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# PUTTING EXCLUSIONARY ZONING IN ITS PLACE: AFFORDABLE HOUSING AND GEOGRAPHICAL SCALE

Essay

*Christopher Serkin\* & Leslie Wellington\*\**

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## INTRODUCTION

There is a conventional narrative surrounding the term “exclusionary zoning.” It describes a particular phenomenon: a suburb adopting large-lot zoning or other density controls that reduce the supply of developable land, thereby driving up prices and making housing unaffordable for lower-income households.<sup>1</sup> This phenomenon, in turn, generates a set of familiar worries about municipalities not bearing their fair share of lower-income households and imposing the associated costs on their neighbors and

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\* Professor of Law, Vanderbilt Law School. Thanks to Nestor Davidson for steering us towards this topic. Thanks also to Nicole Tarpey and Ben Stark for early discussions about the piece.

\*\* J.D., Brooklyn Law School (2013); M.S., City and Regional Planning, Pratt Institute (Expected 2014).

1. 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).

in particular on the urban core.<sup>2</sup> This relatively parochial frame, however, misses some of the scales at which exclusion operates, and therefore the forms that exclusionary zoning sometimes takes. Expanding the frame reveals problems of exclusion not just at the local level, but at the regional and sub-local levels as well. Exclusionary zoning in its modern form is no longer limited to low-density suburbs, but now occurs also within the urban core and region-wide.

Most responses to exclusionary zoning operate only on the local scale to address the exclusion of lower-income households from suburban municipalities.<sup>3</sup> Most famously, the New Jersey Supreme Court, in *Southern Burlington County NAACP v. Township of Mount Laurel*, required municipalities to bear their fair share of affordable housing need.<sup>4</sup> New Jersey's legislative response has similarly focused on local governments' fair share obligations.<sup>5</sup> Other states also have a local focus.<sup>6</sup> Massachusetts, for example, gives developers an exemption from local zoning if a municipality does not meet a pre-determined affordable housing quota.<sup>7</sup>

These are appropriate responses to the conventional concern of exclusionary zoning, which consists of a local government using particular zoning techniques to force lower-income households into neighboring municipalities. These tactics benefit the excluding government's tax rolls to the detriment of its neighbors. But an exclusive focus on municipal-level exclusionary zoning misses other important problems, namely: access by lower-income households to public services and higher wages.

In contrast to the traditional focus on inter-local externalities, we argue here that the problem of exclusionary zoning should be viewed first and foremost from the perspective of lower-income households.<sup>8</sup>

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2. See generally *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

3. See *infra* text accompanying notes 28–31.

4. *Mt. Laurel*, 336 A.2d at 731–32.

5. See, e.g., Mallach, *supra* note 1, at 850 (discussing the legislation establishing New Jersey's Council on Affordable Housing, the state agency tasked with monitoring local government compliance with fair share obligations).

6. See STUART MECK ET AL., REGIONAL APPROACHES TO AFFORDABLE HOUSING, AMERICAN PLANNING ASSOCIATION (2003) (describing the fair share approaches adopted in New Jersey, California, Oregon and New Hampshire).

7. Massachusetts Low and Middle Income Housing Act, MASS. GEN. LAWS ch. 40B, §§ 20–23 (2002).

8. See, e.g., Norman Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 345 (1955). Williams divides the problem of exclusionary

As a group, they have needs at different geographical scales. They need access to regions where employment opportunities are available and wages are high relative to costs of living. They need access to municipalities that offer an attractive mix of services and taxation. And they need housing opportunities in specific neighborhoods that are not isolated from core public services. Exclusionary zoning can operate in each of these spatial frames independently of one another. The long-standing focus of exclusionary zoning on the content of local ordinances, instead of on these broader exclusionary dynamics, has defined the problem of exclusionary zoning too narrowly. We aim to remedy that deficiency in our contribution to the *Fordham Urban Law Journal's* Fortieth Anniversary issue.

In Part I we describe traditional accounts of exclusionary zoning. In Part II, we explore the different geographical scales at which exclusion can operate and the varied forms exclusion can take. Finally, in Part III, we discuss the need for more finely-tuned judicial interventions to comprehensively address exclusion in its many forms.

## I. THE LOCAL FOCUS OF EXCLUSIONARY ZONING

Contemporary concerns about exclusionary zoning are intimately bound up with Twentieth Century suburbanization.<sup>9</sup> In the 1940s, middle- and upper-income households increasingly took advantage of improvements in transportation infrastructure to build and buy houses farther and farther outside the urban core.<sup>10</sup> Simultaneously, those newly developing suburbs enacted restrictive zoning ordinances that excluded or limited affordable housing options for lower-income households.<sup>11</sup>

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zoning into two key components—the improper burden shifting among local governments and the relegation of lower-income groups to “slum housing.” *Id.* Williams’ overarching premise is that various forms of exclusion limit spontaneous contact across racial, ethnic, and economic lines, harming our system of democratic government. *Id.* at 348.

9. Suburbanization does not refer to only one phenomenon. See Wayne Batchis, *Suburbanization and Constitutional Interpretation: Exclusionary Zoning and the Supreme Court Legacy of Enabling Sprawl*, 8 STAN. J. C.R. & C.L. 1, 7 (2012) (“Over the course of American history, the meaning of ‘urban’ and ‘suburban’ have shifted in accordance with technological capacity and social proclivities.”).

10. See *id.* at 18–20 (describing post-war suburbanization). Some scholars have observed how the proliferation of exclusionary devices tracked the expansion of the interstate highway system. See, e.g., William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effect*, 41 URB. STUD. 317, 319 (2004).

11. See James C. Quinn, *Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches*, 4 FORDHAM URB. L.J. 147, 147 (1975) (noting

In addition to blatant discrimination, there are fiscal reasons for exclusionary zoning that are easily observable and well developed in the academic literature.<sup>12</sup> Where public services are funded in significant part by property taxes, owners of lower-valued housing contribute less to those services, receiving an implicit subsidy from owners of higher valued property.<sup>13</sup> The effect is exacerbated if owners of lower-valued property also “consume” more than the average amount of public services by, for example, having more children in the public school. The availability of lower-valued property in a municipality can therefore present tough choices to existing property owners: either pay more in property taxes, or accept cutbacks in the level of public services.<sup>14</sup> Neither is very appealing, so existing property owners have a significant incentive to use “fiscal zoning” to keep out owners of lower-valued property in order to minimize, if not eliminate, the extent of the cross-subsidy from owners of higher-valued to owners of lower-valued property.<sup>15</sup>

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how municipalities facing suburban development pressures were most likely to adopt exclusionary devices to preserve neighborhood character, and keep taxes and demand for municipal services at low levels).

12. See, e.g., Bruce W. Hamilton, *Property Taxes and the Tiebout Hypothesis: Some Empirical Evidence*, in FISCAL ZONING AND LAND USE CONTROLS 15 (Edwin S. Mills & Wallace E. Oates eds., 1975); Rolf Pendall et al., *Connecting Smart Growth, Housing Affordability and Racial Equity*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 229–30 (Xavier de Souza Briggs ed., 2005) (noting positive justifications for zoning with “exclusionary or expulsive impacts”); Henry A. Span, *How Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 18 (2001) (describing how exclusionary zoning aligns taxes and services with preferences of residents). For an example of uncommon candor about fiscal concerns, see *S. Burlington Cnty NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 723 (1975) (acknowledging purpose of exclusionary zoning to protect the local tax base).

13. Span, *supra* note 12, at 18–19 (describing fiscal zoning, which can produce exclusionary outcomes as residents attempt to limit entry to those “who will pay more in property taxes than they will consume in municipal services”).

