

REPORT EDUCATION

Tearing Down the Walls: How the Biden Administration and Congress Can Reduce Exclusionary Zoning

APRIL 18, 2021 — RICHARD D. KAHLENBERG

In the 2020 presidential campaign, Joe Biden, defied the pundits who wrote him off by returning again and again to a few key themes: racial justice, respect for working-class people, and national unity. He said he would seek to heal the soul of the country, which had been damaged by Donald Trump's embrace of racism. As a proud product of Scranton, Pennsylvania and the University of Delaware, Biden said he would value the dignity of working people and not look down on anyone. And he said that as president, he would seek to unify a politically polarized country by exhibiting decency and empathy toward all and representing the people who voted against him as much as those who voted for him.

As President Biden builds off the success of the American Rescue Plan Act and charts a course forward, how can he—working with the new Congress—best deliver on those three longer-term promises? Perhaps no single step would do more to advance those goals than tearing down the government-sponsored walls that keep Americans of different races and classes from living in the same communities, sharing the same public schools, and getting a chance to know one another across racial, economic and political lines.¹

Economically discriminatory zoning policies—which say that people are not welcome in a community unless they can afford a single-family home, sometimes on a large plot of land—run counter to American ideals and yet are pervasive in America. In most U.S. cities, zoning laws prohibit the construction of duplexes, triplexes, quads, and larger multifamily units on at least three quarters of available land.² In the early twentieth century, cities had adopted explicitly racist zoning policies that prohibited Black people from living in white communities. But after racial zoning was struck down by the U.S. Supreme Court in 1917, municipalities replaced their race-based policies with economic zoning, which continues to discriminate against low-wage families—many of them families of color—to this very day.³

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These policies—coupled with private practices such as racial steering by real estate agents⁴—carry an ugly underlying message: some people are better than others because of how much money they make or the color of their skin. In a country where 75 percent of students attend neighborhood public schools, these local housing ordinances also serve to divide American school children into separate cohorts—with one being significantly whiter and wealthier.⁵ No single step could be more important to healing America's soul and uniting the country than providing more children with the opportunity to go to school with classmates of different racial, ethnic, religious, and economic backgrounds where they can learn together what it means to be an American.

Local government bans on duplexes, triplexes, or apartment buildings not only drive racial and economic segregation, they also exacerbate two other challenges the Biden administration has identified as critical: the housing affordability crisis and climate change.

Economists from across the political spectrum agree that zoning laws that ban anything but single-family homes artificially drive up prices—for houses in exclusive neighborhoods and for multi-unit rental dwellings alike—by limiting the supply of housing that can be built in a region, just as surely as OPEC constricting the production of oil drives up oil prices.⁶ At a time when the COVID-19 pandemic has left many Americans jobless and people are struggling to make rent or pay their mortgages, it is incomprehensible that ubiquitous government zoning policies would make the housing affordability crisis worse by driving prices artificially higher.⁷

Likewise, there is widespread agreement that laws banning the construction of multifamily housing promote damage to the planet.⁸ Single-family-exclusive zoning pushes new development further and further out, which lengthens commutes and increases the emissions of greenhouse gases. Indeed, the United Nations Environmental Program has recommended removing limits to multifamily housing as an important strategy for reducing emissions.⁹

What keeps these harmful policies in place? For decades, powerful “not in my back yard” (NIMBY) forces have thwarted reform and kept exclusionary policies in place. Because the voices of upper-middle-class, mostly white homeowners are amplified in zoning discussions, a political consensus congealed around the idea that economically discriminatory zoning, no matter how damaging, is politically untouchable.¹⁰ Lee Anne Fennell of the University of Chicago Law School notes that economically discriminatory zoning has become “a central organizing feature in American metropolitan life.”¹¹

Recently, though, that political consensus has been upended. Reformers in cities such as Minneapolis and states such as Oregon have adopted sweeping reforms to end single-family-only zoning.¹² California, too, has enacted extensive reforms that allow the construction of small living spaces (known as “accessory dwelling units”) next to single-family homes in areas previously zoned exclusively for single-family residences.¹³

At the national level, Biden made the judgement that it was politically possible to endorse federal reform of exclusionary zoning, which he did in 2020, when he called for enactment of legislation proposed by Cory Booker and James Clyburn.¹⁴ Moreover, Donald Trump’s attempt to use that issue to win over “suburban housewives of America”—at a time many people were rejecting racism in the wake of George Floyd’s murder—fell flat.¹⁵ Invoking fears of increased crime and reduced property values—claims that have been largely debunked by research—proved unsuccessful.¹⁶

Developments that followed the 2020 election have further accelerated the hopes of those who would like to see reform of economically discriminatory zoning. President Biden appointed Representative Marcia Fudge (D-OH) as secretary of the Department of Housing and Urban Development (HUD), which excited advocates who care about reducing racial and economic segregation. In the education arena, Fudge was the chief congressional sponsor of the Strength in Diversity Act, the leading legislative vehicle for supporting local school integration efforts. And, as mayor of Warrington Heights, Ohio, an inner-ring suburb of Cleveland, Fudge successfully championed an effort to bring families of different economic backgrounds together to live in the community.¹⁷ Biden also appointed Susan Rice head of the Domestic Policy Council, with racial justice declared as her central goal.¹⁸

Within days of taking office, President Biden also issued executive orders indicating his intent to reinstate two important rules that the Obama administration promulgated and the Trump administration repealed—the 2015 “Affirmatively Furthering Fair Housing” rule that implemented an important element of the Fair Housing Act, and the 2013 rule interpreting the Fair Housing Act’s “disparate impact” rule that unjustified rules with discriminatory impact are illegal even absent discriminatory intent.¹⁹ (Both of these rules, which impact exclusionary zoning, are discussed in much greater detail below.) The American Rescue Plan Act just signed into law also invests billions of dollars in funds for emergency rental assistance, assistance to homeowners trying to pay mortgages, and housing for the homeless.²⁰

The leadership of key housing committees are also champions of equity and opponents of exclusion. Representative Maxine Waters (D-CA), a longtime leader on issues of racial and economic equity, retained her chairmanship of the House Committee on Financial Services (which has jurisdiction over housing). And Senator Sherrod Brown (D-OH), a longtime champion of the dignity of American’s multiracial working class, is the new chair of the Senate Committee on Banking, Housing, and Urban Affairs.

There are many possible paths forward to make housing more affordable and residential areas more integrated. These include full funding of the Housing Choice Vouchers program and the American Jobs Plan’s proposal to invest \$213 billion in housing as part of a push to rebuild America’s infrastructure.²¹ Reform must also include the subject of this report—reducing exclusionary zoning policies that are a central source of segregation and affordability concerns. Pointing to local zoning laws, the *New York Times* editorial page has noted, “Housing is one area of American life where government really is the problem.”²² Biden’s American Jobs plan itself acknowledges this, and includes an exciting new \$5 billion competitive grants program to encourage jurisdictions to reduce exclusionary zoning.²³

Beyond this grants program, how can federal leaders capitalize on this moment to bring about meaningful change to exclusionary zoning? What steps could the Congress and Biden administration take to curtail zoning policies that cause so much harm?

In December 2020, The Century Foundation (TCF) and the Bridges Collaborative—an initiative for school and housing integration—assembled more than twenty of the leading thinkers from across the country to discuss these issues. The group included elected officials, civil rights activists, libertarians, and housing researchers. (See list of participants in the appendix.) This report is informed by the collective wisdom of the group—though individual participants may object, perhaps strenuously, to a number of particular conclusions in this report and are in no way responsible for them.

The first part of this report explains the ways in which the U.S. Constitution provides federal authority to reduce harmful local zoning ordinances and reviews the evidence on three key reasons why the federal government should exercise its authority: (1) to reduce economic and racial segregation and discrimination; (2) to improve housing affordability and health; and (3) to fight climate change.

The second part briefly reviews the experiences in several cities and states seeking exclusionary zoning reform, with a focus on Minneapolis, Oregon, California, and Virginia. This section asks what lessons local and state experiences hold for federal reform on questions such as how to build effective coalitions for reform; how to address the possibility that exclusionary zoning reform might inadvertently accelerate gentrification and displacement; and whether reforms should seek change that is incremental or bold.

The third part outlines eight leading federal reform ideas, which include efforts to provide incentives for state and local reform through new funding carrots, attaching conditions to the receipt of existing federal funding, and employing a private right of action against government discrimination in federal court. Some of these ideas have already been endorsed by President Biden, others have not.²⁴ The report discusses the advantages and disadvantages of each of these reforms based on three criteria: their potential effectiveness in bringing about change; their political viability (including the possibility of bipartisan support); and their constitutional viability to withstand possible challenges in federal court. Any of these approaches could be incorporated into key legislative vehicles for the Biden administration, including infrastructure and climate change bills.

The fourth and final part of the report concludes with recommendations on the best paths forward for the Biden administration and Congress.

Why Should the Federal Government Get Involved in Local Exclusionary Zoning?

Zoning decisions are typically made at the local level, so does the federal government have the authority to enter into this sphere? And if it does have such authority, should it exercise it?

Federal Authority on Zoning Policies That Run Counter to the National Interest

Although states have delegated considerable authority over zoning matters to localities, state and local control in this realm has never been unlimited. The U.S. Constitution has long provided federal courts and the U.S. Congress with the authority to intervene in zoning questions when localities have abused their power.

In a landmark 1917 decision, the U.S. Supreme Court struck down local racial zoning laws that prohibited Black people from buying in predominantly white areas as a violation of the Equal Protection Clause.²⁵ In 1968, Congress employed its powers to regulate interstate commerce to pass the Fair Housing Act, which bars discrimination in housing.²⁶ The act, in turn, has been used on numerous occasions to strike down zoning policies that hurt people of color.²⁷

Congress has intervened in local zoning in other spheres as well. The Telecommunications Act of 1996, for example, “allows the federal government to override local land-use regulations that impede the siting of cell phone towers.”²⁸ The Religious Land Use and Institutionalized Persons Act of 2000, passed unanimously by Congress, came in response to an outcry from religious

institutions that had faced discrimination when local governments denied zoning approval. Under the federal law, religious institutions can bring suits and receive injunctive or declaratory relief.²⁹

The federal government also has broad authority under its spending powers to place conditions on the use of funds, so long as those conditions are related to spending and are not unduly “coercive.”³⁰ Because the federal government has an interest in ensuring that its spending advances national goals, it can place conditions on related spending that implicates local zoning laws. For example, in 2020 the House passed the Yes In My Back Yard (YIMBY) Act to require recipients of federal Community Development Block Grants to report on their efforts to reduce exclusionary zoning. (The bill has not yet passed the Senate.)³¹

That Congress has a right to ensure that its spending advances its goals—including on the question of zoning—is a principle that is widely shared by conservatives as well as liberals. Ryan Streeter of the American Enterprise Institute, for example, suggests that the federal government has an interest in reducing restrictive zoning because it drives up housing prices, which in turn increases federal spending. “Tying federal funding to how well communities are matching housing supply with demand is sensible policy,” he says. “Localities expect the federal government to pay for considerable social welfare costs in their communities. Asking them to do their part by not driving up housing costs on lower-income families is a reasonable policy goal.”³²

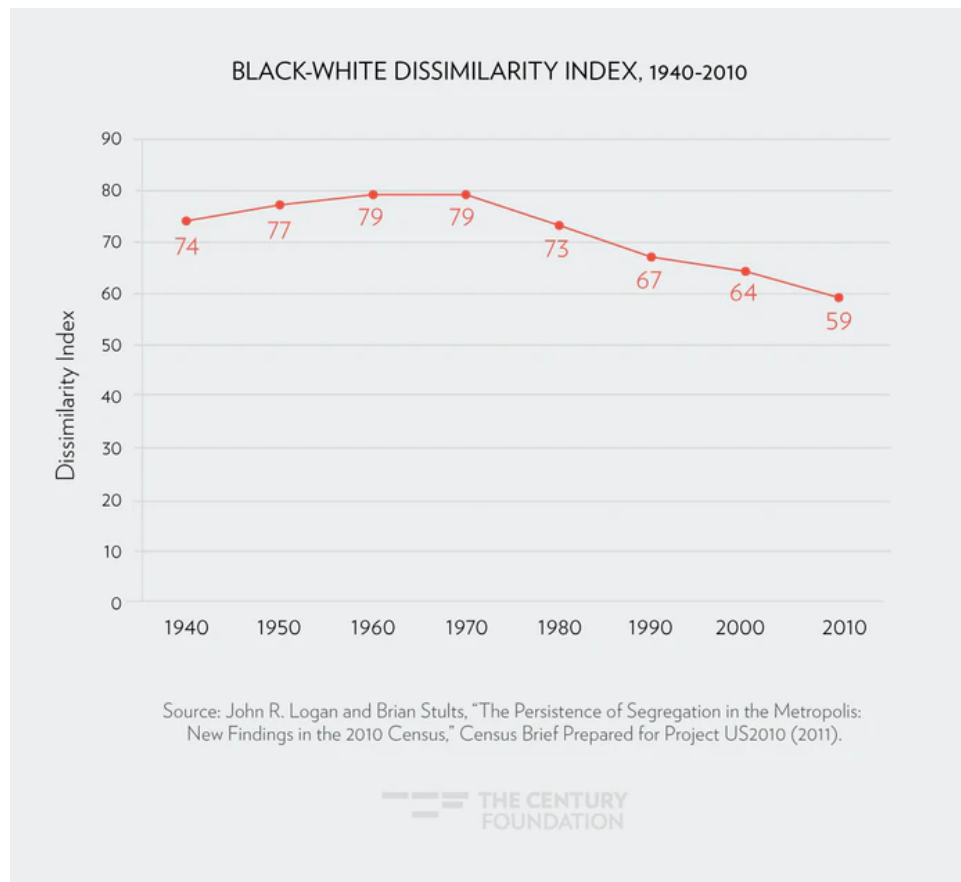
Why the Federal Government Should Exercise Its Authority

If the federal government clearly has the authority to reduce economically and racially discriminatory zoning policies, it also has several very important reasons to do so: to enhance opportunities, particularly for low-income families and families of color; to reduce segregation and unify the country; to make housing more affordable by increasing its supply; to reduce the negative health effects of overcrowded housing; and to improve the quality of the environment.

The Federal Interest in Enhancing Opportunity and Social Cohesion

Low-income families, many of them families of color, are increasingly cut off from access to safe neighborhoods with strong public schools. The good news is that the 1968 Fair Housing Act cleared the way for many middle-class Black people to escape ghettos, and racial segregation has slowly declined over the past half century. As a result, the Black–white dissimilarity index (in which 0 is perfect integration and 100 is absolute segregation) has shrunk from a high of 79 in 1970 to 59 in 2010, according to an analysis of Census data. (See Figure 1.) A more recent study found that between 2010 and 2014, Black–white segregation declined in 45 of 52 metropolitan areas.³³

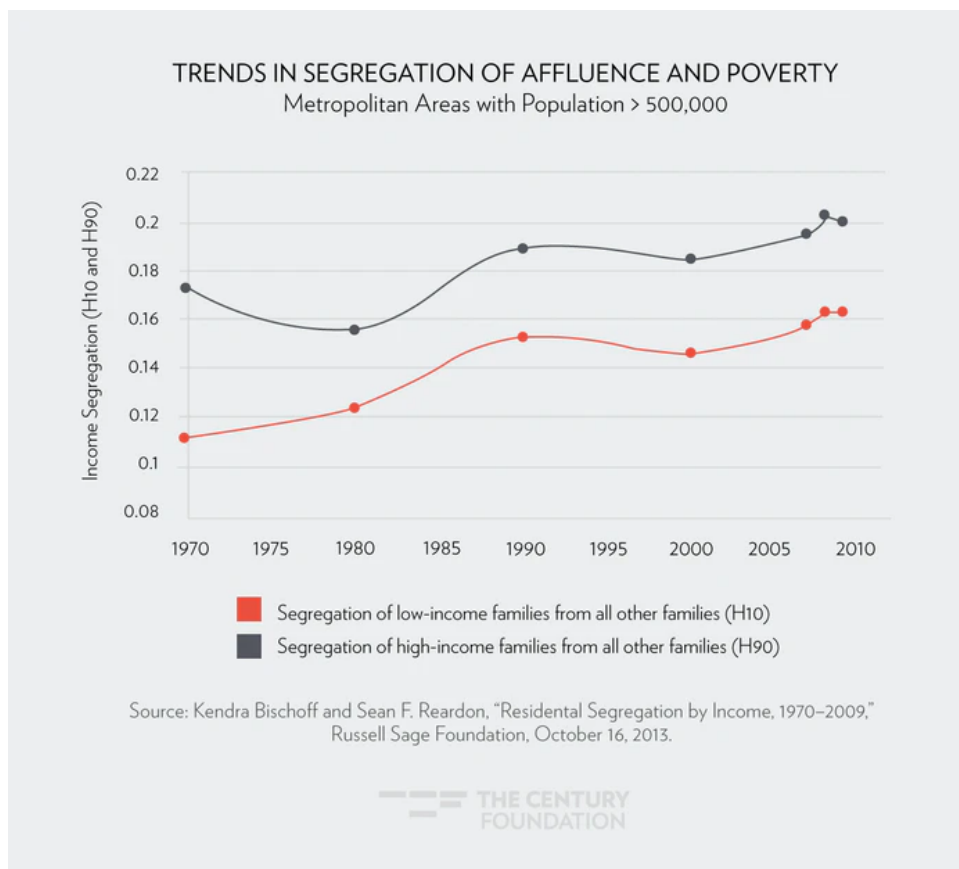
FIGURE 1



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But the bad news is that, in recent decades, as Robert D. Putnam, a political scientist at Harvard, notes, “while race-based segregation has been slowly declining, class-based segregation has been increasing.” In fact, Professor Putnam says, “a kind of incipient class apartheid” has been sweeping across the country.³⁴ In 2015, in a panel discussion with Putnam, President Barack Obama observed that “what used to be racial segregation now mirrors itself in class segregation.”³⁵ Despite the existence of a small number of high-profile gentrifying, mixed-income urban communities, the number of families living in economically segregated neighborhoods has more than doubled since 1970, and indexes of economic dissimilarity are on the rise.³⁶ (See Figure 2.)

FIGURE 2



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Government-sponsored economic discrimination matters a great deal because where people live in America dramatically shapes their opportunities and those of their children. Neighborhoods determine one's access to transportation, employment opportunities, decent health care, and good schools. In a much-discussed 2015 study, Raj Chetty of Harvard University and his colleagues looked at how well children who relocated from high-poverty to low-poverty areas through the federal "Moving to Opportunity" program did as adults. They found that, compared with a control group that wanted to move but could not because of the program's limited number of spaces, children who moved before age 13 were 16 percent more likely to attend college between the ages of 18 and 20 and earned 31 percent more as adults.³⁷

Consider KiAra Cornelius, an African-American single mother of two, who works as a claims analyst at United Healthcare, and who was interviewed for a Century Foundation report on housing integration.³⁸ For many years, she lived in a tough neighborhood in south Columbus, Ohio, where she forbade her school-aged children from walking the few blocks to their grandmother's house because she worried that they might "get crossed up" in gang-related activity. She wanted to move to a suburban neighborhood with less crime and better schools.

