Post-Neoliberal Housing Policy

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POST-NEOLIBERAL HOUSING POLICY

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For the last half-century, housing policy debates and proposals have been dominated by neoliberal, market-based ideas. But after decades of such policies, the United States faces a housing crisis. Property values have soared in recent years, putting housing out of reach of many people. Policymakers on both right and left are looking for new, post-neoliberal solutions to policy problems. In the housing context, a popular and scholarly consensus has emerged over the last decade that local zoning regulations are largely to blame for the country's affordability crisis. The policy prescriptions that follow from this diagnosis seem obvious: loosen zoning limits, defang regulatory restrictions on growth, and free developers to meet housing demand.

In this Article, we argue that focusing exclusively – or even primarily – on loosening or eliminating zoning rules is misguided. What is needed is a recognition of the more fundamental, structural issues in housing markets, and a more creative and comprehensive set of policy responses. Yes, zoning in some places is a meaningful impediment to development. But the obsession with zoning is conceptually flawed, descriptively problematic in that it ignores or obscures the many other causes of the affordability crisis, and potentially perverse by promoting solutions that, in some cases, may be ineffective and even harmful. Indeed, at the extreme, those who are laser-focused on zoning are falling back into a neoliberal paradigm that makes overly simplistic assumptions about markets.

Moving beyond neoliberal housing policy solutions will require embracing the reality that public policy choices and legal rules set up the housing marketplace, and that they can channel market actors into pro-social, competitive behaviors or into extractive and problematic ones. Increasing the supply of housing and ensuring housing affordability therefore requires market-crafting and market-shaping, not abdicating responsibility for—and regulatory control over—land use decisions.

A post-neoliberal approach would therefore expand the housing policy toolkit and take an all-of-the-above, comprehensive approach. An industrial policy for the housing sector, including public investment, procurement, and regulatory standard-setting interventions, could mean cheaper and faster homebuilding. Letting go of the neoliberal obsession with privatization could unlock the public's role in housing provision, so governments can increase housing supply directly and efficiently. Rather than embrace trickle down policies for the rich, Pigouvian-

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inspired taxes that target undesirable behaviors can help prevent constraints on supply. Finally, because regulations are market-shaping, policymakers can adopt antimonopoly and consumer regulations, supply-side zoning rules, and macro-level regulations to disperse economic growth.

While neoliberalism's descendants may have captured the conventional wisdom among elite commentators and scholars that deregulation is the primary objective in the housing sector, our examples show that a post-neoliberal approach is a viable alternative paradigm and that, at least in some areas, post-neoliberal housing policies are emerging from the bottom up.

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INTRODUCTION

For the last half-century, many of the most important debates and proposals on housing policy have been dominated by neoliberal ideas.[1] By neoliberal, we mean a preference for market allocation of goods and services by for-profit enterprises.[2] Neoliberal economic policy has tended to focus on four types

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[1] For accounts, *see, e.g.,* Keith Jacobs, *Neoliberal Housing Policy: An International Perspective* (2019); Stuart Hodkinson, Paul Watt & Gerry Mooney, *Introduction: Neoliberal Housing Policy—Time for a Critical Re-Appraisal,* 33 CRITICAL SOC. POL'Y 3 (2013); Kiran Sandhu & Stanislaw Korzeniewski, *The Impact of Neo-Liberal Ideology on Housing Policy and Practice,* 1 ITPI J. 1 (2004); Raquel Rolnik, *Late Neoliberalism: The Financialization of Homeownership and Housing Rights,* 37 INT'L J. URB. & REG'L RES. 1058 (2013). For specific case studies, see, e.g., Rachel Friedman & Gillad Rosen, *The Face of Affordable Housing in a Neoliberal Paradigm,* 57 URBAN STUD. 959 (2020) (Israeli context); Joe Beswick, Walter Imilan & Patricia Olivera, *Access to Housing in the Neoliberal Era: A New Comparativist Analysis of the Neoliberalisation of Access to Housing in Santiago and London,* 19 INT'L J. HOUS. POL'Y 288 (2019)

[2] *See, e.g.,* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005); GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER (2022). This isn't to say government isn't involved. Indeed, neoliberal ideas often had to be forced onto populations by government—because the people tend to prefer non-neoliberal policies. See QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM *passim* (2018) (making this point).

of actions: deregulation, trade liberalization, privatization, and fiscal austerity.[3] To the extent that social problems could not be solved through market mechanisms directly, the neoliberal solution would be a form of tax-and-transfer, in which markets allocate resources and *ex post* taxation enables transfers in the form of subsidies or vouchers to help the market serve everyone.[4]

In the housing context, neoliberal ideas have set the policy agenda for decades.[5] Privatization and austerity went hand-in-hand as policies shifted from supporting the creation and financing of public housing toward a financialized model that emphasized incentives and benefits for private investors. In the U.K., privatization of council houses was a signature Thatcher government policy.[6] In the U.S., investment in housing shifted away from public construction, entrenched by the federal "Faircloth Limit," which placed a cap on such developments,[7] and toward

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[3] This is the formulation of GANESH SITARAMAN, THE GREAT DEMOCRACY: HOW TO FIX OUR POLITICS, UNRIG THE ECONOMY, AND UNITE AMERICA 3, 16 (2019). *See also* MANFRED B. STEGER & RAVI K. ROY, NEOLIBERALISM: A VERY SHORT INTRODUCTION 14 (2010) (describing neoliberalism as including deregulation, liberalization, and privatization).

[4] *See, e.g.,* Zachary D. Liscow, *Redistribution for Realists,* 131 YALE L.J. 2449 (2022), for a summary of the general arguments for tax and transfer; *see also* Ilyana Kuziemko, Nicolas Longuet Marx, & Suresh Naidu, *The Political Effects of Neoliberalism,* L. & POL. ECONOMY BLOG (Feb. 27, 2024), https://lpeproject.org/blog/the-political-effects-of-neoliberalism/; Matthew Yglesias, *Neoliberalism and Its Enemies, Part I*, SLOW BORING (Aug. 7, 2024), https://www.slowboring.com/p/neoliberalism-and-its-enemies-part ("the 'neoliberals' think you should try to address individual issues on the merits and deal with distributional concerns separately through tax policy and the welfare state").

[5] We don't mean to suggest that housing policy writ-large has been free-market. Throughout American history, governments have been actively involved in shaping and supporting housing markets. At the federal level alone, major housing initiatives span every century, from the Northwest Ordinance of 1787, the Homestead Acts of the late 19th century, to the creation of the Federal Housing Administration in 1934, the Section 8 voucher program in 1974, and the Federal Housing Finance Agency in 2008, among many others. The focus of housing policy has varied over this long period—from promoting westward migration, responding to economic crises, housing the poor, battling slums, supporting the needs of returning veterans, addressing discrimination, and, at times, reinforcing segregation.

[6] *See, e.g.,* Ray Forrest, *Privatization and Housing Under Thacher,* 13 J. URB. AFF. 201 (1991) (describing reforms).

[7] *See, e.g.,* Vickie S. Longosz, *Repositioning or Recapitalization of Public Housing, Mixed-Financed Housing, and Section 202 Elderly Housing and Keeping It Affordable*, 31 J. AFFORDABLE HOUS. & CMTY. DEV. L. 95, 104 (2022) ("The Faircloth Amendment states that the Department cannot fund the construction or operation of new public housing units with Capital or Operating Funds if the construction of those units would result in a net increase in the number of units the PHA owned, assisted, or operated as of October 1, 1999.").

a system of tax incentives including the Low Income Housing Tax Credit (LIHTC), which seeks to encourage private developers to build.[8]

Deregulation and liberalization were characteristic of housing finance policy. The breakdown of the New Deal financial regulatory regime from the 1980s through the 2000s, including creating a national mortgage market by deregulating inter-state banking rules, was central to reshaping housing markets.[9] Liberalization emerged in the housing context not in the form of trade deals but as increased foreign investment in real estate and mortgage backed securities.[10]

During the neoliberal era, vouchers became perhaps the paradigmatic policies for expanding housing affordability.[11] A voucher system assumes that housing markets work reasonably well, but that some people will still not have enough money for rent. Giving them a voucher earmarked for housing would, in theory, enable them to access housing on the private market.[12] Vouchers are, in other words, a form of redistribution via a market-based tax-and-transfer program. The voucher approach has well-known problems and limitations, even as it remains a cornerstone of federal housing policy.[13]

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[8] *See, e.g.,* David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit,* 6 J.L. & POL'Y 537, 537, 542 (1998) (describing LIHTC).

[9] *See, e.g.,* DAN IMMERGLUCK, FORECLOSED 17–47 (2009) (describing history); RANDALL S. KROSZNER & PHILIP E. STRAHAN, REGULATION AND DEREGULATION OF THE U.S. BANKING INDUSTRY: CAUSES, CONSEQUENCES, AND IMPLICATIONS FOR THE FUTURE, IN ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED? 485, 488–505 (NANCY L. ROSE ED., 2014) (SAME).

[10] *See, e.g.,* Kevin F. Gotham, *The Secondary Circuit of Capital Reconsidered: Globalization and the U.S. Real Estate Sector,* 112 AM. J. SOC. 231, 244–45 (2017) (demonstrating ratio of foreign investment in U.S. real estate increasing from 0.44 in 1973 to above 4 through 2006); *see also* U.S. Gov't Accountability Office, Foreign Investment: Analyzing Foreign Investment in Commercial Real Estate, GAO/NSIAD-91-140 (1991), https://www.gao.gov/assets/nsiad-91-140.pdf; Nat'l Ass'n of Realtors, 2024 International Transactions in U.S. Residential Real Estate (2024), https://cdn.nar.realtor/sites/default/files/documents/2024-international-transactions-in-us-residential-real-estate-report-07-17-2024.pdf; FED. RES. BANK OF ST. LOUIS, MORTGAGE DEBT OUTSTANDING BY SECTOR, https://fred.stlouisfed.org/series/BOGZ1FR265014003A. Herman M. Schwartz shows that massive foreign investment in mortgage-backed securities (MBS) was among the key drivers of U.S. economic growth during the early 2000s, with foreign ownership of MBS increasing from $133 billion in 2001 to over $1 trillion by 2007. HERMAN M. SCHWARTZ, SUBPRIME NATION: AMERICAN POWER, GLOBAL CAPITAL, AND THE HOUSING BUBBLE 104 (2009).

[11] Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project,* 57 UCLA L. REV. 983 (2010) (arguing for the inherent superiority of vouchers).

[12] *See, e.g.,* Noah M. Kazis, *The Failed Federalism of Affordable Housing: Why States Don't Use Housing Vouchers,* 121 MICH. L. REV. 221, 229–40 (2022) (providing history and rationale of voucher system).

[13] *See id*. at 232 (describing the "balance" in federal law between vouchers and place-based subsidies, with vouchers' use growing). Among the well-known but contested limitations of vouchers are the extent to which they are capitalized into rental prices. *Compare*

The problem is that after decades of neoliberal housing policies, the United States faces a housing crisis. Property values have soared in recent years, especially since 2012, putting housing out of reach of many people.[14] According to recent census data, nearly half of America's renters are housing cost burdened, meaning that they are spending more than 30% of their income on housing.[15] Owners, too, are feeling the effects. Nearly 20 million households that own their own homes are also housing cost burdened – for a staggering total of one-third of all U.S. households now spending more than 30% of their income on housing.[16] In real terms, the ratio of home prices to inflation is near the highest it has been since 1890, the earliest the data are available.[17] This general data, of course, hides the true effects of these costs on poor and middle-class families, where housing costs in many places have resulted in acute financial strains and even homelessness,[18] simply because of the unavailability of affordable housing options.[19]

Scott Susin, *Rent Vouchers and the Price of Low-Income Housing*, 83 J. PUBL. ECON.109 (2002) (finding significant impact) Michael D. Eriksen & Amanda Ross, *Housing Vouchers and the Price of Rental Housing*, 7 AM. ECON. J. ECON. POL'Y 154 (2015) (same); *with* Michael D. Erskine & Amanda Ross, *Housing Vouchers and the Price of Rental Housing*, 7 AM. ECON. J. ECON. POL. 154 (2015) (finding no impact) see also Ingrid Gould Ellen, *What Do We Know About Housing Choice Vouchers?,* 80 REG'L SCI. & URB. ECON. 103380 (2020) (summarizing studies). Vouchers are also notoriously difficult for tenants to get and to use. "In 2021, only two of the fifty largest housing authorities had average waitlist lengths of less than one year, while seven averaged waitlist durations of four to over ten years." Kaitlyn M. Sims, et al., *Barriers to safe and secure housing in the US section 8 voucher programme post-Dobbs*, 44 CRITICAL SOC. POL'Y 523 (2024). Leading researchers found in 2019 that only 61% of recipients were able to use their vouchers before they expired. *See* Ingrid G. Ellen, et al., *Using HUD Administrative Data to Estimate Success Rates and Search Durations for New Voucher Recipients*, Feb. 23, 2023, *available at* https://www.huduser.gov/portal/publications/Using-HUD-Administrative-Data-to-Estimate-Success-Rates.html.

14 Federal Reserve Bank of St. Louis, *Median Sales Price of Houses Sold for the United States,* FRED ECONOMIC DATA, https://fred.stlouisfed.org/series/MSPUS (updated Jan. 27, 2025).

15 Press Release, Renter Households Remain Cost-Burdened, Especially Black and Hispanic Renters, U.S. CENSUS BUREAU (Dec. 12, 2024), https://www.census.gov/newsroom/press-releases/2024/renter-households-cost-burdened-race.html.

16 Peyton Whitney, *More than 42 Million U.S. Households Were Cost-Burdened in 2022,* HARVARD JCHS BLOG (Oct. 3, 2023), https://www.jchs.harvard.edu/blog/more-42-million-us-households-were-cost-burdened-2022.

17 Will Beaufoy, *Home Price vs. Inflation,* LONGTERMTRENDS, https://www.longtermtrends.net/home-price-vs-inflation/ (last visited Jan. 28, 2025).

18 *See, e.g.,* Jason DeParle, *Migrants and End of Covid Restrictions Fuel Jump in Homeless,* N.Y. TIMES, (Dec. 27, 2024), at A22 ("Homelessness soared to the highest level on record this year, driven by forces that included high rents, stagnant wages and a surge in migrants seeking asylum, the federal government reported on Friday.").

19 *See* JOINT CTR. FOR HOUSING STUD., AMERICA'S RENTAL HOUSING 2024 (2024), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2024.pdf.

Decades of neoliberal economic policy ideas have led to crises in other sectors as well, and as a result, policymakers on both right and left are now looking for new, post-neoliberal solutions to policy problems.[20] In the housing context, a popular and scholarly consensus has emerged over the last decade that local zoning regulations are largely to blame for the country's affordability crisis.[21] Zoning regulations constrain density and impose regulatory hurdles for developers.[22] Opponents charge zoning with enabling neighbors' Not In My Back Yard (NIMBY) objections to new development.[23] Katherine Einstein and her co-authors have dubbed the older, whiter participants who tend to dominate local zoning meetings "neighborhood defenders."[24] The result is a kind of "opportunity hoarding," where in-place residents use local zoning to exclude new housing.[25] On some accounts, this approach corresponds with the rise of neoliberalism.[26] Although comprehensive zoning has been around since the 1920s, opponents argue that restrictive

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[20] *See, e.g.,* Sarah Jones, *Chris Murphy Wants Democrats to Break Up with Neoliberalism,* NEW YORK MAG. (Nov. 20, 2024), https://nymag.com/intelligencer/article/chris-murphy-democrats-neoliberalism.html; Oren Cass, *Founder's Letter: Neoliberal Falls Apart*, AM. COMPASS (Dec. 17, 2020), https://americancompass.org/2020-founders-letter/. *See also* Larry Kramer, *Beyond Neoliberalism,* WILLIAM & FLORA HEWLETT FOUND. (Apr. 28, 2018), https://hewlett.org/library/beyond-neoliberalism-rethinking-political-economy/; Ganesh Sitaraman, *After Neoliberalism*, THE NATION (Dec. 24, 2019), https://www.thenation.com/article/archive/neoliberalism-policies-nationalism/.

[21] *See, e.g.*, Jerusalem Demsas, *Who's Responsible for the Housing Crisis?,* ATLANTIC, (Sept. 3, 2024), https://www.theatlantic.com/podcasts/archive/2024/09/housing-crisis-local-government/679670/; Matthew Yglesias, *The Promise and Peril of Obama's YIMBY,* SLOW BORING (Jan. 15, 2024), https://www.slowboring.com/p/the-promise-and-peril-of-obamas-yimby; *see also*, Christopher Serkin & Kelsea Best, *Growth ≠ Density: Zoning Deregulation and the Enduring Problem of Sprawl,* 50 PEPPERDINE L. REV. 557, 562 N.25 (2023).

[22] *See*, Jenny Schuetz, *Is Zoning a Useful Tool or a Regulatory Barrier,* BROOKINGS (Oct. 31, 2019), https://www.brookings.edu/research/is-zoning-a-useful-tool-or-a-regulatory-barrier/#cancel ("Research shows that overly restrictive zoning makes it hard for developers to build new housing, driving up rents and prices.").

[23] *See, e.g.,* Christopher Serkin, *Creating Density: The Limits of Zoning Reform,* 11 BRIGHAM-KANNER PROP. RTS. J. 183, 185–86 (2022) (hereinafter Serkin, *Creating Density*) (describing objections to zoning).

[24] KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS (2020) (studying participation in local land use meetings).

[25] RICHARD V. REEVES, DREAM HOARDERS 104–08 (2017); *see also,* Olatunde C.A. Johnson, *Inclusion, Exclusion, and the "New" Economic Inequality,* 94 TEX. L. REV. 1647, 1655 (2016) (describing "opportunity hoarding"); Carrie Engel, *Play the Dream Hoarders Game,* BROOKINGS (July 13, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/13/play-the-dream-hoarders-game/ (providing 8-bit interactive illustration of the phenomenon).

[26] *See*, *e.g.,* EZRA KLEIN & DEREK THOMPSON, ABUNDANCE (2025).

attitudes towards development largely emerged in the 1970s and spread thereafter, during the ascendency of neoliberalism.[27]

The policy prescriptions that follow from this diagnosis seem obvious: loosen zoning limits, defang regulatory restrictions on growth (including environmental regulations and historic preservation), and free developers to meet housing demand.[28] Starting in California, the YIMBY ("Yes In My Back Yard") movement has demanded more housing and called for eliminating regulatory barriers that stand in the way.[29] In recent years, the movement has gained traction nationally, with leading politicians across the political spectrum announcing support for this approach to housing policy. In his 2024 Democratic Convention speech, former President Barack Obama called for a YIMBY housing agenda.[30] The Harris-Walz ticket embraced the approach, calling on government to "take down barriers and cut red tape" that stands in the way of housing development.[31] YIMBY activists embraced Harris as one of their own.[32] On the right, too, the YIMBY platform dominates policy proposals, even if not always by that name. The conservative policy blueprint "Project 2025" called for loosening regulations and unlocking more private sector development to meet housing needs, while scaling back investments in public housing.[33] On the surface, this is a surprising alliance of advocates across the political spectrum.[34]

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[27] *See id.; see also* Roderick M. Hills & David Schleicher, *How the Gentry Won: Property Law's Embrace of Stasis,* (forthcoming Texas L. Rev.).

[28] *See, e.g.,* MATTHEW YGLASIAS, ONE BILLION AMERICANS 185-214 (2020) (arguing for broad ranging regulatory reform to allow more building).

[29] *See, e.g.*, Kenneth Stahl, *"Yes in My Backyard:" Can a New Pro-Housing Movement Overcome the Power of NIMBYs?,* 41 ZONING & PLAN. REP. 3 (Mar. 2018) (describing movement); *see also generally*, CONOR DOUGHERTY, GOLDEN GATES (2020) (describing California YIMBY battles to increase development).

[30] *See,* Madison Pauly, *Democrats Grapple with Housing Crisis at National Convention,* MOTHER JONES (Aug. 21, 2024), https://www.motherjones.com/politics/2024/08/democratic-national-convention-obama-harris-housing/; see also, Barack Obama, Remarks by the President at U.S. Conference of Mayors (Jan. 21, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/21/remarks-president-us-conference-mayors, THE WHITE HOUSE ("We can work together to break down rules that stand in the way of building new housing and that keep families from moving to growing, dynamic cities.").

[31] Press Release, Harris-Walz Economic Policy (Aug. 2024), https://nhc.org/wp-content/uploads/2024/08/Harris-Walz-economic-policy-press-release.pdf.

[32] Daniel Marans & Kevin Robillard, *Why the YIMBY Pro-Housing Movement is So Excited About Kamala Harris,* HUFFPOST (Aug. 28, 2024), https://www.huffpost.com/entry/yimby-housing-movement-kamala-harris_n_66cfa806e4b04f2c61c9b6db.

[33] Michael Lewyn, *Project 2025 and Housing Policy,* PLANETIZEN (Aug 4, 2024), https://www.planetizen.com/blogs/130699-project-2025-and-housing-policy (summarizing and evaluating Project 2025 housing policy).

[34] *See, e.g.,* DOUGHERTY, *supra* note 29, at 36 (describing a 2016 conference and noting that "Most of the attendees identified as liberal, but the YIMBY movement had started to attract a contingent of anti-regulation conservatives."); *see also* Christopher Serkin, *The*

Cities and states across the country have been industriously implementing the YIMBY agenda in measures both large and small. A clarion call to end single-family zoning is ringing across the country.[35] California, Minnesota, and other states have adopted deregulatory YIMBY strategies to promote development.[36] New York's City of Yes zoning reforms are intended to loosen land use regulations to permit more development.[37] Policy advocates have ambitious agendas to go further: to allow more development as of right, to limit environmental and historic preservation protections, and to strike down density limits broadly. Scholars and commentators focus on zoning and land use regulations as the principal impediment to addressing our housing needs.[38] Many people today believe "zoning is a problem to be overcome."[39]

New Politics of New Property and the Takings Clause, 42 VM. L. REV. 1, 14 (2017) (describing liberal and conservative alliance around zoning deregulation).