14. See, e.g., WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

15. While this traditional account of exclusionary zoning is focused primarily on the relationship between exclusionary devices and the preservation of property values, scholars have also highlighted the preservation of neighborhood character as an underlying motivation for exclusionary zoning. See, e.g., Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 797 (1969). Neighborhood character, however, is an ambiguous motivation, and as legal scholar Norman Williams Jr. pointed out, it may be “merely another way of [residents] saying . . . they want economic segregation.” Williams, *supra* note 8, at 344; see also Stephen Sussna, *Residential Densities: A Patchwork Placebo*, 1 FORDHAM URB. L.J. 127, 133–34 (1972) (detailing the many justifications

Early writing in this journal described the tangible impacts that resulted from this appetite for exclusionary devices.<sup>16</sup> Large-lot zoning was ubiquitous across suburbs that developed around major cities like New York and Saint Louis.<sup>17</sup> In fact, in the late 1960s, Missouri had a four-year supply of one-third acre lots, but a stunning 350-year supply of one-acre lots.<sup>18</sup> These figures reflect an obvious and significant barrier to new affordable housing development during that period.

To make matters worse, the political calculation tends to be weighted strongly against affordable housing. The burden of housing price increases is felt primarily by people who are excluded from the municipality—people who are prevented from ever moving in the first place, or who are forced to move out because they cannot afford higher rents. Neither constituency is likely to have much political influence,<sup>19</sup> and the former is unlikely even to self-identify as a constituency. Therefore, local politicians' incentives tend to be dominated in these matters by the interests of local homeowners, who are primarily concerned with maximizing local property values.<sup>20</sup>

These dynamics led to obvious and predictable outcomes throughout the latter half of the twentieth century. People who could afford to do so began leaving cities en masse, increasing property values and the tax base in suburbs while relegating an increasingly poor population to the inner cities.<sup>21</sup> This “white flight” had a pernicious racial aspect, segregating cities and suburbs into minority

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for exclusionary zoning, including the aesthetic preferences for large lots that drove many Americans to leave urban areas). Some state courts have rejected the preservation of neighborhood character as a basis for restrictive land use controls. See generally Jeffrey M. Lehmann, *Reversing Judicial Deference Toward Exclusionary Zoning: A Suggested Approach*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 229 (2003) (describing how state courts evaluate community character justifications, and providing recommendations for when such justifications should be categorically rejected).

16. See, e.g., Quinn, *supra* note 11, at 147–48; Sussna, *supra* note 15, at 134.

17. Sussna, *supra* note 15, at 132 (citing Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1645 n.5 (1971)).

18. *Id.*

19. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 402 (1977).

20. FISCHER, *supra* note 14.

21. See, e.g., S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 735–36 (N.J. 1975) (citing NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. Doc. No. 34 (1968)).

and white populations respectively.<sup>22</sup> Cities then faced the dual pressures of a declining tax base and increased demand on public services.<sup>23</sup> In the competition between cities and suburbs, exclusionary zoning was a powerful tool to protect the suburban tax base and keep cities poor.

Affordable housing, in this view, presents a kind of NIMBY (Not in My Backyard) problem. Every region needs some low-wage workers—whether in service, manufacturing, or government sectors of the regional economy—but no particular municipality wants to house them. Likewise, every region has a dependent population that requires some government support, but every municipality would rather it be provided somewhere else. As the New Jersey Supreme Court therefore recognized in *Mt. Laurel*, exclusionary zoning creates a kind of inter-local externality, imposing costs on neighboring communities forced to house a disproportionate share of lower-income households.<sup>24</sup> For example, Mount Laurel's exclusionary zoning was primarily to the detriment of Philadelphia, Camden and Trenton, the nearby urban centers.<sup>25</sup> But that same dynamic has played out throughout the country, with suburbs enacting exclusionary zoning ordinances that impose the costs of lower-income households on to the urban core.

When people think or write about exclusionary zoning, then, they often have this form of inter-local competition at least implicitly in mind: suburbs using large-lot zoning and other density controls to

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22. See, e.g., Scott J. South & Kyle D. Crowder, *Escaping Distressed Neighborhoods: Individual, Community, and Metropolitan Influences*, 102 AM. J. SOC. 1040 (1997) (explaining concurrent dynamics fueling racial segregation including the difficulty racial minorities face exiting ghettos, and their ease of entry into ghettos); Sussna, *supra* note 15, at 131 (describing “two distinct racial societies . . . dangerously developing in the United States” as mostly white families fled urban areas and percentage of blacks increased).

23. See ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* 9–10 (1973) (describing how older, more affordable housing remained in “central cities and some close-in suburbs,” which compelled “thousands of such households to become concentrated in the worst urban housing”).

24. *Mt. Laurel*, 336 A.2d at 727–28 (“[T]he universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.”).

25. See, e.g., Linda H. Jones, Note, *The Mount Laurel Case: A Question of Remedies*, 37 U. PITT. L. REV. 442, 443 (1975) (“Because of Mount Laurel’s proximity to the urban centers of Camden, Trenton and Philadelphia, it is a likely place for growth and for immigration from the nearby overcrowded urban centers.”).

prevent affordable housing options, forcing lower-income households to remain in the urban core.<sup>26</sup> As a result, zoning ordinances identified as “exclusionary” usually involve municipalities limiting density and increasing infrastructure costs, either directly or indirectly.<sup>27</sup>

What is often missing from the debates and discussion, however, is recognition that exclusion happens at different geographical scales. Regional and sub-local exclusion may be just as problematic as exclusion at the municipal level.

## II. THE SPATIAL DYNAMICS OF EXCLUSIONARY ZONING

Most writing and theorizing about the problem of exclusionary zoning focuses on the geographic scale of the municipality or relevant zoning authority.<sup>28</sup> At first blush, this seems obviously “correct” because responsibility for exclusionary zoning lies with the government that enacted the zoning ordinance. Moreover, exclusionary zoning’s role in inter-local competition makes local governments seem like the appropriate scale for analysis because property taxes are collected and many public services—like schools—are provided at the local level.<sup>29</sup> The traditional concern, after all, is with one local government avoiding its fair share of the costs of lower-income households to the detriment of other municipalities.

The local focus is due in part to the fact that the most successful legal challenges to exclusionary zoning have relied on this theory of inter-local externalities and the unreasonable application of state police power.<sup>30</sup> In contrast, federal constitutional challenges by

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26. In some cases, large lot zoning did not originate as an exclusionary device, but rather, was a counter-response to the speculative real estate markets of the 1920s, when far too many small lots were created. See Sussna, *supra* note 15, at 134.

27. See Quinn, *supra* note 11, at 148 n.9 (providing examples of common exclusionary devices including minimum lot sizes and widths, exclusion of multi-family housing, restrictions on number of bedrooms in apartment developments, and prohibitions on mobile homes).

28. See, e.g., Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877, 888–89 (2006) (describing exclusionary zoning as a problem originating with municipality, using delegated powers to “serve only the perceived interest of that locality, without consideration of the effect of their laws on the larger region”).

29. *But see generally* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 *U.C. DAVIS L. REV.* (forthcoming 2013) (discussing regional services and amenities).

30. See *Britton v. Town of Chester*, 595 A.2d 492, 495–96 (N.H. 1991) (relying on “general welfare clause” of New Hampshire’s zoning enabling statute to invalidate



excluded residents, based on equal protection or access to housing, have been largely unsuccessful.<sup>31</sup> As a result, the spatial inquiry is regularly confined to individual municipalities and inter-local affordable housing burdens, rather than the experience of exclusion by lower-income households at various scales. The question of scale, however, is far less straightforward than it appears. When it comes to affordable housing options, a lower-income household may be relatively indifferent to local jurisdictional boundaries (subject to some caveats, examined below). The question for the household is simply whether there are affordable housing options in a safe neighborhood with appropriate access to basic needs (jobs, schools, services, medical care, and so forth). According to one account, the focus should be on a broader “geography of advantage and disadvantage: dangerous streets and safe ones, good schools and failing ones.”<sup>32</sup> Zoning is exclusionary to the extent that it limits or eliminates such housing options. Judged by this broader criterion, the problem of exclusionary zoning can occur at both the sub-local and the regional level.

#### A. The Needs of Lower-Income Households

Traditional exclusionary zoning—as practiced at the municipal level—is not the only form of residential exclusion. At the regional level, lower-income households need the ability to move to

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town’s large-lot zoning that served parochial interests of residents rather than broader concerns); *S. Burlington Cnty. NACP v. Twp. Of Mount Laurel*, 336 A.2d 713, 713 (N.J. 1975); *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975) (setting out two-part test for exclusionary zoning challenges, including whether the ordinance gives due consideration “to regional needs and requirements”); *Twp. of Willistown v. Chesterdale Farms* 341 A.2d 466 (Pa. 1975) (striking down ordinance providing limited apartment development for failure to accommodate fair share of multi-family development in the township).