But Cornelius found she couldn't afford to live in most of Columbus's suburbs, as those towns have erected largely invisible barriers, specifically to keep out families of modest means. State-sponsored discrimination in communities like these forbid developers from building duplexes, triplexes, or apartment buildings. Some require that when multifamily units are allowed,

they must have expensive features, such as special trims or facades. Some towns go further and forbid anyone who cannot afford a large home sitting atop an expansive plot of land. All these requirements are designed to keep families like Cornelius's out.

KIARA CORENELIUS AND HER CHILDREN. SOURCE: KIARA CORNELIUS

Economically discriminatory zoning hurts all people of modest means, but it hits African-American and Latino families particularly hard—an important point to recognize as America belatedly begins to reckon with its history of racial oppression. To purchase a single-family home, it is necessary to have accumulated enough wealth for a down payment. Yet because of historic and contemporary discrimination, median Black household wealth (savings accumulated over time) is just 10 percent of median white household wealth. (Median Black annual income, by contrast, is 60 percent of median white income). HUD secretary Marcia Fudge has identified the challenge Black buyers have coming up with down payments as the biggest impediment to Black homeownership.³⁹ So, exclusionary zoning that limits a neighborhood's housing stock to single-family homes is especially likely to exclude Black families, perpetuating racial segregation and the racial wealth gap.

While racial segregation is particularly harmful to Black Americans, it also divides and polarizes Americans politically. Much has been made of the ideological divide between rural and urban areas, but researchers have found that, even within metropolitan areas, Democrats and Republicans often cluster in different communities, where they no longer converse with and come to know as neighbors and friends those who have different ideological outlooks.⁴⁰ Researchers have found that more racially segregated cities tend to have the highest levels of political polarization.⁴¹ Racial segregation reduces empathy across racial lines and makes it easier for politicians to demonize others.

The Federal Interest in Making Housing More Affordable and Communities Healthier

Exclusionary zoning not only blocks the opportunity of families to live in neighborhoods rich with opportunity; it also stacks the deck against working families by making housing in entire metropolitan areas less affordable. When a community says that available land can only be used for single-family homes on large lots, it artificially limits the supply of housing and increases housing costs. By contrast, if builders (or existing homeowners) were allowed to subdivide houses into duplexes or triplexes, a community could double or triple the number of housing units available to potential consumers, making housing more affordable for everyone.

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Allowing government to drive up home prices makes little sense when the nation is facing what the Urban Institute has called “the worst affordable housing crisis in decades.” Going back to passage of the United States National Housing Act of 1937, public policy has suggested that families should spend no more than 30 percent of their pre-tax income on housing. Yet, according to a recent report of Harvard’s Joint Center for Housing Studies, nearly half of all renters (21 million Americans) spend more than that—double the proportion in the 1960s.⁴² While some of this affordability crisis can be chalked up to wage stagnation, it is also true that rents have been rising faster than other costs for decades.⁴³ At its extreme, the housing affordability crisis leads to eviction and homelessness.

Zoning policies that limit housing supply and drive up housing costs have made life miserable for people like Janet Williams.⁴⁴ A 29-year-old Black single mother who is employed as a community health worker in Columbus, Ohio, Williams frequently faces a tough dilemma when her meager paycheck arrives. She says that, on several occasions, it’s gotten “to the point where I had to choose if I wanted to pay for groceries or if I wanted to pay rent or if I wanted to pay for my gas and electric or . . . to pay childcare.” Williams, a mother of two, explains that sometimes her hand is forced. “I’ve had times where, if I didn’t pay my rent, the next day I was going to have an eviction filed.” On those occasions, “the whole check goes to my rent,” and while she waits for the next paycheck to arrive, she may have to tell her kids, we will “not have hot water and not have the electric working.”

Williams did all the right things, according to American social expectations, including taking on \$70,000 in student debt to get a bachelor’s degree in human services from Ohio Christian University, awarded in 2019. Her income now is just above what would qualify for food stamps, she says, so “it’s on me to put groceries in the house.” She hates owing money, so when she gets a windfall, like a pandemic stimulus check, she says she uses it to pay down her credit card debt. But she’s frustrated that high housing costs mean she is constrained to a neighborhood where her kids don’t feel safe. “I can’t tell you how many times we’ve seen the police outside of our window,” she says. To avoid dangers in the neighborhood, she says, “we pretty much keep to ourselves. We don’t really do too much.” What really aggravates her is that even in her crime-ridden East Columbus neighborhood, the rent is so high that “every month is deciding what’s going to get paid.”⁴⁵

The high cost of housing spurred on by exclusionary zoning also exacerbates health problems, an issue highlighted by the COVID-19 pandemic. While some early reporting focused on the idea that housing density spreads COVID-19, in fact, the studies show that it's overcrowding—too many people living in the same apartment or home—that presents the largest health concerns. Some small towns had high infection rates because individual housing units were crowded, with three or four families living in a single home, while some very dense cities, such as Hong Kong, Seoul, and Singapore, have contained the spread of COVID-19 because units themselves are not overcrowded.⁴⁶

The Federal Interest in Slowing Climate Change

Exclusionary zoning policies such as those that limit development to detached, single-family houses promote suburban sprawl, which means longer commutes, more cars on the road, and more greenhouse gas emissions.⁴⁷ Moreover, as a general rule, because multifamily units have fewer exterior walls, they are easier to heat and cool, and are more energy efficient, than are single-family homes.⁴⁸ Families should always have the freedom to make personal choices about their living arrangements, but as the planet heats up, it is odd that government—which is fighting in all sorts of arenas to reduce greenhouse gasses—would explicitly *prohibit* construction of the most environmentally friendly options.

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Environmentalists have joined with civil rights activists and affordable housing advocates to make climate change a third major prong in the campaign to reduce exclusionary zoning.⁴⁹ Moreover, this push could have broad public support. In 2020, the Pew Research Center found that 68 percent of voters said climate change was a very or somewhat important issue to them.⁵⁰

Exclusionary Zoning Reform in States and Cities

As federal policymakers consider what they can do to reduce exclusionary zoning, it is important to draw lessons from the experiences of states and localities in tackling the problem. This section of the report examines: (1) longstanding initiatives to rein in exclusionary zoning in places such as New Jersey and Massachusetts; (2) recent reforms in Minneapolis, Oregon, California, and Virginia; and (3) lessons for federal policymakers on both the substance and the politics of zoning reform.

Longstanding State Efforts to Reduce Exclusionary Zoning

A number of states have for decades taken important steps to try to reduce exclusionary zoning in residential communities.⁵¹ In 1969, for example, the state of Massachusetts passed an “anti-snob” zoning law that empowered the state to alter local zoning laws in communities where less than 10 percent of housing stock is deemed affordable; recently, an effort to overturn the law

through a statewide referendum was opposed by 58 percent of voters.⁵² Another leading example is New Jersey, where in 1975, the state Supreme Court ruled in *Southern Burlington County NAACP v. Mount Laurel* that zoning laws that have the effect of excluding low-income families from a municipality violate the state constitution. The court ruled that localities have an affirmative obligation to provide their “fair share” of moderate and low-income housing.⁵³ After the state dragged its feet on action, the court ruled again on the matter in *Mount Laurel II* (1983), which established an enforcement mechanism known as a “builder’s remedy,” by which developers can bring suit against a municipality to change zoning so long as 20 percent of the development is dedicated to low- or moderate-income homes. Although implementation of the *Mount Laurel* decision has often proven difficult, thousands of low-income families have been allowed to move to low-poverty neighborhoods as a result of the decision and have benefited greatly.⁵⁴

Recent State and Local Efforts in Minneapolis, Oregon, California, and Virginia

The circle of states and localities seeking to reduce exclusionary zoning—or even end single-family-exclusive zoning altogether—has expanded recently in a way that would have astonished reformers in earlier generations who thought NIMBY forces were unbeatable. In 2018, observers were stunned when the city of Minneapolis voted to do something long considered impossible in American politics: end single-family-exclusive zoning in an entire city.

A city of 425,000 residents, Minneapolis once had one of the most stringent zoning policies, having banned duplexes, triplexes, and larger apartment buildings from 70 percent of its residential land; in New York City, by comparison, just 15 percent of residential land is set aside for single-family homes. The new long-term plan passed by the city council in 2018—Minneapolis 2040—paved the way to up-zone the city to allow two- and three-family buildings on what had previously been single-family lots, tripling the potential number of housing units in the city.⁵⁵ Once Minneapolis broke the log jam, a second major victory followed in 2019, when a bipartisan group of legislators in Oregon passed the nation’s first statewide ban on single-family-exclusive zoning. The provision applied to all cities with a population of at least 10,000 residents, and overcame the strong opposition of the League of Oregon Cities.⁵⁶

In California, meanwhile, state senator Scott Wiener came close to passing a dramatic bill that would have allowed the state to override local zoning restrictions in order to permit four-to-eight-story buildings near mass transportation stops.⁵⁷ Although the legislation did not pass, a number of related bills did, including one to allow “in law-flats,” also known as Accessory Dwelling Units (ADUs) in areas zoned for single-family houses. The change, notes Ingrid Gould Ellen of New York University’s Furman Center, “essentially doubles the potential housing stock” in the state.⁵⁸ Virginia, likewise, has begun a conversation about reducing exclusionary zoning, led by state delegate Ibraheem Samirah, who has emphasized the ways in which single-family-exclusive zoning leads to sprawl and more traffic congestion.⁵⁹

Substantive and Political Lessons for Federal Policymakers from State and Local Experiences

What can federal policymakers take away from these state and local experiences in exclusionary zoning reform? One lesson is that federal intervention is both necessary and possible. It is *necessary* because, while there have been some policy successes, in general, states cannot do the work alone. As Tom Loftus of the Equitable Housing Institute finds, even in the states with the most forward-looking efforts to curb exclusionary zoning need more support. Reviewing the effects of longstanding state statutes to curb exclusionary zoning in places such as Massachusetts and New Jersey, Loftus concludes that while they've made progress, housing production has still been stymied and "those state statutes have not been able to prevent worse than average housing affordability problems in their states."⁶⁰ At the same time, very recent efforts at reform in places such as Minneapolis and Oregon to eliminate single-family housing restrictions suggests that federal reform may be *possible*, because NIMBY forces are not as powerful as they once were.

More specific lessons also emerge about how federal policies might be shaped. On a substantive level, the fact that states have grappled with such difficult issues as what constitutes a community's "fair share" of affordable housing means that federal policy makers will not have to start from scratch in coming up with appropriate metrics for outcomes. Another substantive lesson, given the limited impact of some state reforms, is that deferring to state legislatures to implement reductions in exclusionary zoning may be a less effective way of bringing about change than giving plaintiffs a private right of action to compel results by judicial injunction.⁶¹

Finally, federal policymakers can draw a number of specific (and hopeful) lessons from the very recent successful efforts to curtail exclusionary zoning in places such as Minneapolis, Oregon, and California. Among the critical lessons: (1) reform of exclusionary zoning can make for unlikely coalitions; (2) positive messaging and framing can make a difference; (3) confronting concerns about gentrification and displacement intelligently can win support; and (4) being bold can make space for more modest reforms.

Unlikely Coalitions

One lesson for defeating exclusive zoning is to be creative in forging the sometimes unlikely political coalitions for reform that can include a variety of "groups that don't normally work together," says Wiener.⁶² These groups include liberal stalwarts—civil rights, labor, environmentalists, affordable housing activists, young people, and seniors⁶³—but also employers, libertarians, builders, and rural white residents.⁶⁴

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In Minneapolis, civil rights activists became engaged in zoning discussions and pointed out that the maps that had redlined majority-Black areas as ineligible for financing in decades past overlapped significantly with maps that distinguished between single-family and multifamily zones. “Zoning is the new redlining,” said Kyrra Rankine, an activist who pushed for reform. Organized labor emphasized that single-family-exclusive zoning exacerbates housing unaffordability; union members testified that, because the city had become unaffordable, they had to move to blue-collar suburbs and take two buses to get to work, which was a major hardship.⁶⁵ The building trades expressed their interest in pro-growth reforms that create jobs.⁶⁶ Environmentalists who know that exclusionary zoning contributes to climate change have been part of the coalition for reform, as has the American Association of Retired Persons (AARP). The group has pushed for more flexibility to build backyard cottages, both to provide older homeowners with a new source of rental income and to allow grandparents to live close to children and grandchildren (spawning the so-called PIMBY movement, “parents in my back yard”).⁶⁷

In California, a coalition for zoning reform included not only civil rights and labor groups, but young middle class white residents who are part of the “yes, in my back yard” (YIMBY) movement. Brian Hanlon, executive director of California YIMBY, explained that, among upper-middle-class millennials in places such as San Francisco and Los Angeles, the most pressing question is: “I went to a good school and can’t afford rent? WTF?” Allied with these millennials are employers in the tech industry who are having trouble recruiting and retaining employees, given the astronomical housing prices in Silicon Valley and elsewhere.⁶⁸ Finally, some small-government conservatives have long championed efforts to reduce exclusionary zoning as a form of deregulation that enhances property rights and makes housing more affordable without additional government spending.

In forming coalitions, it is important to recognize, says Wiener, that the issue often breaks down less on the basis of party or ideology than on the basis of class. In the California legislature, there are some left-wing Democrats and right-wing Republicans who are supportive of efforts to reform exclusionary zoning, he says, and some of each who are opposed.⁶⁹ The key dividing line was wealth.

Broad-based Tactics and Messaging

State and local experiences also suggest that focusing on being as broad-based as possible in tactics and messaging can make an important difference. Minneapolis officials did well with both. To avoid the dominance of NIMBY voices, city planners and advocates sought direct input from those hurt by exclusionary zoning. City staff went to street fairs, festivals, and churches to gather input on zoning reform from people in low-income and minority communities. They didn’t speak in jargon-laden terms about “increasing housing density,” but instead asked big questions such as “Are you satisfied with the housing options available to you right now?” and “What does your ideal Minneapolis look like in 2040?”⁷⁰ Advocates recognized more broadly that language matters a lot in policy debates. The umbrella organization pushing for the Minneapolis 2040 reforms called itself “Neighbors for More Neighbors”—a name that brilliantly evoked the shared humanity of those who want to be included in exclusive neighborhoods.

In Oregon, the Sightline Institute concluded that positive framing was critical to success: telling people not what they're giving up, but rather what they're gaining. "Almost no one thinks 'single family zoning' is outrageous," write Sightline's Michael Andersen and Anna Fahey. "But when you tell people that duplexes are illegal to build in most of the United States and Canada, most people do actually find this outrageous."⁷¹ Legalizing duplexes, triplexes, and apartments is more popular than ending single-family zoning. Likewise, Sightline's messaging research suggests, when people say they worry about loss of "neighborhood character," point out that people matter more than buildings. "It's neighbors who give a community character. . . . When we allow only certain expensive building types, it determines who can or cannot afford to live in a community," say Fahey and Anderson.⁷² In addition, be concrete about what's being proposed—use pictures of duplexes and triplexes, so that people's minds don't erroneously go immediately to skyscrapers.

Even die-hard NIMBY constituencies—who may not be persuaded by moral arguments about racial segregation—may be receptive to arguments that explain how exclusionary zoning negatively affects them and their families. Wiener says that even older, upper-middle-class white homeowners were open to the argument that residents should work to avoid a situation in which their children "[were not] going to be able to afford to live in the community where they grew up"⁷³ Wiener says framing the stakes in those personal family terms was often "extremely powerful with people."⁷⁴

Likewise, Virginia delegate Ibraheem Samirah, who is pushing legislation to reduce exclusionary zoning, finds that concrete arguments about how such zoning contributes to traffic congestion by pushing families further and further out can be more persuasive than abstract moral appeals. The bumper-to-bumper traffic, and stress, he says, is something that "everyday people can relate to."⁷⁵

Confronting Concerns about Gentrification and Displacement

A third important lesson for federal policymakers is that they need to address concerns that reforming exclusionary zoning could inadvertently accelerate gentrification and displacement. While eliminating single-family-exclusive zoning generally decreases housing prices by increasing overall supply and making less expensive construction possible, in rare cases, reform can also come with a downside. Zoning changes can pave the way for new construction, which often attracts wealthier residents who are willing to pay more precisely because the units are new.

State and local experience suggests policymakers must confront this problem head on in two ways. First, says Wiener, it's critical to point out that the vast majority of gentrification does not occur in neighborhoods that had previously been zoned for single-family homes. Typically, neighborhoods with single-family-exclusive zoning are relatively wealthy areas; they already house the gentry.⁷⁶ Second, in the "exceptional" cases where low-income, single-family communities are up-zoned and start to gentrify, inclusionary zoning requirements should be put into place to compel developers to set aside some new units for low-income and working-class people.⁷⁷

Being Bold Can Make Room for More Modest Reforms

A final lesson from states is that, in the case of zoning reform, it can make sense to introduce bold, broad-sweeping reforms, because even if they are not immediately enacted, they can change the conversation and make room for important, more modest reforms. In politics, Wiener says, there is “a tendency to want to start small.”⁷⁸ But with respect to zoning, California’s experience suggests the opposite can be true. When Wiener proposed sweeping legislation to require localities to open up transit corridors to apartment buildings, his dramatic proposal spurred alarm. “From the NIMBY perspective, it was like the death star was coming out” he says. Although the proposal has not yet passed, it started a conversation that “totally shifted the politics,” so that more modest reforms—like requiring single-family zoned areas to allow smaller accessory dwelling units, and allowing for lots to be split—became mainstream. The more aggressive proposal, he says, “created space for all of these other bills to move.”⁷⁹ He concluded: “Even though that mega bill did not pass, it opened up enormous political space and shifted the goal posts in a positive way.”⁸⁰

In sum, federal policymakers can learn a lot from state and local efforts about what types of reforms have the biggest impact and how the politics and messaging can bring about meaningful change. Perhaps the biggest takeaway is that making zoning laws more inclusive is no longer the taboo issue that it once was. Reform is not only necessary, it is possible, if pursued intelligently.

