

# Eliminating Exclusionary Land Use Regulations Should be the Civil Rights Issue of our Time

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## Introduction

Like cicada swarms, presidential commissions and federal initiatives to eliminate local barriers to housing development have a certain temporal cadence. By my accounting, there have been at least five such efforts over the past fifty years put in motion by both Democratic and Republican administrations (see Table 1). Though their respective contexts may vary according to the political economy of the time, their centers of gravity are strikingly similar. Each is based on the proposition that unnecessary land use regulations drive up production costs and drive down housing supply, especially for starter homes and affordable apartments.<sup>1</sup> Generally, regulatory barriers include such things as “land use restrictions that make developable land much more costly than it is inherently, zoning restrictions, off-street parking requirements, arbitrary or antiquated preservation regulations, residential conversion restrictions, and unnecessarily slow permitting processes” (see Table 2).<sup>2</sup>

The latest entry in the barrier removal sweepstakes is President Trump’s White House Council on Eliminating Regulatory Barriers to Affordable Housing, created by executive order in June 2019.<sup>3</sup> Chaired by US Department of Housing and Urban Development (HUD) Secretary Ben Carson, the council has twelve months to “identify practices and strategies that most successfully reduce and remove burdensome Federal, State, local, and tribal laws, regulations, and administrative practices that artificially raise the costs of housing development, while highlighting actors that successfully implement such practices and strategies.” The second part of the charge is more prescriptive: “Recommend federal, state, local and tribal actions and policies that would reduce and streamline statutory, regulatory, and administrative burdens at all levels of government that inhibit the development of affordable housing, and encourage these governments to reduce regulatory barriers to the development of affordable housing.”<sup>4</sup>

Though the outcomes of the Carson Council should not be prejudged, it is worth noting that previous federal efforts to address regulatory barriers have resulted in more talk than action, in failed modest spending measures, and in dead-end legislative proposals. Lack of success is reflected in a couple of data points. First, the quantity of state-level regulatory barriers, according to one measure,

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<sup>1</sup> For two of the five, the Douglas Commission and the Kaiser Commission, dealing with regulatory barriers to housing development received less emphasis than proposing new affordable housing production policies and programs.

<sup>2</sup> The White House, “Housing Development Toolkit,” Washington, D.C., September 2016, [https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing\\_Development\\_Toolkit%20of.2.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20of.2.pdf).

<sup>3</sup> “Executive Order Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing,” June 25, 2019, Sec. 4 (ii) (b), <https://www.whitehouse.gov/presidential-actions/executive-order-establishing-white-house-council-eliminating-regulatory-barriers-affordable-housing/>.

<sup>4</sup> Ibid.

increased by nearly half between 1980 and 2010.<sup>5</sup> Second, HUD estimated that the compound effects of 40 years of housing development regulations have added \$850 million to \$2 billion in additional yearly costs to the Housing Choice Voucher program.<sup>6</sup> In my judgment, the ineffectiveness of these previous federal initiatives is in large part due to underestimating the national implications of not addressing the problem, and to policymakers' collective judgment that the political pain associated with these initiatives considerably exceeds the benefits that might flow from the modest policy agendas that have resulted from them.

The impetus for revisiting this issue in my inaugural Joint Center essay is a recent *Wall Street Journal* article on the Trump executive order. The article recalled an Obama administration report that highlighted actions that state and local jurisdictions have taken and could take to promote healthy, responsive, affordable, high-opportunity housing markets; this initiative by the administration was "to little effect," according to the reporter.<sup>7</sup> As a White House senior housing policy advisor at the time, I agree with her assessment. The quiet release of the "Housing Development Toolkit"<sup>8</sup> late in the president's second term is evidence of our failure to convince the White House to make the elimination of exclusionary land use practices a centerpiece of the administration's housing recovery strategy and confirmation of the hypothesis above about political pain. My reflections on how this came about are, if nothing else, cathartic, but recounting the challenging politics of this issue and sharing some of the research and data we developed in the process, might provide insights and help policymakers going forward.

The remainder of this policy brief is in three parts. I start with a case study of our inability to make a sufficiently persuasive case to the Obama White House communications team that exclusionary land use practices, by constraining housing supply and raising prices, not only make housing less affordable but also contribute to growing inequality, and may reduce the rate of economic growth.

