

# Separate and Still Unequal: How Neighborhood Zoning Laws Keep U.S. Schools Segregated

Glynnis Hagins\*

## INTRODUCTION: LEGAL BACKGROUND

Despite federal court desegregation orders issued beginning in the 1950s to remedy unconstitutional de jure segregation, resulting in some regions having more school integration,<sup>1</sup> schools in the United States continue to remain racially and socioeconomically segregated, with half of America’s public school students attending integrated schools where “fractured communities” and “a fractured system of education funding” abound.<sup>2</sup> Based on the most recent data, U.S. public schools enroll approximately 49.4 million students as of fall 2020,<sup>3</sup> and of those students, based on data collected in 2016, approximately 71% attend the schools that their district assigns.<sup>4</sup> The data, therefore, suggests that most U.S. public school students attend a neighborhood school or a school closer to their homes in their school districts’ attendance zones.

Because students attend neighborhood schools, students are more likely to attend schools that mirror the statistics of their neighborhoods; therefore, students living in either high-poverty or high-income neighborhoods that are also racially isolated are more likely to attend

---

\* Glynnis Hagins is currently a Skadden Fellow working on the NAACP Housing Navigators Program in Columbia, South Carolina. She graduated from the University of South Carolina School of Law in 2022 and from North Carolina Central University in 2015. She is a former high school English teacher who, as the child of parents who desegregated North Carolina’s public schools, witnessed the impact of school segregation on all students. Many thanks to Professor Derek W. Black for sharing his knowledge about school segregation and for his guidance and supervision.

1. Ivan Natividad, *Why Are American Public Schools Still Segregated*, BERKELEY NEWS (Mar. 4, 2020), <https://news.berkeley.edu/2020/03/04/why-are-american-public-schools-still-segregated/>.

2. Ailsa Chang & Jonaki Mehta, *Why U.S. Schools Are Still Segregated—And One Idea to Help Change That*, NPR (July 7, 2020, 6:58 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/07/888469809/how-funding-model-preserves-racial-segregation-in-public-schools>.

3. *Fast Facts: Back to School Statistics*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Nov. 22, 2021) [hereinafter *Back to School Statistics*].

4. *Fast Facts: Public School Choice Programs*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=6> (last visited Nov. 22, 2021) [hereinafter *Public School Choice Programs*]; see *Back to School Statistics*, *supra* note 3 (noting that students had the option to attend school virtually and in remote settings during the 2020–2021 school year in response to the COVID-19 pandemic).

schools that mirror these statistics.<sup>5</sup> Black and Hispanic students are more likely to attend schools that have 75% or more minority enrollment, with 59% of Black students and 60% of Hispanic students attending such schools.<sup>6</sup> White students are less likely to attend schools with high minority enrollment; instead, 47% of white students attend schools with less than 25% minority enrollment.<sup>7</sup> Professor Erika K. Wilson observes that “[o]f all racial and ethnic groups, white students are the most segregated within public schools in many racially diverse metropolitan areas.”<sup>8</sup> Thus, if looking at school enrollment on the basis of minority/majority racial composition, students of all races attend racially isolated neighborhood schools.

The United States Supreme Court’s landmark decision in *Brown v. Board of Education* paved the way for robust and sweeping changes to the demographic makeup of schools, especially those in the Jim Crow South, establishing a constitutional right of Equal Protection in education, though not establishing a fundamental right, and increasing the educational opportunities available to students.<sup>9</sup> But since those robust and sweeping changes of the mid-to-late twentieth century, the Court has recognized that housing zones influence school attendance zones, and because of this influence, the Court has more recently held that school districts, especially those districts that did not previously practice de jure segregation and those that are no longer under court orders to desegregate, cannot rely on individual racial classifications when developing racially conscious school assignment plans.<sup>10</sup> Although the Court recognized that some schools remained segregated, the Court’s decisions speak to the belief that the cause of lingering

---

5. Alvin Chang, *The Data Proves that School Segregation Is Getting Worse*, VOX (Mar. 5, 2018, 1:50 PM), <https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data>.

6. *Racial/Ethnic Enrollment in Public Schools*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/programs/coe/indicator/cge> (last updated May 2021).

7. *Id.*

8. Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2389 (2021).

9. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (*Brown I*) (prohibiting segregation in public schools and recognizing that separate is not equal in educational opportunity).

10. *Compare Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (holding that school districts seeking to remedy past segregation could use busing, among other plans, as a permissible remedial option), *with Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (expanding on the Court’s recognition that voluntary desegregation plans are analyzed differently than remedial plans for de jure segregation and held that school districts should not use racial classifications in school assignments).

segregation was not the result of deliberate state action, but rather because of individual choices, such as with housing and parents' decisions about where to live; thus, through its interpretation of the constitution, the Court could not prohibit de facto segregation. Where states did not sponsor de jure segregation, the Court would look at those remedies with more exacting and higher levels of scrutiny.<sup>11</sup>

The Court's private choices logic is most visible in decisions about when and how school districts could remedy lingering segregation in states where separate and unequal was not the law of the land. Even when the Court had an opportunity to address the role states played in housing segregation, it continued to blame de facto segregation as being the result of private choices.<sup>12</sup> In *Milliken v. Bradley*, the Court held that busing plans could only remedy intradistrict segregation and could not reach beyond the district to remedy school segregation across districts; in essence, a group of school districts could not create interdistrict remedies for school segregation unless the district, or the suing family, could prove that the interdistrict segregation was intentional.<sup>13</sup> In its opinion, the district court observed that the State as well as private choices caused racially isolated neighborhoods with predominant racial makeups in Detroit.<sup>14</sup> However, the Supreme Court declined the opportunity to address the effect of housing segregation on the racial isolation of Detroit's and the suburban areas' schools: "Accordingly, in its present posture, the case does not present any question concerning possible state housing violations."<sup>15</sup> The inferential message of the Court was clear—families could move to another school district to avoid being subject to school integration policies. As James Ryan, now President of the University of Virginia, put it, "*Milliken v. Bradley* essentially told parents that they and their children would be safe once they reached the suburbs."<sup>16</sup> As time passed and schools, especially in the South, continued to update and implement desegregation plans, the Court empowered federal district courts to relinquish school districts

---

11. *Parents Involved in Cmty. Schs.*, 551 U.S. at 720–22.

12. See *Milliken v. Bradley*, 418 U.S. 717 (1974).

13. *Id.*

14. *Id.* at 728 n.7.

15. *Id.*

16. JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 65 (2010).

from federal oversight, holding that once school districts achieved “unitary” status, school districts were no longer legally bound to develop desegregation plans or consider individual racial classifications in school assignment plans.<sup>17</sup>

The Court’s decisions effectively allowed segregation to continue, despite its unconstitutionality, under the guise of private discrimination. This presumably private discrimination drives education policy, including school attendance zones, assignment plans, admissions policies, and, most interestingly to this Article, housing choices. Thus, segregation persists not only in schools but also in the communities surrounding them. The Court’s consistent determination that school segregation is the result of housing segregation while also refusing to address the underlying laws and policies that states and local governments created raise socioeconomic and educational concerns for families isolated based on income and race. Exclusionary zoning laws, such as single-family only zones, keep low-income families and families of color from accessing affordable housing in high-opportunity areas with strong schools. Unless state and local governments resolve community segregation, it will be difficult to resolve school segregation so long as schools operate under a neighborhood school assignment model. Therefore, the expansion of affordable housing opportunities, through the implementation of more inclusive zoning policies, provides a good path forward to combating racial and socioeconomic segregation in U.S. public schools. State and local governments, as well as school districts, should collaborate to expand access to affordable housing opportunities through municipal zoning laws, such as multiuse zones and inclusionary zones, and more inclusive land use regulation.

---

17. *See* *Freeman v. Pitts*, 503 U.S. 467 (1992); *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

## I. IS EXTENDED SEGREGATION AND RESEGREGATION REALLY THE RESULT OF PARENTS' PRIVATE CHOICES?

If you are a parent, think about how you decided where your children would attend school; if you are not a parent, think about why you attended school in the school district that you did. When most people think of school choice, they associate choice policies with charter schools, school district magnet programs, and specialized schools.<sup>18</sup> However, as the Supreme Court acknowledged, parents often practice school choice by selecting where they want to live based on the schooling options available in a neighborhood or area of the city.<sup>19</sup> As of 2016, the data suggested that 22.4% of public school students attending their assigned school moved to the neighborhood so that they could attend a specific public school in that district or school attendance zone.<sup>20</sup> Contrastingly, only 11.2% of parents reported choosing the public school that their children attend through school choice options.<sup>21</sup> Parents' school choice decisions may impact their selection to purchase or rent a home in a suburban area where the school district or a particular school within the district has good achievement ratings or other indicators of strong schools, such as school climate.<sup>22</sup> Surveys of parents seeking to understand how they make decisions and evaluate school quality found that reviews from other parents influence decision making around school choice.<sup>23</sup>

---

18. *What Is School Choice?*, NAT'L SCH. CHOICE WK., <https://schoolchoiceweek.com/what-is-school-choice/> (last visited Oct. 3, 2022).

19. See Adam Goldstein & Orestes P. Hastings, *Buying In: Positional Competition, Schools, Income Inequality, and Housing Consumption*, 6 SOCIOLOGICAL SCI. 416, 419–20 (2019) (acknowledging empirical data and research indicating that “school attendance remains closely linked to residential location” and evaluating the correlation between schools and residential value based on inequality).

20. *Public School Choice Programs*, *supra* note 4.

21. *Id.*

22. *How Do Parents Research and Choose Schools?: Parent Attitudes and Behaviors When Choosing Schools*, 2013, GREAT SCHS. 11 (2013), [https://www.greatschools.org/catalog/pdf/How\\_Do\\_Parents\\_Research\\_and\\_Choose\\_Schools.pdf](https://www.greatschools.org/catalog/pdf/How_Do_Parents_Research_and_Choose_Schools.pdf) [hereinafter *How Do Parents Research and Choose Schools?*]; see also Sarah Grady, *Why Do Parents Choose Schools for Their Children?*, NCES BLOG (July 30, 2020), <https://nces.ed.gov/blogs/nces/post/why-do-parents-choose-schools-for-their-children>.

23. *How Do Parents Research and Choose Schools?*, *supra* note 22, at 20–21.

Considering that parents may combine their children's school needs with other neighborhood amenities, such as high-end grocery stores, restaurants, and retail options, makes this real estate a hot commodity that realtors capitalize on to market neighborhoods and areas. For example, a realtor in Tampa, Florida, has an article on its website entitled "3 Reasons Why It's Worth Moving for a Better School District."<sup>24</sup> This Article notes that for parents, "[F]ew things carry the anxiety of trying to decide where to live based on the school district."<sup>25</sup> The article observes that the appreciated value of homes in neighborhoods with good schools increases at "a more consistent rate," citing a study finding that "homes in good school districts tend to sell faster and at a higher value."<sup>26</sup> Indeed, the article capitalizes on the competitive values of meritocracy, which flourish on comparison,<sup>27</sup> by recognizing that "[m]oving into areas where [children] are surrounded by other successful people is one of the key things that wealthier, successful people do, according to a study in the American Sociological Review."<sup>28</sup> The article also quotes a University of Southern California professor: "Buying a neighborhood is probably one of the most important things you can do for your kid."<sup>29</sup>

Changing viewpoints and capitalizing on parents' eagerness to choose good schools for their children make it apparent that the best way to ensure integrated schools would be to convince parents that diverse schools have increased academic and social benefits for all students. The research shows that all students benefit from learning in integrated schools and classrooms.<sup>30</sup> Students in diverse classrooms

---

24. *3 Reasons Why It's Worth Moving for a Better School District*, CASA FINA REALTY (July 11, 2017), <https://casafinarealty.com/3-reasons-worth-moving-better-school-district/> [hereinafter *3 Reasons*].