[35] *See, e.g.,* Jake Wegmann, *Viewpoint: Death to Single-Family Zoning . . . and New Life to the Missing Middle, Time to End Single-Family Zoning,* 86 J. AM. PLAN. ASS'N 113, 117 (2020); Laurel M. Shugart, *Proposal to Abolish Single-Family Zoning in Cambridge Moves Forward,* HARV. CRIMSON, (May 9, 2024), https://www.thecrimson.com/article/2024/5/9/single-family-zoning-proposal/; Dan Bertolet, *Nine Reasons to End Exclusionary Zoning,* SIGHTLINE INST. (Sept. 29, 2021), https://www.sightline.org/2021/09/29/nine-reasons-to-end-exclusionary-zoning/; Christian Britschgi, *Maine Becomes the Third State to End Single-Family-Only Zoning,* MAINE WIRE (Apr. 29, 2022), https://www.themainewire.com/2022/04/maine-becomes-the-third-state-to-end-single-family-only-zoning/; *The Conservative Case for Ending Single-Family Zoning,* STRONG TOWNS (July 8, 2020), https://www.strongtowns.org/journal/2020/7/7/abolish-single-family-zoning.

[36] *See, e.g.,* Benjamin Donel, *California's New Accessory Dwelling Units Laws: What You Should Know,* FORBES (Mar. 12, 2020), https://www.forbes.com/sites/forbesfinancecouncil/2020/03/12/californias-new-accessory-dwelling-units-laws-what-you-should-know/?sh=1f02ec4e17a3; Policy 1, Access to Housing: Increase the Supply of Housing and Its Diversity of Location and Types, MINNEAPOLIS 2040, https://minneapolis2040.com/policies/access-to-housing; Cambridge City, Mass., Policy Order 2020 #289, *Elimination of Single-Family Zoning,* CAMBRIDGEMA.GOV (Dec. 14, 2020), https://cambridgema.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=2757&MediaPosition=&ID=13192&CssClass=%3C.

[37] *See,* Matt Priznick, *Landmark 'City of Yes' Housing Creation Plan Approved with $5 Billion Push,* N.Y. YIMBY, Nov. 23, 2024, https://newyorkyimby.com/2024/11/landmark-city-of-yes-housing-creation-plan-approved-with-5-billion-push.html.

[38] *See, e.g.,* Vanessa Brown Calder, *Zoning, Land Use Planning, and Housing Affordability,* CATO INST. (Oct. 18, 2017), https://www.cato.org/policy-analysis/zoning-land-use-planning-housing-affordability (arguing the costs of land use regulations outweigh the cost to housing prices and affordability); Edward Glaeser, *Reforming Land Use Regulations,* BROOKINGS (Apr. 24, 2017), https://www.brookings.edu/research/reforming-land-use-regulations; Paul Krugman, *Why a Blue City Is Feeling the Blues,* N.Y. TIMES (Jan. 17, 2022), https://www.nytimes.com/2022/01/17/opinion/new-york-city-wall-street-economy.html.

[39] Christopher Serkin, *A Case for Zoning,* 96 NOTRE DAME L. REV. 749, 751 (2020) (hereinafter, Serkin, *A Case for Zoning*) (identifying scholarly consensus); *see also,* Richard Florida, *The Flip Side of NIMBY Zoning,* BLOOMBERG CITYLAB (Oct. 26, 2017), https://www.citylab.com/equity/2017/10/the-flip-side-of-nimby-zoning/543930/ ("It's

In this Article, we argue that focusing exclusively – or even primarily – on loosening or eliminating zoning rules is misguided. What is needed is a recognition of the more fundamental, structural issues in housing markets, and a more creative set of policy responses. Yes, zoning in some places is a meaningful impediment to development. Yes, zoning modernization and substantive reforms can be an important part of the response to the affordability crisis. But the obsession with zoning is conceptually flawed, descriptively problematic in that it ignores or obscures the many other causes of the affordability crisis, and potentially perverse by promoting solutions that, in some cases, may be ineffective and even harmful. Indeed, at the extreme, those who are laser-focused on zoning, to the exclusion or marginalization of other policy levers, are falling back into an overly-simplistic neoliberal paradigm: De-zoning is just the housing specific term for deregulation – and deregulation is one of the pillars of traditional neoliberal economic policy.

In Part I, we show why the new consensus on loosening zoning is insufficient – conceptually, diagnostically, and paradigmatically. The conceptual problem is that some of the most extreme YIMBY advocates target zoning as inherently problematic.[40] The policy director of the influential California YIMBY movement, M. Nolan Gray, has thus argued for "zoning abolition."[41] Like any regulatory regime, however, "zoning" and land use regulations more generally are market-shaping: they can be designed to channel market activity in a variety of directions. Some density limits might overly restrict building in some places, but in others, they help to ensure that infrastructure is developed efficiently, that municipal services are adequate for community needs, and that municipalities are able to attract development and investment in the long run.[42] The question should not be whether zoning is restrictive but rather whether less regulated markets will produce better land use and development outcomes. Sometimes the answer is yes, but sometimes it isn't.

With proper design and implementation, zoning can and should play an important role in shaping urban form. Indeed, zoning rules can be designed to *enable* affordable housing and enhance density, and they might also be important for confronting other public problems, like addressing climate change, preventing nuisances, reducing the externalized costs of new development, and controlling

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become perhaps the most widely accepted truism in urban development and economic policy circles: NIMBY zoning and overly restrictive land-use policies and building codes keep housing prices high, making superstar cities like New York and San Francisco less affordable. . . . Remedying this has won wide support from urban economists and city builders on both sides of the political aisle.").

[40] *See, e.g.,* Roger Valdez, *Zoning Is a 20th Century Solution to a 19th Century Problem, Let's End It,* FORBES (May 16, 2019), https://www.forbes.com/sites/rogervaldez/2019/05/16/zoning-is-a-20th-century-solution-to-a-19th-century-problem-lets-end-it/; Abdulrahman Ateya, *Why Stop at Ending Single-Family Zoning? End All Zoning in Ann Arbor,* MICH. DAILY (Feb. 22, 2023), https://www.michigandaily.com/opinion/why-stop-at-ending-single-family-zoning-end-all-zoning-in-ann-arbor/.

[41] M. NOLAN GREY, ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT 127 (2022).

[42] *See* Serkin, *A Case for Zoning*, *supra* note 39 (demonstrating how local governments actually use zoning today).

overbuilding where ecological dangers exist.[43] Particular zoning rules might be problematic of course. But zoning in some general sense is not the villain. More responsible zoning reformers acknowledge that zoning can serve important purposes, but they still frequently decry zoning limits on density or on many of the land use processes that create procedural barriers to developers building whatever and wherever they think the market will generate profits.[44]

YIMBYs' focus on zoning also leads to an extreme myopia in diagnosing deeper problems in the housing market. This is not entirely surprising. The YIMBY movement began in the San Francisco Bay area and then migrated to New York City, before expanding nationally.[45] Those two cities are similar to each other as coastal superstar cities facing significant development pressure in geographically constrained places, where new housing opportunities often take the form of redevelopment. Zoning in those cities may be an important barrier to growth, and loosening zoning in those cities may produce the outcomes that zoning reformers champion: more and denser development in the urban core.[46] But for this reason, they are not the best case studies from which to generalize. In other cities, zoning and building regulations might not be the problem; it could be infrastructure, labor force shortages, financing, or other issues. Moreover, looser zoning in these other cities may not result in a meaningful increase of housing, nor in compact, dense, and diverse housing options.

Perhaps because their movement began in these idiosyncratic cities, YIMBYs too often fail to account for the single most important event for housing policy in the last half-century: the 2008 financial crisis. The financial crash and Great Recession that followed were born of the housing market, and they – and the policies

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[43] *See, e.g.,* Serkin, *A Case for Zoning*, *supra* note 39 (identifying leading purposes of zoning); *see also,* Christopher Serkin, *Climate Zoning,* 99 NOTRE DAME L. REV. 1093, 1143 (2024) (examining how zoning can be implemented to reduce greenhouse gas emissions).

[44] *See infra* text accompanying notes 86-88 (describing attitudes towards exclusionary zoning).

[45] *See, e.g.,* Nicky Woolf, *The Rise of the YIMBYs: Angry Millennials and Their Radical Housing Solution,* THE GUARDIAN (Oct. 2, 2017), https://www.theguardian.com/cities/2017/oct/02/rise-of-the-yimbys-angry-millennials-radical-housing-solution; *About New York YIMBY,* NEW YORK YIMBY, https://www.newyorkyimby.com/about-new-york-yimby; Matthew Yglesias, *Ten Years of YIMBYism Have Accomplished a Lot,* SLOW BORING (Nov. 16, 2023), https://www.slowboring.com/p/ten-years-of-yimbyism-have-accomplished; Noah Smith, *The Long March of the YIMBYs,* NOAHPINION (Apr. 1, 2023), https://www.noahpinion.blog/p/the-long-march-of-the-yimbys.

[46] *See, e.g.,* Rolf Pendall, *Varieties of U.S. Growth Management: Lessons from New York and San Francisco,* in TOWARDS SUSTAINABLE CITIES 80 (2004) (closely analyzing and comparing zoning regimes in these two cities); *see also* New York City Charter Revision Commission, Testimony of Vicki Been, Feb. 11, 2025 (advocating for reform of New York City's Uniform Land Use Review Procedure to address housing crisis)

adopted after them – reshaped the housing market.[47] Illegal lending practices and weak consumer financial protection rules led to the housing bubble, which burst catastrophically in 2008.[48] After the crash, many homeowners were underwater and lost their homes.[49] Financiers bought up housing stock, supported by Federal Reserve policies and easy money for capital-holders. Homebuilding dried up, leading to mergers and a new oligopoly in the homebuilding sector.[50] This transformed housing development.[51] Corporate concentration also afflicts other aspects of the housing sector, like rental markets, leading to cartel-like pricing, junk fees, and other abusive practices.[52] As Conor Doughtery succinctly summarized: "[D]uring the long recovery from the Great Recession, every single thing about housing became horrible at once."[53] Importantly, none of these problems has to do with zoning.

Ignoring these problems and focusing primarily on loosening zoning may, as a result, be ineffective in some situations – and potentially even counterproductive in others. If a jurisdiction's problem is not zoning, but some other issue or combination of issues, then loosening zoning will not solve the problem. And it will be counterproductive if it makes ecological crises worse, or drives more people into private homeowner associations, for example. Houston is the only city in the country without comprehensive zoning.[54] Many would not consider it a housing utopia, but instead a cautionary example of what the unregulated housing market may produce.[55] Indeed, a 2024 study of the 50 largest metropolitan areas in the United

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[47] *See, e.g.*, ADAM J. LEVITIN & SUSAN M. WACHTER, THE GREAT AMERICAN HOUSING BUBBLE: WHAT WENT WRONG AND HOW WE CAN PROTECT OURSELVES IN THE FUTURE (2020).

[48] Michael Simkovic, *Competition and Crisis in Mortgage Securitization,* 88 IND. L.J. 213, 224 (2013) ("Underwriting shifted toward riskier loans in the years leading up to the financial crisis, especially from 2004 to 2007.").

[49] DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD (2016). Patricia A. McCoy & Susan M. Wachter, *Why the Ability-to-Repay Rule Is Vital to Financial Stability,* 108 GEO. L.J. 649, 663–64 (2020) ("The sharp decline in home prices starting in early 2007 wiped out equity . . . . Lenders refused to refinance homeowners whose loans were 'underwater' . . . . As home prices fell, delinquencies soared and increasing numbers of borrowers tipped into default.").

[50] *See infra* text accompanying note 261.

[51] Luis Quintero, *Fewer Players, Fewer Homes: Concentration and the New Dynamics of Housing Supply* (Johns Hopkins Carey Business School Working Paper No. 18-18 (Aug. 30, 2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303984.

[52] Brian Callaci & Sandeep Vaheesan, *The Market Alone Can't Fix the Housing Crisis*, HARV. BUS. REV. (Sept. 12, 2024), https://hbr.org/2024/09/the-market-alone-cant-fix-the-u-s-housing-crisis.

[53] DOUGHERTY, supra note 29, at 22.

[54] *See* BERNARD SEGAN, LAND USE WITHOUT ZONING 23–44 (1972) (analyzing Houston).

[55] *See, e.g.*, Jay Gentile, *The 9 Worst-Designed Cities in the US,* THRILLIST (Mar. 4, 2016), https://www.thrillist.com/travel/nation/the-9-worst-designed-cities-in-the-

States found that Houston is the *second worst* in availability of affordable rental homes for low-income people.[56]

As a paradigm, the zoning-focused approach to housing policy collapses into overly-simplistic neoliberal assumptions about how markets and society work. This is easiest to see at the extreme, in which some YIMBY advocates for zoning abolition argue that markets alone can provide the necessary housing supply – and even go so far as to assert that government can *never* engage in effective policy-making for housing. The assumption is that if government simply got out of the way – via deregulating land use controls and zoning rules – the free market would provide a better package of housing for society's needs.[57] While most zoning-reform advocates do not go so far, their more moderate version is a kind of "neoliberalism lite," in that it still prioritizes deregulation as its primary policy solution, rather than a broader, affirmative market-shaping strategy.[58]

It is important to acknowledge that most zoning reformers may not view themselves as neoliberals, and indeed are not. They may even readily concede that zoning may serve some important purposes.[59] But that does not change the fact that a policy agenda dominated by loosening zoning regulations *is* a neoliberal approach to the housing market. Of course, there is a spectrum, and advocating for loosening parking requirements, for example, is a far cry—and a more responsible one—from advocating for wholesale repeal of land use regulation.[60] But it is still deregulatory, unlike, for example, replacing parking minimums with parking maximums—a regulatory response that helps to shape the building forms that we want, instead of relying on developers to decide how much space to set aside for cars.[61]

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us (naming Houston #1). *But see*, Jessica H. Young, *Houston Named Among America's Worst Designed Cities,* HOUSTON CHRON., (Mar. 6, 2016) (arguing that Houston does not look like "a patchwork urban Dumpster fire."); Michael Lewyn, *How Overregulation Creates Sprawl (Even in a City Without Zoning),* 50 WAYNE L. REV. 1171, 1174 (2005) (arguing that Houston actually has many land use regulations and so the problem may be that it is not deregulated enough).

[56] NAT'L LOW INCOME HOUSING COALITION, GAP: A SHORTAGE OF AFFORDABLE HOMES 20 (2024).

[57] *See infra* notes 83-85 (describing most extreme zoning deregulators); see also Callaci & Vaheesan, *supra* note 48.

[58] *See infra* note 86-88 (describing more moderate zoning reformers).

[59] *See, e.g.,* Hills & Schleicher, *supra* note 27*,* ("Development values are not the same as liberarian or deregulatory values: Promoting growth and change sometimes calls for limits on property rights, sometimes for protecting such rights. Either way, the goal is *more* — more building, more sales, more competition.").

[60] *See, e.g.,* Sara C. Bronin, *Rethinking Parking Minimums*, PLAN. MAG., Feb. 2018, at 9 (discussing parking minimums).

[61] James Brasuell, *Nashville Sets Downtown Parking Maximums*, PLANETIZEN (Nov. 20, 2022), https://www.planetizen.com/news/2022/11/119787-nashville-sets-downtown-parking-maximums (describing Nashville's move to enact parking maximums).

Even the most responsible zoning reformers—and there are many[62]—tend not to articulate an affirmative case for zoning, but focus almost exclusively on loosening regulations.[63] We have no doubt that many in this camp have a background belief that zoning plays an important role, but it is too often left unstated and so the push for deregulation continues to dominate the policy conversation.

Identifying post-neoliberal housing policy solutions will require taking aim at the core economic policy moves and assumptions of the neoliberal era—in particular, the idea that deregulation, liberalization, privatization, and fiscal austerity should be the touchstones of public policy because the housing market will work quite well were it not for government interference. Instead, we need to embrace the fact that the housing market does not exist in a vacuum: It has been crafted and shaped by public policy choices and legal rules.[64] Those choices and rules set up the marketplace, and they can channel market actors into pro-social, competitive behaviors or into extractive and problematic ones. The policy choices we make and the way we design the rules are what are critical. In other words, we need to build the housing market we want to see, not assume it will miraculously appear from the benevolence of financiers, developers, and landlords. Increasing the supply of housing and ensuring housing affordability requires market-crafting and market-shaping, not abdicating responsibility for—and regulatory control over—land use decisions. This point may seem simple, but it is at best unsaid, perhaps unrecognized, and at worst rejected in housing policy debates. Embracing it fully unlocks a range of post-neoliberal policy frameworks and ideas, all of which could help improve housing affordability and supply but without regressing into overly-simplistic and utopian thinking about the magic of the market.

Part II offers a framework for a post-neoliberal approach to housing policy by embracing public policy's role in market shaping and market crafting. Instead of the neoliberal focus on deregulation, liberalization, privatization, and austerity, a post-neoliberal approach would expand the housing policy toolkit to emphasize industrial policy, public options, taxation, and regulation. We start by calling for an industrial policy for the housing sector and we argue that public investment, procurement, and regulatory standard-setting interventions could mean cheaper and faster homebuilding and therefore increased housing supply. The second section embraces the public's role in housing provision, as opposed to the neoliberal era's obsession with privatization. It offers ways governments can increase housing supply directly and efficiently, and explores ways in which federal housing finance policies (especially mortgage policy) can play a profound role in shaping housing availability and affordability. The third section turns to fiscal policy and shows how tax policies—and especially Pigouvian taxes—can help channel and shape the housing market toward access and affordability. The last section turns to

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[62] *See, e.g.,* Vicki Been, Ingrid Ellen & Katherine O'Regan, *Supply Skepticism Revisited,* HOUSING POL'Y DEBATE, Oct. 25, 2023, https://doi.org/10.1080/10511482.2024.2418044; JENNY SCHUETZ, FIXER UPPER (2022).

[63] There are some exceptions. *See, e.g.,* SARA C. BRONIN, KEY TO THE CITY: HOW ZONING SHAPES OUR WORLD (2024).

[64] *See supra* note 5 (providing broad overview of government intervention into housing markets).

market-shaping regulations. Concentration and power are problems in the housing market, particularly in rental markets. We start by showing how antimonopoly and consumer regulations can help address rental prices, increasing affordability. We then return to zoning reform. We embrace the reality that regulations are market-shaping, and suggest a variety of zoning rules that could potentially *increase* supply, affordability, and density. Finally, we shift to the demand side and observe that some places in America have affordable housing and weak economic growth and vibrancy. Growth in those places would help rebalance the housing market. After all, not everyone needs to live in San Francisco or New York. Indeed, regulatory policy was critical in the mid-twentieth century in creating an era of economic convergence between regions and broad economic growth across a wide range of cities.[65] Deregulation brought with it a period of concentrated growth in a small number of superstar cities and the collapse of many other places.[66] Regulatory choices at a macro level could help expand access to affordable housing by expanding the number of places that have vibrant growing economies.

In each of these categories, we seek to accomplish three things. First, we offer a brief account of the conceptual category – industrial policy, public options, Pigouvian taxation, and regulation – to show how they contribute to a post-neoliberal approach. Second, we provide a range of specific policy ideas that show how the conceptual category could be translated into law and policy. Our goal is not to offer a comprehensive survey of every possible policy intervention, but simply to illustrate some concrete ideas that emerge from a post-neoliberal framework. We hope and suspect that outlining the framework and specific illustrations will spark additional policy proposals, including in areas we do not treat in depth. And finally, we give examples of places in which some of these policies are already being implemented – or at least have strong advocates. This latter point is important because it shows that while neoliberalism's descendants may have captured the conventional wisdom among elite commentators and scholars that deregulation is the primary objective in the housing sector, post-neoliberal housing policies are emerging from the bottom up, and a post-neoliberal approach is a viable alternative paradigm. A brief conclusion follows.

In advancing the case for a post-neoliberal housing policy, we make a few contributions that are important to highlight explicitly. First, we show that the case against zoning is insufficient, conceptually and descriptively. So much of the housing debate has focused on zoning in recent years to the detriment of other causes of affordability problems and possible solutions. We seek to expand that scope. Second, we observe that those focused on extreme de-zoning proposals are truly embracing neoliberalism. Their view—sometimes unstated, sometimes not—is that the market will work just fine to provide society with affordable housing if government simply exited the policy space. We think this is naïve because it accepts an uncritical and fantastical view of markets that has proven problematic and even perverse. We do not claim these extreme dezoning views are representative

[65] Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L. J. 1763-1836 (2021) (identifying trends of economic convergence that slowed in the 1980s).

[66] *See id.*

of the mainstream YIMBY movement. They are on the fringe of current policy debates. Nevertheless, focusing on this far end of the spectrum of zoning reforms highlights the difficult question about how far zoning reform should go—and offers caution in leaning too hard into de-zoning rhetoric. Third, we offer a framework and concrete proposals for expanding the housing policy debate. We of course cannot go into detail on every issue, but we show what a post-neoliberal housing policy could look like.

Before wading into fierce housing policy debates, a few caveats are also worth noting. First, as we have already said, we do not think zoning is never a problem. In fact, we think it is a problem in some places.[67] But we do not think it is always the most important problem, and it might not be a problem everywhere. As a result, loosening zoning—and the extreme version of dezoning—might be poor policy in some cases. To address the problem of housing affordability, we must expand our view of the problems in the housing market and the policy solutions.

Second, we also do not mean to suggest that many responsible zoning reformers are likely to resist the need for policies beyond zoning reform.[68] Indeed, we hope that they will embrace this broader framework and a broader set of tools. Already, there are efforts in various corners to develop a more comprehensive suite of responses to the housing crisis.[69] Nevertheless, the state of the current debate remains overwhelmingly dominated by proposals to loosen zoning. Reframing the debate around post-neoliberal reforms helps to identify and amplify the nascent ideas that are starting to emerge piecemeal as additions or alternatives to zoning deregulation.

Finally, the ideas we outline in Part II need not be considered a package, but rather a menu of options. Their appeal and efficacy, individually and together, will vary depending on political and economic conditions in any given community. This is a critical point because part of our critique of the anti-zoning crowd is that they too often generalize from idiosyncratic locales and thus offer solutions that may not work well in all jurisdictions. Housing is a complex asset that creates multidimensional challenges. Housing policy must therefore be closely connected to geography: policies suited to one place may not be suited to another—even if

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[67] *See* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in its Place: Affordable Housing and Geographical Scale,* 40 FORDHAM URBAN L. J. 1667 (2013).

[68] *See, e,g,* Been, *et al., supra* note 62 (arguing for the importance of government-supplied affordable housing to meet the needs of the very poor).

