACTIVITY 1, 1–4, (2015) (arguing that “[e]mpirically, . . . the long-term increase in capital’s net share of income in large developed countries has consisted entirely of housing” and noting that land use regulations are the most likely explanation).

75. *Id.* at 1–2, 51; Schleicher, *The City*, *supra* note 61, at 1509–12.

76. Christian Hilber & Wouter Vermeulen, *Regulation is to Blame for England’s Surging House Prices*, VOXEU (Apr. 10, 2016), <https://voxeu.org/article/regulation-blame-england-s-surging-house-prices> [<https://perma.cc/S5SW-HEHH>]; Martin Wolf, *Opinion, Why Radical Reform of Urban Planning Is Essential*, FIN. TIMES (May 16, 2021), <https://www.ft.com/content/b2cd5d2e-83bf-4a04-8a40-dc114c5a25b7> [<https://perma.cc/4V8R-6DRN>]. Notably, Japan’s land use planning policy is nationally centralized and very liberal, allowing denser development. Harding, *supra* note 34; Alan Durning, *Yes, Other Countries Do Housing Better, Case 1: Japan*, SIGHTLINE INST. (Mar. 25, 2021, 3:44 PM), <https://www.sightline.org/2021/03/25/yes-other-countries-do-housing-better-case-1-japan/> [<https://perma.cc/SZ8P-S98D>]. Tokyo has all of the demand pressures of other global cities but still has relatively low rents since builders have been able to increase supply.

77. There is a regular debate about whether development increases or decreases prices in the immediate vicinity of the building site. In theory, the effect is ambiguous. New development might either include new amenities or attract new richer residents, increasing housing prices nearby, or drive down prices in line with the basic theory of supply and demand by adding to the housing stock. While empirical studies have not reached total consensus, a large majority find that the supply effect dominates and that new development reduces prices nearby in most contexts. See Shane Phillips, Michael Manville & Michael Lens, *Research Roundup: The Effect of Market-Rate Development on*

but particularly for the poor, who spend a greater percentage of their income on rent.<sup>78</sup> Most people rely on the private housing market, and the high cost of housing in many places creates particular burdens on those with less means.<sup>79</sup> High housing costs drive greater homelessness.<sup>80</sup> Also, local land use restrictions over the years have particularly targeted market-

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*Neighborhood Rents*, UCLA LEWIS CTR. (Feb. 17, 2021), <https://www.lewis.ucla.edu/research/market-rate-development-impacts/> [<https://perma.cc/5WSX-4AMY>] (noting that, among six recent substantive empirical studies, “[f]ive find that market-rate housing makes nearby housing more affordable across the income distribution of rental units, and one finds mixed results”); Arpit Gupta, *The Hyperlocal Effects of Real Estate*, ARPITRAGE (Dec. 6, 2020), <https://arbitrage.substack.com/p/the-hyperlocal-effects-of-real-estate> [<https://perma.cc/7E8W-DGCC>] (reviewing recent literature and finding that most, although not all, papers showed development leading to declines in nearby rents). My favorite of these papers uses exogenous facts about the timing of project completion to provide identification and shows that new construction reduces nearby rents by freeing up apartments for poorer people to move into. Brian J. Asquith, Evan Mast & Davin Reed, *Local Effects of Large New Apartment Buildings in Low-Income Areas*, REV. ECON. & STAT. 1, 1–3 (Apr. 2, 2021), [https://direct.mit.edu/rest/article/doi/10.1162/rest\\_a\\_01055/100977/Local-Effects-of-Large-New-Apartment-Buildings-in](https://direct.mit.edu/rest/article/doi/10.1162/rest_a_01055/100977/Local-Effects-of-Large-New-Apartment-Buildings-in) [<https://perma.cc/6LUL-QE8Z>].

In any event, the normative importance of hyperlocal price effects is unclear. If prices near new buildings increase but prices and supply constraints relax at a citywide level, it should be seen as a success, not a failure. Given the indirect benefits associated with new development, immediate changes in prices in one neighborhood or another should be relatively insignificant from the perspective of society as a whole, or even citywide. See Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market* 1–5 (W.E. Upjohn Inst. for Emp. Rsch., Working Paper No. 19-307, 2019), <https://doi.org/10.17848/wp19-307> [<https://perma.cc/LG4J-57FP>] (examining household migration histories to demonstrate that new development frees up existing housing stock through filtering); Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability*, NYU FURMAN CTR. 5–10 (Aug. 20, 2018) (unpublished manuscript) (on file with NYU Furman Center) (discussing relative importance of supply effects).

78. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-427, RENTAL HOUSING: AS MORE HOUSEHOLDS RENT, THE POOREST FACE AFFORDABILITY AND HOUSING QUALITY CHALLENGES 14–21 (2020) (finding that renting households became more cost-burdened from 2001 to 2017 and that this burden was most severe among lower-income households).

79. MAC TAYLOR, CAL. LEGIS. ANALYST’S OFF., PERSPECTIVES ON HELPING LOW-INCOME CALIFORNIANS AFFORD HOUSING (Feb. 9, 2016), <https://lao.ca.gov/Publications/Report/3345> [<https://perma.cc/AA5F-JMUS>] (“[F]acilitating more private housing development in the state’s coastal urban communities would help make housing more affordable for low-income Californians.”).

80. Jerusalem Demsas, *Los Angeles’s Quixotic Quest to End Homelessness*, VOX (May 14, 2021, 8:30 AM), <https://www.vox.com/22420753/homelessness-los-angeles-skid-row-judge-carter-housing-crisis-zoning> [<https://perma.cc/MV4Q-6SL2>] (summarizing evidence). As Matt Yglesias notes, high rates of homelessness among states and metropolitan areas are much more strongly correlated with housing unaffordability than with stingy welfare policies. Matthew Yglesias, *Homelessness Is About Housing*, SLOW BORING (May 17, 2021), <https://www.slowboring.com/p/homelessness-housing> [<https://perma.cc/K2L4-3RXU>] (noting that New York, Hawaii, California, Oregon, Washington, and Massachusetts have the nation’s highest homelessness rates).

rate housing aimed at the poor, like single-room occupancy hotels or houses on small lots.<sup>81</sup>

These harms to the housing market are not limited to market-rate units. Land use restrictions drive up the cost of building subsidized affordable units; in San Francisco, the cost of building a two-bedroom affordable unit is now \$750,000.<sup>82</sup> Limited supply means that demand-increasing policy tools like housing vouchers have the effect of increasing costs for those who do not receive them.<sup>83</sup> Limited federal housing voucher dollars go further in areas that are loosely zoned.<sup>84</sup> A lack of housing supply in areas of economic opportunity also has dramatic effects on children and their potential for social mobility.<sup>85</sup>

On top of this, building too little new housing in coastal areas has negative environmental impacts.<sup>86</sup> Strict zoning near downtowns and other job centers generates sprawl as people who want access to job markets move further away, generating more vehicle miles traveled and, thus, more

81. See PAUL GROTH, *LIVING DOWNTOWN: THE HISTORY OF RESIDENTIAL HOTELS IN THE UNITED STATES* 146–47, 238–39, 241, 243, 255, 257 (1994) (describing regulations on SROs and flop houses); Brian J. Sullivan & Jonathan Burke, *Single-Room Occupancy Housing in New York City: The Origins and Dimensions of a Crisis*, 17 CUNY L. REV. 113, 119–25 (2013) (describing how New York City regulated SROs to the point of near-extinction).

82. Thomas Fuller, *Why Does It Cost \$750,000 to Build Affordable Housing in San Francisco?*, N.Y. TIMES (Feb. 20, 2020), <https://www.nytimes.com/2020/02/20/us/california-housing-costs.html> [<https://perma.cc/E5LA-EYUD>]; Carolina Reid, *The Costs of Affordable Housing Production: Insights from California's 9% Low-Income Housing Tax Credit Program*, TERNER CTR. 24–25 (Mar. 30, 2020), <https://turnercenter.berkeley.edu/research-and-policy/development-costs-lihtc-9-percent-california/> [<https://perma.cc/S5JK-2QTT>] (describing how land use regulation and fees drive up costs of building affordable housing).

83. Emily Hamilton, *Opportunities for Better Federal Housing Policy: How the Biden Administration and Congress Can Improve Housing Affordability*, MERCATUS CTR. (Jan. 28, 2021), <https://www.mercatus.org/publications/housing/opportunities-better-federal-housing-policy-how-biden-administration-and> [<https://perma.cc/3NNA-57TM>].

84. Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST. (Oct. 18, 2017), <https://www.cato.org/policy-analysis/zoning-land-use-planning-housing-affordability> [<https://perma.cc/MKM5-MTMD>] (noting that the federal government allocates more money to rich areas to make up for their high housing costs).

85. Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 855–60 (2016) (discussing how younger children living in different neighborhoods have substantially different levels of socioeconomic mobility).

86. See Devin Edwards, *Green Houses and Greenhouse Gases: Why Exclusionary Zoning is a Climate Catastrophe*, GEO. PUB. POL'Y REV. (Nov. 5, 2019), <http://gppreview.com/2019/11/05/green-houses-greenhouse-gases-exclusionary-zoning-climate-catastrophe/> [<https://perma.cc/73DH-PVT7>]; Morgan E. Rog, Note, *Highway to the Danger Zone: Urban Sprawl, Land Use, and the Environment*, 22 GEO. INT'L ENV'T. L. REV. 707, 707–08, 711, 713–14 (2010).

greenhouse gas emissions.<sup>87</sup> Regional effects make this worse: per capita greenhouse gas emissions are much lower in temperate California and mass-transit heavy New York than they are in other areas of the country.<sup>88</sup> Restricting access to these areas displaces people to other areas of the country where driving and air conditioning are more necessary, threatening to increase overall emissions nationwide.<sup>89</sup>

As the broader consequences of land use restrictions have emerged over the last forty years, so, too, has the “elite consensus” calling for their liberalization.<sup>90</sup> Ever since the 1920s, land use has been one of the most important powers of local governments.<sup>91</sup> The “consensus” generally suggests that this extreme level of local control is a problem that needs addressing.<sup>92</sup> Local politics tend to be dominated by homeowners,<sup>93</sup> who depend on land use regulations to ensure the value of their most important and undiversified investment: their home.<sup>94</sup> Homeowners use these regulations to reduce local externalities and decrease supply and are unconcerned with any effects they might have on the regional and national economy.<sup>95</sup> Further, by keeping average property values high, homeowner-voters can ensure the availability of well-funded public services at low tax rates in their towns and exclude those who would benefit from redistribution.<sup>96</sup>

Increasingly, it is not just small suburbs but also big cities that limit supply.<sup>97</sup> The combination of a lack of political party competition, the demise of political machines, and a decrease in the power of at-large

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87. And as jobs spread across a region, there is even more commuting, as workers have to traverse vastly larger distances. See Todd Litman, *Evaluating Transportation Land Use Impacts*, VICTORIA TRANSP. POL’Y INST. 2, 10, 11, 18 (Sept. 1, 2021), <https://www.vtpi.org/landuse.pdf> [<https://perma.cc/P2PC-V92Q>] (reviewing literature on environmental consequences of sprawl).

88. See U.S. ENERGY INFO. ADMIN., ENERGY-RELATED CARBON DIOXIDE EMISSIONS BY STATE, 2005–2016, 4 fig.2 (2019), <https://www.eia.gov/environment/emissions/state/analysis/pdf/stateanalysis.pdf> (listing per capita energy-related CO<sub>2</sub> emissions by state in 2016) [<https://perma.cc/9DQ2-SWSV>].

89. See GLAESER, *supra* note 58, at 14–15, 197 (comparing relative environmental impacts of different U.S. metropolitan areas).

90. See Serkin, *supra* note 7, at 751, 768, 770.

91. *Id.* at 749–50, 755–58.

92. *Id.* at 750–51.

93. Potential residents cannot vote, and resident renters are less likely to participate in local elections. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 80–81 (2001).

94. See *id.* at 1–18.

95. See *id.* at 229–31.

96. See *id.* at 134.

97. Schleicher, *City Unplanning*, *supra* note 29, at 1693; Vicki Been, *City NIMBYS*, 33 J. LAND USE & ENV’T L. 217, 218–21 (2018).

representatives has meant that “distributive politics” norms dominate in most cities.<sup>98</sup> As most land use decisions are made “seriatim” or one at a time through zoning amendments, most land use decisions are left in the control of the individual city council member who represents the area where a change is being sought, a rule known as “aldermanic privilege.”<sup>99</sup> Homeowners dominate politics in council races,<sup>100</sup> and the result is that homeowners and residents in Greenwich Village in New York City end up with nearly as much power to exclude as homeowners in Greenwich, Connecticut.

The “elite consensus” thus suggests that state governments should take action to reduce local zoning authority. States can take into consideration the interests of people who do not yet live in a particular town but would like to.<sup>101</sup> Much of the work in the field—particularly my own—also focuses on how governments make land use decisions and who within them is empowered to do so.<sup>102</sup> This work focuses on changes to land use procedure that encourage policymaking in state or citywide fora, rather than through seriatim localized determinations, and on locating more power in state or city executive branches, which are reliably more liberal than legislatures.<sup>103</sup>

State interventions into local land use regulations are no panacea. In the 1970s, the “quiet revolution”<sup>104</sup> of greater state involvement in land use led to more rather than less restrictive land use law. As William Fischel argues, this process created a “double veto,” or a set of state requirements, particularly environmental laws, that limited development even in situations where local governments would allow it and that added time and costs to development.<sup>105</sup> And very large cities—even those like New York or Los Angeles that are bigger than many states—have become very restrictive, suggesting the size of the jurisdiction is not the only factor.<sup>106</sup>

In recent years, however, state involvement has taken on a much more pro-growth cast, with a number of state governments considering or

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98. Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81, 85 (2011); Schleicher, *City Unplanning*, *supra* note 29, at 1699, 1708–09; Roderick M. Hills, Jr. & David N. Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 111–12 (2015) [hereinafter Hills & Schleicher, *Planning*].

99. Schleicher, *City Unplanning*, *supra* note 29, at 1678, 1709–10, 1713.

100. FISCHEL, *supra* note 93, at 88.

101. See Serkin, *supra* note 7, at 751.

102. See Hills & Schleicher, *Planning*, *supra* note 98, at 111–12; Schleicher, *City Unplanning*, *supra* note 29, at 1699, 1708–09; Been, *supra* note 97; Elmendorf, *supra* note 21, at 82–83, 85; Infranca, *supra* note 15.

103. Infranca, *supra* note 15, 824–25; Elmendorf, *supra* note 21, at 85, 148.

104. See FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 1–4 (1971).

<sup>105</sup> 105. Fischel, *supra* note 35, at 28–29.

106. See RYAN AVENT, *THE GATED CITY* loc. 1009–65 (2011) (ebook).

passing some reforms to local land use authority. California both increased its method for calculating housing growth targets through its unique “Regional Housing Needs Assessment” process and created new consequences for local governments that fail to hit these targets.<sup>107</sup> Oregon, New Hampshire, and Massachusetts have passed land use reforms in recent years as well.<sup>108</sup> A number of states, from Utah to North Carolina, are also considering substantial changes.<sup>109</sup> Further, Accessory Dwelling Unit (ADU) reforms, which require cities to allow landowners to build second and sometimes third units on their properties, have been passed in a number of states.<sup>110</sup> So that’s the “elite consensus.” Now on to its critics.

