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SMALL SUBURBS, LARGE LOTS: HOW THE SCALE OF LAND-USE
REGULATION AFFECTS HOUSING AFFORDABILITY, EQUITY,
AND THE CLIMATE

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Abstract

Housing costs in major coastal metropolitan areas nationwide have skyrocketed, impacting people, the economy, and the environment. Land-use regulation, controlled primarily at the local level, plays a major role in determining housing production. In response to this mounting housing crisis, scholars, policymakers, and commentators are debating whether greater state involvement in local land-use decision-making is the best path forward.

We argue here that there are good reasons to believe that continuing on the current path—with local control of land-use regulation as it is—will lead to persistent underproduction of housing. The benefits of housing production are primarily regional, including improved job markets, increased socioeconomic mobility, and reduced greenhouse gas emissions. But the costs associated with producing more housing are often local, felt at the neighborhood level. Local governments whose voters are impacted by the local negative impacts of housing and will usually have less incentive to consider those regional, and national, benefits and approve housing. Recent political science, planning, economics, and legal research shows that smaller local jurisdictions tend to produce less housing, and when political institutions decentralize control over housing to the sublocal (e.g., neighborhood) scale, less housing is approved.

A central theory in academic research in land-use regulation and local government law has been the idea that competition among highly fragmented local governments can produce more efficient outcomes in public services and land-use regulation, even if there may be significant inequities across local jurisdictions in outcomes. Our analysis shows that this theory no longer accurately describes how fragmented local governance affects economic efficiency. Indeed, our analysis makes clear

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that fragmented local governance is both inequitable and inefficient, at least in the context of land-use regulation. Our analysis also raises questions about local government law scholarship contending that increased local governmental power can effectively address the dysfunctions of metropolitan areas in the United States.

We present a range of policy proposals to address the problems we identify. First, greater state intervention in local land-use regulation is necessary. While a greater state role need not (and probably should not) entirely displace local control, it is essential to ensure that the larger-scale benefits of housing are appropriately considered. Second, we note that the highly fragmented local land-use regulatory system imposes challenges for housing production, in part, because variation among local regulatory practices creates barriers to entry for new housing across jurisdictions. Accordingly, we advocate for a state role to increase the standardization of local land-use regulatory tools as a key step to help advance greater housing production, even where local control is maintained.

INTRODUCTION

For decades housing costs in major coastal metropolitan areas around the United States have skyrocketed, impacting people, the economy, and the environment. By the late 2010s, housing costs reached levels that priced out lower- and middle-income renters from their homes and excluded millions more from moving into these metropolitan areas that have been the drivers for growth and opportunity in the United States. Some residents pushed to the exurban fringe now face megacommutes. At the same time, when high housing costs exclude people—disproportionately people of color—from neighborhoods with high levels of opportunity in the form of excellent schools, good job opportunities, high-quality public services, and low crime, this perpetuates entrenched racial inequities in the United States.

Preventing people from moving into high-growth, high-productivity metropolitan areas also harms regional and national economic growth. The economic costs of exclusion to the United States in these metropolitan areas may be as high as \$1.4 trillion.¹ Moreover, addressing the present and future threats of climate change requires reducing greenhouse gas emissions around the world, including in the United States. A large portion of American greenhouse gas emissions come from transportation, and a major component of transportation emissions in the United States comes from the use of gasoline for passenger vehicles.

¹ Chang-Tai Hsieh & Enrico Moretti, *How Local Housing Regulations Smother the U.S. Economy*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/opinion/housing-regulations-us-economy.html> [<https://perma.cc/U4G4-BWMF>].

At present, reducing greenhouse gas emissions depends in part on reducing transportation emissions by increasing the ability of people to walk, bike, or public transit.²

Addressing all of these issues requires more housing in high opportunity neighborhoods within major metropolitan neighborhoods or infill development. More housing supply can reduce the cost of housing overall in a metropolitan area; locating that housing supply in high opportunity neighborhoods can support racial and class integration; lowering barriers to entry in the most economically dynamic metropolitan areas can support social mobility and national economic productivity; and producing infill housing can reduce the need for automobiles for transportation and increase other forms of transit.³ In particular, scholars and policymakers have identified encouraging development in single-family and other low-density neighborhoods in older and newer suburbs around metropolitan areas as a key step to address these four issues.⁴

But encouraging development in these single-family and other low-density neighborhoods depends on decisions made by city councils, town halls, and county boards of supervisors around the country. Most land-use regulation in the United States is adopted and implemented by general-purpose local governments, such as towns and cities. These local governments often manage extremely small areas of land, producing a highly fragmented governance landscape for most of the major metropolitan areas in the United States. For instance, in the Bay Area, there are 110 local governments with land-use regulatory powers in a metropolitan area of 7.75

² See, e.g., California Air Resources Board, *California's 2017 Climate Change Scoping Plan*, at 74–77 (Nov. 2017) (stating that reductions in vehicle miles travelled (VMT) are required to achieve state climate goals); *id.* (“While most of the [greenhouse gas emission] reductions from the transportation sector in this Scoping Plan will come from technologies and low carbon fuels, a reduction in the growth of VMT is also needed. VMT reductions are necessary to achieve the 2030 target and must be part of any strategy evaluated in this Plan.”).

³ Identifying production as a key response to both housing costs and residential segregation does not mean that it is the only important or even necessary response. Other steps such as protection of tenants from displacement and preservation of existing affordable housing are essential as well, as has been recognized by policymakers and advocates in places such as California. See The Committee to House the Bay Area, *CASA Compact: A 15-Year Emergency Policy Package to Confront the Housing Crisis in the San Francisco Bay Area* (Jan. 2019), https://mtc.ca.gov/sites/default/files/CASA_Compact.pdf [<https://perma.cc/X9NC-698C>].

⁴ See, e.g., Michael Manville, Paavo Monkkonen & Michael Lens, *It's Time to End Single Family Zoning*, 86 J. AM. PLAN. ASS'N 1, 108–09 (2020); Jake Wegmann, *Death to Single-Family Zoning . . . and New Life to the Missing Middle*, 86 J. AM. PLAN. ASS'N 1, 115 (2020); CONOR DOUGHERTY, *GOLDEN GATES: FIGHTING FOR HOUSING IN AMERICA* 117–44 (2020) (describing motivations by state legislators in California to push for denser zoning in urban areas); Laura Bliss, *Oregon's Single-Family Zoning Ban Was a 'Long Time Coming,'* BLOOMBERG (July 2, 2019, 7:03 AM), <https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning> [<https://perma.cc/5Q3M-U6E8>] (describing legislation in Oregon requiring cities to allow dense multifamily housing).

million people.⁵ As of 2010, there were 565 general-purpose local governments with land-use regulatory authority in the New York metropolitan area for 18.9 million people, despite the existence of the large consolidated five-borough New York City government, and in the Boston metropolitan area, there were 197 such governments for 4.55 million people.⁶

The fragmentation of local government in the United States creates the possibility that one local government's decisions about land-use regulation can have spillover effects on other local governments.⁷ Production of housing in a particular location has broader regional and national benefits—it contributes to lower housing costs at the regional level since housing markets are regional, not just local. Those lower housing costs can, in turn, produce several benefits at the regional and national level: fostering economic growth in high productivity metropolitan areas; providing affordable housing that creates access for low-income and historically disadvantaged groups in high opportunity neighborhoods and metropolitan areas; and mitigating climate change by facilitating the development of dense infill neighborhoods that can reduce greenhouse gas emissions.

Development, in contrast, typically produces local, concentrated costs. Increased burdens on local public goods (in particular schools), increased traffic, reduced access to parking, and other impacts from denser residential development

⁵ There are 101 incorporated cities and towns and nine counties in the Bay Area. See Egon Terplan, *Strengthening the Bay Area's Regional Governance*, 2 (2013), https://www.spur.org/sites/default/files/publications_pdfs/Strengthening_Regional_Governance.pdf [<https://perma.cc/XW7K-H83C>].

⁶ The two metropolitan areas analyzed are the New York-Northern New Jersey-Long Island, NY-NJ-PA Metro Area and the Boston-Cambridge-Quincy, MA-NH Metro Area. General purpose local governments are typically classified by the Census Bureau as places, county subdivisions, and/or counties. We classify census geographies as general purpose local governments with land-use regulatory authority based on each geography's federal information processing standards (FIPS) class code, as recorded in geographic information system shapefiles provided by the US Census Bureau and the IPUMS National Historical GIS program, combined with data from other sources as described in Nicholas J. Marantz & Paul G. Lewis, *Jurisdictional Size and Residential Development: Are Large Scale Local Governments More Receptive to Multifamily Housing?*, URB. AFFS. REV., Jan. 23, 2021, at 1, 5–7. Population statistics are from U.S. CENSUS BUREAU, 2010 CENSUS SUMMARY FILE 1 DATASET (2011), <https://www.census.gov/data/datasets/2010/dec/summary-file-1.html> [<https://perma.cc/5NVT-P8S4>].

⁷ For prior researchers noting the possible issue of spillovers in land-use regulation, see, for example, Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000) [hereinafter Briffault, *Localism and Regionalism*]; WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 86–87 (2001) [hereinafter FISCHER, THE HOMEVOTER HYPOTHESIS]; Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget,"* 62 CASE W. RES. L. REV. 81, 90–94 (2011) [hereinafter Hills & Schleicher, *Balancing the "Zoning Budget"*]; Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1133–41 (1996) [hereinafter Briffault, *Boundary Problem*]. We analyze the literature in more detail in Sections III.A and B.

will generally be realized at the neighborhood scale or the level of an individual local government. In many cases, these costs will be higher for local governments when new housing is more affordable and denser. The implication of this asymmetry in the geographic scale is that local control over land use will focus on the smaller scale, negative impacts of housing development, and underweight the larger scale, positive impacts of that development. Thus, local control over land-use regulation should underproduce housing in high-cost, highly fragmented metropolitan areas. Providing at least initial support for this assessment is the fact that local land-use regulation in many metropolitan areas is highly restrictive in terms of what residential development it allows—a major contributor to skyrocketing housing costs, residential segregation, and unsustainable sprawling development. Moreover, local governments, particularly small suburban local governments, are politically dominated by homeowners who seek to protect home values by restricting the construction of dense infill development.

Increasingly there is evidence to support this critique of local control over land use. Research in law, economics, and urban planning has found extensive evidence that housing production and restrictions on housing production in one jurisdiction impact the cost of housing in other jurisdictions at the regional level.⁸ Research has found evidence that highly fragmented local government structures facilitate sprawling, low-density patterns of growth. This research has found evidence that smaller local governments have stricter zoning that excludes dense, lower-cost housing. It has found evidence that smaller jurisdictions produce less housing overall. And it has found that even within larger local governments, where land-use regulation decisions are devolved to smaller units of control (such as city councilmembers or neighborhood groups), less housing overall is produced.

This evidence is a powerful argument for greater state or regional roles in land-use regulation. In other words, reducing local control of land-use regulation should advance housing production that can address housing costs, residential segregation, and the climate crisis. Thus, our analysis also rebuts proponents of the primacy of local control of land-use regulation, proponents who have resisted state-level efforts to advance dense, infill housing production in states such as California.

There are important theoretical payoffs from our analysis as well. One key theoretical framework in both land-use and local government law involves the possibility that competition among highly fragmented local governments might produce more efficient local government and more efficient outcomes from land-use regulation. In particular, some economists and legal scholars have posited that such competition reduces housing costs by incentivizing local governments to advance the socially optimal amount of public services and development.⁹ This argument,

⁸ See *infra* Parts II and III.

⁹ See, for example, FISCHER, THE HOMEVOTER HYPOTHESIS, *supra* note 7, for economist theories. For legal scholar theories, see, for example, Nicole Stelle Garnett, *Planning for Density: Promises, Perils, and a Paradox*, 33 J. LAND USE & ENV'T L. 1, 11 (2017) [hereinafter Garnett, *Planning for Density*]; Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms from the Inside Out*, 119 YALE L.J. 1905, 1906, 1908,

which builds on an economic analysis of local government developed by economist Charles Tiebout in the mid-twentieth century,¹⁰ is also one of the arguments used to support the status quo of local control over land in the United States.¹¹ Some academics have speculated that unified regional or state-level control of land-use regulation might, in fact, undermine housing production, since it would create a governmental entity with monopolistic control over land-use regulation that is vulnerable to capture by those who might fight housing production and seek to keep housing prices high.¹² More fundamentally, an influential thread of economics research asserts that strong zoning controls on the influx of new residents into a jurisdiction are an essential feature of Tiebout competition, at least so long as property taxes continue to be the dominant approach for local government finance in the United States.¹³

Tiebout competition has always focused on efficiency rather than equity—as even proponents would concede. The merits of this tradeoff are and have always been problematic. However, our analysis indicates it is unclear whether there is even a major efficiency gain from Tiebout competition—if small, fragmented local governments do not adequately consider the regional or national benefits of housing production, then they will not provide the efficient level of that housing. One of the most important implications of Tiebout competition has been that it could advance efficient provision of public services by local government more generally, such as schools, policing, and public utilities. However, maintaining these services comes at a cost. High-quality public schools—traditionally a beacon of suburban America—require a population that can pay for those services through higher taxes and assessments. Efficient Tiebout competition in these contexts may well depend on the ability of local governments to wield land-use regulation to exclude low- and moderate-income outsiders from entering the jurisdiction, to take advantage of high-quality public services. Under these circumstances, exclusionary zoning is a crucial component of putatively efficient intergovernmental competition. This has clear equity implications, as exclusionary zoning will preclude lower-income residents from moving to communities with high-quality public services. But there are efficiency implications as well. Dense housing, the kind that exclusionary zoning is most likely to preclude, has regional economic and global climate benefits. And because of the large-scale of those benefits that extend beyond the borders of many

1915 (2010) [hereinafter Garnett, *Unbundling Homeownership*] (reviewing LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009)); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 899–900 (2007) [hereinafter Serkin, *Local Property Law*]; Vicki Been, “Exit” as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991).

¹⁰ See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) [hereinafter Tiebout, *Local Expenditures*].

¹¹ See *infra* Section II.C. (discussing arguments for local control over land-use).

¹² See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 3, 409, 434–35 (1977) [hereinafter Ellickson, *Suburban Growth*].

¹³ See *infra* notes 163–166, and accompanying text.

local jurisdictions, local governments will not have strong incentives—and indeed may have strong disincentives—to allow dense housing.

Our analysis provides an important contribution to the scholarship on land use and local government, as well as to the urban planning and economics literatures. Scholars have previously identified the possibility that local governments might not have adequate incentives to produce housing for metropolitan regions because of the mismatch between the scale of local government and the scale of metropolitan housing markets, and that smaller jurisdictions may be particularly reluctant to adequately permit sufficient housing to meet regional needs.¹⁴ Scholars have previously noted the importance of rising housing costs to regional and national economies¹⁵ and the importance of infill development to address climate change.¹⁶ There is ample literature debating the merits and demerits of Tiebout competition as an accurate portrayal of how local governments in the United States function and as a normatively desirable outcome, including in the context of land-use regulation.¹⁷

¹⁴ See, e.g., DAVID RUSK, *CITIES WITHOUT SUBURBS* 52 (3rd ed. 2000); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *GEO. L.J.* 1985, 2004–14 (2000) (outlining the bias intrinsic to local governance); Richard Briffault, *Our Localism: Part II-Localism and Legal Theory*, 90 *COLUM. L. REV.* 346, 426–29 (1990) [hereinafter Briffault, *Our Localism Part II*] (highlighting the issues of size with respect to local governments and boundary formation); Briffault, *Localism and Regionalism*, *supra* note 7, at 18–20 (arguing that “a purely localist governance structure will fail to provide some of the critical elements of the efficiency model”); WILLIAM A. FISCHER, *ZONING RULES!: THE ECONOMICS OF LAND REGULATION*, 314–16 (2015) [hereinafter FISCHER, *ZONING RULES!*] (addressing the regional variances in local governments); Ellickson, *Suburban Growth*, *supra* note 12, at 402–03 (discussing the various effects of antigrowth policies); John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 *B.C. L. REV.* 823, 830–35 (2019); Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 *BYU L. REV.* 177, 191–93; see also ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* 65–67 (5th ed. 2020) (noting this dynamic of local government underproviding housing because of the broader benefits of limited housing). Ellickson, Been, Hills, and Serkin indicate that this dynamic is “difficult to verify.” *Id.* at 67. Our synthesis here provides what we believe to be the best summary of the evidence that does verify that this dynamic exists.

¹⁵ See, e.g., Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 *AM. ECON. J.: MACROECONS.* 1 (2019) (examining national effects of housing constraints and spatial misallocation); David Schleicher, *The City as a Law and Economic Subject*, 2010 *U. ILL. L. REV.* 5, 1534 (2010) [hereinafter Schleicher, *The City as a Subject*] (noting regional effects of agglomeration gains).

¹⁶ See *infra* Section IV.B.

¹⁷ For classic scholarship by the advocates of the role of Tiebout competition, see VINCENT OSTROM, ROBERT BISH & ELINOR OSTROM, *LOCAL GOVERNMENT IN THE UNITED STATES* (1988); MARK SCHNEIDER, *THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA* (1989); Vincent Ostrom, Charles M. Tiebout & Robert Warren, *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 *AM. POL. SCI. REV.* 831, 832 (1961) [hereinafter Ostrom et al., *Government in Metropolitan Areas*]. For key work

Scholars such as David Schleicher have questioned whether Tiebout competition can adequately function in a world in which a few key metropolitan areas increasingly dominate economic output.¹⁸ However, this piece is the first to both combine these disparate strands of the literature and summarize the results of recent economics, planning, and political science literature that provides quantitative evidence of how smaller jurisdictions disproportionately fail to produce adequate housing; and it takes this summary to provide a comprehensive critique of the use of Tiebout competition to describe or justify land-use regulation by local governments.

While legal scholarship based on Tiebout competition emphasizes the ability of local governments to make policy decisions that can facilitate choices by residents, other local government law scholars have argued that local governments in the United States are in fact hamstrung by state limits on their policymaking powers—including in the context of land-use decision-making.¹⁹ Local government scholars have argued that these trends have accelerated in the past several years with the “new preemption” in which states have moved to significantly constrict local government regulatory powers.²⁰ Some of these scholars have called for both expanding local government powers and for more robust protections of local government autonomy.²¹ Limiting local land-use regulatory powers might threaten

critiquing Tiebout competition, frequently on equity grounds, see GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999); PETER DREIER, JOHN MOLLENKOPF & TODD SWANSTROM, *PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY* (2001); MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997); NEAL R. PEIRCE, *CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD* (1993); RUSK, *supra* note 14; Briffault, *Our Localism Part II*, *supra* note 14, at 415–35 (refuting the localist theory of governance). We expand on this theoretical discussion in Sections II.C and III.A, *infra*.

¹⁸ See Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 *GEO. MASON L. REV.* 3 (2012); Schleicher, *The City as a Subject*, *supra* note 15, at 1535–45.

¹⁹ See David J. Barron, *Reclaiming Home Rule*, 116 *HARV. L. REV.* 2255 (2005) [hereinafter Barron, *Reclaiming Home Rule*]; GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008); see also RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 60–86 (2016) [hereinafter SCHRAGGER, *CITY POWER*] (explaining that cities are subordinated to the free market and that “competitive decentralization is intended to *limit* cities” instead of empowering them).

²⁰ See Richard Briffault, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995, 1995 (2018) [hereinafter Briffault, *New Preemption*]; Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 *YALE L.J.* 954, 954 (2019); Paul A. Diller, *The Political Process of Preemption*, 54 *UNIV. RICH. L. REV.* 343, 343 (2020); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 *GEO. L.J.* 1469, 1469 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 *TEX. L. REV.* 1163, 1163 (2018) [hereinafter Schragger, *Attack*].

²¹ See Briffault, *New Preemption*, *supra* note 20, at 2017–25; Barron, *Reclaiming Home Rule*, *supra* note 19, at 2364–79; FRUG & BARRON, *supra* note 19, at 211–12 (introducing proposals in context of land-use regulation); see also NAT’L LEAGUE OF CITIES, *PRINCIPLES*

other important local regulatory powers without the intended payoff if “there is no reason to believe that a state’s land use regime . . . will not come to reflect similar political pathologies” as at the local level.²²

Our analysis provides one response to the skepticism that reducing even some local control over land use would provide better outcomes. We identify a specific mechanism, limited to land-use regulation, that predicts local governments will usually under-provide housing relative to larger scales of regulation, such as at the regional or state level, because of the positive spillovers of housing.²³ Our analysis is limited to land use and therefore does not threaten other areas of local regulation, nor does it provide support for the blanket or punitive forms of state intervention described in the “new preemption” literature. Our analysis does provide a theoretical grounding for an expectation that at least some states will, on average, provide regulation that is more effective in producing needed housing.

Our analysis also makes a theoretical contribution to property law more broadly. A key effect of local control over land-use regulation is that the regulatory process is extremely complicated and highly variable from place to place. It is time- and resource-intensive for a landowner or developer to identify what the processes for development are and how to navigate them to fruition. This adds costs to development and increases barriers to entry for developers who seek to produce residential housing in a city where they have not worked in the past. The complexity and diversity of land-use regulatory forms across local jurisdictions also facilitate evasion by local governments of state-level efforts to advance housing production, as local governments adopt new forms of regulation to evade state-level restrictions and mandates. Property scholars have emphasized how the creation of standardized forms can facilitate the transfer and use of property, but their work has focused on property (i.e., private law) rather than land-use regulation (i.e., public law).²⁴ Standardization of land-use regulatory tools and terms—limiting local governments to a specified menu of regulatory options in developing their zoning systems—could have analogous benefits. By enabling land-use regulation that is predictable and comprehensible to landowners and the public, reducing development costs and barriers to entry, and limiting the ability of local governments to evade housing production mandates, standardization could play a crucial role in facilitating the

OF HOME RULE FOR THE 21ST CENTURY 26 (2020) (group of leading local government scholars calling for a “substantial state interest” that is “narrowly tailored” for any state preemption of local power); *id.* at 26, 35, 53 (calling for presumption of local power).

