

THE BLACK BOX OF SINGLE-FAMILY ZONING REFORM

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BRIAN J. CONNOLLY*

Abstract: America faces a staggering housing affordability crisis. The consequences of the crisis include reduced economic productivity, suppressed labor mobility, greater social inequity, and increased homelessness. A scholarly consensus blames excessive land-use regulation for these problems and advocates now call for deregulation. Several jurisdictions have recently elected to allow middle housing—small, multi-family developments—in areas previously zoned for single-family detached housing. The results of these reforms, however, have been disappointing. This Article examines why they have fallen short and how to do better.

This Article identifies an analytical disconnect between the deregulatory consensus and actual single-family zoning reforms adopted to date. Given this disconnect and the limited success of single-family zoning reforms thus far, it is unclear why such reforms continue to be adopted. Moreover, these reforms cannot achieve their promised ends. Interviews of middle housing builders in reform jurisdictions reveal legal and structural barriers that prevent market participants from responding to the housing crisis with scale and urgency. This Article proposes several regulatory alternatives that offer a greater probability of success in achieving the consensus's goals: (1) modestly expanding multi-family zones to allow redevelopment and densification of underutilized non-residential properties; (2) providing affordable-housing density bonuses; (3) streamlining land-use procedures and eliminating administrative delay to reduce uncertainty in permitting processes; and (4) reevaluating financing mechanisms for new housing development. Taken together, these policies are necessary complements to single-family zoning reforms for addressing undersupply of market- and below-market-rate housing.

INTRODUCTION

America faces a frightening housing crisis. The crisis has expanded beyond a few unaffordable cities to the entire nation.¹ Once just a problem for

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low-income individuals, housing cost burden has rapidly increased among middle-income households.² Homeownership is increasingly inaccessible. The median-income household falls short of the income necessary to make payments on a median-priced home.³ Few homes are even available.⁴ For renters—who generally have less income and are more racially and ethnically diverse than homeowners—things are bleaker.⁵ Median rents skyrocketed during the COVID-19 pandemic, inventories of available units are at historic lows for extremely low-income renters, and approximately half of renter households are cost burdened.⁶ Just thirty-four affordable rental properties are available for every one hundred extremely low-income households.⁷ Homelessness has rapidly increased.⁸

¹ See, e.g., M. NOLAN GRAY, *ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT* 65 (2022) (describing how, as more people leave increasingly expensive cities, zoning issues arise where previously affordable areas develop remaining land); see also Adolfo Flores, *The Californization of the Texas Housing Market*, WALL ST. J. (Oct. 10, 2023), <https://www.wsj.com/economy/housing/texas-housing-california-migration-affordability-a50c78f> [<https://perma.cc/7EYL-323Y>] (discussing decreasing housing affordability in Texas as thousands of Californians move into the state—a trend that is reflected in other cities nationwide).

² See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *THE STATE OF THE NATION'S HOUSING* 2024, at 2 (2024) (noting the steep rise of cost burdened homeowners and renters following the pandemic). A “cost burdened” household spends over thirty percent of its gross income on housing costs, such as rental or mortgage payments, taxes, insurance, and utilities. Molly Cromwell, *Renters More Likely Than Homeowners to Spend More Than 30% of Income on Housing in Almost All Counties*, U.S. CENSUS BUREAU (Dec. 8, 2022), <https://www.census.gov/library/stories/2022/12/housing-costs-burden.html> [<https://perma.cc/A3J9-FAT5>].

³ See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 2, at 5 (detailing a decline in homeownership growth since 2023).

⁴ See *id.* at 4 (describing a drop in the number of available homes from 1.7 million in March 2019 to 1.1 million in March 2024).

⁵ See Drew DeSilver, *As National Eviction Ban Expires, a Look at Who Rents and Who Owns in the U.S.*, PEW RSCH. CTR. (Aug. 2, 2021), <https://www.pewresearch.org/short-reads/2021/08/02/as-national-eviction-ban-expires-a-look-at-who-rents-and-who-owns-in-the-u-s/> [<https://perma.cc/V446-Z6Y8>] (finding that Black-, Hispanic-, and Asian-headed households account for nearly half of the nation's renters, compared to approximately a quarter of homeowners, and that renters typically are less wealthy than their homeownership counterparts).

⁶ See ANDREW AURAND ET AL., NAT'L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES* 3–4 (2024), https://nlihc.org/sites/default/files/gap/2024/Gap-Report_2024.pdf [<https://perma.cc/E6CX-R45F>]; Raven Molloy, *The Effect of Housing Supply Regulation on Housing Affordability: A Review*, 80 REG'L SCI. & URB. ECON., 2020, at 1, 1 (observing that the share of renter households paying more than thirty percent of income on housing increased from one-quarter to nearly half between the 1960s and 2016). “Extremely low-income” households are defined as those that earn less than thirty percent of the area median income or below the federal poverty guideline, whichever is greater. AURAND ET AL., *supra*, at 4.

⁷ AURAND ET AL., *supra* note 6, at 6.

⁸ See *id.* at 9–10 (noting that, in 2023, approximately 650,000 individuals experienced homelessness each night; see also JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 2, at 7 (finding that the population of people experiencing homelessness reached a historic peak in 2023 at 653,100 individuals)).

The housing crisis affects everything from the economy to social equity, the climate, and even national politics.⁹ Unaffordable housing in economically productive cities suppresses national economic output by a considerable degree.¹⁰ It restricts labor force mobility, barring job seekers from the benefits of working and living in higher-opportunity areas.¹¹ This uneven geographic distribution of income increases regional inequality.¹² Approximately half of U.S. wage earners working forty-hour weeks are unable to afford rent for a single-bedroom home, contributing to worker shortages in major U.S. cities.¹³ This problem is particularly evident in sectors like childcare and education that support parents' ability to fully participate in the workforce.¹⁴

⁹ See Lily Katz, *Majority of U.S. Homeowners and Renters Say Housing Affordability Affects Their Pick for President*, REDFIN (Mar. 11, 2024), <https://www.redfin.com/news/housing-affordability-election-2024/> [<https://perma.cc/HN6Z-JUKF>] (finding that approximately fifty-three percent of homeowners and renters in the United States reported that housing affordability would impact their vote in the 2024 presidential election); see also Daryl Fairweather, *Biden Has a Housing Problem*, FORBES (Dec. 13, 2023), <https://www.forbes.com/sites/darylfairweather/2023/12/13/biden-has-a-housing-problem/> [<https://perma.cc/4HW6-ME3X>] (describing the housing crisis's impact on national politics as a major concern of middle-class voters); AURAND ET AL., *supra* note 6, at 16–17 (discussing social inequities in housing); Jake Wegmann, *Death to Single-Family Zoning...and New Life to the Missing Middle*, 86 J. AM. PLAN. ASS'N 113, 115 (2020) (noting the environmental harms of single-family zoning).

¹⁰ See Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1, 25–26 (2019) (asserting that U.S. gross domestic product is reduced by approximately nine percent due to housing undersupply, caused by restrictive regulation, in just three cities); see also Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 25 (2018) (describing the positive relationship between relaxing housing supply regulations and growth in aggregate GDP). The term “affordable housing” is capable of multiple definitions, however, for purposes of this Article, the term generally refers to rental or for-sale housing for which a household spends less than thirty percent of its pre-tax monthly income, irrespective of whether the housing is required by law to maintain that affordability level. See AURAND ET AL., *supra* note 6, at 4. Where this Article references “deed-restricted” or “income-restricted” affordable housing, it is referring specifically to housing units subject to a legal obligation to maintain affordable rents or sale prices. See *id.* at 21–23 (highlighting the government subsidies and strategies put in place by federal and state governments to provide income-restricted housing).

¹¹ Glaeser & Gyourko, *supra* note 10, at 23.

¹² Peter Ganong & Daniel W. Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23609, 2017).

¹³ AURAND ET AL., *supra* note 6, at 13–14; Glaeser & Gyourko, *supra* note 10, at 23–24.

¹⁴ See Eliza Relman, *Childcare Is Getting Even More Expensive as Providers Battle Landlords and Zoning Regulations at a Time When Federal Funding Is Running Out*, BUS. INSIDER (Sept. 26, 2023), <https://www.businessinsider.com/childcare-daycare-cliff-crisis-landlords-zoning-regulations-federal-funding-expiring-2023-9> [<https://perma.cc/L8TQ-TBUP>] (discussing the financial impact of certain zoning regulations that prohibit childcare providers from operating out of residential homes); Lily Katz & Sheharyar Bokhari, *The Typical Teacher Can Afford Just 12% of Homes for Sale Near Their School, Down from 30% in 2019*, REDFIN, <https://www.redfin.com/news/teacher-housing-affordability-2023/> [<https://perma.cc/ZRU4-3L78>] (Aug. 31, 2023) (comparing the median salaries of teachers to the cost of renting and buying properties located within a twenty-minute car ride during peak travel times and finding that only twelve percent of for sale and twenty-seven percent of rentals are affordable for teachers making the median salary).

The housing crisis aggravates income and wealth inequality.¹⁵ Longtime homeowners benefit from increasing home prices, while renters become poorer in real terms.¹⁶ This trend widens the racial wealth gap, as people of color are more likely to rent than white households.¹⁷ Owing in part to home price gains accruing to primarily white homeowner households, the median white household's net worth is now nearly six times that of the median Black household.¹⁸ Moreover, unaffordable housing bars lower-income people, and particularly people of color, from accessing the wealth-creation benefits of homeownership.¹⁹ The crisis accelerates gentrification and displacement. As middle- and high-income households are priced out of higher-opportunity areas, they resort to occupying housing units in lower-income neighborhoods.²⁰ Moreover, the lowest-income households, which are unable to borrow from home equity for emergencies or essential needs, bear the worst burden.²¹ Eight of every ten households earning between \$30,000 and \$45,000 cannot afford basic necessities such as food after housing costs, and suffer the attendant downstream health consequences.²² Households facing these burdens are likely to lose housing altogether.²³ The need to address this crisis is urgent.

¹⁵ See Glaeser & Gyourko, *supra* note 10, at 20–21.

¹⁶ See *id.*

¹⁷ KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 9 (2020); see also LAWRENCE YUN ET AL., NAT'L ASS'N OF REALTORS, 2023 SNAPSHOT OF RACE AND HOME BUYING IN AMERICA 7 (2023), https://cdn.nar.realtor/sites/default/files/documents/2023-snapshot-of-race-and-home-buying-in-the-us-03-02-2023.pdf?_gl=1*hm246b*_gcl_au*MjExOTM2MTI0My4xNzA1NDQ2MDkz [https://perma.cc/DP8X-VDTQ] (depicting a racial gap in homeownership rates).

¹⁸ JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 2, at 20–21 (comparing the relative wealth of white and Black households); see also AURAND ET AL., *supra* note 6, at 15 (describing the racial wealth gap and its effects on non-white homeownership).

¹⁹ See Melvin E. Thomas, Richard Moye, Loren Henderson & Hayward Derrick Horton, *Separate and Unequal: The Impact of Socioeconomic Status, Segregation, and the Great Recession on Racial Disparities in Housing Values*, 4 SOCIO. RACE & ETHNICITY 229, 230–31 (2018) (citing discriminatory lending practices and restrictive covenants as obstacles to wealth building).

²⁰ EINSTEIN ET AL., *supra* note 17, at 9. This process is considered reverse filtering, as “filtering” refers to the process by which older housing stock depreciates and becomes affordable to lower-income households. John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 102 (2014); see also AURAND ET AL., *supra* note 6, at 6 (observing that 3.4 million housing units affordable to extremely low-income renters are occupied by higher-income households).

²¹ RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 185 (2017).

²² AURAND ET AL., *supra* note 6, at 12; see JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., *supra* note 2, at 27 (noting the limited resources available to low-income homeowners who face difficult choices between paying for housing and other needs, like healthcare).

²³ See AURAND ET AL., *supra* note 6, at 24 (“[T]he lowest-income families are just one missed paycheck or unexpected expense away from potential eviction.”).

The crisis has materialized in part because there is not enough housing in places experiencing population growth.²⁴ Simple economic theory holds that housing undersupply elevates prices.²⁵ But why the undersupply? In recent years, scholars and policymakers have zeroed in on zoning as a cause of the crisis and zoning reform as a potential solution.²⁶ Zoning, the predominant form of land-use regulation in the United States, controls what gets built and where it gets built.²⁷ Zoning's most common variety, single-family districts that limit housing development to one detached unit per parcel of land, has come under particular scrutiny from some scholars and advocates.²⁸ Americans strongly prefer single-family detached dwellings; protecting them is sometimes cited as one of the central purposes of zoning.²⁹ As such, single-family districts and the dwellings in them rarely change.³⁰ Some economists have found that

²⁴ See Molloy, *supra* note 6, at 1 (“Increases in the price of housing would not occur if the supply of housing were perfectly elastic, so the rise in housing costs must indicate a limited supply.”).

²⁵ See *id.*

²⁶ See, e.g., GRAY, *supra* note 1, at 3–5 (discussing the housing issues caused by zoning and potential solutions through zoning reform).

²⁷ See, e.g., Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719, 727–31 (2023) (describing the process by which municipalities zone districts); GRAY, *supra* note 1, at 34 (detailing how zoning sets standards for everything from building density to parking lots); Rolf Pendall, Lydia Lo & Jake Wegmann, *Shifts Toward the Extremes: Zoning Change in Major U.S. Metropolitan Areas from 2003 to 2019*, 88 J. AM. PLAN. ASS'N 55, 56 (2022) (identifying different ways in which zoning controls land uses).

²⁸ See, e.g., Mary Jo Wiggins, *Supremacy Lost?: Zoning, Covenants, and the Evolution of Single-Family Ownership*, 128 PENN. ST. L. REV. 127, 143–44 (2023) (describing the dominance of single-family zoning compared to other forms of zoning); John Infranca, *Singling Out Single-Family Zoning*, 111 GEO. L.J. 659, 666 (2023) (describing the dominance of single-family districts in America compared to European cities); Stephen R. Miller, *Prospects for a Unified Approach to Housing Affordability, Housing Equity, and Climate Change*, 46 VT. L. REV. 463, 480–81 (2022) (identifying single-family zoning as a common enemy of pro-housing advocates); Michael Manville, Paavo Monkkonen & Michael Lens, *It's Time to End Single-Family Zoning*, 86 J. AM. PLAN. ASS'N 106, 106–08 (2020) (advocating generally for elimination of single-family zoning for reasons including structural racism, bars to high-opportunity areas, and cost burdens on renters); Wegmann, *supra* note 9, at 113–14 (calling for a shift to medium-density housing zoning due to worsening inequality and environmental changes attributed to single-family zoning).

²⁹ See, e.g., SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* 8 (2014) (attributing zoning preferences in part to the American tradition of “spatial individualism,” the practice of preserving one’s own space); RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 3 (1966) (“The insulation of the single-family detached dwelling was the primary objective of the early zoning ordinances, and this objective is predominant today . . .”).

³⁰ See Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 427 (2021) (observing that single-family zoning changes little over time); Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RES. L. REV. 513, 515 (2020) (citing Issi Romem, *America’s New Metropolitan Landscape: Pockets of Dense Construction in a Dormant Suburban Interior*, BUILDZOOM (Feb. 1, 2018), <https://www.buildzoom.com/blog/pockets-of-dense-construction-in-a-dormant-suburban-interior> [<https://perma.cc/>

restrictive zoning, including single-family districts, suppresses housing production, resulting in undersupply and increased housing prices in major cities.³¹

Single-family zoning is the subject of other criticism beyond its affordability implications. Racial and social justice advocates point to single-family zoning's racist origins, segregating effects, and elevation of nuclear families over other household structures.³² Environmentalists underscore the high greenhouse gas emissions attributable to low-density, single-family development's inherent automobile dependence.³³

Thus, "eliminate single-family zoning" has become a rallying cry for some legal and planning academics and policy advocates.³⁴ In 2019, Minneapolis became the first city in the United States to replace its single-family zoning districts with zones that allow three-unit attached homes—generally called "triplexes"—on nearly all residential lots.³⁵ Oregon followed suit with statewide single-family zoning reform, requiring localities in the state's metro-

C9BQ-QAKT]) (asserting that redevelopment of single-family homes and neighborhoods is exceedingly rare).

³¹ See, e.g., Glaeser & Gyourko, *supra* note 10, at 14 (citing Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 332 (2005)) (demonstrating this correlation by comparing the high costs of apartments in Manhattan to the lower costs of constructing new apartments on existing land).

³² See generally Sarah J. Adams-Schoen, *The White Supremacist Structure of American Zoning Law*, 88 BROOK. L. REV. 1225 (2023) (attributing the origin of single-family zoning to segregationists seeking to separate white and Black neighborhoods); Priya S. Gupta, *Governing the Single-Family House: A (Brief) Legal History*, 37 U. HAW. L. REV. 187 (2015) (challenging the narrative that the free market naturally creates housing racial inequities and instead suggesting such inequities are the result of racist policy choices).

³³ See Jonathan Norman, Heather L. MacLean & Christopher A. Kennedy, *Comparing High and Low Residential Density: Life-Cycle Analysis of Energy Use and Greenhouse Gas Emissions*, 132 J. URB. PLAN. & DEV. 10, 18 (2006) (establishing heightened greenhouse gas (GHG) emissions attributable to low-density development).

³⁴ See e.g., GRAY, *supra* note 1, at 111–12 (discussing necessary zoning reforms, including "ending single-family zoning"). See generally Manville et al., *supra* note 28 (encouraging an end to single-family zoning to promote housing development); Wegmann, *supra* note 9 (arguing that single-family zoning leads to wealth inequality and climate change).

³⁵ Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html> [<https://perma.cc/6BPF-6CVY>]. Following the city's adoption of an updated plan that called for eliminating single-family zoning, a group of environmental nonprofits sued to block the plan's implementation. Naasir Akailvi, *Minneapolis 2040 Plan Struck Down by Judge*, KARE11, <https://www.kare11.com/article/news/local/minneapolis-2040-plan-struck-down-judge/89-69eda2f0-312a-4590-93d6-c8067b164ef2> [<https://perma.cc/PQ5D-5ZE4>] (Sept. 6, 2023). A state court judge enjoined the plan in November 2022 and again in September 2023, but the state's court of appeals reversed in August 2024. *State of Minn. by Smart Growth Minneapolis v. City of Minneapolis*, 7 N.W.3d 418, 436–37 (Minn. Ct. App. 2024). Shortly thereafter, the state legislature adopted a law exempting comprehensive plans from the state's environmental review law, H.F. 4028, 2024 Leg., 93d Sess. (Minn. 2024), effectively ending the litigation.

politan areas to allow four or more housing units on a single lot.³⁶ By May 2024, at least seven states and numerous cities had enacted reforms to allow small multi-family dwelling units such as duplexes, triplexes, or fourplexes—frequently called “middle housing”—on lots on which only detached, single-family homes were previously allowed.³⁷ In most instances, these reforms followed other policy interventions allowing the construction of accessory dwelling units (ADUs), such as in-law residences, garage apartments, or other secondary residential dwellings on residential lots.³⁸ This wave of reforms is remarkable given single-family detached living and zoning’s ubiquity in the United States.

Despite the increase in middle-housing *zoning*, however, these reforms have spurred limited middle-housing unit *construction* and little affordable housing. In 2022, Minnesota faced a deficit of ninety-five thousand housing units, yet by 2023 Minneapolis’s single-family zoning reforms had resulted in only forty-five new middle-housing projects three years after adoption.³⁹ Portland, Oregon is experiencing similarly underwhelming results.⁴⁰ In California,

³⁶ Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning> [https://perma.cc/8NVR-GDJN]. For purposes of this Article, “single-family zoning reform” is defined as a state or local measure that allows the construction of multiple primary dwelling units on a lot that was previously zoned to permit the construction of only one primary dwelling unit.

³⁷ See Karla Georges, *What to Expect in State Legislatures on Zoning Reform in 2023*, AM. PLAN. ASS’N (Jan. 20, 2023), <https://www.planning.org/blog/9263443/what-to-expect-in-state-legislatures-on-zoning-reform-in-2023/> [https://perma.cc/Y8K8-9NB9] (listing Oregon, Washington, Connecticut, Utah, California, Massachusetts, and Maine as leaders in middle-housing legislation); Joshua Cantong, Stephen Menendian & Samir Gambhir, *Zoning Reform Tracker*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/zoning-reform-tracker> [https://perma.cc/4ZU4-NX5J] (Nov. 13, 2023) (providing up-to-date tracking on zoning reform actions taken throughout the United States). The term “middle housing” is sometimes used interchangeably with “missing middle housing.” See DANIEL PAROLEK, *MISSING MIDDLE HOUSING: THINKING BIG AND BUILDING SMALL TO RESPOND TO TODAY’S HOUSING CRISIS* 7–8 (2020) (defining “missing middle housing”).

³⁸ See, e.g., Owen Minott, *Accessory Dwelling Units (ADUs) in California*, BIPARTISAN POL’Y CTR. (Sept. 12, 2023), <https://bipartisanpolicy.org/blog/accessory-dwelling-units-adus-in-california/> [https://perma.cc/VF5J-WL8C] (explaining California state legislation giving localities more flexibility to issue ADU permits); Vanessa Brown Calder & Jordan Gygi, *The Promising Results of Accessory Dwelling Unit Reform*, CATO INST. BLOG (June 28, 2023), <https://www.cato.org/blog/results-accessory-dwelling-unit-reform-so-far> [https://perma.cc/669S-EJQD] (presenting ADUs as a viable compromise between increasing the supply of housing and preserving neighborhood aesthetics).

³⁹ UP FOR GROWTH, *HOUSING UNDERPRODUCTION IN THE U.S. 2022*, at 5 (2022), <https://upforgrowth.org/wp-content/uploads/2022/09/Up-for-Growth-2022-Housing-Underproduction-in-the-U.S.pdf> [https://perma.cc/FN9B-WFL4] (describing housing undersupply on a state-by-state basis); Zak Yudhishtu, *Mapping Minneapolis’ Post-2040 Plan Duplexes and Triplexes*, STREETS.MN (Oct. 24, 2023), <https://streets.mn/2023/10/24/mapping-minneapolis-duplexes-and-triplexes/> [https://perma.cc/XTQ4-5G3G].

⁴⁰ See Christian Britschgi, *Portland Legalized ‘Missing Middle’ Housing. Now It’s Trying to Make It Easy to Build.*, REASON (June 13, 2022), <https://reason.com/2022/06/13/portland-legalized->

where single-family new zoning reforms came into effect in 2022 and where the state faces a shortage estimated by some to be near 3.5 million housing units, the results are even more dispiriting.⁴¹ ADU reforms have fared slightly better but have still not addressed housing shortages.⁴² Moreover, it is unclear whether the housing produced under these reforms will be affordable to lower-income households.⁴³ Meanwhile, housing prices continue to climb, reinforcing the same exclusionary and environmentally unsound development patterns that have persisted in single-family neighborhoods.⁴⁴ Although the limited effect of these reforms may be attributable to their recency, the urgency of the housing crisis coupled with the legal and structural barriers to reforms' success identified in this Article necessitate additional interventions.

This Article unpacks the muted response to single-family zoning reform, inquiring why reforms have been limited in their success and what to do about it. Scholars have not yet closely evaluated these disappointing results and their implications for further policy intervention. Although some authors have observed in passing that single-family zoning reform may not make significant headway in addressing the housing crisis and advocates have pushed for additional reforms,⁴⁵ legal scholarship has not inquired as to *why* its effect is so

missing-middle-housing-now-its-trying-to-make-it-easy-to-build/ [https://perma.cc/SK88-69YD] (noting that, in the ten months following Oregon's decision to end single-family zoning, only around one hundred middle-housing units were added).

⁴¹ See Vicki Gonzalez & Mike Hagerty, *California Has Lost Population and Built More Homes. Why Is There Still a Housing Crisis?*, CAP. PUB. RADIO (Aug. 16, 2023), <https://www.caprado.org/191663> [https://perma.cc/6P3W-7QVE] (estimating the state's housing shortage); David Garcia & Muhammad Alameldin, *California's HOME Act Turns One: Data and Insights from the First Year of Senate Bill 9*, TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY (Jan. 18, 2023), <https://turnercenter.berkeley.edu/research-and-policy/sb-9-turns-one-applications/> [https://perma.cc/P6AR-XCCU] (describing an underwhelming number of applications for lot splits and new units despite estimations that single-family zoning reform would create seven hundred thousand new units).

⁴² See Minott, *supra* note 38 (acknowledging that the increase of ADUs in California has helped alleviate, but not fully solve, the state's housing crisis).

⁴³ See Garcia & Alameldin, *supra* note 41 (observing that the California reform has "potential" to create homeownership opportunities for "moderate-income" households).

⁴⁴ See, e.g., *Minneapolis Housing Indicators*, FED. RES. BANK OF MINNEAPOLIS, <https://minneapolisfed.shinyapps.io/Minneapolis-Indicators/> [https://perma.cc/2LEJ-WMRT] (identifying little discernible difference between growth in housing prices with or without the city's single-family zoning reform); Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 880 (2021) (observing that the cost of maintaining the status quo is that a significant proportion of the population remains relegated to a worse-off life as a result of routine zoning practice); Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 TEMP. L. REV. 1093, 1101–02 (2007) (noting that sprawling development patterns preclude lower-income people from accessing jobs and transportation to them).

⁴⁵ See, e.g., Bronin, *supra* note 27, at 724 ("But simply lifting bans on multi-family housing may not actually create more housing options."); Adams-Schoen, *supra* note 32, at 1305–06 (noting that eliminating zoning for single-family housing alone will have a minimal impact on increasing the amount of affordable housing in more expensive neighborhoods); Miller, *supra* note 28, at 481–82 (citing a study finding that reforming single-family zoning in California would only produce around

limited and what that means for other potential reforms. Some authors have identified legal constraints—including, for example, large minimum lot sizes, public participation requirements, and private covenants prohibiting densification in existing single-family neighborhoods—that could preclude reforms’ success.⁴⁶ They have not considered these reforms, however, from the perspective of market participants. Relying on interviews with middle housing builders, this Article fleshes out the structural limitations that handicap these reforms’ efficacy and considers how those limitations might inform other efforts to encourage affordable housing production.

This Article argues that single-family zoning reform, although symbolically important, will not alone solve the housing crisis. Other solutions are needed. Part I of this Article looks at who makes up the scholarly consensus in favor of single-family zoning reform, namely economists, social justice advocates, environmentalists, and those with fiscal arguments.⁴⁷ Part I then looks at the critiques of single-family zoning reforms and the limitations of such reforms in alleviating the effects of the housing crisis.⁴⁸ Additionally, Part I assesses the economic, sociological, environmental, and urban planning foundations underpinning land-use regulatory reform generally, exploring the academic and advocacy consensus that favors boosting housing production through deregulation.⁴⁹ As Part I shows, although this consensus favors deregulation, particularly in higher-opportunity areas, empirical studies to date have not identified the specific regulations most responsible for these problems.⁵⁰ Scholars have also not clearly established the most effective interventions to address the housing crisis. In other words, scholars want deregulation, but re-

ten percent of the amount of housing needed for stabilization); Michael Allan Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171, 194 (2021) (referring to single-family housing reform as “more of a band-aid than a cure”); Emily Hamilton, *Want More Housing? Ending Single-Family Zoning Won’t Do It*, BLOOMBERG (July 29, 2020), <https://www.bloomberg.com/news/articles/2020-07-29/to-add-housing-zoning-code-reform-is-just-a-start> [<https://perma.cc/N3JC-E9E6>] (arguing that reforming zoning codes may not result in more housing if other factors make construction infeasible).

⁴⁶ See, e.g., Bronin, *supra* note 27, at 730 (minimum lot sizes); Dwight Merriam, *Affordable Housing: Three Roadblocks to Regulatory Reform*, 51 URB. LAW. 343, 361–62 (2022) (covenants); Miller, *supra* note 28, at 482–83 (covenants); Wolf, *supra* note 45, at 194 (covenants); Anika Singh Lemar, *Overparticipation: Designing Effective Land Use Public Processes*, 90 FORDHAM L. REV. 1083, 1137 (2021) (public participation requirements).

⁴⁷ See *infra* notes 82–137 and accompanying text.

⁴⁸ See *infra* notes 138–176 and accompanying text.

⁴⁹ See *infra* notes 69–176 and accompanying text.

