JUDICIAL PRE-EMPTION AND ADEQUATE HOUSING SUPPLY IN THE ABSENCE OF LEGISLATIVE ACTION: A MOUNT LAUREL DOCTRINE FOR THE TWENTY-FIRST CENTURY

HARRISON FREGEAU

Table of Contents

I. Statement of the Problem

Housing prices are rising in the United States, with the average price of a house sold in the U.S. increasing from $259,700 at the end of Q4 in 2011 to $473,000 at the end of Q3 2021.[1] Similarly, rental rates in American cities have increased by 85% between 2001 and 2021, far outpacing the 55% increase in prices overall during that time.[2] This rapid rate of increase is only more extreme in major metropolitan areas such as New York City, New York, and San Francisco, California.[3] However, what was once thought of as a problem largely confined to major urban areas, has grown increasingly nationalized.[4] This has coincided with a notable fall in the rental vacancy rate in the Unites States.[5] Perhaps it is unsurprising then, that rental costs now generally exceed the funds many families have available to pay. Today's average renter would

---

[1] FED. RSRV. BANK OF SAINT LOUIS, AVERAGE SALES PRICE OF HOUSES SOLD FOR THE UNITED STATES, 1963–2021 (2022), https://fred.stlouisfed.org/series/ASPUS (displaying a graph that charts housing prices from 1963 through 2021 on quarterly, semiannual, and annual basis).

[2] Fed. Rsrv. Bank of Saint Louis, *Rents still rising with regional riffs,* FRED BLOG (Aug. 23, 2021), https://fredblog.stlouisfed.org/2021/08/rents-still-rising-with-regional-riffs/?utm_source=series_page&utm_medium=related_content&utm_term=related_resources&utm_campaign=fredblog ("Average rent in U.S. cities has risen by 85% in just the past 20 years. That's 30 percentage points above the 55% inflation that's occurred between then and now (July 2021, at the time of this writing).").

[3] *See* Fed. Rsrv. Bank of Saint Louis, *Is the rent too high?*, FRED BLOG (Apr. 15, 2019), https://fredblog.stlouisfed.org/2019/04/the-climbing-cost-of-renting/?utm_source=series_page&utm_medium=related_content&utm_term=related_resources&utm_campaign=fredblog (observing Consumer Price Index (CPI) for rent of primary residences in the San Francisco and New York City Census Bureau Statistical Areas far exceeds the increase in the CPI for urban areas as a whole).

[4] Emily Badger & Eve Washington, *The Housing Shortage Isn't Just a Coastal Crisis Anymore*, N.Y. TIMES (July 14, 2022), https://www.nytimes.com/2022/07/14/upshot/housing-shortage-us.html (stating the housing shortage has "increasingly become a national one.").

[5] *See* FED. RSRV. BANK OF SAINT LOUIS, RENTAL VACANCY RATE IN THE UNITED STATES, (July 27, 2021). https://fred.stlouisfed.org/series/RRVRUSQ156N (falling from 9.2% in Q2 2011 to 6.2% in Q2 2021).

have to work fifty-three hours per week to afford an average two-bedroom apartment,[6] and nearly half of Americans spend more than 30% of their income on housing.[7] Unsurprisingly, a problem this severe, in a sector this critical to human livelihood, has led to much analysis and many proposed solutions.[8]

Government policy can affect the housing market in a few distinct ways: it can intervene directly in the price of housing units (rent control), it can construct housing directly (public housing), or it can influence private construction of housing units (through zoning and other means). Some states and localities approach the problem from a command-and-control perspective and implement rent control policies designed to halt or slow rent increases.[9] However, far more states bar rent control, than implement it.[10] Perhaps these states incorporate longstanding criticisms of rent control, including that rent control slows new housing construction, disincentivizes routine maintenance, and drives existing housing off the market.[11]

The federal government is also involved in the affordable housing market, both through federal construction of housing[12] and

---

[6] Nat'l Low Income Hous. Coal., *Out of Reach: The High Cost of Housing* 2 (2021) ("As a result, the average renter must work 53 hours per week to afford a modest two-bedroom apartment.").

[7] Joint Ctr. for Hous. Stud. of Harv. U., *The State of the Nation's Housing* 31 (2018), https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf (showcasing Figure 32 on page 31 which displays the percentage of renters with cost burdens, which is almost half of all Americans. In the Note under the Figure, it explains that "cost burden" means paying more than 30% of their income on rent).

[8] *See e.g. id.* at 9–10 (listing many different studies and reports that focused on housing issues).

[9] *See Rent Control Laws by State,* NAT'L MULTIFAMILY HOUS. COUNCIL (Sept. 2, 2020) https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/ (depicting California, Maryland, New York, New Jersey, Maine, D.C., and Oregon as states with rent control laws in place).

[10] *See id.* (describing the thirty states that have pre-empted rent control or pre-empt both rent control and inclusionary zonings).

[11] John W. Willis, *Short History of Rent Control Laws*, 36 CORNELL L. REV. 54, 84–85 (1950) (discussing the most common criticisms of rent control).

[12] MAGGIE MCCARTYCONG. RSCH. SERV., R41654, INTRODUCTION TO PUBLIC HOUSING, (Jan. 3, 2014) https://sgp.fas.org/crs/misc/R41654.pdf (recounting the history of public housing in the United States and the varying levels of federal construction).

federal subsidization of renter-occupied private housing (Section 8) in partnership with local governments.[13] As of 2021, there were nearly one million public housing units in the United States.[14] However, public housing is an unlikely stand-alone solution for sufficiently housing the nation's renters, as the total number of units has declined from its peak of just 1.4 million units in the mid 1990's.[15] This decline has two causes: (1) public housing authorities have demolished pre-existing public housing units without replacing them fully, and (2) Congress has not authorized new units of public housing since the late 1990s.[16] This leaves the U.S. with the same amount of public housing units it had in the early 1970's,[17] despite the fact that the population of the United States grew by 63% between 1970 and 2020.[18]

This leaves us with our third option for government policy to shape the nation's housing supply: influencing private construction,

---

[13] U.S. Dep't of Hous. and Urb. Dev., HOUSING CHOICE VOUCHERS FACT SHEET, https://www.hud.gov/topics/housing_choice_voucher_program_section_8 (explaining how the voucher system works and what percentage of rent can be subsidized).

[14] U.S. DEP'T HOUS. AND URB. DEV., 2021 CONG. JUSTIFICATIONS 2-2, https://www.hud.gov/sites/dfiles/CFO/documents/FY21_HUDCongressionalJustifications.pdf ("The President's Budget recognizes that the current public housing funding model continues to present an unsustainable way to preserve the nearly one million public housing units across the Nation.").

[15] *See* McCarty *supra* note 12 at 24 ("The public housing program peaked at just over 1.4 million units in the mid-1990s.").

[16] *Id.* at 25 ("The stock has been declining for two reasons: (1) PHAs have been demolishing and disposing of public housing units without fully replacing them; and (2) Congress has not authorized the addition of new units of public housing except to replace those being demolished and disposed of since the late 1990s.").

[17] *Id.* (displaying a graph that shows public housing units over time, and that the level is similar in 2010 as it was at points in the 1970's).

[18] Author calculation from U.S. Census Data. *See* U.S. Census Bureau, *Monthly Population Estimates for the United States: April 1, 2010 to December 1, 2020 (NA-EST2019-01*), https://www.census.gov/data/datasets/time-series/demo/popest/2010s-national-total.html (compiling the United States population totals and components of change from 2010-2019); U.S. Census Bureau, *1970 Census - Population, Advance Report: Final Population Counts, January 1971* https://www.census.gov/library/publications/1971/dec/pc-v1.html (reporting the United States population in 1970).

largely accomplished through zoning, a regulatory form with a long history in the United States.[19] Los Angeles passed its first comprehensive zoning regulation in 1908,[20] followed by New York in 1916.[21] By 1924, the Department of Commerce, under the direction of future-President Herbert Hoover, published a Standard State Zoning Enabling Act (SSZEA), a standardized model legislation designed to be copied by states.[22] The model legislation was taken up eagerly by states, as the Government Printing Office sold 55,000 copies in the first two years, and nineteen states used the standard act as a model for their own legislation by 1925.[23] The Supreme Court then upheld zoning regulations in the pathbreaking case *Village of Euclid v. Ambler Realty Co*.[24] In approving Euclid's zoning

---

[19] Herbert Hoover, DEP'T OF COM., *A Standard State Zoning Enabling Act: Under Which Municipalities May Adopt Zoning Regulation*, ADVISORY COMMITTEE ON ZONING (1926) https://nvlpubs.nist.gov/nistpubs/Legacy/BH/nbsbuildinghousing5a.pdf [hereinafter SSZEA] (introducing a Standard State Zoning Act for states to follow as they enact zoning laws).

[20] Jeremy Rosenberg, *The Roots of Sprawl: Why We Don't Live Where We Work*, KCET, (Mar. 19, 2012), https://www.kcet.org/history-society/the-roots-of-sprawl-why-we-dont-live-where-we-work.

[21] BD. OF ESTIMATE AND APPORTIONMENT, BLDG. ZONE RESOL., CITY OF NEW YORK, July 25, 1916, https://www1.nyc.gov/assets/planning/download/pdf/about/city-planning-history/zr1916.pdf ("A Resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and boundaries of districts for the said purpose").

[22] Salim Furth, *A Brief History of Zoning in America—and Why We Need a More Flexible Approach*, Economics21, MANHATTAN INST. POL'Y RSCH. (Aug. 5, 2019), https://economics21.org/history-zoning-america-flexible-housing-approach ("In 1924, then-Secretary of Commerce Herbert Hoover, . . . convened a panel of zoning experts to write a Standardized State Zoning Enabling Act (SZEA) that states could copy").

[23] *Id.* ("The Government Printing Office published it and sold 55,000 copies . . . in the first two years. Nineteen states had used the standard act as a model for their own legislation by 1925.").

