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Infill: New Housing for Twenty-First Century America

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INFILL: NEW HOUSING FOR TWENTY-FIRST-CENTURY AMERICA

*Paul Boudreaux**

ABSTRACT

The American population has changed dramatically over the past several decades: fewer of us live in big families, more of us live alone or in pairs, and more of us favor metropolitan areas near the coasts. Yet our housing laws remain mired in assumptions from the previous century that we are a spread-out nation of large families that need and prefer single-family houses. This Article proposes that our land use laws should affirmatively encourage the construction of infill housing—that is, housing inside our built-up neighborhoods, of both cities and suburbs—and that this infill should be apartment housing—a form of living that has been disfavored under traditional land use law but is more popular among a changing American populace. This Article marshals census and housing data to explain the changing American population, with its million new households per year, and explores the effects of the traditional discrimination against apartment housing in the areas of Washington, D.C., and the San Francisco Bay. It proposes a legal technique of zoning expansion infill, by which cities would be encouraged to widen geographically their existing zones for apartment housing in a fair and sensible manner. Such infill also would further environmental aims by avoiding sprawl and would ameliorate the high costs of housing in modern America by boosting supply and spurring the process of filtering to dampen the costs of rental housing for lower-income Americans.

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INTRODUCTION

Where will future Americans live? The United States grows by more than two million persons and one million new households each year.¹ Meanwhile, more Americans are living in urban areas and without a spouse or family; more than sixty percent of households consist of only one or two persons.² Despite these changes, however, the laws that govern housing remain mired in outmoded twentieth century ideas. These laws stemmed from the early-century factual assumption that most Americans live in a family with two parents and children and the late-century policy assumption that it is optimal for local governments to discourage the construction of new housing

1. See *infra* Section I.A.

2. See *infra* Section I.A.

because of financial, social, and environmental costs.³ Local land use laws, which often tightly restrain the construction of new housing—especially apartment housing—reflect this outdated thinking.⁴ One result is that apartment housing has become progressively more expensive.⁵ Strikingly, in the current decade, almost half of American renters, and most low-income Americans, are “cost-burdened,” in that they pay more than thirty percent of their income in rent.⁶

This Article argues that the new century and new demographics demand a new approach to housing construction, especially in the high-cost metropolitan areas that are the centers of the new knowledge-based economy. As it currently stands, restrictions on housing construction in these areas have driven up prices beyond the reach of large segments of the population.⁷ To mesh with modern concerns over suburban sprawl, our laws should be revised to allow the building of more *infill* housing—units within built-up metro area boundaries.⁸ More specifically, our laws should allow for many more *apartments*,⁹ which are increasingly demanded by the changing demographic makeup, yet have long been discriminated against under American land use laws.¹⁰ This Article proposes a legal mechanism of *zoning expansion infill*, through which cities expand current high-density residential districts to meet modern housing needs.¹¹

Part I highlights the extraordinary demographic changes in the modern United States, especially the tremendous growth in small households, which are less likely to demand a traditional single-family house and more likely to prefer an apartment, in an increasingly urbanized nation. Part II exposes the legal discrimination against apartments, highlighting examples of such discrimination in the

3. See *infra* Section II.A.

4. See *infra* Section I.B.

5. See *infra* Section III.A.

6. Ellen Marya, *Housing Cost Burdens Weigh Heavily on Low- and Moderate-Income Renters Across the Country*, JCHS: HOUSING PERSP. (Jan. 5, 2016), <http://housingperspectives.blogspot.com/2016/01/housing-cost-burdens-weigh-heavily-on.html> [https://perma.cc/6SFY-KBXT].

7. See *infra* Section III.A.

8. See *infra* Part IV.

9. This Article uses the popular and simple term *apartment* to refer to what land use law often calls *multi-family housing*, which encompasses all forms of dense residential living, including condominiums and cooperatives. See Karl Zandl, *How Are Single-family and Multi-family Buildings Defined?*, MOODY'S ANALYTICS, <https://www.economy.com/support/blog/buffet.aspx?did=8015A9FA-79EF-4EE6-BF79-C84EC932B331> [https://perma.cc/VV9N-94AU].

10. See *infra* Section II.A.

11. See *infra* Section IV.B.

Washington, D.C., and San Francisco Bay areas. Part III analyzes the corrosive effects of restrictive zoning laws on the affordability of housing, especially for low-income Americans. Part IV analyzes proposals for legal reform to spur apartment infill, including the technique of zoning expansion infill.

I. THE CHANGING AND EXPANDING AMERICAN POPULATION

The American population in the twenty-first century (a) rapidly expands, (b) lives in decreasingly smaller households, and (c) is congregating in urban and coastal areas. These trends point to the need for more housing construction *within* our most popular metro areas. This Part highlights in turn these three modern demographic changes.

A. A Million New Households Each Year

Since the first U.S. Census, the United States population has continued to grow. As of early 2018, the nation's population exceeded more than 327 million.¹² The population is more than two million larger than it was a year before.¹³ The United States adds a new baby every eight seconds (and experiences one death every eleven seconds); and gains another person by net migration every twenty-six seconds.¹⁴ In all, the American population grows by one every fifteen seconds.¹⁵ The robust growth of the United States stands in contrast to the populations of other affluent nations, such as Germany, Italy, and Japan, all which recently have experienced little or even negative growth.¹⁶ This is attributable, at least in part, to their extremely low birth rates as compared to the United States.¹⁷

12. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, <http://www.census.gov/popclock> [<https://perma.cc/MJ8X-ATCJ>]; see also Candice Ferrette, *Census: U.S. Population Will Be 327 Million on New Year's Day*, *NEWSDAY* (Dec. 28, 2017), <https://www.newsday.com/news/nation/u-s-population-growth-1.15649172> [<https://perma.cc/SAL3-B9BB>].

13. *U.S. and World Population Clock*, *supra* note 12.

14. *Id.*

15. *Id.*

16. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK: POPULATION GROWTH RATE*, <https://www.cia.gov/Library/publications/the-world-factbook/fields/2002.html> [<https://perma.cc/7DH2-33JJ>].

17. *Crude Death and Birth Rate, Data by Country*, WORLD HEALTH ORG. (June 17, 2015), <http://apps.who.int/gho/data/view.main.CBDR2040> [<https://perma.cc/E7P7-HE4D>]. While the fertility rate for Germany, Italy, and Japan each is equal to or less than 1.5 child per woman, the United States' rate is nearly 1.8. *Fertility Rate, Total (Births Per Woman)*, WORLD BANK (2016), <https://data.worldbank.org/indicator/SP.DYN.TFRT.IN?> [<https://perma.cc/VNR3-F4V3>].

But the United States, which trails only China and India among the world's most populous nations, continues to grow fairly rapidly, both because of its relatively strong birth rate among affluent nations and because it continues to be, as it has been for more than two centuries, the leading focus of emigration on the planet.¹⁸

More people means a greater demand for homes. But the population rise understates the rapid increase in the need for housing. The Census defines a *household* as a person or persons living together in a unit.¹⁹ Because the average size of a typical household in the United States has fallen dramatically over the past century, the number of households has risen even faster than the population.²⁰ For example, while the overall population rose by a little less than 10% between the 2000 and 2010 censuses,²¹ the number of households grew by considerably more than 10%, to greater than 116 million households in 2010,²² and to an estimated 125 million households in 2016.²³ The total number of households is 50% larger than in it was in 1980, when it was just over 80 million, and more than twice the number in 1960, when the United States held only about 53 million households.²⁴ Put simply, the United States in the twenty-first century needs to add housing for *more than one million new households* each year.²⁵

B. A Majority of Small Households

Moreover, the makeup of American households has changed dramatically in recent decades. More specifically, the traditional idea of a household as being parents with children is no longer the norm. In 2012, more than 60% of households (more than three in five

18. See *Top 25 Destinations of International Migrants*, MIGRATION POLICY INST., <http://www.migrationpolicy.org/programs/data-hub/charts/top-25-destinations-international-migrants> [<https://perma.cc/R6RB-QJ7N>] (showing that the United States far exceeds Germany, with the second highest number of migrants, as of 2015).

19. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 4 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> [<https://perma.cc/62WY-BYGL>].

20. *Id.* at 4–5.

21. *Id.* at 4.

22. *Id.* at 5 tbl.2.

23. U.S. Census Bureau, *Number of Households in the U.S. from 1960 to 2017 (in Millions)*, STATISTA, <https://www.statista.com/statistics/183635/number-of-households-in-the-us/> [<https://perma.cc/8UMV-FFYT>].

24. *Id.*

25. This number was reached by interpolating the fact that the total number of households rose by more than 11 million in the ten years from 2000 to 2010.

households) consisted of only one or two persons.²⁶ The stereotype of a family with children is fading; the share of households consisting of married parents with children shrunk from more than 40% in 1970 to less than 20% in 2012—a collapse of more than 50%.²⁷ In 1970, more than half of all households had three or more people, with more than 20% consisting of large families of five or more persons, as demonstrated in Figure 1.²⁸ In 2012, by contrast, the share of large families of five or more persons—such as the traditional Dunphy household in the popular twenty-first-century television show *Modern Family*²⁹—had plummeted to less than 10%.³⁰

At the same time, one-person or two-person households (sometimes a couple, sometimes a single parent with a single child) have taken up a larger and larger share of the overall number of households. The most rapidly growing type of household is one person living alone. In what the Census Bureau calls “the rise of living alone,” the total number of single-person households skyrocketed nearly six-fold from 1960, when there were only six million such households, to today, when more than 35 million Americans live alone.³¹ Overall, the share of those living alone mushroomed from only about 13% of households in 1960 to 28% of households in 2016.³²

26. JONATHAN VESPA ET AL., U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2012, at 7 fig.3 (2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf> [<https://perma.cc/NG3W-53JV>].

27. *Id.* at 5 fig.1.

28. *Id.* at 7 fig.3.

29. The popular situation comedy *Modern Family*, which premiered in 2009, explores some of the changes in the American household in the twenty-first century through three related households, only one of which (the Dunphys) is a traditional family composed of a wife, a husband, and their biological children. See generally *Modern Family*, IMDB, <http://www.imdb.com/title/tt1442437/> [<https://perma.cc/JD92-AKWG>]. As of 2012, fewer than 10% of households had as many persons as the Dunphy family. LOFQUIST ET AL., *supra* note 19, at 7 fig.3.

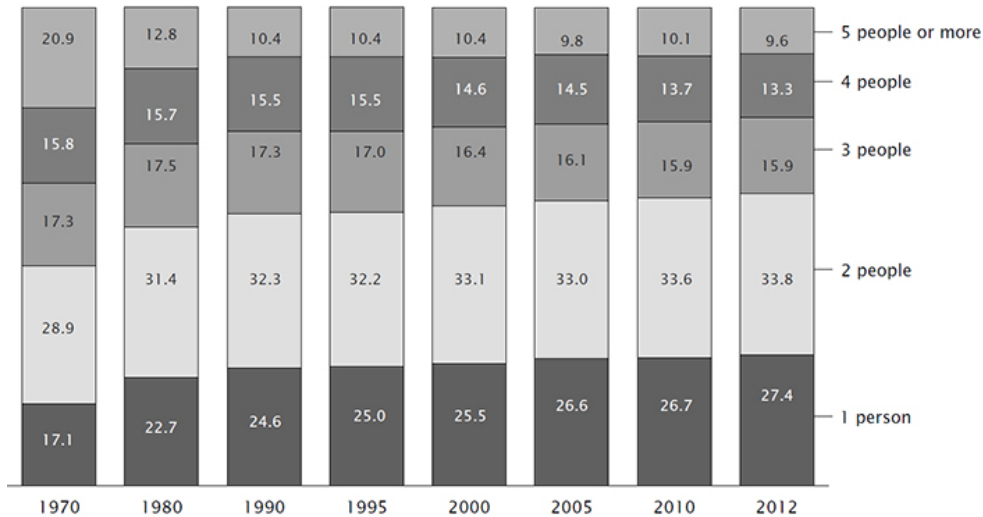
30. LOFQUIST ET AL., *supra* note 19, at 7 fig.3.

31. *Figure HH-4, The Rise of Living Alone*, U.S. CENSUS BUREAU (Aug. 2017), <https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/hh-4.pdf> [<https://perma.cc/9NFN-YT93>]; see also Linda Neidert, *A Rise in the Number of Those Living Alone*, N.Y. TIMES: ROOM FOR DEBATE (July 6, 2015), <http://www.nytimes.com/roomfordebate/2015/07/06/has-being-single-in-america-changed/a-rise-in-the-number-of-those-living-alone> [<https://perma.cc/7UVJ-K5RP>].

32. U.S. CENSUS BUREAU, CHANGING AMERICAN HOUSEHOLDS 6 (2011), https://www.census.gov/newsroom/pdf/cah_slides.pdf [<https://perma.cc/8DW5-M84Z>]; *Table H1. Households by Type and Tenure of Householder for Selected Characteristics: 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> [<https://perma.cc/8A3A-BRK7>] (data on file with the Fordham Urban Law Journal).

Figure 1. U.S. Household by Size, 1970 to 2012³³

(In percent)



Source: U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplement, selected years, 1970 to 2012.

The reasons for these changes are straightforward. First, Americans have fewer children today than did generations past.³⁴ While the typical woman had 3.8 children in 1957, a typical woman today has 1.9 children.³⁵ This phenomenon is attributable both to the widespread availability of contraceptives and the empowerment of women, who are choosing to engage in other life activities, such as pursuing a career, rather than in the traditional role of focusing on children.³⁶

Second, Americans are living alone more often both as young adults and as older persons. Young people are marrying later: the

33. VESPA ET AL., *supra* note 26, at 6 fig.1.

34. See generally Danielle Paquette, *Why American Women Are Having Fewer Babies than Ever*, WASH. POST (Aug. 16, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/08/16/why-american-women-are-having-fewer-babies-than-ever/?utm_term=.80b7c12e17e3 [<https://perma.cc/L7EX-MGKJ>].

35. U.S. CENSUS BUREAU, MEASURING CHILDBEARING PATTERNS IN THE UNITED STATES 4, https://www.census.gov/newsroom/cspan/childbearing/20120817_cspan_childbearing_slides.pdf [<https://perma.cc/6NTV-MYCB>] (displaying data from the National Vital Statistics System).

36. Geeta Nargund, *Declining Birth Rate in Developed Countries: A Radical Policy Re-Think Is Required*, 1 FACTS VIEWS & VISION OBGYN 191, 191-93 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4255510/pdf/FVVinObGyn-1-191-193.pdf> [<https://perma.cc/95LY-7ACX>].

median age at first marriage is now over twenty-eight years old (a number that has risen sharply in recent years), as compared to less than twenty-three years old in 1960.³⁷ This is attributable to a number of factors, including the fact that more people are cohabitating without marriage and choosing not to form a household couple.³⁸ At the same time, modern Americans divorce more often than they did a century ago.³⁹ While there were more than seven marriages for every divorce in 1920, the ratio fell to just over two-to-one by 1990, although it has since risen slightly.⁴⁰ As of 2010, 14% of Americans were divorced or separated and 28% had never married—a record share—because of later and fewer marriages and more divorces.⁴¹ In sum, the fraction of adult Americans (eighteen and older) who are married is down to barely half at 51%—an all-time low.⁴²

Just as significant, the number of elderly people in the United States has rapidly grown over the past several decades. Only about 13 million Americans were sixty-five and older in 1950;⁴³ this grew to about 31.2 million in 1990.⁴⁴ By 2010, 40.3 million Americans were sixty-five and older.⁴⁵ This number is expected to more than double by 2050.⁴⁶ This phenomenon contributes to the growing trend of

37. *Figure MS-2 Median Age at First Marriage: 1890 to Present*, U.S. CENSUS BUREAU (2017), <https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ms-2.pdf> [<https://perma.cc/BSQ6-LN6S>].

38. See Renee Stepler, *Number of U.S. Adults Cohabiting with a Partner Continues to Rise, Especially Among Those 50 and Older*, PEW RES. CTR. (Apr. 6, 2017), <http://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/> [<https://perma.cc/43Y2-HUPJ>] (finding that a record 18 million cohabitated, as of 2017).

39. *Marriages and Divorces, 1900–2012*, INFOPLEASE, <http://www.infoplease.com/ipa/A0005044.html> [<https://perma.cc/LZN6-67VU>].

40. *Id.*

41. D’Vera Cohn et al., *Barely Half of U.S. Adults Are Married – A Record Low*, PEW RES. CTR. (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/> [<https://perma.cc/F9YU-C9MX>].

42. *Id.*

43. CARRIE WERNER, U.S. CENSUS BUREAU, *THE OLDER POPULATION: 2010*, at 3 fig.2 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf> [<https://perma.cc/EYE8-CNUM>].

44. *Id.* at 3.

45. *Id.*

46. JENNIFER ORTMAN ET AL., U.S. CENSUS BUREAU, *AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 1* (2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf> [<https://perma.cc/3LCU-W8DV>].

more persons in the United States living alone.⁴⁷ For Americans sixty-five and older, nearly 36% of women and almost 19% of men live alone.⁴⁸

C. An Urbanized, Coastal Nation

Another profound demographic change is that the American population has been migrating away from farms and small towns towards big metro areas. Though more than half of Americans in 1910 lived in rural areas, as of 2010 more than 80% of Americans lived in urban areas.⁴⁹ In addition, the American population has been migrating away from the center of the country to the coasts, especially the West and South.⁵⁰ As a result, the American population is more concentrated and more crowded than it once was.⁵¹

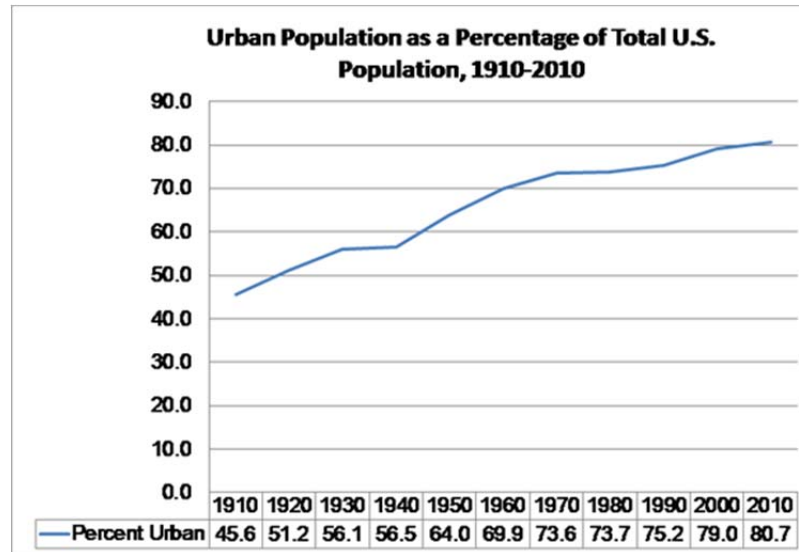
47. A recent Census report on older Americans stated that “[a]s age increases, the percentage of the population living alone also increases.” LORAIN WEST ET AL., U.S. CENSUS BUREAU, 65+ IN THE UNITED STATES: 2010, at 131 (2014), <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p23-212.pdf> [<https://perma.cc/429C-CFXQ>].

48. *Id.* at 130.

49. Michael Ratcliffe, *How Do We Measure Urban Areas?*, CENSUS BLOGS (Apr. 4, 2012), <https://www.census.gov/newsroom/blogs/random-samplings/2012/04/how-do-we-measure-urban-areas.html> [<https://perma.cc/R6E5-R4P4>].

50. *See infra* notes 56–60 and accompanying text.

51. *See infra* notes 56–60 and accompanying text.

Figure 2. The Urbanization of America⁵²

Migration away from rural regions is not confined to the center of the country. In the years between 2010 and 2014, for example, a *majority* of counties in the nation lost population, despite the nation's gaining more than nine million persons overall during these years.⁵³ Many of these were rural counties.⁵⁴ All fifty states had counties that lost population in this period, including those in “boom” states such as Nevada (aside from Las Vegas and Reno), Arizona (far from the sprawling metropolises of Phoenix and Tucson), Texas (many rural western counties), Florida (in the rural panhandle), California (in the dry Owens Valley and northeast, far from the big cities), and Oregon (in the east and south, far from Portland).⁵⁵ The emigration from farm- and small-town America mirrors the changes in the modern economy away from the land and toward the office and service

52. Radcliffe, *supra* note 49.

53. Rebecca Tippett, *Nationwide, Majority of Counties Have Lost Population Since 2010*, UNC CAROLINA DEMOGRAPHY (Apr. 6, 2015), <http://demography.cpc.unc.edu/2015/04/06/nationwide-majority-of-counties-have-lost-population-since-2010> [<https://perma.cc/GU3T-LMRK>].