31. *See, e.g., Ybarra v. City of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974) (rejecting “poverty” as a basis for suspect classification).

32. Matthew Desmond & Tracey Shollenberger, *Mechanisms of Neighborhood Selection: Why and How Poor Families Move 3* (unpublished manuscript) (on file with authors). This “residential attainment model” is one of several frameworks for understanding the motivations underlying the spatial locations of lower-income households. *Id.* (manuscript at 2–3). Here, moves from one locale to another are driven by a desire for economic gains. Traditionally, this has taken the form of minority and immigrant communities moving from urban areas to working class neighborhoods, and ultimately to suburban communities. *Id.* (manuscript at 2–3) (citing John R. Logan & Richard D. Alba, *Locational Returns to Human Capital: Minority Access to Suburban Community Resources*, 30 *DEMOGRAPHY* 243, 244 (1993)).

employment opportunities.<sup>33</sup> Regional economies grow and stagnate. In one decade, Detroit may be an engine of growth, another New York or Nashville.<sup>34</sup> It is important—for workers as well as for the economy—that people be able to move to where the money and jobs are, with limited barriers to entry.<sup>35</sup> Such mobility decreases wage differentials between regions, provides labor in places where jobs are relatively plentiful and workers are needed, and offers a way up the economic ladder for lower-income workers.<sup>36</sup>

There is, however, some evidence that inter-regional mobility is on the decline, and some further evidence that one cause may be land use controls—particularly land use controls enacted in higher-income states.<sup>37</sup> This is troubling as an economic phenomenon, and also poses significant challenges to lower-income workers who may be unable to access regions with higher wages. As a result, regional income convergence has slowed, due at least in part to residential restrictions limiting access to these more economically vibrant parts of the country.<sup>38</sup>

But the problem of exclusion operates at the sub-local level as well. Zoning, after all, can be used to protect well-to-do neighborhoods and segregate lower-income households in discrete pockets within a given municipality. The phenomenon is widespread.<sup>39</sup> The

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33. Ann R. Tickamyer & Cynthia M. Duncan, *Poverty and Opportunity Structure in Rural America*, 16 ANN. REV. SOC. 67, 79–81 (1990) (linking rural poverty to limited opportunities for out-migration).

34. See Kim Severson, *Nashville's Latest Big Hit Could Be the City Itself*, N.Y. TIMES, Jan. 8, 2013, at A11.

35. See generally Davidson & Foster, *supra* note 29; Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Stopped?* (Harvard Kennedy School Working Paper No. RWP12-028, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2081216](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081216).

36. Ganong & Shoag, *supra* note 35, at 2; see also ANDREW J. OSWALD, A CONJECTURE ON THE EXPLANATION FOR HIGH UNEMPLOYMENT IN THE INDUSTRIALIZED NATIONS: PART I (1996) (linking the mobility constraints associated with growing homeownership rates to increased unemployment across western economies); Audrey G. McFarlane, *Race, Space and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 334–36 (1999) (explaining how limited mobility of poorer communities reduced access to jobs as positions moved to the “ever-extending periphery of the metropolitan region”).

37. Ganong & Shoag, *supra* note 35, at 27 (“[T]ighter [land use] regulations impede population flows to rich areas and weaken convergence in human capital.”).

38. *Id.*; cf. Span, *supra* note 12, at 19 (discussing the effect of traditional exclusionary zoning as “isolat[ing] from employment those excluded from the suburbs”).

39. Common interest communities, too, sometimes use fine-grained private land use controls in their master deeds to exclude lower-income households. While this is

revitalization of many cities from the 1980s through today is characterized by increased power of individual communities retaking control over zoning, services, and spending at the sub-local level in order to break the downward spiral of the city more broadly that characterized the previous decades.<sup>40</sup> By asserting sub-local control over services and even, in some cases, revenue (through TIFs, special assessments, and the like), well-to-do neighborhoods within a municipality can benefit by excluding lower-income households. But this creates some of the same NIMBY pressure between neighborhoods that exist between local governments, and many neighborhoods have managed to secure zoning protection to prevent new affordable development, either by asserting formal land use authority at the sub-local level, or by successfully petitioning the local zoning authority.<sup>41</sup>

Viewed exclusively through the lens of inter-local competition, sub-local exclusionary zoning should be of no concern. It does not matter where municipalities provide housing for lower-income households, so long as they accommodate their fair share. But this misses at least some of the point. The ultimate goal is not—or at least is not

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not typically viewed through the lens of exclusionary zoning, the effect in some municipalities may well be to force lower-income households into very limited housing options, with access to a public school and public services that are severely underfunded relative to the common interest communities. See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 442–43 (2006).

40. This has happened both formally and informally. Homeowners' associations amount to a kind of reclaiming of sub-local regulatory power. TIFs allow sub-local communities to capture increased property tax revenue and divert it away from the broader municipality. Less formally, too, city councils have become more responsive to neighborhood demands, like downzoning built-out communities, which can limit development potential. For theoretical proposals supporting these changes, see generally Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning With Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999).

41. Examples of sub-local land use control do not always involve zoning, but can have the very same exclusionary effect. A leading example is the creation of neighborhood conservation districts, which create the veto power of historic preservation without the need for any historic significance. See generally William A. Fischel, *Neighborhood Conservation Districts*, 78 BROOK. L. REV. 339 (2013); see also Desmond & Shollenberger, *supra* note 32, (manuscript at 7) (explaining how even incremental moves from one block to another can mean the difference between total exclusion from community resources and capital to new opportunities for advancement). The “considerable diversity of neighborhood context among the urban poor,” suggests that sub-local inquiries are integral to the understanding of the true sources upward mobility. Desmond & Shollenberger, *supra* note 32, (manuscript at 7).

exclusively—inter-municipal fairness for local governments’ budgets, but must also include positive outcomes for the region’s (and the nation’s) lower-income households. Preventing traditional exclusionary zoning at the municipal level can be important for achieving this goal because it pushes back against ghettoization in the urban core and the reduced public services available to households that may need them the most. It is not, however, a panacea. Even if local governments all bear their fair share of lower-income households, those households may fare no better if they are then segregated by municipal governments into sub-local slums and provided with lower quality services.<sup>42</sup> Importantly, then, exclusionary zoning is not just the pernicious tool of suburbs in their competition with the urban core (and each other), but also exists *within* cities and larger municipalities. A city’s zoning can be exclusionary when it protects well-to-do neighborhoods, and limits housing for lower-income households.

Stepping back, then, the problem of exclusion replicates itself at different scales. At the largest scale, it is concerned with the distribution of lower-income households across the nation. At the middle (traditional) scale, it is concerned with their distribution within a region. And at the smallest scale, it is concerned with the distribution of lower-income households at the neighborhood or even the block or building level.

### B. The Problem of Exclusion Reassessed

With this more comprehensive spatial frame comes some important insights and legal conclusions—described below—but also some new conceptual hurdles. It is simply not true, for instance, that people should be able to live wherever they want. Problematizing exclusion across spatial frames does not mean that Silicon Valley should house a large share of the nation’s poor, nor that Park Avenue or Beverly Hills should have a significant portion of their housing stock dedicated to New York’s or Los Angeles’s lower-income households. So how should exclusion be assessed?

The traditional focus on municipal exclusionary zoning contains the seeds of an answer. In this account, zoning is a mechanism that

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42. Scott A. Bollens, *Concentrated Poverty and Metropolitan Equity Strategies*, 8 STAN. L. & POL’Y REV. 11, 11 (1997) (“Location of households and individuals in segregated, poverty-stricken neighborhoods significantly influences the quality of their schools, the level of municipal services, tax burdens, access to work, and level of safety.”).

well-to-do suburbs can use to limit the subsidy from owners of higher-valued property to owners of lower-valued property.<sup>43</sup> As outlined above, local government actors generally seek to maximize local property values, which requires maximizing the value of the public services they offer—schools, infrastructure, etc.—while minimizing property taxes. One way that a lower-income household can improve its situation is by moving to a municipality with better public services, at least so long as those public services are not fully reflected in that household's housing costs (including property taxes). A lower-income household can benefit by buying lower-valued property in a municipality offering higher-valued services.<sup>44</sup> Exclusionary zoning is problematic from the perspective of lower-income households, then, if it constrains supply to an extent that the value of public services are largely capitalized into housing costs.