[24] 272 U.S. 365 (1926) ("The reasons are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable,

regulation barring apartment houses from its U-1 and U-2 zoned areas, the Supreme Court did little to hide its antipathy to apartments, observing apartments destroy the entire section for private housing purposes, and characterizing them as mere parasites, and borderline nuisances.[25]

Thus, with antipathy to density being present from the very beginning of adjudication of zoning in the United States court system, this paper will explore how courts can be part of the solution to the crisis of housing affordability. This entails examining the origins of the Mount Laurel Doctrine, a series of decisions from the Supreme Court of New Jersey which barred towns from using zoning as a tool to exclude affordable housing and imposed a requirement for towns to affirmatively create affordable housing.[26] This reform, which drastically exceeded the scope of what any other court or

---

having no substantial relation to the public health, safety, morals, or general welfare.").

[25] *See id.* at 394–95 (observing "[w]ith particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities-until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.")

[26] *See* S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 336 A.2d 713 (1975) [hereinafter "Mount Laurel I"]; S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 456 A.2d 390 (1983) [hereinafter "Mount Laurel II"]; Hills Dev. Co. v. Twp. of Bernards, 551 A.2d 547 (App. Div. 1988) [hereinafter "Mount Laurel III"]; In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Housing, 110 A.3d 31 (N.J. 2015), [hereinafter "Mount Laurel IV"].

legislature in the United States required, had its origins in the new suburban towns being set up outside major cities in the third quarter of the 20th century.[27] Thus, a key limitation in the initial formulation of the doctrine was its application solely to those new townships, termed "developing municipalities,[28] which allowed the courts to sidestep the issue of preserving existing neighborhood character. Here, even in a radical set of rulings, the court declined to go after this key justification for preserving stasis in what is inherently a dynamic market. This paper will suggest that courts should adopt a Mount Laurel Doctrine for the housing affordability problem of the 21st century; rising housing costs in heavily zoned urban centers. Much as the Mount Laurel Doctrine was meant to solve a social problem of the 20th century (preventing the formation of segregated enclaves of wealth by affirmatively requiring inclusionary zoning in the face of white flight and rapid suburbanization), a Mount Laurel of the 21st century can be designed to tackle the social problems of the 21st century arising from the increasing unaffordability of "superstar cities", including a substantial net loss of wealth for the nation as a whole.

II. Key Definitional Concern: What is "Affordable Housing"

This paper examines affordable housing mostly from the perspective where government regulation causes housing construction costs to substantially exceed what market forces require.[29] While this is a narrower lens from which to examine the reasons behind the lack of housing affordability, it has several

---

[27] *See* Mount Laurel I, *supra* note 26, at 724–25 (detailing the struggle lower income families had in obtaining housing close to work, forcing most to move farther from city centers and into suburban areas).

[28] *See id.* ("The legal question before us, as earlier indicated, is whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality . . . .").

[29] "'[A] housing affordability crisis means that housing is expensive relative to its fundamental costs of production.'" Steven J. Eagle, *"Affordable Housing" As Metaphor*, 44 FORDHAM URB. L.J. 301, 305 (2017) (quoting Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 FED. RES. BANK N.Y. ECON. POL'Y REV. 21, 21 (2003), https://www.newyorkfed.org/medialibrary/media/research/epr/03v09n2/0306glae.pdf [https://perma.cc/7FXB-5AYB].

advantages for the purposes of this paper. For one, it allows for a simplification of the problem of affordability: for example, housing can be unaffordable as a product of life in general being unaffordable: i.e. through simply being poor.[30] This can arise in areas as diverse as many swaths of rural America which lack access to jobs for structural reasons, such as the decline of manufacturing, or the ever-increasing mechanization of farming practices[31] to urban areas with populations subjected to systemic discrimination.[32] While public policy can be designed to increase housing affordability as part of a more explicit wealth transfer, this requires effectively creating a new government entitlement.[33] While certainly worth considering on its own merits, this is a more difficult problem to solve than my proposal. In the instance of excessively restrictive zoning policies in urban "super-star" cities, even prosperous residents of these cities must devote considerable percentages of their income to securing housing, amidst the public-choice zoning problem.[34] Public choice

---

[30] "For there to be a "social" gain from new construction, housing must be priced appreciably above the cost of new construction." *See id.*

[31] Indeed, a majority of rural districts have fewer U.S. born residents than in 2000, unlike in central urban districts, where demand for housing is increasing, the demand for housing in rural areas may be in decline. Kim Parker, Juliana Menasce Horowitz, Anna Brown, Richard Fry, D'vera Cohn And Ruth Igielnik, *What Unites And Divides Urban, Suburban And Rural Communities: Demographic and economic trends in urban, suburban and rural communities*, PEW RES. CTR., May 22, 2018. https://www.pewresearch.org/social-trends/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities/.

[32] *See generally* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY, (2016).

[33] This could arise, for example, from recognizing a right to housing, expanding housing vouchers to cover everyone who meets the criteria for them and thus making it a true entitlement. For a discussion of making housing a human right in the United States, see Maria Massimo, *Housing As A Right in the United States: Mitigating the Affordable Housing Crisis Using an International Human Rights Law Approach*, 62 B.C. L. Rev. 273, 274–75 (2021).

[34] Eagle, *supra* note 29, at 355 (quoting Emily Badger, *What It Would Actually Take to Reduce Rents in America's Most Expensive City*, WASH. POST (May 22, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/05/22/what-it-would-actually-take-to-reduce-rents-in-americas-most-expensive-city/ ("San Francisco can have a dynamic economy and charming neighborhoods unmarred by new construction and denser housing. But it can't have both of

has been referred to as "the use of economic tools to deal with traditional problems of political science."[35] This differs substantially from the government declining to allocate additional fiscal resources to solving the problem. Rather, agents of the government, encouraged by entrenched special interests, construct obstacles to creating a functioning housing market, while regressively transferring wealth up the ladder to well-placed landlords in a few American cities.

This paper can also see itself in the growing field of supply-side liberalism, as opposed to cost-disease socialism.[36] Rather than tackling the issues of high cost by further subsidizing consumers' purchases of goods and services (potentially a worthwhile path under the right circumstances) this approach targets making goods and services, in this instance, housing, more affordable in the first place.[37] Such zoning restrictions and similar public policy choices have rendered infrastructure projects in general particularly well-studied in the public transit market, being notably more expensive in the United States than in comparison countries in Europe and Asia.[38]

III. Early Zoning History: Pre-Mass-Suburbanization

While urban planning, in some form, dates back to ancient times,[39] the major antecedents to zoning include public nuisance law, which emerged as early as the twelfth century in the United

---

those things without paying a steep cost in rent (and without pushing lower-wage workers out).")).

[35] John Eatwell, Murray Milgate, & Peter Newman, *Public Choice, in* THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS (1987).

[36] *See* Ezra Klein, *The Economic Mistake the Left Is Finally Confronting*, N.Y. TIMES, Sept. 19, 2021 https://www.nytimes.com/2021/09/19/opinion/supply-side-progressivism.html.

[37] *See* Steven Teles, Samuel Hammond, Daniel Takash, *Cost Disease Socialism: How Subsidizing Costs While Restricting Supply Drives America's Fiscal Imbalance*, NISKANEN CENTER (Sept. 9, 2021), Figure 5, https://www.niskanencenter.org/cost-disease-socialism-how-subsidizing-costs-while-restricting-supply-drives-americas-fiscal-imbalance/.

[38] *See* Connor Harris, *The Wrong Critique: Problems with American infrastructure projects extend far beyond cost overruns*, CITY J., https://www.city-journal.org/on-infrastructure-new-york-times-misses-the-forest-for-the-trees.

[39] *See* Sonia A. Hirt, *Zoned in the USA: The Origins and Implications of American Land-Use Regulation*, Cornell University Press, 90–98 (2014).

Kingdom.[40] As industrialization spread in the United Kingdom in the nineteenth century, these laws tightened due to the increase in noxious industries and urban populations growth.[41] Notably, even back then, private deed restrictions were used to prevent lower-income residents from moving into more upper-class areas,[42] much as medieval sumptuary laws once regulated what clothes people could wear. As industrialization took off in the United States, some of the same urban issues that occurred in Europe began to arise.[43] However, in a critical break with the tendencies of European localities to have the wealthiest individuals remain in highly desirable central cities, the United States, (as well as the United Kingdom) responded to these developments of the urban slums by escaping into the residential suburbs, whereas continental Europe embraced a far different strategy of clearing central slums and relocating the residents outside of the main urban centers.[44] Pathbreaking zoning laws in Los Angeles[45] and New York[46] preceded a national movement seeking to control development epitomized by the SSZEA. American zoning, partially an importation from

---

[40] *Id.* at 63.

[41] *Id.*

[42] *Id.* ("Simultaneously, private deed restrictions were used to inhibit the influx of lower-income residents into upper-class enclaves, much as they were in the United States.").

[43] *See e.g.* JACOB RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK 2 (Charles Scribner's Sons, 1890) ("The fifteen thousand tenant houses that were the despair of the sanitarian in the past generation have swelled into thirty-seven thousand, and more than twelve hundred thousand persons call them home.").

[44] *See* Hirt, *supra* note 39 at 104–05 ("Whereas the Anglo-Saxon bourgeoisie, first in eighteenth-century England and later in nineteenth-century United States, chose to respond to the horrors of urbanization by escaping from the city into quaint residential suburbs, the French bourgeoisie embraced a radically different vision.").

[45] *See* Jeremy Rosenberg, *The Roots of Sprawl: Why We Don't Live Where We Work*, KCET (Mar. 19, 2012) ("'Los Angeles was one of the first large cities in the U.S. to adopt a kind of modern zoning to keep the industrial away from the residential,' Vallianatos says.").