⁵⁰ Some scholars have considered the effects of specific regulations, but there is little to no comparison between specific types of regulations. For example, JaeHee Song uses empirical methods to demonstrate that large minimum lot sizes increase sales prices and rents, and that reducing lot sizes would have the opposite effect. See generally Jaehee Song, *The Effects of Residential Zoning in U.S. Housing Markets* (Apr. 19, 2024) (unpublished manuscript), <https://papers.ssrn.com/abstract=3996483> [<https://perma.cc/3836-3BQD>].

search does not support the conclusion that any particular type of deregulation—including single-family zoning reform—will achieve the consensus’s economic, social, and environmental aims.⁵¹

Part II provides context by detailing five important features of zoning.⁵² This Part then looks at recent reforms in zoning and explains why single-family zoning reforms rose to such prominence.⁵³ Zoning is just one form of land-use regulation, and single-family districts are just one variant that limits housing production.⁵⁴ Many other rules, from dimensional standards to procedural requirements, have similar or greater effect.⁵⁵ States and localities have, by and large, recently focused on allowing missing middle-housing units—usually two-, three-, or four-unit structures—in single-family districts, but only a few have gone further.⁵⁶ Given that single-family zoning reform is not required by the mainstream scholarly consensus, and further given the limited success of reforms adopted to date, it is particularly challenging to understand *why* governments continue to adopt these reforms as a purported solution to the crisis.

Part III reviews legal and structural barriers to the success of single-family zoning reforms.⁵⁷ Several legal roadblocks, including loopholes in adopted reforms, a lack of affordability requirements, and private covenants, limit these reforms’ efficacy.⁵⁸ Most of these barriers, however, are reparable through legislation.⁵⁹ The structural barriers are more significant.⁶⁰ To understand the limitations of these reforms, I went straight to the source: the builders the reforms are supposed to encourage. Interviews with middle-housing builders in Minneapolis, Portland, and Los Angeles revealed structural challenges in improving the scale, pace of construction, financing, and affordability of mid-

⁵¹ See Bronin, *supra* note 27, at 724 (suggesting that only promoting multi-family housing is likely not sufficient to address housing needs).

⁵² See *infra* notes 182–292 and accompanying text.

⁵³ See *infra* notes 293–381 and accompanying text.

⁵⁴ Bronin, *supra* note 27, at 724.

⁵⁵ See *id.* (acknowledging that additional factors beyond the number of available units contribute to zoning complexity).

⁵⁶ See PAROLEK, *supra* note 37, at 7–8.

⁵⁷ See *infra* notes 382–526 and accompanying text.

⁵⁸ See Bronin, *supra* note 27, at 724 (describing how process requirements may render zoning reforms inefficacious).

⁵⁹ See *id.* (highlighting multiple zoning requirements as roadblocks to housing production); *State Preemption of Local Zoning Laws as Intersectional Climate Policy*, 135 HARV. L. REV. 1592, 1601 (2022) (highlighting state policies aimed at correcting some of the issues with zoning reform).

⁶⁰ See Infranca, *supra* note 28, at 669–70 (noting that legislative reforms to zoning involve broader topics such as the limits of an individual’s property rights and the government’s police power, economic mobility, and the exclusionary attitudes of certain communities).

dle-housing.⁶¹ These challenges are unlikely to be overcome quickly and to the degree necessary to address the housing crisis.

Part IV suggests solutions.⁶² In light of the structural barriers to single-family zoning reforms' success, four alternative reforms would more effectively respond to the housing crisis and achieve the mainstream consensus's intended results. Reforms should (1) allow housing development at a larger scale, with specific focus on underutilized commercial properties; (2) use bonuses to encourage the production of income-restricted housing that serves low- and middle-income households; (3) streamline procedures, including administrative procedures that are not well understood, to encourage faster, more predictable housing production; and (4) address non-zoning tools, particularly financing tools, to resolve structural barriers to both middle-housing and denser development.⁶³

This Article should not be interpreted as defending single-family zoning. Single-family zoning was designed to exclude, and it has done so, contributing to a broad array of economic, social, environmental, and fiscal problems.⁶⁴ Abolishing single-family zoning is a worthwhile policy intervention, but, as this Article argues, it has been largely symbolic.⁶⁵ The ills of one hundred-plus years of single-family zoning will take time to resolve and require more than simply allowing middle housing in single-family neighborhoods.⁶⁶ Instead, there are interventions available today that are encumbered by fewer legal and structural barriers and thus bear a greater likelihood of more quickly and effectively addressing the housing crisis.⁶⁷ This Article asserts that scholars, advocates, policymakers, and the public would be better off pursuing these alternatives.⁶⁸

I. THE AMBIGUOUS CASE FOR SINGLE-FAMILY ZONING REFORM

To date, scholarship in several fields has contributed to a mainstream policy consensus holding that restrictive zoning is responsible for unaffordable housing, harming our national economy, increasing income and wealth inequality, advancing racial segregation, degrading our environment, and burden-

⁶¹ See *infra* notes 428–472 and accompanying text.

⁶² See *infra* notes 527–611 and accompanying text.

⁶³ See *infra* notes 534–611 and accompanying text.

⁶⁴ See, e.g., GRAY, *supra* note 1, at 79 (referring to segregation through local zoning codes as “apartheid by another name”).

⁶⁵ Infranca, *supra* note 28, at 669–70.

⁶⁶ See GRAY, *supra* note 1, at 13–14 (noting that the roots of zoning in America date back to 1916).

⁶⁷ See *infra* notes 534–611 and accompanying text.

⁶⁸ See *infra* notes 527–611 and accompanying text.

ing all levels of government with unsustainable fiscal obligations.⁶⁹ Among advocates, this consensus unites libertarians with social justice progressives and free market economists with racial equity and environmental activists.⁷⁰ It bridges the political right's preference for deregulation and the political left's concern for social equity.⁷¹ Defenders of local control and zoning, the consensus's primary critics, call it a "libertarian" or "elite" consensus.⁷² Whatever it is called, the consensus generally holds that:

Local politics tend to be dominated by homeowners, who depend on land use regulations to ensure the value of their most important and undiversified investment: their home. Homeowners use these regulations to reduce local externalities and decrease supply and are unconcerned with any effects they might have on the regional and national economy. Further, by keeping average property values high, homeowner-voters can ensure the availability of well-funded public services at low tax rates in their towns and exclude those who would benefit from redistribution.⁷³

Because scholars generally agree that locally adopted, implemented, and enforced zoning has perpetrated these wrongs, some legal scholars have advocated for reform at higher levels of government—namely states—to avoid the political dynamics responsible for restrictive zoning.⁷⁴ These political dynam-

⁶⁹ See, e.g., Glaeser & Gyourko, *supra* note 10, at 20–26 (asserting that restrictive land use regulations have caused unaffordable housing, which in turn results in concentrating wealth and limiting economic productivity); Hsieh & Moretti, *supra* note 10, at 27 (observing limitations on U.S. gross domestic product resulting from unaffordable housing); Ganong & Shoag, *supra* note 12, at 21 (concluding that restrictive land use regulations are causing regional income and wealth inequality); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N 125, 132–34 (2000) (finding that restrictive land use regulations lead to racial exclusion); Norman et al., *supra* note 33, at 18–19 (finding that low-density zoning causes significant increases in GHGs); Christopher B. Goodman, *The Fiscal Impacts of Urban Sprawl: Evidence from U.S. County Areas*, 39 PUB. BUDGETING & FIN. 3, 17–18 (2019) (analyzing the impact of urban sprawl on per capita expenditures).

⁷⁰ See Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 147 (2021) (describing the unification of various arguments in favor of zoning reform).

⁷¹ Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1813–14 (2021).

⁷² See *id.* at 1768, 1778 (challenging the “elite consensus” and “libertarian consensus” by arguing deregulation policies will exacerbate inequalities); Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 770 (2020) (suggesting the “elite consensus” fails to account for density limits’ necessity); see also David Schleicher, *Exclusionary Zoning’s Confused Defenders*, 2021 WIS. L. REV. 1315, 1316–17 (describing the consensus).

⁷³ Schleicher, *supra* note 72, at 1331 (footnotes omitted).

⁷⁴ See *id.* at 1332 (“The ‘elite consensus’ thus suggests that state governments should take action to reduce local zoning authority.”); Eric Biber, Giulia Gualco-Nelson, Nicholas Marantz & Moira O’Neill, *Small Suburbs, Large Lots: How the Scale of Land-Use Regulation Affects Housing Affordability, Equity, and the Climate*, 2022 UTAH L. REV. 1, 20, 54–57 (calling for state government inter-

ics are driven by the fact that, although localities indirectly benefit from the housing affordability, social inclusion, and environmental outcomes of loosened zoning laws, individual local governments are disincentivized to deregulate because of anti-development political pressures and the spillover effects of deregulation, including increased congestion.⁷⁵ Nevertheless, the public at large bears the costs of restrictive land-use regulation.⁷⁶

Section A begins by identifying scholars in several fields that form a four-part mainstream scholarly consensus focused on economics, social justice, environmental protection, and fiscal policy.⁷⁷ Although each group agrees that land-use regulatory reform is needed to achieve its respective policy ends, there is far less agreement on the means to achieve these goals. Section B discusses the critiques of the zoning reform movement.⁷⁸ Section C then explores the lack of scholarly agreement, which is fueled by an absence of reliable empirical data identifying the specific types of land-use regulations that are most responsible for suppressing affordable housing supply.⁷⁹ Thus, there is little basis to identify the policy interventions most likely to resolve this undersupply.⁸⁰ As this Part demonstrates, scholarly disagreement on policy responses means there is little to no consensus around the need for or efficacy of single-family zoning reform.⁸¹

vention to evaluate housing reform on a regional level); Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611, 1691 (2021) (observing that state governments are central in regulating land uses); Rosser, *supra* note 44, at 818 (advocating for state-level intervention on exclusionary zoning to attack inequality).

⁷⁵ See, e.g., Biber et al., *supra* note 74, at 41–42, 49 (identifying reduced carbon emissions as a benefit of densification); Ellickson, *supra* note 74, at 1691 (arguing that the downsides of controls on public land use may outweigh the upsides).

⁷⁶ See Stewart E. Sterk, *Incentivizing Fair Housing*, 101 B.U. L. REV. 1607, 1613 (2021) (describing the costs of restrictive zoning outside of restrictively-zoned jurisdictions as including “reduced housing supply, higher housing costs, and reduced access to high-quality public services, particularly schools”).

⁷⁷ See *infra* notes 82–137 and accompanying text. Although other authors have observed three strains—economics, social and racial justice, and environmental protection—this Article identifies four arguments in favor of zoning reform, adding a fiscal argument to these three strains. See Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 92 (2019) (discussing three housing development roadblocks); Miller, *supra* note 28, at 471 (same).

⁷⁸ See *infra* notes 138–154 and accompanying text.

⁷⁹ See *infra* notes 155–176 and accompanying text.

⁸⁰ As of this writing, new data resources are being developed to support scholarship in this area. One example is the National Zoning Atlas, which is collecting zoning data at scale across over one hundred regulatory characteristics and will enable further cross-jurisdictional and longitudinal study. *Atlas Projects*, NAT’L ZONING ATLAS, <https://www.zoningatlas.org/projects> [<https://perma.cc/2AKC-637D>].

⁸¹ See *infra* notes 82–176 and accompanying text.

A. The Zoning Reform Consensus

This Section considers the arguments advanced by each of the four component groups of the mainstream consensus described above, beginning with economists' view and proceeding to consider the social justice, environmental, and fiscal viewpoints.⁸²

1. The Economists

Over the past two decades, economists have studied the relationship between land-use regulation and housing supply.⁸³ Housing markets are governed by the laws of supply and demand. Thus, in an elastic market, where new construction follows demand increases, prices will moderate.⁸⁴ Nevertheless, regulation or other forces, including high levels of market concentration or physical constraints, can limit this response and elevate prices.⁸⁵

Empirical analyses show a close relationship between unaffordable housing in major U.S. cities and restrictive regulation.⁸⁶ In 2005, one study observed that in New York City—a pricey market—builders slowed their response to housing demand around 1980.⁸⁷ There was an increasing divergence between housing prices and construction costs—unattributable to market concentration among builders or physical limits on building—that resulted from regulation.⁸⁸ Another study also found an increasing share of metropolitan areas where housing prices greatly exceed the minimum profitable cost of production.⁸⁹ Moreover, a third study also observed a limited housing production response to increased demand.⁹⁰ There was greater permitting intensity—new housing units permitted as share of overall housing stock—in markets with near-parity between housing prices and production costs than in markets with larger gaps in housing price and production costs, meaning that less residential

⁸² See *infra* notes 83–176 and accompanying text.

⁸³ See, e.g., Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5 HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289, 1292 (Gilles Duranton et al., eds., 2015) (citing economic studies from as early as 2003 that examine “man-made constraints” on housing supply).

⁸⁴ Molloy, *supra* note 6, at 1; Glaeser et al., *supra* note 31, at 332; Mangin, *supra* note 20, at 93 (“Underlying both of these phenomena—high housing costs in the suburbs and high housing costs in the cities—is a relatively straightforward problem of supply and demand.”).

⁸⁵ See Gyourko & Molloy, *supra* note 83, at 1293 (assessing the effect of regulation and limited available land on housing costs); Molloy, *supra* note 6, at 1 (identifying limited land availability and regulatory constraints as possible causes of reduced housing supply and raised housing prices); Glaeser et al., *supra* note 31, at 333 (looking at the impact of construction costs).

⁸⁶ Gyourko & Molloy, *supra* note 83, at 1293.

⁸⁷ Glaeser et al., *supra* note 31, at 355–56.

⁸⁸ *Id.* at 331–33, 337; see also Glaeser & Gyourko, *supra* note 10, at 6 (explaining the relationship between construction costs and housing prices).

⁸⁹ Glaeser & Gyourko, *supra* note 10, at 14.

⁹⁰ Gyourko & Molloy, *supra* note 83, at 1292.

construction occurs in expensive, tightly-regulated markets.⁹¹ These findings are reinforced by other scholarship demonstrating a negative relationship between downzoning—such as reducing allowable building heights or uses—and affordability for middle-income households, and a positive relationship between land-use regulatory strictness and rents.⁹² Moreover, in a large metropolitan area fragmented into tens, hundreds, or even thousands of small jurisdictions, one municipality’s restrictive regulation can have spillover effects constraining the entire region’s housing supply.⁹³ Thus, the “vast majority of studies have found that locations with more regulation have higher house prices and less construction.”⁹⁴

Economists who study land-use regulations and their effects on housing are concerned with excessive land-use regulation’s inefficiencies and distributional problems exacerbated by those inefficiencies.⁹⁵ Scholars found that the social costs of New York’s building height limits were too large to justify their purported benefits of protecting views, reducing congestion, and addressing service cost delivery increases.⁹⁶ Later studies confirmed that “the negative externalities [of new housing production] are not nearly large enough to justify the costs of regulation.”⁹⁷ Whereas the benefits of supply restrictions accrue to existing, higher-income homeowners, a greater share of the population bears the costs, including reduced labor force mobility and stifled national economic output.⁹⁸ Economists who have studied this problem thus assert that balancing

⁹¹ Glaeser & Gyourko, *supra* note 10, at 18. “Permitting intensity” refers to the number of new housing units permitted as a share of the overall housing stock. *See id.* at 12.

⁹² *See* Christina Stacy et al., *Land-Use Reforms and Housing Costs: Does Allowing for Increased Density Lead to Greater Affordability?*, 60 URB. STUD. 2919, 2922, 2932 (2023) (observing that median rents increased where lot sizes increased); Molloy, *supra* note 6, at 2 (noting that regulation is likely a source of housing supply constraints). Nationally, in 2016, an industry organization reported that the costs of land-use regulatory compliance now account for nearly a quarter of the value of a new single-family home. Molloy, *supra* note 6, at 2. The term “downzoning” is typically used to describe changes that increase regulatory restrictiveness. David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1674 (2013).

⁹³ *See* EINSTEIN ET AL., *supra* note 17, at 169.

⁹⁴ Gyourko & Molloy, *supra* note 83, at 1317.

⁹⁵ *See, e.g.*, Glaeser et al., *supra* note 31, at 366 (concluding that there is little justification for the difference between condominiums’ construction costs and sale prices in Manhattan and that construction regulations are “far too restrictive”).

⁹⁶ *Id.*

⁹⁷ Glaeser & Gyourko, *supra* note 10, at 27.

⁹⁸ *See* Vicki Been, Ingrid Gould Ellen & Katherine O’Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25, 31 (2019) [hereinafter Been et al., *Supply Skepticism*] (“But often the benefits secured by regulatory restrictions are enjoyed by a relatively small number of existing property owners and/or existing residents, whereas costs are borne by a larger set of households who either rent or would like to live in the area.”); Vicki Been et al., *Preserving History or Restricting Development? The Heterogenous Effects of Historic Districts on Local Housing Markets in New York City*, 92 J. URB. ECON. 16, 25 (2016) [hereinafter Been et al., *The Heterogenous Effects*]

the social welfare benefits of regulation and the regulatory tax imposed on housing would result in more optimal levels of housing production.⁹⁹

2. The Social Justice School

The social justice school, comprised of scholars in the fields of political science, urban planning, law, and others, urges zoning reform to remedy ongoing racial and social disparities in wealth, education, public health, and other outcomes.¹⁰⁰ Although this group acknowledges other government policies' role in segregating and excluding low-income individuals and people of color, it is concerned with the segregating effect of restrictive residential zoning.¹⁰¹

More than fifty years after the passage of the Fair Housing Act,¹⁰² racial segregation remains a pervasive problem in and among U.S. metropolitan regions.¹⁰³ The consequences of racial segregation for isolated minority populations are well documented and include worse outcomes concerning employment, income, proximity to jobs, availability of public services, and death rates.¹⁰⁴ Regional inequality, where a few metropolitan regions greatly outperform other areas of the country, exacerbates segregation and disparities in life outcomes.¹⁰⁵

of Historic Districts] (observing house price increases in areas that are or are anticipated to become historic districts); Ellickson, *supra* note 74, at 1616–17 (summarizing the costs of zoning controls).

⁹⁹ Glaeser & Gyourko, *supra* note 10, at 27.

¹⁰⁰ See, e.g., Glynnis Hagins, *Separate and Still Unequal: How Neighborhood Zoning Laws Keep U.S. Schools Segregated*, 51 J.L. & EDUC. 1, 1–2, 20 (2022) (connecting zoning and segregated living patterns with educational outcomes); Jessica Trounstein, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 449 (2020) (observing that localities with more restrictive zoning regulations were less diverse than other jurisdictions). See generally ROTHSTEIN, *supra* note 21 (observing generally the role of public housing, mortgage rules, tax laws, and other government policies in segregating and excluding non-white households).

¹⁰¹ See, e.g., Trounstein, *supra* note 100, at 449–50 (highlighting the role of land use in residential segregation).

¹⁰² 42 U.S.C. §§ 3601–3619.

¹⁰³ *Most to Least Segregated Metro Regions*, OTHERING & BELONGING INST., <https://belonging.berkeley.edu/most-least-segregated-metro-regions> [<https://perma.cc/TZ3J-ZEAA>] (showing that, out of 221 U.S. metropolitan regions with more than 200,000 population, 103 were considered to have “high segregation” and another 116 were considered to have “low-medium segregation”).

¹⁰⁴ See, e.g., Adams-Schoen, *supra* note 32, at 1299 (arguing that single-family zoning contributes to high rates of racial segregation); Schragger, *supra* note 70, at 144 (summarizing arguments that racial segregation is perpetuated by single-family zoning); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 15, 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/7NGT-THFX>] (discussing the negative impact of redlining on people of color).

¹⁰⁵ Bradley L. Hardy, Trevon D. Logan & John Parman, *The Historical Role of Race and Policy for Regional Inequality*, in PLACE-BASED POL'YS FOR SHARED ECON. GROWTH 43, 45–46 (Jay Shambaugh & Ryan Nunn eds., 2018).

Scholarship has consistently and amply demonstrated that restrictive land-use regulation—particularly exclusionary zoning that limits density and elevates home prices—systematically excludes Black and Hispanic households.¹⁰⁶ There is a “chain of exclusion” whereby low-density zoning, often for single-family detached homes, reduces multi-family housing production and the supply of rental units.¹⁰⁷ Because racial and ethnic minority households are likelier to rent instead of own homes, they are excluded.¹⁰⁸ Moreover, sprawling development patterns make it more difficult for low-income individuals who cannot afford cars to access job opportunities.¹⁰⁹ This exclusionary chain exists in places that prohibit high-density housing and jurisdictions that impose other restrictive development rules such as building permit caps.¹¹⁰

Zoning restrictions on new housing construction are a predictor of “Black–White segregation and Black isolation.”¹¹¹ Because restrictions on new construction result in housing-cost inflation, they foreclose many low-income individuals and people of color from building wealth through homeownership and accessing economic opportunity.¹¹² Localities that liberalize zoning rules tend to become more racially integrated.¹¹³ In turn, communities with lower degrees of segregation generally have superior educational and economic outcomes across racial and income groups without negatively impacting white or wealthier people.¹¹⁴

¹⁰⁶ See, e.g., Pendall, *supra* note 69, at 135 (documenting the relationship between zoning and residential exclusion); Been et al., *Supply Skepticism*, *supra* note 98, at 32 (same); Adams-Schoen, *supra* note 32, at 1299–1301 (same).

¹⁰⁷ Pendall, *supra* note 69, at 138; see also Sarah Schindler & Kellen Zale, *The Anti-Tenancy Doctrine*, 171 U. PA. L. REV. 267, 279–80 (2023) (noting the exclusionary effects of single-family zoning).

¹⁰⁸ Schindler & Zale, *supra* note 107, at 279–80.

¹⁰⁹ Lewyn, *supra* note 44, at 1101–02.

¹¹⁰ Pendall, *supra* note 69, at 138. A “building permit cap” is a limit on the total number of housing units a jurisdiction will permit over a given time period; they are sometimes used to slow growth in fast-growing communities. See Constr. Indus. Ass’n of Sonoma Cnty. v. City of Petaluma, 522 F.2d 897, 900–01 (9th Cir. 1975) (describing a city plan in which the city mandated a fixed growth rate for housing development).

¹¹¹ Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 801 (2009).

¹¹² See, e.g., MELVIN OLIVER & THOMAS SHAPIRO, *BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 66–67 (2006) (describing the role of escalating home prices in amassing of household wealth among white households); Hagins, *supra* note 101, at 12 (stating that low housing supply and high demand price non-white and low-income families out of homeownership).

¹¹³ Rothwell & Massey, *supra* note 111, at 801.

¹¹⁴ Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 104–06 (2017).

Today's push for racial equity in housing arises against a backdrop of well-publicized examples of police brutality against Black people.¹¹⁵ The Black Lives Matter movement highlighted continuing disparities in access to opportunity and drew attention to the policy determinants—including land-use regulation—perpetuating these disparities.¹¹⁶ Thus, for the social justice wing of the pro-reform consensus, addressing racial and social injustice requires reforming the hierarchy and structure of residential zoning.¹¹⁷

This group also supports zoning reform to ameliorate gentrification and displacement.¹¹⁸ Scholars have demonstrated that constructing new housing supply furthers “filtering,” or the aging and depreciating of older housing stock that, over time, becomes more affordable to middle- and lower-income households.¹¹⁹ Filtering is the largest source of new low-income housing in America.¹²⁰ In supply-constrained markets, however, which have a shortage of newer, available housing, units “filter up” as higher-income households occupy older, depreciated housing and thus displace lower-income households.¹²¹ This pattern repeats as housing demand in higher-opportunity neighborhoods goes unmet, causing those neighborhoods to become unaffordable and middle- and upper-middle income households then turn to nearby gentrifying neighborhoods and bid up prices in

¹¹⁵ Miller, *supra* note 28, at 473.

¹¹⁶ GRAY, *supra* note 1, at 4.

¹¹⁷ See, e.g., Adams-Schoen, *supra* note 32, at 1304–05 (arguing that reform must be coupled with a recognition that land usages have and continue to perpetuate economic and racial subjugation); ROTHSTEIN, *supra* note 21, at 204 (discussing remedies for segregation, including banning single-family zoning ordinances or changing the tax code); Manville et al., *supra* note 28, at 106 (suggesting that the dismantling of single-family zoning is one way to address inequality); Wegmann, *supra* note 9, at 115 (acknowledging that racial and economic exclusion is intrinsically tied to single-family zoning).

¹¹⁸ See Been et al., *Supply Skepticism*, *supra* note 98, at 26 (citing studies that found an increase in market-rate housing production led to lower rates of displacement in the Bay Area); Cal Kurtz, *Ending Exclusionary Zoning Is One Way Out of Our Housing Crisis*, CNU (Nov. 17, 2022), <https://www.cnu.org/publicsquare/2022/11/15/ending-exclusionary-zoning> [<https://perma.cc/2HRQ-2WU2>] (highlighting how zoning reform can help mitigate gentrification).

¹¹⁹ Been et al., *Supply Skepticism*, *supra* note 98, at 29; Evan Mast, *The Effect of New Market-Rate Housing Construction on the Low-Income Housing Market*, 133 J. URB. ECON., 2023, at 1, 1–2; Stacy et al., *supra* note 92, at 2921; see also Stuart S. Rosenthal, *Are Private Markets and Filtering a Viable Source of Low Income Housing? Estimates from a “Repeat Income” Model*, 104 AM. ECON. REV. 687, 704 (2014) (indicating that, for rental housing, filtering provides an important source of low-income housing in U.S. cities).

¹²⁰ Been et al., *Supply Skepticism*, *supra* note 98, at 29. Nevertheless, filtering alone cannot produce an adequate housing supply for lower-income households. See AURAND ET AL., *supra* note 6, at 21 (explaining that filtering does not always produce housing for lower-income housing-seekers).

¹²¹ Been et al., *Supply Skepticism*, *supra* note 98, at 28; Molloy, *supra* note 6, at 3; see also Liyi Liu, Doug McManus & Elias Yannopoulos, *Geographic and Temporal Variation in Housing Filtering Rates*, 93 REG’L SCI. & URB. ECON., 2022, at 1, 2 (“In our sample, [metropolitan statistical areas] with elastic housing supply have faster downward filtering than the national average, whereas markets with inelastic housing supply have upward filtering, on average.”).

those areas.¹²² Thus, social justice scholars and advocates support densifying high-opportunity neighborhoods to mitigate these problems.¹²³

3. The Environmentalists

Environmental scholars and advocates emphasize the environmental consequences of sprawling development patterns stemming from restrictions on dense housing.¹²⁴ It is now well-established that reducing GHG—namely carbon—emissions is critical to averting catastrophic climate change.¹²⁵ Compared to denser development, low-density patterns—such as single-family detached housing and large lots—increase automobile vehicle miles traveled, resulting in more air pollution and GHG emissions.¹²⁶ Additionally, sprawl consumes open lands, including wildlife habitats and other sensitive places, and wastes land with uses such as excessive vehicle parking areas.¹²⁷ Moreover, although coastal cities offer temperate climates with relatively low home heating and cooling demands, their restrictive zoning has forced population movements toward less-temperate interior regions.¹²⁸

Zoning perpetuates these harms by prohibiting higher-density, non-automobile-centric development and assuming universal automobile ownership.¹²⁹ Compact, dense, walkable residential development is more environ-

¹²² See Been et al., *Supply Skepticism*, *supra* note 98, at 28 (acknowledging that one market's housing prices affect neighboring markets); Mangin, *supra* note 20, at 107 (mapping the process of gentrification). In contrast, research shows that the construction of new apartment housing in low-income neighborhoods actually decreases rents in those neighborhoods. Brian J. Asquith, Evan Mast & Davin Reed, *Local Effects of Large New Apartment Buildings in Low-Income Areas*, 105 REV. ECON. & STAT. 359, 359 (2023).

¹²³ See, e.g., Mangin, *supra* note 20, at 103 (describing the results of restricting development in high-opportunity areas).

¹²⁴ See, e.g., GRAY, *supra* note 1, at 4–5, 100–01 (identifying environmental concerns, such as the destruction of natural areas, the high energy consumption of large houses, and car-centrism, resulting from single-family zoning).

¹²⁵ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT 57 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_Longer_Report.pdf [<https://perma.cc/9XD3-5U7Z>].

¹²⁶ Norman et al., *supra* note 33, at 18–19; TODD LITMAN, ANALYSIS OF PUBLIC POLICIES THAT UNINTENTIONALLY ENCOURAGE AND SUBSIDIZE URBAN SPRAWL 3 (2015), <https://newclimateeconomy.net/sites/default/files/2023-08/public-policies-encourage-sprawl-nce-report.pdf> [<https://perma.cc/YN8L-87NW>]. The transportation sector produces twenty-nine percent (nearly one-third) of U.S. GHG emissions. *Sources of Greenhouse Gas Emissions*, EPA, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> [<https://perma.cc/3FQV-ER6W>] (July 8, 2024).

