UNIVERSITY *of* PENNSYLVANIA
LAW REVIEW

Founded 1852

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AMERICAN LAW REGISTER

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VOL. 171 JANUARY 2023 NO. 2

ARTICLE

THE ANTI-TENANCY DOCTRINE

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The law has failed tenants. A range of distinct legal doctrines, coupled with structural inequities, systematically disadvantage tenants in previously unrecognized ways. This Article identifies a new way of looking at this pattern of collective impediments to tenants' rights, wealth, and power, which we call the "Anti-Tenancy Doctrine."

This Article's analysis of the Anti-Tenancy Doctrine makes three novel and important contributions to legal scholarship. First, the Article catalogues how laws and policies across a range of otherwise unconnected doctrinal areas—from constitutional law to land use law to criminal law—treat tenants as lesser than homeowners. Identifying and naming this thread is more than a mere descriptive exercise: it exposes the systemic and insidious anti-tenancy bias in the law. Cumulatively, the disparate treatment of tenants and homeowners has perpetuated the wealth gap, worsened the affordable housing crisis, and subsidized homeownership by shifting costs to renters. Further, these disparities have had grave consequences for people of color: the majority of Black and Latinx households—who have been impacted by a long history of racist structural barriers to homeownership—are renters.

Second, the Article presents the likely causes of the Anti-Tenancy Doctrine and analyzes how the drivers of this doctrine are themselves normatively problematic. Here, the Article focuses on the historic origins of the freehold-leasehold distinction, the ideology surrounding homeownership in the United States, the influence of conservative frames in property law, and the use of the tenant-homeowner distinction as a proxy for race. By unpacking these drivers of anti-tenancy, the Article exposes how deeply embedded the bias against renters is in our society. Namely, anti-tenancy has been a largely unacknowledged and unquestioned default position in our legal system, but this Article makes clear that it is in fact the result of intentional law and policy choices to treat the interests of tenants as less than those of homeowners.

Finally, the Article concludes by offering a prescriptive roadmap for challenging the Anti-Tenancy Doctrine. Here, the Article advocates for both legislation and litigation to move the needle towards greater equity for tenants and similarly situated homeowners. Although the law's disparate treatment may reflect relevant differences between owners and renters in some contexts, this Article contends that using this distinction as the basis for unequal legal treatment has often caused real harm, particularly to communities that have long been segregated and excluded. This Article therefore argues that we must rethink the use of housing tenure status—whether someone is a homeowner or renter—as a determinant of legal rights and reconceptualize legal doctrines that improperly rely on this distinction.

Rijo, Stephanie Wise, Teresa Cropper, Austin Michaels, Andrew Howard, Nathan Johnson, Shahnoor Khuwaja, Olivia Mizell, Trent Jones, and Laura Gomez Duarte.

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INTRODUCTION

Luis is a tenant in a large apartment building. The building owners have decided to change the building's use from a "rooming house"—with shared facilities—to market rate two-bedroom apartments. A city ordinance requires notice of the proposed changes to be mailed to nearby property owners, but not to nearby tenants—even tenants living in the very building where the change in use will occur. Thus, nearby homeowners are informed of and show up to the public hearing where the city will discuss the building's potential change in use; most of them support the change, commenting that the rooming house has never "fit the character of the neighborhood." But Luis and the other building tenants are not present at this meeting because they were unaware that it was taking place. The city decides to approve the change of use. The building owners inform Luis and his neighbors that they will have to move as soon as renovations begin. Neither Luis nor most of the other existing tenants will be able to afford the building's new, higher rent once renovations are complete.

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Molly signs a lease for new apartment. Although the apartment has flooded three times in the past three years, Molly's landlord fails to notify her of this fact. While sellers must notify prospective buyers of this type of information, there are no laws requiring similar disclosures to prospective tenants. The apartment building is located in a flood zone, but residential landlords are not required to carry flood insurance; federal mortgage law only makes flood insurance mandatory for owner-occupants in such locations. A few months after Molly signs her lease, the building floods in a major

hurricane and is rendered uninhabitable. Because Molly's landlord does not carry flood insurance, he decides not to fix the property. Molly stays in emergency shelters and motels temporarily; she eventually finds a new apartment, but the rent is $200 more per month than her old apartment, as rents in the area have increased since the hurricane. To help cover her relocation and increased living expenses, Molly applies for disaster assistance, but her application is denied: the state agency administering Federal Emergency Management Agency (FEMA) aid informs her that homeownership is a perquisite to obtaining direct financial assistance.

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Abbe, a homeowner, and Bex, a renter, both lost their jobs at the start of the COVID-19 pandemic. Abbe quickly learned that she would not have to pay her mortgage for up to a year; the federal government had rapidly implemented robust, uniform protections for homeowners, including mortgage forbearance and modification of mortgage terms that allowed borrowers to tack missed payments on to the end of their mortgage terms.[1] In contrast, although some states and localities instituted eviction protections, the city where Bex lived did not, and no uniform federal eviction protection was put into place for renters until over six months after comparable protections were enacted for homeowners. Even then, federal eviction protection was relatively short-lived; the Supreme Court struck it down as unconstitutional in July 2021, even as the Court allowed federal mortgage forbearance protections for homeowners to remain. Federal rental assistance programs were enacted in 2021, but they hinged on landlord cooperation, which landlords were free to refuse. Thus, while Abbe was able to stay in her home despite not paying her mortgage (and was further able to delay repayment of missed payments until the end of her mortgage term), Bex's landlord refused to sign the paperwork for her to obtain federal rental assistance, and she was evicted from her apartment for nonpayment of rent.

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Why are the renters and owners in these hypothetical scenarios treated so differently from one another? This Article contends that courts, policymakers, and legal scholars have failed to even ask this question, let alone answer it. Rather, the second-class status of tenants is a largely

1 *See generally* Sarah Schindler & Kellen Zale, *How the Law Fails Tenants (and Not Just During a Pandemic)*, 68 UCLA L. REV. DISCOURSE 146 (2020) (discussing the differences in protections put into place for homeowners as compared to renters during the COVID-19 pandemic).

unacknowledged and unquestioned definitional baseline. This Article identifies and challenges this assumption, uncovering how the law has systematically disadvantaged tenants in previously unrecognized ways across a wide range of legal doctrines. In that vein, this Article confronts the question: should homeownership dictate rights in contexts where both tenants and homeowners have a common interest in their home as shelter? The Article argues that long-standing structural inequities and deeply embedded forces—such as racism, classism, and a culture of homeownership—have led to affirmative law and policy choices that treat tenants as less than homeowners. This Article thus fills a gap in legal literature by exposing this previously under-recognized yet insidious and pervasive pattern in the law, which we term the Anti-Tenancy Doctrine.

The Article catalogues the Anti-Tenancy Doctrine across a range of unconnected doctrinal areas—from constitutional law and land use law to tax law and criminal law. While legal literature on landlord-tenant law has focused on the rights that tenants have gained vis-à-vis landlords, outside of the landlord-tenant context, tenants are routinely accorded a second-class status. For example, when a residence is damaged by a natural disaster, federal, state, and local disaster aid is disproportionately made available to homeowners, not renters.[2] An eviction filing can effectively bar a tenant from future rental housing, while a foreclosure typically will not prevent a homeowner from getting another mortgage.[3] Legal and physical barriers make voter outreach and canvassing of tenants more difficult than for homeowners, which limits tenant participation in the political process.[4] Local anti-nuisance ordinances impose heightened governmental monitoring on tenant behavior that is not imposed on homeowners, and can result in evictions of tenants who have never been convicted of a crime.[5] And while most homeowners benefit from the predictability in housing costs provided by fixed rate mortgages, most tenants are vulnerable to unpredictable and exorbitant increases in their housing costs, with average rent prices increasing upwards of forty percent in some major U.S. housing markets over the past year alone.[6]

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2 *See* discussion *infra* Part I.D.

3 *See* discussion *infra* Part I.B.

4 *See* discussion *infra* Part I.C.

5 *See* discussion *infra* Part I.D.

6 *See infra* notes 78–82 and accompanying text. Median rents increased approximately twenty percent over the one-year period between January 2021 and January 2022 in the fifty largest metropolitan areas in the U.S. *See* Jiayi Xu & Danielle Hale, *January Rental Data: Buying a Starter Home Is More Affordable than Renting in Over Half of the Largest Markets*, REALTOR.COM (Feb. 22, 2022), https://www.realtor.com/research/january-2022-rent [https://perma.cc/D6T7-VTXH]. The annual increase was even greater in many Sun Belt and Rocky Mountain metropolitan areas, including Austin, Miami, and Las Vegas. *Id.*

While not every legal doctrine or public policy that treats owners and renters differently is nefarious, this Article exposes how the Anti-Tenancy Doctrine has been a largely unrecognized factor contributing to two of the major social harms of our time: deepening wealth inequality and structural racism. As to the former, the anti-tenancy laws and policies that this Article identifies prevent renters—who make up over one-third of U.S. households[7]—from building wealth, exacerbating already dramatic problems of inequality: the median wealth of homeowners is close to eighty-nine times greater than the median wealth of renters.[8] The pandemic and associated disruptions to the housing market have further magnified the impacts of anti-tenancy, making this Article's analysis particularly timely.[9] Rapidly escalating housing costs and enormous shortfalls in housing supply have locked out many would-be homeowners who have instead retained the status of tenants.[10]

7 *See Will You Count? Renters in the 2020 Census*, CENSUS COUNTS https://censuscounts.org/whats-at-stake/will-you-count-renters-in-the-2020-census [https://perma.cc/RC7H-W4DL] (indicating that as of 2020, thirty-seven percent of U.S. households are renter households). Because the 2020 Census undercounted renters, their share of U.S. households may be even higher than indicated. *See* Daniel McCue, *Defining "Use with Caution": How We're Navigating New Census Bureau Data*, JOINT CTR. FOR HOUS. STUDS. OF HARV. UNIV. (Apr. 28, 2022), https://www.jchs.harvard.edu/blog/defining-use-caution-how-were-navigating-new-census-bureau-data [https://perma.cc/PB7S-AEDS].

8 Donald Hays & Briana Sullivan, *2017 Data Show Homeowners Nearly 89 Times Wealthier Than Renters*, U.S. CENSUS BUREAU (Nov. 16, 2020), https://www.census.gov/library/stories/2020/11/gaps-in-wealth-of-americans-by-household-type-in-2017.html [https://perma.cc/E2KY-W3P3]. The wealth disparity has been further exacerbated by the pandemic-fueled housing market. *See* Emily Badger & Quoctrung Bui, *The Extraordinary Wealth Created by the Pandemic Housing Market*, N.Y. TIMES (May 1, 2022), https://www.nytimes.com/2022/05/01/upshot/pandemic-housing-market-wealth.html?referringSource=articleShare [https://perma.cc/8W6Z-7C3X] ("Over the past two years, Americans who own their homes have gained more than $6 trillion in housing wealth . . . . [M]ost of this money has been created by the simple fact that housing, in short supply and high demand across America, has appreciated at record pace during the pandemic. Millions of people—broadly spread among the 65 percent of American households who own their home—have gained a share of this windfall.").

9 *See* Megan Lawson, *Unaffordability for Renters Made Worse During the Pandemic*, HEADWATERS ECON. (Sept. 2021), https://headwaterseconomics.org/equity/unaffordability-renters [https://perma.cc/NC5B-SNTR] (noting that "the unprecedented rise in housing prices since 2020" has "affected renters more than homeowners," and that while "homeowners have stable and predictable mortgage payments," renters "are not in control of their housing costs").

10 *See, e.g.*, Sydney Ember, *Housing Costs Swell, Hampering Home Buyers and Pushing Up Rents*, N.Y. TIMES (Jan. 12, 2022), https://www.nytimes.com/2022/01/12/business/housing-rent-inflation.html?referringSource=articleShare [https://perma.cc/96PZ-AM7J] ("[M]any would-be home buyers . . . found themselves on the sidelines as housing prices rose steeply during the pandemic. This kept more people in the rental market."); Ronda Kaysen, *What's Up With the Crazy Housing Market?*, N.Y. TIMES (July 12, 2022), https://www.nytimes.com/2022/07/08/realestate/housing-market.html [https://perma.cc/QYR2-HXE6] ("The forecast does not look good for renters, in the short-term or the long-term. Rising mortgage rates will push some buyers out of the sales market, putting more pressure on the rental market. And as rents climb, even fewer people will move. With no relief in sight for the inventory shortage, renters have few options."); JOINT CTR. FOR HOUS. STUDS. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 4 (2022) [hereinafter STATE OF THE NATION'S HOUSING 2022],

As homeownership becomes more out of reach for more people, it is critical to better understand the doctrinal underpinnings and normative valence of the Anti-Tenancy Doctrine.

With regard to the latter, this Article further demonstrates that anti-tenancy disproportionately impacts low-income individuals and people of color—especially Black and Latinx families, the majority of whom are renters. This adds another layer of structural discrimination to the U.S. housing market.[11] In recent years, many scholars (including these authors) have written about the structural barriers to homeownership faced by low-income individuals and people of color.[12] A growing number of scholars have recognized that U.S. law and policy drive homeowners to react in a variety of ways that keep people of color—as well as the rental properties where they often live—out of their owner-occupied neighborhoods.[13] But the part of the story that doesn't get told is how the law systematically disfavors those who are relegated to renter status.[14] This Article thus contributes an essential missing piece to the larger dialogue around structural racism and inequality.

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https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2022.pdf [https://perma.cc/QEK3-58EU] ("At today's prices, the down[] payment that a first-time buyer would have to make on a median-priced home . . . amounted to $27,400 in April 2022 . . . . [T]his requirement alone would rule out 92 percent of renters.").

11 *See, e.g.*, Ana Hernández Kent & Lowell Ricketts, *Wealth Gaps Between White, Black and Hispanic Families in 2019*, FED. RSRV. BANK OF ST. LOUIS (Jan. 5, 2021), https://www.stlouisfed.org/on-the-economy/2021/january/wealth-gaps-white-black-hispanic-families-2019 [https://perma.cc/3E6Y-GCQZ] ("[W]hite families were both more likely to own various asset types [including homes] and had higher asset values than Black and Hispanic families."); Raheem Hanifa, *This Year, Half as Many Black Households Can Afford a Home as Last Year*, JOINT CTR. FOR HOUS. STUDS. OF HARV. UNIV. (Aug. 17, 2022), https://www.jchs.harvard.edu/blog/year-half-many-black-households-can-afford-home-last-year [https://perma.cc/JC73-UU8D] ("[T]he share of Black renter households who can afford the median-priced home in the [U.S.] has fallen by more than half, while the share of all renter households who could afford the median-priced home fell by 44 percent.").

12 *See, e.g.*, Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1974 (2015) (arguing that legal mechanisms such as racially restrictive covenants and exclusionary zoning have resulted in the legally permissible physical exclusion of various racial and socioeconomic groups); RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 47-49 (2017) (describing various local and federal exclusionary tools, such as exclusionary zoning ordinances, which have disproportionately affected Black Americans).

13 *See* ROTHSTEIN, *supra* note 12, at 48-49 (noting that exclusionary zoning ordinances stopped the "encroachment" of Black Americans, rendering certain owner-occupied middle-class neighborhoods unaffordable).

14 As noted above, the legal system's anti-tenancy bias has largely gone unrecognized in the scholarship. Two brief sociological accounts address the societal status of tenants, but do not delve into the legal analysis provided here. *See generally* Peter Dreier, *The Status of Tenants in the United States*, 30 SOC. PROBS. 179 (1982); *see also* Lawrence J. Vale, *The Ideological Origins of Affordable Homeownership Efforts*, *in* CHASING THE AMERICAN DREAM: NEW PERSPECTIVES ON AFFORDABLE HOMEOWNERSHIP 15 (William M. Rohe & Harry L. Watson eds., 2007). A handful of law students and legal scholars have also discussed the treatment of tenants versus homeowners,

A few preliminary comments are worth noting here. First, the majority of anti-tenancy examples discussed in this Article treat tenants differently from homeowners because of their housing tenure status as renters. However, tenants may also be subject to differing legal treatment because they are more likely than homeowners to live in multifamily buildings.[15] Thus, in some instances, the physical architecture of the building is the cause of the disparate treatment rather than (or in addition to) the housing tenure status of the occupant. Second, and relatedly, the anti-tenancy doctrine can manifest directly or indirectly. For example, anti-tenancy can occur in the form of explicit distinctions between renters and homeowners in laws and

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but within narrow doctrinal contexts. *See, e.g.*, Ellen R. Heiman, Comment, *Protecting Renters from Flood Loss*, 170 U. PA. L. REV. 783, 793-800 (2022) (exploring flood risk and discussing the current obligations landlords have to tenants regarding flooding, as well as renters' limited rights as they pertain to flood damage under landlord-tenant law); Stephen E. Mortellaro, *Equalizing the Political Rights of Renters and Homeowners*, 34 J.L. & POL. 165, 185-89 (2019) (describing renters' political activity and associated rights in multifamily properties); Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1098 (2009) ("While it is beyond the scope of this Article to examine in any detail the comparative merits of home buying versus renting, my analysis calls into question the degree of enthusiasm for home buying saturating the legal literature."); Hannah J. Wiseman, *Rethinking the Renter/Owner Divide in Private Governance*, 2012 UTAH L. REV. 2067, 2071-72 (discussing various restrictions placed on renters in multi-unit apartments and arguing that renters are treated less favorably than homeowners in a private governance context); Nino C. Monea, *Legal Benefits of Homeownership*, 52 N.M. L. REV. 384, 386-88 (2022) (arguing that the law privileges homeowners, and particularly owners of expensive, single-family homes, over those in other living arrangements, such as apartments, multifamily homes, mobile homes, and the unsheltered). While these works offer valuable insights into specific facets of anti-tenancy, this Article is the first to identify anti-tenancy as a doctrine that cuts across legal areas and to provide a comprehensive account of its causes and effects.

[15] *See* MICHAEL NEAL, LAURIE GOODMAN & CAITLIN YOUNG, URB. INST., HOUSING SUPPLY CHARTBOOK 11 (2020), https://www.urban.org/sites/default/files/publication/101553/housing_supply_chartbook_1.pdf [https://perma.cc/56AD-RYG2] (tabulating Census data indicating that as of 2018, 4.2 million units of multifamily housing were owner-occupied, while 27.2 million units of multifamily housing were renter-occupied); *see also* JOINT CTR. FOR HOUS. STUDS. OF HARVARD UNIV., AMERICA'S RENTAL HOUSING 13 (2017), https://www.jchs.harvard.edu/sites/default/files/harvard_jchs_americas_rental_housing_2017_0.pdf [https://perma.cc/3RSL-NP83] (indicating that approximately sixty-one percent of rental housing stock is in multifamily buildings as of 2017). While renters are more likely to reside in multifamily buildings than in single-family homes, it is worth noting that the number of single-family homes being purchased by investors to be rental units has significantly increased in recent years and raises a number of concerns. *See, e.g.*, Tim Henderson, *Investors Bought a Quarter of Homes Sold Last Year, Driving Up Rents*, PEW: STATELINE (July 22, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/07/22/investors-bought-a-quarter-of-homes-sold-last-year-driving-up-rents [https://perma.cc/74L8-F2XK] (stating that the trend of investors purchasing single-family homes to be rental units has been driving up rents, which disproportionally affects Black and Hispanic families).

regulations,[16] or indirectly when laws that are facially-neutral produce outcomes that disparately impact renters due to how political or market forces respond to those laws.[17] Third, while in the broadest sense, the term "homeowner" can refer to anyone who owns a home—whether owner-occupant, investor, or landlord who rents out the property—this Article uses the term homeowner to specifically refer to owner-occupants. There are certainly important questions about how the law treats different categories of owners differently, and whether legal rights are or should be based on occupancy versus on claim of ownership. But by focusing on the legal treatment of renters compared to owner-occupants, this Article aims to draw attention to the home's role as shelter, not just as an asset. Finally, it is important to recognize that renters are not a monolithic group. While overall, renters have far less wealth and lower incomes than homeowners,[18] there are also affluent households who choose to be renters.[19] Thus, not all renters experience the effects of anti-tenancy identified in this Article equally.

The Article proceeds in two parts. Part I begins by identifying and cataloguing the myriad of ways both large and small that tenants have a second-class status under the law, across numerous doctrinal areas, including land use, housing law, constitutional law, public safety and disaster law, contract law, and tax law. Within each of these fields, Part I shows how a variety of laws and policies utilize housing tenure status—whether someone is a homeowner or renter—as a determinant of legal rights and shows how this distinction worsens wealth inequality and disproportionally affects people of color.

Part II unpacks the sources of anti-tenancy and argues that those sources themselves are normatively problematic. This Part begins by discussing the feudal roots of the distinction between homeowner and renter and how the strong historical bias in favor of freehold estates and against leaseholds persists today, despite the outdated and archaic justifications for it. Part II then examines the ideology surrounding homeownership in the U.S.,

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16 *See infra* notes 57–59 and accompanying text (providing an exemplative discussion of the difference in notice requirements for owners and renters).

17 *See infra* note 335 (describing how market forces and split incentives deprive renters of the benefits of energy efficiency measures).