Some might object that this is not a problem with zoning but, instead, its most salutary feature. It goes some way to converting local property taxes into user fees, offering the slate of services only to those families willing and able to pay. By narrowing the range of local property values, it narrows the subsidy available to people at the lower end of that band.<sup>45</sup> For purposes of this short Essay, we do not set out to defend any one view of government, but simply assume that local governments rely on property taxes instead of user fees partly because some measure of redistribution is desirable. It is fair to ask owners of more expensive property to bear a greater share of the costs of public services, and it is appropriate for owners of lower-valued property to receive a kind of subsidy for the services they consume.

We take no view here on the extent of subsidy that is normatively, politically, or economically desirable. Constraining that subsidy to some extent is clearly appropriate and is an important consequence if not function of municipal land use controls. But those constraints can

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43. Exclusionary zoning is traditionally discussed in terms of minimum lot requirements, crafted to create economically homogenous suburban communities. See, e.g., Alan Tarr & Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 531 (1984) (presenting large-lot zoning as the dominant form of residential exclusion).

44. See Hamilton, *supra* note 12, at 15 (describing how local governments institute restrictive zoning to avoid dynamic of "musical suburbs," where lower-income households move to more affluent neighborhoods to access fiscal advantages like better quality public services).

45. *Id.* at 13 (noting how homogeneous housing values promote economic efficiency).

go too far. Zoning is exclusionary when it crosses that line—wherever it is drawn.

The important point for this Essay is that exclusionary outcomes can repeat at the regional and sub-local levels as well. For a lower-income household, accessing a municipality with good public services is no help if those services are not available to everyone in the community. The good schools may only be available to children in wealthy neighborhoods, for example; police may provide different levels of protection, and investments in public infrastructure may be different as well.<sup>46</sup> To the extent the value of these services is fully capitalized into the cost of housing, there is little meaningful access for lower-income households.

If this discussion seems esoteric, consider public schools. Anyone who has shopped for a house knows that the quality of the zoned public school translates into higher home values. If the “full” value of that school is reflected in property values, then it provides little actual access for lower-income households. In fact, school districting is often hard-fought.<sup>47</sup> True, even the most desirable public schools often draw from some less expensive neighborhoods, but the issue is how many affordable housing options are actually available. Too many options, of course, and the quality of the school may decrease, but with too few, the school district starts to look inappropriately exclusionary. Again, our purpose in this Essay is not to suggest where that line is drawn but is simply to recognize the dynamic of sub-local exclusion.

It is possible that sub-local exclusionary zoning is less problematic than municipal exclusionary zoning if all residents are, in fact, able to access municipal services equally. A suburb that has only one public school will not be able to zone out lower-income residents from that school, but in larger jurisdictions and urban areas the opportunity for sub-local exclusion clearly exists. Indeed, the cycle of poor services and low property values is replicated at the sub-local level in many cities. In New York City, parents are well aware of the

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46. There are other legal doctrines that prohibit discrimination in the provision of local services, but they are often weakly enforced. *See, e.g.*, *Mount Prospect State Bank v. Vill. of Kirkland*, 467 N.E.2d 1142 (Ill. App. Ct. 1984), *cited in* LYNN A. BAKER & CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW* (4th ed. 2010) (reproducing case in a discussion of discrimination in public services).

47. *See, e.g.*, Benjamin Zimmer, *A Deregulatory Framework for Alleviating Concentrated African-American Poverty*, 9 HASTINGS RACE & POVERTY L.J. 555, 569 (2012) (detailing “[the] strong incentive for residents in any school district to preclude the development of housing of lower value than their own”).

neighborhoods with “good” schools and, at least in the last few years, the Bloomberg administration has used its zoning power aggressively to maintain property values in those more affluent parts of the city.<sup>48</sup> Residents of a subsidized housing development may be able to send their children to the same public school and access the same police protection as residents in the wealthy parts of town. But maybe not. It depends entirely on the municipality and how services are distributed within its borders.

Political pressure at the sub-local level may increase the likelihood of sub-local exclusion.<sup>49</sup> Wealthy neighborhoods may exercise disproportionate power on the local zoning authority and seek to preserve property values, severely curtailing affordability. They may also fight to keep school zone boundaries tightly correlated to neighborhood affluence.<sup>50</sup> And, even when a municipality is committed to equalizing public expenditures across schools, active parent involvement in fundraising—often through PTAs—can dramatically affect the relative resources of different schools in the same jurisdiction.<sup>51</sup>

If a municipality has the ability—formally or informally—to discriminate between neighborhoods in the provision of services, then sub-local exclusionary zoning implicates problems that are very similar to traditional exclusionary zoning at the municipal level. Both

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48. See AMY ARMSTRONG ET AL., HOW HAVE REZONINGS AFFECTED THE CITY'S ABILITY TO GROW? 10 (2010), available at [http://furmancenter.org/files/publications/Rezonings\\_Furman\\_Center\\_Policy\\_Brief\\_March\\_2010.pdf](http://furmancenter.org/files/publications/Rezonings_Furman_Center_Policy_Brief_March_2010.pdf) (“[U]pzoned lots were located in areas with significantly lower income than the City median . . .”). This happens internationally, too, and often with pernicious effects. In Romania, many Roma (gypsies), live in discrete communities and are provided their own schools so as not to “burden” public schools. This is sub-local exclusion, and the results are little different than if they were forced to live in their own towns. For a compelling account, see OUR SCHOOL (Sat Mic Films, 2011).

49. See David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1699–1705 (2013) (offering account of local political dynamics that identifies sublocal pressures).

50. See, e.g., *Spurlock v. Fox*, 716 F.3d 383 (6th Cir. 2013) (upholding Metro Nashville Rezoning Plan, which was challenged on grounds that it perpetuated “racially isolated geographical zones” by aligning school districts with neighborhood boundaries, rather than using non-contiguous zones to foster more integrated districts).

51. PTAs in high-income New York City neighborhoods like the Upper West Side of Manhattan regularly raise almost one million dollars per year for the local public elementary school, allowing the school to support a range of enrichment programs unavailable to schools with a less affluent base of parents. See Kyle Spencer, *Way Beyond Bake Sales: The \$1 Million PTA*, N.Y. TIMES, June 1, 2012, at MB1.

raise the specter of isolating lower-income families and providing them with fewer services, adversely impacting household outcomes.

Less obviously, a similar dynamic also exists at the regional level, although the focus is on wages rather than on the mix of public services and property taxes. Employment opportunities are not evenly distributed across the country, and the same is true of higher-wage jobs.<sup>52</sup> Even if every local government accommodates a proportionate share of the region's lower-income households, the region as a whole may not bear a fair share of the nation's lower-income households. And that simply replicates the conventional exclusionary zoning problem at the regional level, where wealthy regions—primarily on the coasts—are able to use regulatory burdens to limit affordability.<sup>53</sup> This, in turn, means that an increased number of lower-income households remain where they are (primarily in the South and Midwest), contributing less to the regional tax base and straining public infrastructure.

Ganong and Shoag provide one useful way for thinking about regional exclusion.<sup>54</sup> They examine the extent to which housing prices capitalize inter-regional wage differentials. In their account, one common path towards economic improvement for a lower-income household is to move from a lower-wage to higher-wage region.<sup>55</sup> Residential mobility in this country has largely fit this pattern, with higher-wage regions exerting a kind of gravitational pull for people seeking higher-paying jobs.<sup>56</sup> But that pull exists only to the extent that the wage differential is not fully capitalized into local property values.<sup>57</sup> If someone can achieve an additional \$10,000 in annual wages by moving from Alabama to New York City, but has to pay an additional \$10,000 in housing costs, then the value of the move is a wash.