54. *Id.* For a map of counties that lost population between 2000 and 2010, see PAUL MACKUN ET AL., U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE 2000 TO 2010, at 7 fig.5. (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf> [<https://perma.cc/HK7R-NNFZ>]. Nearly every state had at least one rural county that lost population, and a great majority of the counties in the Great Plains, Appalachia, and rural Southeast saw their populations fall. *See id.*

55. *See* Tippett, *supra* note 53.

economy, including the “creative class” economy highlighted by sociologist Richard Florida.⁵⁶

The population is moving to the coasts,⁵⁷ which are more attractive locations both for service-oriented business and for retirees. Most notable is the shift towards the appealing climates of the South and West.⁵⁸ In sheer numbers, the most rapidly growing regions between 2015 and 2016, for example, were in the coastal and Sunbelt metropolitan areas of Phoenix, Houston, Las Vegas, Seattle, and Dallas-Fort Worth,⁵⁹ while the biggest losers were in the “old economy” areas of Chicago, Detroit, Baltimore, and Cleveland.⁶⁰ Also growing quickly are smaller metropolitan areas with strong service economies, such as Raleigh-Durham, North Carolina, a center of biotech, university, and other white-collar jobs.⁶¹

56. Jesse A. Hamilton, *America's Future: The Heartland Versus the Coasts*, THE ATLANTIC (Oct. 26, 2010), <https://www.theatlantic.com/business/archive/2010/10/americas-future-the-heartland-versus-the-coasts/65162> [<https://perma.cc/XP3V-89BA>] (discussing Florida's “creative class” idea).

57. NOAA, *U.S. Census Report Finds Increases in Coastal Population Growth by 2020 Likely, Putting More People at Risk of Extreme Weather*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Mar. 25, 2013), http://www.noaanews.noaa.gov/stories2013/20130325_coastalpopulation.html [<https://perma.cc/VD5L-JT2C>].

58. See, e.g., Press Release No. CB17-81, U.S. Census Bureau, *The South Is Home to 10 of the 15 Fastest-Growing Large Cities* (May 25, 2017), <https://www.census.gov/newsroom/press-releases/2017/cb17-81-population-estimates-subcounty.html> [<https://perma.cc/4XSS-BQE5>].

59. *Top 10 Largest-Gaining Counties (Numeric Change): July 1, 2015 to July 1, 2016*, U.S. CENSUS BUREAU (2017), <https://www.census.gov/content/dam/Census/newsroom/press-kits/2017/Top%2010%20Largest%20Gaining.pdf> [<https://perma.cc/NWA8-Z3AH>].

60. *Top 10 Largest-Declining Counties or County Equivalents (Numeric Change): July 1, 2015 to July 1, 2016*, U.S. CENSUS BUREAU (2017), <https://www.census.gov/content/dam/Census/newsroom/press-kits/2017/Top%2010%20Largest%20Declining.pdf> [<https://perma.cc/4GWE-AF7K>]. The term “Rust Belt” is often used to refer to places that were based on the old economic model of heavy manufacturing. *Rust Belt*, ENCYCLOPEDIA.COM, <http://www.encyclopedia.com/places/united-states-and-canada/miscellaneous-us-geography/rust-belt> [<https://perma.cc/58A6-DDCS>] (noting the concept of the declining manufacturing-oriented economies of the cities of the Great Lakes area).

61. Evan Matsumoto, *Raleigh Among Top 25 Fastest Growing Metros in Nation*, WRAL.COM (Mar. 23, 2017), <http://www.wral.com/raleigh-among-fastest-growing-metros-in-nation/16601473/> [<https://perma.cc/E796-SQDK>]; see also *Biotechnology Round Table: Wonder of the World*, BUS. N.C. (May 9, 2016), <http://businessnc.com/biotechnology-round-table-wonder-of-the-world/> [<https://perma.cc/KD5Y-3P6K>].

II. THE OUTMODED DISCRIMINATION AGAINST APARTMENT HOUSING

As shown in Part I, the United States has evolved over the past half century from a nation of largely traditional families with two parents and multiple children, spread across the nation, to a nation of smaller household types—with single persons, parent and child, and childless couples forming significant and growing segments of the population—clustered more tightly into the big metro areas of the Sunbelt and coasts.⁶² The social and legal implications of these demographic changes are profound. Part II explains how early twentieth-century America developed its land use laws for a low-density nation of large families with parents and children. Although this factual foundation is no longer valid, our laws have not changed with the times. Laws on housing remain mired in century-old and outmoded conceptions.

Section I.A first exposes the century-long bias in American law in favor of low-density housing. Then, Section I.B explains the implications of this bias in connection with two coastal metro areas—Washington, D.C., and the San Francisco Bay Area—before drawing a brief picture of national trends.

A. American Law's Low-Density Bias

The foundation of American land use law, including its policies of restricting certain types of housing, remains the landmark 1926 U.S. Supreme Court decision in *Village of Euclid v. Ambler Realty Co.*⁶³ Like many municipalities across the nation in the Progressive Era, a suburb of Cleveland adopted an ordinance to “zone” different types of land uses in different areas.⁶⁴ Much of the self-proclaimed “village”—including valuable properties on Euclid Avenue, an artery that runs directly from downtown Cleveland out to the suburb that took its name—was zoned for single-family houses and duplex houses only.⁶⁵ Indeed, house lots could not be any smaller than minimum sizes dictated by the ordinance.⁶⁶ Apartment buildings and other uses

62. *See supra* Part I.

63. 272 U.S. 365 (1926).

64. The term “Progressive Era” was coined in honor of the Progressive Party, founded by former President Theodore Roosevelt, who ran unsuccessfully for reelection in 1912. *See* Elizabeth Sanders, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281 (2011). *See generally* G.E. MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* (1946) (discussing its formation and ideals).

65. *Euclid*, 272 U.S. at 379–80.

66. *Id.* at 381–82.

were not allowed.⁶⁷ A land development company, which planned to build both apartments and commercial uses on Euclid Avenue, asserted in federal court a constitutional right to use its land as it desired.⁶⁸ In an era in which courts often struck down social legislation for violating “substantive due process” and other such vague rights,⁶⁹ such a claim seemed likely to succeed. Indeed, the district court judge that heard the case at the trial level held that the zoning ordinance was unconstitutional.⁷⁰ The judge reasoned that not only did the law infringe on the property rights of the landowner, but land use zoning laws were troubling because they worked to “classify the population and segregate them according to their income or situation in life.”⁷¹

The Supreme Court reversed in a split decision.⁷² In an opinion that resonates nearly a century later, Justice Sutherland, writing for the majority, concluded in effect that land use discrimination in favor of single-family houses was a wise policy choice.⁷³ The Court reasoned that zoning laws further the “health and safety of the community.”⁷⁴ Analogizing to the traditional common-law property doctrine of nuisance—by which a land use may be enjoined by a court if it substantially interferes with another landowner’s use and enjoyment of its property⁷⁵—the Court reasoned that a “nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard,” and approved of the idea of separating land uses that conflict with single-family residential households.⁷⁶ Statutory discrimination against apartments is justified, the Court reasoned, because apartments can be “parasites” that “destroy” the “residential character of a neighborhood” and “come very near to being nuisances.”⁷⁷

67. *Id.*

68. *Id.* at 384.

69. One of the most notable constitutional decisions of the early twentieth century was *Lochner v. New York*, 198 U.S. 45, 74 (1905), in which the Court struck down a law that limited working hours for bakers.

70. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 317 (D. Ohio 1924), *rev’d*, 272 U.S. 365 (1926). The case was considered by the Supreme Court on a direct appeal from the U.S. district court. *Euclid*, 272 U.S. at 384.

71. *Ambler Realty*, 297 F. at 316.

72. *Euclid*, 272 U.S. at 397.

73. *Id.* at 395.

74. *Id.* at 391.

75. *E.g.*, *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 719–21 (Mich. 1992) (giving the common definition of the tort of nuisance).

76. *Euclid*, 272 U.S. at 388.

77. *Id.* at 394–95.

In response to the assertion that zoning was an overreach by a local authority, which did not have the interests of the larger metropolitan area in mind, the Court concluded that local laws should be decided by the interests of the current residents of the suburban jurisdiction, not by metropolitan interests: “[T]he village, though physically a suburb of Cleveland, is politically a separate municipality, with [the] . . . authority to govern itself as it sees fit.”⁷⁸ Through this milestone decision, which was the only high court ruling on local land use law for more than half a century, the Court gave its imprimatur to two general hallmarks of modern land use policy: (1) a locality may ignore the potential housing needs of its region; and (2) a city or suburb may discriminate against apartments and other types of modest-cost housing because single-family housing is a preferred form of American life.⁷⁹

B. Case Studies of Knowledge Economy Areas

This section discusses examples of the persistence of *Euclid*'s low-density bias in two “knowledge economy”⁸⁰ metro areas: Washington, D.C., the nation’s governmental capital, and the San Francisco Bay Area, the world’s capital in digital technology.⁸¹

During the twentieth century, and continuing through the current day, jurisdictions across the nation have adopted restrictive zoning laws.⁸² The City of Houston is a famous exception.⁸³ In most metro

78. *Id.* at 389.

79. States may, of course, adopt their own laws to guide housing and land use in different directions. The most famous state law divergence from the *Euclid* reasoning has been New Jersey’s *Mount Laurel* doctrine, under which municipalities are required to consider low-income housing needs. *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 724–25 (N.J. 1975); *see also* discussion *infra* Section III.C.

80. The term “knowledge economy” refers to economic activity that derives from intellectual capital, as opposed to the traditional “manufacturing economy.” *Knowledge Economy*, INVESTOPEDIA, <https://www.investopedia.com/terms/k/knowledge-economy.asp> [<https://perma.cc/8MF4-DFJY>].

81. *See, e.g.*, Samuel Klein, *The San Francisco Bay Area: Innovation Capital of the World*, ATLANTIC COUNCIL (Nov. 15, 2016), <http://www.atlanticcouncil.org/blogs/futuresource/the-san-francisco-bay-area-innovation-capital-of-the-world> [<https://perma.cc/YGT5-5Z5E>] (referring to the San Francisco Bay Area as the “innovation capital of the world”).

82. *See, e.g.*, G. Donald Jud, *The Effects of Zoning on Single-Family Residential Property Values: Charlotte, North Carolina*, 56 LAND ECON. 142, 142 (1980) (“Zoning has been a ubiquitous method of controlling land use in urban areas since the 1920s.”).

83. *See generally* Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning)*, 50 WAYNE L. REV. 1171 (2005) (discussing the lack of zoning laws in Houston).

areas, especially in the suburbs, the bulk of land that is zoned as residential—as opposed to commercial or industrial—is zoned for single-family houses only; apartments are not allowed, except for in small and discrete areas.⁸⁴ At the same time, the United States is experiencing a fascinating and perverse phenomenon, in which central cities serve as magnets for young people and outer suburbs continue to grow rapidly to meet the demand of a growing population on buildable space; at the same time, however, the inner suburbs, many of which include the most affluent places in the nation, have a stagnant or falling population—all because of their zoning laws.⁸⁵ It is often said that suburbs close to central cities are “built out”—meaning that almost every parcel that can be built on has been built on, to the limit permissible by zoning laws, which for most locations permit only single-family houses.⁸⁶ But these close-in suburbs would not be considered built out if zoning laws allowed for *denser* housing, including more apartments for a changing American population.

1. Washington, D.C.

In recent decades, Washington D.C.’s metro area of more than six million people⁸⁷ has witnessed a great increase in both population size, and as a result, the demand for apartment housing.⁸⁸ Consequently, rental costs rose during the new century’s housing boom, bust, and recovery. For instance, between 2006 and 2014, the median rent in the city of Washington rose by 27%.⁸⁹ During this

84. This Section shows this through the examples of the metropolitan areas of Washington, D.C., and the San Francisco Bay Area.

85. See *infra* Section II.B.3.

86. See JENNIFER COX & CHRISTOPHER JONES, WHAT HAPPENS WHEN WE RUN OUT OF LAND?: A BUILD-OUT ANALYSIS FOR NASSAU & SUFFOLK COUNTIES 1 (2004), research.policyarchive.org/96004.pdf [https://perma.cc/26E3-BKSL] (“[M]any would say that [Long] Island is *already* effectively built out.”).

87. *Annual Estimates of Resident Population: April 1, 2010 to July 1, 2016*, U.S. CENSUS BUREAU (Mar. 2017), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/8RQV-PMQE].

88. The metro area of Washington grew by more than 15% in each of the decades between 1980 and 2010—the largest metro area to do so. WILLIAM H. FREY, BROOKINGS INST. METRO. POLICY PROGRAM, POPULATION GROWTH IN METRO AMERICA SINCE 1980: PUTTING THE VOLATILE 2000S IN PERSPECTIVE 18 app. A (2012), https://www.brookings.edu/wp-content/uploads/2016/06/0320_population_frey.pdf [https://perma.cc/NR2E-UX3S].

89. INGRID GOULD ELLEN & BRIAN KARFUNKEL, NYU FURMAN CTR./CAP. ONE, NATIONAL AFFORDABLE RENTAL HOUSING LANDSCAPE: RENTING IN AMERICA’S LARGEST METROPOLITAN AREAS 14 fig.9, 19 fig.13 (2016), http://furmancenter.org/files/NYU_Furman_Center_Capital_One_National_Affordable_Rental_Housing_Landscape_2016_9JUNE2016.pdf [https://perma.cc/UWA6-65M8].

same time period, the median rent in Washington's suburbs rose by only 8%.⁹⁰ As discussed below, the Washington area struggled not only to keep up with demand for new construction, but also to maintain housing affordability. This failure was, at least in part, attributable to zoning discrimination against apartments in both the city proper and the suburbs.

Like almost all American cities, Washington's central city population rose steadily in the early twentieth century; then, with the advent of mass suburbanization after 1950, its population fell every decade in the second half of the century.⁹¹ With the "revival of the cities" in the new century, however, spurred by young professionals,⁹² Washington's city population increased by nearly 20,000 people in the first decade of the current century.⁹³ Between 2010 and 2015, the city's population rose much more sharply, by an estimated 100,000, to a total of more than 672,000 (although the total is still much lower than the peak of more than 801,000, reached in 1950).⁹⁴ In the central city, however, about half of the city outside of the central core of offices, apartments, and parks is zoned for *single-family residences only*.⁹⁵ Apartments are permissible, for the most part, only in the center of the city and not in most of the northern city neighborhoods, which are in effect "suburban" both in their low-density zoning and, consequently, in their occupation by affluent and middle-class households.⁹⁶ High-density apartment buildings are permissible only

90. *Id.* at 52.

91. See Table 9. *District of Columbia – Race and Hispanic Origin for Selected Large Cities and Other Places: Earliest Census to 1990*, U.S. CENSUS BUREAU (July 13, 2005), <https://www.census.gov/population/www/documentation/twps0076/DCtab.pdf> [<https://perma.cc/QA4Q-P25P>].

92. See generally Andrew Fichter, *DC's Population Is Exploding*, GREATER GREATER WASH. (May 26, 2016), <https://ggwash.org/view/41810/dcs-population-is-exploding> [<https://perma.cc/XE7C-M6QH>].

93. See D.C. OFFICE OF PLANNING, POPULATION TRENDS 2 (2016), <https://dme.dc.gov/sites/default/files/dc/sites/dme/publication/attachments/Office%20of%20Planning%20Presentation%20for%20CSCTF%204%2026%2016.pdf> [<https://perma.cc/MBP2-V2L5>].

94. See *id.*; Fichter, *supra* note 92.

95. *Zoning Regulations of 2016 Overview*, GOV'T OF D.C. [hereinafter D.C. Zoning Map], <http://arcg.is/Kn9fi> [<https://perma.cc/ZQ66-F5CY>] (Click on the map to see that R-1-A and R-1-B both provide "detached houses" on either "moderate" or "large" lots. Only in a fraction of the city, in zones "RA" (delineated in olive green), are apartments permitted.)

96. *Id.* In Washington, D.C., more affluent people (and more white people) have tended to live in the west and north, while poorer people (and more black people) have tended to live in the east and south. In Ward 3, in northwest Washington, the black population is less than 10%. In Ward 7, in the southeast, more than 90% of the residents are black. *Compare DC 2012 Ward Profile – Population: Ward 3*,

in the zones defined as RA-3 and RA-4.⁹⁷ There are very few geographic areas zoned as such in the city.⁹⁸ Thus, much of the high-density apartment zoning in the city is along the corridors of Connecticut Avenue and Wisconsin Avenue.⁹⁹ These are the main thoroughfares of affluent Northwest Washington and, just as crucially, the route of the Red Line of Washington's metro rail system.¹⁰⁰ Yet even along these routes, high-density apartment buildings are typically only permissible when *directly* adjacent to the avenues.¹⁰¹ Even two blocks away from the thoroughfares, the zoning permits only single-family housing.¹⁰²

The demand for city apartments is shown by how the market has built housing units in Washington in recent years. A migration of educated young people, who are often single and/or childless, has fueled a boom in the construction of apartment buildings in the limited zones in which apartments are allowed.¹⁰³ Nearly all new construction in the city has been apartments, not single-family houses.¹⁰⁴ In 2015, for example, more than 90% of new housing units in the city were in multi-family housing—in other words, apartments and condominiums.¹⁰⁵

NEIGHBORHOOD INFO DC, http://www.neighborhoodinfodc.org/wards/Nbr_prof_wrd3.html#sec_1_race [<https://perma.cc/J7PP-KZ27>], with *DC 2012 Ward Profile – Population: Ward 7*, NEIGHBORHOOD INFO DC, http://www.neighborhoodinfodc.org/wards/Nbr_prof_wrd7.html#sec_1_race [<https://perma.cc/E8CN-RJK2>].

97. Various districts whose names start with “R” are, according to the D.C. government, “residential zones, designed to provide for stable, low- to moderate-density residential areas suitable for family life and supporting uses.” D.C. Zoning Map, *supra* note 95. Zones that begin with “RA” are “Residential Apartment.” *Zoning Handbook: Residential Apartment (RA) Zones – General*, D.C. OFFICE OF ZONING, <http://handbook.dcoz.dc.gov/zones/residential-apartment/> [<https://perma.cc/5GGW-J5FP>].

98. See D.C. Zoning Map, *supra* note 95.

99. See *id.*

100. Dan Malouff, *WMATA Releases Its Next Rail Map*, GREATER GREATER WASH. (Sept. 12, 2013), <http://ggwash.org/view/32323/wmata-releases-its-next-rail-map> [<https://perma.cc/L4EJ-AC6Z>] (showing map of the Washington Metrorail system).

101. See D.C. Zoning Map, *supra* note 95.

102. See *id.*

103. See Carol Morello et al., *Census: Young Adults Are Responsible for Most of D.C.’s Growth in Past Decade*, WASH. POST (May 5, 2011), https://www.washingtonpost.com/local/census-young-adults-are-responsible-for-most-of-dcs-growth-in-past-decade/2011/05/04/AFJz5LlF_story.html?utm_term=.141f0e77f6cb [<https://perma.cc/Q7XR-CRfK>].

104. See FREDDIEMAC, MULTIFAMILY 2017 OUTLOOK: POSITIONED FOR FURTHER GROWTH, at 5 Exhibit 4 (2017), http://www.freddiemac.com/research/pdf/mf_2017_outlook.pdf [<https://perma.cc/CKU8-D3BV>].

105. See *id.*

The most notable residential transformation in the city has been on lower 14th Street Northwest, which once was infamous as the center of destructive riots after Martin Luther King's assassination in 1968 but recently has been a fast-growing sector of the city.¹⁰⁶ This is because the zoning for this neighborhood—on a subway line and close to the office centers—allows large apartment buildings.¹⁰⁷ Its housing density did not match its potential capacity until the new century. Not surprisingly, nearly all of the young migrants to Washington move to apartments, not to the single-family houses that fill much of the outer neighborhoods of the city. The city's Ward 1, which encompasses the burgeoning 14th Street neighborhoods, has seen its population rise significantly,¹⁰⁸ while the population has fallen in Ward 4, directly to the north, in which almost no land is zoned for apartments.¹⁰⁹

The exclusionary effects of zoning are not limited to the central city. Adjacent to and north of the central city is Montgomery County, Maryland, a jurisdiction of greater than one million people—more than that of the city of Washington.¹¹⁰ In total, the capital's suburbs account for 83% of Washington's metro population.¹¹¹ Many of the major streets of the central city extend directly into Montgomery County, with little apparent change in their appearance or land use.¹¹²

106. See Robert McCartney, *'Black Branding'—How a D.C. Neighborhood Was Marketed to White Millennials*, WASH. POST (May 3, 2017), https://www.washingtonpost.com/local/black-branding—how-a-dc-neighborhood-was-marketed-to-white-millennials/2017/05/02/68b0ae06-2f47-11e7-9534-00e4656c22aa_story.html?utm_term=.fea3b814cbdc [<https://perma.cc/YA4S-2DHP>] (discussing the influx of young white people into the 14th Street, U Street, and Shaw neighborhoods).

107. See DC Zoning Map, *supra* note 95. Critics of this influx of young people (most of whom are white) lament the “gentrification” of the city. See also McCartney, *supra* note 106.

108. *DC 2012 Ward Profile—Population: Ward 1*, NEIGHBORHOOD INFO DC, http://www.neighborhoodinfodc.org/wards/Nbr_prof_wrd1.html [<https://perma.cc/DK5P-Q8ES>].

109. *DC 2012 Ward Profile—Population: Ward 4*, NEIGHBORHOOD INFO DC, http://www.neighborhoodinfodc.org/wards/Nbr_prof_wrd4.html [<https://perma.cc/UC69-CSW8>].

110. See *Quick Facts: District of Columbia, District of Columbia; Montgomery County, Maryland*, U.S. CENSUS BUREAU [hereinafter *Quick Facts: DC & Montgomery*], <https://www.census.gov/quickfacts/fact/table/districtofcolumbiadistrictofcolumbia,montgomerycountymaryland/PST045216> [<https://perma.cc/5W6X-8LGR>] (estimating a 2016 population of 1.04 million for Montgomery County and a population of about 681,000 for the District of Columbia).