¹²⁷ LITMAN, *supra* note 126, at 23–24.

¹²⁸ Elmendorf, *supra* note 77, at 93.

¹²⁹ GRAY, *supra* note 1, at 4–5. Although zoning is a major contributor to these problems, other policies such as federal-aid highway construction, mortgage subsidies, and urban public housing projects coaxed a significant portion of the U.S. population into sprawling suburbs. Lewyn, *supra* note 44, at 1095.

mentally friendly, supporting public transit usage and solvency.¹³⁰ Whereas past environmental activism opposed new development and encouraged open-space preservation, environmentalists are now encouraging denser urban development to address the climate crisis.¹³¹

4. The Fiscal School

The fiscal school argues that sprawling development patterns caused by zoning impose a significant social cost, forcing government agencies to needlessly expend public resources to provide infrastructure and services to far-flung locations while denser development patterns enable more-efficient service delivery.¹³² Urban planning and public finance research demonstrates that government service delivery to sprawling areas is costlier because “this type of development pattern fails to capitalize on economies of scale, often fails to optimize the location of costly capital facilities, and leads to duplicative service delivery.”¹³³ In these areas, local governments must build and maintain streets, utilities, and schools, and provide public services such as policing and fire protection, across greater distances and to fewer people than in more-urbanized locations.¹³⁴ The relationship between population density and fiscal impact is somewhat murky.¹³⁵ Evidence shows, however, that suburbs characterized by “leapfrog” development have higher per-capita infrastructure and service delivery costs than denser areas.¹³⁶ These conclusions affirm arguments that zoning reform is needed to encourage denser, infill development and therefore promote responsible fiscal policy.¹³⁷

¹³⁰ See GRAY, *supra* note 1, at 101 (noting that low-density zoning denies cities and suburbs of efficient public transit options).

¹³¹ John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 829 (2019); Biber et al., *supra* note 74, at 40–41.

¹³² See, e.g., LITMAN, *supra* note 126, at 27 (surveying the governmental costs associated with providing services to suburban areas); Edward H. Ziegler, Jr., *The Twilight of Single-Family Zoning*, 3 UCLA J. ENV'T L. & POL'Y 161, 210 (1983) (identifying sprawl's hidden costs, including “sewer and other utilities”). Economists define urban sprawl as “inefficient suburbanization.” E.g., Goodman, *supra* note 69, at 6.

¹³³ Goodman, *supra* note 69, at 8 (citations omitted).

¹³⁴ LITMAN, *supra* note 126, at 27; Bronin, *supra* note 27, at 764–65; *State Preemption of Local Zoning Laws as Intersectional Climate Policy*, *supra* note 59, at 1598–99.

¹³⁵ See Goodman, *supra* note 69, at 17 (observing that compact development patterns generally result in lower per-capita public expenditures, but that in particularly dense areas, it may be more expensive to provide some public services).

¹³⁶ *Id.* at 10, 16–18. “Leapfrog” development occurs when outward development happens haphazardly. *Id.* at 16.

¹³⁷ See *id.* at 18.

B. Critiques of the Case for Zoning Reform

Despite broad agreement that restrictive zoning causes unaffordable housing, economic inequity, environmental harm, and fiscal inefficiency, not everyone agrees that zoning requires reform. Some scholars argue that enthusiasm for zoning reform is misplaced.¹³⁸ This Section explores anti-reform arguments, which generally center on concerns regarding the preemption of local authority and skepticism that zoning reform alone can address poor industrial policymaking or intra- and inter-regional income stagnation and stratification.¹³⁹ These arguments are briefly summarized below.

First, some critics of the pro-reform consensus are skeptical of state preemption of local regulatory authority. For instance, Christopher Serkin argues that local land-use regulation best protects property values, paces growth, provides predictability and stability, and enables efficient management of public goods and amenities.¹⁴⁰ Preempting local zoning might, in this analysis, undermine these normatively legitimate policy ends and disincentivize development or redevelopment.¹⁴¹ Some critics point to past, unsuccessful federal and state intervention in local land-use control and housing, such as New Jersey's fair-share program for affordable housing construction and federal urban renewal efforts that sidelined local community voices in land-use decision-making.¹⁴² There are also examples where state preemption undercuts progressive priorities, including bans on local rent controls or inclusionary zoning laws that impose mandatory affordable housing requirements.¹⁴³ In general, these scholars support local control because it enables inclusive decision-making and policy experimentation to resolve localized problems.

Second, scholars concerned with land-use deregulation argue that it cannot address income stagnation or stratification and distracts from developing a more robust industrial policy. These critics blame the housing crisis on income stagnation, noting that the priciest housing markets have experienced large immigrations of high-wage workers who drive up housing prices.¹⁴⁴ They also argue that people are still drawn to highly regulated, high-cost cities, under-

¹³⁸ See generally Sitaraman et al., *supra* note 71; Serkin, *supra* note 72; Schragger, *supra* note 70; Andrés Rodríguez-Pose & Michael Storper, *Housing, Urban Growth and Inequalities: The Limits to Deregulation and Upzoning in Reducing Economic and Spatial Inequality*, 57 URB. STUD. 223 (2020).

¹³⁹ See *infra* notes 140–154 and accompanying text.

¹⁴⁰ Serkin, *supra* note 72, at 771, 778, 781, 784.

¹⁴¹ See *id.* at 784, 793 (identifying policy considerations for municipalities, such as potential harm to current property owners and the risk that density building will cause a rise in vacant properties).

¹⁴² Schragger, *supra* note 70, at 151–52, 155.

¹⁴³ *Id.* at 157.

¹⁴⁴ Rodríguez-Pose & Storper, *supra* note 138, at 230.

mining the notion that expensive cities limit interregional migration.¹⁴⁵ These scholars assert that supply increases are unlikely to lead to reduced housing prices and that deregulation primarily benefits wealthy people, namely existing landowners and high-income earners.¹⁴⁶ They criticize the mainstream consensus for not supporting affordability policies such as subsidies for income-restricted housing and argue that the marginal increases in housing supply that might result from deregulation will not cause material rent reductions.¹⁴⁷ Some scholars argue that, instead of densifying high-opportunity areas to avoid displacement, governments should increase amenities in lower-income neighborhoods to reduce rents in high-income neighborhoods.¹⁴⁸

Zoning reform's critics also assert that it may increase regional inequality by enabling jobs and population to flow to productive cities while declining cities, primarily in the upper Midwest, languish.¹⁴⁹ This pattern would, in their view, exacerbate the consequences of spatial inequality such as socioeconomic stratification, political polarization, and national security risks.¹⁵⁰ Moreover, because the urban wage premium—the marginal difference in wages between urban and rural areas—has declined, new housing in productive cities might simply attract higher-income, higher-educated workers and increase regional inequality.¹⁵¹ Furthermore, critics allege encouraging people with limited resources to relocate to new areas distracts from strengthening existing communities through improved amenities.¹⁵² For critics of the pro-reform consensus, zoning reform cannot overcome poor industrial policymaking, discriminatory employment practices, and other demand-side policy failures; it simply results in parking global capital in newly constructed multi-family properties.¹⁵³

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 227, 240.

¹⁴⁷ *Id.* at 243; see also Elliot Anenberg & Edward Kung, *Can More Housing Supply Solve the Affordability Crisis? Evidence from a Neighborhood Choice Model*, 80 REG'L SCI. & URB. ECON., 2020, at 1, 10.

¹⁴⁸ Anenberg & Kung, *supra* note 147, at 9 (asserting that increasing amenities in lower-income neighborhoods reduces upward pressure on housing prices in higher-income neighborhoods, as demand for amenities is addressed elsewhere).

¹⁴⁹ See Schragger, *supra* note 70, at 185–86 (arguing that the rhetoric encouraging migration to productive cities does not properly address social welfare); Sitaraman et al., *supra* note 71, at 1816 (describing potential population shifts away from the Midwest); see also Serkin, *supra* note 72, at 786–87 (providing historical background on the descent of certain cities post-World War II).

¹⁵⁰ See Sitaraman et al., *supra* note 71, at 1784, 1816 (suggesting that zoning deregulation would encourage migration to larger cities, entrenching the highlighted repercussions of geographic inequality).

¹⁵¹ Rodriguez-Pose & Storper, *supra* note 138, at 236; Sitaraman et al., *supra* note 71, at 1818; Schragger, *supra* note 70, at 172–73.

¹⁵² See Schragger, *supra* note 70, at 182 (identifying shortcomings with “mobility-enhancing policies,” policies that encourage migration to “productive” areas).

¹⁵³ See *id.* at 187–88, 194 (arguing that increasing capacity in productive cities through zoning reform will not address racial and economic challenges).

Nevertheless, irrespective of these arguments' merit, the pro-reform consensus has won the day. As discussed in Part II.B, policymakers in several jurisdictions have quickly moved to amend zoning laws to allow more housing development, and single-family zoning reform has headlined many of these efforts. Section C thus considers the consensus view's relationship to single-family zoning reform and links scholars' disparate policy proposals to a lack of empirical data.¹⁵⁴

C. No Clear Diagnosis and No Clear Cure

Although the weight of scholarship and policy advocacy leans heavily toward the need for zoning reform, a deeper investigation yields disagreement on *which* elements of land-use regulation have caused America's housing problems and *which* interventions are most needed.¹⁵⁵ This Section notes that little empirical data or research ties specific land-use regulations to the problems with which reformers are concerned, and there is no agreed-upon means to measure zoning's restrictiveness.¹⁵⁶ Although reform *could* satisfy all constituent groups within the consensus—by, say, encouraging compact, transit-oriented, high-density, mixed-income development—these groups do not agree on the most efficacious policy interventions.¹⁵⁷

Furthermore, disagreement on preferred reforms is predictable given the nationwide variation in land-use regulations. Evaluating and categorizing zoning regulations across jurisdictions is a complex task.¹⁵⁸ The specific features

¹⁵⁴ See *infra* notes 155–176 and accompanying text.

¹⁵⁵ See, e.g., Biber et al., *supra* note 74, at 56 (discussing a variety of options for state-level intervention); Moira O'Neill, Giulia 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, 6 (2019) (noting that existing research is unclear regarding which aspects of land-use regulation contribute to housing costs); Gyourko & Molloy, *supra* note 83, at 1294 (stating that there is not "a consensus that one particular regulation or subset of constraints is most important").

¹⁵⁶ See O'Neill et al., *supra* note 155, at 6 ("But this research, though important, cannot answer the question of which specific elements of local land use regulation or state environmental review contribute disproportionately to either the cost of housing or the exclusion of low-income communities from these metro areas."); Ellickson, *supra* note 74, at 1621 (observing the lack of consensus around how to measure zoning's stringency); Molloy, *supra* note 6, at 2 ("[T]he vast heterogeneity of different types of regulation and the fact that these regulations are correlated with one another makes estimating the effect of any single regulation quite complicated.").

¹⁵⁷ See Miller, *supra* 28, at 478 (highlighting differing perspectives between activists regarding a path forward); Serkin, *supra* note 72, at 769 ("Proposals and reforms are numerous and varied." (citation omitted)).

¹⁵⁸ See, e.g., NAT'L ZONING ATLAS, <https://www.zoningatlas.org/> [<https://perma.cc/E5HQ-QQDB>] ("We do not have a good understanding of how zoning, enacted at the local level, actually functions."); Elmendorf, *supra* note 77, at 87 (acknowledging the difficulty of quantifying variation in land use regulations over time due to the fact that regulations can take many forms); Ellickson, *supra* note 74, at 1620–21 (highlighting that the author analyzed forty-one unique zoning ordinances to

of zoning—which, as Part II discusses, is only one form of land-use regulation—vary dramatically between thirty-thousand American localities.¹⁵⁹ A zoning code can number in the thousands of pages, and any of the individual provisions of a code can impact the type, size, functionality, and cost of housing constructed within a given jurisdiction.¹⁶⁰ For example, a provision requiring multiple public hearings per site-plan application might restrict housing supply and inhibit affordability as much as zoning that allows only single-family detached housing or large lot sizes.¹⁶¹ Similarly, requiring open space preservation might limit housing production as much as requiring developers to supply income-restricted apartments in a project.¹⁶² Unfortunately, scholars, advocates, and regulators are challenged to identify *which* zoning laws cause *which* problems.¹⁶³

Even within the groups forming the mainstream consensus, this information constrains scholars' ability to offer informed policy prescriptions. For instance, although some economics literature urges deregulating housing construction, it does not identify how to do so.¹⁶⁴ Because of the wide variation in zoning laws across the nation, scholars have struggled to develop longitudinal indices capable of capturing the nuances of individual zoning regulations, instead relying on highly generalized datasets.¹⁶⁵ For instance, the “regulatory tax” might not be caused by zoning, as other land-use restrictions also impact the price of housing.¹⁶⁶ Similarly, within the social justice school, scholars agree that restricting density causes racial segregation, yet little analysis demonstrates the

collect data about zoning practices); O'Neill et al., *supra* note 155, at 19 (noting the difficulties of determining the impact of specific land-use regulations). See generally 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 (2006) (surveying land uses across nearly two thousand municipalities and finding that regulations vary broadly between local governments).

¹⁵⁹ See *infra* notes 177–381 and accompanying text.

¹⁶⁰ See Bronin, *supra* note 27, at 739 (listing varied topics in zoning ordinances); Ellickson, *supra* note 74, at 1620–21 (referencing the lengthy nature of individual zoning codes).

¹⁶¹ Bronin, *supra* note 27, at 760–64.

¹⁶² Stephen Schmidt & Kurt Paulsen, *Is Open-Space Preservation a Form of Exclusionary Zoning?*, 45 URB. AFFS. REV. 92, 110–11 (2009).

¹⁶³ See Molloy, *supra* note 6, at 2 (acknowledging that pinpointing a causal effect between regulation and housing supply is difficult because regulations are localized and heterogenous); Christopher S. Elmendorf, Eric Biber, Paavo Monkkinen & Moira O'Neill, *State Administrative Review of Local Constraints on Housing Development: Improving the California Model*, 63 ARIZ. L. REV. 609, 677 (2021) (proposing questions for local governments to consider when determining policy).

¹⁶⁴ See, e.g., Molloy, *supra* note 6, at 2; Gyourko & Molloy, *supra* note 83, at 1294; Glaeser et al., *supra* note 31, at 360.

¹⁶⁵ See O'Neill et al., *supra* note 155, at 20–31 (summarizing attempts at cross-jurisdictional and longitudinal studies of multiple zoning regulations).

¹⁶⁶ See, e.g., Glaeser et al., *supra* note 31, at 360 (“These regulatory tax estimates would be more convincing if it could be shown that they are related to zoning or other land use restrictions.”).

segregating effects of procedures, design reviews, or dimensional limitations.¹⁶⁷ Some social justice scholars and advocates support modest single-family zoning reform while others argue for multi-family housing everywhere.¹⁶⁸

The absence of such information produces divergence among scholars and advocates who comprise the consensus. Housing-affordability advocates and their economist allies “simply want more housing built anywhere,” social equity advocates argue for more income-restricted affordable housing and access to areas of higher opportunity, and environmental and fiscal advocates want dense infill development.¹⁶⁹ As a result, the social justice school opposes deregulatory interventions that simply produce more housing and environmentalists support only those interventions that increase housing density near public transit.¹⁷⁰ Thus, the pro-reform coalition lacks both a united policy consensus and a shared end goal.¹⁷¹

The absence of scholarly agreement on specific policy solutions is evident in the recent, widespread adoption of single-family zoning reform, discussed in greater detail in Part II.¹⁷² Single-family zoning causes many problems.¹⁷³ Little to no scholarship, however, suggests that single-family zoning alone caused the housing crisis or that reforming it—particularly without other land-use regulatory reforms—will achieve affordable housing, eliminate segregation, or arrest the climate emergency. A strand of the mainstream consensus supports single-family zoning reform because they believe it enables lower-income people to move to opportunity, mitigates gentrification and displacement, and

¹⁶⁷ See Rothwell & Massey, *supra* note 111, at 799 (“Although density zoning stands out here, we are not prepared to draw confident conclusions about the effects of other regulations on segregation . . .”).

¹⁶⁸ Compare Salim Furth & MaryJo Webster, *Single-Family Zoning and Race: Evidence from the Twin Cities 41* (Oct. 2022) (unpublished working paper) (<https://www.mercatus.org/research/working-papers/single-family-zoning-and-race-evidence-twin-cities>) [<https://perma.cc/Y7MC-9JJT>] (supporting single-family zoning reform), and Wegmann, *supra* note 9, at 113–18 (same), with ROTHSTEIN, *supra* note 21, at 204 (supporting broader multi-family zoning).

¹⁶⁹ Miller, *supra* note 28, at 471; see also Glaeser & Gyourko, *supra* note 10, at 27 (generally supporting relaxation of housing supply regulation, but without specific policy prescriptions).

¹⁷⁰ See Mangin, *supra* note 20, at 119–20.

¹⁷¹ Christopher Serkin, *Creating Density: The Limits of Zoning Reform*, 11 BRIGHAM-KANNER PROP. RTS. CONF. J. 183, 212 (2022).

¹⁷² See *infra* notes 177–381 and accompanying text.

¹⁷³ See, e.g., Adams-Schoen, *supra* note 32, at 1300 (identifying a segregationist effect of single-family zoning); Manville et al., *supra* note 28, at 106–08 (“[Single family zoning] is inequitable, inefficient, and environmentally unsustainable.”); Norman et al., *supra* note 33, at 18–19 (observing the impact of single-family zoning on GHG emissions); Wegmann, *supra* note 9, at 115 (identifying single-family zoning’s negative impact on people of color and people with low incomes).

might filter housing to lower-income households.¹⁷⁴ One scholar states that single-family zoning reform has a “symbolic” effect.¹⁷⁵ Nevertheless, the results of these reforms, discussed in greater detail in Part III, imply that it is achieving none of the consensus’s goals.¹⁷⁶

Unfortunately, our nascent understanding of the effects of specific zoning provisions impedes the formation of a collective understanding of the specific areas where reform is needed. Out of this vacuum, advocates have urged single-family zoning reform and a handful of elected leaders have responded accordingly. This lack of informed policy research, however, puts scholars and regulators in the position of simply guessing whether single-family zoning reforms might eventually work to resolve the crisis. That is hardly a satisfying approach to resolving a housing crisis.

II. THE REVOLT AGAINST SINGLE-FAMILY ZONING

Having explored scholarly support for zoning reform and the lack of agreement as to specific policy aims to address the housing crisis, this Part considers recent zoning reforms, including those pertaining specifically to single-family zoning.¹⁷⁷ The history and general contours of zoning are well-documented by other authors.¹⁷⁸ This Part begins in Section A with five observations about zoning and, particularly, single-family zoning, to situate recent reforms in the history and broader context of zoning.¹⁷⁹ Section B reviews recent state and local reforms.¹⁸⁰ Section C concludes by attempting to frame single-family zoning reforms’ adoption within existing literature explaining zoning politics and the until-now unchanging nature of single-family zoning.¹⁸¹

¹⁷⁴ See Manville et al., *supra* note 28, at 107–09 (discussing practical benefits of single-family zoning reform and countering popular arguments for single-family zoning).

¹⁷⁵ Infranca, *supra* note 28, at 669–70; see also Note, *Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right*, 135 HARV. L. REV. 1104, 1114 (2022) (referring to single-family zoning reform initiatives as “symbolic”).

¹⁷⁶ See *infra* notes 383–526 and accompanying text.

¹⁷⁷ See *infra* notes 182–381 and accompanying text.

¹⁷⁸ See, e.g., GRAY, *supra* note 1, at 11–47 (describing the birth and ascent of American zoning and the modern-day function of zoning); HIRT, *supra* note 29, at 31–59, 111–32 (describing the historical roots of zoning); Bronin, *supra* note 27, at 727–31 (describing the ways in which local governments use zoning laws to regulate housing).

¹⁷⁹ See *infra* notes 182–292 and accompanying text.

¹⁸⁰ See *infra* notes 293–342 and accompanying text.

¹⁸¹ See *infra* notes 343–381 and accompanying text.

A. Five Observations About Zoning

Throughout the United States, localities zone according to state enabling laws authorizing them to do so.¹⁸² Nevertheless, today, local zoning authority is broad; many small jurisdictions were formed to exercise zoning authority.¹⁸³ Zoning is now one of the two most widely adopted forms of land use regulation in the United States.¹⁸⁴ Zoning regulations comprise text governing permissible uses, building forms, dimensions, and permitting procedures.¹⁸⁵ The text is geographically applied via a map that divides the locality into districts.¹⁸⁶ Different regulations apply to properties in each district.¹⁸⁷ In most states and localities, the text and map are changed only when the locality's legislative body approves a rezoning.¹⁸⁸

Five observations inform this Article's later analysis of single-family zoning reform. First, zoning is neither the only form of land-use regulation nor the only housing-production restraint.¹⁸⁹ Second, the single-family residential district is foundational within zoning.¹⁹⁰ Third, dimensional and procedural zoning provisions affect housing production as much as or more than density and use limitations.¹⁹¹ Fourth, zoning's restrictiveness has increased over time.¹⁹² Fifth, local governments' zoning decisions are mostly unquestioned by courts and local governments frequently flout legislative and judicial mandates.¹⁹³ Each of these features is discussed in turn below.

¹⁸² Bronin, *supra* note 27, at 727; GRAY, *supra* note 1, at 34; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 19 (1990).

¹⁸³ Biber et al., *supra* note 74, at 15 (tying the rise of small suburbs to localized desire to exercise zoning authority); Kenneth Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1272 (2008); Briffault, *supra* note 182, at 57. Because zoning is adopted locally, in a metropolitan region with hundreds or even thousands of individual jurisdictions, one given developer might need to contend with hundreds or thousands of different zoning regulations. See Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1059 (2019) (acknowledging that modern zoning creates a complicated regulatory scheme that is difficult to navigate); Briffault, *supra* note 182, at 79 (noting that a single metropolitan area can be divided into over one hundred independent municipalities).

¹⁸⁴ Pendall et al., *supra* note 27, at 56.

¹⁸⁵ Bronin, *supra* note 27, at 728.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; Ellickson, *supra* note 74, at 1614.

¹⁸⁸ Biber et al., *supra* note 74, at 11.

¹⁸⁹ See *infra* notes 194–224 and accompanying text.

¹⁹⁰ See *infra* notes 225–239 and accompanying text.

¹⁹¹ See *infra* notes 240–274 and accompanying text.

¹⁹² See *infra* notes 275–279 and accompanying text.

¹⁹³ See *infra* notes 280–292 and accompanying text.

1. Zoning Is but One Form of Land-Use Regulation

Zoning is not alone in affecting housing production.¹⁹⁴ Consider the following handful of examples of other forms of land-use regulation, each of which affects housing production. First, environmental controls in some states impose regulations, permitting, and review requirements on top of zoning restrictions. For example, the California Environmental Quality Act¹⁹⁵ requires real estate development projects to undergo an extended public environmental review process and offers opportunities for project opponents to cause delay through commentary and litigation.¹⁹⁶ Environmental laws can determine whether and how quickly a given real estate development project proceeds.¹⁹⁷

Second, historic preservation laws also parallel zoning, restricting landowners' use of historic properties and imposing procedures relating to development in historic districts.¹⁹⁸ These laws are common.¹⁹⁹ Under a typical local preservation law, when the locality designates a building or district for preservation, it adds layers of design and other reviews—over and above zoning—relating to exterior changes.²⁰⁰ Although historic preservation serves economic development and environmental interests, preservation laws can be deployed to block new development, redevelopment, or provide leverage for project opponents to demand significant changes or delays on particular projects.²⁰¹

¹⁹⁴ See, e.g., Ellickson, *supra* note 74, at 1614 (describing additional land use controls such as subdivision and historic preservation regulations); Serkin, *supra* note 183, at 1064 (adding impact fees to the list of other controls). Beyond regulation, localities control housing development through means like utility service provision and open space preservation. See Ellickson, *supra* note 74, at 1656–63 (evaluating the impact of water supply availability and the desire to protect open space on zoning provisions across different American cities).

¹⁹⁵ CAL. PUB. RES. CODE §§ 21000–21189.91 (West 2024).

¹⁹⁶ See Moira O'Neill, Eric Biber & Nicholas J. Marantz, *Measuring Local Policy to Advance Fair Housing and Climate Goals Through a Comprehensive Assessment of Land Use Entitlements*, 50 PEPP. L. REV. 505, 535 (2023) (surveying the California Environmental Quality Act's mechanics); Mangin, *supra* note 20, at 100–01 (noting how environmental reviews of development projects can stall growth).

¹⁹⁷ See Mangin, *supra* note 20, at 100–01 (labeling the environmental review as “consequential” because development opponents can exploit the review process to delay or halt development).

¹⁹⁸ Serkin, *supra* note 183, at 1068–69.

¹⁹⁹ See Byrd Wood, *Local Government and Historic Preservation*, 15 F.J. 4, 5 (2001) (“Today, more than 2,300 communities have adopted historic preservation ordinances . . .”).

²⁰⁰ See *id.* (stating that a historic site designation requires owners to seek review by a commission to make any changes, including replacing a window).

²⁰¹ See Serkin, *supra* note 171, at 196 (acknowledging that historic preservation zoning laws serve an end goal of resisting change, delaying housing development). Conservation districts operate similarly, establishing non-zoning neighborhood-level design and procedural requirements for new development or alterations of existing buildings. Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525, 1531 (2015).

Third, locally adopted exactions programs require developers to pay for or provide new public infrastructure or services.²⁰² Under these programs, developers may be required to dedicate land for parks and streets, construct off-site transportation or utility infrastructure, or pay impact fees.²⁰³ Although their use varies by jurisdiction and project type, exactions' usage has expanded in recent decades.²⁰⁴ Developers argue that exactions inhibit housing production, yet research is inconclusive.²⁰⁵ By some accounts, exactions increase localities' political acceptance of new residential uses, efficiently account for the marginal cost of providing public amenities, and force developers to internalize the negative externalities of new development.²⁰⁶ Exactions may also expedite infrastructure construction or service delivery to support development.²⁰⁷ Nevertheless, exactions that increase new housing prices may be exclusionary or constrain housing production.²⁰⁸

Fourth, building codes also regulate land use. Building codes govern the minutiae of building materials, plumbing, mechanical, fire protection, and other life safety systems.²⁰⁹ These regulations have been shown to affect housing prices.²¹⁰ In some jurisdictions, building codes pace or cap growth by limiting the number of units permitted in a given year.²¹¹

²⁰² Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 140 (2005); Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 203 (2006).

²⁰³ Been, *supra* note 202, at 140; *see also* ARTHUR C. NELSON, LIZA K. BOWLES, JULIAN C. JUERGENSMEYER, & JAMES C. NICHOLAS, A GUIDE TO IMPACT FEES AND HOUSING AFFORDABILITY 64 (2008) (highlighting an Arizona case that discusses an impact fee scheme in Scottsdale).

²⁰⁴ *See* NELSON ET AL., *supra* note 203, at 64–72 (describing generally the results of surveys of localities regarding impact fee usage); Been, *supra* note 202, at 141 (suggesting a growth in exaction rate usage in municipalities); Elmendorf & Shanske, *supra* note 28, at 525 (highlighting the Supreme Court's endorsement of exaction fees).

²⁰⁵ *See* Been, *supra* note 202, at 143; NELSON ET AL., *supra* note 203, at 100; Gyourko & Molloy, *supra* note 83, at 1320.

²⁰⁶ *See* NELSON ET AL., *supra* note 203, at 83; Been, *supra* note 202, at 143–44.

²⁰⁷ *See* Been, *supra* note 202, at 145 (noting how impact fees can fund necessary infrastructure projects).

²⁰⁸ *Id.* at 146; Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 842–43 (1992).

²⁰⁹ *Understanding Building Codes*, NAT'L INST. OF STANDARDS & TECH., U.S. DEP'T OF COM., <https://www.nist.gov/buildings-construction/understanding-building-codes> [<https://perma.cc/82GN-VYUH>] (June 21, 2022).

²¹⁰ Gyourko & Molloy, *supra* note 83, at 1296 (observing that building codes raise the costs of housing construction, which in turn impacts the cost of homes).

