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## **THE UNEVEN MARCH OF PROGRESS: THE PAST, PRESENT, AND FUTURE OF ZONING REFORM IN THE UNITED STATES**

*Stephen Menendian\**

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\* Stephen Menendian is the Assistant Director at the Othering and Belonging Institute at the University of California, Berkeley. The author would like to thank Adnan Perwez and Emily Chuah for their excellent legal research assistance, Joshua Cantong and Samir Gambhir for their tremendous effort helping build the database of municipal reforms, and Salim Firth, Dylan Casey, Chris Elmendorf, and Richard Rothstein for their expert substantive feedback.

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## ABSTRACT

*Municipal land use—and zoning regulations in particular—has transformed in recent years from an esoteric local development matter into a hotly debated and fiercely contested public policy issue. There are many academic and mainstream periodical articles published in recent years drawing attention to the harmful effects or deleterious consequences of exclusionary and restrictive zoning, investigating the origins of zoning, and concomitant calls for zoning reform. There is, however, a relative dearth of scholarship examining zoning reform policies that have been promulgated in response, comparing their features, studying the reform process, or tracing the trajectory of policy reform, especially those adopted in the last few years as a product of the pro-housing movement.*

*This Article fills a critical gap in scholarship by examining recent zoning policy reform efforts, successes as well as failures, analyzing the elements and types of reform, and tracing and extrapolating the trajectory of reform based upon the pace and pattern of reform efforts underway or already adopted. By drawing a comparison to the evolution of fair housing ordinances and the open housing movement of the 1950s and 60s, this Article draws lessons and makes predictions about the future of zoning reform and the challenges the pro-housing movement will have to overcome to produce meaningful and sustainable change in curtailing restrictive and exclusionary zoning practices and their harmful effects.*

## INTRODUCTION

The esoteric issue of municipal zoning regulation has elevated in recent years from a recondite subject mainly of concern to planning commissions, municipal administrators, commercial developers, and land use experts into a fiercely debated and increasingly visibly contested policy problem. New grassroots organizations have made zoning reform a centerpiece of their political agenda.<sup>1</sup> A broad ideological scholarly consensus has arisen to condemn the misuse and abuse of zoning authority.<sup>2</sup> Candidates for high political office have made zoning reform a top housing policy priority, and proposals for reform are now regularly pushed across the country.<sup>3</sup>

There are several intersecting dynamics that underpin this surprising development. Above all has been the emergence of a nationwide housing affordability crisis—the soaring cost of housing in many, if not most, major metropolitan regions, not just coastal areas.<sup>4</sup> Researchers seeking to identify

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<sup>1</sup> See e.g. YIMBY ACTION, <https://yimbyaction.org/> (last visited May 14, 2024); see CAL. YIMBY, <http://cayimby.org/> (last visited May 14, 2024); see YIMBY DENVER, <https://yimbydenver.org/> (last visited May 14, 2024) (Zoning reform is a primary instrument proposed in affordable housing schemes). I regard many of these grassroots organizations as part of the “pro-housing” movement. A larger part of these organizations, but not all, identify as “YIMBY” organizations, an acronym that stands for “Yes In My Backyard.” The YIMBY label originated in contradistinction to “NIMBY” (standing for “Not In My Backyard”), a derogatory term used to label organizations, people or institutions that tend to oppose new housing and new development, especially in their neighborhoods or communities.

<sup>2</sup> Ilya Somin, *The Emerging Cross-Ideological Consensus on Zoning*, WASH. POST (Dec. 5, 2015, 4:59 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-consensus-on-zoning/>. For an example of a center-right libertarian organization calling for an end to restrictive zoning, see MICHAEL D. TANNER, CATO INST., CATO’S PROJECT ON POVERTY AND INEQUALITY IN CALIFORNIA: FINAL REPORT 11 (2021), [https://www.cato.org/catos-project-poverty-inequality-california-final-report?mc\\_cid=6011f90dc9&mc\\_eid=f780ffaf53](https://www.cato.org/catos-project-poverty-inequality-california-final-report?mc_cid=6011f90dc9&mc_eid=f780ffaf53).

<sup>3</sup> Jeff Andrews, *Cory Booker and Elizabeth Warren want to force cities to adopt YIMBY policies. Can they?*, CURBED (July 22, 2019, 1:00 PM), <https://archive.curbed.com/2019/7/22/20699372/yimby-cory-booker-elizabeth-warren-election-2020>.

<sup>4</sup> There is also an “affordable housing crisis,” which is a related, but distinct issue, and should not be conflated with or confused with the housing affordability crisis. Often, these two problems are expressed under the general header of a “housing crisis,” which is actually a variegated, multifaceted problem. See Stephen Menendian, *Deconstructing the ‘Housing Crisis’*, OTHERING & BELONGING INST. (Nov. 30, 2022), <https://belonging.berkeley.edu/deconstructing-housing-crisis>; Rachel M. Cohen, *How state governments are reimagining American public housing*, VOX (Aug. 4, 2022, 8:00 AM), <https://www.vox.com/policy-and-politics/23278643/affordable-public-housing-inflation-renters-home>; Katherine Schaeffer, *A growing share of Americans say affordable housing is a major problem where they live*, PEW RSCH. CTR. (Jan. 18, 2022),

drivers of housing costs and soaring rents point to stringent regulations as a major culprit. At the same time, growing attention to racial equity in the last few years has sharpened awareness of the ways in which ordinary laws and superficially race-neutral policies maintain patterns of racial residential segregation, exclusion, and inequality. Here, zoning appears to play a major role, as highlighted by Richard Rothstein's popular book, *The Color of Law*, on the history of how government policy fostered and deepened racial residential segregation.<sup>5</sup>

This Article examines these dynamics and is organized into four parts. Part I presents a brief history of zoning, describing its origins and evolution, from racial zoning to the various modes of 'use' and 'fiscal' zoning regimes which predominate today.

Part II summarizes the scholarly critiques of zoning regulations and differentiates among the key harms that have been identified as the grounds for policy reform. In particular, evidence has been adduced that overly restrictive zoning contributes to the underproduction of housing, racial and economic segregation, undermines economic growth, and impedes geographic and socioeconomic mobility and access to opportunity.

Part III summarizes, in a chronological manner, major zoning reform developments of recent years at the local, state, and federal level. It examines the types and modalities of reform and the evolution and implementation of reform efforts, with a particular emphasis on the period from 2018 through 2023, following the emergence of the pro-housing movement. In doing so, this Article tracks the pace and pattern of policy reform proposals and their adoption.

Part IV organizes these reforms into a typology, and then compares the pace and pattern of reform to that of the open housing movement (later known as the "fair housing" movement) of the 1950s and 60s, and the fair housing laws that ultimately emerged from this movement, with a focus on 1958 to 1968. Although there are critical differences between the two movements, there are enough striking similarities that the challenges, setbacks, and achievements of the open housing movement yield revealing insights into the likely future of zoning reform in America and offer lessons that the pro-housing movement should consider as it pursues its goals.

Despite a high-profile maintained by journalistic interest, a growing number of policy victories, cross-ideological political and scholarly support, and an energetic and burgeoning organizational base, the pro-housing movement has a long way to go before it is likely to achieve its ultimate goals.

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<https://www.pewresearch.org/fact-tank/2022/01/18/a-growing-share-of-americans-say-affordable-housing-is-a-major-problem-where-they-live/>.

<sup>5</sup> See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (describing how zoning was used to racially segregate housing and recommending zoning reform as a policy intervention).

## I. A BRIEF HISTORY OF ZONING

The regulation of land uses and development by government authority is ancient, with records of such regulations within the earliest known legal codes.<sup>6</sup> Sophisticated city-building rules, in particular, have existed for millennia, but the industrial revolution and the rationalization of law under Enlightenment thought accelerated and complexified the development of such regulations.

Starting in Europe followed by the United States, industrialization transformed residential life, drawing workers from rural agricultural settings into factories and urban areas. This not only introduced new 'nuisances' and noxious elements into cities, but also transformed living patterns, creating new pollution and crowding in places that lacked contemporary sanitation systems.<sup>7</sup> This, combined with Enlightenment sensibilities, which favored the application of rationality and scientific methods to governance over traditional cultural or aesthetic preferences, spurred new municipal rulemaking to control or regulate development.<sup>8</sup> According to one urban historian, French and German governments "led the way in trying to separate polluting industries from residential areas through proto-zoning regulation."<sup>9</sup>

Although industrialization and mechanized or large-scale agriculture happened later in the United States, the "urban explosion" of the second half of the nineteenth century created "nightmarish conditions similar to those in large European cities."<sup>10</sup> States and localities responded in similar ways to their European counterparts. In 1869, for example, the Louisiana legislature restricted the slaughtering and housing of cattle for slaughter to a particular site under the operation of a single corporation, ostensibly in service of public health and comfort.<sup>11</sup> In an era before modern sanitation standards, the refuse and runoff of a slaughterhouse was more than a nuisance; it was a public health hazard.

Unlike the limited and specifically enumerated powers available to Congress under Article I of the U.S. Constitution, state legislatures enjoy broad 'police powers' to devise and adopt legislation in service of public health and safety.<sup>12</sup> After the adoption of the 14th Amendment, which formally curtailed and restricted the discretion of state governments in their exercise of their

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<sup>6</sup> SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* 90-98 (2014) (tracing back to the codes of Hammurabi, Indus, Greek, Chinese, and Egyptian civilizations).

<sup>7</sup> *See id.* at 155.

<sup>8</sup> *See id.* at 159-60.

<sup>9</sup> *See generally id.*

<sup>10</sup> *Id.* at 130-31.

<sup>11</sup> *See Slaughter-House Cases*, 83 U.S. 36, 59-62 (1872).

<sup>12</sup> Brian W. Ohm, *Some Modern Day Musings on the Police Power*, 47 *URB. LAW.* 625, 631-32 (2015).

legislative prerogatives, however, some of these ordinances and laws were challenged as discriminatory, a violation of due process, property rights, or other related constitutional grounds.

Some of the most notorious efforts to control land use in this era occurred in cities in California between 1870 and 1890, ostensibly targeting business operations.<sup>13</sup> In 1880, the city of San Francisco adopted an ordinance that would severely restrict, and require local approval for, the operation of laundries within city and county limits.<sup>14</sup> The laundry ordinance was promulgated in a context of virulent anti-Chinese sentiment, and it was used to systematically prosecute Chinese laundry operators, but was unenforced against white owners.<sup>15</sup> A challenge to the ordinance made its way to the Supreme Court, which struck down the ordinance as a violation of the Equal Protection Clause in the landmark case of *Yick Wo v. Hopkins*.<sup>16</sup> The Court acknowledged that the law was facially race-neutral, but recognized how it was systematically administered in a discriminatory manner.<sup>17</sup>

A decade later, the city of San Francisco adopted a more targeted and explicit form of racist land use, the so-called Bingham ordinance.<sup>18</sup> This ordinance regulated residence by race.<sup>19</sup> It sought to completely exclude Chinese residents from certain areas of the city and gave those residents 60 days to relocate to areas designated in the law or face a misdemeanor charge and up to six months in jail.<sup>20</sup> This ordinance was also challenged in court and swiftly overturned,<sup>21</sup> but it would not be the last attempt to regulate racial residency.

Historians attribute the idea for the comprehensive division of urban space into districts to Reinhard Baumeister, a German professor who published a major text on urban development in 1876.<sup>22</sup> Baumeister proposed categorizing buildings and activities into three classes based on three zones.<sup>23</sup> Although the idea of regarding different types of developments as distinct in terms of use or purpose was not new, the idea of placing them in different

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<sup>13</sup> HIRT, *supra* note 6, at 195.

<sup>14</sup> ELI MOORE ET AL., U.C. BERKELEY HAAS INST. FOR A FAIR & INCLUSIVE SOC'Y, ROOTS, RACE, & PLACE: A HISTORY OF RACIALLY EXCLUSIONARY HOUSING IN THE SAN FRANCISCO BAY AREA 14, 30 (Oct. 2, 2019), available at [https://belonging.berkeley.edu/rootsraceplace#footnoteref114\\_qb5fbqc](https://belonging.berkeley.edu/rootsraceplace#footnoteref114_qb5fbqc) [hereinafter MOORE ET AL.].

<sup>15</sup> *Id.* at 30.

<sup>16</sup> 118 U.S. 356, 373-74 (1886).

<sup>17</sup> *See id.*

<sup>18</sup> MOORE ET AL., *supra* note 14, at 30.

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *In re Lee Sing*, 43 F. 359, 361-62 (C.C.N.D. Cal. 1890).

<sup>22</sup> *See* HIRT, *supra* note 6, at 135; FRANK BACKUS WILLIAMS, AKRON AND ITS PLANNING LAW 21 (1919).

<sup>23</sup> *See* WILLIAMS, *supra* note 22.



parts of the city was novel.<sup>24</sup> This idea was first adopted in into law in Frankfurt in 1891, possibly the world's first comprehensive zoning ordinance.<sup>25</sup> Other German cities quickly followed suit. From there, the idea spread to other parts of Europe.<sup>26</sup>

Deeply impressed, American planners, architects, and engineers hope to adopt similar regulations in the United States.<sup>27</sup> A committee serving New York City was a key conduit for importing these ideas, having mingled in London where they met with the European counterparts in 1908-9.<sup>28</sup> One of their members published a planning book advocating this approach, which also made its way into a city commission report in 1913.<sup>29</sup>

In 1910, Baltimore adopted the first comprehensive municipal *racial* zoning ordinance, which divided the city into racial districts, regulating who could reside based upon race.<sup>30</sup> Unlike the Bingham ordinance, it was comprehensive in the sense that it covered every part of the city. The ordinance restricted African Americans from buying homes on majority white blocks, and vice versa, enforcing block-by-block segregation.<sup>31</sup> It was quickly emulated by many other southern cities, such as Atlanta, Baltimore, Louisville, and Richmond.<sup>32</sup> These so-called "racial zoning" ordinances, however, were challenged in federal court as a constitutional violation.

Ultimately, in 1917, the Supreme Court struck down these racial zoning ordinances in the landmark case of *Buchanan v. Warley*.<sup>33</sup> Critically, however, the Court's ruling was not based on the discriminatory purpose or effect of such ordinances, but rather a concern over private property rights—especially the rights of white people to sell or dispose of property as they wished.<sup>34</sup> There were various attempts to work around this decision and

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<sup>24</sup> *See id.*

<sup>25</sup> *See* HIRT, *supra* note 6, at 135-36.

<sup>26</sup> *See generally* HIRT, *supra* note 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 205.

<sup>29</sup> *Id.* at 203, n.3.

<sup>30</sup> *See* Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289, 289 (1983).

<sup>31</sup> *Id.*

<sup>32</sup> For the cities that adopted them, see ROTHSTEIN, *supra* note 5, at 44; CHRISTOPHER SILVER, *The Racial Origins of Zoning in American Cities*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS* 25-27 (Manning Thomas, June Ritzdorf & Marsha Ritzdorf eds., 1997).

<sup>33</sup> *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

<sup>34</sup> *Id.* at 81 ("The right which the ordinance annulled was the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.").

maintain racial zoning strictures, but more facially neutral approaches ultimately prevailed.<sup>35</sup>

Although explicit racial zoning eventually subsided in the wake of *Buchanan*, 'use' zoning proliferated. Harkening back to the concerns about public health and well-being, advances in technology introduced new hazards to guard against. Factories or bakeries might be erected next to tenements or schools. Progressive reformers, in particular, sought ways to 'rationalize' urban life. Zoning as a form of municipal regulation emerged as a way to do this in a proactive way, and as an alternative to relying on nuisance law.<sup>36</sup>

In 1908, Los Angeles became the first city to adopt 'use' zoning for residential areas.<sup>37</sup> The ordinance divided the city into industrial and residential districts, and then prohibited businesses from operating in residential areas. The Los Angeles Realty Board was a critical booster of this ordinance, as well as other land use regulations, such as building height limits.<sup>38</sup> When the courts upheld the law, other realty boards pushed for the adoption of similar ordinances in Oakland, Pasadena, and Sacramento, among other cities.<sup>39</sup>

New York City adopted what is regarded as the first comprehensive 'use' zoning plan in 1916, motivated by a desire to keep "Jewish tenements and garment factories out" of certain neighborhoods.<sup>40</sup> The ordinance detailed exactly what could be built in each district, or zone. It became a model for the rest of the nation, which the federal government soon endorsed. In 1922, the Hoover administration issued a primer evangelizing use zoning, arguing that it would help stabilize property values, not just prevent "malodorous" uses of land.<sup>41</sup>

Among the cities that had adopted comprehensive 'use' zoning ordinances in the inter-war period was Euclid, Ohio, a small suburb of Cleveland. The ordinance delineated six different uses and several different height limits. A local realty company challenged the ordinance on the grounds that the ordinance significantly devalued its property. In a landmark and

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<sup>35</sup> See also ROTHSTEIN, *supra* note 5, at 46–47 (describing the cities that attempted to get around *Buchanan* and the legal responses).