18 *See supra* note 8 and accompanying text; *see also* JOINT CTR. FOR HOUS. STUDS. OF HARV. UNIV., AMERICA'S RENTAL HOUSING 13 (2022) [hereinafter AMERICA'S RENTAL HOUSING 2022], https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_Americas_Rental_Housing_2022.pdf [https://perma.cc/CB2V-K277].

19 *See, e.g.*, Ray Wei, *Why Wealthy People Are Choosing to Rent*, LINKEDIN (May 22, 2017), https://www.linkedin.com/pulse/why-wealthy-people-choosing-rent-ray-wei [https://perma.cc/2HU5-X5NX] ("However, since the mortgage crisis of 2008, the perception of a home as a stable investment has changed. This factor is common among the reasons why wealthy people are choosing to rent.").

specifically analyzing the way that class bias and racism have motivated the difference in treatment between tenants and homeowners. This Part also considers whether the laws and policies identified in Part I were enacted by legislatures and upheld by courts with the knowledge (or intent) of providing preferential legal treatment to white people or disfavored treatment to people of color by utilizing the tenant/homeowner distinction as a proxy for race. Finally, Part II discusses how conservative legal frames, to a greater degree than progressive ones, have influenced the development of property law. We argue that this framing has left notions of anti-tenancy bias largely unquestioned as a default position, rather than recognized as the result of law and policy choices.

The Article concludes by briefly sketching possible responses to anti-tenancy. Although the details of these proposals will be discussed in more detail in future work, the Conclusion of this Article highlights legislative and litigation solutions that could be deployed to address the harms wrought by the Anti-Tenancy Doctrine and to bring greater parity to similarly situated homeowners and renters. Finally, this Article considers the implications of a more profound shift towards reconceptualizing the role of housing as shelter rather than a commodity, and the adoption of policies that could be viewed as reparations for ongoing harms.

I. CATALOGUING THE ANTI-TENANCY DOCTRINE

This Part of the Article catalogues different areas of the law that reflect anti-tenancy bias by using housing tenure status—whether someone is a homeowner or renter—to determine a party's legal rights.

A. *Land Use Law*

There are three key features of land use law that reflect anti-tenancy bias: (1) single-family zoning; (2) the location of amenities; and (3) notice procedures.

1. Amount of Land Zoned for Single Family Use

A large percentage of land in the U.S. is zoned such that only detached single-family dwellings are permitted as of right.[20] Scholars have called this

20 *See, e.g.*, Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. (forthcoming 2023) (manuscript at 34) ("[Z]oning assigns 90.6% of [Connecticut's] land to as-of-right single-family housing."); Michael Manville, Paavo Monkkonen & Michael Lens, *It's Time to End Single-Family Zoning*, 86 J. AM. PLAN. ASS'N 106, 107 (2020) (noting that while estimates differ, approximately thirty-eight of land in San Francisco, upwards of seventy percent of land in Los Angeles, above

type of single-family zoning exclusionary,[21] "inequitable, inefficient, and environmentally unsustainable,"[22] and have noted its racial and discriminatory origins and segregative effects.[23] There are two primary reasons that single-family zoning favors homeowners and disfavors renters: the correlation between single-family zoning and owner-occupancy and the effects of single-family zoning on the housing supply.

First, single-family residential homes are typically owner-occupied, while multifamily residential buildings are typically renter-occupied.[24] Thus, homeowners who live in single-family areas reap the exclusionary benefits of those communities: bigger lots, private yards, lower crime rates, proximity to transit and jobs, and wealthier schools as a result of higher property values and local property tax systems.[25] Further, local elected officials are typically responsive to the needs and desires of the homeowners in these single-family zones. Specifically, these homeowners often voice opposition to any increase in neighborhood density.[26] Despite the fact that homeowners' property values

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eighty percent of land in Seattle, and nearly ninety percent of land in San Jose is zoned for single-family homes).

21 Exclusionary zoning is defined as "a method whereby municipalities' zoning regulations require large lot sizes, square-footage minimums for buildings, or occupancy restrictions that make property unaffordable to or impractical for use by poor people." Schindler, *supra* note 12, at 1979.

22 Manville et al., *supra* note 20, at 106.

23 *See* Schindler, *supra* note 12, at 1975-77 (calling the passage of certain zoning ordinances "blatantly racist" and noting that the effects of such ordinances was to "keep out minorities"); *see also* ROTHSTEIN, *supra* note 12, at 47-49 (discussing the use of racial ordinances to reserve single-family homes for white people rather than people of color).

24 *See* SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 58 (2014) (noting that single-family residential districts are "characterized by a high ratio of homeownership"); *see also* Manville et al., *supra* note 20, at 109 ("[I]n the metropolitan United States, only 10% of households in detached single-family homes are poor, compared with close to 30% of households in multifamily units."). Of course, some homeowners live in multi-unit condos, and some renters rent standalone homes. *See* JOINT CTR. FOR HOUS. STUDS. OF HARVARD UNIV., AMERICA'S RENTAL HOUSING 15 fig.15 (2020) [hereinafter AMERICA'S RENTAL HOUSING 2020], https://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_Americas_Rental_Housing_2020.pdf [https://perma.cc/PL57-ABZN] (showing the available number of single-family units available to renters depending on region). Single-family rentals are least common in the Northeast and most common in the South. *Id.*

25 Schools and public goods are often heavily funded through local property taxes. *See generally* DAPHNE A. KENYON, LINCOLN INST. OF LAND POL'Y, THE PROPERTY TAX—SCHOOL FUNDING DILEMMA (2007), https://www.lincolninst.edu/sites/default/files/pubfiles/the-property-tax-school-funding-dilemma-full_0.pdf [https://perma.cc/D6ZA-RSNB].

26 While these concerns are often framed in terms of maintaining property values or "loss of community character," they often simply reflect racial and class biases. *Cf.* MARK OBRINSKY & DEBRA STEIN, JOINT CTR. FOR HOUS. STUDS. OF HARV. UNIV., OVERCOMING OPPOSITION TO MULTIFAMILY RENTAL HOUSING 10 (2007) ("The fear that housing density will hurt property values seems to be primarily based on anecdotes. By contrast . . . neither multifamily rental housing, nor low-income housing, causes neighboring property values to decline.").

rarely actually decrease when multifamily development is permitted nearby,[27] elected officials often vote to keep neighborhood density low in response to these "homevoters," lest the officials lose these homeowners' votes.[28]

Even if some of the standalone houses in these exclusionary communities are for rent, single-family zoning often leads to increased prices in these neighborhoods, which allows those homeowners to charge higher rents to tenants.[29] Generally, however, renters are more likely to be found in areas with more multifamily dwellings, which are also likely to offer fewer amenities.[30] Indeed, renting is sometimes outright prohibited in single-family neighborhoods, either through private restrictive covenants[31] or due to zoning ordinances that limit the number of unrelated people who can rent a house in a given area.[32] The result is that a large number of renters are unable to live

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27 Scholars have published various studies on the effects of local property values after multifamily development is permitted nearby. *See, e.g.*, MICHAEL CRAW, UALR CTR. FOR PUB. COLLABORATION, EFFECTS OF MULTIFAMILY HOUSING ON PROPERTY VALUES, CRIME AND CODE VIOLATIONS IN LITTLE ROCK, 2000-2016, at 43 (2017) (finding either "no effect or a positive effect on the sales prices of nearby single-family homes" in Little Rock, Arkansas after development of multifamily housing was permitted nearby).

28 *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 96 (2001) (explaining that homeowners are the political majority in most American communities, and therefore, "the prospect of capital gains and losses to homeowners is the most consistent motivator of local government activity").

29 *See* Manville et al., *supra* note 20, at 107 ("Higher property values for owners mean higher rents for tenants.").

30 *See id.* at 109 ("Most people in detached single-family homes are not renters, and most renters, especially low-income renters, are not in detached single-family homes."); *see also* DAVID GARCIA, JULIAN TUCKER & ISAAC SCHMIDT, TERNER CTR. FOR HOUS. INNOVATION, SINGLE-FAMILY ZONING REFORM: AN ANALYSIS OF SB 1120, at 4 (2020), https://www.habitatca.org/wp-content/uploads/2020/08/Single-Family_Zoning_Reform_An_Analysis_of_SB_1120.pdf [https://perma.cc/4PEJ-M3YS] (noting that single family neighborhoods are "less likely to contain rental options"). *But see* Richard Florida, *How Housing Wealth Transferred from Families to Corporations*, BLOOMBERG (Oct. 4, 2019, 11:10 AM), https://www.bloomberg.com/news/articles/2019-10-04/the-decline-in-owner-occupied-single-family-homes [https://perma.cc/CQ9N-GWJX] (noting that as of 2019, single family dwellings accounted for approximately thirty-five percent of rental units in the United States).

31 *See* 2 REAL ESTATE LEASING PRACTICE MANUAL, HOMEOWNERS ASSOCIATION CAN BAR LEASING § 52:39 ("It is common for homeowners' associations to limit or bar owners from renting out their properties.").

32 *See, e.g.*, College Hill Props., LLC v. City of Worcester, 135 F. Supp. 3d 10, 13 (D. Mass. 2015) (enforcing a zoning ordinance that prohibited renting to more than three unrelated adult occupants); Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1, 2 (2020) (discussing how zoning can exclude modern living arrangements and preferences by limiting those who may live in a dwelling based on zoning's definition of "family"). Some cities have specifically defined and banned certain types of rentals, such as co-living spaces—"a house configured with separate locked bedrooms and shared common space"—that might otherwise offer affordable housing options to renters. *See* Betsy Webster & Nathan Vickers, *City of Shawnee Bans Co-Living Rentals*, KCTV 5 (Apr. 28, 2022, 8:14 AM), https://www.kctv5.com/2022/04/26/city-shawnee-bans-co-living-rentals [https://perma.cc/B6AB-TP6K] (summarizing a city's ban on co-living spaces and "co-living groups," defined as four or more unrelated adults living together).

in these wealthy, prosperous, desirable neighborhoods.[33] Further, because of the high percentage of Black and Hispanic/Latinx[34] families who are renters,[35] single-family zoning also serves to keep wealthy, low-density neighborhoods predominantly white. Indeed, this is at the root of zoning's origin. As Richard Rothstein noted, "[t]o prevent lower-income African Americans from living in neighborhoods where middle-class whites resided, . . . officials . . . promote[d] zoning ordinances to reserve middle-class neighborhoods for single-family homes that lower-income families of all races could not afford."[36]

A second reason that single-family zoning benefits homeowners and harms renters relates to housing supply. By their very nature, single-family zones tend to be lower-density.[37] This is troubling in the face of increasing housing demand because low-density zoning is one reason that housing construction is constrained.[38] As Paavo Monkkonen stated, "[r]enters lose and owners win in supply-constrained housing markets . . . [homeowners] benefit directly from housing scarcity."[39] Although one way to increase supply and affordability in housing markets would be to replace single-family homes with

33 *See* Laura Sullivan, *Trump Stokes Fear in the Suburbs, But Few Low-Income Families Ever Make It There*, NPR (Oct. 28, 2020, 4:08 PM), https://www.npr.org/2020/10/28/926769415/trump-stokes-fear-in-the-suburbs-but-few-low-income-families-ever-make-it-there [https://perma.cc/3FGK-NSQY] (describing the many barriers preventing low-income families from moving to suburban neighborhoods).

34 This Article occasionally uses the term Hispanic rather than Latinx because that is the term used in the census data on which particular cited research is based.

35 *See supra* note 11 (illustrating the high percentage of Black and Hispanic/Latinx families who are renters).

36 ROTHSTEIN, *supra* note 12, at 48.

37 This trend is exacerbated by the existence of compatibility requirements or step backs. These regulations require multifamily housing that is being built within a certain radius of single-family districts to conform to lower height limits; these buildings can only step up their height as they move farther away from single-family zones. *See* Audrey McGlinchy, *How Tall Should Buildings Be When They're Near Single-Family Homes?*, KUT RADIO (June 8, 2022, 5:39 PM), https://www.kut.org/austin/2022-06-08/austin-zoning-building-height-compatibility [https://perma.cc/N4GS-D9PK] (explaining the compatibility rules and potential reforms in Austin, Texas).

38 *See* Greg Morrow, The Homeowner Revolution: Democracy, Land Use and the Los Angeles Slow-Growth Movement, 1965–1992 (2013) (Ph.D. dissertation, UCLA) (on file with California Digital Library, University of California) ("[T]hrough zoning rollbacks, [Los Angeles's] planned population was reduced by 60% . . . . The hope was that growth would be controlled through more restrictive land use policies—for example, by lowering allowable densities (typically by changing land use designations), increasing minimum lot sizes, increasing parking requirements, mandating larger building setbacks, and so on."). For additional discussion, see generally Christopher S. Elmendorf & Darien Shanske, *Auctioning the Upzone*, 70 CASE W. RSRV. L. REV. 513 (2020) (proposing a new framework for inducing cities with severely supply-constrained housing markets to allow more high-density housing).

39 Paavo Monkkonen, *The Elephant in the Zoning Code: Single Family Zoning in the Housing Supply Discussion*, 29 HOUS. POL'Y DEBATE 41, 41 (2019).

"missing middle" style housing, like duplexes or quadplexes, zoning often makes that impossible.[40] Thus, new housing is instead constructed in existing poorer communities of color (which can lead to gentrification), or in exurban areas (which contributes to sprawl).[41]

2. Geographic Location of Amenities and Disamenities

While individual circumstances vary, land use literature has documented that across the U.S., homeowners are likely to be located near amenities, while renters are likely to be located near disamenities.[42] This amenity disparity can take many forms. For example, there is a "grey-green divide"—wealthy neighborhoods have more green spaces (such as trees and parks), while poorer neighborhoods have more grey spaces (such as concrete, cement,

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40 *See id.* at 42 ("[T]he great potential for making many cities affordable lies in replacing single-family homes with mid-rise multifamily homes."). Of course, even if zoning permitted more density in existing single-family zones, status quo bias is strong; it is not clear that existing homes would be torn down and replaced with higher density options. *See* Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [https://perma.cc/V87Y-A7AR] (stating that single-family zoning is "far-reaching" and "practically gospel" in America, but that some cities are eliminating single-family zoning in "seemingly heretical" moves). State laws can further exacerbate localized opposition to increased density. For example, a number of states have petition protest laws. These mandate that whenever a local government approves a zoning change—including changes requested by the property owner of the affected lot(s)—if a minority of the property owners in the vicinity lodge a protest, then the zoning change may only go into effect if a supermajority of the local government's governing body approves it. *See* Salim Furth & Kelcie McKinley, *Rezoning Protest Petitions Are Ripe for Reform*, MERCATUS CTR. GEORGE MASON UNIV. (2022), https://www.mercatus.org/system/files/furth_and_mckinley_-_policy_brief_-_rezoning_protest_petitions_are_ripe_for_reform_-_v1.pdf [https://perma.cc/ZP5S-Q8ZU] (providing an overview of protest petition laws in various states and suggesting reforms).

41 *See* Monkkonen, *supra* note 39, at 42 (describing the hypothesis that new housing can lead to gentrification and displacement); *see also* Eric Biber & Moira O'Neill, *Building to Burn? Permitting Exurban Housing Development in High Fire Hazard Zones*, 48 ECOLOGY L.Q. 943, 948 (2021) ("[I]nadequate housing supply and high housing costs in urban areas persist. It is therefore unsurprising that at least some low- and moderate-income households increasingly seek housing in exurban and rural areas." (footnote omitted)).

42 Here, we use amenities to mean positive features of the built environment that increase enjoyment of land or increase its value; we use disamenities to mean features of the built environment that most people would find to be detractors. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 520-28 (1991) (surveying evidence that residents chose a community in part because of the amenities it offers or disamenities it avoids); *see also* Charles Lord & Keaton Norquist, *Cities as Emergent Systems: Race as a Rule in Organized Complexity*, 40 ENV'T L. 551, 553, 553 n.9 (2010) (noting that "African-American and Hispanic neighborhoods play host to a disproportionately high percentage of environmental disamenities" and defining that term as "environmental hazards and unwanted land uses that have environmental effects") (quotation marks omitted). Of course, multifamily housing may be surrounded by both disamenities (like traffic and noise) as well as amenities (like public transit).

and impervious surfaces).[43] This occurs in part because single-family homes are often on larger lots, and those lots often have lawns or trees.[44] In contrast, some zoning ordinances have allowed apartment buildings to completely cover the lot, leaving no room for open space.[45]

However, the different level of amenities near renters and homeowners is also an issue of investment versus disinvestment. For example, in Los Angeles, the City only planted trees in parkways if three-fourths of property owners on a block petitioned them to do so; tenants were not able to submit or join these petitions.[46] Further, researchers have shown that formerly redlined neighborhoods (which are often still poorer than non-redlined neighborhoods and have lower rates of homeownership) have less greenspace and are hotter than greenlined neighborhoods.[47] And when low-income neighborhoods do have parks, they are typically smaller[48] and there are often concerns around safety and crowding.[49] These disamenities also lead to

43 *See, e.g.*, Christina Corbane, Pesaresi Martino, Politis Panagiotis, Florczyk J. Aneta, Melchiorri Michele, Freire Sergio, Schiavina Marcello, Ehrlich Daniele, Naumann Gustavo & Kemper Thomas, *The Grey-Green Divide: Multi-Temporal Analysis of Greenness Across 10,000 Urban Centres Derived from the Global Human Settlement Layer (GHSL)*, 13 INT'L J. DIGIT. EARTH 101, 102 (2020) ("Evidence also shows that the amount of vegetation, known as greenness, in densely populated areas, can also be an indicator of the relative wealth of a [neighborhood]." (footnote omitted) (quotation marks omitted)).

44 *See* Sarah B. Schindler, *Banning Lawns*, 82 GEO. WASH. L. REV. 394, 397, 402-03 (2014) (noting the prevalence and "psychological attachment" to lawns in single-family homes).

45 *See, e.g.*, Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, N.Y. TIMES (Aug. 24, 2020), https://www.nytimes.com/interactive/2020/08/24/climate/racism-redlining-cities-global-warming.html [https://perma.cc/BUR2-5E5J] (referencing a previous Portland zoning ordinance that allowed multifamily apartment buildings to be built without any green space).

46 *See* Sam Bloch, *Shade*, PLACES J. (Apr. 2019), https://placesjournal.org/article/shade-an-urban-design-mandate/#ref_35 [https://perma.cc/Q33Q-6GN4] ("The city has since ended that policy, but it still can be hard to get a building's tenants organized around a tree planting petition." (citing *10,000 Miles of Parks*, L.A. TIMES, June 22, 1941)); *see also* Susana María Aguilera, *Prioritizing Tree Planting in Shade-Deprived Urban Areas as a Response to Climate Change*, 27 HASTINGS ENV'T L.J. 101, 108 (2021) ("[R]enters . . . have not historically had the same access to trees.").

47 *See* Jeremy S. Hoffman, Vivek Shandas & Nicholas Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, CLIMATE, Jan. 13, 2020, at 9 ("[T]he consistency of greater temperature in formerly redlined areas across the vast majority (94%) of the cities included in this study indicates that current maps of intra-urban heat echo the legacy of past planning policies.").

48 *See* Laurel Wamsley, *Parks in Nonwhite Areas Are Half the Size of Ones In Majority-White Areas, Study Says*, NPR (Aug. 5, 2020, 4:36 PM), https://www.npr.org/2020/08/05/899356445/parks-in-nonwhite-areas-are-half-the-size-of-ones-in-majority-white-areas-study [https://perma.cc/CXC2-FEZG] ("The data showed that parks serving mostly low-income households are, on average, four times smaller—and potentially four times more crowded—than parks that serve mostly high-income households.").

49 *See* Deborah A. Cohen, Bing Han, Kathryn P. Derose, Stephanie Williamson, Terry Marsh, Laura Raaen & Thomas L. McKenzie, *Promoting Physical Activity in High-Poverty Neighborhood Parks: A Cluster Randomized Controlled Trial*, 186 SOC. SCI. & MED. 130, 130 (describing studies on safety concerns regarding parks in low-income areas).

negative health outcomes, such as an increased number of heat-related health events[50] and increased instances of childhood asthma.[51] Formerly redlined neighbors also have worse air quality, even today.[52]

Rental properties are also more likely than owner-occupied dwellings to be located near locally undesirable land uses (LULUs) like toxic storage and disposal facilities.[53] Indeed, multifamily housing itself is often effectively deemed a LULU, particularly by single-family homeowning neighbors.[54] At base, homeowners are less likely to have to contend with LULUs and other disamenities than are renters.

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50 Aguilera, *supra* note 46, at 102 ("[L]ow-income areas experience[] higher temperatures than their wealthier counterparts. Thus, even in urban areas, some residents are more at risk from extreme heat events than others.").

