

## CREATING DENSITY: THE LIMITS OF ZONING REFORM

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### INTRODUCTION

Zoning has become extraordinarily controversial in contemporary policy circles.<sup>1</sup> Current views about land use and regulatory reform

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1. See 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> (arguing the costs of land use regulations outweigh the cost to housing prices and affordability); Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations>; Paul Krugman, Opinion, *Why a Blue City Is Feeling the Blues*, N.Y. TIMES (Jan. 17, 2022), <https://www.nytimes.com/2022/01/17/opinion/new-york-city-wall-street-economy.html> (“And in the case of New York, NIMBYism is ultimately the reason a great global city has become a one-industry town, leaving it unusually vulnerable to pandemic-driven economic dislocations.”).

have coalesced around a single goal: reducing zoning restrictions to allow development to respond more freely to market demand.<sup>2</sup> An emerging “liberalitarian consensus” objects to the costs of land use regulations.<sup>3</sup>

In this account, zoning interferes with market forces that would otherwise produce more development and density.<sup>4</sup> In the absence of zoning—or with much more permissive zoning—multifamily housing and apartment buildings would proliferate where jobs are plentiful and the economy is thriving.<sup>5</sup> Silicon Valley would become affordable again as developers add more options to satisfy the housing demands of people who are not tech millionaires.<sup>6</sup> Even New York City, which is already the most dense place in America, could accommodate more density, putting downward pressure on housing prices and allowing more people to access its economic and cultural advantages.<sup>7</sup> And this push towards greater density would produce all manner of benefits. It would create macroeconomic gains by unlocking agglomeration—the value of co-locating synergistic businesses in places that amplify their productivity.<sup>8</sup> It would undermine zoning’s exclusionary power to perpetuate racial segregation.<sup>9</sup>

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2. See, e.g., Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1059–60 (2019).

3. Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1810–15 (2021).

4. See *id.* at 1812–14.

5. See Glaeser, *supra* note 1.

6. See Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 405–07 (2021) (describing the emergence and protection of single family housing at the expense of multifamily housing in Silicon Valley). See generally Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611, 1613–14, 1634–49, 1690 (2021) (describing the politics and policies restricting development in Silicon Valley and highlighting that “[i]n 2020, the sale price of an Eichler tract house in . . . south Palo Alto was \$2.6 million, ten times the median nationwide”).

7. See Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25, 32–33 (2019) [hereinafter Been et al., *Supply Skepticism*]; Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 252, 259 (2014) (suggesting that NIMBYism is present in New York City and may prevent more dense development from an empirical study of rezoning decisions that revealed six to fifteen percent of lots were downzoned in less than a decade).

8. EDWARD L. GLAESER, CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM 5–8 (2008) (identifying and discussing agglomeration).

9. Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 801 (2009) (suggesting that “metropolitan

It would enhance health and educational outcomes for children and families who could access more dynamic places.<sup>10</sup> And it would produce climate benefits by offering smaller housing units in less car-dependent locations.<sup>11</sup> In other words, increasing density is a response to many of the most pressing societal problems, and zoning is standing in its way.

What, then, is standing in the way of zoning reform? For reformers, zoning is the product of protectionist and NIMBY insiders.<sup>12</sup> They have labeled zoning “opportunity hoarding” by in-place property owners.<sup>13</sup> Homeowners have disproportionate political power at the local level, and they exercise it to exclude new development.<sup>14</sup> Local land use decisions are a kind of unfair battleground pitting insiders against outsiders, except that outsiders do not even know they are involved in a battle or where it is being fought. The key, then, is to defang the political power of local homeowners, either through state preemption of local land use regulations, procedural reforms, or strengthening legal protection for development rights.<sup>15</sup>

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areas that allowed higher density development moved more rapidly toward racial integration than their counterparts with strict density limitations”); see Robert J. Reinstein et al., *A Case of Exclusionary Zoning*, 46 TEMP. L.Q. 7, 9–11 (1972) (“The Bucks County local zoning ordinances are based upon a general welfare rationale, but they inevitably result in the exclusion of low-income families, and, given the unfortunate facts of modern-day America, this means, to a disproportionate extent, racial minorities.”).

10. Sitaraman et al., *supra* note 3, at 1777 (describing health disparities in different places).

11. See John R. Nolon, *The Land Use Stabilization Wedge Strategy: Shifting Ground to Mitigate Climate Change*, 34 WM. & MARY ENV'T L. & POL'Y REV. 1, 5–6 (2009) (“By shifting ground from predominately single-family to predominately urban settlements, which fosters more energy efficient buildings and transportation systems, we can lower per capita CO2 emissions significantly.”); see also 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/> (summarizing arguments).

12. See generally KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS (2020) (documenting who participates in local land use meetings).

13. See RICHARD V. REEVES, DREAM HOARDERS 104–08 (2017); see also Olatunde C.A. Johnson, *Inclusion, Exclusion, and the “New” Economic Inequality*, 94 TEX. L. REV. 1647, 1655 (2016) (describing “opportunity hoarding”); Carrie Engel, *Play the Dream Hoarders Game*, BROOKINGS (July 13, 2017), <https://www.brookings.edu/blog/brookings-now/2017/07/13/play-the-dream-hoarders-game/> (providing simple arcade-style game demonstrating the phenomenon).

14. See WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS 80–81 (2001) (describing the political power of local homeowners); Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENV'T L. 217, 219–23 (2018) (documenting the rise in “homevoter” power even in cities).

15. See, e.g., John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing*

These are powerful insights and the zoning reform wave is gaining momentum.<sup>16</sup>

There is no real question that zoning has contributed to many pressing problems and that increasing density in many places would produce the benefits that reformers tout. But the benefits of zoning reform are likely to be more context-dependent than reformers like to admit, and reform is also likely to produce costs that reformers have ignored.<sup>17</sup> Specifically, zoning reform will not necessarily lead to more density. Some American cities with the lightest land use regulation, like Houston and Phoenix, are also the *least* dense. And zoning reform imposes costs of its own. It risks disrupting expectations of property owners who selected where to live based on a broad mix of community characteristics, exacerbating regional inequality, and developing past fragile ecological limits.<sup>18</sup>

Notwithstanding simplistic mischaracterizations to the contrary, these are obviously not reasons to reject reform efforts.<sup>19</sup> Nevertheless, telling a Panglossian story about zoning reform and pretending these costs do not exist risks pushing too far. Indeed, a real problem with the current debate over zoning reform is the failure to be clear about the endgame, making these tradeoffs difficult to evaluate. In fact, what appears to be a growing consensus for reform hides three very different possible goals of reform efforts.

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*Crisis*, 60 B.C. L. REV. 823 (2019) (arguing for preemption in some cases); Kenneth Stahl, “Yes in My Backyard”: Can a New Pro-Housing Movement Overcome the Power of NIMBYs?, 41 ZONING & PLAN. L. REP. 3 (2018) (surveying responses to NIMBYism); see also Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954 (2019) (arguing for recalibrating state preemption of local laws to more fully recognize the limits of local authority); Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 824 (2021) (arguing for greater state preemption to take better account of regional and statewide interests).

16. See, e.g., Richard Florida, *The Flip Side of NIMBY Zoning*, CITYLAB (Oct. 26, 2017), <https://www.citylab.com/equity/2017/10/the-flip-side-of-nimby-zoning/543930/> (“It’s become perhaps the most widely accepted truism in urban development and economic policy circles: NIMBY zoning and overly restrictive land-use policies and building codes keep housing prices high, making superstar cities like New York and San Francisco less affordable. . . . Remedying this has won wide support from urban economists and city builders on both sides of the political aisle.”).

17. See generally Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749 (2020) (describing costs of zoning reform).

18. See *infra* Part II (describing these in detail).

19. See generally David Schleicher, *Exclusionary Zoning’s Confused Defenders*, 2021 WIS. L. REV. 1315 (reductively describing recent articles as defending exclusionary zoning).

The first is simply incrementalism and a desire to remove unnecessarily burdensome regulations. This is not a vision of radical deregulation, but rather one of identifying opportunities for marginal improvements in current zoning regimes.<sup>20</sup> Zoning always reflects tradeoffs, and these kinds of reforms are easy to embrace where they respond to evolving local needs and provide important, if discrete, regulatory improvements.

Second, reform efforts might be reflecting a view about optimal city size. This somewhat broader perspective focuses on the benefits of density and growth and promotes zoning reform to make cities grow. But it does not embrace unrestrained growth. While reformers in this camp believe that zoning limits in thriving urban centers are currently drawn too restrictively, they do not reject regulatory limits on growth and density everywhere. Implicitly, this view promotes expanding development up to some new equilibrium. At that point, presumably, housing prices would again start to rise and current dynamics around affordability and sprawl would begin to repeat themselves.

The third possible endgame is considerably more radical and ideologically anti-regulatory. It implicitly presumes that development and housing supply should always keep pace with demand and that local conditions essentially do not matter. There will not be a new equilibrium because zoning should never stand in the way of growth and this view therefore seeks to eliminate density limits and other regulatory limits on development wherever they are found.

The current state of the debate over zoning reform glosses over these different possible endgames and so hides what may be real disagreements between reform advocates. This failure to confront the ultimate objectives of zoning reform also makes it possible to avoid weighing some of its real costs.

Part I examines the current case against zoning and the view of reformers that development should be allowed to be more responsive to market forces. Part II explores reasons for caution. Part III explores the ultimate agenda of zoning reformers and then responds to some specific criticism in the emerging literature.

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20. See *infra* Section III.B.

## I. ZONING AND HOUSING SUPPLY: THE CASE FOR REFORM

There is a housing crisis in the United States.<sup>21</sup> In thriving places like New York and San Francisco, housing prices have risen dramatically over the last decade.<sup>22</sup> The number of people who are housing cost-burdened, defined as spending more than 30% of income on housing, similarly increased from 42% to 48% from 2001 to 2017.<sup>23</sup>

Partly, this is the result of rising regional inequality.<sup>24</sup> Economic activity is increasingly concentrated in fewer places, and so the economic benefits of moving to New York or Silicon Valley have never been higher.<sup>25</sup> The strong desire of workers to relocate to these and other thriving places puts tremendous pressure on local housing markets to satisfy demand. This is pressure that developers have

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21. See, e.g., Florida, *supra* note 16; Ben Winck, *Everywhere You Look America's Housing Crisis Is Getting Worse*, BUS. INSIDER (Aug. 3, 2021, 4:50 PM), <https://www.businessinsider.com/america-housing-crisis-getting-worse-home-prices-apartment-rental-market-2021-8> (describing housing crisis).

22. See, e.g., Jeff Andrews, *NYC Home Prices Nearly Doubled in the 2010s. What Do the 2020s Hold?*, CURBED (Dec. 19, 2019), <https://ny.curbed.com/2019/12/13/21009872/nyc-home-value-2010s-manhattan-apartments> (discussing New York City housing prices); see also Rosser, *supra* note 15, at 828–31 (presenting data on the extent of the housing crisis). See generally U.S. GOV'T ACCOUNTABILITY OFF., RENTAL HOUSING: AS MORE HOUSEHOLDS RENT, THE POOREST FACE ACCOUNTABILITY AND HOUSING QUALITY CHALLENGES, GAO-20-427 (2020), <https://www.gao.gov/assets/gao-20-427.pdf> (evaluating rental prices nationally).

23. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 22 (“Rental affordability declined from 2001 to 2017. In 2017, 48 percent of renter households were rent burdened—that is, they paid over 30 percent of income for rent—which is 6 percentage points higher than in 2001.”).

24. See generally Sitaraman et al., *supra* note 3.

25. See Richard Florida, *Why America's Richest Cities Keep Getting Richer*, ATLANTIC (Apr. 12, 2017), <https://www.theatlantic.com/business/archive/2017/04/richard-florida-winner-take-all-new-urban-crisis/522630> [<https://perma.cc/P9LZ-WLB5>] (adopting the term “superstar cities” to refer generally to thriving places); Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 78 (2017) (emphasizing that wages are higher for workers in New York than in more rural areas but net income is lower now than historically due to higher housing prices); Conor Dougherty, *California Is Booming. Why Are So Many Californians Unhappy?*, N.Y. TIMES (Dec. 29, 2019), <https://nyti.ms/2tevpa6> [<https://perma.cc/KL5W-NBMD>] (noting that while California's economy “has grown more than previous generations had thought possible,” the state “has mostly put higher-value jobs . . . in expensive coastal enclaves, while pushing lower paid workers and lower-cost housing to inland areas like the Central Valley,” and describing the “challenge of continuing to add jobs without affordable places for middle- and lower-income workers to live”). But see Emily Badger & Eve Washington, *The Housing Shortage Isn't Just a Coastal Crisis Anymore*, N.Y. TIMES, July 14, 2022 (describing extent of housing crisis across the country).

traditionally embraced.<sup>26</sup> Indeed, surging demand has historically driven a concomitant boom in housing development.<sup>27</sup> That has not been true recently, however, and many people blame zoning.<sup>28</sup>

Zoning is, fundamentally, a regulatory restriction on supply that constrains developers' ability to meet demand.<sup>29</sup> It caps density expressly through bulk limits on height, floor area ratio, and lot size. It also constrains supply more structurally by creating regulatory hurdles that are expensive and time-consuming to overcome.<sup>30</sup> Reformers therefore blame zoning for insufficient new development and the fact that housing starts in many places have not kept pace with demand.<sup>31</sup>

This supply-side consensus of zoning critics is relatively new. Despite long-standing economic criticisms, zoning has been a traditional part of the regulatory toolkit to promote housing affordability, not a barrier to affordability.<sup>32</sup> Efforts like inclusionary zoning regimes

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26. See Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 331–33 (2005) (arguing that growth in the housing supply from increased development stabilized housing prices despite large increases in population in Las Vegas and historically in New York).

27. See 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) (“After all, without increasingly inelastic supply, an increase in demand should lead to higher prices and more construction.”); Glaeser, *supra* note 1 (“Historically, when parts of America experienced outsized economic success, they built enormous amounts of housing.”).

28. Ganong & Shoag, *supra* note 25, at 76–78, 89–90. See generally Glaeser et al., *supra* note 26.

29. See, e.g., Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place*, 40 FORDHAM URB. L.J. 1667, 1682 (2016) (“There is a sense in which zoning is always and inherently exclusionary. To the extent it restricts supply—and that, after all, is what zoning primarily does—it should have the effect of increasing prices, at least as compared to the alternative of no density controls.”); see also Glaeser & Ward, *supra* note 27, at 265, 267.

30. See, e.g., Moira O’Neill et al., *Getting It Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process* 16 (Feb. 2018) (unpublished manuscript) (available at [https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting\\_It\\_Right.pdf](https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting_It_Right.pdf)) (“[W]ell-capitalized developers with existing relationships and experience in specific jurisdictions are the best situated to navigate these complex local contexts, providing them a competitive advantage.”).

31. See Glaeser, *supra* note 1 (describing history of housing starts); Rosser, *supra* note 15, at 852 (“Increasing housing supply should be a priority for those committed to the values of an ownership society as well as for those concerned about increasing inequality and housing affordability.”).

32. See, e.g., Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 369–84 (1995) (surveying approaches). But see Robert C. Ellickson, *The Irony of “Inclusionary Zoning,”* 54 S. CAL. L. REV. 1167 (1981) (arguing that inclusionary zoning is destined to increase prices and distribute benefits unjustifiably).

and restrictions on high-end market-rate housing have long been championed as regulatory responses to rising costs.<sup>33</sup> But over the last decades, scholars like Vicki Been have demonstrated the downsides of such approaches. In a pioneering study from 2007, Been and her co-authors examined the impact of inclusionary zoning regimes in and around several cities including Boston.<sup>34</sup> Contrary to the expressed intention of Boston's more affluent suburbs, almost no affordable housing units came online under aggressive inclusionary zoning programs.<sup>35</sup> According to the economic model that Been and her co-authors tested, inclusionary zoning can act as a kind of tax on new development that actually increases housing prices.<sup>36</sup> Although the effects were modest, the perverse impact of inclusionary zoning was to make housing *less* affordable.<sup>37</sup>

The effect of zoning on housing prices goes beyond inclusionary policies. In another highly influential paper, Been and her co-authors tackled liberal orthodoxy that increasing the supply of market-rate housing will drive up prices.<sup>38</sup> There is a widespread gentrification anxiety that development will make places unaffordable.<sup>39</sup> The intuitions are often unstated but Been and her co-authors identify

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33. See, e.g., Kriti Ramakrishna, *Inclusionary Zoning*, URB. INST. (Jan. 2019), [https://www.urban.org/sites/default/files/publication/99647/inclusionary\\_zoning\\_what\\_does\\_the\\_research\\_tell\\_us\\_about\\_the\\_effectiveness\\_of\\_local\\_action\\_2.pdf](https://www.urban.org/sites/default/files/publication/99647/inclusionary_zoning_what_does_the_research_tell_us_about_the_effectiveness_of_local_action_2.pdf) (describing history of inclusionary zoning and its questionable impact on development of affordable housing). See generally Andrew Dietrich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 *FORDHAM URB. L.J.* 23 (1996) (challenging the economic consensus that inclusionary zoning will further decrease housing supply and drive up housing prices).

34. See generally Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 *J. AM. PLAN. ASS'N* 441 (2009) [hereinafter Schuetz et al., *Flavors of Inclusionary Zoning*]; Jenny Schuetz et al., *Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets in the United States*, 48 *URB. STUD.* 297 (2011) [hereinafter Schuetz et al., *Silver Bullet or Trojan Horse?*].

35. See Schuetz et al., *Flavors of Inclusionary Zoning*, *supra* note 34, at 452 (noting only one-fifth of Boston communities with inclusionary zoning had reported producing some affordable units through the program); Schuetz et al., *Silver Bullet or Trojan Horse?*, *supra* note 34, at 315 (noting that thirty percent of the jurisdictions around Boston with inclusionary zoning programs adopted before 2000 had reported some affordable units, but that forty-three percent of jurisdictions with programs adopted by 2004 reported no affordable units under the program).

36. See Schuetz et al., *Silver Bullet or Trojan Horse?*, *supra* note 34, at 315–18 (suggesting that inclusionary zoning “put upward pressure on single-family home prices in Boston-area suburbs between 1987 and 2008, particularly during hot housing markets”).

37. See *id.* at 315–18, 321.

38. See Been et al., *Supply Skepticism*, *supra* note 7, at 25.

39. See *id.*

four common arguments opposing development to promote affordability. First, land scarcity means that any market-rate housing comes at the expense of affordable housing that could have been built instead.<sup>40</sup> Second, market-rate housing will not filter down to the lower-priced segment of the market.<sup>41</sup> Third, new development will induce even more demand, and so the increase in supply will further exacerbate the housing crunch.<sup>42</sup> And fourth, economic spillovers from high-cost housing will displace more affordable housing.<sup>43</sup> The paper surveys the best empirical literature to conclude that, in fact, increasing supply will have a moderating effect on local housing costs.<sup>44</sup> Building new high-end housing will prevent affluent homeowners from rehabilitating lower-cost housing, leaving it intact as a more affordable option (avoiding, for example, carriage houses in Brooklyn becoming high-end housing).<sup>45</sup> Plus, there is little empirical evidence supporting the other supposed effects.<sup>46</sup> In short, central to the efforts of affordability should be reducing zoning's restrictions on development and housing supply, even if the immediate result is more market-rate housing.

These arguments, and the empirical support for them, have gone a long way to realigning debates over zoning and land use regulation. Instead of pitting pro-development, free-market conservatives against champions of regulation to control development's negative externalities, both liberals and conservatives have come together to decry zoning's effect on housing markets.<sup>47</sup>

This has macroeconomic consequences, as well. High housing costs reduce or eliminate the economic advantages of moving to a thriving place. In economic terms, the wage advantages are capitalized into housing costs.<sup>48</sup> Indeed, residential mobility has been declining in

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40. *Id.* at 27–28.

41. *Id.* at 28–29.

42. *Id.* at 29–30.

43. *Id.* at 30–31.

44. *Id.* at 26.

45. *Id.* at 28–29.

46. *Id.*

47. Christopher Serkin, *The New Politics of New Property*, 42 VT. L. REV. 1, 13–15 (2017) (describing political realignment); Ilya Somin, Opinion, *The Emerging Cross-Ideological Consensus on Zoning*, VOLOKH CONSPIRACY (Dec. 5, 2015), <https://www.washington-post.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-con-sensus-on-zoning/> (same).

48. *See, e.g.*, Christopher Serkin, *Capitalization and Exclusionary Zoning*, in MEASURING

recent years, and economists like Peter Ganong and Daniel Shoag point to zoning as a primary cause.<sup>49</sup> They claim that the resulting distortions in labor markets reduces the value to businesses of co-locating in thriving places. And it otherwise impedes labor supply. Economists have pegged these costs at between two and nine percent of GDP, which is quite a wide range.<sup>50</sup>

At the same time, zoning is increasingly blamed for non-economic harms, as well. Zoning was born from classist and racist impulses of exclusion.<sup>51</sup> While explicitly race-based zoning did not last long in this country, efforts to restrict apartments and multifamily housing from single-family residential zones were based squarely in racism and classism.<sup>52</sup> It is hard to wash this stink off zoning's origins.<sup>53</sup>

Zoning is also responsible for incalculable environmental harms in this account. With its focus on single-use zones, zoning encouraged the homogenous American suburb that is synonymous with sprawl.<sup>54</sup> Automobile-dependent single-family homes, located far from urban centers, consume open space and produce higher carbon emissions than housing in the urban core.<sup>55</sup>

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THE EFFECTIVENESS OF REAL ESTATE REGULATION: INTERDISCIPLINARY PERSPECTIVES 15, 26 (Ronit Levin-Schnur ed., 2020) (describing capitalization).

49. Ganong & Shoag, *supra* note 25, at 89–90.

50. Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 5, 25 (2018).

51. See RICHARD ROTHSTEIN, *THE COLOR OF LAW* 41–48 (2017) (describing municipal efforts to enact explicitly racial zoning); Serkin, *supra* note 17, at 754–60 (summarizing history of zoning).

52. See Serkin, *supra* note 17, at 755 (“Zoning’s origins in this country therefore began with segregation, although explicitly racial zoning was short-lived.”); see also Serkin, *supra* note 48, at 23 (“[A]ffluent communities are not simply inaccessible to the poor because they are expensive; instead, they are expensive in part because they are inaccessible to the poor.”).