[69] *See, e.g.,* National Housing Crisis Task Force, *From Crisis to Transformation: A Federal Housing Policy Agenda,* Nov. 2024, *available at* https://nationalhousingcrisis.org/app/uploads/2024/11/From-Crisis-to-Transformation-A-Report-from-the-National-Housing-Crisis-Task-Force.pdf (proposing many innovations that go beyond zoning reform); Eliza Shapiro, *40 Ideas to Make New York City More Affordable,* N.Y. TIMES, Jan. 16, 2025 (encdorsing modular construction in addition to loosening zoning, among other ideas); Noah Smith, *Zoning Reform Alone Won't Make Housing More Affordable*, BLOOMBERG, Feb. 4, 2019, *available at* https://www.bloomberg.com/view/articles/2019-02-04/zoning-reform-alone-won-t-make-housing-more-affordable (proposing land value tax, public housing, and housing co-ops).

both have problems with supply or affordability. Our proposals also, by and large, do not depend on action by the federal government, and many of our ideas can be implemented by state and local governments. If we want to address the housing crisis in the United States, we must therefore dramatically expand the range of possibilities for policymakers and break out of the flawed and myopic conversation that currently dominates housing policy debates.

I. THE INSUFFICIENCY OF ZONING REFORM

In recent years, prominent commentators and activists have imagined a future of abundant housing and have identified zoning and land use regulations as the principal impediment.[70] Ed Glaeser has argued that zoning's supply restrictions are responsible for a significant part of the increase in housing costs.[71] Other researchers agree that the problem with housing affordability is the lack of supply, and that zoning is the culprit.[72]

As a result, many prominent proposals to address the housing crisis focus on loosening zoning and land use regulations.[73] These include, for example, eliminating single-family zoning,[74] limiting environmental review,[75] restricting historic

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[70] *See, e.g.,* Florida, *supra* note 35 (describing argument).

[71] Edward L. Glaeser, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices,* 48 J.L. & ECON.331, 331–33 (2005); *see also* Edward L. Glaeser, *How Biden Can Free America from Its Zoning Straitjacket,* N.Y. TIMES (Apr. 12, 2021), https://www.nytimes.com/2021/04/12/opinion/biden-infrastructure-zoning.html[https://perma.cc/JK8A-2ZNP] ("[L]and-use controls have limited the supply of affordable housing.").

[72] *See, e.g.*, Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability,* 29 HOUS. POL'Y DEBATE 25, 27 (2019); Mihir Zaveri, *Rising Rents, and No Cure on Horizon,* N.Y. TIMES, Aug. 2, 2022, at B1 ("At the center of the problem is zoning."); *see also* Christopher Serkin & Kelsea Best, *Growth ≠ Density: Zoning Deregulation and the Enduring Problem of Sprawl,* 50 PEPP. L. REV. 557, 562 n.25 (2023) (citing sources); *cf.* Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 76 (2017) (arguing that inter-regional mobility has declined because zoning prevents housing markets from adjusting to labor demand).

[73] *See, e.g.*, Michele Lerner, *Zoning Reforms to Mitigate America's Affordable Housing Crisis,* URB. LAND (May 21, 2024), https://urbanland.uli.org/issues-trends/zoning-reforms-to-mitigate-americas-affordable-housing-crisis (summarizing proposals); Allison Hanley, *Rethinking Zoning to Increase Affordable Housing,* J. HOUS. & CMTY. DEV.(Dec. 22, 2023), https://www.nahro.org/journal_article/rethinking-zoning-to-increase-affordable-housing/; Laurel Wamsley, *The Hottest Trend in U.S. Cities? Changing Zoning Rules to Allow More Housing,* NPR (Feb. 17, 2024), https://www.npr.org/2024/02/17/1229867031/housing-shortage-zoning-reform-cities.

[74] *See, e.g.*, Jake Wegmann, Viewpoint: *Death to Single-Family Zoning ... and New Life to the Missing Middle, Time to End Single-Family Zoning,* 86 J. AM. PLAN. ASS'N 113, 117 (2020).

[75] *See, e.g.*, Office of the Governor of Cal. (@CAGovernor), *Governor Newsom's Statement After Court Halts UC Berkeley from Building New Student Housing,* X (Feb. 25, 2023, 5:00 PM), https://x.com/CAgovernor/status/1629602373319688192 ("Our CEQA

preservation,[76] loosening parking minimums,[77] allowing accessory dwelling units as of right,[78] and otherwise granting more development entitlements without discretionary review.[79]

The trouble with the zoning-reform supply-side approach is that it is often too narrow. Many supply-side, abundance liberals (and their libertarian allies) focus primarily if not exclusively on the strategy of deregulation, in the form of loosening zoning to produce more supply.[80] The assumption—often implicit—is that the housing market would work pretty well if only local land use regulations weren't getting in the way. While zoning rules may be a contributing factor in the lack of supply of affordable housing, especially in some markets, limiting the policy toolkit to deregulation is myopic. This is for three broad reasons: (1) Conceptually, zoning is a market-shaping tool that can apply very differently depending on the context – and can even be designed in ways that are helpful and positive. (2) Descriptively, zoning might not be the primary problem, or even much of a problem at all, in some jurisdictions dealing with housing supply or affordability issues. (3) As a paradigm, de-zoning is simply a descendent of neoliberal thinking, and it therefore suffers from a variety of problems that often plague overly-simplistic market-focused policy tools.

A. Zoning as Market-Shaping Regulation

First and foremost is a conceptual point that should be self-evident: zoning itself is not inherently problematic. It is merely the category of local land use regulations that determine how and where development occurs. Originally designed as a kind of *ex ante* nuisance prevention, zoning today serves many different purposes.[81]Those regulations can be designed however policymakers want—to encourage building or to restrict it. The *content* of zoning rules is what matters. And their impact varies dramatically depending on local geography, development

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process is clearly broken when a few wealthy Berkeley homeowners can block desperately needed student housing for years and even decades."); Editorial, *CEQA Is Too Easily Weaponized to Block Housing and Slow Environmental Progress,* L.A. TIMES, Jan. 31, 2023, https://www.latimes.com/opinion/story/2023-01-30/editorial-ceqa-is-too-easily-weaponized-to-block-housing-and-slow-environmental-progress.

[76] *See, e.g.*, Edward L. Glaeser, *Preservation Follies*, CITY J., (Spring 2010), https://www.city-journal.org/article/preservation-follies.

[77] *See, e.g.*, Simon McDonnell, Josiah Madar & Vicki Been, *Minimum Parking Requirements and Housing Affordability in New York City,* 21 HOUS. POL'Y DEBATE 45, 64 (2011).

[78] Vanessa Brown Calder & Jordan Gygi, *The Promising Results of Accessory Dwelling Unit Reform,* CATO INST.: CATO AT LIBERTY (June 28, 2023), https://www.cato.org/blog/results-accessory-dwelling-unit-reform-so-far.

[79] Moira O'Neill et al., *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates,* 25 HASTINGS ENVT'L L.J. 1, 36 (2019).

[80] See KLEIN & THOMPSON, *supra* note 23.

[81] *See, e.g.,* Serkin, *supra* note 39 at 751 (providing history of zoning regulations as preventing nuisances and arguing that their use has expanded).

patterns, and political conditions. Traditional use and density limits operate far differently in older cities like New York than in sunbelt cities like Phoenix and Nashville.[82] Zoning reforms should look very different in those places, too.

Once we recognize this elementary point, it is clear that zoning rules need not always be a barrier to supply, density, or affordability; they can instead encourage density, building, and affordability. This is not, however, how some of the more extreme advocates and scholars talk about zoning. For example, policy director of the California YIMBY movement, M. Nolan Gray, has argued in a prominent book that "It's high time we accept the need for zoning abolition and start thinking about what comes next."[83] Channeling libertarian ideas, Gray says zoning is an "impossible" task because governments cannot plan effectively in *any* domain of policy.[84] Or consider the views of Walter Block and Sarah Huddell. In their article, *The Case Against Zoning*, they argue: "The market is a tremendously powerful force that acts directly in line with human desires and tendencies. Therefore, the most effective way to plan, develop and design communities is to let the invisible hand guide us."[85] Such positions are extreme–and they risk throwing the baby out with the bathwater. As we shall see, there are many good reasons to have zoning rules.

Other advocates claim they are not opposed to zoning generally, but only to *exclusionary* zoning rules. Traditionally, this meant large-lot zoning in the suburbs.[86] But all zoning is exclusionary by definition.[87] A zoning ordinance that prohibits heavily-polluting industrial power plants in a residential area is exclusionary, but most people would say this is a desirable rule. An "inclusionary" zoning rule requiring multi-unit, multifamily housing, or affordable housing, is also exclusionary because it excludes housing that does not meet the inclusion criteria. Indeed, even de-zoning altogether is exclusionary: it excludes the possibility of certain kinds of communities because any individual can build however they want. The term "exclusionary zoning" is really more of an epithet than a regulatory

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[82] *See, e.g.*, Serkin, *Creating Density*, *supra* note 23, at 219 ("[Zoning] reforms look different in the Sunbelt or in other regions where zoning is not the principal constraint on density and growth.").

[83] M. NOLAN GRAY, ARBITRARY LINES (2022); M. Nolan Gray, *Abolish Zoning—All of It,* REASON (June 21, 2022), https://reason.com/2022/06/21/abolish-zoning-all-of-it/; *see also infra* note 95, (discussing Gray).

[84] Nolan Gray, *The Case for Abolishing Zoning,* STRONG TOWNS (June 30, 2022), https://www.strongtowns.org/journal/2022/6/30/the-case-for-abolishing-zoning.

[85] Walter Block & Sarah Huddell, *The Case Against Zoning,* 37 INT'L J. ETHICS & SYS. 618, 625 (2021); *cf.* Lewyn, *supra* note 55, at 1207 ("By reversing land use restrictions, Houston and other municipalities with similar policies can create an America that is both more deregulated and less sprawling.").

[86] *See, e.g.*, Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment,* 63 RUTGERS L. REV. 849, 861 (2010) (characterizing exclusionary zoning as a problem of suburban land use controls); Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning,* 103 TEX. L. REV.1 (2024).

[87] J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2255 n.2 (1997) ("Of course, all zoning is exclusionary in principle, prohibiting specified structures and uses in particular locations.").

category. Jenny Schuetz put it poetically: "Measuring 'excessively strict' zoning is like holding a moonbeam in your hand."[88] When zoning reformers say they object only to "exclusionary zoning," they are saying, in essence, that they object to the restrictions they do not like.

Reformers may respond, if pushed, that what they *really* object to are density restrictions on residential development. But this presupposes that the unregulated market will produce greater density via increased supply than a regulated one. In other words, the implicit faith in markets couples deregulation and density when the two do not necessarily go hand-in-hand.

For example, oftentimes the choice is not whether to have zoning and land use regulations. The choice is whether to have *public or private* land use regulations.[89] Where zoning does not satisfy consumers' regulatory preferences, consumers may rely more heavily on homeowners' associations (HOA) and private restrictions on land.[90] There is indirect empirical evidence that looser zoning translates directly into greater demand for HOAs.[91] At the extreme, consider Houston. It is famously the only unzoned city in America, but it is hardly unregulated.[92] Comprehensive zoning has simply been replaced with ubiquitous private regimes.[93] These private restrictions are worse than zoning in most ways. They tend to increase residential segregation, prohibit most forms of density, and are generally impervious to concerns about public costs.[94] Some advocates for de-zoning embrace such voluntary restrictions, even though they can replicate all of the downsides of zoning—and are even harder to change.[95] Others do not go so far, but argue that private land use

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[88] *See, e.g.*, SCHUETZ, *supra* note 62.

[89] *See* Serkin, *A Case for Zoning*, *supra* note 39.

[90] *See* Serkin, *Creating Density*, *supra* note 23, at 194-95.

[91] Wyatt Clarke & Matthew Freedman, *The Rise and Effect of Homeowners Associations,* 112 J. URB. ECON. 1, 13 (2019) ("HOAs are less highly valued where land use regulations are more stringent.").

[92] SEGAN, *supra* note 54.

[93] *See id.*.

[94] *See* Serkin, *A Case for Zoning*, *supra* note 39 at 797 ("[T]he exclusionary effect of suburban HOA development is often much greater than municipal zoning."); V. Kelly Turner & Dorothy C. Ibes, *The Impact of Homeowners Associations on Residential Water Demand Management in Phoenix, Arizona,* 32 URB. GEOGR. 1167, 1168 (2011) (discussing Phoenix).

[95] *See, e.g.*, M. Nolan Gray, *Cancel Zoning,* THE ATLANTIC (June 21, 2022), https://www.theatlantic.com/ideas/archive/2022/06/zoning-housing-affordability-nimby-parking-houston/661289/ ("Blocks that want stricter rules can voluntarily opt into them through private deed restrictions. But they can't just show up at public hearings and shout their preferences into law."); Ilya Somin, *The Difference Between Government-Imposed Zoning Restrictions and Private Planned Communities,* REASON (May 2, 2023), https://reason.com/volokh/2023/05/02/the-difference-between-government-imposed-zoning-restrictions-and-private-planned-communities/ ("I am a longtime critic of zoning restrictions on property rights, which often preclude owners from building new housing on their land, and thereby impede mobility and 'foot voting.' On the other hand, I am also a longtime advocate of private planned communities, such as condominiums and

controls are less problematic because they tend to cover less land, even while acknowledging that most new housing options in fact occur in HOAs.[96]

Density, of course, is one value. But society has others too. Zoning can channel development in ways that allow infrastructure to be developed efficiently and that minimizes harms from development in sensitive places. One acute place to see this problem with de-zoning is the relationship between extreme weather, climate change, and looser zoning regulations. After Hurricane Helene hit western North Carolina in 2024, some blamed years of de-regulatory pressures in North Carolina for the extent of the destruction: "Under pressure to control housing costs, Republican lawmakers rejected standards meant to protect against disasters . . . ."[97] Should zoning be loosened or eliminated so more housing can be built on steep slopes, like in North Carolina? Should zoning be relaxed or even eliminated so that more housing can be built along coasts that are increasingly hit by more devastating hurricanes? What about in places without access to fresh water, that are prone to fire, or that face dozens of days of above 100 F temperatures?[98] All of these risks may be increasing with climate change.[99]

Unlocking development, without any regard to infrastructure provision or environmental risks, will mean tragedies for the affected community and individuals, and significant costs – including for taxpayers outside of those jurisdictions.[100] The costs of emergency and disaster responses are, after all, borne directly and indirectly by the country as a whole. But they are rarely discussed in policy debates

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homeowners associations (HOAs)."); Robert C. Ellickson, *Stale Real Estate Covenants,* 63 WM. & MARY L. REV. 1831, 1849–50 (2022) ("In most instances, however, exclusionary zoning is a far more serious problem than exclusionary covenants."). For a general discussion of the substitution effects between zoning and HOAs, see Serkin, *supra* note 47; Gerald Korngold, *Repealing Single-Family Zoning Is Not Enough: A Proposal For Removing Existing Parallel Private Covenants For Violating Public Policy*, 89 MO. L. REV. (2004).

[96] *See* Hills & Schleicher, *supra* note [], at *51 ("Individual covenants rarely cover more than J% of the land of a municipality, and do not preclude development as comprehensively as zoning regulations can."); ILYA SOMIN, FREE TO MOVE 84-96 (2020).

[97] *See*, Christopher Flavelle, *How the North Carolina Legislature Left Homes Vulnerable to Helene,* N.Y. TIMES, Oct. 3, 2024, https://www.nytimes.com/2024/10/03/climate/north-carolina-homes-helene-building-codes.html.

[98] Katie Sinclair, Water, *Water Everywhere, Communities on the Brink: Retreat as a Climate Change Adaptation Strategy in the Face of Floods, Hurricanes, and Rising Seas,* 46 ECOLOGY L.Q. 259, 285–96 (2019). The recent fires in Los Angeles highlight these concerns. *See* Mira Rojanasakul & Brad Plumer, *More Americans Than Ever Are Living in Wildfire Areas. L.A. Is Not an Exception,* N.Y. TIMES, Jan. 15, 2025 ("Data from CoreLogic, a property and risk analytics firm, show that around 1 in 8 properties in California now face 'very high' fire risk. In Los Angeles County, that figure is closer to 1 in 10, with newer buildings slightly more likely to be in wildfire-prone areas than those built before 2000.").

[99] *See, e.g.,* Adam Freed et al.,*Urban Systems and Services: Vulnerabilities and Impact*, *in* CLIMATE CHANGE AND U.S. CITIES 79, 113–14 (William Solecki & Cynthia Rosenzweig eds., 2022)

[100] *See* Serkin, Climate Zoning, *supra* note 43.

over zoning.[101] Zoning has a role to play in moderating growth and density in places that cannot and should not support it. A market-shaping approach would ask us to design rules with these downsides and externalities in mind. Again, people might reach different conclusions, but pre-judging that the answer is always to loosen regulations to allow more development, without taking into account the downsides, is not reasoned policymaking.

Zoning reformers may complain that they do not mean deregulation in *these* places. In fact, they will argue that it is restrictive zoning in cities that has pushed development into more vulnerable areas. But statewide reforms allowing ADUs or even multifamily housing as of right can increase the number of people living in precisely *these* sensitive places. Zoning reformers implicitly assume that the market will naturally produce more housing in less vulnerable places—that if downtown L.A. allowed more growth, fewer people would be living the fire-prone Palisades, for example. Maybe. But more likely, at least in some places, is that unregulated development patterns would continue to sprawl outwards into the wildland-urban interface and other at-risk places. Even when loosening zoning where we want more development is the right answer, restricting development where it does not belong is at least as important. And that involves zoning and other land use restrictions.

Climate mitigation combines issues of environmental consequences with the value of density.. Many abundance liberals blame zoning for increased greenhouse gas (GHG) emissions. They point out—rightly—that zoning in many places has produced sprawling suburbs that extend out from the urban core. Large lot single-family homes result in leapfrog development patterns that extend ever outward, consuming land and increasing vehicle miles traveled. This form of development and growth produces high per capita GHG emissions. Urban density is a key solution.[102]

Here again, zoning reformers argue that eliminating density limits and unlocking development will produce more sustainable development patterns. While zoning may have contributed to the problem, it is much less clear that loosening zoning will solve it. The effect of land use deregulation will, again, vary significantly by place. Some older cities, like New York, have vibrant urban cores that exert an enormous gravitational pull on the entire metro region. Unlock density in most of Manhattan and developers will consume it all. This is precisely what zoning reformers have in mind. Loosen regulations and the market will produce dense urban form. But will loosening regulations have the same effect in other places, like the already sprawling sunbelt cities in the southeast and west? The answer is much more equivocal.

[101] *But see* J. B. Ruhl, *General Design Principles for Resilience and Adaptive Capacity in Legal Systems—With Applications to Climate Change Adaptation,* 89 N.C. L. REV. 1373 (2010); J. B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law,* 40 ENV'T L. 363 (2010); Julia D. Mahoney, *Foreword: Sustainability in the City,* 45 WM. & MARY ENV'T L. & POL'Y REV. 627 (2021).

[102] *See* Serkin, *supra note* 43 .

Houston is not dense.[103] The unregulated market there has produced endless sprawl. It is not more compact and not more sustainable. And it is not an outlier. In fact, municipal density is generally correlated with zoning intensity—the more tightly zoned the municipality, the denser it is.[104] This is not to suggest that restrictive zoning causes density. Causation likely runs in the opposite direction. Many places adopt strict zoning ordinances precisely because they are already dense. Nevertheless, the many examples of sprawling, loosely zoned places means that de-zoning will not necessarily produce more sustainable development patterns.[105] It will vary tremendously by locality. Given consumer and developer preferences, and decades of government subsidies for suburban single-family living, a less regulated market is likely to produce more sprawl than anything. In those places, the only surefire way to produce density is to zone to *require* it, not simply to de-zone to *allow* it.

As these examples show, eliminating zoning might not lead to more density, might be net negative if it leads to building in places with significant downsides and externalities, and might even lead to perverse outcomes like a shift from zoning to private homeowners associations that replicate the problems of restrictive zoning but in a way that is more entrenched and harder to change. Zoning is not just the NIMBY opportunity-hoarding that its opponents highlight. The better way to think about zoning rules are as market-shaping tools. Zoning rules guide how markets work and can thus be written to encourage, or discourage, any number of activities. As we shall see in Part II.D, zoning rules can be designed to encourage affordability, density, and other goals that proponents of de-zoning seek to achieve. Overbroad campaigns against zoning generally, and even against density restrictions in particular, may thus be actively unhelpful because they turn a potentially useful tool into a villain.

B. The Multiplicity of Problems in the Housing Market

A second problem with blaming zoning for housing affordability is that there are, in fact, *many problems* in housing markets, and it is not clear that zoning is the primary one in all, or even most, jurisdictions. In other words, critics of zoning have a descriptively myopic view of the problems in the housing market – and this, of course, means they will have a far too limited view of the possible solutions.

To start with an example, consider Nashville, Tennessee. In Nashville, zoning and building approvals are not the most significant constraint on development. In many ways, Nashville approximates the loosely-zoned city of California YIMBYs' dreams. Developers often apply for rezonings to allow for specific development plans, and the city grants almost every request—106 in 2023 alone.[106] The result

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[103] *See* Jed Kolko, *The Downtown Decade: U.S. Population Density Rose in the 2010s,* N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/2021/09/01/upshot/the-downtown-decade-us-population-density-rose-in-the-2010s.html.

[104] *See* Serkin & Best, *supra* note [].

[105] *See* Serkin, *Creating Density*, supra note 23.

[106] Data on file with authors.

has been an enormous building boom over the last 15 years. But then why isn't this less regulated market producing enough housing and lower prices?[107]

One problem is infrastructure: the lack of sufficient public transportation, roads that need to be improved, insufficient stormwater systems that are burdened by more impermeable land, and a critical absence of sidewalks.[108] Importantly, when it came to passing a major transit referendum that would have helped enable density, the opposition was not organized by NIMBY progressives, but by the conservative, Koch-brothers-funded anti-tax group, Americans for Prosperity.[109] A second issue is labor shortages, especially in the skilled trades, making apartment buildings and multi-family housing more expensive to develop.[110] More subtly, the enormous amount of real estate development in Nashville is itself a significant driver of economic growth. According to one leading national study, the direct annual impact of development includes 394 jobs for every 100 single-family homes.[111] It is difficult to build your way out of a housing crisis, especially in the short term, when the development process generates so much economic activity. Nashville has thus remained extremely expensive despite relatively loose zoning regulations.