25. *Id.*

26. *Id.*

27. See generally Roge Karma, "The Meritocracy Trap," *Explained*, VOX (Oct. 24, 2019, 8:40 AM), <https://www.vox.com/policy-and-politics/2019/10/24/20919030/meritocracy-book-daniel-markovits-inequality-rich>. Meritocracy is defined as "a system, organization, or society in which people are chosen and moved into positions of success, power, and influence on the basis of their demonstrated abilities and merit." *Meritocracy*, MERRIAM-WEBSTER DICTIONARY (online), <https://www.merriam-webster.com/dictionary/meritocracy> (last visited October 22, 2021).

28. *3 Reasons*, *supra* note 24.

29. *Id.*

30. See generally *The Benefits of Socioeconomically and Racially Integrated Schools and Classrooms*, CENTURY FOUND. (Apr. 29, 2019), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/?agreed=1/>.

have “stronger academic outcomes,” such as higher test scores, higher college enrollment, and lower dropout rates.<sup>31</sup> Students of all racial backgrounds benefit from learning alongside students from diverse backgrounds that “encourage critical thinking, problem solving, and creativity.”<sup>32</sup> Additionally, in a time period when workplaces<sup>33</sup> and public spaces<sup>34</sup> in American life are becoming increasingly diverse, most Americans feel that integrated—racially and socioeconomically diverse—schools are important.<sup>35</sup> Many Americans recognize that public schools should reflect the communities’ “mix of students from different economic backgrounds.”<sup>36</sup>

However, despite the positive correlations between integrated schools and academic and social benefits as well as the resounding support for racially and socioeconomically diverse public schools, Americans, particularly parents, express concerns about the methods of achieving integrated schools.<sup>37</sup> The myth of the “cost to student” trap of longer commutes or added travel time outside of their neighborhoods, as well as perceived threats to student academic success, hinders parents from fully accepting policies geared towards diversifying school assignments through choice policies that the Supreme Court recognized as permissible for initial school desegregation in *Green v. County School Board of New Kent County*.<sup>38</sup> Other Court decisions have allowed longer commutes for students as a permissible means of

---

31. *Id.* at 1.

32. *Id.* at 2.

33. See, e.g., Mitra Toossi, *Labor Force Projections to 2024: The Labor Force Is Growing, but Slowly*, U.S. BUREAU LAB. STAT. (Dec. 2015), <https://www.bls.gov/opub/mlr/2015/article/labor-force-projections-to-2024.htm> (projecting that the diversity of the workforce will continue to increase by 2024).

34. Elise Oberliesen, Katherine Peinhardt & Nathan Storrington, *Well-Designed Public Spaces Are Inclusive Ones*, AM. PLAN. ASS'N (Apr. 14, 2021), <https://www.planning.org/planning/2021/spring/well-designed-public-spaces-are-inclusive-ones/> (recognizing that planners should design public spaces to encourage inclusivity).

35. Halley Potter et al., *School Integration Is Popular. We Can Make It More So.*, CENTURY FOUND. (June 3, 2021), <https://tcf.org/content/commentary/school-integration-is-popular-we-can-make-it-more-so/>.

36. *Id.*

37. *Id.*

38. *Id.*; see also *Green v. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 435–36 (1968) (holding that removal of the visages of past discrimination through dual systems of education to achieve unitary status for fully integrated schools requires a review of student demographics, faculty, transportation, staff, facilities, and extracurricular activities).

achieving integrated schools.<sup>39</sup> But affluent parents have made their voice heard over the years that the cost to students do not outweigh the benefits of having diverse schools.<sup>40</sup> Therefore, school districts appear to operate under the assumption that so long as parents are moving to find better schools for their children, those private choices are beyond the scope and action of diverse school assignment plans, absent a school choice policy through, for example, a magnet program or controlled choice plan.<sup>41</sup> The data and parental actions also make clear that residential choices often drive where children attend school. Because school segregation is presumed to be the result of parents' private residential choices, school districts and local governments should work together to make housing choices more equitable and allow families from all socioeconomic and racial backgrounds to select schools in more affluent, thriving neighborhoods.

---

39. For a full discussion of the Court's school desegregation jurisprudence, see Wilson *supra* note 8 (reviewing the long-term impact of the Court's desegregation framework).

40. See Annette Lareau et al., *Opinion: When Wealthy Parents Hold Sway in Public Schools*, HECHINGER REP. (June 24, 2018), <https://hechingerreport.org/opinion-when-wealthy-parents-hold-sway-in-public-schools/> (observing affluent parents' discontented reactions to proposed or implemented school district reassignment plans meant to promote diversity. The reactions ranged from soliciting expert studies about the school districts' plans to lawsuits against the district.).

41. Created as a school assignment plan in response to court-ordered desegregation orders, controlled choice operates as a way to achieve diversity in public schools by allowing parents to rank their preferences for schools that their children could attend. For more information on controlled choice, see Atila Abdulkadiroglu & Tayfun Sonmez, *School Choice: A Mechanism Design Approach*, 93 AM. ECON. REV. 729, 732 (2003). *But see* David J. Armor, *The Problems with Economic Integration and Controlled Choice*, CATO INST. (Sept. 24, 2019), <https://www.cato.org/policy-analysis/problems-economic-integration-controlled-choice>, for criticisms of using controlled choice as a method to achieve economic integration. For a full discussion of the advantages of voluntary desegregation plans more broadly, see Derek W. Black, *In Defense of Voluntary Desegregation: All Things Are not Equal*, 44 WAKE FOREST L. REV. 107 (2009).



## II. THE HOUSING AFFORDABILITY CRISIS

Juxtaposed with the private choices of families moving to a neighborhood for a particular school or school district is a housing affordability crisis. Many experts believe that a supply shortage of housing options leaves many low-income renters and home buyers at a disadvantage because housing demand is greater than housing supply.<sup>42</sup> In 2018, the housing supply was facing a 350,000-unit shortage that “has increased home prices and rents, a trend that will continue for the foreseeable future absent policy changes.”<sup>43</sup> Other more recent reports estimate a shortage of upwards of 6.8 million units, including single-family, condos, townhomes, and rental units.<sup>44</sup> Housing production has not recovered since the Great Recession of 2008, further deepening the affordability divide and causing units on the market to be valued at elevated prices.<sup>45</sup> Therefore, a supply shortage coupled with an increasing demand caused the most recent astronomical rise of home prices.<sup>46</sup>

Moreover, single-family starter homes that have “long been an affordable” option for young families are also in a severe shortage, with homes with larger square footage taking construction priority.<sup>47</sup> Advocates argue that to make up for this decline in building single-family homes would require building more single-family starter homes to combat this supply-side shortage.<sup>48</sup> However, as with most

---

42. Patrick Sisson et al., *The Affordable Housing Crisis, Explained: Blame Policy, Demographics and Market Forces*, CURBED (Mar. 2, 2020, 12:46 PM), <https://archive.curbed.com/2019/5/15/18617763/affordable-housing-policy-rent-real-estate-apartment>; Michael Neal et al., *Housing Supply Chartbook*, URB. INST. 5 (Jan. 2020) [https://www.urban.org/sites/default/files/publication/101553/housing\\_supply\\_chartbook\\_1.pdf](https://www.urban.org/sites/default/files/publication/101553/housing_supply_chartbook_1.pdf).

43. Neal et al., *supra* note 42, at 5.

44. Ilyce Glink & Samuel J. Tamkin, *Underbuilding Has Led to ‘Acute Shortage’ of Housing and ‘Affordability Crisis,’ Study Says*, WASH. POST (July 19, 2021, 6:00 AM), <https://www.washingtonpost.com/business/2021/07/19/underbuilding-has-led-acute-shortage-housing-affordability-crisis-study-says/>.

45. Neal et al., *supra* note 42, at 8.

46. Glink & Tamkin, *supra* note 44.

47. Julia Carpenter, *For Some Millennials, a Starter Home Is Hard to Find*, WALL ST. J. (July 4, 2021), <https://www.wsj.com/articles/for-some-millennials-a-starter-home-is-hard-to-find-11625391002>.

48. Sam Khater, *One of the Most Important Challenges Our Industry Will Face: The Significant Shortage of Starter Homes*, FREDDIE MAC (Apr. 15, 2021), [http://www.freddiemac.com/perspectives/sam\\_khater/20210415\\_single\\_family\\_shortage.page](http://www.freddiemac.com/perspectives/sam_khater/20210415_single_family_shortage.page).

sectors of life, the COVID-19 pandemic exacerbated the housing shortage by adding to an existing construction labor shortage.<sup>49</sup> These labor shortages are causing a rise in prices for new and existing units in the housing market.<sup>50</sup> A CNBC article observes that “[b]uilders simply can’t afford to produce cheaper homes, given their rising costs.”<sup>51</sup>

Even before the pandemic, researchers found links between home values and school district performance. A study of homes within Charlotte-Mecklenburg Schools<sup>52</sup> found “a significant positive relationship between test performance and housing values.”<sup>53</sup> Moreover, the study revealed that no evidence existed to show yearly changes in test performance or new rankings impacted home values, meaning that initial test performance and understanding of rankings bore more importance in calculating home value differences than did actual performance and rankings.<sup>54</sup> Students’ performance on tests is also reflected in overall school district performance data, which also impacts home values.<sup>55</sup> A report from the Brookings Institute analyzing data from the 100 largest metro areas suggests that, though tenuous, a connection between home values and school district performance undeniably exists.<sup>56</sup> The report found that:

[a]cross the 100 largest metropolitan areas, housing costs an average of 2.4 times as much, or nearly \$11,000 more per year, near a high-scoring public school than near a low-

---

49. Diana Olick, *America Is Short More Than 5 Million Homes, and Builders Can’t Make Up the Difference*, CNBC (Sept. 14, 2021, 10:55 AM), <https://www.cnbc.com/2021/09/14/america-is-short-more-than-5-million-homes-study-says.html>.

50. *Id.*

51. *Id.*

52. Charlotte-Mecklenburg Schools is located in Charlotte, North Carolina, and encompasses several other townships and cities in Mecklenburg County. *See Background, History and Facts: About CMS, CHARLOTTE-MECKLENBURG SCHS.*, <https://www.cms.k12.nc.us/communications/aboutus/Pages/default.aspx> (last visited Jan. 4, 2022).

53. Thomas J. Kane et al., *School Accountability and Housing Values [with Comments]*, BROOKINGS-WHARTON PAPERS ON URB. AFFS. 83, 84 (2003) (noting that the relationship between property values and test performance correlated most with White students’ test performance).

54. *Id.* at 85.