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<sup>5</sup> Ganong and Shoag use the number of state appellate court cases containing the phrase "land use" (as a fraction of case volumes) as a measure of changes in state-level regulatory barriers, resulting in the change reported in the text. Peter Ganong and Daniel Shoag, "Why Has Regional Convergence in the U.S. Stopped?" HKS Faculty Research Working Paper Series RWP12-028, John F. Kennedy School of Government, 2012.

<sup>6</sup> For recipients of HUD rental assistance, HUD bears the full burden of rising costs, paying the difference between 30 percent of a tenant's income and the fair market rent for that metropolitan area. According to HUD analysis, the housing stock increased by roughly 67 percent over the past four decades. Based on CEA and HUD analysis, an additional 10 percent increase in housing stock in response to a rise in housing demand would have led to a \$1.97 billion per decade lower HUD rental assistance budget in a low regulatory environment (1 standard deviation below) compared to the average regulatory environment.

<sup>7</sup> Laura Kusisto, "Trump Administration to Take on Local Housing Barriers," *Wall Street Journal*, June 25, 2019, <https://www.wsj.com/articles/trump-administration-to-take-on-local-housing-barriers-11561483527?mod=searchresults&page=1&pos=2>.

<sup>8</sup> The White House, "Housing Development Toolkit."

While these are my personal reflections only, the case study relies on a variety of internal staff work, research and data collected by a staff of talented members of the White House Domestic Policy Council (DPC) and others with whom I worked who were committed to elevating this issue. Next, I note that, in addition to the Carson Council, the housing platforms of several Democratic presidential primary candidates include proposals to address exclusionary land use practices, but none with a potential to change local political dynamics fueling these activities to become a real game-changer. Here I also cite a few isolated but important recent local zoning breakthroughs. I argue in the third part that it is necessary to reconceive how we think about the exclusionary land use issue: we must link the importance of local efforts to increase the elasticity of local housing supplies in response to surges in demand to widening racial economic and wealth disparities and macroeconomic considerations. I conclude by suggesting that eliminating exclusionary zoning and related local laws and regulations is a challenge worthy of mobilizing the extended civil rights community.

### **The Housing Development Toolkit: If a tree falls in a forest...**

Rather than dropping it in the final months of the president's term, we planned for the White House Development Toolkit to be part of a major presidential event celebrating the ongoing housing recovery (see Table 3 for promising reforms highlighted in the Toolkit). Staff began putting the pieces together for this undertaking over many months, starting with a speech at HUD by Vice President Biden in April 2015 in which he addressed administration plans for closing the growing housing affordability gap. It was here that the vice president previewed, among other initiatives, the administration's plan for a new local housing policy grant program "that could help with reforming local zoning and density requirements."<sup>9</sup> What the vice president did not point out was that this modest \$300 million competitive grant program was funded on the mandatory side of the president's fiscal year 2016 spending plan. This type of budget gimmickry was a dead giveaway of how low the program stood on the president's agenda.<sup>10</sup>

Jason Furman, chair of the president's Council of Economic Advisors (CEA), provided the rationale for tackling the issue in a November 2015 speech: he described how restrictive land use practices raise the cost of housing, limit access to opportunity for low-income families, reduce economic

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<sup>9</sup> Christine Serlin, "HUD Event Addresses Affordability Crisis," *Affordable Housing Finance*, April 7, 2015 [https://www.housingfinance.com/policy-legislation/hud-event-addresses-affordability-crisis\\_o](https://www.housingfinance.com/policy-legislation/hud-event-addresses-affordability-crisis_o).

<sup>10</sup> Mandatory spending programs like this one would not count against congressionally imposed tight domestic discretionary spending caps, which are reserved for higher administration priorities. Recognizing their low priority, Congress rarely approves mandatory spending proposals like this one that have all of the attributes of a domestic discretionary spending program.

growth, and widen economic inequality.<sup>11</sup>

Zoning can reinforce divergence across labor markets by impeding market forces that would otherwise help reduce income inequality and boost productivity. High-productivity cities—like Boston and San Francisco—have higher-income jobs relative to low-productivity cities. Normally, these higher wages would encourage workers to move to these high-productivity cities—a dynamic that brings more resources to productive areas of the country, allows workers in low-productivity areas to earn more, improves job matches and competes away any above-market wages (another type of economic rents) in the high-productivity cities. But when zoning restricts the supply of housing and renders housing more expensive—even relative to the higher wages in the high productivity cities—then workers are less able to move, particularly those who are low income to begin with and who would benefit most from moving. As a result, existing income inequality across cities remains entrenched and may even be exacerbated, while productivity does not grow as fast it normally would. This last result—from a paper out this past year by Chang-Tai Hsieh and Enrico Moretti—frames excessively restrictive zoning policies as hindrances to productivity growth.