53. See Serkin, *supra* note 48, at 17–18 & n.1 (quoting comment by Nestor Davidson at a conference that *Euclid’s* naked classism—and racism—is zoning’s “original sin”).

54. See, e.g., KENNETH T. JACKSON, *CRABGRASS FRONTIER* 238–43 (1985) (describing the proliferation of assembly line construction and low cost suburbs after World War II); Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html> (discussing the prevalence of single-family zoning across the United States and how some cities and states are responding to increase density).

55. See, e.g., Edward J. Sullivan & Jessica Yeh, *Smart Growth: State Strategies in Managing Sprawl*, 45 URB. L. 349, 350–51 (2013) (“Sprawl’s uncoordinated pattern of development contributes to environmental degradation. Where there are great distances placed between destination points, residents are likely to drive those distances, increasing automobile emissions, including greenhouse gas (GHG) emissions, and reducing air quality.”).

Given this wide range of harmful effects, it is no wonder that zoning is currently in the crosshairs for reformers across the political spectrum. The underlying intuition is that if developers could simply build where they wanted, they would produce more housing, and would also be able to cater to housing consumers' demands for dense, urban living, which would generate economic, environmental, and social benefits.<sup>56</sup>

## II. GROWTH, DENSITY AND CHANGE: THE CASE FOR CAUTION

The case for zoning reform seems compelling. Reducing regulatory limits will unlock development, moderate housing prices, and lead to greater density, with attendant economic, environmental, and social benefits. But the relationship between growth and density is more complex than zoning reformers usually acknowledge, and zoning reform comes with its own costs. These are not reasons to reject zoning reforms, but they are important to consider when tallying the costs and benefits.

### A. *The Uncertain Relationship Between Zoning and Sprawl*

Animating much of the zoning reform debate is an implicit assumption that relaxing zoning limits will produce not only more growth but also more density. Indeed, it seems almost tautological that eliminating a prohibition on multifamily housing or unlocking taller apartment buildings, for example, will produce more compact and, simply, *more* housing. In many places, zoning is the principal mechanism for NIMBY opposition to density, and so defanging zoning limits is likely to produce density.

In fact, however, the relationship between zoning and density is not so straightforward. The extreme example, of course, is Houston, Texas. There, the absence of municipal zoning has not produced dense, urban form. Quite the opposite. Houston is among the least dense cities in the country.<sup>57</sup> And Houston is not alone. Cities throughout

56. See Been et al., *Supply Skepticism*, *supra* note 7, at 28–29.

57. See Jed Kolko, *The Downtown Decade: U.S. Population Density Rose in the 2010s*, N.Y. TIMES (Sept. 1, 2021), <https://www.nytimes.com/2021/09/01/upshot/the-downtown-decade-us-population-density-rose-in-the-2010s.html> (discussing extensive population growth in dense urban areas but noting that the fastest growing neighborhoods were in low-density suburbs like those around Houston).

the sun belt tend to be both loosely zoned and also quite sprawling.<sup>58</sup> In these places, it is much harder to blame zoning for sprawl and the lack of density.

Growth without density—that is, through sprawling suburban development—may still help to moderate housing costs in the region and may be reason enough to reform zoning in some places. But growth alone does not provide some of the other important benefits that reformers claim, like reduced carbon emissions and more sustainable development patterns. It is important, then, to explore the reasons that zoning reform might not always result in greater density.

### *1. Available Substitutes*

One culprit is the persistence of many consumers' preferences for single-family homes in single-family communities and the availability of ready substitutes like homeowner associations (HOAs) to satisfy them. According to a famous quote, "No one is enthusiastic about zoning except the people."<sup>59</sup> If zoning does not produce the development patterns that some people want, there are other regulatory and private regimes that can.<sup>60</sup> Indeed, most new development in sun belt cities relies on restrictive HOAs to maintain single-family communities with detailed specificity.

Homeowner associations are typically governed by a master deed that can impose much more intrusive regulatory prescriptions than typical municipal zoning.<sup>61</sup> Minimum house sizes in addition to maximum ones, rules governing aesthetics of all kinds, and even rules governing conduct, are all commonplace.<sup>62</sup> These should be

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58. *See id.* (highlighting that many of the lowest-density metro areas are loosely zoned southern cities).

59. RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 17 (1966).

60. Serkin, *supra* note 17, at 794–95 (describing these substitution effects). *See generally* Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 *GEO. MASON L. REV.* 827 (1999) (advocating to replace municipal zoning with private HOAs).

61. *See* Hannah Wiseman, *Public Communities, Private Rules*, 98 *GEO. L.J.* 697, 713–14 (2010) (describing content of HOA regulations).

62. *See, e.g.*, Barbara C. McCabe, *The Rules Are Different Here: An Institutional Comparison of Cities and Homeowners Associations*, 37 *ADMIN. & SOC'Y* 404, 405 (2005) ("HOAs are often compared with cities: Both provide services, levy taxes, and regulate individual behavior."); Paula Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 *VILL. L. REV.* 553, 555–56 (2002) ("[C]ovenants have been devised to regulate

seen as private substitutes for public land use controls. The availability of nearby homeowner associations means that limiting local land use regulations might drive housing consumers to seek these private regulations if zoning does not meet their regulatory preferences. If this seems abstract, imagine a choice faced by a young family considering two different but similar single-family houses. One is in a developed urban neighborhood—say an inner-ring suburb from the 1950s—with access to a park and a playground nearby. Another is in a subdivision governed by an HOA, also with access to open space and a playground in the subdivision. Those choices might look very similar unless development pressures are overtaking the municipality, leading to unpredictable changes. This particular family might worry that the housing and community characteristics they want, and that both options *currently* have, will be much more stable in the latter. This can put a thumb on the scale for homeowners' associations.

“So what?” some might say. If certain kinds of families prefer stable manicured HOAs, they can depart the more dynamic urban core for the bland *Edward Scissorhands* suburbs.<sup>63</sup> That is their preference (and probably their loss). If the “cost” of their choosing to move to an HOA is that more multifamily housing is built in the inner ring to accommodate development pressure, that is all to the good. But the move to HOAs produces its own costs. HOAs tend to be more restrictive and less flexible than zoning. They are more associated with sprawl and racial segregation.<sup>64</sup> Replacing zoning with HOAs—as has happened not only in Houston but in other sunbelt cities<sup>65</sup>—creates all of the problems that reformers identify in zoning but amplified.

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everything from whether pets are limited or prohibited, to the permissibility and style of one's screen and storm doors, to the ratio of grass, trees and shrubs allowed on one's property. Restrictions are imposed to regulate the mounting of basketball hoops, the retrieval of dog droppings, the posting of for-sale signs, the trimming of bushes and the color of window curtains.”)

63. EDWARD SCISSORHANDS (20th Century Fox 1990).

64. See Serkin, *supra* note 17, at 798 (“People who study HOAs suggest that residential subdivisions ‘intensify social segregation, racism, and exclusionary land use practices.’”); EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 57 (1994) (“Before and during the post–World War II housing boom, large-scale developers used homeowner associations and restrictive covenants in middle-class housing to market exclusion rather than exclusivity.”); cf. SETHA LOW, *BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA* 11 (2004) (“Gated residential communities . . . intensify social segregation, racism, and exclusionary land use practices already in place in most of the United States.”).

65. See *infra* notes 127–32 (discussing Phoenix).

Consumer preferences and the availability of ready substitutes will vary considerably by region and housing market. There is an almost insatiable demand for housing in the heart of New York City, for example, meaning that new housing there will almost inevitably create more density. But that is less obvious in other parts of the country. Unleash the unregulated market in places like Naples, Florida, or Tuscaloosa, Alabama, and the result will not necessarily be greater density, especially if new development in those places occurs primarily in HOAs.<sup>66</sup>

HOAs are not the only competition for municipal zoning, either. Where zoning does not provide the stability that housing consumers appear to want, they increasingly turn to other regulatory tools. The most familiar is historic preservation.<sup>67</sup> Today, the preservation of historic buildings is often just a byproduct of the real goal: resisting neighborhood change.<sup>68</sup> Rules limiting or prohibiting the destruction of contributing buildings, in conjunction with limits on in-fill subdivisions, can significantly slow the pace of urban redevelopment.<sup>69</sup>

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66. Cf., e.g., William Fulton et al., *Who Sprawls Most? How Growth Patterns Differ Across the U.S.*, BROOKINGS (July 1, 2001), <https://www.brookings.edu/wp-content/uploads/2016/06/fulton.pdf> (identifying cities—like Tuscaloosa—that were dramatically expanding in developed land to accommodate growth). Tuscaloosa over the study period saw a density loss of forty-two percent. See *id.* at 8.

67. See David E. Clark & William E. Herrin, *Historical Preservation Districts and Home Sale Prices: Evidence from the Sacramento Housing Market*, 27 REV. REG'L STUD. 29, 29 (1997) (“During the past two decades, land use ordinances have evolved in a different direction in metropolitan areas where historic preservation has become popular.”); N. Edward Coulson & Robin M. Leichenko, *Historic Preservation and Neighborhood Change*, 41 URB. STUD. 1587, 1587 (2004) (“[D]esignation and preservation of historic properties and historic districts has become an important tool in efforts to preserve central-city neighborhoods and to promote economic development in blighted urban areas.”).

68. William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339, 340, 345–46 (2013) (“Historic districts provide one way for a distinct neighborhood to establish additional land use regulations that are resistant to citywide changes.”).

69. See Vicki Been et al., *Preserving History or Restricting Development? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, 92 J. URB. ECON. 16, 25, 27–28 (2016) (finding that housing production dropped in areas designated for historic preservation but that the impact on housing prices varied across neighborhoods and their prior development potential); Adam M. Millsap, *Historic Designations Are Ruining Cities*, FORBES (Dec. 23, 2019), <https://www.forbes.com/sites/adammillsap/2019/12/23/historic-designations-are-ruining-cities/?sh=3baabd6f57af> (“Today, in cities around the country entire neighborhoods of marginal historical value are frozen in time, hindering the ability of cities and their residents to adjust their built environments in response to changing economic circumstances.”); Jaelynn Grisso & Taijuan Moorman, *Do Columbus' Historic Districts Save History or Price People out?*, MATTER (Oct. 15, 2021), <https://www.matternews.org/developus/historic-preserva>

Moreover, historic rules are often stickier than zoning. Developers seeking to increase density can apply for variances, take advantage of incentive zoning or transferable development rights, or utilize some of the other tools built into many zoning ordinances to create flexibility.<sup>70</sup> Historic preservation, by contrast, usually requires a kind of certificate of appropriateness from a historic commission, which focuses on narrow factors that do not typically include the benefits of the intended redevelopment.<sup>71</sup> As people become more insecure about the community protections that zoning affords, they may rely increasingly on historic preservation, which would produce worse outcomes. Hobbling municipal zoning could supercharge alternative regulatory regimes that are even less flexible than zoning.<sup>72</sup>

## 2. *The Timing of Development*

Growth begets growth. There can be a virtuous cycle to urban development. Literature on agglomeration suggests that each new person moving to New York can be more productive and have a greater economic impact than a new person in Poughkeepsie.<sup>73</sup> Moreover, the development industry—famously labeled the “growth machine”<sup>74</sup>—also benefits from new development, generating its own economic output with attendant job creation.<sup>75</sup> As a result, a growing

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tion-columbus-development-expensive (discussing a community’s plan to establish a historic zone over itself to protect its community character by preventing encroaching development around Ohio State University from occurring in the area).