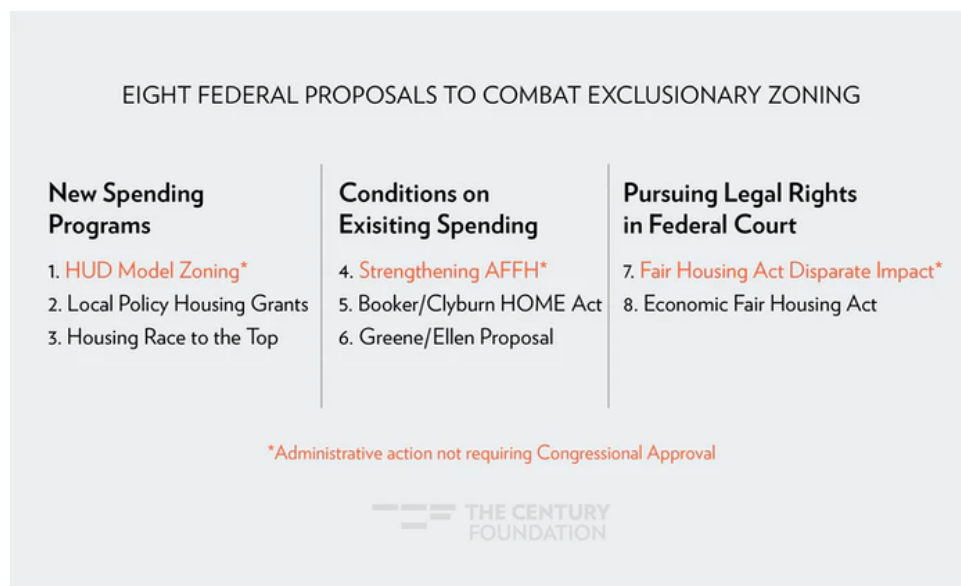
Eight Federal Proposals

The federal government has three broad sets of tools available to curtail exclusionary zoning. First, it can create new spending programs to provide voluntary incentives for localities to reduce exclusionary zoning. Second, it can place conditions on existing spending programs to encourage states and localities to make changes or risk forfeiting federal funds. Third, it can create a private right of action to empower parties harmed by exclusionary zoning to vindicate their rights in federal court.

As Figure 3 below suggests, within each of these three buckets, the report outlines modest proposals that can be enacted without congressional approval as well as bolder interventions that require congressional action. The eight proposals discussed include: (1) a proposal that the Department of Housing and Urban Development promulgate model zoning ordinances that can be used voluntarily by localities to reduce exclusionary zoning; (2) the Biden administration’s proposed Local Policy Housing Grant program, which would provide \$300 million in competitive grants to localities wishing to adopt positive zoning reform; (3) a multi-billion dollar “Race to the Top” competitive grants program to provide incentives to states to adopt more inclusive zoning policies; (4) a proposal to reinstate and strengthen the 2015 Affirmatively Furthering Fair Housing Rule to require localities to submit plans to reduce segregation; (5) the Housing, Opportunity, Mobility, and Equity HOME Act, sponsored by Senator Cory Booker and Representative James Clyburn (and endorsed by President Biden) to require recipients of certain infrastructure programs to outline plans to reduce exclusionary zoning; (6) a proposal by Solomon Greene and Ingrid Gould Ellen published by the Urban Institute to scale up the HOME Act to focus on larger pots of money and states rather than localities; (7) a proposal to more aggressively pursue “disparate impact” litigation under the Fair Housing Act to target exclusionary zoning that disproportionately harms racial minorities; and (8) an Economic Fair Housing Act, envisioned by The

Century Foundation and developed by the Equitable Housing Institute, to provide a private right of action to individuals harmed by economically discriminatory exclusionary zoning. Arguably, the eight proposals run along a continuum, from 1 being the most modest and 8 being the boldest and most aggressive.⁸¹

FIGURE 3



Download

In describing each of these proposals, the report delineates the idea, outlines the rationale and advantages offered, and details limitations. Throughout, the report considers how effective each proposal is likely to be in reducing exclusionary zoning; the political viability; and the risk that the proposal, if enacted, would be undercut by constitutional challenges in the courts.

New Spending Programs

One way to leverage change is to create new federal spending programs to encourage best practices among communities that are interested in reforming exclusionary zoning and need resources to do so. The programs could range from an administration decision to devote resources to creating model codes, to a modestly funded Land Policy Housing Grants to help assistant districts pursuing reform, to a bolder competition for federal funds to reform zoning, modeled after the Obama administration's federal multi-billion dollar Race to the Top program.

HUD Model Zoning and Output Metrics

The Idea

Some housing policy experts have suggested that HUD promulgate model zoning and best practices for land use. As Noah Kazis of the NYU Furman Center notes, many other countries, including Japan and Germany, establish model zoning standards, as do states such as Oregon.⁸² Lists of best and worst practices could draw upon existing efforts: those in the

Housing Development Toolkit published by the Obama administration and proposed bipartisan legislation known as the Yes in My Back Yard (YIMBY) Act.⁸³ Some of the policies that might be disfavored could include those that ban accessory dwelling units, have large minimum lot size or square footage requirements, or require off-street parking.⁸⁴

While the model codes would help inform zoning inputs, HUD could also task a team of researchers from different federal agencies to devise a set of outcome measures that would set targets for housing production goals by region, and each region's appropriate fair share of low- and moderate-income housing—goals that are likely to vary based on whether a local economy is booming or in decline.⁸⁵

Advantages

This proposal offers several advantages. To begin with, promulgating a model zoning code that is inclusive would begin to undo harm associated with pernicious model codes produced by the U.S. government a century ago. As the Economic Policy Institute's Richard Rothstein has extensively documented, the federal government actively promoted racially segregated housing in the United States through numerous means, including the creation of a federal Advisory Committee on Zoning, organized in 1921 by President Warren G. Harding's Commerce Secretary Herbert Hoover. The Advisory Committee promulgated a model zoning law and manual that recommended exclusionary zoning policies. "The manual did not give the creation of racially homogenous neighborhoods as the reason why zoning should become such an important priority for cities," Rothstein writes, "but the advisory committee was composed of outspoken segregationists whose speeches and writings demonstrated that race was one basis of their zoning advocacy."⁸⁶

Promulgating a model zoning code that is inclusive would begin to undo harm associated with pernicious model codes produced by the U.S. government a century ago.

A new model code would provide localities that want to adopt more inclusive zoning programs with a gold standard to shoot for, which would have value in and of itself.⁸⁷ Moreover, the model code would provide the building blocks for more aggressive proposals (outlined below) that seek to provide financial incentives for adopting good practices. Brandon Fuller of the Manhattan Institute suggests that a model code would "serve to give states and localities a sense of what [federal officials] are looking for insofar as they tie relevant block or competitive grants to easing the restrictiveness of local land use."⁸⁸ Because creating a model code would not require new congressional authorization, and because it does not require any locality to adopt the code, this initial step is the least controversial of the eight proposals for reform and the least likely to be challenged as unconstitutional.

Limitations

While creating a model code could have a positive effect on states and localities wishing to become more inclusive, the proposal's impact would also be the most modest of the eight ideas outlined because it would not provide any financial incentives nor require change on the part of any locality or state.

Local Housing Policy Grants

The Idea

Joe Biden has endorsed a plan for the federal government to allocate \$300 million in Local Housing Policy Grants as part of his campaign pledge to “eliminate local and state housing regulations that perpetuate discrimination.” The campaign suggested Biden’s investment in Local Housing Policy Grants would “give states and localities the technical assistance and planning support they need to eliminate exclusionary zoning policies and other local regulations that contribute to sprawl.”⁸⁹ The plan builds upon HUD’s earlier Sustainable Communities Initiative.⁹⁰ Until the Initiative was eliminated by Republicans in 2011, it provided two types of grants: (1) Sustainable Communities Regional Planning Grants that “support metropolitan and multijurisdictional planning efforts that integrate housing, land use, economic and workforce development, transportation, and infrastructure investments”; and (2) Community Challenge Planning Grants that “foster reform and reduce barriers to achieve affordable, economically vital, and sustainable communities,” and includes a specific commitment to reforming “zoning codes.”⁹¹

Very recently, a bipartisan group of senators, including Amy Klobuchar (D-MN) and Tim Kaine (D-VA) and Senator Rob Portman (R-OH) introduced legislation along similar lines to authorize \$1.5 billion in competitive grants to encourage localities to increase housing supply. The Housing Supply and Affordability Act would provide planning and implementation grants to localities that want to ease exclusionary zoning and make way for greater housing production.⁹²

Advantages

This proposal offers several advantages. First, it capitalizes on what experts say is an uptick in interest from local planners to make zoning more inclusive. Rolf Pendall of the University of Illinois says that, following the publication of Richard Rothstein’s *The Color of Law*, which documented the racist history of planning, and the police killing of George Floyd, there has been evidence of “a growing commitment among planners” to reduce exclusionary zoning. Although planners themselves do not have the power to make changes without the consent of elected officials, “they can be important in shaping the narrative, introducing history to the conversation [and] thinking about how to move toward greater inclusion,” he says.⁹³

Local housing policy grants could help spark innovation among planners of good will that could serve to highlight best practices. The idea appears politically attractive because it involves a relatively small amount of federal money, and does not compel unwilling localities to participate. Nor does the proposal present a target for constitutional challenge.

Limitations

The modesty of the proposal can also be seen as a drawback: the planning grants will only provide resources to the already converted, and does nothing directly to compel, or even incentivize, bad actors to change their behavior.

Race to the Top

The Idea

Community Change and the Ford Foundation's *Housing Playbook for the New Administration* has proposed a "Race to the Top for affordable housing," modeled after the Obama administration's \$4 billion Race to the Top education initiative. In order to qualify for funding, a state would have to "demonstrate it has taken state-level actions within the last four years to remove exclusionary zoning or other regulatory barriers that prevent multi-family or manufactured housing." Once states pass the threshold of qualifying for funding, they would compete for federal grants by meeting particular criteria: "states would have to set housing production goals for the state, enact 'fair-share' distribution requirements to ensure all housing is distributed across communities, and adopt broad zoning reforms such as bans on single-family-exclusive zoning, enabling modest multifamily housing to be built in all residential areas, or zoning-override initiatives like the Massachusetts 40B system."⁹⁴ Under Massachusetts's Chapter 40B housing statute, builders may override local zoning laws that prevent the construction of affordable housing in communities where less than 10 percent housing is affordable.

As part of the American Jobs Plan, the Biden Administration has proposed a \$5 billion version of a Race to the Top idea. In order to encourage localities to "eliminate exclusionary zoning and harmful land use policies" Biden's Jobs Plan calls for Congress "to enact an innovative, new competitive grant program that awards flexible and attractive funding to jurisdictions that take concrete steps to eliminate such needless barriers to producing affordable housing."⁹⁵

The Advantages

The Race to the Top for affordable housing seeks to build on the demonstrated ability of the educational Race to the Top program to change state behavior on issues such as lifting caps on charter schools or use of the Common Core Curriculum. If funded with sufficient resources, the Race to the Top model is likely to have a bigger impact on states than a small grant program or promulgating model codes. At the same time, proponents suggest it avoids some of the downsides of programs (outlined below) that condition funds on reducing exclusionary zoning. Because Race to the Top is voluntary, it would likely generate less political opposition than a program that withholds existing streams of money. And it allows states to develop metrics of success that do not currently exist at the federal level.⁹⁶ Because the program involves new competitive grants, it is unlikely to be struck down on the grounds that the federal government's policy is unduly coercive.

Limitations

Having said that, a Race to the Top program would require the outlay of very large amounts of money in order to move state legislatures, which are often dominated by exclusive suburban legislators, to confront the issue of exclusionary zoning.⁹⁷ And states where opposition to reform is strong would simply be free to not apply for the program.

Attaching Conditions to Existing Spending

A second bucket of reforms would go beyond providing new funding carrots for states and localities and instead place conditions on existing funding streams. The federal government currently doles out billions of dollars for infrastructure programs, such as Surface Transportation and Community Development Block Grants (CDBG), and this set of reforms would place relevant conditions on this spending. Within this bucket, the report discusses three leading ideas: restoring the 2015 Obama-era Affirmatively Furthering Fair Housing rule to promote desegregation as part of the Fair Housing Act; a proposal from Senator Cory Booker and Representative James Clyburn to condition a broader set of funding on reducing exclusionary zoning; and a proposal from Solomon Greene and Ingrid Gould Ellen published by the Urban Institute to condition an even broader set of funding on state efforts to reduce exclusionary practices.

Restore the 2015 Affirmatively Furthering Fair Housing Rule

The Idea

In 2015, the Obama Administration adopted the Affirmatively Furthering Fair Housing (AFFH) rule for implementing the 1968 Fair Housing Act's requirement that local government's "affirmatively further fair housing" by taking steps to dismantle racial segregation. The 2015 rule required all municipalities receiving funding from HUD to complete a comprehensive assessment of fair housing and to commit to taking specific steps to "overcome historic patterns of segregation."⁹⁸ The assessment would examine, among other things, the effect of exclusionary zoning laws.⁹⁹

In 2018, the Trump administration postponed implementation of the rule;¹⁰⁰ and in 2020, Trump repealed the rule altogether as part of his campaign to win "suburban housewives of America." As noted above, President Biden has already directed HUD to explore reinstating the rule. Others have suggested going further, and Megan Haberle, Peter Kye, and Brian Knudsen of the Poverty and Race Research Action Council have suggested ways to sharpen AFFH's assessment tools and increase accountability.¹⁰¹

Advantages

Although not perfect, the 2015 AFFH rule ignited important conversations in a number of localities about a long-ignored issue within the Fair Housing Act—the duty not only to stop discriminating, but also to take steps to dismantle segregation. The repeal by the Trump administration, accompanied by bigoted rhetoric about protecting suburban areas from crime and property devaluation, was an outrage. Restoring the rule has several advantages. First, it does not require new legislation from Congress; nor does it require the allocation of new federal funds. Furthermore, application of AFFH has fairly broad reach because it applies to existing streams of federal funds that communities have come to rely upon, not a new set of funds they might choose not to pursue. As a political matter, President Trump's attempt to attack the AFFH rule appeared unsuccessful, and mainstream business groups, including the Business Roundtable, support its reinstatement.¹⁰² Constitutional attack on AFFH is also unlikely to succeed.

Limitations

While restoring the AFFH rule makes enormous sense, there are four reasons to think that doing so is by itself insufficient. First, AFFH, like all programs that condition existing funds on taking certain actions, face the fundamental dilemma that federal officials whose job it is to funnel funds to important programs are loath to exercise threats to withhold funds.¹⁰³ Demetria McCain of Dallas's Inclusive Communities Project objects that in the Dallas area, "HUD continues to greenlight" projects in jurisdictions that discriminate.¹⁰⁴ Second, many of the wealthiest suburbs that engage in the worst forms of exclusionary zoning don't receive much CDBG funding, so AFFH's threat to cut off funds holds little leverage, as Jenny Schuetz of the Brookings Institution has shown.¹⁰⁵ In 2016, for example, Douglas County, a suburb of Denver, Colorado decided to give up CDBG funds rather than comply with the AFFH requirements.¹⁰⁶ Third, the AFFH is focused on processes of identifying goals and steps to take but avoids specific mandates for achieving particular outcomes.¹⁰⁷ And fourth, the AFFH lacks a private right of action, so its enforcement depends on the actions of whichever federal administration is in place.¹⁰⁸

Booker/Clyburn HOME Act

The Idea

Senator Cory Booker and Representative James Clyburn's Housing, Opportunity, Mobility, and Equity (HOME) Act offers two ways to make housing more affordable and equitable. It provides a monthly tax credit for rent-burdened individuals to address the affordability problem immediately, and it also seeks to increase the supply of housing by providing incentives for localities to make zoning less exclusionary.¹⁰⁹

The bill's second prong would condition two types of federal funding—Surface Transportation Block Grants and Community Development Block Grants—on community efforts to reduce exclusionary practices.¹¹⁰ The legislation provides a menu of options that communities could take to reduce exclusionary zoning. They could authorize more high density and multifamily zoning, relax lot size restrictions, or reduce parking requirements and restrictions on accessory dwelling units—small living units adjacent to larger homes. Jurisdictions would also have incentives to allow "by-right development," so that projects that meet zoning requirements could be administratively approved rather than being subjected to lengthy hearings. Inclusionary zoning policies that allow developers to build more units when they agree to set aside some for affordable housing would also be encouraged. Jurisdictions would also have an incentive to adopt prohibitions on "source of income discrimination," which occurs when landlords refuse to rent to people using publicly funded housing vouchers. One provision in the bill—perhaps its most controversial one—encourages jurisdictions to ban the practice of landlords asking potential renters about their criminal history.¹¹¹

The bill includes both input and output measures, but it is designed not to be overly prescriptive.¹¹² "It is a light touch," Booker says. "We're just basically saying, through our legislation, that you have to have a plan" for making zoning more inclusive. "And the components of the plan are on you."¹¹³

President Biden has endorsed the legislation, making it a leading vehicle for zoning reform. Biden's campaign explained:

*Exclusionary zoning has for decades been strategically used to keep people of color and low-income families out of certain communities. As President, Biden will enact legislation requiring any state receiving federal dollars through the Community Development Block Grants or Surface Transportation Block Grants to develop a strategy for inclusionary zoning, as proposed in the HOME Act of 2019 by Majority Whip Clyburn and Senator Cory Booker.*¹¹⁴

The Advantages

Booker and Clyburn's bill builds upon Obama's AFFH rule but offers four potential advantages. To begin with, whereas the AFFH rule is designed to reduce discrimination against groups protected in the Fair Housing Act (primarily people of color), Booker and Clyburn take on economic discrimination as well, by reducing exclusionary zoning that impacts low-income families of all races. Booker told me that while his own upper-middle class Black family was aided by the Fair Housing Act's prohibition on racial discrimination and gained access to an affluent community with strong public schools, many of his cousins, with lesser means, were still left behind because of exclusionary zoning.¹¹⁵

Second, the HOME Act goes beyond the AFFH rule's conditioning of CDBG funds to include Surface Transportation Funds. This is significant, one critic of the Booker legislation suggested, because while suburbs could get around the rule's requirements by foregoing CDBG funds, Booker's inclusion of federal transportation grants would have a much bigger impact. "It may be next to impossible for suburbs to opt out of those state-run highway repairs," critic Stanley Kurtz wrote in the *National Review*.¹¹⁶

Third, because the HOME Act's attack on exclusionary zoning is focused primarily on the issue of housing affordability (by increasing housing supply, Booker suggests the bill will contain housing costs), the bill also includes a monthly tax credit for rent-burdened individuals not benefited by the AFFH rule. While increasing housing supply should reduce housing costs over the long term, Booker argues, the tax credits are needed to provide immediate relief.¹¹⁷ And, if and when the effects of zoning reform kick in, any resulting drop in housing costs will make the purchasing power of tax credits even more substantial.¹¹⁸

Fourth, whereas the AFFH rule can be repealed by executive action (as President Donald Trump did in 2020), Booker and Clyburn seek to enact a new law that could not simply be rescinded by a future administration unfriendly to the goals of the initiative. In addition, the bill's condition of funding is closely related to the underlying legislation and is unlikely to fall to constitutional challenge.