²² Richard C. Schragger, *The Perils of Land Use Deregulation*, U. PA. L. REV. (forthcoming 2021) (manuscript at 3) (on file with author) [hereinafter Schragger, *Perils*]. See also *id.* at 22 (“But few have sought to explain why, if local governments are unwilling to jettison their exclusionary tendencies, state elected officials would do it for them.”) (citation omitted).

²³ Local government scholars regularly note that spillovers across local government boundaries can justify state-level intervention. See, e.g., Briffault, *New Preemption*, *supra* note 20, at 2021; NAT’L LEAGUE OF CITIES, *supra* note 21, at 18, 26.

²⁴ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1, 3 (2000).

production of residential housing.²⁵ It also could have important benefits by making the land-use regulatory system easier for the public to understand—allowing them to hold developers and policymakers accountable for how well or inadequately that system operates.

We do not underestimate the political challenges our proposals for change may face. But we emphasize the urgency of addressing these issues: millions of Americans who have lost their homes or are excluded from areas of economic opportunity; the lasting harms from historical and present residential segregation; and the looming climate crisis.

We begin our analysis in Part I with an overview of how the land-use regulatory process in America operates in the context of fragmented local government structures; we also provide a history of how land use and local government have functioned to structure the rise of the suburbs in the United States, including residential segregation; and we describe current policy debates over local control of land use.

In Part II, we describe the theory and evidence for regional spillovers for housing development by local governments. We explain how the negative impacts of housing development are likely to be smaller in geographic scale than the positive impacts of that development and how this would likely lead small local governments to underproduce housing. We summarize recent research that supports the idea that housing production in one jurisdiction has spillover effects on other jurisdictions and that smaller local governments produce less housing than larger local governments.

In Part III, we summarize the larger scale (national or global) spillovers from housing production. Economists have argued that increasing access to high-productivity metropolitan areas will likely produce significant economic benefits at a national level. Increasing this kind of access to high-opportunity neighborhoods would address historical and present-day racial and other socioeconomic inequities in access to public goods and education. And we note the global climate benefits from facilitating dense infill development that depends less on automobile transportation.

In Part IV, we explore the implications of our analysis. We discuss the basics of Tiebout theory and the relevance of our analysis for that theory. In particular, we note that spillovers raise serious questions about the efficiency benefits of Tiebout competition among local governments, at least in the housing context. Those questions about the efficiency of competition might apply more broadly to a wider range of public service provision by local governments, at least to the extent that efficiency depends on the exclusion of potential future residents, as indicated by some of the theoretical economics literature. We also discuss the implications of our work for local government scholars who have argued for greater powers for local

²⁵ See generally Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 91–92 (2015) [hereinafter Hills & Schleicher, *Affordable City*] (arguing that land-use and property scholars should analyze land-use law similar to the way they analyze common law property rules, which are less relevant today, and calling for greater standardization and certainty in land-use law because that will help accomplish goals of transferability and development of property).

governments to control land use and other policy areas, noting that our story complicates such calls. We then explore important policy implications. Our analysis supports greater state or regional involvement in land-use regulation, as opposed to the local control paradigm that has been dominant in the United States for the last century. It also identifies standardization of land-use regulation as a key reform that could advance housing production.

I. THE DEBATE OVER LOCAL GOVERNMENT FRAGMENTATION AND ITS IMPACT ON LAND-USE REGULATION

A. *Primer on Land-Use Law and Local Government*

The basic framework of land-use regulation in the United States is zoning—a local government puts land into zones that determine the uses and densities that can be developed—sometimes called “base zoning.”²⁶ For instance, a zone might restrict development to residential uses (excluding commercial and industrial uses) and prohibit any structures that are over two stories in height or that have more than five units of housing in them. As zoning has developed, the restrictions on densities, in particular, have become more complicated and more varied.²⁷ A development project that can occur as a permitted use within the zone is often called a “by right” project because, in theory, it should require no additional approvals. The base zoning is set by the local government’s legislative body (e.g., a city council or county board of supervisors) and can be altered by that legislative body in a process known as rezoning. Crucially, because rezoning is a legislative process, it is one that gives great discretion to the local government in decision-making.

Some uses may be permitted in some zones through special review processes that require public hearings and specific findings. Most common is the “conditional use permit” (or an equivalent permit with a different name), in which the local jurisdiction must provide specific approval for that use to occur in that zone. For instance, some residential zones may allow commercial uses as a conditional use—with the local government requiring findings on various criteria to determine whether a particular use is appropriate in a particular place. Another special review process available to allow otherwise prohibited projects under the base zoning is a variance. Variances in many jurisdictions provide only for exemptions from limited provisions of the zoning regulations, such as setback requirements, so they are not usually available to allow a use that would otherwise be prohibited.²⁸ Like

²⁶ Moira O’Neill, Giulia Gualco-Nelson & Eric Biber, *Sustainable Communities or the Next Urban Renewal?*, 47 *ECOLOGY L.Q.* 1061, 1087 (2020).

²⁷ Variations include setback requirements (limits on development near property lines), floor-to-area ratio requirements (limits on the ratio of habitable space in buildings to the total area of the lot containing the building), and open space requirements (requiring a certain amount of outdoor space for each unit in a building).

²⁸ For example, California prohibits many cities from issuing variances from use regulations. However, some states, such as New York, allow use variances. *See Otto v. Steinhilber*, 24 N.E.2d 851, 853 (N.Y. 1939).

conditional use permits, variances generally involve specific findings that must be made by the local government. Crucially, both conditional use permits and variances generally require an exercise of judgment by local governments as to whether a project should be permitted.

Local governments may overlay base zoning with additional review procedures that might require hearings and/or additional findings. For instance, many local governments have adopted design or architectural review, in which a review board must approve the design of a project before it can be approved. Design review standards are often quite general (e.g., requiring findings as to compatibility of the design with neighboring buildings) and can even apply to projects that might otherwise be “by right” under the base zoning.²⁹

Cumulatively, discretionary review requirements can ensure that almost all projects must go through some sort of process in which the local decision-makers have the power to reject any development they want.³⁰ The legislative decision-making process for rezoning and flexible zoning techniques can allow a legislature to prohibit development for almost any reason;³¹ conditional use permits and variances usually have general enough standards that allow for the rejection of a project based on vague reasons such as neighborhood compatibility;³² and design review also usually has generally framed standards that allow local governments to reject almost any project.³³

The power to “say no” gives the local government leverage in negotiations with developers or landowners, as well as power to respond to pressures from constituents.³⁴ Leverage over developers may be important for local governments

²⁹ BRIAN BLAESSER, *DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION* xvii (15th ed. 2012) (noting that design codes increasingly involve subjective standards); *id.* at 13 (“Architectural design review ordinances provide some of the worst examples of vague statements of purpose and overbroad standards that invite abuse. Such ordinances frequently lack sufficiently clear standards and vest too much subjective decision making in the architectural review board officials.”).

³⁰ CLIFFORD L. WEAVER & RICHARD F. BABCOCK, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* 258 (1979) (“The growth of discretion in suburban zoning was . . . attributable to the need to respond to complex proposals and situations and to the desire to preserve the right to say no.”).

³¹ BLAESSER, *supra* note 29, at 254–56, 262 (describing how floating zone and rezoning procedures give discretion and leverage to local government).

³² *See id.* at xvi (noting that many of the discretionary provisions involve “community character” components that are highly subjective); *id.* at 249 (“Municipal attorneys frequently advise their municipal clients to keep standards and conditions for certain types of land use approvals deliberately vague. In this way, the municipality can extract a larger number of amenities during the negotiation process in exchange for the approval.”).

³³ *Id.* at 440–47.

³⁴ Ira Michael Heyman, *Innovative Land Regulation and Comprehensive Planning*, in 13 *SANTA CLARA L. REV.* 183, 183 (1972); RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 53–54 (1966) (noting the importance of delay and uncertainty that stem from discretionary decision-making in raising costs for developers and

concerned about the fiscal impacts of developments³⁵ Constituents may seek to have control over the nature and form of development in their neighborhoods, and a veto power for local government gives them that power.³⁶

Discretionary review has other important implications for our purposes. It generally (though not always) is associated with a higher likelihood of a public hearing for the approval of a project. Hearings are a key entry point into the regulatory process for neighbors and other stakeholders, and therefore can facilitate delay and obstruction to development projects.³⁷ In contrast, “by right” review should not have a public hearing since it simply requires basic determinations of whether a project meets clearly delineated standards. Discretionary review at the local level can be the key trigger determining whether state-level environmental review requirements apply, which themselves will often trigger public hearing requirements.

giving local government leverage over them); BLAESSER, *supra* note 29, at 7–9 (describing how local governments convert as of right “permitted” uses to conditional uses in order to gain leverage over developers); DOUGLAS R. PORTER, PATRICK L. PHILLIPS & TERRY J. LASSAR, FLEXIBLE ZONING: HOW IT WORKS 77–78 (1988) (noting that flexibility allows for extracting public benefits); Ellickson, *Suburban Growth*, *supra* note 12, at 427–28 (arguing local governments use discretionary approval processes that are waivers for unrealistically strict zoning standards to get “maximum leverage in the subsequent bargaining” with developers); FRED E. CASE & JEFFREY GALE, ENVIRONMENTAL IMPACT REVIEW AND HOUSING: PROCESS LESSONS FROM THE CALIFORNIA EXPERIENCE 90 (1982) (identifying “extras” developers give up in LA to get discretionary approvals, such as setbacks, fence construction, landscaping, installation of infrastructure, easement provision); C.J. Gabbe, *How Do Developers Respond to Land Use Regulations? An Analysis of New Housing in Los Angeles*, 28 HOUS. POL’Y DEBATE 3, 423 (2017) (“[W]hereas decision-makers employ discretion at different points in the process, proven pathways to approval are highly valued by developers, who are often willing to provide public benefits in exchange for allowances and/or increased certainty with development approvals.”); Arthur T. Denzau & Barry R. Weingast, Foreword, *The Political Economy of Land Use Regulation*, 23 J. URB. & CONTEMP. L. 385, 402–404 (1982) (arguing that the discretionary decisions in land-use law create ample opportunity for political leaders to extract resources from landowners and developers that are hard for reviewing courts or outsiders to detect).

³⁵ See *infra* Section II.B.

³⁶ See Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 1986 AM. B. FOUND. RES. J. 709, 723–25 (1986) (finding that neighborhood opposition and significance of change in neighborhood character are major determinants of outcomes in discretionary zoning decisions).

³⁷ See KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA’S HOUSING CRISIS 25, 42–43, 79 (2020) [hereinafter EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS]; *id.* at 80 (“[R]egulations derive their power in part by offering unrepresentative members of the public an opportunity to delay or stop the construction of new housing.”). Participants in land-use hearings are often wealthier and whiter than the broader community, and disproportionately opposed to new housing projects. *Id.* at 101–06 (summarizing results from study of participants in land-use hearings in cities in metropolitan Boston).

B. The Co-Evolution of Land-Use Law and Local Government

As the above summary indicates, zoning has grown more complicated over time, with increasing layers of review imposed by local governments. The original concept, as developed in the 1920s, was a base zoning system supplemented by variances and conditional use permits. Design or architectural review was long considered with deep suspicion by state courts and only became widely available in the United States starting in the 1960s and 1970s. State-level environmental review statutes are also primarily a product of the 1960s and 1970s.³⁸

Throughout this history, one key principle has remained consistent for the vast majority of local land-use systems: zoning has traditionally prioritized the protection of single-family homes above all other uses.³⁹ The key Supreme Court decision upholding the constitutionality of zoning emphasized the importance of protecting single-family homes from the intrusion of multifamily housing and commercial and industrial uses,⁴⁰ and the most widespread zoning category in many American cities allows—and has allowed for decades—the development of only single-family houses.

Because land use is regulated at the local government level, the structure and formation of local governments have affected the implementation of land-use regulation in the United States. There has been a long history of creating small, suburban local governments in the United States, though, before the twentieth century, many of these would ultimately get absorbed into an expanding central city. After 1900, a variety of institutional and technological innovations began to facilitate the creation of small, suburban cities that could maintain their independence vis-à-vis large central cities.⁴¹ The result was fragmentation of local governance in many major metropolitan areas around the United States.

³⁸ FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENV'T L QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971) (identifying a trend in the 1960s of the rise of state involvement in land-use decisions).

³⁹ See, e.g., BABCOCK, *supra* note 34, at 6 (stating that the “central goal” of zoning is “insulation of the single-family district”); Steele, *supra* note 36, at 717 (arguing that in a municipality “[s]ingle-family land use is the norm—the touchstone against which other uses are implicitly measured”).

⁴⁰ See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); see also Briffault, *Our Localism Part II*, *supra* note 14, at 370 (noting judicial deference to local ordinances that “lumped together apartments and other multifamily dwellings with industrial or commercial uses and excluded them from the locality as threats to the local residential character.”).

⁴¹ Changes in state law facilitated easier incorporation of cities and made involuntary annexation of smaller cities by larger ones harder. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 140–48 (1985); PAUL KANTOR, *THE DEPENDENT CITY REVISITED: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT AND SOCIAL POLICY* 163–65 (1995) (stating that after state law allowed easy incorporation in twentieth century suburbs “almost universally sought municipal incorporation in order to control the development of their communities”). In addition, the rise of “contract cities,” in which new cities could contract with counties to provide services that had large economies

A prime driver for the creation of many of these small suburban cities was a desire to take control over land-use regulation by preventing annexation into a larger central city.⁴² These small suburban cities in turn were often zoned for low residential densities, with some zoning the entirety of their city for single-family housing.⁴³

Several factors operating together drove both the move towards single-family zoning and fragmented local government. First, there is ample evidence that race and class have been two of the primary drivers for the rise of fragmented local governments with land-use regulatory control—and the use of that regulatory control to facilitate “white flight” after World War II.⁴⁴ Land-use regulation here

of scale, and special districts, in which cities could band together to provide capital-intensive services such as water and sewer services, facilitated the creation and maintenance of small, fragmented local governments. *See* GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* 21 (1981); JON C. TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850–1970*, at 173, 185 (1979); NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENT: PRIVATE VALUES IN PUBLIC INSTITUTIONS* 9–10, 19, 25–27 (1994); Briffault, *Our Localism: Part II*, *supra* note 14, at 376–79 (describing three ways in which “[n]ew state laws reduced [the] fiscal disincentivize to suburban incorporation”).

⁴² *See, e.g.*, ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 19–21 (1994); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1847–49 (2003) [hereinafter Schragger, *Consuming Government*] (“The suburbanite often perceives her borders as an entitlement, and her right to defend them through zoning as the core of self-rule.”); MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 28 (1976); JON C. TEAFORD, *POST-SUBURBIA: GOVERNMENT AND POLITICS IN THE EDGE CITIES* 16–18 (1997) [hereinafter TEAFORD, *POST-SUBURBIA*] (noting examples from Illinois, Michigan, Missouri, and New York in the 1920s and 1930s); *id.* at 188–204 (examples in 1980s from St. Louis County and Orange County, California); *id.* at 65–67, 99–100 (giving examples of “defensive” incorporation in Michigan and Missouri in the 1950s to allow suburban neighborhoods to control land use); FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 3 (“The history of local government formation demonstrates that zoning is an essential ingredient of municipal formation and function.”); Briffault, *Our Localism: Part II*, *supra* note 14, at 367 (“Suburban ‘[r]esidents perceived incorporation as a means of neighborhood protection[]’ and many incorporated in order to zone.”) (citation omitted).

⁴³ *See* MILLER, *supra* note 41, at 86–97, 118–20; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 41 (1990) [hereinafter Briffault, *Our Localism: Part I*] (“By 1970, more than 99% of the vacant and developable land in northeastern New Jersey was zoned to exclude multifamily housing.”); *see also* Stephen Menendian, Samir Gambhir & Arthur Gales, *Racial Segregation in the San Francisco Bay Area, Part 5*, UNIV. CAL. BERKELEY OTHERING & BELONGING INST. (Aug. 11, 2020), <https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-5> [<https://perma.cc/7CHX-T8TR>] (finding that of all land zoned for residential uses in the Bay Area, 82% is zoned for single-family housing).

⁴⁴ *See, e.g.*, DOWNS, *supra* note 42, at 20 (“Thus many middle-income and upper-income households establish independent jurisdictions to pass local zoning, building code, subdivision, and other regulations that raise the cost of housing high enough to exclude low-

built on the history of redlining, urban renewal, racial covenants, and discriminatory housing finance to create and maintain racially and class segregated housing.⁴⁵ Although single-family base zoning has received most of the attention in

income people.”); DENNIS R. JUDD & TODD SWANSTROM, *CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY* 309 (2d ed. 1998) (noting example of St. Louis suburb seceding to block integrated public housing); FRUG, *supra* note 17, at 134 (arguing that local government powers and formation facilitate segregation); BURNS, *supra* note 41, at 20–21, 41–42, 54–57, 83–90 (finding that desire to advance racial exclusion drove city formation in the 1950s); Barbara Sherman Rolleston, *Determinants of Restrictive Suburban Zoning: An Empirical Analysis*, 21 J. URB. ECON. 1 (1987) (finding that increased proportion of minorities in neighboring jurisdictions correlates with more restrictive zoning); JACKSON, *supra* note 41 (arguing suburban zoning “provided a way for suburban areas to become secure enclaves for the well-to-do”); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS’N 2, 125 (2000) (“Zoning . . . was invented in part to keep minorities away from non-Hispanic Whites. . . . [L]arge-lot zoning and other land use controls with the potential to exclude racial minorities remained available to municipalities throughout the United States, often as a very thin cover for racial bias.”) (citations omitted); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 8, 1860–78 (1994) (describing how the creation and boundary setting of suburban cities in the United States facilitated and entrenched racial segregation); MILLER, *supra* note 41, at 172–203 (arguing that easy incorporation facilitates class and race segregation); Juliet Ann Musso, *The Political Economy of City Formation in California: Limits to Tiebout Sorting*, 82 SOC. SCI. Q. 1, 145 (2001) (finding that wealthier communities are more likely to form cities); JESSICA TROUNSTINE, *SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES* 19, 127–29 (2017) (finding that cities that were earliest in adopting zoning early in the 20th century were more likely to be racially segregated later in the 20th century); Laure J. Bates & Rexford E. Santerre, *The Determinants of Restrictive Residential Zoning: Some Empirical Findings*, 34 J. REG’L SCI. 2, 261 (1994) (finding that zoning is more restrictive when a city is near a central city with high proportion of poor residents). *But see* J.M. Pogodzinski & Tim R. Sass, *The Theory and Estimation of Endogenous Zoning*, 24 REG’L SCI. & URB. ECON. 601, 620 (1994) (finding no correlation between racial makeup in nearby communities and zoning).

Studies have also found that more fragmented metropolitan areas have higher economic and racial segregation, RUSK, *supra* note 14, at 41, 46, 83–92; Eric J. Branfman, Benjamin I. Cohen & David M. Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973). Additionally, studies have found high levels of racial and economic segregation in suburbs. J. ERIC OLIVER, *DEMOCRACY IN SUBURBIA* 5, 12–13, 99–103 (2001); TROUNSTINE, *supra* note 44, at 217–22.

⁴⁵ See generally TROUNSTINE, *supra* note 44, at 131 (“Generally speaking, segregation levels remain higher than they would have without urban renewal policies where slums were cleared and public housing was built.”); RICHARD R.W. BROOKS & CAROL M. ROSE, *SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS* 2 (2013) (exploring the “ways that racially restrictive covenants expressed social norms, and the ways that those social norms have related to legal norms, together facilitating patterns of residential racial segregation . . .”). Formation of small suburban cities with exclusionary zoning also allowed residents to exclude poor residents and residents of color even after racial covenants were no longer legally enforceable and federal fair housing laws prohibited explicit discrimination. TROUNSTINE, *supra* note 44, at 61–62.

discriminatory housing policies, discretionary land-use decision-making can be even more pernicious by creating space for racially discriminatory application of the law in a way that is difficult to identify.⁴⁶

Next, residents and local governments often seek to deter development that may have negative fiscal impacts and to attract development that will enhance municipal coffers.⁴⁷ Local governments provide a range of important and expensive public services in the United States, including education and policing. Many states authorize local governments to fund these services via property and sales taxes, which in turn are largely determined by land-use decisions within local boundaries. Commercial properties such as shopping malls, for instance, can provide large amounts of sales tax revenues. Commercial and industrial properties often have high property tax valuations. And commercial and industrial properties do not use expensive local public services such as schools. On the flip side, cheap housing does not have a high property tax valuation but may bring large numbers of residents who in turn demand schools, parks, and police.⁴⁸ The result is a fiscal pressure on local governments when they make land-use decisions—what is called the fiscalization of land use.⁴⁹ This is one of the key drivers for the centrality of discretionary review in local land use, in that the ability for local decision-makers to say no to projects gives them leverage to negotiate for payments by developers to offset the costs of development projects.