²¹¹ *See, e.g.*, LAKEWOOD, COLO., MUN. CODE §§ 14.27.010–.170 (2024) (establishing permitting rules that limit the number of allocations, a necessary condition for receiving a permit to build new housing, to forty per year); PETALUMA, CAL., MUN. CODE §§ 17.26.010–.080 (2024) (providing limits for unit development). The city of Boulder, Colorado enforced such caps until the city council repealed them in early 2024. *See* Boulder, Colo., Ordinance 8600 (Jan. 18, 2024) (repealing a system that limited housing production to one percent of growth yearly).

In addition to these public land-use controls, private land-use regulations—typically in covenants, conditions, and restrictions (called “covenants,” “restrictive covenants,” or “CC&Rs”)—affect housing production. CC&Rs may establish common-interest communities where landowners pay assessments to maintain common properties and cover community management expenses.²¹² These covenants contain self-renewing clauses, making them perpetual unless opponents affirmatively opt out.²¹³ Because they have been shown to increase new-home values, the Federal Housing Administration historically favored covenants in its underwriting practices.²¹⁴ Consequently, covenants are now pervasive: in 2023, over 75 million Americans—thirty percent of the U.S. population—lived in more than 365,000 covenant-controlled communities.²¹⁵ In some states, more than half of owner-occupied homes are encumbered by CC&Rs.²¹⁶

Like the public land-use regulations noted above, covenants are also separate from zoning and apply on top of any local zoning laws.²¹⁷ Like zoning, they restrict uses and contain development standards and procedures.²¹⁸ They prohibit numerous classes of residential dwelling forms, including multi-family housing.²¹⁹ They may also control other things such as paint colors, landscaping design, fences, decks, and outbuildings.²²⁰ Covenants have an ugly history of use for racial and social exclusion, although their use for de jure ra-

²¹² See Robert C. Ellickson, *Stale Real Estate Covenants*, 63 WM. & MARY L. REV. 1831, 1839–40 (2022) (describing the structure of common-interest communities).

²¹³ *Id.* at 1840.

²¹⁴ *Id.* at 1845, 1848; ROTHSTEIN, *supra* note 21, at 83–85.

²¹⁵ *U.S. National Data, 2023*, FOUND. FOR CMTY. ASS'N RSCH., [https://foundation.caionline.org/\[https://perma.cc/79P8-GDF7\]](https://foundation.caionline.org/[https://perma.cc/79P8-GDF7]); see also Merriam, *supra* note 46, at 367–68 (underscoring the pervasive nature of covenants). Data on the number of parcels subject to covenants and the restrictions contained in those covenants are limited, although we know generally that a majority of new dwellings produced in the United States are in covenant-controlled communities and that the prevalence of covenant controls within residential areas has increased dramatically since 1980. See Ken Stahl, *The Power of State Legislatures to Invalidate Private Deed Restrictions: Is It an Unconstitutional Taking?*, 50 PEPP. L. REV. 579, 582 (2023) (explaining that common-interest community enforced regulations are more common than municipal-wide land-use regulations); Merriam, *supra* note 46, at 361 (observing the “remarkable” number of individuals subject to private covenants); Ellickson, *supra* note 212, at 1833–34 (highlighting that covenants were present in sixty-one percent of new housing built in common-interest communities).

²¹⁶ See *Fact Book 2021 Dashboard*, FOUND. FOR CMTY. ASS'N RSCH., [https://foundation.caionline.org/publications/factbook/dashboard-2021/\[https://perma.cc/C859-33RR\]](https://foundation.caionline.org/publications/factbook/dashboard-2021/[https://perma.cc/C859-33RR]) (presenting data on the number of owner-occupied homes in common-interest communities, with California ranking the highest in 2024 at 50,010, and Florida ranking the second-highest at 49,420).

²¹⁷ See Stahl, *supra* note 215, at 590 (acknowledging that CC&Rs prescribe additional land-use restrictions, like paint color).

²¹⁸ Merriam, *supra* note 46, at 367; Wiggins, *supra* note 28, at 148.

²¹⁹ Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1652–53 (2021).

²²⁰ Lemar, *supra* note 201, at 1551; Stahl, *supra* note 215, at 590.

cial segregation—segregation based on the law—was outlawed in the mid-twentieth century.²²¹ Nevertheless, unlike zoning, covenants are generally unencumbered by other constitutional limitations.²²² They are also not easily amended, as prevailing law generally permits CC&Rs to require supermajorities—or even unanimity—to amend or terminate restrictions.²²³ Courts rarely terminate covenants even under changed conditions.²²⁴ Thus, covenants pose many of the same problems as zoning, perhaps to a greater degree.

2. Zoning's Purpose: Protecting Single-Family Housing

Separating uses by district is zoning's nature,²²⁵ but isolating detached single-family housing may be its central purpose.²²⁶ Vast majorities of U.S. residential land, and the majority of urbanized land, are zoned single-family.²²⁷ Nearly every zoning code in America contains a single-family district.²²⁸ Simply reading a municipal zoning map—and observing how little land is zoned for uses other than single-family housing—leads one to the conclusion that single-family detached housing is the most favored land use in nearly every U.S. city.²²⁹

Berkeley, California pioneered exclusive single-family zoning in 1916 and imposed special design rules to sequester upper-income white residents from immigrant workers.²³⁰ Several authors have documented the exclusionary

²²¹ Stahl, *supra* note 215, at 597–98. See generally *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (declaring that racially restrictive covenant enforcement violates the Fourteenth Amendment).

²²² See Merriam, *supra* note 46, at 367 (stating that CC&Rs are “perfectly legal and enforceable”); Ellickson, *supra* note 212, at 1852.

²²³ See Ellickson, *supra* note 212, at 1852 (“When covenants benefit only a dozen or so landowners, beneficiaries are unlikely to have much difficulty in consensually agreeing to modify or terminate the restrictions. When covenant beneficiaries are more numerous, however, as they commonly are, stale covenants threaten to freeze urban neighborhoods.”).

²²⁴ *Id.* at 1857–59 (surveying examples of courts’ hesitancy to uphold covenant amendments, even when the conditions changed and there is public support for the amendment).

²²⁵ Bronin, *supra* note 27, at 728. The typical zoning regulation separates residential, commercial, and industrial uses (along with a handful of others) from each other, and within those categories, establishes myriad subcategories of uses. GRAY, *supra* note 1, at 37–38. Zoning’s use separation is premised upon the historically accepted notion that many land uses are per se incompatible with other uses. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Though, today, modern technology and performance standards have muted or even eliminated many of these incompatibilities.

²²⁶ See BABCOCK, *supra* note 29, at 3 (“The insulation of the single-family detached dwelling was the primary objective of the early zoning ordinances, and this objective is predominant today. . .”).

²²⁷ Bronin, *supra* note 27, at 729; HIRT, *supra* note 29, at 7 (“In U.S. zoning, the single-family residential district is omnipresent.”); Ellickson, *supra* note 74, at 1622–23.

²²⁸ HIRT, *supra* note 29, at 7.

²²⁹ See Adams-Schoen, *supra* note 32, at 1298 (describing single-family zoning as “the defining feature” of zoning in the United States).

²³⁰ GRAY, *supra* note 1, at 24; Adams-Schoen, *supra* note 32, at 1263–65.

aims of the earliest single-family zoning laws.²³¹ The homebuilding industry endorsed and adopted single-family dwellings' isolation through zoning, which aided home sales to middle- and upper-income white households.²³² Despite early questions about its constitutionality, single-family zoning was approved as a constitutional exercise of the police power and elevated by judicial language, such as the U.S. Supreme Court's vivid comparisons of safe, quiet, family-friendly single-family zones to "parasit[ic]" multi-family housing in *Village of Euclid v. Ambler Realty Co.*²³³ Federal policy requiring homebuyers to reside in single-family homes to qualify for mortgages aided the proliferation of single-family zoning.²³⁴

Present-day single-family districts share several common characteristics. In most districts, the only land use allowed without any discretionary procedure is a single, detached dwelling.²³⁵ Single-family zones impose minimum lot sizes, generous setbacks, and building height limits to limit development bulk and density.²³⁶ The designation of a single-family district turns on the definition of "family," which in most jurisdictions is a group related by blood, marriage, or adoption or a similarly-composed single housekeeping unit, with the occasional exception for small groups of unrelated people.²³⁷ Unlike other residential districts—particularly the multi-family variety—single-family districts are buffered and protected from traffic-generating commercial uses, industrial uses, or major highways, railroads, or airports, thereby shifting the costs of undesirable land uses to residents of less exclusive, lower-amenity

²³¹ See Manville et al., *supra* note 28, at 107 (noting that single-family zoning has "invidious" origins); Adams-Schoen, *supra* note 32, at 1265 (highlighting the racial motivation single-family zoning); Schindler & Zale, *supra* note 107, at 349 (acknowledging how single-family zoning was used to exclude people of color); Wegmann, *supra* note 9, at 115 (underscoring that single-family zoning originated to keep people of color and low-income individuals from living in certain neighborhoods).

²³² Infranca, *supra* note 28, at 676.

²³³ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394–95 (1926); see also Infranca, *supra* note 28, at 685 (noting early questions regarding zoning's validity); HIRT, *supra* note 29, at 166 (highlighting early twentieth century documentation from New York City that described apartments as parasitic); Adams-Schoen, *supra* note 32, at 1294 (discussing the Supreme Court's use of a "pastoral myth" to describe single-family living patterns).

²³⁴ Adams-Schoen, *supra* note 32, at 1273–74; Gupta, *supra* note 32, at 199–200.

²³⁵ Ziegler, *supra* note 132, at 168.

²³⁶ *Id.* at 169.

²³⁷ See, e.g., Adams-Schoen, *supra* note 32, at 1295 (discussing how municipalities can control who cohabitates); Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1, 5 (2020) (describing common definitions of the term "family" as used in zoning codes); Frank S. Alexander, *The Housing of America's Families: Control, Exclusion, and Privilege*, 54 EMORY L.J. 1231, 1257, 1259–60 (2005) (noting the relationship between the concept of the nuclear family and the household unit). Even places that eschew the use of the term "family" tend to include some type of definitional framework for a single household unit. See Alexander, *supra*, at 1264 (describing some factors used by local governments to determine a family for zoning purposes, such as "permanency and stability," "shared activities and responsibilities," and "relationship of nurture and support").

areas.²³⁸ Moreover, single-family zones change little over time and are seldom rezoned to a higher use classification.²³⁹

3. Dimensional and Procedural Requirements

Zoning's dimensional restrictions and procedural requirements also affect housing production. Modern zoning regulations control virtually all manner of building form, including lot sizes, setbacks, building height, design, materials, and exterior features such as parking, landscaping, signage, fencing, and more.²⁴⁰ Furthermore, some zoning regulations use floor-area ratio requirements to limit the total floor area of a building based on lot size.²⁴¹ Zoning's degree of design control can be extensive. For instance, on a typical apartment building, Denver's zoning code regulates everything from upper-story building "step-backs" to minimum floor-to-ceiling heights, fenestration requirements, and private open space.²⁴² Such requirements and limitations can dictate the number of developable units, economic feasibility of a given project, and a community's affordability. For instance, large lot requirements compound single-family housing's exclusionary tendencies by limiting housing production across a given geography and forcing a homebuyer to purchase a large plot of land instead of a smaller, likely less expensive, parcel.²⁴³ Similarly, vehicle parking requirements add development cost to new housing and reduce properties' capacity to provide housing units.²⁴⁴

Beyond dimensional requirements, procedural provisions of zoning also affect housing production.²⁴⁵ Zoning laws place each use or project into one of two procedural paths: (1) administrative (also called ministerial) or (2) discre-

²³⁸ Adams-Schoen, *supra* note 32, at 1269, 1299.

²³⁹ See Ellickson, *supra* note 30, at 401 (discussing the author's findings, based on an analysis of multiple jurisdictions and regions, that single-family zones rarely changed over time; in some localities, well over ninety percent of the land zoned for single-family residences one hundred or more years ago were still zoned for the same use).

²⁴⁰ GRAY, *supra* note 1, at 39–42; Bronin, *supra* note 27, at 730–31; Ziegler, *supra* note 132, at 169.

²⁴¹ Bronin, *supra* note 27, at 730.

²⁴² DENVER, COLO., ZONING CODE § 7.3.3 (2024).

²⁴³ Biber et al., *supra* note 74, at 18; Ellickson, *supra* note 74, at 1623; Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 11–12 (2016).

²⁴⁴ Zasloff, *supra* note 114, at 115; Bronin, *supra* note 27, at 730; HANNAH HOYT, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. & NEIGHBORWORKS AM., MORE FOR LESS?: AN INQUIRY INTO DESIGN AND CONSTRUCTION STRATEGIES FOR ADDRESSING MULTIFAMILY HOUSING COSTS 50 (2020), https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_gramlich_design_and_construction_strategies_multifamily_hoyt_2020_3.pdf [<https://perma.cc/3F9N-WCLJ>].

²⁴⁵ See Bronin, *supra* note 27, at 760–61 (highlighting that public hearing laws, laws requiring local governments to provide a public forum before changing zoning regulations, function as a housing development roadblock); Lemar, *supra* note 46, at 1112–37 (describing generally the implications of public participation in land-use processes); O'Neill et al., *supra* note 196, at 529 (acknowledging the role of procedure on housing constraints).

tionary.²⁴⁶ In an administrative process—often called “by-right” zoning—a landowner need only satisfy objective standards to receive a building permit and construct a project.²⁴⁷ The locality’s administrative staff generally issue these permits.²⁴⁸ Although not entirely immune to delay, the administrative approval process provides some certainty as to the process’s outcome.²⁴⁹ In nearly every U.S. jurisdiction, single-family housing is approved in this manner.²⁵⁰

Other uses, including higher-density housing, typically proceed through a discretionary process.²⁵¹ For example, most jurisdictions lack sufficient multi-family and mixed-use-zoned land to satisfy demand for attached housing, meaning every multi-family or mixed-use project must obtain a rezoning *before* seeking other discretionary approvals.²⁵² Other jurisdictions require special permits—which are reviewed via a public hearing—for multi-family housing.²⁵³ Today, even jurisdictions that, on paper, allow multi-family housing by-right frequently review it through discretionary processes.²⁵⁴ It is also common for higher-density housing developments to require multiple approvals.²⁵⁵ Hallmarks of discretionary processes include public notice to neighboring landowners or the community-at-large, public hearings or other public participation opportunities, and the application of a proposal’s facts to subjective approval criteria.²⁵⁶ Few rules govern these proceedings, and the subjectivity of the approval standards gives a locality leeway to reject projects it does not want and offers leverage for public-benefits negotiations with the developer.²⁵⁷

²⁴⁶ GRAY, *supra* note 1, at 43.

²⁴⁷ Bronin, *supra* note 27, at 729; O’Neill et al., *supra* note 196, at 530.

²⁴⁸ Bronin, *supra* note 27, at 729.

²⁴⁹ Michael Manville, Paavo Monkkonen, Nolan Gray & Shane Phillips, *Does Discretion Delay Development? The Impact of Approval Pathways on Multifamily Housing’s Time to Permit*, 89 J. AM. PLAN. ASS’N 336, 336 (2023). Nevertheless, local customs and the personal characteristics of administrative staff members can significantly impact even a ministerial approval process. See Elmendorf, *supra* note 77, at 88 (discussing how originally standard permitting processes have involved more discretion in certain regions). The delays inherent in administrative processes require further research and a better understanding of how the law can address them.

²⁵⁰ HIRT, *supra* note 29, at 40.

²⁵¹ See *id.* (explaining the discretionary review process for certain proposed developments).

²⁵² Lemar, *supra* note 46, at 1092–93; Ellickson, *supra* note 74, at 1632.

²⁵³ See Wolf, *supra* note 45, at 215 (referencing special use permit requirements for housing developers).

²⁵⁴ See O’Neill et al., *supra* note 196, at 539 (noting that Sacramento allows for, but does not actually perform, ministerial review of proposed units in specific locations).

²⁵⁵ O’Neill et al., *supra* note 155, at 50.

²⁵⁶ Bronin, *supra* note 27, at 729.

²⁵⁷ See Daniel R. Mandelker, *A Comment on Professor Wolf’s Zoning Reformed*, 71 KAN. L. REV. 275, 288 (2022) (noting that procedures established under zoning enabling laws are “incomplete and do not provide for hearings that allow the cross-examination that is essential for accurate fact-finding, and do not require findings of fact or a written decision”); Biber et al., *supra* note 74, at 12 (stating that flexibility in zoning decision-making gives municipalities freedom to reject any project

Discretionary approvals are common in present-day zoning and public participation is “embedded into the housing development process for many projects.”²⁵⁸ Discretionary approvals regularly add heavy costs and delays, and may deter new housing development entirely.²⁵⁹ For some projects, zoning processes can last multiple years from application submittal until building permit issuance, even before construction commences.²⁶⁰ With an uncertain outcome, such a costly and time-consuming process can chill developer interest in pursuing projects and necessitates higher financing costs to justify the risk of undertaking such a development.²⁶¹ In particular, where discretionary approval processes allow for or require public participation, delay is commonplace.²⁶²

Compared to other areas of law, land-use law affords community members, particularly landowners, much greater opportunity for public participation.²⁶³ Where discretionary processes are undertaken, zoning enabling statutes require that local governments provide opportunities for public participation, as do local customs and expectations of elected officials and their constituents.²⁶⁴ Participants in discretionary proceedings are typically socioeconomically advantaged, homeowners, older, and white.²⁶⁵ Because homeowners opposing nearby development face lower barriers to collective action than supporters of new housing, participants in land-use processes are more likely to oppose, rather than support, new housing.²⁶⁶ Although denials are common, even approvals can be Pyrrhic victories where developers must either reduce the size of their projects or undertake mitigation efforts to appease project op-

for any reason and provides leverage for local governments); Ellickson, *supra* note 74, at 1622 (explaining how zoning officials can use their authority to negotiate with developers); Elmendorf & Shanske, *supra* note 30, at 521 (explaining how flexible, discretionary-heavy zoning gives municipalities power to demand more from developers).

²⁵⁸ EINSTEIN ET AL., *supra* note 17, at 81; *see also* HIRT, *supra* note 29, at 147 (describing the prevalence of discretionary zoning processes in America today).

²⁵⁹ GRAY, *supra* note 1, at 61; Elmendorf, *supra* note 77, at 88.

²⁶⁰ *See* O'Neill et al., *supra* note 155, at 26 (noting that, in California, it can take up to two and a half years to receive a permit after applying).

²⁶¹ Manville et al., *supra* note 249, at 337; Glaeser & Gyourko, *supra* note 10, at 7; *see also* PETER HENDEE BROWN, *HOW REAL ESTATE DEVELOPERS THINK: DESIGN, PROFITS, AND COMMUNITY* 194–95 (2015) (“[A] developer’s return on a successful project must not only cover the costs and compensate for the risks associated with that project but must also cover the lost pursuit costs from the other projects that never went ahead.”).

²⁶² EINSTEIN ET AL., *supra* note 17, at 15.

²⁶³ Lemar, *supra* note 46, at 1087; EINSTEIN ET AL., *supra* note 17, at 15.

²⁶⁴ Lemar, *supra* note 46, at 1089, 1092.

²⁶⁵ *See* EINSTEIN ET AL., *supra* note 17, at 37–42, 101 (detailing demographics of zoning meeting attendees and neighborhood defenders).

²⁶⁶ Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81, 90–93 (2011); *see also* Ellickson, *supra* note 30, at 417; EINSTEIN ET AL., *supra* note 17, at 106.

ponents, thereby diverting resources from additional housing production.²⁶⁷ Moreover, beyond simply affording participation opportunities in the local development-approval process, state laws routinely allow appeals that might further delay or halt projects.²⁶⁸ It is not uncommon for judicial appeals to kill a project merely as a result of delay.²⁶⁹

Scholars have identified a direct, inverse relationship between the number of dimensional and procedural regulations imposed on multi-family housing and the amount produced in a given community.²⁷⁰ Long approval timelines increase developers' finance, insurance, and maintenance costs to hold property, and they also increase design costs.²⁷¹ Lengthy processes also increase developers' risk, exposing them to changing markets, financing assumptions, and project costs.²⁷² Particularly for small-scale developers, lengthy procedures and public opposition create significant barriers to entry.²⁷³ Furthermore, localized opposition regularly drives developers to seek zoning approvals, particularly for multi-family housing, in locations farther away from existing residential areas, thus contributing to sprawl, inefficient development patterns, and multi-family housing occupants living further from job opportunities.²⁷⁴ Unsurprisingly, these processes can be more impactful and exclusionary than other zoning restrictions.

4. Increasing Restrictiveness

In recent decades, zoning and other land-use laws have become more restrictive.²⁷⁵ Scholars have observed increased stringency in both the dimen-

²⁶⁷ See Mandelker, *supra* note 257, at 288 (noting that project size reductions are typical outcomes of public hearings); Lemar, *supra* note 46, at 1122 (discussing how project mitigation takes away from additional housing production).

²⁶⁸ See EINSTEIN ET AL., *supra* note 17, at 26–27.

²⁶⁹ See ROTHSTEIN, *supra* note 21, at 126 (providing an example of a housing development project that did not proceed because of a lengthy appeals process).

²⁷⁰ See EINSTEIN ET AL., *supra* note 17, at 66–67; O'Neill et al., *supra* note 155, at 28 (discussing the results of a California report that found that fewer reviews resulted in faster home construction timelines).

²⁷¹ See Manville et al., *supra* note 249, at 338 (describing the impact of mitigation requests and negotiations on development costs).

²⁷² *Id.*; see also Lemar, *supra* note 46, at 1133 (noting how unpredictable processes increase developers' risk because they take on predevelopment costs); BROWN, *supra* note 261, at 198 (demonstrating the connection between speed of project development and developer risk).

²⁷³ Mangin, *supra* note 20, at 104.

²⁷⁴ See Ellickson, *supra* note 30, at 406–07 (discussing these effects in the context of a Palo Alto case study).

²⁷⁵ See Joseph Gyourko, Jonathan Hartley & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index* 34–35 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26573, 2019) (detailing increased stringency within local codes among respondents to a national survey); William A. Fischel, *The Rise of the Homevoters:*

sional and procedural standards of zoning laws, in both suburban and urban places.²⁷⁶ Whereas early zoning removed discretion from the development approval process, discretionary procedures like those discussed above are routine today.²⁷⁷ Tied to localities' increasing need for resources to offset reductions in tax revenue and state and federal funding, discretionary processes empower localities to negotiate for public benefits from developers.²⁷⁸ Despite scholarly predictions of greater state intervention to limit zoning's restrictiveness, those interventions have either failed to materialize or resulted in more onerous development-approval processes.²⁷⁹

5. Zoning's Impenetrability

Present-day zoning review standards afford localities great discretion.²⁸⁰ Whereas early zoning decisions involving subjective decision-making drew federal and state constitutional scrutiny,²⁸¹ mid-twentieth-century cases validated "fairly debatable" zoning decisions, even those entailing subjective judgments.²⁸² Therefore, today, basic zoning classifications, including use and di-

How the Growth Machine Was Subverted by OPEC and Earth Day, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 13, 15–16 (Benjamin J. Keys & Lee Anne Fennell eds., 2017) (observing increased restrictiveness in zoning since the 1970s).

²⁷⁶ See Gyourko et al., *supra* note 275, at 34–35 ("[M]any (but certainly not all) local regulatory regimes were strengthened over the past decade."); THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2 (2016) (stating that housing development barriers, including local regulations, have "intensified."); Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENV'T L. 217, 224 (2018) (observing increased development regulation in urban locations); Schleicher, *supra* note 92, at 1674 (recognizing that zoning is more strict now than thirty years ago); Lemar, *supra* note 201, at 1553 (observing an increase in the use of neighborhood conservation districts in pre-developed urban areas as a substitute for private covenant controls).

²⁷⁷ Ellickson, *supra* note 74, at 1622; Elmendorf, *supra* note 77, at 88; EINSTEIN ET AL., *supra* note 17, at 81; HIRT, *supra* note 29, at 147.

²⁷⁸ Elmendorf & Shanske, *supra* note 30, at 520–21.

²⁷⁹ See Elmendorf, *supra* note 77, at 82 (highlighting the rise of state-level requirements and their modern function of hindering development); Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 294–95 (2019) (noting that increased state intervention leads to more complex regulatory schemes).

²⁸⁰ See Mangin, *supra* note 20, at 100 (stating that municipalities can exploit bulk limits to manipulate density); Adams-Schoen, *supra* note 32, at 1275–76 (discussing how the Supreme Court enabled localities "nearly unfettered discretion to regulate the uses of property within their boundaries").

²⁸¹ See, e.g., *Welch v. Swasey*, 214 U.S. 91, 105 (1909) (resolving the issue of whether aesthetic regulation is violative of due process principles).

²⁸² *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926); see also *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 817 (1984) (holding city's aesthetic justification sufficient to support speech regulation); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (holding a local law defining "family" based on the relatedness of household members to be constitutional on the grounds that it advances the aesthetic interests of the community); *Berman v. Parker*, 348

mensional limitations, and single-family zoning itself, are largely unassailable.²⁸³

Even in cases involving federal civil rights, local zoning officials receive broad leeway. Without direct evidence of purposeful discrimination, zoning with discriminatory consequences is constitutionally permissible and subjective aesthetic desires are sufficient to overcome free speech challenges.²⁸⁴ Prevailing law makes it nearly “impossible to disentangle [localities’] motives and to prove” unconstitutional racial discrimination.²⁸⁵ Large-lot single-family zoning is justifiable because it protects property values, irrespective of its discriminatory impact or even an underlying, unspoken discriminatory motive.²⁸⁶ And federal cases limit civil rights claimants’ standing in zoning cases by, for example, prohibiting home seekers outside of a locality from challenging its decision-making.²⁸⁷ There is, simply put, a high bar to invalidate zoning.

The impenetrability of zoning is hardened by localities’ occasional, yet high-profile, failure to heed state or federal legislative and judicial mandates.²⁸⁸ Localities may exploit loopholes to evade the spirit of legislative

U.S. 26, 33 (1954) (confirming that the police power includes the power to regulate on aesthetic matters).

²⁸³ See Boudreaux, *supra* note 243, at 27 (noting that courts’ deference to local governments’ decision-making about zoning renders legal challenges practically moot); Kenneth A. Stahl, *Reliance in Land Use Law*, BYU L. REV. 949, 984–85 (2013) (highlighting courts’ willingness to uphold zoning ordinances).

²⁸⁴ See, e.g., ROTHSTEIN, *supra* note 21, at 54 (describing the permissibility of zoning that produces a disparate impact); Brian J. Connolly, *Government Regulation of Art and Architecture*, in LOCAL GOVERNMENT, LAND USE, AND THE FIRST AMENDMENT 77, 82–84 (Brian J. Connolly ed., 2017) (discussing the validity of aesthetic justifications in land-use law).

²⁸⁵ ROTHSTEIN, *supra* note 21, at 53.

²⁸⁶ See Zasloff, *supra* note 114, at 115 (noting potential “race-neutral justification[s]” that cities may use to preserve single-family zoning); ROTHSTEIN, *supra* note 21, at 53 (discussing the difficulty in separating economic motives from racial prejudice in passing single-family zoning ordinances).

²⁸⁷ See Briffault, *supra* note 182, at 107 (summarizing a Supreme Court case that held outsiders could not challenge zoning laws in a particular municipality because they lacked a particularized injury (citing *Warth v. Seldin*, 422 U.S. 490, 507–08 (1975))).