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[107] Kylie Walker, *Nashville Housing Crisis Pushes Residents to Leave As Prices Surge, Shortage Worsens*, WZTV FOX17 NASHVILLE, (May 21, 2024: 8:25PM), https://fox17.com/news/local/nashville-housing-crisis-pushes-residents-to-leave-as-prices-surge-shortage-worsens-middle-tennessee-economy-housing-market; *see also* FRED Economic Data, FED. RES. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/MEDLISPRI34980 (showing median sales prices remain near all-time historic highs).

[108] Nathan Weinberg, *Nashville Has an Infrastructure Problem,* GREATER NASHVILLE REALTORS,https://www.greaternashvillerealtors.org/news/2021/05/28/realtor-roundup/nashville-has-an-infrastructure-problem-realtors-have-some-solutions/ (discussing housing and sewers, sidewalks, and other infrastructure); Opinion, *Nashville Growth: Why Investing More in Transit Is Critical to Success,* TENNESSEAN (June 6, 2023), https://www.tennessean.com/story/opinion/contributors/2023/06/06/nashville-growth-why-investing-more-in-transit-is-critical-to-success/70292882007/ (discussing housing and transit). Indeed, Nashville is currently conducting a study on housing and infrastructure to address these challenges. *Nashville Housing & Infrastructure Study,* ENGAGE NASHVILLE, https://engage.nashville.gov/housingandinfrastructure.

[109] Hiroku Tabuchi, *How the Koch Brothers are Killing Public Transit Projects Around the Country*, N.Y. TIMES (June 19, 2018).

[110] *Workforce Shortages in the Trades,* GO BUILD TENNESSEE, https://www.gobuildtennessee.com/#:~:text=For%20every%205%20tradesman%20who,in%20the%20trades%20are%20endless; Robert Yarbrough, *Local Contractors Wrestle with Growing Worker Shortage,* NASHVILLE POST (Sept. 24, 2012), https://www.nashvillepost.com/home/local-contractors-wrestle-with-growing-worker-shortage/article_a90104a9-a06d-506e-b9cc-f4a334d6d0c9.html; Jarod Word, *Construction Industry Faces Shortage of Workers Amid Unprecedented Growth*, Tennessee Bar Association (Jan. 24, 2018), https://www.tba.org/?pg=Articles&blAction=showEntry&blogEntry=29979.

[111] NAT'L ASS'N OF HOME BUILDERS, THE ECONOMIC IMPACT OF HOME BUILDING IN A LOCAL AREA (2015), https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics/economic-impact/economic-impact-local-area-2015.pdf.

But there are also deeper, and more indirect, challenges for development in less-regulated markets like Nashville. Development comes with substantial risks that are priced into the development process. While economic models imagine developers continuing to build so long as there is any profit to be made—effectively developing down to the margin where development costs are at sales prices—the reality is far more complex. First, real estate investments must offer benefits over other investment opportunities, like equities markets. Where returns are not high enough—or do not provide other important benefits like diversification—money will move to other sectors. The possibility of profits is not enough to spur development; it must be the possibility of profits or other financial benefits that are not available more cheaply elsewhere.

Second, and more subtly, developers focus on absorption rates and try to time the market so that not too much supply comes online at once.[112] While it is hard to imagine today, with housing so tight in so many places, one need only look at Las Vegas before the 2008 crash, or China today, to see the risks to developers of overbuilding.[113] Developers mitigate those risks and maximize profits by slowing the speed at which new housing comes online, even if they are allowed to build.[114] While controlling the pace of development might be difficult in a robust and competitive market, the reality is that consolidation among developers has produced cartel-like market power in some places.[115] Even where there is no such market power, sophisticated developers still make complex projections about future market demand and do not build all at once, trying, instead, to spread out the timing of new housing.[116]

Blaming zoning for housing costs seems especially blinkered because different jurisdictions in the United States have very different approaches to land use regulations, and yet the housing crisis is a nationwide phenomenon. One recent paper studied the impact of supply constraints, like zoning, on housing prices and concluded that "housing supply constraints are quantitatively unimportant in explaining rising housing costs across U.S. cities."[117] The paper found that differences in

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[112] Rocket Mortgage, Absorption Rate, *Rocket Mortgage*, https://www.rocketmortgage.com/learn/absorption-rate; *see also* Cameron K. Murray, *A Housing Supply Absorption Rate Equation*, 64 *J. Real Est. Fin. & Econ.* 228, 230 (2022).

[113] *See, e.g.*, Kaiji Chen & Yi Wen, *The Great Housing Boom of China*, 9 AM. ECON. J. 73 (2017) (predicting unsustainability of housing prices in China given high vacancy rates); Mary Riddel, *Are Housing Bubbles Contagious? A Case Study of Las Vegas and Los Angeles Home Prices*, 87 LAND ECON. 126 (2011) (discussing causes and effects of excessive inventory in Las Vegas).

[114] *See, e.g.*, SCHUETZ, *supra* note 62, at 5 (identifying "frictions" in housing markets, including the time it takes to build and the durability of the product, making supply adjustments sticky in both directions).

[115] *See* text accompanying notes 136-141 (discussing market consolidation).

[116] Murray, *supra* note 112.

[117] *See* Schuyler Louie, et al., *Supply Constraints Do Not Explain House Price and Quantity Growth Across U.S. Cities,* NBER Working Paper, Mar. 2025, *available at* http://www.nber.org/papers/w33576.

supply constraints among municipalities could not account for increases in housing prices or housing quantity in response to increased demand; what mattered was rising incomes.[118]

Indeed, the housing crisis is a *global* phenomenon, but the United States is the only country with its particular approach to zoning.[119] Tellingly, Great Britain is trying to replace its discretionary land use regime with something much closer to American-style zoning in order to address its housing crisis.[120] Supply-siders might look for substantive similarities in international land use regulations and continue to blame the regulatory interference with market forces, but the ubiquity of the housing crisis across very different land use regimes requires looking for other causes. Indeed, government intervention in housing markets does not always produce higher priced housing, as China shows with the collapse of its housing sector due to government-supported over-building.[121] The problem of housing affordability can have different sources and thus might require different solutions.

Those focused on zoning reform also tend to neglect major historical shocks, like the financial crash in 2008 and COVID-19, and structural issues of market power. This too is a mistake. Let's start with the 2008 financial crash, undoubtedly the most important event for the housing market in the past half century.[122] Taking

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[118] *Id.* at *23 ("Contrary to prevailing beliefs and influential policy narratives, our empirical results consistently demonstrate that higher income growth predicts similar growth in house prices, housing quantities, population, and living space per person across more and less housing constrained cities.").

[119] *See, e.g.*, SONIA HIRT, ZONED IN THE USA (2015) (discussing America's zoning exceptionalism).

[120] *See* Ministry of Hous., Cmty. & Loc. Gov't, *Planning for the Future* (2020), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958420/MHCLG-Planning-Consultation.pdf (British government white paper laying out a proposal for "radical reform" to the country's "outdated and ineffective planning system"); Feargus O'Sullivan, *In a Bid to Speed Development, Britain Gives Zoning a Try,* BLOOMBERG: CITYLAB (Aug. 13, 2020), https://www.bloomberg.com/news/articles/2020-08-13/britain-proposes-radical-overhaul-of-city-planning; *see also* Anthony Breach, *Planning for the Future: How Flexible Zoning Will End the Housing Crisis,* CENTRE FOR CITIES (June 2020), https://www.centreforcities.org/wp-content/uploads/2020/06/Planning-for-the-future-how-flexible-zoning-will-end-the-housing-crisis-final-online.pdf ("The problem at the heart of the housing crisis is the discretionary element in the planning system, which rations the supply of land for development and new homes. It is wasteful and inefficient and must be reformed. England and the devolved nations need to shift from this discretionary approach to a flexible zoning system to reconnect the supply of housing to demand and end the housing crisis."). For an interesting comparison of the divergence of American and British law affecting development rights, see Hills & Schleicher, *supra* note [] (arguing that before 1970, American law generally promoted growth while British law promoted stasis).

[121] *See* Lingling Wei & Stella Y. Xie, *China Revives Socialist Ideas to Fix Its Real-Estate Crisis,* WALL ST. J., (Feb. 15, 2024) (describing China's housing crash).

[122] David Dayen, *The Housing Industry Never Recovered from the Great Recession,* THE AMERICAN PROSPECT (Dec. 11, 2024), https://prospect.org/infrastructure/housing/2024-12-11-housing-industry-never-recovered-great-recession/.

the financial crash seriously is certainly more complex than the simplistic libertarian story that zoning regulations make it hard to build. But it is essential to understanding how the housing market has evolved over the last few decades. The crash and policies adopted in its aftermath had at least three major impacts on the housing market – none of which support the argument that zoning is the primary driver of housing supply or affordability across U.S. jurisdictions.

First, the crash burst the housing bubble of the early 2000s, leading to a massive decline in home prices.[123] The decline in prices, with many homeowners underwater in the value of their homes, led to a decline in new home construction. As data from the Federal Reserve shows in Figure 1, new private housing construction reached its peak prior to the 2008 financial crash before plummeting. While it has recovered somewhat, the number of new units being built has still not reached pre-crash levels. In California, in particular, developers were issued building permits in 2006 at more than double the numbers today.[124] This data is hard to square with the story told by dezoning advocates: It is unlikely, to say the least, that local jurisdictions across the United States – and the world – imposed new, severely restrictive zoning rules starting in or since 2006. If they didn't, why would we think zoning is the sole, or even primary, cause of the decrease in new housing construction over the last 15 years? Clearly the signal event in the decline of homebuilding was the mortgage bubble bursting and the crash and Great Recession that followed.

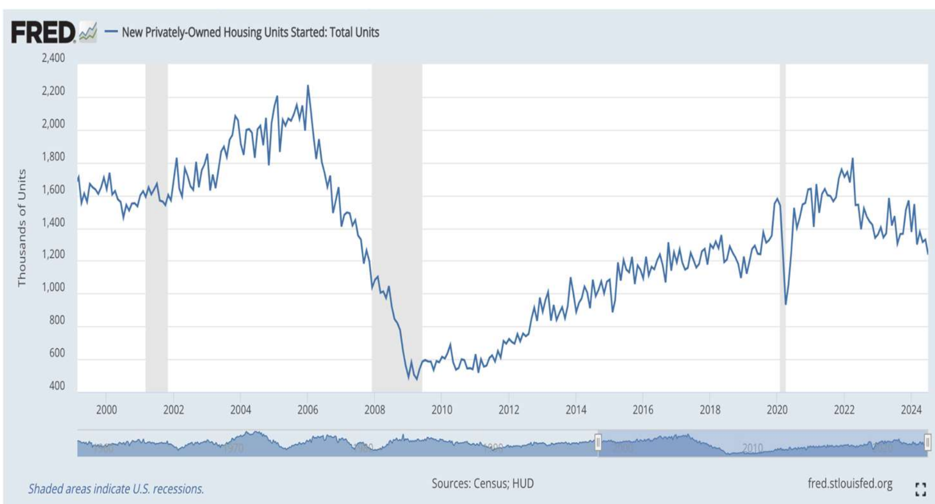

Figure 1. Source: FRED[125]

[123] *See generally* Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble,* 100 GEO. L.J. 1177 (2012)(describing history).

[124] FRED Economic Data, *New Private Housing Units Authorized by Building Permits for California,* FED. RES. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/CABPPRIVSA#.

[125] FRED Economic Data, *U.S. Housing Starts,* FED. RES. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/HOUST.

The second impact of the crash was the reshaping of homeownership and the rise of institutional investment in the single-family home market. After the crash, the federal government did not prioritize helping distressed homeowners to the extent demanded by consumer advocates. Programs adopted in the aftermath of the crisis, with acronyms HARP and HAMP, were largely insufficient and unsuccessful at keeping people in their homes – indeed, HAMP was designed to "foam the runway" to help Wall Street banks, *not* homeowners, recover in the post-crash period.[126] The crash resulted in a huge number of distressed and underwater homeowners, creating an opportunity for institutional investors to purchase houses and mortgages at rock bottom prices. The Fed both encouraged institutional investors to build an asset class of rental properties from foreclosed homes and enabled those purchases through quantitative easing (QE).[127] Lowering the cost of capital for institutional investors made it possible to reshape the single-family market in the United States from one dominated by homeowners to one in which investors were a major force. According to a recent GAO report, no single investor owned more than 1,000 homes before 2011, and most owned fewer than 10 units.[128] But by 2022, the top five investors owned almost 300,000 homes.[129] In some communities today, investors own more than 20% of properties.[130] The Blackstone Group alone purchased around 50,000 homes in the United States, in addition to buying up housing around the world, and ultimately sold its portfolio in 2018, making a large profit.[131] For the homeowners who lost their homes, federal policies that bought them time—instead of facilitating their losses—would have allowed them to keep their homes, get back above water, and eventually see their home values increase.

Third, federal policies collectively led to a more unequal housing market, causing further problems for affordability. The Fed's policy of easy money allowed capital owners – whether homeowners with stable jobs and credit or investors – to

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[126] David Dayen, *This Man Made Millions Suffer: Tim Geithner's Sorry Legacy on Housing,* SALON (May 14, 2014), https://www.salon.com/2014/05/14/this_man_made_millions_suffer_tim_geithners_sorry_legacy_on_housing/.

[127] Brett Christophers, *How and Why U.S. Single-Family Housing Became an Investor Asset Class*, 49 J. URB. HIST. 430 (2023); Tobias J. Peter, *Statement before the Senate Committee on Banking, Housing, and Urban Affairs: How the Federal Government's Policies Are Crowding Lower Income Americans Out of the Housing Market*, AM. ENTERPRISE INST. (Feb. 10, 2022), https://www.aei.org/wp-content/uploads/2022/02/Peter-Senate-Banking-testimony-written-2.10.2022-FINAL.pdf?x85095.

[128] U.S. Gov't Accountability Off., GAO-24-106643, Rental Housing, Information on Institutional Investment in Single-Family Homes 10 (2024), https://www.gao.gov/assets/gao-24-106643.pdf.

[129] *See id*.

[130] Ben Horowitz & Libby Starling, *Rise in Investor-Owned Single-Family Rentals Prompts Policy Responses,* FED. RES. BANK OF MINNEAPOLIS (2024), https://www.minneapolisfed.org/article/2024/rise-in-investor-owned-single-family-rentals-prompts-policy-responses.

[131] Brett Christophers, *Mind the Rent Gap: Blackstone, Housing Investment, and the Reordering of Urban Rent Surfaces*, 59 URB. STUD. 698 (2022).

refinance at lower rates and purchase homes. At the same time, for individuals without strong credit, tightened mortgage lending standards – a reasonable reform after too-loose standards led to the crash – made purchasing a home more difficult.[132]

These shifts have significantly changed the housing market. They have shaped who has equity, the cost and ease of borrowing, and the supply of, price of, and demand for housing. But here is the most important part: None of these changes involved zoning.

Zoning also had nothing to do with the COVID-19 pandemic. But the pandemic undoubtedly had a significant effect on housing prices. Changes in median home prices skyrocketed between 2020 and 2025, with the U.S. average home price increasing 44.6 percent, and some states, like Montana and Maine seeing increases of around 81 percent.[133] At the start of the pandemic, low borrowing costs and remote work led to a rush of homebuying, sending prices up.[134] Then, as interest rates increased, buyers were increasingly priced out of higher mortgages. Supply decreased as well. Those with lower mortgage rates felt locked in, given that the same size house would now cost more and be financed at a higher rate.[135] Zoning is, once again, not a significant character in this story.

Looking at broader, structural factors also raises the question of whether and how market structure, corporate power, and anticompetitive practices have impacted the supply of affordable housing. Consider two examples. The first ties back to the financial crash. As building construction declined after the crash, homebuilders faced an economic crisis. Since 2007, the number of homebuilders has declined by 67 percent.[136] Smaller players were more likely to go under than larger ones, and the biggest homebuilders increasingly became dominant – in some cases building 70 to 80 percent of new construction.[137] Today, the top two homebuilders in the country make more houses than the next eight combined.[138] The problem is that homebuilders with market power can refuse to build, or slow their building, in order to keep housing scarce and prices high. Importantly, the mechanism for how

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[132] Brett Christophers*, The Role of the State in the Transfer of Value from Main Street to Wall Street: U.S. Single-Family Housing After the Financial Crisis,* 54 ANTIPODE 130 (Jan. 2022).

[133] Sami Sparber, *How the Pandemic Transformed the Housing Market in 5 Years*, AXIOS (Mar. 10, 2025), https://www.axios.com/2025/03/10/covid-home-prices-trends.

[134] *Id.*

[135] *Id.*

[136] Emily Gains Buchler, *Buying a House Isn't What It Used to Be*, FUTURITY (Sep. 12, 2023), https://www.futurity.org/buying-a-house-real-estate-2973222-2/.

[137] *See id*.

[138] *See id*.; *see also* Russell Ormison, et. Al., *Rebuilding Residential Construction, in* CREATING GOOD JOBS: AN INDUSTRY-BASED STRATEGY 75, 77 (Paul Osterman, ed., 2020) ("[T]he homebuilding market has grown substantially and the industry's largest firms have consolidated over the last twenty-five years. In 1994, the ten largest homebuilders (by number of homes) accounted for 9.7 percent of new homes sold in the United States; in 2017, the ten largest companies were responsible for 27.5 percent.").

to do this is by holding land. The large homebuilders do not actually build much of anything themselves. As Matt Stoller has observed, "they are financiers that borrow cheaper than real developers and use that cheap credit to speculate in land, hiring contractors to do the work."[139] Because they are large and have significant access to capital, they can hold property for long periods of time – waiting to maximize their profits without engaging in construction.[140] Smaller players cannot do this, and if they cannot get financing for a project, end up having to sell land they have acquired to these bigger players.[141] Larger homebuidlers are also increasingly vertically integrated, with access to institutional investors.[142]

This furthers their market power and ability to manage supply to maximize their profits.

A second example comes from the rental market. In recent years, many landlords and property managers started using software from RealPage, a company that collected data on available units and rents and then made pricing recommendations. The software, lawsuits allege, is essentially a high-tech form of collusion: instead of landlords getting together in person to discuss their rental prices, and agree on higher prices, RealPage simply did it for them. In Washington DC, RealPage is estimated to have set rents for 90% of large multi-family properties in the metro area.[143] According to the Department of Justice, RealPage coordinated landlords to raise prices while leaving occupancy in rentals available: lower occupancy and higher prices were more profitable than higher occupancy and lower prices. That made housing less available and less affordable.[144] These examples show that concentrated market structure and collusive practices are connected to high housing prices and low supply. Again, critically, zoning has nothing to do with these problems.

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[139] Matt Stoller, *It's the Land, Stupid: How the Homebuilder Model Constrains Housing Supply*, BIG (Aug. 15, 2024), https://www.thebignewsletter.com/p/its-the-land-stupid-how-the-homebuilder.

[140] *See id*.

[141] *See id*.

[142] *See, e.g.,* John McManus, *JP Morgan's Latest Power Move: A Homebuilding Shake-Up in the SFR Market,*. BUILDER'S DAILY, Feb. 13th, 2025, *available at* https://www.thebuildersdaily.com/jp-morgans-latest-power-move-a-homebuilding-shake-up-in-the-sfr-market/.

[143] Callaci & Vaheesan, *supra* note 51.

[144] *See id*.

C. Neoliberalism's Descendants: Loosening Zoning as Deregulation

While historians and other commentators have declared the neoliberal era over,[145] neoliberal advocates and ideas persist.[146] In the housing policy context, the emerging consensus that zoning is the primary problem and that eliminating or loosening zoning rules is the primary or exclusive solution, fits comfortably within the neoliberal paradigm. This is easiest to see at the extremes, where proponents of the anti-zoning view such as Nolan Gray and Block and Huddel fully embrace neoliberal ideas of prioritizing markets, in addition to expressing a general hostility to government action in addressing housing problems.[147]

Such positions make explicitly clear the market-prioritization of at least a subset of anti-zoning advocates and scholars. These kinds of sentiments were central to neoliberal ideology over the last half-century – as was a commitment to deregulation. YIMBY advocates focused primarily or exclusively on de-zoning thus have much in common with neoliberals and libertarians, which is likely why some of the fiercest advocates of de-zoning come from those camps.[148] Even less extreme advocates for loosening zoning recognize that the policy is a form of deregulation. For example, Ezra Klein has said that building more, faster, and extending public dollars requires a "deregulatory agenda."[149] Whether stated or unstated, the looser-zoning paradigm is one in which free markets work extremely well and the primary problem is government regulation. Zoning-reform supply-siders thus assume a version of trickle-down economics that they call "filtering."[150] They assume deregulation will lead developers to build more. Even if this building is high-end development for wealthier people, unlocking that supply will then mean there

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[145] *See, e.g.,* GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA (2022).

[146] *See, e.g.*, SITARAMAN, *supra* note 3, at 59-82 (describing a "New Neoliberalism" as one possible future); Matthew Yglesias, *What Was Neoliberalism?,* SLOW BORING, July 11, 2024, *available at* https://www.slowboring.com/p/what-was-neoliberalism.

[147] *See* GRAY, *supra* note 83; Block & Huddell, *supra* note 85; *see also, e.g.,* Rick Cole, *Abolish Zoning. Entirely. For Good.*, PASADENA STAR-NEWS (June 25, 2023), https://www.pasadenastarnews.com/2022/06/25/abolish-zoning-entirely-for-good/; Jason Sorens, *Should We Abolish Zoning?,* THE DAILY ECONOMY (Aug. 25, 2023), https://thedailyeconomy.org/article/should-we-abolish-zoning/ ("The surprisingly strong argument for abolishing zoning is the rare case of successfully moving the 'Overton window.'"); Adam A. Milsap, *Time to Abolish Zoning? New Book Makes the Case*, FORBES, July 29, 2022 (reviewing favorably GRAY, ARBITRARY LINES); The Center for New Liberalism, Abolish Zoning Sticker, https://cnliberalism.org/store/p/abolish-zoning-sticker.

[148] *See, e.g.,* Matthew Yglesias, *Unleash the Growth Machine*, SLOW BORING, Apr. 3, 2024, *available at* https://www.slowboring.com/p/unleash-the-growth-machine; Noah Smith, *The Build-Nothing Country,* NOAHPINION, Feb. 27, 2023, *available at* https://www.noahpinion.blog/p/the-build-nothing-country; David Schleicher, *Exclusionary Zoning's Confused Defenders,* 2021 WISC. L. REV. 1315.