<sup>36</sup> See Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1069, 1617, 1637 (2021); WILLIAM A. FISCHER, *ZONING RULES!: THE ECONOMICS OF LAND USE REGULATION* 79–80 (2015).

<sup>37</sup> GENE SLATER, *FREEDOM TO DISCRIMINATE: HOW REALTORS CONSPIRED TO SEGREGATE HOUSING AND DIVIDE AMERICA* 35 (2021).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1081 (1996); James Burling, *America's Sordid History of Exclusionary Zoning*, 44 REAL EST. ISSUES 1, 2 (2020), <https://cre.org/real-estate-issues/americas-sordid-history-of-exclusionary-zoning/>.

<sup>41</sup> EDWARD M. BASSETT ET AL., *A ZONING PRIMER BY THE ADVISORY COMMITTEE ON ZONING* 2 (1922).

somewhat surprising decision, in light of the reasoning of *Buchanan*, the United States Supreme Court upheld the ordinance as a valid application of the states' police powers.<sup>42</sup>

However, in a case heard two years later, the Supreme Court reviewed and struck down another zoning ordinance out of Cambridge, Massachusetts, on the grounds that the ordinance there did not adequately advance the health, safety, and welfare of the residents, and was extremely harmful to the economic interests of the plaintiff.<sup>43</sup> Nonetheless, these 'use' zoning ordinances proliferated in the wake of the Supreme Court's decision in *Euclid*. By 1936, 85% of all places with land use authority had some sort of zoning ordinance, a rapid transformation of local land use regulation across the United States.<sup>44</sup>

Between comprehensive 'use' zoning and racial zoning, there was yet another evolution in the exercise of zoning authority under the police power authority. Although many property rights advocates opposed zoning as a restriction on and curtailment of those rights, gradually homeowners became supportive of such measures as realty boards and realtor associations pressed the case to the public that these ordinances could be used to maintain—and even increase—property values.

One proponent of zoning for this purpose was Duncan McDuffie, a prominent Berkeley developer and pioneer of the use of racially restrictive covenants.<sup>45</sup> McDuffie recognized the appeal of developments modeled after Roland Park in Baltimore – exclusive, high-end neighborhoods. In 1916, McDuffie persuaded the Berkeley city council to adopt the first use of so-called 'single-family' districts, zoned areas where only single-family homes could be constructed.<sup>46</sup> The idea was not to zone for the entire city, but to preserve and protect high-end residential neighborhoods and maximize or maintain property values. Such purposes, however, were not entirely benign nor merely self-interested, but were often undergirded or inflected, as in the case of New York City's ordinances, by racial and ethnic animus. In the case of Berkeley, the proximate concern was a 'prominent negro dance hall' that was attempting to relocate to an adjacent district.<sup>47</sup> Following Berkeley's lead, other Bay Area cities adopted similar ordinances.

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<sup>42</sup> *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926). This case is the origin of the phrase "Euclidian" zoning. *Euclid* refers to the city whose ordinance was challenged in this case, and that term is now a synonym for function or 'use' zoning. *Id.*

<sup>43</sup> *Nectow v. Cambridge*, 277 U.S. 183, 187-88 (1928).

<sup>44</sup> See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 242 (1985).

<sup>45</sup> SLATER, *supra* note 37, at 57-59. Racially restrictive covenants are not a subject of this article although they are similar in purpose and effect to racial zoning ordinances.

<sup>46</sup> *Id.* at 61.

<sup>47</sup> *Id.*

Instead of separating potentially incompatible uses, this application of zoning authority may be better described as ‘fiscal’ zoning. It is intended not merely to avoid possible nuisances, but to preserve—if not maximize—property values (and property tax revenues) on a classist and racist basis. Other cities quickly saw the appeal of such ordinances because it also meant that they could preserve or regulate their own property tax base in the process, tightening the interests of existing resident homeowners, local political leaders, and realtor-developers.

The manipulation of zoning and land use authority to maintain property values and to shape property tax revenue flows is now a national norm. ‘Use’ zoning may have been devised to avoid nuisances or incompatible purposes, but it is also used to reinforce or stabilize the local tax base and please homeowners by helping secure the value of their (often considerable) financial asset. Relatedly, it is also used as a basis or mechanism for negotiation, used by local authorities to demand or extract concessions and benefits from developers for local communities, possibly in exchange for waivers, variances, or exemptions.<sup>48</sup>

Virtually every municipality in the United States today has a zoning code (the notable exception being Houston), which delineates districts both in terms of use but also density, size, and more.<sup>49</sup> Many of these codes have evolved into labyrinthine and sprawling codes that divide cities into dozens of districts with dozens of different overlapping designations.<sup>50</sup> Zoning regulations are woven into the fabric of American life.

## II. CRITIQUES OF MUNICIPAL ZONING PRACTICES

Municipal zoning practices—especially overly restrictive and exclusionary forms—have many critics from across the ideological spectrum. It is worth attempting to summarize the vast and growing scholarship, punditry, and opinion in terms of the grounds and specific harms that are averred by critics of contemporary zoning practices. Specifically, this part of the Article examines critiques of zoning and land-use relating to the costs of housing and development, racial and economic segregation, access to opportunity and social and economic mobility, and the impacts on macroeconomic growth.

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<sup>48</sup> Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 887–900 (1983); Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, STAN. L. REV. 591, 643–45.

<sup>49</sup> See Andrew Rumbach, *You Don't Need Zoning to be Exclusionary: Manufactured Home Parks, Land-Use Regulations and Housing Segregation in the Houston Metropolitan Area*, 123 LAND USE POL'Y 1, 6 (2022).

<sup>50</sup> *Connecticut Zoning Atlas*, DESEGREGATE CONN., <https://www.desegregatect.org/atlas> (last visited May 14, 2024).

### A. Costs of Housing and Development

One of the most frequent critiques of zoning relates to its role in making housing more costly and less affordable, principally by slowing or impeding production and development of housing stock generally, and stifling more naturally affordable housing stock particularly.<sup>51</sup> As a prime example, a research report issued by the Cato Institute in 2021 recommends “end[ing] exclusionary zoning” in California.<sup>52</sup> As the report explains, “high [housing] costs are the result of basic economics: demand badly exceeds supply. Estimates suggest that California needs at least 3.5 million new housing units just to meet currently projected demands.”<sup>53</sup>

A broad range of scholars and pundits have advanced calls for zoning reform. In his book *A Republic of Equals*, the prominent economist Jonathan Rothwell maintains that local governments should be prohibited from regulating the density of residential housing, with few exceptions.<sup>54</sup> He even goes so far as to recommend that states adopt state constitutional amendments that universally ban land-use density regulations and police loopholes that would otherwise allow local governments to block market forces.<sup>55</sup>

As with Richard Rothstein, the scholars Richard Sander, Jonathan Zasloff and Yana Kucheva call for the repeal or preemption of bans on multi-family housing and impact litigation to challenge existing exclusionary ordinances in their study of fair housing and segregation.<sup>56</sup> And in her book, *White Space, Black Hood: Opportunity Hoarding and Segregation in the Age of Inequality*, civil rights scholar Sheryll Cashin calls for repealing local zoning and permitting greater density, in addition to inclusionary zoning and fair share laws.<sup>57</sup>

These policy recommendations are empirically supported by economic research. In a classic article published in 2005, the economist Edward Glaeser claimed that “[c]hanges in housing-supply regulations may be the most important transformation that has happened in the American housing market

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<sup>51</sup> For a literature review on this header, see John Lanis & Vincent J. Reina, *Do Restrictive Land Use Regulations Make Housing More Expensive Everywhere?*, 35 *ECON. DEV. Q.* 305, 306–09 (2021).

<sup>52</sup> TANNER, *supra* note 2, at 11.

<sup>53</sup> *Id.*

<sup>54</sup> JONATHAN ROTHWELL, *A REPUBLIC OF EQUALS: A MANIFESTO FOR A JUST SOCIETY* 281–82 (2019).

<sup>55</sup> *Id.* at 282.

<sup>56</sup> RICHARD HENRY SANDER ET AL., *MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING* 440, 455 (2018).

<sup>57</sup> See SHERYLL CASHIN, *WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY* 213 (2021).

since the development of the automobile. . . .”<sup>58</sup> Specifically, he pointed to zoning and permitting regulations as a major driver of why housing became so expensive.<sup>59</sup> Glaeser and his co-authors found that regulation constrains the supply of housing such that increased demand leads to much higher prices rather than significant production in a number of other high-price housing markets across the country.

Another study published the same year found a 52% increase in housing costs between 1992 and 2002, attributable to housing regulations including zoning policies.<sup>60</sup> Other studies have drawn similar conclusions. A 2014 study, for example, found a 4 to 8% drop in home values associated with deregulation in 110 jurisdictions.<sup>61</sup>

One notable study published in 2021 examined multiple measures of regulatory stringency and found widespread and pervasive effects on housing costs and development.<sup>62</sup> This study examined 336 major metropolitan areas. Depending on the specific measure of zoning stringency, they found extremely large cost increases to housing development. Using the Wharton Regulatory Land Use Index as the correlate, they found a \$16,652 increase in 2016 median home values attributable to zoning regulations.<sup>63</sup>

In a study of California, one economist found that, in Los Angeles alone, rents are 32% higher and home values 38% higher in jurisdictions with stringent lot size requirements compared to jurisdictions that are relatively lenient, and that “the share of land zoned for single-family detached use predicts higher housing home values.”<sup>64</sup> Another study of California found that cities with more restrictive zoning have fewer apartments, and that the state of California produces very little multi-family housing because of the prevalence of restrictive zoning.<sup>65</sup>

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<sup>58</sup> Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005).

<sup>59</sup> Edward L. Glaeser et al., *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331, 333-34, 355-56 (2005).

<sup>60</sup> Michael H. Schill, *Regulations and Housing Development: What We Know*, 8 CITYSCAPE: J. POL'Y DEV. & RSCH. 5, 5 (2005).

<sup>61</sup> Nils Kok et al., *Land Use Regulations and the Value of Land and Housing: An Intra-Metropolitan Analysis*, 81 J. URB. ECON. 136, 145-46 (2014).

<sup>62</sup> John Lanis & Vincent J. Reina, *Do Restrictive Land Use Regulations Make Housing More Expensive Everywhere?*, 35 ECON. DEV. Q. 305, 319-20 (2021).

<sup>63</sup> *Id.* at 314.

<sup>64</sup> Jonathan Rothwell, *Land Use Politics, Housing Costs, and Segregation in California Cities 8-9*, (Sept. 2019) (unpublished working paper) (on file with the University of California at Berkeley Turner Center for Housing Innovation), <https://turnercenter.berkeley.edu/wp-content/uploads/2023/04/Land-Use-Politics-Rothwell.pdf>.

<sup>65</sup> See Jenny Schuetz & Cecile Murray, *Is California's Apartment Market Broken? The Relationship Between Zoning, Rents, and Multifamily Development 5-12* (July 2019) (unpublished working paper) (on file with the University of California at Berkeley Turner Center for Housing Innovation), <https://www.brookings.edu/wp->

The additional costs to development due to these restrictions are not trivial. Another study found that restrictive zoning and other land-use regulations drive up the price of a quarter-acre lot by almost \$200,000 in Los Angeles and over \$400,000 in San Francisco.<sup>66</sup>

In a set of regional studies which I led, our team found that restrictive zoning predicted higher rents and home prices in California's largest metropolitan regions. In the San Francisco Bay Area, cities with high levels of single-family zoning have median incomes \$34,000 higher and home values \$100,000 higher than those of cities with low levels of single-family zoning.<sup>67</sup> In the Los Angeles region, we found that median home values are more than twice as great in jurisdictions with more than 90% single-family-only residentially zoned areas (\$811,492) compared to those with less than 10% (\$405,875).<sup>68</sup>

Although the general point is relatively intuitive—that more restrictive regulations can make it harder to build and/or directly inflate the cost of housing—the specific concern here is somewhat nuanced, and there are several highly controversial assumptions being made as well. To begin, some critics emphasize housing affordability—the median or average cost of housing—rather than affordable housing, which is housing stock only available to low or lower-income people.

Other advocates, however, focus principally on affordable housing for low-income people, and are less concerned with housing produced for middle-income earners.

It is probably the case, however, that excessive land use regulations, and zoning in particular, affect both the problem of housing unaffordability and the lack of affordable housing. Restrictive zoning drives up the cost of median housing while also making it more difficult to build affordable housing stock. Regulations that mandate large lots or single-family-only housing stifle the development of denser, more naturally affordable housing as well as so-

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content/uploads/2019/07/20190711\_metro\_Is-California-Apartment-Market-Broken-Schuetz-Murray.pdf.

<sup>66</sup> Joseph Gyourko & Jacob Krimmel, *The Impact of Local Residential Land Use Restrictions on Land Values Across and Within Single Family Housing Markets 3* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28993, 2021),

[https://www.nber.org/system/files/working\\_papers/w28993/w28993.pdf](https://www.nber.org/system/files/working_papers/w28993/w28993.pdf).

<sup>67</sup> Stephen Menendian et al., *Single-Family Zoning in the San Francisco Bay Area: Characteristics of Exclusionary Communities*, OTHERING & BELONGING INST. (Oct. 7, 2020), <https://belonging.berkeley.edu/single-family-zoning-san-francisco-bay-area>.

<sup>68</sup> Stephen Menendian et al., *Single-Family Zoning in Greater Los Angeles*, OTHERING & BELONGING INST. (Mar. 2, 2022), <https://belonging.berkeley.edu/single-family-zoning-greater-los-angeles>.

called “missing middle” developments.<sup>69</sup> Although affordable housing and housing affordability are obviously different, they are also related problems simultaneously affected by zoning regulations.

Another assumption is that loosening these regulations will solve the problem. It is not necessarily evident that simply loosening restrictive zoning regulations will lead to the production of affordable housing or even more affordable housing, reducing the median cost of housing at the margin.<sup>70</sup> Some scholars studying this problem argue that, in the short run, zoning reform will mostly slow the increase in housing costs rather than produce deep affordability.<sup>71</sup> A recent study of zoning reforms in Minneapolis shows how this works. Between 2017 and 2022, reforms permitted sufficient new housing production that rents in Minneapolis rose just 1% while they increased 14% in the rest of Minnesota.<sup>72</sup> This is still a positive outcome from the perspective of addressing the problem of growing housing unaffordability, but not necessarily the ultimate outcome that some reformers hoped to achieve.

Additionally, redevelopment of existing stock—especially in hot markets—could produce units that are individually or collectively more expensive than that which is being replaced (imagine three gleaming new high-end apartments replacing a dilapidated single-family home on a residential parcel). An increase in the cost of labor or construction materials alone could make this true, irrespective of the number of units that can now be generated to meet general demand (because sale prices must cover production costs).