Building further toward a presidential event to highlight the housing resurgence, White House Domestic Policy Council staff saw an opportunity to leverage the president’s presence at two upcoming winter meetings of the US Conference of Mayors (USCOM) and the National Governors Association (NGA). Since removal of exclusionary land use practices is most politically primed for state and local action, we wanted to include in the president’s remarks the negative impacts of excessive regulation and highlight examples where successful local strategies were working to enhance the housing recovery, and then challenge the chief executives to take on the charge.

In anticipation of the upcoming mayors meeting, DPC staff drafted illustrative speech materials that the president’s speechwriters could adapt for incorporation into his prepared remarks to the mayors. Here is an example:

In many of our most productive regions—where companies are flocking to do business—it’s harder for them to find workers because it’s so hard for those workers to find affordable housing. And it’s not for lack of developers who are willing to invest, or construction workers wanting to get back to work—it’s because some localities haven’t gotten around to reforming outdated, decades-old rules on housing development, or have unintentionally piled requirement after requirement that create real barriers to getting new, reasonably priced housing built. When that happens, hardworking families have to drive farther and farther just to find housing they can afford. So we need to see more efforts like that of the Silicon Valley Leadership Group, or the Chicago Commercial Club, who partnered with their local policymakers to ease those barriers—to make sure their employees were able to find housing.

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<sup>11</sup> Jason Furman, “Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents,” The Urban Institute, November 2015, [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120\\_barriers\\_shared\\_growth\\_land\\_use\\_regulation\\_and\\_economic\\_rents.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120_barriers_shared_growth_land_use_regulation_and_economic_rents.pdf).

Another harbinger of a disappointing outcome was a request we received from the White House communications team asking us to test the ideas reflected in our draft remarks by previewing them with another trade organization of local political officials other than the two whom the president would be meeting. The political advice we received from these local government representatives was blunt and to the point: drop the topic all together. Challenging those elected to do more to modernize their obsolete development regulations would fall on deaf ears, be politically divisive, and make it harder to get the mayors and governors behind the president's more important priorities.

The president's advisors took this advice to heart, as we struck out entirely with the governors meeting and managed to get only a single sentence in the president's remarks to the mayors. In the closing section of his remarks, the president reflected on his close working relationship with the mayors:

So we've accomplished a lot together on behalf of the American people. I could not be prouder of the work that we've done together. There's a lot more that I want to get done this last year. I still am pushing hard and we have I think a real opportunity to get criminal justice reform done this year. We have to work together to combat the scourge of opioids and heroin that is spreading through so many of our communities across the country. We still have a lot of work we can do to improve our schools. We can work together to break down rules that stand in the way of building new housing and that keep families from moving to growing, dynamic cities [emphasis added].<sup>12</sup>

With a presidential event not happening, the Development Toolkit sat there all dressed up with nowhere to go, and the Communications staff finally released it eight months later as a standalone product with little fanfare. While the Development Toolkit remains an important albeit underutilized affordable housing resource, the research that stands behind it is, perhaps, even more important than the report itself. Given that the Trump executive order shares our view that regulatory barriers widen the affordability gap and reduce economic growth, and directs the Carson Council to quantify those effects,<sup>13</sup> the following research and data highlights compiled by our DPC staff might be useful to that effort.

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<sup>12</sup> "Remarks by the President at U.S. Conference of Mayors," The White House, January 21, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/01/21/remarks-president-us-conference-mayors>.

<sup>13</sup> Executive Order Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing, June 25, 2019, Sec. 4 (ii) (b), <https://www.whitehouse.gov/presidential-actions/executive-order-establishing-white-house-council-eliminating-regulatory-barriers-affordable-housing/>.