## II. A CASE FOR ZONING: HOW OPPOSITION TO ZONING REFORM IGNORES THE PRESENT

Serkin’s piece, *A Case for Zoning*, begins by stating that the traditional justification for zoning, separating incompatible land uses and reducing nuisances, does not explain much about modern zoning regimes.<sup>111</sup> Instead, modern zoning regimes are necessary to “preserve

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107. Elmendorf, *supra* note 21, at 102–05, 114–22.

108. Laura Bliss, *Oregon’s Single-Family Zoning Ban Was a ‘Long Time Coming,’* BLOOMBERG: CITYLAB (July 2, 2019, 8:03 AM), <https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning> [<https://perma.cc/XL4C-3M4W>] (describing Oregon land use reforms); Brian Chen, *New Hampshire’s Housing Appeals Board: A Surgical Approach to State Land-Use Intervention*, MANHATTAN INST. (Mar. 11, 2021), <https://www.manhattan-institute.org/new-hampshires-housing-appeals-board-state-land-use> [<https://perma.cc/92TD-EGW8>] (describing New Hampshire reforms); Jon Chesto, *Housing Choice Brings the Biggest Changes to Massachusetts Zoning Laws in Decades*, BOS. GLOBE (Feb. 8, 2021, 7:20 PM), <https://www.bostonglobe.com/2021/02/09/business/housing-choice-brings-biggest-changes-massachusetts-zoning-laws-decades/> [<https://perma.cc/D339-FL89>] (describing Massachusetts reforms).

109. Salim Furth & Joseph Coletti, Opinion, *North Carolina’s SB 349 Is the Most Ambitious State Zoning Reform Yet*, CAROLINA J. (Apr. 13, 2021, 6:00 AM), <https://www.carolinajournal.com/opinion-article/north-carolinas-sb-349-is-the-most-ambitious-state-zoning-reform-yet/> [<https://perma.cc/QJ58-GZNV>] (describing reforms proposed in North Carolina); Tony Semerad, *Utah Lawmakers Advance Housing Helps, but Will They Run out of Time?*, SALT LAKE TRIB. (Mar. 2, 2021, 7:28 PM), <https://www.sltrib.com/news/2021/03/02/utah-lawmakers-push/> [<https://perma.cc/PWY5-8M75>] (describing reforms proposed in Utah).

110. Infranca, *supra* note 15, at 857–75 (summarizing ADU reforms).

111. Serkin, *supra* note 7, at 749, 751–52, 754, 762. For what it is worth, this is a very strange opinion. Serkin writes, “Today, local governments deploy zoning not primarily to keep industry (or apartment buildings) out of residential neighborhoods . . .” *Id.* at 749. But local governments do in fact use zoning to keep industry, retail, and apartment buildings out of single-family neighborhoods. As Sara Bronin found in her terrific empirical study of zoning in Connecticut, every inch of private land in the state is zoned, and 91.1 percent of all zoned land in Connecticut only permits single-family homes to be built, often on very large lots. Sara C. Bronin, *Zoning by a Thousand Cuts: The*

community stability by regulating the pace of change, protect property values, and allocate the costs of development and growth.”<sup>112</sup> Zoning is useful because it allows incumbent homeowners to regulate the pace of change and make newcomers pay for the costs they impose.<sup>113</sup> Zoning also serves to promote “sorting” among communities, as in the famous Tiebout Model, where residents move to capture particular baskets of public services and tax rates.<sup>114</sup> Strict limits on building encourage investment by homeowners by assuring them that they will not have to share public services with residents who pay less in property taxes per capita.<sup>115</sup> Further, Serkin argues that liberalizing zoning would lead to greater use of homeowners’ associations (HOAs) and other deed covenants, which may be a worse problem than zoning.<sup>116</sup> Finally, he argues that zoning has helped promote growth in rich central cities in the 1990s and 2000s, as they were able to give homebuyers a similar type of amenities they found in the suburbs.<sup>117</sup>

For the most part, Serkin’s arguments are not new. And, as applied to our zoning debates of the last forty or so years, they do not make much sense either. The most novel argument in the piece is Serkin’s claim that extensive zoning in big cities was a major causal factor in the “return to the city” of the 1990s to 2010s.<sup>118</sup> He focuses particularly on the use of tools like Community Benefit Agreements and changes in procedures for passing zoning amendments, like New York City’s notoriously difficult-

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*Prevalence and Nature of Incremental Regulatory Constraints on Housing*, CORNELL J.L. & PUB. POL’Y (Sept. 24, 2021) (forthcoming) (manuscript at 15, 33–34), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3792544](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792544). This is true in big cities as well. See Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES: UPSHOT (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html> [<https://perma.cc/SS9A-SQDR>] (listing percentages of residential land in several major American cities zoned exclusively for detached single-family homes as of 2019, including 75% in Los Angeles, 81% in Seattle, and 84% in Charlotte). Serkin also says that “the original goal of separate zones where everything is in its own homogenous place has given way to New Urbanism with a focus on dynamic communities with mixed uses and walkable neighborhoods.” Serkin, *supra* note 7, at 762. But these approaches are still quite rare, at least in the United States. See Sonia Hirt, *Mixed Use by Default: How the Europeans (Don’t) Zone*, 27 J. PLAN. LITERATURE 375, 377, 389 (2012) (noting that Euclidean zoning remains the “default option” in the United States and that mixed-use and form-based codes are uncommon as compared to Europe).

112. Serkin, *supra* note 7, at 749, 752.

113. *Id.* at 773–74, 778–82.

114. *Id.* at 771–76; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–20 (1956).

115. Serkin, *supra* note 7, at 776–78.

116. *Id.* at 794–98.

117. *Id.* at 789–93.

118. *Id.*

to-navigate Uniform Land Use Review Procedure.<sup>119</sup> There would be little demand to live in cities like New York or San Francisco unless their neighborhoods were protected by strict, suburban-style zoning, Serkin claims.<sup>120</sup>

This argument is not particularly responsive to the claims of those who favor zoning deregulation. Zoning reform arguments (and the policies favored by pro-growth groups and legislators) are as focused, if not more, on suburban land use regulations as they are on urban ones.<sup>121</sup> But even on its own terms, Serkin's argument is not particularly powerful. He does not provide any empirical evidence that increased zoning restrictions—rather than more common and plausible explanations like falling crime rates, the changing nature of the economy, or changes in school funding mechanisms—caused increasing demand to live in downtown areas.<sup>122</sup> Further, there was demand for both cities with strict zoning restrictions and cities that lacked them.<sup>123</sup> Lightly zoned cities and metropolitan areas like Houston and Phoenix saw big inflows of population.<sup>124</sup> Of course, other cities, like Boston and San Francisco, saw huge demand reflected through increasing property prices rather than population growth.<sup>125</sup> But it is not the case that strict land use controls were a necessary component for

119. *Id.* at 790. For what it is worth, Serkin's history of zoning in New York City misses the forest for the trees. The biggest change—by far—in making it harder to build housing in New York was the 1961 zoning resolution. Eric Kober, *Zoning That Works*, CITY J. (2021), <https://www.city-journal.org/nycr-nyc-zoning-reform-needed-for-housing-growth> [<https://perma.cc/9396-54S7>] (“It’s hard for anyone involved in New York City land use, zoning, and real estate to believe, but the city once had very permissive residential zoning. Rents were affordable, even in new buildings, and new housing was plentiful. This happy interlude was ended not by war, depression, or natural disaster, but by a political deal . . . . The deal, taking effect a year later and known as the 1961 Zoning Resolution, was the culmination of a multi-decade effort to replace the city’s 1916 zoning framework with one ostensibly suitable for the modern age.”). The rules Serkin talks about were mostly limits on the capacity of the city to increase zoning capacity after the city had downzoned aggressively in 1961.

120. Serkin, *supra* note 7, at 753–54, 767–68.

121. *See infra* note 137 and accompanying text.

122. *See* SASSEN, *supra* note 70, at xix–xxii (explaining demand to live in global cities as a product of changing technologies and rise of superstar firms); GLAESER, *supra* note 58, at 195–97 (discussing the role of economic changes and the decline in crime in driving demand to live in the city); Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828, 1866–69 (2017) (finding that changing amounts of state education aid led to “return to the central city” as aid offset the tax penalty rich residents paid for collocating with poorer ones); Devin G. Pope & Jaren C. Pope, *Crime and Property Values: Evidence From the 1990s Crime Drop*, 42 REG’L SCI. & URB. ECON. 177, 177–78 (2012) (describing correlation between falling crime and increasing urban property values).

123. GLAESER, *supra* note 58, at 183–93.

124. Schleicher, *City Unplanning*, *supra* note 29, at 1674–75 (noting population growth in less restrictive, high demand areas, while Boston and San Francisco saw housing prices appreciate); GLAESER, *supra* note 58, at 183–93.

125. Schleicher, *City Unplanning*, *supra* note 29, at 1674–75.

demand, either at the regional or city level. Rather, spikes in demand reflected themselves differently in highly regulated places (in the form of high housing prices) and less regulated places (in the form of population increases and increased home building).<sup>126</sup>

Serkin's claims about HOAs are similarly flawed. It is true, as he notes, that HOAs and deed covenants exist in large numbers and are responsive to similar demands from homeowners to control uses in nearby lots.<sup>127</sup> But HOAs do not have the same effect as zoning and other land use controls on housing prices or exclusion. As Molly Brady recently noted, zoning came into existence in large part because deed covenants could not successfully limit the construction of apartment buildings in New York City in the early 1900s.<sup>128</sup> Developers can buy out deed restrictions, or restrictions can fall into disuse.<sup>129</sup> And deed restrictions are generally small—few covenants cover more than one percent of the size of a municipality—leaving space for development to occur and making them useless for the purpose of fiscal zoning.<sup>130</sup>

Consider Houston, which Serkin discusses extensively as an example of the harms created by HOAs.<sup>131</sup> Houston, our one major city without use zoning, has always had lots of HOAs.<sup>132</sup> Houston recently even let particular blocks opt out of a recent reform to its subdivision regulations as part of a successful effort to reduce political opposition.<sup>133</sup> There has been huge demand to live in Houston over the past seventy years.<sup>134</sup> If HOAs did the same work in restricting development as did zoning regimes, the city would have high housing prices, like those we see in New York or Boston, and little housing growth. But housing prices in Houston are much lower, roughly in line with construction costs.<sup>135</sup> And its

126. *Id.*

127. Serkin, *supra* note 7, at 796.

128. Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1663–64 (2021).

129. Most HOAs are time-limited, although they can be renewed. Modern innovations—which allow for automatic renewal of HOAs unless a majority or a supermajority of owners opt out—are becoming more common. Robert C. Ellickson, *Stale Real Estate Covenants* 8–10, 25 (Aug. 21, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3678927](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678927).

130. *Id.* at 21.

131. Serkin, *supra* note 7, at 796–97.

132. See BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 78 (Rowman & Littlefield 2021) (1972) (discussing HOAs in Houston).

133. M. Nolan Gray & Adam A. Millsap, *Subdividing the Unzoned City: An Analysis of the Causes and Effects of Houston's 1998 Subdivision Reform*, J. PLAN. EDUC. & RSCH., July 15, 2020, at 1, 5.

134. M. Nolan Gray, *Afterword* to BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING*, 249, 250 (Rowman & Littlefield 2021).

135. Glaeser, Gyourko & Saks, *Why is Manhattan So Expensive?*, *supra* note 52, at 358–59 (comparing housing prices in Houston and other cities); Glaeser, *supra* note 34 (describing population inflows and low housing prices in Houston); Emily Hamilton, *Want*

population, both at the city and regional level, has boomed.<sup>136</sup> Given this visible difference in the elasticity of housing supply between places, HOAs clearly do not substitute for zoning.<sup>137</sup>

Serkin's central argument is no stronger. He argues that zoning today is not genuinely about reducing externalities associated with incompatible land uses.<sup>138</sup> Instead, he finds zoning regimes useful for three distinct but interrelated goals: creating community stability, encouraging "sorting," and allocating the costs of growth between developers and current

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*More Housing? Ending Single-Family Zoning Won't Do It.*, BLOOMBERG: CITYLAB (July 29, 2020, 9:06 AM), <https://www.bloomberg.com/news/articles/2020-07-29/to-add-housing-zoning-code-reform-is-just-a-start> [<https://perma.cc/VV9F-372F>] ("Houston now boasts a median home price below the national median in spite of decades of rapid job growth and increasing population.").

136. Serkin also points to Houston's lack of density. It is true that Houston sprawls, but in this way it is not much different from other cities that were also built out during the automobile era. And some of its sprawl is a result of its remaining land use rules, including its subdivision regulations and parking requirements. Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171 (2005). Further, since Houston reformed its subdivision laws in 1998, the city has seen an explosion in townhouse development. Gray & Millsap, *supra* note 133, at 12–13; Gray, *supra* note 134, at 250.

137. There is also an important and ongoing argument about whether deed restrictions need reform and limitation. Notably, the same groups that support zoning reform also support measures such as limitations on HOA rules that bar ADUs. *See AB 3182*, CAL. YIMBY, <https://cayimby.org/ab-3182/> [<https://perma.cc/7P8P-3EH7>] (last visited Sept. 26, 2021) (describing legislation sponsored by California's leading pro-housing growth group that bars HOAs from banning ADUs).

138. Not only does this not actually capture the reality of zoning regulations, *see supra* note 119, but denying the importance of incompatible land uses also removes much of what makes property regulation distinctive. Every argument Serkin raises for zoning regulation could equally be applied to other types of regulations that restrict individual choices in the name of community stability and that encourage investment. For instance, should people who have invested in large wardrobes and houses in areas where people have traditionally dressed in a conservative manner be able to legislate the minimum length of hemlines or the shape of blue jeans? Should local governments hold public meetings to deliberate about the proper width of neckties or whether white can be worn after Labor Day? It sounds absurd, but people make investments in personal property as well as in real property. Both housing densities and the clothes worn by residents have an impact on neighborhood character. Where traditional religious communities abut communities of young people, as they do in Williamsburg, Brooklyn, there is conflict over how people dress. Jennie Rothenberg Gritz, *Where the Religion Meets the Road*, ATLANTIC (Apr. 15, 2020), <https://www.theatlantic.com/national/archive/2010/04/where-the-religion-meets-the-road/39001/> [<https://perma.cc/2GFA-RLE9>] (describing conflict over a bike lane in Williamsburg that was partially caused by traditional religious attitudes about clothing). To follow the lines of Serkin's arguments, members of these religious communities moved to a place expecting not to be confronted by contemporary youth culture and should have been able to protect these expectations with law. Based on his arguments, it seems as if Serkin would support local governmental regulations ensuring that clothing trends do not change too quickly, allowing residents and owners of existing wardrobes to come to terms with the change. Once incompatible land uses or the desire to match development with the provision of public services are abandoned as a justification, zoning becomes simply an effort by insiders to police the lifestyles and market choices of outsiders.

residents.<sup>139</sup> His argument is that by allowing local governments to decide what gets built, existing owners will permit change at a rate they find acceptable:

[Zoning] does not prevent change but instead regulates the pace of change. And this makes sense because people experience slow accretive change to a neighborhood much differently than they experience quick, avulsive changes, even if the ultimate results are exactly the same. In fact, if the change is slow enough, in-place owners might not experience any meaningful harm at all. Zoning gives in-place property owners time to allow their expectations—their reliance on the community character—to change gradually and thereby reduces the disruption that comes from changes to a community.<sup>140</sup>

As an empirical matter, this is false. Bob Ellickson recently published a longitudinal study of suburbs in three very different metropolitan areas—New Haven, Silicon Valley, and Austin.<sup>141</sup> His finding? “The politics of local zoning, a form of public land use regulation that has become ubiquitous in the United States during the past century, almost invariably works to freeze land uses in a neighborhood of houses.”<sup>142</sup> Across each of these jurisdictions, areas that were zoned for single-family houses almost never allowed denser uses after they were first developed. “[W]ith rare exception, local zoning rules forbid construction of denser residential structures, even duplexes.”<sup>143</sup>

Ellickson also looks at the most famous zoning map in American history, the regulations from the village of Euclid, Ohio, that the Supreme Court found constitutionally permissible, allowing zoning to take off around the country.<sup>144</sup> In 1922, a large number of lots in Euclid were zoned for single-family houses, were on streets that were already laid out, and did not abut either of the village’s two largest thoroughfares.<sup>145</sup> Of those lots, ninety-nine percent are still zoned for single-family uses today.<sup>146</sup> As Ellickson notes, other studies have found the same thing. Ninety-nine point seven percent of land in Massachusetts used for single-family houses

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139. Serkin, *supra* note 7, at 771–72, 781.