Thus, even if overall production is enhanced by zoning reform, that does not necessarily mean that—in the short term—either more affordable housing becomes available or that housing stock becomes more affordable. This perhaps helps explain why more equity-oriented scholars and writers emphasize zoning less as an impediment to overall production and more to specific types of housing.<sup>73</sup> Richard Florida, for example, calls for “reform[ing] zoning and building codes” that make it difficult to build affordable housing

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<sup>69</sup> *Missing Middle Housing is a transformative concept that highlights the need for diverse, affordable housing choices in sustainable, walkable places*, OPTICOS DESIGN, INC., <https://opticosdesign.com/missing-middle-housing/> (last visited May 14, 2024).

<sup>70</sup> See Yonah Freemark, *Upzoning Chicago: Impacts of a Zoning Reform on Property Values and Housing Construction*, 56 URB. AFFS. REV. 758, 782-83 (2020); Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 33-34 (2018).

<sup>71</sup> John Lanis & Vincent J. Reina, *Do Restrictive Land Use Regulations Make Housing More Expensive Everywhere?*, 35 ECON. DEV. Q. 305, 321 (2021).

<sup>72</sup> Laurel Wamsley, *The hottest trend in U.S. cities? Changing zoning rules to allow more housing*, NPR (Feb. 17, 2024, 6:00 AM), <https://www.npr.org/2024/02/17/1229867031/housing-shortage-zoning-reform-cities>.

<sup>73</sup> Edward L. Glaeser & Joseph Gyo\*urko, *The Impact of Zoning on Housing Affordability* 6-7, (Nat'l Bureau of Econ. Rsch., Working Paper No. 8835, 2002), [https://www.nber.org/system/files/working\\_papers/w8835/w8835.pdf](https://www.nber.org/system/files/working_papers/w8835/w8835.pdf).



and invest in needed infrastructure in his book *The New Urban Crisis*.<sup>74</sup> He recognizes that the problem isn't merely that of simple supply and demand, but a particular subset of supply.

Similarly, Richard Rothstein, in *The Color of Law*, calls for a "ban on zoning ordinances that prohibit multifamily housing or that require all single-family homes in a neighborhood to be built on large lots with high minimum requirements for square footage."<sup>75</sup> These recommendations are not simply about unlocking greater housing production and increasing the overall supply of units—although they would do that—they are more narrowly aimed at increasing particular types of housing, especially those that would be more affordable than what is currently available or allowed for development. Nonetheless, there is broad agreement that more stringent and restrictive zoning regulations drive up the cost of housing and housing development while also impeding the production of affordable housing and other denser housing options.

### *B. Economic and Racial Segregation and Homogeneity*

The earliest zoning ordinances were often motivated by racial fears and anxieties, especially a desire to control where Black people, and other racial minorities, such as Chinese or Asians, could reside.<sup>76</sup> Another major critique of restrictive zoning focuses on the classism and racism that was so visible and often explicit historically in the development of zoning ordinances, but remains evident even today. Although municipal leaders in affluent communities tend to fiercely deny accusations of racism on account of their exclusionary land use policies (not simply because of the social opprobrium that would follow, but because of the legal liability), they are far more candid and less apologetic about the classist effects of such regulations.

In his book *Dream Hoarders*, Brookings Institute fellow Richard Reeves calls for zoning reform because, he argues, restrictive land use regulations have become "mechanisms for incorporating class divisions into urban physical geographies."<sup>77</sup> In his view, the clustering of tax base capacities, services, and other amenities follow the use of zoning authority, and the resulting place-based sorting of people reinforces economic segregation.

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<sup>74</sup> RICHARD FLORIDA, *THE NEW URBAN CRISIS: HOW OUR CITIES ARE INCREASING INEQUALITY, DEEPENING SEGREGATION, AND FAILING THE MIDDLE CLASS—AND WHAT WE CAN DO ABOUT IT* 11 (2017).

<sup>75</sup> ROTHSTEIN, *supra* note 5, at 204.

<sup>76</sup> Christopher Silver, *The Racial Origins of Zoning: Southern Cities from 1910–40*, 6 *PLAN. PERSPS.* 189, 189–92 (1991).

<sup>77</sup> RICHARD V. REEVES, *DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT* 103 (2017).

Similarly, Richard Rothstein's book, *The Color of Law*, is principally about how various American levels of government helped create and sustain racial residential segregation. Thus, his recommendation is not principally aimed at increasing the supply of affordable housing (or housing generally), but at promoting racial residential integration, and using affordable housing and mixed-income housing as a vehicle for accomplishing that end.

There is considerable empirical research undergirding these recommendations. In an influential article in the *Journal of American Planning*, two UCLA professors found that stricter land use regulations, including zoning, are correlated with economic or class-based segregation.<sup>78</sup> Specifically, they found that in the 95 largest cities, density restrictions, such as minimum lot sizes, were strongly correlated with overall municipal fragmentation within regions as well as with economic segregation and concentration of the affluent.

Scholarly research has consistently found a correlation between low-density zoning and racial residential segregation as well. A study published in 2000 of large cities and various land use controls found a strong connection between racial composition and the degree of restrictiveness in those controls.<sup>79</sup> Specifically, it found that jurisdictions with low housing density had less than half the Black populations and only 60% as large a Hispanic population in 1980 as other places. A similar study published in 2009 by two prominent social scientists based upon an expanded dataset produced a similar finding, but specifically on racial segregation, not just minority composition, as measured by the dissimilarity index.<sup>80</sup>

Using a more sophisticated measure of segregation, the political scientist Jessica Trounstine has found a powerful relationship between restrictive zoning and racial residential segregation. Specifically, she finds that land use policies are correlated with racial residential segregation in the specific sense that more restrictive land use policies predict communities that are whiter, on average, than their surrounding metropolitan areas, even controlling for their demographic makeup years earlier.<sup>81</sup>

Regional studies based on more precise datasets have produced similar findings. A study of the Boston region found that blocks zoned for single-family-only homes had fewer Black and Hispanic residents than blocks zoned

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<sup>78</sup> Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N. 6, 12 (2015).

<sup>79</sup> Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125, 131 (2000).

<sup>80</sup> Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 783, 801-02 (2009).

<sup>81</sup> Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 447-50, 452-53 (2020).

for multi-family housing, by a ratio of two-to-one.<sup>82</sup> A study of California by the economist Jonathan Rothwell found that areas with restrictive zoning policies have more white residents and fewer Black and Latinx residents, and that citizen opposition to development also predicts the exclusion of Black and Hispanic residents.<sup>83</sup>

A study of council-of-government regions in California which I led has uncovered similar patterns. In the San Francisco Bay Area, we found that cities with a greater proportion of single-family-zoning residential zoning had more white residents, fewer Black residents, and significantly fewer Hispanic residents.<sup>84</sup> Moreover, we found that jurisdictions with a greater proportion of restrictive zoning were more segregated from the region (divergence scores of 0.21 for cities with 90%-100% single-family-only zoning compared to 0.12 for cities with 80% or lower). High restrictive zoning cities are also more racially homogenous within their boundaries, meaning that they are less diverse than cities with less single-family zoning.

In our study of the Los Angeles region, we found that cities with the highest range of single-family-only zoned residential areas (90-100%) had a higher share of white residents and fewer Black and Latino residents, especially compared to jurisdictions in the low-exclusionary zoning range (0-63%).<sup>85</sup> Specifically, the exclusionary jurisdictions were 42% white on average, compared to 26% white for the opposite. And they were 3.55% Black and 31% Hispanic compared to 5.21% Black and 50% Hispanic.

Not only was zoning historically tied to racial exclusion, but it is abundantly clear that contemporary forms of restrictive zoning contribute to or maintain racial and class exclusion and segregation today. Although racial exclusion is, in theory, violative of federal law, class exclusion is not. And, in practice, legal challenges to zoning ordinances based upon racial disparate effects are difficult and expensive to bring. Zoning reform offers a more proactive way to address these problems.

### *C. Access to Opportunity, Economic, and Social Mobility*

A third prominent critique of restrictive and exclusionary zoning focuses on broader access to opportunity, socioeconomic mobility, and the

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<sup>82</sup> Matthew Resseger, *The Impact of Land Use Regulation on Racial Segregation: Evidence from Massachusetts Zoning Borders*, 15 (Mercatus Ctr. at Geo. Mason Univ., Working Paper 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4244120](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4244120).

<sup>83</sup> Jonathan Rothwell, *Land Use Politics, Housing Costs, and Segregation in California Cities*, TERNER CTR. FOR Hous. INNOVATION 3 (Sept. 5, 2019), <https://turnercenter.berkeley.edu/wp-content/uploads/2023/04/Land-Use-Politics-Rothwell.pdf>; see also JONATHAN ROTHWELL, *LAND USE POLITICS, HOUSING COSTS, AND SEGREGATION IN CALIFORNIA CITIES 3* (2019).

<sup>84</sup> Menendian et al., *supra* note 67.

<sup>85</sup> Menendian et al., *supra* note 68.

ways in which restrictive zoning forms a barrier to these goals. Although related to the previously noted critiques, the emphasis here is different.

In his book *Dream Hoarders*, Richard Reeves's principal focus is on how the American upper-middle class leverages a variety of policies and practices to maintain its social advantages and economic status, largely to the detriment of the broader American population. In this regard, Reeves condemns exclusionary zoning not simply as a mechanism of economic segregation, but of "dream hoarding," of denying access to opportunity to many more Americans.

Similarly, in her book, *Segregation by Design*, Jessica Trounstine argues that local governments—specifically white homeowners and their political representatives—institutionalized segregation in order to protect their property values, and to secure and access to high-quality public goods and services, generally to the detriment of communities of color.<sup>86</sup> It is this incentive that, according to Trounstine, perpetuates and maintains racial segregation today. Restrictive zoning, in her account, is one of the chief mechanisms by which white and affluent homeowner preferences are used to maintain high-quality public services while excluding higher-need populations. She demonstrates how zoning policy became disconnected from planning and nuisance avoidance, and became the provenance of property value maintenance and used to control public goods. As she puts it, "zoning was a tool that enabled elected officials to generate segregation, increase property values, and make it easier to target public goods to certain constituencies."<sup>87</sup> These goods then facilitate social and economic success by endowing their beneficiaries with human capital and communal assets. In her account, zoning is a mechanism of opportunity hoarding. Therefore, the remedy must include zoning reform.

In the study of California regions which I led, our team found that—consistent with Trounstine's findings—that jurisdictions within regions that had the highest proportion of restrictive, low-density zoning also had the strongest economic outcomes for children when they became adults as measured by the Opportunity Atlas or as predicted by the state's Tax Credit Allocation Committee's designated higher opportunity areas on its opportunity maps.<sup>88</sup> Specifically, we found that in the Los Angeles region, children born into families with incomes at the 75th percentile of the income distribution and residing in communities with nearly 100% single-family-only residential zoning ended up making more than \$10,000 per year as adults than children born into families at the same income level but living in communities

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<sup>86</sup> JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 46, 57–59, 67, 72 (2018).

<sup>87</sup> *Id.* at 85.

<sup>88</sup> Menendian et al., *supra* note 67, figs. 6 & 7.

with 25% or less single-family-only zoned residential areas.<sup>89</sup> In Sacramento, we found that children born into families who reside in communities with 95% single-family-only zoning make approximately \$10,000 more per year as adults than children born into families living in areas with less than 60% single-family-only zoned residential areas.<sup>90</sup>

In addition to inflating the cost of housing and maintaining racial and class segregation, zoning also appears to facilitate opportunity and resource-hoarding through selective human capital investments and exclusive public provision. Exclusionary zoning also appears to play a role not just in slowing or impeding individual socioeconomic mobility, but geographic labor mobility as well.

#### D. Macroeconomic Growth

Growth controls and local land use regulations motivated to maintain and maximize property values hold back the American economy by making it more difficult for productive regions to grow, firms to expand and hire workers, and generally reduce labor mobility. The creation of new industries, discoveries and job opportunities in cities historically drew workers from far and wide. As New York Times housing journalist Emily Badger queried in a headline, “What happened to the American Boomtown?”<sup>91</sup> Her answer is zoning regulations. Americans are far less likely to move for a job and that boom towns no longer spring up as frequently or grow as fast as they once did.

In the 1950s and 1960s, roughly 20% of Americans moved every year.<sup>92</sup> By 1970, a quarter of Americans lived in a different place than where they were born.<sup>93</sup> In 2021, the Census Bureau reported that just 8.4% of Americans moved the preceding year, the lowest rate of geography mobility since the Bureau began tracking moves in 1948. While there are many possible explanations for this trend, economists believe that zoning regulations and housing costs play a significant role.

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<sup>89</sup> Menendian et al., *supra* note 68, at 13.

<sup>90</sup> Stephen Menendian et al., *Single-Family Zoning in the Sacramento Region*, OTHERING & BELONGING INST. (July 13, 2022), <https://belonging.berkeley.edu/single-family-zoning-sacramento-region>.

<sup>91</sup> Emily Badger, *What Happened to the American Boomtown?*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/upshot/what-happened-to-the-american-boomtown.html>.

<sup>92</sup> Table A-1. *Annual Geographic Mobility Rates, By Type of Movement: 1948-2022, CPS Historical Migration/Geographic Mobility Tables*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/geographic-mobility/historic.html> (last visited May 14, 2024).

<sup>93</sup> Joseph P. Ferrie, *Internal Migration*, in HISTORICAL STATISTICS OF THE UNITED STATES, EARLIEST TIMES TO THE PRESENT: MILLENNIAL EDITION 1-489, 1-491 (Susan B. Carter et al. eds., 2006), <http://faculty.wcas.northwestern.edu/~fe2r/papers/essay.pdf>.

Declining geographic mobility may be a proxy for declining economic mobility, but the problem of geographic mobility has consequences for the overall economy. According to one estimate, barriers to labor mobility since 1964 have reduced national GDP by 36%.<sup>94</sup> They find that “lowering regulatory constraints” in areas like New York and Silicon Valley would “increase U.S. GDP by 9.5%” alone. This would be an enormous difference in economic growth.

For a long time, California enjoyed rapid economic growth despite restrictive zoning. It managed this contradiction by providing higher wages and benefits and long commutes for those employed in growth industries, and displacement and even homelessness for those who were not. In recent years, however, California’s proverbial chickens have come home to roost. The state’s population shrank for the first time between 2020 and 2023,<sup>95</sup> and now firms are leaving California because of high costs driven by housing.

This is part of a larger observation that the most production regions of the United States are no longer able to quickly absorb workers from less productive regions.<sup>96</sup> Research on reduced levels of interstate mobility over the past few decades are attributed to restrictive zoning as well, with direct and indirect impacts on overall economic growth.<sup>97</sup>

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There are many varying ways of characterizing the nature of the zoning problem. Among them are restrictive zoning, snob zoning,<sup>98</sup> exclusionary zoning, low-density zoning, stringent zoning, anti-density zoning, and so on. As the foregoing suggests, the articulation of harms attributed or traced to zoning and its excesses, however described, is equally varying, and yet also deeply intertwined. Thus, the economic segregation engendered by zoning laws cannot be entirely untangled from the effects on social and economic mobility. Nor can that be entirely untethered from the larger macroeconomic effects, which are partly caused by mobility barriers.

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<sup>94</sup> Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONS. 1, 1 (2019).

<sup>95</sup> Christian Leonard, *The California Exodus Continues. Chart Shows How Unusual the Population Drop Was*, SAN FRANCISCO CHRONICLE (Dec. 21, 2023), <https://www.sfchronicle.com/california/article/population-exodus-2023-18566180.php>.

<sup>96</sup> Edward Glaeser, *Reforming land use regulations*, BROOKINGS (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations/>.

<sup>97</sup> David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 114-17 (2017).

<sup>98</sup> Elizabeth Winkler, *‘Snob zoning’ is racial housing segregation by another name*, WASH. POST (Sept. 25, 2017, 9:48 AM), <https://www.washingtonpost.com/news/wonk/wp/2017/09/25/snob-zoning-is-racial-housing-segregation-by-another-name/>.