## What the Data Show

### *Barriers raise housing prices*

- Glaeser and Ward find that each additional acre in minimum lot size decreases new construction by roughly 40 percent and increases housing prices by roughly 10 percent.<sup>14</sup>
- Gyourko and Molloy estimate that excessive zoning has pushed real house prices 56 percent above real construction costs.<sup>15</sup>
- Glaeser, Gyourko, and Saks examine 60 Metropolitan Statistical Areas (MSAs) and find that housing prices rise more in regulated areas in response to local demand shocks, like an increase in jobs.<sup>16</sup>
- Ihlanfeldt examines more than 100 cities in Florida, concluding that each additional restrictive land use measure raises house prices by 3 percent.<sup>17</sup>
- Zabel and Paterson use data on 53 critical habitat designations introduced in California between 1979 and 2004, finding that housing prices increased by approximately 10 percent when critical habitat designations were put in place.<sup>18</sup>

### *Barriers reduce and delay housing development*

- Gyourko, Saiz, and Summers find that in the most heavily regulated communities, delays for development approval average ten and a half months – nearly a year – compared to just over three months in lightly regulated communities.<sup>19</sup> Moving from the 25<sup>th</sup> to 75<sup>th</sup> percentile in a regulatory index measure leads to a 20 percent reduction in supply elasticity.<sup>20</sup>

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<sup>14</sup> Edward L. Glaeser and Bryce A. Ward, “The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston,” *Journal of Urban Economics* 65 (2009): 265-78.

<sup>15</sup> Joseph Gyourko and Raven Molloy, “Regulation and Housing Supply,” in Gilles Duranton, J. Vernon Henderson, and William C. Strange, eds., *Handbook of Regional and Urban Economics*, Vol. 5B (Amsterdam, San Diego, and Oxford: Elsevier Science, 2015), 1289-1338.

<sup>16</sup> Edward L. Glaeser, Joseph Gyourko, and Raven Saks, “Why Have Housing Prices Gone Up?” *American Economic Review* 95, no. 2 (2005): 329-33.

<sup>17</sup> Keith Ihlanfeldt, “The Effect of Land Use Regulation on Housing and Land Prices,” *Journal of Urban Economics* 61, no. 3 (May 2007).

<sup>18</sup> Jeffery E. Zabel and Robert Paterson, “The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity,” *Journal of Regional Science* 46, no. 1 (February 2006).

<sup>19</sup> Using data from a survey of over 2,000 jurisdictions, Gyourko, Saiz, and Summers provide a snapshot of the regulatory and political process of residential housing development. Joseph Gyourko, Albert Saiz, and Anita Summers, “A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index,” *Urban Studies* 45, no. 3 (2008).

<sup>20</sup> Saiz estimates national housing price elasticity to be 1.75. Moving from 25<sup>th</sup> to 75<sup>th</sup> percentile in the regulatory index measure for a city of one million inhabitants with average land availability leads to a 20 percent reduction in

- Mayer and Somerville use quarterly data on housing starts and prices for 44 MSAs and find that one standard deviation increase in regulation leads to a 45 percent lower steady-state level of housing starts and 20 percent lower housing elasticities.<sup>21</sup>
- Quigley and Raphael examine 407 cities in California from 1990-2000 and find that housing price elasticity is .36 for regulated cities (those with at least 2 growth control measures) and essentially zero for unregulated cities.<sup>22</sup>

*Regulatory barriers increase income inequality, and reduce economic growth*

- Ganong and Shoag demonstrate that increases in housing regulation among the highest-wage states over the last 30 years have dramatically reduced population growth in high-wage regions, causing income convergence across states to stop for the first time in 100 years, and contributing to growing income inequality nationwide.<sup>23</sup>
- Saks estimates that restrictive land use regulations reduce employment by restricting migration. While the body of research in the field is not large, a signature study finds that the long-run impact of a 1 percent [labor] demand shock in a highly constrained [housing] market results in a 0.9 percent increase in employment, which is 0.1 percent lower than the increase found in less constrained areas. Translating this reduced elasticity to commonly understood terms, by reducing migration, highly restrictive land use regulations are associated with as much as a 10 percent reduction in employment.<sup>24</sup>
- Hsieh and Moretti suggest that constraints to housing supply may have lowered aggregate US growth by 36 percent from 1964 to 2009; and researchers at the University of

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supply elasticity, from 1.75 to 1.38. Albert Saiz, "The Geographic Determinants of Housing Supply," *Quarterly Journal of Economics* 125, no. 3 (August 2010).