Limitations

While the Booker bill offers several advantages, it also has a few notable limitations (which a proposal outlined below seeks to remedy in certain ways) The amount of funding at stake—through CDBG and Surface Transportation Block Grants—may not be broad enough to achieve maximum leverage. The focus on thousands of localities makes it difficult to monitor. The bill's emphasis on districts taking particular actions (reducing certain zoning requirements) may not put sufficient emphasis on outcomes. As a result, one barrier knocked down might be replaced by a new one installed—with no net improvement in

results.¹¹⁹ Finally, while the bill gives flexibility to localities—making it “a fairly light touch intervention”¹²⁰—the moderate nature of the approach did not stop the issue from being weaponized by Donald Trump as an attempt to “abolish the suburbs.”¹²¹

The Greene/Ellen Proposal Published by the Urban Institute

The Idea

In September 2020, Solomon Greene of the Urban Institute and Ingrid Gould Ellen of New York University’s Furman Center proposed that the federal government “require that to receive competitive funding for housing, transportation, and infrastructure, states must demonstrate measurable progress toward meeting regional housing needs and distributing affordable housing across a diverse range of communities.”¹²²

The proposal builds on the Booker/Clyburn HOME Act’s fundamental framework that federal funding ought to be conditioned on reductions in exclusionary zoning but makes a number of design changes that respond to criticisms of the HOME Act.

For one thing, whereas the HOME Act conditioned funding mostly to localities or regional agencies, Greene and Ellen’s proposal would move the focus “up” and “out”; that is, it would move the focus up to the state level,¹²³ and out to a broader set of funding streams for transportation and infrastructure than the HOME Act.¹²⁴ And the proposal places conditions on “competitive” rather than formula grants, so states can choose whether to participate.¹²⁵

In another distinctive feature, Greene and Ellen put their focus primarily on performance goals rather than processes. They set two distinct goals: housing production, and fair share distribution of affordable housing. Greene and Ellen provide an example that “states could create a goal that at least 20 percent of all new construction in any region should be affordable to households with 80 percent of the region’s median income and that at least half of these affordable units should be built in neighborhoods where median income is above the region’s median income.”¹²⁶

While focusing more on outcomes than process, the authors do outline two sets of practices that automatically qualify a state for competitive grants: (1) the elimination of single-family-exclusive zoning policies such as those found in Oregon’s HB 2001 would presumptively qualify states for the housing production outcome goal; and (2) a state law that “allows developers to bypass local zoning laws in communities that lack affordable housing options, when a project includes units with long-term affordability restrictions” similar to Massachusetts’s Chapter 40B law, would make a state presumptively qualify for the “fair share” outcome goal.¹²⁷

Advantages

Greene and Ellen’s approach of focusing “up” at the state level—which was popular among TCF/Bridges Collaborative roundtable participants—offers several benefits. To begin with, the focus of state funding provides the federal government with greater leverage because federal grants constitute 31 percent of state revenues, as compared with just 5 percent of municipal

revenues.¹²⁸ They argue that it is also easier for the federal government to monitor fifty states than thousands of localities.¹²⁹ Philip Tegeler of the Poverty and Race Research Action Council suggests the focus on states is appropriate for a couple of reasons. “States are fully in the driver’s seat when it comes to zoning and land use,” Tegeler notes, as it is the state’s decision whether or not to delegate zoning powers to localities.¹³⁰ States are a key actor in driving segregation.¹³¹ Tegeler argues, “Exclusionary zoning is a problem of state law, implemented at the local level and protected by state legislatures that are largely dominated by suburban legislators.”¹³²

Exclusionary zoning is a problem of state law, implemented at the local level and protected by state legislatures that are largely dominated by suburban legislators.

Greene and Ellen’s focus “out” to a broader set of funds—\$67 billion in transportation money, compared with just \$7 billion for housing and community development—is also attractive as it increases the leverage of the federal government.¹³³

Roundtable participants also appreciated Greene and Ellens focus on outcomes over process, both because it provides flexibility to localities with respect to how to achieve the goals, and because exclusionary zoning is so slippery that, if a law focuses on process, a community can remove one objectionable roadblock to the development of affordable housing and then—quite easily—erect a new, less obvious barrier.¹³⁴ As Jenny Schuetz of Brookings notes, if you give localities a list of prohibited activities such as single-family-exclusive zoning “they will get around that in some way,” by creating new barriers.¹³⁵ She notes that “local governments have a nearly infinite range of land use tools that can effectively block unwanted development.”¹³⁶ Even seemingly progressive policies—such as inclusionary zoning (IZ)—can be perverted to stop development. “Mandatory IZ with an 80 percent low-income set aside is an effective way to kill new housing while claiming to be pro-affordability,” she notes, because no developer would find it profitable to be able to rent only 20 percent of units at market rate.¹³⁷ At the same time, the inclusion of two presumptive practices—eliminating single-family-exclusive zoning and providing Massachusetts-style fair share requirements—gives states a roadmap for the types of reforms that are likely to produce positive results.

Roundtable participants also applauded Greene and Ellen’s focus on two sets of performance goals—not just production but fair share distribution. The distribution prong ensures that a state could not meet its affordable housing production goals by placing all of the new units in high-poverty communities.¹³⁸

Finally, Greene and Ellen’s focus on competitive rather than categorical grants offers a few advantages. Because no state is forced to change behavior, political opposition might be reduced, as are the chances of a constitutional challenge based on federal “coercion.”¹³⁹ The focus on competitive grants also helps mitigate the problem inherent in the AFFH rule that, as NYU’s Noah Kazis notes, “federal agencies are loath to actually withhold funds from jurisdictions.”¹⁴⁰

Limitations

While the Greene/Ellen proposal has many strengths, some roundtable participants noted some limitations. While the focus on outcomes rather than processes is conceptually strong, Kazis argues, as a practical matter, the federal government does not yet have good metrics to measure underproduction and exclusion.¹⁴¹ Given differences in communities (some booming, others struggling) states will have to come up with their own customized metrics that HUD will have to approve.¹⁴² Given that variation, it is wise that Greene and Ellen also include references to two processes—ending single-family-exclusive zoning and Massachusetts’s fair share rule—that provide a common standard across states.¹⁴³ Likewise, while the conditioning of a broader set of funds increases the leverage of the federal government, it also makes passage of Greene and Ellen’s proposal a heavier political lift, and may increase the chances that courts see the spending conditions as coercive.¹⁴⁴

The biggest limitation on the Greene/Ellen proposal, however, may be its reliance on state political actors, rather than courts, to vindicate the rights of excluded parties. As Jenny Schuetz of Brookings asks: “Would legislatures dominated by suburban and/or rural representatives prefer to decline federal money, especially opting out of new funds, rather than concede on exclusionary zoning?”¹⁴⁵ Likewise, Tom Loftus of the Equitable Housing Institute suggests that state political approaches to exclusionary zoning—including Massachusetts’ approach—while positive have ultimately failed the test of producing sufficient housing, as housing costs even in states with relatively good laws on exclusionary zoning, have continued to rise.¹⁴⁶ This limitation is a reason to supplement—not supplant—the Greene/Ellen proposal with ideas to strengthen a private right of action, an issue to which we now turn.

Pursuing Legal Rights in Federal Court

Litigation “sticks” provide a federal right of action to those who have been harmed by exclusionary zoning to sue in federal court and receive damages and attorneys’ fees. The Fair Housing Act provides such a right in cases of racial discrimination. Advocates for this approach argue that, because supporters of exclusionary zoning hold disproportionate political power, especially at the local and state levels, the courts are an important venue for those with less power to pursue their rights.

Disparate Impact Litigation

The Idea

Civil rights advocates have suggested that the Biden administration should do more to reduce exclusionary zoning through so-called “disparate impact” litigation that goes after local practices that have the effect—even if not the intent—of discriminating against minorities.

Under the 1968 Fair Housing Act, private plaintiffs and the U.S. government can bring disparate impact lawsuits against municipalities that engage in policies such as exclusionary zoning. Under disparate impact jurisprudence, plaintiffs have the burden of showing that the challenged practice causes a disproportionately negative impact on a protected class (such as people of color). Once that showing is made, the burden shifts to the defendant to demonstrate that the practice is necessary to achieve a legitimate nondiscriminatory goal.

In the 2015 U.S. Supreme Court decision in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, the Supreme Court ruled, 5–4, that disparate impact litigation is legitimate under the Fair Housing Act, and noted that “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification . . . reside at the heartland of” disparate impact jurisprudence.¹⁴⁷

In *Inclusive Communities Project*, the Supreme Court specifically cited two cases as important precedents involving exclusionary zoning. The first was *United States v. City of Black Jack* (1974), in which the Eighth Circuit struck down Black Jack, Missouri’s ban on multifamily housing, which would have foreclosed 85 percent of Black people in the St. Louis, Missouri metropolitan area from living in Black Jack.¹⁴⁸ Likewise, in the 1980s, the NAACP challenged Huntington, New York’s single-family-exclusive zoning ordinance that channeled multifamily housing away from a section of town that was 98 percent white to an “urban renewal” zone populated by minorities.¹⁴⁹

The Supreme Court in *Inclusive Communities Project* noted that not all government decisions that result in a disparate impact are illegal. “Valid government policies” can stand, but those that pose “artificial, arbitrary and unnecessary barriers,” must fall.¹⁵⁰ When plaintiffs win disparate impact cases, they can seek injunctive relief, damages, and court-awarded attorneys’ fees.¹⁵¹

Civil rights advocates and some journalists suggest the Biden administration take three concrete steps. First, Biden could restore 2013 HUD guidance provided around disparate impact litigation (guidance that Donald Trump repealed).¹⁵² Biden has already instructed HUD to look into doing this.¹⁵³ Second, Biden could increase resources to beef up disparate impact enforcement. As Jerusalem Demsas argues in *Vox*, “More than 50 years after passage of the Fair Housing Act, it’s time to sue the suburbs.”¹⁵⁴ HUD’s Office of Fair Housing and Equal Opportunity should be funded at much higher levels, she suggests, to bring disparate impact cases in communities that engage in exclusionary zoning. Demsas quotes Sara Pratt, a deputy assistant secretary for fair housing enforcement in the Obama administration, as saying: “I think a well-staffed civil rights office can have a major influence over a period of time in changing the country’s patterns of segregation. I actually have no doubt of it.”¹⁵⁵ Third, Biden could allocate federal resources to private fair housing organizations to investigate and enforce exclusionary zoning claims under the Fair Housing Initiatives Program, as Philip Tegeler of PRRAC argues.¹⁵⁶

Advantages

Enhancing Fair Housing disparate impact enforcement offers two major advantages. First, because states and localities make housing policy decisions that are disproportionately influenced by wealthy NIMBY forces, removing the issue from politics to the courts helps people of color vindicate their rights. Second, because the U.S. Supreme Court has recently affirmed the right to bring disparate impact litigation, the strategy requires no new acts of Congress.

Limitations

While a powerful tool, disparate impact litigation has four limitations. First, conceptually, disparate impact is about racial discrimination, not class discrimination. These two categories often overlap—income discrimination in zoning very often results in a negative impact on people of color—but because race and class discrimination are distinct harms, the two do not coincide in all cases. Second, as a practical matter, because plaintiffs in disparate impact cases have the extra evidentiary burden of showing that class discrimination disproportionately harms people of color, plaintiffs have to hire expensive experts to make this showing. Third, over the years disparate impact has had a disappointing track record in the courts, with very few cases winning on appeal.¹⁵⁷ Finally, the 2015 *Inclusive Communities Project* decision upholding disparate impact under the Fair Housing Act may be vulnerable in today's more conservative Supreme Court. In the 5–4 decision, the now-retired Justice Anthony Kennedy cast the deciding vote, a potential vulnerability in the future.¹⁵⁸ (Each of these issues is discussed in further detail below.)

Equitable Housing Institute Economic Fair Housing Act

The Idea

In August 2017, a Century Foundation report proposed the idea of an Economic Fair Housing Act that would make it illegal for government zoning to discriminate based on income, just as the 1968 Fair Housing Act makes it illegal for parties to discriminate based on race.¹⁵⁹ The law would supplement—rather than supplant—the Fair Housing Act's focus on race.

While the private housing market would continue to function based on a consumer's ability to pay, the idea behind the Economic Fair Housing Act is that government should not itself engage in economic discrimination.¹⁶⁰ Tom Loftus and his colleagues at the Equitable Housing Institute (EHI) developed the concept of an Economic Fair Housing Act more fully into actual draft legislation, the latest version of which was published in November 2020.¹⁶¹

In the draft legislation, the Economic Fair Housing Act would seek to “prohibit exclusionary housing practices comprehensively throughout the United States,” by giving harmed individuals and Department of Justice officials the right to sue municipalities and homeowners associations engaged in exclusionary practices in federal court and be eligible for the same penalties as those found in the Fair Housing Act—compensatory damages, injunctive relief, and attorneys' fees.¹⁶²

The proposed law uses an outcomes standard rather than a process standard. The legislation would prohibit local governments or homeowners associations from engaging in exclusionary housing practices that “have the effect or intent of restricting housing opportunities without sufficient justification.”¹⁶³ To distinguish between sufficient and insufficient justifications, the Economic Fair Housing Act invokes the rule from the *Inclusive Communities Project* case that policies cannot present “an artificial, arbitrary and unnecessary barrier.”¹⁶⁴

In addition, the Economic Fair Housing Act would ban “source of income” discrimination—the ability of landlords to discriminate against those using Section 8 housing vouchers. This practice is currently banned by seventeen states, but the absence of federal protection means the majority of state legislatures currently allow such discrimination.¹⁶⁵

Advantages

The Economic Fair Housing Act offers several advantages. The first set of advantages has to do with its emphasis on litigation in the courts rather than working through the political process. The second set of advantages has to do with its direct attack on income and wealth discrimination.

THE ADVANTAGES OF LITIGATION IN THE COURTS

The Economic Fair Housing Act's emphasis on empowering plaintiffs—as a supplement to the incentives approach advanced by Community Change, Senator Booker, or the Greene/Ellen proposal published by the Urban Institute—offers several attractive features.

First, the Economic Fair Housing Act provides a comprehensive approach to exclusionary zoning. It applies in every town and state—not just those who want to participate in competitive federal funding programs. Incentives only go so far. As the federal experience with Medicaid expansion found, some states will turn away what appears to be a sweet economic deal.¹⁶⁶ As Tom Loftus says, “most jurisdictions are not inclined to eliminate the basic, exclusionary aspects of their zoning,” so the federal government should have to “mandate change, and back it up and enforce it.”¹⁶⁷

Second, by giving plaintiffs the power to sue in federal court, the Economic Fair Housing Act seeks to minimize the ability of powerful political interests to neuter reforms—a constant concern when the issue is exclusionary zoning. When George Romney was HUD secretary under Richard Nixon, he sought to withhold funds from wealthy, white suburban jurisdictions that were not providing access to affordable housing; these jurisdictions complained and President Nixon soon killed the effort.¹⁶⁸ More broadly, the litigation approach also avoids the problem inherent in any strategy to condition federal funding: officials whose job is to give away funds for important causes are loath to withhold it.¹⁶⁹ By contrast, the Economic Fair Housing Act “has a more robust enforcement framework,” Noah Kazis notes, because it bypasses the politicians and “anyone can bring a suit.”¹⁷⁰

The Economic Fair Housing Act puts power in the hands of people who need it most: the direct victims of exclusionary zoning.

Third, the Economic Fair Housing Act puts power in the hands of people who need it most: the direct victims of exclusionary zoning. While the Greene/Ellen proposal provides an incentive for states to empower builders to sue to address exclusionary zoning (the so-called builders remedy), the Economic Fair Housing Act would empower the most direct victims—those excluded—to sue.¹⁷¹ The provision for attorneys' fees is critical because otherwise it will be infeasible for low-income families generally to pay the necessary costs to contest unlawful housing practices, including legal costs.¹⁷²

Fourth, by giving plaintiffs the same legal remedies to challenge economic discrimination as the Fair Housing Act provides to victims of racial discrimination, the proposed legislation has the potential to change American culture. The message sent by amending the Fair Housing Act is far more potent than providing fiscal incentives to change. Placing conditions on funding underlines the important point that exclusionary zoning *is bad policy*. Creating Fair Housing Act type-penalties for state-sponsored income discrimination sends the message that such discrimination is *wrong*. There is evidence that the Fair Housing Act helped change society. Polls suggest that whereas a majority of white Americans in the 1960s did not support free residential choice for Black people, today racial discrimination in housing is thoroughly delegitimized.¹⁷³ More importantly, as noted above, the Fair Housing Act remedies appear to have had an important impact on levels of racial segregation, as the dissimilarity index between Black people and white people has declined from 79 in 1970 to 59 in 2010 (see Figure 1 above).

Fifth, empowering litigants who are harmed by exclusionary zoning can aid state and local policymakers in their own attempts to make zoning more inclusive. Asked what federal action would most help his reform efforts in California, state senator Scott Wiener replied: “broad fair housing standards.” In pursuing state-level reforms, he said, it’s very helpful to be able to say to localities, “You’re going to get sued [so] let’s just fix this.”¹⁷⁴ The threat of lawsuits is powerful, he said: “All of a sudden, you have cities getting advice from their attorneys saying, you have to approve this project, or we’re going to get sued and have to pay their attorneys’ fees. And all of a sudden, the projects start getting approved.” A strong federal law, he said, “will provide enormous cover for people at the state and local level to say, ‘I know you don’t like to do this, but we have to do it because we’re going to get sued under federal law, and that’s going to be very expensive and costly.’”¹⁷⁵ The federal power to aid state reform should not be underestimated. George Mason University’s Ilya Somin suggested, because “state level reforms, or in some cases, local level ones, may be the biggest opportunities for breakthroughs.”¹⁷⁶

Sixth, the Economic Fair Housing Act rests on very solid constitutional grounds, roundtable participants suggested. The Greene/Ellen and Booker/Clyburn proposals are also probably fine, roundtable participants suggested, but Poverty and Race Research Action Council president Philip Tegeler said that the Economic Fair Housing Act “seems to have the clearest sailing legally” of the three.¹⁷⁷ The Economic Fair Housing Act rests on Congress’s ability to regulate interstate commerce, while the Greene/Ellen and Booker/Clyburn proposals rest on Congress’s spending powers.¹⁷⁸ As noted above, in recent decades, the U.S. Supreme Court has placed greater limits on Congress’s ability to use its spending powers to shape state and local policy, requiring, among other things, that the condition on funding be “germane” to the underlying legislation and that the amount of money not be so large as to be unduly “coercive.”¹⁷⁹ In 2012, for example, the Supreme Court struck down a requirement that states take new Medicaid expansion funding under the Affordable Care Act in order to continue receiving funding for the existing Medicaid program.¹⁸⁰

It seems probable that both the Booker/Clyburn and Greene/Ellen plans pass these tests. Booker and Clyburn’s smaller amount of money is a plus, as is Greene and Ellen’s focus on competitive rather than formula grants.¹⁸¹ Still, to the extent there is some ambiguity about the spending powers, there is much less about the Economic Fair Housing Act’s reliance on the Commerce Clause. Noah Kazis notes exclusionary zoning “clearly affects interstate commerce, including housing prices, mobility and aggregate economic productivity.”¹⁸² The Equitable Housing Institute cited a number of studies that have found that exclusionary zoning has a pronounced negative impact on interstate commerce and economic growth. Whereas low-income

workers used to routinely move to where jobs could be found, today exclusionary zoning has driven up housing prices, making many such moves cost prohibitive.¹⁸³ In addition, exclusionary zoning—by driving up the price of housing—interferes with the constitutional right to travel, which includes the right to resettle in new communities in order to pursue new opportunities.¹⁸⁴

A seventh and final advantage of the litigation approach is the modest requirement for federal investment. Some spending incentives—particularly the Race to the Top approach—requires new funds to lure communities into doing the right thing. Empowering plaintiffs, by contrast, requires communities to be more inclusive without having to pay them to do so.