[46] *See* BD. OF ESTIMATE & APPORTIONMENT, BLDG. ZONE RESOL., CITY OF NEW YORK, (1916). (For the purpose of regulating and restricting the location of trades and industries and the location of buildings designed for specified uses, the City of New York is hereby divided into three classes of districts: (1) residence districts, (2) business districts, and (3) unrestricted districts . . . .").

Germany, proved far more severe than its foreign origin.[47] Notably, while German zoning "permitted duplex housing in even the most restricted residential zone"[48], and commercial uses in residential areas were subject to performance standards, rather than engineering standards, allowing for commercial properties to be built anywhere.[49] Additionally, of the five major schools of European zoning law (The United Kingdom, France, Germany, Sweden and Russia) all are characterized by weaker local control over zoning law, and none privilege the single family home to the extent that the United States does.[50]

Zoning in the U.S. took off in 1924, following the release of the SSZEA by Secretary of Commerce Herbert Hoover.[51] All fifty states eventually adopted an enabling act based on the national SSZEA.[52] The first three sections of the SSZEA, which define the grant of power, districts, and purposes in view,[53] already show the anti-development bias that American zoning would be prone to. In granting the power to promote "health, safety, morals, or the general welfare of the community" the legislative body (zoning boards) of localities is not only empowered to regulate, but to restrict, the use of

---

[47] *See* George W. Liebmann, *The Modernization of Zoning: Enabling Act Revision as a Means to Reform*, 23 URB. LAW. 1, 9 (1991) ("Zoning, when introduced into America, was in its essential form a German import from which, almost miraculously, all the beneficent features had been removed.").

[48] *Id.*

[49] *See id.* at 9 ("The German practice subjected commercial uses in residential zones to performance standards: they were prohibited only if they emitted objectionable odors or were otherwise noxious.").

[50] SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 62 (Cornell Univ. Press, 2014). ("England, France, Germany, Sweden, and Russia—the European countries that represent the five European planning schools—all practice land-use control differently. But together they also stand apart from what we find in the United States: in none of them is local-level land-use control as strong as it is in the United States and in none does the single-family home hold such a legally privileged position."); *see* Hirt, *supra* note 39 at 62.

[51] *See* SSZEA, *supra* note 19, at III ("The discovery that it is practical by city zoning to carry out reasonable neighborly agreements as to the use of land has made an almost instant appeal to the American people.").

[52] *See generally* Robert Anderson & Bruce Roswig, *Planning Zoning & Subdivision: A Summary of Statutory Law in the 50 States* (1966) (discussing the layout and background of each state's zoning guidelines).

[53] *See generally* SSZEA § 1-3 *supra* note 19.

land.[54] In empowering the zoning boards to divide land into districts and regulate and restrict the "erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land," the SSZEA allows for the preservation of the status quo.[55] Finally, the purposes legitimated by the SSZEA help further illustrate the anti-density aspects of the SSZEA. Legitimate purposes for zoning conjoin clear public health style goals such as "secur[ing] safety from fire, panic and other dangers," with resource provision goals such as "facilitat[ing] the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements," with pure anti-density measures such as "prevent[ing] the overcrowding of land" and "avoid[ing] undue concentration of population" and "conserving the value of buildings" to create its modern amalgamation.[56] While these provisions make sense in the sociological context of the early twentieth century, when the urban United States faced substantial problems with repairing tenement housing,[57] a key issue would arise when the underlying social fabric of the United States changed as the 20th century progressed.

After the Supreme Court ruled in *Euclid*, establishing a practice of deferring to the legislative judgment of zoning board, the details of how future courts were to apply the ruling had to be hashed out. However, zoning boards do not have limitless discretion,[58] as a key early case showed. In *Nectow v. City of Cambridge*, Nectow challenged Cambridge's decision to place his property in a residential-only (R-3) zoning area.[59] In this instance, the finding of the zoning master, the title of the individual in charge of zoning decisions in Cambridge at the time, was that the health safety and

---

[54] *See* SSZEA § 1, *supra* note 19, at 5.

[55] *See* SSZEA § 2, *supra* note 19, at 6 ("All such regulations shall be uniform for each class or kind of buildings throughout each district. . . .").

[56] *See* SSZEA § 3, *supra* note 19, at 6–7.

[57] *See, e.g.*, Riis, *supra* note 43 (showcasing the living conditions of slums in New York City).

[58] *See* Zuckerman v. Town of Hadley, 813 N.E.2d 843, 849 (Mass. 2004) (describing what limits a town can impose on zoning restrictions and what limits the town may not impose).

[59] Nectow v. City of Cambridge, 277 U.S. 183, 185–86 (1928) ("The land of plaintiff in error was put in district R-3, in which are permitted only dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses and gardening, with customary incidental accessories. The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process.").

general welfare of the inhabitants would not be promoted by requiring the plaintiff's parcel to be zoned as residential.[60] Holding for the plaintiff the Court declared, "[t]he governmental power to interfere by zoning regulations… cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."[61] Within Cambridge itself, this ruling's impact seemed to lead to an increase in "spot-zoning" where the City would adopt a permanent zoning change to a specific property, rather than granting a specific permit or variance for the project.[62] This increase in "spot-zoning" can be seen as providing ammunition to Cambridge's rebellion in favor of a major down-zoning in the early 1940s, where neighborhoods which were formally permitted to be dense, were re-zoned to reduce the density.

However, the understanding of what was considered "public health, safety, morals or the general welfare"[63] hardly held a constant understanding, and communities such as Cambridge, suffered from what could perhaps be termed as an elitist perspective. Even prior to WWII, a movement in Cambridge arose to down-zone the area.[64] Proponents argued the residents were "not sardines or Lilliputians. What Cambridge needs are brick and stone mansions, occupied [sic] by millionaires who will share our tax burden [sic]."[65] Additionally, while lamenting that the planning was occurring twenty-five years

---

[60] *Id.* at 187 ("I am satisfied that the districting of the plaintiff's land in a residence district would not promote the health, safety, convenience, and general welfare of the inhabitants of that part of the defendant city, taking into account the natural development thereof and he character of the district and the resulting benefit to accrue to the whole city and I so find.").

[61] *Id.* at 188.

[62] *See* Will Macarthur, *The Kind of City Which is Desirable and Obtainable: A Brief History of Zoning in Cambridge*, Prepared for the Office of Mayor Marc McGovern, Ed. Wilford Durbin, (Oct. 2019) 1, 17. https://www.cambridgema.gov/~/media/Files/officeofthemayor/2019/acitywhichisdesirableandobtainablecambridgezoninghistory102419.pdf#:~:text=The%20Path%20to%20Zoning%20in%20Massachusetts%20%281918%29%20Inspired,land-use%20planning%2C%20including%20not%20long%20thereafter%20in%20Massachusetts [**https://perma.cc/6FQV-2TKQ]. (**"An editorial in the Cambridge Tribune of February 1929 decried "spot zoning," or the practice of adopting a permanent zoning change to a specific property rather than granting a special permit for a specific project.").

[63] *Id.*

[64] *See id.* at 4 (describing the movement in Massachusetts to adopt Amendment LX).

[65] *Id.* at 19.

too late, the passing of the downzoning revision was seen as "a substantial step towards preserving the natural assets of the city . . . ."[66] The statement exemplifies how the connection between downzoning and preserving high-income residents suggests that zoning requirements couched in technical language were often used as methods of social and economic policy. It became clear that the well-to-do residents had begun to see zoning as protecting and promoting a key product: the value of one's private property, and that of the single-family home more particularly.[67]

IV. Mass-Suburbanization and the Zoning Response: Mount Laurel

When zoning began in the 1920's, the United States remained predominantly a rural society, with two-thirds (66%) of Americans living in rural areas, a quarter of Americans living in central cities (24.8%) and less than one-tenth of Americans living in the suburbs.[68] By 1940, the central cities (32.5%) and suburbs (15.3%) had each drawn a significant share of the population away from rural areas (52.3%).[69] However, the predominant movement in the second-half of the twentieth century was the explosive growth of the American suburb, as by 2000 half of all Americans lived in a suburb (50%), compared with three-tenths in a central city (30.3%) and only two-tenths in a rural area (19.7%).[70] The period following WWII is also remembered culturally as a time of mass-suburbanization, as exemplified by the "Levittowns" the first of which began on Long Island in 1947.[71] Following WWII, there was

---

[66] *Id.*

[67] *See* Hirt, *supra* note 39, at 134 (finding that zoning law is a means of protecting the value of private property and the zoning law prejudices minorities and the poor who generally perceived to diminish the values to single-family residential in particular).

[68] U.S. CENSUS BUREAU, DECENNIAL CENSUS OFFICIAL POPULATION (1920), https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.1920.html.

[69] U.S. CENSUS BUREAU, DECENNIAL CENSUS OFFICIAL POPULATION (1940), https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.1940.html#list-tab-HYQ1EFGR11EMRQVB21.

[70] U.S. CENSUS BUREAU, DECENNIAL CENSUS OFFICIAL POPULATION (2000), https://www.census.gov/programs-surveys/decennial-census/decade/decennial-publications.2000.html#list-tab-A4ZCNQH6B80ZZJY6ZD.