55. Kane et al., *supra* note 53.

56. Jonathan Rothwell, *Housing Costs, Zoning, and Access to High-Scoring Schools*, BROOKINGS (Apr. 19, 2012), <https://www.brookings.edu/research/housing-costs-zoning-and-access-to-high-scoring-schools/>.

scoring public school. This housing cost gap reflects that home values are \$205,000 higher on average in the neighborhoods of high-scoring versus low-scoring schools. Near high-scoring schools, typical homes have 1.5 additional rooms and the share of housing units that are rented is roughly [thirty] percentage points lower than in neighborhoods near low-scoring schools.<sup>57</sup>

Although it is unclear from the report whether home values increase specifically because of the connection to the public school's high scores or because the homes in those areas were already assessed at a higher value than schools near low-performing schools, the evidence does suggest that a connection between home prices and school quality prevents low-income students from accessing high quality public schools, at least in terms of academic achievement based on test performance.<sup>58</sup> It is important to recognize that test scores are not the only measure of school quality, and many educators express concerns about the limitations of test performance as a measure of school quality.<sup>59</sup> However, as people continue to rely on test scores of low-income children and their wealthier peers to measure school quality, especially in a real estate context, children continue to be deprived of access to high-opportunity schools. As Professor Wilson notes, at minimum, a "tether between home prices and school quality means that when parents are buying homes, they are also essentially buying access to schools."<sup>60</sup> Therefore, neighborhoods surrounding high-opportunity schools become affluent enclaves where high-income parents purchase homes as well as access to those high opportunity schools.

While it is easy to assume that these astronomical prices and school privileges are limited to families searching for single-family homes or those seeking to purchase a home, rental vacancy rates are also low,

---

57. *Id.*

58. *Id.*

59. Brett Theodos at al., *Getting to Better Performing Schools: The Role of Residential Mobility in School Attainment in Low-Income Neighborhoods*, 16 CITYSCAPES 61, 79–80 (2014).

60. Wilson, *supra* note 8, at 2395.

“pushing up rents far faster than incomes.”<sup>61</sup> The demographics of a typical renter have also changed since the Great Recession. Whereas in the 2000s, many renters were low-income earners; by the 2010s, however, renters more evenly represented all spectrums of the economic ladder.<sup>62</sup> Additionally, “families with children now make up a larger share of renter households (29 percent) than owner households (26 percent).”<sup>63</sup> Increasingly, to meet the demand of higher income renters, new apartment construction has skewed more heavily to market towards such renters, with more expensive, luxury apartments priced at a median of \$1,620 between 2018 and 2019.<sup>64</sup> These increased prices translate to 25% of renters spending more than half of their incomes on rent, at least as of 2018, resulting in cost-burdened renters.<sup>65</sup> Renters earning less than \$50,000 are more likely to be cost-burdened, although that does not mean that higher earners do not also face cost-burdens when paying rent.<sup>66</sup>

The data suggests that families of young children were already facing a housing affordability crisis prior to the pandemic, and the COVID-19 pandemic has only exacerbated those affordability concerns. The low supply but high demand for homes and rental units works to further exclude low-income families and families of color from high-opportunity areas where families are priced out of the housing purchase and rental markets. This lack of affordable housing, therefore, impacts where students attend school as well as their future opportunities. It is widely recognized that where children live impacts their current opportunities, such as the quality of their schools, safety of the neighborhood and playgrounds, and neighborhood demographics.<sup>67</sup> The educational benefits far exceed most other policy funding solutions for low-income students; an oft-cited study conducted by Heather Schwartz

---

61. *America's Rental Housing 2020*, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV. 1 (2020),

[https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard\\_JCHS\\_Americas\\_Rental\\_Housing\\_2020.pdf](https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf).

62. *Id.* at 9.

63. *Id.* at 1.

64. *Id.* at 2.

65. *Id.* at 4.

66. *Id.*

67. See Barbara Sard et al., *Federal Policy Changes Can Help More Families with Housing Vouchers Live in Higher-Opportunity Areas*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 4, 2018), <https://www.cbpp.org/research/housing/federal-policy-changes-can-help-more-families-with-housing-vouchers-live-in-higher>.

for The Century Foundation found that low-income students who move to low-poverty schools grew more in their reading and math scores than low-income students remaining in high-poverty schools.<sup>68</sup> Schwartz found that the “length of exposure” to high-opportunity schools matters; thus, the longer students have to time to learn and attain academic growth in low-poverty schools, the stronger their academic outcomes could be.<sup>69</sup> The findings of this study have huge implications on the best methods of closing the socioeconomic and racial achievement gaps. But, for the purposes of this Article, the implication that ensuring families have access to low-poverty schools for an extended period of time, if not the child’s entire K–12 academic career, speaks to the importance of maintaining affordable housing in low-poverty neighborhoods to bolster students’ educational outcomes.

Access to affordable housing has a deeper impact on a child’s success beyond their education in a classroom. The housing affordability crisis becomes even more devastating because living in low-income neighborhoods can increase a child’s exposure to violence within the community and at home, toxic stress, abuse, and neglect that can impact a child’s ability to manage themselves in a classroom environment.<sup>70</sup> The frequent exposure to toxic stress interferes with brain development and cognitive skills that are the key functions needed to effectively learn and be successful in school.<sup>71</sup> The CDC recognizes that the first eight years of a child’s life are crucial regarding brain development and “build[ing] a foundation for future learning, health and life success.”<sup>72</sup> This research makes it apparent that neighborhood matters, especially in the early years, in building a foundation for students to be successful both in school and beyond. Ensuring that more families have access to affordable housing in safe neighborhoods with

---

68. See *id.*; see also Heather Schwartz, *Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, CENTURY FOUND. (Oct. 16, 2010), <https://tcf.org/content/report/housing-policy-school-policy-economically-integrative-housing-promotes-academic-success-montgomery-county-maryland/?agreed=1>.

69. Schwartz, *supra* note 68.

70. Sard et al., *supra* note 67, at 4–5.

71. *Id.* at 5.

72. *Early Brain Development and Health*, CTRS. FOR DISEASE PREVENTION & CONTROL, <https://www.cdc.gov/ncbddd/childdevelopment/early-brain-development.html> (last visited Feb. 22, 2021).

good schools is important in ensuring better outcomes for students. Therefore, the housing affordability crisis is also an educational crisis, one which lawmakers and policymakers would be wise to not only acknowledge but also to remedy at the beginning of family formation, before children are born.

### III. A WORKABLE REMEDY FOR PRIVATE CHOICES AND AFFORDABILITY—THE HOUSING VOUCHER?

Some policymakers and nonprofits have sought to remedy the housing crisis by providing housing vouchers to families in need. However, these policies have not been large enough to meet the needs of all families impacted by the affordability crisis. Government at all levels—federal, state, and local—as well as nonprofits have developed voucher programs as a remedy for the housing affordability crisis and as a means of getting children into higher opportunity school districts. For example, the United States Department of Housing and Urban Development (HUD) describes the housing choice voucher program as “the federal government’s major program for assisting very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market.”<sup>73</sup> Indeed, policy analysts find that vouchers are effective; they sharply reduce homelessness, lift millions of families and individuals above the poverty line, and give choice about housing decisions that affect access to more affluent neighborhoods.<sup>74</sup> This access to more affluent neighborhoods has effects that “are closely linked to educational, developmental, and health benefits that can improve adults’ well-being and health and children’s long-term outcomes.”<sup>75</sup> Scholars and policy think tanks have proposed that expanding voucher programs is necessary for families who are struggling with housing stability and in an effort to give low-income and

---

73. *Housing Choice Vouchers Fact Sheet*, U.S. DEP’T HOUS. AND URB. DEV., [https://www.hud.gov/program\\_offices/public\\_indian\\_housing/programs/hcv/about/fact\\_sheet](https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/about/fact_sheet) (last visited Nov. 22, 2021).

74. *Policy Basics: The Housing Choice Voucher Program*, CTR. ON BUDGET AND POL’Y PRIORITIES, <https://www.cbpp.org/research/housing/the-housing-choice-voucher-program> (last updated Apr. 12, 2021).

75. *Id.*

minority students access to high-performing neighborhood schools.<sup>76</sup> However, the federal voucher program is still subject to scrutiny because many families receiving vouchers remain in high-poverty, low-opportunity areas due to voucher discrimination and biases held against voucher holders.<sup>77</sup> As children whose families receive housing vouchers continue to live in neighborhoods of extreme poverty, those children are more likely to attend high-poverty schools and deal with the toxic stress of living in violent, unsafe, and unhealthy neighborhoods.<sup>78</sup> While some advocates have encouraged voucher recipients to move to the suburbs,<sup>79</sup> families refusing to move is not the problem; encouragement does not protect from the bias and discrimination that families seeking to use vouchers in the suburbs face.<sup>80</sup>

Voucher discrimination is higher in areas with high-performing schools.<sup>81</sup> In a survey of denial rates in metropolitan areas, including Fort Worth, Texas; Los Angeles; and Philadelphia, respondents shared that denial of vouchers was significantly higher in areas of low-poverty, high-performing schools than in high-poverty areas.<sup>82</sup> While arguments abound that vouchers help people gain neighborhood mobility, landlords cite difficulty in administrative approval and inspections as a reason why they do not accept vouchers.<sup>83</sup> Currently, as is a theme throughout this Article, work on housing initiatives that create better opportunities and outcomes for families is splintered. Indeed, the Center on Budget and Policy Priorities (CBPP) found, “In 35 of the 100 largest

---

76. Will Fischer et al., *More Housing Vouchers: Most Important Step to Help More People Afford Stable Homes*, CTR. ON BUDGET & POL’Y PRIORITIES (May 13, 2021), <https://www.cbpp.org/research/housing/more-housing-vouchers-most-important-step-to-help-more-people-afford-stable-homes>.

77. See Sard et al., *supra* note 67, at 7–8.

78. *Id.* at 3.

79. Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 164, 180–81 (John Charles Boger and Gary Orfield eds., Univ. of N.C. Press) (2005).

80. Serena Lei, *Why Schools Should Care About Housing Voucher Discrimination*, HOUS. MATTERS: URB. INST. INITIATIVE (Aug. 12, 2020), <https://housingmatters.urban.org/feature/why-schools-should-care-about-housing-voucher-discrimination>.

81. *Id.*

82. *Id.*

83. *Id.*

metro areas, voucher administration is divided among *ten or more* agencies.”<sup>84</sup> These administration inefficiencies are tough to overcome and can have detrimental effects on families receiving vouchers. The CBPP claims:

Overcoming these administrative divisions is challenging, and cumbersome federal “portability” policies can exacerbate the problem by making it harder for families coming from the central city or poor suburban areas to use their vouchers to lease housing in low-poverty suburban areas with better schools. Agencies also have financial disincentives to encourage such moves.<sup>85</sup>

These observations are concerning. If vouchers are meant to incentivize choice in the free market, but voucher holders are subject to discrimination and denial, administrative agencies should have legal authority to prevent discrimination, remedy ongoing or past discrimination, and provide a plethora of housing options for families to choose from. However, if landlords feel that the administrative barriers are too great and those administrative procedures serving as barriers are split between agencies, the voucher programs become moot, at least as a way to achieve educational opportunities, because vouchers still relegate families to live in low-opportunity, high-poverty neighborhoods with low-performing schools.