70. See, e.g., ELLICKSON ET AL., *LAND USE CONTROLS* 355–59 (5th ed. 2019) (detailing ways in which developers can assemble density bonuses).

71. Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 *IND. L.J.* 1525, 1533–38 (2015) (describing the sometimes difficult task of convincing commissioners a new or re-development will meet the aesthetic standard of the neighborhood).

72. In Brooklyn, activists used superfund designation of the Gowanus Canal as a tool to resist development and gentrification. See generally Hamil Pearsall, *Superfund Me: A Study of Resistance to Gentrification in New York City*, 50 *URB. STUD.* 2293 (2013).

73. See, e.g., John M. Quigley, *Urbanization, Agglomeration, and Economic Development*, in *URBANIZATION AND GROWTH* 123 (Michael Spence et al. eds., 2009) (“It has been widely reported that incomes have grown more rapidly in U.S. cities with high initial levels of human capital. . . . This finding is consistent with skill acquisition and diffusion through the interaction of workers in denser urban areas.”).

74. Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 *AM. J. SOCIO.* 309, 309–10 (1976) (coining the term “growth machine”).

75. Corina Vanek, *In a Difficult Period for Construction Nationwide, Phoenix Led in Industry Job Growth*, *PHX. BUS. J.* (Jan. 6, 2021), <https://www.bizjournals.com/phoenix/news>

place is usually a thriving place and so creates more demand as economic opportunities increase in a kind of virtuous economic cycle. Indeed, this is at the heart of the economic attack on zoning, which constrains that growth.

New housing is still not counterproductive when it comes to housing affordability. In fact, Vicki Been and co-authors have persuasively argued—and found evidence to support—that increasing housing supply will ultimately have a moderating effect on housing prices despite the possibility of induced demand, because less than perfect elasticity in residential mobility means that new units will continue to exert downward pressure on price.<sup>76</sup> A new longitudinal study of residential moves in Helsinki, Finland, explains how high-end market-rate housing can promote affordability:

As new residents move into the newly constructed units, they vacate their old units. These vacant units then get occupied by a new set of residents whose old units become vacant and so on. Through this process, new market-rate housing can have moderating price effects in the city's lower-income neighborhoods, not just in its immediate neighborhood, by effectively loosening the housing market in these areas through vacancies.<sup>77</sup>

But that does not fully account for the spatial implications of induced demand because of the timing of new development. Dense urban development, like a large new apartment building, takes considerable time to build. In 2014, the average build time nationally for larger multifamily housing was over fourteen months, with significant regional variation.<sup>78</sup> Total development time, from property

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/2021/01/06/phoenix-led-nation-construction-job-growth.html?ana=knxv (discussing the connection between residential and non-residential development and construction jobs in Phoenix and other metro areas across the United States); *Construction: NAICS 23*, U.S. BUREAU LAB. STAT. (Mar. 31, 2022), <https://www.bls.gov/iag/tgs/iag23.htm#iag23emp1.f.p> (reporting more than seven million workers in construction nationwide). *But see* Sally Weller, *The Hollow Promise of Construction-Led Jobs and Growth*, CONVERSATION (Aug. 15, 2017), <https://theconversation.com/the-hollow-promise-of-construction-led-jobs-and-growth-82317> (highlighting the downstream economic benefits of development as well as the dangers associated with too much economic reliance on construction).

76. Been et al., *Supply Skepticism*, *supra* note 7, at 29–30.

77. Cristina Bratu et al., *City-Wide Effects of New Housing Supply: Evidence from Moving Chains 2* (VATT Inst. for Econ. Rsch., Working Paper No. 146, 2021) <https://ssrn.com/abstract=3929243>.

78. *See, e.g.*, Na Zhao, *How Long Does It Take to Build an Apartment Building?*, NAT'L

acquisition through design, permitting, and building, usually takes several years. Single-family development requires much less time.<sup>79</sup>

In thriving places, then, the development industry often cannot keep pace with demand in the urban core, pushing development out into suburbs, even in the absence of restrictive zoning.<sup>80</sup> Nashville, Tennessee, for example, has seen extraordinary population growth over the last ten years and an attendant explosion in new housing in the urban core because of a broadly permissive approach to development. Its urban high-rise district, the Gulch, has essentially sprung into existence in the last fifteen years, with an additional 4,000 residential units currently being developed.<sup>81</sup> Nevertheless, growth in Nashville's suburbs has been even greater than growth in the urban core, which has not kept pace with demand.<sup>82</sup> And despite the loose regulatory environment and full-throttle development activity, housing prices have still increased by over 120% in the last decade.<sup>83</sup>

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ASS'N HOME BUILDERS (Aug. 26, 2015), <https://eyeonhousing.org/2015/08/how-long-does-it-take-to-build-an-apartment-building/>.

79. See *Average Length of Time from Start to Completion of New Privately Owned Residential Buildings*, U.S. CENSUS BUREAU, [https://www.census.gov/construction/nrc/pdf/avg\\_starttocomp.pdf](https://www.census.gov/construction/nrc/pdf/avg_starttocomp.pdf) (last visited Aug. 29, 2022) (finding on average that single family homes across the United States were constructed in around seven months while multifamily housing required around fifteen months).

80. Nor do they want to get too far ahead of demand, often focusing on absorption rates to try to maximize returns on investment. See, e.g., Cameron K. Murray, *Submission to the House of Representatives Standing Committee on Tax and Revenue's inquiry into Housing Affordability and Supply* 10 (Sept. 2021), <https://osf.io/prsy4> ("Housing developers optimise both density and the rate of sales. Large housing developers landbank, holding undeveloped sites off market to ensure they match the rate of sales that maximises their total return on assets."); see also Cameron K. Murray, *A Housing Supply Absorption Rate Equation*, 64 J. REAL EST. FIN. & ECON. 228 (2022).

81. See, e.g., Robert Looper III, *A Look At The 4,000+ Residential Units Underway In The Nashville Gulch Area*, NASHVILLE NOW NEXT (July 23, 2021), <https://nashvillennownext.com/2021/07/23/the-2500-new-residential-units-either-under-construction-or-in-the-pipeline-for-nashvilles-gulch/> (describing current development); Getahn Ward, *Gulch Developers Project Big Changes for Area by 2030*, TENNESSEAN (May 4, 2014, 8:03 AM), <https://www.tennessean.com/story/money/2014/05/04/gulch-developers-project-big-changes-area/8679939/> (describing history of the Gulch and including projections of growth that turned out to be far too conservative).

82. See, e.g., Mariah Timms, *Nashville Suburbs Drive Rapid Growth*, TENNESSEAN, Sept. 14, 2021, at A1 ("Although Davidson County grew by more than 14% since 2010, gaining nearly 90,000 new residents, the surrounding suburban counties are attracting new residents at a far faster rate, new census data shows. Counties and towns around Nashville have seen growth higher than 20% across the board—in some places surpassing 30%.")

83. See Mark Santarelli, *Nashville Real Estate Market: Prices | Trends | Forecast 2021–2022*, NORADA REAL EST. (Nov. 3, 2021), <https://www.noradarealestate.com/blog>

The counterfactual is, of course, difficult to assess: Would Nashville's growth have been even more sprawling and decentralized with more stringent zoning in place? Maybe. It depends, in part, on the substance of the zoning regulations, as well as regional coordination.<sup>84</sup> Anti-sprawl zoning, like urban growth boundaries, would operate differently than large-lot zoning for the proliferation of sprawling development. The overall point is simply this: Although reformers argue that relaxing zoning rules will moderate housing prices and generate density, there are already places with permissive land use environments that nevertheless have seen dramatic increases in both sprawl and housing costs. Simply assuming that relaxed zoning will generate greater density is, at the very least, too facile without an account of places like Nashville.

### *3. Zoning as a Catalyst for Urbanization*

Zoning and land use regulations can also be important tools for cities in their ongoing competition with their suburbs. Throughout much of the twentieth century, cities experienced disinvestment from the urban core.<sup>85</sup> Demographic changes in cities triggered white flight in many places, as more affluent and mostly white residents moved out of cities and into the suburbs.<sup>86</sup> These pressures were reinforced by a set of public policies like investments in roads to facilitate suburban commutes and regulatory "protection" for suburbs in the form of single-family residential zoning.

Typical suburban zoning accomplished two pernicious objectives simultaneously. First, it prohibited lower-cost multifamily housing and so was explicitly exclusionary. But more subtly, it reduced the opportunity to benefit from high-valued public services, like public schools, by promoting greater homogeneity in housing stock and

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/nashville-real-estate-market/ ("Nashville has a record of being one of the best long-term real estate investments in the U.S. Since Oct 2011, the Nashville home values have appreciated by nearly 122%.")

84. Nashville is an unusual example because it merged with its county in 1962, giving it broad geographic reach. *See, e.g., History of Metropolitan Nashville Government*, NASHVILLE.GOV, <https://www.nashville.gov/departments/government/history-metro> (last visited Aug. 29, 2022). Still, significant suburban-style development occurs in neighboring counties. *See* Timms, *supra* note 82 (describing development patterns).

85. *See, e.g.,* Serkin, *supra* note 17, at 786–87 (summarizing history and providing citations).

86. *See, e.g.,* William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOC. REV. 425 (1979) (identifying factors leading to white flight from the urban core).

housing prices within a suburb. As Peter Mieszkowski and Edwin Mills explained:

[Suburbanites] often seek to form homogenous communities, for several reasons. There is the preference for residing among individuals of like income, education, race, and ethnicity. By residing in income-stratified communities, the affluent avoid local redistributive taxes. Homogenous community formation is also motivated by varying demands for local public goods, caused by income and taste differences.<sup>87</sup>

This may sound somewhat abstract but it captures a straightforward and powerful intuition familiar to most homeowners. Because property taxes are levied uniformly across residential property, the owner of a high-valued house pays much more than the owner of a low-valued house for access to the same municipal services. This is a kind of cross-subsidy built into the structure of property taxation.<sup>88</sup> It is also normatively appropriate, given even modest assumptions about fairness in tax burdens. But the extent of the cross-subsidy is entirely a function of the width of the gap in property values. The narrower the gap between high-value and low-value houses in a community, the smaller the cross-subsidy. At the extreme, homogeneity will transform property taxes into a kind of user fee for public services.<sup>89</sup>

Suburban zoning created relatively affluent enclaves that were able to set and protect their own taxing and spending priorities and preferences, some of which imposed stratospheric property taxes to pay for extremely high-quality public schools, for example. Citywide services could not compete with the fiscal and policy self-determination that suburbs could promise, and so the decline of the urban core took on an air of inevitability through the latter half of the twentieth century.<sup>90</sup>

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87. Peter Mieszkowski & Edwin S. Mills, *The Causes of Metropolitan Suburbanization*, 7 J. ECON. PERSP. 135, 137 (1993).

88. See, e.g., Serkin & Wellington, *supra* note 29, at 1670 (citing, *inter alia*, Bruce W. Hamilton, *Property Taxes and the Tiebout Hypothesis: Some Empirical Evidence*, in FISCAL ZONING AND LAND USE CONTROLS 15 (Edwin S. Mills & Wallace E. Oates eds., 1975)).

