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A Federal Builder's Remedy for Exclusionary Zoning

ABSTRACT. This Note proposes a new remedy to the age-old problem of exclusionary zoning. Specifically, the Note proposes a federal builder's remedy that provides judicial relief when a local government—motivated by a desire to block in-migration of the poor, whether for social or fiscal reasons—denies a builder's proposal to build low-income housing. Fortunately, the doctrinal foundation for such a remedy already exists in Fourteenth Amendment jurisprudence. After describing the doctrinal case, this Note makes the normative case for this builder's remedy.

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NOTE CONTENTS

INTRODUCTION	1519
I. THE PERSISTENT PROBLEM OF EXCLUSIONARY ZONING	1522
A. The Emergence and Continued Growth of Exclusionary Zoning	1522
B. Harms of Exclusionary Zoning	1524
C. Why Exclusionary Zoning Persists	1527
1. Impediments to Bargaining Solutions Between Localities and Builders	1527
2. Absence of State Legislative Preemption of Localities	1528
3. Limits of State Law	1529
4. Failure of Previous Federal Litigation Strategies	1531
II. THE DOCTRINAL CASE FOR A FEDERAL BUILDER'S REMEDY	1533
A. The Promise of a Builder's Remedy	1533
1. The Concept of a Federal Builder's Remedy	1534
2. The Fourteenth Amendment Builder's Remedy	1535
a. Option A: Illicit Motive Is Sufficient for Relief	1536
b. Option B: Illicit Motives Trigger a More Searching Inquiry of the Government's Assertion of Fit Between Its Zoning Decision and Motive	1537
c. Option C: The Builder Affirmatively Demonstrates an Absence of Fit Between the Zoning Decision and Permissible State Objectives	1537
B. Step One: A Motive to Prevent Entry of the Poor – Even if Fiscally Driven – Is Illicit	1538
1. Exclusion of the Poor from a Jurisdiction Is an Illicit Purpose	1538
a. <i>Edwards v. California</i> and Legitimate Purposes of the Police Power	1538
b. <i>Shapiro v. Thompson</i> Confirms that Jurisdictional Exclusion of the Poor Is “Constitutionally Impermissible”	1540
2. Fiscal Purpose Is Also Illicit when Achieved Through Exclusion of the Poor	1541
a. Prior Cases Do Not Legitimate Fiscal Zoning in the Exclusionary-Zoning Context	1542
b. Fiscal Concerns Did Not Legitimate the Exclusionary Purpose in <i>Edwards</i> and <i>Shapiro</i>	1544
	1517



C. Step Two: Demonstrating the Presence of Illicit Motives	1545
D. Step Three: Proving the Absence of a Rational Relationship Between Pretextual Motives and the EZ Decision	1546
1. A Builder’s Identification of Potential Development-Related Harms	1547
2. A Roadmap for Mitigations	1548
a. Historic Preservation	1549
b. Aesthetic Character	1550
c. Public Safety	1550
E. Overcoming Procedural Obstacles	1551
1. Exhaustion of State-Court Remedies	1551
2. Limitations on Due-Process Protections of Real Property	1552
III. THE NORMATIVE CASE FOR A FEDERAL BUILDER’S REMEDY	1556
A. Evidence of the Remedy’s Impact	1556
B. Would-Be Resident’s Remedy	1558
1. Judicial Resources	1558
2. Standing	1559
a. Injury in Fact	1559
b. Causation	1560
c. Redressability	1560
C. Addressing Normative Counterarguments	1561
1. Defending the Distributional and Efficiency Consequences of the Builder’s Remedy	1562
2. Defending the Involvement of the Federal Judiciary	1563
3. Defending the Low-Income Set-Aside Requirement	1564
CONCLUSION	1565

INTRODUCTION

Local governments have long sought to exclude “undesirable” populations from neighborhoods by using their “police power.”¹ For example, until 1917, cities such as Louisville regularly barred transfer of property on white-majority blocks to African Americans.² By midcentury, scholars observed emergent efforts by some localities to exclude lower-income people altogether through exclusionary zoning (EZ).³ Technical land-use controls,⁴ though facially race blind⁵ and often class blind,⁶ practically barred the creation of affordable housing for low- and moderate-income (LMI) households by preventing economies of scale in housing construction or barring the subdivision of large existing buildings. These barriers to increasing the supply of housing units are still widely used today, and they continue to keep sale and rental prices high enough to prevent LMI households from joining a community.⁷

In 2020, EZ lies at the heart of America’s affordable-housing crisis⁸ and

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1. See *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) (“The authority of the State to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare is very broad as has been affirmed in numerous and recent decisions of this court.”).
 2. *Id.* at 81-82 (finding that a local ordinance in Kentucky that separated people based upon race violated the Due Process Clause as it “was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law”).
 3. Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 780-82 (1969).
 4. For example, prohibitions on multifamily housing, requirements of large lot size minimums, and low maximum levels of buildable floor area may preclude economically feasible affordable housing development. See, e.g., Mosaic Cmty. Planning, *2016 – 2021 Analysis of Impediments to Fair Housing Choice: Lexington, Kentucky*, LEXINGTON-FAYETTE URB. COUNTY GOV’T DIVISION GRANTS & SPECIAL PROGRAMS 96 (Sept. 2016), <https://www.lexingtonky.gov/sites/default/files/2016-09/17-Analysis%20of%20Impediments%20Draft.pdf> [<https://perma.cc/58ES-D43C>].
 5. Sager, *supra* note 3, at 780 (“Racially exclusive zoning provisions have been struck down by the courts consistently, at least when recognized as such.” (footnotes omitted)).
 6. *Id.*
 7. *Id.*
 8. The term “affordable housing” refers to units with a monthly cost to their resident (irrespective of rental or ownership of the unit) of no more than thirty percent of income. See *Affordable Housing*, U.S. DEP’T HOUSING & URB. DEV., https://www.hud.gov/program_offices/comm_planning/affordablehousing [<https://perma.cc/FM45-QSBN>]. Many affordable units are built pursuant to a federal, state, or local program (with legal restrictions on rent and tenant or homeowner eligibility criteria), but other affordable units may have no public subsidy and

perpetuates patterns of racial and socioeconomic segregation.⁹ EZ also harms American economic output by preventing low-income people from accessing the country's most lucrative regions.¹⁰ Despite growing concern among legal scholars,¹¹ think tanks,¹² and federal policy-makers,¹³ and despite decades of political and litigation efforts,¹⁴ EZ shows no signs of abatement.

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- may simply have a market rent affordable to their tenant. For a discussion of the use of the term, see Steven J. Eagle, "Affordable Housing" as Metaphor, 44 *FORDHAM URB. L.J.* 301 (2017). Land-use regulations often limit the supply of housing in a community and consequently raise prices. See Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 *J.L. & ECON.* 331 (2005); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 *YALE L.J.* 78, 114-17 (2017); see also Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 *STETSON L. REV.* 459 (2009) (attributing high prices for low-income housing in part to zoning regulations). This is not to say land-use regulations necessarily harm affordability objectives. For instance, land-use regulations may require the provision of affordable housing when market-rate units are built. But even here, some skeptics contend regulation has a broader market impact of raising the cost of housing. See Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 *S. CAL. L. REV.* 1167, 1170 (1981).
9. See Douglas S. Massey & Jacob S. Rugh, *The Intersections of Race and Class: Zoning, Affordable Housing, and Segregation in US Metropolitan Areas*, in *THE FIGHT FOR FAIR HOUSING* 245-46 (Gregory D. Squires ed., 2017).
 10. See, e.g., Schleicher, *supra* note 8, at 96-104.
 11. Robert Ellickson observes that the harm of EZ policies falls on (1) existing tenants wishing to remain in a city, (2) households that will move into a city in the future, (3) tenants who exit a municipality because rents rise, and (4) would-be residents who do not enter the jurisdiction because of housing price increases caused by EZ. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 402 (1977); see also RICHARD F. BABCOCK & FRED P. BOSSELMAN, *EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970S*, at 17 (1973) ("The panoply of restrictive land-use controls that local governments can and do use to increase the cost of housing is staggering and pervasive. Although the added expense caused by each regulation may be nominal, in concert they add substantially to housing costs."); EDWARD M. BERGMAN, *ELIMINATING EXCLUSIONARY ZONING: RECONCILING WORKPLACE AND RESIDENCE IN SUBURBAN AREAS* 3-13 (1974) (discussing the effects of EZ).
 12. Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST. (Oct. 18, 2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf> [<https://perma.cc/4BNB-F9ZW>] (articulating a conservative critique of zoning and land-use rules); David Sanchez et al., *An Opportunity Agenda for Renters*, CTR. FOR AM. PROGRESS (Dec. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/16050037/LowIncomeRenters-report1.pdf> [<https://perma.cc/S95J-65A3>] (setting forth a liberal critique of EZ).
 13. Scott Beyer, *Obama Administration Report Attacks NIMBYism and Zoning*, FORBES (Sept. 26, 2016, 9:27 PM), <https://www.forbes.com/sites/scottbeyer/2016/09/26/obama-administration-report-attacks-nimbyism-and-zoning> [<https://perma.cc/9RN3-ESM9>]; Kriston Capps, *Ben Carson Is a YIMBY Now and Everything's Confusing*, CITYLAB (Aug. 14, 2018), <https://www.citylab.com/equity/2018/08/ben-carsons-new-argument-against-fair-housing-rules-its-about-nimbys/567449> [<https://perma.cc/3PPS-44CY>].
 14. See *infra* Part II.

According to some scholars, “settled doctrine” prevents intervention by federal courts.¹⁵ These scholars therefore focus on policy solutions by looking to federal preemption of *some* local land-use decisions,¹⁶ state interventions to override local exclusionary policies,¹⁷ and self-regulation by local elected officials (such as creating a zoning budget).¹⁸

I argue that such scholars offer an incomplete doctrinal analysis, and that federal courts can apply constitutional law to help alleviate the housing crisis. Because of the harms EZ causes throughout the United States, this Note argues that an as-applied challenge to EZ regulations,¹⁹ in the form of a “builder’s remedy,” offers a viable new option. Under the builder’s remedy approach, courts could provide relief to a builder of low-income housing – or housing built in the context of a mixed market-rate/low-income project – when the locality denies a land-use proposal because of its desire to exclude the poor. Properly understood, longstanding Fourteenth Amendment doctrine²⁰ prohibits governments from making local zoning decisions for the purpose of excluding the poor, regardless of the fiscal impact of those decisions.

Throughout the Note, I use the term EZ to refer to restrictive zoning motivated principally by a desire to keep LMI households out of a jurisdiction. This Note does not seek to apply the EZ label to restrictive zoning motivated principally by environmental concerns (such as risks from flooding, wildfires, overburdened infrastructure, or proximity to noxious use), even though some commentators would consider those policies EZ when they incidentally exclude the poor. Because this Note’s definition of EZ is narrower than other possible definitions, its proposed builder’s remedy is likewise narrower: I restrict the remedy

15. John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 94 n.11 (2014).

16. Michael C. Pollack, *Land Use Federalism’s False Choice*, 68 ALA. L. REV. 707, 757 (2017).

17. John Infranca, *The New State Zoning: Land Use Preemption amid a Housing Crisis*, 60 B.C. L. REV. 823, 824 (2019) (arguing that “the current housing crisis justifies bold new forms of state intervention . . . [that] should expressly preempt certain narrow elements of local law, rather than . . . add additional planning requirements, procedural steps, or potential appeals”).

18. See Roderick M. Hills Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81 (2011) (discussing the process through which local governments make zoning decisions).

19. Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 HARV. J.L. & PUB. POL’Y 717, 724 n.28 (2008) (“[T]he remedy for a facial challenge ‘is the striking down of the regulation,’ while the remedy for an as-applied challenge ‘is an injunction preventing the unconstitutional application of the regulation to plaintiff’s property and/or damages resulting from the unconstitutional application.’” (quoting *Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990))).

20. See *infra* Section II.B (discussing *Edwards v. California*, 314 U.S. 160 (1941), and *Shapiro v. Thompson*, 394 U.S. 618 (1969)).

to instances when exclusion occurs by design rather than as an incidental consequence of benign zoning decisions.

Part I of the Note describes the growth of EZ and the failure of past efforts to effectively remedy it. Part II uses existing Supreme Court precedent to make the doctrinal case for a federal builder's remedy that permits a builder of LMI housing to challenge local zoning in limited instances. Finally, Part III explains why this federal builder's remedy is normatively desirable as a means to curb EZ.

I. THE PERSISTENT PROBLEM OF EXCLUSIONARY ZONING

This Part discusses the emergence of contemporary EZ and the practical harms of restrictive land-use regulation. It then explains why EZ persists despite repeated efforts to curtail it.

A. *The Emergence and Continued Growth of Exclusionary Zoning*

This Section focuses on three broad categories of motives for EZ: (i) social, (ii) fiscal, and (iii) environmental.

The first category, social exclusion, encompasses an incumbent community's wish to keep out others because of their class, race, or other traits. As Roderick M. Hills, Jr., shows, "cultural anxieties about the moral unworthiness of the mobile indigent" have long motivated state efforts to deter in-migration.²¹ In many instances, exclusion motives might involve both class and race dynamics.²² Though the Equal Protection Clause and the Fair Housing Act clearly prohibit

21. See Roderick M. Hills, Jr., *Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers*, 1999 SUP. CT. REV. 277, 316; see also *supra* notes 1-3 (discussing various efforts of local governments to exclude the "other").