Recognizing that many low-income families are not in a position to choose a home, and therefore a school district,<sup>86</sup> stories shared from nonprofits show attempts to use vouchers as a way to broaden access to opportunities for families. For example, a report from The Century Foundation shares the triumphs that accompany voucher-based programs, but the challenge that program expansion presents is difficult to overcome.<sup>87</sup> The program, Move to PROSPER, sought to eliminate the discrimination faced by some voucher holders and provided only ten

---

84. See Sard et al., *supra* note 67, at 14.

85. *Id.*

86. Wilson, *supra* note 8, at 2399.

87. Richard D. Kahlenberg, *Hearing from Low-Wage Working Mothers: How a Housing Program in Ohio Connects Children to Better Schools*, CENTURY FOUND. (Aug. 4, 2020), <https://tcf.org/content/report/hearing-from-low-wage-working-mothers-how-a-housing-program-in-ohio-connects-children-to-better-schools/>.



single mothers with vouchers to live in high-opportunity areas around Columbus, Ohio.<sup>88</sup> The goal of the experiment was to evaluate whether moving to a more affluent area with high-opportunity schools would increase children's access to educational opportunities and improve their life outcomes.<sup>89</sup> Because of the historical and modern challenges of overcoming deeply rooted racial isolation due to the effects of redlining, racial covenants, school segregation, and exclusionary single-family zoning, the single mothers had limited access to neighborhoods with high-opportunity schools.<sup>90</sup> The positives of the program—providing cleaner, safer neighborhoods with high-performing neighborhood schools where opportunities abounded—did not outweigh the negatives.<sup>91</sup> Three hundred families applied for the ten available housing voucher slots, providing limited opportunity for families to access “a better neighborhood and school for [their] children.”<sup>92</sup>

The limitations of the Move to PROSPER program speak to the challenges of voucher programs overall. Though housing vouchers, both federally supported and nonprofit philanthropic ones, allow low-income and minority families to seek housing in areas of opportunity, these voucher programs do not solve the root of the problem—access to widely available affordable housing regardless of income-level. Voucher programs and a reliance on the free market neither address supply issues that drive housing and rental costs upward when demand is great nor adequately address the needs of families seeking safer neighborhoods and stronger, more well-resourced schools but who are priced out of the housing market in those affluent areas. Therefore, what families need is a more effective remedy, a solution that addresses the affordability crisis as well as fluctuations in the housing market, including supply and demand issues.

---

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

#### IV. A MORE EFFECTIVE REMEDY—MUNICIPAL ZONING LAWS, LAND USE REGULATIONS, AND LAND USE ORDINANCES

##### A. Historical Use of Zoning Laws

Addressing housing instability and affordability through zoning laws seemingly has a more expansive reach than the limited number of vouchers that do not keep up with housing needs.<sup>93</sup> One remedy repeatedly shared by policy activists and pundits is zoning regulation: revising zoning laws such that they are more inclusive, provide affordable options, and account for the growing diversity of housing needs for families with children, multigenerational families, and other families beyond the typical nuclear family. Zoning laws have shaped where we live, with whom we interact, and our quality of life since their inception. The framework for zoning laws dates to the Napoleonic period where the idea of districts with a space for like buildings (e.g., stores next to stores, houses next to houses, etc.) governed development.<sup>94</sup> Even in the colonial period, the English Parliament instituted laws that mandated the distance between buildings in more populous colonies like Boston to avoid massive destructive conflagrations that devastated entire settlements.<sup>95</sup>

In the twentieth century, the idea of municipalities regulating property use within certain zones took off.<sup>96</sup> By 1926, the United States Supreme Court heard its first case concerning the constitutionality of single-family zoning laws.<sup>97</sup> In *Village of Euclid v. Ambler Realty Co.*, the Village of Euclid, a suburb of Cleveland, Ohio, adopted an ordinance that was actually “a comprehensive zoning plan for regulating

---

93. See generally Justin Stec, *The Deconcentration of Poverty as an Example of Derrick Bell's Interest-Convergence Dilemma: White Neutrality Interests, Prisons, and Changing Inner Cities*, 2 NW. J. L. & SOC. POL'Y 30, 38 (2007) (citing policies that diversify neighborhoods based on residential segregation and wealth inequality using vouchers and mixed-income developments). Though Stec places emphasis on public housing programs and the importance of vouchers in diversifying segregated neighborhoods, reforming zoning laws can be a critical step in ensuring the development of mixed-income housing units. See discussion *infra* Section IV.B.

94. James Metzenbaum, *The History of Zoning—A Thumbnail Sketch*, 9 CASE W. RESV. L. REV. 36, 41 (1957).

95. *Id.* at 36–37 (observing later adoptions of similar laws in the State of Massachusetts concerning the storage of gun powder to prevent fires and explosions).

96. *Id.* at 37–38.

97. See *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

and restricting the location of trades, industries, apartment houses, two-family houses, single-family houses, etc., the lot area to be built upon, the size and height of buildings, etc.”<sup>98</sup> The realty company argued that the zoning laws were a liberty and property deprivation under the Due Process clause and denied equal protection of the law because “the ordinance attempts to restrict and control the lawful uses of appellee’s land, so as to confiscate and destroy a great part of its value” and “propective [sic] buyers . . . in the metropolitan district of Cleveland are deterred from buying any part of this land because of the existence of the ordinance.”<sup>99</sup> The Court upheld the general zoning ordinance and went further to examine whether the zoning ordinance could create and maintain residential zoning districts that excluded apartments, hotels, and other business buildings.<sup>100</sup> Under the police power, municipalities could create and maintain residential zoning districts for single-family homes so long as they are not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>101</sup>

The Court’s decision in *Euclid*, therefore, set the stage for municipalities to constitutionally develop residential zoning ordinances. Euclidean zoning, as it became known, was the way of the future.<sup>102</sup> Residential zoning, however, was not the only mechanism for implementing zoning laws and regulating municipal land use. Prior to the Court’s *Euclid* decision, the Court overturned an ordinance that created racially segregated housing zones by separating blocks where white people and people of color could reside in *Buchanan v. Warley*.<sup>103</sup> The city of Louisville, Kentucky, argued that the ordinance was a proper use of the police power to “promote the public peace by preventing race conflicts.”<sup>104</sup> The Court did not give credence to this argument, instead electing to view the ordinance as an unconstitutional restriction on

---

98. *Id.* at 379–80.

99. *Id.* at 384–85.

100. *Id.* at 390.

101. *Id.* at 387–95.

102. See generally *Euclidean zoning*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/legal/Euclidean%20zoning> (last visited Oct. 30, 2021) (defining “Euclidean zoning” as “a system of zoning whereby a town or community is divided into areas in which specific uses of land are permitted”).

103. *Buchanan v. Warley*, 245 U.S. 60, 70, 82 (1917).

104. *Id.* at 81.

property and contract rights.<sup>105</sup> The Court left open the possibility of using the police power to regulate the location of businesses and other similar industrial zones.<sup>106</sup> Therefore, despite overturning zoning laws that discriminated based on race in *Buchanan*, the Court left open the possibility for like-kind building zoning laws to relegate people to certain zoning districts based on socioeconomic status. By upholding those zoning laws in *Euclid*, the Court paved the way for an insidious type of housing discrimination to occur, one which often cannot be proven as intentional discrimination; therefore, Euclidean zoning, which prioritized residential single-family neighborhoods separate from mixed-use developmental zones including apartments, businesses, and single-family homes, became the primary means of socioeconomic separation and isolation.

The result of the Euclidean like-kind buildings method of zoning laws meant that Black neighborhoods in the twentieth century were more likely to be “neighborhoods zoned to permit industry, even polluting industry.”<sup>107</sup> Indeed, in St. Louis, Black neighborhoods were turned into slums as “the plan commission permitted taverns, liquor stores, nightclubs, and houses of prostitution to open in African American neighborhoods but prohibited these as zoning violations in neighborhoods where whites lived.”<sup>108</sup> These zoning planning policies shaped neighborhoods based on race while also making certain neighborhoods, those that were white and affluent, more desirable than other neighborhoods. Therefore, Euclidean zoning also paved the way for racialized housing discrimination through federally supported mortgages.<sup>109</sup> The Federal Housing Administration prioritized mortgage-backing for single-family neighborhoods; however, because the neighborhoods available to Black homebuyers at the time were near apartments, businesses, and industrial complexes, Black families were ineligible for these federally-backed mortgages.<sup>110</sup> This infamous practice of redlining, used from 1933 to 1977, is one widely

---

105. *Id.* at 80–82.

106. *Id.* at 80.

107. RICHARD ROTHSTEIN, *THE COLOR OF LAW* 50 (2017).

108. *Id.*

109. *Id.*

110. *Id.*

acknowledged contributor to racially homogenous, isolated, and segregated neighborhoods.<sup>111</sup>

The isolationist and exclusionary history of zoning laws contributes to the modern housing segregation in many of America's major metropolitan areas as well as small towns, particularly the suburbs. At the height of redlining, in the 1960s and 1970s, *Brown v. Board of Education* and its progeny worked around housing segregation through mechanisms such as busing and arbitrary school attendance zones to ensure that schools desegregated under federal court orders.<sup>112</sup> However, as federal courts relinquished oversight of school districts' desegregation plans and schools assigned students to nearby neighborhood schools, those schools began to mirror the segregated neighborhoods in which the children lived. Many legal and policy advocates have conducted research on how to achieve neighborhood diversity, and one type of zoning has come to the forefront as an obstacle to integrating neighborhoods.

## **B. Exclusionary Zoning through Single-Family Euclidean Zoning**

Exclusionary zoning takes on myriad forms such as “minimum lot size requirements, single residence per lot requirements, minimum square footage requirements, and costly building codes.”<sup>113</sup> Single-family zoning, most notably the Euclidean zoning seen above, is one such restrictive zone that leads to exclusion. In these zones, the only housing that is built is single-family homes, which means other, often more affordable, options are banned, including apartments, senior housing, low-income housing, and student housing.<sup>114</sup> Currently, single-

---

111. Andre M. Perry & David Harshbarger, *America's Formerly Redlined Neighborhoods Have Changed, and so Must Solutions to Rectify Them*, BROOKINGS (Oct. 14, 2019), <https://www.brookings.edu/research/americas-formerly-redlines-areas-changed-so-must-solutions/>.

112. See discussion *supra* note 10.

113. Elliot Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), <https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/>.

114. Emily Badger & Quoc Trung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html>.

family zones account for about 75% of land in U.S. cities.<sup>115</sup> Single-family zoning is deeply embedded into the American consciousness, with most developers preferring to build such homes and most buyers seeking to purchase such homes.<sup>116</sup> Indeed, families are incentivized to purchase such homes because economists and real estate experts consider them a high-value economic asset of wealth.<sup>117</sup> As Elliot Anne Rigsby of The Century Foundation observes, “Exclusionary zoning is an oft-mentioned policy that keeps affordable housing out of neighborhoods through land use and building code requirements.”<sup>118</sup> Because of their high costs at rates higher than lower income families can afford, many families are priced out of these neighborhoods and, by proxy, their high-achieving schools. Thus, these schools tend to be affluent enclaves comprised of predominately white, upper income families.

Additionally, these exclusionary zoning laws with a preference for single-family zones contribute to the affordability crisis.<sup>119</sup> In a commentary for The Century Foundation, Richard D. Kahlenberg notes that “[e]xclusionary zoning also drives up housing prices because it artificially creates a scarcity of housing supply.”<sup>120</sup> As observed earlier, housing prices are at an all-time high due to more demand for housing and a limited supply available to meet the needs of people seeking to form new households.<sup>121</sup> Writing on behalf of the Cato Institute, Vanessa Brown Calder states, “Empirical research across U.S. cities suggests

---

115. Jenny Schuetz, *To Improve Housing Affordability, We Need Better Alignment of Zoning, Taxes, and Subsidies*, BROOKINGS (Jan. 7, 2020), <https://www.brookings.edu/policy2020/bigideas/to-improve-housing-affordability-we-need-better-alignment-of-zoning-taxes-and-subsidies/>.

116. See Alexander von Hoffman, *Single-Family Zoning: Can History Be Reversed?*, JOINT CTR. FOR HOUS. STUD. HARV. UNIV. (Oct. 5, 2021), <https://www.jchs.harvard.edu/blog/single-family-zoning-can-history-be-reversed>.