89. See *id.*

90. See, e.g., Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 941 (2013) (“Suburbs have been more attractive than central cities as sites for settlement and investment, at least in part because their relatively smaller and more homogeneous populations have enabled suburbs to ensure that landowners’ tax expenditures

But cities clawed their way back. They reversed the suburbanization trends and attracted people back into the urban core. There is no simple story that fully accounts for this transformation. It is partly the result of changes in the nature of the economy, crime reduction, and targeted investments in amenities to lure back the creative class.<sup>91</sup> Land use, however, may have played a role as well.

While it is difficult to document a causal relationship, the period of re-urbanization in the 1990s coincided with a set of municipal policies that had the effect of creating more sub-local, neighborhood level control over fiscal priorities, including the ability to exercise some control over new development to protect local amenities. These tools included, among others, the rise of tax increment financing and business improvement districts, both of which gave certain neighborhoods more control over municipal infrastructure and services.<sup>92</sup> Simultaneously, changes to local land use procedures, like ULURP in New York, combined with the rise of community benefits agreements, created more community involvement in the land use process.<sup>93</sup> These new tools all gained traction during the 1990s and may have contributed to stabilizing property values in some anchor neighborhoods, allowing them, in effect, to better compete with suburbs on their own terms.<sup>94</sup> Those neighborhoods saw property values stabilize and then increase and may have helped to attract investment back into the urban core.

These very same kinds of neighborhood land use controls are the ones that zoning reformers typically target as reinforcing NIMBY opposition to development.<sup>95</sup> And, indeed, they may well have gone too far in many places, in effect becoming victims of their own success. To the extent that these tools were responsible for helping to attract people back into the urban core, they simultaneously created development pressure and armed communities with the tools to

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are concentrated on their own needs, rather than subjected to the redistributive claims of a variety of citywide interest groups.”).

91. See, e.g., EDWARD GLAESER, *TRIUMPH OF THE CITY* 106–14 (2012) (discussing the relationship between policing and crime rates and city success).

92. See Serkin, *supra* note 17, at 788–90 (describing changes during this period).

93. See *id.* at 790.

94. See *id.* at 792.

95. See, e.g., John Mangin, *The New Exclusionary Zoning*, 25 *STAN. L. & POL’Y REV.* 91, 100 (2014) (criticizing ULURP for creating “multiple pressure points” to object to new development); DAVID MERRIMAN, *IMPROVING TAX INCREMENT (TIF) FOR ECONOMIC DEVELOPMENT* (2018) (finding that TIF often diverts revenues away from municipal budgets and school districts).

resist it. But if this story is true, it suggests an important caution about reform efforts. Urbanization trends are by no means inevitable and these tools may be important again for allowing cities to compete with the pull of their more sprawling suburbs.

### *B. The Costs of Zoning Reform*

Even though zoning reform may not necessarily result in more dense development, it may still be important for other reasons. But there are costs that should at least be evaluated when considering zoning reform. Many reformers act as though zoning reform has only upside, and that opposition is the result of bad faith NIMBY self-interest.

#### *1. Tiebout, Sorting, and the Costs of Change*

YIMBY opponents of zoning will point to protectionist neighbors invoking stability as a kind of opportunity hoarding.<sup>96</sup> Yes, it may allow them to protect their preferences, but only by imposing enormous costs on excluded outsiders who cannot then find housing that meets their preferences. Notice, however, that these dynamics can feel very different depending on the neighborhood. It is one thing if members of an expensive Connecticut enclave invoke community stability to keep their manicured mansions sufficiently picturesque. It is something else entirely if low- or middle-income neighborhoods use zoning to try to protect precious social capital and resist gentrification.<sup>97</sup>

Moreover, change itself imposes costs, regardless of whether it takes the form of community investment or disinvestment. When people choose where to live, they are choosing a bundled collection of public and private goods. They are choosing a house with particular features—say three bedrooms and an attached garage—in a specific location for a given price. That location is also embedded in a particular jurisdiction which provides access to a collection of services, like schools and roads, all for some specific level of taxation.<sup>98</sup> The Tiebout Hypothesis predicts that people will sort themselves

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96. Johnson, *supra* note 13, at 1655 (describing “opportunity hoarding”).

97. See generally John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271 (2020) (differentiating between exclusionary zoning in affluent and low-income neighborhoods).

98. See, e.g., Serkin, *supra* note 17, at 771–72 (discussing Tiebout Hypothesis).

into local governments that best satisfy their individual preferences along these dimensions.<sup>99</sup>

What Tiebout proponents sometimes ignore, however, is that for geographic sorting to satisfy consumer preferences, there must be at least some measure of stability or the costs of constantly resorting will be prohibitively high. This is not the same well-trodden observation that zoning is a tool for keeping low-income households out of a community in order to minimize the cross-subsidies embedded in property taxes. The point here—subtly but importantly different—is that change itself is problematic for the Tieboutian sorting function. Even if newcomers buy exclusively at the higher end of the housing market (as in periods of gentrification) and dramatically *increase* the tax base and the quality of public services, this can still disrupt the choices that in-place residents implicitly made by buying into a community with a specific character. Where change is the challenge, not free-riding, zoning can serve the beneficial purpose of moderating the pace of that disruption.<sup>100</sup> Fast changes to a community are more disruptive of settled expectations than slower, controlled ones.<sup>101</sup>

These dynamics are ubiquitous and animate some of the gentrification anxiety in developing places. Gentrification creates predictable winners and losers. Urban pioneers often move into communities—usually communities of color—because they are betting on an influx of capital and services.<sup>102</sup> Change, in this instance, can drive up local prices but in the process drive out long-time residents. While some people benefit, these kinds of changes can impose significant costs on the community, fraying safety nets and eroding social capital.<sup>103</sup> The transformation of neighborhoods like Bedford Stuyvesant in

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99. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

100. See Serkin, *supra* note 17, at 773.

101. See Christopher Serkin, *What Property Does*, 75 VAND. L. REV. 891 (2022). See generally HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 144 (2019) (discussing value of stability in property law).

102. See Miriam Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLAN. LITERATURE 31, 32 (2018) (describing the potential motivations of gentrifiers and the subsequent increase in private and public investment that ultimately increases the cost of living in the neighborhood).

103. See generally Kenneth Temkin & William M. Rohe, *Social Capital and Neighborhood Stability: An Empirical Investigation*, 9 HOUS. POLYDEBATE 61 (1998) (examining empirically the relationship between social capital and neighborhood change).

Brooklyn, or East Nashville in Tennessee, show both the benefits but also the costs of change.<sup>104</sup> Changes to a community mean that some residents may find themselves living in a place that no longer meets their preferred mix of taxes, services, and housing costs. Where that happens, in-place residents are faced with the decision to suffer the disutility of living in a place that does not meet their preferences or incurring the substantial costs of moving.<sup>105</sup> Zoning can serve the important role of helping to moderate the pace of change, even if it should not be used to stop change altogether.<sup>106</sup>

Some might object that the housing crisis is sufficiently acute that dramatic changes are needed now. Others might worry that this use of zoning is simply cooking a frog slowly so it won't jump out of the pot. But nothing here specifies how fast is too fast in any particular context, or how much change to ultimately embrace. In some places, like New York and San Francisco, the gap between supply and demand is so extreme that the most aggressive zoning reforms are appropriate.<sup>107</sup> But in other places, the kind of knee-jerk opposition to zoning that is developing across the political spectrum will impose unnecessary costs on in-place property owners, costs that many zoning reforms seem to ignore.

## 2. *The Costs of Relying on “Natural” Limits*

Unregulated growth in many places will create significant environmental and human costs. Indeed, in parts of the West, promoting freer development without zoning limits on density runs headlong into water scarcity. There is a natural limit—not just a zoning limit—on

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104. See Trymaine Lee, *A Merchant Watches as Bed-Stuy Gentrifies*, N.Y. TIMES (May 8, 2009), <https://www.nytimes.com/2009/05/09/nyregion/09metjournal.html> (describing the decline of minority owned businesses but also increasing safety and property values in Bedford-Stuyvesant, New York as a result of gentrification); Linda Ong, *Gentrification Is Having Mixed Impact in East Nashville Neighborhoods*, WKRN NASHVILLE (Jan. 18, 2019), <https://www.wkrn.com/news/gentrification-is-having-mixed-impact-in-east-nashville-neighborhoods/> (juxtaposing the new restaurants, cafes, breweries, and businesses in East Nashville with the displacement of African Americans from communities that existed since the Civil War).

105. See Serkin, *supra* note 17, at 770–75 (arguing that one purpose of zoning is to moderate the pace of community change).

106. See *id.* at 783 (“[Z]oning and property law more generally constrain the pace of change, but do not prevent change altogether.”).

107. See Glaeser et al., *supra* note 26 (arguing that the gap between building costs and housing costs is largely attributable to land use regulation).

the number of people who can live in Tucson or Las Vegas.<sup>108</sup> Without regulatory limits, however, population may climb past sustainable levels because the market will not necessarily respond quickly to long-term ecological constraints. Indeed, many places may have already passed that point.<sup>109</sup>

Similar dynamics play out in the context of sea level rise, natural disasters and climate change. Our understanding of vulnerable property is continuously evolving with historic rainfall in parts of the country causing unprecedented flooding and strengthening hurricanes that threaten larger swaths of coastal and even inland property.<sup>110</sup> Increasingly frequent and severe wildfires also threaten development that intrudes into the “wildland-urban interface.”<sup>111</sup> These changes make development in some places increasingly risky, and zoning and land use regulations are key tools for keeping people

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108. See, e.g., Ian James, *‘Our Own Survival Is at Stake’: Arizona Is Using up Its Groundwater, Researchers Warn*, AZ. REPUBLIC (May 2021), <https://www.azcentral.com/story/news/local/arizona-environment/2021/05/13/arizona-is-depleting-ground-water-in-many-areas-researchers-warn/5059471001/>; Sarah Tory, *Rapid Growth in Arizona’s Suburbs Bets Against an Uncertain Water Supply*, HIGH COUNTRY NEWS (June 1, 2021) (discussing the rapid growth of Phoenix to the fifth-largest city in the U.S., Arizona’s declining groundwater supplies and measures to protect them, and the freeze on development in the Pinal management area because the state water department could not certify 100-year assured water supplies); Oliver Milman, *‘We Live in a Desert. We Have to Act Like It’: Las Vegas Faces Reality of Drought*, GUARDIAN (July 9, 2021), <https://www.theguardian.com/us-news/2021/jul/09/las-vegas-climate-change-drought-water-conservation>.