140. *Id.* at 784 (footnote omitted).

141. Robert C. Ellickson, *The Zoning Strait-Jacket: The Freezing of American Neighborhoods of Single-Family Houses* 15 (Jan. 30, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3507803](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3507803).

142. *Id.* at 3.

143. *Id.* at 47.

144. *Id.* at 3 (discussing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

145. *Id.* at 11–12.

146. *Id.* at 12.

in 1970 had the same use thirty years later.<sup>147</sup> Issi Romem, Jonathan Levine, Jonathan Rothwell, and Douglas Massey have corroborated the same basic point nationally—once developed, single-family zones are rarely, if ever, allowed to become denser.<sup>148</sup>

Homeowners are not merely limiting the pace of change but wholly averting it, stopping redevelopment and growth altogether. There are a few limited exceptions to the “zoning strait-jacket,” as Ellickson notes—mostly situations involving the building of a new mass transit line—but even these circumstances do not guarantee changes in land use law.<sup>149</sup> Most development, though, proceeds in previously undeveloped areas or areas used for other uses (like old manufacturing sites).<sup>150</sup>

Serkin’s normative moves are no better. He argues that zoning regulations allow cities to permit development when and if developers pay enough in impact fees or other concessions, making developers rather than incumbents bear the cost of growth, while still allowing change.<sup>151</sup>

Notably, this argument was first advanced by Robert Nelson and William Fischel in the 1970s and 1980s.<sup>152</sup> Fischel and Nelson argued that zoning should be understood as a collectively held property right.<sup>153</sup> Assigning the right to develop to a local government dominated by homeowner-voters gives existing property owners the ability to negotiate with developers.<sup>154</sup> If transaction costs are not too high, there should be no difference between what happens when developers can build freely but can be bought out by residents and when developers are forced to buy the

147. *Id.* at 9.

148. *Id.* at 11–23, 47; Rothwell & Massey, *supra* note 49, at 790 (finding that zoning designations were extremely stable between 1988 and 2003); Issi Romem, *America’s New Metropolitan Landscape: Pockets of Dense Construction in a Dormant Suburban Interior*, BUILDZOOM, <https://www.buildzoom.com/blog/pockets-of-dense-construction-in-a-dormant-suburban-interior> [<https://perma.cc/K658-W2SS>] (last visited Sept. 26, 2021) (finding that dormant zones where almost no new housing is built dominate most metropolitan areas); JONATHAN LEVINE, *ZONED OUT: REGULATION, MARKETS AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND USE* 77–79, 204 (2006).

149. Ellickson, *supra* note 141, at 24; *see also* David Schleicher, *How Land Use Law Impedes Transportation Innovation*, in *EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY* 38, 44–45 (Lee Anne Fennell & Benjamin J. Keys eds., 2017) (discussing how land use regulations often impede the value of transportation investments, including rail) [hereinafter Schleicher, *Transportation Innovation*].

150. *See* Romem, *supra* note 148.

151. Serkin, *supra* note 7, at 778–82.

152. WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 74–149 (1985); ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM* 15–18 (1977).

153. FISCHEL, *supra* note 152; NELSON, *supra* note 152, at 15–18.

154. Homeowners have a reason to dominate local politics, Fischel argues, because they have made huge, uninsurable investments in their houses. FISCHEL, *supra* note 93, at 8–12. “Homevoters” use politics to ensure the value of their homes.

right to build, for Coasean reasons. And granting the right to the city, rather than the developer, brings down transaction costs. As Fischel himself notes, these models ignore regional harms, focusing exclusively on the interests of local residents and developers.<sup>155</sup>

Much criticism has been levied at Fischel and Nelson over the years.<sup>156</sup> But their work provides the best explanation of the underlying normative logic of modern zoning regimes, particularly the use of such regulations to bar uses that would not create nuisances recognizable by common law courts. Serkin overlooks the sophistication of their models, ignoring the focus they put on questions like the extent of transaction costs, limits on alienability of zoning created by courts, whether local governments actually represent the interests of property owners, and whether homeowner concerns might be limited through products like home value insurance.<sup>157</sup>

Serkin also argues that zoning facilitates sorting between local governments.<sup>158</sup> The argument, the best-known form of which was made by Bruce Hamilton in the 1970s, is that homeowners in cities with high-quality services funded by property taxes will face huge pressure to subdivide their property.<sup>159</sup> Doing so would allow new entrants to consume services at the average level for the town but pay taxes at a lower level per capita. The result, Hamilton argued, is that the Tiebout Model—which suggests that local services will be provided at the efficient level due to people voting with their feet by moving between towns<sup>160</sup>—has no equilibrium if government services are funded by property taxes.<sup>161</sup> Without zoning and subdivision regulations, people who buy property in high-service-level towns will build housing that will allow many people to live on those lots.<sup>162</sup> This will create population booms that undermine the quality of local services and cause exit from the jurisdiction.<sup>163</sup> Zoning can stabilize the average per capita property value and thus ensure an end

155. FISCHEL, *supra* note 152, at 83.

156. One notable criticism, to which I will return later, is Schragger, *supra* note 33.

157. FISCHEL, *supra* note 152; NELSON, *supra* note 152, at 15–18.

158. Serkin, *supra* note 7, at 771–72.

159. See Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 210–11 (1975) [hereinafter Hamilton, *Zoning and Property Taxation*]; Bruce W. Hamilton, *Capitalization of Intra-jurisdictional Differences in Local Tax Prices*, 66 AM. ECON. REV. 743, 748 (1976) [hereinafter Hamilton, *Capitalization of Intra-jurisdictional Differences*]. Serkin, unlike Hamilton, discusses this mostly in terms of community character and not the tax price of public goods. But the logic is the same.

160. Tiebout, *supra* note 114, at 418.

161. See Hamilton, *Zoning and Property Taxation*, *supra* note 159, at 208.

162. *Id.* at 207–08.

163. See *id.* at 205; Serkin, *supra* note 7, at 772.

to the cycle of subdivision.<sup>164</sup> Zoning protects investments in housing by ensuring that there is no pressure on towns to share their property taxes with people living in housing that results from the subdivision of lots, like renters or purchasers of townhouses, apartments, or whatever else.<sup>165</sup>

But while Serkin echoes these classic arguments by Fischel, Nelson, and Hamilton, he does not acknowledge that they make less sense as normative claims today than they did forty years ago. Serkin repeatedly calls the tradeoffs between towns and new entrants “zero sum.”<sup>166</sup> But the whole point of the research on the broad economic cost of zoning restrictions since the 1980s is that the losses outweigh the gains by enormous amounts.<sup>167</sup> Just because homeowners gain from zoning regulations and new residents lose does not mean the question of housing growth is zero sum. Since the 1980s, the sum has been very, very negative.<sup>168</sup>

You don’t have to rely on me, though. There is not much in Serkin’s normative argument that was not first said in the first edition of Fischel’s *The Economics of Zoning Laws*.<sup>169</sup> Here’s what Fischel says now:

It is now well established that in certain areas of the nation – the Northeast and West Coast especially – local land use regulation is associated with unusually high housing prices. The excessive housing prices retard mobility of labor, reduce national productivity, and worsen income inequality . . . .

Accommodating growth in the Boston-to-Washington corridor and in the larger cities of the West Coast is important for national economic growth and for reducing the level of income inequality in the United States. It is clear from experience that the courts are not able or inclined to protect the interests of development-minded landowners. Federal and state policies that attempt to increase supply or lower local barriers are inevitably frustrated by the political power of the locals and the NIMBY alliance with high-minded environmental goals.<sup>170</sup>

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164. See Hamilton, *Capitalization of Intra-jurisdictional Differences*, *supra* note 159, at 748.

165. See *id.* at 750–51.

166. Serkin, *supra* note 7, at 782, 785–86.

167. See, e.g., Schleicher, *Stuck!*, *supra* note 8, at 114–17.

168. See *supra* Part I.

169. See FISCHEL, *supra* note 152, at 301–04.

170. Fischel, *supra* note 35, at 13, 30. “Boy, if life were only like this.” ANNIE HALL (Rollins-Joffe Productions 1977) (quoting from lead character Alvy Singer after he brings out Marshall McLuhan from behind a sign to resolve a dispute over the meaning of McLuhan’s work).

Despite drawing heavily on Fischel's work, Serkin ignores how Fischel, the nation's leading pro-zoning economist, himself views the changes over the last forty years of development of zoning practice. Fischel specifically argues that zoning changed very dramatically in the 1970s and 1980s as homeowners encouraged by changes in environmental awareness, inflation, and tax law increased their demands for regulations that inhibited development.<sup>171</sup> Before this period, "growth machines" dominated local politics, allowing housing growth, at least at the regional level.<sup>172</sup>

In addition to ignoring changes in zoning policy, Serkin also ignores the issue of who makes zoning decisions. He calls for balance between growth and stasis but then suggests it is alright for states to leave individual towns, dominated by homeowners, in charge of deciding whether growth occurs.<sup>173</sup> He never interrogates their incentives or the merits of lavishing them with power.<sup>174</sup>

While Serkin's arguments appear neutral, claiming the need to find the correct "balance" between existing homeowners' interests and broader regional concerns, the arguments fail to actually assess how the balance is struck today.<sup>175</sup> It is an argument out of touch with the present.

Ultimately, the case Serkin lays out is the incumbents' lament: Why does change have to come when things are so good for me already?

From the 1970s through 2020, America has had slow economic growth after one hundred years of fast growth, rising inequality, insufficient improvement in many categories of racial equality, and a continued flow of greenhouse gases.<sup>176</sup> Over the same period, homeowners in our richest regions have profited quite handsomely. I suppose one could look at American history since the 1970s and regret the extent to which change has unsettled the expectations of property owners, particularly homeowners in the fancy suburbs or downtowns of our richest cities. Sure, their houses have wildly increased in value, making them unbelievably wealthy.<sup>177</sup> And yes, their investments have been buffeted by huge tax benefits, from the absence of income taxes on imputed rents to the

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171. Fischel, *supra* note 35, at 19–20, 24.

172. *Id.* at 17–19.

173. Serkin, *supra* note 7, at 784, 793–98.

174. Further, other than noting that supporters of zoning deregulation focus on them, Serkin does not discuss the effect his view of zoning would have on racial exclusion or global warming. *Id.* at 764, 784–85.

175. *Id.* at 785–86.

176. GORDON, *supra* note 72, at 606–10.

177. Serkin, *supra* note 7, at 766–68.

mortgage deduction to limits on property taxes like California's Prop 13.<sup>178</sup> But consider their settled expectations!<sup>179</sup>

These homeowners will come around eventually, Serkin suggests, allowing some growth at some point.<sup>180</sup> After all, if change is not “avulsive,” it will have no negative effect on them at all.<sup>181</sup> Just wait, he advises, and at some point, homeowners will deign to allow an apartment building or two to be built.<sup>182</sup>

In land use meetings all across the rich suburbs and downtowns of America, Serkin's argument echoes. You can hear it in the complaints of homeowners in Beverly Hills about the threat of state laws that would require densification after the town had to bear the construction of nine affordable housing units and seventy-five market-rate units over an eight-year period, despite fast-growing housing prices.<sup>183</sup> You can see it in yard signs in one of the richest towns in Massachusetts that characterize a proposed five-story building in Massachusetts as the “Weston

178. James Poterba & Todd Sinai, *Tax Expenditures for Owner-Occupied Housing: Deductions for Property Taxes and Mortgage Interest and the Exclusion of Imputed Rental Income*, 98 AM. ECON. REV. 84 (2008) (discussing the favorable tax treatment of owner-occupied housing under the federal tax code); MAC TAYLOR, CAL. LEGIS. ANALYST'S OFF., COMMON CLAIMS ABOUT PROPOSITION 13, at 1–3 (2016).

179. Also, did purchasers of property in 1974 in, say, Cupertino or Mountain View, California, really expect to see such huge gains in wealth? For their neighborhoods to become internet-tech hubs? Serkin wants to protect homeowners' expectations about the built form of their hometowns but cares little about economic or other forms of change. This move is something we see in debates over historic preservation. Much of the West Village of Manhattan's built form has been protected by historic preservation and zoning rules. C.J. Hughes, *The West Village: A Pause, and a Reset, for a Coveted Area*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/realestate/west-village-nyc.html> [<https://perma.cc/U6ZP-TYMX>]. But as demand to live there has increased, both the socioeconomic mix of residents and the types of retail have changed substantially, from bohemian to upscale. *Id.* (quoting a finance professor saying, “You feel a little sorry for the stores that have been kicked out because of ridiculously high rents.”). When we focus on protecting the settled expectations of property owners as to the built environment, we allow them to capture huge economic gains without actually stopping change in the social and cultural milieu of their neighborhoods or preserving much beyond the density and sometimes the look of buildings.

180. Serkin, *supra* note 7, at 784.

181. *Id.*

182. *Id.*

183. Thomas Fuller & Conor Dougherty, *California Today: The Beverly Hills Affordable Housing Loophole*, N.Y. TIMES (Feb. 5, 2020), <https://www.nytimes.com/2018/02/05/us/california-today-beverly-hills-affordable-housing.html> [<https://perma.cc/U2YM-LH6Y>] (describing building numbers in Beverly Hills); Cameron Kiszla, *Mirisch Pushes Back Against Sacramento*, BEVERLY PRESS & PARK LABREA NEWS (Oct. 9, 2019), <https://beverlypress.com/2019/10/mirisch-pushes-back-against-sacramento/> [<https://perma.cc/U7QW-UJDS>] (quoting the mayor of Beverly Hills, in decrying state zoning reform bills and asking for praise for keeping its population constant, as saying, “We shouldn't be demonized; we should be looked at as a stable model of a connected, capable and caring community . . .”).

Whopper.”<sup>184</sup> Don’t hurry them, Serkin advises. Once their housing values have increased enough, they will vote to allow housing growth. Just wait.

Serkin thinks we need to be reasonable in how we balance the settled expectations of homeowners in Scarsdale, New York, and Bel Air, California, about the built form of their neighborhoods against economic growth rates that are too slow, housing that is too expensive, economic inequality that is too severe, segregation that is too intense, and carbon emissions that create too much climate change. The “elite consensus”—long aware of the arguments Serkin raises—presents tons of evidence that the balance is badly off.<sup>185</sup> I suppose you can be the judge.