[149] Ezra Klein, *Biden's State of the Union Message,* N.Y. TIMES (Mar. 10, 2024), https://www.nytimes.com/2024/03/10/opinion/biden-state-union-message.html.

[150] *See, e.g.,* Been, *et al., supra* note 68 (discussing filtering).

is more housing overall, therefore improving affordability at lower price tiers in the market. In other words, the basic argument is that if government regulations were not in the way, then the invisible hand of the market would eventually work its way to more affordable and abundant housing.

The trouble is that the neoliberal paradigm has consistently made significant mistakes – and the updated version in the housing context continues to make these errors: It assumes markets work well, when they often don't. It undervalues the fact that government policies and laws are inevitable, that they can shape markets for good as well as ill, and that design is critical. And it assumes a single policy goal, when there are often multiple at play.

Markets generally, and housing markets specifically, do not always work well. As just one example, consider the problems of concentration and monopolization of homebuilding and the price-fixing cartels in the rental markets.[151] The market, in these cases, is not producing competition, lower prices, and more supply, but rather the opposite. It is naïve to think that the wealthiest, most powerful financiers and developers will not seek to maximize their profits and power, but instead will benevolently seek to provide the affordable housing society needs. The response that *even less* restrained markets is the answer is unrealistic, given the pervasive ways government has and does shape and order housing markets – from land title registries and property rights enforcement to Federal Reserve policies that shape asset prices. Housing is also a multifaceted and complex asset, in which multiple goals and interests are at issue.[152] It is simultaneously shelter for people who need a place to live, an investment vehicle for owners, a financial product for Wall Street, and the location of contested social forces around segregation, exclusion, and opportunity. It raises multidimensional challenges.

Even if we put aside market failures like concentration and price-fixing or other government policies that influence housing affordability, like Federal Reserve interest rates, it is also worth pointing out that de-zoning may not be the most efficient or effective way to increase housing supply or affordability. First, the trickle-down theory of affordability filtering down to lower-income households may not be well-dispersed geographically or demographically. The impact of new private housing developments may be felt regionally, but the local and neighborhood effects are much harder to predict, and not everyone will benefit from the greater supply of market-rate units. Indeed, leading supply-side scholars like NYU law professor Vicki Been readily acknowledge that the market is unlikely to result in housing that is affordable to the poor.[153] More generally, the overall economic benefits of new luxury housing are likely to be concentrated on the higher ends of the housing economy—market-rate builders, affluent buyers, and their brokers, architects, and bankers. Second, unlocking new luxury and market-rate housing might, indirectly and over time, lead to a reduction in prices in other housing

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[151] *See supra* note [] (discussing RealPage).

[152] *See, e.g.*, Lee Anne Fennell, *Homeownership 2.0,* 102 NW. U. L. REV. 1047 (2008) (discussing constitutive elements of homeownership).

[153] Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability,* 29 HOUS. POL'Y DEBATE 25, 27 (2019); *see also* Vicki Been et al., *Supply Skepticism Revisited* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4629628.

segments. But it is not the most direct way of guaranteeing affordable and workforce housing. For that, more direct government involvement in housing markets is more effective.

II. POST-NEOLIBERAL HOUSING POLICY

None of this is to say that housing supply is not an issue. We think it is. But it has been an issue for more than 75 years, long before modern zoning could shoulder any blame. In 1940, Catherine Bauer lamented the lack of affordable, habitable housing, noting that the problem of producing adequate housing "has been recognized for generations, even in America, and has been considered important enough to warrant some sort of public action and intervention almost ever since there were any houses at all."[154] In 1968, following the disastrous policies of urban renewal without accompanying increases in supply, Congress set a goal of constructing or rehabilitating 26 million housing units over the next decade.[155] The number is staggering both for its sheer ambition—housing starts since the 1960s have generally been between 1 and 2 million per year[156] —but also for its reflection of the acute need for greater supply more than half a century ago. The effort failed, obviously, partly because the federal government started focusing less on supporting development and more on demand-side vouchers.[157] The supply shortfall has been a perennial problem, long before the current fad of blaming zoning.[158]

To address the extraordinary scope and multicausal character of the housing challenge, we need a more comprehensive approach, one that will address the deeper, structural roots of the housing crisis. This includes a more explicit industrial policy for housing, public options for housing production and financing, Pigouvian tax policies to address property hoarding, and, finally, market-shaping regulations – including antimonopoly and consumer regulations, especially in rental markets; supply-side zoning policies; and macro-level regulatory policies that distribute economic growth. This is a broad and ambitious agenda. For each area, we sketch out the conceptual category and then offer some specific policy ideas. As with zoning reforms, not all of these proposals are appropriate in all places. A well-targeted approach requires a nuanced understanding of the housing dynamics of any particular place.

Our goal here is not to supply a detailed blueprint for reform. In the vocabulary of development, we intend to operate at the level of a design concept, not the mechanical architectural renderings that builders ultimately need to start construction. But this is an essential first step to building a post-neoliberal housing policy.

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[154] CATHERINE BAUER, A CITIZEN'S GUIDE TO PUBLIC HOUSING 19 (1940).

[155] Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy,* 1949–1999, 11 HOUS. POL'Y DEBATE 489 (2000).

[156] U.S. Housing Stats, TRADING ECON., https://tradingeconomics.com/united-states/housing-starts.

[157] *See* Orlebeke, *supra* note 136 (discussing the history of federal housing policy).

[158] Other scholars point to the 1970s as an inflection point. *See, e.g.,* Hills & Schleicher, *supra* note [], at *43-*44 & n. 190 (citing sources).

A. An Industrial Policy for Housing

An industrial policy is "any government policy that encourages resources to shift from one industry or sector to another, by changing input costs, output prices, or other regulatory treatment."[159] Industrial policy has been part of the American tradition since the founding of the country,[160] with policymakers regularly designing laws and policies to benefit specific domestic industries. While the parlance of industrial policy went out of vogue in the neoliberal era, it has come roaring back in the last few years.[161] Policymakers in both parties have embraced industrial policy, from leading officials in the Biden Administration[162] to then-Senator and now-Secretary of State Marco Rubio.[163] Business scholars have declared that "the new era of industrial policy is here."[164] The tools of industrial policy are wide-ranging – from influencing supply through subsidies, tariffs, labor training, and public spending; to spurring demand via procurement and consumer subsidies; to coordination policies, like standard-setting regulations that improve interoperability.[165]

In the housing context, an industrial policy for the housing sector would apply a range of tools to spur home construction and reduce the costs of development. Housing costs are typically comprised of three distinct elements: construction costs, land costs, and profits.[166] The first two are appropriate targets of an industrial

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[159] Todd Tucker, *Industrial Policy and Planning*, ROOSEVELT INST. (July 2020), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Industrial-Policy-and-Planning-201707.pdf.

[160] Ganesh Sitaraman, *Industrial Revolutionaries: Franklin, Hamilton, Madison, and Jackson,* AM. PROSPECT (Sept. 10, 2020), https://prospect.org/economy/industrial-revolutionaries-franklin-hamilton-madison-jackson/; STEPHEN S. COHEN & J. BRADFORD DELONG, CONCRETE ECONOMICS: THE HAMILTON APPROACH TO ECONOMIC GROWTH AND POLICY (2016).

[161] V. Millot & Ł. Rawdanowicz, *The Return of Industrial Policies: Policy Considerations in the Current Context*, OECD ECON. POL'Y PAPERS NO. 34 (2024), https://doi.org/10.1787/051ce36d-en.

[162] *See* Brian Deese, *Remarks on Executing a Modern American Industrial Strategy by NEC Director Brian Deese,* WHITE HOUSE (Oct. 13, 2022), https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/10/13/remarks-on-executing-a-modern-american-industrial-strategy-by-nec-director-brian-deese/; Jake Sullivan, *Remarks by National Security Advisor Jake Sullivan on Renewing American Economic Leadership at the Brookings Institution,* WHITE HOUSE (Apr. 27, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution/.

[163] *See* Marco Rubio, *Industrial Policy, Right and Wrong,* NAT'L AFF. (Spring 2024), https://www.nationalaffairs.com/publications/detail/industrial-policy-right-and-wrong.

[164] *See* Willy Shih, *The New Era of Industrial Policy Is Here,* HARV. BUS. REV. (Sept. - Oct. 2023), https://hbr.org/2023/09/the-new-era-of-industrial-policy-is-here.

[165] *See* Tucker, supra note 159.

[166] *See* Andrew Justus & Alex Armlovich, *Eliminating the Chassis Requirement to Free Manufactured Homes from Local Discrimination and Regulatory Dead Weight,* FED'N AM.

policy for housing. In particular, industrial policy could drive down construction prices, broadly construed, by promoting innovation in building technologies and reducing the inputs to construction costs, including land value.

There are many promising technological innovations in the construction industry, but construction has often fallen behind other industries in uptake of new technologies.[167] Nevertheless, new technologies can reduce costs and speed up the pace of construction.[168] Consider, for example, innovations in modular, offsite construction for both single-family and also for high-rise construction.[169] Building housing offsite increases efficiencies and reduces carbon emissions.[170] An analysis from the consulting firm McKinsey & Co. shows that modular construction could speed up building times by 20-50 percent while reducing the cost of construction 20 percent.[171]

But there have been a number of barriers to the widespread adoption of modular construction methods in the United States. The first is financial. Modular construction tends to require significant up-front capital investments, unlike traditional

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SCI. (Feb. 21, 2024), https://fas.org/publication/manufactured-home-chassis-requirement/ ("Even in metropolitan areas, most U.S. metros still have median home prices within 125% of construction costs—meaning that construction costs matter more than growth controls and land prices for home prices there.").

[167] *See, e.g.*, Mark Erlich, *Can the Construction Industry Be Disrupted?,* HARV. BUS. REV. (July 10, 2023), https://hbr.org/2023/07/can-the-construction-industry-be-disrupted ("[I]ndustry observers routinely deride the lack of technological sophistication in the construction industry, and have pigeon-holed it as old-fashioned and lagging behind more forward-looking and purposeful industries such as manufacturing."); Kasia Borowska, *The Slow Revolution—Five Technology Trends in Construction 2020,* FORBES (Nov. 19, 2020), https://www.forbes.com/sites/kasiaborowska/2020/11/19/the-slow-revolutionfive-technology-trends-in-construction-2020/("Despite the huge potential that these new technologies bring to the construction industry, its growth has been slower than expected, with roughly 1% growth year on year compared to industries such as manufacturing, growing at a far quicker rate of 3.6%."); Khaled Mouasher, *A Long Overdue Disruption in the Construction Industry,* HARV. TECH. & OPERATIONS MGMT. (Nov. 15, 2017), https://d3.harvard.edu/platform-rctom/submission/a-long-overdue-disruption-in-the-construction-industry/ ("The construction industry is famously inefficient, plagued by a declining productivity index and what Thomas Kuhn might call a 'puzzle-solving' approach.").

[168] E. Sarah Slaughter, *Models of Construction Innovation,* 124 J. CONSTR. ENG'G & MGMT. 173 (1998) (surveying different forms of innovation).

[169] *See, e.g.*, Ryan E. Smith & Ivan Rupnik, *Productivity, Innovation and Disruption,* in OFFSITE PRODUCTION AND MANUFACTURING FOR INNOVATIVE CONSTRUCTION (2019); Huu-Tai Thai et al., *A Review on Modular Construction for High-Rise Buildings,* 28 STRUCTURES 1265 (2020).

[170] *See, e.g.*, Joseph K. Ofori-Kuragu & Robert Osei-Kyei, *Mainstreaming Pre-Manufactured Offsite Processes in Construction—Are We Nearly There?,* 21 CONSTR. INNOVATION 743 (2020) (reviewing literature).

[171] Jose Luis Blanco, Dave Dauphinais, Garo Hovnanian, & Rob Palter, *Making Modular Construction Fit,* MCKINSEY & CO. (May 10, 2023), https://www.mckinsey.com/capabilities/operations/our-insights/making-modular-construction-fit.

construction, which is funded as the project develops.[172] Lenders see this as higher risk and areless interested in funding such projects.[173] Governments at all levels could find ways to financially support modular construction. Just as the Federal Housing Administration has created specific support for mobile homes, it could extend similar support for modular construction.[174]

Innovations only produce their most significant savings when they are deployed at scale. Here too there are challenges. An impediment is the lack of "repeatability of end products in the construction industry."[175] Governments could act as market makers by committing to acquire significant quantities of new housing constructed using the most promising new technologies, allowing offsite construction providers to scale up, so as to then provide significant savings to the market more broadly. Government orders for housing would also help construction firms justify the capital investments required to invest in new technologies.[176] The same is true of other innovations, like 3D-printed housing, implementation of robots and autonomous construction equipment, and new forms of building information modelling (BIM). Acting as a purchaser, the government could drive adoption of these and other new construction technologies. This policy would work well in conjunction with public option policies for housing we discuss below.[177]

Standardization is another issue. Without standardized designs, the cost of production and deployment of modular construction remains high. Standardizing building components could streamline construction and introduce more opportunities for off-site manufacturing as a part of the construction process.[178] For example, self-contained bathroom and kitchen units can simply be dropped into a housing unit, either on-site or as part of off-site construction. These are often the most expensive rooms to build and so this kind of modular construction comes with the possibility of significant savings, as well as greater efficiency in the design-and-build phase of construction. One significant impediment, however, is the absence of interconnection standards. Plumbing and electrical systems must work together, allowing them to connect to other modules in the building, and also to the building itself. The Center for Offsite Construction has detailed plans for increasing interoperability of housing elements, creating interface standards for physical interfaces and communications protocols between building elements, allowing for modular

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[172] Michela Zonta, *Increasing Affordable Housing Stock Through Modular Building,* CTR. FOR AM. PROGRESS (Feb. 6, 2024), https://www.americanprogress.org/article/increasing-affordable-housing-stock-through-modular-building/.

[173] *See id*.

[174] National Housing Act, Title I, 12 U.S.C. §§ 1702–1706d.

[175] *See id.* at 747.

[176] *See* Erlich, *supra* note 167 ("Robots and other forms of automation are costly and require an extended time frame before offering a satisfactory return on capital.").

[177] *See infra.*

[178] *See* COMM. ON ADVANCING THE COMPETITIVENESS & EFFICIENCY OF THE U.S. CONSTR. INDUS., ADVANCING THE COMPETITIVENESS & EFFICIENCY OF THE U.S. CONSTRUCTION INDUSTRY 32–33 (2009).

construction at varying scales.[179] The federal government or state governments could adopt these or similar standards to help reduce construction costs.

Industrial policy could also influence building design by increasing standardization in building codes and thereby reducing compliance costs. Building codes are essential for ensuring that housing is safe. We are long past the Code of Hammurabi, which simply imposed the death penalty for any builders whose buildings collapsed on their owners.[180] But complying with building codes is difficult because they are often adopted at the municipal level and so require local knowledge. There are, therefore, considerable information barriers to entering a new market. States and the federal government could make it easier for developers to navigate building codes by promulgating or adopting pre-approved building designs that *per se* satisfy building code requirements. In effect, creating these designs amounts to a kind of pre-approval. It allows developers to scale up production of housing in these specific forms, with fewer regulatory hurdles. But it also frees up time and resources for the officials who would have to approve these projects, and this should, in turn, speed up the review process for people who want to design their own housing.[181] Of course, states and the federal government could simply preempt local building codes, but this is both less likely politically, and less effective, than creating safe-harbor building designs.[182] Some cities have already embraced this approach. South Bend, Indiana, has recently adopted pre-approved designs to help address the problem of vacant infill lots while expanding housing supply.[183] Nashville, Tennessee, recently proposed asking city departments to collaborate on "pattern books" with designs that would not require further, specific building approvals.[184] At the federal level, one newly-proposed bill in Congress directs HUD to directly fund the creation of pre-approved building plans to reduce the soft costs of development.[185]

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[179] Ctr. for Offsite Construction, *Modular 2.0,* N.Y. INST. OF TECH. (2024), https://site.nyit.edu/files/architecture/Modular_2.0.pdf.

[180] J. Dyneley Prince, *The Code of Hammurabi,* AM. J. THEOLOGY 601, 607 (1903)

[181] Robert Steuteville, *Cities Moving Ahead with Pre-Approved House Plans,* CNU PUBLIC SQUARE (Feb. 7, 2024), https://www.cnu.org/publicsquare/2024/02/07/cities-moving-ahead-pre-approved-house-plans.

[182] *But see* Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards,* 34 HARV. ENVTL. L. REV. 335 (2010) (arguing for federal green building codes to require minimum efficiency standards).

[183] Daniel Herrigs, *Pre-Approved House Designs Jump-Start Infill Development in South Bend,* STRONG TOWNS (Oct. 6, 2022), https://www.strongtowns.org/journal/2022/10/6/pre-approved-house-designs-jump-start-infill-development-in-south-bend; *City of South Bend, Pre-Approved Residential Plans,* SOUTH BEND GOV'T, https://southbendin.gov/bsb/preapprovedplans/.

[184] *See* Stephen Elliott*, 'Missing Middle' Housing Targeted in Nashville Zoning Reform Push,* NASHVILLE SCENE, Jan. 30, 2024, https://www.nashvillescene.com/news/pithinthewind/nashville-zoning-reform-push/article_f2b9588b-4c17-5caa-a584-bc8f15ccc720.html.

[185] *See* Reducing Regulatory Barriers to Housing Act, H.R. 8604, 118TH CONG. (2024).

Importantly, many of these same approaches could be adopted to target and promote manufactured housing—mobile homes—more specifically. Manufactured housing is a significant source of affordable housing in the United States. A recent study reports 18 million residents living in manufactured housing, making it "the largest source of unsubsidized affordable housing in the United States."[186] There are, however, a number of headwinds standing in the way of even more widespread deployment of this housing option. Most obviously, the pervasive stigma against manufactured housing has resulted in many local governments enacting regulatory hurdles for siting mobile homes in their jurisdiction.[187] Zoning is sometimes the culprit here, with local governments zoning only small areas of land—if any—for mobile homes.[188] Federal or state regulators could adopt a nondiscrimination rule, effectively allowing manufactured housing anywhere that is zoned for single-family residential use. It could go further, too, and preempt aesthetic requirements—including architectural review—for manufactured housing. Daniel Mandelker has proposed just such a change.[189] But zoning is only the most obvious problem; others are at least as important.

Financing is a particular challenge. Most owners of manufactured homes own them as chattel, not real estate. Indeed, to be eligible for a standard mortgage, the owner must own both their home and the land on which it is sited, place it on a permanent foundation, and title the land as real estate.[190] As a practical matter, more than half of loan applicants for manufactured homes are denied.[191] This is also partly the result of complex titling rules for manufactured homes, which vary state by state in terms of when a mobile home can be treated as real estate instead of chattel.[192] Increased federal support, through the Federal Housing Administration or other mechanism, could increase demand, especially if keyed exclusively

[186] Noah J. Durst & Esther Sullivan, *The Contribution of Manufactured Housing to Affordable Housing in the United States: Assessing Variation Among Manufactured Housing Tenures and Community Types*, 29 HOUS. POL'Y DEBATE 880 (2019).

[187] *See, e.g.*, Julia Okerman, *Preserving Manufactured Housing Communities in an Affordable Housing Crisis: How Resident Ownership Offers the Solution,* 50 MITCHELL HAMLINE L. REV. 774, 784 (2024) (discussing stigma).

[188] *See* Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing,* 48 URB. LAW. 233, 236–37 (2016) (describing zoning challenges); *see also* Casey J. Dawkins & Theodore Koebel, *Overcoming Barriers to Placing Manufactured Housing in Metropolitan Communities,* 75 J. AM. PLAN. ASS'N 73 (2009) (same).

[189] *See* Mandelker, *supra* note 188, at 277–78.

[190] Maryam Kouhirostami et al., *Investigation of Current Industry Strategies to Reduce the Cost of Financing a Manufactured Home,* 29 J. ARCH. ENG'G 03123002-1 (2023).

[191] Linlin Liang et al., *Data Shows Lack of Manufactured Home Financing Shuts Out Many Prospective Buyers,* PEW(Dec. 7, 2022), https://www.pewtrusts.org/en/research-and-analysis/articles/2022/12/07/data-shows-lack-of-manufactured-home-financing-shuts-out-many-prospective-buyers.

[192] *See* Nat'l Conf. of State Legislatures, *Manufactured Homes: An Underutilized Source of Affordable Housing?* (Dec. 4, 2023), https://www.ncsl.org/human-services/manufactured-homes-an-underutilized-source-of-affordable-housing.

to the nature of the structure and not to the nature of the title. It is important to note, however, that the affordability benefits of manufactured housing are under threat. Wall Street firms have begun buying up so-called trailer parks. "One sign that a large investment firm has taken over a neighborhood is a dramatic spike in lot rent."[193] The business model is geared to extract higher rents from effectively captive tenants who cannot afford to move.[194] Industrial policy can help with the demand and production of manufactured housing, but other regulatory interventions will be needed to protect their occupants.[195]

At a broader level, industrial policy could address one of the key inputs into construction costs: the cost of skilled labor. A pervasive labor shortage, especially in the building trades, drives up the costs of new housing.[196] The number of workers in construction has not bounced back since the 2007 financial crisis and the slowdown in the housing market that it precipitated.[197] Current projections suggest that the construction industry needs at least another 500,000 workers.[198] At the same time, applications for trade schools for skilled carpenters, electricians and plumbers is down nearly 50%.[199] That gap puts pressure on labor costs, as well as the timing and speed of construction. In the modular housing context specifically, there is another challenge: many contractors and workers do not have experience installing modularly constructed homes.[200]

To address these challenges, Congress—or individual states—could invest more in existing workforce development programs. But these programs are many, varied, and complex – and critically, not focused on construction.[201] Governments

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[193] Sheelah Kolhatkar, *What Happens When Investment Firms Acquire Trailer Parks,* NEW YORKER, (Mar. 8, 2021).

[194] *See, e.g.,* Sophia Kasakove, *Investors Are Buying Mobile Home Parks. Residents Are Paying the Price*, N.Y. TIMES, (Mar. 27, 2022).

[195] *See infra* Part II(D).