111. FREY, *supra* note 88, at app. C.

112. Compare D.C. Zoning Map, *supra* note 95, with *Digital Zoning Map*, MONTGOMERY CTY. PLANNING DEP'T (last updated Oct. 9, 2017) [hereinafter *Montgomery Cty. Zoning Map*], <http://mcatlas.org/zoning/> (showing similar zoning along the major avenues).

The county also holds many low-income neighborhoods and an increasing number of immigrants with poor English language skills.¹¹³ Montgomery County has been notable for its progressive approach to land use law. It was one of the vanguards of *inclusionary zoning*—the idea of using law to encourage low-cost housing, not discourage it¹¹⁴—such as the requirement that large new housing developments *set aside* a specified share of the units for low-cost or moderate-cost housing.¹¹⁵ These rules are one reason why the county has diversified both racially and socioeconomically in recent decades.¹¹⁶ But it is still an expensive place to live, with a typical house price of greater than \$400,000 and an average rental cost of more than \$1,600 a month.¹¹⁷

In this close-in, populous county, zoning constrains new housing. The northern third of Montgomery County is largely reserved as a “conservation” area, designed mainly for farming, with tight restrictions on new construction.¹¹⁸ Another third of Montgomery County, especially on the western and eastern borders, is reserved for semi-rural uses: very large lots of at least two or five acres.¹¹⁹ It is only within a few miles of the D.C. border, and along the “corridor” adjacent to Interstate 270, that denser housing is permitted.¹²⁰ But even here, most of the land is zoned for detached houses on at least

113. See generally Bill Turque, *Montgomery County Struggles to Strike a Balance in the Nation's Immigration Fight*, WASH. POST (Feb. 26, 2017), https://www.washingtonpost.com/local/md-politics/struggling-to-strike-a-balance-in-the-nations-immigration-fight/2017/02/26/3cb00b28-fa02-11e6-9845-576c69081518_story.html?utm_term=.f128b6891adc [<https://perma.cc/8QQZ-558P>] (discussing a variety of immigration policy issues in Montgomery County).

114. Steps in land use law to encourage low-cost housing, often termed “inclusionary zoning,” are often controversial. See generally Robert Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL. L. REV. 1167 (1981) (discussing early efforts and criticizing their unintended consequences); see also *infra* Part III.C.

115. See MONTGOMERY CTY. DEP'T OF HOUSING & CMTY. AFFAIRS, MULTI-FAMILY HOUSING FUNDING GUIDE 8 (2007), https://montgomerycountymd.gov/DHCA/Resources/Files/housing/multifamily/reports/multi-family_housing_funding_guide.pdf [<https://perma.cc/LJG9-4EK2>] (discussing the county's low-cost housing set-aside housing requirements).

116. Montgomery County's population transformed from being more than 80% non-Hispanic white in 1980, to less than 50% in 2010. LORRIE FRASURE-YOKLEY, *RACIAL AND ETHNIC POLITICS IN AMERICAN SUBURBS* 54 (2015).

117. See *Quick Facts: DC & Montgomery*, *supra* note 110.

118. See generally Montgomery Cty. Zoning Map, *supra* note 112.

119. This area imposes Development Standard RC-5 (five acre minimum) or Development Standard RE-2 (2-acre minimum). See MONTGOMERY CTY., MD., ZONING CODE art. 59-4, div. 4.3, § 4.3.4 (2014); MONTGOMERY CTY., MD., ZONING CODE art. 59-4, div. 4.4, § 4.4.4.

120. See Montgomery Cty. Zoning Map, *supra* note 112 (showing the higher density in yellow permitted along the I-270 corridor).

moderate-sized lots.¹²¹ Closest to the central city, most of the built-up residential land is zoned for detached houses on lots of at least 60,000 square feet, with other areas imposing minimum lot sizes of either 40,000 or 90,000 square feet.¹²² Only in the centers of the Montgomery suburban cities of Silver Spring, Bethesda, Kensington, and Wheaton—each within two miles of the D.C. boundary—are many apartment buildings permitted, each in compact districts of less than one-square mile apiece.¹²³

These small enclaves have witnessed city-like explosions in apartment construction on a smaller scale than on 14th Street. Affluent Bethesda, for example, has seen the construction of a number of walkable, “new urbanist” apartment complexes.¹²⁴ Bethesda’s population grew 5.7% in the first decade of the century, after falling from 1970 to 2000.¹²⁵ Even Silver Spring, for decades called “slumping” in large part because it has been a magnet for less-affluent households, has witnessed a turnaround in apartment construction within its limited multifamily housing zone.¹²⁶

This mini-boom in suburban apartment construction is not simply part of the continuing suburbanization of America, which was derailed only temporarily by the housing bust of 2008. Suburbs that allow apartments continue to grow, while those that zone them out do not. For example, wealthy Bethesda’s recent rise in population stands in contrast to neighboring and similarly affluent Potomac, whose

121. *See generally id.*

122. These are the R-60, R-40, and R-90 districts. *See id.*

123. These are the red clusters on the map. *See id.*

124. *See generally* Marisa M. Kashino, *\$10 Million Condos Could Be the Future for Bethesda Real Estate*, WASHINGTONIAN (Feb. 15, 2015), <https://www.washingtonian.com/2015/02/19/10-million-condos-could-be-the-future-for-bethesda-real-estate> [<https://perma.cc/94LA-UNZS>] (discussing the boom in Bethesda multifamily housing construction). *See generally* Shilpi Paul, *The 11 Residential Projects Coming to Downtown Bethesda*, URBANTURF (July 1, 2013), http://dc.urbanturf.com/articles/blog/the_bethesda_development_rundown/7262 [<https://perma.cc/KDV4-MQ99>].

125. *See generally* *Bethesda, Maryland, Population*, CENSUSVIEWER, <http://censusviewer.com/city/MD/Bethesda> [<https://perma.cc/KMC4-3HYE>]. *See* U.S. CENSUS BUREAU, 2000 POPULATION AND HOUSING COUNTS 9 (2003), <http://www.census.gov/prod/cen2000/phc-3-22.pdf> [<https://perma.cc/LYE5-UMX3>].

126. *See generally* Andrew Metcalfe, “Central” Seen as Latest Piece in Reinvigoration of Downtown Silver Spring, BETHESDA MAG. (Sept. 9, 2015), <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Central-Seen-as-Latest-Piece-in-Reinvigoration-of-Downtown-Silver-Spring/> [<https://perma.cc/QW65-DE9B>]; *Downtown Silver Spring’s Upcoming Wave of Development*, URB. MID-ATLANTIC (Nov. 10, 2014), <http://urbanmidatlantic.blogspot.com/2014/11/downtown-silver-springs-upcoming-wave.html> [<https://perma.cc/H5P9-9MZN>].

population held steady over the same period.¹²⁷ The distinction is that Bethesda, which is served by the Wisconsin Avenue subway line from Washington, contains a significant apartment zone, while Potomac has no land at all zoned for apartments,¹²⁸ despite its expanse of more than twenty-five square miles, starting just a few miles from Washington.¹²⁹

2. San Francisco Bay Area

The San Francisco Bay Area's laws, history, and housing market show similar attributes to the Washington, D.C. area. The central city of San Francisco is isolated on a peninsula, with water on three sides; despite this, most of the city is zoned for low-density residential, including the great bulk of the western half of the city, most of which is zoned for either single-family residences or, less commonly, duplexes (two attached houses).¹³⁰ Medium and high-density apartments are largely confined to the northeast quadrant¹³¹ of the forty-seven-square-mile city.¹³² Despite its perennial popularity and high-paying technology jobs, San Francisco has experienced only modest population growth over the past half-century, attributable in large part to its tight zoning laws and high housing costs.¹³³

A telling comparison exists between San Francisco and Paris, France. Paris houses almost *three times* as many people as does San Francisco, even though the French capital is slightly smaller in geographic size.¹³⁴ This is a testament to the effects of low-density

127. See generally *Potomac, Maryland, Population*, CENSUSVIEWER, <http://censusviewer.com/city/MD/Potomac> [<https://perma.cc/Y8PE-6LLX>].

128. See Montgomery Cty. Zoning Map, *supra* note 112 (zoom into "Potomac" in the southwest corner). The small pink area near the center of Potomac is zoned for non-residential structures and is occupied by a handful of stores.

129. *Potomac, Maryland*, CITY-DATA, <http://www.city-data.com/city/Potomac-Maryland.html> [<https://perma.cc/SRJ4-UPG7>].

130. See generally S.F. Planning, *San Francisco Zoning Map*, CITY OF S.F. (Oct. 2017) [hereinafter S.F. Zoning Map], http://default.sfplanning.org/zoning/zoning_map.pdf [<https://perma.cc/QP3C-R37S>]. Note the large expanses of light yellow (denoting low-density residential, especially outside the northeast quadrant of the city).

131. See *id.* (showing the expanses of low-density housing limits).

132. *San Francisco, California*, CITY-DATA, <http://www.city-data.com/city/San-Francisco-California.html> [<https://perma.cc/292V-TC87>].

133. See generally *San Francisco, California, Population*, CENSUSVIEWER, <http://censusviewer.com/city/CA/San%20Francisco> [<https://perma.cc/54W9-JNTE>].

134. Paris holds more than 2.2 million persons (below a peak of about 2.9 million in 1910) in less than forty-one square miles. See *Cities*, EUROSTAT, <http://ec.europa.eu/eurostat/cache/RCI/#?vis=city.statistics&lang=en> [<https://perma.cc/29V4-FJ7M>]. San Francisco houses only about 870,000 people in about forty-seven square miles.

zoning constraints in San Francisco: while Paris is filled with apartments, from east to west and north to south, San Francisco's laws bar apartments from much of the city.¹³⁵

The legal restraints of San Francisco have led to a surge in construction of new apartment buildings in the small zones set aside for such housing, especially in the past two decades.¹³⁶ This new construction, as well as the increased demand from high-income young professionals, has led to complaints about *gentrification*: areas of the city that used to offer relatively inexpensive housing are no longer affordable for long-time residents of those areas. For example, the Mission District in the east-central part of the city, which has long been a center of the city's Latino community, now features new studio apartments that were renting in 2016 for \$2,700 a month.¹³⁷

Apartment costs in San Francisco are among the highest in the nation. The median price of a one-bedroom apartment was more than \$3,000 in 2017 (after a decrease in 2016)—far higher than the median rent in New York City.¹³⁸ Meanwhile, a typical single-family house in the city cost more than \$1.2 million.¹³⁹

See Quick Facts: San Francisco County, California, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/sanfranciscocountycalifornia/AGE115210> [<https://perma.cc/7TAR-7675>]. Metro areas in the United States are far less dense than those in other countries, even affluent ones. *See* Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 3–4 (2016) (citing data about density of metro areas across the world).

135. *See generally* Kriston Capps, *Blame Zoning, Not Tech, for San Francisco's Housing Crisis*, CITYLAB (Mar. 11, 2016), <http://www.citylab.com/housing/2016/03/are-wealthy-neighborhoods-to-blame-for-gentrification-of-poorer-ones/473349/> [<https://perma.cc/52RT-WYVF>] (discussing the restraints against the construction of new apartment housing in San Francisco).

136. *See generally* Roland Li, *Has San Francisco's Housing Boom Peaked? New Project Proposals Drop Along with Rents*, S.F. BUS. TIMES (Sept. 19, 2016), <http://www.bizjournals.com/sanfrancisco/blog/real-estate/2016/09/san-francisco-housing-pipeline-sees-drop-prop-c.html> [<https://perma.cc/4E98-9SFP>] (discussing a 2016 drop in new construction, after years of boom).

137. Carol Pogash, *Gentrification Spreads an Upheaval in San Francisco's Mission District*, N.Y. TIMES (May 22, 2015), <https://www.nytimes.com/2015/05/23/us/high-rents-elbow-latinos-from-san-franciscos-mission-district.html> [<https://nyti.ms/2koYie5>] (discussing the gentrification of the once-largely-Latino Mission District).

138. Stephen Cho, *SF Bay Area Metro Report: April 2017*, ZUMPER (Apr. 26, 2017), <https://www.zumper.com/blog/2017/04/sf-bay-area-metro-report-april-2017> [<https://perma.cc/W349-Q69R>].

139. *See San Francisco Home Prices & Values*, ZILLOW, <http://www.zillow.com/san-francisco-ca/home-values/> [<https://perma.cc/ZF65-FGF8>]. *See generally* Jonathon Chew, *How a Billboard Exposed the Insanity of the San Francisco Housing Market*, FORTUNE (Apr. 9, 2016), <http://fortune.com/2016/04/09/billboard-summit800-san-francisco-housing/> [<https://perma.cc/Z9N6-MWPW>] (noting townhouses selling for more than one million dollars).

The other large city in the San Francisco Bay Area is San José, which is the biggest locality in Silicon Valley, the home of many of the world's most important high-tech corporations, including Google, Apple, Facebook, Netflix, and Tesla.¹⁴⁰ Although it first came to the nation's attention in the 1960s hit song "Do You Know the Way to San José?" as a quiet contrast to crowded Los Angeles, San José's population has exploded in the decades since, topping one million persons in 2015, and thus making its considerably more populous than San Francisco, although its population growth has slowed significantly in the new millennium.¹⁴¹ Despite its position as a focal point of the youth-oriented knowledge economy, San José's land use laws remain skewed toward the ideals of a half-century ago. Most of its land is zoned for low- or middle-density residential—that is, single-family houses and townhouses, and not apartments.¹⁴² Not surprisingly, rent in San José is also among the highest in the nation: a single bedroom rental averaged more than \$2,400 in early 2018, surpassed among big cities only by San Francisco and New York.¹⁴³

The high rents in San Francisco and San José are matched, to an extent, throughout the suburbs of the Bay Area. Even in the suburb of South San Francisco—an unglamorous city that advertises itself as "The Industrial City" and which recently has become home to large Latino and Asian populations (and a median household income of a relatively modest \$78,000 in 2016)¹⁴⁴—a one-bedroom apartment rents for \$2,660.¹⁴⁵

140. See generally Paiching Wei, *SV150: Interactive Rankings of Silicon Valley's Top Public Tech Companies*, MERCURY NEWS (May 1, 2017), <https://www.mercurynews.com/2017/05/01/sv150-2017-ranking-of-silicon-valleys-top-150-public-tech-companies/> [<https://perma.cc/6BEC-LY3J>].

141. See generally *Population of San Jose, CA*, POPULATION.US, <http://population.us/ca/san-jose/> [<https://perma.cc/3NUP-Y53F>].

142. *Zoning Map*, CITY OF SAN JOSÉ [hereinafter San José Zoning Map], <http://www.sanjoseca.gov/index.aspx?NID=2037> [<https://perma.cc/6U57-PAGQ>]. The most common zoning in San Jose is R-1-8, colored light yellow on the map. *Id.* It allows only eight units per acre, and thus in effect prohibits apartment buildings even of modest density. SAN JOSE, CAL., MUN. CODE § 20.10.060 (2013).

143. See Crystal Chen, *Top 10 1 Bedroom Median Rent Prices*, ZUMPER (Jan. 2, 2018), <https://www.zumper.com/blog/2018/01/zumper-national-rent-report-january-2018> [<https://perma.cc/J3T3-M3EB>].

144. See *South San Francisco*, SPERLING'S BEST PLACES, http://www.bestplaces.net/economy/zip-code/california/south_san_francisco/94080 [<https://perma.cc/4N9N-9T3A>].

145. See *Rent Trend Data in South San Francisco, California*, RENTJUNGLE (Feb. 2018), <https://www.rentjungle.com/average-rent-in-south-san-francisco-rent-trends/> [<https://perma.cc/3QEN-8GBN>]. Suburban cities in the San Francisco Bay Area make their own discrete land use and zoning laws, unlike Montgomery County, Maryland, where the county reserves this power.

3. National Trends

The tight American economic market for housing is not limited to the Washington, D.C. and San Francisco areas, of course. Indeed, the much-ballyhooed “revival of the cities” among young people¹⁴⁶ has been evinced by migration to knowledge-economy cities such as Boston, New York, and Seattle, all of which have reversed their late-twentieth-century population outflow.¹⁴⁷ By contrast, across the United States, suburbs that restrict apartments are losing population. For example, Nassau County, New York—a quintessential close-in suburban county (on Long Island, adjacent to New York City) and home of the groundbreaking suburban Levittown in the 1950s¹⁴⁸—has not grown at all over the past half-century and is below its peak population of 1970.¹⁴⁹ A similar story exists for Middlesex County, Massachusetts, the large county west of Boston that has the largest population of any jurisdiction (more populous than Boston itself) in the Bay State.¹⁵⁰ Even Santa Clara County, California, home of the famous Silicon Valley, witnessed an increase of less than six percent during the great economic and housing boom of the first decade of

146. See generally Emily Badger, *Who’s Really Moving Back into American Cities*, WASH. POST: WONKBLOG (Apr. 1, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/04/01/the-surprisingly-narrow-reality-of-americas-urban-revival/?utm_term=.e6e7ba1971aa [<https://perma.cc/FY4C-EK5B>]. The answer to the title’s question is young educated people.

147. See generally BOS. REDEVELOPMENT AUTH., BOSTON’S SHIFTING DEMOGRAPHICS 13 (2015), <http://www.bostonplans.org/getattachment/5b407528-bf69-4c01-83b9-d2b757178e47/> [<https://perma.cc/YY8Y-KSRD>]. Compare U.S. CENSUS BUREAU, NEW YORK: 2000: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 24 (2002), <https://www.census.gov/prod/cen2000/phc-1-34.pdf> [<https://perma.cc/JZJ6-GZT4>], with U.S. CENSUS BUREAU, NEW YORK: 2010: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 30 (2012), <https://www.census.gov/prod/cen2010/cph-1-34.pdf> [<https://perma.cc/2XYU-D5HW>]. See generally U.S. CENSUS BUREAU, WASHINGTON: 2000: SUMMARY POPULATION AND HOUSING CHARACTERISTICS (2002), <https://www.census.gov/prod/cen2000/phc-1-49.pdf> [<https://perma.cc/8PVW-RCFU>]; U.S. CENSUS BUREAU, WASHINGTON: 2010: POPULATION AND HOUSING UNIT COUNTS (2012), <https://www2.census.gov/library/publications/cen2010/cph-2-49.pdf> [<https://perma.cc/SWY4-KDJH>].

148. See generally *Levittown, New York*, CITY-DATA, <http://www.city-data.com/city/Levittown-New-York.html> [<https://perma.cc/T7XU-PEHC>].

149. See *Population of Nassau County*, POPULATION.US, <http://population.us/county/ny/nassau-county/> [<https://perma.cc/73CE-UFZH>]. See generally *History of Nassau County*, NASSAU CTY., <https://www.nassaucountyny.gov/3344/History-of-Nassau-County> [<https://perma.cc/NF5U-EPWG>] (referring to a population peak reached in 1970).

150. See generally *Population of Middlesex County*, POPULATION.US, <http://population.us/county/ma/middlesex-county/> [<https://perma.cc/6MH3-RAZW>].

the century.¹⁵¹ The reason that these counties are growing so slowly, or not all, is not because they are unappealing places in which to live, of course.¹⁵² Just as in the cases of the Washington, D.C. and San Francisco Bay areas, the reason is that zoning in these affluent suburban counties—as in many big cities—severely restricts the construction of new housing, especially apartments.¹⁵³

III. INCREASED DEMAND + LEGALLY RESTRAINED SUPPLY = “THE RENT IS TOO DAMN HIGH”

This Part examines some of the implications of the constraints of land use law on apartment housing. First, it sets forth the simple economics of regulated supply driving up cost. Next, it focuses on the special dilemma of so-called “affordable” housing, especially for low-income households. Finally, it sets forth some of the ways in which laws in recent decades have sought—and often failed—to ameliorate the shortage of low-cost housing.

A. The Cost Burden of Rent

It is a simple microeconomic formula: legal restraints on the supply of housing combine with greater demand to increase rental costs. Among many recent empirical studies is that by economists John Quigley and Stephen Raphael, who concluded that much of the blame for high costs are “[I]and use regulations that reduce housing supply and increase housing costs,” such as minimum-lot-size laws, “fiscal zoning” laws that restrain construction to save government infrastructure costs, and housing quality codes.¹⁵⁴ They found that housing costs since the 1980s rose far more quickly than input costs,

151. See generally *Population of Santa Clara, CA*, POPULATION.US, <http://population.us/ca/santa-clara/> [https://perma.cc/MU6X-8XZZ].

152. The median price for a single-family house in Santa Clara County exceeds \$1 million dollars. See generally *Santa Clara County Home Prices & Values*, ZILLOW, <https://www.zillow.com/santa-clara-county-ca/home-values/> [https://perma.cc/5WJ3-C4CY].

153. See generally, e.g., D.C. CODE § 6-601.05 (2016); LOWELL, MASS., ZONING ORDINANCE ch. 290, art. V, § 5.2.2 (2017); SANTA CLARA CTY., CAL., ZONING ORDINANCE ch. 2.30, §§ 2.30.010–2.30.040 (2017); S.F., CAL., PLANNING CODE art. 2.5 §§ 250–295.