117. See Justin Pierce, *Why Single-Family Houses Make Better Investments than Apartment Buildings*, WASH. POST (Aug. 24, 2020), <https://www.washingtonpost.com/business/2020/08/24/why-single-family-houses-make-better-investments-than-apartment-buildings/>; see also discussion *supra* Part II.

118. Rigsby, *supra* note 113.

119. See Neal et al., *supra* note 42, at 6.

120. Richard D. Kahlenberg, *The Ugly History of Single-Family Zoning Resurfaces*, CENTURY FOUND. (Sept. 16, 2020), <https://tcf.org/content/commentary/ugly-history-single-family-zoning-resurfaces/>.

121. See discussion *supra* Part II; see also Jed Kolko, *Who Is Actually Forming New Households?*, UC BERKELEY TERNER CTR. FOR HOU. INNOVATION (Aug. 17, 2015), <https://turnercenter.berkeley.edu/research-and-policy-is-actually-forming-new-households/>.

that, indeed, zoning rules reduce supply, which in turn increases prices.”<sup>122</sup> Single-family residential zoning also comes with minimum lot size requirements and design requirements that influence density, reducing housing supply and driving up costs due to the use of more expensive building materials.<sup>123</sup> These regulations have the effect of instilling and perpetuating mythic beliefs about overcrowding and densely packed neighborhoods that drive down home values.<sup>124</sup> The regulations also actually increase home prices because they restrict supply by reducing the number of homes that builders can construct in a subdivision or neighborhood and increase the cost to builders who also face delays when finding the requisite materials and seeking building permits.<sup>125</sup>

Although federal legislation, such as the Fair Housing Act, and constitutional case law protect from housing discrimination, exclusionary zoning—through preferences for single-family housing—still works to divide and separate people based on race and socioeconomic status.<sup>126</sup> While the legislation is expansive and protects from discrimination based on race, the Fair Housing Act does not protect from discriminatory practices based on socioeconomic status.<sup>127</sup> Race and socioeconomic status often, but not always, converge to leave children growing up in high-poverty areas where they are academically, socially, and emotionally behind their peers who live in more affluent areas.<sup>128</sup> Exclusionary zoning, therefore, effectively creates affluent enclaves with highly ranked, academically achieving schools while simultaneously creating zones of despair with high-poverty, academically struggling, and low-opportunity schools.<sup>129</sup> Approximately 25% of Black students and 16.7% of Hispanic students

---

122. Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST. (Oct. 18, 2017), <https://www.cato.org/policy-analysis/zoning-land-use-planning-housing-affordability>.

123. *Id.*

124. See Badger & Bui, *supra* note 114; but see Maya Brennan et al., *How Zoning Shapes Our Lives*, HOUS. MATTERS: URB. INST. INITIATIVE (June 12, 2019), <https://housingmatters.urban.org/articles/how-zoning-shapes-our-lives>.

125. See Kahlenberg, *supra* note 120.

126. See Rigsby, *supra* note 113.

127. *Id.*

128. *Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS’N (July 2017), <https://www.apa.org/pi/ses/resources/publications/minorities>.

129. Rigsby, *supra* note 113.

live in such zones of despair, which are defined by “limited employment opportunities, underperforming schools, high crime rates, and few recreational spaces, making it nearly impossible for struggling families to achieve social mobility.”<sup>130</sup> Exclusionary zoning, thus, further concentrates racial isolation and class isolation and deeply embeds these concentrations into our collective consciousness as inherent and inevitable.

However, exclusionary zoning does not have to be the norm. Just as city planners created exclusionary zones, city planners can also develop more inclusive zones that account for racial and socioeconomic diversity. Additionally, more strategic zoning laws, or even some deregulation, could increase the housing supply and alleviate pressures on affordability caused by supply-and-demand issues. I will explore those ideas in the Section below and discuss the impacts that revised zones could have on schools.

### C. Inclusionary Zoning and Multiuse Land Development

#### 1. Inclusionary Zoning

The underlying root of the housing affordability crisis that disproportionately affects people of color and low-income families’ access to employment and, important to this Article, access to high-quality schools is exclusionary zoning that prefers low-density rather than high-density neighborhoods. Inclusionary zoning (IZ) seeks to resolve those concerns by ensuring that affordable housing units are available as a proportion of the units in a development project.<sup>131</sup> IZ arose in the 1970s to combat segregation as a response to the increasing rate of exclusionary zoning, which isolated communities by race and class.<sup>132</sup> IZ policies can be either mandatory or permissive in the request for developers to build a percentage of affordable units on the site where the municipal government has granted a building permit.<sup>133</sup> Typically,

---

130. *Id.*

131. Benjamin Schneider, *CityLab University: Inclusionary Zoning*, BLOOMBERG (July 17, 2018, 4:15 PM), <https://www.bloomberg.com/news/articles/2018-07-17/inclusionary-zoning-everything-you-need-to-know>.

132. *Id.*

133. U.S. DEP’T HOUS. & URB. DEV., OFF. POL’Y DEV. & RSCH., INCLUSIONARY ZONING & MIXED-INCOME CMTYS. (Spring 2013), <https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html> [hereinafter PD&R].



developers build “below market rate” units on site, and the area median income (AMI) determines the affordable rate of the units.<sup>134</sup> Though studies on IZ policies and programs are limited, “[s]tudies show that mandatory programs produce more affordable housing than voluntary programs, and developer opt-outs can reduce opportunities for creating mixed-income housing.”<sup>135</sup> New York City; Chicago; Washington, D.C.; and Montgomery County, Maryland—each of these metropolitan areas have implemented some version of IZ policy or program, and each have had varying levels of success with its implementation.<sup>136</sup>

New York City developed its IZ program in 1987 after working-class families left some of the city’s most prominent neighborhoods—downtown Brooklyn and Manhattan—in search of more affordable housing options.<sup>137</sup> Under this Inclusionary Housing Program, developers must offer to create or preserve affordable housing units either on site of the current development or off-site within the same zone, in an area that is neighboring or near the current development.<sup>138</sup> From 2005 until July 2013, the number of affordable units generated as a result of the Inclusionary Housing Program was 2,888 units, representing at least 19% of the units receiving building permits.<sup>139</sup> However, even with these proportional statistics for the on- or near-site units, the affordable housing available based on the city’s overall development rate is a startling 2% of all newly constructed units.<sup>140</sup> Thus, criticism of the program, like with housing vouchers, is that the program is not expansive enough to meet the needs of the numerous families facing housing instability due to a lack of affordable housing. However, Mayor Bill de Blasio spearheaded the replacement of this private market Inclusionary Housing Program with a Mandatory

---

134. Schneider, *supra* note 131.

135. PD&R, *supra* note 133.

136. *See id.*; *see also* Schwartz, *supra* note 68.

137. PD&R, *supra* note 133.

138. *Rules for Special Areas: Inclusionary Housing Program*, N.Y.C. DEP’T CITY PLAN., <https://www1.nyc.gov/site/planning/zoning/districts-tools/inclusionary-housing.page> (last visited Nov. 22, 2021).

139. *Inclusionary Housing Designated Areas—Production, 2005-2013*, N.Y.C. DEP’T CITY PLAN., <https://www1.nyc.gov/site/planning/zoning/districts-tools/affordable-housing-production-in-ih.page> (last visited Nov. 22, 2021) (observing that the Inclusionary Housing Program has a goal to produce at least 20% of affordable housing units per building permit issue).

140. *Id.*

Inclusionary Housing Program that converted the zones into mandatory zones, observing that the private market program failed to “ease[] or reduce[] [the] affordability crisis.”<sup>141</sup>

The City of Chicago revised its Affordable Requirements Ordinance (ARO) in April 2021 after first adopting it in 2007.<sup>142</sup> This IZ program requires City Council approval for “an entitlement, a city land purchase[,] or financial assistance to provide a portion of the units as affordable housing” for residential developments of over ten units.<sup>143</sup> Families making 60% of the AMI must be able to afford a rental unit, while families making 100% of the AMI must be able to afford to purchase a unit.<sup>144</sup> The Inclusionary Housing Task Force noted that the affordable housing crisis resulted in a 120,000 shortage in affordable homes and that the ARO program could overcome the “legacy of racist and classist actions” that have left the city deeply segregated.<sup>145</sup> The Department of Housing data suggests that “the ARO has produced more than 1,000 affordable units . . . and over \$124 million in in-lieu fees that have been reinvested in affordable housing citywide.”<sup>146</sup> In advance of the 2021 revisions, city leaders gathered a Task Force to assess the community’s needs and also hosted Focus Groups to determine how the revisions to the ARO would best serve the community.<sup>147</sup> While the data on the October 1, 2021, revisions are still playing out, what is notable about the city’s approach to the revisions is not only its analysis and assessment of the program but also its inclusion of voices to provide diverse perspectives on the effects and solutions to the affordable housing crisis in Chicago.

The IZ program in Washington, D.C., requires that most new or newly renovated apartments for rent or townhomes and condos for sale

---

141. Barika X. Williams, *N.Y.C. Inclusionary Zoning: A District-by-District Analysis of What Was Lost, Gained, and What Remains*, ASS’N FOR NEIGHBORHOOD & HOUS. DEV. INC. 11–12 (July 2015), <https://anhd.org/wp-content/uploads/2015/07/ANHD-Inclusionary-Zoning-Rpt-7-15.pdf>.

142. *Affordable Requirements Ordinance (ARO)*, CITY CHI., <https://www.chicago.gov/city/en/depts/doh/provdrs/developers/svcs/aro.html> (last visited Nov. 22, 2021).

143. *Id.*

144. *Id.*

145. Marisa Novara, *Inclusionary Housing Task Force Staff Report*, CHI. DEP’T HOUS. 2 (Sept. 2020), [https://www.chicago.gov/content/dam/city/depts/doh/ihtf/doh\\_ihtf\\_report.pdf](https://www.chicago.gov/content/dam/city/depts/doh/ihtf/doh_ihtf_report.pdf).

146. *Id.*

147. *Id.* at 3.

include affordable units.<sup>148</sup> Families must meet eligibility requirements, including income, with housing costs not to exceed 50% of pre-tax income.<sup>149</sup> Developers receive more density in exchange for setting aside 8%–10% of affordable square footage in the development.<sup>150</sup> The total number of units produced between 2009 and 2019 is 989, with averages between 190 and 200 units produced annually.<sup>151</sup> However, it should be noted that most of the families living in inclusionary zones are one-person families,<sup>152</sup> meaning that families with children are less likely to live in inclusionary zones that promote affordable housing. This may be, in part, because the city has an occupancy limit on the number of people eligible to live in a unit based on unit size (e.g., studio, one-bedroom, two-bedroom).<sup>153</sup> This invokes criticism important to this Article because families with children are still excluded from affordable housing based on household size and a limited number of available unit supply; this translates into families with multiple children having to find housing in unsafe areas, uninhabitable apartments, or homeless shelters.<sup>154</sup> The Washington, D.C., IZ policy demonstrates that IZ policies can create affordable housing in areas where housing prices are astronomical, yet IZ policies can have a similar effect as exclusionary zoning, keeping families out of desirable, safe neighborhoods with good schools due to an inability to afford housing in those neighborhoods. If the goal of IZ is to create more inclusive communities and allow families to access affordable housing and high-opportunity schools, the negligible set-aside of 8%–10% and the occupancy limitations in D.C.’s

---

148. *Inclusionary Zoning (IZ) Affordable Housing Program*, DEP’T HOUS. & CMTY. DEV., <https://dhcd.dc.gov/service/inclusionary-zoning-iz-affordable-housing-program> (last visited Nov. 22, 2021).