ADVANTAGES OF A DIRECT ATTACK ON CLASS DISCRIMINATION

In addition, the Economic Fair Housing Act provides three distinct advantages as a supplement to beefing up efforts to pursue important racial disparate impact litigation cases: its direct challenge to state-sponsored economic discrimination; the removal of extra procedural hurdles that reduce the chances that disparate impact litigation will prevail; and the potential constitutional advantages that economic remedies offer.

First, the Economic Fair Housing Act confronts head-on the problem of economic discrimination and rising economic segregation. While race remains a defining feature of American discrimination and segregation—and more resources are needed to stamp it out through the provisions of the Fair Housing Act¹⁸⁵—race is not the only basis for discrimination. Alongside race discrimination there is class discrimination.

If race were only the driving factor behind exclusionary zoning, one would expect to see such policies most extensively promoted in communities where racial intolerance is highest, but in fact the most restrictive zoning is found in politically liberal cities, where racial views are more progressive.¹⁸⁶ Indeed, some liberals even take special pride in the fact that particular neighbors of theirs are members of racial or ethnic minority groups. In these communities, it is economic elitism that plays the most powerful role. The commentator Fareed Zakaria has noted that if the cardinal sin of the political right is racism, the primary sin of the left is elitism.¹⁸⁷ If racism stems from the ugly belief that white people are better than Black people, elitism stems from the nasty belief that college-educated people are culturally superior to society's less educated.

The prevailing American ethos of meritocracy—which appropriately disavows racism and sexism—has also given rise to what Sandel calls “the last acceptable prejudice,” a disdain for the less educated.”

Harvard philosopher Michael Sandel suggests that prejudice in America is evolving. The prevailing American ethos of meritocracy—which appropriately disavows racism and sexism—has also given rise to what he calls “the last acceptable prejudice,” a disdain for the less educated. Meritocracy's winners, Sandel says, “inhale too deeply of their success.” Indeed, social

scientists have found that highly educated elites “may denounce racism and sexism but are unapologetic about their negative attitudes toward the less educated.” A 2018 study by five psychologists, for example, concluded that well-educated elites in the United States are no less biased than those with less education; “it is rather that [their] targets of prejudice are different.”¹⁸⁸

As a result, some upper-middle-class liberals will strenuously argue that people should never be denied an opportunity to live in a neighborhood because of race or ethnic origin, but have no problem with government policies that effectively exclude those who are less educationally and financially successful. As Princeton political scientist Omar Wasow acerbically noted: “There are people in the town of Princeton who will have a Black Lives Matter sign on their front lawn and a sign saying ‘We love our Muslim neighbors,’ but oppose changing zoning policies that say you have to have an acre and a half per house.” He continues: “That means, ‘We love our Muslim neighbors, as long as they’re millionaires.’”

When race is taken out of the equation, class discrimination can persist. So in virtually all-white communities such as La Crosse, Wisconsin, economic divides have persisted and efforts to remedy those changes have engendered strong pushback from middle-class white people.¹⁸⁹ And in some middle-class Black communities, for decades there has been fierce resistance to low-income housing that is related to class rather than race.¹⁹⁰ Tyronda Minter of Urban Strategies, Inc. (USI) observes, “America’s class divisions have historical context even in the Black community,” and Black middle-class opposition to zoning reform represents a privilege that needs to be unpacked.¹⁹¹

Paul Jargowsky of Rutgers University finds strong evidence of racial segregation, but that class segregation within racial groups is a troubling phenomenon as well, and the two can compound. The dissimilarity index between Black people and white people is 58, but economic segregation within racial groups can also be substantial. The dissimilarity rate between poor Asians and wealthy Asians is 57; between poor Hispanics and wealthy Hispanics, 50; between poor Black people and wealthy Black people, 50; and between poor white people and wealthy white people, 36.¹⁹²

Overall, as noted earlier, racial segregation is slowly declining, but economic segregation has more than doubled since 1970. Kendra Bischoff and Sean Reardon found that the proportion of families living in rich or poor (as opposed to middle-class) neighborhoods increased from 15 percent in 1970 to 34 percent in 2012.¹⁹³ Some of the increase in segregation is due to rising income inequality generally, but research by Jargowsky finds that neighborhood inequality has risen faster than household inequality since 1970. Jargowsky notes, “not only have neighborhoods become more unequal over the past four decades, they have become more unequal at a faster rate than households have.”¹⁹⁴

A second reason to supplement disparate impact litigation strategies with a new Economic Fair Housing Act is proving one’s case under the proposed legislation would be less difficult. Under disparate impact, expert statistical studies are required to show the disproportionate impact on minority groups, which adds to the cost of litigation.¹⁹⁵ Tom Loftus notes, “Courts routinely have dismissed ‘disparate impact’ lawsuits where the plaintiffs failed to prove that minority group members were affected disproportionately by economic discrimination.”¹⁹⁶ One of the most extensive studies of disparate impact litigation,

conducted by Stacy Seicshnaydre of Tulane University, found that in the 2000s, plaintiffs prevailed on appeal in disparate impact cases just 8.3 percent of the time.¹⁹⁷ If income discrimination is wrong, whether or not it impacts racial minorities disproportionately, it seems unfair to require surmounting that extra hurdle.

A third reason to supplement disparate impact approaches with a new Economic Fair Housing Act is that it is not entirely clear whether a Supreme Court that narrowly approved such a strategy (by a 5–4 vote) in 2015 will be so supportive in the future.¹⁹⁸ Justice Anthony Kennedy, who provided the fifth vote in support, has retired, and Justice Ruth Bader Ginsburg, another vote in favor of *Inclusive Communities Project*, is no longer on the Court. And even Justice Kennedy at the time of the *Inclusive Communities Project* decision raised concerns that disparate impact remedies that look to racial results could raise constitutional concerns. While one can hope that disparate impact remains a strong tool to attack racial discrimination in housing for years to come, having additional legal avenues to curtail exclusionary zoning seems wise.

Limitations

While the Economic Fair Housing Act offers many advantages, it also faces five key limitations that need to be addressed if it is to be fully successful. This section outlines the challenges, and the subsequent section considers possible remedies.

First, some roundtable participants said the Economic Fair Housing Act must erect very clear guardrails that distinguish between legitimate and illegitimate zoning, or conservative judges will use their discretion to routinely uphold exclusionary zoning. The proposed legislation bans zoning practices that increase the price of homes and thereby exclude lower-income families without “sufficient justification.” The Economic Fair Housing Act’s invocation of the Supreme Court’s *Inclusive Communities Project* standard—“artificial, arbitrary and unnecessary” barriers must fall—may not provide sufficient clarity. For example, would a requirement that new homes be equipped with solar panels constitute a justified policy to fight climate change, or an unjustified exclusionary practice that raises construction costs and keeps low-income families out?¹⁹⁹ Noah Kazis suggested that the Economic Fair Housing Act will only work if it includes “substantive guidance and guardrails about a) what justifications are and are not sufficient for defendants, and b) what the proper remedy is for a finding of exclusionary zoning.”²⁰⁰

Second, to be successful, the Economic Fair Housing Act must also address directly the issue of gentrification and displacement. Because reducing exclusionary zoning will lead to some new development—and new development is often expensive because it is new—what will protect tenants from displacement?

Third, the conventional political wisdom is that the Economic Fair Housing Act, because it is more comprehensive, will be harder to pass than a policy like the Booker bill that conditions federal spending on curtailing exclusionary zoning. A locality that does not wish to reduce exclusionary zoning can simply not apply for a Race to the Top type effort; and it could even turn down federal infrastructure funds that come with the condition that the locality mitigate exclusionary practices. The Economic Fair Housing Act, by contrast, provides no escape hatch, which may make it more effective but also more politically vulnerable to the claim that the federal government is “forcing” changes in practices. In general, political science 101 would suggest more modest proposals are easier to enact, and that more aggressive programs will be a much heavier lift.

Fourth, the Economic Fair Housing Act requires overcoming powerful cultural attitudes that suggest racial discrimination is wrong, but class discrimination is a part of life. In American culture, for very good historical reasons, racist behavior is viewed much more harshly than snobbish behavior, so asking Americans to provide protections to low-income individuals faces a higher hurdle than asking them to provide protections for racial and ethnic minorities.

Fifth, and relatedly, there may be a danger that the addition of economic discrimination to the Fair Housing Act's focus on race would detract attention from the fundamental issue of race.²⁰¹ Moreover, as Lisa Rice, president of the National Fair Housing Alliance, pointed out, if the two issues become muddled in the eyes of the courts, a failure of the Economic Fair Housing Act to pass could be used by litigators for defendants to claim that Congress did not intend for the Fair Housing Act to use disparate impact or other legal precedents to tackle exclusionary zoning, otherwise why would an Economic Fair Housing Act be necessary?²⁰²

Remedying the Limitations of the Economic Fair Housing Act

The issues raised by roundtable participants—the need to erect guardrails; to protect against gentrification and displacement; to address political concerns; to address cultural concerns; and to maintain focus on racial equity—are all serious and legitimate concerns. Below are some ideas on how an Economic Fair Housing Act could address these questions.

THE NEED FOR GUARDRAILS

To help give courts guidance on the line between legitimate zoning and economic discrimination, the Economic Fair Housing Act could draw upon ideas in the Greene/Ellen proposal for the Urban Institute on both process and outcomes. As a matter of process, a municipality's zoning laws could be presumed illegitimate if it outlaws the construction of duplexes or triplexes within the community. Municipalities that take the step of legalizing these types of housing, as Minneapolis has, would avoid the presumption of illegitimacy. Other specific practices could be added to the procedural prong of the test, including large minimum lot sizes, allowing source-of-income discrimination, and the like. If a federal model code of zoning were promulgated, judges could look to that code to draw the line between zoning that is “artificial, arbitrary and unnecessary” and those that are legitimate.

To ensure that municipalities don't just erect new, more subtle barriers to accomplish the same result, municipalities should also be judged on outcomes.

Eliminating the worst zoning practices—that are ubiquitous in the United States today—would represent a substantial step forward. But to ensure that municipalities don't just erect new, more subtle barriers to accomplish the same result, municipalities should also be judged on outcomes. For example, a municipality that had zoning laws that did not violate process requirements yet resulted in fewer than 10 percent of its housing stock being deemed affordable could still be presumed to have

engaged in illegitimate zoning. Municipalities that took steps to loosen zoning restrictions so that 10 percent or more of housing is affordable would avoid the presumption of illegitimate zoning. This 10 percent mark mimics provisions in Massachusetts law, but could be set higher or lower by federal policymakers based on careful empirical research.

PROTECTING AGAINST GENTRIFICATION AND DISPLACEMENT

The Economic Fair Housing Act should also contain protections against the possibility that under certain circumstances, a reduction in exclusionary zoning might facilitate gentrification and displacement. As discussed above, legalizing duplexes and triplexes in jurisdictions that previously engaged in exclusionary zoning will typically increase housing supply and reduce housing prices across a region—thereby making low-income families *less vulnerable* to displacement. But other changes, such as the demolition of low-rise apartments in favor of high-rise luxury units, can result in gentrification and displacement.

In what Wiener called “exceptional” cases,²⁰³ it is possible to put a variety of protections in place, including “inclusionary zoning,” which sets aside a share of units for low- and moderate-income families, and so-called “community preference” policies that provide current residents the first chance to rent or purchase units in new housing.²⁰⁴

ADDRESSING POLITICAL CONCERNS

In assessing the political viability of proposals to reduce exclusionary zoning, political experts typically suggest the best approach would be to start small, with modest efforts that are less likely to arouse anger and opposition. But it is not clear whether that wisdom applies in the case of efforts to curb exclusionary zoning.

Recent experience suggests that even moderate approaches can be weaponized. Senator Booker’s HOME Act was designed, as Booker said, to be “a light touch.”²⁰⁵ Nevertheless, as Cassandra Robertson, who worked for Senator Booker and helped develop the HOME Act, notes, President Trump blew the modest bill out of proportion and “was tweeting about it constantly.”²⁰⁶

Trump appears to have been provoked by an article by Stanley Kurtz in the *National Review*, which suggested that Biden’s endorsement of Booker’s bill meant that “Biden and Dems Are Set to Abolish the Suburbs.”²⁰⁷ Robertson concluded that, as a political matter, “I personally don’t think it matters what the actual content of the bill is. Anything that touches on this topic will be entirely vilified.”²⁰⁸ (Fortunately, Trump’s appeal appears to have fallen flat.²⁰⁹ Biden gained among suburban voters compared to Hillary Clinton.²¹⁰)

Given that some on the Trumpist right may try to weaponize *anything* seeking to curb exclusionary zoning, there may be value in going bold in order to educate the American public about the issue. As Jenny Schuetz of Brookings noted, “It’s really hard to motivate people to fix zoning when they don’t think about zoning as a problem.” She explained, “We are not at the point nationally where people say, ‘single-family-exclusive zoning, that’s bad.’”²¹¹ The Economic Fair Housing Act proposal, which draws attention to the issue of economically discriminatory zoning and draws parallels to the issue of racial discrimination and the Fair Housing Act, may raise the larger moral issues at stake more clearly than a more moderate approach that suggests exclusionary zoning is merely something to be discouraged rather than stamped out.

The comprehensive nature of the Economic Fair Housing Act sends a moral signal that is different from the proposals that condition funding on reducing exclusion. The message of amending the Fair Housing Act is that exclusionary zoning isn't just poor public policy that we want to mediate; it's that erecting state-sponsored walls to keep people out of communities, either by race or income, is wrong. It suggests that this discrimination should end, not just in jurisdictions that want federal competitive grants, but everywhere—just as the Fair Housing Act applies in every region of the country.

Going bold is what Minneapolis and Oregon sought to do in their efforts to legalize duplexes and triplexes. They didn't seek to change the policy in a few areas within the city of Minneapolis or the state of Oregon; they sought to end exclusionary single-family-exclusive zoning across the board. And, with a coalition of affordable housing advocates, civil rights groups, environmentalists, young people, seniors, and others, they succeeded in doing what had long been thought unthinkable.

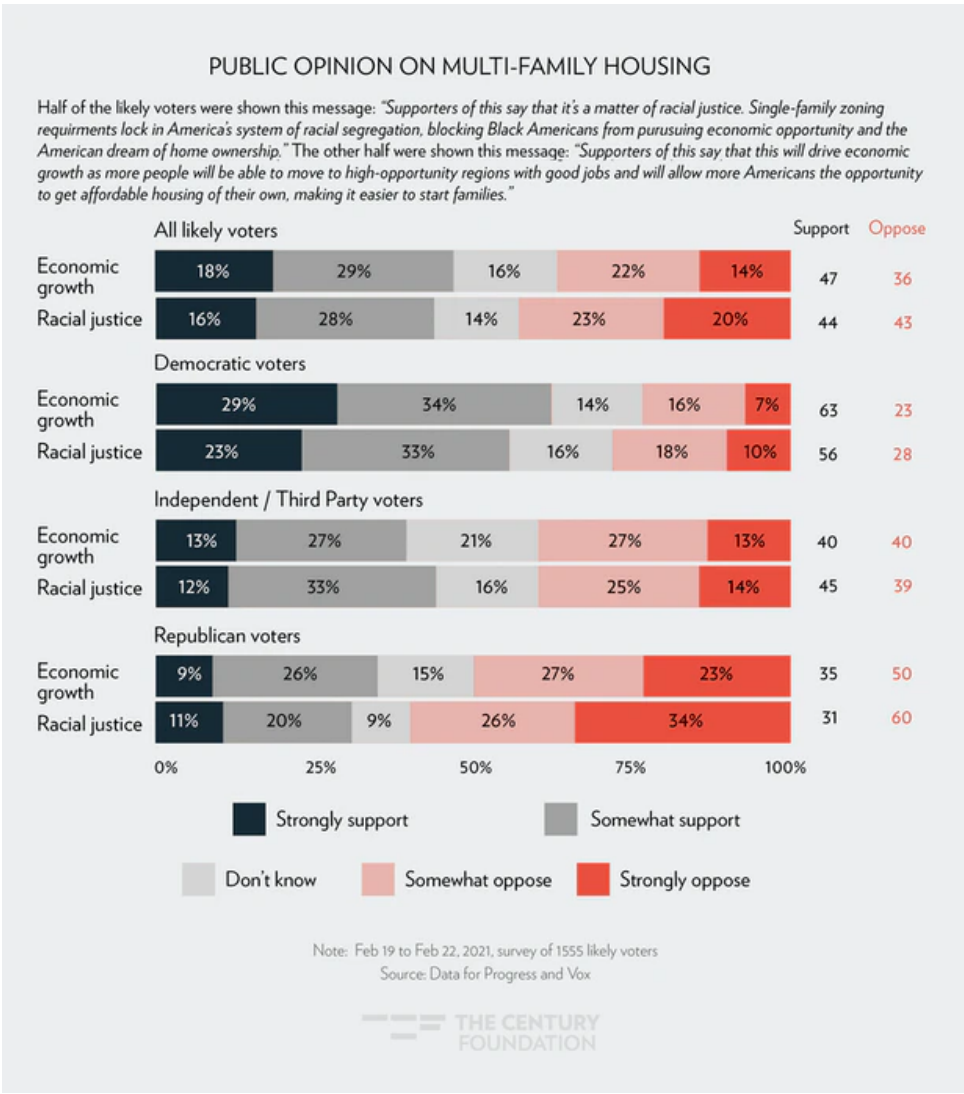
ADDRESSING CULTURAL BARRIERS TO TAKING ON CLASS DISCRIMINATION

In drawing analogies to the 1968 Fair Housing Act, advocates of the Economic Fair Housing Act face a significant cultural barrier. In American in 2021, racial discrimination is properly seen as a deviation from meritocracy, but economic discrimination—discrimination against those with smaller wallets and often with less formal education—is in some ways an outgrowth of meritocratic thinking. That helps explain why, if a low income Black person with a Section 8 Housing Choice Voucher is denied a home because of her race, that is illegal, but if she is denied because of her source of income, she has no federal protection.

For deep historical reasons, it is wholly appropriate that the sin of racial discrimination is seen as especially abhorrent. But that has not stopped America from broadening the circle of groups against whom discrimination is considered wrong: women, gays, religious minorities, and the disabled, to name a few. It is possible that, as America emerges from the COVID-19 pandemic, people with less education—the grocery clerks and truck drivers and bus drivers who came through for the rest of us—will be regarded as deserving of protection against economic discrimination. It's hard to square the admiration Americans have expressed for these workers during the pandemic with exclusionary zoning policies that humiliate working-class people by saying they are unwelcome as neighbors and their children are unwelcome as school classmates.