In a study of regions in California which I led, we consistently found that wherever a higher proportion of land, especially residentially zoned land, is restricted to single-family-only zoning, those neighborhoods are whiter, have higher home values, rents, and better outcomes for children.<sup>99</sup>

The four major critiques outlined above are not the only bases upon which critique of restrictive and exclusionary zoning are made, but they are generally the most prominent arguments for reform. Just as these critiques are closely related to each other, other critiques generally relate to these concerns. For example, another prominent concern with exclusionary land use policies is the effect on the environment, where such regulations lead to sprawl and therefore longer commutes and more greenhouse gas and vehicle miles traveled (VMT) emissions. This problem is closely tied to the problem of geographic mobility and access to opportunity.

Despite the clustering and coincidence of harms associated with these kinds of zoning practices, it is helpful to try to differentiate among the various critiques as well the particular characterization that is deemed problematic (i.e. is it the 'snob' aspect to it or the 'exclusionary' aspect that is most harmful?). After all, any reform effort will need to be tailored to the problem it seeks to address if it is well-designed to succeed. The next part of this Article reviews these efforts.

### III. REFORM EFFORTS

With a clearer idea of the main critiques of restrictive and exclusionary zoning in mind, we can now examine various reform efforts. Although similar in many respects, these efforts are sprawling and disparate in many particulars. This Part will review proposals and adopted reforms at the municipal, state and federal levels, respectively, up through 2023.<sup>100</sup>

#### *A. Municipal Reform*

Although the definition of 'zoning reform' is somewhat ambiguous (a problem that will be discussed in Part IV), the general consensus is that the first major zoning reform, pushed by the emergent pro-housing and YIMBY movement, occurred in 2018. The Minneapolis city council voted, as part of a new long-term housing plan, to abolish single-family only zoning by allowing

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<sup>99</sup> Menendian et al., *supra* note 67; Menendian et al., *supra* note 68.

<sup>100</sup> During the editing process, additional zoning reform policy proposals were being drawn up by various governmental entities, councils and legislatures. To avoid the problem of substantively updating this article through each stage of the editing process, only reforms debated, passed, or rejected through 2023 are intentionally covered, although reference is made to related activities occurring early in 2024.

upward of 3 dwelling units in every neighborhood.<sup>101</sup> According to one analysis, 70% of the residential land in Minneapolis, and 53% of all land, was zoned for single-family housing only, in essence, banning apartments and other denser forms of housing in those areas.<sup>102</sup> The city also abolished parking minimums for all new developments, and loosened density restrictions near transit.<sup>103</sup> One of the goals was to make it easier for developers to build affordable housing.<sup>104</sup>

Minneapolis made headlines, but it wasn't the first to attempt reform along these lines or with similar aims. In 2016, New York City adopted more modest zoning reforms, including loosening parking requirements, expanding building footprints, and the like.<sup>105</sup> Periodically, New York city has also conducted spot upzoning (i.e. loosened restrictions that permit greater density) for particular neighborhoods.

Although less direct than blanket upzonings, another prominent type of zoning and land-use reform designed to increase housing stock is permitting Accessory Dwelling Units (ADUs). ADUs (also known as "granny flats") are structures or small buildings (such as a converted garage or shed) on the same lot as a main structure, and ADU laws permit allow people to live

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<sup>101</sup> Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html>; MINNEAPOLIS 2040, <https://minneapolis2040.com/>.

<sup>102</sup> 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?module=inline>. The city itself found several facts relevant to its reform. It found that it had about "78,000 single family homes representing approximately 43 percent of Minneapolis' housing units and 102,000 multifamily homes, representing approximately 56 percent of Minneapolis' housing units." See also MINNEAPOLIS 2040 – THE CITY'S COMPREHENSIVE PLAN app. C-1 (2019), <https://minneapolis2040.com/media/1429/minneapolis2040plan.pdf>. Since more units are built in multi-family areas, it is not unusual to find more overall housing units in high density areas. However, the city also found enormous disparities in housing tenure, with white families far more likely to own, and Black residents far more likely to rent. *Id.*

<sup>103</sup> Henry Grabar, *Minneapolis Confronts Its History of Housing Segregation*, SLATE (Dec. 7, 2018, 4:48 PM) <https://slate.com/business/2018/12/minneapolis-single-family-zoning-housing-racism.html>; *Parking, Loading, and Mobility Regulations*, MINNEAPOLIS 2040, <https://minneapolis2040.com/implementation/parking-loading-and-mobility-regulations/> (last visited May 14, 2024).

<sup>104</sup> 3. *Affordable and Accessible Housing: In 2040, all Minneapolis residents will be able to afford and access quality housing throughout the city*, MINNEAPOLIS 2040, <https://minneapolis2040.com/goals/affordable-and-accessible-housing/> (last visited May 14, 2024).

<sup>105</sup> *Zoning for Quality and Affordability*, N.Y.C. PLANNING, <https://www.nyc.gov/site/planning/plans/zqa/zoning-for-quality-and-affordability.page> (June 22, 2016).



in the smaller structure. The city of Fayetteville, Arkansas made headlines when it promulgated an aggressive ADU ordinance in 2018.<sup>106</sup>

The Fayetteville ordinance would allow up to three units, inclusive of ADUs, on all of the city's single-family lots. The city had legalized ADUs six years earlier, and then subsequently lowered parking minimums, but in 2018 made clear that all single-family parcels could have two ADUs, one attached to the main house and one detached, as long as the total additional square footage does not exceed 1,200.<sup>107</sup> ADU reforms are the most common type of pro-housing reform found at the local level. At least 17 cities have adopted these reforms in the last half decade or so.<sup>108</sup> These include Seattle, Tacoma, Madison, Raleigh, and Kansas City, MO.

Sometimes, these laws are paired in unusual ways. In 2019, Denver, Colorado adopted a general plan update that would permit ADUs in single-family lots and incentivize transit-oriented development.<sup>109</sup> In 2021, New Haven Connecticut adopted a reform package that allows ADUs in single-family lots, but also would reduce minimum lot sizes.<sup>110</sup>

The city of Atlanta began a reform process with some ADU ordinances in 2019, drawing on a study conducted in 2016, but has since pushed further to allow duplexes, triplexes, and quadplexes and townhomes in single-family zoned areas.<sup>111</sup> Further reforms have been slow, however, and a proposal for further and deeper reforms, including eliminating parking minimums, was defeated in 2021.<sup>112</sup>

Another prominent type of zoning reform is known as "form-based" code. In 2019, Somerville, Massachusetts, for example, adopted this approach, which moves away from use-based designations entirely, and permit certain

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<sup>106</sup> Robert Steuteville, *Gentle density: Making neighborhoods transit-ready*, PUB. SQUARE (Aug. 30, 2018), <https://www.cnu.org/publicsquare/2018/08/30/gentle-density-making-neighborhoods-transit-ready>.

<sup>107</sup> FAYETTEVILLE, ARK., CODE § 164.19 (2023) *amended by* Fayetteville, Ark., Ordinance 6076 (Aug. 7, 2018), <https://www.fayettevilleflyer.com/wp-content/uploads/2018/06/c7.pdf>.

<sup>108</sup> Paula Span, *Senior Housing that Seniors Actually Like*, N.Y. TIMES (Jan. 31, 2023), <https://www.nytimes.com/2023/01/29/health/elderly-housing-adu.html>.

<sup>109</sup> DENVER CITY COUNCIL ET AL., BLUEPRINT DENVER: A BLUEPRINT FOR AN INCLUSIVE CITY 58, 69, 84 (2019),

[https://www.denvergov.org/media/denvergov/cpd/blueprintdenver/Blueprint\\_Denver.pdf](https://www.denvergov.org/media/denvergov/cpd/blueprintdenver/Blueprint_Denver.pdf)

<sup>110</sup> Thomas Breen, *Garage-Apartment Change Wins Final OK*, NEW HAVEN INDEP. (Oct. 5, 2021, 8:42 AM), <https://www.newhavenindependent.org/article/adus1>.

<sup>111</sup> Keisha Lance Bottoms, ONE ATLANTA: HOUSING AFFORDABILITY ACTION PLAN 15-16 (2019), <https://www.atlantaga.gov/home/showdocument?id=42220>.

<sup>112</sup> Sean Keenan, *Proposal to boost intown density killed in committee, but comeback expected*, ATLANTA CIVIC CIRCLE (Dec. 4, 2021), <https://atlantaciviccircle.org/2021/12/04/proposal-to-boost-intown-density-killed-in-committee-but-comeback-expected/>.

ADUs in the form of backyard cottages.<sup>113</sup> In theory, form-based code provide more flexibility to developers and property owners while maintaining the key purposes of use-based designations.<sup>114</sup> Other cities are experimenting with form-based codes, which precede more direct zoning reforms. In 2021, Iowa City, Iowa also adopted “form-based” zoning reform, with an aim at increasing the so-called ‘missing middle.’<sup>115</sup> Buffalo took a similar approach in 2017.<sup>116</sup> As did Nashville in 2016.<sup>117</sup> Hartford’s form-based code, also adopted in 2016, won an award for “smart growth.”<sup>118</sup> New Rochelle, New York’s form-based code “Downtown Overlay Zone” reform in 2015 has proven to be especially successful.<sup>119</sup>

In one of the more direct and high-profile zoning reform efforts, in February, 2021, the Berkeley City Council adopted a resolution to begin the process of reforming its zoning code with a specific goal of ending single-family only zoning by allowing up to four units per parcel.<sup>120</sup> The resolution directed city departments to begin the process to ultimately reform zoning

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<sup>113</sup> Somerville City Council, *Administration Pass City’s First Zoning Overhaul in 30 Years*, CITY OF SOMERVILLE (Dec. 13, 2019), <https://www.somervillema.gov/news/somerville-city-council-administration-pass-citys-first-zoning-overhaul-30-years>.

<sup>114</sup> Jason T. Burdette, *Form-Based Codes: A Cure for the Cancer Called Euclidean Zoning?* (Apr. 19, 2004) (Master's Thesis, Virginia Tech), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.493.2406&rep=rep1&type=pdf> (“With origins in the New Urbanist school of development, Form-Based Codes elevates physical design in city planning, as opposed to the “use-based” restrictions of Euclidean zoning.”).

<sup>115</sup> George Shillcock, *Iowa City Council gambles on new zoning code in South District, hoping to add affordable housing*, IOWA CITY PRESS-CITIZEN (Oct. 6, 2021, 3:05 PM), <https://www.press-citizen.com/story/news/2021/10/06/iowa-city-council-south-district-zoning-plan-clears-first-hurdle-form-based-code-affordable-housing/5952816001/>.

<sup>116</sup> City of Buffalo, *Buffalo Green Code: Welcome*, BUFFALO GREEN CODE, <https://bufgreencode.com/> (last visited May 14, 2024).

<sup>117</sup> *Downtown Community Plan*, METRO NASHVILLE, <https://www.nashville.gov/departments/planning/long-range-planning/community-plans/downtown> (last visited May 14, 2024).

<sup>118</sup> *Hartford, CT wins 2020 Richard H. Driehaus Form-Based Codes Award*, METRO HARTFORD ALLIANCE, <https://metrohartford.com/about-us/newsroom/hartford-ct-wins-2020-richard-h-driehaus-form-based-codes-award/>.

<sup>119</sup> *New zoning makes New Rochelle’s vision a reality*, SMART GROWTH AMERICA (Sept. 5, 2019), <https://smartgrowthamerica.org/new-zoning-makes-new-rochelles-vision-a-reality/>; see also Salim Furth and Philip Wharton, *Case study: Innovations to zoning and permitting regulations can unlock opportunity*, BETTER CITIES PROJECT (June 21, 2021), <https://better-cities.org/community-growth-housing/innovate-zoning-and-permitting-regulations/>.

<sup>120</sup> Sarah Ravani, *Berkeley Considers Ending Single-Family Zoning by December 2022: A ‘Big Deal’*, S.F. CHRON. (Feb. 22, 2021, 9:10 AM), <https://www.sfchronicle.com/bayarea/article/Berkeley-considers-ending-single-family-15961566.php>; see also James Brasuell, *History (Un)made: Berkeley City Council Votes to Eliminate Single-Family Zoning*, PLANETIZEN (Feb. 24, 2021, 10:30 AM), <https://www.planetizen.com/news/2021/02/112396-history-unmade-berkeley-city-council-votes-eliminate-single-family-zoning>.

throughout the city by the end of 2022.<sup>121</sup> In September of 2022, the planning department shared what this might actually look like, although the final approvals were still months away from a final vote.<sup>122</sup>

The City of Sacramento, California's state capital, has gone even further and has proposed around the same time as Berkeley to allow apartments in all residential neighborhoods.<sup>123</sup> The plan has not yet been finalized, but it would allow four units on nearly all residential parcels.<sup>124</sup>

The Gainesville, Florida City Commission adopted a similar ordinance in 2022, allowing up to four units in all single-family neighborhoods.<sup>125</sup> Part of the basis for this reform was the general cost of housing in this city home to the University of Florida. This reform has been reversed, however when new commissioners were elected.<sup>126</sup>

Another college town, Charlottesville, Virginia, home to the University of Virginia, adopted a comprehensive reform in 2021 which included allowing more multi-family housing and increasing the so-called "missing middle."<sup>127</sup> As of late 2022, however, there was still more work to be done to complete the reforms, and the only went into effect in early 2024.<sup>128</sup>

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<sup>121</sup> BERKELEY CITY COUNCIL LAND USE, HOUS., & ECON. DEV. COMM., REGULAR MEETING 3, 12 (2021), <https://berkeleyneighborhoodscouncil.com/wp-content/uploads/2021/02/Quadplex-Zoning.pdf>; CITY OF BERKELEY, ACTION CALENDAR: MARCH 25, 2023, at 2 (2021), <https://newspack-berkeleyside-cityside.s3.amazonaws.com/wp-content/uploads/2021/03/2021-03-25-Special-Item-01-Initiation-of-Public-Process.pdf>.

<sup>122</sup> Nico Savidge, *What Berkeley's Push to End Single-Family Zoning Could Mean for Your Neighborhood*, BERKELEYSIDE (Sept. 22, 2022, 4:43 PM), <https://www.berkeleyside.org/2022/09/22/berkeley-housing-single-family-zoning-city-council>.

<sup>123</sup> Liam Dillon, *In a First for California, Sacramento Poised to Allow Apartments in Single-Family Home Neighborhoods*, L.A. TIMES (Feb. 10, 2021, 5:00 AM), <https://www.latimes.com/homeless-housing/story/2021-02-10/sacramento-ending-single-family-zoning>.

<sup>124</sup> David Garcia, *Sacramento Leapfrogs State Capitol in Zoning Reform Race*, U.C. BERKELEY TERNER CTR. FOR HOUS. INNOVATION (Jan. 28, 2021), <https://turnercenter.berkeley.edu/research-and-policy/sacramento-zoning-reform/>.

<sup>125</sup> *Gainesville City Council Acts to End Single-Family Zoning in College Town*, NAT'L LOW INCOME HOUS. COAL.: MEMO TO MEMBERS (Aug. 29, 2022), <https://nlihc.org/resource/gainesville-city-council-acts-end-single-family-zoning-college-town>.

<sup>126</sup> Patrick Spauster, *How Backlash Reversed a Florida City's Reforms to Allow Denser Housing*, BLOOMBERG: CITY LAB: HOUSING (Feb. 2, 2023, 7:45 AM), <https://www.bloomberg.com/news/articles/2023-02-02/how-gainesville-s-yimby-zoning-reform-was-undone>.

<sup>127</sup> CVILLE PLANS TOGETHER, COMPREHENSIVE PLAN: CITY OF CHARLOTTESVILLE, VIRGINA 29, 33, 37 (2021), <https://www.charlottesville.gov/DocumentCenter/View/7073/Comprehensive-Plan-Document---2021-1115-Final?bidId=>; see also Campbell Robertson, *A Fight over Zoning Tests Charlottesville's Progress on Race*, N.Y. TIMES (Aug. 1, 2021), <https://www.nytimes.com/2021/08/01/us/charlottesville-va-zoning-affordable-housing.html>.