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52. Tickamyer & Duncan, *supra* note 33, at 81 (1990) (detailing the disproportionate amount of low-wage jobs in rural communities).

53. See Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability* 3–6 (Harvard Inst. of Econ. Research, Discussion Paper No. 1948, 2002) (explaining that the coasts are the primary areas where housing prices far exceed construction costs, and attributing that gap to zoning and its artificial constraint on new construction).

54. Ganong & Shoag, *supra* note 35.

55. *Id.* at 2.

56. *Id.* at 2–3 (explaining that historically, workers of all skill levels moved to areas with high nominal incomes).

57. *Id.* (linking escalating housing prices in productive places to the movement of lower-skilled workers to areas with “low nominal income but high real income net of housing costs”).



According to Ganong and Shoag, the increased capitalization of wage differentials in housing prices makes it more difficult for workers to move up the economic ladder.<sup>58</sup> It discourages residential mobility and increases income inequality. And, importantly, it is due in no small part—according to their paper—to the proliferation of land use regulations in higher-wage jurisdictions.<sup>59</sup> Regional exclusionary zoning, then, is characterized by housing prices that capitalize all or most of the relatively higher wages.

### C. Modern Forms of Exclusion

Recognizing that residential exclusion occurs not only at a local scale, but also at sub-local and regional scales, reveals surprising variety in the forms that exclusion can take. Traditional exclusionary zoning at the local scale consists, generally, of large-lot zoning in outer-ring suburbs. By restricting density and constraining the supply of developable land, suburbs can boost local land values, translating directly into higher housing prices. When these conventional land use controls are found to be impermissibly exclusionary, the intuitive response is to call for more density.

But once the problem of exclusionary zoning is reframed using different geographical scales, density is no longer a universal solution. For instance, in neighborhoods experiencing a growing demand for urban living, increased density may be leading to sub-local exclusionary outcomes. The forms of exclusion identified below are by no means comprehensive, but they nevertheless suggest the breadth of the forms that modern exclusionary zoning can take when sub-local and regional effects are included.

There is a sense in which zoning is always and inherently exclusionary. To the extent it restricts supply—and that, after all, is what zoning primarily does—it should have the effect of increasing prices, at least as compared to the alternative of no density controls.<sup>60</sup> But that is not quite right, because consumer preferences for different levels of density will also affect property values, and may affect them quite dramatically.<sup>61</sup> Much of the writing on exclusionary zoning is premised at least implicitly on a relatively static and familiar view of

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58. *Id.* at 27.

59. *Id.* (“Though there has been a dramatic decline in income convergence nationally, places that remain unconstrained by land use regulation continue to converge at similar rates.”).

60. *See, e.g.*, Glaeser & Gyourko, *supra* note 53, at 5–6.

61. *See infra* text accompanying notes 70–76.

consumer preferences.<sup>62</sup> All things being equal, people will prefer to live in single-family homes with plenty of land. More land, in this view, is always better and more valuable than less land. Density restrictions that require more land per house are therefore catering to consumer preferences at the same time that they are reducing the supply of developable land. But there are signs that consumer preferences are changing, at least in certain markets. The aging population in the U.S. may well be driving some of these shifting preferences.<sup>63</sup> Younger populations are increasingly leaving suburbs where older populations (ages forty-five and above) are heavily represented.<sup>64</sup> As a result, aging suburbs are experiencing slow growth, or in some cases declines in their younger populations.<sup>65</sup> On the whole, suburbs are aging at a faster rate than cities, posing broader questions about how to keep older and more established suburbs relevant.<sup>66</sup>

Moreover, the resurgence of cities and the rise of New Urbanist designs suggest that at least a segment of the population actually prefers greater density.<sup>67</sup> Recently, cities like Las Vegas, Raleigh, and Charlotte are seeing sharp gains in their younger populations.<sup>68</sup> Examining the population as a whole between July 2010 and July

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62. See, e.g., Lehmann, *supra* note 15, at 230–31 (noting how wealthy households tend to build “single-family homes on expensive multi-acre plots of land,” while central cities disproportionately house lower-income families).

63. See WILLIAM H. FREY, *THE UNEVEN AGING AND ‘YOUNGING’ OF AMERICA: STATE AND METROPOLITAN TRENDS IN THE 2010 CENSUS* 7–8 (2011) (describing “aging in place” phenomenon, where seniors continue to reside in same post-war suburbs they first settled with young families).

64. *Id.* at 11, 13.

65. *Id.* at 16–17.

66. *Id.* at 10–11.

67. See, e.g., Alan Ehrenhalt, *Trading Places—The Demographic Inversion of the American City*, *NEW REPUBLIC*, Aug. 13, 2008, at 2–4 (detailing difficulties of retaining urban middle class, and high costs associated with luxury urbanism).

68. FREY, *supra* note 63, at 14. However, the low national growth rate for people below the age of forty-five, coupled with outmigration of young adult families and children, have caused cities to experience greater declines in their younger populations than suburbs between 2000 and 2010. See *id.* at 13–14; see also Kyle Fee & Daniel Hartle, *Growing Cities, Shrinking Cities*, *FED. RES. BANK CLEV.* (Apr. 14, 2011), <http://www.clevelandfed.org/research/trends/2011/0411/01labmar.cfm> (finding warmer temperatures, lower concentrations of manufacturing employment, and higher household incomes explain the population growth in fastest-growing cities like Raleigh, Las Vegas, and Austin)

2011 shows that growth rates in larger cities are outpacing their suburban counterparts in metropolitan areas across the country.<sup>69</sup>

A certain minimum density is required to support mass transit, walkable commercial centers, and the kinds of vibrant mixed-use communities that reflect modern design principles. While this, today, may represent a modest share of consumer preferences,<sup>70</sup> it is hardly farfetched to think that more and more people, especially younger people, will actively seek more dense housing options in cities, or in suburban locales embracing modern urban design principles.<sup>71</sup>

Where that seeking occurs, large-lot zoning is likely to suppress, not enhance property values. If the sprawling development patterns that large-lot zoning generates become undesirable, such zoning will put downward pressure on property values and actually increase affordability. Even though the effect of the zoning is to reduce the supply of developable land, it does so by necessitating a form of development that people may not want. Unable to satisfy consumer preferences, prices are likely to decrease, despite the restriction in supply (or, more likely, the zoning will change).<sup>72</sup> Indeed, in some cities, the strong desire for density among younger families has driven up urban housing prices to such an extent that they are now turning to lower cost housing options in the suburbs—a phenomenon that turns the suburbanization patterns of the 1950s and 60s on its head.<sup>73</sup>

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69. See generally Nate Berg, *Urban Versus Suburban Growth in U.S. Metros*, ATLANTIC CITIES (June 29, 2012), <http://www.theatlanticcities.com/neighborhoods/2012/06/urban-or-suburban-growth-us-metros/2419>.

70. See David Ray Papke, *Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation*, 41 URB. LAW. 787, 787–788 (2009) (explaining that the “great majority of middle and upper-class Americans continue to live on the outskirts of the center-cities and even more so in the surrounding suburbs,” while “the poor and working classes continue to live in the older, postindustrial center-cities” despite changing preferences for urban living).

71. See Alex Williams, *Creating Hipsturbia*, N.Y. TIMES, Feb. 15, 2013, at ST1.

72. A similar story can be told regarding bedroom requirements. Local governments would sometimes limit the number of bedrooms per unit in residential development with the goal both of reducing the number of children, in absolute terms, but also as a proxy for lower-income households. See, e.g., Span, *supra* note 12, at 19. Yet if wealthier households increasingly have a preference for larger families, bedroom requirements could have the unintended consequence of depressing property values. We thank Dana Brakman-Reiser for this suggestion. For a similar dynamic, consider rental restrictions imposed by homeowners associations, which—contrary to traditional assumptions—may drive down property values in a strong rental market. See Brian Eason, *Homeowners Associations Clamp Down on Rentals*, USA TODAY (Oct. 4, 2012), <http://www.usatoday.com/story/money/business/2012/10/04/homeowners-oppose-rentals/1614229/>.