154. John M. Quigley & Steven Raphael, *Is Housing Affordable? Why Isn't It More Affordable*, 18 J. ECON. PERSP. 191, 206 (2004). See generally James A. Thorson, *The Effect of Zoning on Housing Construction*, 6 J. HOUSING ECON. 81, 81–91 (1997) (concluding that land use restrictions restrain housing supply and drive up costs); Edward Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RES. BANK N.Y. ECON. POL'Y REV. 1–19 (2002) (similar conclusion).

such as the construction and labor, which helps prove that part of the reason for high housing prices is “regulatory restrictions on new construction.”¹⁵⁵ Similarly, economists Stephen Malpezzi and Richard K. Green concluded that land use restrictions bottle up the supply of housing and thus increase costs for the “bottom”—that is, low-cost housing—of the housing market.¹⁵⁶

The phenomenon of high rents, especially in popular metro areas, has led to a catchphrase of “The Rent is Too Damn High”—first proclaimed by a fringe candidate for mayor of New York City.¹⁵⁷ It then led to a small political movement¹⁵⁸ and was the title of a book by political writer Matthew Yglesias, who criticized apartment construction constraints in big cities.¹⁵⁹

The website ApartmentList asserts that real rental costs (that is, accounting for inflation)¹⁶⁰ in the United States have *nearly doubled* since 1960: from \$568 (in 2014 dollars) in 1960 to \$934 in 2014.¹⁶¹ All types of housing have become more expensive; indeed, the median price of a single-family house rose even more rapidly, more than doubling from 1960 to 2000 in real costs.¹⁶² Many factors push up real

155. Quigley & Raphael, *supra* note 154, at 207.

156. Stephen Malpezzi & Richard K. Green, *What Has Happened to the Bottom of the U.S. Housing Market?*, 33 URB. STUD. 1807, 1817 (1996) (“When overly stringent local land-use regulations are imposed . . . the relative price of low-cost housing rises, production falls and vacancies tighten.”).

157. *See generally* *Rent Is Too Damn High Party Debate*, YOUTUBE (Oct. 18, 2010) <https://www.youtube.com/watch?v=kcsNbQRU5TI> (video of debate with candidate Jimmy McMillan).

158. *See generally* Aliyah Shahid & Glenn Blain, *Crazier than Carl? Jimmy McMillan Upstages Paladino at Debate*, N.Y. DAILY NEWS (Oct. 19, 2010), <http://www.nydailynews.com/news/politics/jimmy-mcmillan-rent-2-damn-high-party-upstages-carl-paladino-andrew-cuomo-article-1.187875> [<https://perma.cc/AA3H-VBEE>].

159. *See generally* MATTHEW YGLESIAS, *THE RENT IS TOO DAMN HIGH* (2012).

160. “Real” price changes refer to changes to “nominal” prices (the prices that people actually pay) that are adjusted for inflation. *See generally* *Economic Snapshot: Nominal Versus Real Oil Prices*, FED. RES. BANK OF ST. LOUIS (Fall 2007), <https://www.stlouisfed.org/publications/inside-the-vault/fall-2007/nominal-vs-real-oil-prices> [<https://perma.cc/FW6C-PWTU>].

161. *See* Andrew Woo, *How Have Rents Changed Since 1960?*, APARTMENTLIST (June 14, 2016), <https://www.apartmentlist.com/rentonomics/rent-growth-since-1960/> [<https://perma.cc/WL9B-J38L>].

162. *See* *Historical Census of Housing Tables Home Values*, U.S. CENSUS BUREAU (June 6, 2012), <https://www.census.gov/hhes/www/housing/census/historic/values.html> [<https://perma.cc/MKW5-7UMC>]; Tracy Jan, *America’s Affordable-Housing Stock Dropped by 60 Percent from 2010 to 2016*, WASH. POST: WONKBLOG (Oct. 23, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/10/23/americas-affordable-housing-stock-dropped-by-60-percent-from-2010-to-2016/?utm_term=.c8158fb81116 [<https://perma.cc/P7E8-NQM3>] (citing government statistics).

house prices: an increasing population, a fixed supply of land, the greater affluence of American households,¹⁶³ the migration of Americans from small towns and farms to a discrete number of popular metro areas, and the desire for larger and better-equipped houses.¹⁶⁴ What is most disturbing about the rental trends, however, is that while house prices tend to fluctuate and even fall at times, *rental costs continue to rise inexorably*. For example, the median American house price fell from a housing-boom high of almost \$200,000 in 2007 to only about \$170,000 at the trough of the housing bust in 2012.¹⁶⁵ But rents continued to rise during this period. The nominal monthly asking rent for an average unit grew from a little more than \$400 in 1995 to more than \$600 at the height of the housing boom in 2005 to more than \$700 at the end of the Great Recession in 2010¹⁶⁶ and to more than \$850 in early 2017.¹⁶⁷

Higher rents have meant that fewer households are able to afford their housing. Most notably, during the twenty-first-century recession, rents went up while household income went down.¹⁶⁸ In the first decade of the century, median household income fell by 7%, while rents rose by 19%.¹⁶⁹ As a result, the share of renters that was “cost-burdened”—meaning that they spent more than 30% of their income on rent—rose dramatically, from less than 25% in 1960 to nearly 50% in 2010, and then stabilizing around 50% for the next few

163. For example, the inflation-adjusted median household income for the United States rose from just over \$49,000 in 1984 to more than \$59,000 in 2016. *See Real Median Household Income in the United States*, FED. RES. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/MEHOINUSA672N> [<https://perma.cc/J8LS-39RL>].

164. *See* Rani Molla, *5 Reasons New Houses Are Still Getting Bigger*, WALL ST. J.: BRIEFLY (Sept. 20, 2014), <https://blogs.wsj.com/briefly/2014/09/30/5-reasons-new-houses-are-still-getting-bigger> [<https://perma.cc/5RWZ-7LWB>] (discussing reasons for the continued increase in house sizes, including the factor of consumer demand for “more”).

165. CHRISTINE FLANAGAN & ELLEN WILSON, U.S. CENSUS BUREAU, HOME VALUE AND HOMEOWNERSHIP RATES: RECESSION AND POST-RECESSION COMPARISONS FROM 2007–2009 TO 2010–2012, at 2–4 (2013), <https://www.census.gov/prod/2013pubs/acsbr12-20.pdf> [<https://perma.cc/2J2Z-HA4W>].

166. Indeed, it made sense that rental costs increased during a recession and housing bust, as fewer households were willing and able to buy houses, and thus turned to renting, increasing the demand. The fact that fewer people were buying houses is shown by the fact that homeownership rate fell from a high over more than 69% in 2005 to less than 64% in 2017. Press Release No. CB18-08, U.S. Census Bureau, Quarterly Residential Vacancy and Homeownership, Fourth Quarter 2017, at 4 (Jan. 28, 2018), <https://www.census.gov/housing/hvs/files/currenthvspress.pdf> [<https://perma.cc/HSY7-XRVY>].

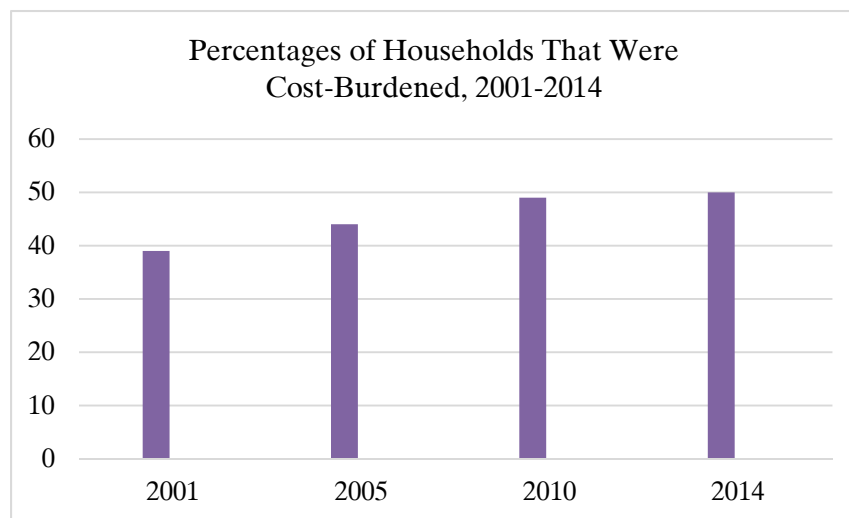
167. Woo, *supra* note 161, at tbl.1.

168. *See id.*

169. *Id.*

years as the economy improved.¹⁷⁰ In most big cities—ranging from New York to Tampa to Kansas City to Los Angeles—more than 50% of renters were cost-burdened.¹⁷¹ This straightforward statistic, shown in Figure 3, is worth emphasizing: about half of all renters in the United States are cost-burdened.

Figure 3. The Rising Cost Burden of Rents, 2001–2014¹⁷²



Similarly, the share of households that were extremely burdened—spending *more than half* of their income on housing—doubled from less than 12% in 2001 to 26% by 2014.¹⁷³

In knowledge-economy metro areas of America, the rental costs have skyrocketed the most. From 1980 to 2014, rental costs increased at least 50% (adjusted for inflation) in each of the metro areas of New York, Los Angeles, San Francisco, Washington, and Boston; in each area, the rents outpaced the growth in median household incomes.¹⁷⁴ Growth in rent exceeded income growth in almost every metro area, with the exception of Phoenix, Las Vegas, and Austin—each in

170. Marya, *supra* note 6; see also Woo, *supra* note 161, at tbl.3 (similar data). This trend has diminished slightly in the current decade after 2010, as the economy has rebounded. Woo, *supra* note 161, at tbl.4.

171. *Housing Affordability Burden for U.S. Cities*, GOVERNING, <http://www.governing.com/gov-data/economy-finance/housing-affordability-by-city-income-rental-costs.html> [https://perma.cc/6URC-SDES].

172. Marya, *supra* note 6.

173. *Id.*

174. Woo, *supra* note 161, at tbl.5.

southwestern states famous for their relatively loose land use laws that make it easier to build new housing.¹⁷⁵

For low-income households, of course, the heavier burden of rising rents hurts the most. The percentage of low-income households (that is, the poorest 20% by income) that were cost-burdened increased from 62% in 1960 to 79% in 2000.¹⁷⁶ In the new millennium, for households earning less than \$30,000, the share burdened by housing costs rose to more than 80%; for those households earning between \$30,000 and \$45,000, the percentage jumped sharply, from less than 40% in 2000 to nearly 50% in 2014.¹⁷⁷

B. The Challenge of “Affordable” Housing

As the numbers show, the “affordability” of housing is an increasingly pressing problem for twenty-first-century America.¹⁷⁸ But the troubling cost of housing has not always been the norm in American history. One hundred years ago, an adequate *food* supply was a more pressing concern for poor Americans than was housing.¹⁷⁹ Indeed, the fear that a growing population would cause massive worldwide famines, not affordable housing shortages, was the dilemma that most troubled economists in the age of neoclassical economics.¹⁸⁰ According to a study by the Department of Labor, the typical American household in 1900 spent 43% of its income on food,

175. *Id.*

176. Quigley & Raphael, *supra* note 154, at 198 tbl.3.

177. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., AMERICA’S RENTAL HOUSING: EXPANDING OPTIONS FOR DIVERSE AND GROWING DEMAND 28 fig.23 (2015), http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/americas_rental_housing_2015_web.pdf [<https://perma.cc/AC2C-Y3EN>].

178. The term “affordable” is problematic. As noted by economists Quigley & Raphael:

[The term] jumbles together in a single term a number of disparate issues: the distribution of housing prices, the distribution of housing quality, the distribution of income, the ability of households to borrow, public policies affecting housing markets, conditions affecting the supply of new or refurbished housing, and the choices that people make about how much housing to consume relative to other goods.

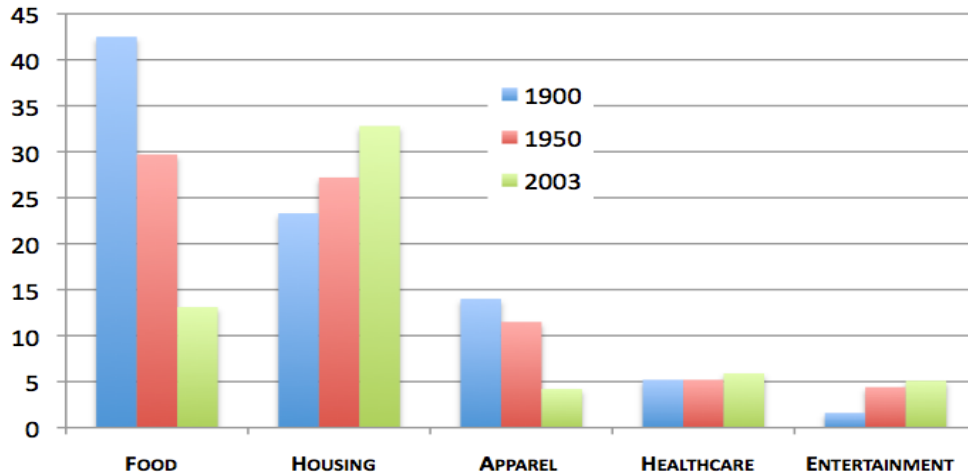
Quigley & Raphael, *supra* note 154, at 191.

179. See generally Derek Thompson, *How America Spends Money: 100 Years in the Life of the Family Budget*, THE ATLANTIC (Apr. 5, 2012), <https://www.theatlantic.com/business/archive/2012/04/how-america-spends-money-100-years-in-the-life-of-the-family-budget/255475/> [<https://perma.cc/VY7S-Y2LN>].

180. See, e.g., THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 61 (1798) (predicting that an increasing population combined with a fixed supply of food might cause food shortages and famine).

but only 23% on housing.¹⁸¹ By the new millennium, however, housing costs had risen to take up a third of income, more than twice that spent as food, as shown in Figure 4.

Figure 4. The Rise in Housing Spending¹⁸²



There are a number of reasons for the radical change in the relative costs of housing and food. The production of food has become vastly more cost efficient, thanks to motorized farm tractors, inorganic fertilizers, and refrigeration.¹⁸³ By contrast, housing is still often constructed in ways that would be familiar to centuries past. Construction workers travel to the location of the future house, build a frame of wood, and finish it with mason-laid bricks, stone, plaster, or concrete.¹⁸⁴ It is ironic that more efficient and low-cost factory-made houses—that is, “mobile” homes, which are more accurately labeled “manufactured housing” in the twenty-first century—are

181. See Thompson, *supra* note 179.

182. *Id.* (this chart is pulled directly from the Thompson article). Expenditures that are not on the chart have risen even more dramatically since 1900; much of this probably is attributable to money spent on motor vehicles.

183. Science writer Robert Bryce has written that innovation constantly makes things that are smaller, denser, and cheaper, thus proving doomsayers wrong and improving life for all. See *generally* ROBERT BRYCE, *SMALLER, FASTER, LIGHTER, DENSER, CHEAPER* (2014). While Bryce’s chief focus was on energy production, his insights resonate in many areas of modern technology. Modern housing policy, by contrast, stands as an outlier, with its twentieth-century focus on sparser (less dense) and bigger.

184. Concrete is not new; the builders of ancient Rome used it more often than marble in their buildings. See HUGH HONOUR & JOHN FLEMING, *A WORLD HISTORY OF ART* 191–92 (2005).

typically discriminated against and relegated to small segregated zones under most American land use and zoning codes.¹⁸⁵

Another factor is the limited amount of land on which to build new housing. Modern farming techniques allow for far greater production of food per acre than was possible in the 1800s, and technology, such as irrigation, has permitted the growth of crops in places that were not arable in centuries past.¹⁸⁶ But technology has done little to make housing more affordable. People do not live in smaller living quarters than they once did; in fact, the average housing space in the United States has grown.¹⁸⁷ As household size shrunk, in fact, land use laws in the twentieth century imposed regulations such as minimum lot size laws,¹⁸⁸ maximum density requirements, and minimum apartment size restrictions.¹⁸⁹ This has pushed up the average square footage of much of American housing. Even in New York City, famous for its small apartments, a law since 1955 has imposed a new construction minimum of 132 square feet for any apartment “living room.”¹⁹⁰ The nation’s square footage per person has further expanded, despite the decrease in household size.¹⁹¹ Moreover, motor vehicles have enabled people to live many miles from their employment, thus allowing for the rapid expansion of metropolitan areas into areas that were once farmland, forest, and grasslands.¹⁹²

185. See, e.g., David Ray Papke, *Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation*, 41 URB. LAW. 787, 795 (2009) (discussing the many ways in which suburbs discriminate against low-cost mobile home construction). See generally James Milton Brown & Molly A. Sellman, *Manufactured Housing: The Invalidity of the “Mobility” Standard*, 19 URB. LAW. 367 (1987) (criticizing the discrimination). For apartments, a new technology is for more “modular” parts that allow for lower-cost, manufactured construction. See Kate Springer, *This Brooklyn Apartment Building Fits Together Like Puzzle Pieces*, CNN (Feb. 7, 2017), <http://money.cnn.com/2017/01/31/technology/modular-construction-461-dean/index.html> [<https://perma.cc/XB8M-U6VT>].

186. See, e.g., B.H. Farmer, *Perspectives on the “Green Revolution” in South Asia*, 20 MOD. ASIAN STUD. 175–76 (1998) (discussing the large productivity increases associated with technological Green Revolution in Asia in the second half of the twentieth century).

187. *Median and Average Square Feet of Floor Area in New Single-Family Houses Completed by Location*, U.S. CENSUS BUREAU (2011), <https://www.census.gov/const/C25Ann/sfttotalmedavgsqft.pdf> [<https://perma.cc/2JRT-DJLB>].

188. See generally Boudreaux, *supra* note 134.

189. See generally AM. SOC’Y OF PLANNING OFFICIALS, MINIMUM REQUIREMENTS FOR LOT AND BUILDING SIZE (1952), <https://www.planning.org/pas/reports/report37.htm> [<https://perma.cc/WN6H-BVTR>] (discussing the prevalence of minimum size laws, including minimum sizes for apartments).

190. N.Y.C. HOUS. MAINTENANCE CODE § 27-2074 (2013).

191. See *infra* Section I.A.

192. The drawbacks of suburban “sprawl” are discussed *infra* Part III.

It is especially ironic that the law has severely constrained perhaps the greatest modern technological advancement of construction: the ability to build *up*, as opposed to out, thereby creating comfortable housing for more people on the same amount of land. Although there are, of course, large apartment buildings in San Francisco and Washington, D.C. that house people far higher than possible in the 1800s,¹⁹³ laws tightly confine such construction.¹⁹⁴ Modern construction allows for extraordinary density for luxury apartments as well as low-cost housing; for example, a thin new apartment building on Manhattan's West Side houses more than 1100 units.¹⁹⁵ But tall apartment buildings are forbidden throughout many American metropolitan areas—in cities as well in as suburbs.¹⁹⁶ This phenomenon forms the basis for the policy proposal in Part IV.

C. Traditional Approaches to Affordable Housing

How could law foster the creation and maintenance of “affordable” housing? The term itself adds to the confusion. What is “affordable” for a middle-class household (with a median income of about \$57,000, as of 2015)¹⁹⁷ differs greatly from what is affordable for a million-dollar-income business executive or for a marginally employed couple earning less than \$20,000 a year.¹⁹⁸ The term is tendentious: who is not in favor of goods and services being “affordable”?¹⁹⁹ To be

193. Tall residential buildings were almost impossible before two inventions of the late nineteenth century: structural steel and elevators. Stephen Lynch, *How Elevators Transformed NYC's Social Landscape*, N.Y. POST (Feb. 8, 2014), <https://nypost.com/2014/02/08/how-elevators-transformed-nycs-social-landscape/> [<https://perma.cc/88EA-2ACY>].

194. Famously, buildings in Washington, D.C. are limited by the federal Height of Buildings Act of 1910, which in effect limits them to 13 stories. See Pub. L. No. 61-96, ch. 263 (1910), reprinted at https://www.npc.gov/docs/Height_of_Buildings_Act_1910.pdf [<https://perma.cc/3FFF-XWDH>]. Although not as clear cut, the zoning laws in San Francisco also limit the height of buildings in residential areas, as they do almost everywhere in the nation.

195. The 71-story apartment building is called “Sky,” located at 605 West 42nd Street. *Building: Sky*, STREETEASY, https://streeteasy.com/building/sky-605-west-42-street-new_york [<https://perma.cc/W5EP-R8L7>]. The building is not “affordable” in any sense, however: a studio apartment in 2017 rented for \$3,500 a month. *Id.*

196. See *supra* Section II.B.

197. BERNADETTE PROCTOR ET AL., U.S. CENSUS BUREAU INCOME AND POVERTY IN THE UNITED STATES: 2015, at 5 (2016), <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf> [<https://perma.cc/VA9Z-JLAZ>].