Indeed, there is some evidence that broadening the discussion of exclusionary zoning to include questions of class inequality can actually increase public appeal for reform. According to a February 2021 poll by Data for Progress and Vox, the *economic* case for allowing more construction of multifamily housing has broader public support than the narrower *racial* argument. Americans favored multifamily zoning over single-family zoning by one percentage point (44 percent to 43 percent) after hearing that “Supporters of this say that it’s a matter of racial justice. Single-family-exclusive zoning requirements lock in America’s system of racial segregation, blocking Black Americans from pursuing economic opportunity and the American dream of home ownership.” By contrast, support grew to eleven percentage points (47 percent to 36 percent) when respondents were presented with an economic argument: “Supporters of this say that this will drive economic growth as more people will be able to move to high opportunity regions with good jobs and will allow more Americans the opportunity to get affordable housing on their own, making it easier to start families.”²¹² (See Figure 4.)

FIGURE 4



Download

ADVANCING RACIAL EQUITY

Is there a danger that adding economic discrimination to the Fair Housing Act’s focus on race will detract attention from the fundamental issue of anti-Black bias, which is central to America’s divide?²¹³ The evidence suggests that the Economic Fair Housing Act need not detract from America’s fight for racial justice; to the contrary, it will accelerate progress.

To begin with, the Economic Fair Housing Act would supplement (rather than supplant) the existing right under the Fair Housing Act to bring disparate impact and intentional discrimination cases. The three-pronged strategy outlined above for disparate impact—restoring the 2013 rule, providing more resources for HUD and Department of Justice enforcement, and adding additional resources for private groups to enforce—all make good sense and serve as an important complement to the Economic Fair Housing Act. Any government funding to enforce the Economic Fair Housing Act should be provided in a separate appropriation line from funds to enforce the Fair Housing Act so that there is no dilution of the latter.

The Economic Fair Housing Act is additive, not subtractive. The distinction between the Economic Fair Housing Act and traditional disparate impact law under the Fair Housing Act would make it difficult for a failure of the Economic Fair Housing Act to pass to be used to hurt disparate impact litigation.

Moreover, by allowing plaintiffs of color to challenge exclusionary zoning as economically discriminatory—without going through the extra hurdle of providing statistical evidence that racial minorities are disproportionately impacted—the Economic Fair Housing Act would add a new tool to the arsenal of civil rights groups. Curbing economic zoning, in turn, will reduce racial segregation. Research from Douglas S. Massey and Jacob Rugh finds that one of the features of metro areas with less racial segregation is less restrictive zoning.²¹⁴ In that sense, the Economic Fair Housing Act can be seen as an important tool in addressing some of the critical unfinished business of the civil rights movement.

Recommendations

If the Biden administration wants to make good on its goals of healing the soul of the nation, showing respect for the dignity of working-class people, and uniting the country, all of the eight proposals outlined above have something to offer, because they begin to dismantle the exclusionary walls that divide us. As detailed below, there are multiple paths forward, but the administration should not shy away from working with Congress on some of the boldest proposals.

Pursue Multiple, Complementary Paths to Reform

The tools to combat and reduce exclusionary zoning examined in this report are many, and each would, in its own way, bring us closer to the goal. Promulgating model codes would set an important standard to which municipalities could aspire. Local Housing Policy Grants would help aid the good work of those who voluntarily wish to move in the right direction and raise up examples of what can be done. A Race to the Top program on removing barriers would inspire those on the fence to do better. A reinstated Affirmatively Furthering Fair Housing rule would restart the important work at reducing segregation that was begun under the Obama Administration and raise the profile of those employing inclusive measures. The Booker/Clyburn HOME Act improves upon and extends the reach of the AFFH rule to go after economically as well as racially discriminatory zoning, and would make housing more affordable by increasing supply and provide immediate relief to those struggling to make rent. The Greene/Ellen proposal published by the Urban Institute would build on the HOME Act and make it bolder, by conditioning more federal dollars on reducing exclusionary zoning, and setting important outcome goals for both production of affordable housing and ensuring its equitable distribution. Plans to enhance federal “disparate impact” litigation would extend the fight against exclusionary zoning to the courts, and highlight the ways in which such laws thwart America’s progress toward racial justice. And the Economic Fair Housing Act—the boldest measure of them all—would extend the Fair Housing Act’s powerful remedies to fight rising economic segregation and also to reduce racial segregation.

Any of the proposed actions could be pursued on their own, or as part of larger germane legislative packages, such as those promoting federal infrastructure funding or addressing climate change, as the Biden administration has already recognized.²¹⁵ Federal infrastructure funding has historically been used to promote racial and economic segregation, so including

requirements for more inclusive zoning approaches is both appropriate and necessary as part of the nation's racial reckoning. Likewise, given the ways in which exclusionary zoning promotes sprawl, traffic, and greenhouse gases, it is important that any climate change legislation include efforts to legalize more environmentally friendly forms of housing.

Given the ways in which exclusionary zoning promotes sprawl, traffic, and greenhouse gases, it is important that any climate change legislation include efforts to legalize more environmentally friendly forms of housing.

Roundtable participants underscored the idea that there are multiple paths to reform that can be pursued simultaneously. Indeed many of the reforms build upon one another; the model zoning codes, for example, will provide a baseline against which many of the other reforms could draw. Administrative action—reinstating the 2015 AFFH rule and the 2013 disparate impact guidance—can be pursued simultaneously alongside various proposals requiring congressional authorization. Likewise, carrots such as the Race to the Top proposal can serve as a complement to sticks such as the Economic Fair Housing Act. And federal and state action can reinforce one another—state reforms can spur federal movement by demonstrating the viability of particular approaches; federal policies can aid state efforts by providing critical political cover for state policymakers wishing to spur recalcitrant exclusive communities to action.

Don't Shy Away From the Boldest Proposals

As the Biden administration and Congress consider options, there is a powerful case to be made for going bold. That means not only using large Race to the Top carrots, but also conditioning funding on the broadest set of dollars as the Greene/Ellen proposal for the Urban Institute would. And, boldest of all, it means proposing an Economic Fair Housing Act to empower those most harmed—low-income and working-class people of all races—with the right to sue in federal court, anywhere in the country, when government uses zoning policies to discriminate against them.

The Risks of Going Bold Are Modest

Because exclusionary zoning involves highly charged issues of race and class, and because NIMBY forces have proven so powerful historically, it is understandable that politicians who want to do the right thing might choose to begin with very modest proposals. But President Trump's 2020 tweet storms over Cory Booker's "light touch" HOME Act suggests that the modesty of a proposal won't shield it from demagogic attacks. Moreover, the experiences in Minneapolis and Oregon—where dramatic reforms were enacted—suggests the politics of exclusionary zoning may be shifting.

Trump's tweets on single-family-exclusive zoning did not appear to win over white suburban swing voters in 2020. And there has always been something of a split on the right over exclusionary zoning, with one faction drawn to Trump's deeply troubling racial animus and other, small-government conservatives agreeing with progressives that exclusionary zoning should end.²¹⁶

Ilya Somin, a libertarian professor at the Scalia School of Law at George Mason University, and a roundtable participant, suggested for conservatives, reducing exclusionary zoning can be a “property rights issue.”²¹⁷ He noted that zoning restrictions may be “the single biggest constraint in many parts of the country on people’s ability to build what they want on their own property.”²¹⁸ He noted the growing power of the property rights movement, which has won a number of state ballot initiatives in the past fifteen years.²¹⁹ Indeed, there was conservative as well as liberal support in the House of Representatives for the YIMBY Act, which requires recipients of Community Development Block Grants to report on their efforts to reduce exclusionary zoning.²²⁰ In the Senate, the YIMBY Act’s lead sponsor is Senator Todd Young (R-IN).²²¹

While democratic egalitarianism and the liberty to be free from government interference are values that are typically in tension with one another, in the case of exclusionary zoning, they point in the same direction. Perhaps because curtailing exclusionary zoning honors both egalitarian (anti-discriminatory) and libertarian (small government) streams in the American belief system, surveys suggest it is popular. In a 2019 Data for Progress poll, for example, voters were asked, “Would you support or oppose a policy to ensure smaller, lower-cost homes like duplexes, townhouses, and garden apartments can be built in middle- and upper-class neighborhoods?” Supporters outnumbered opponents by two to one.²²²

The Advantages of Going Bold Are Substantial

Going bold on exclusionary zoning—by seeking sweeping change, and broadening the conversation to include class discrimination—offers two major advantages. It could add moral clarity to the conversation and galvanize action; and it could help undo longstanding right-wing efforts to divide and conquer America’s working-class population.

Sweeping Reform Sends a Moral Signal

All eight plans to reduce exclusionary zoning outlined in this report would advance the ball in important ways, but the boldest among these would do an especially good job of educating the public about the harms of exclusionary zoning. All of the proposals send the message that exclusionary zoning is bad public policy, but the Economic Fair Housing Act, in particular, makes the point that using zoning to exclude people of lesser means from entire communities is wrong—so wrong, in fact, that victims of this state-sponsored discrimination should have available to them the right to sue in federal court, just like victims of racial discrimination have under the 1968 Fair Housing Act. It is one thing to say that the federal government will provide financial incentives or pressure for a state or locality to curtail exclusionary zoning; it is quite another to say that exclusion should not be tolerated, whether or not the municipality takes federal funding. If state-sponsored economic discrimination that keeps low-wage families from enjoying safe neighborhoods with strong public schools is wrong, then policymakers should not say it is permissible so long as you opt out of federal funding. The lesson from California, state senator Scott Wiener suggests, is that “starting really big and calling the question” is a critical way of “advancing the conversation.”²²³ At worst, it can make space for some of the more modest proposals to advance.

Fighting Right-Wing Divide and Conquer Strategies

Broadening the conversation to take on government-sponsored economic discrimination in housing also highlights a problem of exclusion that faces two constituencies who are often pitted against one another in American politics: working-class white people and working-class people of color. For centuries, going back to Bacon's Rebellion in 1676, right-wing politicians have pursued a politics of dividing America's multiracial working class in order to conquer.²²⁴ In 1848, for example, the white supremacist U.S. Senator John Calhoun sought to rally white people around their racial identity. "With us the two great divisions of society are not the rich and poor, but white and black," he declared, "and all the former, the poor as well as the rich, belong to the upper class, and are respected and treated as equals."²²⁵ As author Heather McGhee notes in her new book, *The Sum of Us*, people of all races have paid the costs of these divisions inspired by white racism.²²⁶

Every once in a while, however, at certain moments in time and in certain issue areas, America breaks free of this grip, and lower-income and working-class people of all races come together and engage in what the Reverend William Barber II calls "fusion politics."²²⁷ Dr. Martin Luther King Jr. sought this alliance in the 1968 Poor People's Campaign and his pursuit of a Bill of Rights for the Disadvantaged. Robert Kennedy briefly brought often-times warring working-class Black, Latino, and white constituencies together in his 1968 campaign for president in which he championed a liberalism without elitism and a populism without racism.²²⁸

More recently, political observers in Texas were stunned to watch fusion politics rally in support of Texas's Top 10 Percent Plan for college admissions, which provided automatic admissions to the University of Texas (UT) at Austin for any student in the top of her high school class, regardless of SAT scores or other factors. While race and ethnicity are powerful fault lines in Texas politics, the battle over the percent plan fell along class lines. Wealthy suburban families did not like the plan because it meant their high-scoring kids had to compete against one another for a limited number of slots in each high school. Meanwhile, working-class white, black, and Latino parents rallied around the plan because high schools that had never sent someone to UT Austin were suddenly able to have access to the state's flagship. When UT Austin tried to significantly curtail the number of seats that would be awarded through the Top 10 Percent Plan (so that the university would have greater discretion over admissions), a remarkable coalition of rural white conservative legislators representing working-class white people, and urban Black and Latino legislators representing working-class people of color, blocked the effort.²²⁹

The same coalition is possible around exclusionary zoning. Although housing has long been an arena in which right-wing politicians sought to scare white voters about the possibility of nonwhite families moving in, the Economic Fair Housing Act flips that equation by highlighting the common predicament—condescension—faced by working-class constituencies of all races. Democrats correctly point out the ways in which white people have wrongly declared themselves to be better than people of color, and Republicans have pointed to ways in which coastal elites sometimes have improperly looked down upon working-class white people who lack educational credentials. The movement to eliminate exclusionary zoning unites those two populist threads—it is anti-racist and anti-elitist. In a nation deeply divided by race, the notion that working-class people should be excluded from entire communities is deeply insulting both to Democratic-leaning working-class people of color, and to the non-college-educated white people who flocked to Donald Trump in part because they felt looked down upon by coastal Democrats.

This coalition is not just theoretical; this is precisely how the politics have been playing out in California. Just as support for the Texas Top 10 Percent Plan divided by class more than political party, so too, says Wiener, fights over exclusionary zoning divided not by Democrat versus Republican but by rich versus poor. The opponents of reform had one thing in common—they represented wealthier constituents who “wanted to keep certain people out of their community.”²³⁰ Supporters of reform, by contrast, wanted other things: an end to exclusion and an end to policies that artificially drive up rents and housing costs for everyone.²³¹

Looking Forward

Helping to end the civil war within America’s multiracial working class would have consequences far beyond housing policy and would advance the central themes of the Biden administration: pursuing racial justice, respecting working-class people, and uniting the country. Exclusionary zoning policies that humiliate people of modest means by telling them they are unwanted in neighborhoods with good schools and other amenities have been a stain on American communities for far too long. The administration of Joe Biden and the new Congress may be uniquely positioned and motivated to tear down these walls.

Appendix: List of Participants/Century Foundation/Bridges Collaborative “Paths for the New Administration to Reduce Exclusionary Zoning” December 11, 2020

Xavier de Souza Briggs

Non-resident Senior Fellow,
Brookings Institution &
Distinguished Visiting Professor
New York University

Sheryll Cashin

Professor of Law, Civil Rights and Social Justice
Georgetown Law School

Ingrid Gould Ellen

Faculty Director
New York University’s Furman Center

William Fischel

Professor of Economics & Legal Studies
Dartmouth College

Brandon Fuller

Vice President of Research and Publications

Manhattan Institute

Salin Geevarghese

Director

Mixed-Income Strategic Alliance &

Senior Fellow

Center for the Study of Social Policy

Solomon Greene

Senior Fellow

Urban Institute

Megan Haberle

Deputy Director

Poverty and Race Research Action Council

Olatunde C. Johnson

Professor of Law

Columbia University Law School

Noah Kazis

Legal Fellow

New York University's Furman Center

Tom Loftus

Chair

Equitable Housing Institute

Demetria McCain

President

Inclusive Communities Project

Tyronda Minter

Vice President of Educational Initiatives

Urban Strategies

Rolf Pendall

Nonresident Fellow

Urban Institute &

Professor of Urban and Regional Planning

University of Illinois, Urbana-Champaign

Lisa Rice

President

National Fair Housing Alliance

Cassandra Robertson

Former Housing Fellow

Sen. Cory Booker &

Senior Fellow

New America

Honorable Ibraheem Samirah

Member

Virginia State House of Delegates

Jenny Schuetz

Fellow

Brookings Institution

Ilya Somin

Professor

George Mason Law School

Philip Tegeler

Executive Director

Poverty and Race Research Action Council

Honorable Scott Wiener

Member

California State Senate

Pablo Zevallos

Excelsior Service Fellow

New York State Homes and Community Renewal

The Century Foundation

Casey Berkovitz, Senior Communications Associate

Michelle Burris, Senior Policy Associate

Richard D. Kahlenberg, Senior Fellow

Stefan Lallinger, Fellow and Director, Bridges Collaborative

Halley Potter, Senior Fellow

Notes

1. Reducing exclusionary zoning also connects to four key issues identified by the Biden administration's transition website: racial equity, the pandemic, the economy, and climate change. Katy O'Donnell, "Biden allies push back on sweeping plan to promote fair housing," *Politico*, December 25, 2020, <https://www.politico.com/news/2020/12/25/biden-allies-push-back-fair-housing-450352>. See discussion of each of these issues below.
2. Jenny Schuetz, "To Improve housing affordability, we need better alignment of zoning, taxes and subsidies," Brookings Institution, January 7, 2020, <https://www.brookings.edu/research/gentle-density-can-save-our-neighborhoods/>. See also Emily Badger and Quoctrung Bui, "Cities Start to Question an American Ideal: A House With a Yard on Every Lot," *New York Times*, June 18, 2019, <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html>.
3. Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright Publishing Corp/W.W. Norton, 2017).
4. For a discussion of racial discrimination in housing, and what to do about it, see Kimberly Quick and Richard D. Kahlenberg, "Attacking the Black-White Opportunity Gap That Comes from Residential Segregation," *The Century Foundation*, June 25, 2019, <https://tcf.org/content/report/attacking-black-white-opportunity-gap-comes-residential-segregation/>.
5. "Public School Choice Programs," National Center for Education Statistics, <https://nces.ed.gov/fastfacts/display.asp?id=6> (indicating that 13 percent of public school parents choose a school outside their neighborhood; roughly 10 percent use private school).
6. See e.g. Edward L. Glaeser, "Houston, New York Has a Problem: The southern city welcomes the middle class; heavily regulated and expensive Gotham drives it away," *City Journal*, Summer 2008, <https://www.city-journal.org/html/houston-new-york-has-problem-13102.html>; Edward L. Glaeser and Bryce A. Ward, "The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston," NBER Working Paper 12601, October 2006, cited in Benjamin Harney, "The Economics of Exclusionary Zoning and Affordable Housing," *Stetson Law Review* 38 (2009): 459; and Joseph Gyourko and Raven Molloy, "Regulation and Housing Supply," NBER Working Paper no. 20536, October 2014, <http://www.nber.org/papers/w20536>.
7. Economists are skeptical that plans to make housing affordable with policies like a first time buyer tax credits will do much good without also addressing the supply problem. See e.g. Michele Lerner, "Housing: A first order of business for Biden: Administration's proposals address affordability, supply and inequality," *Washington Post*, January 30, 2021, https://www.washingtonpost.com/realestate/biden-administration-brings-a-new-focus-on-housing-policies/2021/01/28/ae4570b4-5f4f-11eb-9061-07abcc1f9229_story.html.
8. See Equitable Housing Institute, "Economic Fair Housing Act," 8–10 (citing several studies on the negative effects of exclusionary zoning and resulting sprawl on the environment). https://www.equitablehousing.org/images/PDFs/PDFs-2018-/EHI_Economic_FHA_of_2021_draft-rev_11-30-20.pdf

9. See Noah Kazis, "Ending Exclusionary Zoning in New York City's Suburbs," Furman Center, November 9, 2020, https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf.
10. Katherine Levine Einstein, Maxwell Palmer, and David Glick, "Who Participates in Local Government? Evidence from Meeting Minutes," June 29, 2018 (forthcoming in *Perspectives on Politics*), https://www.dropbox.com/s/k4kzph3ynal3xai/ZoningParticipation_Perspectives_Final.pdf?dl=0; and Sarah Holder and Kriston Capps, "The Push for Denser Zoning Is Here to Stay," *Bloomberg CityLab*, May 21, 2019, <https://www.bloomberg.com/news/articles/2019-05-21/to-tackle-housing-inequality-try-upzoning>.
11. Lee Anne Fennell, "Homes Rule (reviewing William A. Fischel, *The Home-voter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies*)," *Yale Law Journal* 112 (2002): 617–64. https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=8029&context=journal_articles.
12. See Richard D. Kahlenberg, "How Minneapolis Ended Single-Family Zoning," The Century Foundation, October 24, 2019, <https://tcf.org/content/report/minneapolis-ended-single-family-zoning/>.
13. See Richard D. Kahlenberg, "Updating the Fair Housing Act to Make Housing More Affordable," Century Foundation, April 9, 2018, <https://tcf.org/content/report/updating-fair-housing-act-make-housing-affordable/>.
14. "The Biden Plan for Investing in Our Communities Through Housing," Biden/Harris 2020 Campaign, <https://joebiden.com/housing/> ("Exclusionary zoning has for decades been strategically used to keep people of color and low-income families out of certain communities. As President, Biden will enact legislation requiring any state receiving federal dollars through the Community Development Block Grants or Surface Transportation Block Grants to develop a strategy for inclusionary zoning, as proposed in the HOME Act of 2019 by Majority Whip Clyburn and Senator Cory Booker.").
15. See Peter Dreier, "Not Your Granddad's Suburb: Trump's Racist Appeals Fall Flat in Diversified Suburbs," *Shelterforce*, August 17, 2020, https://shelterforce.org/2020/08/17/trump_racist_appeal_suburbs/.
16. For a discussion of research on the effect of economic and racial integration on crime and property values, see Richard D. Kahlenberg, "An Economic Fair Housing Act," The Century Foundation, August 3, 2017, <https://tcf.org/content/report/economic-fair-housing-act/>.