22. As one councilmember in Mount Laurel, New Jersey, said to a group of African Americans planning an affordable-housing development in the late 1960s, "If you can't afford to live in Mount Laurel, pack up and move to Camden!" RICHARD HENRY SANDER, *MOVING TOWARD INTEGRATION: THE PAST AND FUTURE OF FAIR HOUSING* 233 (2018); see also *MHANY Mgmt., Inc. v. County of Nassau*, No. 05-cv-2301, 2017 WL 4174787, at *6 (E.D.N.Y. Sept. 19, 2017) ("[T]he Court reads the Second Circuit's opinion to hold that maintaining the character of a neighborhood is not a substantial, legitimate, nondiscriminatory interest, because the Second Circuit implicitly found that it was a discriminatory interest in this instance. The Circuit court stated that the 'comments of Garden City residents employ recognized code words about low-income, minority housing,' and specifically referenced the residents' use of the word 'character' . . ." (quoting *MHANY Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 609 & n.5 (2d Cir. 2016))).

race-based discrimination,²³ communities currently feel empowered to “zone out” other classes due to minimal judicial oversight.²⁴

A second set of motives involves potential financial costs to incumbents. One example of a fiscal concern is that an increase in the supply of housing units tends to decrease the market-rate price of housing, thus lowering home values for incumbents. As a result, homeowners may seek to defeat newly proposed housing developments to prevent competition. Similarly, local zoning decision-makers who view their objective as protecting their communities from financial and other risks will try to prevent an inflow of LMI households into lower-cost housing units.²⁵

Residents might also fear the impact of new housing on the local government's finances. Local governments fund their own school services, and this, according to Richard Briffault, “provides an incentive for exclusionary zoning and other land use practices whereby affluent communities seek to exclude the less wealthy.”²⁶ Even if a newly constructed apartment building for LMI households brings in more tax revenue than a single-family home, for example, the marginal cost of educating children from the additional units might exceed the marginal increase in property tax revenue. In that case, the development – all else equal – could be a net fiscal cost to the municipality, which a municipality might try to prevent through EZ.

The third category of motives for EZ relates to the environmental risks posed by new housing. In a seminal case concerning New York's Village of Belle Terre, for instance, a local zoning ordinance prohibited occupancy of single-family homes by three or more unrelated people.²⁷ The less-than-one-square-mile

23. See *infra* Section I.C.4.

24. See *infra* Section I.C.3.

25. For extensive discussion of incentives for fiscally motivated zoning policy, see WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 65-67 (2009). See generally ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* (4th ed. 2013) (discussing zoning and land use).

26. Richard Briffault, *The Role of Local Control in School Finance Reform Symposium: Equitable Financing of Our Public Schools*, 24 CONN. L. REV. 773, 803 (1992); see also Richard A. Epstein, *Positive and Negative Externalities in Real Estate Development*, 102 MINN. L. REV. 1493, 1524 (2017) (observing that “local governments will use all the resources at their disposal to keep out low-income families, often because of the additional tax burden that it will place on other landowners to fund the public education required for the influx of families with school-age children”).

27. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

town sought to exclude boarding homes and fraternity houses from the neighboring university.²⁸ The Supreme Court held that municipalities generally may limit new housing when that housing poses reasonably foreseeable environmental risks, and it found that the Village's fears about congestion and noise were supported by evidence.²⁹

Given fiscal and environmental concerns, EZ might seem like a perfectly rational tool for jurisdictions that are only concerned with the wellbeing of preexisting stakeholders and ignore their effects on outsiders.³⁰ After all, the principal persons harmed by EZ are builders and would-be residents, who frequently do not reside in the jurisdiction and therefore lack political power to hold local zoning officials accountable.³¹ The resulting asymmetry in incentives helps explain the continued vitality of EZ.³² A locality's exclusion of LMI outsiders, however, often imposes significant externalities.

B. Harms of Exclusionary Zoning

The harms of EZ include severe rent burdens for families, the perpetuation of racial segregation, fiscal harm to already distressed communities, and national economic harm. They are mostly borne by Americans outside the exclusionary jurisdiction.³³

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28. James F. Blumstein, *A Prolegomenon to Growth Management and Exclusionary Zoning Issues*, 43 LAW & CONTEMP. PROBS., Spring 1979, at 5, 50-51 (1979).
 29. *Belle Terre*, 416 U.S. at 9. Even the dissenting Justices conceded the reasonable fear. *Id.* at 13 (Marshall, J., dissenting).
 30. See *infra* Section I.B.
 31. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 426 (1990).
 32. Although EZ was traditionally conceptualized as a suburban phenomenon, new empirical analysis reveals its growing prevalence in homeowner-dominated portions of large cities. See Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014); Mangin, *supra* note 15, at 250-59 (finding that in an era of record economic growth for New York City, zoning rules for twenty-one percent of lots were altered to permit *less* housing construction). Concerns of congestion and overcrowding of schools may have reasonably motivated some of these efforts to exclude new housing, but the data are unclear about motive. The downzoning phenomenon may be best explained through “aldermanic privilege” — a legislative body’s norm to defer to each legislator’s preference on matters principally impacting the representative’s district. David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1671 (2013).
 33. Not all consequences of EZ are negative. For instance, EZ requiring a minimum acreage per unit of housing may ensure the preservation of trees that consume carbon dioxide, an environmental good. Yet the same restriction that bars multifamily construction could push LMI

First, EZ contributes to the nation's affordable-housing crisis.³⁴ Land-use regulations, in many communities, limit the supply and type of housing available and consequently raise prices.³⁵ While existing homeowners benefit from higher home values secured by EZ,³⁶ existing renters, the homeless, and those seeking to move into a jurisdiction are often forced to pay more for housing than they would have in the absence of EZ. In 2015, 47.7% of renter households in the fifty-three largest U.S. metropolitan areas spent at least 30% of their pre-tax income on rent and were therefore "rent burdened" according to the federal government's definition.³⁷ More than 24% of large metropolitan-area renter households spent at least 50% of their pre-tax income and were therefore "severely rent burdened."³⁸ Beyond limiting a household's capacity to spend money, the high cost of housing directly increases the odds of housing instability, which can entail evictions, environmental damage, and emotional harm.³⁹ These burdens of housing instability fall disproportionately on black and Hispanic households.⁴⁰

families to live further from an urban core, thus *increasing* their carbon footprint. Global environmental impacts tied to land-use controls are complicated and not further explored here. For background information, see Benjamin D. Leibowicz, *Effects of Urban Land-Use Regulations on Greenhouse Gas Emissions*, 70 *CITIES* 135 (2017).

34. Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, *FED. RES. BANK N.Y. ECON. POL'Y REV.* (June 2003), <https://www.newyorkfed.org/medialibrary/media/research/epr/03v09n2/0306glae.pdf> [<https://perma.cc/GMD2-3EUC>].
35. See Glaeser et al., *supra* note 8; Schleicher, *supra* note 8, at 114-17; Jenny Schuetz, *No Renters in My Suburban Backyard: Land Use Regulation and Rental Housing*, 28 *J. POL'Y ANALYSIS & MGMT.* 296 (2009); Jeffrey Zabel & Maurice Dalton, *The Impact of Minimum Lot Size Regulations on House Prices in Eastern Massachusetts*, 41 *REGIONAL SCI. & URB. ECON.* 571 (2011); see also Harney, *supra* note 8 (discussing the economics of EZ). Though land-use regulations may limit the available supply and type of housing, they do not always harm affordability objectives. For instance, land-use regulations may require the provision of affordable housing when market-rate units are built. But even here, some skeptics contend this regulation has a broader market impact of raising the cost of housing. Ellickson, *supra* note 8.
36. FISCHER, *supra* note 25, at 4-12.
37. *Download Data: Combined Data for the 53 Largest Metros*, N.Y.U. FURMAN CTR., <http://furmancenter.org/nrhl/data/all-large-metros> [<https://perma.cc/8Z4Q-ZEBW>].
38. *Id.*
39. For background on the human impacts of inadequate affordable housing, see MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).
40. Massey & Rugh, *supra* note 9; see also Sewin Chan & Gita Khun Jush, *2017 National Rental Housing Landscape: Renting in the Nation's Largest Metros*, N.Y.U. FURMAN CTR. 13 (Oct. 4, 2017), https://furmancenter.org/files/NYUFurmanCenter_2017_National_Rental_Housing_Landscape_04OCT2017.pdf [<https://perma.cc/UN5Y-JR8T>] (explaining that in America's largest metropolitan areas in 2015, the rent burden for black and Hispanic renter households

Second, EZ further entrenches patterns of racial segregation.⁴¹ Depending on the regional dynamics, EZ can lead some LMI households to stay within highly segregated inner cities, but it can also push LMI households to the fringes of metropolitan areas. Michelle Wilde Anderson explains that “exclusionary zoning interacts with cities’ magnetic pull on wage earners to generate unregulated, peripheral development for low-income families.”⁴² LMI households frequently move to unincorporated portions of counties, where basic government services are absent⁴³ or land is more likely to be contaminated.⁴⁴ Although the precise impact of EZ on segregation is not yet quantified, Anderson’s research helps demonstrate the harm that EZ imposes on LMI populations.

Third, EZ shifts funding burdens for school and municipal expenses to already fiscally constrained localities. Because public schools throughout the United States are predominantly funded through local property taxes,⁴⁵ local zoning authorities that exclude poor residents force other jurisdictions with lower-cost housing to bear those education costs. Such costs compound the growing risk of local-government insolvency and bankruptcy throughout the

was more than ten percentage points worse than the rent burden for white and Asian households).

41. Massey & Rugh, *supra* note 9.
42. Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1099 (2008).
43. *Id.* at 1145. Anderson notes that these areas lack “one or more vital service, such as piped, potable water; sewage and wastewater disposal; adequate law enforcement and fire protection; street paving, lighting, and traffic control; and/or flood and stormwater control.” *Id.* at 1101.
44. *Id.* at 1109. For California, Texas, Florida, and North Carolina, Anderson identified “unincorporated urban areas,” which she defined to “include neighborhoods that are: (1) unincorporated (lying outside the borders of any incorporated city); (2) contiguous on one or more sides with a municipal border or lying within the area legally designated for a city’s expected growth (denoted in some states as a sphere of influence or extraterritorial zoning jurisdiction); (3) primarily residential, with densities greater than or similar to adjacent incorporated land; and (4) low-income, as defined by census tract data.” *Id.* at 1101 (footnotes omitted). She found that all unincorporated urban areas under this definition were “predominantly African American or Latino.” *Id.*
45. See KERN ALEXANDER ET AL., FINANCING PUBLIC SCHOOLS: THEORY, POLICY, AND PRACTICE 184 (2014) (“The property tax has always been the mainstay of public school financing in this country.”).

United States.⁴⁶ While homeowners in EZ jurisdictions may save money,⁴⁷ homeowners in other jurisdictions lose money because they fund education expenses for LMI families, and their municipalities may accordingly grow increasingly distressed.

Finally, in addition to these household- and municipal-level problems, EZ also adversely affects the national economy. The aggregate effects of local land-use constraints impede the efficient interstate movement of workers from lower-wage areas to more economically prosperous metropolitan hubs,⁴⁸ which in turn harms the national economy's growth.⁴⁹

C. *Why Exclusionary Zoning Persists*

Despite these harms, EZ persists for four reasons: (1) challenges to bargaining between builders and localities, (2) the absence of state preemption, (3) the abstention of the state courts, and (4) the failure of prior federal litigation strategies.

1. *Impediments to Bargaining Solutions Between Localities and Builders*

Bargaining between real-estate builders and municipalities has not solved EZ because, in part, local procedures and legal doctrine tend to impede mutually beneficial agreements. Specifically, efficiency-enhancing trades to remove EZ are often impeded by several costs. First, builders face the standard transaction costs

46. See Aurelia Chaudhury et al., *Junk Cities: Resolving Insolvency Crises in Overlapping Municipalities*, 107 CALIF. L. REV. 459, 471 (2019). (“There are places all over the country with overlapping jurisdictions that each face severe budget crises.”); see also Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1130 (2014) (noting that twenty-eight cities were participating in programs for the fiscally distressed as of 2013); Tracy Gordon, *Predicting Municipal Fiscal Distress: Aspiration or Reality?*, LINCOLN INST. LAND POL’Y 17 (Sept. 2018), https://www.lincolninst.edu/sites/default/files/pubfiles/gordon_wp18tg1_o.pdf [<https://perma.cc/6H3C-MJUV>] (noting that 666 municipalities have filed for bankruptcy since 1937, and this relatively small number makes predicting future bankruptcies difficult).

47. If the marginal education expenses from a new development exceed the marginal tax revenue, a municipality saves money by preventing the new development.

48. See, e.g., Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 79 (2017) (“We show that tight land use regulations weaken the historic link between high incomes and new housing permits. Instead, income differences across places become more capitalized into housing prices.”); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1, 1 (2019) (describing negative labor market effects of land-use regulation); Schleicher, *supra* note 8, at 114-17.

49. Schleicher, *supra* note 8, at 102.

of negotiating with the government, including application fees, legal costs, time, opportunity costs, and the risk of failed negotiations. Second, the parties who would benefit from removing EZ are diffuse and therefore face significant transaction costs in pooling their financial resources.⁵⁰ Third, there are “political transactions” costs, including the zoning body’s internal process for debate and the development of a consensus bargaining position.⁵¹ Fourth, and perhaps most critically, the law prohibits a builder from simply writing a check to the government to remove the regulatory burden. The inalienable powers doctrine (otherwise known as the reserved powers doctrine) bars “a government from contracting away its police power.”⁵² Because of these costs, bargaining has failed to give rise to many potentially aggregate-welfare-enhancing building projects.

2. *Absence of State Legislative Preemption of Localities*

Instead of lobbying municipalities, builders might lobby states. Because zoning is a state police power delegated to localities and because a locality may not impose zoning restrictions on its own,⁵³ a state could directly prohibit its localities from zoning out the poor. But although opponents of EZ have long called for state preemption of local EZ practices, states have largely resisted.⁵⁴ In 2001,

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50. The low-income-outsider households’ welfare would be enhanced by moving into a newly constructed affordable building, but under an EZ regime, these households have no practical way to coordinate with similar households to contribute to a prospective builder’s offer.
51. Briffault, *supra* note 31, at 402.
52. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 893 (2011) (citation omitted). Even though William Fischel argues that zoning “is a community property right,” the government cannot trade such a property right with the same ease with which a private party can. WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 36 (1985).
53. SANDER, *supra* note 22, at 235 (“[N]o local government could create zoning unless granted the power by the state.”).
54. State action to *per se* ban any manifestation of EZ would address the problem of exclusion of the poor, but there has been no such movement. John Infranca argues that “the current housing crisis, and the effects of local land use policies on housing supply statewide, justify bold new forms of state intervention . . . [that] should expressly preempt specific elements of local law, rather than add additional planning requirements, procedural steps, or potential appeals.” Infranca, *supra* note 17, at 829. California, Florida, and Washington require localities to develop comprehensive plans that consider housing needs at all income levels, but it remains uncertain whether any zoning rules have been changed in accordance with the comprehensive plans to reduce the prevalence of EZ jurisdictions. ELLICKSON ET AL., *supra* note 25, at 779–81. Although states have preempted local exclusion of day cares and mobile homes, Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 307–27, (2019), there has been no blanket preemption of a jurisdiction’s multifamily exclusion outside of Oregon’s effort, *see infra* note 57 and accompanying text.