73. See Williams, *supra* note 71.

Moreover, to attract younger families leaving the urban core, many suburbs are encouraging high-density development to mirror the urban form.<sup>74</sup>

There is still a sense in which zoning is inherently exclusionary by design, but not simply because it reduces supply. Instead, the goal of most zoning, fundamentally, is to preserve or increase property values.<sup>75</sup> Sometimes this comes from large-lot zoning, but sometimes it comes from fostering or even requiring more dense mixed-use development.<sup>76</sup>

This seems obvious enough, but it generates important implications that are often missed. Opponents of exclusionary zoning frequently object to large-lot zoning and push for greater density. But municipalities that embrace greater density are almost certainly betting that greater density will increase not decrease property values and will actually limit affordability. Greater density by itself will not necessarily result in lower property values if the new development actually satisfies high-end consumers' preferences.<sup>77</sup> It also means that the urban core is becoming a new location for exclusionary zoning—or at least neighborhoods within the urban core.<sup>78</sup> Yet the form of the zoning is different—it may not be large-lot requirements, but instead other regulatory controls that limit congestion or sub-local services. Zoning can be exclusionary even if it embraces

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74. *Id.* (“[T]o ward off the nagging sense that a move to the suburbs is tantamount to becoming like one’s parents, this urban-zen generation is seeking out palatable alternatives—culturally attuned, sprawl-free New York river towns like Hastings, Dobbs Ferry, Irvington and Tarrytown—and importing the trappings of a twee lifestyle like bearded mixologists, locavore restaurants and antler-laden boutiques.”).

75. *But see* Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101–21 (Charles M. Haar & Jerold S. Kayden eds., 1989) (describing how industrial zoning can be intentionally designed to reduce property values and displace minority communities).

76. *See, e.g.*, James A. Kushner, *Smart Growth, New Urbanism and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 *UCLA J. ENVTL. L. & POL’Y* 45, 45 (2002) (explaining how smart growth and New Urbanism can lead to “the intensification of ethnic separation,” “gentrification and displacement of the poor”).

77. *See, e.g.*, Richard P. Voith & David L. Crawford, *Smart Growth and Affordable Housing*, in *GROWTH MANAGEMENT AND AFFORDABLE HOUSING* (Anthony Downs ed., 2004).

78. *See* James A. Kushner, *Affordable Housing as Infrastructure in the Time of Global Warming*, 42/43 *URB. LAW.* 179, 206 (2011) (noting the success of transit-oriented development has led to “secondary development [which] has the effect of gentrifying the neighborhood as rents and property sales prices escalate to reflect the new markets and result[s] in the displacement of lower income neighborhood residents”).

density, so long as the resulting housing values capitalize the value of sub-local amenities.

Consider transit-oriented development (TOD).<sup>79</sup> Many opponents of exclusionary zoning decry development patterns that require residents to rely on cars.<sup>80</sup> They point out that cars are expensive to own and operate, and that the absence of public transportation options can effectively exclude lower-income workers from a neighborhood.<sup>81</sup> But it does not follow that the current push for transit-oriented development is necessarily the solution. If housing prices in transit-oriented developments capitalize most or all of the transportation savings, then such developments provide little help for lower-income households.<sup>82</sup> Imagine, for example, that commuting by car costs \$200 per month on average. If housing prices in the transit-oriented development are \$200 per month higher to reflect those cost savings as well as, perhaps, other less tangible benefits of mass transit, then transit-oriented development is not necessarily less exclusionary. In fact, recent studies on walkability and TOD suggest that more walkable urban areas are commanding higher property values.<sup>83</sup>

Increasingly, too, sub-local control over land use can create powerful exclusionary forces at the neighborhood level. The clearest example is the relatively new phenomenon of the community conservation district.<sup>84</sup> It amounts to a kind of historic preservation district without the need for historical significance, and it provides the community with a layer of sub-local control over land use decisions. This additional layer almost inevitably drives up the cost of development because it imposes another regulatory hurdle, and provides a particular vehicle for expressing sub-local NIMBY-ism.

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79. Robert H. Freilich, *The Land-Use Implications of Transit-Oriented Development: Controlling the Demand Side of Transportation Congestion and Urban Sprawl*, 30 URB. LAW. 547, 550 (1998) (setting out key characteristics associated with TOD, including density to support mass-transit and more walkable neighborhoods).

80. See, e.g., TODD LITMAN, VICTORIA TRANSP. POLICY INST., TRANSPORTATION AFFORDABILITY: EVALUATION AND IMPROVEMENT STRATEGIES 3 (2013).

81. See, e.g., Orfield, *supra* note 28, at 905.

82. See, e.g., BARBARA J. LIPMAN, CENTER FOR HOUS. POLICY, A HEAVY LOAD: THE COMBINED HOUSING AND TRANSPORTATION BURDENS OF WORKING FAMILIES 13, 17 (2006).

83. See, e.g., CHRISTOPHER B. LEINBERGER & MARIELA ALFONZO, BROOKINGS INST., WALK THIS WAY: THE ECONOMIC PROMISE OF WALKABLE PLACES IN METROPOLITAN WASHINGTON, D.C. (2012); Christopher B. Leinberger, *Now Coveted: A Walkable, Convenient Place*, N.Y. TIMES, May 25, 2012, at SR6.

84. For a discussion of the phenomenon, see Fischel, *supra* note 41.

Although the phenomenon is sufficiently new that studies have not yet appeared examining the effect of community preservation districts on affordability, it is at least easy to guess which direction the pressures will go.

Neighborhoods can also capture significant control over sub-local revenue through TIFs or special assessments, which can fund neighborhood improvements and infrastructure development with tightly concentrated benefits that do not extend to lower-valued parts of the municipality. The same kind of exclusion can also occur with school district line drawing.<sup>85</sup> In short, neighborhood exclusion is common and can take many forms.

At the regional level, exclusion consists primarily of the aggregate effects of local exclusion.<sup>86</sup> By and large, there is no regional government that enacts exclusionary land use controls.<sup>87</sup> Instead, regional exclusion occurs when too many separate local governments within a particular region enact exclusionary measures.

There is, however, a broader effect at work here that makes regional exclusion more than simply the sum of the effects of local governments' uncoordinated actions. The problem relates back to the dynamics around traditional inter-local exclusionary zoning. In a region facing significant housing demand, especially demand for affordable housing, exclusionary zoning by one local government imposes a kind of region-wide inter-local externality, forcing other local governments to bear a disproportionate share of lower-income households. Importantly, though, that effect is not static. Instead, the more local governments within a region adopt exclusionary measures, the more pressure it puts on the remaining local governments to do the same.

Moreover, the more common exclusionary regulations become within a region, the more knowledge local officials are likely to have about the form that such regulations take. Intra-regional information networks between local planners and zoning officials will often lead to a kind of regional convergence in the content of local zoning

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85. See *supra* text accompanying notes 47–51.

86. See, e.g., Quinn, *supra* note 11, at 148–49 (noting the cumulative effects of exclusionary zoning at the local level).

87. Francois Vigier et al., *Ad Hoc Regionalism: Managing Growth Through Spatial Planning—Learning from the American Experience*, J. CROSS BORDER STUD. IRELAND, Mar. 2006, at 63, available at <http://www.crossborder.ie/pubs/journal1.pdf> (“[T]he management of spatial growth through zoning and other development controls is the responsibility of local governments.”).

codes.<sup>88</sup> This convergence is not a coincidence, and the result, again, can be widespread exclusion at the regional level. As exclusion afflicts an entire region, the problem again surfaces in a range of landscapes. Cities that are already supplying a sizeable amount of affordable housing may nevertheless be contributing to a region-wide shortage of affordable housing in an area rich with employment opportunities.<sup>89</sup> The new frontiers of exclusion call for rethinking conventional remedies for exclusionary zoning.