<sup>128</sup> See Erin O'Hare, *We're About a Third of the Way Through Charlottesville's Massive Rezoning Effort*, CHARLOTTESVILLE TOMORROW (Sept. 29, 2022),

The small city of Auburne, Maine has been called the “YIMBYist city in America,” with its ambitious zoning reforms adopted in March, 2022.<sup>129</sup> The plan aims to increase the city’s population by a quarter by 2025. And despite a public outcry and strong opposition, and the defeat of the mayor who pushed the measure, so far, the reform has not yet been rolled back.

Portland, Oregon also adopted a policy designed to increase the ‘missing middle,’ while also loosening parking minimums in 2022.<sup>130</sup> After a public outcry, Portland, did however, reverse the parking reform.<sup>131</sup>

At the end of 2023, Austin, Texas adopted an important measure to allow multiple units to be developed on single-family lots.<sup>132</sup> This came a month after the city loosened parking minimums for new developments.<sup>133</sup>

While many of these reform efforts are ongoing, as this summary suggests, not all have been successful. Many achievements are reversed based upon organized backlash. And many more proposals have already been outright defeated. In San Francisco, the mayor vetoed a proposal that would have allowed four units on each residential lot and six units on corner lots.<sup>134</sup> Even then, pro-housing advocates critiqued this approach because of flaws and amendments.<sup>135</sup> Boise, Idaho also backtracked on a proposed blanket

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<https://www.cvilletomorrow.org/were-about-a-third-of-the-way-through-charlottesvilles-massive-rezoning-effort/>.

<sup>129</sup> James Brasuell, *The Maine City Setting the Gold Standard for Pro-Development Zoning Reforms*, PLANETIZEN (May 23, 2022, 5:00 AM), <https://www.planetizen.com/news/2022/05/117259-maine-city-setting-gold-standard-pro-development-zoning-reforms>.

<sup>130</sup> *About the RIP2 Project*, CITY PORTLAND, OR., <https://www.portland.gov/bps/planning/rip2/about-rip2> (last visited May 14, 2024).

<sup>131</sup> Catie Gould, *Portland mandates a parking U-turn*, CNU Public Square (Dec. 27, 2022), <https://www.cnu.org/publicsquare/2022/12/27/portland-mandates-parking-u-turn>. Fortunately, however, the state land use commission banned parking minimums. *See also* Owen Minnott and Julia Selby, *Eliminating Single-Family Zoning and Parking Minimums in Oregon*, BIPARTISAN POLICY CENTER (Sept. 26, 2023), <https://bipartisanpolicy.org/blog/eliminating-single-family-zoning-and-parking-minimums-in-oregon/>.

<sup>132</sup> Joshua Fechter, *Austin will now allow more homes to be built on single-family lots*, THE TEXAS TRIBUNE (Dec. 7, 2023, 11:00 PM), <https://www.texastribune.org/2023/12/07/austin-zoning-single-family-housing-costs/>.

<sup>133</sup> Joshua Fechter, *To fight climate change and housing shortage, Austin becomes largest U.S. city to drop parking-spot requirements*, THE TEXAS TRIBUNE (Nov. 2, 2023, 5:00 PM), <https://www.texastribune.org/2023/11/02/austin-minimum-parking-requirements-housing-shortage/>.

<sup>134</sup> Mengyuan Dong, *Breed Vetoes Bill Ending Single-Family Zoning in San Francisco*, KTVU FOX 2 (July 22, 2022), <https://www.ktvu.com/news/breed-vetoes-bill-ending-single-family-zoning-in-san-francisco>.

<sup>135</sup> J.D. Morris, *San Francisco Plans to End Single-Family Zoning. Here’s Why Housing Advocates Aren’t Happy with the Law*, S.F. CHRON. (June 28, 2022, 6:39 PM), <https://www.sfchronicle.com/sf/article/single-family-zoning-17269644.php>.

upzoning reform in 2022.<sup>136</sup> And in the summer of 2023, the San Diego city council voted down a proposal pushed by the mayor to eliminate single-family-only zoning in most of the city.<sup>137</sup>

In other cases, proposals are ignored. In San Jose, California, a task force recommended adopting reforms along the lines of Sacramento, but the city has yet to act.<sup>138</sup> Proposals are also being considered in Louisville,<sup>139</sup> Baltimore,<sup>140</sup> Charlotte,<sup>141</sup> Columbus,<sup>142</sup> Salt Lake City,<sup>143</sup> among other places. And as the foregoing shows, these reforms also take years from intention to adoption to full implementation.<sup>144</sup>

## B. State Reform

Whereas municipal reform principally takes the form of cities amending or revising their own regulations and updating their code, state reform generally overrides or preempts local regulations under particular

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<sup>136</sup> Margaret Carmel, *Density 'Applied Strategically': Boise Backtracks on Citywide Upzone in New Zoning Code Proposal*, BOISEDEV (July 13, 2022),

<https://boisedev.com/news/2022/07/13/boise-zoning-code-rewrite/>.

<sup>137</sup> Jack Rogers, *San Diego Planners Vote Down End to Single-Family Zoning*, GLOBEST (Aug. 7, 2023, 6:01 AM), <https://www.globest.com/2023/08/07/san-diego-planners-vote-down-end-to-single-family-zoning/?slreturn=20240411011054>.

<sup>138</sup> Maggie Angst, *Will San Jose Move to Densify Single-Family Neighborhoods like Sacramento Just Did?*, MERCURY NEWS (Jan. 25, 2021, 6:05 AM), <https://www.mercurynews.com/2021/01/25/will-san-jose-move-to-densify-single-family-neighborhoods-like-sacramento-just-did/>.

<sup>139</sup> *Land Development Code Reform*, LOUISVILLE, KY, <https://louisvilleky.gov/government/planning-design/land-development-code-reform> (last visited May 14, 2024).

<sup>140</sup> Adam Willis & Sophie Kasakove, *Proposed Zoning Code Overhaul Would End Single-Family Zoning in Baltimore*, BALT. BANNER (Sept. 26, 2022, 6:00 AM), <https://www.thebaltimorebanner.com/community/housing/proposed-zoning-code-overhaul-would-end-single-family-zoning-in-baltimore-UJLEVZQKYRGZJQOIC2OT55UEU/>.

<sup>141</sup> See *Goal 2: Neighborhood Diversity and Inclusion*, CHARLOTTE FUTURE 2040 COMPREHENSIVE PLAN POL'Y, <https://www.cltfuture2040plan.com/plan-policy/welcome-letter#> (choose "03. Policy Framework" from dropdown; then choose "Goal 2: Neighborhood Diversity and Inclusion") (last visited May 14, 2024).

<sup>142</sup> Renee Fox, *Columbus' Zoning Code Reform Seeks to Correct Wrongs of the Past, Make Building Easier*, WOSU 89.7 NPR NEWS (Apr. 4, 2022, 5:00 AM), <https://news.wosu.org/news/2022-04-04/columbus-zoning-code-reform-seeks-to-correct-wrongs-of-the-past-make-building-easier>.

<sup>143</sup> SALT LAKE CITY PLANNING, PROPOSAL SUMMARY: AFFORDABLE HOUSING INCENTIVES: ZONING TEXT AMENDMENT 1-2 (2023), [http://www.slcdocs.com/Planning/Projects/Affordable%20Housing%20Overlay/affordable\\_housing\\_summary\\_12\\_28\\_21.pdf](http://www.slcdocs.com/Planning/Projects/Affordable%20Housing%20Overlay/affordable_housing_summary_12_28_21.pdf).

<sup>144</sup> Karina French, *Decoding Zoning: Regulation and Reform in California*, OTHERING & BELONGING INST. (May 13, 2021), <https://belonging.berkeley.edu/decoding-zoning>.

circumstances or, potentially, revokes authority to promulgate particular forms of zoning regulations or adopt certain zoning codes.

Oregon is the first state widely recognized to have adopted meaningful zoning reform as embodied by the principles of the pro-housing movement, which did so in 2019.<sup>145</sup> The state law automatically permits the construction of duplexes in any zoning district zoned single-family only within cities of 10,000 or more people.<sup>146</sup> In the Portland metropolitan region, the state bill went further and automatically permits 4-plexes and developments built around a common yard.

Oregon may have been the first to adopt serious reform, but California was debating it in 2018. That year, Senator Scott Weiner, who represents San Francisco, introduced SB 827, a comprehensive and highly controversial reform bill that would have increased density around transit areas and “high resource” communities.<sup>147</sup> But it, and its successor bill, SB 50, were defeated in committee a year later.<sup>148</sup> After a third attempt, SB 50 reached the floor but fell short by just a few votes (even though it passed with a majority of Senators present).<sup>149</sup>

However, in 2021, the California state legislature finally adopted a scaled-down version of zoning reform, SB 9, which essentially allows single-family-zoned lots to be subdivided into duplexes, and in some narrower cases, quadplexes.<sup>150</sup> It further requires localities to approve applications to do so. And in 2022, the state legislature passed AB 2011, which “allows for ministerial, by-right approval for affordable housing on commercially-zoned lands, and also allows such approvals for mixed-income housing along commercial corridors, as long as the projects meet specified affordability, labor, and environmental criteria.”<sup>151</sup>

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<sup>145</sup> Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning>.

<sup>146</sup> H. B. 2001, 80th Legis. Assemb., Reg. Sess. (Or. 2019).

<sup>147</sup> See Laura Bliss, *The Political Battle over California's Suburban Dream*, BLOOMBERG: CITYLAB (Apr. 5, 2019, 1:36 PM), <https://www.bloomberg.com/news/articles/2019-04-05/the-suburbs-that-fear-california-s-housing-bill>; Kerry Cavanaugh, *Opinion: Holy Cow! California May Get Rid of Single-Family Zoning*, L.A. TIMES (Apr. 24, 2019, 2:56 PM), <https://www.latimes.com/opinion/livable-city/la-ol-sb50-single-family-20190424-story.html>.

<sup>148</sup> Alexei Koseff, *Major California Housing Bill from Sen Scott Wiener Put On Hold Until 2020*, SAN FRANCISCO CHRONICLE (May 16, 2019, 7:52 PM), <https://www.sfchronicle.com/politics/article/Major-California-housing-bill-from-Sen-Scott-13851194.php>.

<sup>149</sup> Alexei Koseff, *California Senate Kills SB50 Denser-Housing Bill*, SAN FRANCISCO CHRONICLE (Jan 9, 2020, 8:52 PM) <https://www.sfchronicle.com/politics/article/California-Senate-kills-SB50-denser-housing-bill-15015081.php>.

<sup>150</sup> See S.B. 9, 2021-22 Reg. Sess. (Cal. 2021).

<sup>151</sup> *AB 2011*, CALIFORNIA YIMBY, <http://cayimby.org/ab-2011/> (last visited May 14, 2024).

Massachusetts enacted a law in 2021 that requires towns to zone for multifamily housing, and some of those zones need to be within ½ mile of transit, if the town has a commuter rail station.<sup>152</sup> Connecticut also adopted a suite of relatively minor reforms in 2021.<sup>153</sup> In 2022, Maine adopted a scaled down reform package which loosened restrictions on accessory dwelling units (ADUs).<sup>154</sup>

In the spring of 2023, Washington state became the one of latest states to adopt significant zoning reform. The new reform law there upzones all residential neighborhoods to permit up to six units per parcel in cities with 75,000 residents or more, up to four units in cities with 25,000 residents or more, and up to two units elsewhere, with a few carve outs.<sup>155</sup> The same legislature also loosened restrictions on ADUs in a separate bill.<sup>156</sup>

Just a few weeks later, the Montana governor signed a package of four different bills that streamlines permitting, allows duplexes in cities, and permits ADUs.<sup>157</sup> The Montana laws allow multifamily in commercial zones and redesign the planning/zoning process. And in June, Vermont adopted a law (the HOME act) that reduces parking minimums, allows duplexes in single-family-zoned neighborhoods, and streamlines permitting and review processes.<sup>158</sup>

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<sup>152</sup> Frank Stearns & Maria de la Motte, *Massachusetts Enacts State Zoning Law Amendments Designed to Encourage Housing Development*, HOLLAND & KNIGHT (Mar. 8, 2021), <https://www.hklaw.com/en/insights/publications/2021/03/massachusetts-enacts-state-zoning-law-amendments>; *Multi-Family Zoning Requirement for MBTA Communities*, MASS.GOV, <https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities> (last visited May 14, 2024).

<sup>153</sup> See H.B. Text 6107, 2021 Jan. Sess. (Conn. 2021); see also *2021 Legislative Reforms, DESEGREGATE CONNECTICUT*, <https://www.desegregatect.org/hb6107> (last visited May 14, 2024).

<sup>154</sup> See L.D. 2003, 130th Leg., Reg. Sess. (Me. 2022); see also Evan Popp, *Mills Signs Bill Reforming Zoning Laws as Maine Grapples with Affordable Housing Crisis*, MAINE BEACON (Apr. 28, 2022), <https://mainebeacon.com/mills-signs-bill-reforming-zoning-laws-as-maine-grapples-with-affordable-housing-crisis/>.

<sup>155</sup> David Gutman, *WA Senate Passes Bill Allowing Duplexes, Fourplexes in Single-Family Zones*, SEATTLE TIMES (Apr. 11, 2023, 2:26 PM), <https://www.seattletimes.com/seattle-news/politics/wa-senate-passes-bill-allowing-duplexes-fourplexes-in-single-family-zones/>; H.B. 1110, 2023-24 Leg., Reg. Sess. (Wash. 2023).

<sup>156</sup> See H.B. 1337, 2023-24 Leg., Reg. Sess. (Wash. 2023).

<sup>157</sup> Diana Ionescu, *Montana Governor Signs Zoning Reform Bills*, PLANETIZEN (May 24, 2023, 9:00 AM), <https://www.planetizen.com/news/2023/05/123493-montana-governor-signs-zoning-reform-bills>; Press Release, State Montana Newsroom, Governor Gianforte Announces Bold, Transformational Pro-Housing Zoning Reform (May 17, 2023) (on file with author).

<sup>158</sup> Amy Love Tomasso, *Vermont Adopts Historic Housing Reform*, PUB. SQUARE: CNU (June 12, 2023), <https://www.cnu.org/publicsquare/2023/06/12/vermont-adopts-historic-housing-reform>.

By the end of the year, proposals were pending in other states, but, despite these achievements, more reform bills have been defeated than adopted. Between 2020 and 2023, reform bills were defeated in Nebraska,<sup>159</sup> Connecticut,<sup>160</sup> Maryland,<sup>161</sup> Minnesota,<sup>162</sup> Montana,<sup>163</sup> New Hampshire,<sup>164</sup> North Carolina,<sup>165</sup> Washington State,<sup>166</sup> Arizona,<sup>167</sup> and Virginia,<sup>168</sup> and even Texas,<sup>169</sup> although a few of those resulted in successful laws in subsequent sessions.

The most prominent of the defeats, however, was the New York reform package that triggered a figurative ‘uprising’ in the suburbs of New York City, despite the support of the New York Governor.<sup>170</sup> The so-called “New York Housing Compact” was described by *Slate* as “modest,” and would have required every jurisdiction to permit for 3% annual housing growth and requiring localities to upzone near train stops run by the Metropolitan Transportation Authority, among other provisions.<sup>171</sup> This defeat follows the failure of a much stronger bill introduced in 2021 that would have banned minimum lot sizes over 1,200 square feet, abolished parking requirements,

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<sup>159</sup> L.B. 794, 107th Leg., Second Sess. (Neb. 2021).

<sup>160</sup> H.B. 6107, 2021 Gen. Assemb., Reg. Sess. (Conn. 2021).

<sup>161</sup> H.B. 1406, 2020 Gen. Assemb., Reg. Sess. (Md. 2020).

<sup>162</sup> H.B. 3256, 92d Leg., Reg. Sess. (Minn. 2021).

<sup>163</sup> See H.B. 134, 2021 Leg., Reg. Sess. (Mont. 2021). Although, a subsequent package of laws was approved in 2023. See Ionescu, *supra* note 157; see State Montana Newsroom, *supra* note 157.

<sup>164</sup> See H.B. 341, 2021 Leg., Reg. Sess. (N.H. 2021).

