Lessons from Luminaries of Land Law: Latest and Greatest Decisions

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No. 19-0689

IN THE SUPREME COURT OF TEXAS

KATHLEEN POWELL AND PAUL LUCCIA,
Petitioners

v.

CITY OF HOUSTON, TEXAS,
Respondent

On Petition for Review
from the First Court of Appeals, Houston,
No. 01-18-00237-CV

Amicus Curiae Brief of Historic Preservation Organizations and Legal Scholars, in Support of Respondent

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IDENTITY OF PARTIES, AMICI, AND COUNSEL

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TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page(s)

Cases

Constitution, Statutes, and Ordinances

Other Authorities

STATEMENT OF IDENTITY OF AMICI CURIAE

The Amici Curiae include both nonprofit, charitable organizations that focus on the preservation of historic properties (the "Historic Preservation Organizations") and law professors expert in the fields of state and local government, land use, and/or historic preservation law (the "Legal Scholars").

The Historic Preservation Organizations

The historic preservation organizations listed below are charitable entities at the national, state, and local levels, whose primary function is the protection and preservation of historic places. They come before the Court with decades of expertise in historic preservation policy and practice, and deep familiarity with local historic preservation law. They have no personal interest in this case, but rather an interest in the long-standing authority of local governments to adopt historic preservation regulations to advance the public interest, and the rights of property owners who have chosen to opt into laws protecting the historic and architectural characteristics of their communities.

The National Trust for Historic Preservation in the United States is a private, charitable, education, nonprofit corporation chartered by Congress in 1949 to protect America's historic resources and to facilitate public participation in the preservation of our nation's heritage. *See* 54 U.S.C. § 312102. The National Trust is headquartered in Washington, DC, and has several field offices around the country, including a field office in Houston. The National Trust has more than 1,000,000 members and supporters nationwide. The mission of the National Trust is to protect significant places representing our diverse cultural experience by taking direct action and inspiring broad public support. In carrying out its mission, the National Trust has participated as a party or amicus curiae in hundreds of cases in federal and state courts since 1970, including many cases to defend and uphold local preservation ordinances.[1] The National Trust also regularly consults with cities and

[1] *See*, *e.g.*, *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104 (1978); *Stahl York Ave. Co., LLC v. City of New York*, 162 A.D.3d 103 (N.Y. App. Div.), *review denied*, 114 N.E.3d 1090 (N.Y. 2018), *cert. denied*, 140 S. Ct. 117 (2019); *Mrowka v. City of Chicago*, 2013 Ill. App. Unpub. LEXIS 2168, 2013 WL 5436642 (2013), *review denied sub nom. Hanna v. City of Chicago*, 3 N.E.3d 795 (Ill. 2014).

municipalities on best practices for preservation ordinances, including Philadelphia, Atlanta, Detroit, and others.

Preservation Action is a 501(c)4 nonprofit organization created in 1974 to serve as the national grassroots lobby for historic preservation. Along with its more than 3,000 members and supporters, it seeks to make historic preservation a national priority by advocating to all branches of government for sound preservation policy and programs through a grassroots constituency empowered with information and training and through direct contact with elected representatives.

The National Alliance of Preservation Commissions was established in 1983, and it serves as the only nonprofit, national organization representing the particular needs of historic preservation commissions.

Preservation Texas, Inc., was established in 1985 and is the only private, nonprofit membership organization in Texas that is dedicated to being a full-service statewide preservation organization. In addition to its thousands of individual, family, and business members, Preservation

Texas has nearly 75 local government and nonprofit members, from El Paso to Brownsville to Marshall.

Greater Houston Preservation Alliance, Inc., dba Preservation Houston, was established in 1978 and is Houston's only citywide nonprofit historic preservation advocacy and education group. It has 1,000 individual members.

Preservation Dallas was established in 1972 and is a nonprofit membership organization dedicated to the preservation and revitalization of Dallas's historic buildings, neighborhoods and places.

Historic Fort Worth Inc. was established in 1969, and is a nonprofit membership organization dedicated to preserving Fort Worth's unique historic identity through stewardship, education and leadership.

Preservation Austin was established in 1953, and is a nonprofit membership organization dedicated to empowering Austinites to shape a more inclusive, resilient, and meaningful community culture through preservation.

The San Antonio Conservation Society was established in 1924 as one of the first community preservation groups in the U.S., and is a

nonprofit membership organization of over 1,700 people, which advocates for the conservation of buildings, landscapes, and cultural heritage.

The Astrodome Conservancy is a Houston-based nonprofit organization focused on the preservation and reuse of the Eighth Wonder of the World, the Astrodome.

The Trost Society is an El Paso-based nonprofit membership organization active in Texas, Arizona, and New Mexico. It aims to promote the legacy of Trost and Trost and other eminent architectural firms of the American Southwest, educate the public about the rich architectural heritage of our region through the twentieth century, and advocate for historic preservation and restoration.

The Legal Scholars

The legal scholars listed below are national experts in, and professors of, state and local government law, land use law, and/or historic preservation law. They come before the Court with decades of scholarly experience dedicated to these fields. They do not have a personal interest in this case, but rather a scholarly interest in the

principles and governance traditions of local government, land use, and historic preservation law in the United States.

Lisa T. Alexander is a Professor of Law at Texas A&M University School of Law with a joint courtesy appointment in the Department of Landscape Architecture and Urban Planning at Texas A&M University. She is also a Co-Director of the law school's Program in Real Estate and Community Development Law.

Sara Bronin is the Thomas F. Gallivan Chair in Real Property Law at UConn Law School, and the co-author of *Land Use Regulation*, *Rathkopf's The Law of Planning & Zoning*, *Historic Preservation Law*, *Historic Preservation Law in a Nutshell*, and the Land Use Volume of the Fourth Restatement of Property (forthcoming).

J. Peter Byrne is the John Hampton Baumgartner, Jr. Professor of Real Property Law at the Georgetown Law Center, Faculty Director of the Georgetown Environmental Law and Policy Program, Faculty Director of the Georgetown Climate Resource Center, and the co-author of *Historic Preservation Law*.

Nestor M. Davidson is the Albert A. Walsh Professor of Real Estate, Land Use, and Property Law at the Fordham University School of Law, Faculty Director of the Urban Law Center, and co-author of *Property Law: Rules, Policies and Practices*.

Sheila Foster is the Scott K. Ginsburg Professor of Urban Law and Policy and Professor of Public Policy at the Georgetown University, and the Chair of the Advisory Committee to Global Parliament of Mayors.

Sarah Fox is an Assistant Professor at Northern Illinois University College of Law.

Ryan M. Rowberry is the Associate Dean for Academic Affairs and the Director of the Center for the Comparative Study of Metropolitan Growth at Georgia State University, and the co-author of *Historic Preservation Law in a Nutshell*.

Kellen Zale is an Associate Professor of Law at the University of Houston Law Center.

No fee has been paid or will be paid for the preparation of this brief.

SUMMARY OF ARGUMENT

The Historic Preservation Ordinance (the "HPO") adopted by the City of Houston (the "City") is a straightforward, valid exercise of municipal powers pursuant to Texas law and any rational interpretation of longstanding principles of land use regulation. In 1995, the City's legislative body first adopted the HPO. Pursuant to the legislation, subsequent amendments, and design guidelines, the City has enabled Houston property owners in historic districts to choose to "opt in," based on a two-thirds vote, to regulation that would help to protect the historical and architectural characteristics of their communities and protect the investment they have made in their properties.

Municipalities choose to implement historic preservation programs for reasons that are distinct from zoning, yet provide profound benefits for people. These old places of our communities provide a sense of continuity and memory, inspire people with beauty and history, and lead to a vibrant and sustainable economy. *See* Thompson M. Mayes, WHY OLD PLACES MATTER – HOW HISTORIC PLACES AFFECT OUR IDENTIFY AND WELL-BEING (2018). As Justice Brennan stated in *Penn Central*, historic

preservation arises from "a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today. '[H]istoric conservation is but one aspect of the much larger problem, basically an environmental one, of enhancing—or perhaps developing for the first time—the quality of life for people.'" *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 108 (1978). In furtherance of these reasons, the City adopted the HPO to designate and protect distinct areas in Houston that "possess a significance concentration, linkage or continuity of buildings, structures, objects, or sites united by historical, cultural, architectural or archaeological significance to the city, state, nation or region." *See* Houston, Tex., Code of Ordinances, ch. 33, art. VII, § 33-201.

With a series of erroneous and wholly unsubstantiated arguments, petitioners have sought to invalidate the HPO. The core of their claim is that the HPO is an unlawful exercise of the City's zoning powers. The

Amici Curiae support the City's brief to this Court, which effectively rebuts all of petitioners' arguments, and correctly states that zoning is not the only means by which a city may regulate historic buildings or districts. The Amici Curiae will focus on three issues, based on their expertise and their deep knowledge of the law, policy, and practice of historic preservation and zoning.

First, the Amici Curiae will show the important distinctions between historic preservation and zoning law. These areas of law can be distinguished from each other in several ways. Zoning and historic preservation law emerged for different reasons, at different times. They regulate different activities: zoning law necessarily regulates uses, as well as the general bulk and placement of buildings, while historic preservation law regulates architectural appearance and the character-defining features of historic properties. And historic preservation law only regulates properties designated as historic (individually or within a designated historic district) – which is not the case with zoning, which regulates all properties within a jurisdiction, whether historic or not.

Second, the Amici Curiae will explain how historic places can be

regulated by zoning law, historic preservation law, both, or neither. The fact that a place, like the Houston Heights Historic District East at issue in this case, is regulated by historic preservation law has no bearing on whether that place is also subject to zoning law. The petitioners' illogical argument that regulation by historic preservation law is necessarily regulation by zoning law has never been adopted by any other court.

Third, the Amici Curiae will show that the HPO is not zoning, let alone spot zoning. Analyzing the HPO in light of the differences between historic preservation law and zoning law, it is very clear that the HPO is not zoning, nor it is spot zoning resulting from unreasonable or irrational singling out of individual owners, as the State of Texas argues in its Amicus Curiae brief.

We urge the Court to deny petitioner's request for review and to affirm the Court of Appeals decision finding that petitioners cannot upend the property rights of their neighbors or invalidate a straightforward, duly-adopted municipal regulation. For all of these reasons, the City should have such relief as to which the Court finds it is entitled.

ARGUMENT AND AUTHORITIES

I. HISTORIC PRESERVATION LAW IS NOT ZONING LAW

Historic preservation law and zoning law each regulate property, but they are two distinct regulatory schemes. The assertion that local historic preservation law must constitute zoning law is belied by the differences in origin of, function of, and properties subject to each of these two distinct regulatory schemes.

The primary casebook on historic preservation law, *Historic Preservation Law*, summarizes the distinction between the two legal fields as follows:

> Zoning and historic preservation law have *very different histories and constituencies*. Zoning, which originated in the Progressive Era, governs the use, size, and placing of all buildings within a jurisdiction, but not their appearance. … Historic preservation… grew to prominence from grass roots movements in the 1960s and 1970s in opposition to the destruction of traditional buildings and communities, entirely legal under existing zoning laws. Preservation ordinances generally have nothing to say about the use of property but addresses changes in the public appearance of historic buildings and districts.

Sara C. Bronin & J. Peter Byrne, HISTORIC PRESERVATION LAW 335 (2012) (emphasis added). This summary is made in a subsection

entitled, "*Conflicts with Zoning*."

Similarly, a leading land use law textbook, *Land Use Regulation*, covers zoning, planning, subdivision, environmental, and historic preservation law, and has this to say about the differences between historic preservation and zoning:

> Communities around the country have enacted historic preservation laws that *complement* zoning laws. *In contrast to zoning*, which applies land use development principles to all properties within a jurisdiction, local historic preservation law focuses on the protection and enhancement of historic properties. In addition, *unlike zoning law*, historic preservation law only regulates structures; it does not regulate uses of land or lots. Local historic preservation laws are authorized by state enabling statutes that are independent of, but have similarities to, the standard zoning enabling acts adopted by every state.

Stewart Sterk et al., LAND USE REGULATION 163 (3d ed. 2020) (emphases added). With these summaries in mind, we turn now to the three key differences between historic preservation law and zoning law.

A. Historic Preservation Law and Zoning Law Emerged for Different Reasons, at Different Times

The origins of historic preservation law and zoning law are very different. They emerged at different times, for different reasons, and have been adopted in communities across the United States in very

different ways.

Zoning law emerged first, with the first comprehensive zoning ordinance in the country being adopted in New York City in 1916. A primary goal of these zoning codes was to separate noxious uses of land (such as polluting factories) from productive uses of land, in an ex ante manner that would replace nuisance litigation as the only means by which property owners could enjoin negative externalities affecting their properties. As the concept of regulating land uses became more popular in the 1920s, the U.S. Department of Commerce drafted Standard Zoning Enabling Acts, which were adopted by all 50 states.

The U.S. Supreme Court sanctioned zoning as a rational use of municipal authority in 1926. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Since *Euclid*, tens of thousands of local governments across the country have adopted zoning. The state enabling acts have ensured a surprising degree of uniformity among local zoning laws. In fact, there is so much uniformity across the country regarding zoning codes that zoning is integrated into a stand-alone volume on land use for the forthcoming Fourth Restatement of Property.

See Restatement of Property (Fourth), Council Draft No. 1 (Sept. 13, 2019) (approved by the Council to include "Zoning"). Indeed, it is so anomalous for a community to not have zoning that Houston has become well-known as an outlier for its conspicuous lack of zoning. It remains the only large city in the United States without zoning, even while tens of thousands of other jurisdictions have adopted zoning.

Local historic preservation laws were much slower to rise in popularity than zoning, and really only started to be adopted on a national scale by local governments in the 1960s and 1970s, following the passage of the National Historic Preservation Act of 1966. *See* Nicholas A. Robinson, Historic Preservation Law: The Metes & (and) Bounds of a New Field, 1 PACE L. REV. 511, 513 (1981). The adoption of these laws coincided with several high-profile instances of wholesale destruction of beloved historic buildings, including the historic Beaux Arts Penn Station in New York City in 1963.

The U.S. Supreme Court upheld local historic preservation regulation as constitutional only in 1978 – five decades after its decision upholding zoning. *See Penn Central*, 438 U.S. at 129. As one

commentator put it, *Penn Central* was to historic preservation what *Euclid* was for zoning: "Just as the U.S. Supreme Court placed its imprimatur on zoning in the 1920s, so has it now spoken in favor of zoning's sibling, preservation controls." Christopher J. Duerksen, A HANDBOOK ON HISTORIC PRESERVATION LAW 30 (1983). *Penn Central* "placed the regulation of historic structures on firm legal ground by upholding local historic preservation ordinances as a valid government tool." Christopher J. Duerksen & Richard J. Roddewig, TAKINGS LAW IN PLAIN ENGLISH 6 (2002).

The *Penn Central* opinion recognized that local historic preservation laws were also emerging under distinct enabling authority from states as a valid use of their police power under the Fourteenth Amendment to the U.S. Constitution, observing that "all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic and aesthetic importance." *Penn Central*, 438 U.S. at 107. In *Penn Central*, the U.S. Supreme Court also confirmed the *constitutionality* of this type of use of the police power by state and local governments. As one scholar noted

three years after *Penn Central* was decided, *Penn Central* distinguished "municipal historic preservation ordinances as a distinct sort of land use control, possibly within the broader construct of Environmental Law generally, but evidently not a part of zoning." Robinson, *supra* at 520. In fact, historic preservation laws have been found to be more akin to environmental laws and as a broader environmental control, rather than zoning laws, since preservation laws seek to regulate historical, architectural and cultural resources. *Id.* at 522. Historic preservation laws and zoning laws were further distinguished in *Penn Central* with the U.S. Supreme Court finding that "[i]t is true … that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws only apply to selected parcels." *Penn Central*, 438 U.S. at 132.

After the *Penn Central* decision, a series of model codes emerged to help communities seeking to adopt their own local historic preservation laws. *See*, *e.g.*, Stephen N. Dennis, NATIONAL TRUST FOR HISTORIC PRESERVATION, RECOMMENDED MODEL PROVISIONS FOR A PRESERVATION ORDINANCE, WITH ANNOTATIONS (1980); Richard J. Roddewig, AMERICAN

PLANNING ASSOCIATION, PREPARING A HISTORIC PRESERVATION ORDINANCE (1983). By the 1990s, about 1,800 communities across the country had adopted local historic preservation laws. *See* Stephanie Meeks, THE PAST AND FUTURE CITY: HOW HISTORIC PRESERVATION IS REVIVING OUR COMMUNITIES 79 (2016). According to the last published count, about 2,300 communities have preservation ordinances. Julia H. Miller, National Trust for Historic Preservation, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW (2008). Houston became one of those communities in 1995, when it adopted its first HPO.

Zoning laws and preservation laws have emerged from different statutory schemes and for different reasons. Now that we have identified how these origins differ, we turn next to the types of activities each of these laws regulate.

B. Historic Preservation Law and Zoning Law Regulate Different Activities

Historic preservation laws and zoning laws regulate different activities. The primary difference between these two distinct fields of law is that zoning laws regulate land uses, the height and bulk of structures, and lot size, while local historic preservation laws focus only

on preserving existing architectural design, materials, and character-defining features that are specifically protected by the preservation ordinance.

Because the Texas legislature has not codified a definition of zoning, we must turn to other legal authorities that clarify what zoning entails. *Black's Law Dictionary*, relied on by the State of Texas in its amicus brief, proves this point: "zoning" is defined to include "different regulations within the districts for *land use*, building size, *and* the like." BLACK'S LAW DICTIONARY 1856 (10th ed. 2014) (emphasis added). The Dictionary includes "land use" as the very first item in the list of activities regulated by zoning, and the dictionary uses the word "and" to identify additional areas of regulation. In addition, the Court may be interested in a draft definition of zoning approved by the Council of the American Law Institute, which describes itself as the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The draft definition reads: "Zoning is local-government regulation of *land use*, structures, *and* lots through the assignment of lots to distinctly

regulated districts." *See* Restatement of Property (Fourth), Council Draft No. 1, § 2.1 (Sept. 13, 2019) (emphasis added). This definition again clarifies that a legal regime is *only a zoning regime* if it regulates land uses, as well as structures and lots. In sum, the most essential characteristic of the function of zoning law is that it regulates the use of land.

For local historic preservation law, there is a distinctly different focus: "The centerpiece of local historic preservation law is the power to control owner changes in the exterior of designated properties." Bronin & Byrne, *supra* at 271. Generally, a local preservation law will require a property owner to obtain a permit (known as a certificate of appropriateness) before demolishing, altering, or replacing protected features of a historic building. *Id.* Most jurisdictions have standardized their reviews of applications for permits to change or modify historic buildings, often adhering expressly or by reference to federal standards for the rehabilitation of historic properties issued by the Secretary of the U.S. Department of the Interior, and commonly referred to as the *Secretary of the Interior's Standards for Rehabilitation* or the

"Secretary's Standards." 36 C.F.R. Part 67. The Secretary's Standards articulate principles involving the preservation of historic architectural features and materials. Simply put, local historic preservation law is at its core a scheme of aesthetic regulation seeking to retain and preserve the historic characteristics of a property or district. It simply does not regulate land use, which is the essential function of zoning law.

We note here that the State of Texas, in its amicus brief in this matter, makes the unusual claim that the "premise" of *Penn Central*, *supra*, was that "the owner may not change the building's use unless it complies with the exterior regulations." State of Texas Amicus Curiae Brief at 17-18. This is a fundamental misstatement of the *Penn Central* decision. The case involved the denial – on aesthetic grounds – by the New York City Landmarks Commission of an application by the owners of Grand Central Terminal to build a modernist office tower over the Beaux Arts Terminal building, and whether this denial to build in the airspace above the Terminal amounted to a regulatory taking under the Fifth Amendment to the U.S. Constitution. The Landmarks Commission was not presented with an application for a change of use, because that

was not under its purview. The Landmarks Commission only regulated and reviewed the proposed physical changes to the historic Terminal building. The U.S. Supreme Court explicitly stated that: "nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal." *Penn Central*, 438 U.S. at 137. Rather, the U.S. Supreme Court indicated that the landmarks commission was justified in denying this *particular* application, and that such a denial was not a taking; nor did the New York City Landmarks Law "interfere in any way with the present uses of the Terminal." *Id.* at 135. For these reasons, *Penn Central* does not, as the State of Texas has argued, require fidelity to any historic use of the building. In fact, neither does local historic preservation law as a whole. Its primary concern, across thousands of jurisdictions, is aesthetic.

In summary:

> Zoning has as its primary objective the separation of incompatible uses; for example, an industrial zone may be located far from a residential zone. As a secondary objective, zoning aims to create a sense of visual order by controlling the general look of certain zones. To do this, zoning may require that buildings be set back a certain distance from the street, may limit the height of buildings, and may limit the square footage (or the bulk) of buildings. While these

> restrictions can affect the general look of a building or neighborhood, zoning regulations do not usually address decorative elements, façade features, or fenestration of a building.
>
> Historic preservation ordinances, by contrast, focus on these aesthetic details. Their primary objective is the preservation of the physical characteristics of historic buildings and districts that are important to their historic character. As a secondary objective, they regulate new construction to ensure that it is compatible with protected historic fabric.

Sara C. Bronin & Ryan M. Rowberry, HISTORIC PRESERVATION LAW IN A NUTSHELL 212-13 (2d ed. 2018).[2]

C. Historic Preservation Law Only Regulates Properties Designated as Historic, Which is Not the Case with Zoning

The properties subject to historic preservation laws and to zoning laws differ, which is yet another way of telling these two regulatory schemes apart.

Properties subject to historic preservation laws are those that have been identified as individual historic landmarks or as part of a historic district, through a formal designation process. An application for a historic designation must include information about the site's history

[2] While it is unusual to reference a "Nutshell" in a brief to a court of this stature, we include this language to show that the understanding of the distinctions in these fields of laws is so pervasive that it is even included in a "Nutshell."

and significance, and details about its structural and material integrity to prove that the designation will comply with certain criteria set forth in the historic preservation law. Miller, *supra* at 8-10. The designation process may also require, as the City of Houston does, that property owners vote to "opt in" to the designation, and by extension, the regulatory scheme.

Properties subject to zoning laws, by contrast, include any and all properties within a jurisdiction or zone, whether they are historic or not. It is true that "some states specifically permit zoning for preservation purposes." 2 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 19:15 (4th ed.). Indeed, Texas is one of those states, and its Zoning Enabling Act explicitly allows for "areas of historical, cultural, or architectural importance and significance" to be regulated through zoning. TEX. LOCAL GOV'T CODE ANN. § 211.001. However, as described in Part I.B of this Amicus Brief, zoning regulation of historic places will not have the same scope or function as historic preservation law. Simple regulation of building height or bulk, often covered by a zoning law, is insufficient to address the aesthetic and historic character concerns that historic

preservation law emerged to address.

In fact, for years preservationists have been concerned about separate zoning schemes that may undermine preservation. One commentator writing in the 1980s suggested, "the first and most important step is to coordinate landmarks policy and regulations with the local zoning ordinance," but also acknowledged that in many localities, the two schemes are at odds. Duerksen, *supra* at 47. This coordination can come in many different forms, such as arranging meetings between the zoning board and the preservation commission, interaction between staff of the two departments, or including a clause in each of the ordinances specifying that, in the event of a conflict between the preservation laws and the zoning laws, the preservation ordinance will take precedence. *See* National Park Service, Stephen A. Morris, ZONING AND HISTORIC PRESERVATION 7-9 (1989).

II. HISTORIC PLACES CAN BE REGULATED BY HISTORIC PRESERVATION LAW, ZONING LAW, BOTH, OR NEITHER

A historic place may be subjected to a variety of regulatory schemes: subdivision controls, wetlands regulation, environmental impact restrictions, building codes, planning – and of course, zoning law

and/or historic preservation law. Petitioners seem to be making the argument that any of these miscellaneous types of land use regulation constitute zoning. However, as we have shown in the preceding section, historic preservation law is not zoning law. As noted, "[a]s a structural matter, the regulation of zoning districts and of historic properties often occurs under two different regulatory schemes: the zoning ordinance and the historic preservation ordinance." Bronin & Rowberry, *supra* at 212.

While historic preservation laws are not zoning laws, the authority of municipalities to adopt such historic preservation laws is established by state law and varies across the country. "In some states, home rule communities and non-home rule communities may have quite different authority, and, similarly, the authority of charter cities and noncharter cities may also differ." Roddewig, *supra* at 9. These differences between (and within) the states provide for a variety of ways that historic preservation laws can be implemented. *See id.* (noting, "Some state enabling legislation, such as that in Illinois, is quite detailed and specific on the powers and authority that may be exercised by local historic preservation commissions. Other state legislation is quite general and

vague in the granting of authority to local governments."). Historic preservation laws are distinct and provide different regulations than zoning laws.

Historic preservation law and zoning law are not interchangeable, and not every community wants both (or either). There are 35,000 general purpose local governments in the United States. U.S. CENSUS, CENSUS OF GOVERNMENTS (2017). As noted in Part I.A, tens of thousands of these have adopted zoning – so much so that the City's failure to adopt zoning is viewed as an anomaly. Yet only 2,300 jurisdictions have adopted historic preservation laws. Local jurisdictions that have adopted zoning codes outnumber the jurisdictions that have adopted historic preservation ordinances by at least ten to one. This numerical comparison underscores the fact that historic preservation law and zoning law are two separate and distinct statutory schemes – both legally, and in the eyes of members of the community that chooses whether to adopt one or the other, both, or neither.

Many local governments have chosen not to enact local historic preservation laws. The City has taken a different approach – choosing to

enact local historic preservation laws, but not zoning laws, through its police power authority and in accordance with its home rule power. The mere fact that the City has chosen to adopt the HPO to regulate the aesthetics and preserve the history of a historic district does not automatically mean that it has adopted zoning. It simply means that within the jurisdiction, more than two-thirds of property owners within a historic district have made a choice to regulate and protect its historic resources through an ordinance that is distinct from zoning.

Similarly, the fact that a place, like the Heights Historic District East at issue in this case, is regulated by historic preservation law has no bearing on whether that place is also subject to zoning law. Under the petitioners' and the State of Texas's definition of zoning, anything that regulates land at all would be zoning. Environmental permitting schemes would be zoning. Stormwater and flooding rules – subdivision controls and building codes – all would constitute zoning. Health, safety, and building codes would be zoning, too. The petitioners' illogical argument that regulation by historic preservation law *is* regulation by zoning law has never been adopted by any other court.

III. HOUSTON'S HISTORIC PRESERVATION ORDINANCE IS NOT ZONING

The City's Historic Preservation Ordinance has none of the hallmarks that would render it a zoning law. It has not originated from a zoning statutory scheme, does not regulate land use, and only applies to a handful of properties within the City. Considering the above factors explaining the difference between zoning law and historic preservation law, the Houston HPO cannot be considered zoning. Indeed, in prior writings, the petitioner's attorney has agreed with our assessment of the HPO.[3]

The HPO originates in the statutory scheme for historic

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[3] We point out that the petitioners' attorney, Matthew Festa, published an article in 2012 (long after the adoption of the HPO), entitled, "Land Use in the Unzoned City." *See* Appendix.

In it, he states, "Houston is the only major city in America *without land use zoning*." *Id*. at 16 (emphasis added). He purports to "address the question of *why Houston is unzoned*." *Id*. (emphasis added). He identifies "[t]he key difference that has kept Houston unzoned for all these years": "zoning is simply harder to do here, legally." *Id*. at 17. In making this statement, Attorney Festa acknowledges that zoning has not, in fact, been achieved by the City of Houston. More importantly, at no time does he argue that Houston's historic districts amount to zoning.

Moreover, Attorney Festa explicitly equates zoning and land use, as we have done in Part I.B of this Amicus Brief, stating that the City's "rules for the most part don't prescribe limitations on use." *Id*. at 17. He expressly mentions the City's "new historical [sic] preservation ordinance, which allows citizens to petition the council for designation as a historic area… in my opinion, [this constitutes] 'de facto zoning.'" *Id*. at 19. But, as he acknowledges with his multiple use of the word "unzoned" to describe Houston, "de facto zoning" is not, in fact, zoning.

preservation law. It was adopted in 1995 pursuant to the City's municipal powers, in a manner completely different than a zoning code would have had to be adopted. For example, the HPO was not adopted pursuant to a comprehensive plan, as would have been required if it were a zoning law. *See* TEX. LOC. GOV'T CODE ANN. § 211.004(a) (requiring same). Nor was the HPO subject to a six-month waiting period after it was proposed, or the subject of a binding referendum, as would have been required by the City Charter if it were a zoning code. *See* Houston, Tex., CITY CHARTER art. VII, § 12 (1994). Instead, the City has independently established its HPO using its home rule authority. The mere existence of the term "historical" within the Texas zoning enabling law does not mean that any law regulating historic places is zoning, nor does it convert historic preservation laws duly adopted pursuant to home rule authority into zoning laws.

Moreover, the function of the HPO is primarily aesthetic and to preserve the historic and architectural characteristics of the historic districts. The HPO applies only to activities visible from the public right of way, and it focuses on whether proposed changes will be aesthetically

harmonious with existing historic fabric. Significantly, the HPO does not attempt to regulate land use, which is the essential characteristic of zoning. The HPO specifically states that "[n]othing in this [HPO] shall be construed to authorize the city to regulate *the use of* any building, structure or property." Houston, Tex., Code of Ordinances, ch. 33, art. VII, § 33-202(b) (emphasis added). The HPO also does not attempt to regulate the siting of buildings, lot sizes, or landscape features – again, all common functions of zoning laws.

Finally, the HPO only covers properties that have undergone the designation process, which includes an evaluation of properties for their historic significance and integrity. In addition, the City requires an affirmative, two-thirds vote by the property owners before the City will regulate an area pursuant to the HPO. This vote adds a layer of due process to ensure that property owners support the regulation. As noted in the City's brief, about 0.4% of the land within the City has been designated historic.[4] The HPO is narrowly tailored to designated

[4] This is a relatively small number. In a 2016 study of more than 50 cities with historic preservation laws, the National Trust for Historic Preservation's Preservation Green Lab found that on average in those cities, 4.3% of buildings are regulated under local historic preservation laws. *See* National Trust for Historic

properties, and only applies after an affirmative vote by two thirds of property owners. It is not a citywide scheme affecting all properties.

Given these factors, we urge the Court to recognize that the City's HPO is not zoning.

It may be important to note here that we find no merit to, and no legal basis for, the assertion in the State of Texas brief that the HPO constitutes "spot zoning." Spot zoning is associated with irrational or unreasonable singling out of individual property owners within a larger zoning scheme. The HPO meets none of the traditional indicia of spot zoning. As we have argued, there is no larger zoning scheme. The HPO does not single out individual property owners for either a benefit or a detriment. Rather, it creates a single, cohesive district, in which all property owners are treated the same. This issue was specifically addressed by the U.S. Supreme Court in *Penn Central*, which held that "landmark laws are not like discriminatory, or 'reverse spot,' zoning …." *Penn Central*, 438 U.S. at 132.

Preservation, THE ATLAS OF REURBANISM 6 (2016).

CONCLUSION

The breadth of concern over the outcome of this case is demonstrated by the appearance here of three preeminent national organizations: the National Trust for Historic Preservation in the United States, Preservation Action, and the National Alliance of Preservation Commissions. A reversal of the appellate court decision could upend the settled expectations and property rights of thousands of Texas families and residents who have democratically chosen to adopt the benefits of local historic preservation law – and could have a chilling effect on local historic preservation regulation across the country.

For the foregoing reasons, the Amici Curiae, the Historic Preservation Organizations and the Legal Scholars, request that the Court affirm the appellate court's judgment, and award to the City such further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 5,061 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Sara Bronin
SARA C. BRONIN

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this instrument was served by electronic service pursuant to Texas Rules of Appellate Procedure upon the following counsel of record on August 6, 2020:

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APPENDIX

Please see attached for a copy of "Land Use in the Unzoned City," by Petitioners' Attorney Matthew Festa, published in *InRe* magazine in 2012 at pp. 14-19.

Land Use in the Unzoned City

Written by Professor Matthew Festa
Photography by Thinkstock

Matthew Festa teaches in the areas of property law, land use regulation, and state and local government law. His research explores the relationship between property rights and land use in contexts such as the contemporary housing market; the impacts of zoning and regulation; the development of government policy toward land, growth, and homeownership; and modern patterns and forms of city and community land use. He is also the editor of the Land Use Prof Blog. This article draws from both his current research project and his involvement with current land use controversies in Houston.

THE CITY OF HOUSTON, TEXAS—which all students at South Texas College of Law call home for at least the better part of three years—is famous for many things. It is the fourth-largest city in America, with 2.1 million residents in the city, and nearly 6 million in the metropolitan area. It is the capital of the global energy industry. It is "Space City," the home of NASA. The Texas Medical Center is the world's largest. It is home to major-league sports teams and world-class arts. And, of course, Houston is the only major city in America without land use zoning.

IT TURNS OUT THAT HOUSTON, DESPITE ITS FAMOUS [OR INFAMOUS] LACK OF ZONING, HAS A PLETHORA OF LAND USE REGULATIONS ...

You might be surprised at how far that last item—being the "unzoned city"—carries Houston's reputation outside the state. To get a sense of how truly unique Houston is in this regard, consider the second-largest unzoned city in America: neighboring Pasadena, Texas—with a population less than 150,000. No other city even comes close. Houston's non-zoning regime gets at least a mention if not an extended discussion in most property law classes and textbooks across the U.S. Routinely, when I speak at property law and land use conferences across the country, I get some version of the cocked eyebrow or the muffled chortle when I meet people and tell them that I teach land use at a law school in Houston. "Why bother?" seems to be the bemused reaction from those who are familiar with Houston's reputation.

It turns out that Houston, despite its famous (or infamous) lack of zoning, has a plethora of land use regulations that are not codified in a formal zoning ordinance; it also has an extensive regime of private covenants that are often even stricter than government zoning. But even more importantly, I believe there is no better place in America for teachers and students to study land use law than in the one place that isn't subject to a strict and longstanding zoning code. But first, let's address the question of why Houston is unzoned.

WHY HOUSTON IS AMERICA'S ONLY MAJOR UNZONED CITY

Zoning is the regulation of land use by prescribing different rules for different places within a municipality based on their geographic location. The typical zoning ordinance establishes different districts on the map for different land uses, such as residential, commercial, industrial, and so on. Almost every zoning law also regulates "site requirements" within each district to control things such as building height, setbacks from the road, minimum or maximum lot sizes, density, and even specific factors such as form and aesthetics.