<sup>21</sup> Christopher J. Mayer and C. Tsurriel Somerville, "Land Use Regulation and New Construction," Columbia Business School, <https://www0.gsb.columbia.edu/mygsb/faculty/research/pubfiles/519/519.pdf>.

<sup>22</sup> John M. Quigley and Steven Raphael, "Regulation and the High Cost of Housing in California," *American Economic Review* 95, no. 2 (2005).

<sup>23</sup> "Over the past fifty years, differences in incomes across states have been increasingly capitalized into housing prices. Coincident with this increase, we show that (1) the returns to living in productive places net of housing costs have fallen dramatically for low-skilled workers but have remained large for high-skilled workers, (2) high-skilled workers continue to move to areas with high nominal income, and (3) low-skilled workers are now moving to areas with low nominal income but high income net of housing costs." Peter Ganong and Daniel Shoag, "Why Has Regional Income Convergence in the U.S. Declined?" July 2012, [https://journalistsresource.org/wp-content/uploads/2013/02/Ganong\\_Shoag.pdf](https://journalistsresource.org/wp-content/uploads/2013/02/Ganong_Shoag.pdf).

<sup>24</sup> Raven Saks, "Job Creation and Housing Construction: Constraints on Metropolitan Area Employment Growth," *Journal of Urban Economics* 64 (2008).



Pennsylvania Wharton School and the Federal Reserve have recently provided new evidence that local regulations are reducing economic efficiency.<sup>25</sup>

- Six of the 9 most productive metro areas over 1 million in population have moderately or highly regulated residential development climates, as shown by HUD analysis of BEA and Wharton Residential Land Use Regulation Index (WRLURI). Productivity is measured by real GDP per capita and “moderately or highly regulated” is defined as a mean metro WRLURI of 0.5 or above.
- Freddie Mac finds that the fastest growing cities in the United States saw a substantial decline in affordable housing units from 2010 to 2017. With an average population growth of more than 15 percent, the 10 fastest growing metros of the top 50 metros in the nation saw the number of units affordable to very low-income residents decline by more than a third. The average loss in very low-income affordable units was limited to about half that amount across all metro areas nationwide, where population growth averaged just over 5 percent.<sup>26</sup>

### **Where We Go from Here**

An ideological and political consensus is emerging that exclusionary zoning and related development barriers decrease housing affordability by restricting new supply and raising housing prices, with profoundly important national implications. The prevailing view remains that the most effective policy levers for addressing this problem reside in the hands of governors, mayors, and other local officials, and to a limited extent, we are seeing evidence that that view is right: “Cities like Chicago, Seattle, Sacramento, and Tacoma and states like Massachusetts have begun to foster more affordable housing opportunities by removing restrictions, implementing transit-oriented zoning ordinances, and speeding up permitting and construction processes.”<sup>27</sup> In December of last year, Minneapolis passed an ambitious zoning plan aimed at building more affordable housing throughout the city by allowing duplexes and triplexes in areas zoned for single-family. Oregon lawmakers passed a bill in July of this year requiring cities over 25,000 to mimic Minneapolis, allowing duplexes, triplexes, fourplexes and “cottage clusters”

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<sup>25</sup>Chang-Tai Hsieh and Enrico Moretti, Housing Constraints and Spatial Misallocation, *American Economic Journal: Macroeconomics* 2019, Available at <https://doi.org/10.1257/mac.20170388>; Joseph Gyourko and Raven Molloy, “Regulation and Housing Supply,” NBER Working Paper 20536 (October 2014), <http://www.nber.org/papers/w20536.pdf>.

<sup>26</sup> Freddie Mac, “Rapidly Growing Metros Are Losing Affordable Housing at Alarming Rates,” June 26, 2019.