Oregon became the first state to prohibit localities from banning attached houses or multifamily houses from all of their residential zones. In other words, a locality in Oregon must identify at least some of its land as appropriate for multifamily housing.⁵⁵ But Oregon is the only state so far to use its preemption power so strongly against EZ.

3. *Limits of State Law*

State-law remedies, too, have been inadequate in challenging EZ. Although state courts that handle most land-use litigation vary somewhat in their treatment of EZ claims,⁵⁶ they generally have not policed localities' uses of zoning to exclude the poor.⁵⁷ In 1975 and 1991, for instance, the highest courts of New York⁵⁸ and New Hampshire⁵⁹ ruled against municipalities' EZ practices. But neither case paved the way for successful litigation efforts.⁶⁰ In New York, later litigation challenging local regulations failed because plaintiffs could not show that the zoning regulations were the but-for cause of inadequate affordable housing,⁶¹ making such challenges a near-impossibility for plaintiffs going forward. In New Hampshire, state courts have limited their attack on EZ to cases where the local zoning official "stated that such exclusion [of low-income families from

55. OR. REV. STAT. ANN. § 197.312 (West 2019).

56. See DANIEL P. SELMI ET AL., *LAND USE REGULATION: CASES AND MATERIALS* 285 (5th ed. 2017).

57. Mangin, *supra* note 15, at 94 ("[S]tate and federal courts for the most part won't intervene."); see, e.g., *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473, 484 (Cal. 1976) (upholding a moratorium on all new residential development after noting that an "indirect burden imposed on the right to travel by the ordinance does not warrant application of the plaintiff's asserted standard of 'compelling interest'").

58. *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242 (N.Y. 1975) (observing that "[t]here must be a balancing of the local desire to maintain the *status quo* within the community and the greater public interest that regional needs be met").

59. *Britton v. Town of Chester*, 595 A.2d 492, 494-96 (N.H. 1991) (upholding a lower court's builder's remedy on state statutory grounds because the multifamily ban did not promote the general welfare of the community).

60. ELLICKSON ET AL., *supra* note 25, at 778 (observing that "there has been very little litigation under *Chester*" in New Hampshire, and that "*Berenson* [has been] unhelpful for most low- and moderate-income housing consumers").

61. Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 46 (2001) (describing *Suffolk Housing Services v. Town of Brookhaven*, 511 N.E.2d 67 (N.Y. 1987)).

living within its borders] was the spirit of the ordinance.”⁶² Similarly, in Pennsylvania, state courts have formally closed paths to challenging EZ that they had once created.⁶³

In a small minority of states, limited litigation remedies are available. For instance, the New Jersey *Mount Laurel* doctrine, which requires towns to affirmatively zone to facilitate low-income housing,⁶⁴ enables aggrieved builders and groups of would-be residents in an exclusionary jurisdiction to obtain relief. In addition, builder’s remedy provisions in Massachusetts, Rhode Island, Illinois, and Connecticut offer builders in select localities a remedy if they promise to build a specified amount of affordable housing.⁶⁵

But even in those states where state-court litigation might assist builders, a federal builder’s remedy could still make a difference. For instance, in a Massachusetts municipality that just surpasses the numerical threshold for state-court intervention, an affordable-housing builder cannot currently obtain relief against such a municipality, even if its denial of permit was motivated by demonstrable animus toward low-income people.⁶⁶ Under such circumstances, a new federal builder’s remedy would complement the existing law by providing an alternative avenue for removing EZ regulations.

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62. *Great Bridge Properties, LLC v. Town of Ossipee*, 04-E-110, 2005 WL 697951, at *11 (N.H. Super. Ct. Feb. 7, 2005). In another case, the Supreme Court of New Hampshire extended the *Chester* holding to the exclusion of halfway houses. “CRJ asks that we extend *Britton* to the facts of this case . . . [L]ike the ordinance at issue in *Britton*, the ordinance in this case has an impact beyond the City’s borders.” *Cmty. Resources for J., Inc. v. City of Manchester*, 917 A.2d 707, 715-16 (N.H. 2007).
63. The Pennsylvania Supreme Court found in 1970 that large minimum-lot-size requirements for developments require an “extraordinary justification.” *Appeal of Kit-Marr Builders, Inc.*, 268 A.2d 765, 767 (Pa. 1970) (“Absent some extraordinary justification, a zoning ordinance with minimum lot sizes such as those in this case is completely unreasonable.”). But a 2002 decision observed that the 1970 case “has never been binding precedent on the Commonwealth Court because four of the seven Justices did not join Justice Roberts’ lead opinion.” *C&M Developers, Inc. v. Bedminster Twp. Zoning Hearing Bd.*, 820 A.2d 143, 152 (Pa. 2002).
64. *See S. Burlington Cty. NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).
65. *Infranca*, *supra* note 17, at 837-39, 839 n.78 (“Connecticut and Illinois also have an appeals process similar to Massachusetts and an affordable housing goal for each municipality, set as a percentage of the overall housing stock.”).
66. *See, e.g., Zoning Bd. of Appeals v. Sugarbush Meadow, LLC*, 981 N.E.2d 690, 695-96 (Mass. 2013).

4. *Failure of Previous Federal Litigation Strategies*

Finally, prior theories to litigate against EZ under the Constitution and federal statutes have likewise failed to solve the problem of EZ.

By the 1970s, the central attack against EZ proceeded through Equal Protection Clause claims.⁶⁷ But these claims failed to dismantle EZ for two core reasons. First, courts readily dismissed attacks on EZ from non-property owners on standing grounds. In *Warth v. Seldin*, the Supreme Court held that nonprofit organizations, neighboring taxpayers, low-income minority residents, and a builder's association all lacked standing to challenge the zoning practices of the town of Penfield.⁶⁸ The majority held that the plaintiffs had not alleged facts showing that EZ caused harm or that a judicial remedy would improve their situation.⁶⁹ The second reason for the failure of equal-protection claims is that EZ challenges, insofar as they allege class-based discrimination, do not trigger heightened scrutiny.⁷⁰ Accordingly, as Richard Henry Sander observes, “challenges to exclusionary zoning had little likelihood of prevailing on constitutional grounds unless a jurisdiction’s actions could be plausibly linked to a racial or ethnic motivation.”⁷¹

Litigation alleging substantive-due-process violations has similarly proved unavailing.⁷² Under the Court’s substantive-due-process test, government action adversely affecting an individual’s fundamental right will be upheld only if the action withstands strict scrutiny: it must be “narrowly tailored to serve a

67. Note, *Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61, 67 (1971).

68. 422 U.S. 490 (1975).

69. *Id.* at 507.

70. See Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 1, 2 (2018) (describing “the Court’s decision, nearly half a century ago, not to accord heightened scrutiny to class-based state action under the Equal Protection Clause”); *Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, *supra* note 67, at 72; see also ELLICKSON ET AL., *supra* note 25, at 741 (describing how, after the early 1970s, “the Equal Protection Clause ceased to be a viable weapon against exclusionary, but not explicitly racial, land use controls”). In this respect, EZ challenges differ from housing challenges that allege racial animus. The latter are more readily actionable under the FHA. Proof of racial discrimination as a motivating factor subjects a land-use denial to strict-scrutiny review. *But see* *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (holding that a government decision-maker’s awareness of land use decision’s racial impact alone is not dispositive in an Equal Protection Clause suit).

71. SANDER, *supra* note 22, at 238.

72. This Note does not evaluate procedural-due-process claims because jurisdictions can easily adhere to any process-based constitutional requirements to perpetuate EZ.

compelling state interest.”⁷³ By contrast, actions affecting no fundamental rights must only be “rationally related to legitimate government interests.”⁷⁴

Although early litigation efforts appeared promising,⁷⁵ they failed for two reasons.⁷⁶ First, the Court does not consider housing a fundamental right that would trigger strict scrutiny.⁷⁷ Second, “the idea that zoning restrictions on low-cost housing threaten freedom of travel was brushed aside in *Village of Belle Terre*.”⁷⁸ Without a fundamental right at stake, a substantive-due-process remedy appeared out of reach to prior scholars and litigants. This Note challenges this consensus.⁷⁹

Finally, while the Fair Housing Act (FHA)⁸⁰ is an effective tool to combat EZ in limited circumstances, the statute does not offer wide-ranging solutions for localities’ EZ practices. The FHA protects neither a jurisdiction’s outsiders (as a class) nor low-income individuals. Rather, it prohibits discrimination in the housing context based on race, color, national origin, sex, familial status, and disability status.⁸¹ When a plaintiff has sufficient evidence to allege that a specific EZ practice *also* discriminates against a protected class, a federal remedy may therefore be available.⁸² But plaintiffs cannot aver that EZ generally has a discriminatory impact on a protected class. Instead, they must produce highly localized data and projections that may not exist.⁸³ Accordingly, the FHA both (1)

73. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

74. *Id.* at 728.

75. For example, the Supreme Court once found an “elaborate” zoning ordinance unconstitutional as applied to a specific lot, *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928), because the prohibition on commercial use “would not promote the health, safety, convenience, and general welfare” in that particular instance, *id.* at 187.

76. ELLICKSON ET AL., *supra* note 25, at 758.

77. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

78. ELLICKSON ET AL., *supra* note 25, at 758.

79. *See infra* Part II.

80. 42 U.S.C. §§ 3601-3631 (2018).

81. 42 U.S.C. §§ 3604-3606, 3617 (2018).

82. Plaintiffs may prove discrimination by showing a disparate impact on a protected class, meaning no proof of discriminatory intent is needed. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525-26 (2015).

83. *See, e.g., Robert G. Schwemm & Calvin Bradford, Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685, 710-18 (2016) (describing the lack-of-data problem for small geographic areas). For more on the shortcomings on the FHA vis-à-vis its data requirements, see Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357, 392 (2013).

fails to target exclusion against low-income outsiders generally and (2) is only an imperfect means of stamping out disparate racial impact.

II. THE DOCTRINAL CASE FOR A FEDERAL BUILDER'S REMEDY

The failure of past remedies to correct the harms of EZ calls for a new approach. This Part introduces a new strategy to address EZ: a federal builder's remedy. Similar to builder's remedies in some states,⁸⁴ the proposed federal builder's remedy requires a builder (i) to hold control of a developable site, which does not necessarily require outright ownership, and (ii) to seek a zoning change for the site to facilitate the development of new housing units in which a portion of units will be affordable for low-income households. Like state builder's remedies, the federal builder's remedy would follow only *after* the local zoning decision-maker denies the builder's application. Yet unlike the state analogs, which require a builder to appeal a local government's denial through state judicial or administrative channels, the proposed federal builder's remedy would permit the builder to seek injunctive relief—whether in federal court or state court—on federal Due Process Clause grounds.

A federal builder's remedy does not require sweeping revision of federal law. Although overlooked by modern scholarship,⁸⁵ existing precedent provides a path to establishing the remedy. Section II.A describes the nature of the suit. Sections II.B, C, and D then explain the legal theory and pleading requirements of a builder's remedy. Finally, Section II.E describes how a plaintiff can overcome the issue of exhaustion and plead a due-process challenge in practice.

A. *The Promise of a Builder's Remedy*

Unlike interventions that seek to force localities to rewrite zoning codes wholesale, a builder's remedy offers more specific relief. Judges would craft injunctions that are narrow enough to allow an already-designed housing project to move forward without disrupting other zoning objectives, yet broad enough to materially increase the movement of LMI households into exclusionary jurisdictions.

84. See Infranca, *supra* note 17, at 840 (explaining how state builder's remedies function).

85. See, e.g., Andrea J. Boyack, *Limiting the Collective Right to Exclude*, 44 *FORDHAM URB. L.J.* 451, 451 (2017).

1. *The Concept of a Federal Builder's Remedy*

The concept of a federal builder's remedy closely resembles state-created builder's remedies—the most robust state-law interventions to EZ to date. State builder's remedies exist in Massachusetts, Rhode Island, Illinois, and Connecticut.⁸⁶ These states have codified an appeals process—the “builder's remedy”—that enables a builder whose land-use proposals contain some low-income units to challenge a local government's denial of a zoning application on more favorable terms than available in a typical challenge to local zoning. Massachusetts enacted the first builder's remedy,⁸⁷ which permits a builder to appeal a locality's denial of a development proposal to a state administrative body under certain circumstances.⁸⁸ If the proposal both complies with a set of health and environmental regulations and does not pose certain serious and unmitigable harms to the locality, either a state judge or special administrative body may overturn or modify the locality's land-use denial.⁸⁹

Once local legal barriers to development are removed, a builder may not need any additional support from the local community to move forward with an affordable-housing project. To the extent financial support is needed, the federal Low-Income Housing Tax Credit can provide subsidies even over the vocal objection of a local government.⁹⁰ But depending on the particular market dynam-

86. For an overview of these programs and their effectiveness, see Infranca, *supra* note 17, at 837-39, 839 n.78.

87. *Id.* at 837-39.

88. The thresholds for state intervention are (1) that less than ten percent of a municipality's housing stock must be affordable to LMI households, and (2) that the proposed building must include twenty-five percent of units for LMI households. ELLICKSON ET AL., *supra* note 25, at 783.

89. In some states, such as Connecticut, analogous procedures are applied in state courts rather than administrative tribunals. See CONN. GEN. STAT. ANN. § 8-30g (West 2019). For background on the Connecticut program, see Robert D. Carroll, Note, *Connecticut Retrenches: A Proposal to Save the Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247, 1250-51 (2001).

90. See Rev. Rul. 2016-29, 2016-52 I.R.B. 875. Under this program, so long as at least twenty percent of the units are income-restricted, the tax credits for the affordable units and revenue from the building's eighty percent of units at market rate can provide sufficient subsidy for the construction and ongoing maintenance of the LMI units. *What Is the Low-Income Housing Tax Credit and How Does It Work?*, TAX POL'Y CTR., <https://www.taxpolicycenter.org/briefing-book/what-low-income-housing-tax-credit-and-how-does-it-work> [<https://perma.cc/73XY-33BM>].

ics, housing for low-income households may not even require government subsidies.⁹¹ A builder's remedy can thus allow a builder to circumvent an obstinate local government and proceed to build affordable housing.