With respect to property values: "Research on programs that introduce affordable housing to neighborhoods generally finds small effects on property values—and that reductions can be mitigated by taking steps to ensure a positive transition. Columbia University's Lance Freeman and Baruch College's Hilary Botein's 2002 literature review, for example, found that there is no conclusive evidence that affordable housing reduces property values. San Francisco State University's Mai Thi Nguyen's 2005 overview of seventeen studies finds negative effects on property values are small, and can be mitigated by making sure the architecture is compatible with the neighborhood's existing architecture and is not concentrated. More recently, in 2013, the University of Chicago's Len Albright and Princeton University's Elizabeth Derickson and Douglas Massey published an analysis of the effects of the Mount Laurel affordable housing development on local property values. The study took advantage of a quasi-experiment that compared property values in Mount Laurel with similar townships that "did not experience the sudden opening of a 100 percent affordable housing project." The authors found no statistically significant differences between property value trends in Mount Laurel and the control townships. The results may be explained by the fact that Mount Laurel affordable housing residents had to go through extensive screening that included criminal backgrounds checks, and that the property was well maintained and aesthetically similar to surrounding areas."

With respect to crime: "After homeowners' concerns about property values, a close second is the fear that economic and racial diversity will bring crime to wealthy, white neighborhoods, an idea sometimes stoked by the media. In 2008, for example, Hanna Rosin published a widely read piece in the *Atlantic* suggesting that after the demolition of a high-rise housing project in Memphis, Tennessee, former residents used housing vouchers to move to surrounding suburbs, and crime spiked in these areas as a result. A host of researchers,

however, have debunked Rosin's analysis. In 2011, for example, Ingrid Gould Ellen and Katherine M. O'Regan of New York University and Michael C. Lens of UCLA analyzed Rosin's hypothesis by looking at longitudinal, neighborhood-level crime and voucher utilization data in ten large U.S. cities. They found that the relationship between the presence of additional housing voucher holders and elevated crime was not statistically significant after controlling for unobserved differences across census tracts and trends in the broader area. In a separate 2013 analysis, Lens reviewed more than a dozen studies on crime and subsidized housing and concluded that "concentrated disadvantage is the chief culprit when subsidized housing affects crime." Scattered-site public housing, by contrast, has little to no effect on neighborhood crime, he found."

17. Howard Husock, "Biden's encouraging HUD pick: If Marcia Fudge follows her own lessons from her time as a small-city mayor, she will bring some good sense to housing policy," *City Journal*, January 29, 2021, <https://www.city-journal.org/marcia-fudge-bidens-encouraging-hud-pick>.

18. See e.g. Joe Davidson, "Susan Rice wants every federal agency to focus on racial equity," *Washington Post*, January 29, 2021, https://www.washingtonpost.com/politics/rice-biden-federal-racial-equity/2021/01/28/a9c0a3be-61b2-11eb-ac8f-4ae05557196e_story.html.

19. See "Memorandum on Redressing Our Nation's and the Federal Government's History of Discriminatory Housing Practices and Policies," The White House, January 26, 2021, Section 2, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-redressing-our-nations-and-the-federal-governments-history-of-discriminatory-housing-practices-and-policies/>. Biden connected these rules to his goal of restoring the soul of the nation. He said: "We're in a battle for the soul of this nation, and the truth is our soul will be troubled as long as systemic racism is allowed to exist." See Cleve R. Wootson Jr. and Tracy Jan, "Biden signs orders to boost racial equity," *Washington Post*, January 27, 2021, A1, https://www.washingtonpost.com/politics/biden-to-sign-executive-actions-on-equity/2021/01/26/3ffbcbff6-5f8e-11eb-9430-e7c77b5b0297_story.html.

20. Ron Lieber and Tara Siegel Bernard, "F.A.Q. on Stimulus, Unemployment and Tax Rebates," *New York Times*, March 12, 2021, <https://www.nytimes.com/live/2021/03/06/business/stimulus-check-plan-details>.

21. See "Fact Sheet: The American Jobs Plan," The White House, March 31, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

22. Editorial Board, "Americans Need More Neighbors," *New York Times*, June 15, 2019, <https://www.nytimes.com/2019/06/15/opinion/sunday/minneapolis-ends-single-family-zoning.html>.

23. See "Fact Sheet: The American Jobs Plan," The White House, March 31, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>. See also Andy Sullivan and Jarrett Renshaw, "Biden seeks to ease housing shortage with \$5 billion 'carrot, not stick' approach," Reuters, April 8, 2021 <https://www.reuters.com/article/us-usa-biden-infrastructure-zoning-idUSKBN2BV1CX>

24. At the time of the December roundtable, most of the focus was on three proposals, but this report considers a broader range (eight) that came up in the larger discussion.

25. *Buchanan v. Warley*, 245 US 60 (1917).

26. See "Economic Fair Housing Act," Equitable Housing Institute, 7 (citing court decisions affirming the power of Congress to impose fair housing requirements under the Commerce Clause. *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 [11th Cir. 1992] ["Congress had ample evidence before it, and was adequately aware that its exercise of power under the Fair Housing Act was supported by the Commerce Clause"]. Real estate rentals "unquestionably" affect interstate commerce. *Russell v. United States*, 471 U.S. 858, 862 [1985] [federal arson statute was valid as applied to a single rental apartment building].) Other U.S. Supreme Court decisions have affirmed Congress's ability to outlaw discrimination in hotels and restaurants because both activities affect interstate commerce. See *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); and U.S. Constitution, Article I,

Section 8 (Commerce Clause). In addition, courts have affirmed the Fair Housing Act citing Congress's powers under the Thirteenth Amendment to remove the badges of slavery. See Equitable Housing Institute, "Economic Fair Housing Act," 7 (citing *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir.), cert. denied, 419 U.S. 1021, 1027 (1974); and *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir.), cert. denied, 409 U.S. 934 (1972).

27. The courts have recognized that Congress's Fair Housing Act reaches to questions of local zoning in a number of cases. In the 1995 case *City of Edmonds v. Oxford House*, for example, a group home operators sued to combat exclusionary zoning targeting them. The U.S. Supreme Court found that a zoning ordinance violated the Fair Housing Act when it attempted to limit the number of unrelated persons who could live in a dwelling zoned for single-family use, because no similar restrictions were imposed on residents of other types of dwellings. 514 U.S. 725 (1995). Likewise, in the 2015 case of *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the U.S. Supreme Court held that the Fair Housing Act authorizes "disparate impact" cases to strike down policies that disproportionately hurt minority groups without sufficient justification, even if the intent may not be to discriminate. The Court noted that challenges to exclusionary zoning policies under the Fair Housing Act "reside at the heartland of disparate-impact liability" citing several precedents. See 576 U.S. ____ (2015), in which the Supreme Court cited the following cases: "*Huntington*, 488 U. S., at 16–18 (invalidating zoning law preventing construction of multifamily rental units); *Black Jack*, 508 F. 2d, at 1182–188 (invalidating ordinance prohibiting construction of new multifamily dwellings); *Greater New Orleans Fair Housing Action Center v. St. Bernard Parish*, 641 F. Supp. 2d 563, 569, 577–78 (ED La. 2009) (invalidating post-Hurricane Katrina ordinance restricting the rental of housing units to only "'blood relative[s]' " in an area of the city that was 88.3% white and 7.6% black)."

For a general discussion of the Congress's powers to regulate interstate commerce, see "The Power to Regulate Commerce: Limits on Congressional Power," Congressional Research Service, May 16, 2014, <https://www.everycrsreport.com/reports/RL32844.html>.

28. Solomon Greene and Ingrid Gould Ellen, "Breaking Barriers, Boosting Supply: How the Federal Government Can Help Eliminate Exclusionary Zoning," Urban Institute, September 2020, 6, https://www.urban.org/sites/default/files/publication/102963/breaking-barriers-boosting-supply_0.pdf.

29. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc, et seq., <https://www.justice.gov/crt/religious-land-use-and-institutionalized-persons-act>.

30. See Brian T. Yeh, "The Federal Government's Authority to Impose Conditions on Grant Funds," Congressional Research Service, March 23, 2017, <https://fas.org/sgp/crs/misc/R44797.pdf> (summarizing key considerations: "for funding conditions to be permissible, they must (1) be 'unambiguous[]' as to the 'consequences of . . . participation' in the federal spending program; (2) germane 'to the federal interest in particular national projects or programs;' (3) not be barred by a separate constitutional provision; and (4) not go so far as functionally to coerce funding recipients, leaving them with no choice but to comply with a federal directive" citing among other Supreme Court decisions *South Dakota v. Dole*, 483 U.S. 203, 205-08 (1987) and *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2605 (2012).

31. Richard D. Kahlenberg, "Homes for Us All: Rethinking the American dream in cities and suburbs," *The American Prospect*, November 13, 2020; and Shane Reiner-Roth, "YIMBY Act passes House of Representatives, could pave the way for more affordable housing," *The Architect's Newspaper*, March 5, 2020, <https://www.archpaper.com/2020/03/yimby-act-passes-house-of-representatives/>; and "Yes In My Back Yard Act," H.R. 4351, 116th Congress, 2019–20, <https://www.congress.gov/bill/116th-congress/house-bill/4351/cosponsors?searchResultViewType=expanded> ("This bill requires certain Community Development Block Grant program recipients to submit to the Department of Housing and Urban Development information regarding their implementation of certain land-use policies [e.g. policies for reducing minimum lot size]").

32. Ryan Streeter, "When the Culture War Comes for Affordable Housing," *Real Clear Policy*, July 29, 2020, https://www.realclearpolicy.com/articles/2020/07/29/when_the_culture_war_comes_for_affordable_housing_500380.html. See also

Reihan Salam, "Make HUD Great Again: A Trump-friendly housing agenda that might actually help working- and middle-class families," *Slate*, January 12, 2017, <https://slate.com/news-and-politics/2017/01/a-trump-friendly-housing-agenda-that-would-help-the-working-class.html>. Salam, the president of the Manhattan Institute, argues that when exclusionary zoning laws in places like California drive up housing prices, it's everyone's problem because it makes California's low income residents more likely than low income residents elsewhere to qualify for federal rental subsidies, "which are paid for by taxpayers across the country."

33. See William H. Frey, "Census shows modest declines in black-white segregation," Brookings Institution, December 8, 2015, <https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/>.

34. Robert Putnam, *Our Kids: The American Dream in Crisis* (New York: Simon and Schuster, 2015), 38–39.

35. Juliet Eilperin and Michelle Boorstein, "In frank language, Obama tackles poverty's roots," *Washington Post*, May 13, 2015, A2, <https://www.washingtonpost.com/local/in-frank-language-obama-addresses-povertys-roots/2015/05/12/>; and "Why Obama Is Worried about 'Class Segregation,'" *National Journal*, May 12, 2015, <https://www.nationaljournal.com/s/27186>.

36. Kendra Bischoff and Sean Reardon, "The Continuing Increase in Income Segregation, 2007–2012," Stanford Center for Education Policy Analysis, 2016,

<https://cepa.stanford.edu/sites/default/files/the%20continuing%20increase%20in%20income%20segregation%20march2016.pdf>.

37. Raj Chetty, Nathaniel Hendren, and Lawrence F. Katz, "The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment," NBER Working Paper No. 21156, May 2015, 2–3. www.nber.org/papers/w21156.

38. Richard D. Kahlenberg, "Hearing from Low-Wage Working Mothers: How a Housing Program in Ohio Connects Children to Better Schools," The Century Foundation, August 4, 2020, <https://tcf.org/content/report/hearing-from-low-wage-working-mothers-how-a-housing-program-in-ohio-connects-children-to-better-schools/>.

39. See Tracy Jan, "HUD nominee lays out priorities at confirmation hearing," *Washington Post*, January 29, 2021, A12, <https://www.washingtonpost.com/business/2021/01/28/hud-fudge-confirmation-hearing/>.

40. See Ruy A. Teixeira, *Red, Blue, and Purple America: The Future of Election Demographics* (Washington, D.C.: Brookings Institution Press, 2008) (citing the research of sociologist Robert Cushing and political analyst Bill Bishop).

41. Rachael Dottle, "Where Democrats and Republicans Live in Your City," Five Thirty-Eight, May 20, 2019, <https://projects.fivethirtyeight.com/republicans-democrats-cities/>.

42. "Toward a comprehensive ban on exclusionary zoning practices," Equitable Housing Institute, December 2019, <https://www.equitablehousing.org/images/PDFs/PDFs-2018-/Toward-comprehensive-ban-EHI-memo-final-2.pdf>. 2 (citing "The State of the Nation's Housing 2018," Harvard Joint Center for Housing Studies, 5).

43. "Is the rent too high? Way more than 525,600 minutes of rent data," The FRED® Blog, April 15, 2019, <https://fredblog.stlouisfed.org/2019/04/the-climbing-cost-of-renting/>.

44. Kahlenberg, "Hearing from Low-Wage Working Mothers: How a Housing Program in Ohio Connects Children to Better Schools," The Century Foundation, August 4, 2020, <https://tcf.org/content/report/hearing-from-low-wage-working-mothers-how-a-housing-program-in-ohio-connects-children-to-better-schools/>.

45. Janet Williams (pseudonym), interview with Michelle Burris and Richard Kahlenberg, January 27, 2021.

46. "Economic Fair Housing Act," Equitable Housing Institute, 6–7 (citing several studies). Scott Wiener, Transcript of The Century Foundation/Bridges Collaborative Roundtable Discussion, "Paths for the New Administration to Reduce Exclusionary Zoning," December 11, 2020, 82–83 (hereinafter referred to as Roundtable Discussion Transcript).

47. See e.g. Conor Dougherty and Brad Plumer, "A Bold, Divisive Plan to Wean Californians from Cars," *New York Times*, March 16, 2018, <https://www.nytimes.com/2018/03/16/business/energy-environment/climate-density.html>.

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49. Richard D. Kahlenberg, "How Minneapolis Ended Single-Family Zoning," Century Foundation, October 24, 2019, <https://tcf.org/content/report/minneapolis-ended-single-family-zoning/>.
50. See Alec Tyson, "How important is climate change to voters in the 2020 election?" Pew Research Center, October 6, 2020, <https://www.pewresearch.org/fact-tank/2020/10/06/how-important-is-climate-change-to-voters-in-the-2020-election/>.
51. Philip Tegeler cites New Jersey, Massachusetts, California, and Connecticut as states that have passed laws designed to curb exclusionary zoning. Philip Tegeler, Commentary Submitted to The Century Foundation/Bridges Collaborative Roundtable, "Paths for the New Administration to Reduce Exclusionary Zoning," December 11, 2020 (hereinafter referred to as Roundtable Commentary). See also Noah Kazis, "Ending Exclusionary Zoning in New York City's Suburbs," Furman Center, November 9, 2020.
52. William A. Fischel, *Zoning Rules! The Economics of Land Use Regulation* (Cambridge, Mass.: Lincoln Institute of Land Policy, 2015), 150.
53. *Southern Burlington County NAACP v. Mount Laurel*, 67 N.J. 151 (1975), 174, 189, 190, and 212.
54. "Mount Laurel Doctrine," Fair Share Housing Center, <http://fairsharehousing.org/mount-laurel-doctrine/>.
55. Richard D. Kahlenberg, "Minneapolis Saw That NIMBYism Has Victims: Single-family zoning hurts a lot of people. In Minnesota's largest city, reformers put them front and center," *The Atlantic*, October 24, 2019, <https://www.theatlantic.com/ideas/archive/2019/10/how-minneapolis-defeated-nimbyism/600601/>.
56. See Laura Bliss, "Oregon's Single-Family Zoning Ban Was a 'Long Time Coming,'" *Bloomberg CityLab*, July 2, 2019, <https://www.bloomberg.com/news/articles/2019-07-02/upzoning-rising-oregon-bans-single-family-zoning>.
57. See Richard D. Kahlenberg, "Updating the Fair Housing Act to Make Housing More Affordable," The Century Foundation, April 9, 2018, <https://tcf.org/content/report/updates-fair-housing-act-make-housing-affordable/>.
58. Ingrid Gould Ellen, Roundtable Discussion Transcript, 44.
59. Patrick Sisson, "Virginia latest place to make single family zoning ban a political fight: A bill to allow duplexes statewide shows housing policy fights carry more weight as suburbs shift and housing crisis worsens," *Curbed*, December 26, 2019, <https://archive.curbed.com/2019/12/26/21037831/virginia-housing-density-zoning-suburbs>.
60. "Toward a comprehensive ban," Equitable Housing Institute, 13–31.
61. We will discuss in much further detail below the distinction between providing incentives for states to take action and giving a private right of action to individuals.
62. Scott Wiener, Roundtable Discussion Transcript, 77–78.
63. See, for example, Michael Andersen and Anna Fahey, "Lessons from Oregon's Missing Middle Success," Sightline Institute, November 4, 2019, <https://www.sightline.org/2019/11/04/lessons-from-oregons-missing-middle-success/> (Habitat for Humanity, AARP, NAACP were key organizations in Oregon's reform).
64. The role of builders, or developers, is complicated. Some developers naturally like the ability to build what they want, but other developers consider their ability to navigate the current zoning laws a competitive advantage, which they don't want to lose. See Kahlenberg, "How Minneapolis Ended Single-Family Zoning." Historically, developers did favor zoning laws to manage risk. Homebuyers worried that their investment's value would plummet if a factory was built next door, and developers and residential communities responded by supporting exclusive single-family zoning laws. William Fischel, Remarks at Equitable Housing Institute, July 9, 2020.
65. See Kahlenberg, "How Minneapolis Ended Single-Family Zoning."
66. Scott Wiener, Roundtable Discussion Transcript, 77–78.