<sup>27</sup> The White House, “Housing Development Toolkit.”

in neighborhoods zoned for single-family housing; in cities of at least 10,000, duplexes would be allowed in single-family zones.<sup>28</sup> Illustrating that party does not strictly define the fault lines of local development issues, the Democratic California State Senate just rolled over until the 2020 session a measure to allow duplexes to be built in all single-family zones throughout the state, notwithstanding strong support from the Democratic governor.<sup>29</sup>

While this patchwork of local innovations is welcome and important, without a national response, it is hard to see them adding up to the kind of systemic reforms necessary to tackle the problem. To this point, it is a positive to see that several Democratic presidential hopefuls who have assembled ambitious affordable housing supply agendas have complemented them with efforts to lower housing prices by reducing what Glaeser and Gyourko call the “implied zoning tax on new construction.”<sup>30</sup> Senator Elizabeth Warren (D-MA) offers up a new \$10 billion incentive-based competitive grant program that would allow states, regions, and localities to fund infrastructure, parks, roads, schools, or other priorities, but they can only compete for these funds if they “reform land-use rules to allow for the construction of affordable housing units and protect tenants from rent spikes and eviction.”<sup>31</sup> Providing no new resources, Senator Cory Booker (D-NJ) would condition eligibility for selected discretionary federal transportation grants on localities’ adopting inclusionary zoning practices.<sup>32</sup> While incorporating inclusionary land use requirements into HUD’s planning and reporting requirements, Booker proposes no new financial penalties for failure to perform.<sup>33</sup> Finally, Julián Castro, former Obama administration HUD Secretary, would create his own presidential commission to develop reforms that promote affordable housing development, including establishing federal guidelines on land use and zoning that “are consistent with efforts to combat segregation in public schools and address practices like red-lining and exclusionary zoning.”<sup>34</sup> In what is an otherwise unremarkable proposal,

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<sup>28</sup> Laura Bliss, “Oregon’s Single-Family Zoning Ban Was a ‘Long Time Coming,’” CityLab, July 2, 2019, <https://www.citylab.com/equity/2019/07/oregon-single-family-zoning-reform-yimby-affordable-housing/593137/>.

<sup>29</sup> Marisa Kendall, “Gov. Gavin Newsom Talked Big on Housing. How Has He Stacked up So Far?” *Marin Independent Journal*, July 1, 2019, <https://www.marinij.com/2019/07/01/newsom-talked-big-on-housing-how-has-he-stacked-up-so-far/>.

<sup>30</sup> Edward L. Glaeser and Joseph Gyourko, “The Impact of Building Restrictions on Housing Affordability,” *FRBNY Economic Policy Review* 9, no. 2 (June 2003), <https://www.newyorkfed.org/medialibrary/media/research/epr/03v09n2/0306glae.pdf>.

<sup>31</sup> Elizabeth Warren, “My Housing Plan for America,” March 16, 2019, <https://medium.com/@teamwarren/my-housing-plan-for-america-20038e19dc26>.

<sup>32</sup> Michael Hobbes, “Finally, A Policy Proposal That Takes The Housing Crisis Seriously,” *HuffPost*, June 7, 2019, [https://m.huffpost.com/us/entry/us\\_5cfaa05ee4b04e90f1c8d110/amp](https://m.huffpost.com/us/entry/us_5cfaa05ee4b04e90f1c8d110/amp).

<sup>33</sup> “Housing, Opportunity, Mobility and Equity Act of 2018,” S.3342, 115<sup>th</sup> Congress, 2<sup>nd</sup> Session, August 1, 2018.

<sup>34</sup> Julián Castro, “People First Housing, Part I,” June 17, 2019, <https://www.julianforthefuture.com/news-events/people-first-housing-part-1/>.

Castro's framing of inclusionary housing as a civil rights issue is an important insight that sets the table for a bigger and bolder future policy agenda that is more up to the challenge, which I discuss in the close to this brief.

### **Final Thoughts**

Rooted in 75 years of local actions, evidence is accumulating that the multiple layers of exclusionary zoning and land use controls are a powerful contributor not just to higher housing costs, but also to declining rates of economic mobility and productivity growth, and to widening disparities in the wealth of white and black Americans. For these reasons, we should make remedying these problems a national civil rights cause. Consistent with Richard Rothstein's argument in *The Color of Law* that we have a "constitutional obligation to remedy de jure segregation in housing,"<sup>35</sup> the Century Foundation's Richard Kahlenberg makes the civil rights case for taking on exclusionary zoning in this way:

Economically discriminatory government zoning practices... exclude low-income and working-class Americans from entire neighborhoods. This economic segregation in housing is damaging, and perhaps even as insidious as outright racial segregation, because while in effect it still excludes substantial numbers of people of color from good places to live, it does so with the open consent of the law.<sup>36</sup>