[196] *See* Andrew Y. Elrod, *Built Trades,* PHENOMENAL WORLD, Aug. 11, 2021, *available at* https://www.phenomenalworld.org/analysis/built-trades/ (identifying structural changes in construction industry that have resulted in fewer skilled workers).

[197] Sophie Huang, *Rebuilding the Construction Trades Workforce,* JOINT CTR. FOR HOUS. STUD. HARV. UNIV. (June 5, 2024), https://www.jchs.harvard.edu/blog/rebuilding-construction-trades-workforce.

[198] Zachary Phillips, *Do People Not Want to Work (In Construction) Anymore?,* CONSTRUCTION DIVE (Nov. 28, 2022), https://www.constructiondive.com/news/round-table-do-people-not-want-to-work-construction-anymore/636271/.

[199] Mary Yang, *America Needs Carpenters and Plumbers. Try Telling That to Gen Z,* NPR (Jan. 5, 2023), https://www.npr.org/2023/01/05/1142817339/america-needs-carpenters-and-plumbers-try-telling-that-to-gen-z.

[200] Jose Luis Blanco, Dave Dauphinais, Garo Hovnanian & Rob Palter, *Making Modular Construction Fit,* MCKINSEY & CO. (May 10, 2023), https://www.mckinsey.com/capabilities/operations/our-insights/making-modular-construction-fit.

[201] Lucy McMillan, Harin Contractor & Anthony D'Andrea, *Guide to the American Workforce System,* NEXIGHT GROUP (Mar. 2023), https://nexightgroup.com/wp-content/uploads/2023/03/GuidetotheAmericanWorkforceSystem.pdf.

could create and fund a program to invest in developing skills in the construction sectors. The program would allocate funds to organizations that engage in training and skill-building in the building trades. Program funds could go either to lower the cost of providing such training (e.g. by hiring more trainers, developing facilities) or to scholarships and financial incentives to enable trainees to start and complete the training programs. Such a program could also work with industry organizations to fund training of contractors and workers in modular construction techniques.

In addition to construction costs, land costs are key inputs into housing costs. The more developers must pay for land, the higher the eventual housing costs to consumers. Often, land costs are driven by zoning and land use regulations. But they can also be affected by the difficulty of assembling large parcels, especially for the development of multi-family housing and apartment buildings and especially in the urban core. The government can reduce the costs of land assembly by using its power of eminent domain. This has become unpopular since the Supreme Court ruled for expansive government authority under the Constitution to take property for public use, but it remains an available option for making larger-scale development viable and affordable.[202] Scholars have proposed smart innovations to reduce the burdens of eminent domain, such as Michael Heller and Rick Hills' proposal to create "Land Assembly Districts," that effectively allow neighborhoods to put themselves up for sale with a profit-sharing mechanism, instead of making neighborhoods the target of government condemnation.[203] Regardless of the specific form, government-assisted land assembly can overcome strategic holdouts that can drive up the costs of land acquisition.

Finally, infrastructure development should be seen as a form of industrial policy for housing. Significant new development often burdens local infrastructure like roads, transit, schools, parking, and water systems. In some places, where infrastructure is at or near capacity, the addition of new housing units may impose real costs, either in congestion of existing infrastructure or the fiscal costs of expanding it—building new roads, new schools, and so forth. Directly investing in infrastructure expansion therefore creates the conditions for unlocking growth. New York City's significant housing reform effort, dubbed "City of Yes," recognizes this explicitly. Proponents added $2 billion to the slate of reforms for infrastructure improvements.[204] In other places, there are significant amounts of affordable housing that available reasonably nearby to major urban centers – but no cheap, convenient, reasonably quick mode of transportation to get to them. In New England, for example, housing is much more affordable in Providence, Rhode Island, and New Bedford and Worcester, Massachusetts, than it is in Boston – and

[202] *See* Kelo v. City of New London, 545 U.S. 469 (2005).

[203] *See* Michael A. Heller & Roderick M. Hills Jr., *Land Assembly Districts,* 121 HARV. L. REV. 1465 (2008).

[204] *See* Emma G. Fitzsimmons & Mihir Zaveri*, N.Y.C. Housing Plan Moves Forward With an Unexpected $5 Billion Boost,* N.Y. TIMES, (Nov. 21, 2024), at A20 ("Half of the $4 billion in new city money will go toward capital expenses over the next five years for sewers, flood protection, streets, and 'open space' investments, according to the mayor's office.").

those other cities are only 40-60 miles from downtown Boston.[205] Affordable and faster rail service could connect these places, expanding access to existing affordable housing, while perhaps also spurring economic growth and development in those further away cities.

This is an even more effective form of industrial policy when adopted at the state or federal level. Many municipalities currently rely on the development process to fund infrastructure expansion through the use of development impact fees and other development exactions.[206] These are demands that municipalities make of developers as a condition for granting land approvals. For example, a developer may be required to install sidewalks, widen streets, or otherwise pay for the street improvements to mitigate traffic. While these have come under constitutional pressure in the last few years, impact fees remain widespread.[207] They also have an obvious economic rationale. Development exactions are a straightforward mechanism for forcing developers to bear the costs that growth will impose on a municipality. Those higher costs, however, can be passed on to housing consumers, resulting in higher housing costs.[208] If the costs are absorbed by in place property owners, either through longer commute times or increased property taxes, they are likely to object and create political opposition to growth. If the costs are shifted to newcomers through developer exactions, housing prices will increase accordingly.

States and the federal government are therefore well positioned to break this zero-sum game. By investing directly in local infrastructure expansion, states can shield in-place property owners from the costs of growth while keeping newcomers from having to pay for the marginal costs they represent. Ideally, federal and state support for municipal infrastructure will be used as an inducement to new development. For example, Congress should more aggressively fund municipal infrastructure expansion—in particular, for local roads, transit, and water—specifically to places that are accommodating growth and density. Not only would this channel infrastructure funding to places that need it, it would also incentivize places to accommodate growth in order to attract these funds.

B. Public Options for Housing

Privatization was one of the touchstones of neoliberal economic policy. The idea was that private companies would do better than the government at ensuring society had certain goods and services.[209] In many areas, this strategy has been a

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[205] Robert Kuttner, *Solving the Housing Crisis Requires More Than YIMBY,* AM. PROSPECT (Dec. 17, 2024), https://prospect.org/infrastructure/housing/2024-12-17-solving-housing-crisis-more-than-yimby/.

[206] *See* Christopher Serkin, *Exacting Assessments: Sheetz and the Problem of Stategraft,* 2024 Wis. L. Rev. 641, 646–47.

[207] *See* Sheetz v. County of El Dorado, 143 S. CT. 1486 (2024).

[208] *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991).

[209] E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT (1987).

disaster, as corporations undermine public goals in search of higher profits.[210] Indeed, when provision of essential services is at issue, the profit motive is in tension with affordable, universal access. Companies will seek to increase prices, reduce supply, monopolize markets, reduce the quality of service, abandon high-cost users, and do other things that make them money – even if it undermines the public goals of access and affordability. In such cases, public provision of goods and services can help ensure access, increase affordability, and expand competition.

A public option is the public provision of a good or service at a controlled price, where the public option coexists with private market provision.[211] Public options are often talked about in the context of health care policy, but they exist everywhere in American society: public swimming pools coexist with private ones; public playgrounds and private ones; public golf courses, public transportation, the list goes on.[212] Public options given individuals the choice of another option in the marketplace: one that is usually cheaper, even if it more limited. But increasing access to basic goods and services has significant benefits: it can increase opportunity, reduce inequality, and improve economic conditions – including for businesses that don't have to provide the service to workers.[213] It can also increase competition in concentrated markets by adding an additional player into the sector.[214]

1. Public Construction and Management— The most direct form of creating a public option for housing is for the government to build more housing itself. Public housing projects first started in the United States in 1937, and they were focused on lower income residents.[215] After a shift toward housing for wartime workers, the post-World War II public housing regime shifted focused primarily to the poor.[216] Over time, examples of housing projects from the 1950s and 1960s reshaped public perceptions to see public housing as linked to concentrated poverty, dilapidated building conditions, and rampant crime.[217] Starting in the 1970s, federal policy shifted significantly: the federal government increasingly withdrew

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[210] ELLIOT D. COHEN & HASSAN MIKAELIAN, THE PRIVATIZATION OF EVERYTHING (2022).

[211] *See* GANESH SITARAMAN & ANNE L. ALSTOTT, THE PUBLIC OPTION 44 (2019).

[212] ID. at 97-129.

[213] ID. at 24-43.

[214] ID. at 38-39.

[215] Maggie McCarty, *Introduction to Public Housing*, CONG. RSCH. SERV., R41654, (updated Feb. 13, 2014), https://crsreports.congress.gov/product/pdf/R/R41654.

[216] *Id*.

[217] For one example, see Colin Marshall, *Pruitt-Igoe: The Troubled High-Rise that Came to Define Urban America*, THE GUARDIAN (Apr. 22, 2015), https://www.theguardian.com/cities/2015/apr/22/pruitt-igoe-high-rise-urban-america-history-cities; U.S. Dep't of Hous. & Urban Dev., *Why Did Pruitt-Igoe Fail*, PD&R EDGE (Nov. 3, 2014), https://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_110314.html; Jackie Dana, *The Failed Promise of Pruitt-Igoe,* UNSEEN ST. LOUIS (Feb. 10. 2022), https://unseenstlouis.substack.com/p/the-failed-promise-of-pruitt-igoe.

from developing new housing and instead actively tried to demolish or privatize public housing.[218]

The history of public housing, however, need not define the future of a public option for housing. As other countries have demonstrated, public housing can be well-designed and well-run and can provide important alternatives to private housing development. Vienna, Austria, in particular, has a large stock of mixed-income affordable housing that has helped to keep prices low throughout the city.[219] When governments design and build housing, they can make different choices than profit-oriented developers, or even than affordable housing developers who still need projects to be financially viable. Governments can make location and design decisions based on maximizing numbers of units, density, and other non-financial considerations. Instead of trying to incentivize private developers to create socially desirable housing options, governments can just build it themselves. A well-designed public-built housing development will most likely be dense, near transit, and include mixed-income options. It might not be limited to rental housing, either. Governments could build condominiums and other multi-family housing options at different price points than private developers.

It is worth stressing: this is not how public housing has generally been built in the United States. Rather, public housing has historically been focused on providing housing to the poor, rather than simply providing a public option for housing to the general public. But as former Health, Education, and Welfare Secretary Wilbur Cohen once remarked, "a program for the poor is a poor program,"[220] in part because it will never have the political support to be sustainable at a high quality. Taking this insight seriously, along with evidence from other jurisdictions, such as Vienna, Austria, one possibility is for public housing authorities to invest in public options for housing that are available to everyone, not just the poor.

Building public options for housing has significant benefits. From a financing perspective, it is more likely to be easier to fund: the housing units would be available to anyone, which means that the return on investment from rents would likely be more reliable and not exclusively dependent on those with uncertain or extremely low incomes. From an affordability perspective, rental rates could be designed through a public utility-style system of rate regulation, in which rents are set at a price that ensures the housing authority covers its invested capital plus operating expenses.[221] In other words, rent could be set on a cost-basis, rather than

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[218] McCarty, *supra* note 215; Abdallah Fayyad, *Public Housing Didn't Fail in the US. But it was Sabotaged.*, VOX (Dec. 8, 2024), https://www.vox.com/policy/390082/public-housing-america-policy-failure-poverty.

[219] Francesca Mari, *Lessons From a Renters' Utopia,* N.Y. TIMES, (May 23, 2023), https://www.nytimes.com/2023/12/16/opinion/lessons-from-a-renters-utopia.html.

[220] Milton Friedman, *"Programs for the Poor are Poor Programs,"* in A CHOICE FOR OUR CHILDREN: CURING THE CRISIS IN AMERICA'S SCHOOLS (Alan Bonsteel & Carlos A. Bonilla, eds.) (1997), available at https://miltonfriedman.hoover.org/internal/media/dispatcher/271021/full.

[221] *See* MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY 147-80 (2022) (discussing rate regulation).

a market-price basis. This could bring down prices significantly for these units – and indirectly for units in the area.[222] Importantly, the public entity would not necessarily need an additional return on invested capital, though it could perhaps allow for some modest return to reinvest into new construction. This approach would also improve affordability in a few ways: first, it would increase the housing supply but do so in a way that keeps rents low. Second, even though anyone at any income would be eligible, the lack of need for profit would keep prices down. Third, legacy programs like Section 8 vouchers could still be used by those who are eligible to bring down the cost of these rents further. Importantly, vouchers used in this context would not lead to higher prices because the public option's rental prices would be set by cost, not by market-demand.

One of the biggest constraints on new publicly-constructed housing is funding. Congress could address this easily by appropriating more funds to programs along these lines. It could also condition this funding on new, innovative models of public housing—such as those discussed above—to prevent new public housing from falling into the traps that have plagued public housing historically.

In addition, Congress could repeal the Faircloth Limit. Passed in 1998, the Faircloth Limit is a ban on the net increase of any public housing—capped at 1999 levels. That means that as the U.S. population increases, public housing authorities are prohibited from building more housing. They can only replace existing units. A number of members of Congress have proposed repealing the limit,[223] but the topic has yet to become a *cause celebre* amongst supply-side housing advocates. Indeed, some supply-side advocates oppose repealing the Faircloth Limit and taking additional steps to expand public options for housing, calling it a "red herring" and "distraction" from loosening zoning.[224] While many places have not reached their limit yet,[225] repealing the limit would, in conjunction with other reforms proposed here, help enable new building—and more experimentation with new kinds of public options for housing. At a minimum, it would send a strong signal that local governments should be in the business of expanding housing stock in their communities.

2. Housing Finance and Mortgage Policies — Mortgage policy debates often have a characteristically neoliberal flavor to them. Some commentators and policymakers pretend that mortgages markets are driven entirely by private lending decisions—that rates are determined by the market, and terms created by private

[222] Notably, public housing projects in the United States were designed in order to *prevent* competition with private options. *See* McCarty, *supra* note 215.

[223] For a list, *see* National Coalition for the Homeless, *Repeal the Faircloth Amendment*, https://nationalhomeless.org/repeal-faircloth-amendment/.

[224] Jenny Scheutz, *Four Reasons Why More Public Housing Isn't the Solution to Affordability Concerns*, BROOKINGS (Jan. 14, 2021), https://www.brookings.edu/articles/four-reasons-why-more-public-housing-isnt-the-solution-to-affordability-concerns/.

[225] Jared Brey, *What Is the Faircloth Amendment?,* NEXT CITY (Feb. 9, 2021), https://nextcity.org/urbanist-news/what-is-the-faircloth-amendment.

agreements between borrowers and lenders.[226] This, of course, ignores the nearly century-long federal intervention into mortgage markets. The federal government has created de facto standardization in mortgage practices in many sectors, first by establishing criteria for federal mortgage insurance, and then by specifying the terms of loans that could be securitized as "conforming loans" through the federally chartered government sponsored enterprises (GSEs), Fannie Mae and Freddie Mac.[227] Combined with banking regulation and the favorable tax treatment of mortgage interest, the federal government is directly involved in housing finance. In many ways, this involvement is akin to a public option – it is a version of a public option for housing finance, in which the GSEs create markets and support for certain mortgage products.[228]

Bankers and regulators have often worried about placing too many risks on financial institutions, and conversely not placing sufficient risk on individuals. A fear, going back to the origins of mortgage finance, is that individuals will act recklessly, and that banks should not bear significant risks to enable lending.[229] In fact, however, securitization of mortgages by Fannie Mae and Freddie Mac, plus implicit government backing, means that financial institutions take on comparatively little risk in the current system.[230] Mortgage policies could do more to help homeowners without adding too much downside to financial institutions in either interest-rate or credit risk. Even modestly shifting the balance of risk leads to some specific proposals for mortgage policies and products.

The first is portable mortgages. Mortgage origination practices manage the risk of default—credit risk—in two distinct ways. First, lenders risk-rate borrowers, charging higher interest rates for riskier borrowers. Second, lenders require an adequate equity cushion, often capping mortgages at an 80% loan-to-value ratio (LTV). That way, if the borrower defaults, the property value can still drop by 20% and the bank will still be able to recoup the loan.[231] Of course, that equity cushion

[226] *See, e.g.,* Simkovic, *supra* note 48, at 249 (describing Treasury Department's efforts to rely on private mortgage markets).

[227] Joseph C. Shenker & Anthony J. Colletta, *Asset Securitization: Evolution, Current Issues and New Frontiers*, 69 TEX. L. REV. 1369, 1383 (1991) (describing history of Fannie Mae and Freddie Mac); Julia Patterson Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 MO. L. REV. 1077, 1085 (2007) (describing operation of Fannie and Freddie).

[228] *See generally* Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 U.C. DAVIS L. REV.1111 (2013) (describing federal intervention in mortgage markets as providing a kind of public option).

[229] *See, e.g.,* W. Scott Frame & Lawrence J. White, *Charter Value, Risk-Taking Incentives, and Emerging Competition for Fannie Mae and Freddie Mac*, 39 J. MONEY, CREDIT & BANKING 83 (2007) (describing risks of securitization).

[230] *See* Viral V. Acharya et al., *Guaranteed to Fail: Fannie Mae, Freddie Mac, and the Debacle of Mortgage Finance*(2011) (describing history of Fannie Mae and Freddie Mac and the risks they incurred).

[231] *See, e.g.,* Robert B. Avery et al., *Credit Risk, Credit Scoring, and the Performance of Home Mortgages*, FED. RES. BULL., July 1996, at 621 (describing risk management practices).

increases over time as the loan is repaid so that lender risk decreases over the life of the mortgage.

Because underwriting standards depend on both the creditworthiness of the borrower and the value of the underlying property, mortgages are traditionally not portable. If mortgagors want to sell, they have to pay off the balance of the outstanding mortgage, often at the time of the closing. New buyers must then obtain their own mortgages. Likewise, mortgagors cannot take their existing mortgages to a new property. It is as if the mortgages are tied to both the borrower and the land. Sever either, and the loan must be repaid immediately.

The lack of portability of mortgages can have perverse consequences, especially when interest rates are increasing, as they have been over the past few years. For one, mortgagors benefiting from low interest rates may be disincentivized from selling their property. If you have a $400,000 mortgage at 3% on a house worth $600,000, you may not be able to afford to sell and buy a different $600,000 house if your new interest rate would be 7.5%.[232] At the same time, many potential sellers may not be willing to sell in such a market, unless forced to do so. The result is fewer moves and a less liquid housing market in times of rising interest rates. Portability of mortgages could result in more housing for sale in an adverse interest rate environment, increasing housing options for buyers.[233]

The sale of property subject to a low-interest mortgage will also result in a kind of windfall for the bank. If the property had not been sold, the bank would only have been able to continue collecting the existing low interest rate. The sale, though, accelerates the repayment, allowing the bank to lend money out again at a higher interest rate. At least part of that interest rate difference will be capitalized into property values, meaning that sellers effectively have to disgorge some of the value of their homes to banks. Neither would happen if mortgages were portable.

Mortgages could be made portable in one of two ways. They could run with the land, allowing a mortgagor to sell the property subject to the existing mortgage at its current interest rate. This is known as an assumable mortgage. Assumable mortgages were popular in the 1980s, but have become less common since.[234] Where the interest rate is lower than current rates, the effect of an assumable mortgage would be to increase somewhat the value of the property. A buyer will pay more for a house with 20 years left on an existing 3% mortgage, than for a house with a new 30-year mortgage at 7.5%. Alternatively, the mortgage could be portable in the sense that the mortgagor could apply the same mortgage to a different

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[232] In theory, those higher interest rates may be reflected in housing costs, meaning that what had been a $600,000 house may now be worth only $450,000, for example. In the current context, of course, housing prices have increased and remain high despite high interest rates – perhaps because few want to sell.

[233] *See* Peter Coy, *The Case for Letting Mortgages Move With Us*, N.Y. TIMES (May 6, 2024) (proposing portable mortgages). Jiawei Zhang et al., *How Making Agency Mortgage-Backed Securities Portable May Impact Housing and Mortgage-Backed Securities Investors*, 33 J. FIXED INCOME 114 (2024) (same).

[234] *See, e.g., Assumable Mortgages Popular in the 1980s Back as Way to Beat High Interest Rates*, STAR TRIBUNE (2024), https://www.startribune.com/assumable-mortgages-popular-in-the-1980s-back-as-way-to-beat-high-interest-rates/600374788.

house. Instead of repaying the outstanding balance on a mortgage when the property is sold, the borrower could transfer the mortgage to a new property, keeping the payments the same. In either case, the buyer might need to finance the difference in the purchase price.

Making mortgages portable obviously creates additional interest rate and credit risk for lenders. The CFPB or other regulator could help to manage those risks by allowing portability only where the substitute borrower or the substitute property presents substantially the same credit risks, i.e., has the same or better credit rating, and the same or better appraised value, respectively. Regardless, the current system is anti-homeowner and constrains the market. Since most mortgages are securitized and held by Fannie Mae or Freddie Mac, the interest rate and credit risks are actually borne by their investors and not by the loan originators, so this proposal really is about shifting risk away from homeowners and to Wall Street—a tradeoff that will benefit housing markets.

Another possibility is to adjust the term of mortgages. Until the New Deal, most mortgages in the United States were for either 10 or 15 years, or shorter, and usually had adjustable rates. During the Great Depression, the Federal Government created the Home Owners Loan Corporation (HOLC), which bought up the then-popular but increasingly risky short-term adjustable rate mortgages and converted them into 20-year fixed rate mortgages.[235] Following World War II, Congress authorized Fannie Mae and Freddie Mac to purchase 30-year fixed rate mortgages, which then became the industry standard.[236] In both instances, there was nothing magical about the 20-year or the 30–year period. Rather, extending the duration of the mortgage was designed to lower the monthly payments by spreading the principal payments over a longer period.

The same tool can be deployed again, redefining conforming mortgages to include 40-year or 50-year mortgages. A 30-year mortgage for $400,000 at 5% will cost the borrower approximately $2,147 per month. The same 50-year mortgage would cost the borrower only $1,816 per month simply because the equity repayment is spread over a longer time. In fact, in California, the 40-year mortgage is becoming popular, presumably in response to the rising housing costs.[237] Making

[235] *See, e.g.,* Dan Cooper & Brian Grinder, *Financing the American Dream: A History of the Fully-Amortized 30-Year Mortgage*, 113 FIN. HIST. 10 (2015).