²⁸⁸ See, e.g., Liam Dillon, *This Exclusive Town Might Be California’s Biggest Violator of Affordable Housing Law*, L.A. TIMES (Apr. 18, 2023), <https://www.latimes.com/homeless-housing/story/2023-04-18/coronado-california-affordable-housing-law> [<https://perma.cc/R78E-U6CD>] (describing how Coronado, California has openly defied state housing law that requires the city to make available affordable housing to certain workers); Taryn Luna, Hannah Wiley & Hannah Fry, *State Sues O.C. Beach City Over Its Ban on Some Housing Types; Legal Action Is the Latest Clash Between Huntington Beach and Newsom*, L.A. TIMES (Mar. 10, 2023), https://enewspaper.latimes.com/infinity/article_share.aspx?guid=624164e1-21a7-4e6b-9c02-68bd924980fa [<https://perma.cc/98CV-Y2YL>] (summarizing California’s lawsuit against Huntington Beach, California for a local law that stifles a state-wide housing initiative); Ashley Balcerzak, *Towns Across NJ Are Suing Murphy Over Affordable Housing. Here’s Why*, NORTHJERSEY.COM (Sept. 14, 2022), <https://www.northjersey.com/story/news/state/2022/09/14/nj-affordable-housing-lawsuit-phil-murphy/69494275007/> [<https://perma.cc/KQ37-JB2B>] (noting that some New Jersey municipalities suing to reinstate the New Jersey Council on Affordable Housing never complied with a mandate to create more housing for lower-income families).

mandates.²⁸⁹ They may even sue states to delay or entirely avoid complying with preemptive, pro-housing laws, as a group of southern California municipalities did (successfully) in response to that state's zoning reform legislation.²⁹⁰ In localities with anti-development sentiment, absent an adverse judicial ruling, elected officials have little political incentive to comply with preemptive legislative mandates.²⁹¹ Judicial mandates suffer the same problems. For example, after the Supreme Court invalidated race-based zoning, some localities flouted its ruling for decades.²⁹²

B. Recent Reforms

Having addressed these five important features of zoning, this Section turns to zoning reforms. This Section describes these state and local reforms, with particular attention to single-family zoning reforms.²⁹³

After its adoption in the early twentieth century, zoning went mostly unchanged for decades. Although some jurisdictions occasionally undertook reform to allow additional housing, earlier attempts at reform avoided changes to single-family districts.²⁹⁴ Moreover, local control of zoning has, by and large, been dogma and largely viewed as politically untouchable by state legisla-

²⁸⁹ See Biber et al., *supra* note 74, at 59 (observing that when the California legislature relaxed standards to construct ADUs, local governments added their own additional regulations to curb ADU construction); see also Elmendorf, *supra* note 77, at 126–27 (noting the resistant response of local governments to California's ADU policy).

²⁹⁰ Ruling on Verified First Amended Petition for Writ of Mandate, *City of Redondo Beach v. Bonta*, No. 22STCP01143 (Cal. Super. Ct. Apr. 22, 2024).

²⁹¹ See Sterk, *supra* note 76, at 1615 (noting that local governments with constituents resistant to development can fight housing projects with few consequences). This pattern has reared its head again in response to the legislative reforms discussed *infra*. See, e.g., Irvin Dawid, *Federal Court Dismisses Huntington Beach Housing Lawsuit*, PLANETIZEN (Nov. 26, 2023), <https://www.planetizen.com/news/2023/11/126419-federal-court-dismisses-huntington-beach-housing-lawsuit> [<https://perma.cc/86R6-BCG5>] (detailing a California city's lawsuit intended to exempt the city from state housing regulations that was ultimately dismissed by a federal court). In some jurisdictions that flout state mandates, local elected officials might well gain favor with their constituents for ignoring state mandates or court rulings.

²⁹² See ROTHSTEIN, *supra* note 21, at 46–47 (discussing municipalities that continued to use racially-divided zoning maps after the Supreme Court held such racial division unconstitutional in *Buchanan v. Waverly*). Even in jurisdictions where a plaintiff prevails against the municipality, the jurisdiction may continue to flout judicial rulings or force a plaintiff to return back to court to challenge a series of adverse decisions. See BABCOCK, *supra* note 29, at 13.

²⁹³ See *infra* notes 294–342 and accompanying text.

²⁹⁴ See Manville et al., *supra* note 28, at 108 (“Even bold zoning reform usually steers clear of [single-family districts].”); Infranca, *supra* note 28, at 675–76 (highlighting the preservation of single-family districts and distaste for multifamily housing); Ziegler, *supra* note 132, at 184–85 (describing pro-housing zoning reform efforts, such as reductions in minimum lot sizes, in the early 1980s). See generally Ellickson, *supra* note 30 (describing generally the unchanging, “straitjacket” nature of single-family zoning).

tures.²⁹⁵ Before the first known single-family zoning reform in 2019, legislative responses to unaffordable housing trended toward limited supply-side measures such as allowing ADUs in single-family zones, rezoning individual properties for multi-family or mixed-use development, allowing increased building heights, or reducing minimum lot sizes and setbacks.²⁹⁶ Some jurisdictions also identified underutilized government-owned properties for housing construction.²⁹⁷ Although well-intentioned, these interventions failed to produce sufficient housing to offset demand increases.²⁹⁸

Recently, more aggressive reforms have gained prominence. The U.S. housing crisis is proving an “inflection point in the relationship of state and local governments,” as states increasingly preempt local land-use authority to encourage production and preservation of affordable housing.²⁹⁹ These statewide reforms preempt or displace local regulation, and streamline—rather than add to—approval processes.³⁰⁰ No such effort has been as sweeping and attention-grabbing as state legislative efforts to preempt single-family zoning.³⁰¹ And some local governments, like Minneapolis, have also adopted zoning changes in furtherance of more affordable forms of housing.³⁰²

²⁹⁵ See Stahl, *supra* note 183, at 1209 (“While formally, the state has the power to remove zoning authority from the municipalities at its pleasure, the power to zone has always been considered a presumptively local power . . .”).

²⁹⁶ See Stacy et al., *supra* note 92, at 2927 (identifying ninety-six deregulatory reforms in jurisdictions located throughout several major U.S. metropolitan regions).

²⁹⁷ See *Use of Publicly Owned Property for Affordable Housing*, LOCAL HOUS. SOLS. (May 17, 2021), <https://localhousingsolutions.org/housing-policy-library/use-of-publicly-owned-property-for-affordable-housing/> [<https://perma.cc/X4WM-JZSA>] (listing examples of such policies).

²⁹⁸ See Pendall et al., *supra* note 27, at 63 (noting that regulations did not change quickly enough to meet growth needs).

²⁹⁹ Edward J. Sullivan, *Will Housing Become the Inflection Point for Realignment of State Land Use Structures?*, 58 IDAHO L. REV. 495, 496 (2022). Even the federal government has considered legislation encouraging more multi-family development. See AURAND ET AL., *supra* note 6, at 24 (discussing federal legislation, such as the Yes in My Backyard Act, that is focused on reducing housing shortages).

³⁰⁰ SHAZIA MANJI ET AL., TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY & URB. INST., INCENTIVIZING HOUSING PRODUCTION: STATE LAWS FROM ACROSS THE COUNTRY TO ENCOURAGE OR REQUIRE MUNICIPAL ACTION 14 (2023), <https://turnercenter.berkeley.edu/wp-content/uploads/2023/02/State-Land-Use-Report-Final-1.pdf> [<https://perma.cc/6YVZ-Y6T7>]; see also Infranca, *supra* note 28, at 667–69 (listing statewide zoning reforms).

³⁰¹ See, e.g., Seth Klamann & Nick Coltrain, *Single-Family Zoning Rules Would Change Across Colorado Under Gov. Jared Polis’ Plan to Spark Denser Development*, DENVER POST, <https://www.denverpost.com/2023/03/22/single-family-colorado-housing-affordability-polis-land-use/> [<https://perma.cc/ST8P-EGPB>] (Mar. 22, 2023) (headlining single-family zoning reform in state legislative package containing other proposed reforms); David Gutman, *WA House Passes Bill Banning Single-Family Zoning*, SEATTLE TIMES (Mar. 7, 2023), <https://www.seattletimes.com/seattle-news/politics/wa-house-passes-bill-banning-single-family-zoning/> [<https://perma.cc/C857-D4Y4>] (headlining single-family zoning reform while burying information about other zoning reforms passed by the state legislature); Jon Healey & Matthew Ballinger, *What Just Happened with Single-Family Zoning in California?*, L.A. TIMES (Sept. 17, 2021), <https://www.latimes.com/homeless-housing/story/2021-09->

By mid-2024, six states—California,³⁰³ Maine,³⁰⁴ Montana,³⁰⁵ Oregon,³⁰⁶ Vermont,³⁰⁷ and Washington³⁰⁸—had adopted legislation preempting single-family zoning.³⁰⁹ Several others have introduced, but not passed, similar bills.³¹⁰ These reforms share several characteristics. Each allows multiple primary, middle-housing dwelling units per residential lot, preempting local regulations that require otherwise. The number of units permitted per lot ranges from two in California,³¹¹ Maine,³¹² Montana,³¹³ and Vermont,³¹⁴ and up to four in Oregon³¹⁵ and Washington.³¹⁶ Washington allows up to six units per lot in large cities, in areas near public transit, or where the project provides income-restricted affordable units.³¹⁷ Every reform bill allows these middle-housing units by-right, avoiding discretionary approval processes.³¹⁸ Each bill also prohibits localities from using other requirements—such as dimensional standards or procedural requirements—to thwart middle-housing construction.

17/what-just-happened-with-single-family-zoning-in-california [https://perma.cc/8MLP-6VX7] (headlining single-family zoning reforms among others passed by state legislature).

³⁰² See, e.g., Mervosh, *supra* note 35 (describing Minneapolis's zoning reforms); Joshua Fechter, *Austin Will Try Again to Tame Its Housing Affordability Crisis with Zoning Reforms. Can It Do It This Time?*, TEX. TRIB., <https://www.texastribune.org/2023/09/19/austin-housing-affordability-zoning/> [https://perma.cc/LX7T-7859] (Sept. 20, 2023) (describing Austin, Texas's proposed zoning reforms); Seairra Sheppard, *This City Removed Its Parking Mandates by Changing One Word*, NEXT CITY (Sept. 13, 2023), <https://nextcity.org/urbanist-news/this-town-removed-its-parking-mandates-by-changing-one-word> [https://perma.cc/4E6C-A94D] (describing Norman, Oklahoma's zoning reforms).

³⁰³ S.B. 9, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

³⁰⁴ H.B. 1489, 130th Leg., 2d Reg. Sess. (Me. 2022).

³⁰⁵ S.B. 323, 68th Leg., Reg. Sess. (Mont. 2023).

³⁰⁶ H.B. 2001, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

³⁰⁷ S.B. 100, 2023–2024 Gen. Assemb., Reg. Sess. (Vt. 2023).

³⁰⁸ H.B. 1110, 68th Leg., Reg. Sess. (Wash. 2023).

³⁰⁹ As of this writing, both the Montana and California single-family zoning reforms face an uncertain legal future. In December 2023, a state district court judge preliminarily enjoined enforcement of Montana's single-family zoning reform legislation. *Decision and Order Re: Plaintiff's Motion for Temporary Restraining Order/Preliminary Injunction and Preliminary Injunction, Montanans Against Irresponsible Densification v. State*, No. DV 23-1248 (D. Mont. Dec. 29, 2023). That ruling is on an interlocutory appeal. In April 2024, a state superior court judge invalidated California's single-family zoning reform legislation as applied to five of the state's charter cities. *Ruling on Verified First Amended Petition for Writ of Mandate, City of Redondo Beach v. Bonta*, No. 22STCP01143 (Cal. Super. Ct. Apr. 22, 2024).

³¹⁰ See, e.g., S.B. 1161, 56th Leg., 1st Reg. Sess. (Ariz. 2023); S.B. 213, 74th Gen. Assemb., 1st Reg. Sess. (Colo. 2023); S.B. 7574, 2021-2022 Leg., Reg. Sess. (N.Y. 2022).

³¹¹ S.B. 9, 2021–2022 Leg., Reg. Sess. § 1 (Cal. 2021).

³¹² H.B. 1489, 130th Leg., 2d Reg. Sess. § 10 (Me. 2022).

³¹³ S.B. 323, 68th Leg., Reg. Sess. § 1 (Mont. 2023).

³¹⁴ S.B. 100, 2023–2024 Gen. Assemb., Reg. Sess. § 2 (Vt. 2023).

³¹⁵ H.B. 2001, 80th Leg. Assemb., Reg. Sess. § 2 (Or. 2019).

³¹⁶ H.B. 1110, 68th Leg., Reg. Sess. § 3 (Wash. 2023).

³¹⁷ *Id.*

³¹⁸ S.B. 9, 2021–2022 Leg., Reg. Sess. § 1 (Cal. 2021); H.B. 1489, 130th Leg., 2d Reg. Sess. § 10 (Me. 2022); Mont. S.B. 323 § 1; Vt. S.B. 100 § 2; Or. H.B. 2001 § 2; Wash. H.B. 1110 § 3.

Examples of such safeguards include California's limit on the amount of off-street parking that may be required for duplexes³¹⁹; Maine's preemption of zoning rules imposing greater restrictions on multiple-unit, as compared with single-unit, dwellings;³²⁰ and Montana's prohibition against discretionary design review requirements.³²¹ Each state that has adopted single-family zoning reform also allows ADUs on residential lots.³²²

These bills' application varies. Oregon and Washington imposed single-family zoning reform only in municipalities located within urban areas, and they permit more dwelling units per lot in larger cities while allowing duplexes in smaller cities.³²³ Other states have limited reforms to incorporated municipalities or areas served by public water and sewer.³²⁴ Only Maine and Vermont permit duplexes on single-family lots statewide.³²⁵

Although these reforms preempt local zoning, they do not affect many other local regulations. For instance, none of the reform bills preempt historic preservation laws that might prohibit exterior changes to existing single-family residences; Montana's reforms specifically allow design review in historic districts.³²⁶ None of the reform bills override existing covenants that contradict single-family zoning reform; California now allows modification of covenants that prohibit income-restricted housing, and Oregon and Washington prohibit new covenants that conflict with their respective reforms.³²⁷

Some of these states have paired single-family zoning reform with other changes. All of these states allow middle housing to be divided into multiple ownership under their respective condominium laws.³²⁸ California's legislature recently approved several preemptive measures to address its longstanding housing crisis. California's single-family zoning reform also establishes a by-right process to split lots, to allow landowners to sell individual middle-

³¹⁹ Cal. S.B. 9 § 1.

³²⁰ Me. H.B. 1489, § 10.

³²¹ S.B. 407, 68th Leg., Reg. Sess. § 1 (Mont. 2023).

³²² CAL. GOV'T CODE § 66317 (West 2024); ME. REV. STAT. ANN. tit. 30-A, § 4364-B (2024); S.B. 528, 68th Leg., Reg. Sess. § 1 (Mont. 2023); VT. STAT. ANN. tit. 24, § 4412(1)(E) (2024); OR. REV. STAT. § 197A.425(1)(a) (2024); H.B. 1337, 68th Leg., Reg. Sess. § 1 (Wash. 2023).

³²³ Or. H.B. 2001 § 2; Wash. H.B. 1110 § 3.

³²⁴ Cal. S.B. 9 § 1 (limiting reforms to incorporated municipalities); S.B. 323, 68th Leg., Reg. Sess. § 1 (Mont. 2023) (limiting reforms to incorporated municipalities); S.B. 100, 2023–2024 Gen. Assemb., Reg. Sess. § 2 (Vt. 2023) (limiting reforms to areas with public water and sewer).

³²⁵ Me. H.B. 1489 § 10; Vt. S.B. 100 § 2.

³²⁶ Mont. S.B. 407 § 1.

³²⁷ Assemb. B. 721, 2021–2022 Leg., Reg. Sess., § 2 (Cal. 2021); Or. H.B. 2001 § 12; Wash. H.B. 1110 § 12.

³²⁸ CAL. CIV. CODE §§ 4000–6150 (West 2024); ME. REV. STAT. ANN. tit. 33, §§ 1601–101 to -118 (2024); MONT. CODE ANN. §§ 70-23-301 to -309 (2024); OR. REV. STAT. §§ 100.005–.990 (2024); VT. STAT. ANN. tit. 27, §§ 1301–1329 (2024); WASH. REV. CODE. §§ 64.34.005–.950 (2024).

housing units separately.³²⁹ Provided income-restricted affordable units are included, California now allows multi-family housing by-right on residential lots in localities that have not met their mandatory housing planning goals, transit-adjacent locations, and commercially zoned areas.³³⁰ California also modified review standards for projects containing income-restricted units and eliminated minimum parking requirements near transit stations.³³¹ Montana now allows multi-family housing on any commercially zoned property in the state's larger municipalities and, although not a zoning reform, requires localities to plan for housing needs.³³² Still, other states have passed different laws encouraging affordable housing production. For example, in 2023, Florida adopted a law requiring localities to allow multi-family housing by-right in any commercial, industrial, or mixed-use zone, provided that forty percent of a project's units are income-restricted.³³³ In 2024, Colorado adopted a law requiring localities served by bus and rail transit to plan and zone for multi-family housing.³³⁴ And Massachusetts now requires transit-served communities in the Boston area to maintain multi-family zoning districts allowing at least fifteen dwelling units per acre in proximity to transit stations.³³⁵

Furthermore, by the end of 2023, twenty cities in states around the country had also abolished single-family zoning.³³⁶ Local reforms largely follow the blueprint of state reforms. For instance, Minneapolis's trailblazing reform allows up to three dwelling units on properties previously zoned for a single unit.³³⁷ Similarly, Charlotte allows up to three—and in some cases, four—units on lots where only single-family dwellings were previously allowed.³³⁸ Portland, Oregon, allows up to four units per lot, or up to six units if two are provided as deed-restricted affordable units for lower-income households.³³⁹ Other

³²⁹ Cal. S.B. 9 § 2.

³³⁰ S.B. 35, 2017–2018 Leg., Reg. Sess. § 3 (Cal. 2017).

³³¹ S.B. 330, 2019–2020 Leg., Reg. Sess. (Cal. 2019); Assemb. B. 2097, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

³³² S.B. 245, 68th Leg., Reg. Sess. (Mont. 2023); S.B. 382, 68th Leg., Reg. Sess. (Mont. 2023).

³³³ S.B. 102, 2023 Leg., Reg. Sess. § 2(c)(7) (Fla. 2023).

³³⁴ H.B. 1313, 74th Gen. Assemb., 2d Reg. Sess. (Colo. 2024).

³³⁵ H.B. 5250, 191st Gen. Ct., Reg. Sess. § 18 (Mass. 2021).

³³⁶ See Cantong et al., *supra* note 37 (enumerating the list of cities that have adopted reforms).

³³⁷ Mervosh, *supra* note 35.

³³⁸ See Alexandria Sands, *No Mad Dash to Build Duplexes in Charlotte Despite New Rules—and Years of Bickering*, AXIOS CHARLOTTE (Aug. 14, 2023), <https://charlotte.axios.com/336698/duplexes-triplexes-charlotte-development-udo-bickering/> [<https://perma.cc/DU4V-PDAX>] (discussing project proposals in Charlotte, some of which are for quadruplexes).

³³⁹ Laura Bliss, *How Portland's Landmark Zoning Reform Could Work*, BLOOMBERG (Aug. 13, 2020), <https://www.bloomberg.com/news/articles/2020-08-13/how-portland-dethroned-the-single-family-home> [<https://perma.cc/HDJ8-EZGG>].

local reforms have addressed minimum lot-size reductions, floor-area ratio increases, and parking reductions.³⁴⁰

Although these reforms have upended the longstanding dominance of single-family zoning, when considered in light of the features of zoning discussed in Section II.A, they do little to address other regulatory constraints on housing production. For example, although California exempted middle housing and some income-restricted housing developments from the state's environmental review process,³⁴¹ its reforms have left other environmental, historic preservation, and exactions laws untouched. Similarly, although reforms have tended to include prohibitions on restrictive dimensional requirements and have allowed middle housing by-right—except Florida's streamlining of multi-family housing approvals and Montana's allowance for multi-family housing in commercial zones—they have avoided preempting or eliminating onerous dimensional or procedural requirements for multi-family housing. Moreover, although reforms placing housing applications under ministerial review eliminate some avenues for judicial challenges, recent state and local reforms largely avoid changes to judicial review of zoning decisions, both for project opponents and applicants.³⁴² Thus, although recent single-family zoning reforms are significant given their historical and geographical context, the changes are far more incremental when considered against the broader land-use regulatory context.

C. Why Single-Family Zoning Reform?

In 2018, as the Minneapolis City Council debated the merits of the city's single-family zoning reform project, councilmembers repeatedly referred to the city's urgent need for affordable housing and a desire to rectify its high degree of racial segregation.³⁴³ In response to Governor Gavin Newsom's signing of California's single-family zoning reform bill, a sponsor justified the bill by

³⁴⁰ Cantong et al., *supra* note 37. For a description of what is included in each listed reform type, see Joshua Cantong, Stephen Menendian & Samir Gambhir, *Zoning Typology—Reform Type*, OTHER-ING & BELONGING INST., <https://belonging.berkeley.edu/zoning-typology-reform-type> [<https://perma.cc/7S9N-K9PS>] (Nov. 13, 2023).

³⁴¹ S.B. 10, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

³⁴² One notable exception is California, which amended the California Environmental Quality Act to exempt certain affordable housing projects from the act's purview, and thus eliminated the prospect of citizen suits to block such projects. See Assemb. B. 1449, 2023–2024 Leg., Reg. Sess. (Cal. 2023).

³⁴³ See, e.g., *Minneapolis 2040 Comprehensive Plan: Hearing on Minneapolis 2040 Comprehensive Plan Before the Minneapolis City Council Comm. of the Whole*, 2018 Minneapolis City Council (2018) (statements of various city council members), <https://lims.minneapolismn.gov/MarkedAgenda/COW/688> [<https://perma.cc/2BEY-EPJY>]; see also Jerusalem Demsas, *The Culture War Tearing American Environmentalism Apart*, THE ATLANTIC (Jan. 18, 2024), <https://www.theatlantic.com/ideas/archive/2024/01/housing-shortage-minneapolis-environmentalism/677165/> [<https://perma.cc/3MYC-RLGE>] (“The stated goals of Minneapolis 2040 included housing affordability and racial equity . . .”).

saying “California needs more housing, and we need it now.”³⁴⁴ Other reformers cite similar reasons for their positions. Nonetheless, despite this enthusiastic support for single-family zoning reform, as Part I asserts, scant evidence suggests it will work—or work expediently—to resolve the housing crisis. Moreover, these reforms’ results thus far are underwhelming. Why, then, do states and localities continue to adopt single-family zoning reform when little evidence indicates that it will address advocates’ concerns? This question is particularly salient given that other reforms, including those described in Part IV, stand better chances of yielding outcomes more consistent with reformers’ goals. This Section begins by discussing the “growth machine” political theory as a way of explaining zoning reforms.³⁴⁵ It then considers the “homevoter hypothesis” to explain the risk-averse nature of homeowners.³⁴⁶ This is followed by an analysis of the politics of decisions on individual land-use applications.³⁴⁷ Finally, this Section analyzes the “zoning straitjacket” theory as a form of resistance against single-family zoning reforms.³⁴⁸

Several theories of politics attempt to explain land-use regulation and decision-making. In 1976, Harvey Molotch introduced the “growth machine” theory, holding that cities’ zoning decisions are guided by a landowning elite interested in maximizing the use of property for financial benefit.³⁴⁹ Per Molotch, although they are underrepresented among the local population at-large, these parties have the greatest financial stake in local zoning decisions, and are therefore likelier than others to participate in local processes to encourage more permissive zoning.³⁵⁰ This theory readily explained rapid urban growth from the nineteenth century into the mid-twentieth century; Molotch, however, also observed that antigrowth sentiment came to dominate localities “where volunteer reform movements have a realistic constituency—a leisured and sophisticated middle class with a tradition of broad-based activism, free from an entrenched machine.”³⁵¹

In the early 2000s, economist William Fischel offered another theory, focused principally on suburbs that exhibited the antigrowth sentiment identified

³⁴⁴ Press Release, Gavin Newsom, Governor of California, Governor Newsom Signs Historic Legislation to Boost California’s Housing Supply and Fight the Housing Crisis (2021), <https://www.gov.ca.gov/2021/09/16/governor-newsom-signs-historic-legislation-to-boost-californias-housing-supply-and-fight-the-housing-crisis/> [<https://perma.cc/MTA3-HDAE>].

³⁴⁵ See *infra* notes 349–351 and accompanying text.

³⁴⁶ See *infra* notes 352–364 and accompanying text.

³⁴⁷ See *infra* notes 365–370 and accompanying text.

³⁴⁸ See *infra* notes 371–379 and accompanying text.

³⁴⁹ Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309, 310–11 (1976).

³⁵⁰ *Id.* at 314.

³⁵¹ *Id.* at 327.

by Molotch. Fischel called his theory the “homevoter hypothesis.”³⁵² Fischel observed that a home is typically a household’s greatest asset and homeowners cannot diversify this investment.³⁵³ Various external factors, including government services and nearby land uses, are capitalized into a home’s value.³⁵⁴ Without insurance against home-value loss, homeowners are particularly risk-averse to anything that might diminish their home’s value.³⁵⁵ For them, risk to home values could include everything from nuisance-producing uses to groups of people that they perceive might devalue the community.³⁵⁶ These same homeowners exercise greater control in local government, as they vote at rates far higher than renters and are much more likely to serve in local government.³⁵⁷ Per Fischel, this dynamic explains the proliferation of small suburban municipalities, each enabling small groups of homeowners to dominate land-use decision-making.³⁵⁸ Homeowner-dominated localities use restrictive zoning to protect owners’ values by minimizing the risk that new development, such as an apartment, might impose a nuisance, strain the delivery of local public goods, or simply increase the supply of housing and thus decrease home prices.³⁵⁹ Fischel’s hypothesis was confirmed by empirical work demonstrating that, when compared with renters, homeowners are likelier to participate in zoning proceedings and oppose new projects in their neighborhoods.³⁶⁰

Although Fischel’s work explains suburban land-use politics, scholars have since observed that even large cities, which once exhibited growth-machine characteristics, have adopted exclusionary policies.³⁶¹ Vicki Been explains this phenomenon as follows: because Americans are moving less frequently and renters must increasingly compete for apartments in a low-inventory market, urban renters have become skeptical that new development will moderate rent increases.³⁶² Urban renters observe that new apartment buildings in their neighborhoods command higher rents and fear they may

³⁵² See generally WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* (2001).

³⁵³ *Id.* at 1, 11.

³⁵⁴ *Id.* at 5–6, 11.

³⁵⁵ *Id.* at 268–69.

³⁵⁶ *Id.* at 271.

³⁵⁷ *Id.* at 80; see also Ellickson, *supra* note 30, at 415–16.

³⁵⁸ See FISCHEL, *supra* note 352, at 211–15; see also Biber et al., *supra* note 74, at 15 (“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.”).

³⁵⁹ See Biber et al., *supra* note 74, at 5.

³⁶⁰ See EINSTEIN ET AL., *supra* note 17, at 101.

³⁶¹ See Been, *supra* note 276, at 219–21 (noting how the line between restrictive suburbs and growing cities is blurring as cities adopt restrictive, suburb-like zoning schemes); see also *supra* notes 86–92 and accompanying text (discussing restrictive zoning in major metropolitan areas).

³⁶² See Been, *supra* note 276, at 243.

foretell additional new, higher-end development.³⁶³ As a result, these urban dwellers pressure their elected representatives to suppress new housing construction, producing restrictions similar to those observed by Fischel.³⁶⁴

Roderick Hills and David Schleicher supplemented these theories by studying the politics of decisions on individual land-use applications. According to Hills and Schleicher, because local governments make land-use decisions seriatim as they receive development applications, new construction's benefits are dispersed across geography, time, and population.³⁶⁵ But its harms—real or perceived—are geographically concentrated around specific projects.³⁶⁶ Therefore, nearby residents—who face comparatively lower barriers to collective action than potential supporters—are motivated to vociferously oppose the project.³⁶⁷ Although developers are generally likely to support pro-development interests, without a clear and direct business impact to them, they are typically insufficiently motivated to participate in individual zoning decisions.³⁶⁸ Hills and Schleicher also blame the lack of locally-organized political parties for exacerbating this problem, as the vacuum of party leadership makes local legislatures reliant on aldermanic privilege, thus leaving decision-makers beholden to homeowners in the affected district.³⁶⁹ Hills and Schleicher propose to eliminate these problems with a “zoning budget,” whereby a locality would offset downzoning (that is, reductions in use or density permissions) with increased development rights elsewhere in the same jurisdiction.³⁷⁰

Robert Ellickson builds on these theories in observing single-family zoning's unique durability, dubbing it the “zoning straitjacket.”³⁷¹ Ellickson ob-

³⁶³ See *id.* at 244. Been's theory about the perceptions of urban renters was confirmed in empirical survey research conducted among San Francisco voters, where the author found significant opposition to new development among renters in expensive jurisdictions. See Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473, 483 (2018). Although renters might perceive that new housing supply increases prices, the evidence on filtering suggests that their perceptions are incorrect. See Been, *Supply Skepticism*, *supra* note 98, at 34.

³⁶⁴ See Been, *supra* note 276, at 226 (noting no empirical, but “ample anecdotal,” evidence that renter opposition to new urban development has increased, and also observing increased regulatory stringency in urban areas).