Kahlenberg would operationalize Rothstein's constitutional obligation by having Congress pass a federal Economic Fair Housing Act (EFHA).<sup>37</sup> The EFHA would complement the 50-year-old federal Fair Housing Act by curtailing "government zoning policies that discriminate based on economic status."<sup>38</sup> While Kahlenberg does not raise the possibility of federal preemption of economically discriminatory local development laws, a legal analysis by Michael Schill of the Kemp Commission's unfulfilled recommendations does address this issue. He first determines through analysis of case law and precedence the constitutionality of the Kemp Commission's recommendation "that the federal government condition various forms of housing assistance on the adoption by states and localities of barrier removal strategies."<sup>39</sup> A state's failure to do so or to make an inadequate effort would result in, among other things, loss of its ability to issue tax-exempt bonds for housing and of its authority to

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<sup>35</sup> Richard Rothstein, *The Color of Law, A Forgotten History of How Our Government Segregated America* (New York: Liveright, 2017).

<sup>36</sup> Richard D. Kahlenberg, "An Economic Fair Housing Act," The Century Foundation, August 2017, <https://tcf.org/content/report/economic-fair-housing-act/>.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Michael H. Schill, "The Federal Role in Reducing Regulatory Barriers to Affordable Housing in the Suburbs," *Journal of Law and Politics* 8 (1992): 703-30.

allocate housing tax credits.<sup>40</sup> While not endorsing it, Schill points out that preemption is a more direct alternative to conditioning federal grants in aid. Congress, says Schill, “could act directly to eliminate restrictive suburban land use practices by exercising its own constitutional power to regulate commerce.”<sup>41</sup> He continues:

States and localities might challenge federal legislation preempting restrictive zoning ordinances on the grounds that (1) land use regulation does not fall within Congress's power to regulate interstate commerce and (2) the states' powers to regulate land use are protected from federal interference by the Tenth Amendment. Neither of these challenges, however, would be likely to succeed.

The Supreme Court has, since the early days of the republic, repeatedly stated that Congress's power to regulate interstate commerce is extremely broad. Nevertheless, prior to the late 1930s, the Court repeatedly struck down federal laws on the ground that they were directed to intrastate rather than interstate concerns. According to the Court, the commerce power was limited to activities that directly affected interstate commerce.

Beginning in the late 1930s, the Court substantially relaxed its standards for determining the reach of the federal commerce power. For example, in *Wickard v. Fillburn* a farmer challenged the power of the federal government to set quotas on the amount of wheat he could harvest. The quotas included wheat that he planned to consume rather than sell. In response to Fillburn's argument that these harvest limitations regulated activities that were local in nature, the Court stated that “even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’”<sup>42</sup>

It seems to me that the research summarized earlier on the economic and racial impacts of widespread local exclusionary land use practices strengthens the nexus of those practices and interstate commerce. About one hundred years ago, Kahlenberg explains, “policymakers and individual citizens pursued a number of policies and practices to segregate housing by race and income, including explicit zoning by race, which was replaced by exclusionary zoning by income”—which had its own adverse racial impacts.<sup>43</sup> Recalling this history, the housing and civil rights community should adopt remedying the harms caused by the perpetuation of economically discriminatory land use laws as the civil rights challenge of our time.

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<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Kahlenberg, “An Economic Fair Housing Act.”

Table 1. Fifty Years of Federal Studies & Commissions on Regulatory Barriers  
(starting with most recent)

<p>1. Federal, State, local, and tribal governments impose a multitude of regulatory barriers — laws, regulations, and administrative practices — that hinder the development of housing. These regulatory barriers increase the costs associated with development, and, as a result, drive down the supply of affordable housing. They are the leading factor in the growth of housing prices across metropolitan areas in the United States.</p>	<p>Executive Order Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing, June 25, 2019.</p>
<p>2. Locally-constructed barriers to new housing development include beneficial environmental protections or well-intentioned permitting processes or historic preservation rules, but also laws plainly designed to exclude multifamily or affordable housing.</p>	<p>The White House, Housing Development Toolkit, September 2016</p>
<p>3. The cost of housing is being driven up by an increasingly expensive and time-consuming permit-approval process, by exclusionary zoning, and by well-intentioned laws aimed at protecting the environment and other features of modern-day life. The result is that fewer and fewer young families can afford to buy or rent the home they want.</p>	<p>The Advisory Commission on Regulatory Barriers to Affordable Housing (The Kemp Commission), "Not In My Back Yard": Removing Barriers to Affordable Housing, July 8, 1991</p>
<p>4. In hearings held across the country, the Commission was told repeatedly that unnecessary regulations at all levels of government have seriously hindered the production of housing, increased its cost, and restricted opportunities for mobility.</p>	<p>The Report of the President's Commission on Housing, June 16, 1981 (commonly referred to as the "Kaiser Commission.")</p>
<p>5. Restrictive zoning regulations greatly increase the price of land for housing, with rising land prices "further explaining the squeeze on low-income families seeking decent housing</p>	<p>Building the American City: Report of the National Commission on Urban Problems to the Congress and to the President of the United States, H.R. Doc. No. 91-34, at vii, 1968 (commonly referred to as the "Douglas Commission.")</p>