51 Research has demonstrated an association between rates of renter-occupied housing and childhood asthma. *See, e.g.*, Lenna Nepomnyaschy & Nancy Reichman, *Low Birthweight and Asthma Among Young Urban Children*, 96 AM. J. PUB. HEALTH 1604, 1607 (2006) ("Census tract–level rates of renter-occupied housing units and vacancies were strong predictors of childhood asthma, ..."); Emily Rosenbaum, *Racial/Ethnic Differences in Asthma Prevalence: The Role of Housing and Neighborhood Environments*, J. HEALTH & SOC. BEHAV., June 2008, at 131-33 (explaining that the housing market disproportionally exposes minority renters to a variety of asthma triggers); BHARGAVI GANESH, CORIANNE PAYTON SCALLY, LAURA SKOPEC & JUN ZHU, URB. INST., THE RELATIONSHIP BETWEEN HOUSING AND ASTHMA AMONG SCHOOL-AGE CHILDREN 6-7 (2017), https://www.urban.org/sites/default/files/publication/93881/the-relationshi-between-housing-and-asthma_1.pdf [https://perma.cc/3YHF-EUFZ] (showing renters are more likely to be exposed to indoor asthma triggers such as smoke and mold).

52 *See* Haley M. Lane, Rachel Morello-Frosch, Julian D. Marshall & Joshua S. Apte, *Historical Redlining Is Associated with Present-Day Air Pollution Disparities in U.S. Cities*, 9 ENV'T SCI. & TECH. LETTERS 345, 348 (2022) ("[Redlined areas] are associated with worse present-day local environmental quality and health outcomes . . . .").

53 *See* Manuel Pastor, Jr., Jim Sadd & John Hipp, *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. URB. AFFS. 1, 15 (2001) ("[A]reas that were soon to receive [toxic storage and disposal facilities] were low-income, minority, and disproportionately renters . . . ."); *see also* Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 3 (1997) ("[L]ow-income and minority neighborhoods are exposed to greater risks from environmental hazards than other neighborhoods because of racism and classism in the siting of [LULUs].").

54 These neighbors often show up at local land use meetings to oppose any proposed nearby multifamily development, even though studies have shown that renter occupancy has little negative effect on single-family home property values. *See, e.g.*, Andrea J. Boyack, *A New American Dream for Detroit*, 93 U. DET. MERCY L. REV. 573, 581 n.33, 608 (2016) (noting that "[t]here is little to no empirical evidence that renter-occupancy in a neighborhood per se necessarily drives down the property values . . . for owner occupants" and that in some neighborhoods, it may be "unfeasible to construct new multifamily rental projects due to intense popular resistance"); Gennady Sheyner, *Eden Housing's 801 Alma St. Project Approved by Council*, PALO ALTO ONLINE (Nov. 10, 2009, 12:07 AM), https://www.paloaltoonline.com/news/2009/11/10/eden-housings-801-alma-st-project-approved-by-council [https://perma.cc/WMY8-AEVQ] (describing the Palo Alto City Council's approval of an affordable housing project despite "heavy opposition" from neighbors).

3. Notice Requirements and the Planning Process

Typically, homeowners receive notice of certain changes that will take place near their property. For example, if there is a proposed zoning change, or if a neighbor is planning to change the use of their building from residential to commercial, a nearby homeowner typically receives both notification from the municipality and an invitation to attend the relevant public hearing(s).[55] However, in many localities, tenants are not entitled to the same notice, even if they may be equally impacted by the change in use.[56]

An examination of the notice requirements in a non-exhaustive, but likely representative, sample of fifty-nine cities[57] reveals that the majority of cities did not require notice to be given to anyone other than real property owners.[58] Only eleven municipalities out of the fifty-nine reviewed required some type of notice to occupants or tenants in addition to the property owners.[59] Of these eleven, only four specifically mentioned tenants in their notice requirement for public hearings on amendments to zoning ordinances.[60] The other municipalities[61] required notice to be mailed to "residents" or "occupants," either in all cases or under specific circumstances.[62]

Why would so many municipalities (and states) not think that notice should be given to tenants? Perhaps it is the belief that homeowners will be more directly impacted by neighboring changes in use, which might harm their property values. And, it is true, at least in part, that providing tenant notice could be more administratively burdensome or costly.[63] For example,

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55 *See infra* notes 57–71 and accompanying text.

56 *See, e.g.*, Katherine Levine Einstein, David M. Glick & Maxwell Palmer, *Neighborhood Defenders: Participatory Politics and America's Housing Crisis*, 135 POL. SCI. Q. 281, 292 (2020) (examining land use hearings in Massachusetts, and noting that, in the jurisdictions studied, "[d]evelopers are required to notify direct and nearby neighbors" in advance of public meetings, but "the set of abutters is not defined as the residents of these neighboring properties, but the property owners").

57 We examined the fifty largest cities in the US, and nine mid-size cities. *See* Sarah Schindler, Kellen Zale & Joe Shagoury, Research Related to Public Notice Requirements for Land Use Hearing—59 City Sample (Jan. 2021) (unpublished manuscript) (on file with authors).

58 Notice was typically required for owners of the property subject to the change, as well as for neighboring property owners. *Id.*

59 *See id.* (identifying the eleven cities with such provisions). Of note, six of the eleven jurisdictions are in California. *Id.*

60 *See, e.g.*, BERKELEY, CA., MUN. CODE § 23A.20.030(B)(1) (2020) (requiring notice "to resident tenants"); *id.* at § 22.12.090(A) (requiring notice to "all addresses and owners of property").

61 Six of the eleven jurisdictions that provide tenant notice are located in California, yet California's state law only requires notice to be mailed to the owner and other owners within 300 feet. CAL. GOV'T CODE § 65091(a)(4) (2021).

62 *See, e.g.*, S.F., CAL., PLAN. CODE art. 3, § 333(e)(2)(C) (2022) (requiring notice be given "to the extent practicable" to "occupants of properties").

63 San Jose, which does provide notice to tenants, admits that the process requires extra work: "[b]ecause the City notifies both tenants and property owners, creating a mailing list requires the

the city of Portland, Maine does not provide notice to tenants because, "unlike property owners, there is not a system to track, maintain, or distribute tenant names and addresses."[64] Similarly, the city of Dallas, Texas[65] recently considered a proposal to provide notice to occupants, but declined to make the change.[66] Instead, the city added a line to its form notice mailings to owners stating, "[t]he City encourages the property owners to inform tenants of potential zoning changes."[67] Of course, cities may require other forms of notice, such as publication on the property or in a local newspaper or a city website. However, these forms of notice are not direct, and are much less certain to reach neighborhood residents than are direct mailings.

Further, tenants may suffer real harm if they do not receive notice of a proposed change. For example, tenants may have no way of knowing that even their *own* building is being rezoned (which will lead to their eviction), and thus may lose the opportunity to speak out against the change.[68] As Katherine Einstein, David Glick, and Maxwell Palmer, noted, "[r]enters may also have strong views about changes to their neighborhoods; they might favor additional housing to provide them more options, or oppose it due to concerns about gentrification and displacement. Local governments,

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extraction of addresses from two different data sources . . . with two different software tools and substantial data cleaning." *See* CITY OF SAN JOSE OFF. OF CITY AUDITOR, DEVELOPMENT NOTICING: ENSURING OUTREACH POLICIES MEET COMMUNITY EXPECTATIONS 15-16 (2019), https://www.sanjoseca.gov/home/showdocument?id=38455 [https://perma.cc/E7W9-Z25T]. Without these mechanisms, the City's records "would not reach remote property owners and the County's records would not reach building tenants who do not own a property." *Id.* at 16 n.6.

64 Memorandum from Christine Grimando, Acting Dir., City of Portland Plan. & Urb. Dev., to Councilor Duson, Chair, City of Portland Hous. Comm. (Sept. 5, 2019) [hereinafter Grimando Memorandum], https://portlandme.civicclerk.com/Web/GenFile.aspx?ad=3132 [https://perma.cc/3NNB-E7GM].

65 Currently, the city is not required to provide notice to occupants. *See* DALLAS, TX, DEV. CODE § 51A-4.701(b)(5) ("The director shall send written notice of a public hearing . . . to all owners of real property lying within 200 feet of the boundary of the area of request.").

66 The city identified three reasons for not adopting the change: (1) it would cause confusion for property owners who occupy their homes, as they would receive two notices under the proposal); (2) at a minimum, it would double the cost of mailing; and (3) it would be difficult to obtain multifamily/multi-unit data for mailing. *See* VASAVI PILLA, DALL. CITY PLAN. COMM'N, ZONING PROPERTY OWNER NOTIFICATION 10 (2019), https://dallascityhall.com/departments/sustainabledevelopment/planning/DCH%20Documents/code%20amendments/Property%20Owner%20Notification/Presentation_10172019.pdf [https://perma.cc/P3RP-XP5N].

67 *Id.*

68 In Portland, for example, when the owner of a large rooming-house sought a change in use from affordable one-bedroom units to market-rate apartments, the planning department notified landowners but claimed they had no way of contacting the building's residents. Grimando Memorandum, *supra* note 64. Thus, existing tenants conceivably did not learn about the public hearings where this change in use was considered and did not have the opportunity to attend and voice concerns.

however, do not prioritize or solicit their views in the planning process."[69] Their research further found that there is a bias in favor of homeowner (as compared to renter) attendance at land use hearings.[70] The fact that renter attendance is typically not solicited for those meetings "likely contributes" to that bias.[71]

B. *Housing Law*

Several aspects of housing law reflect anti-tenancy, including: (1) predictability of costs; (2) eviction repercussions; (3) HOA governance; (4) affordable housing; (5) relocation incentives; (6) home business regulation; and (7) remedies for housing code violations.[72] We consider each of these aspects in turn.

1. Predictability in Housing Costs and Stability in Housing Tenure

Tenants and homeowners experience vastly different treatment under the U.S. legal system regarding the predictability of housing costs and the stability of tenure. While not everyone who purchases a home is eligible for or chooses to obtain a fixed-rate mortgage (FRM), the majority of

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69 Einstein et al., *supra* note 56, at 292-93 (footnote omitted). The jurisdictions that Einstein, Glick and Palmer studied did not require the provision of notice to tenants. *See* E-mail from Katherine Levine Einstein to Sarah Schindler (Aug. 4, 2020, 2:09 PM) (on file with authors) ("The law in the jurisdictions we studied . . . only require[d] notifying property owners. We heard anecdotally about cases where landlords would forward the notifications on to their tenants, but, as far as I know, those were private decisions.").

70 For example, at a meeting in Cambridge, Massachusetts, every neighbor that spoke opposed the development of proposed new housing. Einstein et al., *supra* note 56, at 284-86. No renters were present at this meeting, even though they make up sixty-one percent of the population in that city. *Id.* at 297.

71 *Id.* at 289. Of course, there are other structural reasons that might make attendance at public hearings more difficult for tenants than for homeowners, including issues relating to jobs, transportation, or childcare. *Cf.* Rebecca Ritzel, *Offering Childcare at City Meetings May Be Key to Diversifying Civic Engagement*, NEXTCITY (May 8, 2019), https://nextcity.org/urbanist-news/offering-childcare-at-city-meetings-may-be-key-to-diversifying-civic-engage [https://perma.cc/W5XR-2PR4] (reporting that in one city, civic engagement increased when childcare was introduced at city council and commission hearings).

72 In addition to the anti-tenancy features of housing law discussed here, anti-tenancy bias is also reflected in the legal doctrines that apply to various forms of what we term "liminal housing tenure." These include a variety of housing categories—mobile homes, extended-stay hotel occupancies, installment land contracts, and tenancies in common—that fall on a spectrum between ownership and tenancy, and thus exist outside of the traditional renter/owner dichotomy. The legal status accorded to these liminal spaces and their residents is often less protective than is traditional tenancy. For a more detailed analysis of liminal housing tenure, see Sarah Schindler & Kellen Zale, *The Harms of Liminal Housing Tenure: Installment Land Contracts and Tenancies in Common*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 523 (2021).

homebuyers have FRMs.[73] A FRM enables homeowners to know with a high degree of certainty what their housing costs will be over the life of their mortgage (or for however long they remain in that property).[74] The existence and widespread availability of FRMs is possible only because of federal policy decisions to make low-interest, long-term mortgages widely available to middle-class Americans (although there have also long been racial disparities in mortgage lending).[75]

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73 *See, e.g.*, *Common Questions from First-Time Homebuyers*, U.S. DEP'T HOUS. & URB. DEV. [hereinafter *Common Questions*], https://www.hud.gov/topics/common_questions [https://perma.cc/UF9K-MUWE] ("Most people use a fixed-rate mortgage. . . . The advantage of [an FRM] is that you always know exactly how much your mortgage payment will be, and you can plan for it."); *What Types of Mortgages Do Fannie Mae and Freddie Mac Acquire?*, FED. HOUS. FIN. AGENCY (Apr. 14, 2021), https://www.fhfa.gov/Media/Blog/Pages/What-Types-of-Mortgages-Do-Fannie-Mae-and-Freddie-Mac-Acquire.aspx [https://perma.cc/5KQM-9RL8] (stating that Fannie Mae and Freddie Mac acquired more FRMs than adjustable-rate mortgages between 2018 and 2020).

74 This is not to say that housing costs for homeowners are entirely predictable or within the owner's control. Repairs, increases in property taxes, and other costs associated with homeownership may be less predictable than the monthly FRM payment. However, the lack of predictability is ameliorated for homeowners for a number of reasons. First, non-mortgage housing costs typically comprise a relatively smaller portion of overall housing costs. *See* Harry Jensen, *How Much Is Total Monthly Housing Expense for a Home*, FREEANDCLEAR (Nov. 6, 2020), https://www.freeandclear.com/guides/mortgage/how-much-is-total-monthly-housing-expense-when-you-buy-a-home.html [https://perma.cc/S4G3-F87T] (providing an example of typical total housing expenses and showing mortgage payments as the largest single component). Second, homeowners are able to predict and plan for some costs in advance (for example, by knowing the approximate lifespan of major home components, such as roofs or appliances, homeowners can plan expected costs associated with those components). *See How Much Should You Budget for Home Maintenance?*, AM. FAM. INS., https://www.amfam.com/resources/articles/at-home/average-home-maintenance-costs [https://perma.cc/3VMN-VKHV] (describing several budgeting approaches to account for ongoing and future housing maintenance and repair costs). Finally, legal and market mechanisms for homeowners lower the less predictable components of housing costs (for example, the appeal process for property tax assessments, or state laws capping annual increases in property taxes, or the purchase of home warranty coverage for repairs, or the ability to obtain a low-interest home equity line of credit (HELOC) loan). *See, e.g.*, Rachel N. Weber & Daniel P. McMillen, *Ask and Ye Shall Receive? Predicting the Successful Appeal of Property Tax Assessments*, 38 PUB. FIN. REV. 74, 75-76 (2010) (describing the property tax appeals process and analyzing factors that make it more or less likely homeowners will succeed on their appeals); CAL. CONST. art. XIII(A) (codifying provisions voters approved in Proposition 13 that limit property taxes to one percent of assessed value and restrict increases in assessments to two percent per year); *Warranties for New Homes*, FTC (May 2021), https://consumer.ftc.gov/articles/warranties-new-homes [https://perma.cc/M7KX-YFF5] (describing home warranty contracts); *Home Equity Loans and Home Equity Lines of Credit*, FTC (Dec. 2021), https://consumer.ftc.gov/articles/home-equity-loans-and-home-equity-lines-credit [https://perma.cc/CFX2-VCEE] (describing HELOC loans and the availability of such loans to homeowners).

75 *See generally* DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICAN—AND HOW WE CAN FIX IT (2021) (describing the variety of federal programs over the course of the twentieth century that made homeownership more accessible and affordable for white homebuyers and highlighting how other aspects of federal laws

The legal landscape for tenants, however, provides far less predictability with regard to housing costs. The majority of residential tenants have leases of one year or less.[76] This means that tenants can only know with certainty their housing costs for up to one year at a time. Tenants in month-to-month leases have only a month (and any legally required notice period) of certainty. Further, at the end of these lease terms, there is no limit on how much a landlord can increase the monthly rent unless the property is subject to rent control or some other form of price regulation.[77]

The combination of the pandemic-fueled housing market, the growth of remote work, and comparatively highly-paid remote workers relocating to traditionally lower cost cities is exposing just how vulnerable tenants are to unpredictable and exorbitant increases in their housing costs.[78] In the past few years, many tenants have been given just one month's notice that their respective rents were increasing, often by hundreds or even thousands of dollars.[79] Nationwide, rents increased approximately fourteen percent year-over-year from 2020 to 2021,[80] and the increases were even larger in some markets: 39.9% in Austin, 28.8% in Orlando, and 26.0% in Phoenix.[81] As one

and policies, as well as various market forces, meant that Black Americans did not receive the same benefits from these programs).

76 *See* Jenny Schuetz, *Offering Renters Longer Leases Could Improve Their Financial Health and Happiness*, BROOKINGS (Feb. 19, 2020), https://www.brookings.edu/blog/up-front/2020/02/19/offering-renters-longer-leases-could-improve-their-financial-health-and-happiness [https://perma.cc/AL5G-DKMX] ("[M]ost residential leases in the U.S. only run for one year.").

77 Regulation of rental costs is commonly referred to as "rent control." But that term may reference many different regulatory approaches, not all of which represent the "hard-caps" on rental increases that have stoked academic and political disapproval. Only a handful of U.S. jurisdictions have any form of rent control, and efforts to enact it at have faced opposition and legal prohibitions. *See infra* notes 136–137 and accompanying text. Opponents of rent control often argue: (1) that rent control will decrease rental supply because landlords risk being unable to make enough of a profit compared to other investment opportunities; and (2) that it would rarely be in the landlord's interest to raise rents to a level that the market could not bear, so rent typically would be expected to increase only a relatively small amount each year to account for inflation, maintenance, and other landlord cost increases. *See infra* note 137.

78 *See* Heather Long, *Rent Prices Are Soaring as Americans Flock Back to Cities*, WASH. POST (July 10, 2021, 7:00 AM), https://www.washingtonpost.com/business/2021/07/09/rent-prices-rising [https://perma.cc/N2B8-ZKVS] ("If a renter is not willing to pay the higher rate, landlords are confident they can find someone else—or sell the property.").

79 *Id.*

80 Lily Katz & Tim Ellis, *Rental Market Tracker: Rents Rise 14% in December—Biggest Jump in Over Two Years*, REDFIN NEWS (May 26, 2022), https://www.redfin.com/news/redfin-rental-report-december-2021 [https://perma.cc/JD77-2MQF].

81 Tim Ellis, *Rental Market Tracker: Asking Rents Increased 40% Year Over Year in Austin*, REDFIN NEWS (June 9, 2022), https://www.redfin.com/news/redfin-rental-report-february-2022 [https://perma.cc/PC56-KB5U]; *see also Zumper National Rent Report*, ZUMPER (Aug. 29, 2022), https://www.zumper.com/blog/rental-price-data [https://perma.cc/V77A-97TG] (showing that rental prices continue to soar to new highs).

realtor observing the escalating rents noted, "I tell my buyers: It's a terrible time to buy, but it's an even worse time to rent."[82]

Landlords may justify increases in rent by pointing to the fact that they are simply responding to market demand. For example, in recent years, once-affordable inland cities like Boise, Austin, Las Vegas, and Phoenix have experienced an influx of higher-income residents, often from higher-priced coastal areas.[83] Thus, even if an existing tenant cannot afford a $500 per month rent increase, there are new residents moving to the area who can.[84] A landlord may also raise the rent in order to sell the property because having an existing tenant in the property makes it less attractive to most prospective new owners. By raising the rent, the property owner positions herself to have a vacant—and more valuable—property when it is put up for sale.[85]

Predictability in housing costs is closely associated with stability of housing—and the myriad socioeconomic benefits associated with it.[86] Once again, the law operates to the detriment of tenants: in almost all jurisdictions, landlords may terminate leases for "no cause" at the end of the term, with only whatever notice is legally required to be provided to tenants.[87] Furthermore, as noted above, landlords in jurisdictions without rent control (*i.e.*, most places in the U.S.) can increase rent at the end of the lease term

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82 *See* Long, *supra* note 78 (quoting Chey Tor, a realtor in Scottsdale, Arizona). In other words, landlords have been able to capitalize on the soaring rests to the detriment of renters. *See id.* ("Landlords . . . are realizing the power they suddenly have.").

83 *Id.*

84 *Id.*

85 *See, e.g.*, Max Nesterak, *St. Paul Voters Could Pass One of the Country's Most Stringent Rent Control Policies*, MINN. REFORMER (Oct. 26, 2021, 10:22 AM), https://minnesotareformer.com/2021/10/26/st-paul-voters-could-pass-one-of-the-countrys-most-stringent-rent-control-policies [https://perma.cc/Z4A7-6BQG] ("[An owner] decided to raise the rent $400 [for one of his properties] because he want[ed] to sell it, along with all the other single family homes he owns in St. Paul"). In most jurisdictions, this is not illegal: a landlord may increase the rent at the end of the lease term for any reason, including as a way of pressuring a tenant to leave. *See supra* note 77 and accompanying text.