New York City enacted the first comprehensive zoning ordinance in 1916. The early advocates of zoning were the founders of the urban planning profession, and zoning was part of the Progressive movement. Planners believed they could improve the quality of life for all by prescribing land use rules based on their administrative expertise and what were then perceived to be universal principles. After the U.S. Supreme Court ruled that zoning was not a violation of constitutional property rights in the famous case of *Euclid v. Ambler Realty Co.* in 1926, nearly every city in America —except, of course, Houston—enacted a zoning ordinance in the next few decades. Putting aside the fact that Houston does in fact prescribe numerous land use rules, why is it the only major city without a zoning code?

Popular belief—both within Houston and nationally—attributes Houston's unzoned status to several, mostly cultural, ideas: that Houstonians place an inordinately high value on individual property rights and economic liberty; a western self-reliance ethic; a natural suspicion of excessive government regulation; the classic notion of one's home as one's castle; or a sort of cowboy libertarianism that values everyone's right to do as they please with their land. There is some truth in these stereotypes, but they fall far short of explaining why Houston alone remains unzoned, because they are cultural images that have more to do with Texas generally than with Houston. And the fact that Dallas, San Antonio, Austin—and virtually every other Texas city—all have zoning, undercuts this cultural explanation. Here in Houston, I have observed firsthand at numerous meetings of the Planning Commission, City Council, neighborhood organizations, and advocacy groups, that there are a great many people in Houston who would love nothing more than to enact stricter controls over other people's land.

The key difference that has kept Houston unzoned for all these years may owe something to those cultural explanations, but as a technical matter it is much simpler: Houston has a provision in its City Charter—roughly equivalent to a "constitutional" document that sets the basic rules of government—that forbids the City Council from enacting a zoning ordinance without a popular referendum. If not for this requirement, I believe that the City Council would have established zoning long ago—just as the city councils of Dallas, Austin, San Antonio, and virtually every other American municipality have done. But the referendum requirement in Houston means that the issue has to be subject to popular vote after a public debate, and the three times this has been tried, in 1948, 1962, and 1993, zoning was defeated by a close margin. Other scholars have studied these events extensively, but it is fair to say generally that a significant part of the anti-zoning forces were disparate groups motivated by a variety of specific concerns, at least as much as by any sort of general "Texan" anti-government/pro-property rights sentiment.

So Houston is the only major unzoned city primarily because zoning is simply harder to do here, legally. But what is the effect of this unique status? Is Houston really an unregulated land use free-for-all? Does it matter?

THE UNZONED CITY HAS EXTENSIVE LAND USE REGULATIONS

The popular conception that Houston is unzoned because it is some sort of ultra-Texan free-market landscape is not accurate. Houston's land use is in fact highly regulated. While no Houston ordinance explicitly uses the "z-word," and its rules for the most part don't prescribe limitations on use, there are numerous land use regulations that, in any other city, would be part of the zoning code. Houston defines certain areas as "urban" versus "suburban," with different regulations. There are

Published by Greater Houston Planning Association, W. K. King, Chairman Executive Committee

Vol. 1—No. 4 OCTOBER, 1962 Houston, Texas

Zoning Means 1-Man Rule

Boss Calls Shots On All Land Use

The basic issue in the Nov. 6 zoning election is whether egg-heads, pinheads and politicians should control property in Houston.

Zoning places a lien on everybody's property in Houston.

The value of a piece of land depends on the whim of a Zoning Boss.

Zoning benefits the large land-owners, not the home-owners.

The man with the influence to get a zone changed makes a killing. The man without that influence gets killed.

Search Without Warrant

The proposed zoning ordinance provides for the city to send a zoning inspector to enter a home or a place of business without a search warrant.

The zoning ordinance is made to order for police power abuses and, for harrassment. It calls for stiff fines of up to $200 a day for every day's violation.

It even allows an unspecified fee to be charged a property-owner for a zoning inspection EVEN if the complaint against him turns out to be unfounded!

All Power in One Man

Virtually all power—complete control over Houston's lands—rests with one man. He would bear the title of Zoning Administrator. He would have—in the language of the proposed ordinance itself—UNLIMITED control over all land use.

Hundreds of thousands of Houstonians fail to realize this, for the simple reason that they have not read the zoning ordinance. Many don't know that changes affecting them vitally have been made since they last saw the zoning maps originally drawn.

What The Ordinance Provides

The proposed zoning ordinance provides for a Zoning Administrator, to be appointed by the mayor, for a Planning and Zoning Commission and for a Zoning Board of Adjustment, the latter to consist of five members with two alternate members to fill in when needed for a quorum.

The measure provides that any property owner with a complaint on zoning must go to the Zoning Administrator.

(Continued on Page 3)

$200 Daily Fine Penalty For Any Zone Violation

A fine of up to $200 a day is provided in the final draft of the zoning ordinance for anyone found guilty of any violation.

No search warrant need be carried by the city representative who checks up on a real or imagined violation.

The ordinance simply provides that the inspector (he can be a zoning inspector, a policeman or any other city representative) has the right to enter a home or a place of business "at any reasonable hour."

In the language of the ordinance this is described as "a compliance test.

There's also a fee chargeable against the property owner for the zoning inspector's visit.

Anti-Zoners Will Furnish Speakers

Any organization wishing to hear a speaker against the zoning ordinance is urged to call Anti-Zoning Headquarters, 2403 South Main, FA 3-6216 or get in touch with W. K. King, 4112 Dennis, CA 3-4529.

The Greater Houston Planning Association will be glad to furnish speakers to discuss zoning or debate the issue with zoning advocates any place, any time.

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Greater Houston Planning Association

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W. K. King, Chairman Executive Committee

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laws prescribing minimum lot sizes, which in turn restrict density. There are setbacks from the street, buffer zones for development, and regulated street widths. There are other laws that affect land use, such as the new historical preservation ordinance, which allows citizens to petition the council for designation as a historic area, which comes with additional restrictions. These are all government measures that, in my opinion, operate as "de facto zoning"—they prescribe different land use rules based partly on geographic location. And even these rules pale in comparison to the extensive regime of private covenants and deed restrictions that govern a majority of the property in Houston.

Even though Houston is highly regulated, it is still true that Houston's land use regime is less restricted and affords more freedom than in most American cities. This freedom has allowed much of the innovative development that has made Houston an interesting modern city, with housing prices among the most affordable among major American cities. Indeed, one of the reasons that Houston has fared relatively well during the recent recession is that its lack of artificial restrictions on development prevented Houston from having much of a housing "bubble" in the first place. Houston's relative land use freedom also provides us with a better opportunity to take advantage of modern "progressive" land use ideas such as "new urbanism" and mixed-use, pedestrian-friendly, transit-oriented development—which could be necessary to work with the expanded light rail system.

But the unzoned City of Houston is still subject to pressures to regulate land use. In 2007, a proposal to build a residential high-rise tower in a mostly single-family neighborhood was the subject of intense controversy. While the proposed "Ashby High Rise" was technically legal—there were neither any public laws nor private covenants standing in the tower's way—civic groups and neighborhood advocates pushed city hall to pass stricter restrictions on development. As this article goes to press, the city council is considering a new law that will restrict high-rise development in Houston. While in my opinion the proposal is another instance of "de facto zoning," the fact is that Houstonians continue to debate the proper balance of freedom versus land use control. This is an essential part of the larger tension—with which all lawyers are familiar—between individual rights and the common good.

"Zoning Facts" published by the Greater Houston Planning Association, October 1962. *HMRC, Litterst-Dixon Collection, MSS 1248-3714*

THE UNZONED CITY FOR STUDENTS, LAWYERS, AND CITIZENS

Increasingly, I find that engaged citizens—lawyers and non-lawyers alike—care passionately about land use. Each of us lives in a certain place, and the character of our communities is one of the most important parts of our lives. Most of our students at South Texas have a sophisticated sense of place—the places where they are from; where they live; and where they will practice, with the hope of advancing their clients' interests. When I teach my upper-level courses in Land Use and State & Local Government, I am continually impressed by our students' reporting, engagement, and research on a wide variety of important land use issues. I am confident that South Texas is continuing to produce new lawyers with a mature appreciation of, and devotion to, the betterment of their communities.

Houston provides a fascinating opportunity for our students to observe and engage in land use discussions in the singular place that offers citizens the possibilities of experimentation and evolution in regulation and development. It's a great place for tomorrow's lawyers to study property law and land use, and Houston is the city —America's Unzoned City—that is the most important ground of the quintessentially American legal struggle between individual property rights and the common good.

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Supreme Court of Texas

No. 19-0689

Kathleen Powell & Paul Luccia,
Petitioners,

v.

City of Houston, Texas,
Respondent

On Petition for Review from the
Court of Appeals for the First District of Texas

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

The City has filed a motion for rehearing challenging our holding that section 211.003(b) of the Local Government Code subjects city regulation of structures in historical areas to the requirements of Chapter 211. In part, the City contends that section 211.013 recognizes cities' ability to regulate the appearance of property without complying with Chapter 211. We disagree and therefore deny the City's motion.

Section 211.013 provides that another statute, local ordinance, or regulation may impose higher standards than a regulation adopted under Chapter 211; in that event, the higher standards control. TEX. LOC. GOV'T CODE § 211.013(a). But this section does not list regulations of historical structures under section 211.003(b) among the subjects on which an ordinance could impose a higher standard. Instead, section 211.013 gives examples such as height, size of open space, and percentage of lot left unoccupied—subjects that a city may regulate under section 211.003(a).[1] On those subjects, there are other statutes that authorize a city to regulate without following the constraints of Chapter 211. *E.g.,* TEX. LOC. GOV'T CODE §§ 212.002, 212.045(a).

Given these overlapping sources of statutory authority for city regulation, the Legislature included section 211.013 to address which regulation controls in the event of a conflict. But nothing in section 211.013 is inconsistent with our holding in Part II.A. that a city may not rely on its home-rule authority to issue historic-preservation regulations that do not comply with Chapter 211. As previously noted, we express no view on whether other statutes

[1] Section 211.013 has always tracked the original types of zoning regulations listed in section 211.003(a). *See* Act of March 14, 1927, 40th Leg., R.S., ch. 283, § 9, 1928 Tex. Gen. Laws 424, 428. Section 211.013 was not amended when the Legislature added section 211.003(b) to bring historic-preservation regulations within the ambit of Chapter 211.

with different requirements would also authorize the City's ordinance. *See* n. 16, *supra*.

J. Brett Busby
Justice

OPINION DELIVERED: October 8, 2021

LINKS

December 9, 2021

Amicus Brief of Historic Preservation Organizations and Legal Scholars in Support of the City of Houston, No. 19-0689 (Tex.)
Amicus Brief of Historic Preservation Organizations and Legal Scholars in Support of the City of Houston, No. 19-0689 (Tex.) by Sara C. Bronin, J. Peter Byrne, Lisa T. Alexander, Nestor M. Davidson, Sheila Foster, Sarah Fox, Ryan Rowberry, Kellen Zale :: SSRN

State and Local Government Law Blog:
https://www.sloglaw.org/post/houston-still-zoning-s-last-frontier

City of Austin v. Reagan: Key Facts about the Case

On November 10, 2021, the U.S. Supreme Court will hear oral arguments in a case with critical implications for the Highway Beautification Act. *City of Austin v. Reagan Advertising* considers whether regulation of billboards ("off-premise" signs) violates the First Amendment rights of advertising companies. The final ruling is expected in early 2022.

Why is Austin v. Reagan such an important case?

- **This case has tremendous implications.** If the U.S. Supreme Court upholds the Fifth Circuit Court of Appeals' opinion favoring Reagan, billboard bans and sign ordinances in other communities will be unenforceable, limiting the ability of state and local governments to restrict billboard advertising and undoing much of the Highway Beautification Act.
- **The "scenic" arguments have attracted a diverse set of allies:** Scenic America and several of its chapters and affiliates have joined an amici curiae brief (https://www.scenic.org/sign-control/billboard-laws/important-legal-cases/city-of-austin-v-reagan-key-facts-about-the-case/austin-v-reagan-amicus-brief-summary/)in support of Austin's position. This brief argues that billboards are a uniquely annoying type of land use that can be banned to protect property rights. For the first time, major real estate developers and chambers of commerce have also signed on to this brief, speaking directly and authoritatively on this issue. Key players in the outdoor advertising industry, including Outfront Media and the International Sign Association, have also filed amici briefs favoring Austin's position.

What does Reagan claim is the issue with the City of Austin's sign ordinance?

Like hundreds of communities across the country, Austin bans digital off-premise billboards along the sides of its roads due to concerns about driver safety and to preserve the scenic qualities of its roadways. The restriction dates to the 1960s when the passage of the Highway Beautification Act prompted signage restrictions along roadways across the country. Today Austin's sign code allows businesses to install digital signs "on premise" but prohibits billboard companies from installing digital "off-premise" signs, or from converting existing static billboards into digital billboards.

What is the background behind the Austin v. Reagan case?

In 2017, Reagan National Advertising and Lamar Advantage Outdoor Company applied for permits from the City of Austin to convert static off-premises billboards to digital signs in violation of the city's sign code, which prohibited the digitization of off-premise signs.

Reagan sued the City of Austin, arguing that the sign code's distinction between the digitization of on-premises and off-premises signs violated the First Amendment in that it was an unconstitutional content-based speech restriction, that the sign code was invalid and unenforceable, and that Reagan and Lamar should be permitted to digitize their signs without permits. The federal district court ruled in favor of Austin and upheld the sign ordinance.

Reagan took the case to the U.S. Court of Appeals for the Fifth Circuit, which reversed the lower court's decision in October 2020. The Court of Appeals concluded that the sign code—whose stated purpose was to protect the aesthetic qualities of the city and promote public safety—was not content-neutral and was therefore subject to "strict scrutiny." In the Court's opinion, the city did not provide sufficient arguments that on-premise signs created more visual blight than off-premise signs, nor that they posed a greater threat to public safety.

What legal precedents have been applied in the review of Austin v. Reagan?

The Supreme Court has previously affirmed the constitutionality of billboard laws on ten occasions, beginning with a 1919 opinion by Justice Oliver Wendell Holmes in *St. Louis Poster Advertising Co. v. St. Louis*. In 1939, the Court again unanimously upheld a billboard ban with an exception for on-premise business signs in *Packer Corp. v. Utah*, reasoning: "The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines."

In the 1981 decision of *Metromedia v. San Diego (https://www.scenic.org/sign-control/billboard-laws/important-legal-cases/#metromedia-San-Diego)*, the Court again ruled that billboard bans are constitutional.

The Fifth Circuit Court of Appeals reviewed Austin v. Reagan under ***Reed v. Town of Gilbert*** (about:blank#reed-gilbert-arizona)*,* a 2015 ruling that struck down a sign ordinance that applied different limits to other kinds of signs. For example, the Town of Gilbert's sign ordinance placed certain restrictions on political advertisements that did not apply to advertisements for churches.

However, Justice Alito noted in a concurrence that "rules distinguishing between on-premises and off-premises signs" are permissible. This concurrence reflected the views of a majority of the Court, but the Fifth Circuit minimized it by suggesting it could have referred to bans on freestanding signs. This would be a use of "off-premise" that no city or court has ever used, including Justice Alito in a seminal and pragmatic 1994 Third Circuit opinion upholding the Delaware Highway Beautification Act as a proper balance between local business owners and other landowners and the traveling public.

What organizations are supporting the City of Austin in this case?

One factor that makes this case incredibly unique is the disparate collection of supporters that have stepped up to side with Austin in this case, as articulated in this Amici Brief (http://www.supremecourt.gov/DocketPDF/20/20-1029/170623/20210301235112622_2021-03-01%20brief%20-%20final.pdf) signed by more than forty developers, chambers of commerce, and environmental organizations. This scenic-focused brief argues that billboards are a uniquely annoying type of land use that can be banned in order to protect property rights.

This unusual consensus helped persuade the Court in June to grant certiorari or full review of the case at oral argument on November 10. It also helped inspire an unprecedented array of merits briefs by other organizations, most of whom had never appeared in a billboard case, including:

- Brief of Florida and 21 states (Arkansas, California, Connecticut, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Dakota, Vermont, and Washington)

- Brief of the United States of America
- Brief of the International Sign Association & Chapters
- Brief of Outfront Media, Inc.—second largest billboard company in the U.S.
- Brief of the Knight First Amendment Institute at Columbia University
- Brief of the National League of Cities, the U.S. Conference of Mayors, The International City/County Management Association, and the International Municipal Lawyers Association
- Brief of the American Planning Association

What does the Amici Brief from the scenic community, chambers of commerce, and developers argue?

The Amici Brief filed by developers, chambers of commerce, and scenic organizations makes a unique argument that bans on billboards protect property rights—something that the lower court did not take into consideration. Striking down off-premise restrictions would be costly and onerous for landowners and developers. Almost every city in the country would have to rewrite sign codes. Even key players in the outdoor advertising industry agree that off-premise restrictions should remain in place.

A detailed summary is available here. (https://www.scenic.org/sign-control/billboard-laws/important-legal-cases/city-of-austin-v-reagan-key-facts-about-the-case/austin-v-reagan-amicus-brief-summary/)

What can I/my community do now?

The Supreme Court's decision is expected in early 2022. If a ruling comes down in favor of Reagan, you can expect immediate challenges to any existing billboard bans and sign ordinances. Your local officials should be prepared to respond, and you should be ready to voice your concerns when opportunities arise. Sign up for updates (https://www.scenic.org/signup) from Scenic America to keep apprised on this, and other, scenic issues.

Lady Bird's Legacy

Learn more about Lady Bird Johnson and her efforts to keep our roads beautiful.

johnson/) (https://www.scenic.org/sign-control/digital-billboards/safety-studies/)

Digital Billboard Safety Studies

Research shows that billboards are dangerous for drivers and harmful to wildlife.

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Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0233p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIAM HAROLD THOMAS, JR.,

Plaintiff-Appellee,

v.

CLAY BRIGHT, Commissioner of Tennessee Department of Transportation,

Defendant-Appellant.

No. 17-6238

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 2:13-cv-02987—Jon Phipps McCalla, District Judge.

Argued: January 30, 2019

Decided and Filed: September 11, 2019

Before: COLE, Chief Judge; BATCHELDER and DONALD, Circuit Judges.

COUNSEL

ARGUED: Sarah Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Owen Yeates, INSTITUTE FOR FREE SPEECH, Alexandria, Virginia, for Appellee. Lindsey Powell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Eugene Volokh, UCLA SCHOOL OF LAW, Los Angeles, California, for Amici Curiae. **ON BRIEF:** Sarah Campbell, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellant. Owen Yeates, Allen Dickerson, INSTITUTE FOR FREE SPEECH, Alexandria, Virginia, for Appellee. Lindsey Powell, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Eugene Volokh, UCLA SCHOOL OF LAW, Los Angeles, California, Kannon K. Shanmugam, A. Joshua Podoll, WILLIAMS & CONNOLLY LLP, Washington, D.C., Ilya Shapiro, CATO INSTITUTE, Washington, D.C., Braden H. Boucek, BEACON CENTER OF TENNESSEE, Nashville, Tennessee, Timothy Sandefur, GOLDWATER INSTITUTE, Phoenix, Arizona, Robert Alt, THE BUCKEYE INSTITUTE, Columbus, Ohio, for Amici Curiae.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Under Tennessee's Billboard Act, anyone intending to post a sign along a Tennessee roadway must apply to the Tennessee Department of Transportation (TDOT) for a permit, unless the sign falls within one of the Act's exceptions. This case presents a constitutional challenge to the Act, based on the "on-premises exception" for signs relating to the use or purpose of the real property (premises) on which the sign is physically located, typically signs advertising the activities, products, or services offered at that location.

William Thomas owned a billboard on an otherwise vacant lot and posted a sign on it supporting the 2012 U.S. Summer Olympics Team. Tennessee ordered him to remove it because the State had denied him a permit and the sign did not qualify for the exception, given that there were no activities on the lot to which the sign could possibly refer. Thomas sued, claiming that this application of the Billboard Act violated the First Amendment. The district court held the Act unconstitutional because the on-premises exception was content-based and thus subject to strict scrutiny, failed to survive strict scrutiny, and was not severable from the rest of the Act. We affirm, recognizing that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), overruled our existing circuit precedent on this issue in *Wheeler v. Commissioner of Highways*, 822 F.2d 586 (6th Cir. 1987).

I. BACKGROUND

A. Tennessee's Billboard Act

In 1965, Congress enacted the Federal Highway Beautification Act ("HBA"), 23 U.S.C. § 131, which sought to "promote the safety and recreational value of public travel, and to preserve natural beauty." *Id*. The HBA conditions ten percent of a State's federal highway funds on the State's maintaining "effective control" of signs within 660 feet of an interstate or primary highway, *id*. at § 131(b), meaning the State must limit signage to (1) "directional and official signs and notices," (2) "advertising [for] the sale or lease of property upon which

[the sign is] located," (3) "advertising [for] activities conducted on the property on which [the sign is] located," (4) "landmark[s] . . . or historic or artistic significance," or (5) "advertising [for] the distribution by nonprofit organizations of free coffee." *Id*. at § 131(c). The State may also, with U.S. Department of Transportation approval, permit signs in areas zoned industrial or commercial. *Id*. at § 131(d).

In order to comply with the HBA and ensure full federal funding, Tennessee enacted the Billboard Regulation and Control Act of 1972 ("Billboard Act"), Tenn. Code Ann. (T.C.A.) § 54-21-101, *et seq*. The Billboard Act parallels the HBA in most relevant respects and prohibits all outdoor signage within 660 feet of a public roadway unless expressly permitted by TDOT permit. *Id*. § -103. But the Act also provides exceptions under which certain signs may be posted without permit, including an exception for signage "advertising activities conducted on the property on which [the sign is] located." *Id*. § -103(3). This is referred to as the "on-premises exception" and corresponds to the HBA's third limitation. Under the Act's implementing regulations:

> A sign will be considered to be an on-premise[s] sign if it meets the following requirements:
>
> (a) Premise[s] - The sign must be located on the same premises as the activity or property advertised.
>
> (b) Purpose - The sign must have as its purpose (1) the identification of the activity, or its products or services, or (2) the sale or lease of the property on which the sign is located, rather than the purpose of general advertising.

Tenn. Comp. R. & Regs. (T.C.R.R.) § 1680-02-03-.06(2). The regulations elaborate further:

> The following criteria shall be used for determining whether a sign has as its purpose [] the identification of the activity located on the premises or its products or services, . . . rather than the business of outdoor advertising.
>
> (a) General
>
> 1. Any sign which consists solely of the name of the establishment is an on-premises sign.
>
> 2. A sign which identifies the establishment's principle [sic] or accessory product or services offered on the premises is an on-premises sign.

> 3. An example of an accessory product would be a brand of tires offered for sale at a service station.
>
> (b) Business of Outdoor Advertising
>
> 1. When an outdoor advertising device (1) brings rental income to the property owner, or (2) consists principally of brand name or trade name advertising, or (3) the product or service advertised is only incidental to the principle [sic] activity, it shall be considered the business of outdoor advertising and *not an on-premises sign*. An example would be a typical billboard located on the top of a service station building that advertised a brand of cigarettes or chewing gum which is incidentally sold in a vending machine on the property.
> 2. An outdoor advertising device which advertises activities conducted on the premises, but which also advertises, in a prominent manner, activities not conducted on the premises, is *not an on-premises sign*. An example would be a sign advertising a motel or restaurant not located on the premises with a notation or attachment stating 'Skeet Range Here,' or 'Dog Kennels Here.' The on-premises activity would only be the skeet range or dog kennels.

T.C.R.R. § 1680-02-03-.06(4) (emphasis added; alteration of "premise" to "premises" throughout). So, to recap, and to be a bit more specific, the sign must (1) be physically located on the same "premises" (real property) as the activity being advertised on the sign, and must (2) have as its purpose the identification of that activity occurring on the premises, or the products or services provided by that activity on the premises, not the purpose of advertising generally or advertising an activity, product, or service occurring elsewhere.

Finally, we would be remiss if we did not acknowledge that, by all indications, the Act was intended to, and routinely does, apply to only commercial speech, namely, advertising. But in this case, Tennessee applied the Act to restrict speech conveying an idea: "non-commercial speech" that was not advertising nor commercial in any way, but might be labeled "patriotic speech."

B. State Court Litigation

In 2006, Thomas—the owner of over 30 billboards in Tennessee—applied to the TDOT for a permit to erect a billboard on a vacant lot, hereinafter referred to as the "Crossroads Ford billboard," on which he would display a commercial advertisement. TDOT denied the

application but Thomas constructed the Crossroads Ford billboard and posted his sign anyway. TDOT sued in the Tennessee state court, claiming that Thomas was in violation of the Billboard Act and also arguing that the Crossroads Ford billboard could not satisfy the on-premises exception because it was located on a vacant lot with no on-premises activity whatsoever.

The state trial court found "substantial evidence of selective and vindictive enforcement against [Thomas]," including emails from TDOT employees working in concert with a competitor of Thomas's to "defeat" him, and unsolicited emails sent from TDOT employees to advertisers on Thomas's other billboards suggesting that his billboards were illegal and that associating with Thomas would reflect "negatively" on them. The court granted a temporary restraining order forbidding TDOT from enforcing the Billboard Act against Thomas's Crossroads Ford billboard until further notice. Thomas subsequently obtained a billboard permit from the Memphis and Shelby County (Tenn.) Office of Construction Code Enforcement but did not obtain a state permit from TDOT. He used the Crossroads Ford billboard for commercial advertising until 2012. Meanwhile, TDOT had appealed the decision and the Tennessee Court of Appeals vacated the judgment and remanded the case, instructing the trial court to hear Tennessee's requests for relief. *State ex rel. Dep't of Transp. v. Thomas*, 336 S.W.3d 588, 608 (Tenn. Ct. App. 2010).

By 2012, Thomas had stopped posting commercial advertising on the Crossroads Ford billboard and instead had posted a message about free speech, which he later changed to "Go USA!," imposed on a large American flag, in support of the USA Olympic Team in the 2012 Summer Games. On remand, the state trial court found that this, the conveyance of an idea, was not commercial advertising, and was excepted from TDOT's authority to enforce the Billboard Act. TDOT again appealed and the Tennessee Court of Appeals again reversed, reiterating that, "[u]nless [the sign] fits within one of the exceptions named in the Act, if he does not have a State billboard permit, [Thomas] is not allowed to erect a billboard[,] [p]eriod[,] . . . [r]egardless of what message is displayed on the Crossroads Ford site billboard." *State ex rel. Dep't of Transp. v. Thomas*, 2014 WL 6992126 at *7 (Tenn. Ct. App. Dec. 11, 2014) (editorial mark, quotation marks, and citation omitted).

On remand, Thomas relied on the district court's opinion here, which was proceeding simultaneously, to persuade the state trial court to reinstate its original order (in his favor), but the Tennessee Court of Appeals again reversed, holding that "the 2017 [f]ederal [d]istrict [c]ourt [r]uling does not represent a change in controlling law for purposes of the law of the case doctrine," and this time reassigning the case to a different trial judge. *State ex rel. Dep't of Transp. v. Thomas*, 2019 WL 1602011, at *8 (Tenn. Ct. App. Apr. 15, 2019). Thus, state proceedings are ongoing.

C. Federal Court Litigation

In 2013, Thomas sued in federal court, alleging that the Billboard Act was an unconstitutional restriction of speech in violation of the First Amendment. The district court ultimately agreed, quoting and relying on *Reed*, 135 S. Ct. at 2222, for the proposition that "a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Thomas v. Schroer*, 248 F. Supp. 3d 868, 871 (W.D. Tenn. 2017) (quotation and editorial marks omitted). The district court explained that, under the Act, "the only way to determine whether a sign is an on-premise[s] sign, is to consider the content of the sign and determine whether that content is sufficiently related to the activities conducted on the property on which they are located," *id*. at 879 (quotation marks and record citation omitted), so the Act "is a content-based regulation that implicates Thomas's noncommercial speech," *id*. at 878. This required strict scrutiny, which the Act "does not survive," *id.*, because Tennessee's asserted interests are not compelling, *id*. at 881-82, nor is the Act narrowly tailored to achieve them, *id*. at 885. The court held the Billboard Act unconstitutional as applied to the Crossroads Ford billboard sign. *Id*.

Thomas moved to expand the relief he sought, asking the district court to permanently enjoin Tennessee from enforcing the Billboard Act against *all* signs or at least against *all of his* signs. Thomas argued that his challenge had been both facial and as-applied, but the court held that it was only as-applied and Thomas had not justified an expansion of the relief sought. *Thomas v. Schroer*, No. 13-cv-02987, 2017 WL 6489144, at *1 (W.D. Tenn. Sept. 20, 2017) ("On March 31, 2017, the [c]ourt found the Billboard Act, as applied to Thomas's non-

commercial messages on his Crossroads Ford sign, a violation of the Free Speech provision of the First Amendment of the United States Constitution."); *see also id.* at *7 ("Upon review of the record, it is clear that [Thomas] has not alleged the Billboard Act is unconstitutional in all its applications, or even unconstitutional as to a substantial number of applications."). The court permanently enjoined Tennessee from enforcing the Billboard Act against Thomas's Crossroads Ford sign. *Id*. at *10.

At the same time, Tennessee had moved the court to reconsider its holding that the Billboard Act was not severable. The court denied the motion, finding that there was no clear or prudent line at which to sever, *id*. at *5, and nothing in the Act said that it was severable, as is required for severability under Tennessee law, or that the Tennessee legislature would have enacted it without the unconstitutional portions, *id*. at *3. Thus, the court declined to save the Act's commercial or off-premises aspects by severing the on-premises exception, and instead left that for the Tennessee legislature.[1] *Id*. at *5. Thomas resumed commercial advertising on his Crossroads Ford billboard and Tennessee appealed the judgment here.

II. ANALYSIS

Tennessee appeals the district court's holding that the Billboard Act, as effectuated by the on-premises exception, is an unconstitutional restriction of Thomas's non-commercial speech at the Crossroads Ford billboard location. We review de novo a district court's decision on the constitutionality of a State statute, including whether the statute satisfies the applicable level of scrutiny. *Assoc. Gen. Contr. of Ohio, Inc. v. Drabik*, 214 F.3d 730, 734 (6th Cir. 2000).

A. Exceptions as Restrictions

The restriction here is based on an exception to a regulation, which makes the exception—the *denial of the exception*, actually—the restriction. This posture does not change our analysis.

[1]The district court's rulings reflect an apparent inconsistency: on one hand, the Act was not severable and entirely unconstitutional, but on the other hand, the court limited its as-applied holding to Thomas's non-commercial speech on his Crossroads Ford billboard. Whatever the practical effects, this does not affect our analysis in this appeal.

Textually, the Billboard Act is a blanket, content-neutral prohibition on any and all signage speech except for speech that satisfies an exception; here, the on-premises exception. In this way, Tennessee favors certain content (i.e., the excepted content) over others, so the Act, "on its face," discriminates against that other content. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-66 (2011). The fact that this content-based aspect is in the *exception* to the general restriction, rather than the restriction itself, does not save it from this analysis. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("Selective exclusions from [speech restrictions] may not be based on content alone, and may not be justified by reference to content alone."); *see City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (the notion that the exceptions to a restriction of speech may be insufficiently expansive "is firmly grounded in basic First Amendment principles").

B. Severability

The district court held that the Billboard Act was not severable, and Tennessee has not challenged that holding in this appeal. We will not *sua sponte* address the merits of that issue.

Tennessee had argued to the district court that the non-commercial, on-site exception was severable from the remainder of the Act, particularly the commercial or off-site applications, and, after losing that argument, moved the court to reconsider, which the court denied:

> [T]he [c]ourt declines (1) to find the Billboard Act's provisions concerning outdoor advertising severable as to the challenged provisions or (2) to sever the non-commercial application of those provisions. The Billboard Act does not explicitly address whether it could function without the on-premises/off-premises provision or without application to non-commercial speech.

Thomas, 2017 WL 6489144, at *4. But Tennessee did not raise severability here, in either its briefing or during oral argument. We do not decide issues or arguments that are not directed to us, nor do we make or assume them on behalf of litigants. *See Gradisher v. City of Akron*, 794 F.3d 574, 586 (6th Cir. 2015). Therefore, we will not disturb the district court's determination that the Act, as applied in this case, is unconstitutional inasmuch as the on-premises exception is not severable from it, and that "it is for the Tennessee State Legislature—and not this [c]ourt—to clarify the Legislature's intent regarding the Billboard Act in the wake of *Reed*." *Thomas*, 2017 WL 6489144, at *5.

C. Content-Based Restrictions

The Billboard Act's on-premises exception scheme is a content-based regulation of (restriction on) free speech. Although we discuss this at length, this is neither a close call nor a difficult question. If not for Tennessee's proffered disputes, we would label this "indisputable."

When a case implicates a core constitutional right, such as a First Amendment right, we must determine the level of scrutiny to apply based on whether the restriction is content-based or content-neutral. *Reed*, 135 S. Ct. at 2226-27. Because Thomas's challenge to the Act concerned only non-commercial speech ("Go USA!") and this appeal stems from the district court's as-applied holding, we necessarily confine the analysis here to non-commercial speech and need not consider the commercial-speech doctrine. And, as just explained, the provision is not severable.

Under the First Amendment, the State may regulate certain aspects of speech but has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Content-based regulations are "presumptively unconstitutional" and analyzed under strict scrutiny. *Reed*, 135 S. Ct. at 2226. Content-neutral regulations of non-commercial speech need only survive intermediate scrutiny. *Id*. at 2228.

Although "[d]eciding whether a particular regulation is content-based or content-neutral is not always a simple task," *Turner Broad. Sys. Inc., v. FCC*, 512 U.S. 622, 642 (1994), the Supreme Court has provided several means for doing so. As applicable here, a law regulating speech is facially content-based if it "draws distinctions based on the message," *Reed*, 135 S. Ct. at 2227; if it "distinguish[es] among different speakers, allowing speech by some but not others," *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010); or if, in its application, "it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters*, 468 U.S. 364, 383 (1984)) (quotation marks omitted).[2]

[2]The Court has also recognized that some laws "though facially content-neutral, will be considered content-based," *Reed*, 135 S. Ct. at 2227, such as if the law "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message [the prohibited speech] conveys." *Id*. (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (quotation marks omitted).