149. *Id.*

150. *Inclusionary Zoning: A Program for the DC Department of Housing and Community Development*, DEP’T. HOUSING & CMTY. DEV., [https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/service\\_content/attachments/Inclusionary%20Zoning%20Program%20Fact%20Sheet%202018.pdf](https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/service_content/attachments/Inclusionary%20Zoning%20Program%20Fact%20Sheet%202018.pdf) (last visited Nov. 22, 2021).

151. *FY2019 Inclusionary Zoning Annual Report*, DEP’T HOUS. & CMTY. DEV. 3–5, <https://dhcd.dc.gov/sites/default/files/dc/sites/dhcd/publication/attachments/FY2019%20IZ%20Annual%20Report%20final.pdf> (last visited Nov. 22, 2021).

152. *Id.* at 6.

153. *Id.*

154. *See, e.g., Through the Cracks*, WAMU (Jan. 28–Mar. 18, 2021) (available on Apple Podcasts, Spotify, Stitcher, or wherever podcasts are accessible) (following the disappearance of young girl from a homeless shelter after her family was evicted from their D.C. apartment), also available at <https://wamu.org/show/through-the-cracks/>.

IZ policy fail to provide access to affordable housing widespread enough to address the housing crisis.

Finally, the most touted IZ program resides in Montgomery County, Maryland, where extensive research and data collection has followed not only the program but also the opportunities available to children living in the area, especially regarding their ability to obtain a high-quality education. To give some background, Montgomery County Public Schools consistently rank highly in regard to student achievement and outcomes.<sup>155</sup> Indeed, the district's website boasts an 88.4% graduation rate and Advanced Placement course participation at 67.5%, with students receiving almost \$400 million in scholarships for college in the Class of 2019.<sup>156</sup> Montgomery County's IZ policy has produced over 12,000 affordable units since the program's inception in 1976.<sup>157</sup> Unique to its IZ policy "is that it allows the public housing authority, the Housing Opportunities Commission, to purchase one-third of the inclusionary zoning homes within each subdivision to operate as federally subsidized public housing."<sup>158</sup> This allows low-income families to select publicly funded housing that allows them to "live in affluent neighborhoods and send their children to schools where the vast majority of students come from families that do not live in poverty."<sup>159</sup> In her study observing all children living in public housing and the effects of students living in an IZ area attending the lowest-poverty schools contrasted with students attending moderate-poverty schools, Heather Schwartz found that "[t]he housing-based approach that Montgomery County adopted offered low-income families up to three benefits that each could have contributed to their children's improved school performance: a supply of affordable housing, which could promote stability; residence in a low poverty neighborhood; and enrollment of their children in a low-poverty school."<sup>160</sup> The research on the Montgomery County IZ program speaks to the positive effects of affordable housing on children's lives. There, the set-aside program worked smoothly to integrate neighborhood demographics by race and

---

155. Schwartz, *supra* note 68.

156. *About MCPS: At a Glance*, MONTGOMERY CNTY. PUB. SCHS., <https://www.montgomeryschoolsmd.org/about/> (last visited Nov. 22, 2021) (clicking on the "Read More" button to see specific statistics).

157. *See* Schwartz, *supra* note 68.

158. *Id.*

159. *Id.*

160. *Id.*

socioeconomic status in a way that empowered families and provided the stability that children need to develop academic, emotional, and social success in low-poverty schools.

Looking at each of these urban and suburban areas—New York City, Chicago, D.C., and Montgomery County—as case studies serves as evidence that municipal governments that adopt IZ programs and policies for new construction make some strides in creating more affordable housing in the area. However, municipal governments seeking to develop and implement IZ programs and policies would be wise to tailor those programs and policies to meet the area’s unique community needs. Each municipal community may have differing views of best practices for implementing IZ programs and policies, and those considerations are completely valid. Maximizing affordable housing is key to ensuring that more families have access to affordable housing; otherwise, IZ programs and policies risk the same criticisms as the voucher programs that do not have the expanse necessary to give access to the plethora of families seeking to move to higher opportunity areas. Just as each of the policies and programs discussed above required a minimum number of affordable units, each policy and program a municipality adopts must take into consideration the outcomes and benefits for student attendance to ensure that the program is comprehensive enough to address housing segregation, as discussed in Part VI below. IZ policies and practices, if used uniformly throughout municipalities in each zoned neighborhood, rather than as conceived in the case study cities on a smaller scale and in only specified zones, could resolve the affordability crisis by offering housing priced proportionally to families’ AMI. But again, the smaller scale nature of IZ policies and programs as they are implemented now still leaves much to be desired. Therefore, solutions to the effects of zoning on neighborhood public schools requires a broader lens that may result in more multiuse developments and massive deregulation of certain zoning laws.

## *2. Multiuse Land Development*

Because municipalities have typically only implemented IZ policies and programs on a smaller scale in specified areas designated for IZ development, the next logical step would be to expand those policies and practices on a larger scale such that more land is zoned for multiuse

development or such that an effort is made to massively deregulate arbitrary land use laws typically associated with exclusionary zoning (e.g., minimum lot size requirements and design regulation).<sup>161</sup> It makes sense to think that the fewer exclusionary zones in any given geographic area means that those areas will be more racially and socioeconomically diverse, lending to more racially and socioeconomically diverse neighborhood schools. However, to maximize policies and zoning programs to coordinate these efforts requires a reexamination of current zoning laws, policies, and practices. In this Section, I will briefly examine the current state of zoning laws and multiuse land development and the possibility of a massive deregulation of zoning that favors more racially and socioeconomically diverse neighborhoods.

To begin, mixed-use development takes us back to our origins, when people lived, worked, and slept in the same building.<sup>162</sup> Mixed-use development can be achieved either through “overlay” districts or changing zones.<sup>163</sup> Changing zones is exactly what it sounds like—changing the zone from a residential district to a multi-use or mixed-use district.<sup>164</sup> The more recommended approach is to create “overlay” districts for mixed-use development, which means that no new zones are created, the underlying zone remains the same, and developers are permitted to request variances or permits to build mixed-use development.<sup>165</sup> One of the many benefits to mixed-use zoning is that it “may increase affordable housing opportunities” by “provid[ing] more housing opportunities and choices.”<sup>166</sup>

This Article undertakes a survey of zoning laws and regulations across a variety of municipalities—including small, mid-sized, and large cities—which reveals that municipal leaders develop zoning laws, regulations, and plans based on the perceived needs and goals of the local community. Reviewing the currently adopted ordinances in Hamlet, North Carolina; Columbia, South Carolina; and Charlotte, North Carolina as guides for how small, mid-sized, and large cities implement ordinances shows variance in the goals and decisions that

---

161. See, e.g., Calder, *supra* note 122.

162. *Mixed Use Zoning: A Planners' Guide*, METRO. AREA PLAN. COUNCIL 1, [http://www.mapc.org/wp-content/uploads/2017/11/Mixed\\_Use\\_Planners\\_Toolkit.pdf](http://www.mapc.org/wp-content/uploads/2017/11/Mixed_Use_Planners_Toolkit.pdf) (last visited Nov. 22, 2021) [hereinafter *Mixed Use Zoning*].

163. *Id.* at 5.

164. *Id.*

165. *Id.* at 2.

166. *Id.*

each city makes. For example, Columbia is the capital city of South Carolina, so its “United Development Ordinance of the City of Columbia, South Carolina” favors historical preservation and has Overlay Districts meant “to provide supplemental standards with respect to special areas, land uses, or environmental features that supersede the standards underlying the base zoning districts.”<sup>167</sup> The base zoning districts include residential districts; mixed-use, activity center, and corridor districts; institutional and campus districts; and industrial districts.<sup>168</sup> The City of Columbia also provides flexibility to developers through its Planned Development (PD) District by “encourage[ing] innovative and efficient land planning and physical design concepts.” Similarly, the City of Charlotte offers opportunities for mixed-use districts that provide a wide array of housing-related uses.<sup>169</sup>

However, each city, regardless of size, has a clear zoning preference for single-family zones.<sup>170</sup> The City of Charlotte cites its single-family preference as “standards designed to maintain a suitable environment for family living at various densities to accommodate for different housing types.”<sup>171</sup> The zoning ordinance permits a maximum number of units per acre, ranging from three to eight units depending on the specific residential district, with density requirements for the division of property into two or more lots.<sup>172</sup> Only in its IZ policy does the City of Charlotte allow variance in zoning from single-family to more dense housing types, allowing the integration of multiunit housing such as duplexes, triplexes, and quadraplexes in all but one residential district.<sup>173</sup> The smallest city examined, Hamlet, has six types of residential districts, with single-family detached dwellings allowed in each of those residential districts.<sup>174</sup>

---

167. COLUMBIA, S.C., UNIFIED DEV'T ORDINANCE, CODE § 17-3.7(a) (2019).

168. *Id.* at § 17-3.1.

169. CHARLOTTE, N.C., ZONING ORDINANCE, CODE §§ 9.901–9.902 (2021).

170. *See generally* UNIFIED DEV'T ORDINANCE § 17-3.7(a); CHARLOTTE, N.C., ZONING ORDINANCE §§ 9.901–9.902; HAMLET, N.C., ZONING ORDINANCE, CODE § 6.2 (2021) (“Table of Permitted Use”).

171. CHARLOTTE, N.C., ZONING ORDINANCE, CODE §§ 9.901–9.902.

172. *Id.* at § 9.205.

173. *Id.* at § 9.205(9).

174. HAMLET, N.C., ZONING ORDINANCE, CODE § 6.2.

What each of these cities' ordinances reveals is that more intentional mixed-use development is more likely to occur in larger areas. However, cities are not implementing mixed-use development on a massive scale, instead choosing certain districts in which to implement mixed-use zones. Cities with more flexibility in zoning and planning for multiuse districts may be more likely to provide affordable housing.<sup>175</sup> It is apparent from the cities, however, that each must plan for development that resolves the affordable housing crisis in a way that responds to both present and future citizens' needs. Therefore, this brief survey reveals that multi-use development is still in its infancy, and cities of all sizes have a strong preference for the type of exclusionary zoning—single-family only zones—that leads to neighborhood schools that are representative of affluent enclaves of high-income students at high-opportunity schools.

### 3. Deregulation

Deregulation offers an opportunity to address affordability by making zoning ordinances less restrictive. Pre-pandemic literature suggests that land use is one of the costliest regulations to the U.S. economy.<sup>176</sup> The thinking is that based on the law of demand, if demand drives home prices upward, places that have high costs would also have high levels of construction.<sup>177</sup> Whereas in reality, places that have steep home prices build less than places that build more and are less expensive.<sup>178</sup> So, advocates call for massive deregulation of zoning laws to protect not only a person's property interests but also to increase

---

175. Compare median home price in each of the areas. In Charlotte, the median home price is \$406,169, while the median monthly rent is \$1,073. *Charlotte, North Carolina*, U.S. NEWS & WORLD REP., <https://realestate.usnews.com/places/north-carolina/charlotte> (last visited Oct. 9, 2022). The median home price in Columbia, is \$275,350, while the median monthly rent is \$955. *Columbia, South Carolina*, U.S. NEWS & WORLD REP., <https://realestate.usnews.com/places/south-carolina/columbia> (last visited Oct. 9, 2022). In Hamlet, the median home value of a home as of 2021 was \$88,000, and the median monthly rent was \$544. *Quick Facts: Hamlet city, North Carolina*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hamletcitynorthcarolina/PST045219> (last visited Oct. 9, 2022).

176. Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations/>.