86 *See, e.g.*, Matthew P. Main, *Making Change Together: The Multi-Pronged, Systems Theory Approach to Law and Organizing That Fueled a Housing Justice Movement for Three-Quarter House Tenants in New York City*, 27 GEO. J. POVERTY L. & POL'Y 31, 36-37 (2019) ("When people are stably housed, it provides them a springboard from which they can reach their next goals, be it education, employment, physical and emotional wellness, or financial self-sufficiency." (quoting Luther Mack, *Who We Are*, THREE-QUARTER HOUSE TENANT ORGANIZING PROJECT)).

87 Notice regarding lease termination and/or renewal may be required per the terms of the lease itself. *See, e.g.*, RESIDENTIAL LEASE FORM, TEX. ASS'N REALTORS ¶ 4 (2022), http://content.har.com/FormManager/pdf/79.pdf [https://perma.cc/FP96-FN6E] (providing an exemplative lease form that automatically renews on a month-to-month basis unless the landlord or tenant provides the other with written notice of termination at least 30 days ahead of time). State or local law may also require a minimum amount of notice to be given to tenants before a lease for a specified term may be terminated, even if the lease itself is silent on the issue or provides for less notice. *See, e.g.*, WASH. REV. CODE § 59.18.650(b)(ii) (2022) (requiring landlords to give tenants at least sixty days of advanced written notice before terminating a lease).

by any amount, which for many tenants will amount to an indirect termination of the lease.

Some might consider this difference in housing cost predictability to simply be a definitional difference between owning and renting: if someone wants the benefit of predictable housing costs and stability, they should purchase a home; if they prefer flexibility, they can rent.[88] However, while there are some for whom the flexibility of renting may be worth the tradeoffs, many people are not renters by choice, and for many, the cost of home ownership is simply beyond reach.

Furthermore, treating the difference in housing cost predictability as simply definitional fails to recognize that homeowners are only protected from such risk because of affirmative law and policy choices to protect them. If homeowners faced the risk of their monthly mortgage payments doubling with only thirty days' notice, waves of foreclosures would occur. In fact, that is exactly what happened in the 2008 financial crisis when over-eager lenders offered adjustable-rate mortgages to under-qualified home buyers.[89] Lawmakers responded with a range of legal and policy reforms, such as the Dodd-Frank Wall Street Reform and Consumer Protection Act, which limited the extent to which homeowner borrowers would be exposed to rapidly rising monthly mortgage payments under high-risk loans.[90] And yet, except in those limited number of jurisdictions with rent control, renters have no legal protection from similarly exorbitant and unaffordable housing cost increases.[91]

2. Evictions and Foreclosures: Repercussions for Non-Payment of Rent Versus Mortgages

The repercussions for the failure to pay housing costs—what happens when a tenant is late on rent, as compared to when a homeowner is late on their mortgage payment—is another manifestation of anti-tenancy.

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88 For discussion of the various ways in which homeowner housing costs are more predictable than tenant housing costs, see *supra* note 74 and accompanying text.

89 *See* 154 CONG. REC. S23570 (daily ed. Oct. 1, 2008) (statement of Sen. Chris Dodd) (identifying the high foreclosure and delinquency rates associated with "exploding adjustable rate mortgages, ARMs, interest-only loans, and payment-option ARMs" as being one of the major causes of the 2008 financial crisis).

90 *See generally* Robert A. Cook & Meghan Musselman, *Summary of the Mortgage Lending Provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 64 CONSUMER FIN. L.Q. REP. 231 (2010) (describing some the most significant changes to mortgage law created by the Dodd-Frank Act).

91 While rent control is still very much the exception rather than the rule, there have been a handful of recent successful elections in which voters at the state and local level have approved various forms of rent control. *See infra* note 439 and accompanying text.

Before unpacking the legal mechanisms associated with these two scenarios, it is worth recognizing who is more likely to be impacted by which mechanism. First, people who are evicted are disproportionately Black, women, and low-income.[92] In contrast, the majority of those who hold mortgages are white—not only because white people are more likely to be homeowners, but because Black applicants are denied mortgages at much higher rates than white applicants.[93] And although there are crises levels for both evictions and foreclosures, recent data suggests that there are likely more evictions than foreclosures in most years, despite the fact that there are more homeowners than renters in the U.S.[94]

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92 *See, e.g.*, MATTHEW DESMOND, MACARTHUR FOUND., POOR BLACK WOMEN ARE EVICTED AT ALARMING RATES, SETTING OFF A CHAIN OF HARDSHIP 2 (2014), https://www.macfound.org/media/files/hhm_research_brief__poor_black_women_are_evicted_at_alarming_rates.pdf [https://perma.cc/7UHP-F6H2] (finding that those evicted in Milwaukee "are disproportionately women from [B]lack and Hispanic neighborhoods"); APRIL HIRSH URBAN, ALEKSANDRA TYLER, FRANCISCA GARCÍA-COBIÁN RICHTER, CLAUDIA COULTON & TSUI CHAN, CTR. ON URB. POVERTY & CMTY. DEV., THE CLEVELAND EVICTION STUDY: OBSERVATIONS IN EVICTION COURT AND THE STORIES OF PEOPLE FACING EVICTION 4 (2019), https://case.edu/socialwork/povertycenter/sites/case.edu.povertycenter/files/201911/The%20Cleveland%20Eviction%20Study-10242019-fully%20accessible%28r%29.pdf [https://perma.cc/WH7V-KJ7M] ("Most tenants in [Cleveland] eviction court are low-income, minority, female head of households with children, and are highly housing-cost burdened."); Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 63 (2018) ("[H]uge numbers of Black women face eviction, ..."); Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. (forthcoming 2022) (manuscript at 11-15) (on file with authors) (discussing empirical scholarship on gender and racial disparities in eviction litigation); Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 369 (2022) ("Black women with children are dramatically overrepresented [as evictees]." (footnote omitted)); Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 657 (2020) ("[F]iling and eviction rates were, on average, significantly higher for [B]lack renters than for white renters. . . . [and] [B]lack and Latinx-female renters faced higher eviction rates than their male counterparts.").

93 *See, e.g.*, Bill Dedman, *The Color of Money Part 1: Atlanta Blacks Losing In Home Loans Scramble*, ATLANTA CONSTITUTION, May 1, 1988, at 1 (stating that Atlanta lenders extended five times as many home loans to white applicants than to Black applicants); Emmanuel Martinez & Lauren Kirchner, *How We Investigated Racial Disparities in Federal Mortgage Data*, MARKUP (Aug. 25, 2021, 6:50 ET), https://themarkup.org/show-your-work/2021/08/25/how-we-investigated-racial-disparities-in-federal-mortgage-data [https://perma.cc/6CL6-TXUY] ("Black applicants in Philadelphia were almost three times as likely to be denied a mortgage compared to White borrowers."). Though most mortgage-holders are white, foreclosure is often felt most intensely in Black and Latinx communities. *See* MELANCA CLARK & MAGGIE BARRON, BRENNAN CTR. FOR JUST., FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 9 (2009), https://www.brennancenter.org/sites/default/files/legacy/Justice/Foreclosure%20Report/ForeclosuresReport.pdf [https://perma.cc/6RC5-FQ8T] ("The foreclosure crisis [of 2008] has been felt most acutely in African-American communities, which have disproportionately high foreclosure rates . . . . Latino communities have also been hard hit. The high foreclosure rates in these minority neighborhoods are due largely to the prevalence of subprime loans." (footnote omitted)).

94 *See* Maya Brennan, *A Framework for Effective and Strategic Eviction Prevention*, 41 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 37, 43 (2020) ("At nearly 900,000 eviction judgments and additional untold forced moves, one can reasonably hypothesize that the number of renter households who face eviction each year exceeds the 1.05 million foreclosures at the peak of the

Turning to the legal mechanisms themselves, one important difference is the timeline for each process. Typically, the eviction process is fairly quick, due to summary eviction and unlawful detainer processes that are limited in scope and designed to move quickly.[95] Depending on the jurisdiction, a tenant might have as little as five to ten days from the time that their landlord gives them notice of a lease violation to cure the violation or move out.[96] If neither happens, the landlord can file an eviction lawsuit. Hearings are typically set within a few weeks, or even days, of the eviction complaint being filed.[97] If the tenant loses, which they most often do, they must vacate the premises typically within a few days of the court's order.[98] Finally, because of the rapid eviction timeline, tenants often wind up losing their possessions, leaving them behind, or lacking the means to move them.[99]

In contrast, although timeframes differ between states, generally mortgage lenders will not begin the foreclosure process until three to six months after a mortgage payment has been missed, though they will often assess late fees prior to this.[100] After notice of default, there is often an additional thirty day period to cure.[101] After that period elapses, the borrower is in default, although at any time the borrower can attempt to negotiate with their lender to slow down the process, or seek an alternative, such as a short

mortgage crisis."); *see also* David Montgomery, *Who Owns a Home in America, In 12 Charts*, BLOOMBERG (Aug. 8, 2018, 10:22 AM), https://www.bloomberg.com/news/articles/2018-08-08/who-rents-their-home-here-s-what-the-data-says [https://perma.cc/D92Y-4LQD] ("Though more than 100 million Americans rent, they're outnumbered two-to-one by Americans who own their own home . . . .").

95 *See* Sabbeth, *Eviction Courts*, *supra* note 92, at 376 ("The design of eviction courts emphasizes speed, while it deemphasizes testing the landlord's capacity to meet the burden of proof."). *But see* Michael Scott Davidson, *New Nevada Law to Give Tenants Facing Eviction More Time to Pay Rent*, L.V. REV. J. (June 28, 2019, 8:03 PM), https://www.reviewjournal.com/local/local-nevada/despite-changes-nevada-eviction-law-still-favors-landlords-1697301 [https://perma.cc/NVV3-RZPM] (illustrating that state eviction processes range from five to fifty-three days and noting that "[t]he process is often delayed by overburdened courts and law enforcement officers").

96 *See, e.g.*, 68 PA. STAT. AND CONS. STAT. § 250.501(b) (West 2022) (providing tenants with ten-day notice); VA. CODE ANN. § 55.1-1245(F) (2022) (providing tenants with five-day notice).

97 *See, e.g.*, COLO. REV. STAT. § 13-40-111 (2021) (requiring that a hearing be held seven to fourteen days after issuance of summons); N.C. GEN. STAT. § 42-28 (2021) (requiring that a hearing be held within seven days after issuance of summons); Sabbeth, *Eviction Courts*, supra note 92, at 378 (discussing the rapid timeline of eviction proceedings).

98 *See, e.g.*, MINN. STAT. § 504B.345(d) (2022) (providing seven days to vacate); FLA. STAT. § 83.62(1) (2022) (providing twenty-four hours to vacate).

99 *See* DESMOND, *supra* note 92, at 2 (stating that tenants who are evicted often lose "not only their homes," but their possessions as well, "stripping them of the few assets they had").

100 *See Foreclosure Process*, U.S. DEP'T HOUS. & URB. DEV. [hereinafter *Foreclosure Process*], https://www.hud.gov/topics/avoiding_foreclosure/foreclosureprocess [https://perma.cc/4JAN-NAHH] (noting that while mortgage companies wait several months to begin the foreclosure process, late fees are typically charged ten to fifteen days after a missed payment).

101 *Id.* The Fannie Mae and Freddie Mac mortgage contracts also provide for this cure period. *See, e.g.*, FANNIE MAE & FREDDIE MAC, COLO. UNIF. INSTRUMENT FORM 3006 § 26(a) (2002).

sale.[102] Further, the borrower can exercise their equitable right of redemption up until the moment of foreclosure, and in some cases, even after a foreclosure sale.[103] At base, the odds are that a homeowner who is foreclosed upon will be able to spend a much longer time in the property—during which time they may be paying nothing toward it—than a tenant who is being evicted. Even if the homeowner is ultimately foreclosed on, the buffer of several months allows time to seek new housing and arrange for moving; renters are denied a similar opportunity due to the much shorter eviction timeline.[104]

Another key distinction is how much more public the process of eviction is than the process of foreclosure. The notice of a tenant's failure to pay rent and eviction is typically posted on the door, and this may be the first that the tenant hears of the process. In fact, in at least one state, a person who is late on their rent can be criminally liable and can be arrested and jailed; these charges are mostly filed against Black women.[105] In contrast, the foreclosure process in every state is a civil, not criminal, process. Further, when a borrower is late on their payment, a mortgage lender does not post a public

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102 *See Foreclosure Process*, *supra* note 100 (instructing homeowners to talk to lenders "[a]t any time during the process" to discuss "alternatives and solutions that may exist").

103 *See Redemption*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/topics/avoiding_foreclosure/redemption [https://perma.cc/X2VP-LQDL] (defining "redemption" as the period *after* a home has been sold at a foreclosure sale when a homeowner can still reclaim their home). Although less common, in some states, even after an eviction, there is a right of reinstatement. *See, e.g.*, WASH. REV. CODE § 59.18.410(2) (2021) (stating that after a loss in eviction court for non-payment of rent, if there is time remaining on the lease, a tenant can reinstate that tenancy if they pay off the entire amount that they owe under the judgment).

104 Many properties that are foreclosed upon are rental properties. *See, e.g.*, Matthew Desmond, *The Tenants Who Evicted Their Landlord*, N.Y. TIMES MAG. (Oct. 6, 2021), https://www.nytimes.com/2020/10/13/magazine/rental-housing-crisis-minneapolis.html [https://perma.cc/UN7F-H73T] ("In California . . . an estimated 38 percent of all foreclosures in 2010 were rental properties."). At common law, the foreclosure of a senior interest (like a mortgage) extinguishes all junior interests, including leases. *See* Reilly v. Firestone Tire & Rubber Co., 764 F.2d 167, 172 (3d Cir. 1985) (noting that a senior-lien foreclosure extinguished a junior lease). Thus, historically, a renter who had been paying their rent on time and was unaware that the loan on their rental property was in default could be forced to move out with little to no notice. *See* Eloisa Rodriguez-Dod, *Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J.L. & PUB. POL'Y 243, 245 (2010) ("Tenants dutifully paying their monthly rent have found themselves forced out of their rental homes because landlords defaulted on their mortgages." (footnote omitted)). In 2009, the Protecting Tenants at Foreclosure Act (PTFA) was passed, requiring that tenants be provided at least ninety days' notice before they must move out after a foreclosure. *See Congress Permanently Authorizes the Protecting Tenants at Foreclosure Act*, NAT'L LOW INCOME HOUS. COAL. (May 29, 2018), https://nlihc.org/resource/congress-permanently-authorizes-protecting-tenants-foreclosure-act [https://perma.cc/T3PL-VAXC].

105 *See* Maya Miller & Ellis Simani, *When Falling Behind on Rent Leads to Jail Time*, PROPUBLICA (Oct. 26, 2020, 11:30 AM), https://www.propublica.org/article/when-falling-behind-on-rent-leads-to-jail-time [https://perma.cc/8HFM-YV23] (finding that although Black women made up only twenty percent of the residents in Little Rock, Arkansas, they accounted for sixty-two percent of the criminal eviction cases in 2012).

notice, but rather typically sends a letter to let the borrower know that they are behind on their payments. Although a public notice of foreclosure might eventually be posted—on the door or in a local newspaper—this is typically a later step in the process and one for which the homeowner is prepared.

A final distinction involves outcomes. While both evictions and foreclosures are reported to credit agencies and can negatively impact an individual's credit score,[106] renters and homeowners are likely to face different harms in terms of the impact on their future housing opportunities. An eviction filing—even one that is wrongfully filed by the landlord, or where the tenant successfully defends against the eviction—can effectively bar a person from future rental housing. As Matthew Desmond has noted, "[m]any landlords will not rent to persons who have been evicted, and an eviction can also ban a person from affordable housing programs."[107] In contrast, a prior foreclosure will not bar a person from getting another mortgage, although there is typically a waiting period.[108] Further, if a homeowner is seeking to rent after a foreclosure, they will have more housing options than a previously-evicted tenant does, since landlords often screen out applications with prior evictions more than those with foreclosures.[109]

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106 Maurie Backman, *What Happens to Your Credit Score if Your Home Goes Into Foreclosure?*, NASDAQ (Dec. 20, 2021, 7:00 AM), https://www.nasdaq.com/articles/what-happens-to-your-credit-score-if-your-home-goes-into-foreclosure?time=1640001602 [https://perma.cc/AX8F-ES9Q]; *How Long Can Information, Like Eviction Actions and Lawsuits, Stay On My Tenant Screening Record?*, CONSUMER FIN. PROT. BUREAU (July 1, 2021), https://www.consumerfinance.gov/ask-cfpb/how-long-can-information-like-eviction-actions-and-lawsuits-stay-on-my-tenant-screening-record-en-2104 [https://perma.cc/WJ8T-B4NS].

107 DESMOND, *supra* note 92, at 2; *see also* Kathryn A. Sabbeth, *Erasing the "Scarlet E" of Eviction Records*, APPEAL (Apr. 12, 2021), https://theappeal.org/the-lab/report/erasing-the-scarlet-e-of-eviction-records [https://perma.cc/9J9S-YC38] ("With many landlords, a prior eviction will be a complete bar to accepting a rental housing application.").

108 The waiting period for a new conventional loan after foreclosure is typically at least three years and up to five years. Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 984 (2010). The waiting period after deeds-in-lieu and short sales is typically shorter. *See* Maryann Haggerty, *The Post-Foreclosure Wait*, N.Y. TIMES (June 23, 2011), https://www.nytimes.com/2011/06/26/realestate/playing-the-waiting-game-after-foreclosure-and-short-sale-mortgages.html [https://perma.cc/BHC9-FWLY] (noting that the waiting period in these circumstances can be months rather than years).

109 *See, e.g.*, Jaboa Lake & Leni Tupper, *Eviction Record Expungement Can Remove Barriers to Stable Housing*, CTR. FOR AM. PROGRESS (Sept. 30, 2021), https://www.americanprogress.org/article/eviction-record-expungement-can-remove-barriers-stable-housing [https://perma.cc/F2EM-H9TS] (discussing how landlords screen for previous eviction records); Katelyn Polk, *Screened Out of Housing: The Impact of Misleading Tenant Screening Reports and the Potential for Criminal Expungement as a Model for Effectively Sealing Evictions*, 15 NW. J.L. & SOC. POL'Y 338, 356 (2020) ("Evictions also come with collateral consequences that haunt tenants; particularly, a tenant with an eviction order faces the almost insurmountable challenge of finding future housing.").

3. Common Interest Communities and Voting Rights

Today, around one quarter of Americans live in Common Interest Communities (CICs).[110] These neighborhoods are subject to private governance by a Homeowners Association (HOA), Condo Association (COA), or similar body.[111] Many people who own properties in these developments rent them out, so both renters and owners live in these communities.[112]

There are a number of critiques of private governance generally.[113] For example, one common criticism is that homeowners in an HOA lack both an easy exit and a sufficient voice and are thus often uninvolved or disaffected.[114] In contrast, while exit might be somewhat easier for renters than for owners (although they are locked into the terms of a lease), renters have dramatically fewer opportunities to voice their opinions in most HOAs. This is because tenants often lack notice of meetings, the right to attend meetings, and an opportunity to vote for change at those meetings.

First, notice of meetings is often only required to be provided to owners.[115] Further, even if notice is publicly posted in the building, it is often only members of the HOA (typically defined as owners) who have the right to attend.[116] Finally, after the meeting takes place, minutes may only be provided to homeowners rather than to tenants.[117] These structural barriers

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110 COMM. ASS'N INST., 2019-2020 U.S. NATIONAL AND STATE STATISTICAL REVIEW FOR COMMUNITY ASSOCIATION DATA (2020), https://foundation.caionline.org/wp-content/uploads/2020/08/2020StatsReview_Web.pdf [https://perma.cc/8SVJ-W5Q5].

111 *Id.*

112 *See, e.g.*, Michael C. Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. CIN. L. REV. 839, 863 (2013) ("Renters make up a significant population in many HOAs . . . ."); Cai Roman, *Making a Business of "Residential Use": The Short-Term-Rental Dilemma in Common-Interest Communities*, 68 EMORY L.J. 801, 815 (2019) (discussing the prevalence of leasing restrictions in CICs).

113 *See* Pollack, *supra* note 112 (critiquing the deference HOAs are given by the judiciary); *see also* Michael Pollan, *Town-Building Is No Mickey Mouse Operation*, N.Y. TIMES, Dec. 14, 1997, at 56-64 (criticizing Disney's endeavor to create its own community).

114 *See generally* Gregory S. Alexander, *Conditions of "Voice": Passivity, Disappointment, and Democracy in Homeowner Associations*, *in* COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 145 (Stephen E. Barton & Carol J. Silverman eds., 1994) (arguing that by their very nature, HOAs cause homeowners to become passive and ultimately unsatisfied with their home governance).

115 *See, e.g.*, CONN. GEN. STAT. § 47-250(a)(3) (2021) ("An association shall notify unit *owners* of the time, date and place of each annual and special meeting of unit *owners* . . . ." (emphasis added)); DEL. CODE ANN. tit. 25, § 81-308 (2021) ("[N]otice of [an association] meeting [is] to be delivered to each unit *owner* . . . ." (emphasis added)).

116 *See, e.g.*, CAL. CIV. CODE §§ 4160, 4925(a) (West 2021) (noting that only members, defined as "owner[s] of a separate interest," may attend non-executive portions of board meetings).