[71] Crystal Galyea, *Levittown: The Imperfect Rise of the American Suburbs*, U.S. HIST. SCENE, https://ushistoryscene.com/article/levittown/.

both a severe housing shortage, and a period of unusually high birth rates, bequeathing the name Baby Boomers, for the generation born following the war.[72] Affordable to many working class white inhabitants, the Levittowns attracted many young homeowners to the new suburbs, which often had heavy restrictions on the use of the land.[73] Initially governed by a racial covenant, with a population of 70,000, Levittown NY, was the largest settlement in the United States without an African-American resident.[74]

Ironically, these new tracts, away from the downtown areas where public health rationales inspired the rise of zoning, themselves spawned public health problems.[75] As dense tract housing largely relied on septic systems, rather than sewer systems to save costs, ground water pollution became a major problem, as exemplified by the tract housing built on Long Island.[76] With their increasing water use, driven by the appliances so symbolic of new suburban prosperity, non-soluble water detergents interspersed into the ground water could cause faucets to emit water that was alternatively sudsy and smelly, with risks to the inhabitants of the new neighborhoods.[77]

V. Mount Laurel

While not all suburban restrictions were so severe, heavy restrictions in planned suburban communities provoked significant litigation, reaching the New Jersey Supreme Court in one of the most

---

[72] *See id.* ("One problem was a severe housing shortage. A combination of unusually high birth rates . . . .").

[73] One well-reported example included a prohibition on hanging laundry outside. *See id.* ("The houses were simple, unpretentious, and most importantly to its inhabitants, affordable to both the white and blue-collar worker.").

[74] *See id.* ("By 1953, the 70,000 people who lived in Levittown constituted the largest community in the United States with no black residents.").

[75] Christopher C. Sellers, *Crabgrass Crucible: Suburban Nature & the Rise of Environmentalism*, *in* TWENTIETH-CENTURY AMERICA, 105–36 (2012) ("Identifying the newest problems as industrial and man-made, health officials had begun to keep tabs on their magnitude and scope")

[76] *See id.* at 110–13 ("Three years of monitoring nevertheless showed their drinking water to contain from 5 to 25 ppm of hexavalent chromium.").

[77] *See id.* at 104 ("overflowing cesspools or sewage-contaminated wells certainly remained a serious concern for those whose homes were troubled by them and, in health professional circles, could still conjure up talk about typhoid.").

prominent series of cases in *Southern Burlington County NAACP v. Mount Laurel Township*.[78] Here, the court ruled Mount Laurel had to make affordable housing affirmatively available, and could not use its zoning code to exclude low- and moderate-income housing.[79] Unlike in a standard zoning case, the court placed the burden on the town to prove it met its affirmative obligation unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.[80] The ruling sought to tie its logic to the foundation of the New Jersey State Constitution:

> [A]ll police power enactments . . . must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws. These are inherent in Article I, Paragraph 1 of our Constitution, the requirements of which may be more demanding than those of the federal Constitution . . . . It is required that, affirmatively, a zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare . . . . Conversely a zoning enactment which is contrary to the general welfare is invalid.[81]

This can be thought of as revolutionary reversing the default status of a local zoning decision (rather than deferring to the "legislative" decision of a local board) the court is able to make its own determination based on State Constitutional law.[82] This decision

---

[78] *See* S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp. (*Mount Laurel I*), 336 A.2d 713, 716-735 (N.J. 1975) (concerning the land use regulation by the Township of Mount Laurel which only permits single family homes in the designated residential zones).

[79] *See id.* at 724 ("We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. . . . [I]t cannot foreclose the opportunity of the classes of people mentioned for the low and moderate income housing . . . .").

[80] *See id.* at 724–25 ("These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances.").

[81] *See id.* at 725 (citations omitted).

[82] *Id.* (finding that though most land use ordinances are not typically thought of as involving constitutional matters, zoning decisions by local authorities

("Mount Laurel I"), began the process of creating what became known as the "Mt. Laurel Doctrine."

While there have been four different iterations of cases establishing the Mount Laurel Doctrine,[83] the first one is of particular interest for this paper due to its focus on what it defined as a "developing municipality."[84] A developing municipality had the following characteristics: (1) it had to have sizable land area; (2) it had to lie outside the central cities and older built up suburbs; (3) it had to have substantially shed its rural characteristics; (4) it had to have undergone great population increase since World War II or was in the process of doing so; (5) it was not completely developed; and (6) it was in the path of inevitable future residential, commercial and industrial demand and growth.[85] For our purposes, one of the most critical aspects of the Mount Laurel series of decisions is the creation of these criteria—as any similar decision in the 21st century would need to create analogous criteria for high-growth urban areas.

Mount Laurel I also introduced another critical concept of a "region."[86] Inherently, if a municipality excludes people from residence, inevitably those people must live elsewhere. That "somewhere else" is the housing region of which the municipality is a part. In the case of Mount Laurel itself, the court defined it as belonging to "those portions of Camden, Burlington and Gloucester Counties within a semicircle having a radius of twenty miles or so from the heart of Camden City."[87] The regional concept proved important in this instance because it provided a reference point from which to determine where such individuals were excluded from.

---

are executed under the police power of the state and thus are restricted in the same manner as the state).

[83] *See* Mount Laurel I, Mount Laurel II, Mount Laurel III, Mount Laurel IV, *supra* note 26.

[84] *See* Mount Laurel I, *supra* note 26, at 724–25.

[85] Glenview Dev. Co. v. Franklin Twp., 164 N.J. Super. 563, 397 A.2d 384, 386-87 (Law. Div. 1978), *aff'd in part, rev'd in part sub nom.* S. Burlington Cty. N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158, 456 A.2d 390 (1983) (establishing the six criteria of a developing municipality that the Supreme Court articulated).

[86] *See id.* ("With regard to the definition of the 'region' from which fair share allocations were to be made, the majority cited with approval the trial court's formulation of a region as the 'area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalidly exclusionary gang.'").

[87] *See* Mount Laurel I, *supra* note 26, at 718.

Mount Laurel I additionally required municipalities have their "fair share" of housing—that if municipalities shirk their responsibilities to build adequate housing—they have inevitably shifted that burden to other ones.[88] As the initial decision commented, the notion of fair share was becoming increasingly understood and municipalities, county level officials and state level officials could allocate sufficient land to ensure Mount Laurel would have its fair share.[89]

Mount Laurel I did not determine, however, what would constitute a proper zoning ordinance. In practice, Mount Laurel's minimum lot requirements (9,375 square feet and 20,000 square feet, respectively) and minimum floor plans (1,100 square feet and 1,300 square feet) were impermissible.[90] Their impermissibility emerged from "uncontradicted evidence that, factually, low and moderate income housing cannot be built" under those parameters when "multi-family rental units, at a high density, or, at most, low cost single-family units on very small lots, are economically necessary . . . ."[91]

Under these parameters, if the Township is determined to be both developing and exclusionary, the burden shifts to the municipality to prove otherwise.[92] The erasure of the "presumption of correctness" of local zoning decisions creating exclusionary and unreasonable zoning ordinances meant that courts in New Jersey could no longer uphold the status quo without independently analyzing the zoning decisions. Euclid's "fairly debatable" standard would not be so easily abused going forward. Thus, though Mount Laurel would eventually be applied to all areas within New Jersey in

---

[88] *Id*. ("So long as that situation persists under the present tax structure, or in the absence of some kind of binding agreement among all the municipalities of a region, we feel that every municipality therein must bear its fair share of the regional burden.").
[89] *Id*.
[90] *Id*. at 729.
[91] *See* Mount Laurel II, *supra* note 26, at 722.
[92] *Id.* at 728 ("[W]hen it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection under the state constitution has been made out and the burden, and it is a heavy one, shifts to the municipality to establish a valid basis for its action or non-action.").

Mount Laurel II,[93] it clearly was not intended to primarily effect change in center cities or older suburbs.[94]

VI. The Psychology of Mount Laurel

The residents of Mount Laurel, and of suburbia more generally, were often motivated by the preferences of what became known as "homevoters."[95] Unlike in so-called "growth machine" areas, where a pro-growth agenda drives an aversion to strict land use regulation, in homevoter jurisdictions, status quo bias, fears of congestion, or changing neighborhood character lead to zoning and land use regulations designed to prevent new development.[96] These homevoters, who have a large undiversified asset that cannot be insured against losses due to city tax and expenditure decisions or neighborhood changes due to land use policies, respond by becoming active in local politics to shape land use policy in their favor.[97] By keeping housing supply inelastic, homeowners benefit by having the value of their homes appreciate in the midst of the shortage.[98] This trend intensified in the 1970s in a positive feedback loop, as "housing prices" went from being a phrase that was only rarely used to a phrase that was so common it was used several times more

---

[93] *See* Mount Laurel II, *supra* note 26, at 745 ("Judicial enforcement of municipal obligations, both negative and affirmative, to plan and provide for a fair share of regional housing needs, even if only directed to one municipality, necessarily has grave implications for the entire region.").

[94] *See* PATRICIA E. SALKIN, AMERICAN ZONING LAW § 15:10 (Thomson Reuters ed., 5th ed. 2022) (stating that Euclid's "fairly debatable" standard was applied by the Mount Laurel court to zoning in previously developed areas).

[95] Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1062–63 (2019) (describing the desire for single-family home zone felt by many homevoters).

[96] *Id.* at 1063–64 (describing the differences between "growth machine" and "homevoter" jurisdictions).

[97] WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 1 (Harv. Univ. Press ed., 2005) (explaining the actions taken by homevoters to preserve single-family zoning in their areas).

[98] This can also lead to aspects not covered in this paper, including a relative under-provision of school services, as schools are often the most expensive service provided by a small town, which may seek to restrain the growth of schools to keep property taxes down. *See id.*

frequently than "stock prices."[99] In the suddenly inflationary economy, for those who already owned a home, the declining buying power of their own salary was offset by the fact that they now owned an asset that was performing like a hot stock.[100] Government policy, in allowing homeowners to deduct mortgage interest, assessed largely at fixed rates, and property taxes from their federal tax bill helped further subsidize existing homeowners relative to renters or potential homeowners.[101]

VII. The Rise of Superstar Cities: A New Zoning Concern

Since the time of Mount Laurel, the pace of multi-family housing starts has only slowed, perhaps due to the increasingly stringent regulatory environment.[102] Between 1959 and 1985, the U.S. averaged 459 privately-owned housing starts for buildings with five or more units per month.[103] Between 1986 and 2021, the U.S. averaged 285 privately-owned housing starts for buildings with five or more units per month.[104] A recent estimate of twenty-three states' underproduction of housing suggested a shortfall of 3.7 million units, with a shortage of nearly one million in California alone.[105]

---

[99] Connor Dougherty, *Why Suburban American Homeowners Were Accused of Being a 'Profit-Making Cartel' in the 1970s*, TIME, Feb. 18, 2020. https://news.yahoo.com/why-suburban-american-homeowners-were-215550019.html (explaining the forces that drove the growth of the homevoter movement in the 1970s).