198. *Id.* at 31 tbl.A-2. Ten percent of households, as of 2015, earned less than about \$13,000, 20% earned below \$23,000, and 40% less than \$44,000. *Id.*

199. The term “affordable housing” has been chosen by advocates no doubt because it is rhetorically more appealing to the typical American—who is opposed to things being “affordable”?—than the term “low-cost housing,” which to many

precise, this Article uses the more straightforward term *low-cost housing*.²⁰⁰

Legal efforts to foster low-cost housing can be placed into three groups. The first is direct governmental intervention in the market for housing. An initial step was “public housing,” in which a government either builds or funds housing—typically apartments—with guaranteed low costs.²⁰¹ This straightforward step has dominated the laws of progressive European nations, for example, where it is often called “social housing.”²⁰² In the United States, early public housing efforts—often locally created—were intermittently successful, giving a home to persons as disparate as singer Elvis Presley, Supreme Court Justice Sonia Sotomayor, and former governor Deval Patrick.²⁰³ In recent decades, however, public housing units have earned a poor reputation, with giant complexes such as Chicago’s Cabrini Green and St Louis’s Pruitt-Igoe Houses

conjures up images of “cheap” construction (in its coarse and unpleasing sense) and low-income people, who are associated with crime and other social ills. Because even a middle-class household desires goods and services to be “affordable,” the term attracts a broad range of persons. Its inherent vagueness is perhaps what makes it appealing in terms of political rhetoric. See generally Will Ricciardella, *The Politics and Economics of the “Affordable Housing” Movement*, WILL RICCIARDELLA BLOG (Apr. 4, 2017), <https://www.willricciardella.com/affordable-housing-movement> [<https://perma.cc/DZ7W-26XL>] (a conservative blog critique of the nebulous phrase “affordable housing”).

200. It was only in the second half of the twentieth century that significant federal laws were established specifically to help people of color in *housing*, as opposed to employment or education. The last of the major mid-century civil rights laws was the Fair Housing Act of 1968, which made it unlawful for landlords, lenders, and real estate agents to discriminate on the basis of race or national origin, thus opening up, at least in theory, large swatches of metro areas that previously had been, in practice, off limits to minorities. Fair Housing Act of 1968, codified as amended at 42 U.S.C. §§ 3601–3619, 3631 (2012).

201. For a discussion of various approaches to “social housing” in Europe, see generally Laura Colini, *EU Urban Agenda: The Challenge of “Affordable Housing” in Europe* (Mar. 23, 2016), <https://ec.europa.eu/futurium/en/housing/eu-urban-agenda-challenge-affordable-housing-europe-laura-colini-urbact-expert> [<https://perma.cc/QZ9G-KPPY>].

202. One of the most famous examples of European social housing is the Karl-Marx Hof, built in the 1920s as one of the largest apartment buildings in the world: a kilometer long, with more than a thousand units, and capable of housing up to 5,000 persons. See Karl Ehn, *Karl Marx–Hof*, ARCHITECTUUL (July 13, 2014), <http://architectuul.com/architecture/karl-marx-hof> [<https://perma.cc/5H9B-5D4Z>]. Today, it still serves its purpose of providing decent and comfortable low-cost housing to city dwellers in an expensive big city. See Owen Hatherley, *Vienna’s Karl Marx Hof: Architecture as Politics and Ideology*, THE GUARDIAN (Apr. 27, 2015), <https://www.theguardian.com/cities/2015/apr/27/vienna-karl-marx-hof-architecture-politics-ideology-history-cities-50-buildings> [<https://perma.cc/4J4P-QFM3>].

203. See PAUL BOUDREAUX, THE HOUSING BIAS 189 (2011).

becoming stereotypes of criminal havens and incompetent management.²⁰⁴

As government-built projects lost their luster, efforts shifted to a second approach: governmental financial support of the private sector. For example, the U.S. Department of Housing and Urban Development (“HUD”) manages the Low-Income Housing Tax Credit program.²⁰⁵ Federal tax credits are offered to developers who build or remodel housing for low-cost households (at least 20% of the households must earn less than 50% of median income), through a funding mechanism that uses federal money doled out by state housing agencies.²⁰⁶ Since the program began in 1986,²⁰⁷ more than 2.7 million housing units have been started with the benefit of the credit, although the number of units fell dramatically in the twenty-first century.²⁰⁸ HUD characterizes this program as “the most important resource for creating affordable housing in the United States.”²⁰⁹ Some commentators, however, have criticized the program because it requires that credit recipients reserve the housing as low-cost for only fifteen years and because most subsidized units are built in poor and minority neighborhoods; as a result, the program fails to further social desegregation.²¹⁰ Moreover, the program’s effectiveness is limited by the fact that few very-low-income households, as opposed to moderately-low-income ones, are helped

204. See generally *The 7 Most Infamous U.S. Public Housing Projects*, NEWSONE (Sept. 29, 2011), <https://newsone.com/1555245/most-infamous-public-housing-projects/> [<https://perma.cc/KLX5-J6TP>]. See also Editorial, *New York City Has Been a Problem Landlord*, N.Y. TIMES (Nov. 26, 2017), <https://www.nytimes.com/2017/11/26/opinion/nyc-housing-landlords-housing.html> [<https://nyti.ms/2i8oSZp>] (arguing that the New York City Housing Authority has failed repeatedly in safety and maintenance in recent years).

205. See generally *Low-Income Housing Tax Credits*, U.S. DEP’T OF HOUSING & URB. DEV. (July 10, 2017), <https://www.huduser.gov/portal/datasets/lihtc.html> [<https://perma.cc/3FAB-8PV3>].

206. *Overview of the Low Income Housing Tax Credit Program (LIHTC)*, NAT’L HOUS. LAW PROJECT, <https://nhlp.org/lihtcoverview> [<https://perma.cc/6K99-YY8P>].

207. The program was first established by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2189. The complicated formulas are explained in *Overview of the Low Income Housing Tax Credit Program (LIHTC)*, *supra* note 206.

208. See *HUD’s National Low Income Housing Tax Credit (LIHTC) Database: Projects Placed in Service Through 2014*, U.S. DEP’T OF HOUSING & URB. DEV., <https://www.huduser.gov/portal/Datasets/lihtc/tables9514.pdf> [<https://perma.cc/6LJP-CWGT>].

209. See *Low-Income Housing Tax Credits*, *supra* note 205.

210. See generally Myron Orfield, *Racial Integration and Community Revitalization*, 58 VAND. L. REV. 1747 (2005) (critiquing the racial segregating results of the tax credit program).

by the subsidized housing.²¹¹ As a result, the low-income housing tax credit fails to solve, by itself, the nation's low-cost housing shortage.

Better known is the federal government's Housing Choice Voucher program, which is colloquially called "Section 8" housing, after its initial establishment as Section 8 of a federal statute in the 1970s.²¹² Federal money flows to local public housing authorities that award housing vouchers to low-income persons, who in turn present the vouchers to landlords who will accept them.²¹³ The benefit of vouchers (which work much like food stamps), like tax credits, is that the government avoids the difficult task of maintaining buildings.²¹⁴ The public merely funds, while the private sector, which is subject to the forces of competition in building decent housing, builds and manages.²¹⁵ The Achilles heel of the voucher program is that, as with many big government projects, there is too little funding for too many low-income people. In fiscal year 2016, expenditures for the federal Housing Voucher Program were more than \$19 billion.²¹⁶ Yet, in many places, there was an extraordinary wait for vouchers. In New York City, for example, the waiting list was "closed" in 2007; as of 2016, the list included more than 140,000 households—a number than was nearly twice the number of households that use such vouchers.²¹⁷ According to the Affordable Housing Online website, "[w]e are unaware of even one housing authority in the Nation (and there are

211. See generally Desiree C. Hensley, *Out in the Cold: The Failure of Tenant Enforcement of the Low-Income Housing Tax Credit*, 82 U. CINC. L. REV. 1079 (2014) (discussing various drawbacks of the program); David Phillip Cohen, *Improving the Supply of Affordable Housing*, 6 J.L. & POL'Y 537 (1998) (arguing for an expansion of the program).

212. See generally *Section 8 Program Background Information*, U.S. DEP'T OF HOUSING & URB. DEV., https://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/mfh/rfp/s8bkinfo [<https://perma.cc/D9HJ-VQQ5>].

213. See *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUSING & URBAN DEV., https://portal.hud.gov/hudportal/HUD?src=/topics/housing_choice_voucher_program_section_8 [<https://perma.cc/4TMU-G43Q>].

214. For a critique of government-maintained public housing, see generally Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2010).

215. See generally *id.* (arguing in favor of vouchers as the economically most efficient way to support low-cost housing for low-income households).

216. *Implementation of the Federal Fiscal Year (FFY) 2016 Funding Provisions for the Housing Choice Voucher Program*, U.S. DEP'T OF HOUSING & URB. DEV. (Mar. 10, 2016), <https://portal.hud.gov/hudportal/documents/huddoc?id=PIH-2016-04.pdf> [<https://perma.cc/H6YU-5KAP>].

217. See *Fact Sheet About NYCHA*, N.Y.C. HOUS. AUTH. (Apr. 13, 2017), <https://www1.nyc.gov/assets/nycha/downloads/pdf/factsheet.pdf> [<https://perma.cc/68T9-4XFB>].

2320 that offer Section 8) that doesn't have a waiting list."²¹⁸ The fact that landlords may discriminate against voucher recipients, as many landlords in middle-class neighborhoods do, further limits the effectiveness of the program.²¹⁹

A third approach has been state laws that compel local governments to reverse the exclusionary effect of typical zoning laws on poor people and to take affirmative steps to ensure more low-cost housing.²²⁰ The most famous example has been the *Mount Laurel* doctrine.²²¹ The doctrine was created by the New Jersey Supreme Court, in a series of opinions beginning in 1975 that featured stirring rhetoric about each municipality's duty to provide for a "fair share" of regional low-cost housing needs.²²² The New Jersey legislature

218. *Section 8 Wait Lists*, AFFORDABLE HOUS. ONLINE <https://affordablehousingonline.com/open-section-8-waiting-lists> [<https://perma.cc/SFL9-BFZ8>].

219. See Tammerlin Drummond, *Red Hot Bay Area Housing Puts Big Chill on Section 8*, EAST BAY TIMES (Aug. 15, 2016), <http://www.eastbaytimes.com/2016/06/17/red-hot-bay-area-housing-puts-big-chill-on-section-8> [<https://perma.cc/ZZ8L-35JB>]; Alana Semuels, *How Housing Policy Is Failing America's Poor*, THE ATLANTIC (June 24, 2015), <http://www.theatlantic.com/business/archive/2015/06/section-8-is-failing/396650> [<https://perma.cc/P8TR-B7ZE>].

220. This Part's discussion does not discuss in detail the strategy that is perhaps most commonly pursued in housing litigation: asserting *racial discrimination* in housing. Because of the nation's obvious racial strains, along with strong federal (and local) laws against racial discrimination, race-based claims are often appealing to low-cost housing advocates. Indeed, the New Jersey litigation was pursued by the NAACP. But racial discrimination claims have drawbacks. First, under the Fourteenth Amendment's "equal protection" guarantee, a claim of discrimination must be supported by proof of an *intent* of racial animus; effects alone are insufficient. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). *But see* *Buchanan v. Warley*, 245 U.S. 60, 81–82 (1917) (striking down strict racial housing segregation and rejecting a "separate but equal" approach). Second, although the Supreme Court recently clarified that claims based on "disparate impact" alone are cognizable under the Fair Housing Act, *Texas Department of Housing & Community Affairs v. Inclusive Communities*, 135 S. Ct. 2507 (2015), the Court also made clear that a defendant can prevail by showing good, nondiscriminatory reasons for its policy. *See id.* at 2522–25. Almost all zoning laws that discriminate against apartments have a disparate impact on black Americans, who tend to have lower incomes. But one should not hold one's breath that all of Euclidian zoning will come tumbling down because of *Inclusive Communities*. It is very likely that governments would proffer non-race-based reasons for restrictive zoning and that courts today, as they did 100 years ago, will defer to the judgments of the municipalities. This case is discussed *infra* at Section IV.B.2.

221. For a favorable assessment of the doctrine in its early decades, see generally CHARLES HAAR, *SUBURBS UNDER SIEGE* (1996).

222. The most important of these opinions were *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d, 713, 733 (N.J. 1975) (asserting that each municipality had a duty to allow for its "fair share" of low-cost housing), and *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 456 A.2d 390, 415 (N.J. 1983) (proclaiming that a government "cannot favor rich over poor" and that municipalities

responded by codifying a milder version of the principle through a state agency that reviews local “fair share” plans and encourages such plans by granting the locality some protection from being sued.²²³ Opposition from local governments, however, combined with a series of legal winnowings, has severely limited its effectiveness in providing low-cost housing to the state.²²⁴ In the current century, Republican Governor Chris Christie made it a centerpiece of his state policies to restrain the potency of the *Mount Laurel* system.²²⁵ The “fair share” program has made, at best, a dent in New Jersey’s low-cost housing needs and, because of the rancor of the debate, has arguably dissuaded other states from following a similar path.²²⁶

A variant of this policy is an *inclusionary* zoning law imposed on private housing construction. This idea uses law not to discriminate against low-cost housing, as is typical in Euclidian zoning, but to *require* the construction of private housing affordable for low-income households.²²⁷ Of many techniques, perhaps the most straightforward and widespread is a *set-aside* requirement, by which a new housing project must include a specified percentage of units that are sold or rented at low cost to modest-income households, with a duty to maintain the low costs for many years.²²⁸ One of the earliest efforts was in Montgomery County, Maryland, which has imposed set-asides

must use “affirmative governmental devices,” such as changes in zoning, set-asides, and incentives, when necessary to accomplish the mandate).

223. See Fair Housing Act, N.J. STAT. ANN. §§ 52:27D–301 to –329.9 (West 2017) (establishing the agency); see also *What Is the Mount Laurel Doctrine?*, FAIR SHARE HOUS. CTR., <http://fairsharehousing.org/mount-laurel-doctrine/> [<https://perma.cc/AKJ5-3SS5>] (history of the doctrine and its implementation).

224. See generally Paula A. Franzese, *Mount Laurel and the Fair Housing Act: Success or Failure? A Presentation by the Affordable Housing Colloquium of the Seton Hall University Center for Social Justice with an Introduction and Commentary*, 19 FORDHAM URB. L.J. 59 (1991).

225. Editorial, *Chris Christie’s Fair Housing Problem*, N.Y. TIMES (Mar. 15, 2015), <https://www.nytimes.com/2015/03/21/opinion/chris-christies-fair-housing-problem.html> [<https://nyti.ms/2t6QAUa>]; Editorial, *Supreme Court to Chris Christie: You Are Not Emperor*, NJ.COM (Mar. 13, 2015), http://www.nj.com/opinion/index.ssf/2015/03/supreme_court_to_chris_christie_you_are_not_empero.html [<https://perma.cc/R65X-SGZ8>] (giving a short history of Christie’s opposition).

226. Some states, such as California, impose “fair share” duties with rather vague obligations to consider low-cost housing needs in their land use planning and ordinances. CAL. GOV’T CODE § 65584(a) (West 2018).

227. See Ellickson, *supra* note 114, at 1170 (discussing early efforts and criticizing their unintended consequences).

228. See David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42/43 URB. LAW. 307–29 (2011) (surveying the practice).

for more than forty years.²²⁹ Currently, each new development of at least twenty units must set aside at least 12.5% (one in eight) of the units for “moderate income” households.²³⁰ Nonetheless, a study in 2004 concluded that the program accounted for only about 8% of the county’s low-cost housing needs.²³¹ An even more potent requirement is in San Francisco, where the set-aside requirement was increased in 2016 to between 12% and 25%, depending on the size of the project, for “below market rate” units, although the developer can avoid the set-aside by paying a large fee to the city’s affordable housing fund.²³² Set-asides are, in the early twenty-first century, perhaps the most popular mechanism to ensure the creation of permanent new low-cost housing.²³³

One reason for the popularity of set-asides is that they necessitate no financial expenditures by the government, in contrast to techniques such as subsidies, tax breaks, and duties to provide fair shares.²³⁴ The expenses of providing low-cost housing are borne by housing developers.²³⁵ As such, cash-strapped local governments can avoid charging the taxpayers.²³⁶ But the burden on the private sector highlights two faults. First is the fact that set-asides are imposed only on *new* development, not existing housing, thus limiting both their

229. See *Major Existing Policies & Programs Related to Rental Housing*, MONTGOMERY CTY., http://www.montgomeryplanning.org/research/housing/rental_housing_study/documents/MontgomeryCountyRentalHousingPolicies.pdf [https://perma.cc/R4XF-CJS4].

230. *Id.* “Moderate income households” are defined as those earning between 50% and 80% of the county’s median household income. MONTGOMERY COUNTY, MD., HOUSING ELEMENT OF THE GENERAL PLAN 9 (2011), http://www.montgomeryplanning.org/community/housing/documents/HousingMasterPlan-FINAL_web.pdf [https://perma.cc/RK5H-YDE5].

231. DOUGLAS PORTER, INCLUSIONARY ZONING FOR AFFORDABLE HOUSING 41 (2004).

232. *Inclusionary Zoning Program*, CITY & CTY. OF S.F., MAYOR’S OFFICE OF HOUSING & COMM. DEV., <http://sfmohcd.org/inclusionary-housing-program%20> [https://perma.cc/GH9F-D2RU].

233. See generally Callies, *supra* note 228. Spurred by Mayor Bill de Blasio’s avowal to create or preserve 200,000 rent-regulated apartments in the city, New York City has imposed new set-aside requirements to spur the creation of more low-cost apartments. J. David Goodman, *De Blasio Expands Affordable Housing, but Results Aren’t Always Visible*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/nyregion/de-blasio-affordable-housing-new-york-city.html> [https://nyti.ms/2xWtWUh].

234. Set-aside laws typically are regulations of the *private* sector, not programs to create government-built or operated housing. See Cecily T. Talbert et al., *Recent Developments in Inclusionary Zoning*, 38 URB. LAW. 701, 702 (2006) (explaining the general mechanics of set-aside laws).

235. *Id.*

236. *Id.*

geographic and market reach.²³⁷ Thus, there is no set-aside low-cost housing constructed in neighborhoods that were built up decades ago to the maximum density allowable under the zoning laws.²³⁸ Second, a set-aside law may impose a financial loss on the developer on the price-restricted units.²³⁹ Developers can recoup these losses by increasing the prices of non-restricted housing, thereby increasing the market rate prices in the jurisdiction.²⁴⁰ Indeed, the set-aside burden may discourage new developers from building *at all* in the regulated jurisdiction, and instead encourage construction in nearby localities that hold fewer constraints.²⁴¹ As early as 1981, Robert Ellickson noted the “irony of inclusionary zoning” laws: making it more expensive to build housing will result in less housing being built, thus driving up prices, which is directly contrary to the intended policy goal.²⁴²

It is not the purpose of this Article to assess or rank the relative effectiveness of the various existing techniques to foster low-cost housing. Rather, it is sufficient to point out that each of them has significant drawbacks. Most fundamentally, none of them addresses head-on the most obvious roadblock to the construction and maintenance of low-cost housing, both in cities and suburbs: zoning restraints on low-cost housing, particularly on apartment construction. While the *Mount Laurel* approach encourages municipalities to change their zoning laws, experience has shown that this is done grudgingly and in limited areas. For a bolder approach, the problem of exclusionary zoning needs to be tackled head on.

IV. APARTMENT INFILL

This Part suggests a new legal approach to spur the construction of new housing—and make more low-cost housing available—in the metropolitan areas where it is needed for twenty-first-century America. The proposal does not seek to replace any of the serviceable, but limited, approaches discussed in the previous part. Nor does it offer a radical solution, such as the abolition of zoning or

237. See URBAN INST., EXPANDING HOUSING OPPORTUNITIES THROUGH INCLUSIONARY ZONING: LESSONS FROM TWO COUNTIES, at Abstract (2012), https://www.huduser.gov/portal/publications/HUD-496_new.pdf [<https://perma.cc/UKG9-VP8B>] (explaining that set-aside laws typically impose the duty on only *new* housing developments).

238. *Id.*

239. See Ellickson, *supra* note 114, at 1184–1204, 1215–16.

240. *Id.*

241. *Id.*

242. *Id.*

a federal takeover of local land use authority. Rather, it offers a modest and focused idea—zoning expansion infill—to encourage more infill housing.

A. The Market as a Tool for Lower Housing Costs

New housing for metropolitan areas must either be built *outside* the already-built-up area or *within* it. It must be one or the other. Restrictive zoning laws typically work to encourage new housing construction on the outskirts—the exurbs—where legal restraints are fewer and costs lower.²⁴³ Indeed, in some built-up urban and suburban areas, it is legally impossible to build *any* new apartments *or* new houses because the places are built to the maximum density allowed by law—be it one house for every half-acre in a suburban district zoned for single-family houses only, or city row houses in a district zoned for a maximum density of twenty units per acre.²⁴⁴

This Article argues that low-cost housing would be greatly encouraged by a large-scale reform of zoning, especially in cities and close-in suburbs. If we are serious about making housing affordable for lower-income Americans in the twenty-first century, we should shed the Euclidian bias against apartments—a bias that was the product a less populous, family-dominated, and less diverse America. In particular, we should employ a powerful mechanism in the legal toolbox by encouraging more urban *infill*—that is, more apartments in sections of metropolitan areas that are already built up.

Advocates of “affordable” housing typically have focused their efforts on direct governmental action to create low-cost housing: techniques such as subsidies, tenant assistance, and *Mount Laurel*-type legal challenges.²⁴⁵ Indeed, in the affordable housing world, it is common to refer to a distinction between “market-rate housing”—that is, non-low-cost housing—and “affordable” housing, at least in

243. See *supra* Section II.B.

244. For examples of the metro areas of Washington, D.C. and the San Francisco Bay, see *supra* Section II.B. See generally URBAN INST., *supra* note 237 (a survey of restrictive zoning policies); Boudreaux, *supra* note 134 (focusing on the ubiquity of large-lot zoning laws).