117 *See, e.g.*, CAL. CIV. CODE §§ 4160, 4950(a) (West 2021) (requiring that board meeting minutes be made available to members, who are defined as owners); MINN. STAT. § 515B.3-118 (2021) ("All records . . . shall be made reasonably available for examination by any unit owner or the

arguably make it difficult for renters in HOAs to stay up-to-date with building issues that often directly affect them. For example, a new tenant who signed a lease in the Surfside Condominium building in Florida prior to its collapse would likely not have received earlier meeting minutes or documentation concerning structural issues in the building.[118]

Even if tenants have access to or knowledge of meetings, they still typically lack a voice at those meetings. While voting rights in CICs vary between states and between individual HOAs, the right to vote is typically allocated on a per unit basis or based on some ownership interest—such as unit square footage—rather than based on residency.[119] While some state laws expressly allow property owners who are leasing out their properties to allow others—including tenants—to vote by proxy,[120] there is no requirement that homeowners do so.[121] It is "virtually standard" that "voting rights are held only by owners [which] means both that renters have no voice and that owners who may own more than one home (and rent them out) have a disproportionately large voice."[122] Again, taking the 2021 Surfside Condo collapse as an example, even if renters had been aware of the structural issues in the building and wanted their landlords to pay a hefty assessment to make much needed structural repairs, they likely would have had no official avenue through which to influence that decision. Thus, although those renters are subject to the rules and regulations within the CIC, they lack the ability to sway the creation and enforcement of those rules.[123] Further, although their

unit owner's authorized agent, subject to the applicable statutes."); NEV. REV. STAT. § 116.3108(5) (2021) (instructing that minutes are to be provided to owners).

118 *But see* Deborah Acosta, *Miami-Area Condo Board President Warned of Need for Repairs in April Letter*, WALL ST. J. (June 28, 2021, 10:45 PM), https://www.wsj.com/articles/miami-area-building-collapse-condo-board-president-warned-of-need-for-repairs-in-april-letter-11624930495 [https://perma.cc/UXB5-D4J4] (noting that the COA president sent a letter to all residents, whom she referred to as "neighbors," two months prior to the collapse notifying them of the structural issues in the building). Of course, even if the tenants had known of the issues and wanted the board to pay for repairs, they likely would have had no say in that matter.

119 *See, e.g.*, KAN. STAT. ANN. § 58-4614 (2021) (permitting only unit owners to vote); 68 PA. STAT. AND CONS. STAT. ANN. § 3310 (West 2022) (same).

120 *See, e.g.*, NEV. REV. STAT. § 116.311(3) ("A unit's owner may give a proxy . . . [to] a tenant of the unit's owner who resides in the common-interest community . . . .").

121 In certain states, proxies can only be given to other owners. *See, e.g.*, CAL. CIV. CODE § 5130(a)(1) (West 2021) (stating that in California, where member is defined as owner, "'[p]roxy' means a written authorization signed by a member or the authorized representative of the member that gives another member or members the power to vote on behalf of that member"). *But see* NAT'L CONF. OF COMM'RS OF UNIF. STATE L., UNIF. COMMON INT. OWNERSHIP ACT § 3-110, cmt.1 (2021) ("[I]t may be desirable to give lessees . . . the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the common interest community.").

122 Pollack, *supra* note 112, at 863 (quotations marks omitted).

123 HOA members can typically vote to change their rules and regulations; thus, a tenant might be subject to changed restrictions during their tenancy without having a say in those changes. *See*

health and safety is at stake with respect to the condition of the building itself, they lack the ability to participate in self-governance.[124]

4. Affordable Housing

Another example where we see legal tools providing preferred treatment to homeowners rather than tenants involves the provision of affordable housing. In raw numbers, there are more affordable, below market rate *rental* units provided by governments and private entities than affordable units that are offered for sale.[125] However, the subsidies that are provided to homeowners in general are much larger than those provided to renters.[126] According to the National Housing Institute, "[t]he most distinctive feature of affordable housing policy in the United States in recent years has been its unrelenting focus on promoting homeownership as a social good, and on increasing the ranks of homeowners among the nation's lower income households."[127]

The ongoing affordable housing crisis is a major problem for both renters and first-time homebuyers. Prior to the pandemic, approximately thirty percent of U.S. households were cost burdened—spending over thirty

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Jonathan D. Ross-Harrington, *Property Forms in Tension: Preference Inefficiency, Rent-Seeking, and the Problem of Notice in the Modern Condominium*, 28 YALE L. & POL'Y REV. 187, 188 (2009) ("[L]essees in a condominium are bound by the *evolving* decisions of the ownership class.").

124 *See id.* at 189 ("When renters are given inadequate notice regarding the covenants and governance regime to which they will be subject . . . tensions arise.").

125 For example, the federal government is currently funding more than two million Section 8 "Housing Choice Vouchers," which provide rental assistance to low-income families. *See* CONG. RSCH. SERV., RL32284, AN OVERVIEW OF THE SECTION 8 HOUSING PROGRAMS: HOUSING CHOICE VOUCHERS AND PROJECT-BASED RENTAL ASSISTANCE 6 (2014). In contrast, "no one really knows how much . . . resale-restricted, owner-occupied housing might actually exist in the United States. There may be as few as a half-million units, predominantly in limited equity housing cooperatives. There may be as many as 800,000 units . . . ." *See* JOHN EMMEUS DAVIS, NAT'L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING 2 (2006). Such units are ensured to be affordable upon resale. *Id.* at 1.

126 *See* Jenny Schuetz, *Nine Rules for Better Housing Policy*, BROOKINGS INST. (May 2, 2018), https://www.brookings.edu/blog/the-avenue/2018/05/02/nine-rules-for-better-housing-policy [https://perma.cc/NJ37-UPMR] ("Owners can deduct interest paid on their mortgages (up to $750,000) and some local property taxes from their income subject to federal taxes. The size of these two subsidies—approximately $120 billion per year—dwarfs direct subsidies to low-income renters (around $40 billion)."). The tax code has been the most obvious and well-known historical vehicle for homeowner subsidies. *See infra* Part I.F.; *see also* Julie D. Lawton, *Limited Equity Cooperatives: The Non-Economic Value of Homeownership*, 43 WASH. U. J.L. & POL'Y 187, 189 (2013) (noting how American tax policy supports homeownership).

127 Alan Mallach, *Preface* to JOHN EMMEUS DAVIS, NAT'L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING (2006).

percent of their income on housing.[128] But there are more than twice as many cost-burdened renter households as there are homeowner households,[129] and the pandemic-related real estate boom combined with job loss has exacerbated this crisis to a greater degree for renters.[130] Between March and September 2020, nearly fifty percent of renters and thirty-six percent of homeowners experienced a loss of employment income.[131]

Although the affordability crisis has been well documented, less examined is the fact that legal tools often provide fundamentally different options for affordable housing to would-be owners than to renters. Moreover, the options for renters are typically not as robust: they are often less secure—they might end prematurely for several reasons—and they do not allow for equity-building. Thus, although there may be more affordable rental units than purchasable units in sheer numbers, the options for affordable rental housing provide tenants with a second-class status as compared to options for affordable ownership. Reasons for this disparity include: (a) specific legal barriers to creating affordable rental housing; (b) overemphasis on legal tools for affordable homeownership; and (c) additional hurdles for subsidized tenants.

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128 JOINT CTR. FOR HOUS. STUDS. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 1 (2020) [hereinafter STATE OF THE NATION'S HOUSING 2020], https://www.jchs.harvard.edu/state-nations-housing-2020 [https://perma.cc/9TY5-KCAM].

129 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-427, RENTAL HOUSING: AS MORE HOUSEHOLDS RENT, THE POOREST FACE AFFORDABILITY AND HOUSING QUALITY CHALLENGES 14 (2020) (finding that in 2017, an estimated forty-eight percent of renter households were cost burdened).

130 *See* STATE OF THE NATION'S HOUSING 2022, *supra* note 10, at 37 (stating that the rate of cost-burdened renters rose by two-point-six percentage points and that of cost-burdened homeowners rose by one percentage point during the first year of the pandemic). The definition of affordable housing may undercount how many tenant households are cost burdened due to a distinction in what costs are included in "housing costs" for renters versus owners. While the homeowner calculation is wide-ranging, costs for renters exclude certain utilities and insurance. *See* Tyler Mulligan, *American Rescue Plan: Local Government Funding for Affordable Housing Development*, UNIV. N.C. SCH. GOV'T BLOG (June 1, 2021), https://ced.sog.unc.edu/2021/06/american-rescue-plan-local-government-funding-for-affordable-housing-development [https://perma.cc/74KL-4TGR] (noting that the calculation for renters includes some utilities, but does not include property taxes, HOA dues, or insurance). While not all renters carry renters' insurance, it is often required through lease terms. FAIRFAX CNTY. TENANT LANDLORD COMM'N, HANDBOOK FOR TENANTS AND LANDLORDS: THE KEY TO UNDERSTANDING YOUR RIGHTS AND RESPONSIBILITIES 23 (2010), https://www.fairfaxhousingcollaborative.org/wp-content/uploads/2016/08/tl-handbook.pdf [https://perma.cc/ZT6T-AQZ3].

131 STATE OF THE NATION'S HOUSING 2020, *supra* note 128, at 1; *see also* David Kitai, *The National Rental Market Has Recovered from COVID-19—with a Catch*, MORTG. PRO. AM. MAG. (May 3, 2021), https://www.mpamag.com/us/news/general/the-national-rental-market-has-recovered-from-covid-19-with-a-catch/253890 [https://perma.cc/45ZD-EYPD] (describing the rental market in the wake of the pandemic and noting that rental markets remain down in many major cities across the country).

a. *Legal Barriers to Creating Affordable Rental Housing*

There are a variety of well-known legal barriers to the creation of affordable rental housing: single-family zoning districts that prohibit the construction of apartments,[132] parking minimums—even in locations where residents are less likely to have cars—that make development cost-prohibitive, and cumbersome permitting processes.[133] But this subsection focuses on two less commonly-discussed legal barriers to the creation of affordable rental units that implicate anti-tenancy: (i) state-level restrictions on rent control or inclusionary zoning ordinances; and (ii) local residency restrictions associated with accessory dwelling units.

i. State-Level Limitations on Regulatory Tools

The majority of direct, affordable housing assistance in the U.S. comes in the form of rental assistance, where the amount of rent paid depends on the person or family's income.[134] There are many ways of creating affordable housing opportunities for renters, such as housing vouchers, public housing, rent control, inclusionary zoning requirements, and affordable rental units created through public and private partnerships, like the low-income housing tax credit (LIHTC).[135] However, a number of states have limited the use of some of these tools that local governments could otherwise use to require the provision of affordable rental housing. For example, many states have bans on rent control in place,[136] which might otherwise allow cities to limit the amount that landlords could increase rent over time. And although commentators and economists have long debated the wisdom and efficacy of rent control, recent studies suggest that it is at least beneficial for current tenants and reduces their displacement in the short term.[137] Some of these

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132 *See supra* Part I.A.

133 *See* U.S. DEP'T HOUS. & URB. DEV., *States Reduce Regulatory Barriers for Affordable Housing*, EVIDENCE MATTERS, Spring 2018, at 18-19, https://www.huduser.gov/portal/periodicals/em/spring18/index.html [https://perma.cc/GH2N-F5U5] (discussing the costs of parking minimums and extended permitting processes).

134 *See* MAGGIE MCCARTY, LIBBY PERL & KATIE JONES, CONG. RSCH. SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICIES 10 (2019) (describing housing choice vouchers and other assistance programs that serve American households).

135 *Id.* at 1.

136 According to the National Multifamily Housing Council, the following states preempt rent control: Ala., Ariz., Ark., Colo., Conn., Fla., Ga., Idaho, Ill., Ind., Iowa, Kan., Ky., La., Mass., Mich., Minn., Miss, Mo., N.H., N.M., N.C., N.D., Ohio, Okla., S.C., S.D., Tenn., Tex., Utah, Va., Wash., and Wis. *See Rent Control Laws by State*, NAT'L MULTIFAMILY HOUS. COUNCIL (July 19, 2022) [hereinafter *Rent Control Laws by State*], https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state [https://perma.cc/CR8Y-PU4D].

137 *See* Rebecca Diamond, Tim McQuade & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365, 3392

states have also adopted laws that preempt inclusionary zoning ordinances,[138] which would require developers of new market-rate housing to include a certain percentage of the new rental units at below market rates.[139] States may also impose procedural hurdles on affordable rental housing; for example, although California has statewide rent control caps,[140] it has a provision in its state constitution that requires voter approval in order to construct publicly funded affordable rental housing projects in the state.[141] These types of state-level restrictions make it difficult for local governments to use regulatory tools to protect existing—or add additional—affordable rental housing stock. In contrast, states do not tend to preempt tools that local governments might use to try to add or protect existing housing stock for potential homeowners.[142]

ii. Accessory Dwelling Units and Residency Requirements

Another way that the law makes it harder to provide affordable housing options for renters involves limitations on residency. For example, many cities now allow the construction of Accessory Dwelling Units (ADUs)—either as of right or through a streamlined process—even in neighborhoods zoned as single-family. ADUs "are self-contained units located on the property of a single-family home."[143] Because they are typically smaller than a standalone house, ADUs can provide more affordable housing opportunities.[144] Further,

(2019) ("Incumbent tenants . . . are clearly made better off. . . . [but] future renters . . . must bear higher rents due to the endogenous reductions in rental supply.").

138 The following states preempt mandatory inclusionary zoning: Ariz., Ind., Kan., Tenn., Tex., and Wis. *See Rent Control Laws by State*, *supra* note 136.

139 U.S. DEP'T HOUS. & URB. DEV., *Inclusionary Zoning and Mixed-Income Communities*, EVIDENCE MATTERS, Spring 2013, at 17, https://www.huduser.gov/portal/periodicals/em/spring13/highlight3.html [https://perma.cc/97LF-GPPV].

140 *Rent Control Laws by State*, *supra* note 136.

141 CAL. CONST. art. XXXIV, § 1. Of note, this constitutional provision has a racist history, as it was designed to "keep Black families out of white neighborhoods." *See* Adam Beam, *Lawmakers Push to Repeal Anti-Black Housing Law in California Constitution*, KQED (Mar. 8, 2022), https://www.kqed.org/news/11907336/lawmakers-push-to-repeal-anti-black-housing-law-in-california-constitution [https://perma.cc/VV8T-AEWD].

142 For example, the Colorado Supreme Court ruled that inclusionary zoning was banned by the state's prohibition on rent control. *See* Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 32-33 (Colo. 2000). The holding was not interpreted to apply to affordable housing that was for sale; it applied only to rental housing. *See* Ben Doyle, *"Hang 'Em High": Affordable Housing Covenants in Colorado (Part 1)*, COLO. LAW., July 2019, at 48 (explaining that Colorado's rent control statute "doesn't govern restrictions on sale"); *see also* COLO. REV. STAT. § 38-12-301(2) (2022) (finding that the imposition of rent control does not apply to owned units). However, the General Assembly later reversed course. *See* COLO. REV. STAT. § 29-20-104(1) (2022) (overriding *Telluride*).

143 John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53, 54 (2014).

144 *See id.* at 64 ("Proponents portray ADUs as a more affordable housing option that provides those with modest incomes the opportunity to gain access to 'more desirable single-family

because they typically cannot be subdivided from the single-family house or parcel on which they were constructed, ADUs are most often used as rentals (or as a place where guests can stay when visiting). That said, some cities have an owner-occupancy requirement for their ADUs. For example, Denver—like other cities—requires that the owner occupy either the primary dwelling or the ADU.[145] Other jurisdictions have bans on renting ADUs or using them as short-term rentals.[146] Justifications for these limitations include: the promotion of community stability; property maintenance; ensuring the presence of an on-site property manager; and as a substitute for more detailed regulation of ADUs.[147] However, owner-occupancy restrictions make it less likely that ADUs will be used to provide affordable rental opportunities in the communities where they exist. In other jurisdictions with no restrictions on who can occupy ADUs, would-be long-term residential tenants are still disadvantaged. There, owners can rent out ADUs on short-term rental platforms like Airbnb for far higher nightly rents than a typical lease.[148] Further, these types of rules tend to perpetuate existing race and class-based hierarchies within neighborhoods.[149]

b. *Overemphasis on Affordable Homeownership Options*

Although there are undeniably benefits to homeownership, renting often makes more sense for people seeking affordable housing options. However,

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neighborhoods.'" (footnote omitted) (quoting MUN. RSCH. & SERVS. CTR. OF WASH., ACCESSORY DWELLING UNITS: ISSUES & OPTIONS 14 (1995))); *see also* RODNEY L. COBB & SCOTT DVORAK, AM. PLAN. ASS'N, ACCESSORY DWELLING UNITS: MODEL STATE ACT AND LOCAL ORDINANCE 6 (2000) (acknowledging ADUs as a "cost-effective means of increasing the supply of affordable rental housing").

145 *See* DENVER, COLO. ZONING CODE § 11.8.2.2(C) (2021) ("The owner . . . shall occupy either the primary dwelling unit or the ADU use as the owner's legal and permanent residence."); *see also* Bronin, *supra* note 20 (manuscript at 68) ("The most common . . . restriction[] [in Connecticut] is for owner-occupancy, which requires the property owner to reside either in the main unit or the ADU.").

146 *See* Bronin, *supra* note 20 (manuscript at 68) ("Somewhat common—although less widespread—are requirements that the occupant of the ADU be related to or employed by the owner . . . [as well as] bans on renting ADUs . . . or elderly only requirements."); *see also* Christina Stacy, Eleanor Noble, Jorge Morales-Burnett & Lydia Lo, *Designing Accessory Dwelling Unit Regulations: Recommendations for the City of Alexandria, Virginia*, URB. INST. (Nov. 2020), https://www.urban.org/sites/default/files/publication/103275/designing-accessory-dwelling-unit-regulations.pdf [https://perma.cc/WEA4-AYZ5].

147 Infranca, *supra* note 143, at 76.

148 Of note, in many markets, short-term rentals (whether of ADUs or entire houses or apartments) have a dramatic impact on affordable rental housing and the availability of long-term rental stock more broadly. *See* Kellen Zale, *When Everything Is Small: The Regulatory Challenge of Scale in the Sharing Economy*, 53 SAN DIEGO L. REV. 949, 954-55 (2016) (discussing the cumulative impacts of increased short-term rental activity on rental costs and availability of long-term rental stock). A detailed discussion of this impact is beyond the scope of this paper.

149 *See infra* Part II.B.

the deeply embedded normative preference for owner-occupied housing rather than rental housing[150] has resulted in an overemphasis on the promotion of homeownership as a means of wealth building. This preference has thus led some jurisdictions to focus on the provision of affordable homeownership options rather than rentals.[151]

One form of affordable homeownership that some cities and states have invested in is "shared equity homeownership" or "SEH."[152] Perhaps the most well-known form of SEH is deed-restricted housing, which involves either a real covenant or a restriction in the deed that controls how much an owner-occupied residence can be resold for in the future, as well as income or employment requirements for future purchasers.[153] Deed-restricted housing is an important tool in an affordable housing toolbox and offers benefits to those who reside in it. But many would-be residents cannot afford to take advantage of owner-centric affordability tools. Deed-restricted housing is often sold only to people with incomes at, for example, sixty or eighty percent of an area median income (AMI).[154] Or it is designated for residents who work in the community.[155] However, people at or below those income levels and in need of affordable housing are often less likely to have sufficient savings for a down payment, or might lack a credit score high enough to qualify for a mortgage that would be needed to purchase property.[156] Of course, some SEH purchasers would be eligible for down payment

150 *See infra* Part II.C–D. (discussing NIMBYism and the culture of homeownership).

151 For example, a recent proposal in Maine would forgive student debt for those making a first-time home purchase but offers nothing comparable for renters. *See* Julian Kaplan & Ayelet Sheffey, *Maine Might Pay Up to $40,000 of Your Student Loans if You Move There and Buy a House*, BUS. INSIDER (Feb. 26, 2022, 5:45 AM), https://www.businessinsider.com/maine-willl-pay-student-loan-debt-if-you-buy-house-2022-2 [https://perma.cc/PZ7D-VJYK].

152 As stated by scholar Ryan Sherriff:

> [SEH] encompasses a variety of programs . . . that provide long-term (generally thirty years or more) or permanent affordable homeownership opportunities to low- and moderate-income families. These programs typically involve the investment of large public subsidies to reduce the purchase price of homes, together with resale restrictions and/or appreciation-sharing mechanisms that help ensure the homes stay affordable to future purchasers and preserve the value of public subsidies.

Ryan Sherriff, *Shared Equity Homeownership State Policy Review*, 19 J. AFFORDABLE HOUS. & CMTY DEV. L. 279, 280 (2010).

153 DAVIS, *supra* note 125, at 13-14.

154 *Id.* at 38, 41.

155 *See id.* at 56 (explaining that a city or county might require deed-restricted housing priority to be given to community members or other "key workers" such as police officers, firefighters, and schoolteachers).