2. *The Fourteenth Amendment Builder's Remedy*

A federal builder's remedy could operate through constitutional, rather than statutory, law. A locality violates the Due Process Clause when it employs its state-delegated zoning authority to deprive a person of the right to build housing for low-income people and when such a deprivation is (i) principally motivated by a desire to block in-migration of the poor, including fiscal concerns, and (ii) lacking a bona fide rational relationship to a legitimate government purpose.

The Supreme Court last clarified the relevant due-process inquiry for land-use regulation in *Moore v. City of East Cleveland*, which struck down the application of a zoning rule that prohibited cohabitation by nonnuclear family members.⁹² According to the Court, "land-use regulations violate the Due Process Clause if they are 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"⁹³ Even though the Court acknowledged that "the general welfare . . . embraces a broad range of governmental purposes," it reiterated that "the government's chosen means must rationally further some legitimate state purpose."⁹⁴ Under this test, a builder could allege three possible theories that a refusal to allow affordable-housing development violates the Due Process Clause.

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91. A builder may construct mixed low-income/market-rate housing such that the market-rate units can provide both a building cross-subsidy as well as a long-term operating cost cross-subsidy to low-income units. See Josiah Madar, *Inclusionary Housing Policy in New York City: Assessing New Opportunities, Constraints, and Trade-offs*, N.Y.U. FURMAN CTR. 20-25 (Mar. 26, 2015), https://furmancenter.org/files/NYUFurmanCenter_InclusionaryZoningNYC_March2015.pdf [<https://perma.cc/4C2C-M7ZH>]. Although Madar focuses on the very expensive building construction market in New York, *id.* at app. A, A-1, the principle of the cross-subsidy is translatable to other markets where construction costs and market-rate rents would support a similar *internal* cross subsidy. Also, if units are small enough, a cross-subsidy from higher-priced units may not be necessary. See Eric Stern & Jessica Yager, *21st Century SROs: Can Small Housing Units Help Meet the Need for Affordable Housing in New York City?*, N.Y.U. FURMAN CTR. (Feb. 20, 2018), https://furmancenter.org/files/NYUFurmanCenter_SRObrief_14FEB2018.pdf [<https://perma.cc/G6XB-JBK5>].
92. 431 U.S. 494, 506 (1976). The Court decided only the due-process claim and declined to reach the equal-protection issue in the case. *Id.* at 496 n.3.
93. *Id.* at 498 n.6 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)).
94. *Id.*; accord *City of Dallas v. Stanglin*, 490 U.S. 19, 25-26 (1989); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981).

a. *Option A: Illicit Motive Is Sufficient for Relief*

First, the builder could prove that an illicit purpose drove the locality's zoning decision and argue for injunctive relief on that finding alone. A builder here would rely on potentially analogous precedent⁹⁵ and point to the *Edwards v. California* Court's striking down a California law on illicit purpose alone.⁹⁶ Due to the single requirement of demonstrating that an illicit purpose drove state action, this option would permit the easiest and lowest-cost removal of EZ barriers.

In many circuits, however, Option A would be an uphill battle. Presently, illicit-purpose invalidation analyses appear most frequently in the context of racial discrimination,⁹⁷ and even there illicit purpose must be the principal government motive rather than merely one of several.⁹⁸ In addition, it is doubtful under current land-use litigation practice that proving illicit motive alone will be sufficient absent further inquiry into the circumstances of a zoning decision in most circuits.⁹⁹ Even so, although post hoc justifications may be constitutional

95. See, e.g., *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 764 (7th Cir. 2003) ("Absent some evidence that the policy-making body, in this case the City Council, approved both the rezoning *and* the illicit motivation therefor . . . Chicago cannot be held liable for Alderman Huels' actions."); *Grant v. City of Pittsburgh*, 98 F.3d 116, 125 (3d Cir. 1996) ("When public officials invoke administrative processes for a legitimate purpose, they are acting in conformity with the Constitution and cannot be violating 'clearly established' law (because they are not violating the law at all). But when the same officials invoke administrative processes with an illicit purpose, they are violating substantive due process guarantees and, at the same time, 'clearly established' law."); see also *Marino v. State of New York*, 629 F. Supp. 912, 919 (E.D.N.Y. 1986) (describing two state codes as "subject only to a substantive due process test for irrational arbitrary reasons or illicit motives").

96. See *infra* Section II.B; *Edwards v. California*, 314 U.S. 160, 174 (1941) ("[W]e are not now called upon to determine anything other than the propriety of an attempt by a State to prohibit the transportation of indigent non-residents into its territory.").

97. See, e.g., *Schisler v. State*, 907 A.2d 175, 228 n.3 (Md. 2006) ("After *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, courts recognize that a legislative enactment may be challenged on the basis of invidious intent if plaintiff alleges racial discrimination." (citations omitted)).

98. See *supra* note 70 and *infra* Section II.C.

99. See *Schisler*, 907 A.2d at 228 n.3 ("It is equally clear, however, that the [U.S.] Supreme Court and lower federal and state courts will not always show the same receptivity to claims of impermissible motive when constitutional principles other than racial equality are at issue." (quoting Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 5 (1988))).

for some general economic legislation, these justifications are increasingly unpersuasive to judges when connected with the economic protectionism often embedded in EZ.¹⁰⁰

b. Option B: Illicit Motives Trigger a More Searching Inquiry of the Government's Assertion of Fit Between Its Zoning Decision and Motive

Second, a plaintiff may cite the presence of an illicit purpose as evidence that the proffered legitimate purposes for a zoning decision are pretextual. This could enable courts to use a somewhat more searching form of standard rational-basis review, often called “rational basis plus.”¹⁰¹ Since 2002, three federal courts of appeals have used a “credibility-questioning rational basis review” to strike down economic legislation.¹⁰² Under such an approach, a court could identify whether the asserted legitimate interests in fact served as the but-for cause of the EZ decision.

c. Option C: The Builder Affirmatively Demonstrates an Absence of Fit Between the Zoning Decision and Permissible State Objectives

Third, a builder could affirmatively demonstrate that the locality's asserted legitimate interests are not plausibly facilitated by an EZ decision. Here, the plaintiff would need to demonstrate why each purpose of the EZ decision is either (i) illicit or (ii) lacking a rational relationship to a proffered legitimate state purpose. Such a litigation strategy would be financially costly because it would require pre-application work and, potentially, consultants. Moreover, it would likely preclude relief for a plaintiff whenever the locality had a plausible, albeit insignificant, legitimate interest in an EZ decision—even when an exclusion-of-the-poor motive predominated.

While a builder may elect to plead one or more of these theories in the context of a particular case, Option B is most likely to prevail. The following analysis demonstrates how a builder might prevail under Option B. Under Option A, Section II.D is superfluous. And under Option C, Section II.D does not prove enough. Step One, a purely legal step, demonstrates that the Fourteenth Amend-

100. See Todd W. Shaw, Note, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 489, 498 (2017); *supra* Section I.A.

101. See Thomas B. Nachbar, *Rational Basis “Plus,”* 32 CONST. COMMENT. 449, 449-50 (2017).

102. Shaw, *supra* note 100, at 489, 498 (citing *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223-24 (5th Cir. 2013)); see *Merrifield v. Lockyer*, 547 F.3d 978, 989-91 (9th Cir. 2008); *Craigsmiles v. Giles*, 312 F.3d 220, 226-27 (6th Cir. 2002).

ment's Due Process Clause renders an exclusion-of-the-poor motive and any related fiscal purposes *illicit* motives for a locality's zoning decision. Step Two explains how a builder can prove that an illicit motive principally motivated a zoning decision. Finally, Step Three shows how the builder may overcome a locality's facially legitimate but pretextual justifications for an EZ decision.

B. Step One: A Motive to Prevent Entry of the Poor—Even if Fiscally Driven—Is Illicit

This Section argues that exclusion of the poor—even when coupled with a fiscal motive—should be considered an illicit purpose. The Section demonstrates first that existing doctrine treats exclusion of the poor as an illicit motive and then that a municipality cannot launder such a motive by explaining that the new housing would cause a fiscal burden.

1. Exclusion of the Poor from a Jurisdiction Is an Illicit Purpose

*Edwards v. California*¹⁰³ and *Shapiro v. Thompson*¹⁰⁴ hold that a government's interest in preventing poor people from entering a jurisdiction is an illicit purpose. Accordingly, the government may not rely on this motive to justify a zoning regulation.

a. Edwards v. California and Legitimate Purposes of the Police Power

In *Edwards v. California*, the Supreme Court established that the Commerce Clause bars state action motivated by policy-makers' desire to exclude low-income entrants.¹⁰⁵ The case arose when Fred Edwards drove his unemployed brother-in-law from Texas to California¹⁰⁶ in violation of California's Welfare and Institutions Code Section 2615, which prohibited "bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person."¹⁰⁷ The Supreme Court considered "whether the prohibition embodied in § 2615 against the 'bringing' or transportation of indigent persons

^{103.} 314 U.S. 160 (1941).

^{104.} 394 U.S. 618 (1969), *overruled in part on other grounds* by *Edelman v. Jordan*, 415 U.S. 651 (1974) (addressing whether the Eleventh Amendment bars a federal court from ordering a state to make retroactive payment of benefits wrongfully withheld).

^{105.} 314 U.S. at 177.

^{106.} *Id.* at 170.

^{107.} *Id.* at 165-66 (quoting CAL. WELF. & INST. CODE § 2615 (West 1937)).

into California is within the police power of that State”¹⁰⁸ and ruled “that § 2615 is not a valid exercise of the police power of California.”¹⁰⁹ The appellant raised a number of constitutional claims—including a due-process claim.¹¹⁰ But the Court struck down the California law because it “impose[d] an unconstitutional burden upon interstate commerce”¹¹¹ and declined to decide the other constitutional questions.¹¹²

Although *Edwards* is most commonly cited for the interstate-commerce and right-to-travel principles,¹¹³ scholars have overlooked the case’s relevance for determining illicit state motives, which are pertinent in a due-process inquiry for zoning. Immediately after citing a due-process case, *Olsen v. Nebraska*,¹¹⁴ for the proposition that “we do not conceive it our function to pass upon ‘the wisdom, need, or appropriateness’ of the legislative efforts of the States to solve such difficulties,”¹¹⁵ the *Edwards* Court explained that “[t]here are . . . boundaries to the permissible area of State legislative activity . . . [a]nd none is more certain than the prohibition against *attempts* on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders.”¹¹⁶ Given that the state’s motives were illicit, the Court invalidated the law without seeking to balance the state’s concern for its “health, morals, and especially finance” problems with an individual’s

108. *Id.* at 173.

109. *Id.* at 177.

110. *Id.* at 171.

111. *Id.* at 177.

112. *Id.* The Court’s opinion does not use the term “right” or “rights” and four Justices felt it necessary to discuss such rights in concurring opinions. See *Edwards v. California*, 314 U.S. 160, 177 (1941) (Douglas, J., joined by Black & Murphy, JJ., concurring) (“I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines . . .”); *id.* at 182 (Jackson, J., concurring) (“I turn . . . away from principles by which commerce is regulated to that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any state to abridge his privileges or immunities as such.”).

113. See, e.g., *Ross v. Gunaris*, 395 F. Supp. 623, 628 (D. Mass. 1975) (citing *Edwards* for the notion that a state law “significantly impedes the right to travel or serves to punish the exercise of the right of interstate movement”).

114. 313 U.S. 236, 241-43 (1941) (finding that a “statute of that state fixing the maximum compensation which a private employment agency might collect from an applicant for employment . . . do[es] not violate the due process clause of the Fourteenth Amendment”).

115. *Edwards*, 314 U.S. at 173 (citing *Olsen*, 313 U.S. at 246).

116. *Id.* (emphasis added).

right to interstate mobility.¹¹⁷ The Court therefore recognized California's predicament, yet would not permit those concerns to legitimate California's appeal to its police power in order to exclude the poor.

The *Edwards* analysis is pertinent to EZ because a state's regulation of property beyond the scope of its police power deprives a property owner of a due-process-protected right.¹¹⁸

The *Edwards* Court struck down the California law because the government's motive for enactment was illicit. Although seemingly distinguishable, a builder's remedy for zoning applies the same core analysis as the *Edwards* Court. Both the California law and an EZ regulation (1) are invocations of the state's police power that prohibit an individual's freedom to act, (2) are principally motivated by an exclusion-of-the-poor rationale (with an underlying fiscal concern), (3) burden a protected interest (liberty for the California transporter and property for the landowner) that entitles the aggrieved party to challenge the state action under the federal Constitution, and (4) deter or prevent the entry of poor people into the lawmakers' jurisdiction. When a local government is found to prevent construction of low-income housing to exclude poor people, the *Edwards* analysis is therefore relevant.

b. Shapiro v. Thompson Confirms that Jurisdictional Exclusion of the Poor Is "Constitutionally Impermissible"

Drawing upon *Edwards*, the *Shapiro v. Thompson*¹¹⁹ Court expressly held that exclusion of the poor constitutes an illicit motive under the Fourteenth Amendment. *Shapiro* addressed an equal-protection challenge to a state imposition of a

117. *Id.* By contrast, in *Cantwell v. Connecticut*, the Court recognized a state's legislative motive as an "obvious interest in the preservation and protection of peace and good order within her borders" and only set aside a criminal conviction after considering the strength of the state's interest in burdening an individual right. 310 U.S. 296, 307 (1940) ("Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The state of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact.").

118. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) ("If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."); *Olsen*, 313 U.S. at 243.

119. 394 U.S. 618 (1969).

one-year waiting period for new state residents to obtain welfare benefits.¹²⁰ In addition to finding that an exclusion-motivated welfare policy does not involve a “compelling state interest,” it also observed that “the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible.”¹²¹ Although the Court recognized “that a State has a valid interest in preserving the fiscal integrity of its programs,” it also noted that “a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.”¹²² It concluded that “neither deterrence of indigents from migrating to the State nor limitation of welfare benefits to those regarded as contributing to the State is a constitutionally permissible state objective.”¹²³ That holding confirms the interpretation of *Edwards* as more than a mere right-to-travel case.