177. *Id.*

178. *Id.*



affordability through the development of more housing.<sup>179</sup> If local governments and states cannot solve the housing affordability crisis, calls for deregulation will continue to persist from both sides of the Congressional and Presidential aisle.<sup>180</sup> While deregulation seems like a reasonable solution—less regulation should mean more development which should translate into more housing and drive down increased prices due to demand—deregulation will create the very situations that contravene the original intent of zoning laws.<sup>181</sup> Simply put, deregulation seems like a positive solution, though not if it means developers use land in a way that compromises public health and the general welfare. Based on the discussion so far, some regulation is necessary to accommodate the various land uses needed in U.S. society, but too many stringent regulations that favor exclusive zoning, such as single-family zoning, allow some families to build affluent enclaves, while many families struggle to attain affordable housing.

As cities, municipalities, and local governments revise their zoning laws, these are some considerations that they should keep in mind. Multiuse zones, including overlays, and some forms of deregulation can help drive down demand by addressing the need to develop more affordable housing. While some cities, such as the ones examined earlier, have incorporated mixed-use zones into their zoning laws, regulations, and ordinances, those mixed-use zones only account for a small portion of the zones, and single-family exclusionary zones still dominate. Additionally, overlay multiuse zones, zoning variances, and other small-scale zoning changes may create gentrified neighborhoods, driving low-income families out by seeking to attract high-income property owners and renters.<sup>182</sup> Therefore, calls for zoning reform on a

---

179. See Dustin Romney, *How Deregulating Real Estate Markets Can Solve America's Shortage of Affordable Housing*, FEE STORIES (Apr. 10, 2021), <https://fee.org/articles/how-deregulating-real-estate-markets-can-solve-america-s-shortage-of-affordable-housing/>.

180. See Solomon Greene, *Can We Deregulate Ourselves out of the Affordable Housing Crisis?*, URB. WIRE: BLOG URB. INST. (July 1, 2019), <https://www.urban.org/urban-wire/can-we-deregulate-ourselves-out-affordable-housing-crisis>.

181. *Id.*; see also COLUMBIA, S.C., UNIFIED DEV'T ORDINANCE, CODE § 17-1.3 (2019) (citing that the purpose of zoning ordinances is “to protect, promote, and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare”).

182. See Greene, *supra* note 180; see also Jason Richardson et al., *Shifting Neighborhoods: Gentrification and Cultural Displacement in American Cities*, NAT'L CMTY. REINVESTMENT COAL. (Mar. 19, 2019), <https://nrcr.org/gentrification/>.

massive scale to include more widespread incorporation of mixed-use and multifamily residential zoning are necessary to reduce exclusionary zoning and thereby increase racial and socioeconomic diversity at the neighborhood schools in those exclusionary zones.

## V. OVERCOMING ZONING AND LAND USE CHALLENGES

As noted earlier, solving the ongoing segregation of public schools through zoning laws is not without its challenges and criticisms. Yes, widespread incorporation of IZ and mixed-use zoning is a simple solution to addressing the housing affordability crisis as well as housing and school segregation; however, the simplicity of the solution is misleading. Other difficulties will certainly arise as municipal leaders reform the current state of zoning laws, regulations, and policies. I will explore those difficulties and provide possible avenues that local, state, and national government leaders; lawyers; educators; and policy advocates can explore.

### A. Countering the Disjointed Response

One major difficulty with advocating for zoning reform is that national advocacy is near impossible. Zoning laws are creatures of local government. Somewhat similar to education, they are a local responsibility at the most basic notion of governance; municipal governments develop and operate zoning laws with very minimal state input and with extremely limited national input.<sup>183</sup> Because zoning laws are hyper-localized and reform is required on the local level, zoning advocacy will require grassroots organization and efforts. Organizing reform advocates around a central goal, such as revising zoning laws to promote affordable housing, is vital to the success of grassroots efforts. Reform advocates must then gather stakeholders to review the current operation of zoning laws, discuss areas of reform, consider potential approaches to reform, and execute around the common goal. Additionally, reform efforts can take the form of fair housing litigation and zoning policy changes on the state and local level to create a legal environment where IZ and mixed-use zoning policies can thrive.

---

183. See Greene, *supra* note 180.

Despite the local nature of zoning laws, national advocates and the federal government can still work on reform efforts. In 2016, the HUD, the U.S. Department of Education, and the U.S. Department of Transportation under the Obama administration issued a “Dear Colleague” letter regarding the barriers to mobility in the United States due to socioeconomic and racial segregation leading to areas of concentrated poverty, making it difficult for children to access opportunities.<sup>184</sup> The letter calls for state and local educational agencies, transportation agencies, and HUD program participants to work together so that citizens have better connectivity to housing with access points for transportation and education.<sup>185</sup> Using this brief “Dear Colleague” letter as a guide, the federal government can advocate for local policy initiatives that seek to alleviate barriers to access and connectivity to fair housing through state guidance, sample legislation for state and local governments, and data resources on the effects of zoning laws on segregation.<sup>186</sup>

Moreover, based on my research, the current approach to zoning, both in reform efforts and implementation, reveals a disjointed response to affordable housing policies. As discussed earlier, local housing administrations face division that leads landlords to face administrative barriers that deter them from applying and agreeing to accept vouchers.<sup>187</sup> With divisions at the local level for housing administration, it is difficult to imagine local agencies successfully collaborating to develop solutions to the affordable housing crisis. Like the “Dear Colleague” letter suggests, administrative agencies for both housing and education should join efforts to address the housing, education, and transportation needs of local citizens, instead of working separately to develop policies and make decisions. Additionally, the roots for

---

184. U.S. DEP’T OF HOUS. & URB. DEV., U.S. DEP’T OF EDUC., U.S. DEP’T OF TRANSP., Dear Colleague Letter on Affirmatively Furthering Fair Housing Rule (June 3, 2016), <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf> (encouraging communities to further HUD’s goal of “affirmatively furthering fair housing”) [hereinafter Dear Colleague Letter]. *But see* Greene, *supra* note 180 (noting that Secretary Carson, former HUD director under the Trump administration, suspended the implementation of the Affirmatively Furthering Fair Housing rule).

185. Dear Colleague Letter, *supra* note 184, at 3.

186. See Greene, *supra* note 180 for the suggestion to provide data resources to local governments.

187. See discussion *supra* Part III.

collaboration are already in existence. Based on an October 2017 report released in partnership with the Public and Affordable Housing Research Corporation, 48% of housing agencies partner with school districts to provide educational services to residents living in public housing.<sup>188</sup> Housing agencies also regularly partner with community organizations, most often nonprofits, to provide education services.<sup>189</sup> These statistics show that connectivity among local governments—educational and municipal agencies—and community organizations already exists to some degree. Imagine if these partnerships existed to provide holistic responses to families’ needs such that state and local education agencies, housing agencies, transportation agencies, and other vested stakeholders collaborated on policy initiatives, administrative processes, and support structures. The need for holistic services is too great to ignore and forego a collaborative response. Therefore, expansion of these partnerships among housing agencies, municipalities, school districts, and state education agencies through a collaborative response team can help develop targeted policies that provide solutions to the affordable housing crisis.<sup>190</sup> For purposes of this Article, those targeted policies should include implementing IZ policies and mixed-use zoning ordinances that seek to curb racial and socioeconomic isolation in the locale’s neighborhoods and schools.

While zoning boards do exist in most cities, a review of the background and expertise of the members who comprise the board produces cause for concern. In Columbia, South Carolina, the Board of Zoning Appeals reviews cases resolving special exemption permits and zoning variances and hears Zoning Administrator decisions concerning zoning permits, zoning ordinance interpretations, and conditional use permits, among other things.<sup>191</sup> The Board, therefore, holds a vast amount of power to decide whether to adhere to current zoning laws as well as to determine the locations of new developments when developers appeal decisions of the Zoning Administrator. The

---

188. *How Housing Is Advancing Educational Outcomes: The Scope of Educational Services Offered by Public Agencies*, PUB. & AFFORDABLE HOUS. RSCH. CORP. 5 (Oct. 2017), <https://clpha.org/sites/default/files/documents/EducationServicesSurvey2017.pdf>.

189. *Id.*

190. Government entities should be advised not to collaborate in silos but should include a unification of interests and policies. This includes outside, nongovernmental stakeholders such as real estate networks, builders, developers, education activists, housing activists, and other interested parties.

191. COLUMBIA, S.C., UNIFIED DEV’T ORDINANCE, CODE § 17-2.3(c) (2019).

composition of the Board, however, does not represent a full range of interests that would, as suggested earlier, lead to a collaborative response. In publicly published applications from a Richland County, South Carolina<sup>192</sup> Council Meeting, the applicants for the Board of Zoning Appeals had professional backgrounds in geographic information systems, residential and commercial real estate, business, finance, land use and code enforcement, unspecified government, and public-oriented employment.<sup>193</sup> This lack of professional diversity on municipal zoning boards leaves little room for discourse and collaboration that would lead to more inclusionary zoning practices. The voices of all stakeholders,<sup>194</sup> particularly school district officials, lack sufficient representation on the Richland County Board of Zoning Appeals and are, in fact, underrepresented. Therefore, it is imperative for collaboration on zoning reform efforts to insert new voices into the discourse on the current state of affairs and the impact of zoning laws. This becomes even more important as we consider the detrimental effects that exclusionary zoning practices have on children and their access to educational opportunities and future economic mobility.

## **B. Resisting NIMBYism**

Zoning reformers, collaborators, and other stakeholders should be aware of the negative branding and associations that local property owners have when it comes to IZ and mixed-use zoning policies. Reform efforts may fall short if NIMBYism is allowed to persist and prevail. NIMBY refers to the “Not in my Backyard” phenomenon that is often repeated in the literature to describe efforts, typically by upper class property owners, to block the construction of new projects near their property, sometimes including affordable housing, because of a perceived effect on their “quality of life and the value of their

---

192. The City of Columbia is located in Richland County.

193. RICHLAND CNTY. COUNCIL RULES & APPOINTMENTS MEETING MINUTES (Nov. 1, 2011), <http://www.richlandcountysc.gov/Portals/0/Departments/CountyCouncil/Committees/Rules%20and%20Appointments/Agendas/20111101.pdf>.

194. Potential stakeholders would ideally represent different facets of the community; such stakeholders may include teachers, parents, administrators, neighborhood organizers, business leaders, and nonprofit advocates in addition to the elected or appointed board members.

property.”<sup>195</sup> Recognizing property owners’ due process rights, state laws do statutorily protect those rights.<sup>196</sup> While at least one state that I reviewed does have an option for accepting written citizen comments, including from residents who are not property owners,<sup>197</sup> the law still strongly favors property owners over nearby residents. Two things can be derived from these state preferences. First, states have more control over local zoning laws, as they have delegated the authority to develop zoning laws to municipal governments. States, therefore, have the authority to pass legislation that could reinforce the need to develop more inclusionary zoning policies.<sup>198</sup> Second, states, at least in the Carolinas, elevate property owners’ rights over residents’ rights. So, if the people facing housing instability and suffering from the affordability crisis are primarily renters, their thoughts on zoning laws and their ability to combat NIMBYism on their own are diminished under the law.