³⁶⁵ Hills & Schleicher, *supra* note 266, at 90.

³⁶⁶ *Id.* at 90–93.

³⁶⁷ *Id.*; see also Ellickson, *supra* note 30, at 417; EINSTEIN ET AL., *supra* note 17, at 106.

³⁶⁸ Hills & Schleicher, *supra* note 266, at 93.

³⁶⁹ *Id.* at 99–100. “Aldermanic privilege” generally refers to a local legislature's deference to the member who represents the ward or district most affected by the decision at hand. See Schleicher, *supra* note 92, at 1710–11. The term derives from Chicago's longstanding deference to local aldermen in making land-use and other decisions. Yue Zhang, *Boundaries of Power: Politics of Urban Preservation in Two Chicago Neighborhoods*, 47 URB. AFFS. REV. 511, 517 (2011).

³⁷⁰ Hills & Schleicher, *supra* note 266, at 124–25.

³⁷¹ See Ellickson, *supra* note 30, at 397.

serves that, in most localities, once land is zoned single-family, its designation almost never changes.³⁷² Even in areas that approve more multi-family housing, such as Austin, Texas, single-family development predominates and exhibits its staying power.³⁷³ Ellickson suggests that three forces might contribute to single-family neighborhoods' perpetuity. First, status quo bias, including a "psychological disposition to favor the perpetuation of the familiar," might push homeowners and their elected officials to avoid upending existing zoning.³⁷⁴ Second, opponents of development garner esteem among their peers, forcing a social dynamic that encourages maintaining existing zoning.³⁷⁵ And third, negative perceptions of developers inform opposition to zoning amendments, and developers in turn avoid existing neighborhoods and choose to develop elsewhere in response to this pressure.³⁷⁶ He explains fast-growing areas' departure from the "straitjacket" by noting that fast-growing places are likely to maintain characteristics akin to Molotch's "growth machine": a development industry with a significant stake in continued growth, as well as people in professions supporting that industry.³⁷⁷ Additionally, these places may be more politically inclined against regulation and toward property rights.³⁷⁸ But for places already zoned for single-family dwellings, Ellickson's only exception to his straitjacket theory is transit-oriented development, where he observes that areas in immediate proximity to transit stations bear the greatest likelihood of being upzoned from a single-family designation.³⁷⁹

Because the weight of these theories explains *opposition* to new development and reform, situating single-family zoning reforms within these models is challenging. Further research is needed to develop a coherent understanding of *why* some states and local governments have quickly jumped onto the reform bandwagon. Support for single-family zoning reform could be explained by any number of things: the growth machine reemerging as developers spy opportunities to overcome restrictive zoning; homeowners' recognition that unaffordable housing might negatively affect the provision of public services such as education and childcare and thus diminish home values; home-

³⁷² See *id.* at 401–10 (surveying examples of municipalities where zoning remains practically unchanged in developed neighborhoods with single-family zoning).

³⁷³ *Id.* at 408–10.

³⁷⁴ *Id.* at 422–25.

³⁷⁵ *Id.* at 425.

³⁷⁶ *Id.* at 425–26.

³⁷⁷ *Id.* at 418.

³⁷⁸ *Id.* at 418–19.

³⁷⁹ See *id.* at 426 (noting that homeowners supported multi-family housing development when they believed that the opening of a transit station would increase their home value).

owners' ability to densify their properties actually increases property values;³⁸⁰ concentrating high-density housing in small areas of a city is less politically palatable than citywide zoning reform; or simply that the market's cool response to reforms reassures homeowners that reforms will not quickly produce more development. It may also be possible that pro-housing advocates face lower collective-action barriers due to the advent of social media and other digital outlets for organizing purposes. Whatever the explanation, it will be important for scholars to understand the political conditions that precipitate single-family zoning reforms and apply those lessons to reforms bearing greater likelihood of success in resolving the housing crisis, such as those described in Part IV.³⁸¹

III. THE LIMITS OF REFORM

This Part considers the actual and anticipated results of recently adopted single-family zoning reforms and whether they can successfully address the mainstream consensus's end goals.³⁸² For reformers, the results thus far are disappointing.³⁸³ Where cities have adopted these reforms, middle-housing construction is at a trickle.³⁸⁴ Statewide reforms have fared no better.³⁸⁵ Even

³⁸⁰ See Rodríguez-Pose & Storper, *supra* note 138, at 241 (citing Chicago as an example of where creating more housing has increased housing prices).

³⁸¹ See *infra* notes 527–611 and accompanying text.

³⁸² See *infra* notes 392–526 and accompanying text.

³⁸³ See Bronin, *supra* note 27, at 724 (describing how broad reforms are undercut by additional process requirements).

³⁸⁴ See, e.g., Yonah Freemark & Lydia Lo, *Effective Zoning Reform Isn't as Simple as It Seems*, BLOOMBERG (May 24, 2022), <https://www.bloomberg.com/news/articles/2022-05-24/the-limits-of-ending-single-family-zoning> [<https://perma.cc/UE2D-CWDW>]; Yudhishtu, *supra* note 39; Sands, *supra* note 338.

³⁸⁵ See MARK TRESKON, JORGE GONZÁLEZ-HERMOSO, NOAH MCDANIEL & DENNIS SU, URB. INST., LOCAL AND STATE POLICIES TO IMPROVE ACCESS TO AFFORDABLE HOUSING 51–52 (2023), https://www.urban.org/sites/default/files/2023-08/Local%20and%20State%20Policies%20to%20Improve%20Access%20to%20Affordable%20Housing_0.pdf [<https://perma.cc/W4ZJ-YJF9>] (looking at changes in Oregon's housing permit figures); Jason Ward, *Opinion: How California's Duplex Law Was Designed to Fail*, L.A. TIMES (Feb. 10, 2023), <https://www.latimes.com/opinion/story/2023-02-10/california-affordable-housing-los-angeles-laws> [<https://perma.cc/4UUV-S2SY>] (noting that, as of writing, the state's single-family zoning reform law had resulted in the creation of just 282 new housing units statewide, even as a regional housing needs assessment showed a need for 800,000 new units in Los Angeles County alone); BEN METCALF, DAVID GARCIA, IAN CARLTON & KATE MACFARLANE, TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY, WILL ALLOWING DUPLEXES AND LOT SPLITS ON PARCELS ZONED FOR SINGLE-FAMILY CREATE NEW HOMES? 3 (2021), <https://turnercenter.berkeley.edu/wp-content/uploads/2021/07/SB-9-Brief-July-2021-Final.pdf> [<https://perma.cc/52PA-T5UD>] (“California’s recent housing laws have largely failed to unlock significant housing production changes . . .”).

where middle housing has been allowed for a longer period, little has been built.³⁸⁶

Irrespective of reformers' meritorious goals, single-family zoning reform in its current manifestation cannot solve the housing crisis. It cannot produce the amount, type, affordability, or pace of construction necessary to combat increasingly unaffordable housing, income stratification and a growing racial wealth gap, or the climate crisis.³⁸⁷ Per Dan Mandelker, "[a] more aggressive strategy is needed."³⁸⁸ To explain this conclusion, this Part considers the legal limitations of reforms and, relying on interview-based case studies, the structural barriers to middle-housing development. Although the legal barriers could be addressed through legislation, the structural barriers are more difficult to overcome and will require concerted government intervention to have any promise of success. Section A discusses the legal barriers to zoning reforms,³⁸⁹ and Section B sets forth the structural barriers to zoning reform using three case studies.³⁹⁰

A. The Legal Barriers

As other scholars have observed, myriad legal barriers may thwart the success of single-family zoning reforms in delivering more affordable housing. These barriers include built-in limitations of reforms themselves, private covenants prohibiting neighborhood densification, state prohibitions against affordability measures like inclusionary zoning, enforcement challenges, and other laws that counteract recent reforms. Each barrier is discussed in turn below. First, this Section discusses the often self-defeating nature of some reforms.³⁹¹ Second, private covenants on land pose an additional hurdle to building affordable housing.³⁹² Third, friction between state laws and local initiatives creates an additional barrier.³⁹³ Finally, a lack of compliance by states and private parties prevents the success of some reforms.³⁹⁴ Although most of these limitations could be addressed legislatively, to date, they have not been confronted.

³⁸⁶ See Bronin, *supra* note 27, at 755–56 (noting that, despite broad zoning allowance for duplexes in Connecticut, few duplexes have been constructed).

³⁸⁷ See Infranca, *supra* note 30, at 669 ("It is not clear [single-family zoning reforms] will result in a significant number of new housing units due to factors including physical constraints, the relative costs of small-scale development, private restrictive covenants, and the need for existing owners to be interested in new development.").

³⁸⁸ Mandelker, *supra* note 257, at 278.

³⁸⁹ See *infra* notes 392–424 and accompanying text.

³⁹⁰ See *infra* notes 425–526 and accompanying text.

³⁹¹ See *infra* notes 395–402 and accompanying text.

³⁹² See *infra* notes 403–411 and accompanying text.

³⁹³ See *infra* notes 412–414 and accompanying text.

³⁹⁴ See *infra* notes 416–421 and accompanying text.

First, many recent reforms contain self-defeating, or at least self-limiting, provisions. For instance, many reforms exempt large geographies from their requirements. California exempted areas prone to natural hazards, historic districts, rural areas, and renter-occupied homes from its reform,³⁹⁵ leading one analysis to conclude that only 5.4% of single-family-zoned parcels in California would be eligible for middle-housing construction.³⁹⁶ In addition, many reforms to allow more housing have added regulatory requirements that make developing new housing more onerous.³⁹⁷ For example, Boise, Idaho adopted zoning reform to allow four units per residential lot but requires two units to be income-restricted and affordable to middle-income earners.³⁹⁸ Some authors have observed that, because most single-family zoning reforms adopted to date do not require affordability, they result—particularly in high-cost markets—in new housing that fails to serve households most affected by the housing crisis.³⁹⁹ Yet even if such requirements did exist, they would likely be financially infeasible in middle-housing projects.⁴⁰⁰ Thus, single-family zoning reforms may have limited benefit for lower-income households.⁴⁰¹ Additionally, other limitations may appear as these laws’ implementation continues. For example, Sarah Adams-Schoen and Edward Sullivan have observed that Oregon’s single-family zoning reform failed to address continuing environmental injustices, including locating multi-family housing near unhealthy, incompatible land uses.⁴⁰²

³⁹⁵ S.B. 9, 2021–2022 Leg., Reg. Sess. § 1 (Cal. 2021).

³⁹⁶ METCALF ET AL., *supra* note 385, at 9.

³⁹⁷ See, e.g., Christopher S. Elmendorf & Clayton Nall, *Plain-Bagel Streamlining? Notes from the California Housing Wars*, 75 CASE W. RES. L. REV. (forthcoming 2024) (symposium on “Permitting the Future”) (manuscript at 8–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4811580 [<https://perma.cc/N8ZZ-URWX>] (discussing California laws that add additional layers to housing development).

³⁹⁸ CITY OF BOISE, MODERN ZONING CODE USER GUIDE 5 (2023), <https://issuu.com/cityofboise/docs/pds-mzc-userguide-traditionalresidential-r1c> [<https://perma.cc/MB9T-QWR2>].

³⁹⁹ E.g., Sarah J. Adams-Schoen & Edward J. Sullivan, *Middle Housing by Right: Lessons from an Early Adopter*, 37 J. LAND USE & ENV’T L. 189, 237–38 (2022). Washington and Portland, Oregon adopted density bonus programs allowing middle-housing developers to construct additional units in exchange for providing income-restricted units, however, these provisions have resulted in little affordable housing due to the financial infeasibility of this housing model. H.B. 1110, 68th Leg., Reg. Sess. § 3 (Wash. 2023); PORTLAND, OR., CITY CODE § 33.110.265.F (2024); Video Interview with Eric Thompson, Partner, Or. Homeworks (Nov. 6, 2023).

⁴⁰⁰ See *infra* notes 512–516 and accompanying text (discussing one structural problem of single-family zoning reform). Boise’s experience suggests that this is the case; as of this writing, only eleven new middle-housing projects were proposed in the city following the adoption of these reforms in mid-2023. Video Interview with Deanna Dupuy, AICP, City Plan. & Design Manager, City of Boise, Idaho (May 22, 2024).

⁴⁰¹ See Miller, *supra* note 28, at 482 (suggesting that reforming single-family zoning might advance gentrification and displacement); see also Schragger, *supra* note 70, at 155 (suggesting that reforms will not result in less financially-exclusionary neighborhoods).

⁴⁰² Adams-Schoen & Sullivan, *supra* note 399, at 235–36.

Second, as described in Subpart II.A.1, private covenants encumber large swaths of urbanized land and many likely prohibit the housing that single-family zoning reforms now allow.⁴⁰³ Because covenants exist independent of public land-use laws, zoning reforms will be ineffective if covenants prohibit middle housing.⁴⁰⁴ Even if these reforms allow denser housing in areas unencumbered by covenants, neighborhoods might adopt new covenants to block reforms or wealthier households could escape reforms' anticipated results in covenant-controlled communities.⁴⁰⁵ This phenomenon may not only occur in suburbs; evidence suggests that urban neighborhoods also use covenants and conservation districts to restrict new development.⁴⁰⁶

Reforming covenants is neither legally nor politically straightforward. Even if states overrode exclusionary covenants, neighborhoods would retain significant leeway to undermine reforms.⁴⁰⁷ Removing covenants via eminent domain would likely produce political backlash and prove costly.⁴⁰⁸ Buying out restrictions presents similar challenges.⁴⁰⁹ Other authors have suggested

⁴⁰³ See *supra* notes 212–224 and accompanying text. The author is unaware of any study that has analyzed individual covenant restrictions to determine how many housing units or households might be subject to such covenants, but anecdotal evidence suggests that they are pervasive. An example of such a covenant is one applicable to Highlands Ranch, Colorado—an unincorporated, covenant-controlled area with a residential population in excess of one hundred thousand—that prohibits the replacement of single-family homes with anything but another single-family home. See HIGHLANDS RANCH CMTY. ASS'N, RESIDENTIAL IMPROVEMENT GUIDELINES (RIG'S) 8 (2024), https://hrcaonline.org/Portals/0/docs/pdf/covenants/2024-06_ResidentialImprovementGuidelines.pdf?ver=WXHjfw5FcCAHkxNdPI50ig%3d%3d [<https://perma.cc/8LAF-F9RR>] (lacking a provision allowing for multiple units per lot).

⁴⁰⁴ See Miller, *supra* note 28, at 482–83; Wolf, *supra* 45, at 194; see also Decision and Order Re: Plaintiff's Motion for Temporary Restraining Order, *supra* note 309 (observing that private covenants are unaffected by public land-use regulations).

⁴⁰⁵ Serkin, *supra* note 72, at 794.

⁴⁰⁶ *Id.* at 788–89; Lemar, *supra* note 201, at 1548–49.

⁴⁰⁷ See Brady, *supra* note 219, at 1681 (discussing the impact of private law controls).

⁴⁰⁸ See Merriam, *supra* note 46, at 373–74 (highlighting the political backlash following the U.S. Supreme Court's affirmance of the taking of private property at issue in *Kelo v. New London* (citing *Kelo v. New London*, 545 U.S. 469, 489–90 (2005))); Stahl, *supra* note 215, at 630–31 (“[I]f CCR overrides do expand, they will run into increasingly strong political and legal opposition.”); Ellickson, *supra* note 212, at 1863 (flagging that this could be viewed as an unconstitutional taking). Implicit in this suggestion is the assumption that private covenants constitute a property right and that overriding them constitutes a taking under the Fifth Amendment. See Stahl, *supra* note 215, at 606 (noting that covenant defenders may use the Takings Clause as a potential defense to state-level covenant restrictions).

⁴⁰⁹ See Merriam, *supra* note 46, at 374–75 (proposing that governments compensate HOAs for release of their covenants).

declaring exclusive covenants violative of public policy;⁴¹⁰ to date, however, no state has done so.⁴¹¹

The third legal barrier to reforms' effectiveness is other state laws preempting localities' ability to advance affordability. For instance, many states prohibit local inclusionary housing requirements, rent control, and linkage fees that advance housing affordability.⁴¹² Although some of these legal mechanisms have a mixed record of success, foreclosing their usage eliminates opportunities to ensure that new or existing housing stock maintains affordability.⁴¹³ Moreover, given that there is greater political acceptance of affordable, rather than market-rate, housing, enabling localities to use inclusionary housing requirements might make zoning reforms more popular.⁴¹⁴ Absent affordability standards, particularly in high-cost regions, middle housing constructed in previously exclusive single-family neighborhoods will almost certainly be unaffordable for lower-income households, and may be too costly for middle-income households, thus undermining one of the primary arguments for reform.

The fourth legal barrier to reforms' success is enforcement by states and private parties. Subpart II.A.5 described localities' mixed record of compliance with legislative and judicial directives.⁴¹⁵ Already, localities have refused to comply or commenced lawsuits against states to prevent or delay implementation of single-family zoning reforms.⁴¹⁶ Plaintiffs in these challenges assert in some instances that local home rule prohibits states from preempting local planning and zoning authority.⁴¹⁷ Although some courts and scholars have as-

⁴¹⁰ See Stahl, *supra* note 215, at 627 (noting that courts may restrict covenants in favor of public policy to increase affordable housing); Ellickson, *supra* note 212, at 1863 (same).

⁴¹¹ *But cf.* Wiggins, *supra* note 28, at 149 (noting that legislatures have outlawed certain unreasonable restrictions concerning, for example, pets and solar panels); Stahl, *supra* note 215, at 591–92 (describing other topics on which legislatures have declared covenants void for public policy reasons).

⁴¹² Schragger, *supra* note 70, at 157; Schindler & Zale, *supra* note 107, at 299–300. “Inclusionary housing” refers to local rules that require a certain percentage of new housing to be set aside as income-restricted, affordable housing. *What Is Inclusionary Housing?*, INCLUSIONARY HOUS., <https://inclusionaryhousing.org/inclusionary-housing-explained/what-is-inclusionary-housing/> [<https://perma.cc/39VK-TKKV>].

⁴¹³ See Schleicher, *supra* note 72, at 1357 (describing the mixed results of inclusionary zoning); Schleicher, *supra* note 92, at 1685 (same); O'Neill et al., *supra* note 155, at 77–78 (same).

⁴¹⁴ Christopher S. Elmendorf, Clayton Nall & Stan Oklobdzija, *What State Housing Policies Do Voters Want? Evidence from a Platform-Choice Experiment 24* (Apr. 30, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4811534 [<https://perma.cc/64W7-LTTW>].

⁴¹⁵ See *supra* notes 280–292 and accompanying text.

⁴¹⁶ O'Neill et al., *supra* note 196, at 511–12; see also *Ruling on Verified First Amended Petition for Writ of Mandate, City of Redondo Beach v. Bonta*, No. 22STCP01143 (Cal. Super. Ct. Apr. 22, 2024) (invalidating California's single-family zoning reforms as applied to five home-rule cities).

⁴¹⁷ See Elaine Goodman, *Cities Sue to Have SB9, the Law That Allows More Homes on a Lot, Declared Unconstitutional*, PALO ALTO DAILY POST, <https://padailypost.com/2023/02/08/cities-sue-to-have-sb9-the-law-that-allows-more-homes-on-a-lot-declared-unconstitutional/> [<https://perma.cc/F8KF-4C3P>] (Feb. 8, 2023) (highlighting that the California cities challenging Senate Bill 9 have

serted that local home rule does not bar single-family zoning reform, these challenges have slowed reforms' implementation and chilled development activity.⁴¹⁸ Additionally, local opposition groups have used legal challenges to block local-reform implementation.⁴¹⁹

In most cases, enforcing state pro-housing land-use laws typically falls to developers whose projects are rejected by local governments; many states do not have the legal ability or capacity to respond directly to local noncompliance. Often, however, for a developer thwarted by local intransigence, the remedies are unclear or unavailing. In most states, laws governing zoning appeals lack predictable judicial review timeframes, and available remedies are limited, in some cases, to reversal and remand to the offending local government itself.⁴²⁰ Developers face several disincentives for challenging localities, including cost and timing uncertainties, the opportunity cost of not pursuing projects elsewhere, and the prospect of returning to the same locality for reconsideration of its application. The developer may simply elect to exit the jurisdiction.⁴²¹ For a profit-motivated developer needing certainty, zoning appeals provide little, and local intransigence might successfully chill development. Although zoning appeal statutes and procedures vary from state to state, these processes bear a strong possibility of frustrating reformers' good intentions.

Beyond these limitations, a host of other laws affect and restrict middle-housing's construction and feasibility. For example, some middle housing is

home rule, a municipality's authority to govern the municipality on its own terms) ; Merriam, *supra* note 46, at 353–54 (noting that localities sometimes use home rule as a shield). As a general principle, home rule “frees [local governments] from the strictures of [state legislative oversight and control] and gives them general authority to govern themselves in the absence of enabling statutes.” Stahl, *supra* note 183, at 1210. See Briffault, *supra* note 182, at 10–11, for a broader discussion of home rule.

⁴¹⁸ Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. LAW. 179, 194 (2020).

⁴¹⁹ See Demsas, *supra* note 343 (describing a local Minneapolis group's legal opposition to Minneapolis 2040, the city's housing-density project, premised on environmental concerns); Alan Ehrenhalt, *The Weaponizing of Environmental Law*, GOVERNING (Oct. 23, 2023), <https://www.governing.com/assessments/the-weaponizing-of-environmental-law> [<https://perma.cc/6PVL-KJLT>] (same).

⁴²⁰ See, e.g., COLO. R. CIV. P. 106(a)(4) (delineating a general procedure for judicial review and affording the court complete deference in determining the timing of the proceedings, and noting only remand as a form of remedy); MICH. COMP. LAWS § 125.3606 (2024) (explaining the general process of judicial review but lacking a specific timeline); see also Sara C. Bronin & Dwight H. Merriam, *Remand—Reasons for Remand*, in 3 RATHKOPF'S THE LAW OF ZONING & PLANNING § 62:47 (4th ed. 2024). In California, remedies can also include forfeiture of intergovernmental funding transfers from the state to local governments for affordable housing purposes, which would likely satisfy, rather than deter, anti-development constituencies. Edward Glaeser & Atta Tarki, *Opinion: California Housing Development Remains Abysmal Despite Reforms. Here's What's Missing*, L.A. TIMES (Feb. 19, 2023), <https://www.latimes.com/opinion/story/2023-02-19/california-housing-developers-los-angeles> [<https://perma.cc/Z6BF-SC3W>].

⁴²¹ See Stahl, *supra* note 283, at 1000 (discussing exiting as an option for developer protection).

classified under a more stringent building code, the International Building Code (IBC), than the residential code applicable to single-family dwellings, with which residential builders are more familiar.⁴²² The IBC requires different, and more expensive, construction techniques than the residential code.⁴²³ Furthermore, many states' construction-defect laws make for-sale middle housing infeasible, requiring heightened insurance for builders.⁴²⁴

Although challenging, none of the foregoing legal barriers are permanent. States or localities could adopt affordability requirements, override covenants, reform appeals procedures, or amend building or construction-defect laws to advance affordable housing production. Already, some have undertaken these reforms. But even with these reforms, limitations on middle-housing production remain.

B. The Structural Barriers

Other scholars have discussed the legal barriers to middle-housing production; most of those barriers, however, could be addressed by legislation. Moreover, they are not the only problem with single-family zoning reform. The dispiriting results from single-family zoning reforms have also revealed structural challenges to its success. To illustrate these problems, this Section considers three case studies where middle-housing builders are using single-family zoning reforms to build new housing in Minneapolis,⁴²⁵ Portland,⁴²⁶ and California.⁴²⁷

1. Three Case Studies: Minneapolis, Portland, and California

a. Minneapolis

The first is Bruce Brunner from Minneapolis.⁴²⁸ Since around 2010, through his company, Brunner has built approximately thirty rental housing developments, containing two to four units each.⁴²⁹ These projects comprise a sizable share of all middle-housing units completed in Minneapolis during this

⁴²² PAROLEK, *supra* note 37, at 89; Video Interview with Samuel Schneider, Co-Founder, Homestead (Nov. 13, 2023).

⁴²³ PAROLEK, *supra* note 37, at 89.

⁴²⁴ *Id.* at 82. New multi-family housing construction for sale has experienced a decreasing share of all new multi-family housing as a result of this problem. *Id.* at 84.

⁴²⁵ See *infra* notes 428–443 and accompanying text.

⁴²⁶ See *infra* notes 444–459 and accompanying text.

⁴²⁷ See *infra* notes 460–472 and accompanying text.

⁴²⁸ See Daniel Herriges, “What Kind of City Do We Want to Leave for Our Children?,” STRONG TOWNS (Sept. 23, 2020), <https://www.strongtowns.org/journal/2020/9/22/what-kind-of-city-do-we-want-to-leave-for-our-children> [https://perma.cc/593R-BQBS].

⁴²⁹ Video Interview with Bruce Brunner, Manager, Bruce Brunner Constr. LLC (Oct. 30, 2023).

time.⁴³⁰ He has both renovated existing structures and built new ones.⁴³¹ Committed to addressing housing need among families, Brunner builds three- and four-bedroom units to accommodate larger households.⁴³² Brunner relies on vertical integration of his brokerage, design, and construction teams and uses template plans to more efficiently develop projects.⁴³³ Brunner's company retains ownership of most of its projects.⁴³⁴ Prior to 2018, Brunner's projects underwent discretionary reviews, usually for variances, to obtain permits.⁴³⁵ In late 2019, once Minneapolis's single-family zoning reform was adopted to allow three dwelling units per residential lot, many of Brunner's projects became by-right.⁴³⁶

To acquire properties, Brunner uses multiple methods, including buying pre- and post-foreclosure parcels, relying on a network of over one hundred people to buy off-market properties, and employing geographic information systems and neighborhood drives to find empty lots and vacant or derelict buildings.⁴³⁷ He acquires properties using all cash and relies on his relationships with local community banks to finance his construction projects.⁴³⁸ He targets leveraged returns of fifteen percent and his completed units command rents affordable to a median-income, or slightly above median-income, household.⁴³⁹ Although he is the largest housing provider for a local program that aids in preventing youth homelessness, Brunner does not build income-restricted affordable housing due to the administrative burden of affordable-housing finance programs.⁴⁴⁰

Despite using a template design, each of Brunner's projects still generally takes approximately one year to permit, even before construction commences.⁴⁴¹ Brunner noted that Minneapolis still charges heavy permitting fees for

⁴³⁰ See Owen Minott, *Comprehensive Zoning Reform in Minneapolis, MN*, BIPARTISAN POL'Y CTR. (Oct. 3, 2023), <https://bipartisanpolicy.org/blog/comprehensive-zoning-reform-in-minneapolis-mn/> [<https://perma.cc/Y7KL-DRLX>] (stating that Minneapolis permitted an average of fifty-seven permits in two- to four-unit structures per year since the 2040 plan's adoption).

⁴³¹ Video Interview with Bruce Brunner, *supra* note 429.

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ See Miguel Otárola, *Minneapolis Moves Forward by Allowing Triplexes Citywide*, MINN. STAR TRIB. (Nov. 8, 2019), <https://www.startribune.com/minneapolis-moves-forward-with-allowing-triplexes-citywide/564664232/> [<https://perma.cc/9LAJ-A8GF>] (describing zoning amendments that now allow middle housing by-right); Mervosh, *supra* note 35.

⁴³⁷ Video Interview with Bruce Brunner, *supra* note 429.

⁴³⁸ *Id.*

⁴³⁹ *Id.* The term "leveraged return" references the return on the builder's upfront investment, excluding the amount of any loans from the principal amount invested.

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

his projects, which are then passed on to renters.⁴⁴² By June 2023, he stopped constructing new housing due to unaffordable interest rates, construction costs, labor shortages, and a challenging housing market.⁴⁴³

b. Portland

The second case study, Oregon Homeworks, founded by Eric Thompson, builds middle housing in Portland, Oregon.⁴⁴⁴ Once a luxury single-family homebuilder, the company began constructing middle housing after Portland adopted reforms—consistent with the state’s single-family zoning reform law—allowing four units per residential lot, ADUs, and cottage clusters, and eliminating minimum vehicle-parking requirements.⁴⁴⁵ Oregon Homeworks’s projects include fourplexes and cottage clusters, as well as ADUs on lots with existing homes.⁴⁴⁶ The company’s typical product contains nine hundred square feet, two bedrooms, and one-and-a-half bathrooms, and is offered for-sale as a condominium unit or fee-simple lot.⁴⁴⁷ The company markets its housing products to first-time homebuyers or empty-nesters.⁴⁴⁸ Oregon Homeworks expects to complete fifty housing units in 2024.⁴⁴⁹

Like Brunner, Oregon Homeworks identifies properties—whether on- or off-market—to purchase through a network of brokers, lot wholesalers, and others.⁴⁵⁰ The company focuses on lots with dilapidated housing, double lots where it can build a larger project and achieve greater economies of scale, and properties in walkable areas.⁴⁵¹ The financing structure of the company’s four-plex model allows it to outbid other potential buyers. Oregon Homeworks uses all-cash purchases, using either its own equity or “friends and family” investors’, and relies on construction financing from local banks or professional non-bank lenders.⁴⁵² These projects generate leveraged returns of approximate-

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ Video Interview with Eric Thompson, *supra* note 399.