[100] *See id.* (showing that American wealth began to increasingly be held in real estate).

[101] *See id.* (detailing the federal government's helpful role in housing).

[102] National Environmental Policy Act of 1969 §102, 42 U.S.C. § 4332 (exemplifying federal agencies considering the environmental impacts of operations and activities).

[103] ALFRED, "New Privately-Owned Housing Units Started: Units in Buildings with 5 Units or More (HOUST5F)" 1959–2021 (Dec. 16, 2021) https://alfred.stlouisfed.org/series?seid=HOUST5F&utm_source=series_page&utm_medium=related_content&utm_term=related_resources&utm_campaign=alfred.

[104] *Id.* (illustrating data in bar graph).

[105] MIKE KINGSELLA AND LEAH MACARTHUR, UP FOR GROWTH, HOUSING UNDERPRODUCTION™ IN THE U.S. 3 (2022). https://upforgrowth.org/apply-the-vision/housing-underproduction/ (calculating underproduction as difference between total housing need and total housing availability).

A different study examined the impact that stringent zoning had on a few major "superstar cities", New York, San Francisco, and San Jose.[106] Had those three cities had zoning laws comparable to 220 U.S. metropolitan areas over the study period of 1964-2009, the authors found that U.S. GDP overall would be 3.7% higher, increasing average annual earnings by $3,685.[107] The study also demonstrated an impact on regional differences in the rise of productivity.[108] Whereas in New York and the Bay area, insufficient housing supply caused a misallocation of labor that dragged down those cities' contributions to U.S. GDP, Southern cities, which also had substantial employment growth, had no such distortion, due to their sufficiently elastic housing supply.[109] Interestingly, other scholars have challenged the accuracy of this data, but have suggested that math errors in the original paper caused the authors to actually understate the negative impacts of excessive zoning on GDP, and that excessive zoning just in those two urban areas cut U.S. GDP growth by 14%.[110] This leads to an important theme: in the long run, it is ironic that the United States adopted a system of local planning to govern land use in the country, supposedly at the vanguard of free-market economics, and in doing so, put local authorities in a tough situation.[111] Additionally, "America does not uniformly face a

---

[106] Chang-Tai Hsieh and Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J. 1, 1 (2019) (explaining the household migration out of superstar cities).

[107] *Id*. at 2 ("In this scenario [increased housing supply by relaxing land use restrictions to the level of the median U.S. city], US GDP in 2009 would be 3.7 percent higher . . . .").

[108] *Id.*

[109] *Id.* at 2 ("[G]rowth in New York and the Bay Area was in part offset by increased misallocation of labor across cities. . . . Due to an elastic supply of housing, much of the growth in the south took the form of employment growth, with no effect on misallocation.").

[110] Bryan Caplan, *Hsieh-Moretti on Housing Regulation: A Gracious Admission of Error*, ECONLIB (Apr. 5, 2021), https://www.econlib.org/a-correction-on-housing-regulation/ ("[T]he correct estimate to derive from Table 5 [of Hsieh and Moretti's study] is that growth will be 1.084% per year (.795%*1.363), so GDP will be 1.0108^45/1.00795=+*14%* higher, not +3.7%.") (emphasis in original).

[111] *See, e.g.*, Michael Lewyn & Judd Schechtman, *No Parking Anytime: The Legality and Wisdom of Maximum Parking and Minimum Density Requirements,* 54 Washburn L.J. 285, 293–94 (2015) (observing the challenge of setting parking standards through bureaucratic mandates).

housing affordability crisis."[112] Rather, "in the places where housing is quite expensive, building restrictions appear to have created these high prices."[113]

VIII. Zoning and the Courts: How Standards of Review Favor the Status Quo

After the Supreme Court ruled in *Euclid*, establishing a system of deferring to the legislative judgment of zoning boards,[114] the details of how future courts would apply the ruling had to be hashed out. A key determination was the standard of proof a plaintiff was required to demonstrate.[115] *Euclid* became a seminal case for zoning in part by establishing the standard of review for future zoning cases: "[i]f the validity of the legislative classification for zoning purposes be *fairly debatable*, the legislative judgment must be allowed to control."[116] This is thus referred to as the fairly debatable standard, which places the burden on a challenging plaintiff to prove that a zoning ordinance or land use decision is "beyond fair-debate" to win.[117] Some states go beyond this understanding, such as Massachusetts which instead uses the "clearly arbitrary and unreasonable" standard.[118] Plaintiffs seeking to challenge zoning ordinances in states using the "clearly arbitrary and unreasonable" standard have a harder time than plaintiffs doing so in the majority of

---

[112] *See* Eagle, *supra* note 29, at 356 (quoting Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 FED. RES. BANK N.Y. ECON. POL'Y REV. 21, 23 (2003), https://www.newyorkfed.org/medialibrary/media/research/epr/03v09n2/0306glae.pdf [https://perma.cc/7FXB-5AYB]).

[113] *Id.*

[114] *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

[115] *C.f.* SALKIN, *supra* note 94.

[116] *See* Euclid, 272 U.S. at 388 (emphasis added).

[117] *See id.*

[118] *See* Zuckerman v. Town of Hadley, 813 N.E.2d 843, 848 (Mass. 2004) (internal citations omitted) (defining the constitutional test for a zoning bylaw is whether is it "clearly arbitrary and unreasonable").

states using the "fairly debatable" standard.[119] The clearly arbitrary and unreasonable standard makes it harder for a plaintiff to challenge an existing zoning ordinance because a zoning bylaw need only "bear a rational relation to a legitimate zoning purpose", and "every presumption [is made] in favor of a zoning bylaw."[120] This existing deference to zoning should be revisited by courts nationwide, with a particular emphasis in areas with significant housing cost increases.

IX. Dillon's Rule and the Relationship Between State and Local Government in Zoning.

"Municipal home rule" is a state constitutional term describing how states and localities relate to one another.[121] In "home rule" states, municipal governments have the authority to regulate purely local matters.[122] However, in modern practice, activities encompassed under the zoning umbrella tend to expand beyond what zoning was initially intended to cover. For example, in Massachusetts, the use of zoning has expanded far beyond the initial intention of organizing the "division of land into distinct districts," now covering areas as diverse as regulating earth removal and sign displays.[123]

Theoretically, of course, zoning, as a quintessential power of local government, faces the same limitations that local government authority faces generally: namely, that the scope of municipal autonomy relies upon that "granted to localities by the state constitution."[124]Zoning can be defined as the "division of a land into distinct districts and the regulation of certain uses and developments within those districts" and "the process that a community employs to

---

[119] *See* SALKIN, *supra* note 94, at 1 (opining that the clear and convincing evidence burden of proof would be much more onerous for a finding of fair debate than for unreasonable and arbitrary).

[120] *See Zuckerman,* 813 N.E.2d at 848 (explaining further the clearly arbitrary and unreasonable test and its requirements for review).

[121] MARILYN CONTREAS & ROBERT W. RITCHIE, ESQ., MUNICIPAL HOME RULE IN MASSACHUSETTS § 1.1 (2d ed. 2015 & Supp. 2020 & 2022).

[122] *Id.* (observing that the Home Rule Amendment of 1966 confirmed local citizens' "right of self-government in local matters.").

[123] Paul M. Coltoff, et al., § 3 ZONING DEFINED, ZONING AND PLANNING, 83 AM. JUR. (2nd ed., 2022 Update).

[124] *See* LYNN A. BAKER & CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 389 (4th ed. 2010).

legally control the use which may be made of property and the physical configuration of development upon tracts of land located within its jurisdiction."[125]"[T]he state can exercise plenary power over municipalities, subject to limits in the state constitution."[126] This relationship is a natural source of tension, as advocates of "home rule," dating back to the second-half of the nineteenth century, have sought to enhance the power of localities against interference by state legislatures.[127] Thus, in the face of rising local government power, the judiciary must distinguish between "local affairs" rightfully entrusted to local governments and "matters of statewide concern," more properly entrusted to state or regional bodies.[128] One attempt to do so is Dillon's Rule: a canon of statutory construction which entails construing local government authority in a strict and narrow fashion.[129]

> It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, – not simply convenient, but indispensable.[130]

---

[125] Coltoff, *supra* note 123.

[126] *See* BAKER & GILLETTE, *supra* note 124, at 250.

[127] *See id.* at 314–15 (excerpting from DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK 10-14 (2001)) (explaining that the home rule movement expanded from limiting state interference in local affairs into the "larger idea of broad grants of local government autonomy").

[128] *See id.* at 318 (excerpting from Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER U. L. REV. 1337, 1364–1371 (2009)).

[129] *See* Southern Constructors, Inc. v. Loudon County Board of Education, 58 S.W.3d 706, 710 (Tenn. 2001). (stating that there is a presumption that municipal governmental authority is "granted in clear and unmistakable terms").

[130] John F. Dillon, *Commentaries on the Law of Municipal Corporations,* 448–49 (5th ed. 1911) (emphasis added).

Thus, Dillon's Rule seems to come down clearly on one side of a critical question in the relationship between states and their localities: to what extent can localities seek to avoid implementing policies unencumbered by the effects of their choice on the broader community around them?[131] Much as the *Mount Laurel* Doctrine imposed an affirmative understanding that Twentieth Century suburban local zoning decisions in New Jersey could not be unencumbered by their effects on the broader region,[132] a Twenty-First Century urban *Mount Laurel* Doctrine would decree that local zoning restrictions in superstar cities could not be unencumbered by their effects on the nation as a whole.