Relatedly, residents may be concerned about congestion of local services—traffic, schools, parks. For instance, in California, school financing is now highly centralized with local school district revenues largely determined by the number of student-days, such that there should not be a major pressure to minimize school expenditures. Yet residents may still be concerned that, for instance, the physical

⁴⁶ TROUNSTINE, *supra* note 44, at 122 (“[W]hite homeowners and land-oriented businesses controlled city governments and planning commissions and opposed residential integration along either race or class lines.”); James C. Clingermayer, *Heresthetics and Happenstance: Intentional and Unintentional Exclusionary Impacts of the Zoning Decision-making Process*, 41 URB. STUD. 2, 377 (2004) (noting that there are a wide range of pretextual reasons that can support the exclusionary impacts of zoning).

⁴⁷ See TEAFORD, *POST-SUBURBIA*, *supra* note 42, at 60; MILLER, *supra* note 41, at 37–40, 62 (arguing that creation of small cities in Los Angeles was a reaction against perceived redistribution of resources to poorer communities or to larger jurisdictions, facilitating low tax rates); PETER CALTHORPE & WILLIAM FULTON, *THE REGIONAL CITY* 85–86 (2001) (noting the importance of fiscal zoning); FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 65–66 (noting the use of land-use regulation to ensure that development is a net benefit fiscally for local government).

⁴⁸ DOWNS, *supra* note 42, at 23.

⁴⁹ For evidence of fiscal motivations in zoning, see, for example, Bates & Santerre, *supra* note 44, at 260 (finding evidence of fiscal zoning in study of Connecticut cities); Pogodzinski & Sass, *supra* note 44, at 626 (concluding “that zoning is consistent with fiscal, externality and exclusionary motives.”). *But see* Bengte Evenson & William C. Wheaton, *Local Variation in Land Use Regulations*, BROOKINGS-WHARTON PAPERS URB. AFFS. 221, 249 (2003) (finding no evidence of fiscal zoning in a study of zoning ordinances in Massachusetts cities).

infrastructure of schools may be overwhelmed by new residents, at least in the short term before additional state funding can kick in. And parks and open space may be space-constrained, particularly in built-up cities, such that additional funding would not resolve the problem.

Together, these factors have led to suburban land-use regulation that doesn't just protect single-family zoning, but also makes it difficult to construct anything but low-density, expensive single-family housing—what is often called exclusionary zoning.⁵⁰ One tool to accomplish this goal in many suburban jurisdictions was the use of large-lot zoning, requiring a large minimum size for a lot to allow construction of a residence—sometimes up to one or more acres.⁵¹ Although it is not the only zoning tool that can raise the cost of housing, large-lot zoning generally does make single-family houses significantly more expensive by requiring a house purchaser to also purchase a substantial amount of undevelopable land with the house. It also restricts supply in high-demand, job-rich areas by limiting the amount of housing a given amount of land can produce. These two factors combine to raise housing costs, effectively exclude lower-income homebuyers or renters, and restrict the total size of the population that can live in the jurisdiction, avoiding pressure on public services.⁵²

⁵⁰ See, e.g., JUDD & SWANSTROM, *supra* note 44, at 308; Briffault, *Our Localism Part I*, *supra* note 43, at 21–22; Lee Anne Fennell, *Homes Rules*, 112 YALE L.J. 617, 624–25 (2002) [hereinafter Fennell, *Home Rules*] (reviewing WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)); William A. Fischel, *The Evolution of Zoning Since the 1980s: The Persistence of Localism*, in PROPERTY IN LAND AND OTHER RESOURCES 259, 264–65 (Daniel H. Cole & Elinor Ostrom eds., 2012) [hereinafter Fischel, *Evolution of Zoning*] (noting that exclusionary zoning prevents the construction of low-income housing because it would harm the tax base by not generating enough property taxes to “cover the additional public service expenditures”); Ford, *supra* note 44, at 1855–56 (“Localities with the power to regulate land uses might limit the construction of multi-family housing and moderately priced detached units to certain areas of town, or might even exclude such development altogether,” in part to protect the municipal tax base, if not for explicitly racial reasons).

⁵¹ See *S. Burlington Cnty. NAACP v. Twp. Of Mount Laurel*, 336 A.2d 713, 719 (N.J. 1975); Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* 21–23 (2019) (unpublished manuscript) (on file with the Utah Law Review), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472145 [<https://perma.cc/X5FF-7S27>] [hereinafter Ellickson, *Zoning and the Cost of Housing*].

⁵² Pendall, *supra* note 44, at 135 (finding that low-density residential zoning and permit caps reduces rental and multifamily housing and contributes to racial segregation, while other growth control tools have no statistically significant impacts); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779, 801–02 (2009) (finding that low-density zoning is correlated with racial segregation); Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1140–41 (2010) (finding that low-density zoning is correlated with class segregation); Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by*

The rise of exclusionary zoning prompted efforts by courts and state governments in some states to constrain it. Most notable were a series of decisions by the New Jersey Supreme Court that found a state constitutional obligation on the part of local governments to provide for their fair share of affordable housing in a metropolitan area.⁵³ California took an administrative approach, enacting laws in the 1980s that require local governments to plan for a certain share of regional needs for affordable housing.⁵⁴

Income?, 82 J. AM. PLAN. ASS'N 6, 12 (2016) (finding that residential density regulations lead to segregation of affluent residents from the broader community).

⁵³ See *S. Burlington Cnty. NAACP*, 336 A.2d 713; *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983). The original Mount Laurel opinion has a thorough discussion of the motivations and mechanisms of exclusionary zoning, focusing on fiscal demands:

The record thoroughly substantiates the findings of the trial court that over the years Mount Laurel [the defendant town] 'has acted affirmatively to control development and to attract a selective type of growth' and that 'through its zoning ordinances has exhibited economic discrimination in that the poor have been deprived of adequate housing and the opportunity to secure the construction of subsidized housing, and has used federal, state, county and local finances and resources solely for the betterment of middle and upper-income persons.'

There cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on *Property* . . . and that the policy was carried out without regard for non-fiscal considerations with respect to *People*, either within or without its boundaries. . . .

This policy of land use regulation for a fiscal end derives from New Jersey's tax structure, which has imposed on local real estate most of the cost of municipal and county government and of the primary and secondary education of the municipality's children. The latter expense is much the largest, so, basically, the fewer the school children, the lower the tax rate. Sizable industrial and commercial ratables are eagerly sought and homes and the lots on which they are situate [sic] are required to be large enough, through minimum lot sizes and minimum floor areas, to have substantial value in order to produce greater tax revenues to meet school costs. Large families who cannot afford to buy large houses and must live in cheaper rental accommodations are definitely not wanted, so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing for those of lesser income.

This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base . . .

S. Burlington Cnty. NAACP, 336 A.2d at 722–23 (citations omitted).

⁵⁴ See PAUL G. LEWIS, CALIFORNIA'S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 11–34 (2003).

Another response to exclusionary zoning has been numerous scholarly calls for greater regional governance.⁵⁵ To the extent that fiscal pressures are a key driver of exclusionary zoning, the argument was that regional governance—including redistribution of revenues across the metropolitan region—might ameliorate some of the pressures on local governments to focus on land uses yielding high tax valuations.⁵⁶ Redistribution of revenue through regional governance also could incentivize local governments to provide more housing for lower-income residents, which can help support regional economic growth.⁵⁷ However, few proposals for regionalization actually were implemented in the United States in the latter half of the twentieth century, and fewer of those addressed land-use regulation.⁵⁸

Through the twentieth century, the dynamic of land-use law and local government formation was associated with white flight—with higher socioeconomic status groups moving to the urban fringe to new suburban and exurban developments, combined with concentrated poverty in urban cores. However,

⁵⁵ See, e.g., CALTHORPE & FULTON, *supra* note 47, at 61–62 (discussing the intricacies of the proposed regional city); RUSK, *supra* note 14, at 3–4; ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* 139 (2000); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 94–98 (1999); Gerald E. Frug, *City Services*, 73 *N.Y.U. L. REV.* 23, 43 (1998).

⁵⁶ See Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 *U. PENN. L. REV.* 607, 655–56 (1997) [hereinafter Poindexter, *Collective Individualism*]. See generally Georgette C. Poindexter, *Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses*, 47 *WASH. UNIV. J. URB. & CONTEMP. L.* 3 (1995) (arguing for the suburbs to pay for expenses related to poverty in the city).

⁵⁷ Cashin, *supra* note 14, at 1985, 1991–96, 2004 (detailing the problems intrinsic to local governance such as bias and a “systematic practice of exclusion” and arguing for more centralized American governance).

⁵⁸ Examples of consolidation in postwar American include Nashville, Jacksonville, and Indianapolis. TEAFORD, *POST-SUBURBIA*, *supra* note 42, at 109. There has been tremendous resistance in suburban counties to consolidation measures to create regional governments from the 1920s to the present. *Id.* at 34–36, 40–41 (resistance of Nassau County, New York, to consolidation measures, and limited regionalization measure that does pass in 1936 preserves local land-use powers); *id.* at 114–16, 133–34, 194–95 (voter rejections of consolidation proposals in St. Louis County in 1960s, 1970s, and 1980s); *id.* at 168–70 (resistance to metropolitan consolidation proposals in Cleveland and Pittsburgh in 1920s and 1930s); *id.* at 176 (noting widespread defeat of consolidation proposals in 1950s except for Miami). Many of the successful regionalization efforts excluded land-use regulation from the scope of the regional government. See *id.* at 76 (noting consolidated St. Louis county government in 1950s only took on land-use powers by contract with incorporated cities); *id.* at 78 (expanded county power in Suffolk County, Long Island did not include zoning); *id.* at 81–82 (planning commission created for Oakland County, Michigan coordinates among local governments, but has very limited land-use powers). Portland, Oregon is a rare example of successful regionalization that involved land-use regulation. See Carl Abbott & Margery Post Abbott, *A History of Oregon Metro*, *METRO* (May 1991), https://www.oregonmetro.gov/sites/default/files/2014/05/18/abbott-a_history_of_metro_may_1991.pdf [<https://perma.cc/RZ8E-278M>].

around the turn of the twenty-first century, this dynamic began to switch, with the “return to the city.”⁵⁹ Higher-income residents began to compete for housing in core urban areas, drawn by urban amenities and prioritizing relatively short commutes over the comforts of suburban lifestyles. The return to the city has also been associated with evidence that exclusionary zoning is occurring even within some large cities, as gentrified, wealthier, whiter neighborhoods constrain development.

C. *The Fight over Local Control of Land use*

The housing crisis in major metropolitan areas has produced a variety of proposals for stronger state intervention to relax local zoning regulations and increase housing production.⁶⁰ For instance, in California, the state legislature has debated and (in some cases) enacted legislation that requires local governments to streamline approval processes for certain kinds of affordable housing projects,⁶¹ to approve “by right” accessory dwelling units,⁶² and to upzone areas accessible to transit in order to facilitate denser housing.⁶³ These proposed and enacted reforms have in turn prompted a heated opposition in the name of “local control” over land-use, arguing that land-use is the kind of question best addressed by local governments responsive to local conditions.⁶⁴

⁵⁹ Lena Edlund, Cecilia Machado & Maria Micaela Sviatschi, *Gentrification and the Rising Returns to Skill* 8 (Nat’l Bureau of Econ. Research., Working Paper No. 21729, 2019).

⁶⁰ See, e.g., H.B. 2001, 80th Leg., 2019 Reg. Sess. (Or. 2019); S.B. 6536, 66th Leg., 2020 Reg. Sess. (Wash. 2020); H.B. 152, 2020 Sess. (Va. 2020); H.B. 1406, 2020 Sess. (Md. 2020). For scholars arguing for state intervention, compare Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293 (2017), and Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 966, 973 (1976), with FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 205 (arguing that race-to-the-bottom arguments should not support preemption of local land-use regulation, because local governments usually have incentives to avoid spillovers and maximize benefits of development for residents).

⁶¹ See S.B. 35, 2017–2018 Reg. Sess. (Cal. 2017) (codified at CAL. GOV’T CODE § 65913.4).

⁶² A.B. 68, 2019–2020 Reg. Sess. (Cal. 2019) (noting accessory dwelling units are additional units developed on a property in addition to an existing primary dwelling unit. Examples include conversions of garages into small apartments, “in law” units converted from bedrooms within a main building, and the construction of small outbuildings in lots that can serve as additional units).

⁶³ Laura Bliss, *The Last Days of SB50, California’s Doomed Upzoning Bill*, BLOOMBERG (Jan. 30, 2020, 1:37 PM), <https://www.citylab.com/equity/2020/01/california-sb50-vote-affordable-housing-zoning-law-transit/605767/> [<https://perma.cc/RQ73-MEED>].

⁶⁴ See, e.g., Marisa Kendall, *Inside Livable California’s Fight for Single-family Neighborhoods*, MERCURY NEWS (Jan. 26, 2020, 6:00 AM) <https://www.mercurynews.com/2020/01/26/inside-livable-californias-fight-for-single-family-neighborhoods/> [<https://perma.cc/BSD3-QMBY>]. See also DOUGHERTY, *supra* note 4, at 188–95); Infranca, *supra* note 14, at 852–54; *Our 2020 Principles for Housing Legislation*, LIVABLE CAL.,

At the federal level, the debate has centered around federal fair housing rules promulgated by the Obama Administration that would condition some federal grants to local governments on taking steps to assess and redress exclusionary zoning.⁶⁵ In 2020, the Trump Administration moved to repeal most of the Obama Administration's rules, and in the course of doing so, stated they were protecting America's suburbs from radical leftists seeking to force dense development on suburban communities.⁶⁶ Commentators critical of the Obama-era rule and supportive of the Trump Administration repeal repeated this rhetoric, accusing the

<https://www.livablecalifornia.org/portfolio-items/livable-californias-2020-principles-for-housing-legislation/?portfolioCats=60> [https://perma.cc/XV72-H3ZC] (last visited July 11, 2021) (“State legislation that respects the self-determination of local governments to control their destinies, allowing them to expand housing opportunities in ways unique to their jurisdictions.”); *In 2019 We Opposed SB 50, SB 330, SB 592, AB 68 & AB 1487*, LIVABLE CAL., <https://www.livablecalifornia.org/portfolio-items/in-2019-we-opposed-sb-50-sb-330-sb-592-ab-68-ab-1487/?portfolioCats=60> [https://perma.cc/87GJ-PKTC] (last visited July 26, 2021) (“We oppose the growing list of top-down Sacramento bills by Wiener and his largely Bay Area-based followers in the state legislature, who seek to cripple local planning and land-use authority and hand this power to private developers.”).

⁶⁵ See Affirmatively Furthering Fair Housing Assessment Tool: Announcement of Final Approved Document, 80 Fed. Reg. 81840 (Dec. 31, 2015) (referring to rules as “affirmatively furthering fair housing” or AFFH rules). See also Brian J. Connolly, *Promise Unfulfilled? Zoning, Disparate Impact, and Affirmatively Furthering Fair Housing*, 48 URB. LAW. 4, 831 (2016) (“Thus, a clear implication of the AFFH Rule is that jurisdictions predominated by single-family homes and lacking in housing diversity will be expected to zone additional lands for multi-family uses and other forms of inclusionary housing.”).

⁶⁶ See Donald J. Trump & Ben Carson, Opinion, *We'll Protect America's Suburbs*, WALL ST. J. (Aug. 16, 2020, 4:02 PM) <https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133>, [https://perma.cc/KXB8-UFNL] (“[W]e stopped the last administration's radical social-engineering project that would have transformed the suburbs from the top down. We reversed an Obama-Biden regulation that would have empowered the Department of Housing and Urban Development to abolish single-family zoning, compel the construction of high-density ‘stack and pack’ apartment buildings in residential neighborhoods, and forcibly transform neighborhoods across America so they look and feel the way far-left ideologues and technocratic bureaucrats think they should.”); Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47899 (Aug. 7, 2020) (to be codified at 24 CFR Parts 5, 91, 92, 570, 574, 576, 903). See also Ben Carson, Opinion, *Obama's Housing Rules Try to Accomplish What Busing Could Not*, WASH. TIMES, (July 23, 2015) <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish/> [https://perma.cc/JCH3-FTYK] (“[T]he rule would fundamentally change the nature of some communities from primarily single-family to largely apartment-based areas by encouraging municipalities to strike down housing ordinances that have no overtly (or even intended) discriminatory purpose—including race-neutral zoning restrictions on lot sizes and limits on multi-unit dwellings, all in the name of promoting diversity.”).

Obama Administration and supporters of regional governance of wanting to “abolish the suburbs” and erase local jurisdictional lines.⁶⁷

Arguments for local control have been based on a range of theories. Most frequently made are claims that local decision-making is better *a priori* for a range of policy issues than decision-making at higher levels of government. In the context of local land-use regulation, these claims are often founded on a belief that local communities should have a greater say in land-use decisions because they are more likely to feel the negative impacts of those decisions,⁶⁸ because they have a better sense of local conditions,⁶⁹ or because communities or neighborhoods that have historically been disempowered should have more control over land use as a matter of equity and historical justice.⁷⁰

⁶⁷ Stanley Kurtz, *Biden and Dems Are Set to Abolish the Suburbs*, NAT’L REV., (June 30, 2020, 9:42 AM) <https://www.nationalreview.com/corner/biden-and-dems-are-set-to-abolish-the-suburbs/> [<https://perma.cc/M8R5-T9TJ>] (arguing that implementation of Obama-era AFFH will “abolish the suburbs” and lead to “de facto annexation” of suburbs by cities and creation of regional governance); Stanley Kurtz, *Attention America’s Suburbs: You Have Just Been Annexed*, NAT’L REV., (July 20, 2015, 2:01 PM) <https://www.nationalreview.com/corner/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz/> [<https://perma.cc/9269-XWUT>] (“Just by issuing AFFH, the Obama administration has effectively annexed America’s suburbs to its cities. The old American practice of local self-rule is gone. We’ve switched over to a federally controlled regionalist system.”); Stanley Kurtz, *Burn Down the Suburbs?*, NAT’L REV. (August 1, 2012, 8:00 AM) <https://www.nationalreview.com/2012/08/burn-down-suburbs-stanley-kurtz/> [<https://perma.cc/LD7H-KW9W>] (claiming that the ultimate goal of proponents of regional government is to “quite literally to abolish the suburbs”); see also Robert P. Astorino, *Washington’s ‘Fair Housing’ Assault on Local Zoning*, WALL ST. J. (Sept. 5, 2013, 7:01 PM) <https://www.wsj.com/articles/SB10001424127887323623304579056721426092030> [<https://perma.cc/JBA5-E8C5>] (“The agency wants the power to dismantle local zoning so communities have what it considers the right mix of economic, racial and ethnic diversity.”).

⁶⁸ See Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use – Installment Two*, 24 STAN. ENV’T L. J. 269, 272 (2005) (“[A]n open and participatory decisionmaking process serves both as a check on privileged dealmaking and as a necessary conduit for important information about the relevant subjective and often competing interests of individuals affected by a particular land use decision.”).

⁶⁹ See *Our Town: Restoring Localism*, CTR. OPPORTUNITY URBANISM, 19 (2016), https://urbanreforminstitute.org/wp-content/uploads/2016/10/Restoring-Localism_9-10-16.pdf [<https://perma.cc/MLP9-KU4S>] (criticizing state and regional intervention in land-use decision-making in California on the grounds that “[l]ocal governments have historically played a critical role in seeing to it that communities are built in ways that reflect local preferences”); cf. Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 894–99 (1983) (discussing the intricacies of local government); Camacho, *supra* note 68.

⁷⁰ Anti-gentrification advocates, particularly in southern California, were also key opponents of SB 50 and similar legislation, and they relied on arguments about local control being essential to redress historical racial discrimination and prevent further gentrification.

Another set of arguments for local control are based on the benefits of competition across jurisdictions to produce efficient decisions for land-use regulation. Conservative critiques of the Obama fair housing regulations explicitly drew on interjurisdictional competition and citations to Tiebout competition literature to justify devolution of power to the local level and even splitting up existing large urban jurisdictions like New York City.⁷¹ More broadly, legal and other scholars who are skeptical of regional governance and/or supportive of sprawling suburban development have also drawn on the concept of interjurisdictional competition and Tieboutian literature to justify decentralized local governance structures.⁷²

See DOUGHERTY, *supra* note 4, at 188–195 (describing this opposition and its alliances with suburban opponents of the legislation).

⁷¹ See STANLEY KURTZ, SPREADING THE WEALTH: HOW OBAMA IS ROBBING THE SUBURBS TO PAY FOR THE CITIES 126 (2012); *id.* at 7, 40, 119, 128 (criticizing Obama Administration policies as infringing on local zoning powers, and characterizing them as part of a plan to undermine suburbs). For additional conservative commentators making these points based on Tieboutian theory, see Stephen Hayward, *Legends of the Sprawl*, HOOVER INST. POL’Y REV. (Sept. 1, 1998), <https://www.hoover.org/research/legends-sprawl> [<https://perma.cc/SF7V-A59V>] (relying on Tieboutian theory to argue against regional governance, as part of a broader critique of anti-sprawl proposals such as smart growth zoning); Howard Husock, *Let’s Break Up the Big Cities*, CITY J. (1998) <https://www.city-journal.org/html/let%E2%80%99s-break-big-cities-11899.html> [<https://perma.cc/UUN4-6D5V>] (relying on Tiebout theory to argue against regional governance and in favor of devolving powers to neighborhoods, including zoning).