⁴⁴⁵ Bliss, *supra* note 339. A cottage cluster is a grouping of detached dwelling units. PORTLAND, ORE., ZONING CODE § 33.910.030 (2022). Portland’s zoning code allows cottage clusters of between three and sixteen units on a single residential lot. *See id.* Under Portland’s law, a developer can build up to six units per lot, so long as half of the units in the project are income-restricted for low-income households earning no more than sixty percent of the area median income. *See id.* § 33.110.265.F.1–.2.

⁴⁴⁶ Video Interview with Eric Thompson, *supra* note 399.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² *Id.*

ly twenty percent.⁴⁵³ Portland's high land costs—a vacant, unbuilt lot costs between \$350,000 and \$450,000—make building and financing smaller projects challenging.⁴⁵⁴ But with per-unit sales prices between \$425,000 and \$525,000, Oregon Homeworks sells units well below Portland's median home sales price.⁴⁵⁵ Like Brunner, Oregon Homeworks has not constructed income-restricted housing; Portland's density bonus for projects providing income-restricted units is insufficient to make such projects feasible for a for-profit developer.⁴⁵⁶

Oregon Homeworks also uses a flexible template design, with variations depending on particular properties' conditions, allowing the company to design and permit new projects in six months or less.⁴⁵⁷ Permitting fees for its projects can run to \$40,000 per unit in a four-plex, although the city waives fees if the company delivers units affordable to a median-income household.⁴⁵⁸ Thompson continued to build in late 2023 despite a challenging interest rate and cost environment.⁴⁵⁹

c. California

The third case study, Homestead, was initially founded by Sam Schneider to take advantage of California's ADU reform, but has since evolved to work on middle housing.⁴⁶⁰ Homestead's ADU model involved working directly with homeowners to build ADUs, with the company's income deriving from a revenue share from future rentals of completed units.⁴⁶¹ This approach allowed Homestead to avoid upfront property acquisition costs.⁴⁶² The company maintained a template ADU plan, and undertook to design, permit, finance, and construct on the landowner's behalf.⁴⁶³ After California adopted single-family zoning reform in 2021 to allow duplexes and urban lot splits, the company devised a similar model for middle housing: it would enter into tenancy-in-common arrangements with homeowners; design, permit, finance, and con-

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ Kate Reggev, *This New Company Wants to Help Homeowners Turn Their Unused Spaces into Rentable ADUs*, DWELL (June 16, 2021), <https://www.dwell.com/article/homestead-adu-conversion-company-los-angeles-7654bc63> [<https://perma.cc/BAN6-5LYY>]; Video Interview with Samuel Schneider, *supra* note 422.

⁴⁶¹ Video Interview with Samuel Schneider, *supra* note 422.

⁴⁶² *Id.*

⁴⁶³ Reggev, *supra* note 460.

struct multi-unit projects at its own cost; and then profit by selling the units.⁴⁶⁴ Like its ADU model, the company's middle-housing approach avoided the transaction costs of acquiring property.⁴⁶⁵ Despite strong consumer interest in this model, owing to changing market conditions beginning in 2022 and the complexities of working with individual homeowners on infill housing, the company was unable to raise needed capital to move forward.⁴⁶⁶

Schneider is now pursuing a more traditional real estate development platform for middle housing in California. He plans to seek out institutional real estate investors and lenders to construct for-sale, four-unit projects.⁴⁶⁷ He is anticipating returns well above fifteen percent and hopes for closer to fifty percent.⁴⁶⁸ Schneider observed that large cities, such as Los Angeles, have streamlined middle-housing permit approvals to six months or less.⁴⁶⁹ Because of California's heightened land values, Schneider noted that four units per lot may be infeasible in many locations.⁴⁷⁰ As for identifying properties, Schneider indicated that he seeks properties large enough such that he can avoid demolishing existing housing, but these properties are very difficult to find—"one in a hundred in a good case."⁴⁷¹ As of late 2023, Schneider had not constructed any of his proposed projects but anticipated working on one soon.⁴⁷²

2. Lessons from the Case Studies

Each case-study builder is enthusiastic about middle housing as part of the solution to the housing crisis, and Brunner and Thompson experienced success in producing it. These case studies, however, underline several structural roadblocks to single-family zoning reform's success. Even though opportunities might exist to make middle housing more viable, these structural problems will inhibit single-family zoning reforms' efficacy in addressing the housing crisis.

The first structural problem is scale. Most new housing is produced by large homebuilders or multi-family developers that construct, in many cases, hundreds or even thousands of units per project.⁴⁷³ Large projects enable them

⁴⁶⁴ Video Interview with Samuel Schneider, *supra* note 422.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ Gopal Ahluwalia, Kermit Baker & Kent Colton, *Concentration in Homebuilding Driven by a Few Large Builders*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. (Apr. 19, 2022), <https://www.jchs.harvard.edu/blog/concentration-homebuilding-driven-few-large-builders> [<https://perma.cc/7GR2->

to achieve economies of scale in land acquisition, permitting, financing, construction materials, labor, and marketing, along with sufficient returns to justify development risks.⁴⁷⁴ These economies of scale are less achievable with infill middle housing.⁴⁷⁵ The piecemeal nature of land acquisition, permitting, and financing attendant to infill middle-housing projects elevates transaction costs and limits builders' capability of producing vast quantities of housing units.⁴⁷⁶ Design and permitting timelines and costs can be nearly identical between large and small projects, yet larger projects yield more housing and generate greater returns.⁴⁷⁷ Middle-housing builders create efficiencies by developing property-acquisition networks and relying on repeatable designs and streamlined permitting processes, such as Oregon Homeworks's flexible template.⁴⁷⁸ But each middle-housing project simply results in fewer new, urgently needed units than a larger project.⁴⁷⁹ Nevertheless, at least one builder suggested that the risks of uncertain approval timelines and construction timing pose a disincentive to pursuing larger projects.⁴⁸⁰

Data on single-family zoning reforms' outcomes confirm this problem. Although large swaths of Connecticut have long allowed duplexes, few have been constructed.⁴⁸¹ Similar results occurred in two Colorado counties.⁴⁸² Conversely, land zoned for larger-scale multi-family development is regularly built to capacity, reflecting stronger developer demand for larger-scale pro-

MXNF]; Greg Willett, *Typical New Apartment Project Size Varies Sharply Across Metros*, REALPAGE (Aug. 31, 2021), <https://www.realtor.com/analytics/typical-new-apartment-project-size-varies-sharply-across-metros/> [<https://perma.cc/LB8K-JK2J>].

⁴⁷⁴ Ahluwalia et al., *supra* note 473; Molloy, *supra* note 6, at 2; PAROLEK, *supra* note 37, at 81; *see also* BROWN, *supra* note 261, at 194–95 (discussing the economic considerations of home construction).

⁴⁷⁵ PAROLEK, *supra* note 37, at 81; *see also* Video Interview with Bruce Brunner, *supra* note 429 (“If you have the capability to do [large multi-family projects], you should do that.”).

⁴⁷⁶ Video Interview with Eric Thompson, *supra* note 399; Video Interview with Bruce Brunner, *supra* note 429.

⁴⁷⁷ PAROLEK, *supra* note 37, at 81.

⁴⁷⁸ Video Interview with Eric Thompson, *supra* note 399; Video Interview with Bruce Brunner, *supra* note 429.

⁴⁷⁹ Video Interview with Bruce Brunner, *supra* note 429; Video Interview with Eric Thompson, *supra* note 399; Video Interview with Samuel Schneider, *supra* note 422. *But see* Schleicher, *supra* note 92, at 1712–13 (observing that, because of the lack of large assemblages for new housing development in major cities, new urban housing is often developed in smaller, more incrementally-sized projects).

⁴⁸⁰ Video Interview with Eric Thompson, *supra* note 399.

⁴⁸¹ *See* Bronin, *supra* note 27, at 755–56 (noting that duplexes comprise of less than ten percent of all housing in Connecticut).

⁴⁸² *See* ROOT POL’Y RSCH., STATE OF COLORADO HOUSING RESEARCH, at III-28 (2021), <https://cohousingaffordabilityproject.org/wp-content/uploads/2021/11/Colorado-Housing-Research-Report-November-2021.pdf> [<https://perma.cc/KEU8-RZ3S>] (“[D]uplexes have not developed to the estimated capacity permitted by zoning ordinances.”).

jects.⁴⁸³ Minneapolis's adoption of higher-density, six-story zoning near transit stops and its elimination of vehicle parking requirements for new residential development spurred far more housing production than its single-family zoning reforms.⁴⁸⁴ Moreover, middle-housing construction's inefficiency is compounded by the inefficiencies of infill development. A relatively small share of new housing is constructed in infill areas, in part because developers experience heightened transaction costs due to the site-specific inquiries inherent in infill development.⁴⁸⁵ Conversely, the urban fringe provides homebuilders with larger land assemblages and permitting efficiencies, allowing them to produce more units.⁴⁸⁶ Thus, single-family zoning reforms' greatest effect may be in new suburban development, where middle-housing construction in new subdivisions would contribute to sprawl.⁴⁸⁷

The second structural roadblock to reforms' success is pace. Even when unrestricted by permitting processes, transaction costs, or construction delays, building housing is time-consuming.⁴⁸⁸ Furthermore, the U.S. housing stock changes very slowly.⁴⁸⁹ Even if single-family zoning reforms result in robust middle-housing production in the long term, the other challenges set forth in this Section mean that these benefits will not materialize quickly—as evi-

⁴⁸³ *Id.* at III-31. Notably, in states that have implemented ADU reforms, ADU production also outpaces middle-housing construction because ADU construction does not require tearing down existing housing stock or displacing existing residents. See Garcia & Alameldin, *supra* note 41; Video Interview with Samuel Schneider, *supra* note 422.

⁴⁸⁴ See Richard D. Kahlenberg, *How Minneapolis Ended Single-Family Zoning*, CENTURY FOUND. (Oct. 24, 2019), <https://tcf.org/content/report/minneapolis-ended-single-family-zoning/> [<https://perma.cc/M9XB-THPM>] (highlighting additional reforms included in the Minneapolis 2040 plan); Linlin Liang, Adam Staveski & Alex Horowitz, *Minneapolis Land Use Reforms Offer a Blueprint for Housing Affordability*, PEW (Jan. 4, 2024), <https://www.pewtrusts.org/en/research-and-analysis/articles/2024/01/04/minneapolis-land-use-reforms-offer-a-blueprint-for-housing-affordability> [<https://perma.cc/544B-KK6G>] (explaining that the majority of new housing in Minneapolis was not built in formerly single-family-only neighborhoods); Christian Britschgi, *Eliminating Single-Family Zoning Isn't the Reason Minneapolis Is a YIMBY Success Story*, REASON (May 11, 2022), <https://reason.com/2022/05/11/eliminating-single-family-zoning-isnt-the-reason-minneapolis-is-a-yimby-success-story/> [<https://perma.cc/5MHS-TLNZ>] (stating that single-family zoning reform produced “exceedingly modest” outcomes); Video Interview with Bruce Brunner, *supra* note 429; see also TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY, TRANSIT-ORIENTED COMMUNITIES: LOS ANGELES 3 (2019), https://turnercenter.berkeley.edu/wp-content/uploads/2020/12/TOC_Los_Angeles.pdf [<https://perma.cc/A5J2-MDHU>] (discussing the success of similar reforms in Los Angeles).

⁴⁸⁵ Miller, *supra* note 28, at 467; Biber et al., *supra* note 74, at 57; BROWN, *supra* note 261, at 28.

⁴⁸⁶ BROWN, *supra* note 261, at 28; Video Interview with Eric Thompson, *supra* note 399.

⁴⁸⁷ See Serkin, *supra* note 171, at 186 (describing generally the potential unintended consequences of zoning reform).

⁴⁸⁸ See *id.* at 19–99 (providing a general development timeline of several years).

⁴⁸⁹ Arthur C. Nelson, *The Great Senior Short-Sale or Why Policy Inertia Will Short Change Millions of America's Seniors*, 4 J. COMPAR. URB. L. & POL'Y 473, 482–83 (2020); Elmendorf, *supra* note 77, at 86, 88–89.

denced, for example, by the delay in Schneider's housing projects.⁴⁹⁰ Moreover, because filtering occurs slowly, middle-housing production today might take decades or generations to benefit lower-income households.⁴⁹¹ Thus, single-family zoning reforms are little match for the housing crisis's urgency.

The third structural roadblock is the absence of a middle-housing building industry. Small projects do not typically attract large developers.⁴⁹² Although little data exists on the middle-housing industry, middle housing is almost exclusively constructed by small and local builders.⁴⁹³ The dearth of builders is a byproduct of middle housing's decades-long prohibition in most jurisdictions and small developers' inability to withstand the costs and uncertainties of the development approval process.⁴⁹⁴ Compounding this problem is the absence of contractors with experience in middle-housing construction; because larger multi-family housing gives them larger contracts, contractors are loath to work on middle-housing developments.⁴⁹⁵ Producing middle housing at scale requires incubating a building industry.⁴⁹⁶ Recent reforms may precipitate industry growth, however, more is needed to coax prospective industry participants into building. For instance, Schneider believes that leveraged returns on middle-housing construction must be fifty percent or greater to attract builder and investor interest in the middle-housing industry, yet existing middle-housing builders generate far lower returns.⁴⁹⁷ In contrast to the slow growth of the middle-housing building industry, demand for ADUs combined with California's statewide permission for them fueled the growth of a prefabricated ADU industry there.⁴⁹⁸ But the structure of ADU transactions and development dif-

⁴⁹⁰ See TRESKON ET AL., *supra* note 385, at 56–57 (noting that constructing homes is a time-intensive process that could lead to years in lags); Adams-Schoen, *supra* note 32, at 1306 (“Land availability and market dynamics also constrain the pace and scope of housing development such that reforms like those in Oregon and California will almost certainly not result in rapid transformation of existing single-family neighborhoods.”).

⁴⁹¹ See Been et al., *Supply Skepticism*, *supra* note 98, at 34 (acknowledging skepticism regarding filtering due to its slower pace).

⁴⁹² See DAVID GARCIA, MUHAMMAD ALAMELDIN, BEN METCALF & WILLIAM FULTON, TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY, UNLOCKING THE POTENTIAL OF MISSING MIDDLE HOUSING 14 (2022), <https://turnercenter.berkeley.edu/wp-content/uploads/2022/12/Missing-Middle-Brief-December-2022.pdf> [<https://perma.cc/8E5C-4Y2N>].

⁴⁹³ Video Interview with Samuel Schneider, *supra* note 422; PAROLEK, *supra* note 37, at 80.

⁴⁹⁴ See Schleicher, *supra* note 92, at 1714 (highlighting various costs associated with development, such as hiring lawyers and environmental specialists); PAROLEK, *supra* note 37, at 80 (noting that middle housing has traditionally been excluded from zoning codes).

⁴⁹⁵ Video Interview with Samuel Schneider, *supra* note 422.

⁴⁹⁶ PAROLEK, *supra* note 37, at 80.

⁴⁹⁷ Video Interview with Samuel Schneider, *supra* note 422.

⁴⁹⁸ Kriston Capps, *How California Set Off a Backyard Apartment Boom*, BLOOMBERG (Mar. 25, 2021), <https://www.bloomberg.com/news/articles/2021-03-25/can-granny-flats-fill-california-s-housing-gap> [<https://perma.cc/DR9Y-8BVV>].

fers from middle-housing projects, and the prospects for incubating a similar industry in middle housing are therefore more remote and would require increased subsidy.⁴⁹⁹

The fourth structural barrier to reforms' success is financing. New-housing builders rely on a mix of equity and debt financing.⁵⁰⁰ "Debt is provided in the form of a loan from a lender (generally a bank) and carries an interest rate which the developer pays back over time," while equity financing makes up the difference between the total project cost and the debt.⁵⁰¹ Because of the development process's risks, including delays in permitting and construction and unforeseeable changes in costs and markets, equity investors demand relatively high returns to justify their investments.⁵⁰² Middle-housing builders face challenges on both the equity and debt financing fronts, posing issues like those faced by Thompson where government density bonuses prove insufficient. Due to their relatively small size and lack of scale, middle-housing builders generally cannot obtain loans from larger banks.⁵⁰³ Large equity investors are deterred for these reasons, and because returns on middle-housing projects cannot meet these investors' thresholds.⁵⁰⁴ Thus, a middle-housing project in a high-cost market is often attractive to financing partners only where the builder constructs expensive housing that fails to address affordable housing needs and can exceed local price tolerances.⁵⁰⁵ Middle-housing builders typically rely on smaller or nontraditional sources of financing that are less easily identifiable.⁵⁰⁶

For-sale projects, i.e., condominiums, face particularly acute financing challenges. Historically, condominium financing has been constrained due to

⁴⁹⁹ See *infra* notes 517–521 and accompanying text (discussing the unique cost structure of ADUs).

⁵⁰⁰ DAVID GARCIA, TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY, MAKING IT PENCIL: THE MATH BEHIND HOUSING DEVELOPMENT 7 (2019), https://ternercenter.berkeley.edu/wp-content/uploads/2020/08/Making_It_Pencil_The_Math_Behind_Housing_Development.pdf [<https://perma.cc/BM8U-RRKY>].

⁵⁰¹ *Id.* at 7–8.

⁵⁰² *Id.* at 8–9; Video Interview with Samuel Schneider, *supra* note 422; BROWN, *supra* note 261, at 199.

⁵⁰³ GARCIA ET AL., *supra* note 492, at 12; Video Interview with Bruce Brunner, *supra* note 429; Video Interview with Eric Thompson, *supra* note 399. Large banks' skepticism of middle housing is fueled in part by the fact that these projects are difficult to appraise due to a relative lack of available comparators. See GARCIA ET AL., *supra* note 492, at 14.

⁵⁰⁴ GARCIA ET AL., *supra* note 492, at 12.

⁵⁰⁵ See Michael Andersen, *We Ran the Rent Numbers on Portland's 7 Newly Legal Home Options*, SIGHTLINE INST. (Aug. 1, 2021), <https://www.sightline.org/2021/08/01/we-ran-the-rent-numbers-on-portlands-7-newly-legal-home-options/> [<https://perma.cc/9NGR-KFPB>] (explaining the circumstances that make middle-housing development viable in Portland).

⁵⁰⁶ GARCIA ET AL., *supra* note 492, at 12–13; Video Interview with Bruce Brunner, *supra* note 429; Video Interview with Eric Thompson, *supra* note 399.

the multi-party structure of these arrangements and the associated risks of condominium development and ownership.⁵⁰⁷ These projects face high upfront transaction costs to prepare a condominium declaration and establish governance mechanisms.⁵⁰⁸ Thus, construction lenders generally require high rates of unit pre-sales before allowing draws on a loan.⁵⁰⁹ Moreover, the Federal Housing Administration generally maintains higher standards for insuring condominium mortgages, such as higher loan-to-value ratios, than detached housing.⁵¹⁰ On top of these challenges, for-sale projects also face heightened legal risk—and thus heightened insurance costs—under state construction-defect laws that enable homebuyers to readily sue builders upon discovering even minor problems.⁵¹¹

The fifth structural problem of single-family zoning reforms is that, without significant subsidy, income-restricted middle-housing production is impossible even with density bonuses offered by Portland, Oregon, or Washington’s reform legislation.⁵¹² A simple example explains the problem. Middle-housing builders reported that they currently face construction costs of two hundred dollars per square foot, meaning that a modest 1,500-square-foot middle-housing unit would cost \$300,000 to build.⁵¹³ Simply servicing a thirty-year loan, at six percent interest, for the construction cost—meaning that no developer profit or other ownership costs are factored in—would be unaffordable to a household earning less than \$71,000 per year.⁵¹⁴ If developer profit and other ownership costs are included in the principal, such a housing unit would be unaffordable to a median-income household. Moreover, subsidies are rare.

⁵⁰⁷ PAROLEK, *supra* note 37, at 85.

⁵⁰⁸ *Id.* at 87–88.

⁵⁰⁹ *Id.* at 85.

⁵¹⁰ *Id.* at 85–87; WALTER SCOTT, STEPHEN SCHWARTZ & ANGELA THREADGILL, FANNIE MAE, RESPONSIBLY INCREASING AFFORDABLE HOUSING SUPPLY & ACCESS TO CREDIT 4–5 (2023), <https://singlefamily.fanniemae.com/media/document/pdf/white-paper-responsibly-increasing-affordable-housing-supply-access-credit> [<https://perma.cc/2AAM-KM4R>].

⁵¹¹ See Elliott Wenzler, *New Condos Are Hard to Find in Colorado. Getting Developers to Build More Will Roil the Capitol Next Year*, COLO. SUN (Oct. 2, 2023), <https://coloradosun.com/2023/10/02/colorado-construction-defects-bill-2024-housing/> [<https://perma.cc/SQ9N-HZNC>] (explaining problems with Colorado’s construction-defect law).

⁵¹² Andersen, *supra* note 505; Adams-Schoen & Sullivan, *supra* note 399, at 238–39; Video Interview with Bruce Brunner, *supra* note 429; Video Interview with Eric Thompson, *supra* note 399; Video Interview with Samuel Schneider, *supra* note 422.

⁵¹³ Video Interview with Eric Thompson, *supra* note 399; Video Interview with Bruce Brunner, *supra* note 429.

⁵¹⁴ That is only slightly less than the median household income levels in both Minneapolis and Portland. See *Quickfacts: Minneapolis City, Minnesota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/minneapoliscityminnesota> [<https://perma.cc/V2WT-BV7D>] (reporting that Minneapolis’s median household income in 2022 was \$76,332); *Quickfacts: Portland City, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/portlandcityoregon/INC110222> [<https://perma.cc/XUZ6-H9JP>] (reporting that Portland’s median household income in 2022 was \$85,876).

Most below-market-rate affordable housing in the United States is financed using federal low-income housing tax credits.⁵¹⁵ Using these credits for small-scale middle-housing projects, however, is infeasible due to the transaction costs of obtaining them.⁵¹⁶

The relative success of ADU reforms underlines the challenges of missing-middle housing development. Over eighty thousand permits for ADUs were issued in California since it adopted ADU reform in 2016.⁵¹⁷ Although small compared to the state's housing needs, ADUs are making a far greater dent in addressing California's housing shortage than middle housing in single-family neighborhoods. ADU design and permitting are highly replicable, fueling a booming prefabricated ADU industry.⁵¹⁸ Because they are primarily backyard structures, ADUs avoid procedural hurdles or prohibitions on demolition and the financing challenges inherent in demolishing improvements to property.⁵¹⁹ Moreover, ADU builders avoid the transaction cost of acquiring property and shouldering carrying costs during the design, permitting, and construction phases.⁵²⁰ Although ADUs are not immune to criticisms—they generally do not offer a path to homeownership and have been criticized as exclusionary in their design⁵²¹—they lack the same structural barriers attendant to middle housing.

⁵¹⁵ Yonah Freemark & Corianne Payton Scally, *LIHTC Provides Much-Needed Affordable Housing, but Not Enough to Address Today's Market Demands*, URB. INST. (July 11, 2023), <https://www.urban.org/urban-wire/lihtc-provides-much-needed-affordable-housing-not-enough-address-todays-market-demands> [<https://perma.cc/H4AH-E7YS>]. See generally 26 U.S.C. § 42 (codifying low-income housing credits).

⁵¹⁶ Lemar, *supra* note 46, at 1098–99; Video Interview with Bruce Brunner, *supra* note 429; see also Judith Crown, *The High Cost of Creating Affordable Housing*, CRAIN'S CHI. BUS. (Jan. 16, 2024), <https://www.chicagobusiness.com/equity/what-makes-affordable-housing-development-so-expensive> [<https://perma.cc/Q873-5DFS>] (describing the high monetary cost and administrative burden associated with below-market-rate affordable housing construction).

⁵¹⁷ Minott, *supra* note 38.

⁵¹⁸ Video Interview with Samuel Schneider, *supra* note 422. Middle-housing design can be replicable. See Video Interview with Bruce Brunner, *supra* note 429; Video Interview with Eric Thompson, *supra* note 399. Nonetheless, the larger footprint of a middle-housing structure and uniqueness of individual parcels makes it less likely that a single design can accommodate all possible projects.

⁵¹⁹ Andersen, *supra* note 505. In most cases, demolishing improvements on real property violates mortgage agreements that prohibit impairing the loan's collateral.

⁵²⁰ Video Interview with Samuel Schneider, *supra* note 422.

⁵²¹ See Travis Beck, *ADUs Can Help Address the Lack of Housing. But They're Bad Urban Design*, NEXT CITY (Oct. 5, 2023), <https://nextcity.org/urbanist-news/adus-can-help-address-housing-crisis-but-theyre-bad-urban-design> [<https://perma.cc/3B7S-R7RB>] (arguing that, by placing renters of ADUs in the backyards of owner-occupied homes, ADUs' design isolates their occupants and deprives them of opportunities to engage in the social fabric of the surrounding neighborhood).

Defenders of single-family zoning reform argue that the slow market response to these interventions results from their recency.⁵²² After all, it has been only a few years (or less) since the reforms discussed in Part II were adopted. Housing production takes time and reformers might urge patience in light of the disappointing results described above.

Nevertheless, because of the factors discussed above, single-family zoning reforms may never produce sufficient housing to advance affordability, social equity, and environmental protection. For lower-income and racial and ethnic minority households, single-family zoning reform promises little mobility.⁵²³ Furthermore, because upzonings will increase land values,⁵²⁴ single-family zoning reforms run the risk of further elevating production costs, making new middle housing more likely cater to high-income households. Additionally, if middle-housing development occurs as expected in places with market upside, gentrification and displacement might advance in lower-income, minority neighborhoods.⁵²⁵ Without further interventions, single-family zoning reforms are exceedingly unlikely to bear greater housing production and, particularly, affordable housing production. The next Part discusses possible alternatives.⁵²⁶

IV. ALTERNATIVES TO SINGLE-FAMILY ZONING REFORM

The barriers to single-family zoning reforms' success are sobering. They highlight the need for scholars and policymakers to better understand the causes of unaffordable, segregated, and environmentally destructive housing patterns, and they necessitate more effective reforms. Of course, single-family zoning should not remain untouched: its creation and perpetuation resulted from racism and exclusionary motives, along with reliance on shaky legal foundations. Single-family development patterns have exacerbated economic,

⁵²² See, e.g., Adams-Schoen & Sullivan, *supra* note 399, at 237; Editorial, *Patience, Please. Undoing Damage from Decades of Anti-Housing Policy in California Won't Happen Overnight*, L.A. TIMES (Jan. 20, 2023), <https://www.latimes.com/opinion/story/2023-01-20/sb9-single-family-zoning-reform-takes-time> [<https://perma.cc/FK5M-YSUZ>]; Erin Baldassari, *Facing Housing Crunch, California Cities Rethink Single-Family Neighborhoods*, NPR (Mar. 13, 2021), <https://www.npr.org/2021/03/13/973770308/facing-housing-crunch-california-cities-rethink-single-family-neighborhoods> [<https://perma.cc/6CH6-N4QS>] (observing that changes to existing neighborhoods could take decades).

⁵²³ See Pendall, *supra* note 69, at 127 (observing that low-density zoning serves to exclude).

⁵²⁴ Keith R. Ihlanfeldt, *The Effect of Land Use Regulation on Housing and Land Prices*, 61 J. URB. ECON. 420, 430 (2007).

⁵²⁵ See Manville et al., *supra* note 28, at 108–09 (noting that landlords of single-family homes can sell to developers and earn windfalls after the neighborhood is upzoned).

⁵²⁶ See *infra* notes 527–611 and accompanying text.

social, and environmental harms. Eliminating single-family zoning is symbolically important but will not solve a complex problem.