X. Current Efforts to Enact Zoning Reform to Consider in Judicial Criteria

The imposition of a new *Mount Laurel* doctrine can be hybridized with existing efforts to increase zoning density in heavily urban areas.[133] In the initial *Mount Laurel* decision, Justice Pashman, in a concurrence, would have created the following criteria to judge whether a zoning regulation was impermissible and would have evaluated very severe scrutiny: (1) minimum house size requirements; (2) minimum lot size and frontage requirements; (3) prohibitions of multifamily housing; (4) bedroom restrictions; (5) prohibitions of mobile homes; (6) over-zoning for nonresidential uses.[134] In the case of urban corridors, the last two factors would be less applicable.[135] Thus, in attempting to modernize these criteria for our purposes, I propose including historical preservation status as

---

[131] *See* Baker and Gillette, *supra* note 124, at 237 (defining the questions inherent in the scope of *local autonomy*).

[132] *See* Glenview, *supra* note 82, at 386–89 ("This court finds as fact, based upon its population, land use and lack of an adequate capital infrastructure, I. e., roads, and other public facilities and services, that Franklin Township has not shed its rural characteristics.").

[133] *See generally* Mount Laurel I, *supra* note 26, at 725 (reiterating a zoning regulation, within a state's police power, must promote public health, safety, morals, or the general welfare).

[134] *See* Mount Laurel I, *supra* note 26, at 737–40. (describing the zoning devices that are inherently exclusionary).

[135] *See id.* at 740 (highlighting only 0.1% of land is zoned for use of mobile homes, and thus, unlikely that heavily urban areas are included; moreover, over-zoning is an issue for suburban land).

being subject to strict scrutiny and also creating a ratio that evaluates job growth in comparison to housing supply growth. A region where job growth over the prior ten years more than doubled supply growth would have a very strong inference that it was acting to impermissibly restrain housing supply growth to the detriment of the community's welfare as a whole.[136]

From here the essay proposes an area to target, transit corridors; a concept, preemption; and a method, a private right of action. I fuse these elements together to propose that courts in areas with the criteria above preempt the power of local governments to restrain housing growth in transit corridors by granting residents of the locality a private right of action to challenge zoning restrictions This can help relieve the imbalance between local forces acting to restrain development to the disadvantage of the larger whole, and provide teeth to those forces' efforts.

A. Transit Corridors

While reforms seeking to increase housing density can be targeted at any location, transit corridors are often deemed to be ideal areas to enact denser zoning requirements, because lower-income persons without equal access to private modes of transportation can take advantage of existing modes of public transportation to increase their mobility.[137] This can also have the added benefit of increasing ridership, as decreased use has been a problem for many public transit authorities following the disruption of the COVID-19 pandemic.[138] Certain areas will allow for developments that set aside some or all of the units as being explicitly affordable to avoid certain permitting delays or expedite review of the actions with the planning board.[139] This has the benefit of allowing for review of projects that

---

[136] *See generally id.* at 724 (holding Mount Laurel could not use its zoning code to exclude low- and moderate-income housing).

[137] *See* MASS. GEN. LAWS ANN. ch. 40A, § 3A(a)(1) (West 2022) (requiring each community with an MBTA service to have a zoning ordinance providing for at least one area of multi-family zoning by right).

[138] *See* Madeleine E.G. Parker, *Public transit use in the United States in the era of COVID-19: Transit riders' travel behavior in the COVID-19 impact and recovery period*, 111 TRANSP. POL'Y 53, 57 (2021) ("Of transit riders, 74.5% reported taking transit less since the pandemic . . . .").

[139] *See Delivering Housing Justice*, MICHELLE WU FOR BOSTON, https://www.michelleforboston.com/plans/housing-justice [https://perma.cc/HKZ6-GWCR] (describing plans to reform zoning laws to

may have greater resistance within local communities, while allowing projects with broader community support to bypass restrictions. An example of this type of legislative action is embodied in Section 3A of Massachusetts's Zoning Act, which permits multi-family zoning as of right in MBTA Communities.[140] The state requirement serves as a floor, requiring an MBTA community to have "at least 1 district . . . in which multi-family housing is permitted as of right" and that must "be located not more than 0.5 miles from a . . . subway station, ferry terminal or bus station . . . ."[141] 3A emerged from Section 18 of chapter 358 of the Acts of 2020, a sprawling bill designed to "finance improvements to the commonwealth's economic infrastructure."[142] Allowing multi-family housing "as of right" means that the construction and occupancy of multi-family housing is allowed "without the need to obtain any discretionary permit or approval."[143] For cities across the country, which have suffered from various degrees of disinvestment over the years, reinvestment via transit-oriented development can also provide the opportunity to revitalize areas left behind by economic change and government policy.[144]

Boston is a great example of a locality that has advanced different smart growth initiatives through transit-oriented development (TOD) that can be a model for the types of interventions for courts to preempt recalcitrant local zoning boards. A strength of the city's approach is embracing a plan that helps to combat the tendencies for there to be a lack of regional

---

exempt affordable housing developments from "most review in order to prevent frivolous lawsuits").

[140] MASS. GEN. LAWS ANN. ch. 40A, § 3A (West 2021) ("An MBTA community shall have a zoning ordinance or by-law that provides for at least 1 district of reasonable size in which multi-family housing is permitted as of right.").

[141] ch. 40A, § 3A(a)(1).

[142] *Id.*

[143] COMMONWEALTH OF MASS. DEP'T OF HOUS. & CMTY. DEV., *Draft Compliance Guidelines for Multi-family Districts Under Section 3A of the Zoning Act* 4 (Dec. 15, 2021), https://www.mass.gov/doc/draft-guidelines-for-mbta-communities/download.

[144] *See, e.g.*, ch. 40A, § 3A(b) (denying MBTA communities that fail to comply with Section 3A eligibility for funds from various statewide capital projects and infrastructure programs).

cooperation.[145] For example, in wealthy areas largely comprised of single family homes, maintaining high minimum lot sizes, large setbacks, and other low-density development patterns overlap political and municipal boundaries.[146] Though there is a limited movement towards greater cooperation often times localities will not readily work with one another unless incentivized to or required to.[147] Thus, complicated issues like maintaining an appropriate jobs/ housing balance around transit stations can be a challenge to plan without some form of a top-down inter-regional approach.[148]

One method to promote this sort of transit led development is to simply create a different legal arrangement for land surrounding transit corridors. Along with simply creating zoning-by-right areas, another legislative model to seek to emulate through the judicial preemption model would be to follow the model of using so-called Earned-as-of-Location (EAOL) credits.[149] Like much advocated for in this article, "EAOL credits seek to separate the power to limit building densities in strategic transportation corridors from parties that have an interest in restraining such growth."[150] EAOL credits

---

[145] *See*, Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 Va. Env't. L.J. 247, 281 (2000) (describing how unwillingness of localities to cooperate with one another limits the effectiveness of smart growth policies).

[146] *Id.* at 276 (discussing the 1991 Intermodal Surface Transportation Efficiency Act (ISTEA) which allows "states to spend a larger share of the federal funds they receive on a broader range of transportation options (such as mass transit), increased local authority over transportation decisions, and dedicated transportation funds to air quality improvements . . . .").

[147] *Id.* at 280–81 (identifying jealousy as the reason that localities are unmotivated to work together despite cross-political development issues such as traffic congestion, environmental degradation, and fiscal stresses).

[148] Tom Hopper, *Research brief: Transit-Oriented Development Explorer (TODEX)*, MASSACHUSETTS HOUSING PARTNERSHIP (Dec. 17, 2019), https://www.mhp.net/news/2019/todex-research-brief (contrasting job rich but housing poor areas of Boston like Kendall Square and Newmarket Station with more housing-rich transit areas like Fenway).

[149] Matthew G. Jewitt, *Encouraging Transportation-Oriented Development in the United States: A Case for Utilizing "Earned-As-of-Location" Credits to Promote Strategic Economic Development*, 57 WM. & MARY L. REV. 1949, 1953–54 (2016) (identifying various benefits of EAOL credits such as advancing transportation-oriented development and encouraging "greater investment in and utilization of transportation infrastructure.").

[150] *Id.* at 1967.

work best where strong demand for denser structures around transit centers in towns limiting zoning to only low-density housing end up "allowing the developer to bypass opposing interests to build in excess of current zoning limitations when the property is linked to transit infrastructure."[151] In places like Eastern Massachusetts, modeling after EAOL credits would work well in communities surrounding commuter rail stations, where the density of development tends to be lower, and the existing housing structure around stations tends to be comprised of large single family homes with large minimum lot sizes.[152]

Modeling a judicial intervention after EAOL credits have the benefit of having a relatively light touch. Rather than simply compelling high-density development in instances in which no market demand exists, as might exist in constructing public housing via government-mandate, "EAOL credits are designed to satiate organic market desire to build structures in strategic transportation corridors that produce viable economic returns under otherwise unfavorable zoning regulations."[153] However, for the court system to assist the implementation of EAOL credits, there needs to be a mechanism to have the court system interact with the local governance aspects described earlier. Judicial preemption of local government zoning regulations restraining denser development is one solution to help alongside the mechanism of EAOL.[154] Rather than simply mandating upzoning across full communities (another feasible option), courts can look to preempt zoning regulations specifically impacting areas most apt to benefit from decreased regulation —areas surrounding existing public transit.

B. Preemption

---

[151] *Id.* at 1968.

[152] *See* Hopper, *supra* note 136 (observing how some suburban commuter rail stations near metro Boston have gross density levels as low as 0.8 units per acre).

[153] *See* Hopper, *supra* note 137, at 1968.