### III. REGULATION AND THE GEOGRAPHY OF INEQUALITY AND THE EXTREME CONSERVATISM OF OPPOSITION TO ZONING REFORM

Serkin’s defense of zoning also appears in a piece he co-authored with Morgan Ricks and Ganesh Sitaraman (henceforth “RSS”).<sup>186</sup> This piece, *Regulation and the Geography of Inequality*, is a bit more measured in its critique of land use policy and makes a number of interesting arguments.<sup>187</sup> But the piece captures well an ideological and psychological attitude—an extreme and unexplained conservatism—that undergirds a good deal of skepticism about zoning deregulation.

In Part II, I briefly laid out the macroeconomic case for zoning deregulation, noting that allowing more building in rich regions would allow for more growth.<sup>188</sup> Zoning deregulation would lead to increases in output and increases in innovation because it would allow people—particularly less well-off people—to move to areas that have higher wages and are more creatively fertile.<sup>189</sup> During the Trump years, particularly after 2016, a huge literature developed to address the problems of

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184. Edward L. Glaeser, *How to Fix American Capitalism*, CITY J., Autumn 2020, at 3 (describing opposition to the “Weston Whopper”); *The Weston Whopper: A Huge Apartment Complex Near Weston High School*, PRES. WESTON, <https://www.preserveweston.org/the-weston-whopper/> [<https://perma.cc/4P6J-SFKF>] (last visited Sept. 24, 2021); Ben Steverman, Alexandre Tanzi & Wei Lu, *It Takes \$2.2 Million a Year to Live in America’s Richest Zip Code*, BLOOMBERG: WEALTH (Nov. 27, 2020, 6:00 AM), <https://www.bloomberg.com/news/articles/2020-11-27/richest-american-zip-codes-it-takes-2-2-million-a-year-to-live-in-us-no-1> [<https://perma.cc/H854-3UWP>] (ranking Weston as the zip code with the highest average adjusted gross income in the Northeast region based on 2018 IRS and census data).

185. See Schleicher, *City Unplanning*, *supra* note 29, at 1704–11 (describing the imbalance of landowner influence over development proposals).

186. Sitaraman, Ricks & Serkin, *supra* note 7.

187. “We are not opposed to zoning and land-use reforms. Indeed, we think there are opportunities to increase density and agree that NIMBYism can be socially oppressive. But we do intend to sound a cautionary note.” *Id.* at 1825.

188. See discussion *supra* Part II.

189. See *supra* Part II.

geographic economic inequality.<sup>190</sup> Many noted that economic differences between Silicon Valley and the Appalachian Valley had increased substantially in recent years.<sup>191</sup>

These two literatures intersect. The reason reducing zoning regulations would increase the size of the economy is because doing so would allow people to move from low-wage areas to higher-wage areas (and to areas that encourage greater development of human capital).<sup>192</sup> The point of zoning reform is not to equalize places, but rather to reduce rents and allow people to move to better jobs.<sup>193</sup> But allowing greater mobility should have the effect of reducing per capita inequality between places, as working people move from poorer areas to richer ones (and not just high-income people, who can move to these regions no matter what form housing policy takes).<sup>194</sup>

RSS are focused on the problem of regional inequality. They argue that zoning deregulation would not fully address the problem of regional inequality and may exacerbate it by encouraging people to move to already-successful areas.<sup>195</sup> Rather than allow people to move to jobs, they argue we should encourage jobs to move to where people already are.<sup>196</sup> They do not advocate for place-based subsidies, as others have, but instead

190. Sitaraman, Ricks & Serkin, *supra* note 7, at 1776–85 (summarizing and analyzing the literature).

191. See, e.g., Benjamin Austin, Edward Glaeser & Lawrence Summers, *Jobs for the Heartland: Place-Based Policies in 21st-Century America*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2018, at 151, 153 (“The most compelling case for place-based policies is that one-size-fits-all interventions are woefully inappropriate for regional economies as diverse as Appalachia and Silicon Valley.”).

192. See Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 78 (2017).

193. See Hamilton, *Capitalization of Intra-jurisdictional Differences*, *supra* note 159, at 750–52.

194. Sitaraman, Ricks & Serkin, *supra* note 7, at 1772–76; Ganong & Shoag, *supra* note 192, at 78 (noting the role played by land use in reversing the trend toward convergence).

195. Sitaraman, Ricks & Serkin, *supra* note 7, at 1824–25. This argument misses how zoning affects the composition of who moves where. While RSS note that today, richer people are on average more mobile than poorer people, the net moves into regions are largely driven by the housing crisis itself. In California, the center of the zoning-driven housing crisis, poor and middle-class people have left over the past ten years, while rich people have moved in, because of the high housing costs necessary to access the state’s job markets. Hans Johnson, *Who’s Leaving California—and Who’s Moving In?*, PUB. POL’Y INST. OF CAL. (May 6, 2021), <https://www.ppic.org/blog/whos-leaving-california-and-whos-moving-in/> [<https://perma.cc/3KDV-YZ92>]. One reason computer programmers or financiers are more likely to move to high-opportunity areas is that the wage premium they get for living in California or New York is sufficiently large to pay for housing, while the (still quite real) wage premium for janitors is insufficient. See Ganong & Shoag, *supra* note 192, at 78.

196. Sitaraman, Ricks & Serkin, *supra* note 7, at 1778.

argue for re-regulation of industries like trucking and airlines, the adoption of geographic criteria in trade deals, and increased antitrust regulation.<sup>197</sup>

But moving jobs to people, rather than allowing people to move to jobs, would be very costly. A major premise of the economic research discussed in Part II—much of which RSS cite as well—is that some areas have higher wages than others due to gains from agglomeration benefits like information spillovers, deep labor and consumption markets, and reduced shipping costs.<sup>198</sup> All of these phenomena contribute to increased productivity when people co-locate in regions.<sup>199</sup> If regulations convinced or forced firms to deconcentrate, these gains would dissipate.

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197. The argument about antitrust is particularly strange. RSS do not provide any actual evidence that greater antitrust enforcement would lead to deconcentration of economic activity away from superstar regions. Now, it is totally *possible* that it would. Perhaps breaking up big firms will lead to the rise of regional champions, a Google in every midsized city. On the other hand, it might not. Big firms in concentrated industries frequently deconcentrate employment, spreading workers around the country. Military contractors are very concentrated at the firm level, but each firm has factories and officials everywhere; the concentrated auto industry spreads its employment around the Midwest and South. See William D. Hartung, *Defense Contractors Are Tightening Their Grip on Our Government*, NATION (July 16, 2019), <https://www.thenation.com/article/archive/military-industrial-complex-defense-contractors-raytheon-united-technologies-merger/> [https://perma.cc/73TR-CWU2] (arguing that increasingly concentrated defense contractors spread employment around the country to generate political influence); Dennis Cuneo, *The Changing Geography of the American Auto Industry*, AREA DEV. (2014), <https://www.areadevelopment.com/Automotive/Advanced-Industries-2014/changing-geography-of-american-auto-industry-2262541.shtml> (discussing regional distribution of the American auto industry). Tech giants like Amazon, Google, and Facebook are increasingly developing major offices throughout the country and world, even during the pandemic. See Karen Weise & Matthew Haag, *Amazon Sticks With Office Expansion Plans in New York and Elsewhere*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/technology/amazon-office-expansion.html> [https://perma.cc/CC3C-PMVT]. Also, many industries that are not concentrated at the firm level are still geographically concentrated. Hedge funds cluster in New York and Connecticut despite there being many of them; tech firms clustered in Silicon Valley in the 1990s before the rise of dominant market players like Google and Facebook. Daniel Gross, *The Kingdom of Hedgistan*, N.Y. MAG. (Apr. 6, 2007), <https://nymag.com/news/features/2007/hedgefunds/30347/> [https://perma.cc/B8SY-FJXP] (noting extreme clustering of hedge funds in midtown Manhattan and Greenwich, Connecticut); ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, at 29–57 (1994) (describing history of the rise of Silicon Valley as a tech cluster).

One would like to see some empirical evidence on this point. But all RSS point to is a few journalistic accounts. Sitaraman, Ricks & Serkin, *supra* note 7, at 1804 n.208 (citing magazine articles and popular books without much in the way of systematic evidence or statistical analysis).

198. See discussion *supra* Part I.

199. These forces are sufficiently strong that it is not clear whether there are policies powerful enough to counteract them. As Adam Posen notes, countries around the world, including authoritarian ones with policy tools far beyond what are on offer domestically, have struggled to revive declining areas. Adam Posen, *The Price of*

Similarly, RSS do not seriously acknowledge the costs of their regulatory solutions.<sup>200</sup> Noting that deregulation of the airline industry, for instance, had implications for which cities grew is not an argument for reregulation unless you presuppose the importance of keeping the country's geographic distribution of people the same as it was in 1970. After all, it is cheaper to run flights (or trucks or trains) between a few locations where people concentrate than it is to run a far-flung operation to every small town in America. One could argue that re-regulation is still worth it—that the benefits of deconcentrating economic activity outweigh these losses. But this is a steep hill to climb given the clear and significant costs of forcing industries to cross-subsidize money-losing routes. All federal policies have geographic consequences—all of them benefit some places more than others—but this does not mean that their only effect is to choose geographic winners and losers.<sup>201</sup> In the case of transportation services, providing service among a smaller number of more densely populated hubs is genuinely cheaper.<sup>202</sup> Requiring cross-subsidies is a tax by another name, and not a small one, in order to produce unclear benefits.

But these points are to the side of the central flaw, or at least the central feature, of RSS's piece: its extreme conservatism, both politically and philosophically. The piece stands athwart moving vans, yelling Stop, and does not explain why.<sup>203</sup>

Recall that one of the “benefits” that Serkin sees in zoning regulation is that property owners can use it to ensure that local public services do not engage in economic redistribution.<sup>204</sup> By isolating themselves in suburban towns and ensuring that property is not subdivided, property owners can ensure that per capita property values are relatively consistent and that high-quality public services are not shared.<sup>205</sup> For Serkin, one key aspect of protecting owners' settled expectations is protecting their interest

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*Nostalgia*, FOREIGN AFFS. (May/June 2021), <https://www.foreignaffairs.com/articles/united-states/2021-04-20/america-price-nostalgia> [<https://perma.cc/H4D3-5U8S>].

200. RSS note that it is cheaper to ship or fly between a smaller number of nodes as an explanation for the effect that deregulation of the airline and freight rail industry had on the geographic spread of economic activity. Sitaraman, Ricks & Serkin, *supra* note 7, at 1787–88. But they don't follow through to say that cheaper shipping costs due to servicing a fewer number of nodes is a benefit of such a policy.

201. See, e.g., Jason Scott Johnston, *A Game Theoretic Analysis of Alternative Institutions for Regulatory Cost-Benefit Analysis*, 150 U. PA. L. REV. 1343, 1347 (2002) (noting tremendous regional variation in the cost of compliance for nationally uniform federal pollution standards).

202. See Severin Borenstein, *Dissipating the Airline Deregulation Dividend*, REGUL., Winter 1990, at 69, 72.

203. See WM. F. Buckley, Jr., *Publisher's Statement*, NAT'L REV., Nov. 19, 1955, at 5, 5.

204. See *supra* notes 114–15 and accompanying text.

205. Serkin, *supra* note 7, at 772, 776–77.

in not having to share tax dollars.<sup>206</sup> RSS's skepticism about zoning deregulation is in part premised on the fear that it will lead to taxes paid by rich property owners being shared with people who live in apartments, not large houses.<sup>207</sup> Similarly, RSS acknowledge that rents will fall as a result of zoning deregulation, including for the less well-off.<sup>208</sup> And the justification RSS give for their skepticism about zoning reform is that it would permit migration.<sup>209</sup>

The paper thus "intend[s] to sound a cautionary note" about land use deregulation *because* it would permit redistribution and make migration possible.<sup>210</sup> The authors are somewhat indifferent to the fact that land use deregulation would reduce rents (for renters and for property owners).<sup>211</sup> The paper does not clearly justify why it gives so little normative weight to redistribution, migration, and reduced rents.

But RSS's temperamental or philosophical conservatism is more fundamental than their political conservatism. Most advocates of place-based policies view their interventions as methods for producing more accurate and effective redistribution among individuals.<sup>212</sup> Targeting redistribution at people who currently have little income, they argue, may not as precisely target those in need as sending money to declining places.<sup>213</sup> And targeting places allows policies to directly address shortfalls in public goods.<sup>214</sup> The goal of those interventions, though, is to reduce individual-level economic inequality using geographically-specific policies as a tool.<sup>215</sup>

Whatever the merits and demerits of that approach, it is not what RSS are up to. Rather than addressing individual inequality through targeting places, they focus on solutions to the problem of inequality between places in and of itself.<sup>216</sup> They argue that we should re-regulate industries in order

206. *Id.* at 777–78. This is restated somewhat more obliquely in Sitaraman, Ricks & Serkin, *supra* note 7, at 1820–21, 1821 n.299.

207. Sitaraman, Ricks & Serkin, *supra* note 7, at 1819–21.

208. *Id.* at 1824 (acknowledging "land-use deregulation . . . [as] an important part of the response to the affordability crisis in many cities").

209. *Id.* at 1815–16.

210. *Id.* at 1824–25.

211. *Id.* at 1763–64, 1824–25.

212. *See, e.g.,* Matias Busso, Jesse Gregory & Patrick Kline, *Assessing the Incidence and Efficiency of a Prominent Place Based Policy*, 103 AM. ECON. REV. 897, 897–99 (2013); Schleicher, *Stuck!*, *supra* note 8, at 141, 142 n.284 (reviewing literature).

213. Schleicher, *Stuck!*, *supra* note 8, at 142 n.284. For example, people can have low incomes but high wealth or can have low incomes today but good opportunities.

214. *See* Sitaraman, Ricks & Serkin, *supra* note 7, at 1792 n.132 (explaining subsidies targeted at locations hurt by transportation deregulation); *id.* at 1825–29 (discussing place-based policies in the form of tax benefits and industrial policy and their impacts).

215. *See id.* at 1827–28.

216. *Id.* at 1768.

to return people and firms to more closely match where they were located in 1970 (or 1900).<sup>217</sup>

But why? If the 500 largest businesses in a country in 1970 were also the 500 largest businesses in 2020, we'd think it was a sign of a sclerotic economy, one that is not open to change or growth. The same is true for cities. Different technologies allow and encourage people to live in different places. When shipping was the main transportation technology, cities located near ports; when railroads became important, cities sprung up at hubs.<sup>218</sup> Elevators allowed for denser cities, cars for more spread-out metropolitan areas.<sup>219</sup> Information technology, at least until 2020, has been a force for centralization, with firms able to run far-flung operations from a central office and individuals able to better coordinate their activities in a city.<sup>220</sup> The federal government has traditionally helped people capture the gains from technological development by aiding local governments in building infrastructure but did so not to equalize places but to increase output and individual choice.<sup>221</sup>

There's nothing magical about where people located in 1970 or 1900. Those location decisions were themselves products of responses to economic, technological, and political forces of their time. Cities that rose because of their ports were surpassed by cities that served as railroad hubs.<sup>222</sup> Some railroad hub cities declined when shipping goods by truck became more feasible.<sup>223</sup> Cities in cold places became less popular when air conditioning made living in warm places more pleasant.<sup>224</sup> We are

217. *Id.* at 1767–68.