Middle housing has many benefits: it provides sufficient density to support walkability, public transit usage, and public infrastructure and amenities; it uses land efficiently; and it offers the best opportunity for affordable for-sale housing.⁵²⁷ Yet, as Part III demonstrated, simply reforming zoning will not result in prolific middle-housing production.⁵²⁸ More is needed to support this nascent industry. This Part discusses additional reforms—alternatives to single-family zoning reform and improvements upon it—that reformers might consider to better address the goals of the mainstream consensus.⁵²⁹ Section A will discuss the benefits of allowing higher density development to address housing supply shortages.⁵³⁰ Section B proposes incentivizing income-restricted affordable housing with meaningful density-bonus programs.⁵³¹ Section C explores the likely positive impact of streamlining permitting processes and eliminating unpredictability in housing production costs.⁵³² Section D discusses non-zoning tools that may be used to encourage more housing production.⁵³³

A. Allowing More Density in More Places

Given the robust absorption of properties zoned for higher density, reforms should allow higher-density development, even if it is more geographically concentrated. Creating a healthy supply of developable multi-family residential land would enable a better market response to supply shortages.⁵³⁴ This Section discusses the benefits of higher-density zoning, including sustainable transportation, an increase in the housing supply, and increased social equity.⁵³⁵

Denser housing development should satisfy the pro-reform consensus because it produces more units, realizes efficiencies in permitting and transaction costs, enables lower-cost unit production and offerings, and encourages more environmentally sustainable transportation modes.⁵³⁶ The scale, pace, financing, and small-industry challenges facing middle-housing builders are mitigated at greater densities. Fortunately, it does not take much additional density to

⁵²⁷ See PAROLEK, *supra* note 37, at 14–24 (discussing the benefits of middle housing).

⁵²⁸ See *supra* notes 382–526 and accompanying text.

⁵²⁹ See *infra* notes 534–611 and accompanying text.

⁵³⁰ See *infra* notes 534–554 and accompanying text.

⁵³¹ See *infra* notes 555–566 and accompanying text.

⁵³² See *infra* notes 567–594 and accompanying text.

⁵³³ See *infra* notes 595–611 and accompanying text.

⁵³⁴ See Ellickson, *supra* note 74, at 1671–72 (observing that Austin’s supply of developable multi-family land allowed it to keep better pace with population changes).

⁵³⁵ See *infra* notes 536–554 and accompanying text.

⁵³⁶ See Beck, *supra* note 521 (discussing various social, economic, and environmental benefits of denser housing).

make projects viable. As discussed in Part III, Oregon Homeworks feasibly produces fourplexes for sale under Portland's median home sales price, and Schneider says that increasing per-lot density in California to six or even ten units would make most projects feasible.⁵³⁷ Another study shows that the most economically advantageous building type is a midsize, three-story multi-family structure constructed with inexpensive materials such as wood (compared to more-expensive concrete or steel), which do not require expensive components such as elevators or enhanced fire-suppression systems to meet building safety codes.⁵³⁸

Modest expansions of denser multi-family zones could produce far more housing than more geographically expansive reforms to allow multi-plexes in single-family neighborhoods. For example, although Minneapolis's single-family zoning reforms stole headlines, the city's other reforms allowed denser multi-family housing construction along transit corridors.⁵³⁹ These higher-density reforms have generated far more units—including income-restricted units—than the city's single-family zoning reforms.⁵⁴⁰ Los Angeles has had a similar experience.⁵⁴¹ Similarly, in Colorado, land zoned at densities only modestly greater than two- to four-unit buildings is far likelier to be developed to capacity.⁵⁴² Another recent study prepared by planner Peter Calthorpe demonstrates that increasing zoning density along major arterial streets in the Bay Area would allow 1.3 million additional housing units.⁵⁴³

Continued online-retail- and work-from-home-induced weaknesses in the retail and commercial office sectors offer opportunities for dense residential development.⁵⁴⁴ A national housing non-profit estimated that allowing low- or

⁵³⁷ Video Interview with Eric Thompson, *supra* note 399; Video Interview with Samuel Schneider, *supra* note 422.

⁵³⁸ GARCIA ET AL., *supra* note 492, at 9. This argument is not to suggest that localities should allow the construction of unsafe or inaccessible buildings; as is the case with middle housing, building codes simply impose lesser requirements on medium-density multi-family buildings that offer easier egress routes.

⁵³⁹ Liang et al., *supra* note 484.

⁵⁴⁰ *See id.*; Freemark & Lo, *supra* note 384; Video Interview with Bruce Brunner, *supra* note 429.

⁵⁴¹ *See* TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY, *supra* note 484, at 2–3 (discussing the successful implementation of dense housing development near transit in Los Angeles).

⁵⁴² *See* ROOT POL'Y RSCH., *supra* note 482, at III-31.

⁵⁴³ Martin C. Pedersen, *Peter Calthorpe Has a Plan for More Housing in California*, COMMON EDGE (Apr. 3, 2023), <https://commonedge.org/peter-calthorpe-has-a-plan-for-more-housing-in-california/> [<https://perma.cc/Q9E3-FH2E>].

⁵⁴⁴ Konrad Putzier, *Texas Cities Are Booming, but Their Offices Are the Most Vacant*, WALL ST. J. (Oct. 9, 2023), https://www.wsj.com/real-estate/commercial/texas-cities-are-booming-but-their-offices-are-the-most-vacant-4cffb565?mod=Searchresults_pos1&page=1 [<https://perma.cc/2955-AX22>]; AHMAD ABU-KHALAF, ENTER. CMTY. PARTNERS, REPURPOSING UNDERUTILIZED STRIP MALLS TO CREATE MULTIFAMILY HOUSING 5 (2023), <https://www.enterprisecommunity.org/sites/>

mid-rise residential buildings in just a small proportion of U.S. commercial shopping centers would add seven hundred thousand housing units nationally.⁵⁴⁵ Doing so would expand walkability and transit usage, thus benefiting the environment and public infrastructure.⁵⁴⁶ Another benefit of this approach is that underutilized commercial properties are less likely to be subject to the same covenants encumbering existing neighborhoods; they might at least face lower barriers to amending covenants.⁵⁴⁷ Recently, California and Montana adopted reforms allowing multi-family housing by-right in commercially zoned areas.⁵⁴⁸ Although data is not yet available to quantify these reforms' results, they are likely to produce more housing units than single-family zoning reforms.

Supporters of single-family zoning reform may argue that concentrating density reinforces segregation, allowing single-family neighborhoods to remain isolated enclaves while middle- and lower-income households are pushed into denser housing abutting highways and train lines.⁵⁴⁹ Locating multi-family housing outside single-family neighborhoods may reduce prospects for racial, ethnic, and economic integration in existing single-family neighborhoods.⁵⁵⁰ But given the structural barriers described in Part III, single-family zoning reform is exceedingly unlikely to accomplish such integration.⁵⁵¹ Instead, curbing racial and ethnic isolation requires "[a] healthy supply of multifamily housing," which cannot be produced under existing single-family zoning reforms.⁵⁵² Moreover, the feasibility of income-restricted units serving low- and moderate-income households improves with larger projects, as developers are better able to offset the costs of providing them.⁵⁵³ Adding market-rate housing supply for middle-income households—which is feasible at higher densities—

default/files/2023-10/Repurposing-Underutilized-Strip-Malls-White-Paper-Final.pdf [https://perma.cc/MC3F-8TFC]; Nelson, *supra* note 489, at 519–20.

⁵⁴⁵ ABU-KHALAF, *supra* note 544, at 15.

⁵⁴⁶ *Id.*; see Wolf, *supra* note 45, at 197–98 (noting the need for walkable communities).

⁵⁴⁷ This statement assumes that any covenants encumbering commercial properties are unlikely to contain single-family housing restrictions.

⁵⁴⁸ Snow Zhu & Ben Metcalf, *Residential Housing Is Now Allowed in All Commercial Zones: Are California Cities Ready?*, TERNER CTR. FOR HOUS. INNOVATION U.C. BERKELEY (Sept. 12, 2023), <https://turnercenter.berkeley.edu/research-and-policy/ab-2011-commercial-zones/> [https://perma.cc/ZXT8-WJZJ]; S.B. 245, 68th Leg., Reg. Sess. § 1 (Mont. 2023).

⁵⁴⁹ See O'Neill et al., *supra* note 155, at 68 (describing a “grand bargain” whereby Bay Area homeowners support upzoning in single-family-adjacent areas to avoid densifying upscale neighborhoods).

⁵⁵⁰ See *id.* (highlighting a trade-off between approving the development in growth areas and preserving current single-family zoned neighborhoods).

⁵⁵¹ See *supra* notes 382–526 and accompanying text.

⁵⁵² Pendall, *supra* note 69, at 127.

⁵⁵³ Video Interview with Samuel Schneider, *supra* note 422; see Mangin, *supra* note 20, at 113 (detailing how density bonus programs provide financial incentives to developers).

enables government subsidies to be directed to needier households and further allows older housing to filter to lower-income households.⁵⁵⁴ Thus, allowing higher-density housing in smaller geographies will more effectively serve equity interests than single-family zoning reforms adopted to date.

B. Incentivizing Income-Restricted Affordable Housing

For reformers, one of single-family zoning reforms' greatest shortcomings is its failure to produce housing affordable to low- and moderate-income households. Meaningful density bonuses, however, which offer relief from restrictive zoning for projects containing housing affordable to low- and moderate-income households, can produce large quantities of both market-rate and income-restricted affordable housing.⁵⁵⁵ Austin, Texas's density bonus program, called "Affordability Unlocked," exemplifies this opportunity.⁵⁵⁶ This Section highlights the approach of this city-based program as an example of incentivizing income-restricted affordable housing.⁵⁵⁷

In 2017, the city adopted a plan calling for 60,000 new units affordable to low-income households by 2027.⁵⁵⁸ Two years later, it enacted Affordability Unlocked, allowing developers several incentives to create affordable housing.⁵⁵⁹ These incentives include height, setback, floor-area ratio, and occupancy limit waivers, and projects in the program are processed administratively.⁵⁶⁰ Perhaps owing to Austin's rapid growth and demand for new housing, between its inception and the end of 2023, the program produced 7,700 units, more than

⁵⁵⁴ Been et al., *Supply Skepticism*, *supra* note 98, at 29.

⁵⁵⁵ *Id.* at 33; Wolf, *supra* note 45, at 215.

⁵⁵⁶ See Audrey McGlinchy, *Austin Policy Lets Builders Forgo Red Tape. The Result? More Affordable Housing, Less Public Input.*, AUSTIN MONITOR (Sept. 25, 2023), <https://www.austinmonitor.com/stories/2023/09/austin-policy-lets-builders-forgo-red-tape-the-result-more-affordable-housing-less-public-input/> [<https://perma.cc/B5EG-H5LY>] (noting the success of Austin's density bonus program). In December 2023, while reversing several other zoning reforms undertaken by Austin, a state court judge ruled that the Affordability Unlocked program would remain in effect. Jo Clifton, *Court Signs Order Overturning Three Zoning Ordinances*, AUSTIN MONITOR (Dec. 12, 2023), <https://www.austinmonitor.com/stories/2023/12/court-signs-order-overturning-three-zoning-ordinances/> [<https://perma.cc/NC48-ARS3>].

⁵⁵⁷ See *infra* notes 558–566 and accompanying text.

⁵⁵⁸ Audrey McGlinchy, *Austin City Council Loosens Rules So Low-Income Housing Developers Have an Easier Time Building*, KUT NEWS (Feb. 21, 2019), <https://www.kut.org/austin/2019-02-21/austin-city-council-loosens-rules-so-low-income-housing-developers-have-an-easier-time-building> [<https://perma.cc/4EVR-KUYE>].

⁵⁵⁹ McGlinchy, *supra* note 556. Texas prohibits localities from adopting mandatory inclusionary zoning. TEX. LOCAL GOV'T CODE ANN. § 214.905(a) (West 2024).

⁵⁶⁰ CITY OF AUSTIN NEIGHBORHOOD HOUS. & CMTY. DEV. DEP'T, AFFORDABILITY UNLOCKED DEVELOPMENT BONUS PROGRAM APPLICANT GUIDE 8–9 (2019), https://www.austintexas.gov/sites/default/files/files/Housing/AU_Applicant_Guide_FINAL_1019.pdf [<https://perma.cc/WVG3-S7PU>].

two-thirds of which are affordable to low- and moderate-income households.⁵⁶¹ The program's annual unit production outpaces Austin's prior rate of affordable housing construction; given its nascency, affordable housing production will likely continue increasing.⁵⁶² Although some developers argue that affordable units may have been constructed without Affordability Unlocked,⁵⁶³ its streamlined approval process provides certainty and speedier housing production.⁵⁶⁴ As of late 2023, Austin considered expanding the program to support for-sale middle-housing construction.⁵⁶⁵

Despite Affordability Unlocked's success, it does not follow that *mandatory* inclusionary housing programs, which require developers to set aside income-restricted units, will succeed. These programs have, at best, mixed success: they cannot produce sufficient affordable housing, they can make new housing production infeasible, and they may result in a counterproductive reallocation of costs within a project, as market-rate units become more expensive to subsidize income-restricted units within the same project.⁵⁶⁶ Nevertheless, Austin's bonus program demonstrates that, with proper incentives that offset the costs of providing income-restricted units, developers will voluntarily produce such housing at significant volume, offering an opportunity for jurisdictions short on affordable housing.

C. Procedural Reforms

Lengthy permitting processes also undermine single-family zoning reforms' success.⁵⁶⁷ For many developers, procedural unpredictability poses a greater challenge than restrictive zoning, as it generates higher financing and construction costs.⁵⁶⁸ Cities with more permissive zoning are not inclusionary if their processes fail to facilitate new housing construction.⁵⁶⁹ Reducing delay,

⁵⁶¹ Fechter, *supra* note 302; McGlinchy, *supra* note 556.

⁵⁶² TRESKON ET AL., *supra* note 385, at 41–43.

⁵⁶³ Antoinette M. Jackson, Presentation at the Joint Meeting of the American Bar Association Forum on Affordable Housing and Community Development Law and Section of State and Local Government Law: Affordable Housing: Partnering with Local Governments (Oct. 5, 2023).

⁵⁶⁴ McGlinchy, *supra* note 556.

⁵⁶⁵ Ben Thompson, *Austin Leaders Look to Broaden Affordable Ownership, Rental Housing Programs*, CMTY. IMPACT (June 7, 2023), <https://communityimpact.com/austin/central-austin/city-county/2023/06/07/austin-leaders-look-to-broaden-affordable-ownership-rental-housing-programs/> [<https://perma.cc/K7EE-NTEY>].

⁵⁶⁶ Schleicher, *supra* note 72, at 1357; Schleicher, *supra* note 92, at 1685; O'Neill et al., *supra* note 155, at 77–78.

⁵⁶⁷ Video Interview with Bruce Brunner, *supra* note 429; Video Interview with Eric Thompson, *supra* note 399; Video Interview with Samuel Schneider, *supra* note 422.

⁵⁶⁸ O'Neill et al., *supra* note 155, at 76.

⁵⁶⁹ See O'Neill et al., *supra* note 196, at 552 (noting that San Francisco's discretionary decision making for zoning leads to delays, making it very difficult to build housing).

and therefore uncertainty, in zoning procedures reduces housing costs and accelerates housing production.⁵⁷⁰ This Section discusses procedural reforms that would expedite the permitting process and assist with zoning reforms.⁵⁷¹ First, discretionary permitting processes and public hearing requirements should be replaced.⁵⁷² Second, state-level reforms could ensure uniformity of process across jurisdictions.⁵⁷³ Finally, reforming judicial appeals processes could also aid housing development.⁵⁷⁴

Fortunately, delay-reduction opportunities abound. Discretionary approval processes, which are inherently uncertain, offer a place to start. These processes take longer and have greater variance in their processing timelines as compared with administrative procedures.⁵⁷⁵ Public participation adds to the uncertainty of these processes.⁵⁷⁶ Thus, eliminating discretion—and public hearings—could boost housing development, particularly regarding expanding multi-family zoning districts.⁵⁷⁷ Eliminating public hearings requirements is logical in light of their limited information-collection benefit.⁵⁷⁸

In contrast to discretionary proceedings, administrative processes speed permitting and production of new housing.⁵⁷⁹ Nevertheless, even by-right housing is subject to delay and uncertainty,⁵⁸⁰ and administrative approval does not guarantee reduced project costs.⁵⁸¹ In administrative processes, approval lags are less easily tied to legal requirements; better mechanisms are needed to ensure their predictability.⁵⁸² Additional research could shed light on how local

⁵⁷⁰ See O'Neill et al., *supra* note 155, at 29–30 (assessing the social and economic costs of zoning approval delays).

⁵⁷¹ See *infra* notes 575–594 and accompanying text.

⁵⁷² See *infra* notes 575–587 and accompanying text.

⁵⁷³ See *infra* notes 588–590 and accompanying text.

⁵⁷⁴ See *infra* notes 591–594 and accompanying text.

⁵⁷⁵ Manville et al., *supra* note 249, at 343.

⁵⁷⁶ See Lemar, *supra* note 46, at 1132 (observing that public participation can be costly and results can be indeterminate); BABCOCK, *supra* note 29, at 141 (describing the abdication of zoning decision-making to neighboring property owners).

⁵⁷⁷ See Bronin, *supra* note 27, at 761, 763–64 (discussing negative side effects of public hearings and participation requirements).

⁵⁷⁸ See Lemar, *supra* note 46, at 1137–38 (observing that public hearings rarely enable decision-makers to learn information relevant to the application at hand).

⁵⁷⁹ Manville et al., *supra* note 249, at 344.

⁵⁸⁰ Stahl, *supra* note 418, at 195; BABCOCK, *supra* note 29, at 54 (“Even the economically powerful developer knows that he may whip the municipality on zoning and still be beaten down in a dozen other regulatory arenas where he must face the village.”). Each middle-housing builder-interviewee noted the need to reduce permitting timelines and unforeseeable processing delays to facilitate additional middle-housing construction. Video Interview with Bruce Brunner, *supra* note 429; Video Interview with Eric Thompson, *supra* note 399; Video Interview with Samuel Schneider, *supra* note 422.

⁵⁸¹ Manville et al., *supra* note 249, at 337.

⁵⁸² See O'Neill et al., *supra* note 155, at 72–73 (noting that, in California, similar projects subject to the same legal framework can have varied timelines based on the city in which the project is located).

administrative processes, customs, and practices impact development approvals, given the variation in approval timeframes between cities.⁵⁸³

Of course, some might argue that eliminating discretionary proceedings reduces accountability in the development process. But discretionary processes tend to serve already-powerful, politically connected interests—particularly wealthier individuals in smaller jurisdictions—perpetuating discrimination and segregation.⁵⁸⁴ Moreover, because local residents lack the technical expertise to comment on the probable effects of proposed land uses, the information presented by members of the public is frequently inaccurate or irrelevant to the subject of the hearing.⁵⁸⁵ And discretionary processes tend to favor only the voices of current residents, avoiding the accountability that might come from participation by future residents or the general population.⁵⁸⁶ To address the problem of accountability while balancing the need for certainty in the development process, Lemar suggests, for instance, offering robust public participation opportunities during the planning and legislative decision-making stages—incorporating ample outreach to hard-to-reach groups and opportunities for written comment—while eliminating public hearings on individual developments.⁵⁸⁷

State-level reforms can also minimize procedural variation across jurisdictions, thereby making development more predictable and easing information asymmetries.⁵⁸⁸ The unique structure, provisions, and procedures of each of the thirty thousand-plus zoning codes across the United States can obscure codes' purposes and intent, posing significant information costs to developers working across multiple jurisdictions.⁵⁸⁹ Conversely, similarities in zoning requirements and procedures across jurisdictions reduces information costs, aiding housing production.⁵⁹⁰

Finally, reformers should reconsider judicial appeals processes to encourage housing production. As discussed *supra*, zoning decisions—approvals or denials—are rarely reversed, and developers lack incentive to challenge deni-

⁵⁸³ O'Neill et al., *supra* note 196, at 529, 546 (identifying the impact of local land use controls on housing development).

⁵⁸⁴ Lemar, *supra* note 46, at 1127–29.

⁵⁸⁵ *Id.* at 1117–18.

⁵⁸⁶ *Id.* at 1130–31.

⁵⁸⁷ *Id.* at 1140–46.

⁵⁸⁸ See O'Neill et al., *supra* note 155, at 75 (highlighting procedural variations across different jurisdictions resulting from varied local regulations).

⁵⁸⁹ Serkin, *supra* note 183, at 1076–77; Elmendorf & Shanske, *supra* note 30, at 540; see also Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 116–17 (2015) (observing that these same information costs apply with respect to property-by-property rezonings, where developers are required to learn the idiosyncrasies of each locality's rules as well as its citizenry and political decision-makers).

⁵⁹⁰ See Serkin, *supra* note 183, at 1076 (noting that straightforward zoning schemes make it easy for developers to plan ahead).

als.⁵⁹¹ Statutes easing appeals of housing denials have had mixed effectiveness,⁵⁹² and the most efficacious means to force localities' compliance with state mandates remains subject to debate. For instance, although one study found Massachusetts's zoning appeal statute—which allows a state agency to override exclusionary zoning decisions—less effective than New Jersey's system of allocating fair shares of housing among municipalities, even New Jersey's system is susceptible to lengthy delays when builders attempt to vindicate development rights.⁵⁹³ Simultaneously, housing opponents use appeals processes to delay projects, seeking developer giveaways or stopping projects altogether. Procedural reforms could limit antidevelopment litigation's effect by, for instance, restricting challengers' standing, expediting appeals' resolution, or employing security mechanisms to make developers whole when appeals prove unmeritorious. Although there is research on this subject,⁵⁹⁴ it is limited, and more work is needed to identify the best means to address these problems.

D. Non-Zoning Tools

Despite myriad opportunities to reform land-use regulations to encourage more housing production, the barriers to affordable housing production go well beyond a lack of available land, and specifically include inadequate funding for constructing, financing, and operating affordable housing.⁵⁹⁵ Subsidies, inclusionary housing requirements, and density bonuses can encourage affordable housing production, but the financing structure of middle-housing construction makes them unworkable under existing single-family zoning reforms.⁵⁹⁶ In particular, subsidies are almost always necessary to address housing needs among lower-income households.⁵⁹⁷ For these projects, the federal low-income housing tax credit is the only universally available new-housing subsidy,⁵⁹⁸ although some states and local governments offer other pro-

⁵⁹¹ See *supra* notes 280–292 and 416–419 and accompanying text (discussing local government's broad power in making local zoning regulations and their ability to circumvent state- and federal-level zoning mandates).

⁵⁹² Mandelker, *supra* note 257, at 286.

⁵⁹³ Pendall, *supra* note 69, at 139; see Rosser, *supra* note 44, at 816–17 (noting a lead time of twenty-five years for developers to implement an affordable housing project in New Jersey after securing the right to build it).

⁵⁹⁴ See EINSTEIN ET AL., *supra* note 17, at 122–30; Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 44–68 (1993).

⁵⁹⁵ Been et al., *Supply Skepticism*, *supra* note 98, at 27.

⁵⁹⁶ *Id.* at 33; Video Interview with Bruce Brunner, *supra* note 429; Video Interview with Eric Thompson, *supra* note 399.

⁵⁹⁷ Mangin, *supra* note 20, at 115.

⁵⁹⁸ Lemar, *supra* note 43, at 1098; see also Crown, *supra* note 516 (describing the low-income housing tax credit program as the “primary” means for funding new affordable housing).

grams.⁵⁹⁹ Furthermore, voucher programs and conversions of existing housing units to affordable units are equally or more effective subsidies.⁶⁰⁰ Thus, adequate subsidies must be available to support affordable housing development and preservation. This Section discusses solutions that exist outside of zoning reform.⁶⁰¹ First, reducing exactions and impact fees could combat high housing costs.⁶⁰² Additionally, public financing can help achieve housing affordability.⁶⁰³

Moreover, tailoring exactions and impact fees to reduce burdens on housing production might offer another opportunity to reduce housing costs. Exactions and impact fees affect the price of housing, yet evidence also shows that exactions make growth possible by mitigating opposition to new development and offering a more predictable development approval process.⁶⁰⁴ Scholars and advocates debate the extent to which exactions inhibit housing—and specifically affordable housing—production.⁶⁰⁵ For smaller middle-housing projects, impact fees affect project feasibility, because they are spread across few units, and they can directly affect the units' affordability.⁶⁰⁶ In the case of one affordable housing project in Chicago, public improvements requirements drove up the project's per-unit cost to nearly \$900,000, making the provision of affordable housing nearly impossible.⁶⁰⁷ Thus, reducing or eliminating exactions and impact fees might encourage greater middle-housing production. Portland's ADU reforms included fee waivers that are credited for spurring increased ADU production across the city, and many jurisdictions already waive or reduce impact fees in exchange for income-restricted housing.⁶⁰⁸

Beyond these tools, other mechanisms are available. Owing to inherent risks in the permitting and construction processes, the existing real estate development finance system does not provide long-term, low-cost forms of fi-

⁵⁹⁹ See, e.g., N.Y. PUB. HOUS. LAW § 21 (McKinney 2024) (state low-income housing tax credit statute); DENVER, COLO., REV. MUN. CODE § 27-150 to 27-165 (2024) (local affordable housing capital assistance program); ALBUQUERQUE, N.M., CODE OF ORDINANCES § 14-9-1 to 14-9-7.5 (2024) (local workforce housing trust fund). For a comprehensive list of state and local affordable-housing development programs, see *Rental Housing Programs Database*, NAT'L LOW INCOME HOUS. COAL., <https://nlihc.org/rental-programs> [<https://perma.cc/8UG7-86B5>].

⁶⁰⁰ Mangin, *supra* note 20, at 114.

⁶⁰¹ See *infra* notes 604–611 and accompanying text.

⁶⁰² See *infra* notes 604–608 and accompanying text.

⁶⁰³ See *infra* notes 609–611 and accompanying text.

⁶⁰⁴ NELSON ET AL., *supra* note 203, at 79, 85, 91, 93.

⁶⁰⁵ See Schleicher, *supra* note 72, at 1356–57 (highlighting the differing perspectives on exactions); Been, *supra* note 202, at 146 (noting the “mixed” evidence on impact fees).

⁶⁰⁶ PAROLEK, *supra* note 37, at 78; Video Interview with Eric Thompson, *supra* note 399.

⁶⁰⁷ Crown, *supra* note 516.

⁶⁰⁸ Lydia Lo & Owen Noble, *Four Lessons to Strengthen Land-Use Reforms*, URB. INST. (Oct. 27, 2020), <https://www.urban.org/urban-wire/four-lessons-strengthen-land-use-reforms> [<https://perma.cc/6RJK-AR5B>]; Been, *supra* note 202, at 168.

nancing. Efforts in the San Francisco Bay region to pilot a low-cost financing approach for middle-income housing development present an opportunity.⁶⁰⁹ Another example of a publicly sponsored financing approach is Colorado's Middle Income Housing Authority, which uses tax-exempt bonds and public-private partnerships to support middle-income rental housing production.⁶¹⁰ Similarly, recent changes to mortgage backing rules among the government-sponsored housing enterprises to facilitate mortgage lending on small, multi-family housing units may also encourage more production of this type of housing.⁶¹¹ Taken together, policymakers must continuously evaluate opportunities to assist the overall financing approach for housing development to both encourage more housing production, production of the types of housing units that will best accomplish the goals of the reform consensus, and affordability.

CONCLUSION

The depth and breadth of America's housing crisis requires urgent, effective solutions. Despite some advocates' and elected officials' enthusiasm for single-family zoning reform, it is proving ineffective in quickly addressing housing undersupply, unaffordability, racial and social inequities, or the climate emergency. Although symbolically important, single-family zoning reform is neither a necessary nor sufficient condition to resolve the housing crisis, and housing affordability and social equity explanations for it make little sense in light of its shortcomings. More efficacious alternatives, including allowing higher-density development, density bonuses for affordable housing production, procedural reforms, and financing mechanisms, are necessary and available, and scholars and policymakers should urgently push for their adoption.

⁶⁰⁹ Miller, *supra* note 510, at 491–92.

⁶¹⁰ *Middle Income Housing Authority*, COLO. OFF. OF ECON. DEV. & INT'L TRADE, <https://oedit.colorado.gov/middle-income-housing-authority> [<https://perma.cc/4ZHF-NLTC>].

⁶¹¹ SCOTT ET AL., *supra* note 510, at 6.