<sup>165</sup> See S.B. 349, 2021-22 Leg., Reg. Sess. (N.C. 2021).

<sup>166</sup> See Heidi Groover, *WA Bill Allowing Duplexes, Fourplexes Fails to Pass Key Deadline*, SEATTLE TIMES (Feb. 15, 2022, 7:51 PM), <https://www.seattletimes.com/seattle-news/wa-bill-allowing-duplexes-fourplexes-fails-to-pass-key-deadline/>.

<sup>167</sup> See Abe Kwok, *Republicans Kill Consensus Again, This Time on Affordable Housing*, AZCENTRAL (June 14, 2023, 6:20 AM), <https://www.azcentral.com/story/opinion/oped/abekwok/2023/06/14/arizona-legislature-refuses-compromise-affordable-housing/70319621007/>.

<sup>168</sup> H.B. 152, 2020 Gen. Assemb., 2020 Reg. Sess. (Va. 2020).

<sup>169</sup> See Diana Ionescu, *Opinion: Failed Housing Bills Could Signal California-Style Housing Crisis in Texas*, PLANETIZEN (June 8, 2023, 10:00 AM), <https://www.planetizen.com/news/2023/06/123804-opinion-failed-housing-bills-could-signal-california-style-housing-crisis-texas> (explaining that the Texas reform package would have permitted ADUs, reduced minimum lot-size regulations, and reformed restrictions on height limits).

<sup>170</sup> See Janaki Chadha, *Hochul Faces an ‘Uprising’ Over Her Plan to Build New Housing in NYC Suburbs*, POLITICO (Feb. 11, 2023, 7:00 AM), <https://www.politico.com/news/2023/02/11/hochul-faces-uprising-housing-plan-00080949>.

<sup>171</sup> See Henry Grabar, *New York has a YIMBY Governor*, SLATE (Jan. 11, 2023, 2:40 PM), <https://slate.com/business/2023/01/kathy-hochul-housing-new-york-zoning.html>.



legalized fourplexes, and legalized six-unit buildings within a quarter-mile of a commuter rail or subway station.<sup>172</sup>

Outright defeat is not the only strategy reform opponents have employed. In addition to downvotes, some bills have been significantly weakened by amendment. A major reform zoning and land-use reform proposal in Colorado, where reformers had high hopes, was stripped of its upzoning requirements in April of 2023, effectively killing it as a meaningful reform effort.<sup>173</sup>

But such defeats are not the end of the story. In 2023, both Montana and Washington state managed to push through meaningful reforms despite these earlier defeats. And California still managed to enact some reforms despite the defeats of the larger omnibus packages. In addition to its earlier (although narrowed) achievements, at the end of 2023, California adopted a law that would allow faith-based institutions and non-profits colleges to build up to 30 units per acre in urban and some suburban areas regardless of local zoning rules, but only if 100% of the units are affordable housing with below market-rate rents.<sup>174</sup>

Although not comprehensive zoning reform, a number of states (up to 10) have adopted ADU laws that indirectly boost density, loosened parking requirements, or created processes that mandate growth at the local level, such as through California's Housing Element process.<sup>175</sup> These should be considered as part of an overall package of reforms that can advance the goal of greater housing production, density and affordability. These successes are part of the story and trajectory of state reform.

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<sup>172</sup> See Joe Lovinger, *New York Takes Aim at Apartment Bans*, THE REAL DEAL (Dec. 10, 2023, 4:19 PM), <https://therealdeal.com/new-york/2021/12/10/new-york-takes-aim-at-single-family-zoning/>.

<sup>173</sup> Sara Wilson, *Major Colorado Land-Use Reform Bill Stripped of Upzoning Requirements*, COLO. NEWSLINE (Apr. 26, 2023, 12:42 PM), <https://coloradonewsline.com/briefs/major-colorado-land-use-reform-bill-stripped-of-upzoning-requirements/>.

<sup>174</sup> Press Release, Gavin Newsom, Governor, State of California, Governor Newsom Signs Package to Streamline Housing and Expand Tenant Protections in California, (Oct. 11, 2023), <https://www.gov.ca.gov/2023/10/11/governor-newsom-signs-package-to-streamline-housing-and-expand-tenant-protections-in-california/>; see also Rick Reinhard, *Affordable Housing: YIGBY ("Yes in God's Backyard") Movement Seeks to Counter NIMBY Movement*, URBAN LAND (Feb. 20, 2024), <https://urbanland.uli.org/property-types/housing-affordable-and-workforce/affordable-housing-yigby-yes-in-gods-backyard-movement-seeks-to-counter-nimby-movement>.

<sup>175</sup> See generally, e.g., *Housing Elements*, CAL. DEP'T HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/planning-and-community-development/housing-elements> (last visited May 14, 2024).

### C. Federal Reform

Since zoning is principally a local land use regulation, generally promulgated under the auspices of the state's police powers and delegated legislative authority, it is less obvious that zoning and land use reform could or should occur at the federal level. Another problem is the uncertainty and variability of the possible basis for federal reform since the federal government lacks general police powers as a source of legislative authority. One possible basis for regulating or overriding local land use authority would be the Commerce Clause or some other delegated congressional power. Another possibility for reform would be a set of incentives or sticks based upon the withholding of federal funds, such as CDBG grants, highway dollars, or perhaps as part of the duty to affirmatively further fair housing under the federal Fair Housing Act.

Regardless of the source of power or mechanism for reform, there are many avenues for advancing reform at the federal level. One approach would be to promulgate model zoning codes through HUD, just as the Hoover administration did a century ago.<sup>176</sup> Another approach would be direct legislation. Another would be rulemaking authority by a federal agency.

One actual proposal, for example, would have made \$10 billion in incentives available to jurisdictions that adopted local land use reforms, but could use the funding however they wanted. This was a bill first proposed by Senator Elizabeth Warren in 2018 under the title "American Housing and Economic Mobility Act."<sup>177</sup> The goal was to generate more than 3 million new housing units for low- and middle-income Americans. The program would create a competition for grants.

Another proposal was advanced by Democratic Senators Amy Klobuchar, Tim Kaine and Republican Senator Rob Portman, called the Housing Supply and Affordability Act.<sup>178</sup> The aim was to create a grant program that would also incentivize cities to re-write zoning codes, but the bill became part of the Build Back Better Act that stalled out in Congress.<sup>179</sup>

These are not all theoretical. The Biden-Harris Administration Housing Supply Action Plan indicated that it would reward jurisdictions that reformed

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<sup>176</sup> See generally *Soho Forum: Government Caused Housing Segregation. Do We Need More Government to Fix the Problem?*, MANHATTAN INST. (Jan. 23, 2019), <https://www.manhattan-institute.org/video/soho-forum-public-housing-government>.

<sup>177</sup> Rachel M. Cohen, *Elizabeth Warren Introduces Plan to Expand Affordable Housing and Dismantle Racist Zoning Practices*, INTERCEPT (Sept. 28, 2018, 1:28 PM), <https://theintercept.com/2018/09/28/elizabeth-warren-affordable-housing-bill/>.

<sup>178</sup> S. 902, 117th Cong. (2021).

<sup>179</sup> Lisa Hagen, *Talks Stall on Biden's Trimmer Build Back Better Act*, U.S. NEWS (Feb. 1, 2022), <https://www.usnews.com/news/politics/articles/2022-02-01/talks-stall-on-bidens-trimmer-build-back-better-act>.

zoning with “higher scores in certain federal grant processes.”<sup>180</sup> The “Unlocking Possibilities” program would essentially help cities pay for new policy documents that will guide their future development to promote new housing supply and more diverse neighborhoods.

Another program in the bipartisan infrastructure bill is the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) program.<sup>181</sup> \$2.2 billion of that was supposed to be linked to zoning reform. And in December, 2022, the \$1.7 trillion omnibus spending package passed by Congress included \$85 million in grants for HUD to fund a competitive grant program that would incentivize reforms along the lines envisioned by first two proposals mentioned.<sup>182</sup>

Thus far, these programs have not yet produced meaningful reform.<sup>183</sup> But they suggest the strong possibility of eventual federal activity and participation in the process of reforming local zoning practices. Despite the limits to its authority, there is much the federal government can do to spur and advance zoning policy reform.

#### IV. THE PACE AND PATTERN OF REFORM

After the initial flush of pro-housing legislative victories, it seemed that a corner had been turned. One headline wondered, suggestively, in March of 2021, “Will 2021 Be the Year Zoning Reform Reaches Critical Mass?”<sup>184</sup> By year’s end, some victories had been achieved, but the reform momentum seemed to slow to a trickle.<sup>185</sup> Much the same could be said by the end of 2022.

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<sup>180</sup> Press Release, White House, President Biden Announces New Actions to Ease the Burden of Housing Costs (May 16, 2022) (on file with author); *see also* Jared Brey, *The \$1.6B Federal Plan to Spur Local Zoning Reforms*, ROUTE FIFTY (Dec. 17, 2021), <https://www.route-fifty.com/infrastructure/2021/12/16b-federal-plan-spur-local-zoning-reforms/359974/>.

<sup>181</sup> *Biden-Harris Administration Announces \$1.5 Billion Available Through the 2023 RAISE Grant Program*, U.S. DEP’T TRANSP. (Dec. 15, 2022), <https://www.transportation.gov/briefing-room/biden-harris-administration-announces-15-billion-available-through-2023-raise-grant>.

<sup>182</sup> *See* Jason Jordan, *Congress Funds New ‘YIMBY’ Grants for Zoning Reform*, APA: BLOG (Jan. 10, 2023), <https://www.planning.org/blog/9262900/congress-funds-new-yimby-grants-for-zoning-reform/>.

<sup>183</sup> *See* Christian Britschgi, *Joe Biden’s Use of Transportation Dollars to Incentivize Zoning Reform Is a Big Flop*, REASON MAG. (Aug. 23, 2022, 8:00 AM), <https://reason.com/2022/08/23/joe-bidens-use-of-transportation-dollars-to-incentivize-zoning-reform-is-a-big-flop/>.

<sup>184</sup> Daniel Herriges, *Will 2021 Be the Year Zoning Reform Reaches Critical Mass?*, STRONG TOWNS (Mar. 4, 2021), <https://www.strongtowns.org/journal/2021/3/4/will-2021-be-the-year-zoning-reform-reaches-critical-mass>.

<sup>185</sup> *See* Christian Britschgi, *2021 Was a Great Year for Zoning Reform*, REASON MAG. (Dec. 28, 2021, 9:00 AM), <https://reason.com/2021/12/28/2021-was-a-great-year-for-zoning-reform/>.

By the end of 2023, there were notable victories in multiple states, but the “critical mass” of municipal reform has yet to arrive, just as statewide reform efforts have proved elusive in states like New York, Colorado, and Texas.

### A. Summary and Typology

As the foregoing Part suggested, the types of reforms that have been adopted take several common forms. The most common type of reform relates to permitting Accessory Dwelling Units (ADUs). These are units typically co-located on the same parcel as a primary housing unit, but much smaller, between 600 and 1,000 square feet. They are sometimes called “granny flats” or in-law suites.<sup>186</sup> Many municipalities have adopted such reforms, including, including Denver, New Haven, Jacksonville, Gainesville, Atlanta, Boise, Carmel, Louisville, Lexington, Portland, Ann Arbor, Minneapolis, Kansas City, Charlotte, Philadelphia, Rapid Falls, Draper, Salt Lake City, Burlington, Laramie, Seattle, Tacoma, Bellingham, Madison, Everett, Yakima and Tukwila.<sup>187</sup> Moreover, between eight and 10 states, plus the District of Columbia, have also explicitly promulgated ADU laws.<sup>188</sup> Allowing ADUs does not really solve most of the problems caused by exclusionary zoning, but it does loosen the rigidity of exclusionary codes and helps address some of the problems that restrictive zoning creates. It helps expand available housing units and produces some more affordable housing stock. In California, annual permits for ADUs have increased tenfold between 2016 and 2021 to nearly 20,000 based upon a series of meaningful reforms in that period.<sup>189</sup>

Another prominent type of reform is to ease or eliminate parking minimums, a requirement that all new developments feature parking, usually at a certain ratio for every housing unit.<sup>190</sup> Berkeley, for example, took that

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<sup>186</sup> Span, *supra* note 108.

<sup>187</sup> Joshua Cantong et al., *Zoning Reform Tracker*, OTHERING & BELONGING INST. (Mar. 15, 2023), <https://belonging.berkeley.edu/zoning-reform-tracker>. This tracker was created at my direction, and I have relied upon this database to inform my understanding of extant municipal reforms. I recommend this tracker to the attention of any reader interested in reading more about municipal reforms or tracking future reforms.

<sup>188</sup> DESEGREGATE CONN., *supra* note 50; see Span, *supra* note 108.

<sup>189</sup> See M. Nolan Gray, *The Housing Revolution Is Coming*, ATL. (Oct. 5, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/california-accessory-dwelling-units-legalization-yimby/671648/>; see also BILL FULTON ET AL., TERNER CTR. FOR HOUS. INNOVATION, NEW PATHWAYS TO ENCOURAGE HOUSING PRODUCTION: A REVIEW OF CALIFORNIA’S RECENT HOUSING LEGISLATION 7 (2023).

<sup>190</sup> See Catie Gould, *Shifting Gears: Parking Reform Gains Traction*, PUB. SQUARE (Nov. 28, 2022), <https://t.co/rh6Kq2Bii0>.

step in 2022.<sup>191</sup> Anchorage followed suit later that year.<sup>192</sup> Four states have abolished parking minimums.<sup>193</sup> Parking reforms allow developers to design for greater density than otherwise. Although most of these reforms simply ease parking requirements, especially in commercial or historical districts, about 20% eliminate or abolish them altogether.<sup>194</sup>

A third type of reform is known as “Transit-Oriented Development” (TOD) reform. The basic idea is to leverage public investments in local infrastructure and transit by requiring localities to permit more housing development in places proximate to transit, such as light-rail and subway systems. The idea here is that the substantial public investment in such infrastructure justifies countering the preferences of local residences for less development or the status quo. A variety of reforms take this approach, including those adopted in Los Angeles, Denver, Chicago, Draper, and approaches that failed, including SB 827.

A fourth type of reform is “plex” reform. This is an attempt to essentially loosen the most restrictive forms of zoning by automatically allowing multiple units per lot or parcel. Plex-reforms allow a single-unit parcel to be subdivided into a number of units, typically 2 to 4, but sometimes more, such as 6.<sup>195</sup> This is the approach taken in Minneapolis, Portland, Berkeley, Charlottesville, Louisville, Boise, Sacramento, San Jose, and Atlanta, although it is often highly controversial, as the rejected proposal in San Francisco illustrates.<sup>196</sup> California’s SB 9 embodies a gentle version of this approach.

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<sup>191</sup> See Berkeleyside Staff, *Berkeley Was First City in Bay Area to Explore Ending Parking Minimums*, BERKELEYSIDE (Sept. 23, 2022, 10:46 AM), <https://www.berkeleyside.org/2022/09/23/berkeley-parking-minimums>.

<sup>192</sup> See Catie Gould, *Anchorage Assembly Unites to End Parking Mandates*, SIGHTLINE INST. (Nov. 23, 2022, 6:12 PM), <https://www.sightline.org/2022/11/23/anchorage-assembly-unites-to-end-parking-mandates/>.

<sup>193</sup> DESEGREGATE CONNECTICUT, *supra* note 50.

<sup>194</sup> *Mandates Map*, PARKING REFORM NETWORK, <https://parkingreform.org/resources/mandates-map/> (last visited May 14, 2024).

<sup>195</sup> See Wesley Jenkins, *America Has a Housing Shortage. Zoning Change Near Transit Could Help.*, URB. INST. (June 2023), <https://apps.urban.org/features/affordable-housing-shortage-and-zoning/> (I take a broader view, and regard “plex” reform as any that allows greater density with no clearly defined upper bound, although some scholars now differentiate between “plex reforms” as 2-4 units, and “missing middle,” as permitting 2-12 per parcel or combined parcels.); *see also* MISSING MIDDLE HOUSING, <https://missingmiddlehousing.com/> (last visited May 14, 2024) (Even more fine-grain distinctions of this sort have been made, and perhaps the most widely circulated visual of this difference is the one created by Opticos Design).