Both *Edwards* and *Shapiro* remain good law.¹²⁴ Even cases in which the Court found no exclusion-of-the-poor motive confirm that such a motive would be impermissible if it existed. In *Village of Belle Terre v. Boraas*,¹²⁵ for instance, the Court held that a zoning prohibition on cohabitation of three or more people within a single-family building did not violate the Equal Protection Clause.¹²⁶ In upholding the village’s policy, the Court observed that the local law was *not* “aimed at transients,” in contrast to the state law invalidated by *Shapiro*.¹²⁷ Because *Belle Terre* explicitly contrasted its holding to *Shapiro*’s holding that “the purpose of inhibiting migration by needy persons into the State is constitutionally impermissible,”¹²⁸ the decision confirms that the purpose of blocking the inflow of the poor is impermissible under the Fourteenth Amendment.

2. Fiscal Purpose Is Also Illicit when Achieved Through Exclusion of the Poor

Given that the exclusion-of-the-poor motive is illicit, this Section shows why an associated fiscal motivation cannot legitimate a government’s use of the police power to exclude the poor. To be clear, I accept that local zoning officials are often

120. *Id.*

121. *Id.* at 629.

122. *Id.* at 633.

123. *Id.*

124. See *Saenz v. Roe*, 526 U.S. 489 (1999).

125. 416 U.S. 1 (1974).

126. *Id.* at 9.

127. *Id.* at 7.

128. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (emphasis added).

incentivized to exclude the poor on account of local reliance on school funding.¹²⁹ Yet a locality's response to a fiscal incentive does not render EZ legitimate.

a. Prior Cases Do Not Legitimate Fiscal Zoning in the Exclusionary-Zoning Context

The widely held perception that residents' fiscal concerns alone are a legitimate motive for EZ should be discarded.¹³⁰ At the same time, I do not allege that the practice of fiscal zoning is per se illegitimate.¹³¹ Fiscal zoning may be a permissible means to achieve some government objective, but it is not itself a legitimate purpose and has never been held to be such by the Court.

The Supreme Court has never held that improving a jurisdiction's fiscal interests is a stand-alone legitimate purpose under the relevant due-process (or equal-protection) inquiry.¹³² The widely held contrary perception often stems

129. See *supra* note 26 and accompanying text.

130. For examples of state courts using this reasoning, see, for example, *Du Page Trust Co. v. Village of Glen Ellyn*, 376 N.E.2d 1049 (Ill. App. Ct. 1978), which disapproved a proposed apartment development because the property value of surrounding single-family homes would fall; and *Westling v. City of St. Louis Park*, 170 N.W.2d 218, 222 (Minn. 1969), which observed that preventing a decline in nearby home values is a sufficient reason to deny a special permit for proposed building. Some other federal case law discusses fiscal concerns as legitimate ends in other contexts. See, e.g., *Benjamin v. Town of Fenton*, 892 F. Supp. 64, 67 (N.D.N.Y. 1995) (observing that "budgetary savings is a valid purpose" in the context of a due-process challenge to a salary reduction); *N.Y.C. Managerial Emps. Ass'n v. Dinkins*, 807 F. Supp. 958, 966 (S.D.N.Y. 1992) ("[T]here can be no question that generating budget savings, particularly during a budget crisis, is a legitimate governmental purpose."). Also consider this reasoning embodied in urban studies literature. See, e.g., William T. Bogart, "What Big Teeth You Have!": *Identifying the Motivations for Exclusionary Zoning*, 30 URB. STUD. 1669, 1671 (1993) (characterizing "fiscal zoning as a legitimate exercise of the police power of the local government").

131. For background on the topic of fiscal zoning, see Thomas J. Miceli, *Optimal Fiscal Zoning when the Local Government Is a Discriminating Monopolist*, 22 REGIONAL SCI. & URB. ECON. 579 (1992).

132. See *Lyng v. Int'l Union*, 485 U.S. 360, 373 (1988) (explaining, in dicta, that "protecting the fiscal integrity of government programs, and of the Government as a whole, 'is a legitimate concern of the State'" in the context of Congress's modification to the food-stamp program (quoting *Ohio Bureau of Emp't Servs. v. Hodory*, 431 U.S. 471, 493 (1977))); *Hodory*, 431 U.S. at 493 ("It is clear that protection of the fiscal integrity of the [unemployment] fund is a legitimate concern of the State. We need not consider whether it would be 'rational' for the State to protect the fund through a random means, such as elimination from coverage of all persons with an odd number of letters in their surnames."). Roderick Hills, Jr., observes that in *Martinez v. Bynum* – in which the Court upheld a Texas ban on tuition-free public education for a minor who lived apart from his legal guardian "for the primary purpose of attending the

from a misreading of the Court's landmark case on wealth-based discrimination: *San Antonio Independent School District v. Rodriguez*. There, the Court upheld Texas's school-financing system, which was highly reliant on local property taxes, as rationally related to the purpose of providing education for children.¹³³ The state chose the means of local control to achieve this purpose.¹³⁴ Although wealth-based discrimination arguably was an effect of the Texas system,¹³⁵ the Court never held that it had been its purpose, let alone that such a purpose would be permissible.¹³⁶ Accordingly, *Rodriguez* is distinguishable from EZ as I have defined it, where exclusion of the poor is the purpose rather than a side effect.

To be sure, fiscal impacts are among the bread-and-butter considerations for localities. And they may be permissible in the context of certain housing decisions. For instance, in *James v. Valtierra*, the Supreme Court upheld a referendum procedure on a locality's acceptance of federal funds for an affordable-housing development, in part because it "may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues."¹³⁷ But *Valtierra* is distinguishable from a property owner's due-process challenge to a town's justification for restricting the owner's use of its land. *Valtierra* addressed a government's administrative process for deciding whether to engage in a federal program. By contrast, EZ implicates the government's use of its coercive

public free schools," 461 U.S. 321, 323 (1983) – "[t]he Court was silent on whether this fiscal motivation was legitimate." Hills, Jr., *supra* note 21, at 294.

133. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 47 (1973).
134. By contrast, at least one state supreme court has held that local control is itself a core value that may itself invalidate state legislation. Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 782 (1992) ("In *Buse v. Smith*, the Wisconsin Supreme Court relied on the principle of local control to strike down state legislation that would have redistributed some locally raised revenues from wealthier districts to poorer ones.") (citing 247 N.W.2d 141 (Wis. 1976)).
135. *Rodriguez*, 411 U.S. at 22-23.
136. As confirmation of this reading, take, for example, the D.C. Circuit's identification of a legitimate government interest in the context of the District of Columbia's decision to close a clinic: "[T]he legitimate purpose motivating the action is readily apparent: accommodation of the health care needs of D.C. residents with the District's continuing fiscal crisis." *Spivey v. Barry*, 665 F.2d 1222, 1233 (D.C. Cir. 1981). If cost savings alone were an adequate governmental interest, the D.C. Circuit would not have needed to say any more than that the closing of a clinic is permissible because it reduces government expenditures.
137. *James v. Valtierra*, 402 U.S. 137, 143 (1971). Although the decision did not discuss the presence or absence of a "legitimate" governmental interest, *id.*, at least one district court has inferred that *Valtierra* ratified a "legitimate" government interest. *Buckeye Cmty. Hope Found. v. Cuyahoga Falls*, 970 F. Supp. 1289, 1313 (N.D. Ohio 1997) (observing that "the Supreme Court has definitively stated that a referendum on the building of a low-income housing project is rationally related to legitimate state interests").

power to limit a property owner's free use of its land. While a government's regulation of private property is limited under the Due Process Clause by, at minimum, a rational-basis test, the Due Process Clause does not similarly limit a state government's decision-making process vis-à-vis the government's voluntary participation in federal fiscal programs under which no property is subject to deprivation.¹³⁸

*b. Fiscal Concerns Did Not Legitimate the Exclusionary Purpose in
Edwards and Shapiro*

As evidence that fiscal concerns are not a legitimate reason to deter in-migration of the poor, we return to *Edwards* and *Shapiro*. In *Edwards*, the Court understood that California's severe financial predicament was tied to in-migration of the poor and that its fiscal health predicament was intricately tied to the exclusionary purpose.¹³⁹ The Court, however, did not even balance the state's fiscal interests with those of the federal government or those of the out-of-state indigents but rather said that mere attempts to exclude were sufficient to strike down the California law.¹⁴⁰ The *Shapiro* Court similarly "recognize[d] that a State has a valid interest in preserving the fiscal integrity of its programs"¹⁴¹ and "may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program."¹⁴² But the *Shapiro* Court nevertheless said that "a State may not accomplish such a purpose by invidious distinctions between classes of its citizens."¹⁴³ These cases therefore prevent a state or municipality from legitimating its exclusion of the poor by presenting it as a fiscally motivated policy.

138. *Valtierra* contains no mention of due process or of a plaintiff's property.

139. *Edwards v. California*, 314 U.S. 160, 173 (1941) ("The State asserts that the huge influx of migrants into California in recent years has resulted in problems of health, morals, and especially finance, the proportions of which are staggering. It is not for us to say that this is not true.").

140. *Id.*

141. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974). Here, as discussed in note 136 *supra*, fiscal interests are relevant to the extent that they relate to governmental programs that themselves are related to a legitimate government interest. In *Shapiro*, the pertinent welfare programs served low-income state residents. *Id.*

142. *Id.*

143. *Id.*

C. Step Two: Demonstrating the Presence of Illicit Motives

Given that state and local governments act unconstitutionally when their motive is to exclude the poor, this Section focuses on how a court could identify the presence of such an unconstitutional motive. Although judicial inquiry into motives underlying governmental action may be challenging, courts routinely engage in this type of fact finding. To determine whether exclusion of the poor is the motivating factor of the regulatory decision, a court could adapt the factors laid out in *Arlington Heights v. Metropolitan Housing Development Corp.*¹⁴⁴ Those factors, which were developed to determine the motive behind a multifamily housing-application denial,¹⁴⁵ are: (1) “[t]he impact of the official action,” which in the EZ case would be whether it practically excludes low-income outsiders; (2) “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes”; (3) “the specific sequence of events leading up to the challenged decision”; (4) “[d]epartures from the normal procedural sequence” of decision-making; (5) “[s]ubstantive departures [from past practice] . . . particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached”; and (6) “legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports” that evince illicit purpose.¹⁴⁶

In many EZ jurisdictions, a builder could plead facts to meet each of the *Arlington Heights* factors. (1) Basic U.S. Census data can demonstrate an absence of housing stock affordable to low-income outsiders.¹⁴⁷ (2) Local archives or news reports of meetings might reveal that adoption of the original EZ restriction or denial of a rezoning application was motivated by the desire to keep out low-income residents or by related fiscal concerns. (3) Builders can carefully document predictable reticence of public officials who might not be forthcoming in providing mitigation-related information for a proposed land-use permit. (4 and

^{144.} 429 U.S. 252, 266-68 (1977).

^{145.} *Id.* at 266 n.12 (citing Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116-18).

^{146.} *Id.* at 266-68.

^{147.} See U.S. Census Bureau, *American Housing Survey*, AM. FACTFINDER, <https://factfinder.census.gov/faces/nav/jsf/pages/programs.xhtml?program=ahs> [https://perma.cc/42CC-LY7W]. Census data alone cannot show the causal link between EZ and the absence of affordable LMI housing, but such data can show the absence of affordable housing for LMI households. An intern or consultant (for minimal fees) can then match census data, local zoning rules, and basic market data on the odds of new housing construction if the zoning was changed.

5) If local officials are concerned about the project, they might deviate from the standard notice and hearing procedures (including imposing significantly more public noticing and altered hearing requirements) or make an assertion of public interests not previously asserted by the regulators. (6) Zoning decision-makers (often lay individuals) frequently cite fiscal concerns and preservation of “community character,” which are akin to the arguments rejected by *Edwards* and *Shapiro*.¹⁴⁸

Courts need not adopt the *Arlington Heights* framework, of course; other frameworks can also be used to uncover improper government motives.¹⁴⁹ But since *Arlington Heights* addressed government motive in a case about multifamily housing, these factors may be particularly well suited for the EZ inquiry.

D. Step Three: Proving the Absence of a Rational Relationship Between Pretextual Motives and the EZ Decision

The third step involves rebutting government justifications for zoning decisions that are facially legitimate but pretextual.¹⁵⁰

A municipality may proffer a host of legitimate justifications for preventing the construction of affordable housing, such as the prevention of coastal erosion,¹⁵¹ historic preservation,¹⁵² or public safety.¹⁵³ Understandably, the potential for post hoc justifications may have discouraged plaintiffs from challenging EZ decisions. To overcome this obstacle, a builder can (1) identify foreseeable harms of the rezoning, in part through consultation with the local government, (2) develop a mitigation plan for those harms, and (3) commit to mitigating the harms as a condition for rezoning approval. If a builder finds that some harms are unmitigable or that a particular mitigation tips a project from financially feasible to infeasible, it may opt for a more modest showing under Step Three, which might lessen its chance to succeed in obtaining the builder’s remedy.

This Section first describes how builders may proactively identify potential harms, and then illustrates mitigation efforts.

148. See *supra* Sections II.B.1-2.

149. For example, the Supreme Court recently used an alternative framework for determining motive in *Department of Commerce v. New York*, 139 S. Ct. 2551, 2573-76 (2019).

150. See *supra* text accompanying notes 97-99.

151. Preventing coastal erosion is a clear federal objective based upon the Coastal Zone Management Act, which calls on states to regulate in order to limit coastal erosion. See Coastal Zone Management Act, 16 U.S.C. § 1451 (2018).

152. See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 134-35 (1978) (recognizing historic preservation as a legitimate governmental purpose).

153. See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 466 (2014) (describing as “legitimate” the asserted interest “in maintaining public safety”).

1. *A Builder's Identification of Potential Development-Related Harms*

A builder should gauge the scope of potential harms by having a land-use attorney evaluate the range of permissible conditions for which a local government could ask if it denied the zoning application. The Court permits the government's imposition of conditions—known as exactions—without compensation under the Fifth Amendment's Takings Clause only if those conditions are reasonable: “[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.”¹⁵⁴ For instance, “[w]here a building proposal would substantially increase traffic congestion, . . . officials might condition permit approval on the owner's agreement to deed over the land needed to widen a public road.”¹⁵⁵ As Vicki Been observes, “exactions play [a role] as ‘damages’ for the injuries that developments cause to the public.”¹⁵⁶

Courts should not uphold a zoning denial for a builder's failure to mitigate a particular harm when the locality would have violated the Fifth Amendment for conditioning a zoning permit on the applicant's mitigation of that harm. In other words, there must be symmetry in the outer permissible scope of the government's wish list of mitigations where (i) the government demands them in the context of voluntary negotiations and (ii) the builder proposes them alongside its zoning proposal when the government has refused negotiations. This latter case—with a hostile local government—is the prototypical EZ scenario.¹⁵⁷ The contrary conclusion is untenable: if in the context of voluntary negotiations between the government and builder, the government is *prohibited* under the Takings Clause from raising certain mitigation demands because they are too tangentially related to the project's impact, yet the government is permitted to

154. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987)).