245. See, e.g., *Housing Type Definitions*, HOME BASE FOR HOUS., <http://homebaseforhousing.org/Education/Definitions.cshtml> [https://perma.cc/3X6M-RXEL] (referring to a distinction between, on the one hand, “affordable housing” as units with a government “subsidy” that provides “below-market rents” and, on the other hand, “market rate housing” as housing with “no subsidy”); see also Goodman, *supra* note 233 (reflecting the assumption that “affordable housing” in high-cost places such as New York City is the result of government action, not the housing market).

expensive housing markets.²⁴⁶ But this attitude reflects an assumption that the market can play little role in the provision of low-cost housing in metropolitan areas.

This attitude is incorrect. The market can, over time, generate low-cost housing when it is not hampered by land use laws that choke off supply and drive up housing prices. One way in which market-rate housing can spur low-cost housing is through the process of *filtering*.²⁴⁷ Generally, when law allows the market to offer a newer good that meets current tastes and desires, older goods become less popular and thus more affordable. Consider the market for motor vehicles: low-income persons sometimes can afford a car by purchasing a used vehicle.²⁴⁸ For example, a Cadillac that was built in 1987 would have been unaffordable for modest-income households when sold new, but thirty years later, the now-devalued car is likely to be more affordable for far more potential buyers. Although housing does not depreciate as quickly as does a motor vehicle, of course, older housing is likely to remain habitable for far longer than a car remains drivable.²⁴⁹

246. See *Housing Type Definitions*, *supra* note 245.

247. See, e.g., Quigley & Raphael, *supra* note 154, at 205 (*filtering* is a process “by which housing units move through a quality hierarchy, either through depreciation in excess of maintenance outlays or investments to upgrade dwellings”). Quigley & Raphael asserted that “filtering is especially important for low-income rental housing, because new construction at higher quality levels tends to be more profitable [T]he supply of bottom-quality housing is dependent on new housing construction at all levels, not just newly built ‘affordable housing.’” *Id.*; see also C. Tsurriel Somerville & Christopher J. Mayer, *Government Regulation and Changes in the Affordable Housing Stock*, 9 *ECON. POL’Y REV.* 45, 50 (2003) (discussing the effect of filtering and when it is likely to be effective); Brendan O’Flaherty, *An Economic Theory of Homelessness and Housing*, 4 *J. HOUSING ECON.* 13, 13–49 (1995) (discussing the process of filtering in affecting the prices for housing and different levels of the market, including the effect that older housing tends to become more affordable as it ages and moves “down” the market).

248. The median price of a new car in 2016 was more than \$33,000. *New-Car Transaction Prices Jump More than 3 Percent Year-Over-Year in May 2016, According to Kelley Blue Book*, KELLEY BLUE BOOK (June 1, 2016), <http://mediaroom.kbb.com/new-car-transaction-prices-jump-more-than-3-percent-year-over-year-may-2016> [https://perma.cc/3RMG-ARQB].

249. There are many homes and apartments from the 1950s, for example, that currently house people adequately, while witnessing a car from the 1950s is a rare phenomenon. One reason is that a house or apartment suffers less wear and tear than a moving vehicle. When a housing unit’s refrigerator needs replacement, it can be accomplished for only a small fraction of the price of the unit; by contrast, the need to replace a vehicle’s engine often results in the abandonment of the car entirely. In the early twenty-first century, many old houses were re-modeled and “flipped” by housing speculators. See, e.g., Susan Martin Taylor, *Flipping Homes for Big Profits Is Getting Harder in Tampa Bay*, TAMPA BAY TIMES (Dec. 13, 2017),

Housing filtering can be explained with an example. When land use laws allow for the construction of a significant number of new housing units in an expensive city—for example, new apartments—the market is likely to respond by constructing expensive, high-profit apartments, as has been the experience in Washington and San Francisco in recent decades.²⁵⁰ Big-city apartments built in 2018 are likely to include features that appeal to consumers of today, such as a walk-in closet, a kitchen with new appliances, granite countertops, bathrooms attached to the bedrooms, and easily accessible parking.²⁵¹ Such new apartments are likely to attract many consumers and therefore can command high prices, thus doing nothing *directly* for low-income households. But the construction of the new housing has a powerful *indirect* effect on the rest of the market. Because of the new construction, other segments of the metro area’s housing stock become relatively less appealing.²⁵² For example, apartments that were originally built for the “high-end” in the 1980s—but without twenty-first-century conveniences—would become marginally less popular. In the economic model of supply and demand, the decreased market desire for older apartments causes the price to fall over time.²⁵³

Further down the market scale, apartments built in the 1950s—which may have no central air conditioning, no dishwasher, radiator heating, small rooms (for the multiple-children households of the era), and small single-paned windows—likewise would become relatively cheaper, allowing more modest-income households to rent

http://www.tampabay.com/news/business/realestate/Flipping-homes-for-big-profits-is-getting-harder-in-Tampa-Bay-_163527548 [https://perma.cc/DX99-WKGB].

250. See generally O’Flaherty, *supra* note 247 (explaining the incentives to build high-cost, as opposed to low-cost, new housing).

251. For anecdotal evidence of the features that drive consumer preferences in this century, see Jen Dollar, *The Top 10 Amenities Home Buyers Want in 2017*, REALTY EXECUTIVES (Feb. 17, 2017), <http://www.realtyexecutivesfl.com/blog/the-top-10-amenities-home-buyers-want-in-2017.html> [https://perma.cc/QN4A-R8FU] (asserting that homebuyers demand modern amenities such as a walk-in closet and granite countertops); *Buyers Willing to Trade Square Footage for Amenities, Survey Results Show*, NAT’L ASS’N OF HOME BUILDERS (Jan. 12, 2017), <https://www.nahb.org/en/news-and-publications/press-releases/2017/01/buyers-willing-to-trade-square-footage-for-amenities-survey-results-show.aspx> [https://perma.cc/8KV4-HCUF].

252. CAL. LEGISLATIVE ANALYST’S OFFICE, PERSPECTIVE ON HELPING LOW-INCOME CALIFORNIANS AFFORD HOUSING 4 (2016), <http://www.lao.ca.gov/Reports/2016/3345/Low-Income-Housing-020816.pdf> [https://perma.cc/X3WU-ZML2] (“New housing generally becomes less desirable as it ages and, as a result, becomes less expensive over time.”).

253. The effects of filtering may take time. If inflation occurs during this time, the nominal price of the older housing unit might even increase, but its real price—that is, its price relative to incomes and other goods and services—will fall.

affordably. The expansion of the supply of new housing—even expensive housing—*filters* down to suppress prices across the spectrum of the market.

Recent studies have shown that filtering works—not only as a model of microeconomics, but in real places. Recognizing that filtering is “a phenomenon not easily understood by policy-makers,” economists Stephen Malpezzi and Richard Green analyzed low-cost housing in various metropolitan areas across the nation.²⁵⁴ They concluded that “to the extent that a city makes it easy for *any* type of housing to be built, it will also enhance the available stock of low-cost housing.”²⁵⁵ When the law in a metropolitan area allows new market-rate construction—as in places such as Houston, Dallas, and Las Vegas—low-cost housing becomes more available, and vice versa.²⁵⁶

Similarly, a 2016 report of the California Legislative Analyst’s Office confirmed the positive effects of filtering in generating low-cost housing.²⁵⁷ In California, more than half of low-income households spend *more than half* of their income on housing.²⁵⁸ Most such households receive no housing assistance at all, simply because there is not enough government funding to help them.²⁵⁹ This is especially true on the coast,²⁶⁰ which includes the three metro areas of greater Los Angeles, the San Francisco Bay Area, and San Diego County, which combined hold more than 28 million people,²⁶¹ or more than any other state in the country.²⁶² Coastal California suffers from a housing shortage in the places where it is needed,²⁶³ the report

254. Malpezzi & Green, *supra* note 156, at 1811.

255. *Id.* (emphasis in original).

256. *See id.* at 1812 figs.3 & 4; Quigley & Raphael, *supra* note 154, at 205–06 (“to the extent that cities make it difficult to build new housing, *any type of housing*, the availability of low-cost housing will be reduced and the affordability of *all* housing will decline”).

257. CAL. LEGISLATIVE ANALYST’S OFFICE, *supra* note 252, at 2.

258. *Id.* at 2.

259. *Id.*

260. *Id.* at 1, 5 (discussing the slow pace of highly regulated housing construction in coastal California).

261. USA: *Combined Metropolitan Areas*, CITY POPULATION, <https://www.citypopulation.de/php/usa-combmetro.php> [<https://perma.cc/L4BP-SMNV>].

262. Texas, the second most populous state, holds fewer than 28 million. *Quick Facts: Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/48> [<https://perma.cc/W7QY-UQG4>].

263. One telling statistic about housing in California is this: While the median price of a house in California in 1940 was only slightly higher than one in Ohio and less than one in Rhode Island, a median California home in 2000 cost more than twice that in Ohio and 50% more than a house in Rhode Island. *Historical Census of*

concluded, in large part due to “local community resistance and [environmental study requirements, which] limit the amount of housing—both private and subsidized.”²⁶⁴ The recommended solution was the encouragement of more market-rate housing.²⁶⁵ When new housing is built, middle- and upper-income households often move from older units to the new locations.²⁶⁶ As these people abandon the older housing, it eventually becomes cheaper and more available for lower-income households.²⁶⁷ This filtering is less likely to occur in communities where new housing construction is limited.²⁶⁸

Another benefit of new market-rate construction is that persons with rising incomes—for example, young professionals—are less likely to use their wealth to demand the upgrading of older, extant housing in older neighborhoods—a phenomenon that may result in the *gentrification* of once-modest-income neighborhoods.²⁶⁹ As stated in a study by economists C. Tsurriel Somerville and Christopher J. Mayer, “the more constrained the supply response for new residential units to demand shocks, the greater the probability that an affordable unit will filter up and out of the affordable stock.”²⁷⁰ In a hypothetical example, an affluent young San Franciscan is less likely to “displace” a modest-income household from an older house or apartment in a gentrifying neighborhood, such as San Francisco’s Mission District, if the law allows for construction of appealing *new* market-rate housing. California data show that new construction correlates with *less* displacement of existing residents.²⁷¹

Housing Tables: Home Values, U.S. CENSUS BUREAU, <https://www.census.gov/hhes/www/housing/census/historic/values.html> [<https://perma.cc/4MF7-Q4Z2>].

264. CAL. LEGISLATIVE ANALYST’S OFFICE, *supra* note 252, at 3. California local governments have been, not surprisingly, at the cutting edge of using environmental and fiscal concerns to limit new housing construction in their crowded but popular metro areas. Some critics assert, of course, that much of the concern is driven by a desire to “keep newcomers out” of paradise. *See* Associated Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 492–93 (Cal. 1976) (Mosk, J, dissenting) (criticizing a tight California law). This phenomenon is known generally as NIMBY, for a desire that new construction be “not in my backyard.” Peter D. Kinder, *Not in My Backyard Phenomenon (NIMBY)*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon> [<https://perma.cc/8JMK-J4E6>].

265. CAL. LEGISLATIVE ANALYST’S OFFICE, *supra* note 252, at 7–11 (“More Private Home Building Could Help”).

266. *Id.* at 8 (“When new construction is abundant, middle-income households . . . often move from older, more affordable housing to new housing.”).

267. *Id.* (“As these middle-income households move out of older housing it becomes available for lower income households.”).

268. CAL. LEGISLATIVE ANALYST’S OFFICE, *supra* note 252, at 4.

269. *Id.*

270. Somerville & Mayer, *supra* note 247, at 50.

271. CAL. LEGISLATIVE ANALYST’S OFFICE, *supra* note 252, at 5–6 & fig.3.

On a national level, it is notable that strict land use regulation correlates strongly with high prices, and vice versa. Metropolitan areas such as San Francisco, Washington, D.C., and New York City, which boast tight regulations on construction—often touted as slowing gentrification—also have among the highest housing costs in the nation.²⁷² By contrast, big metropolitan areas such as those of Houston, Dallas, and Chicago—which have looser land use laws and are friendlier to new construction—enjoy much lower housing costs and greater housing affordability for low-income households.²⁷³

Apartment infill offers promise for more affordable housing in twenty-first-century metropolitan America. The advocacy of apartments, however, stands in stark contrast to U.S. social policy of the past century, which encouraged single-family homeownership.²⁷⁴ This policy has had many features, from the 1916 tax exemption for home mortgage interest (originally meant to be a short-term wartime tax break),²⁷⁵ the creation of the pro-ownership Federal Housing Administration during the New Deal,²⁷⁶ and the establishment of Fannie Mae and Freddie Mac as government-sponsored enterprises to spur mortgage lending.²⁷⁷ Favoring homeownership has been pursued both by Democrats such as Franklin Roosevelt, who encouraged ownership as a means of providing financial benefits to modest-income households,²⁷⁸ and by Republicans such as George W. Bush, who promoted the advantages of an “ownership society” in

272. *Family Housing Affordability in U.S. Cities*, GOVERNING (Nov. 2015), <http://www.governing.com/gov-data/other/family-housing-affordability-in-cities-report.html> [<https://perma.cc/G2SD-LZBB>] (comparing house and apartment prices among large metro areas).

273. *Id.*

274. *See supra* Section II.A.

275. The literature criticizing the home mortgage interest deduction is large. For a good and thorough example, including a discussion of its accidental history, see generally Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 *LAW & CONTEMP. PROBS.* 232 (2010).

276. *Federal Housing Administration*, INVESTOPEDIA, <http://www.investopedia.com/terms/f/federal-housing-administration.asp> [<https://perma.cc/PC9B-UM3F>].

277. *Fannie Mae and Freddie Mac*, FED. HOUS. FIN. AUTH., <https://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae---Freddie-Mac.aspx> [<https://perma.cc/4273-3PV6>].

278. *FDR Solves the Mortgage Crisis*, CBS NEWS (Sept. 13, 2007), <http://www.cbsnews.com/news/fdr-solves-the-mortgage-crisis> [<https://perma.cc/7HC4-EBDW>] (discussing Roosevelt’s efforts to spur the housing market in the Great Depression).

developing personal responsibility among the American populace.²⁷⁹ The policy was ostensibly successful for many decades and homeownership peaked at about 68% of all American households in 2004.²⁸⁰ But homeownership has never been close to universal: a majority of residents of cities such as New York, Chicago, and Los Angeles are renters.²⁸¹ The homeownership rate fell dramatically during the housing bust that began in 2007 and has not rebounded with the recent recovery of the economy; the rate in late 2017 was less than 64%.²⁸²

The twenty-first-century housing implosion muddied the once-rosy view of homeownership.²⁸³ Much of the blame for the bust was placed on the risk-laden mortgages held by households that could not afford them, from “subprime” (that is, high interest) loans for modest-income households to excessive borrowing on equity by more affluent Americans.²⁸⁴ Americans should now recognize that buying a home is far from being an unalloyed benefit. It imposes an extraordinary debt on borrowers and limits their ability to move or change their lives during an economic downturn.²⁸⁵ Simply put, using law to encourage modest-income households in expensive areas to buy a house and become encumbered by a large mortgage is not only

279. Jo Becker et al., *Bush Drive for Home Ownership Fueled Housing Bubble*, N.Y. TIMES (Dec. 21, 2008), <http://www.nytimes.com/2008/12/21/business/worldbusiness/21iht-admin.4.18853088.html> [<https://nyti.ms/2m2VNyX>].

280. FLANAGAN & WILSON, *supra* note 165, at 13 fig.4.

281. CHRISTOPHER MAZUR & ELLEN WILSON, U.S. CENSUS BUREAU, HOUSING CHARACTERISTICS: 2010, at 11 tbl.5 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-07.pdf> [<https://perma.cc/2R5X-P7KY>].

282. *Homeownership Rate for the United States*, FED. RES. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/RHORUSQ156N> [<https://perma.cc/F9X7-KQ7X>]. The rate fell to 62.9% in the last quarter of 2016, which was the lowest number since 1965.

283. For a recent and thoughtful general critique of the supposed benefits of homeownership, see generally Stephanie M. Stern, *Reassessing the Civic Virtues of Homeownership*, 100 COLUM. L. REV. 103 (2011). See also Mathew Desmond, *How Homeownership Became the Engine of American Inequality*, N.Y. TIMES: MAG. (May 9, 2017), <https://www.nytimes.com/2017/05/09/magazine/how-homeownership-became-the-engine-of-american-inequality.html> [<https://nyti.ms/2pZp92k>].

284. See, e.g., Anthony Sanders, *The Subprime Crisis and Its Role in the Financial Crisis*, 17 J. HOUSING ECON. 254, 254–61 (2008) (analyzing the role of subprime lending in creating the financial crisis of the early twenty-first century).

285. See, e.g., Barbara Kiviat, *The Case Against Homeownership*, TIME (Sept. 11, 2010), <http://content.time.com/time/magazine/article/0,9171,2013850-2,00.html> [<https://perma.cc/6SVM-EH8U>] (criticizing the assertion that homeownership is better for all families and that it makes people better citizens).

a risky strategy—it is an unwise policy.²⁸⁶ To state this truth is not being churlish to low-income people; it is being sensible.²⁸⁷ Indeed, many other affluent nations have avoided the American obsession with homeownership. For example, in Germany and Switzerland—consistently ranked among the world’s most successful nations, and which weathered the Great Recession better than house-dependent nations²⁸⁸—homeownership has hovered around 50%.²⁸⁹ In these countries, renting is not an embarrassment, but rather a sensible form of living for those who do not wish to be tied down by debt, especially since renting (at least in Germany) is relatively cheap.²⁹⁰

Infill holds another tremendous advantage over construction on the outskirts of a metropolitan area: the environment. In terms of urban policy, environmentalism’s biggest target is “sprawl”—the building of low-density projects on the edges of an urban area.²⁹¹ Sprawl destroys farmlands, forests, wetlands, and wildlife habitat.²⁹² It requires the construction of new highways that further clog suburban traffic and further pollute the air.²⁹³ It necessitates large public expenditures for infrastructure²⁹⁴ such as new schools, police, and fire stations, in addition to roads. It tends to exacerbate racial and class segregation and, many assert, leads to social isolation.²⁹⁵

286. Charles Lane, *Why the Decline of the Homeownership Rate Is Good News*, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/opinions/why-the-decline-of-the-homeownership-rate-is-good-news/2016/08/03/c6b8bf7c-58d1-11e6-9767-f6c947fd0cb8_story.html?utm_term=.8d2bba1bfd28 [<https://perma.cc/A4SM-BTEQ>].

287. *See, e.g.*, Stern, *supra* note 283, at 104.

288. *See, e.g.*, Niraj Chokshi, *These Are the World’s Best Countries. (Sorry, America—You’re No. 4.)*, WASH. POST (Jan. 21, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/01/20/these-are-the-worlds-best-countries-sorry-america-youre-number-4> [<https://perma.cc/7FZH-ZPLX>].

289. *Homeownership Rate in Selected European Countries in 2016*, STATISTA, <https://www.statista.com/statistics/246355/home-ownership-rate-in-europe> [<https://perma.cc/BD43-NWM9>].

290. *See* Mark Phillips, *Most Germans Don’t Buy Their Homes, They Rent. Here’s Why*, QUARTZ (Jan. 23, 2014), <https://qz.com/167887/germany-has-one-of-the-worlds-lowest-homeownership-rates/> [<https://perma.cc/KYY6-8VL4>].

291. For a comprehensive environmentalist critique of sprawl, see generally SIERRA CLUB, *SPRAWL COSTS US ALL* (2000), <http://vault.sierraclub.org/sprawl/report00/sprawl.pdf> [<https://perma.cc/GD2L-9K7V>].

292. *Id.* at 6, 14.

293. *Id.* at 2, 5.

294. *See, e.g.*, S. Mark White, *Development Fees & Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives*, 6 J. LAND USE & ENVTL. L. 25 (1990).

295. Paul Jargowsky, *Sprawl, Concentration of Poverty, and Urban Inequality*, in URBAN SPRAWL: CAUSES, CONSEQUENCES, & POLICY RESPONSES 41, 60–63 (Gregory Squires ed., 2002).

Some even attribute America's obesity problem to the sedentary, automobile-centric lifestyle that suburban sprawl engenders.²⁹⁶

Apartment infill acts as the antithesis, of course, to sprawl. By definition, infill entails the construction of new housing *within* the borders of the metro area, not at its fringes.²⁹⁷ It takes advantage of existing infrastructure, such as roads, schools, and sewer lines.²⁹⁸ It avoids farms and natural areas.²⁹⁹ An apartment typically uses far less energy than does an isolated single-family house, because apartments tend to be smaller, thus requiring less space to heat, cool, and light, and are clustered together.³⁰⁰ Indeed, economist Edward Glaeser has suggested that the nation could save a tremendous amount of energy and related costs if Americans filled in the big metropolitan areas of the West Coast, with its mild climate, rather than into the sprawling exurbs of the humid South.³⁰¹

Infill can take many forms. Except for easily buildable apartment infill—that is, construction within districts already zoned for high density, such as Washington's 14th Street Corridor and, in recent decades, San Francisco's SoMa³⁰²—infill typically is complicated by land use restrictions.³⁰³ Building more densely than permitted by tight zoning laws typically requires a request for a variance, a special

296. Zhenxiang Zhao & Robert Kaestner, *Effects of Urban Sprawl on Obesity 3* (Nat'l Bureau of Econ. Res. Working Paper No. 15436, 2009), <http://www.nber.org/papers/w15436.pdf> [<https://perma.cc/L5QX-ZQUR>].