<sup>196</sup> See generally Joe Kukura, *Breed Vetoes Fourplex Legislation, Says It Would ‘Set Back Housing Production’*, SFIST (July 21, 2022), <https://sfist.com/2022/07/21/breed-vetoes-fourplex-legislation-says-it-would-set-back-housing-production/>; *see generally* J.D. Morris, *S.F. Housing Crisis: New Fourplex Law Passes – with Support from Breed and YIMBYs*, S.F.

These reforms do not exhaust the possibilities for zoning reform, but they embody the main strategies that have been adopted into law. More comprehensive or direct approaches have proved less successful, so far.

Related land-use reforms, such as streamlining bills, are also aimed at the same goals of ameliorating the housing crisis, increasing the production of housing units, density, and so forth. Streamlining bills, for example, are designed to reduce the barriers and roadblocks that review processes and public input often create, offering opportunities for angry neighbors, especially so-called NIMBYs, to organize and block developments they dislike. As an example, one of the 2023 bills adopted in the Montana housing reform package, Senate Bill 407, eliminates local design review by volunteer boards, and therefore “streamlines” the local permitting process a bit.<sup>197</sup> These bills ease production, but don’t necessarily reform zoning directly.

There remain more options to reform than those that have been currently adopted and reforms can, and should, be considered as well to discretionary approval processes, adjustments to zoning authority, environmental regulations, and other stringent regulations, among other possibilities.<sup>198</sup> For example, another reform that may prove important in the future is waiving or abbreviating certain environmental reviews typically associated with major development. Environmental reviews can be used as a tactic by opponents of development to impede or raise the costs of a particular project.<sup>199</sup> In August 2023, the California legislature unanimously passed, and the governor subsequently signed, a bill that would make it harder for local residents to use California’s environmental law to block certain housing developments while also easing the construction of student-based housing on university campuses.<sup>200</sup> Lawsuits against UC Berkeley’s housing plan were the impetus for this law.

Similarly, in 2023, a court struck down the landmark Minneapolis 2040 Plan that was adopted in 2018 to reform municipal zoning in a suit brought by

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CHRON. (Oct. 18, 2022, 7:09 PM), <https://www.sfchronicle.com/sf/article/S-F-housing-crisis-New-fourplex-law-poised-to-17515571.php>.

<sup>197</sup> See S.B. 407, 68th Leg., 2023 Jan. Reg. Sess. (Mont. 2023).

<sup>198</sup> See SALIM FURTH, MERCATUS CTR. GEO. MASON UNIV., HOUSING REFORM IN THE STATES: A MENU OF OPTIONS 2-4 (2021), [https://www.mercatus.org/system/files/furth\\_-\\_policy\\_brief\\_-\\_housing\\_reform\\_in\\_the\\_states\\_a\\_menu\\_of\\_options\\_-\\_v1.pdf](https://www.mercatus.org/system/files/furth_-_policy_brief_-_housing_reform_in_the_states_a_menu_of_options_-_v1.pdf).

<sup>199</sup> Jennifer Hernandez, California Environmental Quality Act Lawsuits and California’s Housing Crisis, 24 HASTINGS ENV’T L.J. 21 (2018).

<sup>200</sup> Press Release, Jesse Arreguin, Mayor, City of Sacramento, California, “People Are Not Pollution” - Governor Newsom Signs AB 1307 Into Law (Sept. 8, 2023), <https://www.jessearreguin.com/press-releases/2023/9/29/people-are-not-pollution-governor-newsom-signs-ab-1307-into-law>; see also California Environmental Quality Act, 2023 Cal. Stat. 1307.

environmental groups.<sup>201</sup> Although the city appealed, the Minnesota state legislature signaled that it would take steps to clarify that certain environmental reviews should not be used to thwart density.<sup>202</sup>

Thus far, ADU laws are the most common form of zoning reform. Deeper and broader reforms tend to be either narrowly restricted to transit-oriented areas or impose only modest increases in density, such as SB 9, without necessarily reaching the so-called “missing middle.” From this vantage point, we are closer to the beginning rather than the end of the reform wave capable of producing the significant changes needed to solve the problems described in Part II.

### *B. A Historical Review of Fair Housing Laws*

As an illuminating point of comparison, it may be helpful to consider the pace and trajectory of reform on another related housing policy matter: that of open housing movement and fair housing legislation. The parallels are striking but can best be appreciated by chronicling the pace and pattern of reform on that issue. The juxtaposition may offer some important lessons and intriguing insights into what the future of zoning reform portends.

As Black workers migrated to northern and western cities during the Great Migration—especially during the war mobilization effort, but also to work in northern factories and cities like Detroit and Chicago—they frequently encountered formal and informal barriers to housing.<sup>203</sup> By the mid-twentieth century, virtually every major northern city was fully racially residentially segregated.<sup>204</sup> This was in contrast to southern cities, which had so fully segregated every other facet of life that residential segregation was mostly superfluous and inconvenient.

In the face of these barriers, civil rights organizations began demanding “open housing” laws, laws that would allow Black workers to reside in white neighborhoods, rather than be confined to often overcrowded Black neighborhoods. NAACP affiliates and other civil rights organizations began pressing for open housing legislation in northern cities, even convincing

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<sup>201</sup> *Minneapolis appeals recent ruling that struck down 2040 Plan*, CBS NEWS (Sept. 15, 2023, 3:47 PM), <https://www.cbsnews.com/minnesota/news/minneapolis-appeals-recent-ruling-striking-down-2040-plan/>.

<sup>202</sup> Peter Callaghan, *Are Minnesota environmental laws 'being used against the environment?' Why legislators want to end Minneapolis 2040 lawsuit*, MINNPOST (Feb. 28, 2024), <https://www.minnpost.com/state-government/2024/02/are-minnesota-environmental-laws-being-used-against-the-environment-why-legislators-want-to-end-minneapolis-2040-lawsuit/>.

<sup>203</sup> See generally THOMAS J. SUGRUE, *THE ORIGIN OF URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (Princeton Univ. Press, 1996).

<sup>204</sup> DOUGLAS S. MASSEY, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 42, 45–49, 57* (Harv. Univ. Press 1993) (ebook).

municipal authorities to recommend or introduce ordinances to that effect. But such legislation proved extremely unpopular and the opposition well-organized. Although cities like Seattle, Minneapolis, and others debated such legislation, it was an uphill battle to persuade municipal leaders to adopt them into law.

In Minneapolis, the NAACP and the Urban League organized and pressed for local and state open housing laws in the early- and mid-1950s. In St. Paul, the NAACP formed a committee to support an open housing ordinance in 1956. But in 1957, the Minneapolis City Attorney Charles A. Sawyer declared such laws unconstitutional because it would interfere with property rights.<sup>205</sup> Two years later, the St. Paul City attorney reached the same conclusion.<sup>206</sup>

Similar objections arose in Seattle. The NAACP called upon the city to adopt an open housing ordinance in 1961, the city's general counsel raised doubts about the legality of such a law and concerns over enforceability.<sup>207</sup> As a consequence, the city council declined to adopt such a law. Although an advisory committee recommended the adoption of such an ordinance a year later, the city only adopted such an ordinance in 1963 in response to organized protests and acts of civil disobedience.<sup>208</sup>

Despite such concerns, New York City is the first municipality to adopt an open housing ordinance, which it did in 1957, to go into effect in 1958.<sup>209</sup> This ordinance prohibited racial discrimination in sale, rental or leasing of housing, although it contained the so-called "Mrs. Murphy" exception that allowed a live-in landlord to discriminate.

Although doubts over constitutionality and administrative enforcement hampered these efforts, the main barriers were more political. More typical of the challenges faced by open housing advocates was the case of Milwaukee. A Black alderwoman introduced an open housing proposal in 1962, but the so-called "Philips Housing Ordinance" was defeated by an overwhelming 18-1 vote.<sup>210</sup> Milwaukee only ended up adopting a fair housing ordinance after intense demonstrations and the Congress had adopted a federal law in late 1968, making the local ordinance somewhat redundant. Instead, Madison was the first city in Wisconsin to adopt a fair housing

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<sup>205</sup> Jessica Carter, *Open Occupancy and the "Racial Problem"*, PUB. HIST. 35W (Dec. 11, 2020), <https://humantoll35w.org/uncategorized/open-occupancy-and-the-racial-problem/#easy-footnote-bottom-5-784>.

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

<sup>207</sup> Anne Frantilla, *History of the Seattle Open Housing Campaign, 1959-1968*, BLACK ART STORY, <https://blackartstory.org/2022/08/15/history-of-the-seattle-open-housing-campaign-1959-1968/>.

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

<sup>209</sup> See William J. Collins, *Fair Housing Laws*, ECON. HIST. ASS'N (Feb. 10, 2008), <https://eh.net/encyclopedia/fair-housing-laws/>.

<sup>210</sup> *Open Housing*, UWM: MARCH ON MILWAUKEE, <https://uwm.edu/marchonmilwaukee/keyterms/open-housing/> (last visited May 14, 2024).



ordinance, which it did in 1963.<sup>211</sup> This followed, however, an effort in 1962 which failed, based upon the recommendation of a human rights commission.

The Berkeley City Council adopted an open housing ordinance in 1963.<sup>212</sup> The organized opposition was so swift that a ballot initiative overturning the ordinance was adopted just a few months later by will of the voters.<sup>213</sup> This presaged a similar statewide ballot initiative that would overturn California's first major fair housing statute a year later.

In places like Akron, the opponents of open housing laws were more proactive: they adopted a city charter amendment that would have required majority approval of the voters before a fair housing law could go into effect, and thereby hamstrung local politicians from trying to pass such an ordinance.<sup>214</sup> This effort would ultimately result in a convoluted journey to the United States Supreme Court.<sup>215</sup>

The first *state* to attempt to regulate housing discrimination was California, although the first iteration was notably weak. The Unruh Civil Rights Act of 1959 only protected California residents from discrimination by businesses, including property managers and hotel and motel management.<sup>216</sup> It was followed in 1963 by the California Fair Housing Act of 1963, also known as the Rumford Act.<sup>217</sup> This law, however, was unpopular and a statewide ballot initiative (Proposition 14) sponsored by the California Real Estate Association to repeal it was adopted by voters in 1964.<sup>218</sup> Only a California Supreme Court decision, which overturned that referenda, restored the Rumford Act until the issue was mooted by federal law.<sup>219</sup>

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<sup>211</sup> Stu Levitan, *Madison Made Civil Rights History in 1963 by Adopting the First Fair Housing Ordinance in the State*, MADISON MAG. (Jan. 29, 2021), <https://www.channel3000.com/madison-made-civil-rights-history-in-1963-by-adopting-the-first-fair-housing-ordinance-in-the-state/>.

<sup>212</sup> Douglas Henry Daniels, *Berkeley Apartheid: Unfair Housing in a University Town*, 3 U.C. SANTA BARBARA HIST. RSCH. 321, 332-33 (2013).

<sup>213</sup> See KRON-TV, *Assignment Four - Segregation Western Style*, DIVA S.F. UNIV., <https://diva.sfsu.edu/collections/sfbatv/bundles/223879> (last visited May 14, 2024).

<sup>214</sup> See *Hunter v. Erickson*, 393 U.S. 385, 387 (1969).

<sup>215</sup> See *generally id.* (reversing the Ohio Supreme Court's decision and finding that that the city charter amendment constituted a denial of equal protection of the laws under the Fourteenth Amendment).

<sup>216</sup> See *Unruh Civil Rights Act*, CA DEP'T REHAB., <https://www.dor.ca.gov/Home/UnruhCivilRightsAct> (last visited May 14, 2024).

<sup>217</sup> See Herbert G. Ruffin II, *The California Fair Housing Act [The Rumford Act] (1963-1968)*, BLACKPAST (June 5, 2011), <https://www.blackpast.org/african-american-history/california-fair-housing-act-rumford-act-1963-1968/>.

<sup>218</sup> See *generally* Arthur Wayne Hartgraves, *A Study of Proposition 14 of the 1964 California General Election (June 1967)* (M.A. thesis, University of the Pacific) (on file with the University of the Pacific Scholarly Commons) (discussing the passage and nullification of Proposition 14).

<sup>219</sup> See *Mulkey v. Reitman*, 413 P.2d 825, 834-36 (Cal. 1966).

Although the city leaders in the Minneapolis region resisted adopting open housing laws, the state legislature appointed a special commission in 1957 to consider the matter at the state level. The commissioners reviewed various ordinances, including the New York City law, and ultimately recommended the state adopt something similar. This resulted in the Fair Housing Law of 1962.<sup>220</sup> Unfortunately, it had broad exceptions which dramatically weakened its effectiveness. In addition to the Mrs. Murphy exception, it also excepted any single-family dwelling that was not federally backed or subsidized.<sup>221</sup>

Oregon adopted a law similar to the Rumford Act in 1959.<sup>222</sup> Local organizing in Oregon had been ongoing for a better part of a decade. A City Commission on Intergroup Relations and the Urban League had organized conferences on housing discrimination in 1958 and attempted to educate public leaders and the general public on the myths which underpinned housing discrimination.<sup>223</sup> It was not uncommon for local organizing and even the recommendations of human rights or civil rights committees to precede these legislative efforts.

After years of advocacy, 1959 was a watershed year for open housing laws at the state level. Not counting California, four states adopted open housing statutes: Colorado, Connecticut, Massachusetts, and Oregon. Four more states followed suit in 1961: New York, New Jersey, New Hampshire, and Pennsylvania. None of these laws, however, encompassed owner-occupied housing and they all were adopted in non-election years. The New York state law, however, applied to both public and private housing.<sup>224</sup>

The first state law to prohibit private discrimination in owner-occupied housing was Alaska's 1962 fair housing law (just three years after it became a state).<sup>225</sup> This proved to be a turning point. From that point on, most open housing statutes would cover owner-occupied housing.

As in New York and California, state-level efforts followed municipal reforms. Building on the success in Madison, the Wisconsin legislature adopted an open housing law in 1965.<sup>226</sup> Significant was the support of the Realtors Association, which did so only because the law was weakened so that violators only paid a \$10-\$200 fine, and it was also made impermissible to use

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<sup>220</sup> Carter, *supra* note 204.

<sup>221</sup> *See id.*

<sup>222</sup> See William J. Collins, *The Political Economy of State Fair Housing Laws Before 1968*, 30 SOC. SCI. HIST. 15, 18 (2006).

<sup>223</sup> Leanne Serbulo, *Small Steps on the Long Journey to Equality: A Timeline of Post-Legislation Civil Rights Struggles in Portland*, 119 OR. HIST. Q. 376, 379 (2018).

<sup>224</sup> See Letitia James, *Fair Housing*, N.Y. STATE ATT'Y GEN., <https://ag.ny.gov/civil-rights/fair-housing> (last visited May 14, 2024).

<sup>225</sup> William J. Collins, *The Housing Market Impact of State-Level Anti-Discrimination Laws, 1960-1970*, at 35 (Nat'l Bureau of Econ. Rsch., Working Paper No. 9562, 2003).

<sup>226</sup> WIS. STAT. ANN. § 101.222 (1989).

testers to prove discrimination. This was an example of co-opting a bill to water it down and undermine its effectiveness and enforcement.

After the success of the Civil Rights Act of 1964 and Voting Rights Act of 1965, Dr. Martin Luther King, Jr. and the Southern Christian Leadership Conference turned their attention, in 1966 and 1967, to housing justice.<sup>227</sup> King led a series of open-housing marches in Chicago, accompanied by nationally broadcasted images of white outrage, which finally put the issue of fair housing firmly on the national political agenda.<sup>228</sup> Despite the concerted efforts of the Civil Rights Movement, not all states adopted such laws even after considering them in this period. Nebraska's legislature rejected a fair housing law by a vote of 28 to 21 in 1967.<sup>229</sup>

Nonetheless, by 1968, twenty-two states had adopted statewide fair housing laws, overcoming entrenched opposition and general public unpopularity. Despite the many defeats they were a testament to the success of the open housing movement and its strategy.<sup>230</sup> Table 1 summarizes the municipal ordinances and state laws designed to effectuate open housing prior to the adoption of the 1968 federal Fair Housing Act, the capstone to all of

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<sup>227</sup> Martin Luther King, Jr., *Where Do We Go From Here?*, address before the Southern Christian Leadership Conference, in THE MARTIN LUTHER, JR. RESEARCH AND EDUCATION INSTITUTE (Aug. 16, 1967), <https://kinginstitute.stanford.edu/where-do-we-go-here>.