The Billboard Act's on-premises exception allows a property owner to avoid the permitting process and proceed to post a sign without any permit, so long as the sign is "advertising activities conducted on the property on which [the sign is] located." T.C.A. § 54-21-103(3). The enabling regulation specifies that the sign must be "located on the same premises as the activity" and "have as its purpose [the] identification of the activity[,] products[,] or services [offered on that same premises]." T.C.R.R. § 1680-02-03-.06(2). Therefore, to determine whether the on-premises exception does or does not apply (i.e., whether the sign satisfies or violates the Act), the Tennessee official must read the message written on the sign and determine its meaning, function, or purpose.

The Supreme Court has made plain that a purpose component in a scheme such as this is content-based: "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its *function or purpose*." *Reed*, 135 S. Ct. at 2227 (emphasis added). Clearly, this regulatory scheme requires Tennessee officials to assess the meaning and purpose of the sign's message in order to determine if the sign violated the Act. *See McCullen*, 573 U.S. at 479. To digress a bit, a sign written in a foreign language would have to be translated (and interpreted) before a Tennessee official could determine whether the on-premises exception would apply or the sign violated the Act. There is no way to make those decisions without understanding the content of the message. More to the point here, Tennessee's own agent confirmed at trial that officials would be "looking at the content of [the] sign to make [a] determination whether it's on-premises or off-premises." That makes the Billboard Act—via the on-premises exception—content based. "[A] regulatory scheme [that] requires a municipality to examine the content of a sign to determine which ordinance to apply . . . appears to run afoul of *Reed*'s central teaching." *Wagner v. City of Garfield Heights*, 675 F. App'x 599, 604 (6th Cir. 2017) (quotations omitted).

Moreover, under this scheme, to determine whether a violation has occurred, the Tennessee official not only "examines the content of the *message* that is conveyed," *see McCullen*, 573 U.S. at 479 (emphasis added), but must also identify, assess, and categorize the

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Because the Billboard Act is facially content-based, however, we need not proceed to these other means in this analysis.

activity conducted at that location and determine whether the content of the message sufficiently relates to that activity, product, or service. *See* T.C.R.R. § 1680-02-03-.06(2). The examples provided in the Tennessee regulations are relatively straightforward: a sign on a service station advertising a brand of tires versus one advertising a brand of cigarettes. *Compare* -.06(4)(a)(3) *with* (b)(1). And the present case is hardly more difficult, given that the Crossroads Billboard is on a vacant lot. But what if this sign, with its "Go USA!" and American flag referencing the Summer Olympics were posted on a U.S. Olympic Committee facility? Or on an unaffiliated athletic training facility, a retail store selling U.S. Olympic Team merchandise, an NBC station broadcasting the Games, a travel agency offering discount trips to London for the Games, a casino with wagering on Olympic events, an animal shelter that names each of the pets after an American Olympic athlete because that faciliates adoptions, or a Korean consulate attempting to extend diplomatic good will? Which of these activities, products, or services falls satisfactorily within the meaning, function, or purpose of the sign so as to meet the exception? More importantly, who decides? The Tennessee official decides.

This brings us back around to Tennessee's argument that *nothing* at the Crossroads Ford billboard location could satisfy the exception because *nothing* happens there; it is a vacant lot. But rather than render the scheme content-neutral, that redoubles the importance of the content of the message. Suppose the sign said: "vacant lot, lots of vacancy," "free air—stop and enjoy some," or "fill wanted." Those messages might or could be the lot's activities, products, or services.

Tennessee contends that the Billboard Act's on-premises exception is not content-based because the operative distinction is "between signs that are related to the property on which they are located and those which are not . . . [meaning] the on-premise[s] exception distinguishes between signs based on their location, and not their content." That is, the content of the message is irrelevant; all that matters is its location—*signs can say whatever they want so long as they are in the correct location*. But Tennessee's argument is specious: whether the Act limits on-premises signs to only certain messages or limits certain messages from on-premises locations, the limitation depends on the content of the message. It does not limit signs from or to locations

regardless of the messages—those would be the (content-neutral) limitations that would fit its argument.

Even if Tennessee were correct, this "location" argument would simply trade one problem for another: instead of discriminating against the signs' messages, the Act would discriminate against the speaker. A law that allows a message but prohibits certain speakers from communicating that message is content-based. *See Turner*, 512 U.S. at 658 ("[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)."); *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 193-94 (1999) ("Even under the degree of scrutiny that we have applied in commercial speech cases, [regulations] that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment.").

Tennessee cites language from *Reed*, 135 S. Ct. at 2227, that the law in question there "depend[ed] entirely on the communicative content of the sign," for its argument that *Reed* means that a law is content-based only if it "depends entirely" on the content of a message. But that language was a factual statement describing the defendant's municipal code, not part of *Reed*'s analysis or holding. In any event, the Supreme Court has repeatedly held that laws combining content-based and content-neutral factors are nonetheless content-based. *See Mosley*, 408 U.S. at 98 (holding a law was content-based where it prohibited nonlabor-related picketing at a place of employment); *Carey v. Brown*, 447 U.S. 455, 460 (1980) (same); *Boos v. Barry*, 485 U.S. 312, 319 (1988) (holding a law was content-based where it prohibited speech critical of a foreign government within 500 feet of that government's embassy). In fact, in those cases, the Court used the same or similar "depends entirely" language to describe a necessarily content-based component even though it was combined with a content-neutral one. *See*, *e.g.*, *Boos*, 485 U.S. at 318 (holding that restriction "depends entirely upon whether [the] signs are critical of the foreign government"). The Act's on-premises exception employs a similar conjunctive binary of location and purpose: a sign must meet *both* prongs to qualify. Either can render the whole provision content-based.

Tennessee also argues that an otherwise content-based law is content-neutral if the State's justifications for that law are content-neutral, relying on *Wheeler v. Commissioner of Highways*, 822 F.2d 586, 590–94 (6th Cir. 1987), in which we considered a similar challenge to Kentucky's identical billboard law and held that it was not content-based because Kentucky's justifications were content-neutral. But *Reed* established that the State's justifications or motivations are relevant only if the law appears facially content-neutral:

> A law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech. . . . That is why we have repeatedly considered whether a law is content-neutral on its face *before* turning to the law's justification or purpose.

Reed, 135 S. Ct. at 2228 (quotations and citations omitted). In fact, *Reed* criticized the same argument Tennessee makes now: "The Court of Appeals . . . misunderstand[s] our decision in *Ward* as suggesting that a government's purpose is relevant even when a law is content-based on its face. That is incorrect." *Id*. Rather, while "a content-based purpose may be sufficient" to transform a facially content-neutral law into one that is content-based, "an innocuous justification cannot transform a facially content-based law into one that is content-neutral." *Id*. (citation omitted). Simply put, *Reed* overruled *Wheeler*, which is no longer good law.

Finally, Tennessee would have us reconstruct the *Reed* decision by engaging in a form of speculative vote-counting. All nine Justices joined the judgment in *Reed*, but three concurred in the judgment only, with Justice Kagan opining that she would have applied intermediate scrutiny, *id*. at 2238 (Kagan, J.), and three concurred in Justice Alito's "few words of further explanation," in which he identified some examples of state regulations that would not be content-based, including one for "[r]ules distinguishing between on-premises and off-premises signs." *Id*. at 2233 (Alito, J.). Tennessee pounces on this example and contends that the three Justices who joined Justice Alito would find an on/off-premises distinction content-neutral, as would the three who joined Justice Kagan—ergo, six of the nine Justices would find an on/off-premises distinction content-neutral. The district court appropriately made quick work of this argument:

> This Court agrees it is possible for a restriction that distinguishes between off- and on-premises signs to be content-neutral. For example, a regulation that defines an off-premise[s] sign as any sign within 500 feet of a building is content-neutral. But if the off-premises/on-premises distinction hinges on the content of the message, it is not a content-neutral restriction. A contrary finding would read Justice Alito's concurrence as disagreeing with the majority in *Reed*. The Court declines such a reading. Justice Alito's exemplary list of "some rules that would not be content-based" ought to be read in harmony with the majority's holding. [] Read in harmony with the majority, Justice Alito's concurrence enumerates an 'on-premises/off-premises' distinction that is not defined by the sign's content, but by the sign's physical location or other content-neutral factor.

Thomas, 248 F. Supp. 3d at 879. There might be many formulations of an on/off-premises distinction that are content-neutral, but the one before us is not one of them.

Tennessee's Billboard Act contains a non-severable regulation of speech based on the content of the message. Applied to Thomas's billboard, it is, therefore, a content-based regulation of non-commercial speech, which subjects it to strict scrutiny. *See Reed*, 135 S. Ct. at 2226–27.

D. Strict Scrutiny

For a content-based restriction of non-commercial speech to survive strict scrutiny, the State must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quotation omitted). Because the on-premises exception is not severable from the Billboard Act, we must consider the Act as a whole and analyze both Tennessee's interests and precisely how Tennessee has tailored the Act to achieve those interests.

1. Compelling State Interests

Tennessee proffers three "compelling state interests": public aesthetics, traffic safety, and safeguarding the constitutional rights of property owners. Tennessee furthers its interests in aesthetics and traffic safety through enforcement of the Billboard Act and the Act's general prohibition of signage. Tennessee pursues its interests in safeguarding the constitutional rights of property owners through the Billboard Act's exceptions, including the on-premises exception.

In *Reed*, 135 S. Ct. at 2231, the Court "assum[ed] for the sake of argument that [aesthetic appeal and traffic safety] are compelling governmental interests." In *Wagner*, 675 F. App'x at 607, we decided to "follow the Court's example in *Reed* and assume without deciding that [aesthetic appeal and traffic safety] are sufficiently compelling."

But the Supreme Court has repeatedly found a State's interest in public aesthetics to be only "substantial" (rather than compelling), which is the interest level of intermediate scrutiny. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425–29 (1993). Tennessee concedes that no court has ever found public aesthetics to be a *compelling* interest and presents no persuasive arguments for finding that it is, but nonetheless urges us to break new ground. We decline to do so.

Traffic safety presents a different scenario. In the Fourth Amendment context, the Supreme Court has recognized a compelling interest in "highway safety," *Mackey v. Montrym*, 443 U.S. 1, 19 (1979) (upholding a Massachusetts "implied consent" law for breathalyzer tests), and we have done likewise, *see Tanks v. Greater Cleveland Reg'l Transit Auth.*, 930 F.2d 475, 479–80 (6th Cir. 1991) (upholding an Ohio law requiring public bus drivers to submit to randomized drug tests). But neither the Supreme Court nor this court has issued any such holding in the First Amendment context. We would, again, be breaking new ground and decline to do so.

As an aside, the Court has held elsewhere (under intermediate scrutiny) that the State must show that its justifications for a restrictive law are "genuine [and] not hypothesized or invented *post-hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Here, we have persuasive evidence that Congress in enacting the HBA, and in turn Tennessee in enacting the Billboard Act, were motivated almost exclusively by aesthetic, not public safety, concerns. *See Brief for the Buckeye Institute as Amicus Curiae in Support of Appellee*, pgs. 4–11. Moreover, exceptions "diminish the credibility of the government's rationale for restricting speech in the first place." *Gilleo*, 512 U.S. at 52. The Billboard Act's ready exceptions, *see* T.C.A. §§ 54-21-103(4)-(5); -104; -107, undermine Tennessee's professed concern for traffic safety by allowing significant commercial signage that serves Tennessee's economic interests, which Tennessee concedes are not compelling. And, we note that, despite

"[a]ssuming for the sake of argument," that traffic safety is a compelling interest, the Court in *Reed*, 135 S. Ct. at 2231-32, nonetheless concluded that restrictions on non-commercial signs were not "justified by traditional safety concerns."

Finally, Tennessee argues that it has a compelling interest in safeguarding the constitutional rights of business and property owners, namely their First Amendment rights, through the on-premises exception to the Billboard Act. It is undoubtedly true that a State's interest in complying with its constitutional obligations is compelling. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). Thomas concedes this point but objects to Tennessee's raising the argument here, protesting that Tennessee forfeited the issue by not raising it clearly to the district court. We agree—and Tennessee admits—that Tennessee could have done a better job of addressing this issue to the district court, but we proceed as if Tennessee sufficiently raised the issue and preserved it for appeal. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009).

2. Narrowly Tailored

To establish that a law regulating or restricting speech is narrowly tailored, "the Government carries the burden of showing that the challenged regulation advances the Government's [compelling] interest in a direct and material way." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (quotation omitted). While the regulation need not be perfectly tailored, the State's burden is not carried if the regulation "provides only ineffective or remote support" of the claimed compelling interest. *Greater New Orleans*, 527 U.S. at 188 (quotation omitted).

In *Metromedia*, 453 U.S. at 503, the Court addressed a billboard ordinance similar to Tennessee's Billboard Act. Under that ordinance:

> a sign advertising goods or services available on the property where the sign is located is allowed; [but] a sign on a building or other property advertising goods or services produced or offered elsewhere is barred; [and] non-commercial advertising, unless [relating to the premises], is everywhere prohibited. The occupant of property may advertise his own goods or services; he may not advertise the goods or services of others, nor may he display most non-commercial messages.

Id. Finding the ordinance unconstitutional as applied to non-commercial speech, a divided court rendered a four-Justice plurality opinion, a two-Justice concurrence in the judgment only, and three separate dissents, each agreeing with different aspects of the plurality opinion or concurrence. *Id*. Later, in another First Amendment challenge to a sign ordinance, the Court affirmed both the plurality and concurrence as "two analytically distinct grounds for challenging the constitutionality of [an ordinance] regulating the display of signs." *Gilleo*, 512 U.S. at 50.

The first ground is if the law is overinclusive. *Metromedia*, 453 U.S. at 521-39 (Brennan, J., concurring in the judgment only). A content-based law regulating speech is overinclusive if it implicates more speech than necessary to advance the government's interests. *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). "[S]uch provisions are subject to attack on the ground that they simply prohibit too much protected speech." *Gilleo*, 512 U.S. at 51. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 538 (1980); *see also Jamison v. Texas*, 318 U.S. 413, 416 (1943) (holding invalid the total prohibition of handbills on the public streets); *Martin v. City of Struthers*, 319 U.S. 141, 145–149 (1943) (holding invalid the total prohibition of door-to-door distribution of literature); *but see City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (upholding a total prohibition of signage attached to utility poles). To survive an overinclusiveness challenge, the State must both meet the requisite tailoring requirements and "leave open ample alternative channels for communication" of the affected speech. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The second ground is if the law is underinclusive. *Metromedia*, 453 U.S. at 512-17 (White, J., plurality). This type of challenge is generally appropriate when a regulation functions "through the combined operation of a general speech restriction and [selected] exemptions." *Gilleo*, 512 U.S. at 51. Such a law is problematic "because its exemptions discriminate on the basis of the signs' messages." *Id*. By picking and choosing which subjects or speakers are exempted, the government may "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat. Bank v. Bellotti*, 435 U.S. 765, 785

(1978). The underinclusiveness of a law can be cured by either eliminating the exemptions such that all speech is treated equally or expanding the exemptions to include more protected speech. *See Metromedia*, 453 U.S. at 513-15 (plurality).

Although Thomas makes both overinclusiveness and underinclusiveness arguments, his challenge is more appropriately one of underinclusiveness. Most obviously, the Billboard Act's "operation of a general speech restriction and [selected] exemptions" clearly lends itself to such an examination. *See Gilleo*, 512 U.S. at 51. Notably, the ordinance in *Metromedia* would have required the removal of long-standing billboards and the parties jointly stipulated that billboards had long been "an effective medium of communication" and "other forms of advertising [were] insufficient, inappropriate, and prohibitively expensive." *Metromedia*, 453 U.S. at 525-26 (concurrence). Those stipulated facts were central to the concurrence's finding that an overinclusiveness challenge was the "appropriate analytical framework to apply." *Id*. at 525. That dynamic is not present here—indeed there is no broad reliance interest at stake nor does Thomas argue, or Tennessee concede, that billboards are necessary media for non-commercial speech.

Because, as applied in this case, the exception is the restriction, we must consider whether the exception is sufficiently expansive to save constitutionally protected speech from the Act's effective prohibition. *See Metromedia*, 453 U.S. at 520. If not, then the "exemptions discriminate on the basis of the signs' messages," and the Act is an underinclusive restriction on speech. *See Gilleo*, 512 U.S. at 51. We find the Act underinclusive in two ways.

First, the Act discriminates among non-commercial messages on the basis of content. Consider a hypothetical. A crisis pregnancy center erects a sign on its premises that says: "Abortion is murder!" Such a sign would presumably qualify for the on-premises exception because the message is related to the activities, goods, and services at the center. But may the property owner next door, who provides no services related to abortion, erect a sign that says: "Keep your laws off of my body!"? Under the Billboard Act, no. Two identically situated signs about the same ideological topic—one sign/speaker/message is allowed; the other is not.

By favoring on-premises-related speech over speech on but unrelated to the premises, the Billboard Act "has the effect of disadvantaging the category of non-commercial speech that is probably the most highly protected: the expression of ideas." *Ackerley Commc'ns. of Mass., Inc. v. City of Cambridge*, 88 F.3d 33, 37 (1st. Cir. 1996). That Tennessee favors speech related to the premises—intentionally or not—"does not justify prohibiting an occupant from displaying its own ideas. . . . Although the [State] may distinguish between the relative value of different categories of commercial speech, the [State] does not have the same range of choice in the area of non-commercial speech to evaluate the strength of, or distinguish between, various communicative interests." *Metromedia*, 453 U.S. at 513-15 (plurality). "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive [the State's] *ad hoc* balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

The Billboard Act is underinclusive also because it discriminates against *non-commercial* speech on but unrelated to the premises while allowing on-premises *commercial* speech. Consider another scenario. A pet store that sources its dogs from a notorious puppy mill erects a sign on its premises that says: "We have the most dogs around—and can always pump out more! Come get one!" Such a sign would presumably qualify for the on-premises exception because the message is related to the on-premises commercial activity of the pet store. But may the property owner across the street, who offers no services regarding animals, erect an otherwise identical sign that says: "Puppy Mills are Animal Cruelty!"? Under the Billboard Act, no. Yet, in this instance, the speech that would be allowed is unsettling commercial advertising while the speech prohibited is non-commercial protest. This contradicts established First Amendment caselaw, which "ha[s] consistently accorded non-commercial speech a greater degree of protection than commercial speech." *Metromedia*, 453 U.S. at 513 (plurality).

> Insofar as the [State] tolerates billboards at all, it cannot choose to limit their content to commercial messages; the [State] may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of non-commercial messages.

Id. (plurality). That Tennessee allows some so-called "on-premises non-commercial speech" does not save it from this conclusion.

> The rule against content discrimination forces the government to limit all speech—including speech the government does not want to limit—if it is going to restrict any speech at all. By deterring the government from exempting speech [that] the government prefers, the Supreme Court has helped to ensure that [the] government only limits any speech when it is quite certain that it desires to do so.

Rappa v. New Castle County, 18 F.3d 1043, 1063 (3d Cir. 1994). By placing a burden "more heavily on ideological than on commercial speech" the Billboard Act represents "a peculiar inversion of First Amendment values." *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 15-16 (1st Cir. 1980) (finding Maine billboard law underinclusive of non-commercial speech).

Our review of the record and the language of the Billboard Act leads to one more inescapable conclusion: the on-premises exception is tailored to promote Tennessee's economic interests. Of all possible speech, the on-premises exception allows for signage that communicates messages that encourage commercial patronage. Tennessee argues that this is sufficient First Amendment protection—*property owners can choose to say whatever they want, so long as their messages relate to the activities, goods, or services at the premises*—which reminds us of Henry Ford's famous quip about options for the original Model T: "Customers can choose any color they want, so long as it is black." That there is some overlap between what the on-premises exception allows and what property owners may choose to communicate does not mean that Tennessee is safeguarding its citizens' First Amendment rights. Because the Billboard Act is "hopelessly underinclusive," it is not narrowly tailored to further a compelling interest and thus is an unconstitutional restriction on non-commercial speech. *See Reed*, 135 S. Ct. at 2231.

E. Tennessee's Policy Arguments

Tennessee also presses two policy concerns as if they were legal arguments. First, Tennessee urges us to pay special attention to the practical distinction between billboards and signs, and include that in our analysis. The Billboard Act and its attendant regulations cover all signs near public roadways regardless of whether those signs are situated on the ground, mounted on business or residential buildings, or affixed to billboard bases. The Act also regulates billboard bases as structures, imposing certain size, spacing, lighting, and safety

requirements. Tennessee complains that it will not be able to enforce these content-neutral regulations of billboard bases if we affirm the district court. Second, Tennessee complains that if the on-premises exception is unconstitutional, then it is henceforth powerless to regulate even commercial signage.

As the district court explained, these are problems for the Tennessee Legislature, not the courts. *Thomas*, 2017 WL 6489144, at *5. Indeed, in the wake of *Reed*, state legislatures and municipal governments have begun to preemptively cure their signage regulations to satisfy the First Amendment. *See, e.g.,* Indianapolis, Ind. Code § 734 (Amended, Nov. 30, 2015); Ind. Code § 734-501(b) (amending definitions of on-premises, off-premises, and advertising signs to clarify that the limitations "[do] not apply to the content of noncommercial messages"); *Geft Outdoor LLC v. Consol. City of Indianapolis and Cnty. of Marion, Ind.*, 187 F. Supp. 3d 1002, 1009 (S.D. Ind. 2016) (noting that the city brought its regulations "into compliance with *Reed*"); *see also* Tex. Transp. Code § 391.031, Tex. S.B. 2006, 85th Leg., ch. 964 (S.B. 2006), §§ 6, 7, 33(3), eff. June 15, 2017 (changing the prohibition from "outdoor advertising" to only "commercial signs").

Tennessee is free to regulate the erection and attributes of billboard bases—and all other content-neutral aspects of signs—provided that it does so without unconstitutional reference to the content of the signage affixed to those billboard bases. Nothing in this opinion disturbs that longstanding principle, which the Court affirmed in *Reed*, 135 S. Ct. at 2232. But Tennessee's policy considerations are irrelevant to the constitutional matter before this court.

III. CONCLUSION

The district court determined that the Tennessee Billboard Act, as effectuated here by its non-severable on-premises exception, is a content-based regulation of free speech that cannot survive strict scrutiny and is, therefore, unconstitutional. For the reasons stated in the district court's opinions and those elaborated upon herein, we find that we agree and must AFFIRM.

SB-9 Housing development: approvals. (2021-2022)

Date Published: 09/17/2021 09:00 PM

Senate Bill No. 9

CHAPTER 162

An act to amend Section 66452.6 of, and to add Sections 65852.21 and 66411.7 to, the Government Code, relating to land use.

[Approved by Governor September 16, 2021. Filed with Secretary of State September 16, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

SB 9, Atkins. Housing development: approvals.

The Planning and Zoning Law provides for the creation of accessory dwelling units by local ordinance, or, if a local agency has not adopted an ordinance, by ministerial approval, in accordance with specified standards and conditions.

This bill, among other things, would require a proposed housing development containing no more than 2 residential units within a single-family residential zone to be considered ministerially, without discretionary review or hearing, if the proposed housing development meets certain requirements, including, but not limited to, that the proposed housing development would not require demolition or alteration of housing that is subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low income, that the proposed housing development does not allow for the demolition of more than 25% of the existing exterior structural walls, except as provided, and that the development is not located within a historic district, is not included on the State Historic Resources Inventory, or is not within a site that is legally designated or listed as a city or county landmark or historic property or district.

The bill would set forth what a local agency can and cannot require in approving the construction of 2 residential units, including, but not limited to, authorizing a local agency to impose objective zoning standards, objective subdivision standards, and objective design standards, as defined, unless those standards would have the effect of physically precluding the construction of up to 2 units or physically precluding either of the 2 units from being at least 800 square feet in floor area, prohibiting the imposition of setback requirements under certain circumstances, and setting maximum setback requirements under all other circumstances.

The Subdivision Map Act vests the authority to regulate and control the design and improvement of subdivisions in the legislative body of a local agency and sets forth procedures governing the local agency’s processing, approval, conditional approval or disapproval, and filing of tentative, final, and parcel maps, and the modification of those maps. Under the Subdivision Map Act, an approved or conditionally approved tentative map expires 24 months after its approval or conditional approval or after any additional period of time as prescribed by local ordinance, not to exceed an additional 12 months, except as provided.

This bill, among other things, would require a local agency to ministerially approve a parcel map for an urban lot split that meets certain requirements, including, but not limited to, that the urban lot split would not require the demolition or alteration of housing that is subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low income, that the parcel is located within a single-family residential zone, and that the parcel is not located within a historic district, is not included on the State Historic Resources Inventory, or is not within a site that is legally designated or listed as a city or county landmark or historic property or district.

The bill would set forth what a local agency can and cannot require in approving an urban lot split, including, but not limited to, authorizing a local agency to impose objective zoning standards, objective subdivision standards, and objective design standards, as defined, unless those standards would have the effect of physically precluding the construction of 2 units, as defined, on either of the resulting parcels or physically precluding either of the 2 units from being at least 800 square feet in floor area, prohibiting the imposition of setback requirements under certain circumstances, and setting maximum setback requirements under all other circumstances. The bill would require an applicant to sign an affidavit stating that they intend to occupy one of the housing units as their principal residence for a minimum of 3 years from the date of the approval of the urban lot split, unless the applicant is a community land trust or a qualified nonprofit corporation, as specified. The bill would prohibit a local agency from imposing any additional owner occupancy standards on applicants. By requiring applicants to sign affidavits, thereby expanding the crime of perjury, the bill would impose a state-mandated local program.

The bill would also extend the limit on the additional period that may be provided by ordinance, as described above, from 12 months to 24 months and would make other conforming or nonsubstantive changes.

The California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report on a project that it proposes to carry out or approve that may have a significant effect on the environment. CEQA does not apply to the approval of ministerial projects.

This bill, by establishing the ministerial review processes described above, would thereby exempt the approval of projects subject to those processes from CEQA.

The California Coastal Act of 1976 provides for the planning and regulation of development, under a coastal development permit process, within the coastal zone, as defined, that shall be based on various coastal resources planning and management policies set forth in the act.

This bill would exempt a local agency from being required to hold public hearings for coastal development permit applications for housing developments and urban lot splits pursuant to the above provisions.

By increasing the duties of local agencies with respect to land use regulations, the bill would impose a state-mandated local program.

The bill would include findings that changes proposed by this bill address a matter of statewide concern rather than a municipal affair and, therefore, apply to all cities, including charter cities.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for specified reasons.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 65852.21 is added to the Government Code, to read:

65852.21. (a) A proposed housing development containing no more than two residential units within a single-family residential zone shall be considered ministerially, without discretionary review or a hearing, if the proposed housing development meets all of the following requirements:

(1) The parcel subject to the proposed housing development is located within a city, the boundaries of which include some portion of either an urbanized area or urban cluster, as designated by the United States Census Bureau, or, for unincorporated areas, a legal parcel wholly within the boundaries of an urbanized area or urban cluster, as designated by the United States Census Bureau.

(2) The parcel satisfies the requirements specified in subparagraphs (B) to (K), inclusive, of paragraph (6) of subdivision (a) of Section 65913.4.

(3) Notwithstanding any provision of this section or any local law, the proposed housing development would not require demolition or alteration of any of the following types of housing:

(A) Housing that is subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low income.

(B) Housing that is subject to any form of rent or price control through a public entity's valid exercise of its police power.

(C) Housing that has been occupied by a tenant in the last three years.

(4) The parcel subject to the proposed housing development is not a parcel on which an owner of residential real property has exercised the owner's rights under Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 to withdraw accommodations from rent or lease within 15 years before the date that the development proponent submits an application.

(5) The proposed housing development does not allow the demolition of more than 25 percent of the existing exterior structural walls, unless the housing development meets at least one of the following conditions:

(A) If a local ordinance so allows.

(B) The site has not been occupied by a tenant in the last three years.

(6) The development is not located within a historic district or property included on the State Historic Resources Inventory, as defined in Section 5020.1 of the Public Resources Code, or within a site that is designated or listed as a city or county landmark or historic property or district pursuant to a city or county ordinance.

(b) (1) Notwithstanding any local law and except as provided in paragraph (2), a local agency may impose objective zoning standards, objective subdivision standards, and objective design review standards that do not conflict with this section.

(2) (A) The local agency shall not impose objective zoning standards, objective subdivision standards, and objective design standards that would have the effect of physically precluding the construction of up to two units or that would physically preclude either of the two units from being at least 800 square feet in floor area.

(B) (i) Notwithstanding subparagraph (A), no setback shall be required for an existing structure or a structure constructed in the same location and to the same dimensions as an existing structure.

(ii) Notwithstanding subparagraph (A), in all other circumstances not described in clause (i), a local agency may require a setback of up to four feet from the side and rear lot lines.

(c) In addition to any conditions established in accordance with subdivision (b), a local agency may require any of the following conditions when considering an application for two residential units as provided for in this section:

(1) Off-street parking of up to one space per unit, except that a local agency shall not impose parking requirements in either of the following instances:

(A) The parcel is located within one-half mile walking distance of either a high-quality transit corridor, as defined in subdivision (b) of Section 21155 of the Public Resources Code, or a major transit stop, as defined in Section 21064.3 of the Public Resources Code.

(B) There is a car share vehicle located within one block of the parcel.

(2) For residential units connected to an onsite wastewater treatment system, a percolation test completed within the last 5 years, or, if the percolation test has been recertified, within the last 10 years.

(d) Notwithstanding subdivision (a), a local agency may deny a proposed housing development project if the building official makes a written finding, based upon a preponderance of the evidence, that the proposed housing development project would have a specific, adverse impact, as defined and determined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.

(e) A local agency shall require that a rental of any unit created pursuant to this section be for a term longer than 30 days.

(f) Notwithstanding Section 65852.2 or 65852.22, a local agency shall not be required to permit an accessory dwelling unit or a junior accessory dwelling unit on parcels that use both the authority contained within this section and the authority contained in Section 66411.7.

(g) Notwithstanding subparagraph (B) of paragraph (2) of subdivision (b), an application shall not be rejected solely because it proposes adjacent or connected structures provided that the structures meet building code safety standards and are sufficient to allow separate conveyance.

(h) Local agencies shall include units constructed pursuant to this section in the annual housing element report as required by subparagraph (I) of paragraph (2) of subdivision (a) of Section 65400.

(i) For purposes of this section, all of the following apply:

(1) A housing development contains two residential units if the development proposes no more than two new units or if it proposes to add one new unit to one existing unit.

(2) The terms "objective zoning standards," "objective subdivision standards," and "objective design review standards" mean standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal. These standards may be embodied in alternative objective land use specifications adopted by a local agency, and may include, but are not limited to, housing overlay zones, specific plans, inclusionary zoning ordinances, and density bonus ordinances.

(3) "Local agency" means a city, county, or city and county, whether general law or chartered.

(j) A local agency may adopt an ordinance to implement the provisions of this section. An ordinance adopted to implement this section shall not be considered a project under Division 13 (commencing with Section 21000) of the Public Resources Code.

(k) Nothing in this section shall be construed to supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code), except that the local agency shall not be required to hold public hearings for coastal development permit applications for a housing development pursuant to this section.

SEC. 2. Section 66411.7 is added to the Government Code, to read:

66411.7. (a) Notwithstanding any other provision of this division and any local law, a local agency shall ministerially approve, as set forth in this section, a parcel map for an urban lot split only if the local agency determines that the parcel map for the urban lot split meets all the following requirements:

(1) The parcel map subdivides an existing parcel to create no more than two new parcels of approximately equal lot area provided that one parcel shall not be smaller than 40 percent of the lot area of the original parcel proposed for subdivision.

(2) (A) Except as provided in subparagraph (B), both newly created parcels are no smaller than 1,200 square feet.

(B) A local agency may by ordinance adopt a smaller minimum lot size subject to ministerial approval under this subdivision.

(3) The parcel being subdivided meets all the following requirements:

(A) The parcel is located within a single-family residential zone.

(B) The parcel subject to the proposed urban lot split is located within a city, the boundaries of which include some portion of either an urbanized area or urban cluster, as designated by the United States Census Bureau, or, for unincorporated areas, a legal parcel wholly within the boundaries of an urbanized area or urban cluster, as designated by the United States Census Bureau.

(C) The parcel satisfies the requirements specified in subparagraphs (B) to (K), inclusive, of paragraph (6) of subdivision (a) of Section 65913.4.

(D) The proposed urban lot split would not require demolition or alteration of any of the following types of housing:

(i) Housing that is subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of moderate, low, or very low income.

(ii) Housing that is subject to any form of rent or price control through a public entity's valid exercise of its police power.

(iii) A parcel or parcels on which an owner of residential real property has exercised the owner's rights under Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 to withdraw accommodations from rent or lease within 15 years before the date that the development proponent submits an application.

(iv) Housing that has been occupied by a tenant in the last three years.

(E) The parcel is not located within a historic district or property included on the State Historic Resources Inventory, as defined in Section 5020.1 of the Public Resources Code, or within a site that is designated or listed as a city or county landmark or historic property or district pursuant to a city or county ordinance.

(F) The parcel has not been established through prior exercise of an urban lot split as provided for in this section.

(G) Neither the owner of the parcel being subdivided nor any person acting in concert with the owner has previously subdivided an adjacent parcel using an urban lot split as provided for in this section.

(b) An application for a parcel map for an urban lot split shall be approved in accordance with the following requirements:

(1) A local agency shall approve or deny an application for a parcel map for an urban lot split ministerially without discretionary review.

(2) A local agency shall approve an urban lot split only if it conforms to all applicable objective requirements of the Subdivision Map Act (Division 2 (commencing with Section 66410)), except as otherwise expressly provided in this section.

(3) Notwithstanding Section 66411.1, a local agency shall not impose regulations that require dedications of rights-of-way or the construction of offsite improvements for the parcels being created as a condition of issuing a parcel map for an urban lot split pursuant to this section.

(c) (1) Except as provided in paragraph (2), notwithstanding any local law, a local agency may impose objective zoning standards, objective subdivision standards, and objective design review standards applicable to a parcel created by an urban lot split that do not conflict with this section.

(2) A local agency shall not impose objective zoning standards, objective subdivision standards, and objective design review standards that would have the effect of physically precluding the construction of two units on either of the resulting parcels or that would result in a unit size of less than 800 square feet.