109. See Henry Fountain, *In a First, U.S. Declares Shortage on Colorado River, Forcing Water Cuts*, N.Y. TIMES (Aug. 6, 2021), <https://www.nytimes.com/2021/08/16/climate/colorado-river-water-cuts.html> (discussing the extent of the drought in the western United States and challenges to managing declining water supplies as irrigation and development increases in arid places); Jim Morrison, *Climate Change Turns the Tide on Waterfront Living*, WASH. POST (June 20, 2021), <https://www.washingtonpost.com/magazine/2020/04/13/after-decades-water-front-living-climate-change-is-forcing-communities-plan-their-retreat-coasts/> (discussing the challenges of waterfront living in the face of sea level rise); Chloe Johnson, *Charleston’s Dilemma: How to Fix a Housing Crunch Without Building in Places that Flood*, POST & COURIER (Sept. 21, 2021), [https://www.postandcourier.com/rising-waters/charlestons-dilemma-how-to-fix-a-housing-crunch-withoutbuilding-in-places-that-flood/article\\_884599c2-fb79-11eb-9370-2f48ec16b7c6.html](https://www.postandcourier.com/rising-waters/charlestons-dilemma-how-to-fix-a-housing-crunch-withoutbuilding-in-places-that-flood/article_884599c2-fb79-11eb-9370-2f48ec16b7c6.html) (highlighting the tension between housing demand and sea level rise in growing coastal cities).

110. See generally Michael Dettinger et al., *Western Water and Climate Change*, 25 ECOLOGICAL APPLICATIONS 2069 (2015) (discussing potential shifts and increasing water availability problems throughout much of the western United States).

111. See, e.g., Volker C. Radeloff et al., *Rapid Growth of the US Wildland-Urban Interface Raises Wildfire Risk*, 115 PROC. NAT’L ACAD. SCI. 3314, 3316–17 (2018) (discussing increasing residential development in or near wildland vegetation that could both increase the prevalence and impact of wildfires).

and property out of harm's way. Density in New Orleans' Lower Ninth Ward, for example, would risk an enormous human and economic toll, even if it would produce lower housing costs throughout the city. Reforms that weaken zoning's ability to respond to ecological vulnerability may come with a high cost.

### 3. *Regional Inequality*

There is a deeper worry, as well: exacerbating regional inequality. As noted above, one strand of opposition to zoning regulation is based on macroeconomic concerns about the mismatch between labor supply and demand.<sup>112</sup> Zoning is a culprit because it prevents housing markets from responding to demand, and so keeps people from moving so easily to more flourishing places.<sup>113</sup> This claim embeds fundamentally libertarian assumptions that regulation is the problem to be overcome, and that the absence of regulation will unlock market forces that solve all manner of problems. This account, however, assumes both that demand is somehow naturally occurring, and that there are no costs to this deregulatory approach (or at least that the costs are outweighed by the economic benefits). Both are problematic.

In a recent article with Professors Ganesh Sitaraman and Morgan Ricks, we examined the evidence that regional inequality is increasing in this country.<sup>114</sup> After nearly a century of economic convergence, as predicted by economic theory, flourishing places have increasingly been pulling away from struggling ones.<sup>115</sup> Zoning reformers invoke all manner of economic phenomena to explain this change, highlighting the agglomeration benefits of co-location, and the economic advantages of dense places in the modern economy.<sup>116</sup> If only housing markets operated with less regulatory friction, people would be free to move to thriving places, improving both their own situation and also generating benefits for the economy as a whole.

Missing from this story, however, is any recognition of the role that regulatory policy has played in regional economic divergence.

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112. *See supra* notes 25–27.

113. *See supra* note 30.

114. Sitaraman et al., *supra* note 3, at 1772–76.

115. *See id.* at 1774.

116. Schleicher refers obliquely to “technological changes” and “social shifts.” Schleicher, *supra* note 19.

As we demonstrated, a series of deregulatory changes dating primarily back to the Reagan era promoted concentration in economic opportunity, giving rise to an increasingly winner-take-all economy with perennially left-behind places.<sup>117</sup> These changes included, primarily, deregulation of transportation and communication, lack of enforcement of anti-trust rules, and the centralization of trade policy in the executive branch.<sup>118</sup> These all operate somewhat differently, and the argument does not need to be repeated here. But each of these dramatic changes in regulatory policy had the result of making it more difficult for cities like Louisville or Memphis to compete with the superstar cities like New York and San Francisco. It is hard to run an international company with no direct flights to most places.<sup>119</sup>

If the reason for New York's economic advantages is a set of deregulatory policies, it is troubling to think that a further deregulatory response will produce better outcomes. A better target for reform are the regulatory choices that let New York, Chicago, and San Francisco pull further and further ahead of many places in the country, addressing housing affordability from the direction of demand instead of—or at least in addition to—supply.<sup>120</sup>

This is important because regional inequality produces its own harms. Population growth in a few thriving places comes at the expense of the places that are left behind. In a truly insightful treatment of zoning deregulation, Richard Schragger points out this cost of “the YIMBY ‘build, build, build’ demand.”<sup>121</sup> According to a study he cites, eliminating regulatory limits on housing would produce employment gains of 787% in New York, 500% in San Francisco, and employment losses of 98% in Flint, Michigan.<sup>122</sup> There are distributional costs to such an extreme realignment of housing and jobs that are often ignored.

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117. Sitaraman et al., *supra* note 3, at 1816.

118. *See id.* at 1785–1809.

119. *See id.* at 1791 (“Because travel to and from such inland cities has become much more expensive and inconvenient, corporate headquarters have fled.”).

120. *See id.* at 1830–36 (proposing a range of structural responses).

121. Richard Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 180–81, 191–94 (2021) (discussing the difficulty of predicting future housing demand and potential consequences of unleashing uncontrolled housing development).

122. *See id.* at 186 n.285 (citing 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, 238 (2020)).

In reality, no one suggests that everyone will—or should—move to a few thriving places. But it is predictably better educated and more affluent white people who take the most advantage of moving, putting further pressure on the places left behind.<sup>123</sup> And, even on the margins, accommodating greater population in a few thriving urban centers does further damage to our democratic system, where projections based on Census data predict that within two decades only sixteen senators will represent more than fifty percent of the population, and eighty-four will represent the other half.<sup>124</sup>

### III. WHAT COMES NEXT

#### A. *The Sad State of the Current Debate*

Strident advocates of zoning reform have demonstrated an especially dismissive attitude towards any defenses of land use regulation, even modest and careful ones.<sup>125</sup> In a response to several recent articles, for example, David Schleicher lambasts any note of caution about zoning reform as naïve NIMBY pandering.<sup>126</sup> This scholarship of derision disguises a number of problematic assumptions that call for more careful attention.

In particular, in responding to my article *A Case for Zoning*, he dismisses the argument that zoning may have had any role to play in re-urbanization in the 1990s. He points out that “lightly zoned” cities like Phoenix also experienced dramatic growth during this period, suggesting that zoning was therefore not an important driver of re-urbanization.<sup>127</sup> This is an interesting argument, and it is useful to look to other cities for comparison, but Phoenix is a puzzling example.

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123. Sitaraman et al., *supra* note 3, at 1818 (“Data from the Federal Reserve on internal migration show that white people are more likely to move than Black people, those with greater educational attainment are more likely to move than those with less, and higher-income people are more likely to move than lower-income people.”); cf. Sheila R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J.F. 480, 489 (2017) (“In other words, one of the consequences of agglomeration economies—i.e., the clustering of talent and industry—is that it has become one of the main drivers of inequality.”).

124. See Sitaraman et al., *supra* note 3, at 1781.

125. See generally Schleicher, *supra* note 19.

126. See *id.*

127. See *id.*

It is true that lightly zoned Phoenix was also growing when New York and other coastal cities were re-urbanizing. But the growth of that city was driven more by annexation and sprawl than by re-urbanization.<sup>128</sup> Between 1990 and 2000, the land area of Phoenix grew by thirteen percent, and population growth was concentrated at the urban fringe.<sup>129</sup> While Phoenix grew during this period, it was not through any process that resembled re-urbanization in places like New York and its formula for growth has produced generally worse outcomes on many dimensions.<sup>130</sup>

Indeed, structural features of Phoenix and discriminatory practices in the real estate industry there have perpetuated a segregated city where the relatively dense downtown area is predominantly Black and Latino and suffers from chronic disinvestment.<sup>131</sup> According to one damning account of this period of growth, “Within th[e] national context of downtown redevelopment, it is remarkable that the revitalization of downtown Phoenix took so long. The city holds the dubious honor of having the least interesting and profitable downtown area of any major city in America.”<sup>132</sup> The growth of Phoenix has occurred much more through consumption of agricultural land and the sprawl of single-family housing on the outskirts.<sup>133</sup> This is hardly the example of urbanization without zoning that Schleicher suggests.

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128. See, e.g., PATRICIA GOBER, *METROPOLITAN PHOENIX* 3 (2006) (describing a “relentless push toward new land at the urban fringe, a push that continues today. Despite periodic efforts to reinvigorate its downtown, Phoenix has the least developed urban core of any large city in America.”).

129. Carol E. Heim, *Border Wars: Tax Revenues, Annexation, and Urban Growth in Phoenix*, 36 INT’L J. URB. & REG’L RSCH. 831, 834 (2012). As one article explains in detail:

Between 1990 and 1999, the population of Maricopa County, which includes metropolitan Phoenix, grew by 34.8 percent or 739,294 persons to 2,861,395 . . . Residential growth occurred primarily at the urban fringe because land and development costs there are low, employment opportunities are available within a forty-five-minute commute, and growth management regulations are weak. To accommodate growth, Phoenix-area communities annexed a total of 214 square miles—the land mass of El Paso, Texas—between 1990 and 1997.

Patricia Gober & Elizabeth K. Burns, *The Size and Shape of Phoenix’s Urban Fringe*, 21 J. PLAN. EDUC. & RSCH. 379, 384 (2002).

130. See, e.g., PHILIP R. VANDERMEER, *PHOENIX RISING* 63 (2002) (“The absence of effective city planning or zoning encouraged ‘leapfrog’ development where builders sought land on the outskirts or outside of the current city boundaries.”).

131. *Id.*

132. *Id.* at 177.

133. See, e.g., Carol E. Heim, *Leapfrogging, Urban Sprawl, and Growth Management: Phoenix, 1950–2000*, 60 AM. J. ECON. & SOCIO. 245, 251–53 (2001) (describing development in Phoenix).

Schleicher next rejects the claim that there could be problematic substitution effects if homeowners choose private zoning in the form of HOAs over public land use regulations. Schleicher argues that HOAs cannot replicate zoning controls, and that zoning arose partly because “deed covenants could not successfully limit the construction of apartment buildings in New York City in the early 1900s.”<sup>134</sup> HOAs, according to Schleicher, are not as protective and restrictive as zoning and so are preferable. And he points to Houston as proving his point.

Houston, he argues, demonstrates that relying on HOAs instead of zoning allowed population to increase dramatically without concomitant increases in housing prices, presumably because HOAs are less restrictive than comprehensive zoning and less protective of neighbors’ rights. It is true that Houston has not seen housing costs rise at nearly the rate of other thriving municipalities.<sup>135</sup> It has experienced dramatic growth but without such a significant increase in property values (although prices have been rising recently).<sup>136</sup>

Houston, however, is another strange example to invoke as support for his claim. In fact, it corroborates the foundational observation that housing consumers do use HOAs as private substitutes for public zoning. Phoenix—Schleicher’s other example—is similar. Just like

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134. Schleicher, *supra* note 19.

135. Emily Hamilton, *Want More Housing? Ending Single-Family Zoning Won’t Do It*, BLOOMBERG CITYLAB (July 29, 2020, 10:06 AM), <https://www.bloomberg.com/news/articles/2020-07-29/to-add-housing-zoning-code-reform-is-just-a-start> (“A typical house in Houston costs less than \$200,000, compared with nearly \$300,000 in Atlanta or a staggering \$680,000 in San Diego. In other booming cities, more jobs and new residents have led to skyrocketing prices but few new homes.”).