155. *Id.* at 605.

156. Vicki Been, “*Exit*” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 487 (1991); *id.* at 488 n.77 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488–93 (1987); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 125–27, 133 n.30 (1978); *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387–88 (1926); *Mugler v. Kansas*, 123 U.S. 623, 668–70 (1887)).

157. See, e.g., *Town of Branford v. Santa Barbara*, 988 A.2d 209, 211, 214 (Conn. 2010) (observing that two months after a builder applied to change zoning on a site—upon which it held a purchase option—pursuant to the state's affordable-housing builder's remedy and while said application remained pending before the zoning commission, the town voted to take the subject property through eminent domain and then denied the affordable-housing application).

raise the same demands in litigation, we are left with a constitutional jurisprudence on property that needlessly inhibits housing development where a builder would have willingly mitigated the project's harms. The simple upshot is that a builder need only mitigate those harms that a municipality could legitimately require in the context of purely voluntary negotiations.

2. *A Roadmap for Mitigations*

With these potential mitigations in mind, builders can establish a factual record that would undermine any post hoc, pretextual justifications for a zoning denial. If a builder conducts adequate due diligence prior to submitting its rezoning application and commits to mitigating any adverse harm, the builder can both address a community's reasonable environmental concerns with a project and remove the government's ability to raise objections during litigation. Accordingly, a builder can—with some effort—demonstrate that the illicit exclusion-of-the-poor motive is the true cause for the municipality's decision.

Take, for example, a jurisdiction with local environmental-review requirements for discretionary zoning decisions.¹⁵⁸ Because environmental review in these states presumptively covers many (though not all) kinds of harms entailed by zoning changes, the builder can electively bind itself through the zoning process to mitigate any environmental harms, either through direct action or through an in-lieu payment. A builder has a variety of mechanisms for preempting the kinds of environmental concerns courts have deemed legitimate. If the builder binds itself in this way, it would address any nonpretextual environmental concerns.

Before proceeding to the illustrations, it is important to stress that not all projected harms can be mitigated. A builder's remedy, therefore, will not always succeed. For instance, a zoning change to permit twenty-resident fraternity houses in the small Village of Belle Terre would likely lead to noise that a builder would not be able to mitigate. But in those cases, the locality's noise concern is probably genuine, not pretextual. In such instances, a builder would not merit judicial relief under this Note's proposed builder's remedy.

158. The scope of inquiry for environmental review can vary depending on the scale of the project, but will typically anticipate impacts not only on air quality, noise, and traffic, but also on historic resources and socioeconomic character. Some states, including California, Connecticut, Georgia, Indiana, North Carolina, and Wisconsin, have standards similar to those of the federal government. See *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, NAT'L ENVTL. POL'Y ACT, <https://ceq.doe.gov/laws-regulations/states.html> [<https://perma.cc/2XSL-P4XL>]; see also, e.g., WIS. STAT. ANN. § 1.11 (West 2019).

a. *Historic Preservation*

Although a locality's interest in preserving historic structures is a legitimate interest,¹⁵⁹ a low-income-housing builder may seek to build low-income housing within a historic building envelope.¹⁶⁰ Often, EZ rules mandating a minimum-unit square footage or maximum number of residences for a given land area preclude subdividing existing structures into multifamily properties. But affordable housing can be situated within an existing, historic structure with proper design¹⁶¹ so long as some of the locality's zoning rules are eased. Such an application may require waiving zoning regulations that do not regulate a building's exterior but instead implicate other zoning requirements such as minimum-square-footage-per-unit rules or ratios of off-street parking spaces to units. So long as a builder does its homework beforehand, it can demonstrate that historical preservation concerns are pretextual by committing to mitigate them appropriately.

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159. *Penn Cent. Transp. Co.*, 438 U.S. at 134-35 (“Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.”).
160. For an example of such an effort involving collaboration between an affordable-housing provider and a community group, see *For the Prince George Hotel, a New Life*, N.Y. TIMES (Aug. 3, 1997), <https://www.nytimes.com/1997/08/03/realestate/for-the-prince-george-hotel-a-new-life.html> [<https://perma.cc/T5MB-4E6B>].
161. See, e.g., Sophie Francesca Cantell, *The Adaptive Reuse of Historic Industrial Buildings: Regulation Barriers, Best Practices, and Case Studies* (May 2005) (unpublished Ph.D. dissertation, Virginia Polytechnic Institute and State University) (on file with author); *Using the Historic Tax Credit for Affordable Housing*, HUD EXCHANGE, <https://www.hudexchange.info/programs/environmental-review/historic-preservation/tax-credit> [<https://perma.cc/DMU9-LQ8N>]. A builder can also build historically respectful structures on vacant lots within historic districts. See, e.g., JESSICA R. RUSSO, *EXPANDING HOUSING OPPORTUNITIES AND PRESERVING CHARACTER IN HISTORIC NEIGHBORHOODS* 52 (2018) (describing a plan to create “context-sensitive infill on vacant lots”); Mohammed Aliyu, *Strategies for the Development of Integrated Infill Buildings in Historic Contexts*, 3 J. ADVANCED RES. CONSTRUCTION & URB. ARCHITECTURE 26, 26 (2018) (describing “infill buildings development” on vacant and underutilized parcels); Douglas R. Appler, *Affordable Housing in National Register Districts: Recognizing the Advantages of Historic Urban Neighborhoods in Louisville and Covington, Kentucky, USA*, 9 J. URBANISM 237, 249 (2016) (arguing for “putting new houses on vacant lots in historic neighborhoods”); Jeffrey Karl Ochsner, *The Past and Future of Pioneer Square: Historic Character and Infill Construction in Seattle’s First Historic District*, 7 CHANGE OVER TIME 320, 325-26 (2017) (describing the requirements for infill buildings in a historic district).

b. Aesthetic Character

If a builder predicts that a land-use-permit denial could cite an aesthetic justification, the builder can sometimes force the locality's hand. A builder's challenge to an aesthetic objection is most easily handled by constructing housing types in the "missing middle" between single-family detached homes and high-density apartments. Such buildings – including rowhouse structures and courtyard apartments – can provide significantly cheaper housing while maintaining a community's physical character.¹⁶²

When anticipating an aesthetic objection, the builder should present two options for its projects: (1) a financially feasible yet aesthetically objectionable project and (2) a tastefully designed project where design mirrors the surrounding structures. If the municipality rejects both proposals, aesthetics are unlikely to be the genuine motivating concern. And where a builder could show that the town facilitated other projects with the same (or worse) types of aesthetic harm, it could convincingly plead that an aesthetic justification is pretextual.

c. Public Safety

To forestall potential safety concerns, owners can actively work with local police and fire departments before submitting an application. Brookfield, Connecticut provides a case study. The town was subject to the state's Section 8-30G builder's remedy, which only sustains a locality's housing denial when a town can show a sufficient connection between the government's stated concerns and the housing development.¹⁶³ The Brookfield zoning commission denied a builder's application to build nine apartments, including three affordable apartments, on top of a planned commercial building. The only stated basis for the town's denial was insufficient space in the rear portion of the building to permit the town's fire ladder to reach the residences.¹⁶⁴ Although the builder offered to

162. See Luke Mich, *The Missing Middle: Understanding Low-Rise, Moderate-Density Housing in Greater Boston* (June 2017) (unpublished Ph.D. dissertation, Massachusetts Institute of Technology) (on file with author).

163. Carroll, *supra* note 89, at 1258 (discussing Connecticut's law requiring a locality to show that "the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; . . . such public interests clearly outweigh the need for affordable housing; and . . . such public interests cannot be protected by reasonable changes to the affordable housing development").

164. Julia Perkins, *Affordable Housing Suit in Brookfield Could Be Resolved*, *NEWTIMES* (Apr. 19, 2018), <https://www.newstimes.com/local/article/Affordable-housing-suit-in-Brookfield-could-be-12848538.php> [<https://perma.cc/VB5A-Y2NA>].

install additional fire hydrants, sprinklers, and a landing with a fixed retractable ladder, the fire officials said these mitigations were not permitted.¹⁶⁵ The commission rejected the plan and the builder sought reversal of the decision through Section 8-30G litigation. Recognizing that it would likely lose the lawsuit, the town settled with the builder and only required a slightly modified fire mitigation.¹⁶⁶ Negotiations in the shadow of the builder's remedy can produce the same outcomes that the litigation itself would.

E. Overcoming Procedural Obstacles

The builder's remedy strategy outlined above can only work if a builder can have its day in court. Therefore, this Section identifies two potential doctrinal obstacles to builder's remedy suits and provides builders with arguments for how to overcome these obstacles.

1. Exhaustion of State-Court Remedies

Opponents of the federal builder's remedy may argue that federal-court relief is precluded until builders have exhausted local and state remedies. In 1985, the Supreme Court imposed an exhaustion barrier to alleging a Takings Clause claim in federal court.¹⁶⁷ Two federal circuits extended that doctrine to due-process claims.¹⁶⁸

But the Supreme Court's recent decision in *Knick v. Township of Scott*¹⁶⁹ eliminates the doctrinal basis for requiring exhaustion of state-court remedies before suing municipalities in federal court for due-process violations in zoning decisions. By expressly overruling the prior Takings Clause precedent, *Knick* abrogated the circuit-court decisions extending the doctrine to due-process claims.

¹⁶⁵. *Id.*

¹⁶⁶. Julia Perkins, *Settlement Paves Way for Affordable Housing on Federal Road in Brookfield*, NEWS-TIMES (July 6, 2018), <https://www.newstimes.com/local/article/Settlement-paves-way-for-affordable-housing-on-13054860.php> [<https://perma.cc/N4HU-LDK4>].

¹⁶⁷. *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194 (1985), *overruled by* *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

¹⁶⁸. *Deniz v. Municipality of Guaynabo*, 285 F.3d 142, 149 (1st Cir. 2002); *Gamble v. Eau Claire Cty.*, 5 F.3d 285, 288 (7th Cir. 1993).

¹⁶⁹. 139 S. Ct. 2162 (2019).

2. *Limitations on Due-Process Protections of Real Property*

Another potential obstacle to the use of a due-process builder's remedy is a recent rule in the majority of federal circuit courts that bars most land-use due-process claims by aggrieved property owners. Ironically, this effective diminution of federal constitutional protections for real property grew out of the Supreme Court's efforts to expand the notion of property entitled to due-process protections, and then to find a limiting principle for newly protected property.¹⁷⁰ In *Board of Regents of State Colleges v. Roth*, a case declining to extend due-process protections to a college professor's interest in a contract renewal, the Court explained that "[t]o have a property interest in a *benefit*, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."¹⁷¹

As part of an effort to keep land-use litigation out of federal court, a majority of circuit courts applied this "test" for determining procedural-due-process-protected "*new property*" as a way to limit substantive-due-process claims related to *traditional property*.¹⁷² *RRI Realty Corp.* frames the Supreme Court's decisions in

170. Traditional notions of property include an owner's common-law interest in real property. An owner begins with an underlying common-law entitlement to exclusive use of her land subject to nuisance and regulatory limitations. But Charles Reich's landmark 1964 article, *The New Property*, helped expand the legal conception of property to cover a variety of government benefits. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734-37 (1964). *Goldberg v. Kelly*, 397 U.S. 254 (1970), drew on Reich's article to find a protectible property interest in benefits under the Aid to Families with Dependent Children program.

171. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (emphasis added).

172. See, e.g., *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068, 1070 (8th Cir. 1997) ("There is good reason for this judicial reluctance to intervene in such disputes. 'To allow the loser of each zoning decision, both those who seek a change and those who seek to block changes, to sue in federal court on bald allegations of arbitrariness would significantly burden both federal courts and local zoning decisionmakers.' Thus, even allegations of bad faith enforcement of an invalid zoning ordinance do not, without more, state a substantive due process claim." (quoting *Queen Anne Courts v. City of Lakeville*, 726 F. Supp. 733, 738 (D. Minn. 1989))); *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal courts are not boards of zoning appeals."); *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911, 918 (2d Cir. 1989) ("If federal courts are not to become zoning boards of appeals (and not to substitute for state courts in their state law review of local land-use regulatory decisions), the entitlement test of *Yale Auto Parts*—'certainty or a very strong likelihood' of issuance—must be applied with considerable rigor."); see also *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985) ("[T]he question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.").

Roth and a companion case as reshaping “the analytical framework applicable to constitutional challenges to land regulation.”¹⁷³ Previously, there was an unquestioned due-process right to challenge the government’s regulation of real property as invalid under the police power¹⁷⁴ – whether through facial and as-applied challenges to existing zoning or the denial of a land-use application.¹⁷⁵ But through the 1990s and 2000s, the First,¹⁷⁶ Second,¹⁷⁷ Fourth,¹⁷⁸ Sixth,¹⁷⁹ Ninth,¹⁸⁰ Tenth,¹⁸¹ and Eleventh¹⁸² Circuits adopted the new rule that equated a requested land-use change to a *Roth*-style government benefit. By contrast, the

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173. See *RRI Realty Corp.*, 870 F.2d at 915 (citing *Roth*, 408 U.S. at 577; *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)).
174. See *id.*; see also *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (“The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.”); *Leventhal v. District of Columbia*, 100 F.2d 94, 95 (D.C. Cir. 1938) (“The action of zoning authorities, as of other administrative officers, is not to be declared unconstitutional unless the court is convinced that it is ‘clearly arbitrary and unreasonable, having no substantial relation to the . . . general welfare.’” (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926))).
175. See *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 683 (1976) (Stevens, J., dissenting) (“[T]he opportunity to apply for an amendment [to amend land-use regulation] is an aspect of property ownership protected by the Due Process Clause of the Fourteenth Amendment.”).
176. See *Macone v. Town of Wakefield*, 277 F.3d 1, 9 (1st Cir. 2002) (“We have consistently rejected substantive due process claims arising out of disputes between developers and land planning authorities while leaving the door ‘slightly ajar’ for ‘truly horrendous situations.’” (quoting *Néstor Colón Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992))).
177. See *RRI Realty Corp.*, 870 F.2d at 917.
178. See *Quinn v. Bd. of Cty. Comm’rs*, 862 F.3d 433, 443 (4th Cir. 2017); *Gardner v. Baltimore Mayor*, 969 F.2d 63, 68-69 (4th Cir. 1992).
179. See *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 897 (6th Cir. 1991) (“Nasierowski’s property interest in the previous zoning classification, if any, depends not on the federal Constitution, but rather on ‘existing rules or on understandings that stem from an independent source, such as state law.’” (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972))).
180. See *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994).
181. See *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991).
182. See *Mackenzie v. City of Rockledge*, 920 F.2d 1554, 1558-59 (11th Cir. 1991).