(3) (A) Notwithstanding paragraph (2), no setback shall be required for an existing structure or a structure constructed in the same location and to the same dimensions as an existing structure.

(B) Notwithstanding paragraph (2), in all other circumstances not described in subparagraph (A), a local agency may require a setback of up to four feet from the side and rear lot lines.

(d) Notwithstanding subdivision (a), a local agency may deny an urban lot split if the building official makes a written finding, based upon a preponderance of the evidence, that the proposed housing development project would have a specific, adverse impact, as defined and determined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.

(e) In addition to any conditions established in accordance with this section, a local agency may require any of the following conditions when considering an application for a parcel map for an urban lot split:

(1) Easements required for the provision of public services and facilities.

(2) A requirement that the parcels have access to, provide access to, or adjoin the public right-of-way.

(3) Off-street parking of up to one space per unit, except that a local agency shall not impose parking requirements in either of the following instances:

(A) The parcel is located within one-half mile walking distance of either a high-quality transit corridor as defined in subdivision (b) of Section 21155 of the Public Resources Code, or a major transit stop as defined in Section 21064.3 of the Public Resources Code.

(B) There is a car share vehicle located within one block of the parcel.

(f) A local agency shall require that the uses allowed on a lot created by this section be limited to residential uses.

(g) (1) A local agency shall require an applicant for an urban lot split to sign an affidavit stating that the applicant intends to occupy one of the housing units as their principal residence for a minimum of three years from the date of the approval of the urban lot split.

(2) This subdivision shall not apply to an applicant that is a "community land trust," as defined in clause (ii) of subparagraph (C) of paragraph (11) of subdivision (a) of Section 402.1 of the Revenue and Taxation Code, or is a "qualified nonprofit corporation" as described in Section 214.15 of the Revenue and Taxation Code.

(3) A local agency shall not impose additional owner occupancy standards, other than provided for in this subdivision, on an urban lot split pursuant to this section.

(h) A local agency shall require that a rental of any unit created pursuant to this section be for a term longer than 30 days.

(i) A local agency shall not require, as a condition for ministerial approval of a parcel map application for the creation of an urban lot split, the correction of nonconforming zoning conditions.

(j) (1) Notwithstanding any provision of Section 65852.2, 65852.21, 65852.22, 65915, or this section, a local agency shall not be required to permit more than two units on a parcel created through the exercise of the authority contained within this section.

(2) For the purposes of this section, "unit" means any dwelling unit, including, but not limited to, a unit or units created pursuant to Section 65852.21, a primary dwelling, an accessory dwelling unit as defined in Section 65852.2, or a junior accessory dwelling unit as defined in Section 65852.22.

(k) Notwithstanding paragraph (3) of subdivision (c), an application shall not be rejected solely because it proposes adjacent or connected structures provided that the structures meet building code safety standards and are sufficient to allow separate conveyance.

(l) Local agencies shall include the number of applications for parcel maps for urban lot splits pursuant to this section in the annual housing element report as required by subparagraph (I) of paragraph (2) of subdivision (a) of Section 65400.

(m) For purposes of this section, both of the following shall apply:

(1) "Objective zoning standards," "objective subdivision standards," and "objective design review standards" mean standards that involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal. These standards may be embodied in alternative objective land use specifications adopted by a local agency, and may include, but are not limited to, housing overlay zones, specific plans, inclusionary zoning ordinances, and density bonus ordinances.

(2) "Local agency" means a city, county, or city and county, whether general law or chartered.

(n) A local agency may adopt an ordinance to implement the provisions of this section. An ordinance adopted to implement this section shall not be considered a project under Division 13 (commencing with Section 21000) of the Public Resources Code.

(o) Nothing in this section shall be construed to supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code), except that the local agency shall not be required to hold public hearings for coastal development permit applications for urban lot splits pursuant to this section.

SEC. 3. Section 66452.6 of the Government Code is amended to read:

66452.6. (a) (1) An approved or conditionally approved tentative map shall expire 24 months after its approval or conditional approval, or after any additional period of time as may be prescribed by local ordinance, not to exceed an additional 24 months. However, if the subdivider is required to expend two hundred thirty-six thousand seven hundred ninety dollars ($236,790) or more to construct, improve, or finance the construction or improvement of public improvements outside the property boundaries of the tentative map, excluding improvements of public rights-of-way that abut the boundary of the property to be subdivided and that are reasonably related to the development of that property, each filing of a final map authorized by Section 66456.1 shall extend the expiration of the approved or conditionally approved tentative map by 48 months from the date of its expiration, as provided in this section, or the date of the previously filed final map, whichever is later. The extensions shall not extend the tentative map more than 10 years from its approval or conditional approval. However, a tentative map on property subject to a development agreement authorized by Article 2.5 (commencing with Section 65864) of Chapter 4 of Division 1 may be extended for the period of time provided for in the agreement, but not beyond the duration of the agreement. The number of phased final maps that may be filed shall be determined by the advisory agency at the time of the approval or conditional approval of the tentative map.

(2) Commencing January 1, 2012, and each calendar year thereafter, the amount of two hundred thirty-six thousand seven hundred ninety dollars ($236,790) shall be annually increased by operation of law according to the adjustment for inflation set forth in the statewide cost index for class B construction, as determined by the State Allocation Board at its January meeting. The effective date of each annual adjustment shall be March 1. The adjusted amount shall apply to tentative and vesting tentative maps whose applications were received after the effective date of the adjustment.

(3) "Public improvements," as used in this subdivision, include traffic controls, streets, roads, highways, freeways, bridges, overcrossings, street interchanges, flood control or storm drain facilities, sewer facilities, water facilities, and lighting facilities.

(b) (1) The period of time specified in subdivision (a), including any extension thereof granted pursuant to subdivision (e), shall not include any period of time during which a development moratorium, imposed after approval of the tentative map, is in existence. However, the length of the moratorium shall not exceed five years.

(2) The length of time specified in paragraph (1) shall be extended for up to three years, but in no event beyond January 1, 1992, during the pendency of any lawsuit in which the subdivider asserts, and the local agency that approved or conditionally approved the tentative map denies, the existence or application of a development moratorium to the tentative map.

(3) Once a development moratorium is terminated, the map shall be valid for the same period of time as was left to run on the map at the time that the moratorium was imposed. However, if the remaining time is less than 120 days, the map shall be valid for 120 days following the termination of the moratorium.

(c) The period of time specified in subdivision (a), including any extension thereof granted pursuant to subdivision (e), shall not include the period of time during which a lawsuit involving the approval or conditional approval of the tentative map is or was pending in a court of competent jurisdiction, if the stay of the time period is approved by the local agency pursuant to this section. After service of the initial petition or complaint in the lawsuit upon the local agency, the subdivider may apply to the local agency for a stay pursuant to the local agency's adopted procedures. Within 40 days after receiving the application, the local agency shall either stay the time period for up to five years or deny the requested stay. The local agency may, by ordinance, establish procedures for reviewing the requests, including, but not limited to, notice and hearing requirements, appeal procedures, and other administrative requirements.

(d) The expiration of the approved or conditionally approved tentative map shall terminate all proceedings and no final map or parcel map of all or any portion of the real property included within the tentative map shall be filed with the legislative body without first processing a new tentative map. Once a timely filing is made, subsequent actions of the local agency, including, but not limited to, processing, approving, and recording, may lawfully occur after the date of expiration of the tentative map. Delivery to the county surveyor or city engineer shall be deemed a timely filing for purposes of this section.

(e) Upon application of the subdivider filed before the expiration of the approved or conditionally approved tentative map, the time at which the map expires pursuant to subdivision (a) may be extended by the legislative body or by an advisory agency authorized to approve or conditionally approve tentative maps for a period or

periods not exceeding a total of six years. The period of extension specified in this subdivision shall be in addition to the period of time provided by subdivision (a). Before the expiration of an approved or conditionally approved tentative map, upon an application by the subdivider to extend that map, the map shall automatically be extended for 60 days or until the application for the extension is approved, conditionally approved, or denied, whichever occurs first. If the advisory agency denies a subdivider's application for an extension, the subdivider may appeal to the legislative body within 15 days after the advisory agency has denied the extension.

(f) For purposes of this section, a development moratorium includes a water or sewer moratorium, or a water and sewer moratorium, as well as other actions of public agencies that regulate land use, development, or the provision of services to the land, including the public agency with the authority to approve or conditionally approve the tentative map, which thereafter prevents, prohibits, or delays the approval of a final or parcel map. A development moratorium shall also be deemed to exist for purposes of this section for any period of time during which a condition imposed by the city or county could not be satisfied because of either of the following:

(1) The condition was one that, by its nature, necessitated action by the city or county, and the city or county either did not take the necessary action or by its own action or inaction was prevented or delayed in taking the necessary action before expiration of the tentative map.

(2) The condition necessitates acquisition of real property or any interest in real property from a public agency, other than the city or county that approved or conditionally approved the tentative map, and that other public agency fails or refuses to convey the property interest necessary to satisfy the condition. However, nothing in this subdivision shall be construed to require any public agency to convey any interest in real property owned by it. A development moratorium specified in this paragraph shall be deemed to have been imposed either on the date of approval or conditional approval of the tentative map, if evidence was included in the public record that the public agency that owns or controls the real property or any interest therein may refuse to convey that property or interest, or on the date that the public agency that owns or controls the real property or any interest therein receives an offer by the subdivider to purchase that property or interest for fair market value, whichever is later. A development moratorium specified in this paragraph shall extend the tentative map up to the maximum period as set forth in subdivision (b), but not later than January 1, 1992, so long as the public agency that owns or controls the real property or any interest therein fails or refuses to convey the necessary property interest, regardless of the reason for the failure or refusal, except that the development moratorium shall be deemed to terminate 60 days after the public agency has officially made, and communicated to the subdivider, a written offer or commitment binding on the agency to convey the necessary property interest for a fair market value, paid in a reasonable time and manner.

SEC. 4. The Legislature finds and declares that ensuring access to affordable housing is a matter of statewide concern and not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution. Therefore, Sections 1 and 2 of this act adding Sections 65852.21 and 66411.7 to the Government Code and Section 3 of this act amending Section 66452.6 of the Government Code apply to all cities, including charter cities.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because a local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act or because costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

AB-721 Covenants and restrictions: affordable housing. (2021-2022)

Date Published: 09/29/2021 02:00 PM

Assembly Bill No. 721

CHAPTER 349

An act to add Section 714.6 to the Civil Code, relating to real property.

[Approved by Governor September 28, 2021. Filed with Secretary of State September 28, 2021.]

LEGISLATIVE COUNSEL'S DIGEST

AB 721, Bloom. Covenants and restrictions: affordable housing.

Existing law permits a person who holds an ownership interest of record in property that the person believes is the subject of an unlawfully restrictive covenant based on, among other things, source of income, to record a Restrictive Covenant Modification, which is to include a copy of the original document with the illegal language stricken. Before recording the modification document, existing law requires the county recorder to submit the modification document and the original document to the county counsel who is required to determine whether the original document contains an unlawful restriction.

This bill would make any recorded covenants, conditions, restrictions, or limits on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale that restricts the number, size, or location of the residences that may be built on the property, or that restricts the number of persons or families who may reside on the property, unenforceable against the owner of an affordable housing development, as defined, if an approved restrictive covenant affordable housing modification document has been recorded in the public record, as provided, unless a specified exception applies.

The bill would authorize the owner of an affordable housing development to submit, among other things, a copy of the original restrictive covenant and a restrictive covenant modification document, pursuant to the above-described provisions of existing law, that modifies or removes any existing restrictive covenant language to the extent necessary to allow an affordable housing development to proceed. Before recording the restrictive covenant modification document, the bill would require the county recorder to submit documentation received from the owner and the modification document to the county counsel, and would require the county counsel to make specified determinations, including whether the original restrictive covenant document contains an unlawful restriction in violation of these provisions and whether the property qualifies as an affordable housing development.

The bill would specify that its provisions do not apply to restrictive covenants that relate to purely aesthetic objective design standards, provide for fees or assessments for the maintenance of common areas, or provide for limits on the amount of rent that may be charged to tenants. The bill would also specify that its provisions do not apply to conservation easements that meet certain conditions, a recorded interest in land comparable to a conservation easement held by a political subdivision, or any settlement, conservation agreement, or conservation easement for which certain conditions apply. The bill would also specify that its provisions do not

apply to any recorded deed restriction, public access easement, or other similar covenant that was required by a state agency for the purpose of compliance with a state or federal law under certain circumstances.

This bill would declare that ensuring access to affordable and supportive housing and the production of additional affordable and supportive housing is a matter of statewide concern, not a municipal affair, and that this bill shall therefore apply statewide to all cities and counties, including charter cities, and to all conditions, covenants, restrictions, or limits on the use of land, whether recorded previous to the effective date of this bill or recorded at any time thereafter.

By imposing additional duties on counties with regard to recorded covenants, the bill would impose a state-mandated program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to the statutory provisions noted above.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) The lack of available and safe affordable and supportive housing equitably distributed throughout California presents a crisis for Californians that threatens the health of California citizens and their communities.

(b) The Legislature has previously taken action to expand access to affordable and supportive housing.

(c) Recorded covenants burdening real estate have historically been used to perpetuate discrimination and racial segregation in housing throughout the state and have hampered the effectiveness of efforts to expand the availability of affordable and supportive housing.

(d) The safety and welfare of the general public is promoted by eliminating, with limited exceptions as specified herein, the ability of recorded covenants, conditions, restrictions, or private limits on the use of land to prevent the construction or maintenance of additional affordable and supportive housing particularly in areas that have historically excluded this type of housing.

(e) Ensuring access to affordable and supportive housing and the production of additional affordable and supportive housing is a matter of statewide concern and is not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution. It is the intent of the Legislature that this act therefore apply statewide to all cities and counties, including charter cities, and to all conditions, covenants, restrictions, or private limits on the use of land, whether recorded previous to the effective date of this act or recorded at any time thereafter.

SEC. 2. Section 714.6 is added to the Civil Code, to read:

714.6. (a) Recorded covenants, conditions, restrictions, or private limits on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest in real property that restrict the number, size, or location of the residences that may be built on the property, or that restrict the number of persons or families who may reside on the property, shall not be enforceable against the owner of an affordable housing development, if an approved restrictive covenant affordable housing modification document has been recorded in the public record as provided for in this section, except as explicitly provided in this section.

(b) (1) The owner of an affordable housing development shall be entitled to establish that an existing restrictive covenant is unenforceable under subdivision (a) by submitting a restrictive covenant modification document pursuant to Section 12956.2 of the Government Code that modifies or removes any existing restrictive covenant language that restricts the number, size, or location of the residences that may be built on the property, or that restricts the number of persons or families that may reside on the property, to the extent necessary to allow the affordable housing development to proceed under the existing declaration of restrictive covenants.

(2) (A) The owner shall submit to the county recorder a copy of the original restrictive covenant, a copy of any notice the owner believes is required pursuant to paragraph (3) of subdivision (g), and any documents the owner believes necessary to establish that the property qualifies as an affordable housing development under this section prior to, or simultaneously with, the submission of the request for recordation of the restrictive covenant modification document.

(B) Before recording the restrictive covenant modification document, pursuant to subdivision (b) of Section 12956.2 of the Government Code, the county recorder shall, within five business days of receipt, submit the documentation provided to the county recorder by the owner pursuant to subparagraph (A) and the modification document to the county counsel for review. The county counsel shall determine whether the original restrictive covenant document restricts the property in a manner prohibited by subdivision (a), whether the owner has submitted documents sufficient to establish that the property qualifies as an affordable housing development under this section, whether any notice required under this section has been provided, whether any exemption provided in subdivision (g) or (h) applies, and whether the restriction may no longer be enforced against the owner of the affordable housing development and that the owner may record a modification document pursuant to this section.

(C) Pursuant to Section 12956.2 of the Government Code, the county counsel shall return the documents and inform the county recorder of the county counsel's determination within 15 days of submission to the county counsel. If the county counsel is unable to make a determination, the county counsel shall specify the documentation that is needed in order to make the determination. If the county counsel has authorized the county recorder to record the modification document, that authorization shall be noted on the face of the modification or on a cover sheet affixed thereto.

(D) The county recorder shall not record the modification document if the county counsel finds that the original restrictive covenant document does not contain a restriction prohibited by this section or if the county counsel finds that the property does not qualify as an affordable housing development.

(E) A modification document shall be indexed in the same manner as the original restrictive covenant document being modified. It shall contain a recording reference to the original restrictive covenant document, in the form of a book and page or instrument number, and date of the recording. The effective date of the terms and conditions of the modification document shall be the same as the effective date of the original restrictive covenant document, subject to any intervening amendments or modifications, except to the extent modified by the recorded modification document.

(3) If the holder of an ownership interest of record in property causes to be recorded a modification document pursuant to this section that modifies or removes a restrictive covenant that is not authorized by this section, the county shall not incur liability for recording the document. The liability that may result from the unauthorized recordation shall be the sole responsibility of the holder of the ownership interest of record who caused the unauthorized recordation.

(4) A restrictive covenant that was originally invalidated by this section shall become and remain enforceable while the property subject to the restrictive covenant modification is utilized in any manner that violates the terms of the affordability restrictions required by this section.

(5) If the property is utilized in any manner that violates the terms of the affordability restrictions required by this section, the city or county may, after notice and an opportunity to be heard, record a notice of that violation. If the owner complies with the applicable affordability restrictions, the owner may apply to the agency of the city or county that recorded the notice of violation for a release of the notice of violation, and if approved by the city or county, a release of the notice of violation may be recorded.

(6) The county recorder shall charge a standard recording fee to an owner who submits a modification document for recordation pursuant to this section.

(c) (1) Subject to paragraph (2), this section shall only apply to restrictive covenants that restrict the number, size, or location of the residences that may be built on a property or that restrict the number of persons or families who may reside on a property. This section does not apply to any other covenant, including, but not limited to, covenants that:

(A) Relate to purely aesthetic objective design standards, as long as the objective design standards are not applied in a manner that renders the affordable housing development infeasible.

(B) Provide for fees or assessments for the maintenance of common areas.

(C) Provide for limits on the amount of rent that may be charged to tenants.

(2) Paragraph (1) shall not apply to restrictive covenants, fees, and assessments that have not been consistently enforced or assessed prior to the construction of the affordable housing development.

(d) In any suit filed to enforce the rights provided in this section or defend against a suit filed against them, a prevailing owner of an affordable housing development, and any successors or assigns, or a holder of a conservation easement, shall be entitled to recover, as part of any judgment, litigation costs and reasonable attorney's fees, provided that any judgment entered shall be limited to those costs incurred after the modification document was recorded as provided by subdivision (b). This subdivision shall not prevent the court from awarding any prevailing party litigation costs and reasonable attorney's fees otherwise authorized by applicable law, including, but not limited to, subdivision (d) of Section 815.7 of the Civil Code.

(e) Nothing herein shall be interpreted to modify, weaken, or invalidate existing laws protecting affordable and fair housing and prohibiting unlawful discrimination in the provision of housing, including, but not limited to, prohibitions on discrimination in, or resulting from, the enforcement of restrictive covenants.

(f) (1) Provided that the restrictions are otherwise compliant with all applicable laws, this section does not invalidate local building codes or other rules regulating either of the following:

(A) The number of persons who may reside in a dwelling.

(B) The size of a dwelling.

(2) This section shall not be interpreted to authorize any development that is not otherwise consistent with the local general plan, zoning ordinances, and any applicable specific plan that apply to the affordable housing development, including any requirements regarding the number of residential units, the size of residential units, and any other zoning restriction relevant to the affordable housing development.

(3) This section does not prevent an affordable housing development from receiving any bonus or incentive pursuant to any statute listed in Section 65582.1 of the Government Code or any related local ordinance.

(g) (1) Subject to paragraph (2), this section does not apply to:

(A) Any conservation easement, as defined in Section 815.1, that is recorded as required by Section 815.5, and held by any of the entities or organizations set forth in Section 815.3.

(B) Any interest in land comparable to a conservation easement that is held by any political subdivision and recorded in the office of the county recorder of the county where the land is situated.

(2) The exclusion from this section of conservation easements held by tax-exempt nonprofit organizations, as provided in subparagraph (A) of paragraph (1), applies only if the conservation easement satisfies one or more of the following:

(A) It was recorded in the office of the county recorder where the property is located before January 1, 2022.

(B) It is, as of the date of recordation of the conservation easement, held by a land trust or other entity that is accredited by the Land Trust Accreditation Commission, or any successor organization, or is a member of the California Council of Land Trusts, or any successor organization, and notice of that ownership is provided in the text of the recorded conservation easement document, or if that notice is not provided in the text of the recorded conservation easement document, the land trust or other entity provides documentation of that accreditation or membership within 30 days of receipt of either of the following:

(i) A written request for that documentation.

(ii) Any written notice of the intended modification of the conservation easement provided pursuant to paragraph (3).

(C) It was funded in whole or in part by a local, state, federal, or tribal government or was required by a local, state, federal, or tribal government as mitigation for, or as a condition of approval of, a project, and notice of that funding or mitigation requirement is provided in the text of the recorded conservation easement document.

(D) It is held by a land trust or other entity whose purpose is to conserve or protect indigenous cultural resources, and that purpose of the land trust or other entity is provided in the text of the recorded conservation easement document.

(E) It, as of the date of recordation of the conservation easement, burdens property that is located entirely outside the boundaries of any urbanized area or urban cluster, as designated by the United States Census Bureau.

(3) (A) At least 60 days before submission of a modification document modifying a conservation easement to a county recorder pursuant to subdivision (b), the owner of an affordable housing development shall provide written notice of the intended modification of any conservation easement to the parties to that conservation easement and any third-party beneficiaries or other entities that are entitled to receive notice of changes to or termination of the conservation easement with the notice being sent to the notice address of those parties as specified in the recorded conservation easement. The notice shall include a return mailing address of the owner of the affordable housing development, the approximate number, size, and location of intended structures to be built on the property for the purposes of affordable housing, and a copy of the intended modification document, and shall specify that it is being provided pursuant to this section.

(B) The county recorder shall not record any restrictive covenant modification document unless the county recorder has received confirmation from the county counsel that any notice required pursuant to subparagraph (A) was provided in accordance with subparagraph (A).

(h) This section shall not apply to any settlement, conservation agreement, or conservation easement, notice of which has been recorded, for which either of the following apply:

(1) It was entered into before January 1, 2022, and limits the density of or precludes development in order to mitigate for the environmental impacts of a proposed project or to resolve a dispute about the level of permitted development on the property.

(2) It was entered into after January 1, 2022, and limits the density of or precludes development where the settlement is approved by a court of competent jurisdiction and the court finds that the density limitation is for the express purpose of protecting the natural resource or open-space value of the property.

(i) The provisions of this section shall not apply to any recorded deed restriction, public access easement, or other similar covenant that was required by a state agency for the purpose of compliance with a state or federal law, provided that the recorded deed restriction, public access easement, or similar covenant contains notice within the recorded document, inclusive of its recorded exhibits, that it was recorded to satisfy a state agency requirement.

(j) For purposes of this section:

(1) “Affordable housing development” means a development located on the property that is the subject of the recorded restrictive covenant and that meets one of the following requirements:

(A) The property is subject to a recorded affordability restriction requiring 100 percent of the units, exclusive of a manager’s unit or units, be made available at affordable rent to, and be occupied by, lower income households for 55 years for rental housing, unless a local ordinance or the terms of a federal, state, or local grant, tax credit, or other project financing requires, as a condition of the development of residential units, that the development include a certain percentage of units that are affordable to, and occupied by, low income, lower income, very low income, or extremely low income households for a term that exceeds 55 years for rental housing units.

(B) The property is owned or controlled by an entity or individual that has submitted a permit application to the relevant jurisdiction to develop a project that complies with subparagraph (A).

(2) “Affordable rent” shall have the same meaning as defined in Section 50053 of the Health and Safety Code.

(3) “Lower income households” shall have the same meaning as defined in Section 50079.5 of the Health and Safety Code.

(4) “Modification document” means a restrictive covenant modification document described in paragraph (1) of subdivision (b).

(5) “Restrictive covenant” means any recorded covenant, condition, restriction, or limit on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of any interest that restricts the number, size, or location of the residences that may be built on the property or that restricts the number of persons or families who may reside on the property, as described in subdivision (a).

SEC. 3. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

PERSPECTIVE | MAGAZINE

How is it that the average Boston-area house ‘made’ more than a minimum wage worker last year?

Something is wrong when a couple working full time earned less combined than, say, a three-bedroom Colonial in Dedham did in equity just by sitting there.

By Jon Gorey Globe Correspondent, Updated February 3, 2021, 9:56 a.m.

ADOBE STOCK

Between the yardwork, repairs, and maintenance, owning a home can sometimes feel like a full-time job. Last year, though, it also paid like one.

As restless, lockdown-weary buyers stoked competition for the few homes listed for sale during the pandemic, the median price of a Boston-area single-family house rose 9.7 percent in 2020, according to the Greater Boston Association of Realtors — from $620,000 to $680,000. That means the typical Boston-area house earned its owner

$60,000 in equity in a single year. That astonishing sum doesn't represent income that could buy groceries or pay for child care, but it is real wealth that could one day be tapped to pay for college, start a new business, or fund a remodel that increases the home's value even further.

Meanwhile, someone who worked 40 hours a week at minimum wage in 2020 — then a fairly progressive $12.75 an hour in Massachusetts — would have earned only about $26,500 last year. A couple who both worked full time for minimum wage wouldn't have earned as much combined as, say, a three-bedroom Colonial in Dedham did by just sitting there.

In fact, Boston area houses made more money last year, on average, than our preschool teachers, cooks, journalists, and paramedics. That seems … absurd. And lest we're tempted to write this off as an anomaly produced by Boston's famously frenzied housing market, a similar scenario played out nationwide: Median home prices across the United States rose 13 percent through December, according to Redfin, from $295,000 to $334,000, generating about $39,000 of wealth in just a year for the typical American homeowner.

These figures would cast a startling contrast in any year. But against a pandemic that has stolen the lives and livelihoods of Black and brown people with disproportionate ruthlessness, it's particularly jarring. Because even as people of color are more likely to have lost their jobs due to the pandemic, the bulk of housing wealth is accruing to an already privileged class of white homeowners.

In Massachusetts, 67 percent of white households own their home, according to census estimates. That's almost double the Black homeownership rate of 36 percent, and the gap between the two groups remains as wide as it was in 1968, when the Fair Housing Act was passed. The homeownership rate among Latino households in the state is even lower, at just 28 percent.

The roots of these racial disparities are deep and sprawling. From legally racist redlining policies of the 20th century to present-day discrimination that infiltrates the lending, appraisal, and credit scoring industries, structural forces have conspired to shut out too many people of color from homeownership — and the intergenerational wealth it can provide.

"Even before the pandemic, people of color were already disproportionately worse off," says Michael Neal, senior research associate at the Urban Institute. "The impact of the pandemic has really been to quicken and worsen a lot of the structural gaps that were already in place."

The income gap in the United States remains alarmingly vast. The racial wealth gap is even wider. And wealth matters. As Americans, we claim to value hard work, but it's often wealth, not labor, that begets more wealth. Houses are just one example. The S&P 500 gained about 18 percent last year, including dividends, so many 401(k)s likely outearned low-wage workers, too.

"Wealth is actually much more of a predictor of all other disparities — educational disparities, health disparities — than income is," says Dania Francis, assistant professor of economics at the University of Massachusetts Boston. Wealth is intergenerational,

Francis adds, and not just in obvious ways. If parents are able to take out a home equity loan to help pay their kids' college tuition, for example, those children can graduate with less student loan debt, making it easier for them to buy their own homes in a well-funded school district later on. The benefits compound over the generations — or leave you further behind, if your parents and grandparents were forbidden access to the instruments of wealth creation in our country.

Even modest wealth offers a layer of protection from negative life events, such as an illness or job loss. It can also lay the groundwork for entrepreneurship. A safety net of assured support from family can make someone "more willing to start a small business, or more willing to fail at a small business and try again," Francis says.

One positive in the current data, Neal says, is values of lower-priced homes are "by and large rising faster than those of higher priced homes." Since Black homeowners tend to purchase less expensive homes, he adds, they may be seeing particularly strong equity gains.

The flip side, of course, is that entry-level housing is now more costly than ever. And while record-low interest rates are helping buyers stretch their purchasing power, Black home buyers are still more likely to be offered a higher rate or be denied a mortgage altogether, according to a recent Northwestern University study.

Francis has argued that reparations and the dismantling of structural inequalities are the only ways to truly close the racial wealth gap, and research from McKinsey suggests doing so would help the overall economy. Until then, some cities, including Boston, are making their own efforts to boost Black home ownership. Evanston, Illinois, is using cannabis tax revenue to fund reparations programs including grants of up to $25,000 toward a home. Boston now offers grants targeted at first-generation home buyers, in addition to discounted mortgages and down payment assistance for eligible buyers.

Meanwhile, if you're living in a home that has risen in value, it's perfectly reasonable to leverage that windfall to your benefit or that of your kids, Francis says. Just don't

conflate your home’s good luck with your own hard work. “Intergenerational wealth really underlies a lot of advantages,” she says. “It’s OK if the advantage is there — but you can’t pretend that it’s not there.”

Jon Gorey is a regular contributor to the Globe Magazine. Send comments to magazine@globe.com.

Do the rich always get richer?

New research from the Boston Fed argues that the racial wealth gap may be smaller and more stable than thought.

By Larry Edelman Globe Columnist, Updated August 25, 2021, 10:19 a.m.

SHUTTERSTOCK/JOHN BRUESKE

You don't need an economics degree to understand the essence of wealth in this country: The rich get richer, the poor get poorer.

But it's not so easy to quantify the wealth gap with the kind of precision we've come to expect in our Big Data world. Different studies yield different results, depending on the statistics and assumptions researchers plug into their mathematical models

statistics and assumptions researchers plug into their mathematical models.

Just how rich are the rich? Do the poor really get poorer?

A paper released last week by the Federal Reserve Bank of Boston is the latest effort to examine these questions through the prism of race. It finds — somewhat surprisingly, at least to me — that disparities in wealth between white families and families of color are smaller than other studies have asserted. Moreover, the differences have been fairly stable over the past three decades.

The conclusions are driven by a broader calculation of wealth than those used in much of the other research on the topic. The overall picture remains one of Croesus-scale capital held by a small swath of society, but this report expands our understanding of one of the country's most fundamental and pernicious problems.

Here are four things I learned.

First, there's more than one way to count wealth.

Most research has used some form of net worth as a proxy for wealth. Simply put, net worth — also known as market wealth — is the sale value of what you own (a home, a business, stocks, for example) minus the amount you owe (a mortgage, credit card debt

business, stocks, for example) minus the amount you owe (a mortgage, credit card debt, etc.). But even studies using net worth can vary significantly based on their specific parameters.

A stark example: One report, produced in 2015 and highlighted later in a Globe Spotlight series, found that the median net worth of US-born Black families in Boston was a confounding $8, while it was $12,000 for Caribbean-born black families and $247,500 for all white families in the city. (The median is the midpoint of the range of values being analyzed.)

But a year later, the widely followed Survey of Consumer Finances, conducted every three years by the Federal Reserve in Washington, put the median net worth of all Black households nationally — native born and immigrant — at $17,600, compared with $171,000 for white households.

Two different cuts of the demographics. Two different population surveys used to arrive at net worth. Two different bottom lines.

The authors of the new paper — the Boston Fed's Jeffrey Thompson and Alice Henriques Volz of the Federal Reserve in Washington — go beyond net worth, estimating what they call "combined wealth." It's their version of net worth plus two key additions: Social Security and traditional pensions.

Thompson and Henriques Volz calculated combined wealth for a sample of households where the family head was 40 to 59 years old, an age group for which they said they could more accurately project Social Security and pension income in retirement.

What they found: When looking at just market wealth, white families had 5.8 times the median net assets of Black families in 2019, a ratio that fell by almost half to 3.0 when using combined wealth. For Hispanic families, the ratio went from 3.9 to 2.2. The combined-wealth ratios have remained relatively constant since 1989.

In dollar terms, median combined wealth for Black families was $197,000, five times more than their market wealth alone. For Hispanic families, median combined wealth

was $269,000, also five times their market wealth. For white families, median combined wealth was $596,000, but that was less than three times their market wealth.

The study also examines average wealth figures, which are higher than the median because the insanely vast fortunes of the one percenters tilts the scales. But the trends are the same.

Second, Social Security and pensions can be pivotal for families of color.

Social Security income is a far more important financial resource for families of color than for white families, according to the report. For median Black and Hispanic households, projected Social Security wealth was three times their market wealth. For white families, market wealth was higher.

Most private-sector employers have eliminated traditional pensions, which provide a defined monthly payment, in favor of 401(k)-type plans, where workers direct a portion of their paycheck to investment accounts whose proceeds are supposed to fund retirement. But traditional pensions are still relatively common in the public sector, especially among federal workers, where the proportion of Black workers is bigger.

That helps explain why among Black families, average wealth from defined benefit pensions exceeded market wealth. For white and Hispanic households, market wealth was substantially higher. (Pensions don't play a big role when looking at median wealth because far less than half of each group has them.)

"There is a missing piece" in most tallies of wealth for people of color, Thompson said in an interview, referring to pensions and Social Security. "They are counting on it. It's important to them."

Excluding these future income streams limits our understanding of the sources and concentration of wealth, Thompson said.

Third, Asian American families are now the richest demographic in the country.

Thompson and Henriques note that Asians are often not tracked in wealth surveys due to their relatively small sample sizes. They got around that obstacle by combining the

results of two Fed consumer finance surveys (2010-13 and 2016-19) and expanding the age range for heads of households to 30 to 62 years old.

Using this method, median combined wealth for Asian families was $806,000 compared with $539,000for white households.

Finally, not all sources of wealth are created equal.

Thompson and Henriques Volz concede that Social Security and traditional pensions come with significant drawbacks: They are usually available only in retirement and in fixed amounts over fixed periods of time; they can't be used as collateral for a loan; and while family members may get survivors' benefits, the head-of-household income streams can't be inherited or gifted.

Or, as Tiffiany Howard, an associate professor of political science at the University of Nevada, Las Vegas, put it: "It's not a form of wealth if you don't own it."

Unlike stocks or a second home, you can't sell your pension if you lose your job or get sick and need cash to get by, Howard said. "It can't be a cushion in an emergency."