Criticism of regional governance in the context of land-use regulation does not come from just the right. In California, some of the opposition to regionalization has been from the left, on the grounds that regional governance subverts local preferences and participation to advance the interests of real estate developers. See Zelda Bronstein, *The False Promise of Regional Governance*, 48HILLS (May 12, 2015), <https://48hills.org/2015/05/the-false-promise-of-regional-governance/> [<https://perma.cc/2XV3-AS8S>]; Zelda Bronstein, *The Attack on Local Zoning Control*, 48HILLS (Dec. 8, 2015), <https://48hills.org/2015/12/9080/> [<https://perma.cc/XNZ8-DPMM>].

⁷² See Howard Husock & Wendell Cox, *The Enduring Virtues of American Government Localism*, in AM. ENTER. INST., LOCALISM IN AMERICA: WHY WE SHOULD TACKLE OUR BIG CHALLENGES AT THE LOCAL LEVEL 14, 18–20 (Joel Kotkin & Ryan Streeter eds., 2018) <https://www.aei.org/wp-content/uploads/2018/02/Cox.Husock.2.pdf?x91208> [<https://perma.cc/ZUM8-K3AG>] (arguing against regional or state control of land-use regulation, relying in part on Tiebout competition); Howard Husock, *Suburban Government and the Virtues of Local Control*, in INFINITE SUBURBIA 660, 664–66 (Alan Berger, Joel Kotkin & Celina Balderas Guzmán eds., 2017) (citing Tiebout as part of an argument in favor of local control over land-use regulation). For scholars specifically criticizing regional governance on Tieboutian grounds, see, for example, Robert L. Bish, *Local Government Amalgamations: Discredited Nineteenth-Century Ideals Alive in the Twenty-First*, 150 C.D. HOWE INST. COMMENTARY 1, 20 (2001) (citing Tiebout competition as argument for devolution of power to local government and arguing that fragmented governance can support rapid economic

Whatever their theoretical basis, these arguments for local control have potentially large and real legal consequences for land-use regulation. Arguments for “local control” have been the basis for constitutional challenges to state interventions in California. California has a state constitutional “home rule” provision providing for enhanced autonomy for certain kinds of cities (“charter cities”).⁷³ Opponents of state intervention have argued that this provision precludes extensive state intervention in land-use control.⁷⁴ There have also been proposals for a state constitutional amendment committing land-use decisions to local, rather than state, control.⁷⁵ And “local control” is also part of the resistance to federal efforts to encourage denser and more inclusive zoning by local governments, as seen in the debates over the Obama Administration’s fair housing regulations.⁷⁶

II. REGIONAL-LEVEL SPILLOVERS OF LAND-USE DEVELOPMENT

A key weakness of any devolution of governmental power to smaller-scale jurisdictions is the possibility that the impacts of that small-scale jurisdiction’s decisions might spillover beyond its borders, such that a jurisdiction will not have an incentive to consider all of the impacts of its decision.⁷⁷ Positive spillovers will

development); Salim Furth, *Expanding Housing Opportunity in an Environment of Exclusionary Regulation*, GEO. MASON UNIV. (April 2, 2019), https://www.mercatus.org/system/files/furth_-_testimony_-_housing_affordability_testimony_for_house_committee_on_financial_services_-_v1.pdf [<https://perma.cc/54FX-FX6N>] (testifying before the House Committee on Financial Services and citing Tieboutian theory as a driver of efficiency in government and identifying the “rise of regional governments” as a cause of higher housing costs). See *infra* Section V.A for a discussion on how Tiebout competition might produce efficient interjurisdictional competition for land-use regulation.

⁷³ CAL. CONST. art. XI, § 5(a).

⁷⁴ Bryan Wenter, *Judicial NIMBYism? Overreaching San Mateo Trial Court Decision Takes on Legislature and Governor, Declaring Nearly 40-Year Old Housing Production Law Inapplicable to Charter Cities*, MILLER STAR REGALIA: LAND USE DEVS. (Nov. 15, 2019), <https://www.landusedevelopments.com/2019/11/judicial-nimbyism-overreaching-san-mateo-trial-court-decision-takes-on-legislature-and-governor-declaring-nearly-40-year-old-housing-production-law-inapplicable-to-charter-cities/> [<https://perma.cc/38WV-W8RH>]; Alexei Koseff, *California Tries to Save Law It Calls Crucial Tool in Housing Crisis*, S.F. CHRON. (Jan. 14, 2020, 5:36 PM), <https://www.sfchronicle.com/politics/article/California-intervenes-to-try-to-force-San-Mateo-14972675.php> [<https://perma.cc/X83X-XTRV>].

⁷⁵ *Sen. Wiener’s SB 50 Prompts Filing of Constitutional Amendment*, PLAN. REP. (May 20, 2019), <https://www.planningreport.com/2019/05/20/sen-wieners-sb-50-prompts-filing-constitutional-amendment%0A> [<https://perma.cc/MEH5-RZX2>]; see also Kendall, *supra* note 64.

⁷⁶ See *supra* notes 65–68 and accompanying text.

⁷⁷ See, e.g., Briffault, *Localism and Regionalism*, *supra* note 7, at 20–21 (noting that spillovers undermine the argument for local control and governance); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1222–23 (1992).

lead a jurisdiction to undertake less of the action that causes the spillover than would be socially optimal; negative spillovers will cause the opposite result.

For our purposes, we will focus on two major categories of spillovers from local land-use decisions: regional and national/global. In this Part, we will discuss regional spillovers—specifically, the impact of local land-use decisions on regional housing and job markets. In the next Part, we will discuss larger scale spillovers—national, even global—where local land-use decisions affect national economic growth, the ability of society to address climate change, and the ability of society to provide for upward mobility more broadly.

A. The Theoretical Problem for Local Control in Land-Use Regulation

Regional spillovers center on how land-use decisions regarding housing could have an impact on regional housing markets.⁷⁸ Those impacts on regional housing markets might also have regional economic impacts.⁷⁹ Those regional housing and economic impacts will go far beyond the borders of the jurisdiction that makes the land-use decision.⁸⁰ That jurisdiction will therefore have less of a reason to consider those benefits.⁸¹

It is true that small jurisdictions may not individually matter much for regional housing markets. But in a metropolitan area with highly fragmented local governments, if there are a lot of small jurisdictions, their decisions in the aggregate

⁷⁸ Pillsung Byun & Adrian X. Esparza, *A Revisionist Model of Suburbanization and Sprawl: The Role of Political Fragmentation, Growth Control, and Spillovers*, 24 J. PLAN. EDUC. & RSCH. 252 (2005) (theorizing that there are substantial spillover effects creating “imperfect competition” that prevents the achievement of efficient outcomes); see also William H. Hoyt, *Imperfect Competition Between Communities, Politics, and Capitalization*, in THE TIEBOUT MODEL AT FIFTY 127, 129–30 (William A. Fischel ed., 2006). However, this research has not drawn on the housing crisis as evidence of the extreme nature of those spillovers and has at times argued that spillovers might lead to higher levels of regulation or taxation by larger cities. See *id.* at 131–32.

⁷⁹ See generally FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 7, at 86–87, 257–58 (2001) (“Scarcity of rental housing seems to have less worthy spillover effects. . . . [N]ational and regional unemployment issues may warrant a more active rental market than any individual community might want.”); Hills & Schleicher, *Balancing the “Zoning Budget,”* *supra* note 7, at 90–94; Briffault, *Boundary Problem*, *supra* note 7, at 1133–41; Stephen Malpezzi, *Housing Prices, Externalities, and Regulation in U.S. Metropolitan Areas*, 7 J. HOUS. RSCH. 2 (1996); Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 544 (1992); Briffault, *Localism and Regionalism*, *supra* note 7.

⁸⁰ EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS, *supra* note 37, at 169 (“[H]ousing shortages are usually regional problems.”).

⁸¹ See DOWNS, *supra* note 42, at 27; FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 7, at 167–68, 170–71; Schragger, *Consuming Government*, *supra* note 42, at 1831 (“[I]t is probable that the full costs and benefits of the local [land-use] decision are not borne solely by the residents of the jurisdiction.”).

may have a major impact. Thus, if small jurisdictions have little interest in advancing housing development, collectively, those individual decisions will matter.

The benefits of permissive local land-use decisions are therefore likely to spill over beyond a city's borders in the form of cheaper housing,⁸² but the harms may remain localized. Many of the relevant adverse impacts of development are plausibly small scale: increased traffic; the noise and disruption of construction; loss of light and air for neighboring properties; increased demand for local services like schools and police, and so forth. If the costs are smaller in geographic scale than the benefits, then smaller jurisdictions will feel less of the benefits and more of the costs.

Those costs will fall in significant part on homeowners in the jurisdiction to the extent that they affect home values. Homeowners have high stakes in home values—for many Americans, the most important source of wealth is home value.⁸³ Homeowners are often among the most politically active at the local government level.⁸⁴

Homeowners might respond to threats to property values and protect against these threats through political participation, especially in responding to potential development.⁸⁵ In what he has called the “homevoter hypothesis,” economist Bill

⁸² To be precise, we expect employers, renters, and future residents in the metropolitan area would benefit from cheaper housing. In contrast, cheaper housing might harm incumbent homeowners across the metropolitan area. However, even incumbent homeowners might gain from the other metropolitan-level benefits of cheaper housing, such as increased regional economic growth and other products of agglomeration economics.

⁸³ *Wealth, Asset Ownership, & Debt of Households Detailed Tables: 2016*, U.S. CENSUS BUREAU (Sept. 19, 2019), <https://www.census.gov/data/tables/2016/demo/wealth/wealth-asset-ownership.html> [<https://perma.cc/43CP-AYU8>] (indicating the median value of assets for U.S. households with various demographic characteristics and by type of asset owned). FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 1 (“[H]ome values are the largest part of most people’s assets, and public events like taxes and spending affect the value of that asset.”).

⁸⁴ Andrew B. Hall & Jesse Yoder, *Does Homeownership Influence Political Behavior? Evidence from Administrative Data*, *J. POL.* (forthcoming 2021) (on file with authors) (finding that homeowners vote more); Joseph T. Ornstein, *Election Timing and the Politics of Urban Growth* (Aug. 14, 2019) (unpublished manuscript), <https://joeornstein.github.io/ElectionTiming.html> [<https://perma.cc/S7Z2-PW7H>] (finding that homeowners are disproportionately more likely to vote in off-cycle local elections); *see also* J. Eric Oliver & Shang E. Ha, *Vote Choice in Suburban Elections*, 101 *AM. POL. SCI. REV.* 3 (2007) (finding that homeowners are more knowledgeable and active voters). *But see* BRIAN J. MCCABE, *NO PLACE LIKE HOME: WEALTH, COMMUNITY, AND THE POLITICS OF HOMEOWNERSHIP* 80–90 (2016) (analyzing whether homeowners have higher political and civic participation rates than renters, finding that while homeowners do have higher rates than non-homeowners for many such forms of participation, even higher are those who are resident in a place for more than five years, whether owning or renting).

⁸⁵ FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 8–10 (stating that risk aversion by homeowners as to impacts on property values drives much opposition to housing development); *see also* Lee Anne Fennell & Julie A. Roin, *Controlling Residential Stakes*, 77 *U. CHI. L. REV.* 143, 151 (2010); Albert Saiz, *The Geographic Determinants of Housing*

Fischel has articulated the argument that homeowners who are concerned about home values will prioritize the protection of those home values in their voting decisions.⁸⁶ According to this theory, homeowners are a powerful force for responding to negative effects from development, particularly in small suburban jurisdictions where they are often the dominant actors in local politics and will oppose much development.⁸⁷ There is some evidence in support of the claim that homeowners are the primary political driver of resistance to development,⁸⁸ though

Supply, 125 Q. J. ECON. 1253, 1254 (2010); C.J. Gabbe, *Why Are Regulations Changed? A Parcel Analysis of Upzoning in Los Angeles*, 38 J. PLAN. EDUC. & RSCH. 3 (2018) (discussing a study, based on collection of zoning changes in Los Angeles, finding that neighbors, especially homeowners, are the primary determinants of whether property is up zoned).

⁸⁶ For a summary of Fischel's argument, see FISCHEL, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 4 ("The homevoter hypothesis holds that homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are more efficient than those that would be made at a higher level of government. Homeowners are acutely aware that local amenities, public services, and taxes affect ('are capitalized in') the value of the largest single asset they own. As a result, they pay much closer attention to such policies at the local level than they would at the state or national level.").

⁸⁷ *Id.* at 229 (stating that homevoters seek low-density housing, which contributes to sprawl and reduces affordability); *id.* at 87–88 (arguing that homeowners dominate small cities); *see also* Ellickson, *Suburban Growth*, *supra* note 12, at 405–06 ("Predevelopment interests are far out-numbered and can hope to achieve political influence only if the home owner majority is splintered on land-use issues."); Kenneth A. Stahl, *Reliance in Land Use Law*, 2013 BYU L. REV. 949, 998 (2014); MCCABE, *supra* note 84, at 98–101.

⁸⁸ For studies that support the role that homeowners play in obstructing development, *see* Ornstein, *supra* note 84 (finding that homeowners are disproportionately more likely to vote in off-cycle local elections, that ballot measures permitting more housing are more likely to fail in off-cycle elections, and that cities with off-cycle elections approve fewer building permits); François Ortalo-Magné & Andrea Prat, *On the Political Economy of Urban Growth: Homeownership Versus Affordability*, 6 AM. ECON. J.: MICROECON. 154 (2014) (developing model that predicts homeowners will vote against growth); Jeffrey A. Dubin, D. Roderick Kiewiet & Charles Noussair, *Voting on Growth Control Measures: Preferences and Strategies*, 4 ECON. & POL. 191 (1992) (discussing study of zoning voting in San Diego, finding that homeowners support growth controls); Alan Gin & Jonathan Sandy, *Evaluating the Demand for Residential Growth Controls*, 3 J. HOUS. ECON. 109 (1994) (explaining that study of voting results for growth control initiative in San Diego County finds that increased homeownership correlated with increased support for growth controls); Mark Purcell, *The Decline of the Political Consensus for Urban Growth: Evidence from Los Angeles*, 22 J. URB. AFFS. 85 (2000) (noting homeowners pose a major resistance to growth in Los Angeles); Christopher Hawkins, *Competing Interests and the Political Market for Smart Growth Policy*, 51 URB. STUD. 2503 (2014) (concluding that owner-occupied housing is inversely correlated with mixed-use and by right multifamily zoning, based on survey of planning officials in Massachusetts and a state smart growth scorecard); *see also* Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5B HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289, 1293 (Giles Duranton, J. Vernon Henderson & William Strange eds., 2015) (noting the "role of homeowners as the primary

the most recent survey of the relevant empirical literature found “little empirical evidence that areas with more homeowners adopt stricter housing supply regulations,” but also noted that the existing empirical literature has significant weaknesses.⁸⁹ Because our argument is more general—smaller jurisdictions have less incentive to support development—it does not depend on a relationship between homeownership and resistance to development, though the mechanisms would be similar. For instance, renters in a smaller city may also object to the localized negative impacts of development and undervalue the larger regional benefits of housing production.⁹⁰

These dynamics might be even more significant to the extent that agglomeration of economic activity has major benefits, such that adding housing in key metropolitan areas is crucial to addressing costs.⁹¹ If a particular metropolitan area is increasingly important for economic activity because of agglomeration effects, then that will drive economic growth in that metro area, and concomitantly, housing demand. Production of housing in that metropolitan area will therefore have disproportionately significant national effects.⁹² For instance, San Francisco has become a hub for the tech industry, and that industry would benefit from increased availability of housing within a reasonable commuting distance of San Francisco—but the benefits of that housing will redound both for the entire region and the entire

supporters” of growth regulations); Ellickson, *Suburban Growth*, *supra* note 12, at 405–06 (arguing that majoritarian politics in suburban cities allows homeowners to dominate political system and impose growth controls to maximize property values). For contrary assessments and studies, see Katharina Schone, Wilfried Koch & Catherine Baumont, *Modeling Local Growth Control Decisions in a Multi-City Case: Do Spatial Interactions and Lobbying Efforts Matter?*, 154 PUB. CHOICE 95, 115 (2013) (drawing on analysis of French land-use tax data, finding that “[r]esident homeowners . . . do not seem to be the driving force for the adoption of growth controls” and that instead absentee homeowners acting as landlords are more important); Mark Baldassare & Georjeanna Wilson, *Changing Sources of Suburban Support for Local Growth Controls*, 33 URB. STUD. 459 (1996) (finding no connection between homeownership and support for growth controls).

⁸⁹ Gyourko & Molloy, *supra* note 88, at 1308.

⁹⁰ See Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473, 477–78 (2018) (examining a recent study that found renters can be as oppositional to development as homeowners; in a survey of voters in San Francisco, renters were found to be more likely than homeowners to oppose development in their neighborhood, but more likely to support development in the city as a whole).

⁹¹ Edward L. Glaeser & Joshua D. Gottlieb, *The Wealth of Cities: Agglomeration Economies and Spatial Equilibrium in the United States*, 47 J. ECON. LITERATURE 983 (2009) (explaining that agglomeration effects are economic effects that increase with increasing geographic density of population or activity and such effects are generally the result of reduced transportation costs); Paul Krugman, *Increasing Returns and Economic Geography*, 99 J. POL. ECON. 483 (1991) (examining the relationship between economic growth and geographic density).

⁹² Schleicher, *The City as a Subject*, *supra* note 15, at 1534 (arguing that “agglomeration gains . . . are not felt exclusively, or even primarily, within local government boundaries”).

nation.⁹³ At the regional level, individual jurisdictions may seek to freeride off of the agglomeration benefits in core economic areas, enjoying the higher housing costs (which benefit incumbent homeowners) but not providing the housing that would help the regional or national economy.⁹⁴

While small jurisdictions would have less incentive to produce housing,⁹⁵ larger jurisdictions would have more—particularly to the extent that they are a locus for economic activity that would benefit from housing production—at least up until a certain size. When cities become large enough, such that they incorporate much or all of the relevant metropolitan area, these cities may have the strongest incentives to produce housing, all other factors being equal.⁹⁶ On the other hand, cities that incorporate all, or substantially all, of a metropolitan area may have a monopoly on the production of housing in the metropolitan area. That monopoly position may allow these cities to exploit their position controlling the metropolitan housing market to produce less housing and raise the costs of housing.⁹⁷

B. The Evidence of Regional Spillovers

There is both direct evidence of spillovers and evidence that smaller jurisdictions produce less housing and that even large jurisdictions that make land-use decisions at a smaller geographic scale produce less housing.

⁹³ See DOUGHERTY, *supra* note 4, at xii (noting the importance of agglomeration effects as driving rising demand for housing in the Bay Area). We explore the details and implications of this dynamic at the national level in more detail below, but it also has regional implications.

⁹⁴ Fennell & Roin, *supra* note 85, at 171 (“Exclusionary zoning presents one example of an oft-noted problem created by territorial boundaries within metropolitan areas: the ability of some jurisdictions to reap the general agglomeration benefits of the metropolitan area without fully sharing in the costs of that agglomeration, and indeed, by failing to share, increasing overall costs.”).

⁹⁵ By small jurisdictions, we mean jurisdictions that are small relative to their broader metropolitan area.

⁹⁶ DOWNS, *supra* note 42, at 40–41 (“A central city can influence the total growth of its metropolitan area under some circumstances[,]” as when it is “a large proportion of the entire area’s population . . . [and] territory.”).

⁹⁷ See *infra* Section III.B for an elaboration of this possibility.

1. Direct Evidence

By now, substantial literature has developed exploring the extent to which land-use regulation in one jurisdiction impacts other jurisdictions, and it generally has found spillover effects. One form of spillover effects is that housing costs might increase in neighboring jurisdictions or at the regional level as a result of stricter regulation in one jurisdiction.⁹⁸ There is fairly consistent evidence from the economics and planning literature that these effects exist.⁹⁹ Of course, the impacts

⁹⁸ Robert W. Helsey & William C. Strange, *Strategic Growth Controls*, 25 REG'L SCI. & URB. ECON. 435 (1995) (creating an economic model that shows that growth control in one community will create negative externalities in other communities without growth controls); Jan K. Brueckner, *Strategic Control of Growth in a System of Cities*, 57 J. PUB. ECON. 393 (1995) (developing a model predicting that growth controls will have spillover effects on other cities, which may in turn respond with their own growth controls); see also Ellickson, *Suburban Growth*, *supra* note 12, at 402–03 (“Antigrowth policies that raise housing prices within municipal boundaries make housing in competing jurisdictions relatively more attractive to consumers. As a result, the demand for new housing in competing areas is enhanced, raising the price of both new and used housing there.”); David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 401 (2001) (noting spillover impacts of exclusionary zoning); Fennell, *Home Rules*, *supra* note 50, at 637–45 (same); Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1687 (2013) (“The more local governments within a region adopt exclusionary measures, the more pressure it puts on the remaining local governments to do the same.”); Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 164, 176 (2001) [hereinafter Garnett, *Trouble Preserving Paradise*] (noting that local growth control may shift development to other jurisdictions in the metro area).