136. Florian Martin, *Rising Prices Are Making Houston Homebuyers Lower Their Expectations*, HOUS. PUB. MEDIA (April 30, 2021), <https://www.houstonpublicmedia.org/articles/news/in-depth/2021/04/30/397115/rising-prices-are-making-houston-home-buyers-lower-their-expectations/> (highlighting that, although median home prices are still below the national median, “prices have grown so fast recently it’s becoming harder for Houstonians to afford their dream house. From March 2020 to March 2021, Houston home prices went up by 16%—from just under \$250,000 to \$290,000.”); R.A. Schuetz, *Houston Is Often Touted as One of the Most Affordable Cities. But Is It Really?*, HOUS. CHRONICLE (June 24, 2021), <https://www.houstonchronicle.com/business/article/The-majority-of-Houston-renters-are-now-cost-16265423.php> (reporting that “Houston renters are now more cost burdened—and evicted at a higher rate—than renters in Dallas, Chicago or Atlanta” and that eviction rates are second only to New York City, a city twice Houston’s size, between 2018 and 2020); Sarah Smith, *No City in America Has Enough Low-Income Housing. Houston Is One of the Worst*, HOUS. CHRONICLE (Mar. 18, 2021), <https://www.houstonchronicle.com/news/houston-texas/houston/article/No-city-in-America-has-enough-low-income-housing-16033351.php> (“Seventy-nine percent of the lowest-income renters [in Houston] pay at least half of their income toward rent and utilities.”).

in Houston, housing consumers in Phoenix have opted significantly for private zoning in the form of HOAs. Since 1985, “[t]he majority of new residential developments in Phoenix . . . have been governed by HOAs . . . .”<sup>137</sup> Of course, individual HOAs will not constrain development of a whole area or community in the same way as zoning. But where they are ubiquitous, in places like Houston and Phoenix, they create a tapestry of private regulation that, in effect, restricts development in large areas and exacerbates sprawl.

Schleicher argues that zoning drives up costs, creates sprawl, and contributes to climate change. But if we are to take Houston and Phoenix as the models of growth with less zoning, the result is sprawl, segregation, and environmentally unsustainable development.<sup>138</sup> Does this make sense? “I suppose you can be the judge.”<sup>139</sup>

### *B. The Unspecified Endgame*

Part of the problem with the current debate is that zoning reformers have, by and large, not been particularly explicit about their ultimate goals or what they see as the endgame of their efforts. This creates the illusion of policy consensus when, in fact, deep disagreements may lurk beneath the surface.

One shared goal is simply incremental improvements in land use regulations to account for new information and changed conditions on the ground. In a comprehensive article, for example, Professor Wolf has argued for a host of zoning changes to respond to modern land use demands, such as allowing home occupations in more places, expanding permissible accessory uses, and accommodating more affordable housing, among others.<sup>140</sup> Changes in minimum parking requirements recognize the aspiration to have less car-dependent cities.<sup>141</sup>

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137. See V. Kelly Turner & Dorothy C. Ibes, *The Impact of Homeowners Associations on Residential Water Demand Management in Phoenix, Arizona*, 32 URB. GEOGRAPHY 1167, 1168 (2011).

138. See, e.g., Joe Cortright, *Where Does Houston Rank Among American’s Least (and Most) Segregated Cities?*, KINDER INST. URB. RSCH. (Sept. 4, 2020), <https://kinder.rice.edu/urbanedge/2020/09/04/houston-rank-america-least-and-most-segregated-cities> (“Houston (defined as Harris County) has the 18th highest level of white/non-white segregation among urban counties in the U.S.”).

139. Schleicher, *supra* note 19, at 1344.

140. See generally Michael Allen Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171 (2021).

141. See, e.g., Sara C. Bronin, *Rethinking Parking Minimums*, PLAN. MAG., Feb. 1, 2018, at 9.

Other important reform efforts along these lines recognize the increasing power that neighbors exercise in the land use process, tilting the balance of power towards NIMBY exclusion.<sup>142</sup> Focusing on those political dynamics suggests important reforms to reduce veto points in land use approvals.<sup>143</sup> Reforms can also be political, like upstreaming certain kinds of land use decisions to the state to avoid local gridlock, relying on planning to avoid self-interested myopia, or otherwise trying to activate groups in opposition to motivated NIMBYs.<sup>144</sup> This incremental approach looks simply to identify and correct pathologies in land use decision-making whenever and wherever possible.

Another related but distinct goal may be to create larger and, ideally, denser places. There is a vast literature on optimal size, with the efficiencies of infrastructure pushing up against the costs of congestion. That balance may be shifting in some places for any number of reasons.<sup>145</sup> For example, there may be excess infrastructure capacity in some places, or the costs of exclusion may now exceed the costs of increased congestion.<sup>146</sup> More generally, changes in technology and the modern economy may have increased the optimal city size.<sup>147</sup>

These zoning reform efforts are aimed at recalibrating density and growth limits and expanding allowable development. Reforms can be targeted, like the recent rezoning of Gowanus to allow an

142. See Moira O'Neill et al., *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENV'T L.J. 1, 49–71 (2019) (presenting granular findings); see also EINSTEIN ET AL., *supra* note 12, at 157–71 (focusing on changing who participates in land use decision-making); Been, *supra* note 14, at 245–46 (analyzing political dynamics around NIMBYism in cities).

143. Been, *supra* note 14, at 22 (citing Mangin, *supra* note 95).

144. See, e.g., Infranca, *supra* note 15, at 875–86 (arguing for and surveying responses); Rosser, *supra* note 15, at 824 (discussing preemption); Alejandro E. Camacho & Nicholas J. Marantz, *Beyond Preemption, Toward Metropolitan Governance*, 39 STAN. ENV'T L.J. 125, 149–51 (2020) (arguing for realigning local control over land use regulation to promote housing affordability).

145. See generally Gilles Duranton & Diego Puga, *The Economics of Urban Density*, 34 J. ECON. PERSPS. 3 (2020) (highlighting the drivers and costs and benefits of more dense development).

146. *Id.* at 15–18; Alex Baca et al., “Gentle” Density Can Save Our Neighborhoods, BROOKINGS (Dec. 4, 2019), <https://www.brookings.edu/research/gentle-density-can-save-our-neighborhoods/> (arguing that housing density can more “gently” increase in forms other than high-rise buildings that still increase housing supply and service efficiencies without the costs of sudden increases in population).

147. See Duranton & Puga, *supra* note 145, at 16 (noting that technological developments have allowed increased density in cities with taller buildings).

additional 8,500 new apartments in a well-established Brooklyn neighborhood.<sup>148</sup> Or they can be broader, like allowing ADUs as of right, reducing or eliminating off-street parking requirements, and making it easier to subdivide lots.<sup>149</sup> In California, for example, new statewide laws allow ADUs even in HOAs in communities that currently prohibit them.<sup>150</sup> And Minneapolis and other jurisdictions have all but banned single-family zones, dramatically increasing permissible development to increase the supply of housing.<sup>151</sup>

These kinds of reforms promise to transform many places, and often for the better. But these reforms do not fundamentally alter the underlying dynamics of urban development. Zoning still has a role to play in protecting infrastructure and services from too much congestion, even if cities today can accommodate significant growth in many places. Once development has consumed that excess capacity, zoning will again constrain change. The endgame, in other words, is not to do away with zoning, but is simply to accommodate additional growth now and to promote a new equilibrium with marginally larger and denser cities.

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148. See, e.g., David Brand, *NYC Council Approves de Blasio's Massive Gowanus Rezoning*, CITY LIMITS (Nov. 23, 2021), <https://citylimits.org/2021/11/23/nyc-council-approves-de-blasios-massive-gowanus-rezoning/> (describing the rezoning).

149. See, e.g., Assemb. B. 881, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (allowing accessory dwelling units); S.B. 13, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (same); Laura Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NAT'L PUB. RADIO (July 1, 2019), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning> (discussing Oregon). For a brief overview of these kinds of reform efforts, with links, see Solomon Greene & Jorge González-Hermoso, *How Communities Are Rethinking Zoning to Improve Housing Affordability and Access to Opportunity*, URB. INST.: URB. WIRE (June 12, 2019), <https://www.urban.org/urban-wire/how-communities-are-rethinking-zoning-improve-housing-affordability-and-access-opportunity>.

150. See CAL. CIV. CODE § 4751 (2021); Assemb. B. 760, 2019–2020 Leg., Reg. Sess. (Cal. 2019); Benjamin Donel, *California's New Accessory Dwelling Units Laws: What You Should Know*, FORBES (March 12, 2020), <https://www.forbes.com/sites/forbesfinancecouncil/2020/03/12/californias-new-accessory-dwelling-units-laws-what-you-should-know/?sh=1f02ec4e17a3>.

151. See *Policy 1, Access to Housing: Increase the Supply of Housing and Its Diversity of Location and Types*, MINNEAPOLIS 2040, <https://minneapolis2040.com/policies/access-to-housing/> (last visited Aug. 29, 2022); CAMBRIDGE CITY, MA., *Policy Order 2020 #289 Elimination of Single Family Zoning*, CAMBRIDGE.MA.GOV (Dec. 14, 2020, 5:30 PM), [https://cambridgema.iqm2.com/Citizens/Detail\\_LegiFile.aspx?Frame=&MeetingID=2757&MediaPosition=&ID=13192&CssClass=%3C](https://cambridgema.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=2757&MediaPosition=&ID=13192&CssClass=%3C); Wamsley, *supra* note 149 (discussing Oregon's decision to allow multiple units on plots as of right depending on the size of the locality and thus functionally eliminating single family zoning); S.B. 9, 2021–2022 Leg., Reg. Sess. (Cal. 2021); see also *Build, Baby, Build: California Ends Single-Family Zoning*, ECONOMIST (Sept. 25, 2021), <https://www.economist.com/united-states/2021/09/23/california-ends-single-family-zoning>.

Some zoning reformers may be arguing for something more radical, however: eliminating most if not all density limits and regulatory restrictions on development.<sup>152</sup> This goal is not about unlocking some amount of new growth, but is instead promoting a future where development decisions are made exclusively by the market, and planning and politics are sidelined.<sup>153</sup> Undergirding this view may be a sense that zoning has become irredeemably exclusionary and needs to be fundamentally reset, or a more ideological hostility to regulation.

But what is the endgame here? There are still “natural” constraints on growth. At certain levels of congestion people will choose to live elsewhere and growth will slow or stop. Where water becomes scarce or natural disasters more devastating, places will eventually become undesirable. Without regulatory constraints, however, developers may well blow right past those limits. Even if the market ultimately corrects, uncontrolled growth may impose significant costs in the meantime.<sup>154</sup> Schleicher himself has suggested that his dystopian anti-regulatory vision should include housing that is easier to dismantle so that it can simply be discarded as people chase jobs from place to place.<sup>155</sup> The deadweight costs are potentially staggering.

More fundamentally, this ideologically motivated endgame is troubling because it does not easily admit any weighing of the costs and benefits of growth, or any of the benefits of land use regulation. It is one thing to say that the voices of NIMBYs have grown too powerful in opposing development, a point that should draw consensus. It is something else entirely to say that growth is always an unalloyed good. There are costs to growth—costs that vary by place—and regulation remains an important tool for managing them. But finding the right balance will require a clear-eyed look at its costs and benefits.