218. See Edward L. Glaeser & Janet E. Kohlhase, *Cities, Regions and the Decline of Transport Costs*, in *FIFTY YEARS OF REGIONAL SCIENCE 197* (Raymond J. G. M. Florax & David A. Plane eds., 2004); Glaeser & Ponzetto, *Death of Distance*, *supra* note 69.

219. See Schleicher, *Transportation Innovation*, *supra* note 149, at 39 (discussing how different transportation technologies affect urban form).

220. Jess Gaspar & Edward L. Glaeser, *Information Technology and the Future of Cities*, 43 *J. URB. ECON.* 136, 138 (1998).

221. See *Strong Infrastructure and a Healthy Economy Require Federal Investment: Hearing Rep. of H. Comm. on the Budget*, 117th Cong. 1–3, 7–8 (2019) (emphasizing the importance of infrastructure to the economy).

222. See, e.g., Benjamin W. Dreyfus, *The City Transformed: Railroads and Their Influence on the Growth of Chicago in the 1850s* (1995), <https://www.hcs.harvard.edu/~dreyfus/history.html> [<https://perma.cc/3RSP-XJ2F>].

223. See Glob. Resilience Inst., *How the Decline of the Freight Rail Industry Highlighted the Importance of Community Resilience: Murdo, South Dakota*, NE. U. <https://globalresilience.northeastern.edu/how-the-collapse-of-the-freight-rail-industry-highlighted-the-importance-of-community-resilience-murdo-south-dakota/> [<https://perma.cc/MLU4-ZKQY>].

224. Emily Badger & Alan Blinder, *How Air-Conditioning Conquered America (Even the Pacific Northwest)*, N.Y. TIMES (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/upshot/the-all-conquering-air-conditioner.html> [<https://perma.cc/AXB4-EDDK>] (“Air-conditioning has been remarkably good at creating demand for itself. It enabled the sweeping postwar development of the South, where all new single-family homes today include central air.”).

always moving around.<sup>225</sup> It makes little sense to romanticize any particular set of location decisions that responded to the technologies and politics of their time.

Now, it is true that there are costs to transitioning to new modes—people who can't move to new industries or new places when the economy shifts, firms that lose out when competition comes. It is a reasonable and good thing to be concerned about people left behind when the economy, technology, or social norms change.

But were RSS concerned about transitioning from one economic moment to another, they would propose temporary solutions. They do not. They propose policies designed to permanently set in place our current geography.<sup>226</sup> Concern about transition costs should not obscure the more important issue, which is the need for progress on many key social and economic issues. RSS focus on the costs of change without thinking about its upsides.<sup>227</sup> Nothing in their proposals focuses on, or even considers, the effect of policies on economic growth, which is the central factor in producing better outcomes for current and future Americans.<sup>228</sup> RSS focus so exclusively on preserving things as they are (or even on going backward, to a geography of the past) that they ignore the possibility of progress. This instinctive and crippling fear of change—a refusal to even consider the benefits of progress when deciding whether to allow change—undergirds much opposition to zoning deregulation and to growth more broadly.

It is easy to see why homeowners in rich towns, or elected officials chosen by them, find this type of conservatism attractive. Limiting change and competition is good for them, at least in a narrow sense. But it is harder to see why the rest of us should.

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225. Another place to see RSS's blinding conservatism is in their embrace of arguments that cities cannot grow because their infrastructure cannot expand to match new population. Sitaraman, Ricks & Serkin, *supra* note 7, at 1817. Their defeatism about the possibility of growth is particularly odd given the ambitions of their regulatory agenda. Their paper calls for a radical reregulation of whole industries but assumes that widening a few roads or building new sewer systems is impossible. *Id.* at 1764, 1817.

226. *See id.* at 1834–35.

227. To be fair, there is an offhand comment accepting the likelihood that people will not always live in the same places. “[W]e acknowledge and embrace the inevitability of economic changes over time. The geography of opportunity has never been static, nor should it be. But though the particular geographic configuration of opportunity might change over time, policymakers should realize that these shifts are not automatic or inevitable.” *Id.* at 1772. What RSS don't see is that change can be good if it allows us to better exploit our technological capacities, not something to be lamented. Their grudging willingness to accept the possibility of some small amount of migration over the course of the next several decades is testament to their entrenched conservatism.

228. *See, e.g., id.* at 1834–36; Chad Stone, *Economic Growth: Causes, Benefits, and Current Limits*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 17, 2017), [cbpp.org/research/economy/economic-growth-causes-benefits-and-current-limits](http://cbpp.org/research/economy/economic-growth-causes-benefits-and-current-limits) [<https://perma.cc/QR2S-QX4Y>].

Finally, RSS have a confusing relationship with the politics of regional development. They claim that reregulating industries would help the federal constitutional system function better by reducing population inequality between states.<sup>229</sup> But they don't consider that our current fiscal policy is a product of a Senate that features vast population inequality between states and likely (and indeed does promote) promotes huge amounts of economic redistribution from more populated to less populated states already.<sup>230</sup> Unless RSS think that any amount of subsidy to declining places is justified no matter what the cost, it would behoove them to consider their proposed system of cross-subsidies as part of the broader universe of place-effecting federal policies.<sup>231</sup>

And then RSS argue in favor of regulating industries and forcing them to cross-subsidize declining areas with profits made in growing ones, rather than using taxes and transfers, because it obscures who is paying for them. “[F]inancing through cross-subsidies,” they argue, “removes these decisions from the ordinary appropriations and political process,” making them “more reliable than annual appropriations and less subject to political capture.”<sup>232</sup> Their proposed method of fixing the structural problems of representative democracy is to reduce the transparency of public policy.

A critique of an “elite consensus” ends up proposing the creation of a system of cross-subsidies managed by technocrats designed to make it hard for voters to comprehend and thus challenge. And an egalitarian-styled argument ends up siding with rich property owners against renters, migrants, and those in favor of redistribution. To invert Disraeli, one might say that these authors might be Whiggish or even Social Democratic men, but they have written an arch-Tory paper.<sup>233</sup>

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229. See Sitaraman, Ricks & Serkin, *supra* note 7, at 1776–77, 1781–84.

230. Laura Schultz, ‘Blue State Bailouts’? Some States Send Billions More to Federal Government Than They Get Back, U.S. NEWS (May 15, 2020), <https://www.usnews.com/news/best-states/articles/2020-05-15/some-states-like-new-york-send-billions-more-to-federal-government-than-they-get-back> (discussing differences in how much taxpayers in different states pay into and receive back from the federal government).

231. Also, one wonders what their substantive problem with an unequal Senate is, exactly. Sitaraman, Ricks & Serkin, *supra* note 7, at 1782. The likely effect of a legislature that gives relatively more power to less populated areas is to produce policies designed to reallocate resources to those areas. And that’s exactly what RSS propose!

232. *Id.* at 1831–32.

233. See BENJAMIN DISRAELI, CONNINGSBY 220 (London, Henry Colburn 1844) (critiquing a conservative government as consisting of “Tory men and Whig Measures”).

IV. THE PERILS OF LAND USE DEREGULATION AND THE  
UNCONDITIONAL EMBRACE OF LOCAL AUTHORITY IN OPPOSITION TO  
ZONING REFORM

Richard Schragger’s defense of local zoning authority, *The Perils of Land Use Deregulation*, is a wide-ranging survey of both the content and the process of zoning reform.<sup>234</sup> The piece is structured as a criticism of state laws requiring some degree of zoning deregulation. It notes that “[i]t does not quibble with the main criticisms of exclusionary zoning” but its central argument is that zoning deregulation does not always provide the benefits suggested by its proponents and that states should not mandate it.<sup>235</sup>

While it is comprehensive, it is also full of arguments at war with themselves and built on a fundamentally misguided idea—a belief that local control should be defended at all costs, no matter what it is used for and no matter who it is used by. State laws aimed at zoning liberalization target the most aggressive forms of local exclusion, but Schragger will countenance no limits on local power. Despite claiming an opposition to the interests of capital, he ends up relying on a series of inconsistent and inapposite arguments to defend the interests of property owners.

The first part of his argument focuses on the politics of land use reform. Schragger begins criticizing contemporary state governmental efforts to liberalize zoning on the grounds that, over the years, there have been many state policies that have failed to remedy segregation or improve housing affordability.<sup>236</sup> It is true—there have been bad state governmental policies over the course of American history. But, as Schragger himself notes, local governments are the most important and powerful regulator of land uses and thus of housing supply.<sup>237</sup> So while state governments have

234. See Schragger, *supra* note 3.

235. *Id.* (manuscript at 3).

236. *Id.* Most of the policies Schragger mentions—urban renewal, highway spending, and home mortgage subsidies, for example—were not aimed at liberalizing zoning. *Id.* (manuscript at 22–25). He does note that several 1970s efforts to mandate housing construction in California and Oregon did not do much, but these are exactly the policies that those states have sought to strengthen in recent years. See also Elmendorf, *supra* note 21.

237. Schragger argues in favor of local control by noting that state legislatures are dominated by suburban voters. Schragger, *supra* note 3 (manuscript at 22–23). The central reason for this trend is that most people live in suburbs. Kim Parker, Juliana M. Horowitz, Anna Brown, Richard Fry, D’Vera Cohn & Ruth Igielnik, *Demographic and Economic Trends in Urban, Suburban and Rural Communities*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities/> [https://perma.cc/3TYY-NV9U]. It is true that cities are disadvantaged in state legislatures due to methods of districting. Paul A. Diller, *Re-Orienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 290–91 (2016). But the central advantage suburban voters have in state legislatures is simply numerical (although of course suburbs are themselves

failed many times at many things, if we understand segregation and slow housing growth in high-demand areas to be problems, most of the blame should lie with the governments that do most of the regulating.

More importantly, it is unclear what the point of the comparative exercise is. Why should we ask whether states or locals are better at regulating land use in the abstract? If zoning is too strict, one should support state interventions that successfully liberalize it, just as one should support local efforts to liberalize zoning and not those that will make it stricter.

Proponents of state intervention argue that federal and state policies that encourage or require local governments to liberalize land use rules are justified because local governments are unlikely to reasonably balance the costs and benefits of zoning policy.<sup>238</sup> They (or rather we) argue that preempting some local zoning rules makes sense because the benefits of doing so accrue to people who do not live inside the boundaries of the governments doing the regulating or to people who do but are less likely to vote or participate in local politics.<sup>239</sup> That is, state intervention to liberalize local regulation can be justified as a way of addressing its externalities. But no one in favor of zoning liberalization would support state policies that restrict development simply because they are made by states. In fact, a large part of the pro-growth platform is defeating the “double veto” of restrictive state land use policies, like state environmental laws that limit dense development.<sup>240</sup>

Schragger next argues that state-level zoning reform, whatever its merits, is futile since it will be defeated by homeowners resistant to efforts at regionalization and to building affordable housing.<sup>241</sup> I am a bit more optimistic than he is, and there have been some important recent successes,

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diverse). For the exact same reason, suburban voters dominate local zoning decisions completely. Residents of rich suburbs are the only ones who get a say on zoning in their towns, and that is where most of the action occurs. See RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* xvi (1966) (classic work on zoning politics, stating that “the primary emphasis” should be on “suburban, not urban, activity,” since “[o]ne hunts where the ducks are believed to be”). At least in state legislatures there are other actors, urban and rural, who can play a part. In most local zoning disputes, the only relevant actors are homeowners.

238. Elmendorf, *supra* note 21, at 83–84.

239. See, e.g., Schleicher, *Stuck!*, *supra* note 8, at 149–54; Elmendorf, *supra* note 21, at 134–38.

240. See Elmendorf, *supra* note 21, at 82; Infranca, *supra* note 15, at 876–77.

241. Schragger, *supra* note 3 (manuscript at 5–6).

but betting on massive change is usually wrong.<sup>242</sup> Things are as they are for a reason.<sup>243</sup>

However, thinking that zoning reform faces an uphill battle in state legislatures is hardly a reason to oppose zoning deregulation. Lots of good things are difficult to achieve!<sup>244</sup> Perhaps this would make sense as an argument to activists about how to best use scarce political capital, but it is not on its own a normative argument against preemptive state laws. The policies Schragger argues are better than zoning reform are not likely to pass in most jurisdictions either, but he supports them nonetheless. Absent

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242. See *supra* notes 107–10 and accompanying text. Of course, state land use policies are not likely to solve the problems of slow growth, high housing costs, or segregation all on their own or entirely. Schragger seems to think little of marginal gains that address, but do not completely solve, the problems of inequality or segregation. In characterizing the *Mount Laurel* regime in New Jersey largely as a failure, he dismissively notes that “some amount of affordable housing has been produced in New Jersey after almost half-a-century.” Schragger, *supra* note 3 (manuscript at 23). But some is better than none! Further, New Jersey jurisdictions produce much more housing than New York’s other suburbs. See Noah Kazis, *Ending Exclusionary Zoning in New York City’s Suburbs*, N.Y.U. FURMAN CTR. 9–10 (Nov. 9, 2020), [https://furmancenter.org/files/Ending\\_Exclusionary\\_Zoning\\_in\\_New\\_York\\_City’s\\_Suburbs.pdf](https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_City’s_Suburbs.pdf) [<https://perma.cc/5SN5-FF7V>]; Nicholas J. Marantz & Huixin Zheng, *Exclusionary Zoning and the Limits of Judicial Impact*, J. PLAN. EDU. & RSCH. 1 (2018) (finding “that New Jersey’s approach was associated with increases in the stock of townhome and apartment units relative to suburban jurisdictions in New York State, but not Pennsylvania”). And other northeastern states with affordable housing appeals systems of a variety of sorts tend to produce more affordable housing than those without. Nicholas J. Marantz & Huixin Zheng, *State Affordable Housing Appeals Systems and Access to Opportunity: Evidence From the Northeastern United States*, 30 HOUS. POL’Y DEBATE 370, 370–71 (2020) (finding that state housing laws in Connecticut, Massachusetts, and Rhode Island, but not New Jersey, led to greater affordable housing production than New York, which lacks such laws).

243. At one point, Schragger makes a version of the argument Eric Posner and Adrian Vermeule call the “inside/outside fallacy.” See Schragger, *supra* note 3; Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013). Posner and Vermeule argue that it is a mistake to suggest a problem was created by incentives of political actors and then suggest solutions that ignore the existence of those incentives. *Id.* Rick Hills and I have devoted several papers to addressing this concern, arguing that supporters of land use reform should take advantage of stochastic election results (weird stuff happens sometimes) to propose procedural changes rather than simply push for one-time increases in housing growth. Schleicher, *City Unplanning*, *supra* note 29, at 1718; Roderick M. Hills, Jr. & David Schleicher, *Building Coalitions Out of Thin Air: Transferable Development Rights and ‘Constituency Effects’ in Land Use Law*, 12 J. LEGAL ANALYSIS 79, 114 (2020). Procedural changes can change results going forward in a stable way if those results were the product of cycling preferences in an Arrowian sense or a “defect” result in a policy area that features prisoner dilemma-like features. Further, organizing land use laws in different ways can encourage political participation by different groups. *Id.* at 112, 127.

244. Also, Schragger is contributing to the very problem that he identifies. He, and those who make arguments like his, are part of the reason state zoning reform is difficult to pass.

some explanation why his prediction bears on the merits, this argument bears little weight.