⁹⁹ WILLIAM A. FISCHER, LINCOLN INST. LAND POL'Y., DO GROWTH CONTROLS MATTER?: A REVIEW OF EMPIRICAL EVIDENCE ON THE EFFECTIVENESS AND EFFICIENCY OF LOCAL GOVERNMENT LAND USE REGULATION 36–37 (1990) (summarizing relevant literature and finding that growth controls in one community raise housing prices in a metropolitan area); William A. Fischer, *Exclusionary Zoning and Growth Controls: A Comment on the APA's Endorsement of the Mount Laurel Doctrine*, 40 J. URB. & CONTEMP. L. 65 (1991) (arguing that zoning laws can have the effect of spreading out expensive metropolitan areas in a specific region); Maryjane Lenon, Sajal K. Chattopadhyay, & Dennis R. Heffley, *Zoning and Fiscal Interdependencies*, 12 J. REAL EST. FIN. & ECON. 221 (1996) (studying spillover effects from zoning rules in an analysis of Connecticut zoning and housing data); John M. Quigley, *Regulation and Property Values in the United States: The High Cost of Monopoly*, in LAND POLICIES AND THEIR OUTCOMES 46 (Gregory K. Ingram & Yu-Hung Hong eds., 2007) (summarizing literature surrounding regional impacts of local land-use regulation); Henry O. Pollakowski & Susan M. Wachter, *The Effects of Land-Use Constraints on Housing Prices*, 66 LAND ECON. 315 (1990) (studying zoning in Maryland and finding significant interjurisdictional spillover effects of land-use regulation); Man Cho & Peter Linneman, *Interjurisdictional Spillover Effects of Land Use Regulations*, 4 J. HOUS. RSCH. 131 (1993) (examining the nature of interjurisdictional spillover effect and estimation bias). *But see* Bernard Fingleton, *Housing Supply, Housing Demand, and Affordability*, 45 URB. STUD. 1545 (2008) (noting that in the UK, the decrease in price caused by increased

of any one individual jurisdiction on a metropolitan area will often be relatively small, but in the aggregate, they might well be significant.

A related form of spillover effect is that neighboring jurisdictions might respond strategically to decisions by an individual jurisdiction to change its land-use regulations. For instance, if one jurisdiction enacts growth controls that drive growth outside its borders, other jurisdictions may then enact growth controls to deal with the spillover effects.¹⁰⁰ Again, there is both theoretical and empirical support for the proposition in both the planning and economics literature.¹⁰¹

2. *Evidence from Studies of Sprawl*

Another substantial branch of planning and economics literature has examined the extent to which fragmented local government contributes to sprawl. Fragmented local government might contribute to sprawl because of spillover effects. Stricter regulation in one local government of land use could push development to other jurisdictions with weaker regulation, causing leap-frog development.¹⁰² Again, there is significant evidence in the economics and planning literature that fragmentation

housing production in particular locations can be offset by the increase in demand for housing caused by the movement of jobs that are triggered by increased housing production, if jobs follow housing).

¹⁰⁰ Briffault, *Boundary Problem*, *supra* note 7, at 1134 (“When one locality acts to exclude a use, its neighbors may feel compelled to adopt comparable regulations to protect themselves from the growth they fear will be diverted to them by the initial locality’s regulation.”); Schone et al., *supra* note 88, at 97 (“[A] city’s decision to set up growth controls generally creates spillover effects and increases demand for land and housing in other cities.”).

¹⁰¹ Q Shen, *Spatial Impacts of Locally Enacted Growth Controls: The San Francisco Bay Region in the 1980s*, 23 ENV’T & PLAN. B: PLAN. & DESIGN 61 (1996) (using modeling to examine the relationship between different localities around the San Francisco Bay Area as regards their enactment of growth control policies and regional spatial growth impacts); Kristoffer Jackson, *Do Land Use Regulations Stifle Residential Development? Evidence from California Cities*, 91 J. URB. ECON. 45 (2016) (analyzing regulatory data to find that that cities which have land use regulations see more changes in housing stock, residential permits, and home construction).

¹⁰² WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 248, 260–61, 263–64 (1985) [hereinafter FISCHER, *THE ECONOMICS OF ZONING LAWS*] (noting the possibility that restrictive suburban zoning might increase housing costs overall in metropolitan areas and push development to rural areas, encouraging sprawl); Briffault, *Boundary Problem*, *supra* note 7, at 1133–41 (describing spillover effects of land-use decisions, including encouragement of sprawl and leapfrog development); Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 ENV’T AFFS. L. REV. 437, 444 (2003) (arguing that sprawl results because of impact of development spills across jurisdictional borders).

of local government correlates with increasing sprawl, supporting the existence of significant spillover effects from local housing decisions.¹⁰³

3. *Smaller Jurisdictions Have Stricter Zoning*

A corollary of the spillover theory should be that, all other things being equal, smaller jurisdictions should have stricter zoning than larger jurisdictions, since they face fewer of the benefits of zoning that permits dense housing projects. The earlier economics and planning literature found mixed results on this question.¹⁰⁴

Bob Ellickson recently conducted ground-breaking, in-depth research into the zoning codes of forty-one jurisdictions in three metropolitan areas: Silicon Valley; Austin, Texas; and New Haven, Connecticut.¹⁰⁵ Ellickson analyzed how each of the jurisdiction's zoning codes set minimum lot sizes for housing construction (i.e., how prevalent large minimum lot sizes are in each jurisdiction); how much of the jurisdiction's land allows detached houses on small lots; and how much of the jurisdiction's land that is vacant and available for development allows multifamily construction by right (without discretionary review). Each of these measures are relatively good proxies for exclusionary zoning: large minimum lot sizes set a minimum cost for entry into a jurisdiction's housing market by requiring a larger

¹⁰³ See generally John I. Carruthers, *Growth at the Fringe: The Influence of Political Fragmentation in United States Metropolitan Areas*, 82 PAPERS REG'L SCI. 475, 495 (2003) (finding that fragmentation is associated with sprawl); Adrian X. Esparza & John I. Carruthers, *Land Use Planning and Exurbanization in the Rural Mountain West: Evidence from Arizona*, 20 J. PLAN. EDUC. & RSCH. 23, 23 (2000) (developing the theoretical argument "that land use planners, and the planning discipline in general, hasten the pace of exurban development"); Byun & Esparza, *supra* note 78; Jae Hong Kim, Timothy D. Keane & Eric A. Bernard, *Fragmented Local Governance and Water Resource Management Outcomes*, 150 J. ENV'T MGMT. 378, 384 (2015) (finding that more fragmented local government is correlated with lower increases in density).

¹⁰⁴ For studies finding that larger cities have stricter zoning, see Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 278 (2009) (finding that larger town size correlates with higher minimum lot size); John F. McDonald & Daniel P. McMillen, *Determinants of Suburban Development Controls: A Fischel Expedition*, 41 URB. STUD. 341, 358 (2004) (finding in a study of zoning provisions in Chicago suburbs that "larger suburbs tend to make greater use of nearly all forms of development controls and more complex zoning ordinances"). For studies finding no clear evidence of a pattern, see Bengte Evenson & William C. Wheaton, *Why Local Governments Impose Land-Use Restrictions* 18–19 (Aug. 2002) (unpublished manuscript) (on file with authors) (finding no evidence for or against theory that smaller jurisdictions are more likely to produce stricter regulation); C.J. Gabbe, *Local Regulatory Responses During a Regional Housing Shortage: An Analysis of Rezonings in Silicon Valley*, 80 LAND USE POL'Y 79, 79 (2019) (finding, in a study across three cities in Silicon Valley, that the largest city had both more upzoning that increased density and more downzoning that decreased density).

¹⁰⁵ See generally Ellickson, *Zoning and the Cost of Housing*, *supra* note 51 (developing metrics for measuring exclusionary zoning and applying these metrics to Silicon Valley, Greater New Haven, and Greater Austin).

purchase of land to go with a house; allowing a significant amount of houses on small lots is the reverse, because it allows purchase of a house with a relatively small amount of land; and multifamily housing, by using land very efficiently to produce housing, is the least exclusionary.

Ellickson found that the most exclusionary zoning by far was in New Haven. And New Haven (as with most of the Northeast) has a much more fragmented local government landscape than much of the rest of the country, with much smaller-sized local governments.¹⁰⁶ Ellickson's results are consistent with data from research surveys of planning departments around the country, which find that the Northeast has some of the strictest zoning in the United States,¹⁰⁷ including some of the most exclusionary forms of zoning.¹⁰⁸

4. *Smaller Jurisdictions Produce Less Housing*

Perhaps most important is the ultimate result of the land-use regulation process, for example, whether smaller jurisdictions approve and build more or less housing than larger jurisdictions. Here we draw on recent research that finds, in general, cities and counties with larger populations produce more housing than smaller jurisdictions. In particular, urbanized census tracts in jurisdictions with larger populations have greater production of multifamily housing than census tracts in jurisdictions with smaller populations.¹⁰⁹ Tracts in jurisdictions under 50,000 in population have the lowest rates of multifamily housing production, while jurisdictions between 500,000 and one million in size have the highest.¹¹⁰ Jurisdictions over one million still produce substantially more housing than those

¹⁰⁶ See Marantz & Lewis, *supra* note 6, at 5–7.

¹⁰⁷ See, e.g., Joseph Gyourko, Albert Saiz & Anita Summers, *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693, 714 (2008); Joseph Gyourko, Jonathan S. Hartley & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index*, 124 J. URB. ECON. 1, 2 (2021).

¹⁰⁸ See Rolf Pendall, Robert Puentes & Jonathan Martin, *From Traditional to Reformed: A Review of the Land Use Regulations in the Nation's 50 Largest Metropolitan Areas*, BROOKINGS INST. 12–14 (Aug. 2006) https://www.brookings.edu/wp-content/uploads/2016/06/20060802_Pendall.pdf [<https://perma.cc/V696-2AT9>].

¹⁰⁹ See Marantz & Lewis, *supra* note 6, at 11–26. The national study drew on census tracts as the base unit of analysis rather than jurisdictions themselves. *Id.* That is because larger population jurisdictions are likely, all other things being equal, to have more housing construction, obscuring any relationship between population size and the openness of a jurisdiction to increased housing production. *Id.* Census tracts, on the other hand, are much more uniform in population than local governments. *Id.* Multifamily housing is important because, as noted above, it is most likely to produce socioeconomic diversity in a community and allow for affordable housing in areas with high land costs, such as high-demand metro areas. Exclusionary zoning also generally targets multifamily housing.

¹¹⁰ *Id.* at 25. The study found that census tracts in cities with populations from 500,000 to one million produced 46 more multifamily units compared to census tracts in cities with populations under 50,000. *Id.*

under 50,000, though not as much as jurisdictions in the 500,000 to one million category.¹¹¹ This slight decline may reflect the ability of these very large jurisdictions (of which there are very few) to dominate the land-use market, consistent with a theory of monopolization by large jurisdictions.¹¹²

5. Within Larger Jurisdictions, Devolving Power to Smaller Geographic Scales Produces Less Housing

Even within a larger jurisdiction, the structure of that jurisdiction's political process may have important implications for how housing is produced and provide important insights on the extent to which housing development decisions have benefits at greater geographical scales. As noted above, local legislatures play a key role in housing decisions.¹¹³ It is city councils, for instance, that decide on rezoning decisions. Even more important in practice, local legislatures often decide appeals from lower-level decision-makers (such as staff and planning commissions) on conditional use permits, variances, and similar decisions.¹¹⁴ The election and structure of local legislatures have important implications for housing decisions which can, in turn, provide insight into the spillover benefits of local housing decisions.

A fundamental distinction for local legislatures is between those that are elected from geographically-based districts within the jurisdiction (district elections) and those that are elected by the entire population of the jurisdiction (at-large elections). To the extent that legislators are responsive to their constituents, a district-based system will lead individual legislators to privilege the interests of a smaller population and geography over citywide interests. If negative effects of development are smaller in scale and positive effects are larger in scale, that district-based representation could, on average, produce less housing than at-large representation.

It turns out that this dynamic is quite strong in practice. Recent studies have found that when a city shifts from at-large elections to district-based elections, the amount of housing approved by the local government declines substantially—over 40% for multifamily housing.¹¹⁵ These results are consistent with the prior literature

¹¹¹ *Id.* The study found that census tracts in cities with populations over one million produced 24 more multifamily units compared to census tracts in cities with populations under 50,000. *Id.*

¹¹² *See id.*

¹¹³ *See supra* Section II.A.

¹¹⁴ *See* Moira O'Neill, Guila Gualco-Nelson & Eric Biber, *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENV'T. L.J. 1, 71–72 (2019) (providing data on administrative appeals in Bay Area cities).

¹¹⁵ *See generally* Evan Mast, *Warding Off Development: Local Control, Housing Supply, and NIMBYs* 11–12 (Upjohn Inst. Emp. Rsch., Working Paper No. 20-330, 2020), https://research.upjohn.org/cgi/viewcontent.cgi?article=1349&context=up_workingpapers [<https://perma.cc/WM2U-EG28>] (comparing, in a national study, cities that moved to district

that predicted such a relationship.¹¹⁶ This dynamic is driven by norms in district-based city councils where other city legislators commonly defer to legislators who represent the district where the housing decision is occurring (what is often called

elections with cities that did not, and finding a 24% decrease in housing production, with 47% decrease for multifamily units and 12% for single-family units in cities that shifted election structures); Michael Hankinson & Asya Magazinnik, *The Supply-Equity Trade-off: The Effect of Spatial Representation on the Local Housing Supply* 21 (Feb. 20, 2021) (unpublished manuscript) (on file with authors), (comparing housing production in California cities that moved to district elections with cities that stayed at large, and finding a decline of 56% in multifamily housing in cities that shifted election structures but also finding that production was more equitably distributed across neighborhoods).

¹¹⁶ See FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 94 (“Ward-based cities behave more like suburbs in land-use decisions.”); James C. Clingermayer, *Distributive Politics, Ward Representation, and the Spread of Zoning*, 77 *PUB. CHOICE* 725, 730, 733 (1993) [hereinafter Clingermayer, *Distributive Politics*] (finding a historical pattern of zoning being adopted more readily by cities with district-based representation); James C. Clingermayer, *Electoral Representation, Zoning Politics, and the Exclusion of Group Homes*, 47 *POL. RSCH. Q.* 969, 973 (1994) [hereinafter Clingermayer, *Electoral Representation*] (finding a correlation between ward representation systems and zoning laws excluding group homes based on a survey of local government officials); Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 *HASTINGS L.J.* 79, 135 (2019) (stating that district or ward representational systems can mean more restrictive zoning); Hills & Schleicher, *Affordable City*, *supra* note 25, at 113 (arguing that in small suburbs or ward districts in large cities, “[a]t the size of a single city electoral district, property holders and the city council members who represent them have both incentives and capacity to limit development locally even where they support growth overall”); AMY BRIDGES, *MORNING GLORIES: MUNICIPAL REFORM IN THE SOUTHWEST* 203 (1997); Hills & Schleicher, *Balancing the “Zoning Budget,”* *supra* note 7, (arguing that city council members focus on district-level concerns, which means they are less likely to support upzoning); David Schleicher, *City Unplanning*, 122 *YALE L.J.* Y 1670, 1699–1717 (2013) [hereinafter Schleicher, *City Unplanning*] (arguing that ward voting combined with case-by-case consideration of projects decreases development in major cities); Hankinson, *supra* note 90, at 475 n.7 (“[N]eighborhood-level, ward-based decision-making leads to more restrictive zoning and fewer group homes in a municipality.”) (citing Clingermayer, *Distributive Politics*, *supra*; Clingermayer, *Electoral Representation*, *supra*); WEAVER & BABCOCK, *supra* note 30, at 194–96 (arguing that increased neighborhood power can be in tension with allowing development that benefits the city as a whole). Scholars have noted similar patterns when cities devolve significant housing decision-making power to neighborhood groups. See William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 *BROOK. L. REV.* 339, 340 (2013) (arguing that neighborhood conservation districts are an additional local veto point on land-use); Greg Morrow, *The Homeowner Revolution: Democracy, Land Use and the Los Angeles Slow-Growth Movement, 1965–92* (2013) (Ph.D. dissertation, UCLA) (ProQuest) (finding that neighborhood-led bottom-up planning promotes slow growth in Los Angeles).

“aldermanic courtesy”)¹¹⁷—this exacerbates the local control over housing decisions and the emphasis on the negative local effects of that decision.¹¹⁸

C. Variation in Land-Use Regulation Across Small Jurisdictions

In addition to spillover effects, another important driver of lower housing production in smaller jurisdictions is the variation in zoning rules across local governments. We found significant variations in zoning rules, standards, and even basic concepts across local jurisdictions in California.¹¹⁹

These variations are not just nomenclature. Cities often used the same names for very different processes. For example, Planned Unit Developments (PUDs) are a zoning tool that many jurisdictions use to facilitate relatively large planned developments that might include a combination of residential, commercial, office uses, and reserved open space, which generally involve the creation of a new zoning district for that specific development.¹²⁰ However, other cities use PUDs as a tool to allow a specific project (usually an individual building) to be built under a preexisting zoning and planning system, without any need for rezoning.¹²¹ Even where land-use regulatory tools in theory accomplish the same goal, they may come with dramatically different procedures in different cities. For instance, design review

¹¹⁷ The term “aldermanic courtesy” originates in Chicago, where the practice is entrenched. See WEAVER & BABCOCK, *supra* note 30, at 147 (describing aldermanic courtesy in Chicago). For broader discussion and other examples, see BABCOCK, *supra* note 34, at 141; Purcell, *supra* note 88, at 95 (discussing the example of Los Angeles: “For land use decisions in a given district, the other 14 members generally defer to the will of that district’s council member.”).

¹¹⁸ The flip side is that district-based legislators are more responsive to local preferences as to housing, which is supported by advocates for local control. See Ostrom et al., *Government in Metropolitan Areas*, *supra* note 17, at 838 (1961) (arguing for more devolution of decision making to neighborhoods in large cities, and stating that the “interests of smaller publics might be properly negotiated within the confines of a smaller political community”); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 515 (1997) (arguing that increased sublocal governance can allow more voice and tailored conditions for neighborhoods). There is also evidence that shifting to district-based representation means that the siting of housing is more evenly distributed across the city, rather than being concentrated in politically less powerful neighborhoods (often poor and minority neighborhoods). See Hankinson & Magazinnik, *supra* note 115, at 2–6. Those potentially more equitable outcomes lead some scholars to advocate for district-based election even given the potential impact on housing production. Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 MARQ. L. REV. 1, 63–69 (2010).

¹¹⁹ Moira O’Neill-Hutson, Eric Biber, Raine Robichaud, Giulia Gualco-Nelson & Nick Marantz, *Examining Entitlement in California to Inform Policy and Process: Advancing Social Equity in Housing Development Patterns* 19–23 (Mar. 18, 2021) (unpublished manuscript) (on file with authors).

¹²⁰ See ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* 358–61 (4th ed. 2013).

¹²¹ O’Neill-Hutson et al., *supra* note 119, at 52.

in some cities is done by planning staff administratively, and in other cities requires public hearings before multiple commissions.¹²²

These variations in local land-use regulatory processes may create barriers to entry to developers seeking to work in new jurisdictions. They create substantial learning costs for a developer seeking to understand what the approval process is and how it works.¹²³

These barriers to entry may be particularly important in restricting development in small jurisdictions, where the costs of learning a new land-use regulatory system can only be spread across a limited number of projects. It is one thing for a developer to learn a new regulatory system for a city like Los Angeles—while the system there is byzantine in its complexity,¹²⁴ learning that system also opens the door for development in a city of four million. In contrast, in the Silicon Valley area of California, which has a similar-sized population, a developer has to learn the planning and zoning rules for at least eighteen small- to medium-sized cities in addition to the rules for two counties that have unincorporated areas within the

¹²² *Id.*

¹²³ For a description of learning costs, and their importance in creating administrative burdens for entities seeking to comply with government rules, see PAMELA HERD & DONALD P. MOYNIHAN, *Understanding Administrative Burden, in ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* 15–41 (2018).

¹²⁴ A PDF printout of the L.A. city zoning code runs over 600 pages. *See* L.A., CAL., MUN. CODE §§ 11.00–19.19 (2021).

Valley.¹²⁵ These costs may be a significant deterrent for developers¹²⁶ and exclude national developers who might bring competition to new markets.¹²⁷

III. NATIONAL AND GLOBAL IMPACTS OF LOCAL LAND-USE DECISIONS

A. National Economic Impacts

One national impact of local land-use decisions is simply a larger-scale version of the impact of those decisions on regional job markets and economies. To the extent that agglomeration economics are increasingly important in modern, post-industrial, global economies, society will be worse off if local land-use decisions

¹²⁵ The core of Silicon Valley includes the following cities in Santa Clara and San Mateo Counties: Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Morgan Hill, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, East Palo Alto, Menlo Park, Atherton, Redwood City. See *Silicon Valley Map*, <https://www.siliconvalleymap.org/> [<https://perma.cc/92HH-H985>] (last visited July 26, 2021).