[236] *See id.; see also* FREDDIE MAC, *Why America's Homebuyers & Communities Rely on the 30-Year Fixed-Rate Mortgage*, FREDDIE MAC INSIGHTS (Apr. 10, 2017), https://sf.freddiemac.com/articles/insights/why-americas-homebuyers-communities-rely-on-the-30-year-fixed-rate-mortgage (providing history).

[237] *See* Gregory Wilcox, *40-Year Home Loan Soaring in Popularity*, L.A. DAILY NEWS (Aug. 29, 2017), https://www.dailynews.com/2005/12/13/40-year-home-loan-soaring-in-popularity/; see also Shane Hickey, *The 40-Year Mortgage—Solution to Rising Property Values or Too High a Price to Pay?*, THE GUARDIAN (Sept. 16, 2024), https://www.theguardian.com/business/2024/sep/16/the-40-year-mortgage-solution-to-rising-property-values-or-too-high-a-price-to-pay (describing rising use in England, noting that "In June, 22% of loans taken out by first-time buyers were for 35 to 40 years.").

40-year and 50-year mortgages more common could significantly increase buyer's purchasing power.[238]

There are downsides, of course. The longer loan term creates greater interest rate risk.[239] Lenders would presumably charge higher interest rates up front to mitigate those risks, just as banks today have lower interest rates for 15-year than for 30-year mortgages. But those higher rates still result in lower monthly payments in most cases. That is, 30-year mortgages cost borrowers less per month than a 15-year mortgage. Of course, more interest will be paid over the life of the 30-year mortgage than the 15-year mortgage, and this is a tradeoff that almost every homebuyer has weighed. It always involves balancing monthly carrying costs against interest rates and total payments. Expanding those options to include an even longer term, at lower monthly payments, will help make housing more affordable.

An even more aggressive product is a perpetual interest-only mortgage. This vehicle—originated either at purchase or, more likely, as a kind of construction loan—would never require the borrower to pay off principal. The interest-only payments would dramatically reduce the monthly costs of ownership. A key feature, however, would be assumability. The mortgage would run with the property, and so any buyer would acquire the same monthly obligation, still without paying down principal.

This product would effectively create a new form of tenure, a hybrid between owning and renting. It would provide the stability of ownership, because the monthly cost would never increase. But it would create the economic interests of renting, because the buyer would never pay down the equity on the loan. The buyer would, however, acquire any equity as a result of appreciation. If the original buyer sold the property, he or she could capture that equity. For example, an interest-only mortgage of $400,000 at 5% would cost approximately $1,666 per month. If a buyer was willing to pay, say, $2,000 per month for the ability to live in a house that cost only $1,666 per month, that "extra" value would be captured by the seller. In this example, a buyer would be willing to pay up to approximately $80,000 to acquire the interest-only mortgage.

This product, too, would create significant interest rate risk. Prepayment penalties—or even prohibitions on prepayments—could help alleviate those risks, as could other structural innovations.[240] But it would likely require the government to create this product and hold that risk. Whether through the FHA, the VA, or Fannie and Freddie, the government could create the market for this innovative new low-cost form of ownership. Implementation aside, the insight is that a new form of financing could dramatically increase how much house buyers could afford to buy.

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[238] *See* Alena Botros, *Forget the 30-Year Mortgage: The 40-Year Mortgage Needs to Become the New American Standard, Former Obama Advisor Says*, FORTUNE (Aug. 21, 2024).

[239] *See, e.g.,* Robert C. Merton, *On the Pricing of Corporate Debt: The Structure of Interest Rates*, 29 J. FIN. 449 (1973)(describing the nature of interest rate risk).

[240] *See* Andrea Beltratti, et al., *The Role of Prepayment Penalties in Mortgage Loans,* 82 J. BANKING & FIN. 165 (2017) (describing operation of prepayment penalties).

C. Tax Policies for Affordability

In the neoliberal era, tax policy largely focused on cuts – and especially tax cuts for the wealthiest people and corporations in the United States.[241] The theory was that tax breaks for the wealthy would "trickle down" and benefit everyone else,[242] but the theory was incorrect and evidence shows it has not had these effects.[243] Rather than focus on reducing taxes to the wealthy and capital holders, housing tax policy could be designed to discourage socially undesirable practices and encourage socially desirable ones. All taxes are market shaping tools. In tax theory, Pigouvian taxes, named after the English economist Arthur Pigou, are taxes on firms that create negative externalities.[244] Classic examples of Pigouvian taxes are taxes on pollution or alcohol.[245] At a high level of generality, Pigouvian taxes both require firms to internalize externalities and also discourage behavior by raising their cost.[246] Many economists thus see them as an efficient mode of regulation.[247] Policymakers could take inspiration from this form of taxation and consider taxes in the housing context that would discourage behaviors that reduce supply and increase prices. In other words, rather than focusing on reducing taxes and hoping development trickles down, taxing certain behaviors could make it less expensive to use housing for shelter and therefore increase supply and affordability.

Second homes are one possible target. Tax policy can provide tools for states and local governments to discourage second homes and investor-owned properties without prohibiting them.[248] Some states, like Vermont, tax second homes at a lower rate than primary homes.[249] The rationale is that second-home owners do

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[241] MONICA PRASAD, THE POPULAR ORIGINS OF NEOLIBERALISM IN THE REAGAN TAX CUT OF 1981, 24 J. POL. HIST. 351 (2012).

[242] *Trickle-Down Theory,* INVESTOPEDIA (2024), https://www.investopedia.com/terms/t/trickledowntheory.asp.

[243] David Hope & Julian Limberg, *The Economic Consequences of Major Tax Cuts for the Rich*, 20 SOCIO-ECONOMIC REV. 539 (2022).

[244] *Pigouvian Tax,* TAX FOUND. (2024), https://taxfoundation.org/taxedu/glossary/pigouvian-tax/.

[245] *Id.*

[246] Gary M. Lucas, Jr., *Shaping Preferences with Pigouvian Taxes*, 27 N.Y.U. J.L. & PUB. POL'Y 69 (2024), https://nyujlpp.org/wp-content/uploads/2024/12/JLPP-27-1-Lucas.pdf.

[247] For overviews and interesting proposals in the legal literature, see Jonathan S. Masur & Eric A. Posner, *The Pigouvian State*, 164 U. PA. L. REV. 93 (2015); Peter Salib, *The Pigouvian Constitution*, 130 YALE L.J. 2180 (2021). For a skeptical account, under certain conditions, see Victor Fleischer, *Curb Your Enthusiasm for Pigouvian Taxes*, 91 TEX. L. REV. 1377 (2013).

[248] *See* Andrew T. Hayashi & Richard M. Hynes, *Protectionist Property Taxes*, 106 IOWA L. REV. 1091, 1110-1111 (2021) (giving examples of jurisdictions with taxes on second homes).

[249] Ethan Weinstein, *Many Second Homeowners Pay a Lower Rate Than Residents. Will the Legislature Change That?,* VT DIGGER, Jan 13, 2023 (describing tax system).

not consume public services, and especially public schools, to the same extent as permanent residents, and that second-home owners contribute to the economy.[250] But at the same time, this tax structure – and the housing stock that comes along with it – means that housing is less affordable for primary residents. Taxing second homes at a higher rate would inject a measure of progressivity into the property tax system. People who can afford second homes should pay more in taxes for them. To the extent this disincentivizes ownership of second homes, that is a feature not a bug, as it will reduce demand and free up housing for primary residences. Of course, some communities might *want* more second homes in order to attract vacationers. Those communities might prefer a tax regime like Vermont's.

A mirror-image version of the tax on second homes already exists in states that provide a homestead exemption. Instead of a higher tax for second homes, a homestead exemption provides a tax benefit for owner-occupied primary residences.[251] This is implicitly a higher tax on non-primary residences. Homestead exemptions have a long pedigree, dating back at least to the Great Depression, as a way of helping income-constrained homeowners to stay in their homes.[252] States take very different approaches to the homestead exemption. Most exempt a fixed dollar amount from the taxable value of a homestead—say $20,000.[253] Others exempt a percentage of the property value. Some have income caps. Some require an affirmative application and documentation by the property owner.[254] Details aside, the effect is to impose a higher tax burden on property that is not the owner's primary residence. A more focused second-home tax would be distinct and have some advantages compared to the homestead exemption. For one, a homestead exemption results in an implicit tax on all property other than primary residences, including commercial property. Moreover, an explicit second-home tax could be greater than the implicit tax of a homestead exemption. The objective is instead to force second-home owners to bear the opportunity costs of consuming housing for something other than a primary residence, which in many communities could be quite high.

Instead of higher tax rates, states could also impose higher transfer taxes on the sale of second homes and investor-owned properties. This creates less of an ongoing burden for owning a second home, while slightly reducing the attractiveness of buying housing for investment purposes. For a transfer tax to work,

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250 *See id.* ("As of now, if a town spends more per pupil on education than a certain state-determined number, primary homeowners shoulder the burden, causing them to pay a higher relative rate than second homeowners.").

251 *See, e.g.,* Adam H. Langley & Joan Youngman, *Property Tax Relief for Homeowners*, LINCOLN INST. OF LAND POL'Y (Mar. 2022), https://www.lincolninst.edu/app/uploads/legacy-files/pubfiles/property-tax-relief-homeowners-brief-full.pdf.

252 *See* Keith Ihlanfeldt & Luke P. Rodgers, *Homestead Exemptions, Heterogeneous Assessment, and Property Tax Progressivity*, 75 NAT'L TAX J. 7, 12 (2022) (describing the history of Florida's homestead exemption).

253 *Id.*

254 *See* Ihlanfeldt & Rodgers, *supra* note 252*,* at 14 ("[In Florida] eligible homeowners must apply for the exemption, which involves providing documentation that they use the property as their primary residence.").

however, it would need to exempt developers, or else it would disincentivize development of new housing. But a transfer tax could apply to property flippers and others who are using property primarily as an investment vehicle instead of as housing itself.

Unoccupied property can also restrict housing supply in some markets. When rents start to falter in a market, property owners will sometimes prefer to keep property vacant in hopes that rents will stabilize. For large commercial landlords holding many units in a market, they may prefer some amount of vacancy to a wider reset of rental rates that might happen if they start entering into leases at lower prices. The same is true of sellers, who might prefer to hold empty property in order to try to time the market. The effect of both is that housing is under-used. Tax policy can address this problem, imposing an escalating tax on vacancies.[255] By making it more expensive for property owners to hold units off the market, they will be incentivized to price units at the lower, market-clearing rent level or the lower purchase price in order to avoid the vacancy tax.[256] Such a tax would put downward pressure on price in two related ways: first, it would make it more difficult for owners to try to manipulate the market by keeping contract prices artificially high, and second, it would increase the supply of available housing. Henry George proposed a version of this approach in the nineteenth century, an approach still championed by the Lincoln Institute of Land Policy.[257]

In some markets, non-resident foreigners looking for investment opportunities can also take property off the market. The U.S. real estate market has been an attractive destination for foreign investment. It often features high returns, and for those from countries with unpredictable governance, a high degree of stability and property protection.[258] In recent years, foreign investment has increased, and in the process, captured supply and reduced affordability – with units often remaining vacant because the foreigners do not seek to rent them out. A recent study from a Federal Reserve economist showed that since 2008, when China relaxed some of its capital export controls, investment flooded into the United States – but without

[255] Hayashi & Hynes, *supra* note 227, at 1111 (discussing vacancy taxes); *see also* Smith, *supra* note 69 (proposing land value tax).

[256] Indeed, some jurisdictions have tried just this. *See, e.g.,* Charles Gallmeyer, Note: *Vancouver Empty Home Tax: An Analysis of Taxation as a Solution to a Housing Crunch*, 18 PITT. TAX. REV. 191 (2020); Tonya Mosley, *Vacancy Taxes: The Next Frontier in Housing Policy?*, WBUR (Jan. 27, 2020).

[257] *See* History of the Lincoln Institute, Lincoln Institute of Land Policy, *available at* https://www.lincolninst.edu/about-lincoln-institute/history/. For a discussion of George, see CHRISTOPHER W. ENGLAND, LAND & LIBERTY: HENRY GEORGE AND THE CRAFTING OF MODERN LIBERALISM (2023); *see also* Donald G. Hagman, The Single Tax and Land-Use Planning: Henry George Updated, 12 UCLA L. REV. 762 (1965) (imagining Henry George on Mars).

[258] Heidi Przybyla & Christine Haughney, *Russian Money Flows into U.S. Real Estate,* NBC NEWS (Mar. 2, 2022), https://www.nbcnews.com/business/real-estate/russian-money-flows-us-real-estate-rcna17723.

additional migration.[259] The result was higher home prices and lower-income people being pushed out of neighborhoods, while homes were used for foreigners to park their assets and gain a return. Placing a tax on unoccupied homes owned by non-resident foreigners would prevent this use of the U.S. real estate market as a foreign bank account and further unlock either rental or ownership opportunities.[260]

Similar dynamics arise around undeveloped land. Between the 1990s and 2010s a series of mergers has concentrated a large share of homebuilding into the hands of a few companies. These companies rarely engage in any homebuilding themselves, but instead operate as financial middlemen that hold undeveloped land (or interests in undeveloped land), until prices are so high that they can develop the land at great profit.[261] But because of their market power, these firms need not develop the land even if smaller firms would have – and even if the community needs more housing. One possibility to get at this problem is a tax on undeveloped land held by corporate investors. Such a tax could be designed at the local level, or at the state or federal level but applied only to areas with significant lack of housing stock or potential for development. The tax would increase the cost of sitting on those parcels, and thus encourage the start of development. A potential downside of this approach is to discourage more complex land assemblies. Developers and corporate investors can sometimes take years to put together parcels of land for some large-scale project. Taxing the early-acquired parcels at some higher rate would make that land assembly more expensive. Tax rules could try to exempt these land assemblies from higher taxes. Better yet, governments could help with the land assembly problem through more aggressive use of eminent domain (as noted above).

Tax policy can also be used to tackle another, growing problem with housing markets: the rise of institutional investors in residential rental markets. In recent years, private equity and hedge fund investors have increasingly been purchasing single family homes – in some areas, investors have amounted to half of all home sales.[262] Economic research shows that investor ownership of this type has increased prices and reduced affordability – and especially does so when there is

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[259] Leslie Shen, *China's Massive U.S. Real Estate Investment and Housing Shock: Major Impacts,* FED. RESERVE BANK OF BOS. NEWS (Nov. 2023), https://www.bostonfed.org/news-and-events/news/2023/11/china-massive-us-real-estate-investment-housing-shock-major-impacts-leslie-shen-boston-fed.aspx.

[260] For a discussion of the constitutionality of such a proposal, and similar proposals, see Hayashi & Hynes, *supra* note 227.

[261] Matt Stoller, *It's the Land, Stupid: How the Homebuilder Cartel Drives High Housing Prices,* BIG NEWSLETTER(2024); Cameron Murray, *Time Is Money: How Landbanking Constrains Housing Supply,* 49 J. HOUS. ECON. 101708 (2020).

[262] *See* Hal Singer, *Are Hedge Funds and Private Equity Firms Driving Up the Cost of Housing?,* THE SLING, July 12, 2024, https://www.thesling.org/are-hedge-funds-and-private-equity-firms-driving-up-the-cost-of-housing-2/. *But see* JERUSALEM DEMSAS, ON THE HOUSING CRISIS 74 (2024) (criticizing data for not properly distinguishing between institutional and other investors).

greater concentration in ownership.[263] Some of this shift has also been a function of government policy, as Freddie Mac has offered low interest loans to private equity firms. Meanwhile, renters in private equity owned apartments have seen prices go up and maintenance declines.[264] To address these problems, Congress could pass the End Hedge Fund Control of Homes Act, which would require divestment of housing by big investors over a period of years.[265] The Federal Housing Finance Agency could also reduce its funding of private equity housing deals, or, at a minimum, impose rent regulations and quality of service mandates as a condition on federal funding. In addition, Congress could prohibit Fannie Mae and Freddie Mac from purchasing mortgages from housing developments owned by private equity firms. According to a report from ProPublica, Freddie Mac's biggest financing deals were with private equity firms.[266] Given the problems with private equity-run housing developments – including higher rental prices, lower quality of service – federal policy should not enable this mode of ownership.

D. Market-Shaping Regulations

As we have noted, one of the signal failures of de-zoning advocates is embracing the fact that regulations can be market-shaping. This basic insight leads to a very different policy conclusion than the one that de-zoning advocates proffer. Rather than simply eliminate problematic regulations and assume that the market will produce the housing stock society needs in a fair, affordable, and accessible manner, the aim would be to use regulatory policy to ensure that market actors deliver the housing society needs. Focusing on regulatory design, not deregulation, is therefore critical.

In this section, we discuss three ways in which regulatory policy can influence housing markets and affordability. The first is by embracing antimonopoly and consumer regulatory tools, which we illustrate with a discussion of regulating rental prices and landlord abuses. The second is by embracing zoning, but turning it toward affordability. In other words, it is possible to use zoning regulations as a tool to increase supply and expand affordability. We call this "supply-side zoning." Finally, we shift from the micro-level within jurisdictions to the macro-level nationally. Historically, regulation of critical infrastructure dispersed economic growth across the country. Deregulation coincided with a period of severe

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[263] *See id.* (reviewing literature).

[264] Heather Vogell, *When Private Equity Becomes Your Landlord,* PROPUBLICA (Feb. 7, 2022), https://www.propublica.org/article/when-private-equity-becomes-your-landlord; Gretchen Morgenson, *A New Study Reveals the States where Private Equity Has the Most Influence on Housing, Health Care, Jobs, and Pensions*, NBC NEWS (Apr. 9, 2024), https://www.nbcnews.com/news/us-news/states-rank-private-equity-influence-housing-health-care-jobs-pensions-rcna146818.

[265] *End Hedge Fund Control of American Homes Act:* BILL SUMMARY, OFFICE OF SEN. JEFF MERKLEY (2024), https://www.merkley.senate.gov/wp-content/uploads/imo/media/doc/end_hedge_fund_control_of_american_homes_act_bill_summary.pdf. *But see* DEMSAS, *supra* note 262, at 83 (arguing that blaming institutional investors is scapegoating, and promoting increasing supply instead).

[266] *See* Vogell, *supra,* at 264.

economic concentration, with increased geographic divergences and the rise of superstar cities. Regulation, in other words, shapes the broader marketplace of demand for where people live—and thereby for housing.

1. Antimonopoly and Consumer Regulation -- As we have seen, one of the problems in the housing market is concentration: monopoly or oligopoly in different aspects of the sector: homebuilding and rental ownership, for example. Significant supply constraints also lead to scarcity, which, like monopoly or oligopoly, gives owners of the supply the ability to earn monopoly rents – by charging higher prices and reducing the quality of the product. These dynamics are evident in the housing market, and are readily addressed with tools from antimonopoly policy, including regulatory and competition policies. Some problems ripe for an antimonopoly treatment include regulations on rents, algorithmic pricing, and junk fees, and the problem of hidden and unresponsive landlords. Consider each in turn.

Economists have generally been opposed to regulations capping rent increases because they can perversely lead to higher prices. They point to the example of New York City, which adopted rent control in the 1940s and has maintained it for some buildings—with modifications—since then. The orthodox view is that rent regulations increase costs of unregulated units by decreasing supply.[267] Rent regulations reduce the incentive to build new rental units, shifting development to condominiums and potentially decreasing development activity altogether. Others find that rent controls reduce housing quality by disincentivizing landlords from maintaining or improving their units.[268] Furthermore, the primary beneficiaries of rent regulation over time tend to be middle-class tenants, and not the lower-income households that rent regulation is ostensibly intended to help.[269]

But the economic literature is largely focused on first-generation rent controls that imposed strict price caps. There is less empirical work studying the impact of more sophisticated rent regulations that are designed to allow developers and landlords to obtain a reasonable return on their investments.[270] More sophisticated rent regulation ordinances may be able to address some of the downsides of the older rent control approach. Vicki Been and her co-authors have provided a useful

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[267] *See, e.g.,* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 759-60 (1988) ("In general, economists, unlike urban planners, are well nigh unanimous in their condemnation of rent control statutes.").

[268] *See* Choon-Geol Moon & Janet G. Stotsky, *The Effect of Rent Control on Housing Quality Change: A Longitudinal Analysis,* 101 J. POL. ECON. 1114 (1993); Joseph Gyourko & Peter Linneman, *Rent Controls and Rental Housing Quality: A Note on the Effects of New York City's Old Controls,* 27 J. URB. ECON. 398 (1990).

[269] *See* Prasanna Rajasekaran et al., *Rent Control: What Does the Research Tell Us About the Effectiveness of Local Action*, URB. INST. (Jan. 2019), https://www.urban.org/research/publication/rent-control-what-does-research-tell-us-about-effectiveness-local-action (surveying literature and summarizing arguments).

[270] There is, however, some sophisticated empirical work on modern rent regulation. *See, e.g.,* Richard Arnott, *Time for Revisionism on Rent Control?,* 9 J. ECON. PERSPECTIVES 99 (1995); *see also* Dirk W. Early, *Rent Control, Rental Housing Supply, and the Distribution of Tenant Benefits,* 48 J. URB. ECON. 185, 185 (2000) (citing sources defending modern rent regulations).

survey of the forms of modern rent regulations, recognizing that local governments are likely to face increasing pressure to adopt them.[271] That survey shows that there are many different ways to design rent regulations–and much depends on these design choices.

More sophisticated rent regulation can, for example, take a page from the history of antimonopoly policy, and in particular, from public utility rate design.[272] Public utility rate regulation seeks to encourage both capital investment and affordability for users, goals shared in the housing context. To achieve this goal, utility rates are set by assessing capital expenditures and operating and maintenance costs, and then adding to that a fixed rate of return.[273] This approach has some benefits (and, of course, drawbacks) that in the housing context may prove to be net beneficial when compared to older versions of rent regulation or no regulation. First, the approach ensures that owners get a return on their investment, and this guaranteed return encourages development. Second, because the guaranteed return is on top of operating expenses and capital expenditures, owners are not penalized for ongoing upkeep or improvements to the facilities – they are, in fact, encouraged to do so, because their return is usually a percentage of these expenditures. This would help address the problem of landlords allowing units to fall into disrepair.[274] The return on investment, however, is regulated – and capped – which means that landlords can't exploit housing shortages, the unavailability of land, or other market failures to increase their profits. This keeps overall prices down. Indeed, if done right, it would mean that prices will be lower over time if ownership stays in the same hands, because once the initial capital outlays are recovered, the landlord's costs decrease; with that comes a decrease in rent. The downside, of course, is that this approach might encourage landlords to spend too much on capital improvements, in order to increase their returns, or that rates of return are set at levels that are either underprotective of tenants or that drive landlords out of the market. But rent increases for such major capital improvements can also be capped or spread out over time. Moreover, if utility-style rent regulation is adopted in conjunction with other antimonopoly provisions, the dynamics may differ. Smaller scale owners (e.g. individuals, rather than big corporations) will face higher transaction costs to make continuous unnecessary improvements, and likely would be deterred from doing so unless truly important.