### III. REJECTING AN ORDINANCE-CENTRIC FOCUS

Concerns about exclusionary zoning are not primarily about density limits, nor even about affordability in the abstract. Rather, the central worry is about the extent to which land use controls at any scale prevent lower-income households from accessing economic opportunity and quality public services. Zoning, when too restrictive, forces people to disgorge most or all of the value of living in a place in the form of higher housing prices. That is not to say that everyone should be able to live everywhere they want, but it is to say that if exclusion is too widespread at any level—regional, local, or sub-local—it can exacerbate wealth and income inequality, and make the distribution of public services even more inequitable.

The question of when zoning becomes too restrictive is entirely dependent on the underlying market context. Consider the conventional story of suburban exclusion detailed in Part I. Exclusionary zoning was originally about post-war inner-ring suburbs enacting large-lot zoning, density limits, and regulatory requirements increasing the costs of development.<sup>90</sup> These early post-war suburbs were therefore largely unaffordable to the poor. Fast forward thirty years, however, and affordability of housing options is not high on the list of problems facing some of these same inner-ring suburbs.<sup>91</sup>

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88. *Id.* (presenting examples of ad-hoc regionalism, including “voluntary association[s]” of neighboring local governments “facing common growth management issues”).

89. See Ganong & Shoag, *supra* note 35, at 22 (“The U.S. is increasingly characterized by segregation along economic dimensions, with limited access for most workers to America’s most productive cities.”).

90. See *supra* text accompanying notes 9–15.

91. See, e.g., Sugie Lee & Nancy Green Leigh, *The Role of Inner-Ring Suburbs in Metropolitan Smart Growth Strategies*, 19 J. PLAN. LITERATURE 330, 330 (2005) (“Current metropolitan trends of spatial decentralization may serve to increase the economic vulnerability of skipped-over inner ring suburbs since they have neither the

In fact, leapfrogging development, in which the affluent continue to push farther and farther outside of urban centers, has led to disinvestment from some of these early inner-ring suburbs.<sup>92</sup> Even if zoning ordinances continue to impose minimum lot sizes and exclude forms of multi-family development, housing prices are low enough that they are accessible even to lower-income families. In suburbs surrounding Detroit, to take the most extreme example, people can buy houses for as little as \$2500—which is a fraction of the roughly \$10,000 cost of demolishing a house—but the decrepitude of the neighborhoods and the lack of services means that few people want to move.<sup>93</sup> The impact of the zoning ordinance has therefore changed over time. Even widespread use of characteristically exclusionary devices will not make housing unaffordable in places people do not want to live. Traditionally exclusionary provisions in a zoning ordinance do not make the ordinance exclusionary in fact.

The point is a general one. In places without meaningful development pressure, exclusionary zoning ordinances have little effect on affordability. Many rural municipalities have extremely large lot zoning, often justified on environmental grounds, and they are not unaffordable as a result. In the absence of meaningful development demand, density restrictions are likely to have little effect.

But dense urban neighborhoods can also be exclusionary if they are not dense enough. Zoning that permits dense, multi-family housing is often not on the radar as potentially exclusionary, but it can be. Height limits, or limits on the floor-area-ratio,<sup>94</sup> can still significantly constrain supply relative to the given demand, even in neighborhoods with truly urban density.<sup>95</sup> And simply adding density may not make a dent in exclusionary outcomes if that new

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centrality and attraction of the central cities nor the attractive residential environments of outer ring suburbs at the metropolitan fringe.”).

92. *Id.*; see also Wendell E. Pritchett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 909 (2006) (noting how inner-ring suburbs struggle with shrinking tax bases as residents opt for newer areas).

93. See *The Cost of Demolishing a House in Detroit*, MARKETPLACE (Jan. 29, 2013), <http://www.marketplace.org/topics/wealth-poverty/cost-demolishing-home-detroit>.

94. This is a measure of density employed in New York City, referred to as FAR. N.Y.C., N.Y. Zoning Resolution, art. I § 12-10 (2013), <http://www.nyc.gov/html/dcp/html/zone/zonetext.shtml>. For a discussion on the mechanics of FAR, see ARMSTRONG ET AL., *supra* note 48, at 3–4.

95. ARMSTRONG ET AL., *supra* note 48, at 7 (explaining how downzonings “may limit owners’ ability to capitalize on the development capacity of their lots”).



development capacity is not directed at affordable housing development. Again, the underlying market context is determinative when assessing the problem of exclusionary zoning and the proper remedy.

More provocatively, increased density can even increase property values if it better satisfies consumer preferences. This is not farfetched. Greater density—at least in certain contexts—can lead to greater availability of services, from public transportation, to Whole Foods and Starbucks. These familiar incidents of gentrification mean that greater density can decrease affordability, depending on local market conditions.<sup>96</sup>

Nevertheless, many continue to identify exclusionary zoning exclusively by reference to specific zoning provisions abstracted from market pressures on the ground.<sup>97</sup> Moreover, if the market is ever considered in the context of exclusionary zoning challenges, it is typically confined to the affordable housing needs in and around the municipality, rather than the dearth of affordable housing in an entire region, or the unmet affordable housing needs at the neighborhood scale.

Courts, in particular, tend to be dismissive of the market forces operating at various scales when analyzing whether an ordinance is impermissibly exclusionary.<sup>98</sup> Even courts that have imposed fair share obligations on municipalities have not done so in response to inter-regional concerns, but only inter-local ones.<sup>99</sup> Similarly, courts rarely touch upon the possibility of sub-local exclusion, and its consequent denial of a meaningful opportunity to access the quality public services offered within a municipality's bounds. But as the above discussion has underscored, sub-local and regional forms of exclusion pose many of the same concerns as the more traditional

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96. ASS'N OF BAY AREA GOV'TS, DEVELOPMENT WITHOUT DISPLACEMENT, DEVELOPMENT WITH DIVERSITY 11-39 (2009), *available at* <http://www.bayareavision.org/initiatives/dwd-final.pdf> (reviewing TOD projects in California's Bay Area communities and reporting that "most new TOD projects serve upper-income households who can pay a premium to live in them").

97. *See infra* text accompanying notes 98–121.

98. *See, e.g., Associated Home Builders v. City of Livermore*, 577 P.2d 473 (Cal. 1975).

99. Some courts have, however, highlighted the widespread adoption of residential restrictions across states to limit the migration of low-income workers. For instance, the dissent in *Associated Home Builders v. City of Livermore* noted that "[t]he State of California made an abortive effort toward exclusivity back in the 1930s as part of a scheme to stem the influx of poor migrants from the dust bowl states of the southwest." 577 P.2d 473, 494 (Cal. 1975) (Mosk, J., dissenting).

forms of exclusion at the local level.<sup>100</sup> Courts should therefore adopt more flexible spatial frames when evaluating how a particular ordinance interacts with the market.

This is not to say that courts have been completely inattentive to issues of scale in exclusionary zoning challenges. Courts have expanded their spatial frame slightly to consider the problems of inter-local externalities and region-wide cumulative impacts.<sup>101</sup> And this expanded view has uncovered exclusion that would have almost certainly been missed from a purely localized analysis.<sup>102</sup> An example of this can be found in the divergent approaches to spatial framing that the Northern District of California and the Ninth Circuit took in *Construction Industry Ass'n of Sonoma County v. Petaluma*.<sup>103</sup> The ordinance there had limited the number of multi-family units that could be developed over a five-year period in Petaluma, a suburb outside of San Francisco.<sup>104</sup> But, interestingly, the ordinance allowed for some multi-family development where none had previously been allowed.<sup>105</sup> The ordinance also set aside a portion of that new development for lower-income households. Testimony at trial indicated that if Petaluma's limits on multi-family housing were to be adopted more widely across the San Francisco region, a serious shortfall in housing would result.<sup>106</sup> Furthermore, this burden would fall disproportionately on lower income households within the region, unable to access affordable units.<sup>107</sup>

The District Court expanded its spatial frame to consider the inter-local externalities and the cumulative impacts that such an ordinance

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100. See *supra* text accompanying notes 77–89.

101. See, e.g., *Berenson v. New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975) (reviewing a municipal zoning ordinance in terms of local impacts and the needs and requirements of the larger region).