¹²⁶ C. Tsuriel Somerville, *The Industrial Organization of Housing Supply: Market Activity, Land Supply, and the Size of Homebuilder Firms*, 27 REAL EST. ECON. 669, 679 n.13 (1999) (arguing that there are economies of scale for builders in dealing with regulation, which would create a barrier to entry into new jurisdictions); see also Byun & Esparza, *supra* note 78 (arguing that strict land-use regulation creates barriers to entry for small developers). Developers often focus on particular jurisdictions where they can rely on their knowledge of the local zoning rules and connections with elected officials and neighborhood groups. CASE & GALE, *supra* note 34, at 66 (“The experienced, well-connected developer has an advantage over the out of town or new developer.”); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1297–98 (1997) (discussing “[l]ocal regulators’ incentive to discriminate against new developers” and in favor of developers established in their localities); Corie Calfee, Paavo Monkkonen, John M. Quigley, Stephen Raphael, Larry A. Rosenthal & Joseph Wright, *Measuring Land-Use Regulation in the San Francisco Bay Area: Report to the MacArthur Foundation* 12 (Aug. 2007) (unpublished manuscript) (on file with the Fisher Center for Real Estate and Urban Economics) (“Builders who successfully and profitably navigate the entitlement process in one locality may then benefit when proposing future projects in that jurisdiction. Strict rules and requirements stand as a barrier to entry, but those establishing the necessary knowledge base, and personal and political relationships, may then realize advantages relative to others who wish to build.”).

¹²⁷ Defense of the status quo by local builders reflects their vested interest in the exercise of zoning authority by suburban governments. The fragmentation of public control over land use and housing has played an important role in sustaining small developers in an era of rapid increases in the scale of most enterprises. The local contractor’s comparative advantage is his ability to develop intimate knowledge of local regulations and close relations with local officials. Builders in the suburbs are understandably reluctant to see changes in the present system that would jeopardize their privileged status or encourage competition from outsiders who lack access to local officials and familiarity with local zoning, building, and subdivision codes. DANIELSON, *supra* note 42, at 133–37 (noting that national builders tend to push for preemption of local control, while regional or local builders often support local zoning).

constrain housing in the metropolitan areas that are the centers for agglomeration economics. Higher housing costs in those metropolitan centers deter people from living in those areas, artificially increasing labor costs and decreasing economic activity. The mechanism is more or less the same as at the regional level—local governments feel most or all of the pain from individual development projects, while many of the benefits are felt at a much larger scale. Economists have estimated that the impacts of restrictive local land-use regulation on national economies are significant—one study found that stringent land-use regulation reduced U.S. economic growth by 36% over a 55-year period.¹²⁸ There may be a range of other benefits that agglomeration economics can provide for national economies as well, such as increased rates of technological innovation.¹²⁹

B. Global Climate Impacts

Local land-use decisions have a global climate impact in the way they affect greenhouse gas emissions. Transportation is one of the most important sectors of emissions in the United States and is increasingly important as emissions from the electricity sector decrease.¹³⁰ The challenge is ironically best exemplified in jurisdictions that have been the most aggressive in decarbonizing their economies. For instance, in California, the state's aggressive efforts to decarbonize its electricity grid have reduced the share of state-wide emissions from electricity to about 14%. However, transportation produces 40% of the state's greenhouse gas emissions; and while California and national electricity greenhouse gas emissions are declining, transportation emissions are increasing nationally¹³¹ and have only just started to decline in California.¹³²

Transportation emissions can be reduced in a significant way by electrification—the conversion of automobiles, buses, and trucks from internal combustion engines to electric motors—presuming that the electricity grid has been decarbonized. However, to achieve climate goals, it is also essential to reduce the

¹²⁸ See Hsieh & Moretti, *supra* note 15, at 1.

¹²⁹ For an overview of those additional possible benefits, see David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017).

¹³⁰ *Fast Facts on Transportation Greenhouse Gas Emissions*, EPA, <https://www.epa.gov/greenvehicles/fast-facts-transportation-greenhouse-gas-emissions> [<https://perma.cc/MXA4-WWU2>] (last visited July 25, 2021).

¹³¹ *Sources of Greenhouse Gas Emissions*, EPA, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> [<https://perma.cc/F5DP-FY4V>] (last visited July 13, 2021).

¹³² *Mandatory Greenhouse Gas Reporting 2018 Emissions Year Frequently Asked Questions*, CAL. AIR RESOURCES BD. (Nov. 8, 2019), <https://ww3.arb.ca.gov/cc/reporting/ghg-rep/reported-data/2018mrrfaqs.pdf> [<https://perma.cc/UNT9-E46K>]; see also *California Greenhouse Gas Emissions for 2000 to 2017: Trends of Emissions and Other Indicators*, CAL. AIR RESOURCES BD. 5–9 (2019) (identifying transportation and electric power sector trends as well as overall state trends).

amount of transportation by automobiles.¹³³ That is primarily because cars have an average lifespan of fifteen years in the United States.¹³⁴ As a result, if we rely solely on electrification to eliminate transportation emissions, the time it takes to turn over the vehicle fleet means that significant emissions from legacy internal combustion engines will occur for a decade or more, even with an extremely aggressive (and perhaps unrealistic) transition to electric motors for new vehicles. Reducing the amount that cars are used—vehicle miles traveled (VMT)—has the advantage of reducing emissions from all vehicles and has a more immediate impact on greenhouse gas emissions than electrification.

However, reducing VMT requires a move towards denser, less car-dependent urban forms. It is impossible, or at least unrealistic, to expect people living in sprawling suburbs to stop using their cars and instead bike, walk, or use public transit for transportation.¹³⁵ Indeed, development below a certain density is economically infeasible to serve with public transit.¹³⁶

Residents of dense cities thus have lower carbon footprints than residents of otherwise similar suburban, rural, and exurban areas, and densification can help significantly reduce carbon emissions overall.¹³⁷ But the global climate benefits of

¹³³ Alejandro E. Camacho, Melissa L. Kelly, Nicholas J. Marantz & Gabriel Weil, *Mitigating Climate Change Through Transportation and Land Use Policy*, 49 ENV'T L. REP. 10473, 10473–74 (2019) (noting importance of reducing VMT to help CA achieve climate goals).

¹³⁴ Antonio Bento, Kevin Roth & Yiou Zuo, *Vehicle Lifetime and Scrapage Behavior: Trends in the U.S. Used Car Market*, 39 ENERGY J. 159, 159 (2018).

¹³⁵ See, e.g., Alieza Durana, *Getting from Here to There: In the Suburbs, Car Ownership Is Practically a Necessity*, SLATE (Mar. 26, 2018, 10:00 AM), <https://slate.com/human-interest/2018/03/the-suburbs-were-built-for-cars-todays-suburban-incomes-were-not.html> [<https://perma.cc/XJ5C-5NSJ>]; Robert Cervero, *Making Transit Work in Suburbs*, 1451 TRANSP. RSCH. REC. 3, 3 (1994); John Pucher, *Public Transportation*, in GEOGRAPHY OF URB. TRANSP. 202 (Susan Hanson & Genevieve Giuliano eds., 2004).

¹³⁶ See S. Cooke & R. Behrens, *Correlation or Cause?: The Limitations of Population Density as an Indicator for Public Transport Viability in the Context of a Rapidly Growing Developing City*, 25 TRANSP. RSCH. PROCEDIA 3003, 3005 (2017) (describing the “density threshold,” or the minimum population density level “needed by different modes of public transport to be viable”).

¹³⁷ See Christopher Jones & Daniel M. Kammen, *Spatial Distribution of U.S. Household Carbon Footprints Reveals Suburbanization Undermines Greenhouse Gas Benefits of Urban Population Density*, 48 ENV'T SCI. & TECH. 895, 895 (2014) (finding “consistently lower” household carbon footprints “in urban core cities . . . and higher carbon footprints in outlying suburbs . . .”); Edward Glaeser, *Cities, Productivity, and Quality of Life*, 333 SCI. 592, 594 (2011) (“Within the United States, low-density living is associated with substantially higher carbon emissions from home energy use and transportation than is living in dense urban centers.”). Notably, the climate benefits of housing abundance in California would be particularly substantial. Four of the five U.S. metropolitan areas with the lowest annual standardized household CO₂ emissions are located in California. Edward L. Glaeser & Matthew E. Kahn, *The Greenness of Cities: Carbon Dioxide Emissions and Urban Development*, 67 J. URB. ECON. 404, 410 (2010). As economists Edward Glaeser &

dense infill development will spillover far beyond the borders of local governments, meaning they will have less incentive to consider them. That does not mean, of course, that cities will take no action to reduce greenhouse gas emissions. There are many examples of cities that have produced climate action plans that provide commitments to reducing greenhouse gas emissions.¹³⁸ These efforts have the promise to make a real difference in helping to address climate change, given the importance of cities for global economic and population growth.¹³⁹ Many of these cities are central cities, which for all the reasons developed above may have stronger incentives to provide for dense, infill development that can reduce housing costs in a metro area¹⁴⁰—and therefore may have an incentive to reduce climate emissions in this way in any case. Moreover, climate action plans often include a wide range of actions, only some of which might involve local land-use decisions.¹⁴¹ The non-land-use decisions may be much easier politically or economically for the city to pursue, and there is at least anecdotal evidence that cities, especially small cities, with climate action plans have made little progress on the land-use component of those plans.¹⁴²

Joe Gyourko note, “[i]f California’s restrictions induce more building in Texas and Arizona,” where household CO2 emissions are much higher, “then their net environmental effect could be negative in aggregate.” Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 27 (2018).

¹³⁸ See, e.g., Office of Energy & Sustainable Development, *Berkeley Climate Action Plan*, CITY OF BERKELEY, <https://www.cityofberkeley.info/climate/> [<https://perma.cc/PTT8-DXZV>] (last accessed July 13, 2020); Eric Garcetti, *L.A.’s Green New Deal: Sustainable City Plan*, MAYOR L.A. (2019), http://plan.lamayor.org/sites/default/files/pLAn_2019_final.pdf [<https://perma.cc/K9XV-4J8P>]; *City of San Diego Climate Action Plan*, CITY SAN DIEGO (Dec. 2018), https://www.sandiego.gov/sites/default/files/final_july_2016_cap.pdf [<https://perma.cc/9JPV-ETUV>].

¹³⁹ Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth*, 30 KREISMAN WORKING PAPER SERIES HOUS. L. & POL’Y 1 (2015); Katrina Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CAL. L. REV. 305, 305 (2020).

¹⁴⁰ See *supra* Section IV.A.

¹⁴¹ See the climate action plans cited *supra* note 138.

¹⁴² For instance, Santa Barbara, a coastal city with a strong stated commitment to environmental protection, has struggled with the implementation of its climate action plan components related to land use. See Scott Wilson, *Fires, Floods, and Free Parking: California’s Unending Fight Against Climate Change*, WASH. POST: 2°C: BEYOND THE LIMIT (Dec. 5, 2019), <https://www.washingtonpost.com/graphics/2019/national/climate-environment/climate-change-california/> [<https://perma.cc/6XAY-8LMS>] (noting that 2015 emissions in Santa Barbara were 14% above 2007 levels). While there are current state-level efforts in California to encourage local governments to plan for more transit-oriented development, those efforts fall short of a mandate on those local governments and instead primarily rely on various financial and non-financial incentives to encourage infill development. Camacho et al., *supra* note 133, at 10481.

C. Equity and Social Mobility Considerations

A final broader scale impact of local land-use decisions is the impact on non-residents, particularly those for whom living in metropolitan areas with high levels of economic opportunity could provide significant economic gains.¹⁴³ The economic success of metropolitan areas with high levels of agglomeration economics can provide major economic opportunities for individuals living in other parts of the United States, or even for residents of those same metropolitan areas who happen to live in outlying areas. Research indicates, for instance, that land-use regulation may increase national income inequality by excluding lower-wage and skilled workers from jobs and housing in high-growth metros.¹⁴⁴ However, the economic opportunities for these non-residents will not be considered by local governments since they are not current voters, only potential future voters.

More broadly, there is significant social science research that indicates children from families in lower socioeconomic categories reap significant benefits from living and growing up in wealthier neighborhoods. Some of these benefits include improved outcomes in educational attainment, income, and health.¹⁴⁵ Breaking down exclusion from high opportunity neighborhoods would produce great benefits for these children and their families. But many of these children and their families live outside jurisdictions with high opportunity neighborhoods, so these jurisdictions are less likely to consider the benefits of reducing exclusion in making land-use decisions. Indeed, the history of race, class, and land-use developed earlier in this Article makes clear that excluding these children and their families was a key goal

¹⁴³ Schleicher, *supra* note 129, at 96–107, 114–17.

¹⁴⁴ See Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 76 (2017) (“[R]ising housing prices in high-income areas deter low-skill migration . . .”); see also Richard Florida, *How Expensive Cities Hurt Workers: For Working Class and Service Employees, Wages Matter Less than What They Can Afford to Buy*, BLOOMBERG (July 12, 2016, 9:09 AM), <https://www.citylab.com/life/2016/07/how-expensive-cities-hurt-workers/490688/> [<https://perma.cc/2MNV-FDW3>] (describing the growing economic divide between lower income workers and the creative class in expensive metro areas); Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763 (2021) (“[S]uperstar cities are running up against extreme housing affordability problems, rendering middle-class life all but unsustainable.”).

¹⁴⁵ Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility II: County-Level Estimates*, 133 Q. J. ECON. 1163, 1163 (2018); Patricia J. Martens, Daniel G. Chateau, Elaine M. J. Burland, Gregory S. Finlayson, Mark J. Smith, Carole R. Taylor, Marni D. Brownell, Nathan C. Nickel, Alan Katz, James M. Bolton & the PATHS Equity Team, *The Effect of Neighborhood Socioeconomic Status on Education and Health Outcomes for Children Living in Social Housing*, 104 AM. J. PUB. HEALTH 2103, 2103 (2014).

for incorporating many of these jurisdictions and their development of land-use regulations.¹⁴⁶

There are both efficiency and equity implications to improving both economic outcomes and broader quality-of-life outcomes for people from lower-income and socioeconomic categories through changes to land-use regulation. From an efficiency perspective, people are not as productive for society as they otherwise could be if they could move to metropolitan areas with economies driven by agglomeration effects. More directly, society is worse off when there are fewer people available to help drive economic growth in these areas.¹⁴⁷ Equally or more important are the equity implications: People are foreclosed from the opportunity to earn higher incomes, more social mobility, and greater life outcomes because local governments exclude them from moving in.¹⁴⁸

IV. IMPLICATIONS

In Parts II and III, we compiled the evidence that the positive spillovers from housing development are significant and generally lead fragmented and small local jurisdictions to underprovide housing. In Part IV, we focus on four significant implications of our analysis. First, our analysis deeply undermines the normative argument that competition among local jurisdictions can provide efficient outcomes in local land-use regulation. Second, our analysis challenges scholars who have called for providing local jurisdictions greater powers, at least in the context of land-use regulation. Third, our analysis provides a buttress in policy debates for much more significant state intervention into local land-use decisions, although this does not necessarily mean complete state preemption is warranted. Fourth, our analysis supports a call for more standardized land-use regulation that facilitates transparency and accountability.

A. *The End of Tiebout?*

The debates over exclusionary zoning that we summarized in Section I.B. emphasized the negative impacts of local government control over land use.

¹⁴⁶ See *supra* Section II.B. See also *supra* notes 44, 50 and accompanying text (discussing the role of race and class in land-use regulation); see also TROUNSTINE, *supra* note 44, at 123 (“[W]hite homeowners vigorously blocked the building of low-income and multiunit housing in their neighborhoods.”).

¹⁴⁷ See Hsieh & Moretti, *supra* note 15, at 1.

¹⁴⁸ DOUGHERTY, *supra* note 4, at xiii (“Rising housing costs are a main driver—arguably the main driver—of segregation, income inequality, and racial and generational wealth gaps.”); *id.* at xv (arguing that interregional mobility is a key way to address inequality). Zoning will not address all elements of regional inequality, nor can it address inequality that remains for individuals who are unable or unwilling to move to high-opportunity metropolitan areas. See Sitaraman et al., *supra* note 144, at 1815–25. However, we believe that on net, greater housing production in high-opportunity metropolitan areas will be an important contributor to reducing inequality, even if it is not a complete solution.

However, separate academic literature has emphasized the benefits of competition among large numbers of local governments. The premise of this literature is that competition among local governments would lead to more efficient government administration, as local governments compete for residents. These arguments drew on the work of Tiebout, who developed a model to demonstrate that sorting of residents among local governments could allow those residents to select the mix of public goods they desired, and thus provide a pricing and allocation mechanism for public goods that otherwise cannot be traded in the market.¹⁴⁹ Economic and legal scholars took the original, descriptive Tieboutian model to make a normative argument that competition between jurisdictions for development and (the right sort of)¹⁵⁰ residents could prompt the efficient production of public goods by those local governments, as each government would choose to provide a mix of public goods that would appeal to particular residents.¹⁵¹ Reciprocally, residents could move and sort themselves into the jurisdictions that best matched their preferences.

Tiebout's theory was originally applied by scholars to the concept of the provision of public services, such as schools or police, with predictions that metropolitan areas that had more competition among local governments would be more efficient in the provision of public services, with better services and lower taxes.¹⁵² Greater competition would generally imply a larger number of local governments and thus a more fragmented local government structure.¹⁵³

However, scholars soon extended the theory to land-use regulation.¹⁵⁴ In that context, the claim usually is that competition among local governments for residents would drive local governments to provide efficient land-use regulation that met

¹⁴⁹ Tiebout, *Local Expenditures*, *supra* note 10, at 419 (articulating the local government model). For an excellent, concise summary of the original Tiebout paper, see Lee Anne Fennell & Richard H. McAdams, *Inversion Aversion*, 86 U. CHI. L. REV. 797, 803–04 (2019).

¹⁵⁰ We say “right sort” because jurisdictions might have an incentive to compete only for wealthy residents who can pay for the public goods and services being provided by the local government. We expand on this point *infra*, notes 161–167 and accompanying text.

¹⁵¹ See Fennell & McAdams, *supra*, note 149.

¹⁵² See, e.g., Poindexter, *Collective Individualism*, *supra* note 56, at 615 (arguing that “[e]mpirical data . . . bear out the Tiebout hypothesis” by showing that middle-class migration between cities is related to taxes and education spending); William H. Hoyt, *Leviathan, Local Government Expenditures, and Capitalization*, 29 REG’L SCI. & URB. ECON. 155, 158–59 (1999); Caroline M. Hoxby, *The Productivity of Schools and Other Local Public Goods Producers*, 74 J. PUB. ECON. 1, 1 (1999) (developing theoretical model that Tiebout competition can produce higher efficiency and productivity); FISCHEL, THE HOMEVOTER HYPOTHESIS, *supra* note 7, at 223 (arguing that local government fragmentation in Los Angeles County produced competition that made the central cities more efficient).

¹⁵³ See Ostrom et al., *Government in Metropolitan Areas*, *supra* note 17, at 832.

¹⁵⁴ See Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 205–06 (1975); Serkin, *Local Property Law*, *supra* note 9, at 899–900; see also Infranca, *supra* note 14, at 833 (noting possibility that Tiebout competition can produce “certain efficiency gains” by allowing residents to sort by their “preferences for a particular package of taxation, regulation and amenities”).

socially optimal needs for housing.¹⁵⁵ Some residents might prefer bucolic rural environments, leading some local governments to provide that environment through suitable land-use regulation. Other residents might prefer denser environments with mixed-uses, and again other local governments could provide that type of setting through suitable regulation.¹⁵⁶ Overall, the dynamic interaction among local governments would match demand for housing with supply—those that undersupplied would have too few residents, too high housing costs, and lose residents to neighbors; those that oversupplied might have crowded public services and lose residents to neighbors with better services. The balance between the two would lead to an efficient allocation of land use across all the local governments in the metropolitan area and prevent inefficient land-use regulation by local governments.¹⁵⁷

Accordingly, under this theory, the development of regional governance might be positively harmful, as it would reduce interjurisdictional competition.¹⁵⁸ It would allow the single regional government that controlled land use to set prices, plausibly too high, with underproduction of housing.¹⁵⁹ This risk might be even greater with

¹⁵⁵ See Been, *supra* note 9, at 506–08, 514–26 (explaining the political theory of competitive federalism and the influence of competitive federalism); Robert Warren, *A Municipal Services Market Model of Metropolitan Organization*, 30 J. AM. INST. PLANNERS 193, 197–98 (1964).

¹⁵⁶ Ellickson, *Suburban Growth*, *supra* note 12, 506 (“The famous Tiebout Hypothesis suggests that differentiation among suburbs enhances consumer satisfaction by making available a wider variety of packages of public goods.”).

¹⁵⁷ *Id.* at 430 (arguing that there is no “strong efficiency reason to place tethers on the discretion of fungible suburbs” because competition will prevent regulation that stifles the “natural rate of growth”); Steven J. Eagle, *On Engineering Urban Densification*, 4 BRIGHAM-KANNER PROP. RTS. CONF. J. 73, 73 (2015); Garnett, *Planning for Density*, *supra* note 9, at 11; Garnett, *Unbundling Homeownership*, *supra* note 9, at 1906, 1908, 1915 (discussing the market pressures potential home owners exert on “both local governments and private developers to offer policies that satisfy their preferences”). See Serkin, *Local Property Law*, *supra* note 9, at 901–03 for scholars explicitly arguing that Tiebout competition can constrain local land-use regulation; Been, *supra* note 9.

¹⁵⁸ ROBERT L. BISH, *THE PUBLIC ECONOMY OF METROPOLITAN AREAS* 161 (1971) (claiming that centralized or consolidated metropolitan government is “a despotic solution”); see also Warren, *supra* note 155; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures’ Control*, 97 MICH. L. REV. 1201, 1222 (1999). Nobel-prize winning scholar Elinor Ostrom supported this position. See Elinor Ostrom, *The Danger of Self-Evident Truths*, PS: POL. SCI. & POL. 33, 33–35 (2000).