156 *See, e.g.*, Sherriff, *supra* note 152, at 291 ("[S]hared equity homebuyers in many states have fewer options for first mortgage financing.").

assistance,[157] but the amount of available state funds are typically limited.[158] Thus, deed-restricted housing, by its nature, often caters more to people at or near the median income, rather than low-income families.

Those families and individuals who cannot afford to buy need to rent, but their options may be limited, as the demand for vouchers and affordable rentals typically exceeds their supply.[159] And in jurisdictions that have prioritized the provision of deed-restricted housing—perhaps because it evokes less of a NIMBY-based opposition than the construction of affordable rental units—there may be fewer rental options.[160]

At base, the provision of affordable homeownership options, often at the expense of additional rental units, fails to account for the nonfungible characteristics of many would-be occupants of affordable housing: many individuals simply cannot afford to purchase property, even if it is deed-restricted.[161] Further, because of long-standing structural barriers to building wealth and credit, these individuals are often people of color.

c. *Additional Hurdles for Subsidized Housing Tenants*

There is an enormous literature addressing the problems with existing affordable rental housing options in the United States, and it is beyond the scope of this paper to engage in depth with that literature.[162] However, it is

157 Various works discuss down payment assistance programs and how such programs assist prospective home buyers. *See, e.g.*, Lawton, *supra* note 126, at 198 ("Down payment assistance programs, homeownership counseling programs, adjustments to underwriting standards, and closing cost assistance are just a few of the programs and initiatives funded by public and private sources to increase homeownership among low- and moderate-income residents.").

158 *See* Sherriff, *supra* note 152, at 293 (noting that the "funding capacity" of many state housing trust funds has been "greatly reduced").

159 *See* Michael Diamond, *Shared Equity Housing: Cultural Understanding and the Meaning of Ownership*, *in* THE PUBLIC NATURE OF PRIVATE PROPERTY 39 (Robin Paul Malloy & Michael Diamond eds., 2011) ("There is not today a sufficient number of affordable housing units and the pace at which new affordable units enter the market is insufficient to meet current demand.").

160 While some municipalities might provide their own rent-subsidized apartments to residents, this is likely harder in smaller localities, or those where the property is mostly privately owned and expensive.

161 *See* Suzanne Cheavens, *Creekside Residents Face Uncertain Future*, TELLURIDE DAILY PLANET (Jan. 17, 2020), https://www.telluridenews.com/news/article_e4787fc2-3986-11ea-a91f-cbc4ddfed0a2.html [https://perma.cc/D5Z7-K5PK] ("We are all low-income town employees that can barely afford to rent/eat/raise children in this town, [l]et alone purchase a so-called 'affordable housing deed-restricted condo' for hundreds of thousands of dollars." (quotation marks omitted)).

162 *See infra* Part II.B; *see also infra* note 392 and accompanying text (discussing source of income discrimination). Various examples of scholarship address these problems in greater depth. *See generally* EVA ROSEN, THE VOUCHER PROMISE: "SECTION 8" AND THE FATE OF AN AMERICAN NEIGHBORHOOD (2020) (describing the promises and perils of vouchers); Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540 (2012) (describing discrimination against and harassment of voucher-holders); Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60

worth highlighting how anti-tenancy has manifested in a particularly virulent form with respect to one particular category of tenants: public housing residents.

Scholars have raised concerns with the fact that public housing regulation seems to pass moral judgments about the behavior of public housing tenants and whether they are worthy of public assistance.[163] For example, there are certain personal requirements that people must meet before they can access public housing, including having a job[164] or taking a drug test.[165] Public housing tenants might also lose their existing housing if they are convicted of—or even accused of—certain crimes.[166]

In contrast, there is no equivalent harm or judgment that is visited on most homeowners—even purchasers of affordable housing—or most tenants in the private rental market. In other words, drug use, conviction, and former evictions will generally not result in a loss of property for homeowners.[167] The heightened legal hurdles imposed on public housing tenants are often justified on the grounds that those tenants are obtaining a government-

U. CHI. L. REV. 497 (1993) (examining causes of public housing distress and policies designed to remedy that distress); ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE & HOUSING IN CHICAGO 1940-1960 (1998) (discussing the role of public housing in residential segregation); Freddy Monares, *Housing Costs Are Soaring, but Federal Rental Assistance Isn't Keeping Up*, MONT. PUB. RADIO (Feb. 25, 2022, 7:43 AM), https://www.mtpr.org/montana-news/2022-02-25/housing-costs-are-soaring-but-federal-rental-assistance-isnt-keeping-up [https://perma.cc/R73J-CWAT] (discussing the failure of the Section 8 voucher program to keep pace with rising rents in Montana).

163 *See, e.g.*, MAGGIE MCCARTY, RANDY ALISON AUSSENBERG, GENE FALK & DAVID H. CARPENTER, CONG. RSCH. SERV., R42394, DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE 1 (2013) (discussing "worthiness" in the context of federal programs that provide assistance to low-income individuals and families).

164 *See, e.g.*, *Are You Required to be Employed to Receive Housing Assistance?*, AFFORDABLE HOUS. ONLINE, https://affordablehousingonline.com/housing-help/Are-You-Required-To-Be-Employed-To-Receive-Housing-Assistance [https://perma.cc/HF7S-FKQT] (noting that some waitlists prioritize applicants who are employed and describing the requirements of the "Moving to Work" program).

165 *See, e.g.*, *Section 8—FAQs*, NORWALK HOUS. AUTH. (Sept. 2016), https://www.norwalkha.org/section-8-faq [https://perma.cc/YP3X-BRBT] ("NHA will also conduct a criminal background check and drug testing for all household members 18 years of age and older.").

166 *See, e.g.*, Marah A. Curtis, Sarah Garlington & Lisa S. Schottenfeld, *Alcohol, Drug, and Criminal History Restrictions in Public Housing*, CITYSCAPE: J. OF POL'Y DEV. & RSCH., 2013, at 38 ("[F]ederal guidelines require [public housing authorities] to implement certain alcohol abuse, drug use, and criminal activity restrictions, but they also give PHAs the discretion to create more severe restrictions. As such, the screening criteria for alcohol, drug, and criminal history vary tremendously across PHAs.").

167 *See* Suzanne Cheavens, *Affordable Housing Compliance Checks Begin*, TELLURIDE DAILY PLANET (Oct. 16, 2020), https://www.telluridenews.com/news/article_9d753e68-0ffe-11eb-8d2f-c709f1a69ef0.html [https://perma.cc/YQB6-FE9N] (describing compliance checks for deed-restricted housing that review income, but not criminal history or drug use).

provided benefit.[168] However, broad homeownership subsidies like the mortgage interest deduction are across the board government-provided subsidies that benefit all homeowners who have mortgages. Yet, there are no requirements, such as jobs or drug tests, for homeowners to obtain those benefits, nor have commentators generally suggested such limitations should exist.[169]

5. Relocation Incentives

Many states and localities have long offered economic incentives—tax breaks or other subsidies for land acquisition or infrastructure costs—to corporations in an attempt to bring jobs and growth to their communities.[170] A smaller but growing number of governments have offered a different and more direct type of program to bring human capital to their communities: relocation incentives paid directly to certain types of qualified workers who move to the jurisdiction.[171]

Such programs have proliferated during the pandemic, as the opportunity for remote work has become increasingly available in many knowledge industries employing the type of higher-income workers that communities

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168 Curtis et al., *supra* note 166, at 38 (describing restrictions imposed on public housing tenants as "intended to increase the safety of assisted housing" and to "award a scarce benefit to 'deserving' applicants"). An additional justification for restrictions on public housing tenants is the interest in protecting other public housing tenants from being subjected to living in dangerous communities. Cheavens, *supra* note 167.

169 Not earnestly, anyway. *See* Paul Waldman, *Want That Mortgage Interest Tax Deduction? Pee In this Cup First.*, THE WEEK (Apr. 4, 2017), https://theweek.com/articles/689982/want-that-mortgage-interest-tax-deduction-pee-cup-first [https://perma.cc/F6DN-84NT] (criticizing drug testing requirements for certain government-provided benefits by sarcastically suggesting such requirements may as well apply to mortgage interest tax deductions).

170 *But see* Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1138 (2008) ("[T]he costs of attracting new industry or business through tax incentives are often not offset by local economic benefits. And commentators generally agree that locational incentives do not contribute to national prosperity because they are zero-sum. [One city] gains at the expense of the cities where the plants would otherwise have located." (footnotes omitted)); Matthew T. Furton, *The Use of Penalty Clauses in Location Incentive Agreements*, 70 IND. L.J. 1009, 1018 (1995) ("[M]ost researchers criticize the effectiveness of location incentives . . . . Given the ironic combination of the dubious effectiveness and the remarkable resiliency of location incentives, the necessity for prudent administration is apparent.").

171 *See* Jon Kamp, *Remote Workers Can Live Anywhere. These Cities (and Small Towns) are Luring Them with Perks.*, WALL ST. J. (Oct. 9, 2021, 7:04 PM), https://www.wsj.com/articles/remote-workers-can-live-anywhere-these-cities-and-small-towns-are-luring-them-with-perks-11633820638 [https://perma.cc/9GEA-D6KA] (noting that these incentive programs "mark a shift from an older economic-development model" in that they no longer try "to persuade companies" but focus on individuals). *But see id.* ("Paying to lure new residents has drawn some skeptics. In Vermont, some lawmakers have questioned whether payments are really the deciding factor when people move there . . . . [and whether] that resident [is] really the ideal resident . . . .").

seek as residents.[172] The details of such incentive programs vary, but many of the programs offer differing levels of incentives depending on whether the relocating individuals are incoming homeowners or renters. For example, relocation incentive programs in Michigan, Oklahoma, Iowa, and Mississippi are all conditioned on the relocating party purchasing a home above a certain specified price in the jurisdiction, and do not provide for any relocation incentives to relocating renters.[173] Other programs offer incentives to both incoming homeowners and renters, but provide for higher payments to homeowners.[174]

At first glance, this disparity in incentives may seem logical: like the tax breaks provided to relocating corporations, these individual relocation programs utilize taxpayer dollars, and thus, the government seeks some assurance that there will be a positive return on its investment.[175] Yet the assumption that homeowners will remain in the community and therefore are better investments than renters is far from certain. Homeownership is not necessarily a proxy for a long-term commitment to a community,[176] and

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172 *See* Tim Henderson, *Pandemic Sweetens Lure of Smaller Cities' Relocation Incentives*, STATELINE (Dec. 17, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/12/15/pandemic-sweetens-lure-of-smaller-cities-relocation-incentives [https://perma.cc/XT5B-974B] ("Though the idea started before the pandemic, COVID-19 fed the movement by quintupling the number of remote workers and dampening some of the conviviality millennials sought in big cities.").

173 *See, e.g.*, NATCHEZ, INC. ECON. DEV., SHIFT SOUTH: WORK REMOTELY FROM NATCHEZ & ADAMS COUNTY (2021), http://natchezinc.com/images/uploads/ShiftSouth-Application.pdf [https://perma.cc/B96M-ZR4H] (providing $2,500 of relocation expenses and $300 in stipends for one year to remote workers that purchase homes worth at least $150,000 in Natchez or Adams County, Mississippi); MOVE TO MICHIGAN, https://movetomichigan.org/#signup [https://perma.cc/PT56-HFQA] (presenting a Michigan incentive program that provides a $10,000 to $15,000 forgivable grant to remote workers who purchase a Michigan home worth at least $200,000).

174 *See* Maria Cramer, *Vermont, Oklahoma and Now Topeka, Kan., Want You*, N.Y. TIMES (Dec. 14, 2019), https://www.nytimes.com/2019/12/14/us/Move-to-Topeka-Kansas.html?smid=nytcore-ios-share [https://perma.cc/5BHS-S9TD] (noting that Topeka, Kansas provides a $15,000 relocation incentive for owners and a $10,000 relocation incentive for renters).

175 For example, in the context of corporate tax incentives, local or state governments may require the company receiving the incentive to add a specified number of new jobs within a certain time frame. *See, e.g.*, Michael H. LaFave, *Taking Back the Giveaways: Minnesota's Corporate Welfare Legislation and the Search for Accountability*, 80 MINN. L. REV. 1579, 1581 (1996) (explaining that Minnesota's corporate welfare legislation requires recipients to "add new jobs to the state within two years of receiving aid" or repay the state in full).

176 For example, available data from 2019 and 2020 indicates that approximately six percent of single-family homes nationwide were purchased by home-flippers in each of those years (i.e., buyers who do not intend to reside as owner-residents in the home but rather who intend to remodel and sell the property at a profit within a relatively short time frame). *See 10 Statistics That Show the State of Home Flipping in America Today*, UPNEST (Sept. 24, 2021), https://www.upnest.com/1/post/state-of-home-flipping [https://perma.cc/QJ6Q-7N6Q].

renters are often long-term community residents.[177] Furthermore, relocating workers—particularly those employed in the high-compensation, knowledge-industry fields that relocation incentives often target—contribute to the local economy in numerous ways that do not hinge on their housing status, from paying state and local income and sales taxes to consuming local goods and services.[178]

6. Limits on Commercial Use of Premises

While it is well recognized that homeowners, unlike tenants, can build wealth through appreciation of home values,[179] that is not the only way to build wealth using one's home. The physical premises itself can serve as a situs of wealth-building for occupants in ways that do not rely on the equity-building feature of ownership and thus are, at least theoretically, equally available to both owners and tenants. For example, an owner or tenant could operate a home business or offer a room to paying guests on short-term rental platforms like VRBO or Airbnb.

However, in order to engage in these types of activities, a resident must comply with all applicable private law requirements (such as terms of a lease or HOA rules) as well as public law requirements (such as zoning).[180] Most public land use regulations and private covenants that limit the use of the

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177 *See* Schuetz, *supra* note 76 (indicating that most renters remain in same unit for three years, with twenty percent of renters remaining for eight or more years). Furthermore, while the available data is not specific to renters, the majority of residential moves are within the same county. From this, it is likely that many of the eighty percent of renters who move from their rental home after less than eight years simply move locally. *See* Riordan Frost, *Who Is Moving and Why? Seven Questions About Residential Mobility*, HOUS. PERSPS. (May 4, 2020), https://www.jchs.harvard.edu/blog/who-is-moving-and-why-seven-questions-about-residential-mobility [https://perma.cc/6AJP-CAL6] ("Most moves are local, either within the same county or within the same state. Within-county moves accounted for 65 percent of all moves in 2019, while moves between counties in the same state accounted for 17 percent . . . .").

178 There may be some differences between the net total contributed to local economies at the margins. For example, relocating homeowners may spend more directly at local hardware stores and employing local contractor services, while relocating renters pay rent to their landlords, who in turn may use some of that rent to spend at local hardware stores and employing local contractors. But a relocating renter and homeowner with similar incomes likely similarly contribute to the local economy.

179 *See* discussion *infra* Part II.C. While home value appreciation is not guaranteed, nor is it universally true that homeownership will function as a wealth-building tool, much of U.S. housing law and policy is built on this premise, and there is empirical evidence that for many—although not all—households, homeownership serves this goal. *Id.*

180 Zoning laws may require a conditional use permit for a home business, regardless of whether the resident is a homeowner or tenant. *See, e.g.*, Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1209 (2001) (detailing and critiquing such requirements). Private covenants or HOA rules may also pose barriers to the establishment or operation of home businesses; such private law provisions would typically apply regardless of whether the resident is an owner or tenant. *Id.* at 1234-35.

home for commercial purposes apply equally to both tenants and homeowners.[181] Nonetheless, tenants may face additional limitations that their landlord may impose under the terms of their lease.

Most standard residential lease forms issued by local realtor groups contain provisions that prohibit tenants from engaging in home businesses or short-term rentals,[182] presumably reflecting valid concerns (e.g., wear and tear, noise, liability) that a landlord might have about commercial activities occurring on their residential property.[183] However, competing policy concerns are implicated when landlords have complete discretion over whether tenants can engage in any commercial activities in their home. In-home childcare provides a particularly stark example. Locally available and affordable childcare is an integral element of economic growth and opportunity for providers, families, children, and communities.[184] However, in many communities, would-be home childcare providers who are tenants are prohibited from operating such programs because of their lease terms, even though the exact same activity would be permitted were they

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181 Some public laws regulating short-term rentals differentiate between owners and renters. *See, e.g.*, SUMMIT CNTY, COLO., DEV. CODE § 3821.03(B) (2020) (stating that a short-term vacation rental property license "shall be issued in the name of the owner and shall not be transferable"); BERKELEY, CAL., MUN. CODE § 23.314.050(A)(2) (2022) (allowing a short-term rental to be operated by a "tenant-host" only if they provide "written authorization allowing for a short-term rental . . . from the building owner or authorized agent of the owner"). The intent of such public laws is typically to protect long-term rental housing stock from being converted into short-term rentals, and to address negative impacts on neighborhoods from short-term rentals. *See generally* Zale, *supra* note 148.

182 *See* Marcia Stewart, *Typical Provisions in Leases and Rental Agreements*, NOLO (2022), https://www.nolo.com/legal-encyclopedia/free-books/renters-rights-book/chapter2-4.html [https://perma.cc/NM57-CBMR] (describing typical residential lease provisions, including typical limits on tenant behavior, guest stays, assignments or sublets, and use of the property). While few residential lease forms explicitly address short-term rentals, most landlords (as well as courts and commentators) interpret standard lease terms prohibiting assignment or subletting without permission to operate as a prohibition on short-term rental by a tenant. *See* Zale, *supra* note 148, at 985 n.158, 986 n.160 (noting that lease terms have been interpreted as forbidding tenants from offering short-term rentals, providing landlords with grounds for eviction if tenants engage in home-sharing in violation of their lease).

183 In the case of short-term rentals, landlords also have a financial disincentive: if a tenant engages in short-term rental activity, the tenant benefits from use of the property at the (typically) higher short-term rental rate for nightly use, while the landlord is only getting paid the agreed upon monthly rent by the tenant. *See* Zale, *supra* note 148, at 985-86.

184 *See* COMM. FOR ECON. DEV., CHILD CARE IN STATE ECONOMIES 24 fig.15, 32-33 (2019), https://www.ced.org/assets/reports/childcareimpact/181104%20CCSE%20Report%20Jan30.pdf [https://perma.cc/S5LE-ZTQ7] (providing data linking economic growth and affordable childcare, and noting that the U.S. child care industry provided employment for over one and a half million workers in 2016); *see also* RACHEL LEVENTHAL-WEINER & CYD OPPENHEIMER, CONN. VOICES FOR CHILD., HOME BASED CHILD CARE PROVIDERS IN GREATER HARTFORD 2, 14 (2014), https://www.hfpg.org/application/files/1315/8102/3257/HFPG_HACCC_Report_FINAL.pdf [https://perma.cc/E84T-RWLV] (discussing the educational and economic reasons underlying home-based childcare utilization).

homeowners.[185] This prohibition has a particularly perverse effect on who it adversely impacts, since tenants have significantly lower household incomes and less household wealth than homeowners. Thus, they are more likely both to need affordable childcare and to benefit from the opportunity of building a more secure economic foundation as an operator of an in-home family childcare facility.[186]

7. Remedies for Pursuing Housing Code Violations

Across much of the country, apartment buildings are deteriorating. Problems like mold, rodent or bug infestations, and sewage leaks typically violate local health and safety codes.[187] And although tenants are the victims of these harms, individual tenants typically do not have the power to fix these problems under the terms of their lease.[188] Thus, tenants who live in these buildings have limited options. They could try to rely on their landlord, but often landlords—especially those who own deteriorating buildings—are not very responsive to tenant requests for maintenance.[189] They could try to

185 In addition, public laws that require a resident to obtain a conditional use permit (also known as special permits or special exceptions) may impose additional barriers on would-be home childcare providers, regardless of whether they are an owner or renter. *See, e.g.*, DEREK MRAZ & PATRICK WOOLSEY, YALE L. SCH. CMTY. & ECON. DEV. CLINIC, OBSTACLES TO AFFORDABLE CHILD CARE IN CONNECTICUT: POLICY REPORT 9 (2019) [hereinafter CHILD CARE IN CONNECTICUT], https://allourkin.org/files/galleries/Zoning_Policy_Report.pdf [https://perma.cc/SQ35-4YP9] (discussing the number of municipalities in Connecticut that require group home childcare providers to obtain a special permit to operate).

186 In-home childcare has been recognized as one of the most accessible small business opportunities for lower-income individuals—especially women, and particularly women of color. *See* CHILD CARE IN CONNECTICUT, supra note 185, at 5; *see also* Cindy Larson & Bevin Parker-Cerkez, *Investing in Child Care Fuels Women-Owned Businesses and Racial Equity*, LOC. INITIATIVES SUPPORT CORP. (Mar. 8, 2022), https://www.lisc.org/our-stories/story/investing-child-care-fuels-women-owned-businesses-racial-equity [https://perma.cc/8T33-QBJX] ("An estimated 90 percent of [small businesses in the childcare sector] are owned by women, more than half of whom are women of color."). Further, lease provisions prohibiting in-home childcare also may create perverse incentives for the operation of *unlicensed* in-home childcare, which undermines the public policy goals of having a system to monitor childcare operations to ensure children's and providers' safety and well-being. *See* CHILD CARE IN CONNECTICUT, *supra* note 185, at 4-5.