102. However, widening the spatial frame does not always signify a willingness to find an ordinance impermissibly exclusionary. See *Ybarra v. City of Los Altos Hills*, 503 F.2d 250, 254 (9th Cir. 1974) (holding that availability of affordable housing within the region defeated a challenge to the ordinance as exclusionary); *Duffcon Concrete Prods. v. Borough of Cresskill*, 64 A.2d 347, 351 (N.J. 1949) (holding that a bar to industrial development was permissible since there was suitable land within the region for new industrial development).

103. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975).

104. 522 F.2d at 901.

105. *Id.* at 908 n.16.

106. *Id.* at 902.

107. *Id.* The ordinance was expected to operate to the detriment of the region's low-income population, even though the impact of the ordinance was to "increase[] the availability of multi-family units (owner-occupied and rental units) and low-income units which were rarely constructed in the pre-Plan days." *Id.*

might impose, and concluded that the limits on multi-family development were impermissibly exclusionary.<sup>108</sup> However, the Ninth Circuit rejected the District Court's broader spatial framing of the ordinance, instead choosing to focus strictly on the ordinance's impact within the city lines.<sup>109</sup> This spatially-constrained framing led the Ninth Circuit to conclude that the ordinance could actually be characterized as inclusionary, merely because it provided for some new and affordable multi-family housing development.<sup>110</sup>

The Ninth Circuit's approach improperly disassociates Petaluma's ordinance from the underlying market context. Whether Petaluma's ordinance is inclusionary or exclusionary depends entirely on the market for affordable housing at various scales, as influenced by the distribution of higher-wage jobs and public services. Even an ordinance that takes affirmative steps to address affordable housing needs may not go far enough to root out exclusion at the regional scale.

Moreover, the ordinance should not be characterized without considering where housing is likely to be developed at the sub-local level. Notably, there was some discussion in the Ninth Circuit opinion about how Petaluma's ordinance planned for a somewhat even distribution of multi-family housing across the city so as not to cluster the new development in one isolated neighborhood.<sup>111</sup> But despite this acknowledgement, there was no express discussion of sub-local exclusionary dynamics or the possibility of inequitable distribution of municipal services.<sup>112</sup>

The swift characterization of ordinances without respect to background market conditions is certainly not unique to the *Petaluma* decision. In *Associated Home Builders v. City of Livermore*,<sup>113</sup> the

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108. 375 F. Supp. at 584–88.

109. 522 F.2d at 908 (reasoning that the question of regional impacts was better left for the state legislature). However, the expectation of a state legislative response is optimistic at best and misguided at worst. The state may be unlikely to respond to a flourishing region that is passing off affordable housing burdens to neighboring areas. In fact, states may have a strong incentive to silently shift affordable housing burdens across state lines. This inter-state externality problem suggests that some forms of residential exclusion may require intervention at the national level. And at that scale, it is open to debate whether Congress or federal courts are best positioned to rule on the exclusionary impacts of a land use regulation; the tables do not tip so clearly against the courts.

110. *Id.* at 908 n.16.

111. *Id.* at 901.

112. *Id.*

113. 577 P.2d 473 (Cal. 1975).

California Supreme Court fell into precisely the same trap as the Ninth Circuit, characterizing an ordinance based on the content of its provisions abstracted from market conditions.

The city of Livermore had flatly banned all new development for an undetermined amount of time, without drawing the familiar distinctions between expensive and affordable housing that are conventionally characterized as exclusionary ordinances.<sup>114</sup> Because Livermore's plan did not single out affordable housing development, the court rejected any reliance on exclusionary zoning cases that involved large lot zoning or other density limitations.<sup>115</sup> The California Supreme Court stressed how the impacts of an ordinance are not coextensive with municipal boundaries, but in nearly the same breath distinguished between ordinances that have more direct wealth-based implications and those that do not.<sup>116</sup> The irony is that with a regional lens, this may be a distinction without difference. An outright restriction on all new development could theoretically be far more exclusionary for lower-income households in a region that sorely needs more housing than an ordinance that overtly favors single-family homes in an area where affordable housing demand is weaker.

The larger point is that spatial framing can shed light on exclusion at the regional or sub-local level, or it can obscure it when analysis is confined to a local scale. A purely local focus only tends to capture residential exclusion between municipalities. This observation is not entirely new in the context of inter-local externalities. In 1969, Professor Lawrence Sager observed the importance of looking beyond the municipality for "an intelligent appraisal of the social harm deriving from exclusionary zoning."<sup>117</sup> Indeed, a slight broadening of the frame to consider inter-local externalities displays the possibility of wholesale exclusion from a particular region. The New Jersey Supreme Court's decision in *Mount Laurel* is perhaps the most famous for broadening its spatial frame in precisely this fashion.<sup>118</sup>

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114. *Id.* at 484.

115. *Id.* at 485.

116. *Id.* at 487.

117. Sager, *supra* note 15, at 793.

118. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 727–28 (N.J. 1975) (“[T]he universal and constant need for such [low- and moderate income] housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond

While regional framing is one step closer to a more careful exposition on the exclusionary zoning problem, courts continue to cast remedies to exclusionary zoning in static terms and without the right level of spatial nuance. An article published in this journal by James Quinn in 1975 observed that even in cases where courts held that municipalities have a legal obligation to provide their fair share of affordable housing within a region, the concept of demand was not expressed with any precision.<sup>119</sup> Quinn referenced the Pennsylvania Supreme Court's decision in *Appeal of Girsh*,<sup>120</sup> where the court's assessment of demand was based again on a purely localized measure: whether there was a developer that wanted to pursue an affordable housing project within the municipality.<sup>121</sup>

Although the *Girsh* court was attentive to how local ordinances can frustrate regional migration patterns, its assessment of demand failed to account for regional market conditions that might make affordable housing development pressing, even without a developer that stands ready to construct low-cost multi-family housing in the municipality. Likewise, the demand assessment does not account for the prospect of developers ghettoizing lower-income households by placing all new development on the edge of a municipality. A developer may want to build on a particular block, but that new apartment project might do little to address the affordable housing problems facing lower-income households at the sub-local level, and in fact, it might exacerbate sub-local residential exclusion.

Ultimately, then, it is important for courts and litigants to recognize that the terms of an ordinance, standing alone, do not tell the full story of exclusion. In one context, widespread density restrictions may be making an entire region cost-prohibitive. In another, it may be dense development patterns that impose exclusionary pressures sub-locally. Therefore, courts need to break away from longstanding conceptions of an ordinance's terms; the terms should no longer serve as the benchmark for residential exclusion.

Instead, judicial interventions should involve a careful examination of an ordinance's interaction with the market at various geographical scales. Without thoughtful spatial framing, courts will likely miss

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their boundaries and cannot be parochially confined to the claimed good of the particular municipality.”).

119. Quinn, *supra* note 11, at 159.

120. 263 A.2d 395 (Pa. 1970).

121. *Id.* at 399.

exclusion at the regional and sub-local level, which is working alongside local exclusion to deny lower-income households access to higher-income producing regions, and quality public services. A move away from ordinance-centric reasoning will make judicial interventions more responsive to all forms of residential exclusion, and more attentive to the actual needs of lower-income households that suffer at the hand of such exclusion at regional, local and sub-local scales.

### CONCLUSION

Traditionally, exclusionary zoning has been discussed and analyzed as a problem of inter-local externalities. Yet a look at exclusion from the perspective of lower-income households reveals that the problem replicates itself across three geographical scales: regional, local, and sub-local. As the value of high-paying jobs at the regional scale, or public goods at the sub-local scale are more fully capitalized into property values, lower-income households can no longer take the most fundamental steps towards economic empowerment. Courts and commentators must therefore look beyond the content of the ordinance to uncover the extent to which land use controls are operating across geographical scales to the detriment of lower-income households.

The new frontiers of exclusion reinforce the importance of geographical scale. Courts merely looking at conventional tools of exclusion may mistake density as a remedy for exclusionary zoning. There is a renewed interest in urban living, which means that the growing popularity of density, in the form of New Urbanist or TOD developments, may yield exclusionary outcomes. A consideration of sub-local and regional exclusion reveals the myriad ways that municipal decision-making and market forces drive up housing costs and problematically inhibit the upward mobility of lower-income households.