Schrager then argues that if we want to address inequality, changing the tax code would be a more efficacious method of doing so than zoning reform.<sup>245</sup> If he can find tax policies that would simultaneously have as big a positive effect on growth, efficiency, and equity as would zoning reform, we should be all ears.<sup>246</sup> More importantly, an argument in favor of a specific change to federal or state taxes is not an argument against zoning deregulation. Unless Schrager thinks that the problems of slow growth and inequality can be vanquished entirely by a few tweaks to the tax code, rendering all other efforts to improve the economy meaningless, there is no conflict. We can do more than one good thing. Why not both?<sup>247</sup>

Schrager also says that other local policies would be better than zoning reform, including “fair wage and hours reform, health care and paid leave, eviction and tenant protections, and labor rights.”<sup>248</sup> Whether one likes the idea of local governments enacting these policies or not, there is no obvious conflict between them and zoning deregulation.<sup>249</sup> States can grant localities the power to enact these policies while restricting their power to use zoning to exclude. Also, state land use reforms, as a matter of legislative politics, are frequently paired with eviction restrictions, tenant protections, labor regulations, and/or inclusionary zoning requirements.<sup>250</sup>

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245. Schrager, *supra* note 3 (manuscript at 5).

246. Economists’ estimates about the negative economic impacts of land use are so enormous that even if you think they are overstated, they far outweigh any single tax reform. Also, no less than a paragraph earlier, Schrager discusses the political difficulty of zoning reform but then blithely assumes that massive tax policy changes will be easy to achieve. *Id.*

247. Por qué no los dos! See *Why Not Both? / Why Don’t We Have Both?*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/why-not-both-why-dont-we-have-both> [<https://perma.cc/X2ES-23PX>] (last visited Oct. 8, 2021).

248. Schrager, *supra* note 3 (manuscript at 6).

249. Schrager argues that state-level zoning reform undermines local power more generally by setting a bad precedent, *id.* (manuscript at 30), but does so without any evidence of any such effect. If state legislatures limit localities from passing one type of regulation, it does not have any automatic effect on any other power. And the effect of passing zoning in politics is surely mixed—zoning reform could be a substitute for other types of preemption, or it could be a complement. Absent some evidence of a causal effect (or even a substantial explanation of his assumptions), there is little basis for this argument.

250. For instance, one of the most aggressive proposed zoning reforms in the country—California’s failed SB50—included requirements that builders had to either include a certain percentage of affordable units or comply with local inclusionary requirements. Scott Wiener, *Fighting Our Housing Crisis: The Facts About My Housing Legislation, SB 50*, MEDIUM (Mar. 15, 2019), <https://scott-wiener.medium.com/fighting-our-housing-crisis-the-facts-about-my-housing-legislation-sb-50-676af1aad94> [<https://perma.cc/TS7U-QBKT>] (describing affordable housing requirement of fifteen to twenty-five percent or higher local requirement). Further, SB50’s density bonus could not be used on lots occupied by renters in the last seven years. *Id.* SB50 also did not displace

This pivots into a somewhat more serious argument that control over zoning gives local governments the ability to extract concessions from developers who want to build.<sup>251</sup> Other players in land use politics—for instance, the California branch of the American Planning Association, as well as some construction labor groups—have taken similar stances.<sup>252</sup> Even stupid and pernicious local regulations are useful, they argue, because the power to lift these regulations gives local governments the power to hold up developers.<sup>253</sup>

There is a long literature about “exactions.”<sup>254</sup> As tax policy, exactions are strange: they discourage something we should like (building new houses and offices) while differentially putting a tax burden on outsiders (developers, new residents), leaving existing residents with comparatively lower taxes.<sup>255</sup> For exactly this reason, exactions are understandably popular among existing homeowners/voters in a city, as they offload the cost of paying for needed public goods to outsiders.<sup>256</sup> As a result, state laws on “development impact fees” generally limit local government to extracting fees that cover the costs created by new

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local labor requirements. Matt Levin, *A Gentler, Still Incredibly Controversial Housing Bill Is Back—with a Powerful New Ally*, CAL MATTERS (June 23, 2020), <https://calmatters.org/housing/2018/12/bill-pushes-denser-housing-around-transit-california/> [<https://perma.cc/R3VV-2QTZ>]. Whatever one thinks of these requirements, the politics of statewide land use reform usually ends up requiring combinations of density, tenant protections, and labor rules.

251. Schragger, *supra* note 3 (manuscript at 56–57).

252. Henry Grabar, *Everyone Agrees California’s Parking Laws Are Bad for Cities. So Why Do Planners Like Them?*, SLATE (May 13, 2021, 2:10 PM), <https://slate.com/business/2021/05/california-parking-minimums-planners-housing-ab1401.html> [<https://perma.cc/8GPQ-SPEF>] (describing and criticizing planners for supporting regulations they know are bad); Michael Manville & Taner Osman, *Motivations for Growth Revolts: Discretion and Pretext as Sources of Development Conflict*, 16 CITY & CMTY. 66, 66–67 (2017).

253. Grabar, *supra* note 252.

254. See, e.g., RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 184–87 (1993) (criticizing Vicki Been’s pro-exactions framework); Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831 (1992) (arguing that exactions are used for exclusion and that many jurisdictions have sufficient market power to make them inefficient); Vicki Been, *“Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991) (arguing that local governments lack market power and thus cannot charge excessively high exactions).

255. EPSTEIN, *supra* note 254, at 182–83; Sterk, *supra* note 254, at 832–33.

256. Been, *supra* note 254, at 478–82.

development.<sup>257</sup> The federal Takings Clause puts limits on “conditional takings” as well.<sup>258</sup>

More sophisticated proponents of policies like inclusionary zoning (rules that require developers to build a certain number of below-market-rate units, often in return for density bonuses and/or tax abatements) argue that they unlock local politics, encouraging communities to approve rezonings.<sup>259</sup> These proponents argue that inclusionary zoning thus encourages growth as well as affordable housing and integration.<sup>260</sup> The past few years have not been very friendly to this argument. Policies like New York City’s Mandatory Inclusionary Zoning policy did not ease the path to neighborhood rezonings.<sup>261</sup> Further, many jurisdictions set inclusionary requirements so high that they stop development in its tracks.<sup>262</sup> But this is at least a coherent argument and may be true in some contexts. Arguing that zoning liberalization is bad because it reduces political support for zoning liberalization, though, does not make sense.

The most common argument for exactions is that they allow local governments to price entry. They are the means by which local governments alienate their collective property right to exclude development.<sup>263</sup> Exactions play an important role in the work of Fischel

257. See Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 204–06 (2006) (describing state law limitations on impact fees).

258. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 383–84, 396 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 595–96, 599, 607 (2013) (the Supreme Court’s three most important exaction or conditional takings cases).

259. Andrew Dietderich, *An Egalitarian’s Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 40–41, 45 (1996).

260. *Id.* at 26–29 (arguing that inclusionary zoning requirements do not constrict development but usually enable more of it).

261. See Caroline Spivack, *As NYC Neighborhoods Push Back Against Rezoning, de Blasio’s Signature Housing Policy Is Threatened*, CURBED: N.Y. (Mar. 2, 2020, 1:10 PM), <https://ny.curbed.com/2020/2/6/21123983/nyc-affordable-housing-rezoning-bill-de-blasio> [<https://perma.cc/8ZUX-DZV3>] (describing political pushback in neighborhoods despite mandatory inclusionary zoning).

262. See Joe Cortright, *Inclusionary Zoning: Portland’s Wile E. Coyote Moment Has Arrived*, CITY OBSERVATORY: COMMENT (Sept. 3, 2021), <https://cityobservatory.org/inclusionary-zoning-portlands-wile-e-coyote-moment-has-arrived/> [<https://perma.cc/WP3F-NA3B>] (showing that inclusionary zoning requirement of Portland, Oregon, which applies only to apartment buildings of twenty units or more, completely stalled development of buildings at or above this size, while smaller buildings continued to get built); Eric Kober, *De Blasio’s Mandatory Inclusionary Housing Program: What Is Wrong, and How It Can Be Made Right*, MANHATTAN INST., (Jan. 16, 2020) (noting that New York City’s Mandatory Inclusionary Zoning requirements meant that new housing could not be built except in the highest-demand neighborhoods, as the cost of providing affordable units exceeded the value the developer got from renting market-rate units).

263. See Sterk, *supra* note 254, at 832–33.

and Nelson, discussed above.<sup>264</sup> Vicki Been's well-known defense of exactions explicitly relies on a Tieboutian logic.<sup>265</sup> Exactions are an important piece of a system in which zoning creates a right to exclude, one that can be exercised or sold.

Years ago, Schragger wrote a review of Fischel's book, *The Homevoter Hypothesis*:

[Fischel] is seemingly less aware of the distributional consequences of a political economy that gives the homevoter almost unfettered control over who gets to move in next door and that reduces significantly the options for those who are barred. The losers in the interlocal competition for low-cost, high-tax-base homeowners—the urban poor, racial minorities, families in search of affordable housing, the elderly—are nowhere to be found in his account of local power.

....

... The device for pegging property values to the quality of local public goods is zoning, which provides residents with a collective property right to exclude others from the jurisdiction analogous to their individual property right to exclude others from their homes . . . .<sup>266</sup>

Zoning, and the entire regime of land-use controls, is the mechanism for ensuring scarcity. Zoning restricts the development of new housing in the jurisdiction, thus ensuring that all the benefits of local investment accrue to existing homeowners in the form of increased property values. It makes buying a house of a certain value a prerequisite for entry into the jurisdiction, ensuring that the cost of new entrants is offset by what they pay in property taxes. And it controls for overcrowding, ensuring that local public goods that are susceptible to overuse (like a school) are not devalued by congestion . . . .

....

Indeed, Fischel's praise for the homevoter is somewhat puzzling in light of the fact that her political economy is based on the legal right to exclude. 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. His praise is even more puzzling when one considers the litany of costs that

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264. See *supra* notes 152–55 and accompanying text.

265. Been, *supra* note 254, at 507.

266. Schragger, *supra* note 33, at 1826, 1829.

flow from the homeowner's defensive posture: the sprawling, inefficient use of land and associated costs in terms of infrastructure investment, commuting times, social isolation, and environmental quality; the concentration of the poor in urban cores with dwindling tax bases and reduced city services; and the extreme segregation of Americans by race and income.<sup>267</sup>

This critique of collective property right theories of zoning now applies to Schragger's own work. Schragger's criticism of Fischel was about exclusion by suburban jurisdictions, while he is embracing zoning restrictions and exactions imposed by larger jurisdictions.<sup>268</sup> But the logic of his earlier arguments applies equally well to exclusion by cities. After all, cities are not immune to exclusionary impulses, particularly at the neighborhood level, which decides most land use questions.<sup>269</sup>

Also, state zoning reforms—the policy he is criticizing in this piece, after all—fall mostly on suburban jurisdictions because most people and most local governments are suburban.<sup>270</sup> While demand to live in cities certainly increased after the great decline in crime in the 1990s<sup>271</sup> and property prices in some cities increased very dramatically,<sup>272</sup> a huge majority of Americans live in suburbs.<sup>273</sup> And while suburbs are more diverse than ever, zoning restrictions in many suburbs of our richest regions are extreme.<sup>274</sup> For instance, more than one-third of Greenwich, Connecticut, has a four-acre minimum lot size.<sup>275</sup> From 1940 to 1970, Greenwich's population increased by seventy percent, but due to zoning restriction, its population has not increased since 1970, an economic boom.<sup>276</sup> Zoning restrictions have meant that there has been barely any housing growth since 2001 in all of Long Island, Westchester, and the Hudson Valley—around 7,600 new units a year for an area with a

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267. *Id.* at 1829, 1836.

268. *See id.* at 1825–27.

269. Schleicher, *City Unplanning*, *supra* note 29, at 1675, 1704.

270. *See* Schragger, *supra* note 3 (manuscript at 22–31).

271. Pope & Pope, *supra* note 122, at 177, 187.

272. *Id.*

273. Jed Kolko, *America Really Is a Nation of Suburbs*, BLOOMBERG: CITYLAB (Nov. 14, 2018, 7:00 AM), <https://www.bloomberg.com/news/articles/2018-11-14/u-s-is-majority-suburban-but-doesn-t-define-suburb> [<https://perma.cc/9J8U-NNYX>]; Parker et al., *supra* note 237.

274. *See* Bronin, *supra* note 111 (manuscript at 47–56); Parker et al., *supra* note 237.

275. Nicholas Abbott, *How Restrictive Zoning Shut the Middle Class out of Greenwich, Conn.*, BROOKINGS: AVENUE (Apr. 24, 2021), <https://www.brookings.edu/blog/the-avenue/2021/04/14/how-restrictive-zoning-shut-the-middle-class-out-of-greenwich-conn/> [<https://perma.cc/CEJ5-M5YH>] (describing history and present of land use law, population, and housing prices in Greenwich).

276. *Id.*

population of 5.1 million.<sup>277</sup> As a result, state laws that preempt zoning rules mostly affect the suburbs. That's where the people, the land value, and the most severe zoning restrictions generally are. When one favors land use localism, the main beneficiaries are owners of housing in rich suburban towns.

In order to protect the capacity of downtowns to demand exactions, Schragger would leave every rich town and neighborhood in America free to use zoning to exclude. In the piece, he regularly describes those in favor of zoning deregulation as being on the side of capital,<sup>278</sup> but homeowners in Beverly Hills and Great Neck are no less holders and wielders of capital than developers and big businesses are. Schragger defends homeowners' capacity to use their control over local governments to protect their investments against competition.<sup>279</sup>

Not content to stop there, Schragger makes a whole variety of inconsistent economic arguments that zoning liberalization is bad, full stop.<sup>280</sup> In doing so, he cites a grab bag of scholars skeptical of zoning liberalization even though these arguments are often inconsistent with one another or do not apply to the types of state laws he's criticizing.<sup>281</sup> He's throwing spaghetti, but none of it sticks to the wall.

The Section is long, so I cannot go through all of his claims. But here are a few:

Schragger argues that population flows to superstar metros might not achieve the type of growth suggested by economists like Hsieh and Moretti because the population density created by zoning liberalization would be a bad kind of density.<sup>282</sup> For this proposition, he cites Jane Jacobs, who famously argued that mid-rise urban neighborhoods, like the West Village in New York City, were important for the spilling over of ideas because they featured a diversity of land uses and just the right amount of density.<sup>283</sup> But while there are debates inside New York City over increasing densities, Schragger's paper is critiquing state laws limiting local zoning authority. No state law anywhere has ever proposed requiring

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277. Kazis, *supra* note 242 (noting that Long Island, with a population of 2.8 million, permitted 56,000 units between 2001 and 2018 and that Westchester and the Hudson Valley, population 2.3 million, permitted 81,000).

278. *See* Schragger, *supra* note 3 (manuscript at 62).

279. *Id.* (manuscript at 62–63).

280. *See generally* Schragger, *supra* note 3 (discussing the “perils” of land use deregulation throughout).