187 *See, e.g.*, HEATHER K. WAY & CAROL FRASER, UNIV. TEX. SCH. OF L. ENTREPRENEURSHIP & CMTY. DEV. CLINIC, OUT OF ORDER: HOUSTON'S DANGEROUS APARTMENT EPIDEMIC 20 (2018) https://law.utexas.edu/wp-content/uploads/sites/11/2018/02/2018-02-ECDC-FullReport-HoustonApartments.pdf [https://perma.cc/ZJ6D-G8DG] (discussing such conditions throughout apartment complexes in Houston and the local regulations that aim to prevent such conditions).

188 Nor would many tenants have the money or incentive to do so, given that they do not own the property.

189 *See, e.g.*, Amy Pritchard, Lynn Foster & Jimmy Gazaway, *The Public Health Connection to the Implied Warranty of Habitability and HB1410*, 54 ARK. LAW 24, 26 (2019) (noting that seventy-three percent of respondent tenants had to ask landlord to fix a problem more than once).

allege breach of the implied warranty of habitability (IWH) and withhold rent,[190] but doing so is risky,[191] expensive, and procedurally difficult.[192]

Thus, recourse for tenants often defaults to the municipality's enforcement of its health and safety codes.[193] However, many cities employ too few health inspectors to effectively enforce code violations.[194] Further, even if an inspection is undertaken, violations are discovered, and a civil penalty or fine is assessed against the landlord and paid, that money typically goes to the local government.[195] The government is not acting as an enforcer of the tenant's rights in these situations, as the city or the public—not the individual tenant—is the client.[196] Thus, the tenants who have suffered in substandard housing typically do not recover any of the obtained monetary relief.[197]

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190 Tenants may have additional causes of action beyond the warranty of habitability. *See* Kathryn A. Sabbeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. POVERTY L. & POL'Y 97, 111-15 (2019) (summarizing potential causes of action other than IWH breaches, including common law torts, consumer protection statutes, and antidiscrimination laws). Further, withholding rent is not always permissible in many jurisdictions. *See, e.g.*, N.C. GEN. STAT. § 42-44(c) (2021) ("The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.").

191 Withholding rent might subject tenants to an eviction lawsuit. *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 443 (2011) (discussing how courts' potential insertion of an implied notice requirement of the IWH could expose tenants to retaliation). Even if the tenants ultimately prevail, the eviction lawsuit will remain on their record, which could affect their future housing prospects. *See, e.g.*, LAW. COMM. FOR BETTER HOUS., HOUS. ACTION ILL., PREJUDGED: THE SIGMA OF EVICTION RECORDS 5 (2018), https://housingactionil.org/downloads/EvictionReport2018.pdf [https://perma.cc/5UDG-9A48] (finding that, in Chicago, many landlords will assume culpability and refuse to rent to someone if they see an eviction filing on their record, regardless of a case's context or outcome).

192 *See* Anthony J. Fusco, Jr., Nancy B. Collins & Julian R. Birnbaum, *Damages for Breach of the Implied Warranty of Habitability in Illinois—A Realistic Approach*, 55 CHI.-KENT L. REV. 337, 338 (1979) ("[B]reach of the implied warranty of habitability is the most often alleged defense by tenants in eviction actions, yet the trial courts repeatedly refuse to consider this defense." (footnote omitted)); *see also* Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145, 199-204 (2020) (providing empirical evidence of judges' failures to enforce the warranty of habitability).

193 *Cf.* Sabbeth, *supra* note 190, at 119-20 (stating that lack of enforcement may also occur because low-income tenants are unable to afford lawyers).

194 *See* WAY ET AL., *supra* note 187, at 1 (noting that the city of Houston only has two health inspectors enforcing interior health code violations).

195 *See, e.g.*, TEX. LOC. GOV'T CODE ANN. § 54.017(a) (West 2021) ("In a suit against the owner . . . the municipality may recover a civil penalty . . . ."); PATTERSON, CAL., MUN. CODE § 1.32.015 (2022) ("When this code is violated, the city may collect damages . . . [and] seek remedies . . . ."). Further, in the instances where tenants actually are awarded a rent abatement, the calculation of tenants' damages fails to fully recognize or properly compensate their losses. *See* Sabbeth, *supra* note 190, at 121 (concluding that rent abatements are proportional to class and undervalue home as a place to live).

196 Sabbeth, *supra* note 190, at 131.

197 *Id.* at 133-34. Compare this to the Fair Housing Act, wherein the Department of Justice does obtain monetary relief for those who have been discriminated against. *Id.* at 132.

C. *Constitutional Law*

Anti-tenancy extends beyond land use and housing law into a range of other doctrinal contexts, including constitutional law. Here, we discuss the anti-tenancy bias that is woven into the First, Second, Fourth, and Fifth Amendments, and voting rights under the Fourteenth Amendment.

1. First Amendment: Free Speech

Political speech is one of the core rights protected by the First Amendment. As such, local governments cannot enact zoning or other laws that prohibit residents from displaying a campaign sign in a yard or window, nor can they restrict the right of residents to assemble to protest for or against a political cause.[198] While certain time, place, and manner restrictions are permissible—including limitations on the dimensions or number of signs—any such regulations will be closely scrutinized by courts and must be narrowly tailored to advance a significant government interest.[199]

In contrast, private actors—including private, non-governmental landlords—are generally not subject to the First Amendment.[200] Landlords are thus free to impose anti-signage and/or anti-assembling rules in their leases, which may trigger an eviction if violated.[201] As a result, despite the

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198 *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 54-59 (1994) (discussing the importance of political speech in the residential sphere and striking down a ban on residential political signs).

199 *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

200 The First Amendment (and all other amendments other than the Thirteenth) do not apply to private conduct unless that private conduct is found to be state action. As the Court held in *Lugar v. Edmondson Oil Co.*:

> Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State . . . . [T]he party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

201 *See, e.g.*, Mortellaro, *supra* note 14, at 166 ("Even if my landlord had not ensconced an anti-signage rule into the lease I signed, defying the request may have led to my eviction a few months later."). Even absent such a lease provision, if a landlord disagrees with a particular tenant's political speech, the landlord can take other actions against the tenant, such as intimidating them or calling the police. *See* Marcela Mitaynes, *Landlords Use Police to Stop Tenants from Organizing*, JACOBIN MAG. (June 22, 2020), https://jacobinmag.com/2020/06/nypd-landlords-tenant-organizing-housing [https://perma.cc/R76E-XB95] (describing how community organizers invited by tenants to meet in their building lobby were threatened with arrest).

fact that the First Amendment protects renters and homeowners alike from suppression of political speech by governmental entities, renters lack "the political rights to express, associate, and receive information that homeowners enjoy."[202] Landlords wield "enormous power to censor what renters say, limit who they say it with, and even control what they hear."[203]

Landlord control over the political speech of tenants, combined with the legal and structural barriers to voter outreach and canvassing of tenants,[204] has the effect of making "political participation costlier for renters than for homeowners" and amplifying the already outsized voice that homeowners have in the political process—particularly at the local level.[205] Not only does this potentially distort the extent of political support that tenants might otherwise provide for candidates and issues, but it also further marginalizes the political voice of those most likely to be tenants: low-income individuals and people of color.

2. Second Amendment

Courts and state legislatures have taken an increasingly expansive view of the Second Amendment in recent years, with the former striking down various limitations viewed as violating gun owners' constitutional rights and the latter enacting increasingly permissive gun laws.[206] However, this expansiveness is tempered by the tension that exists between property rights and the Second Amendment. This tension stems from the longstanding recognition that the right to control who may enter one's private property—and to impose conditions on that entry, including a condition prohibiting the possession of firearms—is fundamental to property law.[207] For example, in

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202 Mortellaro, *supra* note 14, at 189.

203 *Id.* at 165.

204 *See* discussion *infra* subsection I.C.5.

205 Mortellaro, *supra* note 14, at 168; *see also id.* at 179 ("Many [renters] may find those costs too great to bear and forego such [political] activities entirely for fear of landlord retaliation. Because homeowners do not have landlords and tend to live in stable housing arrangements, they continue to have measurable advantages over renters in the public sphere and are better positioned to have their voices heard in political discourse.").

206 *See generally* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022) (holding that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside of the home); Kevin Behne, *Packing Heat: Judicial Review of Concealed Carry Laws Under the Second Amendment*, 89 S. CAL. L. REV. 1343 (2016) (overviewing Second Amendment jurisprudence).

207 *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 58, at 393 (5th ed. 1984) ("The possessor of land has a legally protected interest in the exclusiveness of his possession. In general, no one has any right to enter without his consent, and he is free to fix the terms on which that consent will be given." (citations omitted)); *see also* David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 291 (2018) ("The

2012, the Eleventh Circuit upheld a state law that allowed private property owners to ban the possession of firearms by anyone on their private property, stating:

> An individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land. The Founding Fathers placed the right to private property upon the highest of pedestals, standing side by side with the right to personal security that underscores the Second Amendment.[208]

While this principle has most often been applied in the context of invitees on privately owned property, it also provides support for laws in a handful of states with otherwise permissive firearms laws that explicitly permit landlords to prohibit tenants from possessing lawfully owned firearms on leased property.[209] Although landlords in these states cannot legally prohibit tenants from owning firearms, these laws allow landlords to prohibit the possession of firearms by tenants on the premises of their rental properties. These restrictive lease provisions leave tenants with less expansive Second Amendment rights than homeowners in states with otherwise minimal limitations on gun ownership.[210]

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rights of private property owners are not part of the sensitive places doctrine. Any private property owner can prohibit guns . . . . [G]overnment assistance to property owners who want to exclude guns is simply an aspect of government support for property rights.").

208 GeorgiaCarry.Org, Inc. v. Georgia, 687 F.3d 1244, 1265 (11th Cir. 2012). For further discussion of the intersection of property rights and the Second Amendment, see Adam B. Sopko, *Second Amendment Background Principles and* Heller*'s Sensitive Places*, 29 WM. & MARY BILL RTS. J. 161, 161 (2020) ("Justice Scalia observed that both property rights and the right to keep and bear arms are fundamental rights that prefigure ratification.").

209 *See, e.g.*, TENN. CODE ANN. §§ 39-17-1359, 66-28-402 (2022) (stating, in relevant part, that an individual is authorized to prohibit the possession of a weapon on any property she owns, operates, or manages, and the tenant must abide by such rules and regulations); GA. CODE ANN. § 16-11-127(c) (2022) (granting landlords the right to prohibit firearms on their property). Most states do not have specific statutes on whether landlords can prohibit firearm possession by tenants, but a handful of states take the opposite approach, and explicitly block landlords from prohibiting firearm possession by tenants. *See, e.g.*, MONT. CODE ANN. § 70-24-110 (2021) ("A landlord . . . may not, by contract or otherwise, prevent a tenant or a guest of a tenant from possessing on the premises a firearm that it is legal for the tenant or guest to possess."); MINN. STAT. § 624.714(17)(f) (2021) ("A landlord may not restrict the lawful carry or possession of firearms by tenants or their guests.").

210 In identifying this disparity, the authors do not wish to suggest that such laws are invalid. Federal courts have upheld such laws as striking a constitutional balance between property rights and the Second Amendment. *See supra* note 208 and accompanying text. Moreover, from a policy perspective, such laws contribute to gun safety efforts. Nonetheless, such laws provide another example of how anti-tenancy manifests in the law.

3. Fourth Amendment

The Fourth Amendment of the U.S. Constitution provides, in relevant part, that individuals have the right to be free from unreasonable governmental searches and seizures.[211] The "home" has been offered exceptionally strong Fourth Amendment protection under Supreme Court precedent.[212] However, this is yet another context in which owners and renters are treated differently under the law, based on whether their "home" is a space they own or rent. Three key areas where we see this distinction in Fourth Amendment jurisprudence are: (a) how the location impacts whether certain activities constitute a search requiring a warrant; (b) governmental rental inspections; and (c) landlord inspections.

a. *Searches: Single-Family Curtilage and Multifamily Hallways*

At base, the plain language of the Fourth Amendment seems to equally protect homeowners and renters; both groups have an expectation of privacy in their homes, and both might reasonably assume their homes are "constitutionally protected area[s]."[213] As Justice Scalia noted in a concurring opinion in *Minnesota v. Carter*:

> [T]his is not to say that the Fourth Amendment protects only the Lord of the Manor who holds his estate in fee simple. People call a house "their" home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free—*so long as they actually live there*.[214]

In practice, however, this has not been the case.

While tenants might have strong protections inside their dwelling units, many renters live in multi-unit apartment buildings with common spaces

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211 U.S. CONST. amend. IV.

212 *See, e.g.*, United States v. Karo, 468 U.S. 705, 714 (1984) ("[P]rivate residences are places in which the individual normally expects privacy . . . and that expectation is plainly one that society is prepared to recognize as justifiable."); Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 912-16 (2010) (describing the arc of Fourth Amendment jurisprudence that defends the home as a "sacred site at the 'core of the Fourth Amendment'") (quoting Wilson v. Layne, 526 U.S. 603, 612 (1999).

213 United States v. Jones, 565 U.S. 400, 407 (2012).

214 525 U.S. 83, 95-96 (1988) (Scalia, J., concurring). For further discussion of owner and tenant expectations of privacy under the Fourth Amendment, see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 810 (2004) ("So long as the tenant complies with the rental contract that grants him the right to exclude others in exchange for rent money, he enjoys the full panoply of Fourth Amendment protections.").

such as entryways, hallways, and stairwells.[215] The majority of circuit courts that have considered the issue have found that tenants do not have a reasonable expectation of privacy in these common areas.[216] Therefore, police dogs are allowed to sniff in the hallways and common areas in the absence of a warrant without violating the Fourth Amendment rights of tenants who live in those buildings.[217] In contrast, a homeowner's curtilage—"the land immediately surrounding and associated with the home"[218]—is typically offered protection under Fourth Amendment jurisprudence although it is outside the walls of the home.[219] As scholars have recognized, this means that "only citizens living in places with curtilage—i.e., most privately owned single-family homes—are afforded Fourth Amendment protection from police dogs sniffing for narcotics."[220] Thus, the physical structure of the home plays an important role in determining the extent of Fourth Amendment protections.[221] Of course, some homeowners live in multi-unit condominium buildings, just as some renters live in single-family homes.[222] However, the weakened Fourth Amendment protections in multi-unit buildings will

215 *See, e.g.*, Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN L. REV. 1005, 1009-13 (2010) (discussing the Fourth Amendment's "inside/outside distinction").

216 *See* Alexander Porro, *Dwelling in Doubt: Do Tenants Have a Reasonable Expectation of Privacy in the Common Areas of Their Apartment Buildings?*, 2018 U. CHI. LEGAL F. 333, 342 ("The First, Third, Seventh, Eighth, and Ninth Circuits have . . . [held] that tenants do not have a reasonable expectation of privacy in the common areas of their apartment buildings.").

217 *See* Jackie McCaffrey, Note, *Fourth Amendment Protections in Common Areas of Apartment Buildings: How the* Whitaker *Holding Contributes to the Circuit Split*, 2018 U. ILL. L. REV. 1147, 1154-58 (describing a circuit split on whether the use of drug-sniffing dogs in apartment common areas violates the Fourth Amendment).

218 *See* Oliver v. United States, 466 U.S. 170, 171, 180 (1984) (further describing curtilage as the area "which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life'") (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

219 *See* Florida v. Jardines, 569 U.S. 1, 7-9 (2013) (holding that the warrantless use of a drug-sniffing dog in the "curtilage" of a home was unconstitutional).

220 David C. Roth, Comment, Florida v. Jardines*: Trespassing on the Reasonable Expectation of Privacy*, 91 DENV. U. L. REV. 551, 571 (2014).

221 *See* Michael Mayer, *Keep Your Nose Out of My Business—A Look at Dog Sniffs in Public Places Versus the Home*, 66 U. MIAMI L. REV. 1031, 1045 (2012) ("If courts continue to find that no search occurs when in the context of an apartment building, but perhaps a search does occur when at a person's private home, then people who are more financially successful would have greater Fourth Amendment protections . . . ."); *see also* United States v. Roby, 122 F.3d 1120, 1126-27 (8th Cir. 1997) (Heaney, J., dissenting) ("The majority, in highlighting that the hotel corridor significantly limits Roby's expectation of privacy in his room seems ready to accept that persons who live in apartment complexes similarly have a limited expectation of privacy in their rented home because other people have access to the apartment hallways. I do not believe that the Fourth Amendment protects only those persons who can afford to live in a single-family residence with no surrounding common space.").

222 *See* AMERICA'S RENTAL HOUSING 2020, *supra* note 24, at 15 fig.15.

disproportionately harm renters.[223] Indeed, one of the few cases that does extend Fourth Amendment protections to common hallways in apartments, *United States v. Whitaker*, expressly recognized this problem, stating that "a strict apartment versus single-family house distinction is troubling because it would apportion Fourth Amendment protections on grounds that correlate with income, race, and ethnicity."[224] And yet, in most jurisdictions, this is precisely the result of courts' interpretations of the Fourth Amendment: those living in apartment buildings are offered less protection under the Fourth Amendment than those who live in single-family homes.[225]

b. *Administrative Searches Pursuant to Rental Inspections and Housing Codes*

Many jurisdictions have adopted housing codes that establish minimum standards of habitability or require rental licenses before a property may be rented.[226] To the extent these codes are enforced, it is typically through inspections by local governmental entities, which constitute administrative searches of private property. For example, an ordinance may require tenants to allow governmental rental inspections, including access to "any part" of the home, without probable cause.[227] While intended to protect renters by ensuring that rental properties are habitable, these provisions expose renters to a level of governmental intrusion that homeowners are simply not exposed to. To that end, these ordinances might allow for searches without warrants at all, or with only a general administrative search warrant, which is granted without any specific probable cause or "individualized suspicion" of wrongdoing.[228] While some courts have struck down such ordinances that

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223 Forty-five percent of rental households live in multi-unit buildings with five or more units, while seventeen percent live in buildings with two to four units. STATE OF THE NATION'S HOUSING 2020, *supra* note 128.

224 United States v. Whitaker, 820 F.3d 849, 854 (7th Cir. 2016); *see also* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 406 (2003) ("[T]here are fairly robust indications that the Court's caselaw affords the poorer people in our country much less protection of their privacy and autonomy than those who are better off.").

225 Of course, given that a person's Fourth Amendment rights relate to reasonable expectations of privacy, some might argue that a single-family homeowner in the suburbs has a greater expectation than a higher-density urban renter.

226 *See, e.g.*, PEW CHARITABLE TRS., RENTAL CODE ENFORCEMENT IN PHILADELPHIA (2021), https://www.pewtrusts.org/-/media/assets/2021/11/rental-enforcement-in-philly.pdf [https://perma.cc/9LRU-67N8]; CHANGELAB SOLS., A GUIDE TO PROACTIVE RENTAL INSPECTION PROGRAMS (2014), https://www.changelabsolutions.org/sites/default/files/Proactive-Rental-Inspection-Programs_Guide_FINAL_20140204.pdf [https://perma.cc/4VXY-FQ6F].

227 *See, e.g.*, GOLDEN VALLEY, MINN., CITY CODE § 16-56(f) (2022) ("Each tenant shall grant access to any part of its rental dwelling at reasonable times for the purpose of effecting inspection . . . .").

228 *See* Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 633-34 (1989) (holding that neither probable cause nor individualized suspicion is necessary for mandatory drug testing of railway employees involved in accidents or safety violations); *see also* Camara v. Mun. Ct., 387 U.S. 523, 539-

allow for these rental inspections without warrants,[229] generally courts have upheld those conducted pursuant to administrative warrants.[230] Thus, cities are effectively allowed to inspect a rental property without the permission of the renter.[231]

c. *Landlord Searches*

Finally, renters are more vulnerable to government intrusions in yet another way. Leases often allow for landlord inspection or visitation with minimal notice.[232] If a landlord inspects the premises and suspects evidence of illegal activity or contraband, they might pass this information on to the police.[233] While the landlord's interest in ensuring that illegal activity does not occur on the premises may be understandable, the effect is to create a legal gap in Fourth Amendment protections for renters.[234] Because the landlord is generally not a state actor, the landlord inspection is not a Fourth Amendment search. But the third-party rule allows the government to obtain information revealed to third parties—like landlords—even if that information was obtained through the landlord's search of the tenant's

40 (1967) (holding the same). Generally, the Fourth Amendment requires that the government obtain a warrant or voluntary consent (with a few narrow exceptions). *Id.* at 536-38.

229 For example, an Ohio city's ordinance that required warrantless inspections of rental properties every time a new tenant moved in (or every two years) was held to violate the Fourth Amendment. Pund v. City of Bedford, 339 F. Supp. 3d 701, 713 (N.D. Ohio 2018); *see also* Baker v. City of Portsmouth, No. 1-14-CV-512, 2015 WL 5822659, at *5 (S.D. Ohio Oct. 1, 2015).