Putting aside overall rent regulations, more targeted regulations on specific pricing practices can also be helpful. In recent years, for example, there have been news reports and lawsuits against RealPage, a firm that engages in price

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[271] *See* Vicki Been et al., *Laboratories of Regulation: Understanding the Diversity of Rent Regulation Laws*, 46 URB. L.J.1041 (2019).

[272] *See, e.g.,* Emily P. Achtenberg, *The Social Utility of Rent Control in Housing in Urban America* (2d ed. 1980).

[273] *See* Ricks et al., *supra* note 221, at 147-80.

[274] *See, e.g.,* Richard M. Alston, J.R. Kearl, Michael B. Vaughan, *Is there a Global Consensus Among Economicsts in the 1990s?,* 82 AM . ECON. REV. 203, 204 (1992) (reporting strong consensus view among economists that "[a] ceiling on rents reduces the quantity and quality of housing available.").

consultation and coordination for corporate rental properties.[275] The allegations are that RealPage works with corporate rental properties to help them set their prices – and that by doing so, it effectively operates as a cartel that is price-fixing at higher rates than would exist in a competitive market. For markets to work, landlords need to make uncoordinated decisions about prices. While antitrust cases against RealPage proceed apace, they operate on a case-by-case basis, can take years, and only apply to RealPage. A more direct solution would be for Congress to simply ban algorithmic pricing in rental markets – and to ban the practice of price consulting and related services for rental markets where the consultant works for more than one firm.

Other aspects of the real estate market may also be affected by algorithmic pricing. The real estate website, Zillow, famously posts its estimate of values for properties that are *not* for sale. Its "Zestimate" tool uses a black-box of data to predict the sale price of over 70% of all U.S. homes, whether or not they are for sale.[276] It is primarily a marketing tool for Zillow, but it nevertheless serves as a kind of anchor for many sellers, setting expectations in ways that may affect actual sales prices.[277]

In addition to problems of collusive rent-setting through algorithms, renters often face hidden and surprise fees. In addition to application fees and security deposits, corporate rental firms have started adding a wide range of questionable junk fees on top of the cost of rent. For example, the FTC recently sued Invitation Homes for a range of abusive practices against renters, including adopting junk fees like their "lease easy fee," "utility management fee," and "smart home technology fee."[278] Executives wanted to "juice this hog" using these extra fees.[279] Banning junk fees and adopting all-in pricing, in which the advertised rental price covers all fees, would make this market more transparent, allow renters to compare prices in an apples-to-apples way, and prevent renters from having to choose

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[275] Heather Kelly, *RealPage Lawsuit: How an Algorithm May Have Pushed Rent Prices Higher,* WASH. POST (Jan. 8, 2025), https://www.washingtonpost.com/business/interactive/2025/realpage-lawsuit-rent-map/; Press Release, U.S. Dep't of Just., *Justice Department Sues RealPage: Algorithmic Pricing Scheme Harms Millions of American Renters* (Aug. 23, 2024), https://www.justice.gov/opa/pr/justice-department-sues-realpage-algorithmic-pricing-scheme-harms-millions-american-renters.

[276] *See* James Rodriguez*, Zillow's Home Price Zestimate Is Distorting the Real-Estate Market,* BUS. INSIDER, (Dec. 18, 2024).

[277] *Id.*

[278] Press Release, Fed. Trade Comm'n, FTC Takes Action Against Invitation Homes for Deceiving Renters, Charging Junk Fees, Withholding Security Deposits, and Employing Unfair Eviction Practices (Sept. 24,2024), https://www.ftc.gov/news-events/news/press-releases/2024/09/ftc-takes-action-against-invitation-homes-deceiving-renters-charging-junk-fees-withholding-security; Matt Stoller, *Monopoly Round-Up: Corporate Slumlords and Housing Cartels*, Substack (Sept. 29, 2024), https://www.thebignewsletter.com/p/monopoly-round-up-corporate-slumlords.

[279] *Id.*

whether to pay extra beyond what they anticipated or lose their application fee and start from scratch.

Across the board, bad behavior in the rental market can fly under the radar because landlords are not always identifiable because they are limited liability corporations (LLCs).[280] A number of states have begun to address this problem by creating landlord registries, which ensure that property owners, including LLCs, are identifiable and have contact information on the books.[281] More states or the federal government could create a landlord registry (at the federal level run perhaps by HUD or the CFPB), in which landlords' identities would be disclosed. This would prevent landlords from hiding behind corporations – whether to shield themselves from tax liabilities, the blowback from disinvestment in their properties, or monopolization in a region.[282] The result would be that both renters and the public – the press, legislators, regulators, and citizens – would know who is responsible in the event of poor conditions and high prices. Such a registry would also enable better data collection on concentration in rental markets.

2. Supply-Side Zoning -- We have now seen how industrial policy, public options for housing, mortgage finance reform, tax policy, and regulation of rental markets can work together to provide a new, more comprehensive toolkit for addressing the housing crisis than simply loosening zoning restrictions. There is an important role for zoning reform, but it is not limited to the current approach of eliminating density restrictions. While that one-dimensional approach is important some places where regulatory barriers are significantly limiting new housing, more aggressive zoning regulations might be part of the solution in some areas.

Taking seriously the insight that zoning is merely one set of regulatory tools that can shape markets in a variety of directions has profound implications for housing policy. It means that zoning rules can themselves be designed to increase supply, density, and affordability; that regulations on rents can be designed to keep prices affordable while not arresting new development; and that policymakers can shape markets to prevent pricing abuses in the housing and rental markets. Of

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280 Brian Mykulyn & Elora Raymond, *When Landlords Hide Behind LLCs*, Shelterforce (Aug. 23, 2022), https://shelterforce.org/2022/08/23/when-landlords-hide-behind-llcs/; Julia Carrie Wong, *Hidden Landlords: How Limited Liability Companies Shape the Rental Market,* THE GUARDIAN (Nov. 16, 2023), https://www.theguardian.com/us-news/2023/nov/16/hidden-landlords-limited-liability-companies-llcs-rental-property; Emily Badger, *Why It Has Become So Easy to Hide in the Housing Market,* N.Y. TIMES, (Apr. 30, 2018), https://www.nytimes.com/2018/04/30/upshot/anonymous-owner-llc-why-it-has-become-so-easy-to-hide-in-the-housing-market.html.

281 Tim Henderson, *States Try to Ferret Out Hidden Property Owners,* HERALD NEWS (Nov. 7, 2019), https://www.heraldnews.com/story/news/2019/11/07/states-try-to-ferret-out/2345302007.

282 David Wachsmuth & Alexander Weis, *The Eviction Economy: How Landlords Profit from Housing Insecurity,* 55 URBAN AFFS. REV. 1291(2020), https://journals.sagepub.com/doi/full/10.1177/0003122418821339; Daniel De Visé, *How Landlords Are Evading Taxes and Fueling the Housing Crisis,* THE HILL (Aug. 23, 2023), https://thehill.com/policy/3585336-how-landlords-are-evading-taxes-and-fueling-the-housing-crisis/.

course, doing so will require carefully designed zoning rules and other regulations, and there are always tradeoffs. But recognizing this basic insight unlocks a range of different and potentially valuable policy ideas. Zoning regulations that are more prescriptive, not less, can *enhance* development, density, and housing affordability.

Density minimums are one example. Most traditional zoning is a constraint on density. Minimum lot sizes, height limits, and floor area ratio (FAR) requirements define a specific developable envelope that limits how much housing can be built per acre of land. But there is no reason this approach cannot be reversed. Local governments can impose density *minimums* on new developments. This approach is uncommon but not unprecedented.[283] A number of cities, from Portland, Oregon, to Charlotte, North Carolina, and places in between, have adopted some version of density minimums, at least in some areas, often to maximize the impact of public transit.[284] Supply-siders often assume that zoning regulations are what prevent density and that an unregulated market will produce many more, smaller units. But this is not necessarily true. Without regulation, developers in many places will prefer to build large houses on large lots to maximize profits.[285] Density minimums will instead require them to build many units on a single tract, producing more housing than profit-motivated developers might build on their own. Density minimums need to be designed carefully in order to work. If they are not designed well, then developers may choose not to develop at all because they do not have the financing to build at the required density levels. The result can be less housing, not more dense housing. Density levels must also be aligned with consumer preferences in order to be successful, and those preferences will vary by locality. Nevertheless, density minimums have the potential to result in a greater number of housing units, instead of fewer, larger houses.

Maximum house sizes are another example.[286] The average size of single-family homes has increased by more than sixty percent over the last fifty years. Expanding the developable envelope of land will not necessarily produce more housing units if developers fill it with a single McMansion, or with other large luxury housing. Supply side advocates argue that even this form of development will indirectly and eventually help reduce prices through "filtering," as once high-end housing ages and filters down to become more affordable over time, putting downward pressure on prices throughout the housing market. Nevertheless, these ever-expanding building patterns represent a missed opportunity of producing more

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[283] *See* Michael Lewyn & Judd Schechtman, *No Parking Anytime: The Legality and Wisdom of Maximum Parking and Minimum Density Requirements,* 54 WASHBURN L.J. 285, 286 (2015).

[284] *See* Serkin, *supra* note 43 at 1143.

[285] *Cf.* Paul Emrath, *Economies of Scale in Single-Family Home Construction*, NAT'L ASSOC. HOME BUILDERS (Sept. 3, 2024), https://eyeonhousing.org/2024/09/economies-of-scale-in-single-family-home-construction/.

[286] Alec LeSher, Jonathan Rosenbloom, & Christopher Duerksen, *Establish Maximum Size of Single-Family Residences, Sustainable City Code,* SUSTAINABLE DEVELOPMENT CODE, https://sustainablecitycode.org/brief/establish-maximum-size-of-single-family-residences-7/.

units per acre when property is developed—especially in places where density is most desirable and land is scarce. Maximum unit sizes, on the other hand, would channel new construction into smaller and more affordable housing directly, instead of relying on filtering. Indeed, a number of cities have already adopted maximum sizes, using a variety of specific mechanisms.[287] As with minimum density requirements, the maximum unit sizes must be adopted carefully and contextually. If they require a development form that consumers do not want, they will act as a barrier to development.

Zoning traditionally targets buildings' use as well as its form and bulk. Use restrictions can also be used to promote affordability by, for example, targeting uses that compete with housing as a primary residence. In many places, property held as second homes constitute a significant portion of the housing market. Data on second-home ownership rates are scarce and contested.[288] But where second homes are widespread, they reduce the housing available for full-time residents. One zoning strategy, then, is to define permissible uses in an area as including only primary residences. The term "primary residence" is itself often contested, focusing sometimes on a standard like "habitual residence," and sometimes on a strict "presence time," that specifies some number of days per year of occupancy. However defined, requiring only primary residences in a place will help to ensure that all of the housing in the zone is actually occupied most of the time. Notice that this does not exclude long-term renters. Nor does it exclude short-term rentals for the time that the primary resident is not occupying the property. Primary residence zones would need to include a provision grandfathering existing second-home owners, to prevent unfairness. Note also that primary residence zones need not be an all-or-nothing proposition: a second home could be allowed as a conditional use, but subject to different and heightened zoning requirements, for example a limit on the total number of second homes in the zone.

There are many places where second-homes are welcomed, and where summer houses may be routinely and appropriately shuttered for the winter. But there are other places, like New York City, where persistently vacant units impose real opportunity costs for housing supply. One solution to this problem is minimum occupancy zoning – a rule requiring that any housing unit actually be occupied for a certain number of days per year. This would be both more and less strict than primary residence zoning rules, discussed above. For example, someone using the housing as a primary residence might still not meet occupancy requirements in a minimum occupancy zone, which might demand the units to be occupied for a certain number of days that is more than is required for a primary residence. At the same time, minimum occupancy rules might allow successive short-term rentals without anyone using the property as a primary residence, so long as the unit is

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[287] *See Id*.

[288] *See, e.g.,* Zhiwei Gao, Michael Sockin & Wei Xiong, *Economic Consequences of Housing Speculation,* NBER WORKING PAPER NO. 26457, NAT'L BUREAU OF ECON. RSCH. (2019) (identifying non-owner-occupied home purchases at 15% of mortgage originations in 2005); Daniel I. Garcia, *Second-Home Buying and the Housing Boom and Bust,* 50 REAL EST. ECON. 33 (2022) (proposing alternative methodology for identifying second-home purchases).

occupied for enough days of the year. Primary residence zones and minimum occupancy rules could be alternatives or work in conjunction, and their appropriateness would depend on local housing conditions and the persistence of vacant housing units.

Zoning typically restricts the use and form of development, and not the owner. But housing in some markets is coming under increasing pressure by large institutional investors. It has been commonplace in this country for large multi-family apartment buildings to be owned and managed by commercial landlords, who benefit from expertise and economies of scale. This ownership form also has some benefits, as it can both reduce discrimination and increase professionalization of building operations.[289]

But the single-family rental market is quite different. Traditionally, the rental market for single-family homes has been dominated by small landlords—owners of one or two houses who are entering into long-term rentals with individual tenants. That has been changing in the last decade as large firms, like Blackstone, have aggressively entered into the single-family market. These institutional investors have been acquiring a significant percentage of single-family homes in some markets, relying on sophisticated algorithms for both house pricing and then property management. The results for investors are encouraging – but for tenants and housing markets, not so much. Early research suggests that single-family homes owned and managed by large institutional investors have much higher tenant turnover, worse housing conditions, and higher rents than other single-family rental properties.[290] In other places, investors are also buying up single-family homes for use as short-term rentals through companies like AirBnB, again outcompeting many residents looking for long-term, stable housing.[291]

A municipality could address both problems by prohibiting institutional-investor-owned properties. Primary residence zones would address an aspect of these issues, but again may be more restrictive than a particular municipality wants. In some places, a municipality might want to allow second homes, but not institutional-investor-owned properties, for example. Institutional investor-free zones would face some legal challenges. In some states, zoning may not be allowed to regulate ownership. But state enabling legislation, where required, would free up municipalities to address this growing phenomenon of Wall Street invading Main Street housing. Specific alternatives are also possible to imagine: a city could bar a single investor (whether individual or institutional) from owning more than a certain number of properties, or owning a number of properties in a particular class (e.g. apartments, homes).

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[289] *See, e.g.,* Erling R. Larsen & Dag Sommervoll, *The Impact on Rent from Tenant and Landlord Characteristic Interaction,* 39 REG'L SCI. & URB. ECON. 316 (2009) (summarizing data from Norway).

[290] Nadiyah J. Humber, *Corporate-Tech Landlordism—The New Era,* STAN. TECH. L. REV. (FORTHCOMING); BRETT CHRISTOPHERS, OUR LIVES IN THEIR PORTFOLIOS (2024) (describing impact of financial firms buying housing).

[291] Cameron Ehrlich, Tim McDonald, L. David Vertz & Sage Computing Staff, *Institutional Investors Outbid Individual Homebuyers*, Evidence Matters (Winter 2023), https://www.huduser.gov/portal/periodicals/em/winter23/highlight1.html#title.

Finally, when zoning does not provide sufficient stability and control over community character, housing consumers are likely to seek private substitutes primarily in the form of homeowner associations (HOAs).[292] Housing units in HOAs usually sell for a premium. That premium is inversely related to the restrictiveness of local zoning. The looser the zoning, the higher the premium, indicating that consumers view HOAs as a kind of substitute for public land use regulations.[293] The private covenants regulating HOAs are often much more restrictive than any municipal zoning. They also can ignore public policy pressures and are much more difficult to change than local zoning codes.[294] The impact of zoning innovations may be blunted by the constraints of restrictive covenants in HOAs unless the regulatory reforms apply to them, too. Already, California has preempted both zoning and HOA covenants that restrict accessory dwelling units, effectively allowing accessory dwelling units throughout the state, even in HOAs that prohibit them.[295] Where governments adopt the other kinds of reforms suggested in this section, like density minimums, those could also apply to HOAs.

3. Regulation and the Geography of Growth — So far, our discussion of market-shaping regulation has been focused on the micro-level, zoning or rents within particular jurisdictions. But regulation and deregulation influence housing markets at the macro-level too: by shaping the jurisdictions in which economic growth and development happens. Throughout American history regulatory choices – and particularly, those of the Progressive and New Deal Eras – were designed to disperse economic growth throughout the country.[296] Regulations required firms to provide fair priced transportation services throughout the country, not just between the most populous cities. Railroad regulation included rules on short-haul and long-haul pricing.[297] Airline regulation involved allocating routes, including mandating service to lesser-trafficked cities.[298] In the communications context, the postal monopoly ensured mail and newspaper services throughout the vast American continent.[299] Universal service requirements helped create a national telephone system.[300] Banking regulations ensured dispersal of financial institutions across the

[292] Serkin, *Creating Density, supra* note 23.

[293] Wyatt Clarke & Matthew Freedman, *The Rise and Effect of Homeowners Associations,* 112 J. URB. ECON. 1, 13 (2019).

[294] Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses,* 96 IND. L.J. 395 (2021); *cf.* Robert C. Ellickson, *Stale Real Estate Covenants,* 63 WM. & MARY L. REV. 1831 (2022).

[295] Ken Stahl, *The Power of State Legislatures to Invalidate Private Deed Restrictions: Is It an Unconstitutional Taking?,* 50 PEPP. L. REV. 579 (2023).

[296] Sitaraman et al., *supra* note 60.

[297] Noam Maggor, *Escaping the Periphery: Railroad Regulation as American Industrial Policy*, 11 CRIT. HIST. STUD. 47 (2024).

[298] GANESH SITARAMAN, WHY FLYING IS MISERABLE AND HOW TO FIX IT (2023).

[299] RICKS ET AL., *supra* note 221, at 252-277 (discussing the postal monopoly and universal service).

[300] *ID*. at 352-369.

country, enabling access to credit and safe deposits.[301] These regulatory policies enabled people to live, thrive, and conduct business even if they didn't live a coastal city or inland megalopolis. They also helped foster a wide range of thriving cities: from St. Louis to Memphis to Toledo.

In the late 20th century, policymakers deregulated these infrastructural sectors. In one after another – trucking, airlines, rail, buses, telecommunications, banking, maritime shipping, energy – deregulation promised to increase competition and will few, if any, downsides, especially for mid-sized cities, small communities, and rural areas.[302] Any losses of service would be address through redistributive mechanisms like subsidies.[303] But the results have not worked out the way the deregulators wanted. In sector after sector, firms abandoned rural areas and smaller communities, and consolidated operations in the highest-volume, highest traffic areas. The result, ultimately, was more concentration, higher prices, and lower quality of service for many communities.[304]

As one example, consider the airline industry. After deregulation, airlines consolidated their operations into a hub-and-spokes model, in which they focused operations in a smaller number of large airports.[305] For many communities, losing an smaller airport hub was devastating economically because companies do not want to be located in a city that does not have nonstop air service to a wide range of places. After Cincinnati, Ohio, lost its hub, for example, the Chiquita corporation moved its headquarters to Charlotte, North Carolina, a major hub for American Airlines.[306] When Memphis, Tennessee lost its hub, organizations that had held their annual conferences in that city for decades moved elsewhere – leaving the city with reduced tourism dollars – because it was too hard for members to travel.[307] Many smaller communities have lost all major carrier air service. Toledo, Ohio, for example, has lost all major air carrier service.[308] Dubuque, Iowa, has lost all airline service.[309] Redistributive subsidies have not kept service in these cities.

Loss of access to important infrastructural services due to deregulation ties back to housing in an important way. Without access to important infrastructure, economic growth is unlikely. No serious entrepreneur would create a Fortune 500 company in Dubuque, given that doesn't have access to airline service. If only a few dozen cities are credible candidates for major economic enterprises, those places will of course see increased housing demand and prices – than they would

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[301] *ID.* at 873-876 (discussing geographic dispersal in banking).

[302] *See* Benjamin Dinovelli, *Universal Service by Regulation* (draft on file with authors).

[303] *See id*.

[304] *See id*.

[305] SITARAMAN, *supra* note 3.

[306] Phillip Longman & Lina Khan, *Terminal Sickness*, WASH. MONTHLY (Mar. 1, 2012), https://washingtonmonthly.com/2012/03/01/terminal-sickness/.

[307] *Id.*

[308] SITARAMAN, *supra* note 3.

[309] *ID*.

if there were fifty or a hundred viable cities for operating a large business. In other words, if economic growth was dispersed and distributed more widely across the country, then demand for housing would not be so high in a small number of cities.

Regulation, then, can help address housing challenges at a macro-level – by ensuring reliable, stable, and affordable access to critical infrastructural services all throughout the country. That, in turn, is one factor that could help spur growth in many different parts of the country, thereby increasing housing demand in those places (which may have low demand and more affordable housing at present) and reducing demand in superstar cities that currently have high demand and less housing stock.

CONCLUSION

America's housing crisis is serious, and it is widespread. Across the country, cities with varying geographies, populations, demographics, industries, and housing stocks are facing severe shortages of affordable housing. Despite the scope of the problem and range of places in which it manifests, the policy conversation has been overly focused on loosening zoning as the primary – and in some cases, the exclusive – solution to the challenge of housing affordability.

As we have argued, we think this approach is myopic. The obsession with loosening zoning misses the many problems in housing markets, confuses the issue of particular zoning rules with zoning in some general sense, and as a paradigm, falls prey to magical thinking about markets. Policymakers should instead pursue a post-neoliberal approach – one that lets go of the obsession with deregulation, privatization, liberalization, and austerity. A post-neoliberal approach would embrace the view that policy is market-crafting, and instead focus on industrial policy, public options, taxation, and market-shaping regulations. This post-neoliberal framework offers a way to categorize existing proposals and imagine new ones. It offers a broader and more contextually-specific way to addressing the housing affordability crisis.