281. *See id.*

282. Schragger, *supra* note 3 (manuscript at 50–52).

283. *Id.* (manuscript at 51–52) (citing JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 143–51 (1961); JANE JACOBS, *THE ECONOMY OF CITIES* 50 (2d ed. 1969); JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* (1984)).

localities to zone for densities as high as in the West Village.<sup>284</sup> San Francisco's population would have to more than quadruple to equal the West Village's population density. If Schragger actually took Jacobs's argument seriously, he would be a rabid supporter of state laws that preempt local density restrictions, as they would encourage densities to get somewhat closer to Jacobs's ideal but not anywhere near going past it.<sup>285</sup>

Schragger argues that new housing supply does not necessarily reduce prices for all housing users, but reduces prices only for the rich and middle class.<sup>286</sup> If this were true, and newly built housing were unusable by working people or the poor (and new housing did not free up units in existing housing when richer people left), new housing would reduce prices for those who could use it very substantially, as none of it would

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284. The West Village had 114.6 people per acre in 2010, which translates to 73,000 per square mile. *Total Population and Persons Per Acre: New York City Neighborhood Tabulation Areas, 2010*, U.S. CENSUS BUREAU (Feb. 2012), [https://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/census2010/t\\_pl\\_p5\\_nta.pdf](https://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-population/census2010/t_pl_p5_nta.pdf) [<https://perma.cc/WTT2-NALF>]. The broader neighborhood of Greenwich Village and SoHo had a population density of 56,900 people per square mile as of 2019. *Greenwich Village/SoHo*, N.Y.U. FURMAN CTR., <https://furmancenter.org/neighborhoods/view/greenwich-village-soho> [<https://perma.cc/U8U4-TQS3>]. San Francisco's population density was 18,000 per square mile in 2017. Caleb Pershan, *Visualize a Map of SF if Its Density Matched That of Other Major Cities*, SFIST (Mar. 13, 2017), [https://sfist.com/2017/03/13/sf\\_density\\_mapping/](https://sfist.com/2017/03/13/sf_density_mapping/) [<https://perma.cc/39PE-ND3B>].

285. Also, no recent state zoning reform discourages mixed-use neighborhoods.

286. Schragger, *supra* note 3 (manuscript at 32–34). This argument is made somewhat frequently but is based on a basic misunderstanding. Allowing more housing to be built can reduce prices, but it does not magically mean there are no poor people. And being poor means lacking the resources to buy goods in the market. No one would argue that it does not matter if grain prices are high or low because the very poor cannot afford bread at any price. Instead, the question is whether a policy reduces prices and increases access for most and whether it makes it easier for the government to help the poor afford essential services by reducing the needed amount of subsidies. In the case of housing, decreasing zoning regulations achieves both of these ends. It reduces prices and increases access for people buying housing services in the market. And it makes it easier for the government to afford housing assistance by reducing the needed amount of subsidy and facilitating affordable housing development. See Calder, *supra* note 84.

filter down market.<sup>287</sup> But he denies this, too, saying the effects on rents for richer residents are also marginal.<sup>288</sup>

Further, the only reason new supply would not drive down prices is if there are many people who would like to move into the city or region but can't due to a lack of suitable housing.<sup>289</sup> That is, the argument relies on an extreme form of market segmentation, that housing for the rich and poor are different products completely, lest those outside of the jurisdiction who want to move in buy housing currently used by the less wealthy.<sup>290</sup> But Schragger repeatedly discusses gentrification, which involves richer people buying housing in previously less-well off neighborhoods, suggesting he does not believe housing markets are that

287. He gets a good bit of this from Michael Storper and Andrés Rodríguez-Pose's work. 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, 234–35 (2020); Andrés Rodríguez-Pose & Michael Storper, *Dodging the Burden of Proof: A Reply to Manville, Lens and Mönkkönen*, 00 URB. STUD. 1 (2020). I would devote more time to responding to their claims, but this has already been done in several terrific essays. See Michael Manville, Michael Lens & Paavo Monkkonen, *Zoning and Affordability: A Reply to Rodríguez-Pose and Storper*, 00 URB. STUD. 1 (2020); Michael Manville, Michael Lens & Paavo Monkkonen, *Rebuttal to the Response to the Critique*, available at <https://docs.google.com/document/d/1FA3DjrHxglc6RbPkXbJFCoeT26CkMkAMZ4Xq-8oDmZ0/edit> [<https://perma.cc/3THL-4UL6>] (“[I]t’s hard to argue with people who just invent facts.”). It would be a major understatement to say that Manville, Lens, and Monkkonen get the better of this exchange.

288. Schragger, *supra* note 3 (manuscript at 32) (“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).”).

289. Even this requires some strange assumptions about how the demand curve for urban property is structured. Schragger also mentions the possibility that housing is just vacant. *Id.* (manuscript at 59). This is contradicted by the evidence that tight housing markets—i.e., superstar markets—have low vacancy rates. Michael H. Schill and Glynis Daniels, *State of New York City’s Housing and Neighborhoods: An Overview of Recent Trends*, 9 ECON. POL’Y REV. 5, 5–6 (2003) (finding the lowest vacancy rates among major cities in San Francisco, Boston, New York, and Los Angeles). Rent regulation in New York City is tied to its low vacancy rate, which defines the terms for declaring the prerequisite condition of a “housing emergency.” *Rent Stabilization in New York City*, FURMAN CTR. FOR REAL EST. & URB. POL’Y 1–2 (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/63E9-YRYQ>] (explaining that the city’s power to declare a housing emergency requires a vacancy rate of below five percent).

290. Of course, the reason new development (when it is allowed) is often aimed at the top of the market is because housing supply is so restricted. John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 102–04 (2014). What makes new housing “luxury” is not anything specific about the units themselves, but their scarcity. Once restricted supply renders them so expensive, it is unsurprising that they have fancy appliances and finishes. Sub-Zero refrigerators and Viking range stoves are lagging indicators of housing scarcity, not causes of high housing prices.

strongly segmented.<sup>291</sup> Like Serkin, Schragger argues that zoning regulations in big cities drive and sustain demand to live in them by protecting amenities.<sup>292</sup> As discussed above, this is almost surely wrong, given that there is also clearly demand to live in cities and regions with more relaxed zoning rules.<sup>293</sup> If new housing *did* reduce the amenity value of cities, though, it would drive prices down substantially since amenities are capitalized into housing values.<sup>294</sup> But Schragger denies that new development brings down prices,<sup>295</sup> suggesting he doesn't actually believe that new construction destroys amenities.

Schragger's predictive claims about the likely effects of new housing on prices do not fit his normative arguments. If new housing does not drive down prices nearby, it means that it is not having a negative amenity effect or competing with existing units (or it is having a positive amenity effect that is counteracting the effect supply has on prices).<sup>296</sup> New housing that has no effect on prices in a jurisdiction is almost definitionally very good—it gives someone new a chance to live in a jurisdiction without harming anyone else. Unless new housing is making things worse for someone, it is hard to see the benefits of stopping people from building it.<sup>297</sup>

Schragger also argues that zoning rules are not the reason why new housing does not get built in cities.<sup>298</sup> But if this is the case—if new building is held up by factors other than zoning—then governments' ability to demand exactions by relaxing zoning regulations would not

291. See generally Noah Smith, *Yuppie Fishtanks: YIMBYism Explained Without "Supply and Demand,"* NOAHPINION (July 27, 2018, 2:50 PM), <http://noahpinionblog.blogspot.com/2018/07/yimbyism-explained-without-supply-and.html> [<https://perma.cc/E6MM-B787>] (arguing for building luxury apartments as a way to keep rich from bidding up value of ordinary people's homes).

292. Schragger, *supra* note 3 (manuscript at 36).

293. See discussion *supra* notes 122–24 and accompanying text.

294. Driving down the amenity value of cities would be very bad! It would reduce prices but would do so by making things worse.

295. See Schragger, *supra* note 3 (manuscript at 36).

296. The conventional economic view is that whatever negative effects new housing does have on local prices, *see supra* note 77, are normatively indeterminate. That is, if new housing drives down prices in town because it creates negative externalities, that's bad. If it drives down prices because it is new supply and competes with existing housing, it is good. But if new housing has no effect on nearby prices, it is clearly good—existing users are not worse off, but new users are happier.

297. If new housing causes nearby property prices to increase, it is also generally good, as the externalities are clearly outweighing the supply effect (but this can have some negative distributive effects for renters). That said, this is a pretty theoretical concern. Even at the neighborhood level, most evidence suggests new development causes prices to fall, not rise, even where new amenities that increase demand are present. *See supra* note 77.

298. Schragger, *supra* note 3 (manuscript at 34–35) (“Builders of moderate-income housing do not generally attempt to build housing in high-demand cities anyway. 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.”).

exist.<sup>299</sup> And the reason he is in favor of local zoning authority is to allow cities to demand exactions.<sup>300</sup>

One could go around endlessly with this, but it's pretty clear that Schragger does not have one idea about the effects housing development has on the economy, but rather has many inconsistent ones. One could maintain a consistent, if wrongheaded, position that new development destroys local amenities and productivity, but then one would have to accept that it would cause prices to fall. One could, I suppose, argue that luxury and non-luxury markets are extremely segmented such that new supply has no effect on housing prices for the non-rich, but then one would have to accept that new supply would reduce prices substantially for those who can use it and deny the possibility that rich new entrants will invest in housing currently used by the non-rich (i.e., gentrification). One could be incredibly particular about the optimal urban form, relying on Jane Jacobs, but then one would have to compare actual existing built forms to the ones for which she advocated.

None of these arguments make much sense individually; together they are a mishmash. Schragger's willingness to offer incompatible arguments suggests that it is not economic theory that is driving his criticism of state-led zoning reform. Rather, it is his unquestioning support for local control. He echoes Gerald Frug in arguing that giving regulatory power to cities is not the same thing as supporting the power of exclusive suburban jurisdictions: "city power need not be synonymous with defensive land-use-based localism."<sup>301</sup>

But his paper is critiquing state laws that do not target all local authority, but rather specifically limit local governments' power to exclude through limiting the construction of new housing. The case for state-led zoning reform is not that local authority is necessarily synonymous with "defensive, land-use based localism." Instead, it is that local bans on ADUs or limits on building apartments are *examples* of "defensive, land-use-based localism." When local governments use their regulatory authority to stop the construction of triplexes and townhouses, it is not in conflict with private-sector power, as Schragger suggests, but rather is a product of the political power of existing property owners who would rather not see new supply that competes with their units. Limits on building make landowners and local monopsonists more powerful rather than less.

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299. He might be after some distinction between ordinary housing development and super-high-end big developments in cities. But no state zoning reform that I am aware of has ever suggested removing the capacity of cities to bar very tall towers or new sports stadiums.

300. Schragger, *supra* note 3 (manuscript at 64–65).

301. *Id.* (manuscript at 67) (citing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 143–64 (1999)).

His view is not even conditional on the type of local government engaged in regulation. Schragger is against preempting local zoning regulations regardless of whether they are promulgated by a town of 2,000 people or a city of several million.<sup>302</sup> And he is against all limits on local zoning authority, even those that are intended to address its most egregious abuses.<sup>303</sup>

As local government law scholars have long noted, one of the most important questions in figuring out the merits of a local governmental law regime is about local boundaries—who gets to benefit from local policies and who does not—and not just the extent of local power.<sup>304</sup> Schragger is in favor of local power even if it is used to exclude, even where it protects the interest of rich homeowners, even if it denies the whole country needed economic growth. Empirical evidence can't shake this faith, though it can force him to make strange rhetorical moves. If this is what constitutes a critique of the “elite consensus” in favor of zoning deregulation, the elite consensus should be just fine.

#### V. ON WORKING FROM HOME, AGGLOMERATION ECONOMIES, AND ZONING: WILL EVERYTHING BE DIFFERENT NOW?

The ramifications of the coronavirus pandemic are still being felt. One major effect of the pandemic was that large swaths of the economy devoted to professional services moved online. The availability of information and communications technology (ICT)—email, Zoom, Slack, and the like—made this transition way less painful than many feared.<sup>305</sup> Despite offices emptying out due to the risk of virus transmission, many parts of the service economy did quite well during the pandemic.<sup>306</sup> And a substantial amount of shopping also moved online, with grocery delivery and contact-less pickup exploding and delivery of other goods through Amazon and other providers (Wal-Mart and Target notably) increasing substantially.<sup>307</sup>

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302. *Id.* (manuscript at 68–69).

303. *Id.* (manuscript at 29–31).

304. *See supra* note 31.

305. Noah Smith, *Imagine the Covid-19 Economy Before Zoom and Amazon*, BLOOMBERG (Mar. 7, 2021, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2021-03-07/imagine-the-covid-19-economy-before-zoom-and-amazon> [<https://perma.cc/8YB6-XPJ2>]; Constance L. Hunter, Kenneth Kim & Henry Rubin, *A Tale of Two Economies: Pandemic Dictates Contour of GDP for 2021*, KPMG (Apr. 21, 2021), <https://www.kpmg.us/content/dam/global/pdfs/2021/tale-of-two-economies.pdf> [<https://perma.cc/2AGT-3PHA>].

306. Hunter, Kim & Rubin, *supra* note 305.

307. Kathy Gramling, Jeff Orschell & Joshua Chernoff, *How E-Commerce Fits into Retail's Post-Pandemic Future*, HARV. BUS. REV. (May 11, 2021), <https://hbr.org/2021/05/how-e-commerce-fits-into-retails-post-pandemic-future> [<https://perma.cc/NUU3-SQTT>]; Gary Drenik, *The World Is Entering a Post-Pandemic*

This led to a huge amount of speculation about whether the increases in working from home and shopping from home will be permanent, radically changing how the economy functions.<sup>308</sup> This idea is, of course, of long standing. Alvin Toffler famously argued that videoconferencing would mean the end of cities more than forty years ago.<sup>309</sup> As Glaeser and Jess Gaspar showed, improvements in ICT have, to this point at least, mostly served as a complement to in-person communication rather than a substitute (although they do both).<sup>310</sup> People use email, online shopping, and online dating services to set up in-person meetings or local deliveries, as a mechanism for accessing the market depth available in dense places.<sup>311</sup> And as Sassen argued, information technology allowed far-flung corporate empires to be run from a single headquarters, concentrating office work in “global cities” while dispersing manufacturing, sales, and back-office operations.<sup>312</sup>

But simply because ICT made places like New York and San Francisco attractive in the past does not mean new changes in ICT will not make it attractive to spread more economic activity out in the future, reducing the wage premium available in those places and complicating the economic story told in Part II. The leading figure making this argument is Adam Ozimek, who argues that the 2020s are going to see a huge increase in WFH, with large effects on where people live in the country.<sup>313</sup> A decrease in demand in rich metropolitan areas would remove pressure on rents there, reducing the losses created by too-strict zoning in these places.

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*Future: Here's What the Latest Consumer Data Says About What's Next for Retail*, FORBES (Apr. 29, 2021, 10:00 AM), <https://www.forbes.com/sites/garydrenik/2021/04/29/the-world-is-entering-a-post-pandemic-future-heres-what-the-latest-consumer-data-says-about-whats-next-for-retail/> [<https://perma.cc/XUN9-H5UU>].

308. See Richard Eisenberg, *Is Working From Home the Future of Work?*, FORBES (Apr. 10, 2020, 2:44 PM), <https://www.forbes.com/sites/nextavenue/2020/04/10/is-working-from-home-the-future-of-work/?sh=589e8b0746b1> [<https://perma.cc/2BTT-UTM9>]; Gramling, Orschell & Chernoff, *supra* note 307; Drenik, *supra* note 307.

309. For a discussion of Toffler's work and the longstanding futurist belief that technology would be the end of the city, see Edward L. Glaeser, *Are Cities Dying?*, 12 J. ECON. PERSP. 139, 149 (1998).