[154] John Infranca, *The New State Zoning: Land Use Preemption Amid A Housing Crisis*, 60 B.C. L. REV. 823, 824 (2019) ("Such interventions should expressly preempt certain narrow elements of local law, rather than, as an earlier generation of interventions did, add additional planning requirements, procedural steps, or potential appeals.").

State level-preemption of zoning ordinances is a major area of activity impacting local housing law.[155] Much as the history of local zoning dates back nearly a century, state interventions into local zoning regulations date back nearly as far.[156] For example, states will preempt local governments in their attempts to promote local green energy production, or to restrict land uses seen as being socially undesirable, such as group homes and pre-fabricated housing.[157] Additionally, many states, including Massachusetts,[158] preempt local rent control regulations, which would otherwise restrict the ability of landlords to increase rent. The court system can act alongside this rise of state level preemption of local government authority.

This longer-term trend of states pre-empting local zoning regulations has grown stronger and more diverse in recent times, as the contexts and scenarios in which states apply preemption continuously expand. Legislative preemption has been used to preempt local zoning laws designed to promote inclusionary zoning in places as diverse as Virginia, Texas, Arizona, Tennessee, Kansas and Wisconsin.[159] Several states have even sought to limit or prohibit localities from regulating short term rentals through online platforms such as Airbnb including Arizona, Florida, New York, Utah, Tennessee, Idaho, and Indiana.[160] By contrast, California has led the

---

[155] *Id.* at 823, 848–57 (discussing state level-preemption of zoning ordinances across California and Massachusetts).

[156] *See* Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 293–94 (2019) ("Contrary to assumptions embedded in both the political debate and the land use scholarship, state-level liberalization of zoning has benefited users such as family day cares and mobile homeowners for at least forty years.").

[157] *Id.* at 295 ("In a few notable and oft-overlooked cases, however, a substantial number of states have intervened to limit or prohibit local regulation, thus decreasing development costs.").

[158] *Massachusetts Rent Control Prohibition Initiative, Question 9 (1994)*, BALLOTPEDIA, https://ballotpedia.org/Massachusetts_Rent_Control_Prohibition_Initiative,_Question_9_(1994) (last visited May 28, 2022) ("This proposed law would prohibit rent control for most privately owned housing units in Massachusetts").

[159] Infranca, *supra* note 154 at 848–57 ("More recently, Arizona (in 2015), Tennessee (in 2016), Kansas (in 2016), and Wisconsin (in 2018) have imposed their own restrictions.").

[160] *Id.* ("As the "sharing economy" has grown in prominence over the past few years, a number of states have constrained and in some cases essentially

way with a recent bill banning localities from requiring land to be zoned solely for single-family purposes.[161] Oregon similarly banned single-family zoning statewide.[162] In her recent State of the State Address, New York Governor, Kathy Hochul proposed repealing an existing New York State law preempting New York City from allowing a residential Floor Area Ratio (FAR) to exceed 12.0.[163] Barring single family zoning at the state level has the advantage of creating a level playing field, where certain localities cannot block construction of adequate affordable housing solely through zoning the land for single family use.

These instances are part of a growing trend over the past fifteen years or so where states "clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems."[164] The flaws with pursuing that type of preemption generally emerge from a lack of an attempt to coordinate to

---

prohibited local efforts to regulate short-term rentals, including Arizona, Florida, New York, Utah, Tennessee, Idaho, and Indiana.").

[161] Cal. leg., S. B. 9, CHAPTER 162, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB9 ("(a) A proposed housing development containing no more than two residential units within a single-family residential zone shall be considered ministerially, without discretionary review or a hearing, if the proposed housing development meets all of the following requirements. . . .").

[162] Laurel Wamsley, *Oregon Legislature Votes To Essentially Ban Single-Family Zoning*, NAT'L PUB. RADIO (July 1, 2019), https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning ("The state's House and Senate have now both passed a measure that requires cities with more than 10,000 people to allow duplexes in areas zoned for single-family homes.").

[163] Kathy Hochul, *Governor Hochul Announces Sweeping Plans to Address Housing Affordability Crisis in New York State,* N.Y. STATE (Jan. 5, 2022), https://www.governor.ny.gov/news/governor-hochul-announces-sweeping-plans-address-housing-affordability-crisis-new-york-state ("Governor Hochul will propose amending the State law that limits the maximum density of residential floor area ratio to 12.0 in New York City, returning it to local authority.").

[164] Richard Briffault, *The Challenge of the New Preemption* 1 (Colum. Pub. L. Research Paper No 14-580, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119888 ("[T]he real action today is the "new preemption" – new sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems.").

affirmatively solve problems, such as through a regional or a state level policy, in favor of simply prohibiting local regulation from an ideological perspective.[165] The focus of those sorts of preemptions are designed to eliminate the locality's action without creating an alternative state-level action.[166] In the context of housing, such state preemptions have been seen by some scholars and commentators as being motivated by anti-density and anti-urban concerns.[167] The sort of preemption I would be advocating for from a judicial perspective would be to help confront the tendencies at the local level for each individual town to act rationally, responding to the concerns of local voters, to create a NIMBY environment where an insufficient supply of housing gets built.[168] This is meant to contrast with activities by judiciaries (or legislatures) which limit the scope of local authority without providing alternative guidance or standards.[169]

That is not to say that pre-emption by either a state legislature or a state judiciary designed to free up local zoning restrictions is without danger, as noted previously with how several states have sought to pre-empt valuable local zoning initiatives designed to promote inclusive zoning requirements.[170] Rather, the key, in establishing judicial preemption, or evaluating a legislative one is whether it addresses a problem appropriate for a state or a government to fix (such as a negative externality) or through following through with a constitutional requirement, such as

---

[165] *See id.* at 2 ("[T]he preponderance of deregulatory, punitive, and nuclear preemptive actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to – and are designed to block – relatively progressive regulatory actions adopted by activist cities and counties.").

[166] *See id.* at 1 ("[P]reemptive state laws are aimed not at coordinating state and local regulation but preventing any regulation at all.").

[167] *See, e.g.*, Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) (discussing various forms of anti-urbanism).

[168] *See* Nolan Gray, *The Positive Power of Preemption*, BLOOMBERG: CITYLAB (Aug. 13, 2017), https://www.citylab.com/equity/2017/08/the-positive-power-of-preemption/536241/ (discussing how local governments act on behalf of "politically active homeowners [who] want to protect the value of their home[s]").

[169] *See* Lemar, *supra* note 143, at 9–10 (discussing the effects and nature of judicial and legislative preemption of local authority).

[170] *See* Schragger, *supra* note 154, at 1165–1167 (explaining the implications and dangers inherent in state preemption of local zoning ordinances).

promoting the general welfare.[171] Establishing standards are challenging, and there have been prominent examples where instituting inclusionary zoning, or rent control laws, have decreased housing starts to such an extent that the gains from the increased standards evaporate.[172]

Thus, I will advise that the instances in which judiciaries pre-empt local zoning regulations should be restrained, much as with legislatures, to instances in which the benefits are clearly and empirically demonstrated, and will be curtailed and narrow in its scope, as certain aspects of land use regulation truly are best left to local jurisdictions.[173] In such situations, the judiciary, much like the state legislatures, are justified in preempting overly restrictive local zoning.[174] Creating presumptions favoring denser development, such as zoning by right along transit corridors[175] universally permitting

---

[171] I.e., in the case of the federal government: U.S. CONST. preamble.

[172] *See i.e.* Bill Lindeke, *In first months since passage of St. Paul's rent-control ordinance, housing construction is way down*, MINNPOST (Mar. 2022) https://www.minnpost.com/cityscape/2022/03/in-first-months-since-passage-of-st-pauls-rent-control-ordinance-housing-construction-is-way-down/ (observing how Saint Paul, Minnesota, where the imposition of a local rent control law designed to promote affordable housing appeared to lead to a sudden and drastic decline in housing starts—making it more likely that non-rent controlled units will see a price increase).

[173] *See id.*; C.J. Gabbe, *Local Regulatory Responses During a Regional Housing Shortage: An Analysis of Rezonings in Silicon Valley*, 80 LAND USE POL'Y 79 (2019).

[174] *See* Infranca, *supra* note 154, at 885–86. ("Rather than impose new procedural steps, planning requirements, or the uncertainty of a potential appeal, states would be better served by directly displacing specific elements of local zoning, as more recent interventions have increasingly done. These interventions have not ignored local concerns, rather they have specified the types of concerns local governments can continue to address, and in some instances have required local governments to substantiate those concerns.").

[175] *See* An Act Enabling Partnerships for Growth, H.R. H5250, 191st Gen. Ct. Comm. Mass. (Mass. 2021) (enacted), at 25 ("For state financial assistance in the form of grants or loans to accelerate and support the creation of low-income and moderate-income housing in close proximity to transit nodes; provided, that the program shall be administered to: (i) maximize the amount of affordable residential and mixed-use space in close proximity to transit nodes, resulting in higher density, compact development and pedestrian-friendly, inclusive and connected neighborhoods.").

accessory development units, excepting traditional zoning concerns[176] or bans on single family zoning[177] can be a part of narrowly tailoring, either in scale, or in scope, that can directly displace elements of local zoning, rather than creating a long, expensive potential appeal process.[178] The purpose is not to "ignore[] local concerns, [but] rather [to specify] the types of concerns local governments can continue to address, and in some instances [require] local governments to substantiate those concerns.[179] This arises from the controversial, but poignant argument, about the nature of democratic processes vs. democratic outcomes. As argued in a recent book[180] reforming democratic institutions to slightly increase their insulation from democratic pressures can improve policy outcomes ranging from central bank independence,[181] to discrepancies between

---

[176] David Garcia, *ADU Update: Early Lessons and Impacts of California's State and Local Policy Changes*, TERNER CENTER FOR HOUSING INNOVATION, UNIVERSITY OF CALIFORNIA AT BERKELEY (Dec. 21, 2017), https://ternercenter.berkeley.edu/research-and-policy/adu-update-early-lessons-and-impacts-of-californias-state-and-local-policy-changes/ ("Accessory Dwelling Units (ADUs) – built with a small footprint predominantly in under-utilized single family neighborhoods – can offer much needed naturally-affordable supply to the market.").