Third,¹⁸³ Fifth,¹⁸⁴ Seventh,¹⁸⁵ and Eighth Circuits¹⁸⁶ follow a “minority rule” that permits land-use due-process claims. The circuit split between the majority and minority rules should be resolved in favor of the minority rule for at least three reasons.

First, the majority rule is inconsistent with longstanding Supreme Court precedent. The rule directly contravenes the Court’s twentieth- and twenty-first-century due-process decisions on zoning regulation and substantive due process. As Peter Byrne observes, “the entitlement requirement is surely inconsistent with *Euclid* and *Nectow*, which welcomed facial and as-applied due process challenges to discretionary land use decisions. Indeed, it is inconsistent with the very idea of substantive due process, which authorizes judicial limits on *legislative* judgments, which will always be discretionary.”¹⁸⁷

The rule also ignores the Supreme Court’s substantive-due-process test for regulation of non-real-property forms of common-law property. In *Eastern Enterprises v. Apfel*,¹⁸⁸ the Court restated the substantive-due-process test without discussing any liberty- or property-entitlement prong.¹⁸⁹ Even though *Apfel* was about retirement benefits rather than regulation of real property, and it merely states the due-process test without applying it (because the Court found a Takings Clause violation), the case still clarified the Court’s test for substantive due process.¹⁹⁰

Second, a structural and textual modality of constitutional interpretation precludes the majority rule in light of the Court’s Takings Clause jurisprudence:

183. See *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592, 601 (3d Cir. 1995), *overruled on other grounds* by *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003).

184. See *Shelton v. City of College Station*, 780 F.2d 475, 479 (5th Cir. 1986) (en banc) (declining to determine whether a property interest was in the right to seek a zoning variance or in the right to use the plaintiff’s property).

185. *Burrell v. City of Kankakee*, 815 F.2d 1127, 1129 (7th Cir. 1987) (“[I]n order to prevail on a substantive due process claim, plaintiffs must allege and prove that the denial of their proposal is arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare.”).

186. *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006) (“Due process claims involving local land use decisions must demonstrate the ‘government action complained of is truly irrational, that is something more than . . . arbitrary, capricious, or in violation of state law.’” (quoting *Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993))).

187. J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 *ECOLOGY L.Q.* 471, 476 (2007).

188. 524 U.S. 498 (1998) (addressing the Coal Industry Retiree Health Benefit Act of 1992).

189. *Id.* at 537 (plurality opinion) (“To succeed, *Eastern* would be required to establish that its liability under the Act is ‘arbitrary and irrational.’”).

190. *Id.*

protectable property under the Fourteenth Amendment's Due Process Clause cannot have a *narrower* meaning than under the Takings Clause inquiry for state action because the Due Process Clause incorporates the Takings Clause against the states. Yet the Supreme Court has held that the Takings Clause limits state action vis-à-vis an owner's use of real property even when no *new* regulation is imposed and no physical appropriation occurs.¹⁹¹

Third, a historical modality of constitutional interpretation weighs against the application of the majority rule. Since the nineteenth century, well before the *Lochner* Court, the Supreme Court understood the Fourteenth Amendment's Due Process Clause to serve as a check on the state's exercise of the police power, not merely as a check on the deprivation of a vested right.¹⁹² In addition, the Framers originally understood the Fifth Amendment's Due Process Clause (operatively the same as the Fourteenth Amendment's Due Process Clause) to protect a broader range of property interests than the Takings Clause.¹⁹³ In other words, the Framers believed that all compensable property under the Takings Clause should likewise be deemed protectable property under the Due Process Clause. Therefore, because the Court finds a builder's interest in building on one's site to be compensable under the Takings Clause, an originalist reading demands that it is likewise protectable under the Due Process Clause.

191. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

192. *See, e.g., Budd v. New York*, 143 U.S. 517, 544 (1892) (“[T]he act of the legislature of New York is not contrary to the fourteenth amendment to the constitution of the United States, and does not deprive the citizen of his property without due process of law; that the act, in fixing the maximum charges which it specifies, is not unconstitutional, nor is it so in limiting the charge for shoveling to the actual cost thereof; and that it is a proper exercise of the police power of the state.”); *Davidson v. City of New Orleans*, 96 U.S. 97, 101-02 (1877) (observing the ill-defined scope of the due-process inquiry, the Court described that “[i]t must be confessed, however, that the constitutional meaning or value of the phrase ‘due process of law,’ remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States”).

193. *See generally* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826 (2006) (discussing the original meaning of the Takings Clause and arguing that it was intended to be a federalism safeguard). Further, Zygmunt J.B. Plater and Michael O’Loughlin suggest that Madison saw the protections of the Takings Clause as narrow, applying only to the federal government and only to physical appropriations. His contemporaries viewed the Takings Clause the same way, and the state constitutions that had inspired it conveyed the same concrete but limited protections. All other protections applied more generally, under due process. Zygmunt J.B. Plater & Michael O’Loughlin, *Semantic Hygiene for the Law of Regulatory Takings, Due Process, and Unconstitutional Conditions – Making Use of a Muddy Supreme Court Exactions Case*, 89 U. COLO. L. REV. 741, 764 (2018) (citing William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708, 711 (1985)).

In sum, doctrinal, structural, and historical reasons all point against the majority rule. Accordingly, after having considered the potential exhaustion and due-process pleading barriers, this Note concludes that neither should materially deter a builder's remedy suit.

III. THE NORMATIVE CASE FOR A FEDERAL BUILDER'S REMEDY

A federal builder's remedy is not the only feasible idea for remedying EZ, and this Note is not the first to propose a greater role for the courts¹⁹⁴ or the federal government to help remove EZ barriers.¹⁹⁵ Rather, this Note's unique contribution is to explain why a federal builder's remedy through the courts offers a viable mechanism for limiting the harms of EZ.

In addition to its viability, the federal builder's remedy is also desirable. In Section III.A, I describe the effectiveness of state-level builder's remedies, which offer a model for a federal version. Section III.B contrasts the builder's remedy with a would-be resident's remedy, which would likely face greater doctrinal barriers to success. Section III.C addresses other normative counterarguments, including impact on the incumbent EZ communities; concerns of federal overreach; and underperformance relative to an alternative, fully market-rate builder's remedy.

A. Evidence of the Remedy's Impact

Evidence from prior litigation efforts indicates that state builder's remedies have increased the supply of housing affordable to LMI households.¹⁹⁶ Although the precise increase is difficult to measure, the available data suggest that site-specific adversarial litigation generates a meaningful supply increase in affordable housing in EZ jurisdictions.¹⁹⁷

194. See, e.g., Boyack, *supra* note 85, at 451 (arguing that “[c]ourts should acknowledge and consider the broad public and private costs that are created by a group’s unfettered right to exclude” but not offering a specific framework for such intervention).

195. See, e.g., Schleicher, *supra* note 8, at 151 (suggesting that the Commerce Department adopt Robert Ellickson’s proposal to publish a new model zoning enabling act expressly limiting some exclusionary practices).

196. Nicholas J. Marantz & Huixin Zheng, *Exclusionary Zoning and the Limits of Judicial Impact*, J. PLAN. EDUC. & RES. (forthcoming).

197. In Massachusetts, for instance, the builder’s remedy directly facilitated the creation of thirty-five thousand units of LMI housing between 1972 and 2018 in localities in which less than ten percent of the existing units were affordable to LMI households. Infranca, *supra* note 17, at

For the initial plaintiffs attempting to use a federal builder's remedy, litigation will presumably be both costlier and riskier than for later plaintiffs. But once a federal builder's remedy precedent is established, even for-profit builders of affordable housing will take advantage of litigation remedies so long as developing mixed market-rate and income-restricted housing permits an adequate return on investment.¹⁹⁸

Furthermore, litigation, or the threat of litigation, can spur state legislation against EZ.¹⁹⁹ Ellickson and his coauthors observe that "any judicial inclination to enter the exclusionary fray was largely suppressed by the state legislature's attention to the problem" in Michigan, California, and Massachusetts.²⁰⁰ In other cases, the political process may have worked, but only following a jolt from the judiciary. In 1985, for instance, New Jersey enacted its fair-housing law to govern the creation of affordable housing in exclusionary localities.²⁰¹ But it only did so after public backlash against the New Jersey Supreme Court's decision imposing an affirmative obligation for EZ jurisdictions to support LMI housing growth,²⁰² and the subsequent judicial recognition of a "builder's remedy" under

838. Tabulations of low-income housing units built pursuant to these programs likely understate the real effects of these remedies. This is because the tabulations only encompass the units built *pursuant* to the builder's remedy and not the number of LMI units created as a result of bargaining between parties to *avoid* litigation where a builder's remedy is available. See Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535, 576 (1992). For an example of a unit-count figure, see *Proposed and Completed Affordable Units*, N.J. DEP'T CMTY. AFF., <http://www.nj.gov/dca/services/lps/hss/transinfo/reports/units.pdf> [<https://perma.cc/36ZG-VA4L>].

198. See, e.g., Carroll, *supra* note 89, at 1255 & n.39 (recounting how for-profit builders in Connecticut use section 8-30g(c), which requires builders of affordable housing to appeal adverse local land-use decisions in state courts to obtain relief (citing CONN. GEN. STAT. § 8-30g(c) (1999))).
199. ELLICKSON ET AL., *supra* note 25, at 779 (observing that "[s]tate legislatures, spurred no doubt in part by the threat of judicial rulings on exclusionary zoning, and in part by extraordinary need for affordable housing in their jurisdictions, have adopted a variety of techniques to encourage local governments to provide opportunities for affordable housing within their borders" (citations omitted)).
200. *Id.* at 778.
201. New Jersey Fair Housing Act, ch. 222, 1985 N.J. Laws 996 (codified at N.J. STAT. ANN. § 52:27D-301 (West 2019)); see also Infranca, *supra* note 17, at 840 (discussing the events preceding the enactment of the Fair Housing Act).
202. S. Burlington Cty. NAACP v. Mount Laurel Township, 336 A.2d 713 (N.J. 1975).

state law.²⁰³ Many saw this state intervention as “diluting” the New Jersey Supreme Court’s doctrine,²⁰⁴ suggesting that it reflected a political check on perceived judicial overreach. More research is needed to quantify and evaluate the impact of particular judicial interventions because they are quite heterogeneous. Even so, the positive impact of a judicial remedy is evident.

B. Would-Be Resident’s Remedy

Although would-be residents might appear to be natural plaintiffs for EZ challenges, this Section explains why this Note argues for a builder’s remedy rather than a would-be resident’s litigation remedy. It discusses judicial economy and Article III standing.

1. Judicial Resources

The proposed builder’s remedy avoids significantly burdening the judiciary. Because builder’s remedies respond to market incentives to build (related to financial return on investment), these suits will only be filed where there is real appetite for the project to move forward. Therefore, judicial intervention would only occur when there is a reasonably high likelihood that new units would be built and occupied in the near future. Furthermore, the builder’s remedy requires only limited judicial involvement: either the local-zoning denial violates the Due Process Clause, or it does not. The limited relief under a builder’s remedy contrasts with the potentially open-ended relief nonbuilder plaintiffs might seek through (1) facial challenges to zoning provisions, which would potentially require broader relief than as-applied challenges; (2) suits requesting affirmative measures to zone portions of a locality to permit low-income housing or dedicate government-owned land for a new privately built affordable-housing project; or (3) requests to compel a locality to use its own budget to construct new LMI housing.

203. *S. Burlington Cty. NAACP v. Mount Laurel Township*, 456 A.2d 390, 420 (N.J. 1983) (“Builder’s remedies will be afforded to plaintiffs in *Mount Laurel* litigation where appropriate, on a case-by-case basis. Where the plaintiff has acted in good faith, attempted to obtain relief without litigation, and thereafter vindicates the constitutional obligation in *Mount Laurel*-type litigation, ordinarily a builder’s remedy will be granted, provided that the proposed project includes an appropriate portion of low and moderate income housing, and provided further that it is located and designed in accordance with sound zoning and planning concepts, including its environmental impact.”).

204. *ELLICKSON ET AL.*, *supra* note 25, at 772.

Judicial intervention for a would-be resident's remedy—absent a builder's concrete plans to develop—poses two core problems for the judiciary. First, if a town is found to have engaged in EZ, a court would need to expend significantly more resources than under a builder's remedy to determine the appropriate remedy. Second, a judicial order requiring that a locality *affirmatively* rezone parcels, or fund new affordable housing on such sites, would demand the judiciary's long-term involvement in overseeing implementation. These demands tax the judiciary, and they also risk judicial overreach.²⁰⁵

2. Standing

Would-be residents have a major jurisdictional impediment to challenging EZ decisions: standing.²⁰⁶ This Note's proposed remedy avoids this problem altogether. Standing requires (1) a "concrete and particularized" and "actual or imminent" injury in fact that is (2) traceable to the defendants' actions and (3) likely redressable by the court.²⁰⁷ Builders are more likely than would-be residents to succeed on each of these prongs.

a. Injury in Fact

On injury in fact, a builder could demonstrate that a prohibition on building housing for LMI households leads to identifiable harm. A for-profit builder might seek to quantify this harm through forgone profits. A nonprofit builder

205. Span, *supra* note 61, at 104 n.466 ("It is hard to see how ad hoc rulings requiring that towns zone for some unspecified number of multi-family housing units could lead to large numbers of new units being built without causing major disruption and cries of unfairness from towns with the misfortune of being singled out by a developer.").