It is easy to disguise the differences between these three camps because they are usually aligned on many of the discrete reforms that policymakers are considering today. Incrementalists, growth

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152. See Serkin, *supra* note 17, at 770 n.129 (citing sources).

153. See Walter Block & Sarah Huddell, *The Case Against Zoning*, 37 INT’L J. ETHICS & SYS. 618, 625 (2021) (“The market is a tremendously powerful force that acts directly in line with human desires and tendencies. Therefore, the most effective way to plan, develop and design communities is to let the invisible hand guide us.”) (internal citation omitted).

154. See *supra* Section II.B.

155. See David Schelicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 139 (2017) (“If housing was less durable, it would also presumably be less costly to produce *ex ante*.”).

advocates, and ideologues all agree on issues like ADU reform. And indeed, these are changes that are easy to embrace. But what comes next? Without giving more careful thought to the next set of regulatory challenges and the affirmative goals that zoning should promote, it will be easy for all three camps to be swept up in anti-regulatory fervor that may well go too far. This is a dangerous path. Going forward, zoning reform efforts should be more attentive to both the costs and benefits of reforms and be more explicit about underlying values and ultimate goals.

### *C. What Comes Next?*

Of course there are important opportunities to increase density in many places. There is no question that we have a housing crisis in many thriving places and that zoning is partly to blame. Zoning has contributed to a number of urgent problems. It has codified discrimination and segregation. And it has helped to produce the sprawling single-family development that contributes to climate change while simultaneously dissipating social capital. Many of our most vibrant cities should increase supply by increasing permissible density.

This Article is not an argument against regulatory reform. The interventions here are not intended to push back against these very real problems. They are, instead, intended to sound a note of caution about what comes next. Urban policy over the last century has not pointed in a single direction but has instead been a kind of pendulum.<sup>156</sup> It is important as the pendulum swings back away from regulation not to let it swing too far.

Zoning reformers seem to assume a kind of inevitability to the current trends of urban growth and development. They claim that urbanization is the result of changing consumer preferences and point to the appetite of younger workers, in particular, to live in denser urban places where cultural amenities are more readily available.<sup>157</sup>

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156. See, e.g., Serkin, *supra* note 17, at 754–66 (providing a brief history of urban planning and zoning and its shifts over time).

157. John R. Nolan, *Shifting Paradigms Transform Environmental and Land Use Law: The Emergence of the Law of Sustainable Development*, 24 *FORDHAM ENV'T L. REV.* 242, 255–57 (2017) (“For a variety of reasons . . . the majority of the projected 100 million new Americans [by 2050] will be inclined to shift ground [away from sprawling suburbs], preferring to live in dynamic, walkable neighborhoods in urban areas.”); Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 *ALA. L. REV.* 257, 257–60, 263, 266–69 (2006) (providing a brief synopsis of

When people think about dramatically increasing density in the urban core, they often imagine—at least implicitly—a kind of heterogeneous utopia with workforce housing intermixed with upscale apartments that attract the creative class, to use Richard Florida’s formulation.<sup>158</sup>

Re-urbanization is not an inevitable force, however. If demand decreases as neighborhood stability becomes unsettled—especially among the more affluent who have other ways of purchasing neighborhood stability by buying in HOAs—then the result might be worse for cities. Shifts in consumer preferences could transform what has been a virtuous cycle of job creation and municipal revenue into the death spiral of the 1970s with a hollowing out of the tax base and the loss of municipal services.<sup>159</sup>

Such a change may be underway right now. Millennials’ preference for dense, urban living appears to be less durable than many people have assumed. Even prior to COVID, millennials appeared to be shifting towards the suburbs.<sup>160</sup> COVID has accelerated that change.<sup>161</sup> Already, population growth in many suburbs is outpacing growth in the urban core.<sup>162</sup> COVID may accelerate these trends

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New Urbanist ideas and the barriers to developers attempting to build in line with them). *But see* Dowell Myers, *Peak Millennials: Three Reinforcing Cycles that Amplify the Rise and Fall of Urban Concentration by Millennials*, 26 HOUS. POL’Y DEBATE 928, 930–32, 943–45 (2016) (discussing urbanism in the millennial generation and why urbanism may be temporary or shift as millennials age, priorities shift, and other housing opportunities emerge).

158. *See* Richard Florida, *Cities and the Creative Class*, 2 CITY & CMTY. 3, 7–10 (2003) (describing the success of places embracing the creative class and the desire for members of that class to live among one another and within diverse, vibrant communities).

159. *See, e.g.*, Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1139 (2014) (“Both poverty and population loss hit government revenues directly, as declining wealth and a declining number of city taxpayers produce lower revenues to fund current services and keep up with past debt.”).

160. *See, e.g.*, Myers, *supra* note 157. *But see* Hyojung Lee, *Are Millennials Leaving Town? Reconciling Peak Millennials and Youthification Hypotheses*, 26 INT’L J. URB. SCIS. 68 (2022) (arguing that millennials are being replaced by the next generation of young people, who again prefer urban living).

161. *See, e.g.*, Avert Hartmans, *Millennials and Gen Z Are Fleeing Cities and Buying Up Homes in the Suburbs Amid the Coronavirus Pandemic*, INSIDER (Nov. 20, 2020, 11:05 AM), <https://www.businessinsider.com/millennials-gen-z-leaving-cities-for-suburbs-amid-pandemic-2020-11> (describing “a noticeable migration among people ages 25 to 34 from urban areas to suburban ones”); *see also* PARAG KHANA, MOVE 106 (2021) (“Rising city costs, the Covid lockdown, and the explosion in telecommuting are also likely to bring about a substantial suburban revival.”).

162. *See* Laura Kusisto, *Suburbs Outstrip Cities in Population Growth, Study Finds*, WALL ST. J. (Dec. 3, 2016, 7:00 AM), <https://www.wsj.com/articles/suburbs-outstrip-cities-in-population-growth-study-finds-1480766402> (highlighting a study that found on average suburban

because people may once again start to prefer larger houses on larger lots after spending so much time at home. Moreover, COVID has demonstrated to many businesses that employees do not need to come to the office every day—or ever—and that they can be productive working remotely.<sup>163</sup> New living-working configurations may allow people to live wherever they want without giving up access to thriving economies.<sup>164</sup>

For cities to continue to compete in this changing landscape, they will need to offer more than access to good jobs and higher wages. Those “amenities” may be increasingly available to people wherever they choose to live. So cities will need to act to continue to foster and enhance the non-economic values that attract people to living in the dense urban core: community, diversity, urban amenities like cultural activities and restaurants, dynamism, and simply the aesthetic quality of urban life that suburbs cannot provide. Disarming local governments’ regulatory arsenal will make it harder to respond when these pressures change.

As always, it is important not to be dogmatic in this caution. Cities can also sow the seeds of their own destruction by becoming such exclusive enclaves that the generative forces of economic and

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areas around the fifty largest metropolitan areas in the country comprised seventy-nine percent of the population of each region, ninety-one percent of the population growth in the region between 2000–2015, and seventy-five percent of the population between twenty-five and thirty-four in these regions lived within suburbs); Richard Fry, *Prior to COVID-19, Urban Core Counties in the U.S. Were Gaining Vitality on Key Measures*, PEW RSCH. CTR. (July 29, 2020), <https://www.pewresearch.org/social-trends/2020/07/29/prior-to-covid-19-urban-core-counties-in-the-u-s-were-gaining-vitality-on-key-measures/> (“Since 2000, the U.S. population has been increasingly concentrated in the 52 largest metropolitan areas, particularly their suburban counties. The population of the large suburban counties has increased by 25% in the new century, outpacing the nation’s overall population growth (16%). The population in the urban core counties grew at the same pace as the national average.”).

163. Lananh Nguyen, *Wall Street Grudgingly Allows Remote Work as Bankers Dig In*, N.Y. TIMES (Nov. 24, 2021), <https://www.nytimes.com/2021/11/24/business/wall-street-remote-work-banks.html> (highlighting that Wall Street banks posted record profits and revenue over the time period employees worked remotely); Claire Cain Miller, *The Office Will Never Be the Same*, N.Y. TIMES (Sept. 22, 2021), <https://www.nytimes.com/2020/08/20/style/office-culture.html>.

164. See generally KHANA, *supra* note 161 (describing these trends and offering a number of visions for the future of migration and development); AnnElizabeth Konkel, *Indeed US Job Postings Tracker: Data Through January 7*, INDEED HIRING LAB (Jan. 13, 2022), [https://www.hiringlab.org/2022/01/13/job-postings-tracker-through-january-7/?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=newsletter\\_axioswhatsnext&stream=science](https://www.hiringlab.org/2022/01/13/job-postings-tracker-through-january-7/?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axioswhatsnext&stream=science) (highlighting that the metropolitan areas with fastest growth in job postings were largely in the Sunbelt and Pacific Northwest and not in traditional “superstar” cities).

cultural dynamism dissipate or never take hold. There is a story, for example, that the most interesting music and theater scenes in New York have largely left for smaller, less expensive cities.<sup>165</sup> Addressing affordability and allowing communities to reconstitute themselves is essential. Dynamism, growth, and renewal are core features of thriving places, and considerable change and development are good. The point, simply, is that this can also go too far and that cities should have the tools to control the pace of change.

These pressures cannot all be addressed in the abstract, or through one-size-fits-all reforms. There is often a kind of regional myopia that infects the land use discourse. It is not surprising that most of the important voices in the field—and most of the important reform efforts—come from places facing the most acute development pressures: California, New York, Boston, and Washington, D.C., for example. But reforms look different in the sunbelt or in other regions where zoning is not the principal constraint on density and growth. Those are places that often suffer from too little planning and zoning, not too much. There is a careful balance to be struck, but it is a different balance in different places. The current debate often paints with too broad a brush and, again, risks unnecessary harm in the process.

## CONCLUSION

As welcome efforts to reform zoning continue to gain traction in cities and states throughout the country, it is important to recognize that there is no secret sauce that cures all problems. Less restrictive zoning can unlock density, but it may not always do so. And zoning reform comes with its own costs. There is no serious question that zoning is now too restrictive in many places, but the goal of reform should be to recalibrate the balance between development and exclusion. Focusing more honestly on the ultimate goals of zoning reform will help to sharpen the terms of the debate.

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165. See Alice Newell-Hanson, *Why New York's Young Artists Are Leaving the City and Moving Upstate*, VICE I-D (Dec. 6, 2016), [https://i-d.vice.com/en\\_uk/article/qvb4q7/why-new-yorks-young-artists-are-leaving-the-city-and-moving-upstate](https://i-d.vice.com/en_uk/article/qvb4q7/why-new-yorks-young-artists-are-leaving-the-city-and-moving-upstate) (interviewing artists that left New York City to live in smaller cities with a lower cost of living that enabled them to focus more on their art); Kim Velsey, *Artist's Studio: How About the Living Room?*, N.Y. TIMES (Nov. 29, 2019), <https://www.nytimes.com/2019/11/29/realestate/artists-working-from-home.html> (describing how rising rents forced artists in New York City apart from one another and away from working in studio spaces).