[177] *See* Cal. leg., S. B. 9, CHAPTER 162, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB9 ("This bill, among other things, would require a proposed housing development containing no more than 2 residential units within a single-family residential zone to be considered ministerially, without discretionary review or hearing, if the proposed housing development meets certain requirements . . . .").

[178] *See* Infranca, *supra* note 154, at 886.

[179] *Id.*

[180] David R. Henderson, *10% Less Democracy*, CATO INSTITUTE (Summer 2020), https://www.cato.org/regulation/summer-2020/10-less-democracy# ("Jones argues that if we made the United States and many other countries slightly less democratic, we would get slightly more freedom and slightly better policies. He makes his case by examining the details of central bank policy on inflation, appointed versus elected judges, restrictions on who can vote, the effects of the European Union, and the extreme case of Singapore.").

[181] *Id.* ("[L]ooked at central banks around the world and used simple graphs to show that the more independent a bank was from the political system, the lower the inflation rate.").

elected and appointed judges.[182]Thus, in this context, "[i]nterventions that displace, rather than simply channel, local land use decision-making can, perhaps paradoxically, better serve to vindicate valid local interests."[183] Given the tendencies for local zoning meetings to be disproportionately dominated by older homevoters,[184] who are less representative of the population as a whole and heavily incentivized to consider the value of their primary economic asset,[185] reducing the democratic nature of the zoning process could be an asset rather than a liability.

C. Private Right of Action

Above all, a key here would be to create a private right of action for residents priced out of high-cost areas. Private rights of action have the benefit of increasing the mechanisms through which a policy can be prosecuted via the court system.[186] As part of increasing this private right of action, a key will be to declare renters

---

[182] *Id.* ("Jones . . . shows that damage awards granted by elected judges are systematically higher than those granted by appointed judges.").
[183] *See* Infranca, *supra* note 154, at 886.
[184] *See* Fischel, *supra* note 97.
[185]Jerusalem Demsas, *The Next Generation of NIMBYs*, THE ATLANTIC (July 20, 2022), https://www.theatlantic.com/newsletters/archive/2022/07/the-next-generation-of-nimbys/670590/ ("[I]t stands to reason that people who bought houses… [and] have no other savings to rely on in case of a medical or other financial emergency [] will be that much more worried about any potential declines in value.").
[186] For controversial examples of increasing the use of private rights of action, *See* Glenn Thrush, *Inside Missouri's '2nd Amendment Sanctuary' Fight*, N.Y. TIMES, (Sept. 9, 2021), https://www.nytimes.com/2021/09/09/us/politics/missouri-gun-law.html ("The Missouri law has . . . [a] provision allowing citizens to sue . . . for every incident in which they can prove that their rights were violated."); Alan Feuer, *The Texas Abortion Law Creates a Kind of Bounty Hunter. Here's How It Works.*, N.Y. TIMES (Sept. 10, 2021), https://www.nytimes.com/2021/09/10/us/politics/texas-abortion-law-facts.html ("The new law in Texas effectively banning most abortions has ignited widespread controversy and debate, in part because of the mechanism it uses to enforce the restrictions: deputizing ordinary people to sue those involved in performing abortions and giving them a financial incentive to do so.").

as being a protected class, expanding beyond the confines of federal law. As one commentator observes:

> Since the 1950s and 1960s, the number of cities with civil rights ordinances has grown exponentially… for instance, while federal law prohibits employment and housing discrimination on the basis of race, color, religion, sex, national origin, or disability as well as age for employment and familial status for housing, cities also prohibit discrimination on the basis of categories like sexual orientation, gender identity, height, weight, physical appearance, marital status, parental or family status, source of income, military or veteran status, educational association, prior psychiatric treatment, AIDS or HIV status, ex-offender status, and political ideology, even when state law does not.[187]

Implementing private enforcement of local pro-housing density initiatives is not unprecedented, as the idea of allowing for private rights of action to arise from municipal ordinances is permitted in multiple states.[188] This can continue the trend, dating back to the 1940s to the 1960s, where the distinction between public and private law declined in the face of greater public regulation of what were once private rights through state and federal civil rights laws.[189] These private rights of action need not be limited by exceptions found in federal civil rights law.[190] Rather, in an era where local regulation has increasingly specified by fiat what types of housing can be built where, surrendering the production of "'missing middle' housing–housing somewhere between traditional single-family detached suburban homes and large apartment complexes–that used to be built in American cities before the rise of middle-class suburbs

---

[187] Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1147–49 (2012).

[188] *Id.* at 1171–72 (describing at the time how nine states were permissive of such readings).

[189] *Id.* at 1118 ("The 1950s and 1960s witnessed even more public regulation of the formerly 'private' sphere through state and federal civil rights laws.").

[190] *Id*. at 1149 (analogizing how, in the context of housing discrimination, many cities' civil rights ordinances lack the exceptions found in federal law).

after World War II", has produced major consequences for housing affordability.[191] Duplexes, multiplexes, bungalow courts, courtyard apartments, townhouses, and live/work housing would all qualify as being part of that missing middle that has been discouraged by local policy makers[192] – courts should enable those without access to affordable housing to have the right to sue to enforce the right to shelter, particularly in areas where housing costs have outpaced the national average, and, in areas near transit, where the demand for new housing is only increasing over time.

XI. Conclusion

Deregulating zoning – whether via local governments, regional governments, or, as proposed here, by the court system, can be thought of as an example of manufacturing a future of abundance. A so-called "abundance agenda"[193] connecting infrastructure developments as varied as manufacturing next-generation vaccines, green energy projects, and, of course, housing, provides a vision for an America that is more prosperous and equitable than the one existing today. Understanding that particular challenges, partially

---

[191] Paul A. Diller, Edward J. Sullivan, *The Challenge of Housing Affordability in Oregon: Facts, Tools, and Outcomes*, 27 J. AFFORDABLE HOUS. & CMTY DEV. L. 183, 225 (2018) ("Nationally, there has been a movement to reclaim and stimulate the production of 'missing middle' housing—housing somewhere between traditional single-family detached suburban homes and large apartment complexes—that used to be built in American cities before the rise of middle-class suburbs after World War II.").

[192] *See id.* at 213, 224–25. ("There has been significant litigation regarding the failure of local governments to apply clear and objective standards and procedures to needed housing. . . . Nationally, there has been a movement to reclaim and stimulate the production of 'missing middle' housing . . . [t]hese include housing types such as duplexes, triplexes, four-plexes, multiplexes, bungalow courts, courtyard apartments, townhouses, and live/work housing.").

[193] Derek Thompson, A SIMPLE PLAN TO SOLVE ALL OF AMERICA'S PROBLEMS, *Atlantic,* (Jan. 12, 2022) https://www.theatlantic.com/ideas/archive/2022/01/scarcity-crisis-college-housing-health-care/621221/ (postulating scarcity as a negative cornerstone of the U.S. economy and lays out an "abundance agenda" for multiple essential services, like housing).

caused by past regulations on housing supply,[194] require new solutions, does not mean that we cannot embrace models that were considered in the past. *Mount Laurel*, our series of cases from New Jersey, designed to tackle the particularized problem of denying the bottom half a place in the booming suburbs of a rapidly changing 20th Century America,[195] can be a model for solving today's parallel problem of rising housing costs. The average sale price of a home in the United States increased from $313,000 in Q1 of 2019 to $428,700 in Q1 2022,[196] far outpacing even the rapid increase in inflation during that period. Local governments, influenced by voters following the homevoter hypothesis,[197] have been slow to respond. The court system, the least democratic of the three branches of government, can be leveraged to produce a fairer and more just outcome, by preempting local decisions artificially restricting the supply of a critical asset[198] that many seek to be declared a human right.[199] By putting its thumbs on the scale, and preempting

---

[194] *See* SSZEA §3, *supra* note 19 (establishing a "Standard State Zoning Enabling Act" allowing state government to regulate, essentially, the availability of housing through price, housing type, etc.).

[195] *See* Mount Laurel IV, *supra* note 26 (holding that courts will be forum of first resort for evaluating municipal compliance with constitutional obligations and its evaluation of each municipality's plan may result in judicial equivalent of substantive certification and accompanying protection under FHA).

[196] *See, e.g.*, *Fed. Reserve Bank of Saint Louis Median Sales Price of Houses Sold for the United States, 1963–2022*, FED. RSRV. ECON. DATA , https://fred.stlouisfed.org/series/MSPUS (last visited Nov. 1, 2022) (establishing rapid increase of average sale price of US homes in Q1 of 2019 to Q4 of 2021).

[197] *See generally* Fischel, *supra* note 94 (summarizing phenomenon of homevoter hypothesis where local governments bend to the will of local homeowners when tasked with making land use decisions).]

[198] *See* Demsas, *supra* note 185 (explaining culture of NIMBYism, particularly millennial NIMBYs whose resistance to change is tied to primary goal of maintaining home values, shapes values of local decisionmakers).

[199] U. N. Office of the High Commissioner for Human Rights (Special Rapporteur on the right to adequate housing), *The human right to adequate housing*, (Fact Sheet No. 21/Rev.1) https://www.ohchr.org/en/special-procedures/sr-housing/human-right-adequate-housing#:~:text=Housing%20is%20a%20right%2C%20not%20a%20commodity%201,informal%20settlements.%20...%204%20Building%20back

inefficient and inequitable decrees from quasi-legislative bodies such as local zoning boards, the court system can get on the right side of history, and help solve a problem deeply affecting Americans of all kinds.

%20better.%20 ("Increasingly viewed as a commodity, housing is a human right.").