297. See Michael O. Minor, *The Ups and Downs of Infill Housing*, FED. RES. BANK OF ST. LOUIS (2007), <https://www.stlouisfed.org/publications/bridges/fall-2007/the-ups-and-downs-of-infill-housing> [<https://perma.cc/YKB3-KKNQ>] (defining “infill housing as new houses constructed . . . in established urban neighborhoods”).

298. See SIERRA CLUB, *supra* note 291, at 10–15 (discussing the infrastructure costs of sprawl).

299. The American Farmland Trust asserts that nearly forty acres of agricultural and ranch land is “lost” to development each hour. *Farmland*, AM. FARMLAND TR., <https://www.farmland.org/our-work/areas-of-focus/farmland> [<https://perma.cc/6QH2-KSJF>].

300. Mark Obrinsky, *Are Apartments Energy Efficient? (June 2013)*, NAT'L MULTI FAMILY HOUSING COUNCIL (June 20, 2013), [http://www.nmhc.org/News/Research-Notes--Are-Apartments-Energy-Efficient--\(June-2013\)](http://www.nmhc.org/News/Research-Notes--Are-Apartments-Energy-Efficient--(June-2013)) [<https://perma.cc/A5QS-K8LB>] (asserting that housing in large apartment buildings are the most energy-efficient form of housing).

301. Edward Glaeser, TRIUMPH OF THE CITIES (2011), *relevant excerpt available at* <https://www.scientificamerican.com/article/glaeser-triumph-of-the-city-excerpt> [<https://perma.cc/B8ZT-5GW6>].

302. Roland Li, *SoMa Micro-Apartment Project Has an Ambitious Goal: Cheaper Rents*, S.F. BUS. TIMES (Sept. 7, 2016), <http://www.bizjournals.com/sanfrancisco/blog/real-estate/2016/09/soma-microapartment-sf-rent-development.html> [<https://perma.cc/MGW5-DKGH>] (discussing the recent proliferation of new apartment construction in San Francisco's SoMa).

303. See *infra* Section II.B.

exception, or other piecemeal approaches that sail directly into the skepticism of existing residents—the “not-in-my-backyard” phenomenon that often drives the discretionary decisions of local zoning and legislative authorities.³⁰⁴

Consider, for example, the effort to build apartment infill on the site of the disused Macmillan Reservoir in Washington, D.C. Situated in a section of the city that has not yet been gentrified, but may be so in future, the Macmillan location has been the site of a proposed high-density project of apartments (a small number of which would be low-cost), shops, and offices.³⁰⁵ The proposal is a quintessential example of modern “smart growth” or “new urbanist” design, which emphasizes density and encourages walkability over automobile use.³⁰⁶ After years of consideration and debate, the D.C. Zoning Commission in 2014 and 2016 approved the plan, including a necessary exception from zoning limits (the current zoning for the area is mostly for medium density).³⁰⁷ But the District’s highest court in 2016 vacated the commission’s action, concluding, among other things, that it had not studied thoroughly enough the potential adverse effects on the neighborhood, which consists mostly of row houses.³⁰⁸ The litigation was bought by a group called Friends of Macmillan Park, which preferred, of course, that the land be turned into a public park.³⁰⁹

304. See generally WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS* (1990) (arguing that the parochial interests of entrenched “homevoters” dominate much of local politics).

305. See *Vision*, ENVISION MACMILLAN, <http://envisionmcmillan.com> [<https://perma.cc/HP3M-E4DR>] (discussing the project).

306. See generally Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257 (2006) (setting forth the basics of New Urbanism, including density and mixing of uses).

307. See *McMillan Sand Filtration Site Redevelopment*, COAL. FOR SMARTER GROWTH (2016), <http://www.smartergrowth.net/dc/mcmillan> [<https://perma.cc/4RL5-J5MQ>].

308. Perry Stein, *The Fight to Develop McMillan Park Continues: Court Rules Against Zoning Commission*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/local/the-fight-to-develop-mcmillan-park-continues-court-rules-against-zoning-commission/2016/12/08/bb2db2c0-bd85-11e6-ac85-094a21c44abc_story.html [<https://perma.cc/8ZRG-W5WD>]. In 2017, the D.C. Zoning Commission approved a revised plan, but opponents stated that they might again challenge the approval in court. Karen Goff, *D.C. Zoning Commission Rules in Favor of McMillan Developers, Again—But this Fight Isn’t Over*, WASH. BUS. J. (Sept. 15, 2017), <https://www.bizjournals.com/washington/news/2017/09/15/d-c-zoning-commission-rules-in-favor-of-mcmillan.html> [<https://perma.cc/GZ79-R9P3>].

309. Karen Goff, *D.C. Appeals Court Overturns McMillan Zoning*, WASH. BUS. J. (Dec. 8, 2016), <http://www.bizjournals.com/washington/news/2016/12/08/d-c-appeals-court-vacates-decisions-on-mcmillan.html> [<https://perma.cc/FWF6-N92C>].

Similarly, in the San Francisco Bay Area, many notable efforts to build infill housing have failed. Expensive Palo Alto, in the heart of Silicon Valley, allows citizens to vote on infill projects.³¹⁰ Recently, the city government approved a small infill housing project for senior citizens, including price restraints to ensure affordability.³¹¹ But the voters shot down the plan, citing the inevitable concerns about “traffic” and other supposed annoyances.³¹² The personal and parochial interests of the existing residents reign over the needs for the region and the nation to provide decent housing for modest-income persons and the one million new households that are needed in the nation each year.³¹³

B. Zoning Expansion Infill

Considering the political obstacles to new construction, how can housing advocates spur more apartment infill in American metropolitan areas? There is no magic bullet and no easy solution. The experiences of litigation and legislation from *Mount Laurel* to the Macmillan Reservoir to the Palo Alto examples³¹⁴ show that local residents often will fight tooth and nail to keep apartment infill out of their communities.³¹⁵

1. Federal Law Approaches

Federal law could be the most effective way to impose new infill housing on recalcitrant municipalities. But federal law typically plays little role in American land use law; indeed, as we have seen, federal

310. Jason Green, *Voters Reject Affordable Senior Housing Project in Palo Alto*, MERCURY NEWS (Nov. 5, 2013), <https://www.mercurynews.com/2013/11/05/voters-reject-affordable-senior-housing-project-in-palo-alto> [<https://perma.cc/H6SC-DMCR>].

311. Stephen J. Smith, *NIMBY Palo Alto Rejects Senior Housing Complex*, NEXT CITY (Nov. 8, 2013), <https://nextcity.org/daily/entry/palo-alto-one-ups-san-francisco-rejects-senior-housing-complex-in-citywide-> [<https://perma.cc/NEC2-J9W5>].

312. *Id.*

313. For more examples of how local opposition blocks or delays new housing construction in the San Francisco Bay Area, with a highlight on a small project that required no zoning changes, see Connor Dougherty, *The Great American Single-Family Home Problem*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/business/economy/single-family-home.html> [<https://nyti.ms/2BzwcG6>].

314. *See supra* Sections III.C., IV.A.

315. *See, e.g.*, Fernanda Santos, *After 27 Years, Yonkers Housing Desegregation Battle Ends Quietly in Manhattan Court*, N.Y. TIMES (May 2, 2007), <http://www.nytimes.com/2007/05/02/nyregion/02yonkers.html> [<https://nyti.ms/2jEiqHS>] (discussing the quarter-century of litigation about the placement of public housing in mostly white east Yonkers, New York, which was vigorously opposed by the city for decades).

policy has been to foster homeownership, to the neglect of apartment housing.³¹⁶ One exception has been the proscriptions of the federal Fair Housing Act, which makes it unlawful to discriminate on the basis of race, national origin, and other suspect grounds in the rental or sale of housing.³¹⁷ Housing advocates cheered the recent decision of the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,³¹⁸ which clarified that a plaintiff may prove a case of housing discrimination through a “disparate impact” claim, by which statistical evidence alone, without proof of animus, may be enough to establish liability.³¹⁹ The plaintiff asserted that a Texas state agency discriminatorily placed public housing projects in mostly black neighborhoods of the state.³²⁰ But the Supreme Court also took pains to clarify the hurdles that a plaintiff must overcome to prove liability, including the identification of a specific governmental policy that discriminates and proof of adverse impact on racially protected groups (not simply low-income people), as well as the ability of a government to avoid liability by showing a non-discriminatory reason or its policy.³²¹

It is unlikely that a plaintiff would succeed in challenging a typical American land use system under this test. It is true that the zoning bias in favor of single-family houses imposes an adverse effect on black and Latino Americans, simply by virtue of the fact that these groups, on average, hold lower household incomes, thus making it more difficult for them to afford houses at the same rate as white Americans (and Asian Americans) do.³²² But courts have held since the days of *Euclid* that the legal preference for single-family houses, or at least a segregation of housing types, is a valid exercise of the police power.³²³ Unless the Supreme Court is willing to overturn *Euclid* and declare the fundamental premise of zoning unlawful, or

316. *See supra* Section II.A.

317. 42 U.S.C. § 3604 (2012).

318. 135 S. Ct. 2507 (2015).

319. *Id.* at 2513 (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)); *id.* at 2523 (discussing the rules for making a disparate impact claim on statistical evidence alone).

320. *Id.* at 2514.

321. *Id.* at 2522–25 (explaining the limit of the holding and the hurdles that a plaintiff must overcome).

322. *Compare* PROCTOR ET AL., *supra* note 197, at 5 fig.1 (showing income disparities by race), *with* Press Release No. CB18-08, *supra* note 166, at tbl.7 (showing that fewer than half of black and Hispanic households own their home, as opposed to a majority of Asian households and more than 70% of white households).

323. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

unless Congress enacts a new law to upset centuries of deference to local control of land use, federal law offers only a dead end for fostering more apartment infill.

2. State Law Approaches

State law offers greater hope than the federal law approach. There is a firmer tradition of state regulation of local governments (which are a creation of the state sovereign) than of federal regulation.³²⁴ It is not easy, of course, to convince state governments to require municipalities to foster more low-income housing. Indeed, in this age of entrenched conservatism, especially at the state and local level,³²⁵ many states have reversed their involvement in housing. For example, Florida recently gutted its once-landmark requirement that local governments ensure that infrastructure is developed “concurrently” with land use changes (although this change does make it somewhat easier to build new apartments in Florida).³²⁶ The inevitable desire of existing citizens to suppress new housing construction in their community, which is reflected in local politics, cannot easily be overcome without a sea change in American social politics.³²⁷

3. Expanding Apartment Zoning Districts

This Article proposes a new technique to create apartment infill, and thus ameliorate the high costs of housing. It may be called *Zoning Expansion Infill* (“ZEI”). The idea is broader than the case-

324. Notable local efforts at fostering low-cost housing include steps such as eliminating minimum size requirements for apartments, such as New York City’s current move to permit so-called “micro-apartments.” See Chris Ragalie, *Are NYC’s New Micro-Apartments Much Smaller?*, DECODER (July 27, 2015), <http://www.decodernyc.com/are-nycs-new-micro-apartments-much-smaller/> [<https://perma.cc/EP8L-5J52>] (discussing the effort). Considering the effectiveness of enforceable housing codes in ensuring safety and the trend of technology to make things smaller and more efficient—what does a Manhattanite need except a smart phone and a mattress?—such steps are long overdue. But they do not strike at the heart of the matter: the discrimination of zoning against apartments.

325. After the 2016 election, Republicans controlled 67 of the nation’s 98 state legislative bodies. Reid Wilson, *Dems Hit New Low in State Legislatures*, THE HILL (Nov. 18, 2016), <http://thehill.com/homenews/campaign/306736-dems-hit-new-low-in-state-legislatures> [<https://perma.cc/JB5V-LQH8>].

326. In 2011, Florida’s once-revolutionary “concurrency” requirement, Fla. Stat. Ann. § 163.3180, was softened to make many steps optional. *Summary of Some of the Major Changes to the Florida Growth Management Statutes*, FLA. LAND DEV. REGS. (June 11, 2011), <https://floridaldrs.com/tag/community-planning-act> [<https://perma.cc/QPH6-HPT4>].

327. See generally FISCHEL, *supra* note 304.

by-case efforts to build infill housing³²⁸ because it would create a new legal system to ensure denser zoning throughout metropolitan America, but it is also less radical than ideas such as the elimination of zoning entirely.³²⁹ This moderation might make it more palatable to jurisdictions that look skeptically upon infill and density.³³⁰ Because it presents a new policy proposal, this Article does not seek to flesh out all the potential details of zoning expansion infill. Rather, it seeks to build a skeleton of an idea, which may be fleshed out with further thinking, perhaps through trial and error.

Through zoning expansion infill, state law could require each municipality in a metropolitan area to identify specific districts that *currently* are zoned for apartments and that could be *expanded* in geographic size. Identifying these districts would require an evaluation of multiple factors. For instance, the districts would have to be places where we expect a strong demand for such housing, such as areas with high housing rental costs. Expert evidence from real estate professionals could suggest locations in which there is an unmet demand for multi-family housing (thus excluding locations next to hazardous waste landfills or in flood plains).³³¹ Favorable locations

328. See generally, e.g., REAL ESTATE RESEARCH CORP., INFILL DEVELOPMENT STRATEGIES (1982) (focusing largely on efforts to secure infill case by case); Hous. P'ship, *Filling in the Spaces: Ten Essentials for Successful Urban Infill Housing* (Nov. 2003), <https://www.cob.org/documents/planning/neighborhoods/planning-academy/academy-ii/10-essentials-for-successful-urban-infill-housing.pdf> [https://perma.cc/6NHL-Z4T7] (discussing strategies for case by case approval of infill projects); Gail R. Grudder, *The Zoning of Mobile Homes, Strategies in Regulation (Part II)*, 23 ZONING & PLANNING L. REP. 17 (2000) (noting that making mobile home permitting a “conditional use”—that is, the permits are granted in case by case—is popular in part because it gives discretion to the government land use permitting authority).

329. See Michael Lewyn, *You Can Have It All: Less Sprawl and Property Rights Too*, 80 TEMP. L. REV. 1093, 1107–08 (2007) (discussing the benefits of an elimination of “use-based zoning” and other land use restrictions).

330. The annoyance of new construction is often summed up in the term “NIMBY,” for “not in my backyard.” It reflects the observation that extant residents, especially homeowners, with a financial investment in their home, oppose the annoyances of new construction. These annoyances included added traffic on the streets and parking lots, more pollution, new fiscal costs of infrastructure to serve the new buildings and residents, and, potentially, concerns over the migration of their neighborhood of people with incomes lower than theirs. Kinder, *supra* note 264; see DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 567–69 (7th ed. 2017) (arguing that it is unfair to allow new development that generates infrastructure costs to government without imposing at least some of these costs of the developer); see also *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 722 (N.J. 1965) (discussing the “hostility” of a suburb to allowing housing for low-income persons).

331. One result of the New Jersey’s “fair share” requirement in the 1970s and 1980s was that towns re-zoned to allow apartment housing, but did so in unfavorable

also would be near existing capital facilities, such as public transportation lines or major highways, that would both facilitate residents' movement and minimize new infrastructure costs to the government.³³² And the locations should be around pre-existing high-density residential zoning districts so that the infill would be merely an expansion of an existing zone, not the creation of a new one.

Once cities have identified places in which infill makes sense, the law could require the local governments to expand the geographic area of the high-density zone to allow for more apartment construction. This would be required even if—or perhaps because—the zoning district boundaries had been in place for decades.

Rapid changes in density were once common in American cities. Nineteenth century mansions on Fifth Avenue in New York and Nob Hill in San Francisco were torn down with a generation or two as the market made the land more valuable for higher densities, such as tall apartment buildings.³³³ But Euclidian zoning freezes the old land uses in place—a freeze that is solidified further by the legal duty that zoning be “in accordance” with a municipality’s long-term comprehensive plan.³³⁴ Requiring that the apartment zones be expanded would unfreeze the constraints of outmoded zoning for a growing and diversifying twenty-first-century America.

With incentives for local governments, developers, and residents alike, the ZEI mechanism might be more palatable than some of the other methods of fostering low-cost and apartment housing. By requiring that the new high-density areas expand *existing* high-density districts, the new housing would be less of a shock to the existing residents (although they would no doubt complain). The key to

locations, in which there was little chance that the apartment housing would be built. See HAAR, *supra* note 221, at 32–33.

332. See, e.g., *Golden v. Planning Bd. of Town of Ramapo*, 285 N.E.2d 291, 304–05 (N.Y. 1972) (approving the ground-breaking plan to allow new development only when it generates relatively low infrastructure costs); Paul Boudreaux, *The Impact Xat: A New Approach to Charging for Growth*, 43 U. MEMPHIS L. REV. 35, 103 (2012) (arguing for development impact fees that vary by the impact on the community).

333. See NIKOLAUS FOGLE, *THE SPATIAL LOGIC OF SOCIAL STRUGGLE: A BOURDIEUIAN TOPOLOGY* 104 (2011) (discussing Fifth Avenue’s transformation). Rapidly urbanizing cities in other countries are experiencing the same effects, as low-density housing is demolished and replaced by high-density apartments. See Tara Grescoe, *Shanghai Dwellings Vanish, and with Them, a Way of Life*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/travel/shanghai-shikumen-architecture-homes-china.html> [<https://nyti.ms/2jPT093>] (discussing transformation of old, low-density neighborhoods in Chinese cities).

334. ADVISORY COMM. ON ZONING, U.S. DEP’T OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT* § 3 (1926) (recommending comprehensive plans).

comprehending American land use law is to understand its reliance on *expectations*: changes are disfavored when they greatly upset expectations of existing residents, but are permissible when they fairly match, or at least do not diverge far from, long-held expectations.³³⁵

A sensible ZEI law might require slow conversion, perhaps with one-block-wide segments. By allowing new apartment infill zoning only by expanding existing apartment districts, expectations would be upset less violently than by, for example, placing an apartment building in the middle of a large area zoned only for single-family homes. Once a block has been converted from single-family houses to apartments, the next block over then would become available for further expansion of the apartment district and conversion.

Does ZEI contemplate the demolition of single-family houses? Yes, it does. This might seem shocking. But this shock says more about the traditional American bias in favor of single-family houses than it does about the need for a diversified housing mix. While it might have been reasonable in 1950 for a convenient city or close-in suburban neighborhood along a major public transportation route to be reserved for isolated houses, it makes little sense today.³³⁶ It is likely that the metropolitan area has grown in population, making such neighborhoods the most attractive places for high-density apartment housing to meet the demands of a modern, diversified America.

Zoning expansion infill would no doubt face serious objections among the residents in the targeted neighborhoods. The foundation

335. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (factor of “investment-backed expectations” in the test for whether a regulation is a compensable regulatory taking); *Fla. Cos. v. Orange Cty.*, 411 So.2d 1008, 1010 (Fla. App. 1982) (government may be estopped from applying changes to a landowner that has relied in good faith on previous regulation); 53 PA. STAT. AND CONS. STAT. ANN. § 10910.2(a) (West 2017) (a variance from a land use restriction must “not alter the essential character of the neighborhood”).

336. While it might have made sense in 1950 to view suburbs as merely single-family houses appendages of big cities, it makes little sense today, when the majority of persons live in the expanding suburbs, not the central city. For example, the suburbs of Washington, D.C., comprise 83% of the metro area’s population. FREY, *supra* note 88, at app. C. Washington’s suburb of Montgomery County, Maryland, mushroomed from less than 165,000 persons in 1950 (compared to Washington’s 800,000 at the time) to more than one million in 2017 (compared to the central city’s 681,000). *Compare Quick Facts: DC & Montgomery*, *supra* note 110, with 1950 *Census of the Population: Preliminary Counts*, U.S. CENSUS BUREAU (Aug. 3, 1950), <https://www2.census.gov/library/publications/decennial/1950/pc-02/pc-2-04.pdf> [<https://perma.cc/S8KM-4P7V>], and 1950 *Census of the Population Preliminary Counts: Washington D.C.*, U.S. CENSUS BUREAU (Oct. 15, 1950), <https://www2.census.gov/library/publications/decennial/1950/pc-02/pc-2-49.pdf> [<https://perma.cc/7H5C-CJHY>].

of these objections is likely to be the oft-cited colloquial phenomenon of “NIMBY”—the observation that existing residents, especially homeowners, respond with an assertion of “not in my backyard” to proposed new construction of various kinds.³³⁷ More formally, existing residents object to new development because it upsets the expectations they have held of the character of their neighborhood, in features such as the bulk of buildings, auto traffic, the density of people, and the personal characteristics of the residents.³³⁸ In addition to these subjective, psychological demurrals, existing residents may seek to interpose more objective, social reservations, such as the added costs of infrastructure that new development might generate,³³⁹ as well as the concern that new market-rate housing might cause gentrification of existing modest-income neighborhoods with affluent households.³⁴⁰

There is no silver bullet for overcoming these local objections. Nonetheless, zoning expansion infill can be defended with responses that may blunt some of these objections, especially when an advocate for infill is speaking to a higher level of government—a city, county, or state, as opposed to a neighborhood. At heart is the observation that the costs and annoyances of new housing *must* be imposed on *some* locations, simply because the nation grows by more than one million new households each year.³⁴¹ It is better for our economy and for the happiness of the American people for new housing units to be built in places where people prefer to live.³⁴² Building units in rural

337. See sources cited *supra* note 330.

338. *Id.*

339. See White, *supra* note 294, at 25. One technique for “making development pay” for the added costs of infrastructure is to impose on new development an “impact fee” to the government, in effect to reimburse the government for the added costs. See Boudreaux, *supra* note 332, at 80. One drawback is that the hit-or-miss nature of such fees is that developers are encouraged to build in locations in which fees have not yet been established, which might be undeveloped “greenfield” areas, which, ironically, are likely to be places where new infrastructure costs are likely to be highest because of the lack of pre-existing development. *Id.* at 80.