<sup>228</sup> THE MARTIN LUTHER, JR. RESEARCH AND EDUCATION INSTITUTE, CHICAGO CAMPAIGN, <https://kinginstitute.stanford.edu/chicago-campaign>.

<sup>229</sup> Dirk Chatelain, *Slumlords, Ghettos, Segregation: Housing Issues Split Nebraska Lawmakers – and Landed at an NBA Star's Doorstep*, OMAHA WORLD-HERALD (July 8, 2019), [https://omaha.com/sports/slumlords-ghettos-segregation-housing-issues-split-nebraska-lawmakers-and-landed-at-an-nba-stars-doorstep/article\\_395554e9-c217-5a01-8439-f993b3066090.html](https://omaha.com/sports/slumlords-ghettos-segregation-housing-issues-split-nebraska-lawmakers-and-landed-at-an-nba-stars-doorstep/article_395554e9-c217-5a01-8439-f993b3066090.html).

<sup>230</sup> Collins, *supra* note 208, at 16.

these efforts.<sup>231</sup> In the same period, 32 cities had adopted open housing ordinances.<sup>232</sup>

*Table 1 - Open Housing Laws Adopted Prior to the FFHA by Year*

STATE STATUTES	MUNICIPAL ORDINANCES
Colorado (1959)	New York City, NY (1958)
Connecticut (1959)	Pittsburgh, PA (1959)
Massachusetts (1959)	Toledo, OH (1961)
Oregon (1959)	Oberlin, OH (1961)
New Hampshire (1961)	Berkeley, CA (1963)
New Jersey (1961)	Schenectady, NY (1963)
New York (1961)	Philadelphia, PA (1963)
Pennsylvania (1961)	Albuquerque, NM (1963)
Alaska (1962)	New London, CT (1963)
Minnesota (1962)	Yellow Springs, OH (1963)
California (1963)	Erie, PA (1963)

<sup>231</sup> *Id.* at 19; NAT'L PARK SERV., U.S. DEP'T INTERIOR & NAT'L HIST. LANDMARKS PROGRAM, CIVIL RIGHTS IN AMERICA: RACIAL DISCRIMINATION IN HOUSING 59–64 (2021); INTERGROUP RELATIONS SERV. & OFF. GEN. COUNS., HOUS. & HOME FIN. AGENCY, FAIR HOUSING LAWS . . . . SUMMARIES AND TEXT OF STATE AND MUNICIPAL LAWS 240–352 (1964); see Jesse Barber, *Redlining: The History of Berkeley's Segregated Neighborhoods*, BERKELEYSIDE (Sept. 20, 2018, 1:36 PM), <https://www.berkeleyside.org/2018/09/20/redlining-the-history-of-berkeleys-segregated-neighborhoods>; see also Steven L. Beshear et al., *Open Housing Meets My Old Kentucky Home: A Study of Open Housing with Special Attention to Implications for Kentucky*, 56 Ky. L.J. 140, 141–42, 188 n.209 (1967); see also HARRY FLEISCHMAN, THE CIVIL RIGHTS STORY: A YEAR'S REVIEW (1964); see also *Des Moines Council Votes a Fair-Housing Ordinance*, N.Y. TIMES (June 2, 1964), <https://www.nytimes.com/1964/06/02/archives/des-moines-council-votes-a-fairhousing-ordinance.html>; see also *Historical Injustice in the Urban Environment: The Ecological Implications of Residential Segregation in Indianapolis*, IND. LEGAL ARCHIVE: CASE STUDY, <https://www.indianalegalarchive.com/ej-case-study> (last visited May 14, 2024); see generally *Hunter v. Erickson*, 393 U.S. 385, 386 (1969); see generally *McNeil v. Springfield*, 658 F. Supp. 1015, 1023 (C.D. Ill. 1987).

<sup>232</sup> *Housing and Urban Development Legislation of 1968: Hearing on S. 91-619 Before the Subcomm. On Hous. & Urb. Affs. Comm. On Banking & Currency, 90th Cong. 202 (1968).*

Connecticut (v. 2) (1963)	Chicago, IL (1963)
Massachusetts (v. 2) (1963)	Tacoma, WA (1963)
New York (v. 2) (1963)	Seattle, WA (1963)
Michigan (1964)	Madison, WI (1963)
Colorado (v. 2) (1965)	Grand Rapids, MI (1963)
Indiana (1965)	Peoria, IL (1963)
Maine (1965)	District of Columbia (1964)
New Hampshire (v. 2) (1965)	St. Louis, MO (1964)
Ohio (1965)	King County, Washington (1964)
Rhode Island (1965)	Beloit, WI (1964)
Wisconsin (1965)	New Haven, CT (1964)
New Jersey (v. 2) (1966)	Des Moines, IA (1964)
Hawaii (1967)	Indianapolis, IN (1964)
Iowa (1967)	Akron, OH (1964)
Maryland (1967)	St. Paul, MN (1964)
Minnesota (v. 2) (1967)	Wichita, KS (1964)
Vermont (1967)	Gary, IN (1965)
Washington (1967)	Oak Ridge, TN (1965)
Kentucky (1968)	Louisville, KY (1965)
	Elyria, OH (1965)
	Ann Arbor, MI (1965)
	Springfield, IL (1966)
	Tucson, AZ (1966)

Compiling these laws by year yields the following chart, displayed in Table 2, which shows the pace of reform at the state and municipal level from 1958 to 1968.

*Table 2: Fair Housing Statutes and Ordinances by Year, Pre-FFHA*

YEAR	STATE STATUTES	MUNICIPAL ORDINANCES
1958	0	1
1959	4	1
1960	0	0
1961	4	2
1962	2	0
1963	1 (+ 3)*	12
1964	1	10
1965	6 (+1)	5
1966	(+1)	2
1967	5 (+1)	
1968 (before April)	1	

*\*The (+1) indicates states that revised or strengthen their laws)*

Table 2 reveals some interesting observations about fair housing reform around the country. The highwater mark for reform at the municipal level is 1963-64, whereafter reform trails off, presumably because of the efforts at the state and federal levels, which supersede and override local laws. At the state level, the highwater mark is 1965. This pattern is suggestive about the pace of other controversial policy reforms and regulations, especially that of zoning reform.

### C. Projecting the Future of Zoning Reform

This review of the history of open housing movement and its legislative successes at the local, state and federal level with fair housing laws suggests a few dynamics that are likely to be reflected in the pattern and pace of zoning reform, and which can already be observed. Although the particularities are quite different, there are many striking similarities, not least of which is the context of housing policy and the generally intense and well-organized political opposition to reform efforts.

First, it shows that although reform originates at the local level, as a proof of concept and to resolve many of the fundamental regulatory and administrative questions. One of the lessons of the history of fair housing laws is that the center of energy can quickly shift to statewide reform after a critical mass of local ordinances have been adopted. Reformers realize that statewide regulations are needed to address these problems at a meaningful scale. Individual municipal reforms—even in large cities—are too limited to overcome regional, statewide or even national problems that these reform movements aimed at solving. Nonetheless, the successful adoption of local reforms demonstrates the political strength of the pro-housing movement and help keep the issue on the political agenda while educating the public.

Although there are a notable municipal zoning reform successes for the pro-housing movement, they may not be as comprehensive or strong enough to build the political will to move this issue forward at the state level. A telltale signal of progress will be when the legislative focus of the pro-housing movement shifts decisively from the local to the state level. This inflection point will be an important signal of the strength of the pro-housing movement. So far, local zoning reform efforts appear to have more legislative energy and activity than adopted or debated state-level reform, but that could change at any point, and we may be on the verge of that shift already, based upon the reform achievements of 2023 and those that could be adopted into law in 2024.

Second, this history shows that the earliest attempts to address the problem are narrow and tepid, both much weaker in terms of both coverage or reach and enforcement mechanisms. Initial fair housing ordinances only covered public housing or housing subsidized with public funds and grants, and then gradually reached into private housing, but with critical loopholes.<sup>233</sup>

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<sup>233</sup> For example, the Washington State legislature passed the Omnibus Civil Rights Act in 1957, which outlawed housing discrimination in home sales as long as loans from a Federal or state agency remained unpaid or while there was commitment for such loans. This is about as narrow as a protection can be devised, which is why it is not listed in the tables above. See (1957) WASHINGTON (STATE) OMNIBUS CIVIL RIGHTS ACT OF 1957., BLACKPAST.ORG, <https://www.blackpast.org/african-american-history/washington-state-omnibus-civil-rights-act-1957/>.

Many states revised and strengthened their fair housing laws in order to expand coverage and remove loopholes such as the Mrs. Murphy exception. A similar dynamic is observable with zoning reform. Localities are tiptoeing into this issue with less impactful and dramatic reforms, and the statewide reforms that have passed are often watered down or less comprehensive, like the shift from SB 827 and SB 50 to SB 9 and AB 2011 in California. We should expect stronger bills to follow weaker achievements.

Third, we saw that the earliest fair housing laws had the weakest enforcement architecture. Stronger enforcement mechanisms were required to improve compliance. Right now, states seem reluctant to impose strong mandates on localities for fear of local backlash. At the federal level, the main proposals are carrot-oriented incentives rather than punishing sticks. Because zoning is typically a matter of local policy prerogative, states may be more hesitant to intrude upon this prerogative without localities taking the lead first.

Fourth, and perhaps most importantly, progress was not always linear. Not only did reforms come in waves (4 states in 1959 and 1961, but no states adopted open housing laws in 1960—possibly because it was an election year), but there was also significant backlash and well-organized campaign to undermine these laws. Many municipal and statewide laws were overturned or weakened by voters or courts, as occurred in Berkeley, Akron, and even the state of California's Rumford Act.

We can expect that the stronger laws will generate and foment their own organized backlash, including referenda or bills to override them. In California, some local groups planned—but abandoned—a ballot initiative, called "Our Neighborhood Voices," that would have overturned reforms.<sup>234</sup> It was withdrawn, but could return if stronger laws are adopted. Reforms in some cities are already under threat, and others have already been reversed, such as Gainesville's, as previously noted.<sup>235</sup> A neighborhood group filed a lawsuit to prevent implementation of one reform out of Arlington, Virginia, a Washington D.C. suburb.<sup>236</sup> And the landmark Minneapolis reforms were held up with a similar environmental suit.<sup>237</sup> More reversals could occur.

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<sup>234</sup> James Brasuell, *Ballot Initiative Could Overturn California's Zoning Reforms*, PLANETIZEN (Feb. 15, 2022), <https://www.planetizen.com/blogs/116210-ballot-initiative-could-overturn-californias-zoning-reforms>.

<sup>235</sup> Patrick Spauster, *How Backlash Reversed a Florida City's Reforms to Allow Denser Housing*, BLOOMBERG: CITYLAB (Feb. 2, 2023), <https://www.bloomberg.com/news/articles/2023-02-02/how-gainesville-s-yimby-zoning-reform-was-undone>.

<sup>236</sup> See Teo Armus, *Residents Sue Arlington County over 'Missing Middle' Zoning Change*, WASH. POST (Apr. 21, 2023), <https://www.washingtonpost.com/dc-md-va/2023/04/21/arlington-missing-middle-lawsuit-zoning/>.

<sup>237</sup> See Christian Britschgi, *Judge Rules Minneapolis' Zoning Reforms Are Getting Too Much Housing Built*, REASON (Sept. 7, 2023, 9:41 AM), <https://reason.com/2023/09/07/judge-rules-minneapolis-zoning-reforms-are-getting-too-much-housing-built/>.



The federal Fair Housing Act came only when nearly half of the states had their own fair housing laws on the books. We can expect that significant federal zoning reform is a long way off, but if someday there is a critical mass of state reforms, then a federal law is not only likely, it would be the logical conclusion of this problem. In the meantime, we can expect federal lawmakers to continue to use incentive-laden policies or hortatory guidance to move reform forward.<sup>238</sup>

There are, of course, significant differences between the open housing movement and the pro-housing movement, and I am not arguing that the zoning reform movement and its legislative successes will follow the same or even a similar pattern to that of the open housing movement and the trajectory of fair housing law. Perhaps the most notable difference is that the real estate industry was deeply opposed to fair housing laws, but has warmed to YIMBY reforms and is largely aligned with the pro-housing movement.

There are, however, striking similarities, not the least of which is the same context, housing, and a similar set of layered relations spanning local to federal government, as well as dynamics that pit racial and economic inclusion against privilege and property rights. The dynamics observed in the zoning reform efforts described in Part III of this Article suggest further parallels. In both cases, academics and advocates tend to favor reform, while the general public seems skeptical, and certain well-organized lobbies are deeply opposed.

Studies show that there remains both misunderstanding of the effects of restrictive zoning and opposition to zoning reform, just as open housing and fair housing ordinances were far from popular (as the ballot initiative reversals demonstrate).<sup>239</sup> Making the case for zoning reform is painstaking and requires cross-coalition building and mass public education.<sup>240</sup>

The reason for the comparison, however, is to illustrate the challenges that reform movements originating at the local level have, in terms of surviving not only court challenges but also popular referenda and ballot

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<sup>238</sup> See e.g. Press Release, Joseph R. Biden, President of the United States, FACT SHEET: Biden-Harris Administration Announces New Actions to Boost Housing Supply and Lower Housing Costs (Feb. 29, 2024) <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/29/fact-sheet-biden-harris-administration-announces-new-actions-to-boost-housing-supply-and-lower-housing-costs/>; see also Jim Tankersley and Conor Dougherty, *Biden Suggests a Bigger Federal Role to Reduce Housing Costs*, N.Y. Times (Mar. 21, 2024), <https://www.nytimes.com/2024/03/21/us/politics/biden-housing-costs.html>.  
<sup>239</sup> See Ilya Somin, *NIMBYism and Economic Ignorance*, REASON MAG.: VOLOKH CONSPIRACY (Nov. 13, 2022, 4:25 PM), <https://reason.com/volokh/2022/11/13/nimbyism-and-economic-ignorance/>.

<sup>240</sup> See Michael Andersen, Sightline Inst., *Eight Ingredients for a State-Level Zoning Reform: Lessons from Oregon's House Bill 2001*, at 8–11 (Lincoln Inst. of Land Pol'y, Working Paper No. WP21MA2, 2021), <https://www.lincolninst.edu/publications/working-papers/eight-ingredients-state-level-zoning-reform>.

initiatives designed to overturn, undermine or impede them, and the broader interplay of progress and organized efforts to undermine or reverse progress in the public policy arena. It is this sense—the march of progress and the countervailing challenges and counter-currents—that is illuminating and perhaps illustrative of the likely future of zoning policy reform.

### CONCLUSION

If the history of fair housing law is any indication, the era of zoning reform is just emerging out of its early stages. Policy reform achievements in a number of municipalities and a handful states should not be a source of unwarranted optimism and conceal the long road ahead. The reforms that have been adopted are not nearly as strong as will be needed to overcome the harmful effects of restrictive and exclusionary zoning and begin to solve the manifold housing crises we face. And stronger reforms will generate stronger opposition.

This Article has hopefully helped illustrate not only the types of reforms that have been adopted and their underlying bases, but also the modalities of reform. It has shown which types of reforms are likely to prevail in the short-run, and which are likely to be a harder push, and more likely to sustain reversals and setbacks. By juxtaposing the pattern and pace of zoning reform efforts with the fair and open housing movement of the 1950s and 60s, we can see just how many challenges and roadblocks await, and what it might take to overcome them.