67. Richard D. Kahlenberg, "Homes for Us All: Rethinking the American dream in cities and suburbs," *The American Prospect*, November 12, 2020, <https://prospect.org/culture/books/homes-for-us-all-diana-lind-brave-new-home/>.
68. Kahlenberg, "Updating the Fair Housing Act to Make Housing More Affordable."
69. Scott Wiener, Roundtable Discussion Transcript, 64.
70. Janne Flisrand, "Minneapolis' Secret 2040 Sauce was Engagement," *Streets MN*, December 10, 2018, <https://streets.mn/2018/12/10/minneapolis-secret-2040-sauce-was-engagement/>.
71. Michael Andersen and Anna Fahey, "Lessons from Oregon's Missing Middle Success," Sightline Institute, November 4, 2019, <https://www.sightline.org/2019/11/04/lessons-from-oregons-missing-middle-success/>; and Anna Fahey and Michael Andersen, "Message Memo: OR Missing Middle Bill, HB 2001," Sightline Institute, January 2019.
72. Fahey and Andersen, "Message Memo."
73. Scott Wiener, Roundtable Discussion Transcript, 68.
74. Scott Wiener, Roundtable Discussion Transcript, 82.
75. Ibraheem Samirah, Roundtable Discussion Transcript, 83.
76. Scott Wiener, Roundtable Discussion Transcript, 64; see also Scott Wiener, Roundtable Discussion Transcript, 78.
77. *Ibid.*
78. *Ibid.*, 77.
79. *Ibid.*, 64.
80. *Ibid.*, 77.
81. Of course, there are other possibilities beyond the eight outlined in this report. For example, in 1993 University of North Carolina Law professor Jack Boger proposed limiting the federal tax deductibility of mortgage interest in communities with exclusionary zoning. See John Charles Boger, "Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction," *University of North Carolina Law Review* 71, no. 5 (1993): 1573–618, <https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=3508&context=nclr>. His idea is intriguing but may have less power following the 2017 Trump tax legislation, which doubled the standardized deduction and drove down the proportion who use the mortgage tax deduction to fewer than 10 percent of taxpayers. See Sarah O'Brien, "Tax bill will slash by half the number of homeowners using the mortgage deduction," *CNBC*, April 3, 2018, <https://www.cnn.com/2018/04/23/tax-bill-will-slash-the-number-of-homeowners-claiming-the-mortgage-deduction.html>.
82. Noah Kazis, Roundtable Commentary. See also Sonia Hirt, "To zone or not to zone? Comparing European and American Land-use Regulation," *PNDonline* (2010), https://vtechworks.lib.vt.edu/bitstream/handle/10919/48185/hirt_to_zone_or_not_to_zone.pdf?sequence=4 6 (re Germany) and Christopher S. Elmendorf and Darien Shanske, "Auctioning the Upzone," *Case Western Reserve Law Review* 70 (2020): 540–41, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4859&context=caselrev> (re Japan).
83. Greene and Ellen, "Breaking Barriers," 9.
84. Brandon Fuller, Roundtable Commentary.
85. Jenny Schuetz, Roundtable Commentary; Noah Kazis, Roundtable Discussion Transcript, 16.
86. Richard Rothstein, "Suppressed History: The Intentional Segregation of America's Cities," *The American Educator*, Spring 2021, <https://www.aft.org/ae/spring2021/rothstein>.
87. Noah Kazis, Roundtable Commentary.
88. Brandon Fuller, Roundtable Commentary.
89. "The Biden Plan for Investing in our Communities Through Housing," Biden–Harris 2020 Campaign, <https://joebiden.com/housing/>.
90. Salin Geevarghese, Roundtable Commentary. See also Rolf Pendall, Roundtable Discussion Transcript, 71.

91. "Sustainable Communities Initiative," U.S. Department of Housing and Urban Development Office of Sustainable Communities, <https://www.hud.gov/hudprograms/sci>.
92. See Kriston Capps, "Bipartisan Bill Would Bring \$1.5 Billion to Spur New Housing," *Bloomberg CityLab*, March 23, 2021, <https://www.bloomberg.com/news/articles/2021-03-23/klobuchar-bill-would-offer-yimby-grants-to-cities>.
93. Rolf Pendall, Roundtable Commentary.
94. "New Deal for Housing Justice: A Housing Playbook for the New Administration," Community Change, January 2021, <https://communitychange.org/wp-content/uploads/2021/01/New-Deal-for-Housing-Justice.Policy-Paper.Community-Change.1.2020.pdf>, 141.
95. "Fact Sheet: The American Jobs Plan," The White House, March 31, 2021. <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>. See also Andy Sullivan and Jarrett Renshaw, "Biden seeks to ease housing shortage with \$5 billion 'carrot, not stick' approach," Reuters, April 8, 2021 <https://www.reuters.com/article/us-usa-biden-infrastructure-zoning-idUSKBN2BV1CX>
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97. Philip Tegeler, Roundtable Commentary.
98. Megan Haberle and Philip Tegeler, "Coordinated Action on School and Housing Integration: The Role of State Government" *University of Richmond Law Review* 53 (2019), https://prrac.org/pdf/housing_and_school_integration_univ_of_richmond_l_rev_2019.pdf: 962; and Megan Haberle, Peter Kye, and Brian Knudsen, "Reviving and Improving HUD's Affirmatively Furthering Fair Housing Regulation: A Practice-Based Roadmap," Poverty and Race Research Action Council, December 2020, <https://prrac.org/pdf/improving-affh-roadmap.pdf>.
99. Megan Haberle, Roundtable Commentary.
100. Kriston Capps, "The Trump Administration Just Derailed a Key Obama Rule on Housing Segregation," *Bloomberg CityLab*, January 4, 2018, <https://www.bloomberg.com/news/articles/2018-01-05/trump-s-hud-delays-affirmatively-furthering-fair-housing>.
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103. Noah Kazis, Roundtable Commentary.
104. Demetria McCain, Roundtable Commentary.
105. Jenny Schuetz, "HUD can't fix exclusionary zoning by withholding CDBG funds," Brookings, October 15, 2018, <https://www.brookings.edu/research/hud-cant-fix-exclusionary-zoning-by-withholding-cdbg-funds/>.
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107. Haberle and Tegeler, "Coordinated Action," 963.
108. Pablo Zevallos, Roundtable Commentary.
109. Cory Booker, "Booker, Clyburn Take Innovative Two-Pronged Approach to Tackling Affordable Housing Crisis," October 23, 2019, <https://www.booker.senate.gov/news/press/booker-clyburn-take-innovative-two-pronged-approach-to-tackling-affordable-housing-crisis>.
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111. Kahlenberg, "Taking on Class and Racial Discrimination."
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115. Richard D. Kahlenberg, "Taking on Class and Racial Discrimination in Housing: Cory Booker's big idea to rein in exclusionary zoning," *The American Prospect*, August 2, 2018, <https://prospect.org/civil-rights/taking-class-racial-discrimination-housing/>.
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120. CassandraRobertson, Roundtable Discussion Transcript, 7.
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124. Greene and Ellen, "Breaking Barriers," 8.
125. Greene and Ellen, "Breaking Barriers," 12.
126. Greene and Ellen, "Breaking Barriers," 9.
127. Greene and Ellen, "Breaking Barriers," 10.
128. Greene and Ellen, "Breaking Barriers," 10.
129. Ingrid Gould Ellen, Roundtable Discussion Transcript, 8.
130. Philip Tegeler, Roundtable Discussion Transcript, 56.
131. Megan Haberle Roundtable Commentary; see also Megan Haberle and Philip Tegeler, "Coordinated Action on School and Housing Integration: The Role of State Government," *University of Richmond Law Review* (2019),
132. Philip Tegeler, Roundtable Commentary.
133. Greene and Ellen, "Breaking Barriers," 11.
134. See e.g. Brandon Fuller, Roundtable Commentary (noting the attractiveness of setting goals but then gives jurisdictions the flexibility to get there); and Salin Geevarghese, Roundtable Commentary (same).
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136. Jenny Schuetz, Roundtable Commentary. See also Jenny Schuetz, "Is zoning a useful tool or a regulator barrier?" *Brookings*, October 31, 2019, <https://www.brookings.edu/research/is-zoning-a-useful-tool-or-a-regulatory-barrier/>.
137. Jenny Schuetz, Roundtable Commentary.
138. Greene and Ellen, "Breaking Barriers," 11. See also Cassandra Robertson, Roundtable Discussion Transcript, 7.
139. Olatunde Johnson, Roundtable Discussion Transcript, 76.
140. Noah Kazis, Roundtable Commentary.
141. Noah Kazis, Roundtable Commentary.
142. Greene and Ellen, Breaking Barriers, Boosting Supply, 8-9.
143. Noah Kazis, Roundtable Discussion Transcript, 16.
144. Noah Kazis, Roundtable Commentary (heavier political lift).

145. Jenny Schuetz, Roundtable Commentary. See also Jenny Schuetz, Roundtable Discussion Transcript, 71.
146. Equitable Housing Institute, "Economic Fair Housing Act," 3. See also Megan Haberle, Roundtable Commentary (arguing that the Greene/Ellen proposal needs a private right of action to enforce efforts to reduce exclusionary zoning).
147. *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 135 S.Ct., 2507, 2521–22 (2015).
148. *United States v. City of Black Jack*, 508 F.2d 1179, 1183 (8th Cir. 1974).
149. *Huntington Branch, NAACP v. Huntington*, 844 F.2d 926, 928 (2d. Cir. 1988). See also Jerusalem Demsas, "America's racist housing rules really can be fixed: More than 50 years after passage of the Fair Housing Act, it's time to sue the suburbs," *Vox*, February 17, 2021, <https://www.vox.com/22252625/america-racist-housing-rules-how-to-fix>. Jerusalem Demsas, "How to convince a NIMBY to build more housing: A new Vox and Data for Progress poll indicates voters increase support for building more homes when presented with an economic case for it," *Vox*, February 24, 2021.
150. *Inclusive Communities Project*, slip opinion, 18.
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156. Philip Tegeler, Roundtable Commentary.
157. Stacy Seicshnaydre, "Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act," *American University Law Review* 63, no. 2 (2013), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1906&context=aulr>.
158. Pablo Zevallos, Roundtable Commentary.
159. See Richard D. Kahlenberg, "An Economic Fair Housing Act," The Century Foundation, August 3, 2017, <https://tcf.org/content/report/economic-fair-housing-act/>. See also Richard D. Kahlenberg, "The Walls We Won't Tear Down," *New York Times*, August 3, 2017, <https://www.nytimes.com/2017/08/03/opinion/sunday/zoning-laws-segregation-income.html>. The law would also run parallel to the Religious Land Use Act, which to end local zoning ordinances that discriminate against religious institutions.
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161. "Economic Fair Housing Act of 2021: Partial Draft Bill and Comments," Equitable Housing Institute, November 30, 2020, 1, https://www.equitablehousing.org/images/PDFs/PDFs-2018-/EHI_Economic_FHA_of_2021_draft-rev_11-30-20.pdf. For an earlier version, see "Toward a comprehensive ban on exclusionary housing practices," Equitable Housing Institute, December 2019, https://www.equitablehousing.org/images/PDFs/PDFs-2018-/EHI-Toward-comprehensive-ban-tech_edits-10-2020.pdf.

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163. "Economic Fair Housing Act," Equitable Housing Institute, 1 and 2 n3.
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173. See Robert D. Putnam and Shaylyn Romney Garrett, *The Upswing: How America Came Together a Century Ago and How We Can Do It Again* (New York: Simon & Schuster 2020), 234, Figure 6.9.
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175. Scott Wiener, Roundtable Discussion Transcript, 79.
176. Ilya Somin, Roundtable Discussion Transcript, 75; Ilya Somin, Roundtable Commentary.
177. Phil Tegeler, Roundtable Discussion Transcript, 60
178. Olati Johnson, Roundtable Discussion Transcript, 58.
179. See Brian T. Yeh, "The Federal Government's Authority to Impose Conditions on Grant Funds," Congressional Research Service, March 23, 2017, <https://fas.org/sgp/crs/misc/R44797.pdf> (summarizing key considerations: "for funding conditions to be permissible, they must (1) be "unambiguous[]" as to the "consequences of participation" in the federal spending program; (2) germane "to the federal interest in particular national projects or programs;" (3) not be barred by a separate constitutional provision; and (4) not go so far as functionally to coerce funding recipients, leaving them with no choice but to comply with a federal directive" citing among other Supreme Court decisions *South Dakota v. Dole*, 483 U.S. 203, 205-08 (1987) and *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2605 (2012).
180. *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2605 (2012). See also Pablo Zevallos Commentary.
181. Olaunde Johnson, Roundtable Discussion Transcript, 76.
182. Noah Kazis, Roundtable Commentary.
183. See "Economic Fair Housing Act," Equitable Housing Institute, 7–8 (citing Peter Ganong and Daniel Shoag, "Why has regional income convergence in the U.S. declined? " *Journal of Urban Economics* 102 (2017): 76–90 (finding "hyperinflation in housing costs in the wealthier states since 1980 has had adverse effects on the upward mobility of American workers in other states, and on the American economy overall"). See also Noah Kazis, "Ending Exclusionary Zoning in New York City's Suburbs," Furman Center, November

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190. See e.g. Roger Starr, "The Lesson of Forest Hills," *Commentary*, June 1972, <https://www.commentarymagazine.com/articles/roger-starr-2/the-lesson-of-forest-hills/>
191. Tyronda Minter, Roundtable Discussion Transcript, 49. See also Brandon Fuller, Roundtable Commentary.
192. Paul Jargowsky, "What Would a New Kerner Commission Conclude Today?" *Pathways*, Winter 2019, https://inequality.stanford.edu/sites/default/files/Pathways_Winter2019_Kerner.pdf, 45, Table 1. The highest segregation rates can be found when race and class combine. The dissimilarity index between poor Black people and affluent white people is an astounding 79.
193. Kendra Bischoff and Sean Reardon, "The Continuing Increase in Income Segregation, 2007–2012," Stanford Center for Education Policy Analysis, 2016.
194. Paul Jargowsky, "What Would a New Kerner Commission Conclude Today?" *Pathways*, Winter 2019, 44.
195. Tom Loftus, Memorandum to Author, June 8, 2020.
196. Ibid.
197. Stacy Seicshnaydre, "Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act," *American University Law Review* 63, no. 2 (2013).
198. Pablo Zevallos, Roundtable Commentary.
199. Brandon Fuller, Roundtable Commentary.
200. Noah Kazis, Roundtable Commentary. See also Jenny Schuetz, Roundtable Commentary (the major challenge of the ban on exclusionary zoning is "the difficulty in defining what constitutes problematic zoning"); and Noah Kazis, Roundtable Discussion Transcript, 18.

201. Sheryl Cashin, "A Reply to Kahlenberg," Poverty and Race Research Action Council, 2017, 5–6.
202. Lisa Rice, Roundtable Discussion Transcript, 31.
203. Scott Wiener, Roundtable Discussion Transcript, 64; see also Scott Wiener, Roundtable Discussion Transcript, 78.
204. See Tom Loftus, "Resolving Displacement Concerns In Gentrifying Urban Neighborhoods," Equitable Housing Institute, March 11, 2021 (Draft).
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211. Jenny Schuetz, Roundtable Discussion Transcript, 66.
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216. Ilya Somin, "Expanding housing and job opportunities by cutting back on zoning," *Washington Post*, June 10, 2017, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/20/expanding-housing-and-job-opportunities-by-cutting-back-on-zoning/>.
217. Ilya Somin, Roundtable Discussion Transcript, 48.
218. Ilya Somin, Roundtable Discussion Transcript, 76.
219. Ilya Somin, Roundtable Commentary. See also Ilya Somin, Roundtable Discussion Transcript, 48 and Ilya Somin, *The Grasping Hand: Kelo v. City of New London and the Limits of Eminent Domain*, rev. ed. (Chicago: University of Chicago Press, 2016), chapter 5. Some conservatives also see curbing exclusionary zoning as a fiscally responsible way of reducing the affordability crisis. By removing artificial barriers to housing supply, reform can reduce upward pressure on housing prices, without a new government investment in

public housing. Of course, many progressives want to attack the problem from both angles—increase supply of both public and market housing. But zoning reform can be an area of common ground.

220. Noah Kazis, Roundtable Commentary.

221. Pablo Zevallos, Roundtable Commentary.

222. Peter Harrison and Henry Kraemer, “Homes for All: The Progressive 2020 Agenda for Housing,” Data for Progress, May 2019, https://www.filesforprogress.org/reports/homes_for_all.pdf.

223. Scott Wiener, Roundtable Discussion Transcript, 77.

224. Richard Kahlenberg, “A Path Forward on Reparations?” *Democracy Journal*, September 16, 2020, <https://democracyjournal.org/magazine/a-path-forward-on-reparations/>.

225. Ta-Nehisi Coates, “The Case for Reparations,” *The Atlantic*, June 2014, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

226. Heather McGhee, *The Sum of Us: What Racism Costs Everyone and How We Can Prosper Together* (New York: One World, 2021).

227. William J. Barber II, *The Third Reconstruction: Moral Mondays, Fusion Politics, and the Rise of a New Justice Movement* (Boston: Beacon Press, 2016).

228. See Richard D. Kahlenberg, “The Inclusive Populism of Robert F. Kennedy,” The Century Foundation, March 16, 2018, <https://tcf.org/content/report/inclusive-populism-robert-f-kennedy/>; Richard D. Kahlenberg, “The Bobby Kennedy Pathway,” *New York Times*, March 16, 2018; and Simon Greer and Richard D. Kahlenberg, “How Progressives Can Recapture Seven Deeply Held American Values,” The Century Foundation, February 26, 2020, <https://tcf.org/content/report/progressives-can-recapture-seven-deeply-held-american-values/>.

229. See Richard D. Kahlenberg, “Achieving Better Diversity: Reforming Affirmative Action in Higher Education,” The Century Foundation, December 3, 2015, <https://tcf.org/content/report/achieving-better-diversity/>. See also Matthew Watkins and Neena Satija, “How an Attempt to Boost Diversity at Texas Colleges Could Kill Affirmative Action,” *The Texas Tribune*, March 29, 2016, <https://apps.texastribune.org/price-of-admission/>.

230. Scott Wiener, Roundtable Discussion Transcript, 69; see also Scott Wiener, Roundtable Discussion Transcript, 78.

231. Kahlenberg, “Updating the Fair Housing Act to Make Housing More Affordable.”



Richard D. Kahlenberg, Director of K–12 Equity and Senior Fellow

Richard D. Kahlenberg is director of K–12 equity and senior fellow at The Century Foundation with expertise in education, civil rights, and equal opportunity.