William Darity, a coauthor of the 2015 study that reported the $8 net worth for US-born Black families in Boston, raised another issue.

While the ratio for the white-Black wealth gap narrowed by almost half when using the combined wealth measure, the difference in dollars grew larger: $399,000 for combined wealth compared with $176,000 for market wealth.

Darity, a professor of economics and public policy at Duke University, is a proponent of reparations for Black American descendants of persons enslaved in the United States, using federal payments to bring up their net worth to the level of white Americans.

"Ironically, if I were to take these [combined wealth numbers] numbers at face value, the reparations bill would be even larger," he said.

In our interview I asked Thompson whether the smaller disparity in wealth he and Henriques Volz identified using combined market wealth suggested the problem wasn't as intractable as he previously thought. Of course not, he said.

The research points to the merits of preserving public-sector pensions and Social Security to protect the financial resources of Black and Hispanic workers in retirement. But the underlying causes of the wealth gap — racism and its role in the inequality of education, income, home ownership, and intergenerational wealth — remain.

"You still have conversations about all the same policy questions," he said. "It's all still on the table."

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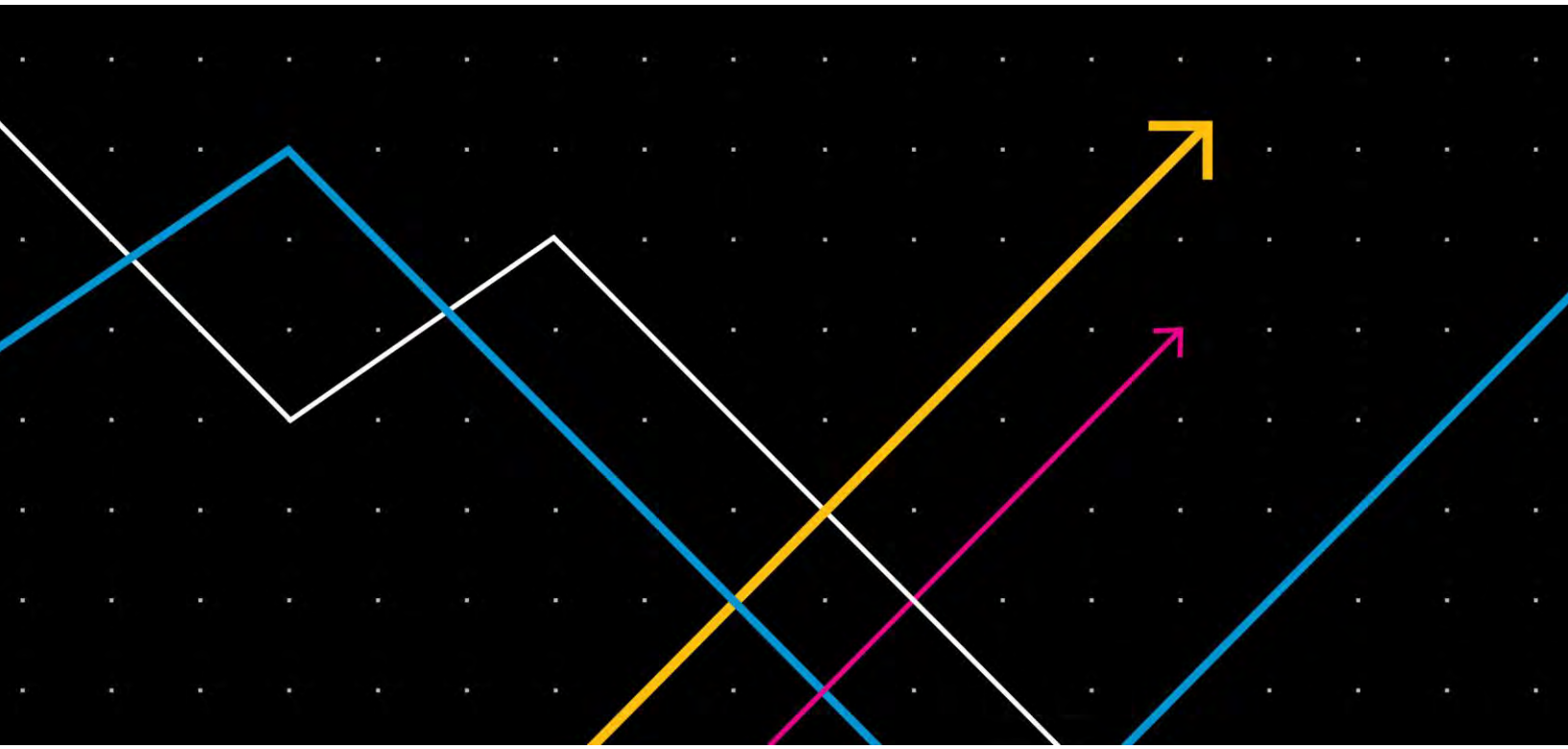

RESEARCH REPORT

Intergenerational Homeownership

The Impact of Parental Homeownership and Wealth on Young Adults' Tenure Choices

Jung Hyun Choi *Jun Zhu* *Laurie Goodman*

October 2018

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Contents

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Executive Summary

This study examines how parents' homeownership and wealth influence young adults' (ages 18 to 34) tenure choices. Using Panel Study of Income Dynamics data between 1999 and 2015, we show that the children of homeowners are 7 to 8 percentage points more likely to be homeowners than children of renters, all else equal. Additionally, a 10 percent increase in parental wealth increases young adults' likelihood of owning a home by 0.15 to 0.20 percentage points. The difference in parental homeownership and wealth explains 12 to 13 percent of the homeownership gap between black and white young adults. Our study also shows that the stability of parents' homeownership and the amount of wealth they possess also affect their child's likelihood of owning a home. The impact of parental homeownership and wealth on young adults' homeownership also varies across time and location. The parental homeownership effect was stronger during the economic boom, and the wealth effect was stronger during the bust, when credit tightened. Both parental wealth and homeownership have a stronger relationship with young adults' likelihood of homeowning in low-cost cities, where housing is more affordable.

Intergenerational Homeownership

Introduction

Young adults are delaying the transition to homeownership. Our recent report on millennial homeownership finds that millennials ages 18 and 34 are 7 to 8 percentage points less likely to be homeowners than Gen Xers and baby boomers at the same age (Choi et al. 2018). We also find persistent racial and ethnic disparities in homeownership.

As the US population becomes more racially and ethnically diverse, it is important to ask how the significant decline and ongoing gaps in homeownership will affect future generations. Historically, homeownership has been an important wealth-building asset. Wealth accumulation is financially beneficial not only to the homeowners themselves but can also be transferred to their children. This intergenerational homeownership transfer is likely to reinforce and expand the homeownership and wealth gaps across race and ethnicity.

This study examines the impact of parents' homeownership and wealth on the homebuying prospects of their children between 1999 and 2015. We focus on young adults ages 18 to 34, who are likely to be first-time homebuyers and have fewer financial resources. We find that having a homeowning parent increases a young adult's likelihood of being a homeowner by 7 to 8 percentage points. Additionally, a 10 percent increase in parental wealth increases a young adult's likelihood of owning by 0.15 to 0.2 percentage points. For example, if parental wealth is $200,000, the young adult would have a 50 percent likelihood of owning a home. If parental wealth is $260,000 instead and all other factors are the same, the young adult's homeownership propensity is 54.5 to 56.0 percent. Parental wealth includes financial assets and nonfinancial assets, such as homes and automobiles, minus any debt. Parents' tenure status and wealth explains 12 to 13 percent of the difference in homeownership between black and white young adults.

Additionally, our regression analysis demonstrates that the impact of parents' homeownership on the likelihood of a young adult's homeownership is the strongest for parents who stayed homeowners from 1999 to 2015, the entire sample period. While 71.5 percent of white parents were stable homeowners, only 31.4 percent of black parents sustained their homeownership. Parents also need to have sufficient wealth to support their young adult's homeownership. Young adults are more likely to

be homeowners if their parental wealth is above $200,000. More than 50 percent of white parents and only 10 percent of black parents hold more than $200,000 of wealth.

Finally, we examine whether our results change across time and location. Parents' homeownership and young adults' homeownership have a stronger relationship in low-cost cities. The impact of parental wealth is also higher in low-cost cities where housing is more affordable, but young adults in high-cost cities are also more likely to be homeowners if their parents have greater wealth. The relationship between parents' and young adults' homeownership became weaker after the housing crisis, and the crisis may have shifted young adults' perceptions of homeownership, especially before the economic recovery. The influence of parental wealth on a young adult's homeownership became slightly stronger postcrisis, probably reflecting the tighter borrowing constraints.

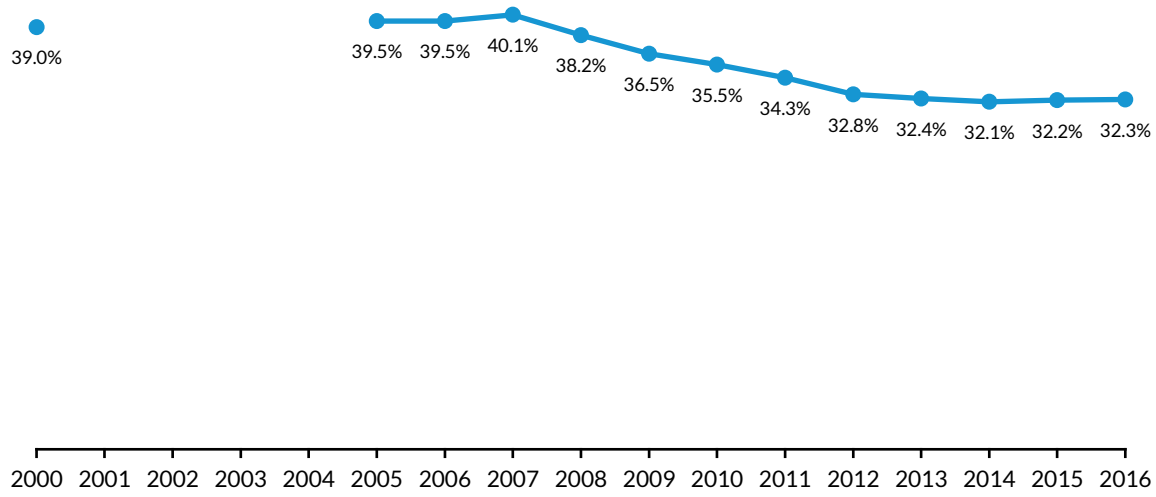
In recent years, house prices have increased (especially at the lower end of the market and in areas where supply is limited) while credit continues to be tight. Our research suggests that young adults who can receive sufficient help from their parents are more likely to access homeownership than in the past. We also make several policy recommendations to support first-time homebuyers who do not have parental assistance: (1) improve financial education on homeownership, (2) introduce tax-free accounts to save for a down payment, and (3) expand the credit box to include more creditworthy borrowers. These policies could help bridge the racial and ethnic gaps in homeownership and expand the wealth-building opportunity for future generations.

Decline and Disparities in Young Adults' Homeownership

The homeownership rate among young adults ages 18 to 34 has dropped from 39.0 percent in 2000 to 32.3 percent in 2016. According to the American Community Survey (ACS), which has provided annual data since 2005, the young adult homeownership rate has decreased consistently since 2007, when the housing market started to collapse.

FIGURE 1

Homeownership Rate among Household Heads Ages 18 to 34



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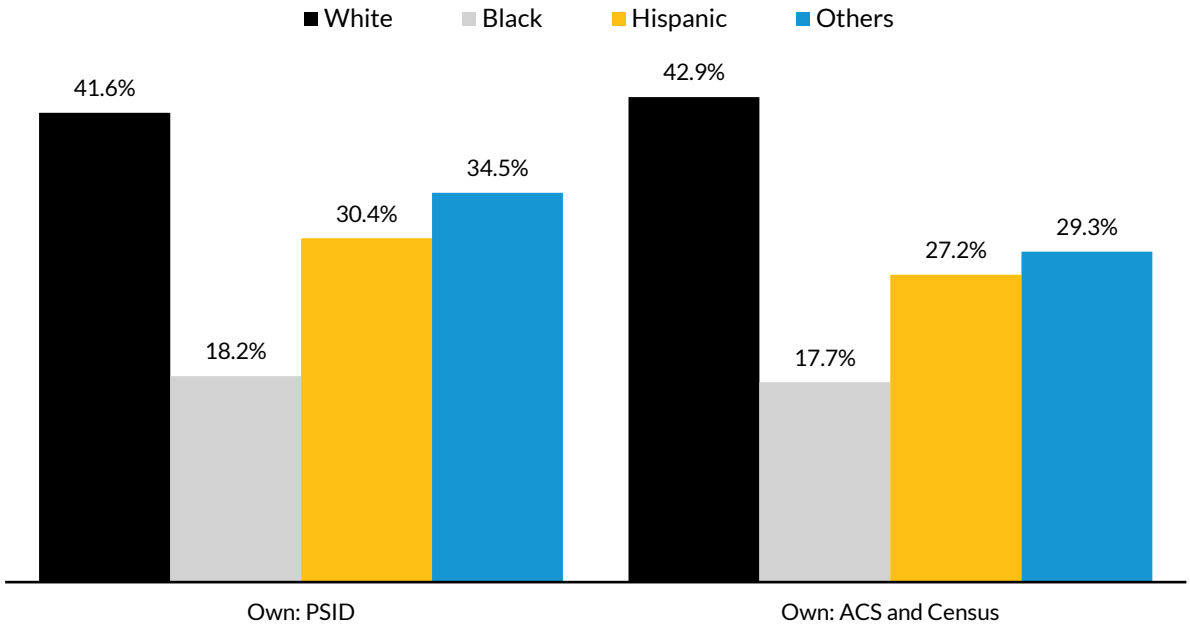
Sources: Decennial Census (2000) and American Community Survey (2005–16).

During this period, the racial and ethnic disparity in homeownership persisted. Both the Panel Study of Income Dynamics[1] and Census Bureau and ACS data show that white young adults have the highest homeownership rate (more than 40 percent), and black young adults have the lowest rate (less than 20 percent).

FIGURE 2

Homeownership Rate among Household Heads Ages 18 to 34 by Race and Ethnicity



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Sources: PSID (1999–2015), Decennial Census (2000), and ACS (2005–16).
Note: ACS = American Community Survey; PSID = Panel Study of Income Dynamics.

Multiple factors contribute to the decline in young adults' homeownership (see Choi et al. [2018] for a comprehensive analysis) and the gaps across race and ethnicity, but we focus on parental influence to better understand how current trends could be passed to the next generation.

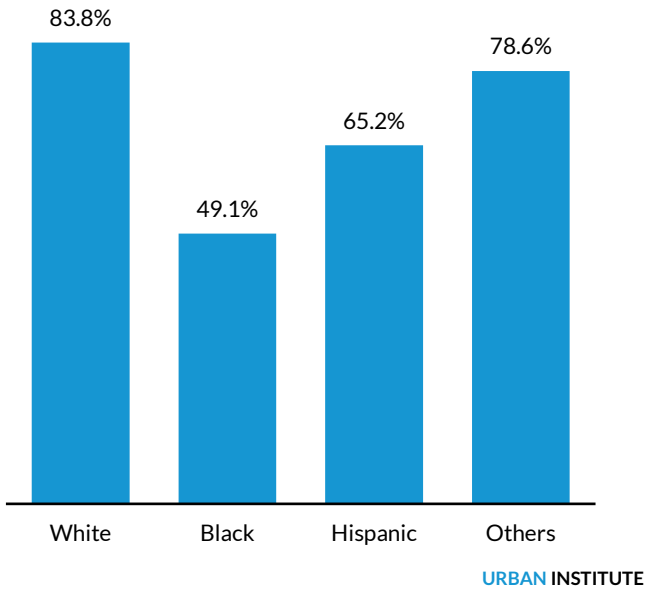
This study uses the Panel Study of Income Dynamics (PSID), a panel dataset that has followed a sample of US individuals and households since 1968. Since 1997, the survey data have been collected biannually. The PSID allows us to link parents' information to young adults' information, and we can examine how parental wealth and homeownership status affect a young adult's propensity of owning a home. As the dataset contains extensive information on individual- and household-level characteristics, we can control for other observable factors that are linked to a young adult's tenure choices. Wealth variables were first included in the 1984 survey and were collected every five years until 1999. Since 1999, the PSID has collected wealth information in every survey period, which is why we selected 1999 to 2015 as our sample period. This covers periods when the US housing market experienced a boom and a bust.

Racial and Ethnic Disparities in Parental Wealth and Parental Homeownership

The disparities in young adults' homeownership rates by race and ethnicity look similar to the disparities in parental homeownership rates. White parents have the highest homeownership rate (83.8 percent), and black parents have the lowest (49.1 percent). The homeownership rate is 65.2 percent for Hispanic parents and 78.6 percent for the remaining parents. The PSID oversamples low-income white and black households, so the sample size of Hispanic and Asian households is small. We combine Asians with other racial and ethnic groups to increase our sample size. In all our analyses, we use sample weights to increase representativeness.

FIGURE 3

Parental Homeownership Rate by Race or Ethnicity, 1999–2015



Source: Panel Study of Income Dynamics.

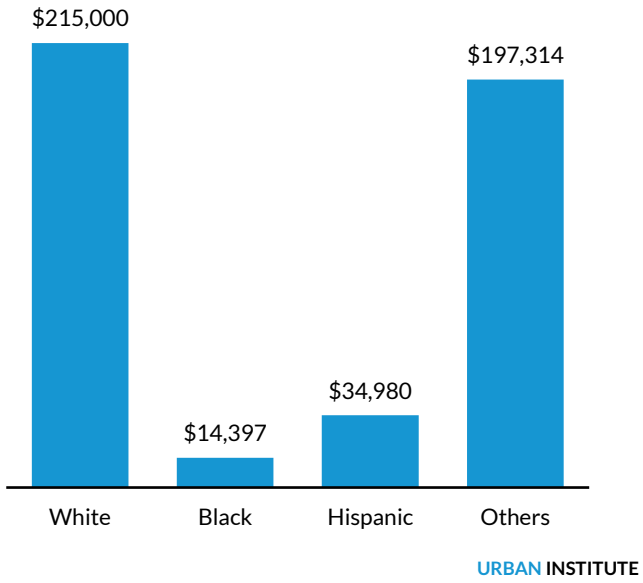
Living with a homeowner parent could help a young adult gain access to homeownership in many ways. For example, the young adult could obtain more information about the mortgage application process from his or her parents. Further, the young adult may have greater motivation to become a homeowner, having realized the benefits of owning. Not only can homeownership help future wealth building, but prior research has also suggested that homeownership can have a positive influence on a young adult's educational attainment, civic participation, and health outcomes (DiPasquale and Glaeser 1999; Green and White 1997; Rohe and Stegman 1994), although it is difficult to confirm the casual

relationship because of selection bias. Studies by Boehm and Schlottmann (1999) and Helderman and Mulder (2007) have found a strong statistical association between parental homeownership and child homeownership.

Parental wealth also shows substantial variations across race and ethnicity. Median wealth for white parents is $215,000, compared with $35,000 for Hispanic parents and $14,400 for black parents. Parents of other races and ethnicities have almost the same level of wealth as white parents, but because their sample size is small (about 40 households a year), the median wealth likely contains substantial measurement error.

FIGURE 4

Parental Median Wealth by Race and Ethnicity in 2015 Dollars, 1999–2015



Source: Panel Study of Income Dynamics.

Parental wealth can have a more direct impact on a young adult's ability to afford a home, especially with respect to having a down payment. Charles and Hurst (2002) find that differences in parents' ability and willingness to provide down payment assistance to their children explains a significant portion of the mortgage application gap between black and white children. Begley (forthcoming) finds that increases in parental housing wealth increases the likelihood of providing a financial transfer to their children, which also increases the young adult's likelihood of becoming a homeowner. This effect was pronounced during the housing bust. Lee and coauthors (2018) also find that financial transfers increase a young adult's probability of becoming a homeowner. Moreover, affluent parents can more easily cosign the loan if their support is needed.

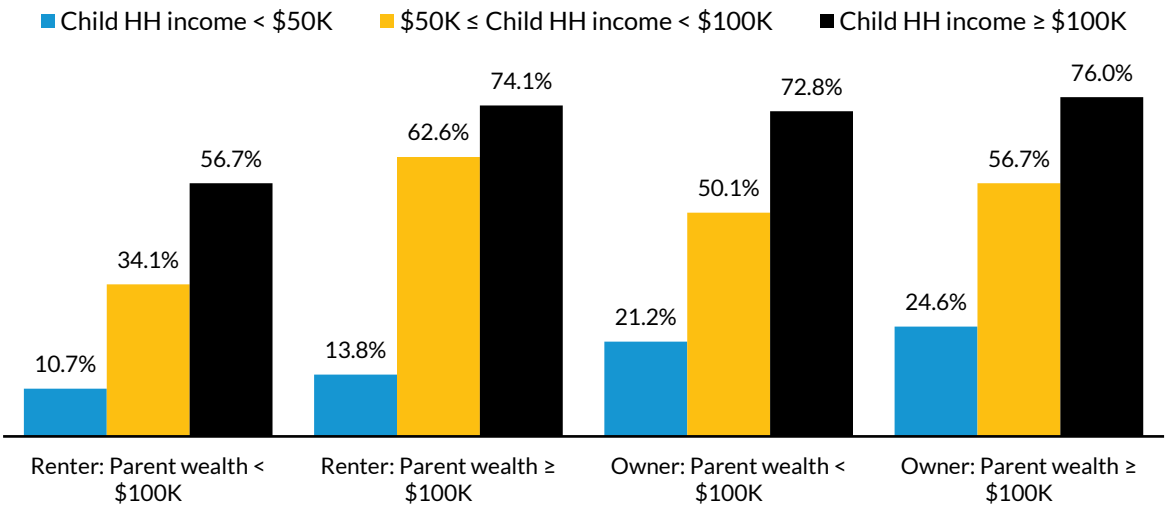
Impact of Parental Homeownership and Wealth on Young Adult's Homeownership

Before presenting the results of our regression analysis, figure 5 depicts how parental wealth and homeownership are related to young adults' homeownership. We divide young adults by their parents' tenure status and calculate the homeownership rate by their household income and their parents' wealth.

A young adult's household income and homeownership are highly correlated. For all four groups, a young adult's homeownership rate increases with household income. This effect is compounded by parental homeownership status. In general, children of homeowners have a higher homeownership rate than those with parents who are renters. The homeownership gap is larger for those whose parents have less than $100,000 in wealth. Finally, the difference in homeownership between those with high-wealth parents and those with low-wealth parents is largest for those earning between $50,000 and $100,000 (middle income). Intuitively, this makes sense. For the lower income group, parental wealth transfers may not be enough to help the child to obtain a mortgage. The high-income group will rely less on parental support, as they are likely to have enough financial resources to access homeownership independently.

FIGURE 5

Young Adults' Homeownership by Household Income, Parental Homeownership, and Parental Wealth, 1999–2015



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Source: Panel Study of Income Dynamics.
Note: HH = household.

We use a linear probability model (LPM) to estimate the effect of parental wealth and homeownership on young adults' homeownership. Although our dependent variable is bivariate (1 if the young adult is a homeowner, 0 otherwise), we use the LPM because the coefficients are easy to interpret. Prior studies, including one by Angrist and Pischke (2009), suggest that the difference between marginal effects calculated from the LPM and logit (or probit) models is minor when the mean of the dependent variable ranged between 0.2 and 0.8. The mean value of a young adult's homeownership is 0.35. For robustness, we provide the results of the logit model in appendix table A.1, which shows results similar to the ones in table 1.

The first column of table 1 shows that black and Hispanic homeownership rates are significantly lower than the white homeownership rate. Without including controls, the homeownership rate for black young adults is 23.3 percentage points lower than the homeownership rate for white young adults. The gap between Hispanic and white young adults is 11.1 percentage points. Young adults in the Other category also have a negative coefficient, but because of the small sample size, the standard error is too large to generate statistical significance.

Column 2 includes young adults' demographic and socioeconomic characteristics, including age, sex, marital status, education, a dummy variable for having a child, and household income. We also include year and fixed effects. Once we include controls, the statistical difference in homeownership between Hispanic and white young adults disappears. The homeownership gap between black and white young adults drops to 15.7 percentage points but remains statistically significant. These results are in line with previous studies (Painter, Gabriel, and Myers 2001) that find that the differences in observable characteristics largely explain the homeownership rate gap between white and Hispanic households but do not fully explain the gap between black and white households.

As for other variables, we find that young adults are more likely to own a home as they get older. Females are less likely to be homeowners than males. Married young adults and those with children are more likely to own. The likelihood of owning increases with educational attainment and household income.

Columns 3 and 4 include parental homeownership and wealth separately. Column 3 shows that young adults whose parents own homes are 7.4 percentage points more likely to a home than young adults whose parents are renters. Column 4 shows that a 1 percent increase in parental wealth increases the likelihood of a young adult's homeownership by 0.021 percentage points. Column 5 includes parents' tenure status and their wealth in one regression model. We also include how many times parents have moved between 1999 and 2015 to examine whether housing stability affects young

adults' homeownership. Because parental wealth and homeownership are correlated, both coefficients become smaller than those in columns 3 and 4. Now, children of homeowners are 4.0 percentage points more likely to own than those with renter parents. A 1 percent increase in parental wealth increases a young adult's likelihood of owning by 0.017 percentage points. The variable that measures the number of times the parent has moved is statistically insignificant.

TABLE 1

How Parental Homeownership and Wealth Affect Young Adults' Homeownership

Variables	**(1)**	**(2)**	**(3)**	**(4)**	**(5)**
Black	-0.233***	-0.157***	-0.142***	-0.129***	-0.128***
	(0.021)	(0.019)	(0.020)	(0.020)	(0.020)
Hispanic	-0.111***	-0.011	-0.003	0.011	0.011
	(0.036)	(0.030)	(0.030)	(0.030)	(0.030)
Others	-0.071	-0.013	-0.011	-0.009	-0.009
	(0.068)	(0.070)	(0.070)	(0.069)	(0.069)
Parent own			0.074***		0.040**
			(0.018)		(0.020)
ln(parent wealth)				0.021***	0.017***
				(0.004)	(0.004)
Age		0.022***	0.022***	0.022***	0.022***
		(0.002)	(0.002)	(0.002)	(0.002)
Female		-0.099***	-0.100***	-0.098***	-0.099***
		(0.015)	(0.015)	(0.015)	(0.015)
Married		0.109***	0.107***	0.108***	0.107***
		(0.019)	(0.019)	(0.019)	(0.019)
Divorced, separated, widowed		0.030	0.030	0.035	0.035
		(0.026)	(0.026)	(0.026)	(0.026)
High school		0.094***	0.086***	0.083**	0.081**
		(0.033)	(0.033)	(0.033)	(0.033)
College		0.111***	0.097***	0.084**	0.083**
		(0.033)	(0.033)	(0.033)	(0.034)
Child exist		0.134***	0.136***	0.142***	0.141***
		(0.015)	(0.015)	(0.015)	(0.015)
ln(Household income)		0.100***	0.099***	0.095***	0.095***
		(0.007)	(0.007)	(0.007)	(0.007)
Parent: Number of moves					0.002
					(0.005)
Constant	0.416***	-1.584***	-1.620***	-1.771***	-1.763***
	(0.011)	(0.127)	(0.130)	(0.133)	(0.136)
Year fixed effect	N	Y	Y	Y	Y
State fixed effect	N	Y	Y	Y	Y
Observations	9,944	9,944	9,944	9,944	9,944
R^2	0.029	0.288	0.291	0.293	0.294

Source: Panel Study of Income Dynamics.

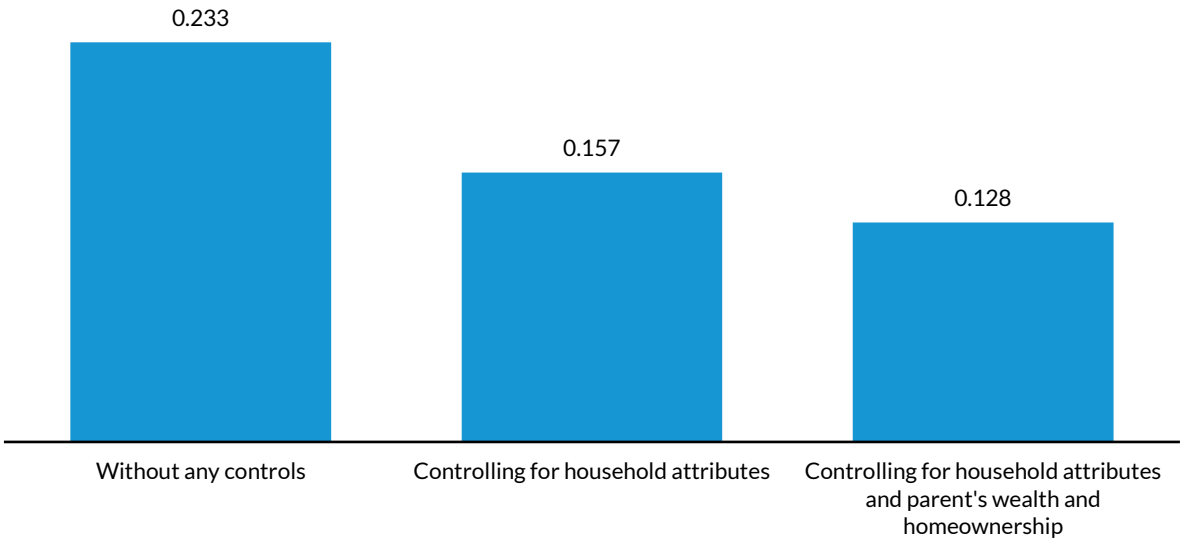
Notes: All regressions are weighted by household weights provided by the Panel Study of Income Dynamics. Standard errors are clustered by household ID. The numbers in the parenthesis are standard errors.

*** $p < 0.01$; ** $p < 0.05$.

Table 1 demonstrates that the difference in the white-black homeownership rate of young adults decreases as more control variables are added to the regression. Figure 6 visualizes the results. The black-white homeownership gap decreases from 23.3 percentage points to 15.7 percentage points once the control variables are included. It further decreases to 12.8 percentage points when we include parental homeownership rate and wealth. This means that parental variables explain about 12.4 percent ((15.7−12.8/23.3)) of the homeownership gap between black and white young adults.

FIGURE 6

How Parental Homeownership and Wealth Affect the Black-White Homeownership Gap among Young Adults, 1999–2015



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Source: Panel Study of Income Dynamics.

Parents' Homeownership Stability and Wealth Threshold: Black versus White

Table 2 further investigates whether parental homeownership stability and wealth affect young adults' homeownership. We include the same control variables as columns 2 to 4 in table 1. In column 1 of table 2, we categorize parents into five groups based on their tenure transitions: (1) those who remained renters between 1999 and 2015 (reference category), (2) those who remained homeowners, (3) those who switched from owning to renting, (4) those who switched from renting to owning, and (5) those who made more than one transition between owning and renting. In column 2, we classify parents into three

groups according to their wealth: (1) those with wealth less than $100,000 (reference category), (2) those with wealth between $100,000 and $200,000, and (3) those with wealth above $200,000.

Column 1 demonstrates that only young adults with parents who remained owners during the whole sample period are statistically more likely to be homeowners than young adults whose parents who were renters the entire period. For the other three groups, we find a young adult's likelihood of owning does not differ from those whose parents never owned a home. This suggests that the children of stable homeowners may have a more positive view toward owning a home or receive more information about obtaining a home from their parents. Our housing stability measure likely also captures parents' financial stability. Parents in a stable financial situation can more easily support their children's home purchase.

Column 2 shows that young adults with parental wealth greater than $200,000 are significantly more likely to be homeowners than those with parental wealth less than $100,000. But young adults whose parents have wealth between $100,000 and $200,000 are no more likely to be homeowners than those whose parents have wealth below $100,000, suggesting that parents need to have a threshold amount of wealth to financially support their child's homeownership.

TABLE 2

How Parental Homeownership Stability and Wealth Affect Young Adults' Homeownership

Variables	(1)	(2)
Parent: Stayed owner	0.060**	
	(0.030)	
Parent: Owner to renter	0.008	
	(0.038)	
Parent: Renter to owner	0.028	
	(0.034)	
Parent: Frequent transition	0.035	
	(0.034)	
$100K < parent wealth ≤ $200K		0.015
		(0.019)
$200K < parent wealth		0.071***
		(0.017)
Parent own		0.055***
		(0.019)
ln(Parent wealth)	0.016***	
	(0.004)	
Controls	Y	Y
Year fixed effect	Y	Y
State fixed effect	Y	Y
Observations	9,944	9,944
R^2	0.294	0.294

Source: Panel Study of Income Dynamics.

Notes: All regressions are weighted by household weights provided by the Panel Study of Income Dynamics. Control variables include age, sex, marital status, education, presence of children, and household income. Standard errors are clustered by household ID. The numbers in the parenthesis are standard errors.

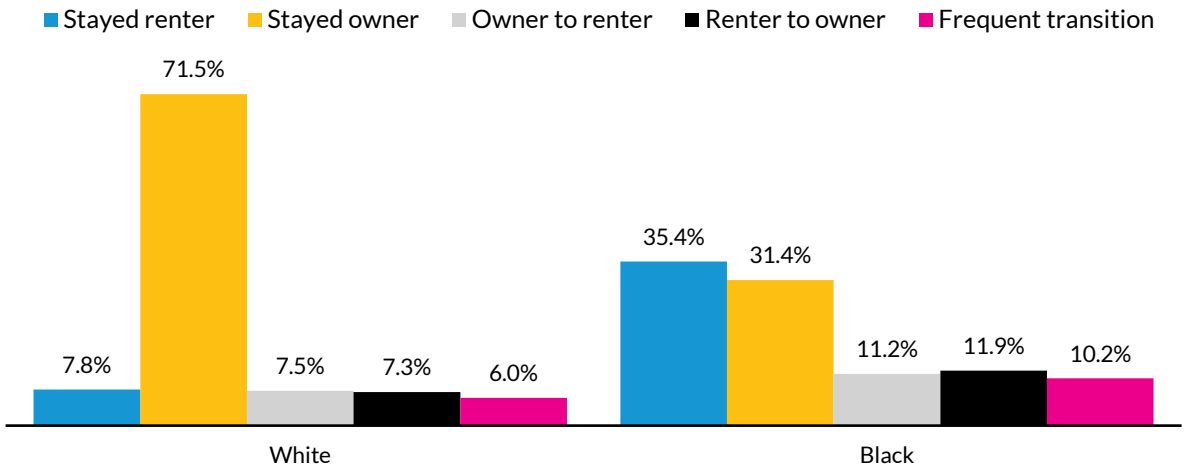
*** $p < 0.01$; ** $p < 0.05$.