<p>Table 2. Targeted Regulatory Barriers</p> <ul style="list-style-type: none"> <li>• Overly restrictive zoning and growth management controls; rent controls;</li> <li>• Cumbersome building and rehabilitation codes;</li> <li>• Excessive energy and water efficiency mandates;</li> <li>• Unreasonable maximum-density allowances;</li> <li>• Historic preservation requirements; overly burdensome wetland or environmental regulations;</li> <li>• Outdated manufactured-housing regulations and restrictions;</li> <li>• Undue parking requirements;</li> <li>• Cumbersome and time-consuming permitting and review procedures;</li> <li>• Tax policies that discourage investment or reinvestment;</li> <li>• Overly complex labor requirements; and inordinate impact or developer fees.</li> </ul>	<p>Trump/Ben Carson</p>
<ul style="list-style-type: none"> <li>• Excessive off-street/on-site parking requirements;</li> <li>• Lengthy or complex permitting processes;</li> <li>• Large minimum lot sizes;</li> <li>• Outdated, decades-old zoning codes;</li> <li>• Inflexible or arbitrary historic preservation rules;</li> <li>• Restrictive height limits, floor area ratios, setbacks, open space requirements, etc.;</li> <li>• Growth control mechanisms like moratoria, permitting caps and development quotas that restrict land availability without increasing density.</li> </ul>	<p>Obama/Domestic Policy Council</p>
<p>Five types of suburban land use regulations that serve to restrict the amount of low income housing built in the suburbs:</p> <ul style="list-style-type: none"> <li>• Growth controls,</li> <li>• Zoning,</li> <li>• Subdivision controls,</li> <li>• Exactions, and</li> <li>• Excessive permitting requirements.</li> </ul>	<p>GHW Bush/Jack Kemp</p>
<ul style="list-style-type: none"> <li>• State and local governments have increased their use of traditional land use and building regulations while becoming more involved in other rulemaking that affects housing: <ul style="list-style-type: none"> <li>○ environmental regulations and energy standards;</li> <li>○ State licensing requirements controlling entry into one of the construction trades;</li> <li>○ municipal use of special fees for on- and off-site development;</li> <li>○ growth management controls used to limit and channel development;</li> <li>○ rent control and condominium conversion regulations</li> </ul> </li> </ul>	<p>Reagan/McKenna, Hills</p>
<p>Fairer taxation and financing, in bringing larger units of government into existence, in providing a more uniform and fairer application of those State police powers, such as zoning and building codes, which they have largely abdicated to even the smallest locality. Zoning and building code restrictions have held back the application of economies of scale and production in the building industry.</p>	<p>LBJ/Paul Douglas</p>

Table 3. Promising local practices include:

- High-density/multifamily zoning;
- By-right development;
- Inclusionary zoning;
- Governmental policies to facilitate infill development;
- Form-based zoning codes that incorporate expedited permitting;
- Standardized building codes;
- Elimination of parking minimums;
- Transit-oriented development;
- Mutable housing stock that can convert from single family to multi-family (and vice versa) and zoning that allows conversions by right;
- Allowing accessory dwelling units (e.g., granny flats, English basements)
- Allowing for micro-units;
- Taxing vacant land;
- Facilitating conversion of non-residential buildings to residential use;
- Flexibility in historic preservation and environmental regulation processes, particularly for affordable housing; Growth management programs that increase density when restricting land availability.

Source: Development Toolkit Sept. 2016