Professor Erika Wilson launched criticism on local governments that elevate the rights of property-owning voters through the theory of localism developed and sustained by the Supreme Court in its almost half-century of jurisprudence since *Milliken v. Bradley*, holding that remedies to school segregation must be within the district and localized.<sup>199</sup> Federal and state policies allow localism to thrive, “delegat[ing] broad powers to localities that allow them to separate from predominantly poor and minority central cities.”<sup>200</sup> In a later article, Professor Wilson criticizes secessionist movements by some local governments, where suburban and affluent areas secede from larger metropolitan areas into “predominantly white and affluent school

---

195. *Not in My Backyard Phenomenon*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Not-in-My-Backyard-Phenomenon> (last visited Nov. 22, 2021); see also Jaimie Ross, *Avoiding and Overcoming Neighborhood Opposition to Affordable Rental Housing*, NAT’L LOW INCOME HOUS. COAL. 2–36, 2–36 (2017), [http://nlihc.org/sites/default/files/AG-2017/2017AG\\_Ch02-S10\\_Avoiding-and-Overcoming-Opposition.pdf](http://nlihc.org/sites/default/files/AG-2017/2017AG_Ch02-S10_Avoiding-and-Overcoming-Opposition.pdf).

196. See S.C. CODE ANN. § 6-29-760 (2018); see also N.C. GEN. STAT. ANN. § 160D-602 (West 2020).

197. N.C. GEN. STAT. ANN. § 160D-603 (West 2020).

198. See S.C. CODE ANN. § 6-29-740 (2018).

199. Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 630, 641, 650 (2011) (“Localism is broadly defined as a belief that decentralized, independent local government structures are preferable to a centralized government structure, particularly in a metropolitan region.”).

200. *Id.* at 650.

district enclaves” that hoard opportunities “situated next to predominantly minority and low income” districts.<sup>201</sup> As Professor Wilson notes, local governments embolden and, to some extent, promote policies and practices that elevate NIMBY attitudes and provide shields that may reward seceded or suburban municipalities for declining to approve IZ and mixed-use zoning policies through voter support. These attitudes and practices also allow the maintenance of the status quo so that rather than revising policies for inclusivity, exclusionary zoning continues to regulate where housing is built and the access to educational opportunities that accompany the housing.

Therefore, it is of the utmost importance that reform efforts include all voices, giving all interested parties an opportunity to provide input on zoning reform efforts. Whether that leans toward better zoning, such as IZ and mixed-use zoning policies, or deregulation—the outcome will provide greater access to affordable housing for the most affected families. Furthermore, state legislative efforts can provide stronger statutory protections for the voices and interests of residents on par with those of property owners.

### **C. Litigating to Produce Inclusionary Practices**

Beyond reforming policies that advocate for more inclusionary practices, litigation provides another avenue, though often not as potent, to challenging exclusionary zoning ordinances. The difficulty with litigation is that the results of zoning laws, the housing that is built or not built-in specific districts, remains in place long after changes to zoning laws go into effect. Thus, the only way to meaningfully challenge zoning laws is through the laws’ impact on new construction and renovation projects. Additionally, court processes may move more slowly than development, so challenges through litigation ultimately have no effect on newly planned developments. However, enterprising attorneys and the U.S. Department of Justice (DOJ) Civil Rights Division have instituted action against both school boards and housing agencies to address the intentional segregation of public schools and

---

201. Wilson, *supra* note 8, at 2429.

public housing.<sup>202</sup> For example, in *United States v. Yonkers Board of Education*, the Second Circuit affirmed the lower court's judgment "holding the City liable for racial segregation of housing in Yonkers, holding both the City and the Board liable for racial segregation of the Yonkers public schools, and ordering each defendant to take steps to remedy the segregation for which it was found liable."<sup>203</sup>

The Second Circuit reviewed extensive evidence, including census data and the City's housing decisions that resulted in deeply segregated public housing as well as the school board's multitude of decisions that showed an intent to segregate the school district, writing that "[t]he relationship between schools and housing was hardly lost on the City while it was making its various decisions as to whether and where to construct subsidized housing."<sup>204</sup> The court also viewed the "differing standards of proof" for equal protection and Fair Housing Act claims for racial discrimination as "immaterial" to that case because the plaintiffs were able to establish discriminatory intent to segregate.<sup>205</sup> Ultimately, using the "flexible but not unlimited" power of federal courts to provide remedies for constitutional violations,<sup>206</sup> the Second Circuit upheld the remedies issued by the federal district court to build more units of subsidized housing outside of highly concentrated minority neighborhoods and school remedies to desegregate the entire school district with financial support from the City of Yonkers.<sup>207</sup> Although the Supreme Court's jurisprudence on remedying the vestiges of discrimination evolved over the years, the underlying proposition from this case remains: if cities and school districts collude to intentionally segregate both housing and schools, both can be held jointly liable for intentional discrimination under the Fourteenth Amendment and the Fair Housing Act.

However, in the twenty-first century, when many school districts have been released from federal court orders to desegregate,<sup>208</sup> one of

---

202. U.S. DEP'T OF JUSTICE: CASE SUMMARIES, <https://www.justice.gov/crt/case-summaries> (last visited Nov. 22, 2021).

203. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987).

204. *Id.* at 1208.

205. *Id.* at 1217.

206. *Id.* at 1235.

207. *Id.* at 1236–37.

208. Associated Press, *Desegregation Remains an Issue in Many US Schools*, N.Y. POST (July 11, 2019), <https://nypost.com/2019/07/11/desegregation-remains-an-issue-in-many-us->



the keys that litigators can use to hold cities and school districts accountable is difficult to overcome in the era of the Roberts Court—disparate impact theory.<sup>209</sup> While fair housing litigators and advocates know that disparate impact theory is alive and well under the Fair Housing Act, the Court’s interpretation leaves much to be desired regarding continuing the gains of the Civil Rights Movement and addressing ongoing racial and socioeconomic segregation. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, the Court held that “disparate-impact claims are cognizable under the Fair Housing Act” based on the consideration of its “results-oriented language” in line with other antidiscrimination statutes such as the Civil Rights Act and Congressional intent.<sup>210</sup> The Court recognized that litigants relied on the Fair Housing Act’s disparate impact theories to “uncover[] discriminatory intent . . . counteract[ing] unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”<sup>211</sup> To continue the work of the U.S. “quest to reduce the salience of race in our social and economic system,” adequate safeguards limiting disparate impact theory must be in place.<sup>212</sup> So, under the Fair Housing Act, disparate impact applies to government and private policies that “are ‘artificial, arbitrary, and unnecessary barriers.’”<sup>213</sup>

On paper, the Court’s holding that disparate impact litigation is available under the Fair Housing Act seems like a win. However, if the Court’s previous rulings, such as in *Parents Involved*<sup>214</sup> where the Court split on whether schools should enter voluntary school desegregation plans and what remedies schools could use in those plans,<sup>215</sup> provide any direction on how the current Roberts Court might hold, litigators will have difficulty calling for remedies to ongoing discrimination for

---

schools/ (noting that anywhere from 150 to 200 school district remain under federal court orders to desegregate).

209. See generally Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653 (2015).

210. *Texas Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 545–46 (2015).

211. *Id.* at 540.

212. *Id.* at 544.

213. *Id.* at 543.

214. See discussion *supra* note 10.

215. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

districts released from federal court orders, as the DOJ and attorneys did in the *Yonkers Board of Education* case. While Justice Kennedy writing for the majority in *Inclusive Communities* does recognize that vestiges of de jure segregation remain, he also hesitates to expand the law in a way that would fully remove those vestiges due to concern that such recognition of race might “tend to perpetuate race-based considerations rather than move beyond them.”<sup>216</sup> In both *Inclusive Communities* and *Parents Involved*, the Court hesitates to expand laws in a way that would “eradicate discriminatory practices” in zoning laws and other restrictions on housing as Congress designed the Fair Housing Act to do,<sup>217</sup> instead opting for more essentially colorblind strategies.

As I have detailed in this Article, the vestiges of segregation remain deeply rooted in our housing and educational systems today and work to exacerbate an affordable housing crisis that only seems to get worse with each new nationwide economic downturn and precludes children from accessing educational opportunities. Litigation is a particularly difficult avenue because of the Roberts Court’s approach to disparate impact theory, and though not detailed in this Article, Equal Protection violations. De jure segregation is still an ongoing problem, so litigators could challenge exclusionary zoning laws and their impact on educational opportunities in areas where school districts are still under federal court orders to desegregate as was done in *Yonkers*. Where intentional segregation remains, courts are more likely to find constitutional violations and violations of antidiscrimination laws. Additionally, using disparate impact theory in such cases could expand the definition to include a more robust definition of disparate impact. That is not to claim that disparate impact theories should be without safeguards or limitations, but to note that the theory’s breadth is not expansive enough at this time to challenge exclusionary zoning laws that continue to leave housing options out of reach and create ongoing racial and socioeconomic segregation.

The challenges posed against reform to exclusionary zoning in the form of more inclusive policies and practices, such as IZ and mixed-use policies, seem difficult to overcome, especially in a polarized society where the sentiment runs deep “that to acknowledge disparities faced by

---

216. *Texas Dep’t of Hous. & Cmty. Affs*, 576 U.S. at 543.

217. *Id.* at 539.

people of color would tilt social advantages to their benefit.”<sup>218</sup> No one wants to feel left behind or forgotten on the margins of society. However, the affordable housing crisis continues to make a deeper and more indelible mark on our society, at one time affecting only certain minority and racial groups and low-income families, now stretching more infectiously into the middle class. To affect zoning policy reform will ultimately benefit everyone, so long as the changes to those policies include all voices and perspectives and develop laws and policies that remove any barriers to opportunity.

## VI. CONCLUSION

Affordable housing is a continuing crisis in the United States that has isolating effects for low-income students in racially and socioeconomically isolated schools, barring them from accessing educational opportunities. As the Supreme Court observed, the blame for continued segregation has been attributed to deeply rooted housing segregation across the United States. Exclusionary zoning laws are one of those deeply rooted policies that has evolved since being upheld by the Court in the 1920s, and exclusionary zoning creates a strain on the supply of housing that is built in high-opportunity areas. While many solutions exist to alleviate financial pressures on families facing housing instability, such as housing vouchers, the demand for vouchers far outweighs the number of available vouchers. Moreover, families with vouchers continue to face discrimination and face additional barriers to opportunity that prevent them from using their vouchers in high-opportunity areas. Therefore, solutions to the affordability crisis must address the root of the problem—exclusionary zoning.

Inclusive zoning policies and practices have taken off as a theoretical matter and policy initiative in the last decade to address families’ changing needs and as younger people seek to move to urban and more densely populated areas. At the same time, as the U.S. navigated a global recession and a global pandemic, affordable housing came to the national forefront, as millions of Americans were priced out

---

218. Reid J. Epstein, *A ‘Community for All’? Not So Fast, This Wisconsin County Says.*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/2021/05/18/us/politics/race-inclusion-wasau-wisconsin.html>.

of neighborhoods. The literature reveals that exclusionary zoning laws that preference single-family homes contribute to the affordable housing crisis through minimum lot size requirements and design requirements that prevent multifamily and multiuse development. Therefore, zoning reformers should advocate for a coalition of local and state governments, including local and state education agencies as well as local housing agencies and transportation agencies, to incorporate more widespread mixed-use zones and overlays to incentivize multiuse and multifamily development in existing exclusionary zones. In addition to mixed-use zoning policies, cities should continue to review and expand IZ policies so that a percentage of new developments can be sold or rented at a market value affordable to many families in the community.

While zoning reformers will face challenges and opposition to the revision and replacement of exclusive single-family zones, it is important that they include a variety of voices and perspectives, as housing segregation continues to have a detrimental effect on the most vulnerable members of communities—children. Where children live, of course, impacts their environment and their educational opportunities. To expand opportunities, reform efforts must ensure that housing and educational segregation is not allowed to persist as separate and unequal.