340. See generally, e.g., Danyahel Norris, *Houston Gentrification: Options for Current Residents of Third Ward*, 35 T. MARSHALL L. REV. 239 (2010) (illustrating arguments against gentrification by reviewing the current gentrification of Houston’s Third Ward showing gentrification of a neighborhood largely occupied by communities of color by more affluent white migrants). *But see* J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 406 (2003) (critiquing the arguments against gentrification).

341. See *supra* Section I.A (discussing the growth in the number of American households).

342. See, e.g., Edward Glaeser & Joe Gyourko, *The Economic Implications of Housing Supply* 24 (Zell/Lurie Working Paper No. 802, 2017), <http://realestate.wharton.upenn.edu/wp-content/uploads/2017/03/802.pdf>

regions or declining rust-belt cities will not help; the new housing should be built in the knowledge-economy metro areas, such as those of San Francisco and Washington, where they are both needed and wanted.³⁴³

More specifically, extant residents may cavil over the physical annoyances of infill, such as the bulk of new apartment buildings, the added traffic on streets and parking lots, and the added noise, light, water, and air pollution that new people will inevitably bring. But some annoyances are unavoidable with a growing American population. It is inevitable, I contend, that our popular metro areas will become more crowded; there is no reasonable alternative. Moreover, the local complaints can be assuaged with simple responses and countermeasures. First is the observation that American cities and suburbs are not truly crowded, compared to most urban areas of the world. Indeed, because of our embrace of suburban sprawl, our metro areas are the least dense in the world.³⁴⁴ Even our central cities are comparatively sparse: as noted above, cities such as San Francisco and Boston hold far fewer people per square mile than do cities such as Paris or London,³⁴⁵ not to mention the incredibly dense cities of Asia.³⁴⁶ The future of a more populous planet by necessity must be dense.

For environmental concerns, infill is superior to sprawling construction of new housing. By definition, infill builds in locations that have already been built up. It avoids forests, wetlands, and farms. For decades, the environmental movement has advocated

[<https://perma.cc/7PC3-9B4K>] (“The regulation of America’s most productive places seems to have led labor to locate in places where wages and prices are lower, reducing America’s overall economic output in the process.”); Meera Senthilingam, *A Longer Commute Could Hurt Your Health, Add to Your Waistline*, CNN (Aug. 25, 2016), <https://www.cnn.com/2016/08/23/health/longer-commutes-health-problems/index.html> [<https://perma.cc/E7ZM-UEPN>] (discussing the personal drawbacks of long commutes from home to jobs).

343. See *supra* Section II.B.

344. See Boudreaux, *supra* note 134, at 3–4 (citing data about density of metro areas across the world).

345. See *id.* at 3; *supra* notes 133–134 and accompanying text.

346. For example, metropolitan Dhaka, Bangladesh, holds approximately 115,000 persons per square mile and Seoul, South Korea, has about 27,000. Wendell Cox, *World Urban Areas and Population Density: A 2012 Update*, NEWGEOGRAPHY (May 3, 2012), <http://www.newgeography.com/content/002808-world-urban-areas-population-and-density-a-2012-update> [<https://perma.cc/NG9G-XGAR>]. By comparison, there are only about 18,000 persons per square mile in the city of San Francisco and about 11,000 in Washington, D.C. See *Population Density for U.S. Cities Statistics*, GOVERNING (July 2016), <http://www.governing.com/gov-data/population-density-land-area-cities-map.html> [<https://perma.cc/C9VY-7UEH>].

density, not suburban sprawl, as the more beneficial approach to new development.³⁴⁷ For environmentally conscious transportation, infill also is superior. While existing residents of a built-up neighborhood may not welcome more cars and more people to their streets, encouraging new residents to live near their jobs and stores would result in less driving than would shuttling new people to and from distant suburbs.³⁴⁸ Put simply, having new residents to begin their commute closer in would be *less* annoying than having these people drive from outskirts *through* the older neighborhood.

The best solution to traffic density is of course, public transportation. Sensible infill would be located near existing bus and rail lines. Once again, long-time residents near the rail stops of Cleveland Park in Washington or of the close-in suburb of Dale City just south of San Francisco would not relish new migrants converging on their stops each day, but this would be better than encouraging the new migrants to move to the ends of the lines, where they would either crowd the trains for longer commutes or fill the congested highways.

Zoning expansion infill also holds cogent responses to the social objections of *gentrification* and the distrust of apartment dwellers. The first phenomenon refers to the concern that new, affluent migrants to a neighborhood, typically white people, will outbid and thus elbow out long-time residents with more modest incomes, who are often people of color.³⁴⁹ There is no doubt that this phenomenon may occur any time that new migrants move to a neighborhood. But zoning expansion infill offers reasons to be optimistic about movement of new people into built-up urban areas *without* gentrification. First, as noted above, construction of new housing does not directly impact existing housing units. Indeed, gentrifiers

347. See, e.g., REID EWING ET AL., GROWING COOLER: THE EVIDENCE ON URBAN DEVELOPMENT AND CLIMATE CHANGE, at Executive Summary, 16 (2007), https://www.nrdc.org/sites/default/files/cit_07092401a.pdf [https://perma.cc/S2JM-WFKR] (discussing the benefits of density on carbon emissions and other environmental harms); Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 345, 376 (1997) (arguing for increased density as part of a solution to the environmental harms of sprawl).

348. See URBAN LAND INST., LAND USE AND DRIVING: THE ROLE COMPACT DEVELOPMENT CAN PLAY IN REDUCING GREENHOUSE GAS EMISSIONS 7 (2010), <https://uli.org/wp-content/uploads/ULI-Documents/Land-Use-and-Driving-Low-Res.pdf> [https://perma.cc/RP2V-M58U] (discussing the positive effects of density in decreasing driving).

349. See Norris, *supra* note 340, at 239 (criticizing the phenomenon of gentrification).

may well be attracted to the newer housing, instead of the older units,³⁵⁰ this would dampen the demand of new migrants to outbid the existing residents. Moreover, as noted above, increasing the supply of apartment units is likely to moderate, over time, the markets costs of housing. Through filtering, older units will become more affordable for low-income households.³⁵¹ Thus, we may expect that zoning expansion infill might slow, not accelerate, the phenomenon of gentrification.

On the other hand, if our concern with gentrification is simply a matter of the overall comparative populations of racial groups, zoning expansion infill offers less assurance.³⁵² For example, some black commentators in Washington lament the fact that white migration into the city, combined with black movement away from it, has depressed the black share of the city's population to slightly less than half.³⁵³ San Francisco's black population has fallen in recent decades to one of the smallest by share of any big city in the nation.³⁵⁴ More infill housing may, admittedly, exacerbate a trend of in-migration by white persons. But, by giving new migrants more choices in built-up areas, it may decrease their demand for older housing and thus *slow* the *out-migration* of people of color.

Finally, existing residents are likely to resist infill because of a fear or distrust of new migrants, especially those in apartments. This is the impetus for *exclusionary zoning*, a phenomenon in which a jurisdiction's residents, who choose their local policymakers, support land use laws that dampen new migration and exclude certain categories of new migrants.³⁵⁵ The least desirable new migrants are, of course, low-income persons; while existing residents and their

350. See *supra* text accompanying notes 268–270.

351. See *supra* text accompanying notes 246–270.

352. See Byrne, *supra* note 340, at 406 (discussing the complexity of the gentrification issue).

353. Paul Schwartzman & Ted Mellnik, *A Wave of Mostly White Voters Is Reshaping the Politics of D.C.*, WASH. POST (Mar. 7, 2015), https://www.washingtonpost.com/local/dc-politics/a-mostly-white-youth-movement-is-reshaping-politics-in-the-district/2015/03/07/e57f95b2-b6d3-11e4-aa05-1ce812b3fd d2_story.html [https://perma.cc/J7CV-TZCE].

354. The black share of San Francisco's population fell from more than 13% in 1970 to less than 8% by 2010. See *San Francisco City and County*, BAY AREA CENSUS, <http://www.bayareacensus.ca.gov/counties/SanFranciscoCounty.htm> [https://perma.cc/N97J-7J9W]; see also Thomas Fuller, *The Loneliness of Being Black in San Francisco*, N.Y. TIMES (July 20, 2016), <https://www.nytimes.com/2016/07/21/us/black-exodus-from-san-francisco.html> [https://nyti.ms/2ka5cQl].

355. See generally Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographic Scale*, 40 FORDHAM URB. L.J. 1667 (2013) (discussing a variety of issues relating to exclusionary zoning).

politicians cannot *directly* bar such people from moving to their neighborhoods, they can use zoning law to do so indirectly, by discriminating against housing associated with lower income persons—that is, apartments.³⁵⁶ Accordingly, the quintessential opponents of infill apartment housing would be affluent homeowners—precisely those people who might lose the most political ground with zoning expansion infill. With the lessons of the *Mount Laurel* saga and other examples in mind, we should expect that existing homeowners would firmly and vigorously resist policy efforts to encourage more apartment infill in built-up city and suburban neighborhoods.³⁵⁷ If the matter is left to local governance, we should expect little success. But at a state level, where the scope of governance is wider and the costs of sprawl and the distortions of constrained metropolitan housing are more apparent, the myriad benefits of infill may become clearer.

In any event, it is politically beneficial to try to assuage neighbors who reside near proposed apartment infill locations.³⁵⁸ These neighbors might be appeased by the most potent of all American incentives: money. The state law could require that the developer *compensate* single-family home neighbors in adjacent blocks for the estimated decreases in the values of their properties attributable the new apartment construction. This obligation would not be welcomed by developers, of course, but twenty-first-century housing developers are accustomed to governmental delays and expenses, such as subdivision infrastructure conditions³⁵⁹ and impact fees.³⁶⁰ A ZEI compensation scheme might be yet another cost of construction that fits in a developer's bottom line—and a cost that might be well worth paying in order to construct potentially profitable apartment buildings in places where they previously have not been permitted.

356. This U.S. district court judge in *Euclid* noted in 1924 that zoning, with its discrimination against apartments, would tend to “segregate” people by wealth. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

357. See *S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713, 722 (N.J. 1965) (discussing the “hostility” of suburbs against allowing housing for low-income persons).

358. See *generally* FISCHER, *supra* note 304 (analyzing the powerful role that “homevoters” hold on land use).

359. See, e.g., *Brous v. Smith*, 106 N.E.2d 503, 506–07 (N.Y. 1952) (a landmark early example of approving the practice of a government requiring that a developer build road infrastructure as a condition for building a housing subdivision).

360. See *Boudreaux*, *supra* note 332, at 103 (discussing the extent and theories of imposing costs on housing developers for the supposed financial impacts on the community).

Consider the example of rezoning a low-density block adjacent to an apartment zone in a popular city or close-in suburban neighborhood. If the developer were allowed to buy a single block of houses, each costing \$1 million, and replace *each* of them with ten or so apartments or condominium units priced at \$0.4 million each—or \$4 million total for the new units on the spot of the demolished house—the potential profit might well be sufficient enough to encourage the conversion. This might be true even if the developer had to pay neighbors on the adjoining blocks a few hundred thousand dollars each for the decreased appraised values of their homes. Developers would have the incentive, of course, to look for blocks in which they could make the most money by their conversions, by choosing locations in which apartments are in high demand and in which the costs of compensating neighbors would be minimized. The incentives of the market would encourage locations with the most efficient potential conversions.

Washington and San Francisco could be favorable locations to implement ZEI. In the Washington metropolitan area, we might identify the Connecticut Avenue and Wisconsin Avenue corridors as promising spots.³⁶¹ These Washington avenues are the main commercial streets of affluent Northwest Washington and adjacent Montgomery County, Maryland, and they are the only locations of significant zoning for apartments north and west of downtown.³⁶² But for much of their long routes, the zoning for apartments extends only for one block off the avenues.³⁶³ Large apartment buildings, commanding high rents, are often directly adjacent to single-family houses (with high prices) just two blocks off the avenues.³⁶⁴ With their busy retail, bus and rail lines, and minimal expectations of low-density character, these neighborhoods are ideal candidates for potentially profitable zoning expansion infill.

Similarly, in the San Francisco Bay area housing market, hemmed in by the sea and mountains and by famously tight land use laws, a

361. See D.C. Zoning Map, *supra* note 95. On this map, Connecticut and Wisconsin Avenues are the thin green stretches of higher-density zoning that run approximately north-south in the far northwest of the city.

362. See *id.*

363. See *id.* (zoom in on the avenues in the northwest).

364. Many of the most affluent Washington neighborhoods, such as Georgetown, Cleveland Park, and Chevy Chase, are along these two avenues, while others, such as Spring Valley and Kent, are close by. Valerie Paschall, *The Twelve Richest Neighborhoods in D.C. Right Now*, CURBED WASHINGTON, DC (Mar. 20, 2014), <https://dc.curbed.com/2014/3/20/10129478/the-twelve-richest-neighborhoods-in-dc-right-now> [https://perma.cc/37R7-62RE].

city such as South San Francisco, on a commuter rail line only a few miles south of the big city, would be a strong candidate.³⁶⁵ Unlike places such as Palo Alto, South San Francisco is among the few middle-class (except in housing costs) suburban areas in the West Bay.³⁶⁶ Yet less than one third of the town's housing units are apartments or mobile homes.³⁶⁷ While this suburb may have been a natural choice for suburban, single-family housing many decades ago, when the Bay Area held a fraction of its current population today and was not more expensive than other big metropolitan areas,³⁶⁸ the transformation of the Bay Area's economy and the extraordinary high demand for housing makes South San Francisco a sensible choice for expansion of apartment zoning. Similarly, ZEI would make sense for neighborhoods in San José just east of downtown that are currently zoned for low- or medium-density residential,³⁶⁹ with their proximity to the high-density city center of the nation's tenth most populous city.³⁷⁰

If apartment infill were legally permitted in a number of locations in the Washington and San Francisco Bay areas, we would expect positive benefits. The greater supply of market-rate housing would cause a ripple effect through the regional housing market, through the process of filtering.³⁷¹ With more market-rate apartments available, the overall prices for housing would fall—perhaps first at the more expensive end of the market.³⁷² This would encourage more affluent renters to lease the new apartments and thus dampen the demand for

365. See *BART System Map*, BAY AREA RAPID TRANSIT, <https://www.bart.gov/stations> [<https://perma.cc/ZVL9-IPC8>].

366. The median household income of South San Francisco was “only” about \$85,000 in 2016. *Quick Facts: South San Francisco*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/0673262> [<https://perma.cc/2ES5-AJ9Z>]. Moreover, only about 60% of households owned their home. *Id.*

367. BAY AREA ECON., CITY OF SOUTH SAN FRANCISCO, GENERAL PLAN, HOUSING ELEMENT 20–21 (2009), http://ci-ssf-ca.granicus.com/Viewer.php?view_id=4&clip_id=146&meta_id=9840 [<https://perma.cc/RR3T-WX79>].

368. See Quigley & Raphael, *supra* note 154, at 191 (discussing how San Francisco's housing costs have outpaced most other places in the nation).

369. San José Zoning Map, *supra* note 142. The areas colored in beige are zoned for low and medium-density residential housing.

370. San José now holds more than one million people and is California's third-largest city. Press Release No. CB16-81, U.S. Census Bureau, Five of the Nation's Eleven Fastest-Growing Cities Are in Texas, at tbl.3 (May 16, 2016), <https://www.census.gov/newsroom/press-releases/2016/cb16-81.html> [<https://perma.cc/RNL8-M9RU>].

371. For a discussion of filtering, see *supra* text accompanying notes 246–270.

372. See *supra* text accompanying notes 246–270 (explaining how filtering may make low-cost housing more affordable).

older apartments. In turn, this would decrease the costs of older housing, and so on. Eventually—and the process may take years or decades—rents at the lower end of the market would fall (at least in comparison to inflation). Zoning expansion infill would unleash market forces to meet the growing demand for apartments in our changing nation. It also would complement existing programs as another step towards the long-desired social goal of making housing more affordable for lower-income Americans.

CONCLUSION

The romance of a neighborhood of single-family houses continues appeal to twenty-first-century America. The idea that such a residential landscape reflects the perfection of civilization remains a potent force. But it fails to match modern reality. Today's America should accept that the twentieth-century sentiment about single-family houses fails to meet the realities of our new millennium. We are no longer a nation dominated by two-parent families with children; only half of all adults are married, and fewer than two of every five households consist of more than two people.³⁷³ As housing gobbles up an increasing amount of our spending—as is inevitable, considering our increasing population and fixed amount of land—we should accept that a nation of single-family houses is no longer an ideal.

Fostering apartment infill would not be lowering our expectations; it would be a reflection of the changing demographics of a nation that adds more than one million households each year.³⁷⁴ The American exceptionalism in our worship of the single-family house and our legal discrimination against apartment living is no longer sensible or affordable.³⁷⁵ We need not lament that American metropolitan areas a century from now might look like Vancouver, Canada, in which tall apartment towers fill the vibrant downtown,³⁷⁶ like Berlin, Germany,

373. *See supra* Section I.B.

374. *See supra* Section I.A.

375. Peter Beinart, *The End of American Exceptionalism*, THE ATLANTIC (Feb. 3, 2014), <https://www.theatlantic.com/politics/archive/2014/02/the-end-of-american-exceptionalism/283540> [<https://perma.cc/SWZ4-UFP9>] (discussing the concept of “American exceptionalism” in the world and concluding that this phenomenon is no longer true).

376. *See In Central Vancouver, Modernism and New Urbanism Mesh*, PUB. SQUARE (Dec. 1, 2003), <https://www.cnu.org/publicsquare/2003/12/01/central-vancouver-modernism-and-new-urbanism-mesh> [<https://perma.cc/6FSL-HY7J>] (discussing the ubiquity of apartments in downtown Vancouver).

in which single-family houses stand only on the outskirts of the city,³⁷⁷ or like Kobe, Japan, which is successfully transforming itself, after a devastating earthquake, from a city of small wooden houses to one of modern, safe, and convenient apartments.³⁷⁸

By infilling our metropolitan areas slowly but steadily with more apartments—both in the central cities and in close-in suburbs—we will help ensure that housing is affordable for more Americans.³⁷⁹ We should trust the simple principles of economics that removing restraints on supply will result in the creation of more housing of the type Americans now demand.³⁸⁰ And we should trust that even the construction of expensive new housing would, over time, work to the benefit of low-income Americans, as the process of filtering makes apartment housing relatively cheaper and more affordable.³⁸¹ Infill would not replace existing legal efforts to encourage low-cost housing, such as tax breaks, subsidies, and set-asides.³⁸² But these efforts have been insufficient.³⁸³ Zoning expansion infill would complement them.³⁸⁴ It would not act immediately to supply low-cost housing, as public housing projects do.³⁸⁵ Filtering would take longer.³⁸⁶ But infill offers a broader and fiscally less expensive legal method of encouraging housing that lower-income urban American households need.³⁸⁷

It may take decades for the market to make this transformation. But infill is perhaps the best single step that land use law can take, considering the decades of failures behind us in the *Euclid*-driven national policy of constraining the supply of housing in metropolitan areas. We owe it to the American households of the twenty-first century to allow the market to respond to the revolution in the demand for housing. The America of 2100 may be different in ways

377. See Senate Dep't for Urban Dev. & Hous., *Land Use Planning for Berlin: The Zoning Map of the Land Use Plan*, BERLIN.DE, <http://www.stadtentwicklung.berlin.de/planen/fnp/en/fnp/index.shtml> [<https://perma.cc/54MS-YCK5>].

378. See ROBERT B. OLSHANSKY ET AL., OPPORTUNITY IN CHAOS: REBUILDING AFTER THE 1994 NORTHRIDGE AND 1995 KOBE EARTHQUAKES 6–42 (2005) (discussing Kobe's transformation for low-density wooden houses and larger apartment buildings).

379. See *supra* Section IV.A.

380. See *supra* Section IV.A.

381. See *supra* Section IV.A.

382. See *supra* Section IV.B.

383. See *supra* Section III.C.

384. See *supra* Section IV.B.

385. See *supra* Parts III, IV.

386. See *supra* Section IV.A.

387. See *supra* Section IV.B.

that we cannot predict, but it is certain that our metropolitan areas—both in the central cities and in their more populous suburbs—will be denser and more diverse, and that far more Americans will live in safe, comfortable, and modern apartments. Law should begin the transformation now.