¹⁵⁹ Bruce W. Hamilton, *Zoning and the Exercise of Monopoly Power*, 5 J. URB. ECON. 116, 116 (1978) (“If the zoning power within an urban area is sufficiently concentrated (that is if there are a sufficiently small number of autonomous jurisdictions) the urban-area supply of housing will be below, and its price above, those which would prevail in competitive equilibrium with no zoning.”). Scholars pointed to Los Angeles as an example of a highly fragmented metropolitan area where the fragmentation could facilitate interjurisdictional competition. See BISH, *supra* note 158, at 91–92 (noting fragmented local government in Los

the possibility that the single regional government might be captured by an interest group that had a reason to constrain development and raise prices—for instance, a monopoly developer or incumbent property owners.¹⁶⁰

It is important to keep in mind that Tiebout competition focused on efficiency, not equity.¹⁶¹ To the extent equity is considered in this literature, it notes that the interjurisdictional competition would make redistribution from richer to poorer residents very difficult for local governments (who would see their rich residents move to another jurisdiction), such that redistribution would have to occur at a higher level of government.¹⁶² The different foci of the Tiebout competition (on efficiency) and exclusionary zoning (on equity) literatures meant that to some extent, those working in these two spaces were contesting the relative importance of efficiency versus equity.¹⁶³

But in fact, the equity implications of Tiebout competition are even more stark. Efficient allocation of public goods under Tiebout competition requires in part the ability of local governments to exclude people from moving into the jurisdiction, to avoid overcrowding of those public goods.¹⁶⁴ For instance, a jurisdiction that chooses high service and high tax levels has to be able to ensure that those who use its public services and public goods pay those high tax levels. Given that American local government has primarily been financed by property taxes, this would be undermined if, for instance, large numbers of new residents are able to move into

Angeles produced “dynamism, competition, and change taking place within an understandable system geared to efficient meeting of consumer demands”); Ellickson, *Suburban Growth*, *supra* note 12, at 425 (arguing that Los Angeles County in the 1970s was an example of “[p]erfect [c]ompetition [a]mong [u]ncongested [s]uburbs”).

¹⁶⁰ See Ellickson, *Suburban Growth*, *supra* note 12, at 409 (noting the risk that regulation at “the metropolitan, regional, or state level – say a state environmental agency or land-planning commission” might produce monopoly regulation). Some scholars have argued that the credible threat of entry by new local governments (e.g., through easy secession or incorporation) can provide the benefits of competition without a large number of local governments. FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 227–28; Dolores Tremewan Martin & Richard E. Wagner, *The Institutional Framework for Municipal Incorporation: An Economic Analysis of Local Agency Formation Commissions in California*, 21 J.L. & ECON. 409, 416 (1978).

¹⁶¹ See Been, *supra* note 9, at 506–08, 514–26 (noting that Tiebout competition can result in income segregation in highly fragmented metropolitan areas and regressive outcomes in terms of tax and service levels).

¹⁶² Charles M. Tiebout, *An Economic Theory of Fiscal Decentralization*, NAT’L BUREAU ECON. RSCH. 79, 94 (1961) (stating that under competitive circumstances, “the rich [will avoid] paying taxes for the poor”).

¹⁶³ FRUG, *supra* note 17, at 168–72 (critiquing application of Tiebout theory to local government law in part because it produces exclusionary zoning that leads to segregation and inequality); MILLER, *supra* note 41, at 156–57, 167–72 (arguing that the efficiency gains of Tiebout competition come at the expense of equity).

¹⁶⁴ See Lee Anne Fennell, *Exclusion’s Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY* 163, 169 (William A. Fischel ed., 2006) [hereinafter Fennell, *Exclusion’s Attraction*].

the jurisdiction and pay low property taxes by purchasing cheap housing. These new residents would then use the services, increasing demand, without contributing the same level of revenue that prior residents provided.¹⁶⁵ This problem is resolved with the use of exclusionary zoning to exclude these potential residents.¹⁶⁶ In other words, the standard version of Tiebout competition necessarily presumed exclusion, and such exclusion could be targeted at the poor.¹⁶⁷

There are also scholars who have questioned whether Tiebout competition would actually play out in practice. Tiebout's model depends on a range of assumptions that are highly unlikely to manifest in the real world.¹⁶⁸ For instance, it assumes fungibility across jurisdictions that may not be realistic as some jurisdictions may have location-specific or other advantages vis-à-vis other communities; it also assumes a readiness of individuals to move. Both of these assumptions may be highly questionable both within metropolitan areas and across metropolitan areas.¹⁶⁹ Tiebout theory has also been criticized for ignoring issues of race and class. Specifically, scholars have noted (as summarized above) the long history of using local government and jurisdictional borders, as well as land-use

¹⁶⁵ See Wallace E. Oates, *The Many Faces of the Tiebout Model*, in *THE TIEBOUT MODEL AT FIFTY* 21, 27 (William A. Fischel ed., 2006) (noting “free-rider problem” under Tiebout competition in “a world in which local government finance their budgets with property taxes” where a “household . . . can purchase a house with a value substantially below those of other residents in the community and thereby consume public goods at a tax price below that of other households in the community”).

¹⁶⁶ See *id.* at 27–28; Fennell, *Exclusion's Attraction*, *supra* note 164, at 163, 174–81; William A. Fischel, *Property Taxation and the Tiebout Model: Evidence for the Benefit View from Zoning and Voting*, 30 J. ECON. LIT. 171, 172 (1992); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1114–16 (2008) [hereinafter Schragger, *Cities, Economic Development, Free Trade Constitution*]; Schleicher, *City Unplanning*, *supra* note 116, at 1684–85 (explaining Robert Ellickson's critique of exclusionary zoning practices and his recognition of the “similar negative effects” of inclusionary zoning); FISCHEL, *ZONING RULES!*, *supra* note 14, at 135, 160–61; DOUGHERTY, *supra* note 4, at 108–09. The seminal paper is Hamilton, *supra*, note 154.

¹⁶⁷ See Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 497 (2017); Infranca, *supra* note 14, at 833.

¹⁶⁸ Fennell & McAdams, *supra*, note 149, at 803; Been, *supra* note 9, at 550–51 (noting limits to Tiebout competition, including that local governments may have site-specific amenities, barriers to entry for developers, and limited land to develop); Briffault, *Boundary Problem*, *supra* note 7, at 1144 (noting that competition among local governments for residents only can work if you have “both a large number of small localities in close proximity to each other and a general separation of work from residence, so that households can move relatively easily from one locality to another without changing jobs.”); Hills & Schleicher, *Affordable City*, *supra* note 25, at 115–16 (arguing that Tiebout competition will not be effective where individual jurisdictions have amenities that are not available elsewhere, including the benefits of agglomeration).

¹⁶⁹ Indeed, arguably the real import of Tiebout's original paper was in demonstrating the implausibility of the initial assumptions, and thus the very importance of issues such as spillover effects. See Fennell & McAdams, *supra*, note 149, at 804–05.

regulation, to exclude lower-income people and people of color.¹⁷⁰ The use of jurisdictional lines as tools of exclusion, as documented above, also challenges the extent to which Tiebout theory can assume mobility by individuals in response to different preferences over local government choices.

Our analyses in Parts II and III make clear that in the context of housing production and land-use regulation, the key assumption of no spillover effects is false. Local government decisions with respect to housing will generally have significant spillover effects, and, as a result, local governments will not have strong incentives to provide the optimal amount of housing. Moreover, the strength of the evidence we have compiled in Parts II and III weighs heavily in favor of the conclusion that the spillover effects of housing now dominate any plausible benefits from interjurisdictional competition in land-use regulation, given the important impacts of agglomeration economics on major metropolitan areas.¹⁷¹ At least in the context of land-use regulation, that means Tiebout competition among local governments cannot be an argument for efficient outcomes.¹⁷²

That conclusion is all the more important given the real questions about the impacts on equity of Tiebout competition. This is in part because the focus of Tiebout competition analysis on efficiency downplayed the equity impacts of competition among local governments, which might lead to highly unequal outcomes in terms of a mix of services and resources across jurisdictions.¹⁷³ Moreover, the competitive interactions among local governments make redistribution within a jurisdiction to offset any intra-jurisdictional inequality more difficult, as those who are the source of resources that are redistributed could move to other jurisdictions without redistribution.¹⁷⁴ Finally, the restrictions on entry in many jurisdictions that land-use regulations impose mean that the sorting function that Tiebout competition is supposed to facilitate operates with increasing difficulty, undermining Tiebout competition theory both on equity grounds, because those excluded will often be poor, and on efficiency grounds, since the efficiency benefits from competitive sorting will be reduced.

At first glance, our conclusions here are limited to land-use regulation. There may be a range of other circumstances in which local interjurisdictional competition

¹⁷⁰ See, e.g., Briffault, *Localism and Regionalism*, *supra* note 7, at 24–26; MILLER, *supra* note 41, at 156–57, 167–72; FRUG, *supra* note 17, at 168–72.

¹⁷¹ We are agnostic about whether Tiebout competition was more efficient in the mid-twentieth century when agglomeration economics were less powerful.

¹⁷² For statements along these lines from prior scholarship, see, for example, Briffault, *Localism and Regionalism*, *supra* note 7, at 18 (noting the importance of spillovers in land use and how they undermine the efficiency of Tiebout competition).

¹⁷³ See Oates, *supra* note 165, at 21, 41 (noting that while Tiebout competition “promotes efficient resource use” it has “some unappealing distributional consequences”).

¹⁷⁴ See FISCHER, THE HOMEVOTER HYPOTHESIS, *supra* note 7, at 129–61 (arguing that redistribution of education funding among competitive local governments is ineffective). At least, that is the theory’s prediction, though there is evidence that local governments undertake significant amounts of redistribution. Schragger, *Cities, Economic Development, Free Trade Constitution*, *supra* note 166, at 1147–48.

is efficient. For instance, public service provision by local governments may be efficient where there are few spillover effects, where there are not economies of scale in provision of the service, and where responsiveness to local preferences as to service provision might be normatively desirable (perhaps because it has minimal equity implications).¹⁷⁵

But even in the context of service provision, the fact that land-use regulation by small jurisdictions creates significant inefficiencies raises challenges for Tiebout theory. As noted above, to the extent that provision of public services and public goods by local governments either turns on ensuring that residents pay a minimum amount of taxes or where there is a risk of public goods becoming overcrowded, exclusion is essential to the theory of how competition will lead to higher quality or higher resourced public goods. And as noted above, where property taxes are the primary method of funding local government, land-use regulation is the primary (perhaps only, in a post-de jure segregated America) way to effectively exclude low-income residents from moving into a jurisdiction.¹⁷⁶ If primary local control over land-use regulation can no longer be normatively justified on either equity or efficiency grounds, that also raises real questions about the normative justification for local control in other areas, at least where those justifications depend on Tiebout competition.¹⁷⁷

B. Local Government Reformists

While scholars who have drawn on Tiebout competition emphasize the ability of local governments to make choices about public goods and taxes in ways that allow for sorting by residents, another set of legal scholars have emphasized the constraints that local governments operate under. These scholars have argued that local governments in the United States are actually substantially limited in their legal and practical ability to make significant policy choices in a wide range of areas.¹⁷⁸ While the formal legal doctrine might indicate that local governments have substantial leeway to operate, these scholars emphasize the ability of state courts and legislatures to effectively shrink that leeway through narrow interpretations of state constitutional provisions granting home rule to local governments and through state

¹⁷⁵ See Keith Dowding, Peter John & Stephen Biggs, *Tiebout: A Survey of the Empirical Literature*, 31 URB. STUD. 767, 787 (1994) (surveying empirical research on Tiebout finding support for the claim that expenditures on public services are lower as the number of jurisdictions increases).

¹⁷⁶ See *supra* notes 161–163 and accompanying text.

¹⁷⁷ We emphasize that our conclusion is focused on the normative merits of Tiebout competition—whether the efficiency produced by that competition in land-use regulation outweighs efficiency and equity costs. We do not question in this piece the descriptive validity of Tiebout analysis. Specifically, sorting of residents across local governments might occur and might reflect differential preferences for public goods.

¹⁷⁸ See Barron, *Reclaiming Home Rule*, *supra* note 19, at 2257; see generally FRUG & BARRON, *supra* note 19; see also SCHRAGGER, *CITY POWER*, *supra* note 19, at 60–86 (describing limits to local government powers in the United States).

legislation that preempts local powers.¹⁷⁹ These scholars argue that many of the dysfunctions of modern American urban governance stem from these constraints on local government power—particularly inequality across cities and counties—and that the appropriate remedy would be to expand local government authority.¹⁸⁰

Recently, local government scholars have connected the historical political and legal weakness of American local governments to a new trend of aggressive state preemption of local regulatory powers. This “new preemption” involves a range of characteristics: state legislation that preempts a wide swath of local regulatory powers; state legislation that not only preempts local regulation, but results in a regulatory vacuum without corresponding state regulation (“null preemption”);¹⁸¹ and preemption statutes that impose steep penalties on local governments and local elected officials who contest state preemption rules.¹⁸² The preemption dynamics are generally driven by conservative-dominated state legislatures seeking to constrain policy innovation by progressive city governments, particularly in large metropolitan areas.¹⁸³ The ability of state legislatures to greatly diminish local government autonomy in most states allows state legislatures, driven by political polarization, to override local governments.¹⁸⁴ Local government scholars have decried the new preemption as stifling local democracy and preventing innovative policy developments.¹⁸⁵ In response, many local government scholars have called for reinforcing local government autonomy under state law.¹⁸⁶

While this scholarship often highlights the limits on local authority in areas such as fiscal and education policy, it also identifies land-use regulation as an area

¹⁷⁹ See Barron, *Reclaiming Home Rule*, *supra* note 19, at 2263; FRUG & BARRON, *supra* note 19, at 54–61; SCHRAGGER, *CITY POWER*, *supra* note 19, at 69–70 (describing limits to local government powers in the United States).

¹⁸⁰ See Barron, *Reclaiming Home Rule*, *supra* note 19, at 2364–79; FRUG & BARRON, *supra* note 19, at 211–12 (discussing proposals in context of land-use regulation).

¹⁸¹ See Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1016–51 (2010).

¹⁸² For literature describing the trend, identifying patterns, and providing examples, see Briffault, *New Preemption*, *supra* note 20; Davidson, *supra* note 20; Diller, *supra* note 20; Scharff, *supra* note 20; Schragger, *Attack*, *supra* note 20.

¹⁸³ See Briffault, *New Preemption*, *supra* note 20, at 1999–2002; Davidson, *supra* note 20, at 957–58.

¹⁸⁴ See Briffault, *New Preemption*, *supra* note 20, at 2011–14; Schragger, *Attack*, *supra* note 20, 1192–95.

¹⁸⁵ See Scharff, *supra* note 20, at 1491–93; Briffault, *New Preemption*, *supra* note 20, at 2017–25.

¹⁸⁶ See Briffault, *New Preemption*, *supra* note 20, at 2017–25; Barron, *Reclaiming Home Rule*, *supra* note 19, at 2364–79; FRUG & BARRON, *supra* note 19, at 211–12 (discussing proposals in context of land-use regulation); see also NAT’L LEAGUE OF CITIES, *supra* note 21, at 26 (presenting a group of leading local government scholars calling for a “substantial state interest” that is “narrowly tailored” for any state preemption of local power); *id.* at 26, 35, 53 (calling for presumption of local power).

where these limits harm the production of affordable housing in the United States.¹⁸⁷ Indeed, one prominent local government scholar, Richard Schragger, has argued against reducing local government power over local land-use regulation. Schragger contends that there is no assurance that state-level intervention in land-use regulation will eliminate exclusionary and restrictive zoning patterns and that state preemption of local land-use regulation runs the risk of opening political space for broader state-level preemption of local authority consistent with the “new preemption.”¹⁸⁸

Superficially, this analysis may seem widely divergent from our own, where we contend that it is precisely the breadth of land-use powers held by local governments that contributes to the underproduction of housing in the United States.¹⁸⁹ There are at least two possible reasons for this divergent reaction. First, some of these scholars explicitly focus on central cities in their analysis, while our focus is on the much larger number of small jurisdictions, which are a significant portion (often even a majority) of the area and population of metropolitan areas.¹⁹⁰

Second, the difference also reflects a focus on various components of affordable housing policy in the United States. These local government reformist scholars point to limits on the ability of local governments to adopt rent control or require deed-restricted units as part of residential developments (what is often called “inclusionary zoning”)—in other words, assuming that housing units are available or will be constructed and ensuring that a certain component of those units are available for lower-income residents.¹⁹¹ Our focus instead is on production of all units—affordable and market-rate—as a key component of addressing the housing crisis. Rent control or inclusionary zoning requirements will not, of themselves, facilitate the production of more units of housing.¹⁹² Indeed, there are arguments that

¹⁸⁷ See Barron, *Reclaiming Home Rule*, *supra* note 19, at 2346–57; FRUG & BARRON, *supra* note 19, at 99–120.

¹⁸⁸ See Schragger, *Perils*, *supra* note 22, at 21–31.

¹⁸⁹ Richard Schragger discusses in some detail the ways in which local land-use regulation can undermine regional housing production and create interjurisdictional barriers to mobility within metropolitan areas. SCHRAGGER, *CITY POWER*, *supra* note 19, at 53–54, 108–110, 118; *id.* at 109 (“[T]he cumulative impact of local zoning ordinances generates significant distortions in the regional and national market for land.”).

¹⁹⁰ Frug and Barron’s book for instance, only focuses on seven cities that are all “large, successful central cities.” FRUG & BARRON, *supra* note 19, at 4; *see also* Schragger, *Attack*, *supra* note 20 (focusing on impacts of state preemption on large urban cities).

¹⁹¹ Barron, *Reclaiming Home Rule*, *supra* note 19, at 2347, 2349–61; FRUG & BARRON, *supra* note 19, at 99–120. Frug and Barron also discuss the limits on local regulation of development of state-owned land and possible limits on business improvement districts and tax increment financing systems by local governments. *Id.*; *see also* Schragger, *Perils*, *supra* note 22.

¹⁹² Rent control or inclusionary zoning requirements may, however, be an important component of a political bargain to advance more housing production through relaxing local land-use regulatory barriers. *See* Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1183–84 (1981) [hereinafter Ellickson, *The Irony of “Inclusionary” Zoning*]. They may also be important elements of ensuring that increased housing production

they may interfere with production of housing in certain circumstances, which is a debate that we do not take up in this Article.¹⁹³ We do not see limits on local land-use regulation as being a significant reason why local governments fail to approve more housing, in general.¹⁹⁴

There are key distinctions between our analysis, the policy proposals that we develop below, and the “new preemption” discussed by local government scholars. We do not advocate for complete deregulation of land use or “null preemption.” Whether at the state or local level, we believe there is a role for government in regulating conflicting uses of land. We also argue that not all state-level intervention need be punitive, as in the “new preemption” model. Nor does state intervention need to completely displace local regulation in land use, as we discuss in more detail below.

But most importantly, our theory provides an argument for state intervention that is specific to land use and therefore does not necessarily contribute to broader preemption of local regulatory authority, as has occurred in the “new preemption” and as feared by Schragger. Our analysis identifies a specific way in which local regulation of land use produces spillover effects on regional and national housing markets and economies and on climate change. Spillover effects are a rationale for state intervention long recognized by legal scholars.¹⁹⁵

Our analysis also responds to Schragger’s point that “there is no reason to believe that a state’s land use regime . . . will not come to reflect similar political pathologies” as local governments.¹⁹⁶ Because states will incorporate more of the positive effects of housing production at a regional or state-wide scale, states will therefore, on average, have more of a reason to advance housing production than local governments. Of course, this incentive for states to produce more housing will not always prevail in the contingent battles over individual housing proposals, but there are theoretical and empirical reasons to believe that these battles will be more often won at the state rather than the local level. That, of course, does not mean that

will produce more equitable outcomes, as we discuss in more detail, *infra* notes 206–211 and accompanying text.

¹⁹³ See generally Ellickson, *The Irony of “Inclusionary” Zoning*, *supra* note 192.

¹⁹⁴ It is more plausible to us that state restrictions on local fiscal policy might drive reluctance by local governments to approve housing, and that is an area where broader local powers might be important to address housing shortages. See SCHRAGGER, CITY POWER, *supra* note 19, at 72; Barron, *Reclaiming Home Rule*, *supra* note 19, at 2346–47.

¹⁹⁵ See Schragger, *Perils*, *supra* note 22, at 27 (“Centralization of decisionmaking is theoretically a solution to spillovers . . .”); Briffault, *New Preemption*, *supra* note 20, at 2021. Nestor Davidson has argued that the requirement in most states that government action advance the “general welfare” can justify preemption of local actions that have extra-territorial negative effects or are exclusionary. Davidson, *supra* note 20, at 990–92.

¹⁹⁶ Schragger, *Perils*, *supra* note 22, at 3.

reforms cannot proceed at the local level as well, as shown by recent changes to base single-family zoning in cities like Minneapolis.¹⁹⁷

Our analysis therefore provides an important caution or caveat to reformist proposals that broad expansions of local government powers are beneficial. Indeed, as we discuss next, we believe that in the land use regulatory context, there likely should be significant contraction of local powers in at least some contexts or at least significant state supervision.