310. Gaspar & Glaeser, *supra* note 220, at 138.

311. John B. Horrigan, *The Internet and Consumer Choice*, PEW RSCH. CTR. (May 18, 2008), <https://www.pewresearch.org/internet/2008/05/18/the-internet-and-consumer-choice/> [<https://perma.cc/X8KG-EAMF>].

312. SASSEN, *supra* note 70, at xix–xxi.

313. Adam Ozimek, *The Future of Remote Work*, UPWORK (Oct. 21, 2020), <https://www.upwork.com/press/releases/the-future-of-remote-work> [<https://perma.cc/69TM-BFCT>]. For other discussions of the future of offices, see Richard Florida, *The Death and Life of the Central Business District*, BLOOMBERG: CITYLAB (May 14, 2021, 4:30 AM), <https://www.bloomberg.com/news/features/2021-05-14/the-post-pandemic-future-of-central-business-districts> [<https://perma.cc/SNU3-WYHN>].

Others, like Enrico Moretti, think that WFH will not replicate the gains from agglomeration and thus will have little effect on location decisions.<sup>314</sup>

Clearly, we are in the early days of post-pandemic economic life (the pandemic is still raging as I am writing this). I do not know how much WFH will increase in the future.<sup>315</sup> But a few conditional thoughts can be offered, noting immediately that the size of these effects depends substantially on how much WFH takes off.

If there is a substantial increase in WFH, the form it takes will determine which places grow and shrink: to generalize, if there is a substantial increase in people who work completely from home (i.e., never go into the office), that will decrease demand for places that are major commercial centers.<sup>316</sup> Amenity-rich places—places with access to the beach, mountains, or culture—will gain.<sup>317</sup> But if there is an increase in WFH in a hybrid model, where people work in the office two or three days a week, the effects on regions will be different. Downtown office and housing rents in big cities would fall in both instances.<sup>318</sup> But hybrid offices may cause the population in superstar metros to increase. Firms would use less office space, freeing up space for new entrants. And hybrid work would likely cause the commuter shed to increase in size, as long commutes are less bad if they only need to happen twice a week. That would free up space for newcomers to move to the region. On the other hand, offices might get somewhat bigger per person, even as the number

314. Jerusalem Demsas, *Remote Work Is Overrated. America's Supercities Are Coming Back.*, VOX (Apr. 1, 2021, 9:40 AM), <https://www.vox.com/22352360/remote-work-cities-housing-prices-work-from-home> [https://perma.cc/4ZFC-TDVG] (interviewing Moretti).

315. Cards on table, I am quite skeptical that the most aggressive evangelists of WFH are right. See Jed Kolko, *Tech Hubs Held on to Technology Jobs During Pandemic*, INDEED HIRING LAB (May 6, 2021), <https://www.hiringlab.org/2021/05/06/tech-hubs-held-on-during-pandemic/> [https://perma.cc/BD2G-TQH8] (noting that tech jobs stayed very concentrated during the pandemic). But I also think there will be some increase in both full-time remote work and partial working-from-home, with some real effects on urban location patterns as a result.

316. This would harm the San Franciscos of the world, but also places with back offices, as fully remote WFH would allow exit from both types of places. In many ways, fully remote WFH is more dangerous for places that house these satellite locations than places that house headquarters. If in-person work improves productivity, the value to a firm of increasing the productivity of a CEO will be worth paying enough to stay in high-cost places, but it may be harder to justify real estate investments for other types of corporate officers.

317. There is, of course, substantial overlap between job-rich metros and high-amenity places!

318. On housing rents, see Arpit Gupta, Vrinda Mittal, Jonas Peeters & Stijn Van Nieuwerburgh, *Flattening the Curve: Pandemic-Induced Revaluation of Urban Real Estate* (Nat'l Bureau of Econ. Rsch., Working Paper. No. 28675, 2021) (finding that, while some of the effect is likely to be transitory, COVID-19 shock is associated with increasing suburban and exurban prices and decreasing central city ones). This will have a big effect on the tax bases of major downtowns, which rely on property taxes.

of people coming into them goes down, as workers need more space to coordinate with others who are WFH.<sup>319</sup> That story involves relatively constant demand for office space but reduced population (or slowing growth) at the regional level.

Even if there is a substantial increase in WFH, the form it takes will have major implications for which areas gain and lose. (And it likely would take all three of these forms among different places, firms, and jobs). Industries and job types will vary in which of these futures they adopt, helping some cities while hurting others.

Working-from-home may lead to static increases in real wages, at least among those who can move, but decreases in wage and productivity growth: Glaeser and David Maré showed that moving to dense metros is associated with faster wage growth, reflecting increased learning through agglomeration and thus increasing productivity.<sup>320</sup> Ozimek argues that agglomeration benefits are now easily available online (e.g., information spillovers from talking to people on Slack or Twitter).<sup>321</sup> Whether this is true or not, it is not clear that it matters for the productivity of locations. After all, people in dense areas and superstar cities also have ICT and can talk to people all over the world using Slack as well. The difference is that they can also gain more from knowledge spillovers in real life and thus see relatively more productivity growth.<sup>322</sup>

Workers may see gains in their real wages from WFH by reducing the costs they pay for housing and commuting (i.e., similar wages but lower costs or similar costs but higher amenities, depending on where they move).<sup>323</sup> But doing so may come at the cost of future wage growth and productivity, per Glaeser and Maré.<sup>324</sup> The implication of this is that

319. See Rebecca R. Ruiz, *They Want You Back at the Office*, N.Y. TIMES (Apr. 30, 2021, 10:29 AM) (describing potential post-pandemic trend in office design away from dense “bullpen” style).

320. Glaeser & Maré, *supra* note 65, at 316. Notably, the growth is persistent—workers who leave dense areas see a loss in wage growth but not in wage levels.

321. Adam Ozimek, *When Work Goes Remote*, UPWORK (July 2020), <https://www.upwork.com/press/releases/when-work-goes-remote> [<https://perma.cc/7FZU-SWFE>].

322. Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 651 (2012) (“A lobbyist talking to another lobbyist about congressional procedure is producing information spillovers that will improve the listener’s productivity at work. A lobbyist talking about congressional procedure to just about anyone else is a bore. Similarly, if you planted either of the authors of this piece in an information-spillover-rich, tech-employee-laden Silicon Valley coffee shop or bar, we would have no idea what was happening and therefore would get no benefit. But put us in a research university (or at a good AALS panel) and ideas would emerge.” (footnote omitted)).

323. Aimee Picchi, *If You’re Working from Home, Chances Are You’ll Save Money*, USA TODAY (Mar. 23, 2020, 10:01 AM), <https://www.usatoday.com/story/money/2020/03/22/working-home-likely-save-you-money/5024967002/> [<https://perma.cc/4K34-UFSZ>].

324. Glaeser & Maré, *supra* note 65, at 340.

workers at different points in their careers may choose different options— younger people opting for denser in-person options and older workers favoring more WFH.<sup>325</sup> Extensive use of WFH may require more investment in formal education or to make up for losses in learning through osmosis.

Further, WFH may affect firms' market power in labor markets.<sup>326</sup> The extent of that market power depends substantially on the type of market. In big, deep labor markets (i.e., large metropolitan areas), firms' labor market power is smaller, as workers have more outside options.<sup>327</sup> To the extent WFH creates larger national markets, it will reduce firms' labor monopsony power. It will also increase the quality of “matches” between workers and firms and provide insurance for workers such that they can find a new job without moving.<sup>328</sup> If this is true, WFH will lead to increases in wages for those who can do it.<sup>329</sup> However, if WFH causes declines in concentration, workers in big markets who cannot work from home will see increases in firm market power, as the effective size of these markets will shrink.<sup>330</sup>

WFH will make the problem of suburban exclusion and tax hoarding worse: recall from Part II that prior to the 1980s, the central argument against zoning was that it allowed rich jurisdictions to wall themselves off and keep others away from their fancy public services.<sup>331</sup> That is, the problem zoning created was segregation and inequality. This problem never went away but was simply supplemented by the problem of the collective power of local zoning to exclude people from whole metropolitan areas.<sup>332</sup>

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325. At the firm level, there are interesting questions about whether firm culture can be transmitted to younger workers without offices and whether WFH would lead to a decrease in firm size, as it may reduce transaction costs between firms. This is beyond the scope of this Essay, unfortunately.

326. There has been a boom in research into firms' labor market power. For a summary, see Josh Bivens, Lawrence Mishel & John Schmitt, *It's Not Just Monopoly and Monopsony: How Market Power Has Affected American Wages*, ECON. POL'Y INST. (Apr. 25, 2018), <https://www.epi.org/publication/its-not-just-monopoly-and-monopsony-how-market-power-has-affected-american-wages/> [<https://perma.cc/4ZGU-ANJ4>].

327. See José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data*, 66 LABOUR ECON. (2020).

328. Labor market depth is a traditional benefit of urban agglomerations. See Rodriguez & Schleicher, *supra* note 322, at 642.

329. See Azar, Marinescu, Steinbaum & Taska, *supra* note 327.

330. See *id.*

331. See *supra* text accompanying notes 158–65.

332. See *supra* text accompanying notes 94–101.

To the extent WFH increases, it will give particularly higher-income workers greater choice about where to live.<sup>333</sup> If WFH is fully remote, these choices will be unconstrained by commuting. Even if WFH is hybrid, remote workers will still be able to choose between a broader set of local governments, as a longer range of commutes will be possible.<sup>334</sup> Commutes have always constrained locational choice, reducing the ability of people to opt into communities of choice and to opt out of redistributive taxes.<sup>335</sup> For instance, “millionaire’s taxes” or higher state income taxes on people earning more than \$1 million in a year have generally not caused much exit from states because most people earning a lot of money need to be in a specific place in order to earn it.<sup>336</sup>

To the extent that WFH allows high-income individuals more choice in where to live, they will have more freedom to use their locational decisions to avoid redistribution—in other words, to sort into exclusive towns.<sup>337</sup> All else equal, this will be associated with greater degrees of inequality at the local governmental level. To the extent WFH takes off, rich workers will be able to buy into exclusive areas around the country without having to worry (or worry as much) about the costs created by commuting.<sup>338</sup> The case for zoning reform aimed at breaking up this type of exclusivity and segregation will become stronger. Reforms targeted at inequalities in school finance will become more pressing, both on equity and efficiency grounds.<sup>339</sup>

Regardless of how much WFH there is, zoning in big, rich cities and metros will continue to be a big deal: even if demand to live in San Francisco or New York falls substantially, those cities and metros will still have housing crises.<sup>340</sup> Demand in these places has increased very

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333. Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, *How Coronavirus Has Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/> [<https://perma.cc/CG62-D9KC>].

334. Chris Salviati & Rob Warnock, *Explosion of Super Commuters Offers Lessons for Sustainable Growth*, APARTMENT LIST BLOG (Aug. 16, 2021), <https://www.apartmentlist.com/research/explosion-of-super-commuters-offers-lessons-for-sustainable-growth> [<https://perma.cc/97F5-XLHZ>].

335. See Schleicher, *The City*, *supra* note 61, at 1535–45 (discussing general tradeoff between sorting and agglomeration).

336. See CRISTOBAL YOUNG, *THE MYTH OF MILLIONAIRE TAX FLIGHT* 20–25 (2017).

337. See Schleicher, *The City*, *supra* note 61, at 1538.

338. See *id.*

339. See Liscow, *supra* note 122, at 1828 (arguing that transfers to poor school districts are efficient because they allow people to move where they want without there being an excessive tax penalty for collocating with poorer residents who need more social services).

340. Jerusalem Demsas, *The Housing Crisis Is the Top Concern for Urban Residents*, VOX (Sept. 16, 2021, 8:30 AM),

substantially in the last ten years.<sup>341</sup> But ten years ago, these regions faced a serious housing crisis, and the effects of zoning in these areas were having very deleterious effects on wealth and wages.<sup>342</sup> The same was true twenty years ago.<sup>343</sup> Unless WFH wipes out a truly enormous amount of office work through fully remote work, there will still be a housing crisis—and thus a need for zoning deregulation—in our richest metropolitan areas.

The effects of WFH are still very uncertain. Any way one cuts it, however, the problem of exclusionary zoning will remain. More universally, if the embrace of WFH allows people to move to different places, we should see this as a largely positive development. People have always moved in response to technological development.<sup>344</sup> Increased WFH may require some new policies to overcome some of the problems associated with new arrangements, just as we build infrastructure to navigate around dense agglomerations of people. And it may require other supportive policies, like greater amounts of redistribution, replacing some local financing of schools with greater state involvement, and more support for higher education. Certainly, there will still be a need for zoning deregulation.<sup>345</sup> A liberalism about people's locational choices—accommodating them and aiding them and not standing in their way through restrictive rules constraining development—remains the wisest course.<sup>346</sup>

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<https://www.vox.com/2021/9/16/22674410/housing-crisis-homelessness-poll>  
[<https://perma.cc/6QRJ-34RB>].

341. Michael Hendrix, *The Pandemic Isn't Killing Cities. Housing Regulations Are*, MANHATTAN INST. (Nov. 18, 2020), <https://www.manhattan-institute.org/the-pandemic-isnt-killing-cities-housing-regulations-are> [<https://perma.cc/9XMZ-QYQK>].

342. *Id.*

343. *Id.*

344. See Schleicher, *The City*, *supra* note 61, at 1538.

345. RSS allude in passing to the possibility of changes due to WFH in support of their broader argument about regulatory choices: “Since the COVID-19 pandemic began, some commentators have observed that accelerated adoption of videoconferencing and work-from-home policies might counter the agglomeration trend and facilitate convergence. If people can work from home effectively, they need not live in superstar cities. They could move to suburbs, exurbs, or even rural areas anywhere in the country.” Sitaraman, Ricks & Serkin, *supra* note 7, at 1776. Even if this is true, any new spatial equilibrium that will result from WFH will not be the same as the pre-1900s or 1970s geography. An argument for promoting dispersion if WFH makes doing so more efficient is not an argument for supporting a return to the location patterns of 1970.

346. This is not because welfare-enhancing, place-based policies are impossible. There are plausible arguments that ideally designed and implemented place-based policies can make things better. See Schleicher, *Stuck!*, *supra* note 8, at 141 (summarizing literature). However, they are very hard to design and require particular assumptions about behavior and externalities that are not supported strongly in the research. Further, federally enacted place-based policies suffer from a number of predictable flaws. As with infrastructure spending, the districted nature of Congress leads to aid being spread out among districts and states, reducing the efficacy of targeting. See David Schleicher, *Hands On! Part I: The Trilemma Facing the Federal Government During State and Local Budget*

## CONCLUSION

During the last year or so, law reviews have published several pieces of work critical of zoning deregulation. These pieces are very flawed.

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Crises 5, 16–17 (July 12, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3649278](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3649278) (discussing literature supporting the idea that Congress tends to spread out infrastructure investment). Further, place-based policies are often operated in conjunction with state governments, leading to states designating recipient communities that are the most likely to be able to use federal benefits to attract investment, like those already seeing improvement, as well as nominating areas for political purposes. Mary Margaret Frank, Jeffrey L. Hoopes & Rebecca Lester, What Determines Where Opportunity Knocks? Political Affiliation in the Selection and Early Effects of Opportunity Zones 1–3, 27–28 (Mar. 5, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3534451](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3534451).