These findings suggest a persistent gap in homeownership unless we develop new policies. To further understand how parental wealth and homeownership status is associated with young adults' homeownership disparities, we compare parental homeownership stability and wealth for black and white parents. We focus on these two groups because the PSID oversamples these households and thus we have a sufficient sample size to obtain statistical accuracy.

Black parents are less likely to be homeowners than white parents and less likely to remain homeowners (figure 7). Among white parents, 71.5 percent remained homeowners from 1999 to 2015, compared with 31.4 percent of black parents. Black parents are more likely to move in and out of homeownership, which appears to weaken the relationship between parents' homeownership and their child's homeownership.

FIGURE 7

Parental Homeownership Stability: Black versus White

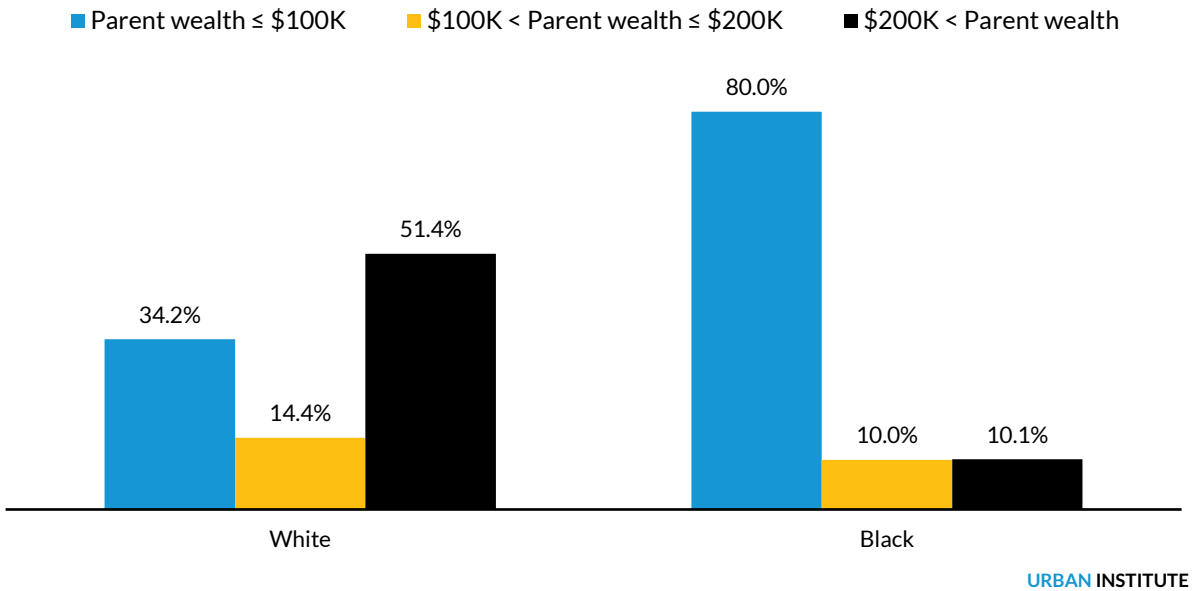


Source: Panel Study of Income Dynamics.

Furthermore, we find that parents need to have a threshold level of wealth to support their children's home purchase: 51.4 percent of white young adults have parents with wealth above $200,000, compared with 10.1 percent of black young adults (figure 8). This suggests that black parents' wealth is not likely to be enough to provide financial support for their child's homeownership.

FIGURE 8

Parental Wealth Brackets: Black versus White



Source: Panel Study of Income Dynamics.

Parental Influence across Location and Time

The impact of parental wealth and homeownership on a young adult's homeownership can differ by location and time. Because of differing housing costs, the down payment required for buying differs across cities. Credit conditions also change. Credit tightened following the housing market crisis. Obtaining mortgages became more difficult for young adults who, on average, have lower credit scores, income, and wealth. These differences can affect the impact of parents' homeownership and wealth on a young adult's homeownership.

For the locational analysis, we use the geocoded PSID data and merge the median price of house sales from CoreLogic for each city by each time period. Table 3 shows that the relationship between parental homeownership and child homeownership and parental wealth and child homeownership remains similar to the results in table 1 after the city-level median house price is controlled for. Children of homeowners are 4.1 percentage points more likely to be homeowners, and a 1 percent increase in parental wealth increases the likelihood of a young adult's homeownership by 0.017 percentage points, after controlling for socioeconomic and demographic characteristics. Also, young adults are less likely to be homeowners in expensive cities. A 1 percent increase in the city-level house prices decreases a young adult's likelihood of owning by 0.049 percentage points (appendix table A.2).

TABLE 3

How Parental Homeownership and Wealth Affect Young Adults' Homeownership, by Housing Cost

Variables	(1)
Parent own	0.041*
	(0.024)
ln(parent wealth)	0.017**
	(0.005)
ln(house price)	-0.045**
	(0.022)
Controls	Y
Year fixed effect	Y
State fixed effect	Y
Observations	7,004
R^2	0.300

Source: Panel Study of Income Dynamics.

Notes: All regressions are weighted by household weights provided by the Panel Study of Income Dynamics. Control variables include age, sex, marital status, education, presence of children, and household income. Standard errors are clustered by household ID. The numbers in the parenthesis are standard errors.

** p <0.05; * p <0.1.

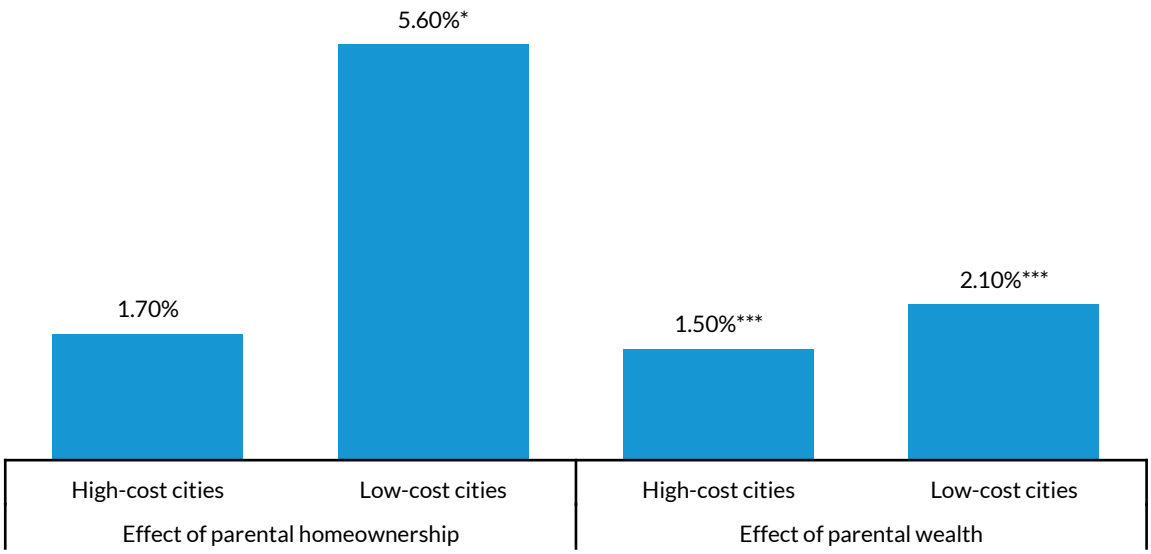
We further divide the sample in three and run the same regression as table 3. The 2015 inflation-adjusted median house price in our sample is $150,000, so we use that number to classify high- and low-

cost cities. The remaining young adults live in small cities or rural areas where house price data are not available. Figure 10 shows that parental influence on young adults' homeownership varies by location. Being a homeowner's child increases a young adult's likelihood of owning by 5.6 percentage points in low-cost cities, but this likelihood decreases to 1.7 percentage points in high-cost cities. The homeownership impact is statistically insignificant in high-cost cities. In expensive cities, knowing the benefits of homeownership and having more information about the process may have less impact than in low-cost cities, as it is more difficult to afford a home in high-cost cities.

An increase in parental wealth significantly increases the likelihood of a young adult's homeownership in both high- and low-cost cities. The coefficient is larger in low-cost cities (0.021 versus 0.015). Because the down payment required for homebuying is lower in low-cost cities, parents' financial support can have a greater influence on a child's homeownership.

FIGURE 10

How Parental Homeownership and Wealth Affect Young Adults' Homeownership, by Location and House Prices



Source: Panel Study of Income Dynamics.
*** $p < 0.01$; * $p < 0.1$.

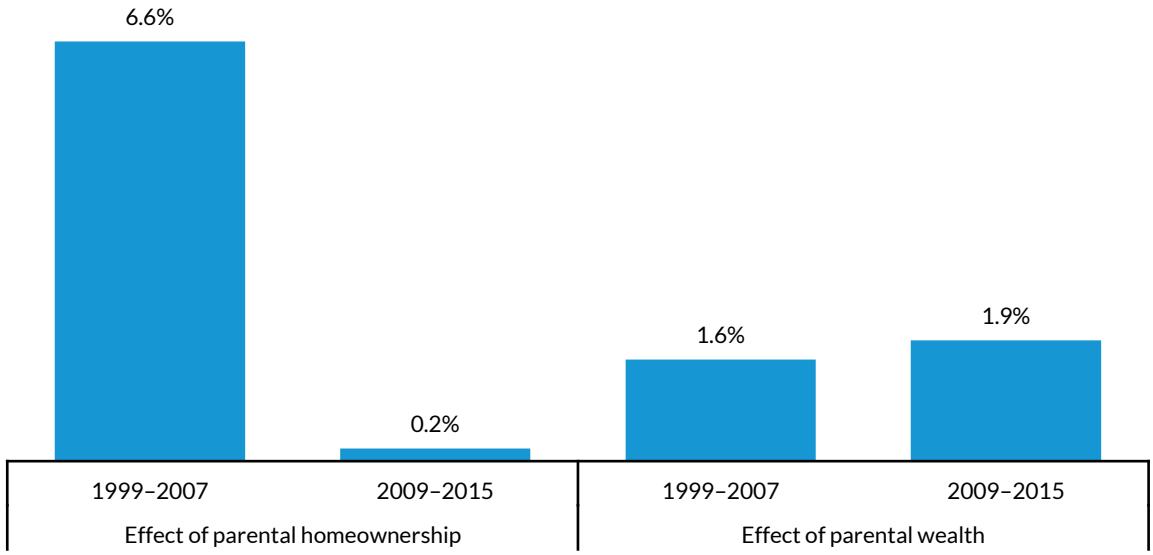
Finally, we divide our sample into two parts: 1999 to 2007 and 2009 to 2015. The earlier years include the boom period, when credit conditions relaxed and accessing the mortgage market was easier for young potential homebuyers. Following the bust, credit conditions tightened, and obtaining mortgages became more difficult. Our results show that the relationship between parents'

homeownership and young adults' homeownership was large and significant during the boom, but the relationship weakened to almost zero during the bust. Like the results in figure 8, having a homeowner parent can have less influence when obtaining a mortgage becomes more difficult.

In contrast, the impact of parental wealth is larger in the latter years. This is in line with previous studies (Begley, forthcoming; Lee et al. 2018) that find that parental wealth's influence on young adults' homeownership became larger during the Great Recession, when young adults faced greater constraints to borrowing in the mortgage market and the availability of a parental contribution, financing, or guarantee became more important to becoming a homeowner.[2]

FIGURE 11

How Parental Homeownership and Wealth Affect Young Adults' Homeownership, by Time Period (Boom and Bust)



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Source: Panel Study of Income Dynamics.

Conclusion and Policy Recommendations

This research finds that parental homeownership and wealth have significant influence on young adults' tenure choices. Young adults are more likely to own a home if their parents are homeowners and are wealthier. Because homeownership is an important tool for building future wealth, the intergenerational transfer of homeownership could further reinforce racial and ethnic wealth disparities.

Homeownership stability matters. Young adults with stable homeowner parents are most likely to be homeowners. This result is particularly concerning for black families, as the homeownership rate among black households headed by 45-to-64-year-olds (who are most likely to be parents of young adults ages 18 to 34) significantly dropped over the past 15 years.[3]

The strong relationship between parental wealth and homeownership suggests that parental financial support can be critical for their child to access homeownership, as many young adults do not have sufficient resources to afford a down payment or meet underwriting standards for a mortgage. As house prices increase (especially at the lower end of the market, where young adults are more likely to buy, and in areas with limited housing supply) amid the tight credit market, young adults are likely to face greater difficulties accessing homeownership than past generations. And the lower levels of black homeownership and wealth mean that black young adults are least likely to receive financial support from their parents. This support can be outright transfers for down payment assistance, as well as the parent cosigning the loan with their child. This essentially gives the lender recourse to the parent if the young adult does not pay.

Without adequate policies in place, the stark differences in homeownership across race and ethnicity is not likely to converge. Stronger measures are necessary on the policy side. Here are three we believe would be effective.

Improve young adults' understanding of homeownership. Many young adults view the down payment as the most critical barrier to homeownership attainment (Choi et al. 2018). But many of them do not have accurate information about the down payment requirement and are unaware of available down payment assistance. Almost 40 percent of young renters believe the minimum down payment is 20 percent (ASA and NAR 2017). But Federal Housing Administration loans require only 3.5 percent down, and the government-sponsored enterprises have programs that require only 3 percent down. Also, most first-time homebuyers qualify for down payment assistance from nonprofit organizations or state housing finance agencies. Most renters are not familiar with these programs.

Fannie Mae (Home Counselor Online) and Freddie Mac (Loan Product Advisor) provide online housing counseling for loan applicants. But this does not help potential homeowners who assume they do not qualify. We need better ways to help young people get accurate information about qualifying to buy a home (including available assistance). There is a tendency to present this information in high school courses, but for homebuying (in contrast to information about appropriate use of credit and budgeting), high school is probably too early. Two- and four-year colleges are increasingly adding

financial skills to their credit and noncredit offerings, often focusing on better use of student loans. Understanding homeownership could be part of these curricula, especially for older students.

Financial services providers—including traditional providers and the mobile-based providers that are attracting significant interest from millennials—can educate their customers about how to become homeowners and to do it sustainably. These providers know more about their customers' finances than any third party and can tailor information, goals, savings products, and incentives to meet millennials' needs, especially if they work with, for example, providers of down payment assistance.

Thinking about the process of moving people from renter to owner status as "homeownership preparation," and not as "housing counseling," can enhance the breadth and effectiveness of assistance. Theodos, Stacy, and Monson (2015) studied the work of Homewise in New Mexico, which offers this type of counseling, and has found their approach effective in extending sustainable homeownership to households (including younger households) who were not initially ready to purchase a home.

Introduce a tax-free account to save for a down payment. Like college savings plans, Congress and states—especially those with significant income taxes—could enact a tax-free account to save for a down payment. This would encourage savings for homeownership. This would need to be capped (at, say, $25,000) so it does not become a tax loophole for those who are wealthy and would save anyway. Savings for homeownership could be further bolstered with a governmental match or partial match in the form of a refundable tax credit. To limit the costs and maximize the effectiveness of a match, the match should have an income cutoff, perhaps expressed as a share of area median income or a metric based on area median income and median house price. This matching is similar to that used in Individual Development Accounts, which are special savings accounts that provide a dollar-to-dollar (or greater) match to the deposits of low- and moderate-income households. The savings and the matched funding can be used when purchasing a home. The tax-free account can be especially beneficial for young adults who will not receive parental support for a down payment.

Expand the credit box to more creditworthy borrowers. Altering mortgage underwriting criteria in ways that expand the credit box without a significant increase in risk is long overdue and would especially help young adults, with the benefits going disproportionately to borrowers who lack parental support. The government-sponsored enterprises and Federal Housing Administration are currently using outdated FICO models. FICO and Vantage models have been updated to score more borrowers with greater accuracy. More importantly, many borrowers (disproportionately minorities) do not use credit, do not have a credit score, and are consequently squeezed out of the market. For these people, credit information can be obtained by the monthly payments they make, such as rental payments, and

payments for telecommunication and utility bills. These are not included in credit scores. Technological advances can allow this information to be harnessed from bank statements and "counted" toward credit.

Other reforms are more straightforward. Currently, when two borrowers jointly apply for a mortgage, lenders use the lower of the two credit scores. This forces some families to apply for a mortgage with only one income, because the credit score of the second income earner is too low. Additionally, mortgage applications often undercount income. Income is generally considered only if it is consistent and the borrower has been in the same job or industry for two years. Borrowers who are particularly affected by this undercount include those who work partly on commission, those who are self-employed, those who have not held their job long enough, and those who always have a second or seasonal income. In multigenerational families, who are disproportionately minorities, there are household members whose income is not counted in a mortgage application. Again, bank statements can be used to capture household income more accurately and thereby increase mortgage approval of young potential homebuyers.

Although some of these changes can be made without any increase in risk to the lender, others—such as reliance on less-than-steady income—may increase risk. This calls for combining underwriting changes with consideration of risk mitigators, such as increased escrows or automatic savings vehicles that build up a reserve account for emergencies.

Appendix

TABLE A.1

How Parental Homeownership and Wealth Affect Young Adults' Homeownership: Logit (Marginal Effect)

Variables	(1)	(2)	(3)	(4)	(5)	(6)	(7)
Black	-0.234	-0.167	-0.153	-0.144	-0.141	-0.137	-0.139
	(11.11)***	(8.82)***	(7.87)***	(7.16)***	(6.99)***	(6.74)***	(6.87)***
Hispanic	-0.112	0.001	0.009	0.02	0.02	0.021	0.021
	(3.09)***	(0.03)	(0.30)	(0.63)	(0.62)	(0.67)	-0.65
Others	-0.069	-0.005	-0.007	-0.006	-0.007	-0.005	-0.006
	(1.00)	(0.07)	(0.09)	(0.09)	(0.09)	(0.07)	(0.09)
Parent own			0.086		0.056		0.068
			(4.41)***		(2.66)***		(3.27)***
ln(parent wealth)				0.02	0.014	0.014	
				(4.71)***	(3.13)***	(3.06)***	
Parent: Stayed owner						0.092	
						(2.69)***	
Parent: Owner to renter						0.049	
						-1.14	
Parent: Renter to owner						0.068	
						(1.68)*	
Parent: Frequent transition						0.079	
						(1.96)**	
$100K < parent wealth ≤ $200K							0.011
							(0.59)
$200K < parent wealth							0.055
							(3.28)***
Age		0.021	0.02	0.02	0.02	0.02	0.02
		(12.08)***	(11.97)***	(11.79)***	(11.76)***	(11.73)***	(11.68)***
Female		-0.077	-0.078	-0.076	-0.077	-0.077	-0.077
		(4.67)***	(4.72)***	(4.67)***	(4.70)***	(4.71)***	(4.68)***
Married		0.089	0.086	0.087	0.085	0.084	0.084
		(4.67)***	(4.60)***	(4.62)***	(4.59)***	(4.53)***	(4.53)***
Divorced, separated, widowed		0.04	0.039	0.043	0.041	0.04	0.041
		(1.56)	(1.50)	(1.66)*	(1.58)	(1.51)	(1.55)
High school		0.099	0.091	0.089	0.087	0.086	0.086
		(3.03)***	(2.77)***	(2.70)***	(2.62)***	(2.57)**	(2.62)***
College		0.11	0.097	0.087	0.084	0.083	0.082
		(3.42)***	(2.98)***	(2.63)***	(2.56)**	(2.50)**	(2.50)**
Child exist		0.11	0.112	0.119	0.118	0.118	0.118
		(8.12)***	(8.32)***	(8.87)***	(8.81)***	(8.79)***	(8.83)***
log(HH income)		0.132	0.13	0.125	0.125	0.125	0.126
		(11.92)***	(11.84)***	(11.41)***	(11.47)***	(11.45)***	(11.53)***
Parent: Number of moves					-0.001	0.000	-0.001
					(0.18)	(0.01)	(0.30)
Year fixed effect	N	Y	Y	Y	Y	Y	Y
State fixed effect	N	Y	Y	Y	Y	Y	Y
Observations	9,932	9,932	9,932	9,932	9,932	9,932	9,933

Source: Panel Study of Income Dynamics.

Notes: All regressions are weighted by household weights provided by the Panel Study of Income Dynamics. Standard errors are clustered by household ID. The coefficients are marginal effects, and the numbers in the parenthesis are *t*-statistics.

*** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

TABLE A.2

How Parental Homeownership and Wealth Affect Young Adults' Homeownership by Housing Cost (OLS and Logit)

Variables	(1) OLS	(2) Logit–marginal effect
Age	0.023***	0.021***
	(0.002)	(10.41)
Female	-0.125***	-0.110***
	(0.018)	(6.00)
Black	-0.130***	-0.14***
	(0.025)	(5.70)
Hispanic	0.029	0.043
	(0.038)	(1.09)
Others	-0.104	-0.123
	(0.080)	(1.48)
Married	0.144***	0.136***
	(0.021)	(6.40)
Divorced, separated, widowed	0.076**	0.087**
	(0.030)	(2.86)
High school	0.061	0.071*
	(0.038)	(1.81)
College	0.088**	0.092**
	(0.039)	(2.36)
Child exist	0.124***	0.104***
	(0.017)	(6.49)
ln(income)	0.104***	0.134***
	(0.009)	(9.65)
ln(parent wealth)	0.017**	0.014**
	(0.005)	(2.75)
Parent own	0.041*	0.054***
	(0.024)	(2.22)
Parent: Number of moves	0.007	0.004
	(0.005)	(0.74)
ln(median house price)	-0.047**	-0.054**
	(0.022)	(2.52)
Year fixed effect	Y	Y
State fixed effect	Y	Y
Observations	7,004	6,991
R^2	0.3	

Source: Panel Study of Income Dynamics.

Notes: OLS =ordinary least squares. All regressions are weighted by household weights provided by the Panel Study of Income Dynamics. Standard errors are clustered by household ID. The numbers in the parenthesis in the OLS regression are standard errors. The coefficients for logit regression are marginal effects, and the numbers in the parenthesis are *t*-statistics.

*** $p < 0.01$; ** $p < 0.05$; * $p < 0.1$.

Notes

[1] Because the PSID has conducted its survey biannually since 1997, our sample includes all odd-numbered years from 1999 through 2015.

[2] Our study uses the level of homeownership as the dependent variable for each time period. In other words, for each year, young adults who own homes are categorized as 1 and young adults who rent are categorized as 0. Begley (forthcoming) and Lee and coauthors (2018) use transition to homeownership between two periods as their dependent variable. They choose a sample of people who do not own homes in a certain year and classifies those who become homeowners in the next period as 1 and those who do not become homeowners as 0. The latter method provides a more accurate examination of how parental wealth affects households to become homeowners, but the small sample size increases the measurement error.

[3] Laurie Goodman, Alanna McCargo, and Jun Zhu, "A Closer Look at the Fifteen-Year Drop in Black Homeownership," *Urban Wire* (blog), Urban Institute, February 13, 2018, https://www.urban.org/urban-wire/closer-look-fifteen-year-drop-black-homeownership.

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AFFORDABLE HOUSING: THREE ROADBLOCKS TO REGULATORY REFORM

Dwight Merriam, FAICP

Forthcoming in the *Journal of Comparative Urban Land and Policy*
Festschrift in honor of Prof. Arthur Christian ("Chris") Nelson

A central theme in the scholarship and consulting work of Prof. Arthur Christian ("Chris") Nelson[1] has been his abiding concern for diversity, equity, and inclusion, particularly in the field of impact fees. His forthcoming book, IMPACT FEES: PRINCIPLES AND PRACTICE OF PROPORTIONATE SHARE DEVELOPMENT IMPACT MITIGATION, is his most recent effort to align practice with scholarship, all within the overarching quest for equity.

I have always admired Chris Nelson for what he does and for the passion he brings to planning. There are widely recognized great scholars. Outstanding classroom teachers who can guide the most advanced students through the thicket of cutting-edge theory and equally able to help a local land use commissioner appreciate the foundations of their routine decision making are out there, though there are not many. Consultants abound, but those who are most sought out because they get great results are few. Planners who feel to their very core the need to make the world a better place for everyone exemplify what we value most.

Chris Nelson is one of the few in planning who is all that: scholar, teacher, consultant, and exemplar.

When we talked about this Festschrift, I thought that one small way in which I might advance his work would be to identify where we ought to seek change to enable more affordable housing that would improve equity. Thus, this modest issue spotting piece, first conceptualized for the American College of Real Estate Lawyers.

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[1] It seems that someone honored at a Festschrift should get a gift. Writing this article is not a gift from me to Chris Nelson; it is a gift from him to me that I might have this opportunity to participate. For that I thank him and offer this gift: One free legal name change in a court of law with competent jurisdiction. Why? Because for years I and countless others have had to spend too much time explaining to other people who he is. The typical moniker madness goes like this.

Me: "You should have a look at Chris Nelson's 2019 article 'Streetcars and Real Estate Rents with Implications for Transit Planning.'"

Reply: "Hmmm. Never heard of him, but I tell you that Arthur Nelson knows his stuff."

Me: "No, Arthur Nelson is Chris Nelson."

Reply: "I don't get it, how can 'Arthur' be 'Chris'? You're confused."

Me: "No, I'm not. See, his middle name is Christian, so he calls himself 'Chris'."

Reply: "Geez, weird."

So, let us encourage Arthur Christian ("Chris") Nelson to get that name change and forever legally be "Chris Nelson." I will draw the writ now.

This article focuses on techniques, initiatives, and regulatory reforms that may help improve affordability in housing, and thereby serve the need for economic, social, and racial equity.

There are numerous impediments standing in the way of affordability. Three of those roadblocks deserve the closest attention and concerted action and must be knocked down, once and for all, to get the housing we so desperately need: the myth of Home Rule, limitations of the Fair Housing Act, and the pervasive use of private covenants and restrictions.

1. The Home Rule Myth

To understand the myth of Home Rule, one must start with the basics. The authority to plan and regulate land use is fundamentally the police power to protect and promote the public's health, safety, and general welfare. Chief Justice Marshall described the police power as "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824).

The 9th and 10th Amendments of the U.S. Constitution reserve to the states all those powers not previously delegated or prohibited to the states and the people. That gives the states the individual and exclusive responsibility for granting to local governments the authority to regulate, including regulations promoting affordable housing. Local land use regulation is an exercise of the police power.

Essential to understanding the extent of any form of the grant of powers to local government requires a refresher course in Home Rule, the Dillon Rule, and the Cooley Doctrine. Anyone that helps to remove the roadblocks to affordable housing needs a grasp of these concepts.

Home Rule

Most simply stated, Home Rule fundamentally defines the degree to which state police powers have been delegated to local governments, including the authority to regulate land use. How Home Rule power is so delegated varies from state to state ranging from self-executing constitutional provisions, to statutes adopted by state legislatures as authorized by their constitutions, to powers included in state granted municipal charters. How broadly these delegated powers are interpreted by the courts also varies from state to state.

Home Rule might be viewed as a long continuum, extending from the extreme of the Dillon Rule for strong state legislative control over local governance at one end to the further extreme of the Cooley Doctrine of unfettered, independent local authority at the other end. Within this continuum a large number of states fall in a great, ambiguous, and increasingly ill-defined middle ground.

Spoiler alert. Herein lies the fundamental problem of the Home Rule myth: in the vast majority of instances regarding local land use regulation, there has been no immutable delegation of exclusive authority to regulate land use at the local level and those who are opposed to

affordable housing continue to invoke Home Rule as a shield to any state law changes that might override what has been the exclusive province of local governments. This has resulted in the segregative effects that drive advocates to seek social, economic, and racial equity in our land use system.

The Dillon Rule

Iowa Supreme Court Justice John F. Dillon, in *Clinton v. Cedar Rapids & Missouri Railroad Co.*, 24 Iowa 455 (1907), saw local governments as creatures of the state, subject to the limitations of the grant of authority to them by the state. The case was about the right of a railroad company to use the city streets for their trackage. The railroad company had its own authority from the state to expand trackage. The city objected to the railroad using the dedicated city streets and challenged whether the railroad had the right to use them under the law and, if it did, whether the city should be compensated for what it alleged was a taking of the city's property interest. Of course, the railroad argued that it had been given all the authority it needed directly by the state.

The court held for the railroad, and in doing so Judge Dillon created the rule that came to bear his name:

> The true view is this: Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy…. [T]he legislature might, by a single act…sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.

Id. at 477-78.

John R. Nolon, the Distinguished Professor of Law Emeritus and Counsel, Land Use Law Center at the Elisabeth Haub School of Law, Pace University, has recently written a definitive analysis of what he sees as the end of Dillon's Rule.[1]

In his analysis, Professor Nolon points to an important nuance in Dillon's Rule, namely, that it has two parts. The first was that created in the Clinton case, which Professor Nolan describes as the "servient entity rule," whereby municipalities are mere "tenants at will," whose powers may be taken back or changed at the will of the state legislature.

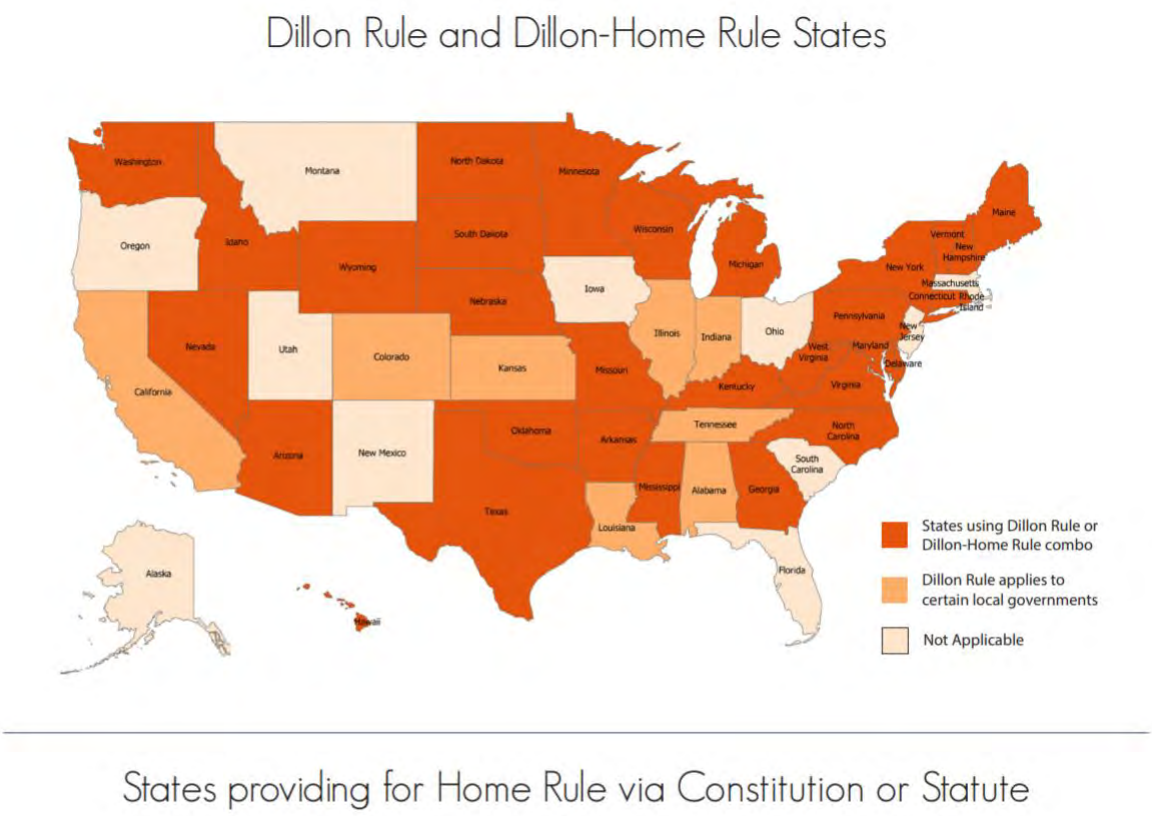
The second part of Dillon's Rule is found in *Merriam v. Moody's Executors*, 25 Iowa 163 (1868), decided a month after Clinton, in which the court established a rule of construction:

> [I]t must be taken for settled law, that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and

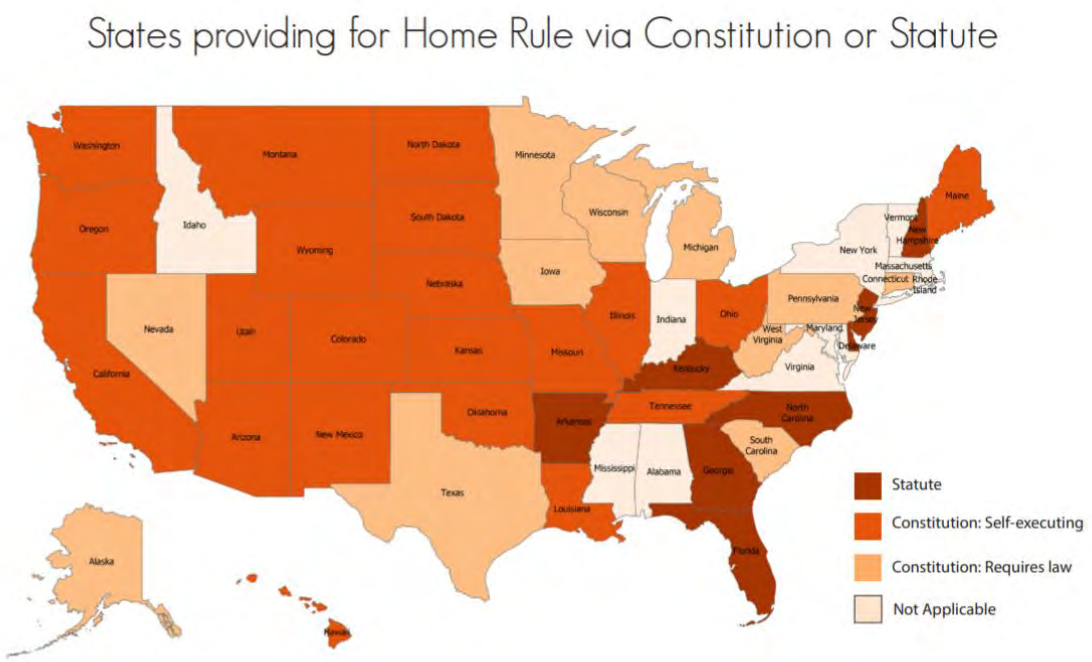
> purposes of the corporation—not simply convenient, but indispensable; fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation—against the existence of the power.