206. See Been, *supra* note 156, at 505 n.151 (observing the "extraordinary difficulties plaintiffs face in establishing standing in exclusionary zoning cases"); see also *supra* notes 68–69 and accompanying text (discussing *Warth v. Seldin*, 422 U.S. 490 (1975)). The *Warth* Court denied standing for a developer's association where the association had failed to sufficiently plead harm to its members. *Warth*, 422 U.S. at 511 ("There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. Moreover, in attempting to secure relief from injury to itself the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties. With the limited exception of [a nondeveloper association], however, none of the associational petitioners here has asserted injury to itself.").

207. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)).

might explain how its inability to create new affordable housing impedes its organizational mission to provide affordable housing for LMI households or leads them to incur higher costs through operation of a shelter.²⁰⁸

By contrast, would-be residents face significant challenges characterizing their harm in a manner that meets the Court's "concrete and particularized" requirement. Harm characterized as a would-be resident's inability to move to a higher-opportunity neighborhood or a would-be resident's present rent burden might be insufficient and would require implausible causation and redressability arguments. For instance, if the payment of more than 30% of one's income (the federal standard for housing affordability) were sufficient for a harm finding, 47.7% of renters in the largest U.S. metropolitan areas would suffer a cognizable harm.²⁰⁹ Alternatively, if harm were characterized as the forgone possibility of moving into an EZ jurisdiction, a court would similarly encounter difficulty in determining the presence of a concrete injury if there are no builder plans to develop new units.

b. Causation

Second, the builder's remedy, in contrast to the would-be resident's remedy, easily passes the causation prong of standing. Under the builder's remedy, a builder's development plans would come to fruition but for the EZ impediment.²¹⁰ The zoning rules directly cause the injury discussed in the first prong.

By contrast, would-be residents face two causation problems. First, would-be residents would need to show that an EZ decision is the causal source of limited LMI housing in a jurisdiction. In some places, removing EZ rules alone would not cause the construction of new mixed market-rate or affordable housing because the rent collected from the market-rate units would be insufficient to provide a cross subsidy to support the construction of income-restricted units for LMI households. Second, while removal of some EZ restrictions might pave the way to construct an affordable-housing project, the realization of such a project is purely "conjectural or hypothetical" absent concrete builder plans to build.

c. Redressability

Finally, the builder's remedy, in contrast to the would-be resident's remedy, easily meets the redressability prong. For the builder, injunctive relief provides

208. See generally *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093-94 (D.C. Cir. 2015) (describing the test for an organization's constitutional standing).

209. See *Download Data*, *supra* note 37.

210. See *supra* text accompanying notes 90-91.

full redress by enabling new LMI housing. For would-be residents, by contrast, the removal of EZ restrictions would likely fail the redressability prong.

First, the removal of certain EZ restrictions in response to suits by would-be residents does not guarantee an increase in housing affordable to LMI plaintiffs, as this may depend on other financial and practical considerations. Second, even if new housing were built as a result of removing EZ restrictions, plaintiffs would have merely a chance, not a guarantee, of gaining admittance to such units. New LMI housing units, for instance, might be allocated by lottery.²¹¹ In fact, the modern standing doctrine emerged, in part, through the Supreme Court's denial of a would-be resident's right to challenge an EZ ordinance in *Warth v. Seldin*.²¹² As Rachel Bayefsky observes, the Court's requirement that "a plaintiff 'seek[ing] to challenge exclusionary zoning practices must allege . . . that he personally would benefit in a tangible way from the court's intervention'" is designed to "distinguish[] the kind of judicial action that could give plaintiffs access to affordable housing from a declaration of the plaintiffs' legal rights that could not result in an altered living situation."²¹³

In sum, the Court's standing requirements pose significant challenges to a would-be resident's remedy through the courts. By contrast, a builder with concrete plans to build can meet the injury-in-fact, causation, and redressability requirements to maintain a federal suit.

C. Addressing Normative Counterarguments

Although a federal builder's remedy has certain advantages, it also entails costs—including potential opportunity costs. Therefore, this Section considers the remedy's implications for EZ jurisdictions and then addresses the counterargument that a federal builder's remedy is an example of federal judicial overreach. This Section also addresses the potential counterargument that a fully market-rate builder's remedy is preferable to this Note's proposed remedy.

211. See, e.g., Lila Seidman, *31 Units up for Grabs in Affordable Housing Lottery*, L.A. TIMES (Nov. 2, 2018), <https://www.latimes.com/socal/glendale-news-press/news/tn-gnp-me-affordable-housing-lottery-20181031-story.html> [<https://perma.cc/YF6P-C893>].

212. 422 U.S. 490 (1975).

213. Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2305 (2018) (footnote omitted) (quoting *Warth*, 422 U.S. at 508).

1. *Defending the Distributional and Efficiency Consequences of the Builder's Remedy*

A federal builder's remedy would likely cause some welfare decline for a portion of incumbent homeowners. An incumbent homeowner has no legally enforceable right to maintain property values, apart from a nuisance suit in tort or a major-diminution-of-value suit under the Takings Clause. But because a site-specific remedy would not entail safety or environmental harms,²¹⁴ a builder's remedy could only impose a potential for financial harm on the incumbent owners—not a nuisance-type harm that would have been actionable under private law.

Admittedly, suburban EZ communities might have to pay somewhat higher property taxes to subsidize school expenses for the children of LMI households. Homeowners also might face more competition from new housing stock and therefore see their property values decline. Because the builder's remedy would not compensate existing homeowners for declining property values, it could only achieve Kaldor-Hicks efficiency, not Pareto efficiency. That is, while the gains to beneficiaries of the EZ removal are sufficient to hypothetically compensate the incumbent homeowners,²¹⁵ the homeowners would not actually receive compensation. To the extent that Pareto efficiency is desirable, a litigation-based solution will likely not provide the answer to EZ.

But often this apparent shortcoming will instead be an appropriate correction to a problematic status quo.²¹⁶ In many cases, that is, the builder's remedy would simply force homeowners to bear a fairer share of the costs and benefits of local government. Moreover, in exceptional cases where an existing community would suffer unduly,²¹⁷ a court could always invoke equitable principles to modify the standard relief after considering the "public interest."²¹⁸

214. See Options B and C *supra* Section II.A.2.

215. See generally Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1221-27 (1991) (explaining the difference between Kaldor-Hicks and Pareto efficiency).

216. See *supra* Section I.A.

217. New Jersey's experience provides a guide on how such limitations may work: even the most aggressive judicial intervention from the New Jersey Supreme Court expressly noted that a municipality need not permit LMI housing *throughout* its jurisdiction. See ELLICKSON ET AL., *supra* note 25, at 786-87.

218. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

2. *Defending the Involvement of the Federal Judiciary*

Critics might also object that a federal builder's remedy would cause the federal courts to overreach, disrupting the delicate federal-state balance of power. But EZ provides a strong case for more aggressive federal intervention.

First, overly restrictive land-use regulations impede a range of national goals regarding affordable housing, racial segregation, fiscal distress of cities, and national economic productivity.²¹⁹ In many instances, EZ directly conflicts with the efficient functioning of federal policies promoting housing mobility.²²⁰ Interstate mobility is not merely a policy goal but also a value of national citizenship.²²¹ Federalism should not come at the expense of these national objectives.

Second, EZ also threatens to undermine federalism itself. Hamiltonian federalism permits innovation through experimentation at the state level. But if people are locked into their existing housing, state innovation may be frustrated.²²² For example, a state that seeks to develop a particular kind of industry may not be able to attract the skilled workers it needs because of an absence of affordable housing.

Third, the federal government is partially responsible for the spread of EZ. Zoning may appear quintessentially local, but the U.S. Department of Commerce played an instrumental role in facilitating the rapid spread of land-use controls by encouraging states to delegate these powers to localities.²²³ Some

219. See *supra* Section I.C.

220. Each year, federally allocated dollars for affordable-housing development construction (through the Low Income Housing Tax Credit Program) and rental subsidies for the lowest income Americans (through the Housing Choice Voucher Program) are unused because of the EZ barriers to the construction of new housing and the availability of sufficient market-rate housing affordable to voucher holders in high-opportunity neighborhoods. See Erin M. Graves, *Rooms for Improvement: A Qualitative Meta-Analysis of the Housing Choice Voucher Program*, FED. RES. BANK BOS. 3-5 (Feb. 2015).

221. See, e.g., *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring) (observing that if “a State can curtail the right of free movement of those who are poor or destitute” it “would . . . contravene every conception of national unity”).

222. See Clayton P. Gillette, *Fiscal Federalism as a Constraint on States*, 35 HARV. J.L. & PUB. POL'Y 101, 102 (2012) (“Perfect sorting of the type ideal federalism requires entails the presence of individuals who possess substantial mobility and minimal attachments to their residences for reasons other than the provision of public goods.”).

223. See ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT 7 (1928) (granting power to municipalities to “make, adopt, amend, extend, add to, or carry out a municipal plan”); JAMES METZENBAUM, THE LAW OF ZONING 53 (2d ed. 1955) (“[T]he Department of Commerce . . . sen[t] out periodic reports and literature for the purpose of disseminating information that went a long way toward educating the public and the states in reference to the benefits of zoning. . . . Herbert Hoover,

federal policies furthering segregation proceeded into the 1970s.²²⁴ The federal government must play a role in correcting the ills it caused and perpetuated.

Finally, the federal builder's remedy would not lead federal courts to regularly strike down economic and social state legislation in the style of *Lochner*.²²⁵ A builder's remedy would be limited to ferreting out the illicit governmental purpose of excluding the poor.

3. *Defending the Low-Income Set-Aside Requirement*

Opponents of the concept of inclusionary zoning – the policy by which local governments affirmatively incentivize new construction of LMI households – may criticize this Note's proposal on the grounds that the low-income housing requirement in a builder's remedy – one *obliging* a builder to legally restrict a portion of units for low-income households – will incentivize builders to build less housing than they would if a builder's remedy eschewed such a requirement. They may argue that inclusionary zoning taxes development, lowering supply and increasing per-unit prices for market-rate housing.²²⁶

This criticism does not hold up in the context of this Note's concern with EZ. First, the relevant counterfactual to the builder's remedy is the status quo. The status quo would permit creation of no or fewer units on a potential development site, not an identical number of market-rate units. Therefore, the builder's remedy, which permits an owner to create more units than permitted under an existing regime (so long as some low-income units are included), will attract more housing investment than the relevant counterfactual. The builder would only seek a zoning change if it was expected to increase the profitability

then Secretary of the Department . . . cause[d] his Department to carry on this helpful work . . . [and] added his own efforts by publicly speaking in favor of zoning.”).

224. See Massey & Rugh, *supra* note 9; Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924, 1001-02 (2020); see also MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962*, at 1127 (1964) (describing how the Bracero program left Mexican Americans without housing).

225. *Lochner v. New York*, 198 U.S. 45, 60-63 (1905).

226. See, e.g., Ellickson, *supra* note 8, at 1203-04 (“The inclusionary program of the California Coastal Commission has probably increased the price of existing modest-quality housing located in the coastal zone.”). If a builder's remedy would permit the construction of a high-density, entirely market-rate building *instead of* a high-density building with required units for LMI households, a builder would likely obtain more profit from building the market-rate-only option (especially if there were no affordable-housing subsidies available). If a market has many potential developable sites and sufficient demand for new market-rate housing in a jurisdiction, the market-rate-only option provides a builder with an incentive to build more market-rate housing, which might ultimately lead to lower market-rate housing prices. See *id.* at 1187-92, 1215-16.

of a development venture relative to what is permitted in the absence of any zoning changes.²²⁷

Second, a builder's remedy without a requirement of a low-income unit provides no guarantee of LMI access to an exclusionary jurisdiction. Assume, for the sake of argument, that a counterproposal to this Note's builder's remedy (including a low-income housing set-aside) is a market-rate builder's remedy (with one hundred percent of units available at market rate) and that a market-rate builder's remedy produced more units of housing than this Note's builder's remedy. The increase in new units could lower the price of market-rate housing (perhaps through a trickle-down effect), but there is no guarantee—let alone an indication—that the market-rate builder's remedy would facilitate entry of excluded LMI households into the exclusionary jurisdiction. By contrast, the builder's remedy ensures the creation of at least some new low-income units in EZ jurisdictions.

Finally, the absence of a low-income housing requirement interferes with this Note's doctrinal mechanism for obtaining the builder's remedy under the Fourteenth Amendment. The inclusion of low-income units in a builder's zoning proposal serves an indispensable function. If a market-rate development would serve only high-income households, a plaintiff could not invoke *Edwards* and *Shapiro*. After all, these cases articulated a concern with excluding the poor, not with generally disincentivizing the entry of newcomers.

CONCLUSION

The national harms from EZ and the federal values at stake justify exploring a new federal pathway for challenging EZ. This Note argues that due-process litigation could and should help limit exclusion-motivated zoning decisions by

227. Permitting the hypothetical twenty-unit proposed building at market rate would attract even greater investment in housing construction. But where expected total profits are higher for a twenty-unit proposed building with affordable units than the status quo of five single-family homes, investors will invest *more* in housing creation than under the status quo. Ellickson impliedly concedes this point: “[T]he construction of inclusionary housing in Orange County has sometimes proved profitable. There, mainly because of the absence of sale price controls, a builder may gain more from the density bonus than he loses from having to comply with the inclusionary requirements.” Ellickson, *supra* note 8, at 1181. Ellickson’s admission—in 1981—occurred even *before* the federal government created the Low-Income Housing Tax Credit, a program that infused billions of dollars into low-income housing projects including buildings built pursuant to inclusionary housing programs.

Finally, because an illustrative scenario of this Note’s builder’s remedy contains fifteen market-rate units as compared with the existing regulation’s limit on five market-rate homes, the builder’s remedy increases the stock of housing for *both* market-rate consumers *and* low-income households.

many American localities while addressing fairness, efficiency, and federalism concerns. In addition, this Note has outlined how a builder could obtain a federal builder's remedy under existing Supreme Court precedent.

This Note does not argue that federal litigation is the only or even the optimal method for removing the EZ barriers to housing construction. Political solutions at all levels of government – local, state, and federal – may be preferable to costly litigation. But EZ today appears resistant to nonfederal and nonlitigation fixes. We need new ways of dismantling EZ across the nation.

As with any turn to federal law and litigation, the builder's remedy presents some danger of judicial overreach and meddling in legitimate local regulations. But the builder's remedy proposed here allows for market-driven, limited, and effective judicial intervention to remedy a locality's exclusion of the poor. With over seventy years of inaction on EZ and no prospect for significant local, state, or federal policy to address the problem, the builder's remedy offers a promising new strategy.