C. *The Need for State Intervention*

If local governments that do not cover the entirety of a regional or metropolitan economy have an incentive to underproduce housing, then that, in turn, implies a need for intervention at a higher level of government—state government.¹⁹⁸ State government would be more likely to take into account the regional impacts of

¹⁹⁷ *Id.* at 56–58 (expressing concern that local governments with less land-use control will be unable to use discretionary land-use review processes to advance progressive goals such as promoting unions or higher wages for workers on new projects; noting that CBAs, which can be a tool for empowering neighborhoods that have historically been disempowered, depend on discretionary review processes). CBAs, for example, are often associated with either large commercial or mixed-use projects. *See* MALO ANDRÉ HUTSON, *THE URBAN STRUGGLE FOR ECONOMIC, ENVIRONMENTAL, AND SOCIAL JUSTICE: DEEPENING THE ROOTS* (2016) (discussing case studies of CBAs across multiple cities); Nicholas J. Marantz, *What Do Community Benefits Agreements Deliver?: Evidence from Los Angeles*, 81 J. AM. PLAN. ASS'N 251, 252 (2015). To the extent the goal is to use case-by-case discretionary review to advance progressive goals—as opposed to legislation requiring those goals be advanced in all projects, which can be coupled with ministerial review—real advancement of those progressive goals will likely be achieved with large projects. Notably, however, our proposal does not necessarily call for eliminating all discretionary review. State law can also attempt to advance progressive goals (like prevailing wages and affordable housing) in exchange for streamlining or ministerial review. *See* S.B. 35, 2017–2018 Reg. Sess. (Cal. 2017) (codified at CAL. GOV'T CODE § 65913.4); CAL. GOV'T CODE §§ 65580–65589.11 (West 2021) (providing for streamlining and elimination of environmental review of housing development that conforms to underlying base zoning, meets specific affordability or mixed-income criteria, and is coupled with prevailing wage and other labor requirements, in jurisdictions that fail to meet housing production obligations).

¹⁹⁸ *See* Infranca, *supra* note 14, at 885–86 (making the case for state-level preemption of some forms of local land-use regulation to ensure housing production); *see also* Lemar, *supra* note 60. Recent scholarship has criticized preemption by states of local policymaking in a range of fields such as environmental protection or education, arguing that these efforts seek to impose “uniform statewide policies” without any justification of protecting “metropolitan-area residents . . . from city spillovers.” Richard C. Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1597 (2019) [hereinafter Schragger, *Federalism*]. But, as we established in Parts III and IV, local land-use regulation that affects housing production is precisely an example of a spillover from local decision-making on metropolitan areas that justifies higher-level governmental intervention.

housing decisions, including the regional benefits of producing more housing.¹⁹⁹ It is true that local governments have strong political power at the state level,²⁰⁰ such that they are likely to be powerful interest groups protecting their interests, including against development that has local negative implications. Nonetheless, at the state level, local governments will only be one interest group of many advocating for positions with respect to housing, rather than being (as they are now) effectively a decision-maker with veto power.

We also emphasize that state intervention need not take the form of full state-level control or even regionalization of all local government decision-making with respect to land-use regulation. Such an approach has had limited political success historically in the United States and has limited political viability today.²⁰¹ States may not be the best venues for consideration of regional impacts, as states can be both overinclusive (including large rural areas that are outside of metropolitan areas) and underinclusive (where metropolitan areas cross state borders).²⁰² In addition, the local impacts of housing production are not impacts that should be dismissed out of hand—they should be considered, just in the context of the regional benefits of that housing.²⁰³ Thus, a targeted approach that is focused on land-use regulation's impacts on housing, and ensures an appropriate consideration of regional or broader-

¹⁹⁹ We can think of limited exceptions, such as when states only include a part of a metropolitan area, as in the New York and Washington D.C. metro areas. However, even in those metropolitan areas, we think that the state will have stronger incentives to encourage housing production on average by including a much larger share of that area than any local government.

²⁰⁰ FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 7, at 36 (“It can formally be said that local governments are creatures of the state, but as a political matter, states are more often creatures of the local governments.”); Garnett, *Trouble Preserving Paradise*, *supra* note 98, at 181 (describing how local governments successfully fought statewide ballot initiatives to restrict growth); DANIELSON, *supra* note 42, at 279–322, 323–47 (noting the political power of local governments in state capitals). For contrary arguments that local government lobbying power is weak, see SCHRAGGER, *CITY POWER*, *supra* note 19, at 79 (“U.S. cities—individually and collectively—do not appear to exercise significant political influence *as* cities. Their ability to achieve the goals that are important to their citizens is often highly constrained.”).

²⁰¹ See, e.g., Briffault, *Localism and Regionalism*, *supra* note 7, at 6 (noting the “long and largely unsuccessful history of efforts to create metropolitan governments”); Briffault, *Boundary Problem*, *supra* note 7, at 1117–20; see also DOWNS, *supra* note 42, at 170 (“Metropolitan government has almost no political support.”).

²⁰² See Schragger, *Federalism*, *supra* note 198, at 1551–52. Of course, even if states may not be great matches for metropolitan areas, they may still be better than any other existing alternatives, where cities represent only fragments of the metropolitan area, and regional governance structures may be minimal or non-existent.

²⁰³ In addition, residents of local governments may have a legitimate reliance interest in the pace of change in their communities, and this factor should receive at least some weight in the process. See Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 783–86 (2020) [hereinafter Serkin, *A Case for Zoning*].

level benefits of housing, seems the appropriate choice.²⁰⁴ To facilitate the political transition to such a new governance structure, one option might be to provide some additional regulatory or fiscal powers to local governments that agree to enter into regional partnerships to address housing and planning.²⁰⁵

There are a range of ways to design such a state-level intervention. The state might set targets for housing production and require local governments to adjust their zoning ordinances to ensure that those targets are met.²⁰⁶ The state might allow individual project proponents to bypass or override the local discretionary review process for certain kinds of projects, such as projects that meet base zoning requirements and provide for affordable housing.²⁰⁷ The state might mandate the elimination of single-family zoning in specific areas around the state.²⁰⁸ The merits and demerits of specific approaches are beyond the scope of this Article.

Whatever the specific approach, the need seems clear. And this has implications for disputes not just about the wisdom of state intervention but also its legality. As noted above, questions about the state's role in land-use regulation have become constitutionalized in California, with local governments making arguments and filing lawsuits claiming that the state has no power in this area, as it is reserved to local control. Our analysis indicates that these arguments should fail—both as a matter of policy and also as a matter of law to the extent that there are arguments that land-use regulation is a local or municipal matter that should be reserved to local governments. There is a clear state role in land-use decisions, particularly in housing markets, given their regional importance.²⁰⁹

As an example, consider a state like California where state laws that seek to preempt local legislation for charter cities in matters that “implicat[e] a municipal affair” must demonstrate that the state law is advancing a substantial state interest

²⁰⁴ See Briffault, *Localism and Regionalism*, *supra* note 7, at 20 (arguing for only partial intervention of state into land-use decision-making); Alejandro E. Camacho & Nicholas J. Marantz, *Beyond Preemption, Toward Metropolitan Governance*, 39 STAN. ENV'T L.J. 125, 146–161 (2020) (describing options for state-level tailoring of interventions into local land-use regulation).

²⁰⁵ Here, we borrow from proposals along these lines made by Gerald Frug and David Barron. See Barron, *Reclaiming Home Rule*, *supra* note 19, at 2379; FRUG & BARRON, *supra* note 19, at 212.

²⁰⁶ CAL. GOV'T CODE § 65584 (West 2021).

²⁰⁷ See MASS. GEN. LAWS ANN. ch. 40B, §§ 1–30 (West 2021); S.B. 35, 2017–2018 Reg. Sess. (Cal. 2017) (codified at CAL. GOV'T CODE § 65913.4).

²⁰⁸ H.B. 2001, 80th Leg., 2019 Reg. Sess. (Or. 2019); S.B. 50, 2019–2020 Reg. Sess. (Cal. 2019).

²⁰⁹ In metropolitan areas with low demand but high local fragmentation—such as St. Louis or Detroit—our efficiency-based arguments for state intervention likely are not very powerful. However, equity-based arguments may still be important.

It is also possible that private covenants for subdivisions, enforced by homeowners associations, would continue to restrict density in many neighborhoods. See Serkin, *A Case for Zoning*, *supra* note 203, at 793–98. State law might override these covenants at least to some extent, though, at the extreme, this may prompt takings claims. We would also note that covenants will not restrict denser development in many inner-ring suburbs.

and is narrowly tailored to achieve that interest.²¹⁰ We think state intervention in land-use regulation to advance housing production is clearly advancing a substantial state interest, given the large-scale impacts of local constraints on housing production.²¹¹

D. Standardization of Land use

Another key conclusion is the need to make property in urban jurisdictions suitable for infill development more like a commodity. The wide range of land-use regulations and permit systems make the process of developing a piece of land—or redeveloping it—much more complicated than would otherwise occur.²¹² In many ways, developers and property owners seeking to redevelop land in infill jurisdictions have to undertake bespoke, site-specific assessments of their property rights in order to make an investment decision. That increases transaction costs for development and reduces the amount of infill development that can occur.

Thus, we advance an important reform for land-use regulation—restricting local jurisdictions to using a predetermined list of regulations when they construct their land-use regulatory systems. For instance, local governments might be authorized to set height limits, floor-to-area ratios, setback requirements, and use restrictions. They could create exemptions from those rules through variances and conditional use permits, and they could initiate rezoning processes to change the zoning map or the rules within zones. But the ability of local governments to come up with new zoning tools—for instance, restrictions on the casting of shadows by buildings on neighboring parcels or parks or the imposition of prohibitive fees on the demolition of existing structures—would be eliminated. Requiring local governments to operate from a fixed “tool box” of zoning tools is not unprecedented—in fact, it is precisely how Japan structures its land-use regulatory

²¹⁰ *Johnson v. Bradley*, 841 P.2d 990, 996 (Cal. 1992); *see, e.g., Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 675 (Cal. Ct. App. 2021), *reh'g denied* (May 19, 2021), *review denied* (July 28, 2021) (holding that state laws intended to limit local opposition to housing “addresses a matter of statewide concern,” allowing the state to constitutionally limit cities’ discretion in order to address the ongoing housing crisis); *Coalition Advocating Leg. Hous. Options v. City of Santa Monica*, 105 Cal. Rptr. 2d 802 (Cal. Ct. App. 2001) (noting the Legislature and courts have declared housing to be a matter of statewide concern).

²¹¹ Under this standard, any intervention must also be narrowly tailored; a range of state interventions might or might not meet this test.

²¹² *Hills & Schleicher, Affordable City*, *supra* note 25 (calling for greater standardization and certainty in land-use law because it will help accomplish goals of transferability and development of property, similar to *numerus clausus* principle).

system, and despite highly constrained land availability and population density, Japan actually has relatively affordable housing and high levels of housing production.²¹³

Of course, we recognize that circumstances change and new problems will arise that the land-use regulatory process will need to address. The state could authorize new tools for use by local governments, whether via legislation or (perhaps more plausibly and effectively) via administrative review. For instance, local governments could petition a state agency for approval of new land-use regulatory tools. The advantage of such a system—even if it does authorize the creation of a significant range of additional tools—is that it would ensure any new tools would be standardized in their adoption across the state. It is also more feasible for a state government review body to evaluate and control the generic tools that local governments across the state use than for a review body to evaluate the complicated zoning codes of hundreds of local governments to ensure that they are not improperly constraining housing production.²¹⁴

Reducing variability in land-use regulatory structures could not only increase the amount of infill development, but also help reduce barriers to entry by new developers who could introduce competition or innovation to the development process.²¹⁵ Indeed, states might draw a lesson from national government efforts to

²¹³ See *Japanese Zoning*, BLOGSPOT: URB. KCHOZE (Apr. 6, 2014), <https://urbankchoze.blogspot.com/2014/04/japanese-zoning.html> [<https://perma.cc/PE55-7APW>] (informal blog post describing zoning); see also Alan Durning, *Yes, Other Countries Do Housing Better, Case 1: Japan*, SIGHTLINE INST. (Mar. 25, 2021, 3:44 PM), <https://www.sightline.org/2021/03/25/yes-other-countries-do-housing-better-case-1-japan/> [<https://perma.cc/LXL3-DD2H>].

²¹⁴ This latter scenario is the one that currently applies in California, where the state is supposed to review local government plans for housing to ensure that they provide adequate zoning to meet the local jurisdiction's fair share of housing demand. *Housing Elements*, CAL. DEP'T HOUS. CMTY. DEV., <https://www.hcd.ca.gov/community-development/housing-element/index.shtml> [<https://perma.cc/4BBG-PGEG>] (last visited Jul. 23, 2021). That process is generally understood to have been a failure, though recent reforms might produce significant improvements.

²¹⁵ An example of the kind of innovations that might occur are start-up businesses in southern California that have developed a new business model for the construction of accessory dwelling units (ADUs) – small additional residential units built on lots that already have a primary housing unit, often called granny flats or in-law units, and often occupying converted garages. Bonnie Tsui, *Empty Garages; The Answer to California's Housing Shortage?* N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/realestate/adu-empty-garages-california-housing-shortage.html> [<https://perma.cc/DC7X-JLUX>] (last updated Feb. 12, 2021). Traditionally, the landowner would undertake the development process for an ADU by hiring a contractor/architect, working through the planning process, and perhaps most importantly, fronting the money (or borrowing the money) for the development. *Id.* This limits ADU construction to property owners with ready access to capital. *Id.* These new start-ups offer to finance the ADU project themselves in return for sharing the rental income from the ADU with the homeowner. *Id.* This has the potential to greatly expand the property owners who can construct ADUs, thus facilitating densification of single-family neighborhoods with relatively affordable housing units.

harmonize regulatory standards to facilitate international trade. The goal is not to weaken standards but to make them more interoperable, facilitating transactions that might otherwise not occur. Some evidence indicates that this might make a difference—metropolitan areas with more fragmented local government systems on average have developers that are smaller in size, implying that developers are limited in their ability to expand by jurisdictional barriers.²¹⁶

Land use standardization also could reduce the ability of local government to evade state-level intervention. At the moment, state intervention in land-use regulation can take on an element of “whack-a-mole” as local governments respond to state efforts to facilitate development by creating new regulatory obstacles to that development. For instance, in California, the state has sought to facilitate the construction of accessory dwelling units (ADUs), which are smaller secondary units built on lots that already have a primary residence. ADUs have the potential to allow increased density in single-family neighborhoods with limited impacts and also create affordable housing in high opportunity zones. Unfortunately, initial state efforts ran into significant local resistance, as local governments imposed new requirements on ADUs to replace those streamlined or prohibited by state law.²¹⁷ More recent state efforts have been more comprehensive, creating a default, uniform state-wide permitting program for many ADUs that supersedes local legislation.²¹⁸ This kind of standardization limits the number of regulatory tools available to local governments, making it easier for the state to supervise what local governments are doing and prevent evasion. It also limits the possibility of evasion in the first place by reducing the scope of options that local governments can use to regulate. Indeed, if the state has a role in approving the use of new regulatory tools, as we describe above, this would allow the state to police and prevent local evasion of just this sort.

An additional benefit of state-level review and control of land-use regulatory tools is that the state could limit the amount of discretion that any land-use regulatory tool contains. For instance, states may mandate that only certain factors are considered in permit review processes or that factors be clearly specified *ex ante*. As noted in Section I.B., discretionary application by local governments of vague provisions in their zoning code is a key way that local governments retain veto power over developments, and this is a key way in which local land-use regulation makes property less of a commodity. One study of land-use regulation in selected California jurisdictions found that most jurisdictions required discretionary review for any

²¹⁶ Somerville, *supra* note 126, at 669.

²¹⁷ See Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519, 523–24, 547–61 (2013).

²¹⁸ See A.B. 68, 2019–2020 Reg. Sess. (Cal. 2019) (“Land use: accessory dwelling units.”); S.B. 13, 2019–2020 Reg. Sess. (Cal. 2019) (“Accessory dwelling units.”); A.B. 587, 2019–2020 Reg. Sess. (Cal. 2019) (“Accessory dwelling units: sale or separate conveyance.”); A.B. 670, 2019–2020 Reg. Sess. (Cal. 2019) (“Common interest developments: accessory dwelling units.”); A.B. 671, 2019–2020 Reg. Sess. (Cal. 2019) (“Accessory dwelling units: incentives.”).

housing development of five units or more, and only one city (Los Angeles) had any significant production of housing without discretionary review.²¹⁹

Giving the local government (and by extension, the community) the ability to veto development decisions has been framed by land-use scholars as expanding the range of parties who have property rights over individual parcels of land.²²⁰ This expansion of the range of parties with a say over development at the extreme can produce anti-commons outcomes, in which the large number of rights-holders for a particular piece of property prevent agreements about how to change the use of that property, even when such changes would be socially optimal.²²¹

State-level review can be an important check on local efforts to broadly expand discretionary review. This is not to say that we advocate for complete elimination of discretionary review. Changes will have to carefully balance facilitating infill development crucial for climate, affordability, and equity goals without undermining those goals indirectly. For instance, facilitation of development in infill areas should not facilitate sprawl, car-dependent development that would undermine climate goals. Likewise, facilitation of infill development by reduction of the number of discretionary review steps should not undermine the power that historically underprivileged communities have recently achieved through organizing efforts.

V. CONCLUSION: THE URGENCY OF CHANGE

There is real urgency to adopt these changes and move more decision-making power away from local governments to states. As noted in the Introduction, resolving the obstacles that local control poses to infill development in urban and suburban areas is essential for economic, environmental, and equity reasons. We cannot effectively address the housing crisis in our metropolitan areas without significant increases in housing supply, for which local control is a serious obstacle. Without addressing local control, particularly in exclusive suburban communities, we will not address the disproportionate burdens that both the skyrocketing housing prices of the present and the historical legacy of racial and class segregation have

²¹⁹ See O'Neill-Hutson et al., *supra* note 119.

²²⁰ See, e.g., FISCHER, *THE ECONOMICS OF ZONING LAWS* *supra* note 102, at 77 (characterizing zoning as a collective property right that has high transaction costs, in the form of hearings and public participation rights, to resolve). See also Fischel, *Evolution of Zoning*, *supra* note 50, at 261; Katherine L. Einstein, David Glick & Maxwell Palmer, *The Politics of Delay in Local Politics: How Institutions Empower Individuals* (Apr. 3, 2017) (unpublished manuscript) (on file with the authors) (arguing that empowering neighbors to oppose projects increases the number of veto points for a project and increases delay); Calfee et al., *supra* note 126, at 6 (stating that a project proposal “amount[s] to a petition by the developer, issued to the neighbors and voters of that locality” that is “[i]n effect, the developer . . . petitioning for the right to alter the built environment”).

²²¹ Michael Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon*, 76 MOD. L. REV. 6, 9 (2013); Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 668–69 (1998).

had on lower-income residents and residents of color. And without addressing local control, we will not open up our cities and suburbs to the infill development that would mitigate climate change. All of these issues are of urgency today—millions of Americans are rent-burdened, and thousands upon thousands are homeless, in large part because of our housing crisis; addressing present and historical inequities is a moral obligation of the present; and every year that we fail to address the greenhouse gas emissions from transportation, we place a greater burden on future generations.

This urgency means action must happen now, and fast. But as noted above, it also doesn't mean that all local control should be stripped away. Local governments can play important roles in managing and preventing displacement from new development, in taking context-specific steps needed to address historical inequities and injustice, and managing growth in ways that both recognize local preferences while still meeting the needs for additional housing. A variety of approaches might help ensure equity is a core component of any interventions to advance housing production. A non-exhaustive list of possibilities includes: protections against new projects directly displacing existing tenants, particularly low-income tenants;²²² requirements that projects receiving streamlined approval processes provide a minimum amount of affordable housing;²²³ state upzoning legislation that distinguishes between neighborhoods with different socioeconomic characteristics;²²⁴ and state legislation that provides greater leeway to local governments that achieve production of low-income housing, thereby providing incentives for local governments to advance affordable housing production.²²⁵

We also recognize that restructuring local control is a necessary, but not sufficient, step to addressing the intertwined issues of housing costs, equity, and climate that connect to urban and suburban infill development. Other steps are required, such as greater public investment in affordable housing and efforts to invest in the transit and other infrastructure needed to support infill development and reduce car-dependency.²²⁶ Importantly, a move to greater state involvement must be

²²² Displacement of existing low-income tenants from rent-stabilized housing has been an important issue in southern California. O'Neill et al., *supra* note 26, at 1112–1113.

²²³ MASS. GEN. LAWS ANN. ch. 40B, §§ 1–30 (West 2021); S.B. 35, 2017–2018 Reg. Sess. (Cal. 2017) (codified at CAL. GOV'T CODE § 65913.4).

²²⁴ For instance, a proposal in California to significantly upzone neighborhoods that had high transit availability provided an additional timeframe for socioeconomically disadvantaged neighborhoods to develop their own plans to provide for additional housing in ways that advanced equity and other community goals. S.B. 50, 2019–2020 Reg. Sess. (Cal. 2019).

²²⁵ S.B. 35 2017–2018 Reg. Sess. (Cal. 2017) (codified at CAL. GOV'T CODE § 65913.4).

²²⁶ See Marlon G. Boarnet, *A Broader Context for Land Use and Travel Behavior, and a Research Agenda*, 77 J. AM. PLAN. ASS'N 197, 205–06 (2011) (noting that land-use policies on their own have limited impacts on VMT unless combined with other policies such as congestion pricing and increases in transit supply).

careful not to replicate the flaws of local decision-making or to reproduce historical inequalities in representation and power.

Nonetheless, we think the task of reframing local control over land use is central to all of these steps. It may not be sufficient, but it is necessary. Governors, legislatures, and courts should heed the call.