Id. at 170.

Most people speak of the Dillon Rule as a monolithic rule and not one of two parts. A consequence of the rule of construction is that the Dillon Rule states apply the Dillon Rule in varying fashion. In some states, eight of them, the Dillon Rule is limited, such as in Indiana where it applies only to townships. Elsewhere, in 32 states, Home Rule is provided for in the state's constitution with 20 of those recognizing it as self-executing and 11 requiring enabling legislation. Finally, eight states enable home rule by statute, not by their state constitutions, and limit to varying degrees what governments may be able to use Home Rule powers.



Travis Moore, *Dillon Rule and Home Rule: Principles of Local Governance*, Nebraska Legislative Research Office (Feb. 2020).[2]



Travis Moore, *Dillon Rule and Home Rule: Principles of Local Governance*, Nebraska Legislative Research Office (Feb. 2020).[3]

Another useful resource with graphics and lists of states is available on the American City County Exchange website. Hon. John D. Russell & Aaron Bostrom, *White Paper: Federalism, Dillon Rule, and Home Rule*, AM. CITY COUNTY EXCHANGE (Jan. 2016).[4]

The U.S. Supreme Court took up the matter in 1907 in *Hunter v. Pittsburgh*, 207 U.S. 161. There, the Court made clear that local governments were very much the subordinates of the state:

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

Id. at 178-79.

The Cooley Doctrine

Michigan Supreme Court Justice Thomas M. Dooley wrote a concurring opinion in 1871, in *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44 (1871),[5] arguing that because local governments were in existence before the states were organized that they have powers of their own, independent of the states and that those powers were not abridged when the union was formed:

> But when we recur to the history of the country, and consider the nature of our institutions, and of the government provided for by this constitution, the vital importance which in all the states has so long been attached to local municipal governments by the people of such localities, and their rights of self-government, as well as the general sentiment of hostility to everything in the nature of control by a distant central power in the mere administration of such local affairs, and ask ourselves the question, whether it was probably the intention of the convention in framing, or the people in adopting, the constitution, to vest in the legislature the appointment of all local officers, or to authorize them to vest it elsewhere than in some of the authorities of such municipalities, and to be exercised without the consent, and even in defiance of the wishes of the proper officers who would be accountable' rather to the central power than to the people over whose interests they are' to preside, — thus depriving the people of such localities of the most essential benefits of self-government enjoyed by other political divisions of the state — when- we take all these matters into consideration, the conclusion becomes very strong that nothing of this kind could have been intended by the provision. And this conviction becomes stronger when we consider the fact that this constitution went far in advance of the old one, in giving power to the people which had formerly been exercised by the executive, and in vesting? or authorizing the legislature to vest, in municipal organizations a further power of local legislation than had before been given to them. We cannot, therefore, suppose it was intended to deprive cities and villages of the like benefit of the principle of local self-government enjoyed by other political divisions of the state.

Id. at 66-67.[6]

So, why does all this somewhat arcane doctrinal history of local government law matter in the context of trying to promote affordable housing?

First, those who are opposed to state and substate regional approaches that potentially override local zoning are quick to throw up the shield of Home Rule under the Dillon Rule. Sometimes, it is just that locals do not want to give up local control. Sometimes, it is more sinister, seeking to continue exclusionary land use practices.

Second, whether Professor Nolon is right or not in believing that the Dillon Rule has faded, it is important to recognize that in those states that have a constitutional provision the Home Rule powers may be implemented, and limited, by statute. Connecticut, where the author lives, is one of those states. The Connecticut Constitution provides "[t]he general assembly shall by general law delegate such legislative authority as from time to time it deems appropriate to towns, cities and boroughs relative to the powers, organization, and form of government of such political subdivisions."[7]

Opponents of the state taking back a bit of its delegated authority over certain aspects of land use regulation that impede the development of affordable housing are quick to throw down the Home Rule card. For example, consider this from Connecticut State Senator Tony Hwang in

opposition to recent affordable housing initiatives proposed for the state's enabling legislation, as posted on his official website:

> Senator Hwang said, "I am deeply concerned about how this bill has been misleadingly purported to 'empower' local zoning and land use rules. In reality, this bill does not offer data proof toward improving social equity, segregation, or even affect the affordability of living in Connecticut, all concepts which I strongly believe in and support. If the legislature truly wanted to implement visionary solutions in affordable housing regulations, then we should re-explore CT General Statute section 8-30g which has not been examined since 1989. The partisan Democratic vote further raises the alarming fear of the camel's nose under the tent regarding expansive zoning, land use legislative mandates evident by the multiple overreaching bills passed out of committees throughout the CT General Assembly this session."
>
> During the discussion, Senator Hwang offered two amendments, both of which failed along a party line vote. One was to prevent a one-size fits all mandate, but instead preserve "home rule" and "local control" on not only land use and zoning but also on education, local finances and taxation, and environmental protection. The second proposed amendment hoped to provide a better balance between the represented stakeholders on the newly created working group ensuring that local experts and members of all political backgrounds had a voice in the future of zoning and land use in the state.[8]

The former mayor of Norwalk, Connecticut, a proponent of affordable housing, described the problem in this way:

> Our Home Rule law pretty much allows towns to "maintain their character" by strictly controlling multifamily housing if they so desire. Most of the rich ones do so. This is one reason our cherished state is so "leafy." People who cannot afford to own property with trees are invited to live somewhere else. Where? Don't ask.[9]

One proposal to promote affordable housing in Connecticut was to eliminate "character of the district" as a proper basis for zoning under the state's enabling statute. "Character of the district" has been a rationale to support zoning that is exclusionary. Typical of the opposition to this reform was this from a resident of Fairfield, Connecticut, with an average home value of $662,000[10] and an African American population of 2.1%[11]:

> Today, considering "character of the district" in land use decisions continues to be fundamental as towns modify their plans and zoning regulations. By eliminating this language, our zoning boards will no longer be allowed to consider the existing built environment and the "character of the district" when they render decisions. This won't be good for our communities.[12]

The state legislature, in the end, did adopt the amendment.

Professor David Schleicher of Yale Law School has written a scathing critique of the National League of Cities' proposed new Model Constitutional Home Rule Article, which would strengthen the ability of local governments to fend off efforts by the state to create affordable housing.[13] His critique is also to be published in a forthcoming issue of the Ohio State Law Journal and as a forthcoming Yale Law School Public Law Research Paper. In it, he lays bare the ways in which the Home Rule myth has been used to perpetuate exclusion:

> Through the 1970s or 1980s, the central political challenge to zoning was that it was economically exclusive at the level of the individual town. Rich suburbs used zoning to reduce construction and to ensure high per capita property values, keeping outsiders from accessing the high-quality services paid for with taxes on those high per capita property values. There were well-known legal and political challenges to exclusionary zoning in the suburbs, from the Mt. Laurel cases to the Fair Housing Act's requirement that federal agencies administer programs in order to "affirmatively further fair housing." Well-known legal scholar Charles Haar famously argued that there should be a "constitutional right to live in the suburbs."
>
> But no one thought zoning had effects at the regional level. Big cities, a few progrowth suburbs and exurban areas allowed for enough construction of new housing such that people could be housed and access regional job markets.
>
> But, starting in the 1970s and 1980s, this changed. As demand to live in them increased, big cities in our richest and most innovative metropolitan areas became less hospitable to growth, and sprawl hit some natural limits (and the few pro-growth suburbs changed their tune). Each town and city excluded new development and, in so doing, created limits on growth at the metropolitan level. When paired with strong demand, zoning restrictions started to drive up prices at the regional level in places like San Francisco and New York. This process has even stalled national economic convergence. In the hundred or so years before the 1980s, the poorest and richest states were getting closer together in per capita economic performance, as capital flowed to poor states and workers moved to richer ones. But, among strictly zoned states, this process slowed in the 1980s and has now stopped completely.[14]

To illustrate how bad this can get, here is a resolution by a small-town land use agency, with final legislative authority as to zoning, holding up Home Rule as the rampart that should stop the state from messing with their local control:

> **A RESOLUTION IN SUPPORT OF "HOME RULE" IN MUNICIPAL ZONING DECISION MAKING**
>
> **WHEREAS** Connecticut's towns and cities successfully use local zoning and planning processes to balance private property rights, the community's interests, demands on infrastructure, housing needs, and economic growth; and

WHEREAS local control and decision making empowers the residents and taxpayers of each town and city to carefully tailor zoning policies that reflect its unique geography, economy, and housing market; and

WHEREAS localized decision making ensures the greatest level of accountability while allowing affected community members the greatest level of input and the platform through a public hearing to provide specific, relevant information on potential impacts that only they would have knowledge of; and

WHEREAS local control and local input enable neighbors and the local community to provide beneficial suggestions, identify errors and maximize community buy-in on zoning proposals; and

WHEREAS proposals have been introduced in the General Assembly to strip local planning and zoning processes from towns and cities; and

WHEREAS proposals have been introduced in the General Assembly to allow BY RIGHT market value multi-family development that will not generate any new affordable housing units; and

WHEREAS proposals have been introduced in the General Assembly to allow outside Housing Authorities within 15 miles radius to develop affordable housing projects within our town; and

WHEREAS BY RIGHT multi-family development can lead to exponential market value overbuilding and can cause adverse impacts to town infrastructure; and

WHEREAS BY RIGHT development gives outsized rights to builders over all other property owners and prevents local Planning and Zoning Commissions from identifying the potential impacts of their project and imposing conditions upon a developer to address those direct impacts; and

WHEREAS, eliminating public hearings and community input on zoning matters would have unintended consequences such as increased infrastructure costs, increased local property taxes, and reduced home and business values which will be borne by the town residents; and

WHEREAS each town and city already have the choice to modify or abolish its zoning ordinances if the elected town or city government decides it best serves the community's interests; and

NOW BE IT RESOLVED the Planning and Zoning Commission of the Town of Winchester opposes State Mandated one size fits all Zoning Legislation and the ability of any outside housing authority to have jurisdiction on our town's Affordable Housing plan and any similar legislation that would further overrule, remove, or diminish local control and decision making related to planning and zoning or affordable housing from the Town of Winchester; and

BE IT FURTHER RESOLVED that a copy of this resolution shall be sent to all State Representatives and State Senators representing this town, to all members of the State Legislature's Planning and Development, Finance, and Housing Committees, and to all legislators sponsoring bills that remove local control of planning and zoning and affordable housing.[15]

What To Do?

The doctrinal chaos of Home Rule, grounded along that continuum of the Dillon Rule and the Cooley Doctrine, and rendered ambiguous in many places by the common law interpreting state constitutions and statutes, demands that states reform Home Rule, at least as to local land use regulation, especially for affordable housing. The plain fact is that many state and local governments simply do not know the limits of their authority and, consequently, almost comically, Home Rule is held up as both a sword and a shield. Mostly, when the locals invoke Home Rule, they do so with little or no basis in the law. And the states are wary about how far they can go. When they do attempt to promote affordable housing, they may lose, as Ohio did in *City of Canton v. State*, 95 Ohio St. 3d 149, 766 N.E.2d 963, 2002 Ohio 2005 (2002), where the court rejected the state's attempt to promote affordable housing with mobile, manufactured housing because it could not meet the four-part test as a general law:

> To constitute a general law for purposes of home-rule analysis, a statute must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.

Perhaps of greater concern is, as Professor Schleicher warns us, the potential for back peddling from where we are to a more Cooley-esque position where local governments are given greater, unbridled authority, at the very time the needs of affordable housing dictate statewide and substate regional mandates.

Reforms under a concept of Home Rule making clear that the state may take back some of its authority might include prohibiting certain local regulations that hinder affordable housing development. California did that with accessory dwelling units, essentially requiring local governments to allow them.

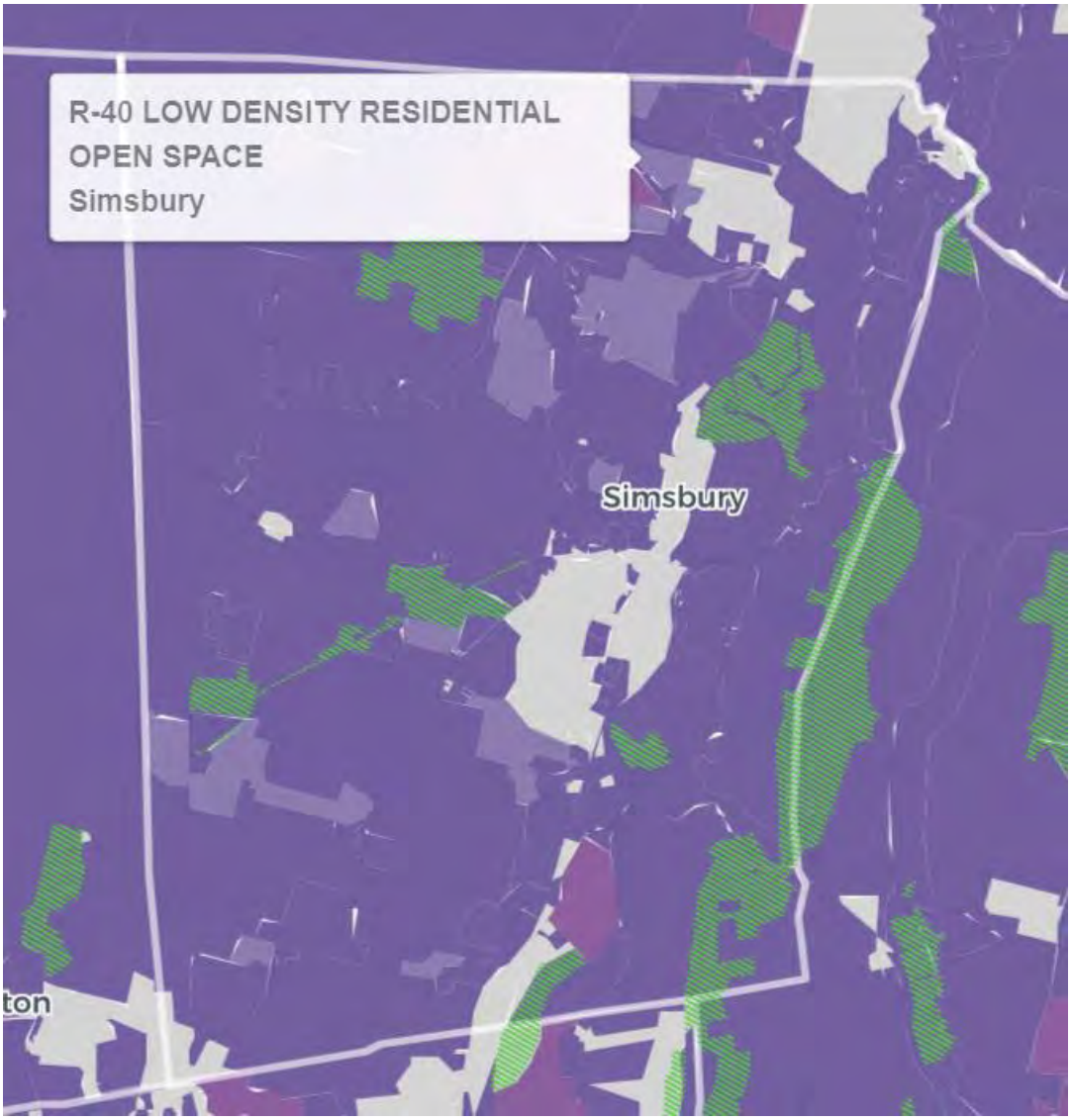
In 2021, the Governor of California signed into law Senate Bill 9 which, among other things, allows lot splits in many circumstances to create opportunities for ownership and the building of generational wealth.[16] In the late 1970's, the Connecticut state legislature did something similar, but more targeted, with an amendment to the enabling statute that took away the right of local governments to zone out certain types of group homes of six or fewer persons when the state legislators found the exclusion intolerable:

> Regulation of community residences for persons with intellectual disability, child-care residential facilities, community residences for persons receiving mental health or addiction services and hospice facilities. (a) No zoning regulation shall treat the following in a manner different from any single family residence: (1) Any community residence that houses six or fewer persons with intellectual disability and necessary staff persons and that is licensed under the provisions of section 17a-227.[17]

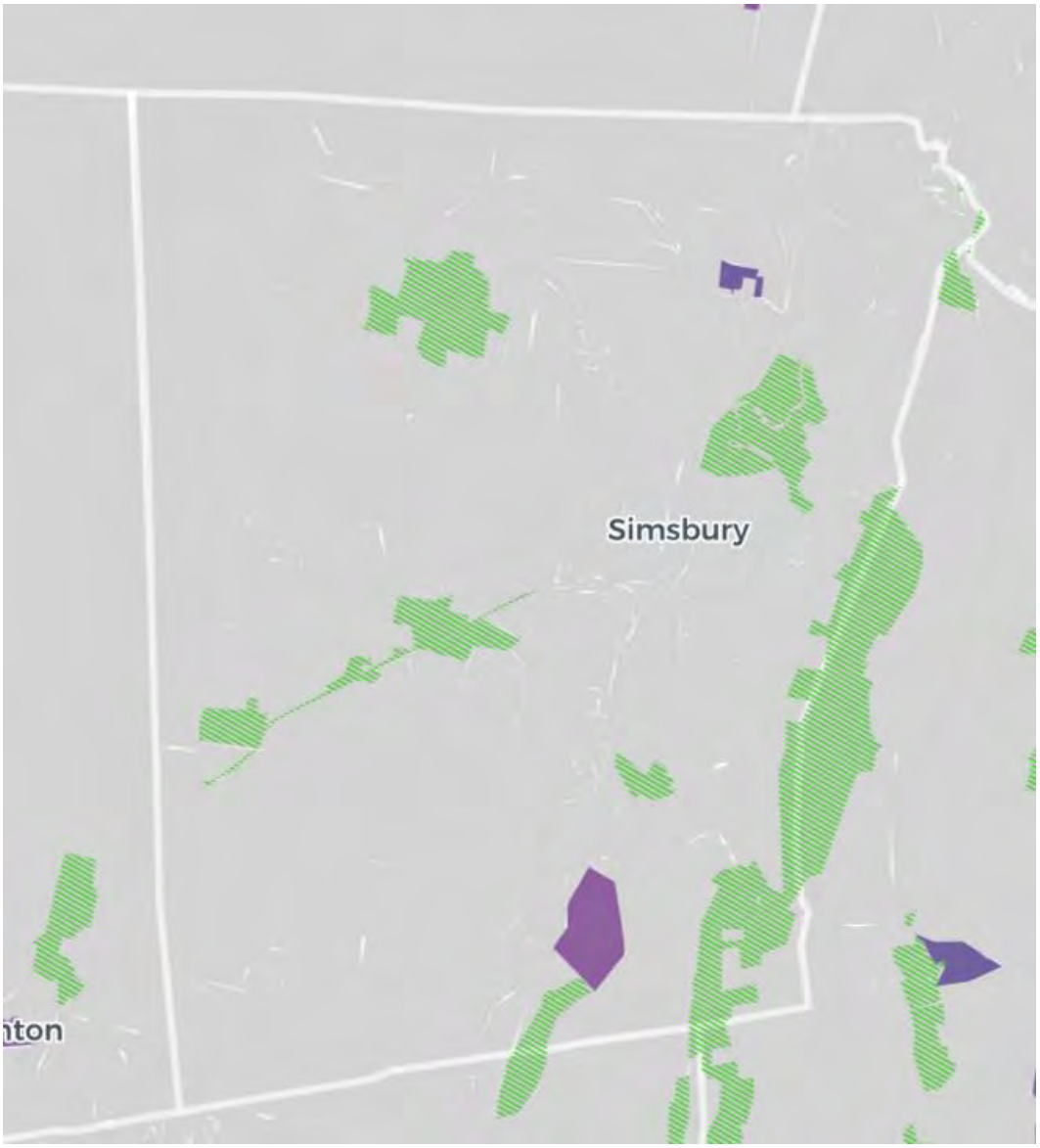
Call it “creeping incrementalism,” if you will, but creeping may be better than standing still.

Reform might also be had through education, helping people understand the extent of the problem through analysis, outreach, and graphics. Desegregate Connecticut, a nonprofit advocacy organization that promoted legislative reforms during the 2021 session in Connecticut, has done a remarkably great job in identifying the extensive exclusionary zoning in the state. It is a model for what others can do.[18]

Here are two illustrations from the town where I live, the first with land zoned for single-family use (everything but the light gray and green areas, which are public lands), and second with the areas zoned for four-family and more multi-family uses (only the two dark areas):



R-40 is single-family zoning for lots of 40,000 sq. ft. and larger.



The picture is easy to see. It is stark. No table of numbers can have this impact.

Education also includes training the public decision-makers. Some states are especially effective in that. North Carolina is one that comes to mind. The legislation adopted this year in Connecticut includes a provision mandating training land-use commissioners.

2. Limitations of the Fair Housing Act

There is a little-known provision in the Fair Housing Act, commonly known as the "Mrs. Murphy Exemption," which precludes enforcement to overcome discrimination in dwellings intended to be occupied by four families or fewer, so long as the property owner lives there:

> Nothing in section 3604 of this title …shall apply to …rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.[19]

The Mrs. Murphy Exemption was a necessary compromise to get the legislation through in 1968. It seems anachronistic today.

There is another exemption for single-family homes if the owner does not own more than three, limited to one sale in every 24 months for the homes in which the owner does not live.[20]

A state may expand or contract the federal exemption under certain circumstances. Here is an example from Oregon:

> Discrimination in selling, renting or leasing real property prohibited. (8) The provisions of subsection (2)(a) to (d) and (f) of this section that prohibit actions based upon sex, sexual orientation or familial status do not apply to the renting of space within a single-family residence if the owner actually maintains and occupies the residence as the owner's primary residence and all occupants share some common space within the residence.[21]

Overcoming the Exemption

Nothing says you cannot have state and local protections that go beyond the federal, including taking the wind out of the sails of the exemption. Some states have limited or eliminated the exceptions.[22] Local governments can and should remove their Mrs. Murphy Exemption, if they have them in local fair housing codes. They need not wait for the state to act. In 2019, the City of Shaker Heights, Ohio removed its Mrs. Murphy Exemption.[23]

The states have an important role to play here. Connecticut this session was the first state to include the requirement to "affirmatively further fair housing" in its zoning enabling statute.

> (b) Zoning regulations adopted pursuant to subsection (a) of this section shall: …(2) Be designed to…(J) affirmatively further the purposes of the federal Fair Housing Act, 42 USC 3601 et seq., as amended from time to time.[24]

The Policy Surveillance Program, A Law Atlas Project at the Center for Public Health Law Research at Temple University Beasley School of Law, has an interactive website where you can see what every state has as to fair housing protections.[25]

Yes, we need federal action to amend the Fair Housing Act to get rid of the Mrs. Murphy Exemption, and yes, we need state action to adopt fair housing laws that encourage affordable housing, but every big and small local government can act. Eugene, Oregon, has done just that in adopting an action-forcing analysis of fair housing choice.[26]

Eugene Analysis of Impediments to Fair Housing Choice 2020-2024

Impediment	Strategies
Lack of Affordable Housing	The City recognizes the impact of high housing costs on residents, working on several initiatives expanding affordable housing stock throughout the City and is taking multiple actions including creation of the Affordable Housing Trust Fund and retooling the ADU policy to increase development. The City should continue to monitor and promote these and other activities that support development of additional affordable housing options. Continue to allocate and further leverage Federal grants to preserve affordable housing.
Community Education	**Resident Education**: Both the *Renters Experience Survey* and the survey conducted for the development of the AI indicate that many residents are not aware of the fair housing protections provided to them. The City should continue to partner with the Fair Housing Council of Oregon (FHCO) in facilitating trainings and workshops marketed to residents, which provide education on fair housing issues. **Provider Education**: Service providers that directly interact with any individual from a protected class (to include low-income in this instance) should be knowledgeable on fair housing policies that impact the communities they serve. Providers need not deeply understand fair housing regulation but should be able to facilitate the process with a client or community they believe to be impacted.
Landlord Education	Ensure landlords with limited portfolios fully understand their fair housing obligations. The City is encouraged to research feasibility of developing a policy mechanism, such as an annual certification, that would ensure that landlords understand their role. Similarly, the City can help ensure that large property management companies understand their fair housing obligations.
Discrimination in Renting	Continue to work with FHCO on enforcement of fair housing allegations. Consider supporting FHCO to conduct regular fair housing testing throughout the community; both administrative and audit testing. Administrative testing is a review of a landlord's or property management company's lease agreement terms. Audit testing is having someone from a protected class go through the process of renting a unit with the purpose of identifying potentially problematic procedures.
Planning, Land Use, and Zoning Practices	Review definition of "family" in the City's Municipal Code related to number of persons living in a single housekeeping unit. The City is encouraged to continue to integrate equity and impact assessments into the policy and planning process; particularly how proposed changes or regulatory efforts will impact protected classes (to include low-income in this instance).
Lending/Sale Discrimination	The current lending and mortgage data are limited in scope and has small sample sizes of protected classes. The City is encouraged to consider outreach to local banks and lending institutions to review their practices and acquire data that could supplement the data within the AI. Data within the AI suggests Hispanic populations originate loans at a lesser rate than do White households. The State of Oregon has established the Task Force on Addressing Racial Disparities in Home Ownership, the City is encouraged to consider dedicating staff time/resources to identify a point of contact for this task force, staying abreast of key findings and associated actions/strategies.

The latest development in promoting housing equity through impact analysis is from New York City where the City Council on June 17, 2021, adopted a local law requiring that developers assess the impacts on racial equity of their proposals, including stating "how the proposed project relates to the goals and strategies to affirmatively further fair housing and promote equitable access to opportunity identified within the city's fair housing plan…". The law amends the Uniform Land Use Review Procedure and is described on the Council's website:

> This bill would require an online citywide equitable development data tool with citywide, borough wide, and where statistically reliable data is available, neighborhood level and community district level data. Data would be provided for six specific categories, and be disaggregated by race and ethnicity, where available. Racial equity reports on housing and opportunity would be required for certain land use applications, using data from the equitable development data tool. The substance of racial equity reports would vary by application type, but all would include a statement of how the proposed project relates to the goals and strategies to affirmatively further fair housing and promote equitable access to opportunity. Residential projects would state the expected rents for market rate and affordable units and the incomes needed to afford them without incurring housing cost burden. The equitable development data tool would provide the race/ethnicity for such households.[27]

3. Private Covenants

Over 7 million people in the United States live in gated communities. Many others, perhaps as many as 40% of them, live in homes where there are restrictive covenants, conditions, and restrictions of various types, some of which preclude the development of affordable housing. Covenants are now found in 61% of all new dwellings according to the Community Associations Institute.

Professor Robert C. Ellickson of Yale Law School recently published an article on the subject, with suggestions on how "stale" covenants might be addressed.[28]

Of course, racial covenants are unenforceable, *Shelley v. Kraemer*, 334 U.S. 1, 23, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), but they remain in the chain of title. Many people, understandably, find it disturbing to see the covenant in a title report. They do not want it to be part of the record of their ownership of the property. This is something state can act on and some have. There is a recent decision in the Court of Appeals of the State of Washington regarding the state law on removing certain provisions from deeds.[29]

The law was enacted over 30 years ago but has been subject to little interpretation. In this decision the court held that the offending language did not have to be "physically and permanently removed from existing records," but that it would be sufficient to declare the "language stricken, thereby removing the language as a matter of law." The effect of this interpretation of the particular statute is to eliminate the offending language as a matter of law so that does not need to be perpetuated in recitations of the title, but the original, physical documents remain unaltered. As the court explained its reasoning:

> By its plain terms, RCW 49.60.227 provides a method for repudiating racially restrictive covenants while still preserving the historical record and integrity of a property's chain of title. This balance makes good sense. Real estate documents with racially restrictive provisions are "offensive, morally reprehensible, and repugnant." *Mason v. Adams County Recorder*, 901 F.3d 753, 757 (6th Cir. 2018). But such documents are part of "our living history." Id. A policy of whitewashing public records and erasing historical evidence of racism would be dangerous. It would risk forgetting and ultimately denying the ugly truths of racism and racist housing practices. Such an outcome cannot be squared with the antidiscrimination purposes of Washington's Law Against Discrimination. See RCW 49.60.010.

If the objective of the statute and of this interpretation by the court is to preserve for future generations an accurate record of the unfortunate history and how people later worked to right the wrong, then this is good approach.

Still, covenants are widely respected. The Boston Zoning Code, for example, provides:

> In their interpretation and application, the provisions of this code shall not be construed to repeal, abrogate, annul or in any way impair or interfere with the

provisions of other regulations, laws or ordinances except Chapter 488 of the Acts of 1924, as amended, which is repealed on the effective date of this code, or with provisions of private restrictions placed upon property by covenant, deed or other private agreement, or with provisions of restrictive covenants running with the land to which the City is a party. Where this code imposes a greater restriction than is imposed or required by any of the aforesaid provisions, the provisions of this code shall prevail.[30]

Another example of a state statute is in Delaware:

§ 9628. Redaction of unlawful restrictive covenant.

(a) An owner of real property that is subject to an instrument that contains a provision that is in violation of § 9605(b) of this title, including a governing document of a common interest community, may request that the recorder for the county in which the instrument is recorded redact and strike the provision from the instrument.

(b)(1) Before granting a request made under subsection (a) of this section, a recorder must submit the request and the instrument at issue to the county attorney.

a. The county attorney shall determine whether the instrument contains an unlawful restrictive covenant in violation of § 9605(b) of this title.

b. The county attorney shall inform the recorder of the county attorney's decision within 90 days of receipt of the request and the instrument from the recorder, unless extraordinary circumstances apply, then the county attorney has 60 additional days to inform the recorder of the county attorney's decision.

c. The recorder shall deny a request made under subsection (a) of this section if the county attorney determines that the instrument does not contain an unlawful restrictive covenant in violation of § 9605(b) of this title.

(2) The county attorney may compile a list of phrases identified as unlawful restrictive covenants in violation of § 9605(b) of this title. Notwithstanding paragraph (b)(1) of this section, a recorder may grant a request made under subsection (a) of this section without further review by the county attorney if the request is in compliance with the list compiled by the county attorney.

(c) A recorder may prescribe the form and required contents of a request under subsection (a) of this section, but the request must include at least the following information:

(1) The legal description of the property subject to the provision in violation of § 9605(b) of this title.
(2) The type of instrument that is subject to the provision in violation of § 9605(b) of this title and the instrument's book and page number or instrument number.
(3) A clear description of the provision claimed to be in violation of § 9605(b) of this title.

(d) (1) This section applies to an owner of real property that is part of a common interest community under Chapter 81 of Title 25.
(2) Notwithstanding any other law or contractual provision to the contrary, an owner of real property that is part of a common interest community under Chapter 81 of Title 25 may make a request under subsection (a) of this section that the recorder for the county in which the instrument is recorded redact and strike a provision that is in violation of § 9605(b) of this title from all instruments affecting real property that is part of the common interest community.

(e) (1) Upon request for inspection, copying, or any other public disclosure of an instrument that has had an unlawful restrictive covenant in violation of § 9605(b) of this title redacted from it under this section, a recorder shall make available only the redacted version of that instrument.
(2) A recorder may disclose the unredacted version of an instrument that has had an unlawful restrictive covenant in violation of § 9605(b) of this title redacted from it under this section only in response to a subpoena or order of a court of competent jurisdiction.[31]

Note the involvement of the county attorney.

An important decision illustrating the difficulties in removing covenants that roadblock affordable housing is *Viking Properties, Inc. v. Holm*, 118 P.3d 322, 155 Wash. 2d 112 (2005). There the court severed a racial covenant and declared it void. That was easy. But then it had to deal with a covenant limiting development to one dwelling on one-half acre or more. Because it was able to sever the racial restriction, the court then turned to the density restriction. Although no affordable housing claim was made, the Growth Management Act was alleged to mandate densification in the developed areas. The court rejected the argument and firmly held that the density restrictions did not violate public policy:

Quite separate from the racial restriction, the last two sentences provide that only one dwelling may be built on each one-half acre of land. Not only is this the logical, common-sense construction of the covenant's language, it is also the construction that best guards "`the homeowners' collective interests.'" Riss, 131 Wash.2d at 624, 934 P.2d 669 (quoting Lakes at Mercer Island Homeowners Ass'n, 61 Wash.App. at 181, 810 P.2d 27). It has been so understood for over 50 years.

Id. at 328.

> The instant case is an appropriate vehicle to illustrate the effect of public policy. In contrast with the racial restriction, it cannot be maintained that the density limitation has a "tendency to evil," nor has the legislature explicitly expressed an intent to override contractual property rights, let alone invalidate those that predate the GMA. The legislature has expressly determined that racial restrictions like that contained in the instant covenant are "void." RCW 49.60.224. The GMA neither states nor implies such an effect with respect to the density limitation.
>
> *Id.* at 330.
>
> Third, although the City's zoning regulations call for a minimum density of four dwelling units per acre, nothing in the regulations compels property owners to develop their parcels to any particular minimum density. Indeed, assuming without deciding that the Homeowners' and Viking's lots constitute nonconformities under the zoning regulations, the regulations provide that they may be maintained indefinitely. See SMC 20.10.040(B), SMC 20.30.280. Moreover, the City has correctly conceded that it "has no authority" to enforce or invalidate restrictive covenants, CP at 201, and explicitly accounted for the existence of such covenants in its comprehensive plan by forecasting that areas subject to covenants would experience less future growth than other areas within the City. Finally, the city's planning manager, on advice of the city attorney, determined that the covenant was not in irremediable conflict with city policy, and that the City "would process building permits on a lot with area that exceeded the minimum densities under the code for the land use district as a nonconforming lot." CP at 310. Accordingly, the density limitation does not violate public policy.
>
> *Id*. at 331.

In 2021, the Governor of California signed into law legislation that enables setting aside of certain private covenants that preclude affordable housing developments:

> This bill would make any recorded covenants, conditions, restrictions, or limits on the use of private or publicly owned land contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale that restricts the number, size, or location of the residences that may be built on the property, or that restricts the number of persons or families who may reside on the property, unenforceable against the owner of an affordable housing development, as defined.[32]

If someone pays a premium for property in Phase 1 of a development that is exclusive, restricted, and gated, and then the developer sells off the proposed later three phases and they are stripped of the covenants as to density and house size, resulting in a significant loss of value, is that compensable taking? Perhaps this is a variation of *Bormann v. Board of Supervisors in and for*

Kossuth County, 584 N.W.2d 309 (Iowa 1998), in which the Iowa Supreme Court invalidated a right-to-farm law because by eliminating the right of those living close to farms to bring nuisance actions. It imposed a kind of easement on their property, which could only be done if just compensation were paid. That is something to ponder.

Conclusion

There is so much we can do and so much that must be done to promote affordable housing. We will not get where we need to be if we do not remove unnecessary roadblocks. A careful review of state constitutional and statutory law to amend them as necessary to bring order to the chaos that currently exists with regard to Home Rule is critical. Eliminating unacceptable exemptions from fair housing under federal, state, and local law will advance the cause of diversity, inclusion, and social, economic, and racial equity. Eliminating private covenants and other restrictions that create and perpetuate social silos is important. People have the right to manage their private property in concert with others through private restrictions. At the same time, we have the legal and moral responsibility to do what we can to promote development of more affordable housing. It is, and will continue to be, a difficult balancing problem and to some extent a zero-sum game. In the context of controls on the use of land we sometimes use the theory of the "average reciprocity of advantage," wherein we may suffer some disadvantage by subjecting ourselves to the common interest but at the same time when working together we get the reciprocal advantage of a better community. That applies here as to removing the roadblocks.

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[1] John R. Nolon, *Death of Dillon's Rule: Local Autonomy to Control Land Use*, SSRN (Oct. 11, 2020), https://ssrn.com/abstract=3709379 or http://dx.doi.org/10.2139/ssrn.3709379.
[2] https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf
[3] https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf.
[4] https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf.
[5] https://www.ravellaw.com/opinions/35a38466d5974971fa5620128e4c98be,
[6] See also Brett A. Stroud, *Preserving Home Rule: The Text, Purpose, and Political Theory of California's Municipal Affairs Clause*, 41 PEPP. L. REV. 587 (2013), https://digitalcommons.pepperdine.edu/plr/vol41/iss3/3.
[7] Conn. Const. art. 10, § 1.
[8] *Sen. Hwang Offers Amendments and Passionate Senate Debate to Preserve Local Zoning, Land Use and Affordable Housing "Home Rule" Decision-Making*, Conn. Senate Republicans. Comm. (May 28, 2021), https://ctsenaterepublicans.com/2021/05/sen-hwang-offers-amendments-and-passionate-senate-debate-to-preserve-local-zoning-land-use-and-affordable-housing-home-rule-decision-making/.
[9] Bill Collins, *Another Scheme for Affordable Housing*, CT. MIRROR (Jan. 10, 2020), https://ctmirror.org/category/ct-viewpoints/another-scheme-for-affordable-housing/.
[10] https://www.zillow.com/fairfield-ct/home-values/.
[11] https://www.census.gov/quickfacts/fairfieldtownfairfieldcountyconnecticut
[12] Alexis Harrison, *Zoning Reform Must Consider the Character of Each Town*, CT. MIRROR (Dec. 17, 2020), https://ctmirror.org/category/ct-viewpoints/zoning-reform-must-consider-the-character-of-each-town/.
[13] David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by the National League of Cities*, SSRN (March 14, 2020), https://ssrn.com/abstract=3554119.
[14] *Id.* [citations omitted].
[15] Winchester, Conn. Planning and Zoning Commission Ordinance (Mar. 8, 2021), This resolution was unanimously approved at the Town of Winchester Planning and Zoning Commission March 8, 2021, regular meeting (by George Closson, Craig Sanden, Jerry Martinez, Peter Marchand, and Willard Platt).
[16] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB9

[17] Conn. Gen. Stat. § 8-3e (effective Oct. 1, 2016).
[18] Desegregate Conn., *Connecticut Zoning Atlas*, https://www.desegregatect.org/atlas (last visited November 27, 2021). *See* Sara C. Bronin, *Zoning by a Thousand Cuts*, SSRN (Feb. 24, 2021), https://ssrn.com/abstract=3792544 or http://dx.doi.org/10.2139/ssrn.3792544.
[19] 42 U.S.C. §3603(b)(2).
[20] *Id.* §3603(b)(1).
[21] Or. Rev. Stat. § 659A. 421.
[22] A list of parallel state exemption laws has been compiled by Scott Badami of Fox Rothschild LLP. Scott M. Badami, *United States: The FHA's "Mrs. Murphy Exemption" -- A 50 State Guide*, MONDAQ (Apr. 23, 2013), https://www.mondaq.com/unitedstates/real-estate/235406/the-fhas-mrs-murphy-exemption--a-50-state-guide.
[23] Codified Ordinance of the City of Shaker Heights, Ohio Ordinance 19-49, § 515 (passed July 22, 2019).
[24] Substitute H.B. 6107, Conn. Pub. Act. No. 21-29, AN ACT CONCERNING THE ZONING ENABLING ACT, ACCESSORY APARTMENTS, TRAINING FOR CERTAIN LAND USE OFFICIALS, MUNICIPAL AFFORDABLE HOUSING PLANS AND A COMMISSION ON CONNECTICUT'S DEVELOPMENT AND FUTURE. https://legiscan.com/CT/text/HB06107/2021.
[25] *See* The Policy Surveillance Program, *State Fair Housing Protections*, https://lawatlas.org/datasets/state-fair-housing-protections-1498143743#:~:text=The%20federal%20Fair%20Housing%20Act,%2C%20familial%20status%2C%20and%20disability. (last updated Aug. 1, 2019).
[26] *Eugene Analysis of Impediments to Fair Housing Choice 2020-2024*, Eugene-Or. Gov., https://www.eugene-or.gov/DocumentCenter/View/55253/Eugene-Analysis-of-Impediments-Summary-4-20-2020- (last visited November 27, 2021).
[27] The legislation is available at https://tinyurl.com/NYCequity.
[28] Robert C. Ellickson, *Stale Real Estate Covenants*, Yale Law & Economics Research Paper, SSRN (Aug. 21, 2020), https://ssrn.com/abstract=3678927 or http://dx.doi.org/10.2139/ssrn.3678927.
[29] "*See* Laws of 1987, ch. 56, §§ 1-2, which provides a method for property owners and others to "petition to strike racially discriminatory provisions from real property contracts." *May v. Spokane Cty.*, No. 37179-4-III (Wash. Ct. App. Feb. 23, 2021), https://www.courts.wa.gov/opinions/pdf/371794_pub.pdf.
[30] Boston, Mass. Zoning Code § 1-3, https://library.municode.com/ma/boston/codes/redevelopment_authority?nodeId=ART1TIPUSC.
[31] Del. Code Ann. tit. 9, § 9628, https://delcode.delaware.gov/title9/c096/index.html. Section 9628 provides:
[32] AB 721, "[a]n act to add Section 714.6 to the Civil Code, relating to real property." A.B. 721, Reg., Sess, (Cal. 2021-22), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB721

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Novel Coronavirus Claims Implicate Age-Old Property Rights Questions

New legal challenges to COVID-19-related government actions, including mask mandates and business closures, address old questions: How far can the police power be stretched to protect the public against dangers? To what extent do property rights limit governmental actions? When does diminution of existing property rights require compensation? Do localities have implied emergency powers, do they need specific authorization, and can they supplement state orders? What rights do property owners, landlords, and tenants have during crises?

Common law principles and a century's worth of U.S. Supreme Court opinions balancing property rights and public interests contribute to a better understanding.
Blackstone's Commentaries demonstrate that even under early common law, government regulation could limit personal liberties and property rights. Many Supreme Court cases build on this concept through Due Process and Takings jurisprudence.

1922, *Penn Coal v. Mahon*: In this seminal Supreme Court case, a property owner sought to enjoin mining under his house based on a Pennsylvania statute regulating coal mining. The Court denied the injunction, finding the statute may have constituted a taking. Before this case, we did not know police power regulations could constitute "regulatory takings." Pre-1922 challenges to property regulations were based on Fifth and Fourteenth Amendment Due Process claims that laws did not reasonably protect the public interest. Property "takings" are different. As Justice Holmes declared in *Penn Coal*, when a regulation goes too far, it can constitute the equivalent of a physical taking, which the Fifth and Fourteenth Amendments prevent unless implemented for a public purpose and accompanied by just compensation. The *Penn Coal* Court held Pennsylvania's mining restriction law could not be sustained as a police power exercise.

1906, *Strickley v. Highland Boy Gold Mining Co.*: 16 years before *Penn Coal*, Justice Holmes wrote *Strickley*, limiting a property owner's ability to enjoin a Utah police power law. The plaintiff challenged the state's action condemning an easement over the plaintiff's property and conveying it to a private mining company. Justice Holmes upheld the challenged legislation, finding that the state's action taking private property and conveying it to another private party was not unconstitutional.

1915, *Hadacheck v. Sebastian* and *Rienman v. Little Rock*: These cases address the legitimacy of using police power to prevent property use that constitutes a nuisance or

causes injury. The Supreme Court validated property restrictions of a brick kiln and livery stable, land uses it found injurious to the public health and safety.

1928, *Miller v. Schoene*: The *Miller* Court found the Takings Clause did not require Virginia to compensate an owner of cedar trees after the state ordered them destroyed to prevent disease to nearby apple orchards. The Court upheld the state's action as "controlled by considerations of social policy which are not unreasonable."

1926, *Euclid v. Ambler Realty*: The famous *Euclid* decision rejected another Due Process claim and upheld zoning as constitutional. The *Euclid* Court presumed the validity of police power enactments and imposed a heavy burden of proof on challengers. *Euclid* demonstrates that the scope of Constitutional principles expands and contracts in a changing world.

1988, *Pennell v. San Jose*: Plaintiffs challenged the City of San Jose's rent-control ordinance, enacted to alleviate elevated rents during a housing shortage. The Court held the ordinance did not violate Due Process but was rationally crafted to protect landlords' investments and prevent tenants' rent increases. The ordinance – with its purpose to prevent unreasonable rent increases – legitimately exercised police power.

2002, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*: This case demonstrates that temporarily suspending land development rights is not a taking. SCOTUS held a 32-month moratorium on development (issued to allow the Agency time to adopt measures to mitigate environmental impacts to Lake Tahoe) was not a regulatory taking.

These cases do not offer much hope for takings claims' success against public health emergency regulations. As for the seminal takings doctrines – *Loretto*, *Lucas*, *Nollan*, *Dolan*, and *Penn Central* – a study of 2,000 takings cases establishes that SCOTUS's categorical rules govern almost no state takings cases and regulatory takings claims almost invariably fail. Public health protection laws accomplish valid public objectives; they are likely to be valid under Due Process jurisprudence.

These cases also illustrate the role that local governments can play during public health crises, which can vary depending on the power granted in local charters, home rule provisions in state constitutions or state laws, or special and general enabling acts.

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Special Alert:

Five Summer of 2021 U.S. Supreme Court Cases on Takings and RLUIPA[1]

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Scope

Within the very short span of ten days (June 23-July 2, 2021), the Justices of the U.S. Supreme Court released opinions in five cases that have serious implications for those seeking enhanced protection of private property rights and for government officials and their designees who are accused of trampling those rights through allegedly confiscatory and arbitrary regulations or of eminent domain abuse. The Court made it easier to bring two types of takings challenges (in situations involving physical occupation[2] and regulations that go too far[3]), allowed privately owned public utilities to exercise eminent domain power over state lands,[4] remanded a Religious Land Use and Institutionalized Persons Act (RLUIPA) case involving the imposition of a septic system ordinance on a Minnesota Amish community,[5] and denied certiorari in an eminent domain challenge alleging that a taking was not for a public use over objections expressed by two Justices.[6] The first full Term of the newly reconstituted Roberts Court produced some surprising alignments and only one 6-3 split along ideological lines. This essay highlights key aspects of the five cases, directing the reader to relevant sections of *Land Use Law* (6th ed.).

I.

In *Cedar Point Nursery v. Hassid*,[7] the Supreme Court concluded that a California regulation allowing "labor organizations a 'right to take access' to an agricultural employer's property in order to solicit support for unionization" up to four 30-day periods per year amounted to "a *per se* physical taking under the Fifth and Fourteenth Amendments."[8]

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[1] This is a modified version of a Special Update that the author prepared for MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY (LexisNexis Matthew Bender).

[2] Cedar Point Nursery v. Hassid, 141 S.Ct. 2063 (June 23, 2021).

[3] Pakdel v. City & Cty. of San Francisco, 141 S.Ct. 2226 (per curiam) (June 28, 2021).

[4] PennEast Pipeline Co., LLC v. New Jersey, 141 S.Ct. 2244 (June 29, 2021).

[5] Mast v. Fillmore Cty., 141 S.Ct. 2430, *cert. granted*, *judg. vacated, and case remanded* (July 2, 2021).

[6] Eychaner v. City of Chicago, 141 S.Ct. 2422, *cert. denied* (July 2, 2021).

[7] Cedar Point Nursery v. Hassid, 141 S.Ct. 2063 (2021).

[8] *Cedar Point Nursery*, 141 S.Ct. at 2069. On physical takings, see DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, LAND USE LAW § 2.03 (6th ed. LexisNexis Matthew Bender).

The six-member majority (all Republican appointees) joined in an opinion by Chief Justice John Roberts that protected the property rights of two growers, one of which claimed that the United Farm Workers (UFW) took access to its property without giving notice, the other that blocked UFW organizers from entering its property. Requesting declaratory and injunctive relief, the growers brought suit in federal district court claiming "that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property."[9] The trial court rejected this argument, and a divided Ninth Circuit panel affirmed.

The Supreme Court reversed and remanded; Chief Justice Roberts explained that the "essential question" of the case was "whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."[10] To the majority the answer to that question was simple:

> The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.[11]

The majority reviewed earlier decisions in which the Court had placed special emphasis on the need to protect the property owner's "treasured" right to exclude, noting that "[t]he Court has often described the property interest taken [by 'government-authorized physical invasions'] as a servitude or easement."[12] In this instance, the growers asserted that the state had acquired an easement in gross without paying compensation.

Moreover, Chief Justice Roberts noted: "In *Loretto v. Teleprompter Manhattan CATV Corp.*,[13] we made clear that a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss."[14] The majority also disputed the dissent's assertion that because the physical occupation occasioned by the regulation was not "permanent" (that is, it did not last throughout the entire year), it was not an illegal taking, asserting that, "[t]o begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary."[15] Still, Chief Justice Roberts did acknowledge that "*Loretto* emphasized the heightened concerns associated with '[t]he permanence and absolute exclusivity of a physical occupation' in contrast to 'temporary limitations on the right to exclude,' and stated that '[n]ot every physical

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[9] *Cedar Point Nursery*, 141 S.Ct. at 2070.

[10] *Id.* at 2072.

[11] *Id.*

[12] *Id.* at 2073. On the right to exclude, see LAND USE LAW § 2.19.

[13] 458 U.S. 419 (1982).

[14] *Cedar Point Nursery*, 141 S.Ct. at 2073.

[15] *Id.* at 2074.

invasion is a taking.' "[16]

California servitudes law also played a role in the *Cedar Point* case, as the California Agricultural Labor Relations Board denied that an easement in gross had been appropriated by the state (a position shared by the dissenters): "In the Board's estimation, the regulation does not exact a true easement in gross under California law because the access right may not be transferred, does not burden any particular parcel of property, and may not be recorded."[17] The majority was not persuaded: "As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law. . . . The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law."[18]

In answer to the Board's "warn[ing] that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property," Chief Justice Roberts responded:

> *First*, our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. . . .
>
> *Second*, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights.[19] . . .
>
> *Third*, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking.[20] . . .[21]

The case was reversed and remanded.

Justice Stephen Breyer, writing for himself and the other two Democratic appointees, denied that a "physical taking" or "appropriation" had occurred,[22] asserted that the case

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[16] *Id.* (quoting *Loretto*, 458 U.S. at 435 n.12).

[17] *Id.* at 2075.

[18] *Id.* at 2075–76. The majority also distinguished the growers' situation from the shopping center owner in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), whose takings argument was rejected by the Court when he attempted to exclude leafleting: "Unlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. Limitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public." *Cedar Point Nursery*, 141 S.Ct. at 2077.

[19] Examples include the privileges "to enter property in the event of public or private necessity" and "to enter property to effect an arrest or enforce the criminal law under certain circumstances." *Id.* at 2079.

[20] The majority noted: "Under this framework, government health and safety inspection regimes will generally not constitute takings." *Id.*

[21] *Id.* at 2078–79.

[22] *Id.* at 2082 (Breyer, J., dissenting) ("The 'access' that [the regulation] grants union organizers does not amount to any traditional property interest in land. It does not, for example, take from the employers, or provide to the organizers, any freehold estate (*e.g.*, a fee simple, fee tail, or life estate); any concurrent estate (*e.g.*, a joint tenancy, tenancy in common, or tenancy by the entirety); or any leasehold estate (*e.g.*, a term of years, periodic tenancy, or tenancy at will).").

involved not a permanent occupation but "temporary limitations on the right to exclude,"[23] and asked the reader to "[c]onsider the large numbers of ordinary regulations in a host of different fields that, for a variety of purposes, permit temporary entry onto (or an 'invasion of') a property owner's land. They include activities ranging from examination of food products to inspections for compliance with preschool licensing requirements."[24] The dissenters were not reassured by the majority's claim that these types of regulations would fit into exceptions carved out of the *per se* rule, asking that "if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court's exceptions and is a *per se* taking, then to what other forms of regulation does the Court's *per se* conclusion also apply?"[25]

By massaging the "permanent" element of physical takings, reemphasizing the essentiality of the "right to exclude," and expanding the reach of the Takings Clause to include routine government inspections, the Supreme Court has issued a ruling that promises to have ramifications far outside the realm of labor relations. The near future holds the promise of a spate of physical takings cases brought against all levels of government for official "invasions" large and small.

II.

In a per curiam decision in *Pakdel v. City and County of San Francisco*,[26] the Justices, following up on the 2019 ruling in *Knick v. Township of Scott*,[27] vacated and remanded a Ninth Circuit ruling that "required petitioners [who brought a challenge under 42 U.S.C. § 1983] to show not only that the San Francisco Department of Public Works had firmly rejected their request for a property-law exemption (which they did show), but also that they had complied with the agency's administrative procedures for seeking relief."[28]

The case involved a married couple, Peyman Pakdel and Sima Chegini, who owned part of a multiunit residential building as tenants in common with other unit owners. Hoping to convert the units "into modern condominium-style arrangements," the couple and the other unit owners sought government permission, which was available "subject to a filing fee and several conditions," the most important being "that nonoccupant owners who rented out their units had to offer their tenants a lifetime lease."[29] While the couple, who had leased out their unit, agreed to offer a lifetime lease when they applied for the conversion, a few months after the conversion was approved,

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[23] *Id.* at 2084.

[24] *Id.* at 2087. Justice Breyer cited a wide range of federal and state regulations regarding inspections of workplaces, meat and dairy products facilities, manufactured home factories, coastal wetlands, historic resources, foster care facilities, preschool programs, slaughterhouses, solid waste management facilities, and owl surveys. *Id.* at 2087–88.

[25] *Id.* at 2089.

[26] 141 S.Ct. 2226 (per curiam 2021).

[27] 139 S. Ct. 2162 (2019). *See* LAND USE LAW §§ 2.31–.33.

[28] *Pakdel*, 141 S.Ct. at 2228.

[29] *Id.*

they "requested that the city either excuse them from executing the lifetime lease or compensate them for the lease."[30] When the city refused and informed the couple that their failure to offer the lifetime lease " 'could result in an enforcement action,' " Pakdel and Chegini sued, asserting among other claims "that the lifetime-lease requirement was an unconstitutional regulatory taking."[31]

In 2017, the federal district court in sided with the city, finding that the case was not ripe because the couple had not sought compensation through California's takings procedures. However, in 2019, the Supreme Court in *Knick* " 'explained that '[t]he Fifth Amendment right to full compensation arises at the time of the taking' and that '[t]he availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim.' "[32]

Nevertheless, on appeal a divided Ninth Circuit affirmed the lower court's dismissal of the couple's claims: "Noting that *Knick* left untouched *Williamson County*'s[33] alternative holding that plaintiffs may challenge only 'final' government decisions, the panel concluded that petitioners' regulatory 'takings claim remain[ed] unripe because they never obtained a final decision regarding the application of the Lifetime Lease Requirement to their Unit.' "[34] The appellate court reasoned that, "[a]lthough the city had twice denied their requests for the exemption—and in fact the 'relevant agency c[ould] no longer grant' relief—. . . this decision was not truly 'final' because petitioners had made a belated request for an exemption at the end of the administrative process instead of timely seeking one 'through the prescribed procedures.' "[35]

The U.S. Supreme Court reversed, concluding that "[t]he Ninth Circuit's demand that a plaintiff seek 'an exemption through the prescribed [state] procedures,' plainly requires exhaustion."[36] However, the Court continued, "[w]hatever policy virtues this doctrine might have, administrative 'exhaustion of state remedies' is not a prerequisite for a takings claim when the government has reached a conclusive position."[37] This was not a situation in which "a plaintiff's failure to properly pursue administrative procedures may render a claim unripe *if* avenues still remain for the government to clarify or change its decision,"[38] as when a landowner could still pursue a zoning variance. Should local governments and other takings defendants desire a change, they

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[30] *Id.*

[31] *Id.*

[32] *Id.* at 2229 (quoting *Knick*, 139 S. Ct. at 2170–71.

[33] Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U. S. (1985).

[34] *Pakdel*, 141 A.Ct. at 2229 (quoting Pakdel v. City & Cty. of San Francisco, 952 F.3d 1157, 1163 (9th Cir. 2020, *rev'd*, 2021 U.S. LEXIS 3557).

[35] *Id.* (quoting *Pakdel*, 952 F.3d at 1166–67).

[36] *Id.* at 2230 (quoting *Pakdel*, 952 F.3d at 1167).

[37] *Id.* at 2231 (citing *Knick*).

[38] *Id.*

should take their case to Congress, which "always has the option of imposing a strict administrative-exhaustion requirement—just as it has done for certain civil-rights claims filed by prisoners."[39] The Court thus remanded the case and, in a footnote, suggested that, in the light of the *Cedar Point* ruling, "the Ninth Circuit may give further consideration" to the exaction, physical taking, and private taking claims raised by Pakdel and Chegini.[40]

In this way the Supreme Court made it even easier for claimants to bring § 1983 takings claims of all varieties in federal courts, tribunals to which the most recent former President appointed dozens, even hundreds, of judges who likely are no friends to government regulation of property.

III.

In *PennEast Pipeline Co., LLC v. New Jersey*,[41] a five-Justice majority made up of strange ideological bedfellows (Alito, Breyer, Kavanaugh, Roberts, and Sotomayor), decided that "the Federal Government can constitutionally confer on pipeline companies the authority to condemn necessary rights-of-way in which a State has an interest."[42] Reaching back to the time of the Framers, Chief Justice Roberts explained, over the objections of Justices Barrett, Gorsuch, Kagan, and Thomas, that, "[a]lthough nonconsenting States are generally immune from suit, they surrendered their immunity from the exercise of the federal eminent domain power when they ratified the Constitution."[43]

In 1947, Congress amended the nine-year-old Natural Gas Act (NGA), authorizing those private natural gas companies that had received certificates of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) "to exercise the *federal* eminent domain power" in order to build interstate pipelines.[44] 1n 2015, a joint venture among energy companies, PennEast Pipeline Co., applied for a certificate in order to build "a 116-mile pipeline from Luzerne County, Pennsylvania, to Mercer County New Jersey."[45] Three years later, following a draft environmental impact statement, thousands of public comments, and route modifications by PennEast in response to some of those comments, FERC granted the certificate.

Weeks later, PennEast filed complaints in New Jersey federal district court in order to exercise federal eminent domain power. Among the targeted parcels were two "in which New Jersey asserts a possessory interest, and 40 parcels in which the State claims nonpossessory interests, such as conservation easements."[46] When New Jersey sought

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[39] *Id.*

[40] *Id.* at 2229 n.*.

[41] 141 S.Ct. 2244 (2021).

[42] *Id.* at 2251. For eminent domain and takings generally, see LAND USE LAW §§ 2.01–.38.

[43] *PennEast*, 141 S.Ct. at 2251–52.

[44] *Id.* at 2252.

[45] *Id.* at 2253.

[46] *Id.*

to have the court dismiss the company's complaints on sovereign immunity grounds, "[t]he District Court denied the motion, holding that New Jersey was not immune from PennEast's exercise of the Federal Government's eminent domain power."[47] A Third Circuit panel vacated the lower court order, basing its ruling in part on Supreme Court decisions "holding that Congress cannot abrogate state sovereign immunity in the absence of an ' "unmistakably clear" ' statement, and finding "that § 717f(h) [of the NGA] did not clearly delegate to certificate holders the Federal Government's ability to sue nonconsenting States."[48]

The Supreme Court disagreed, ruling:

> By its terms, § 717f(h) authorizes FERC certificate holders to condemn all necessary rights-of-way, whether owned by private parties or States. Such condemnation actions do not offend state sovereignty, because the States consented at the founding to the exercise of the federal eminent domain power, whether by public officials or private delegatees.[49]

Chief Justice Roberts' majority opinion was built on a foundation of the early history of eminent domain before and during the framing of the Constitution, nineteenth century decisions establishing that the federal government's taking power reached "areas subject to exclusive federal jurisdiction" and "property within state boundaries as well,"[50] and a 1941 decision in which the Court "upheld an Act of Congress authorizing construction of a dam and a reservoir that would inundate thousands of acres of state-owned land."[51] The Court also asserted:

> For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties. It was commonplace before and after the founding for the Colonies and then the States to authorize the private condemnation of land for a variety of public works.[52]

Moreover, "State property was not immune from the exercise of delegated eminent domain power."[53]

The majority then rejected the arguments "that sovereign immunity bars condemnation actions against nonconsenting States" and "that § 717f(h) does not speak with sufficient clarity to authorize" those condemnation actions.[54] In response to the respondents' and dissenters' assertion that Congress does not have the power under the Commerce Clause to authorize private suits against nonconsenting states, Chief Justice Roberts asserted that "congressional abrogation is not the only means of subjecting States to suit. . . . States can also be sued if they have consented to suit in the plan of

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[47] *Id.*

[48] *Id.* at 2254.

[49] *Id.* at 2263.

[50] *Id.* at 2255.

[51] *Id.* (citing Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U. S. 508 (1941)).

[52] *Id.*

[53] *Id.* at 2256.

[54] *Id.* at 2258.

the [Constitutional] Convention."[55] "[W]hen the States entered the federal system," according to the majority, "they renounced their right to the 'highest dominion in the lands comprised within their limits.' "[56] "The plan of the Convention," he continued in language that would make many modern federalists shudder, "contemplated that States' eminent domain power would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.' "[57]

Chief Justice Roberts next rejected Justice Gorsuch's argument in dissent "that even if the States consented in the plan of the Convention to the proceedings below, the Eleventh Amendment nonetheless divests federal courts of subject-matter jurisdiction over a suit against a State by a diverse plaintiff."[58] Because the majority had found that states consented to eminent domain suits by the federal government and its designees as part of the constitutional plan, any Eleventh Amendment objection would have been in effect waived.

In conclusion, the majority found that "[t]he NGA fits well within [a] tradition"[59] of the use of federal eminent domain to achieve a strong national infrastructure program:

> When the Framers met in Philadelphia in the summer of 1787, they sought to create a cohesive national sovereign in response to the failings of the Articles of Confederation. Over the course of the Nation's history, the Federal Government and its delegatees have exercised the eminent domain power to give effect to that vision, connecting our country through turnpikes, bridges, and railroads—and more recently pipelines, telecommunications infrastructure, and electric transmission facilities. And we have repeatedly upheld these exercises of the federal eminent domain power—whether by the Government or a private corporation, whether through an upfront taking or a direct condemnation proceeding, and whether against private property or state-owned land.[60]

Justice Barrett, joined by Gorsuch, Kagan, and Thomas, begged to differ with the majority's conclusions regarding the plan of convention: "This argument has no textual, structural, or historical support. Because there is no reason to treat private condemnation suits differently from any other cause of action created pursuant to the Commerce Clause, I respectfully dissent."[61]

Those who hope that the Supreme Court will reconsider the expansive use of eminent domain, associated with the highly controversial ruling in Kelo v. New London,[62] *will be disappointed by this pro-condemnation ruling. Cynics will point out that the most direct beneficiaries of the Court's ruling are energy companies who prevailed at the expense of public property owners.*

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[55] *Id.* at 2259.

[56] *Id.* (quoting Cherokee Nation v. Southern K. R. Co., 135 U.S. 641, 656 (1890)).

[57] *Id.* (quoting Kohl v. United States, 91 U.S. 367, 372 (1876).

[58] *Id.* at 2262.

[59] *Id.* at 2263.

[60] *Id.*

[61] *Id.* at 2265 (Barrett, J., dissenting).

[62] 545 U.S. 469 (2005).

IV.

In *Mast v. Fillmore County,*[63] the Court granted the petition for a writ of certiorari to Amish petitioners who, using RLUIPA,[64] challenged a county ordinance mandating modern septic systems for the disposal of gray water[65]; vacated the judgment below in favor of the county; and remanded the case back "to the Court of Appeals of Minnesota for further consideration in light of *Fulton v. Philadelphia*,[66] in which the Court held that the city's refusal to contract with Catholic Social Services (CSS) for foster care services unless CSS agreed to certify same-sex couples amounted to a violation of the Free Exercise Clause.

Justice Alito, who concurred in the *Mast* judgment, wrote a shore statement to emphasize that "[t]he lower court plainly misinterpreted and misapplied" RLUIPA.[67] Justice Gorsuch went further, summarizing the facts of the dispute, attacking the lower court's misapplication of the strict scrutiny mandated by the statutes, and detailed the threats made by the county, including a counterclaim in which the county sought "an order displacing the Amish from their homes, removing all their possessions, and declaring their homes uninhabitable if the Amish did not install septic systems within six months."[68]

Justice Gorsuch concluded his concurrence with hope that RLUIPA properly applied by the lower court would bring vindication for the Amish:

> RLUIPA prohibits governments from infringing sincerely held religious beliefs and practices except as a last resort. Despite that clear command, this dispute has staggered on in various forms for over six years. County officials have subjected the Amish to threats of reprisals and inspections of their homes and farms. They have attacked the sincerity of the Amish's faith. And they have displayed precisely the sort of bureaucratic inflexibility RLUIPA was designed to prevent. Now that this Court has vacated the decision below, I hope the lower courts and local authorities will take advantage of this "opportunity for further consideration," and bring this matter to a swift conclusion. In this country, neither the Amish nor anyone else should have to choose between their farms and their faith.[69]

There is just one problem: a close reading of RLUIPA would reveal that the statute most likely was inapplicable to the specific dispute in *Mast*. The ordinance in question is not a traditional "land use regulation," which is clearly defined in 42 U.S.C. § 2000cc-5 as "a zoning or landmarking law, or the application of such a law, that limits or restricts

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[63] 141 S.Ct. 2430, *cert. granted*, *judg. vacated, and case remanded* (2021).

[64] On RLUIPA, see LAND USE LAW § 5.66.

[65] *Mast*, 141 S.Ct. at 2431(Gorsuch, J., concurring) ("Today's dispute is about plumbing, specifically the disposal of gray water—water used in dishwashing, laundry, and the like.").

[66] 141 S.Ct. 1868 (2021).

[67] *Mast*, 141 S.Ct. at 2430 (Alito, J. concurring).

[68] *Mast*, 141 S.Ct. at 2431 (Gorsuch, J., concurring).

[69] *Mast*, 141 S.Ct. at 243-34 (Gorsuch, J., concurring) (quoting Lawrence v. Chater, 516 U. S. 163, 167 (1996) (per curiam)).

a claimant's use or development of land (including a structure affixed to land) . . .'' The county gray water septic system ordinance is a far cry from "a zoning or landmarking law."

The way in which the Court handled the Mast *petition for certiorari (the reader will please excuse the following pun) only muddies the RLUIPA waters. While the Justices' ardor in support of a religious minority is admirable and understandable, the words of the statute suggest its inapplicability.*

V.

While the Court in *Eychaner v. City of Chicago,*[70] a case involving the use of eminent domain allegedly to transfer ownership from one private owner to another private owner, denied the petition for a writ of certiorari, Justice Thomas (joined by Justice Gorsuch) took the opportunity to express his hope that his colleagues would soon revisit the Court's broad interpretation of public use in *Kelo*.[71]

The "ostensible 'public use' " identified by the city of Chicago—"The city needed to transfer [Eychaner's] land to the [Bloomer Chocolate Company] factory because otherwise it 'may become a blighted area.' "[72]—fell far short of Justice Thomas's standards. He wanted the Court to review the decision below for two reasons:

> First, this petition provides us the opportunity to correct the mistake the Court made in *Kelo*. There, the Court found the Fifth Amendment's "public use" requirement satisfied when a city transferred land from one private owner to another in the name of economic development. That decision was wrong the day it was decided. And it remains wrong today. "Public use" means something more than any conceivable "public purpose." . . .
>
> Second, even accepting *Kelo* as good law, this petition allows us to clarify the Public Use Clause and its remaining limits. *Kelo* weakened the public-use requirement but did not abolish it. In fact, the *Kelo* majority favorably cited an opinion that had concluded that a taking to prevent "future blight" violated the Public Use Clause. This Court should not stand by as lower courts further dismantle constitutional safeguards.[73]

Time will tell whether Justice Thomas's effort to revisit *Kelo* will gain traction.

For now, state legislative and constitutional changes remain Kelo *critics' main avenue of relief, although the efforts of more than forty states to institute such corrections*[74] *have not yet on the ground yielded a dramatic departure since the Court's controversial ruling in 2005.*

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[70] 141 S.Ct. 2422, *cert. denied* (2021).

[71] On *Kelo* and its aftermath, see LAND USE LAW § 2.38.

[72] *Eychaner*, 141 S.Ct. at 2423 (Thomas, J., dissenting).

[73] *Id.* (Thomas, J., dissenting).

[74] *See* MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 79F.03[3][b][iv] (LexisNexis Matthew Bender 2021).