230 For example, the Supreme Court denied certiorari in *Nelson v. City of Rochester*, a lawsuit challenging the issuance of administrative warrants to conduct rental inspections "based solely on the fact that the properties' six-year occupancy certificates were up for renewal." Ilya Shapiro, *Don't Renters Have Fourth Amendment Rights?*, CATO INST. (Dec. 26, 2012, 12:09 PM), https://www.cato.org/blog/dont-renters-have-fourth-amendment-rights [https://perma.cc/R637-7BRP] (citing Nelson v. City of Rochester, 568 U.S. 1205 (2013) (denying petition for writ of certiorari)). Because of this, the lower court's determination that there was no Fourth Amendment violation remains good law. *In re* City of Rochester, No. 09367, 935 N.Y.S.2d 748 (N.Y. App. Div. Dec. 23, 2011).

231 One could argue that the difference in treatment is related to safety: the safety of an apartment is in part based on the safety of the other units in the building.

232 *See* Jay M. Zitter, Annotation, *Notice or Consent Required for Landlord to Exercise Right to Entry for Inspection, Repair, or Maintenance*, 49 A.L.R. 7th Art. 4, § 2 (2020) ("[M]ost leases and landlord-tenant statutes provide that the landlord has a right to enter in certain situations, primarily to repair and inspect and to show the property to prospective buyers and renters.").

233 *See* discussion *infra* Part I.D (discussing crime-free housing ordinances).

234 For a discussion of the even more intrusive access that public housing and welfare-recipients must provide, see Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 708 (2009) ("[T]he Fourth Amendment's protection from search and guarantee of privacy in the home do not appear to apply to welfare recipients."), and Slobogin, *supra* note 224, at 406.

apartment.[235] Further, homeowners who might be suspected of illegal activities are subject to fewer private inspections that might expose them to risk of police notification. Thus, the result is, once again, fewer legal protections and greater burdens on renters.

4. Fifth Amendment: Eminent Domain

Eminent domain is permissible under the Fifth Amendment as long as it is for a public use and just compensation is paid;[236] it has long been recognized as an important tool that the government may need to utilize to undertake needed public projects. However, many commentators have also voiced concerns about its disproportionate use in neighborhoods with historically marginalized populations and its use to benefit private corporate interests more than the general public.[237] Less attention has been given to how eminent domain systemically devalues the interests of tenants in at least two ways: (a) the near-universal rejection of compensating residential tenants when their home has been condemned; and (b) post-*Kelo* state laws providing greater protections for homeowners than for tenants from the possibility of their residences being subject to eminent domain.[238]

a. *No Compensation for Most Residential Tenants*

As a matter of black-letter law, both landlord and tenant have a constitutionally protected property interest if a leased property is the subject of an eminent domain action, absent any language in the lease to the

235 *See* U.S. v. Miller, 425 U.S. 435, 443 (1976) ("[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities . . . .").

236 U.S. CONST. amend. V.

237 *See* discussion *infra* notes 254–255.

238 A third aspect of eminent domain law that reflects anti-tenancy bias is found in state laws requiring property ownership for eligibility to serve on a jury in a condemnation proceeding. *See, e.g.*, TEX. PROP. CODE ANN. § 21.014(a) (West 2022) (requiring three property owners to be appointed in order to assess damages to a property being condemned); W. VA. CONST. art III, § 3-9 (stating that a jury of twelve impartial freeholders may be used by parties in the seizure of private property); OKLA. CONST. art II, § 24 (using a board of at least three freeholders to determine compensation for private property taken or damaged for public use); COLO. REV. STAT. § 38-1-106 (2022) ("The owner of the property involved in any proceeding . . . may demand a jury of freeholders . . . ."). There is scant legislative history on the rationale for such requirements, but anecdotally, it appears that the intent is for the decision about just compensation to be made by individuals who can identify with the prospect of having their property taken from them. However, these requirements also reflect deeply rooted assumptions about the civic virtue (or lack thereof) of non-landowners. While jury consultants and trial lawyers typically seek out jurors who they believe will be sympathetic to their party's position, the explicit assumption in the condemnation statutes—that tenants cannot competently or fairly assess fair market value—is notable for its blatant anti-tenancy.

contrary.[239] However, residential tenants are almost never entitled to compensation under the Fifth Amendment or analogous provisions of state law.[240] This is because even though a tenant who resides in a property that has been condemned unquestionably has lost a property interest—their right to possession of the premises for the remainder of the lease term—under landlord-tenant law, total condemnation is treated as a termination of the lease, thereby relieving the tenant of their obligation to pay rent through the remainder of the term.[241] And because most residential leases are short-term (i.e., one-year),[242] the fair market value of the remaining months under the lease (i.e., the lost value to the tenant for which just compensation is required) is near-universally equated to the rent as agreed upon in the lease. As scholars have noted, "[i]n the language of takings literature, the cancellation of [the tenant's] lease obligation provides him with 'implicit in-kind' compensation for his loss of possession."[243]

Thus, while both a homeowner and a residential tenant lose their home as a result of a total condemnation, in the majority of circumstances, only the homeowner will receive any compensation for this loss.[244] While this disparity may be justified on the economic grounds noted above, some commentators have questioned the lack of compensation to residential tenants, since tenants, who actually reside at the property and make their

239 *See* Victor P. Goldberg, Thomas W. Merrill & Daniel Unumb, *Bargaining in the Shadow of Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant*, 34 UCLA L. REV. 1083, 1086-87 (1987) (stating that both landlord and tenant have constitutionally protected property interests); *see also* Kohl v. United States, 91 U.S. 367, 377 (1875) (stating that both the landlord and the tenant have a constitutionally protected property interest when leased property is taken in eminent domain).

240 Goldberg et al., *supra* note 239, at 1088 ("[T]enants holding short-term leases rarely press takings claims . . . when they do, such claims have generally been denied." (quoting 2 J. SACKMAN & P. ROHAN, NICHOLS ON EMINENT DOMAIN § 5.06[4] (3d ed. 1985))).

241 *See* Utah Dep't of Transp. v. Kmart Corp., 428 P.3d 1118, 1123 (Utah 2018) ("Although a condemnation provision may be structured in any way the parties like, it often contains a clause that terminates the lease upon 'the taking by eminent domain of the whole or a part of the premises leased.'" (quoting 4 NICHOLS ON EMINENT DOMAIN § 12D.01[3][e] (3rd ed. 1997))).

242 *See* Schuetz, *supra* note 76 ("Despite high costs of moving to both landlords and tenants, most residential leases in the U.S. only run for one year.").

243 Goldberg et al., *supra* note 239, at 1089-90 (citing R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195-215 (1985)).

244 A handful of jurisdictions have laws providing limited funding for tenant and homeowner relocation expenses if the residence is the subject of an eminent domain action. *See, e.g.*, L.A., CAL., RENT STABILIZATION ORDINANCE § 151.09(G) (2005) (requiring landlords to pay relocation fees to tenants); MICH. COMP. LAWS § 213.352 (2022) (requiring reimbursement by public agency for reasonable and necessary moving expenses). However, such funding is not compensation for the tenant's lost property interest or use value; rather, it is a separate allocation of funding in recognition of the reality that losing one's home because of an eminent domain action necessarily imposes relocation costs on the tenant. *See* Schuetz, *supra* note 76 ("The out-of-pocket costs—hiring movers, paying application fees, security deposits, and utility connections—can quickly add up.").

home there (unlike the landlord), derive use value from their possession that the economic calculation above fails to account for.[245] Furthermore, although most residential leases are for one-year terms, using that as the calculus for the tenant's lost property interest fails to account for the fact that most tenants renew their one-year leases and remain in their leased home for several years: half of all renters nationwide stay in their rental home for three years, and twenty percent stay for eight or more years.[246]

b. *Post-*Kelo *State Laws Provide Less Protection to Tenants*

In its 2005 decision, *Kelo v. City of New London*, the Supreme Court upheld the use of eminent domain—specifically, a city's condemnation of the non-blighted houses of several middle-class, white homeowners—for the purposes of economic redevelopment.[247] While legal scholars agree that the decision was firmly grounded in precedent, the decision sparked significant controversy; many middle-class homeowners echoed the concern voiced by Justice O'Connor in her dissent that the Court's holding meant that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[248]

In response, over forty states enacted laws tightening the requirements for the use of eminent domain.[249] While many of these statutes protect residential property generally from being subject to eminent domain, several states' post-*Kelo* statutes provide greater protections for homeowners than for tenants. For example, Alaska's post-*Kelo* statute prohibits the use of eminent domain "for the purpose of developing a . . . project if the property to be acquired includes an individual landowner's personal residence," but no corresponding limitation applies if the property to be acquired is used as a

245 *See* Lyons, *supra* note 109, at 282 ("[W]hile the tenant's rent reflects much of the utility the tenant derives from the parcel, the tenant also likely has [additional value] in the parcel's pre-condemnation use."); *see also id.* at 287 ("The tenant's use value turns on idiosyncratic locational benefits such as proximity to friends, work, and school."); Margaret Jane Radin, *Residential Rent Control,* 15 PHIL. & PUB. AFFS. 350, 369 (1986) (discussing how tenants can benefit from a tenant "spiritual community"). *But see* Goldberg et al., *supra* note 239, at 1090 (noting that it is "well established that the government is not constitutionally required to compensate [either tenants or owners] for lost subjective value or consumer surplus."); *id.* at 1090 n.18 ("It could be that the rule is bad, but if so, it should be changed across the board, not simply . . . [for] leased property.").

246 Schuetz, *supra* note 76.

247 Kelo v. City of New London, 545 U.S. 469, 488-90 (2005).

248 *Id.* at 503 (O'Connor, J., dissenting).

249 CASTLE COAL., 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO*, http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf [https://perma.cc/3UY6].

tenant's residence.[250] In Utah, post-*Kelo* statutory reforms provide greater procedural protections before eminent domain may be exercised against owner-occupied property, but not tenant-occupied property.[251] And in California, voters approved the Homeowners and Private Property Protection Act, a ballot measure clarifying that eminent domain may not be used to transfer "owner-occupied residence[s]" to another private party,[252] but not providing any such clarification as to whether eminent domain could be used to do so in the case of tenant-occupied residences.[253] While some of the heightened protections for homeowners in post-*Kelo* laws may be an appropriate way to protect the investment of homeowners, the practical result may be that eminent domain is exercised against other types of property with fewer legal restrictions, such as those occupied by tenants.

Furthermore, the very fact that the *Kelo* decision itself generated such controversy and resulted in dozens of state laws limiting the use of eminent domain, reflects an underlying and long-standing disparity in the law's treatment of tenants and homeowners. For decades prior to *Kelo*, eminent domain had been used by local governments to redevelop properties (including non-blighted properties) occupied by tenants—often low-income residents and people of color—but few in power took notice of this displacement.[254] Yet when the *Kelo* decision highlighted that middle-class,

250 ALASKA STAT. § 09.55.240(e) (2021); *id.* § 09.55.240(h)(3) ("'[P]ersonal residence' means a structure that is the dwelling place of an individual that (A) must be used by the owner . . . as a dwelling unit . . . [and] (B) must be inhabited by the owner . . . .").

251 *See* UTAH CODE ANN. § 17C-1-904(2) (West 2017) ("An agency may not initiate an action in district court to acquire by eminent domain a residential owner occupied property unless: (i) a written petition requesting the agency to use eminent domain to acquire the property is submitted by the owners of at least 80% of the residential owner occupied property within the relevant area representing at least 70% of the value of residential owner occupied property within the relevant area . . . .").

252 CAL. CONST. art. I, § 19(b) (1879). Under the California state constitution, "[o]wner-occupied residence" is defined as: "real property that is improved with a single-family residence such as a detached home, condominium, or townhouse and that is the owner or owners' principal place of residence for at least one year prior to the State or local government's initial written offer to purchase the property." *Id.* § 19(e)(3). Owner-occupied residence also includes "a residential dwelling unit attached to or detached from such a single-family residence which provides complete independent living facilities for one or more persons." *Id.*

253 This use of eminent domain would be unconstitutional in the case of either owner- or tenant-occupied properties, since the Fifth Amendment requires a public use. *See* Cole v. La Grange, 113 U.S. 1, 7 (1885) ("[P]rivate property cannot be taken for private use."). Thus, the owner-oriented language in the California proposition prohibits what was already illegal. But the protection for owner-occupied property specifically is now entrenched into the California state constitution.

254 *See, e.g.*, Edward Imperatore, Note, *Discriminatory Condemnations and the Fair Housing Act*, 96 GEO. L.J. 1027, 1033-34 (2008) ("Historically, the burden of blight-removal condemnations has disproportionately been borne by African-Americans and other minorities. Between 1949 and 1963, 63% of all families displaced by urban renewal were nonwhite."); Alyssa M. Hasbrouck, Note, *Rethinking "Just" Compensation: Dignity Restoration as a Basis for Supplementing Existing Takings Remedies*

white homeowners could face similar risk of displacement,[255] lawmakers in dozens of states acted to limit the use of eminent domain.

5. Fourteenth Amendment: Voting Rights

For much of this country's early history, property ownership was a prerequisite to exercising the right to vote, with the result that vast numbers of non-land owners (as well as all enslaved people and women) had no right to vote.[256] Even after property ownership requirements for federal elections were eliminated by the Civil War Amendments, such requirements persisted in southern states and were used to prevent Black residents from exercising their federally guaranteed voting rights.[257] Additionally, the requirement of a permanent residence in state election laws was often manipulated to deprive Black residents in particular of access to the ballot: landlords would evict sharecroppers (tenant farmers who were overwhelmingly Black) prior to an election, thereby making them unable to lawfully vote due to the lack of a residence.[258] Similarly, owners of property with Black tenants would use the

with Government-Supported Community Building Initiatives, 104 CORNELL L. REV. 1047, 1057 (2019) ("Deliberately or not, eminent domain undertaken in the name of blight clearance and urban renewal disproportionately targeted black and African American communities."); Corinne Calfee, Note, Kelo v. City of New London*: The More Things Stay the Same, the More They Change*, 33 ECOLOGY L.Q. 545, 581 (2006) ("Only now, when a white, middle-class nurse from suburbia faces the loss of her home do so many people pay attention.").

255 Homeowners facing an eminent domain action sometimes compare themselves to renters, implicitly acknowledging the disfavored legal status tenants have in this context. *See* Rebecca Leung, *Eminent Domain: Being Abused?*, CBS NEWS (Sept. 26, 2003, 12:41 PM), https://www.cbsnews.com/news/eminent-domain-being-abused [https://perma.cc/W5A4-CFDW] ("'I thought I bought this place. But I guess I just leased it, until the city wants it.'" (quoting a homeowner in Lakewood, Ohio who was facing eminent domain)).

256 *See, e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 5 (2000) ("The lynchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property."); KIRK H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 56 (1918) ("Possession of real property was considered the best possible evidence of a firm interest in the well-being of the state, would make the owner cautious about public expenditures, insure economy, etc."); Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1046-48 (2017) (discussing property ownership requirements for voting).

257 *See* MICHAEL PERMAN, STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH, 1888–1908, at 112-13, 185, 288-89 (2001) (respectively discussing South Carolina, Mississippi, Alabama, and Georgia's decisions to include property ownership as a new voter eligibility requirement as a means to disenfranchise Black residents). For further general discussion, see J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910 (1974).

258 *See* Risa L. Goluboff, *"We Live's in a Free House Such as It Is": Class and the Creation of Modern Civil Rights*, 151 U. PA. L. REV. 1977, 2016 (2003) ("Were [Black farmers] legally allowed to vote, they still . . . faced intimidation at the polls leveraged by economically powerful [white] landlords."); *see also* Bernadette Atuahene, *Land Titling: A Mode of Privatization with the Potential to Deepen Democracy*, 50 ST. LOUIS U. L.J. 761, 771 (2006) ("[W]hite, racist landowners threatened to fire or evict [B]lack

threat of eviction—and the concomitant loss of home and livelihood—to effectively prohibit those tenants from exercising their right to vote.[259]

Current election laws continue to operate in ways that result in a higher burden being imposed on tenants than on homeowners in exercising their right to vote.[260] For example, renters move more frequently than homeowners, meaning they have to undertake more frequent efforts to maintain active voter registration and to locate their polling place.[261] Combined with the often burdensome time limits imposed by some states' election laws for updating one's address prior to an election,[262] renters are more likely than homeowners to find themselves ineligible to vote.[263] Even more troubling, a renter who makes an innocent mistake regarding their eligibility to vote after moving may face the risk of criminal prosecution for voter fraud in some states.[264]

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sharecroppers who worked their land if they exercised their voting rights." (citing KAY MILLS, THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER 40 (1993))).

259 *Compare* U.S. v. Beaty, 288 F.2d 653, 656 (6th Cir. 1961) (finding that the evidence supported Black sharecroppers' claims that they were threatened with eviction by their white landlords "for the purpose of interfering with their rights of registering and voting"), *with* U.S. v. Harvey, 250 F. Supp. 219, 228-29 (E.D. La. 1966) (rejecting Black sharecroppers' claims that they were evicted for registering to vote in part because "[t]he right of citizens in this country to the undisturbed use and control of their private property is entirely too sacred to be so easily extinguished").

260 In addition to the legal barriers discussed herein, there are other contexts in which the votes of property owners are privileged over non-property owners. For example, the Supreme Court has upheld state laws that provide certain types of property owners with an exclusive or disproportionate vote in elections related to special districts. *See, e.g.*, SALYER LAND CO. V. TULARE LAKE BASIN WATER STORAGE DIST., 410 U.S. 719, 734-35 (1973) (upholding a California state law that provided that only qualified landowners could vote in the elections for a board of directors of a water storage district); Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc., 158 F.3d 92, 108 (2d Cir. 1998) (upholding a New York law that provided for numerically greater representation of property owners than tenants on the governing board of a business improvement district).

261 *See* Derick Moore, *Renters Moving at Historically Low Rates,* U.S. CENSUS BUREAU (Dec. 21, 2017), https://www.census.gov/library/stories/2017/12/lower-moving-rate.html [https://perma.cc/7UCN-TCHE] (discussing how moving rates for renters were relatively low in 2017, despite being approximately four times higher than moving rates for homeowners).

262 *See* TEX. ELEC. CODE ANN. § 15.021(d) (West 2021) (detailing the process for Texas voters to change their addresses); *see also How to Register or Update Your Registration Information*, VOTETEXAS.GOV, https://www.votetexas.gov/register-to-vote/update-voter-registration.html [https://perma.cc/7UCN-TCHE] ("To register to vote in Texas, . . . complete a voter registration application and return it to your county election office at least 30 days before the upcoming election date.").

263 *See* Molly Griffard, *Door-to-Door Democracy: Expanding Canvassing Rights to Promote Democratic Participation*, 44 N.Y.U. REV. L. & SOC. CHANGE 171, 186-87, 186 n.94 (2020) (discussing why renters have low voter registration rates compared to homeowners); *see also* Stephanie M. Stern, Essay, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 906-07 (2011) (discussing why homeowners are more likely than renters to vote in local elections).

264 *See, e.g.*, TEX. ELEC. CODE ANN. §§ 63.001(i), 63.0011(b)-(c), 63.0013 (West 2021) (stating that criminal penalties—either a Class A misdemeanor for perjury or a state jail felony—can be imposed in Texas when voters misstate their residence address); Matt Vasilogambros, *Republican*

Other legal doctrines impose limits on renters' access to the ballot in subtler, but no less pernicious, ways. For example, single-family homeowners are relatively easily accessed by voter registration outreach efforts and political canvassers, who can often simply walk up to the front door and knock. In contrast, renters in multifamily apartment buildings are often more difficult to reach: gate codes and other physical barriers prevent non-residents from entering the building. Both constitutional law and common law reinforce these physical barriers: "[w]hile the First Amendment protects door-to-door canvassing of single-family homes, the law is not as clear in its application to canvassing within apartment buildings," and trespass law has been used to prosecute voting canvassers who attempt to reach voters in apartment buildings.[265] Yet residents of apartment complexes are often precisely the types of individuals for whom voter registration outreach efforts are needed most, since renters are more likely than homeowners to be people of color and members of other historically disenfranchised groups, and are less likely to be registered to vote.[266]

D. *Public Safety Law*

This sub-part examines two aspects of public safety law which reflect anti-tenancy: (1) crime-free housing and anti-nuisance ordinances; and (2) hazard risk and disaster relief programs.

1. Crime-Free Housing and Anti-Nuisance Ordinances

An extensive body of scholarship exists on policing and crime disparities in communities of color.[267] However, there has been less analysis of how

Legislators Curb Authority of County, State Election Officials, STATELINE (July 28, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/28/republican-legislators-curb-authority-of-county-state-election-officials [https://perma.cc/2E9C-J8W4] ("GOP legislators in at least 14 states have enacted 23 new laws that empower state officials to . . . make local election officials criminally . . . liable for even technical errors . . . .").

265 *See* Griffard, *supra* note 263, at 185; *see also* Mortellaro, *supra* note 14, at 185-89 (discussing how renters are not equal beneficiaries of voter registration canvassing).

266 *See* Chris Salviati, *Renters vs. Homeowners at the Ballots Box—Will America's Politicians Represent the Voice of Renters?*, APARTMENT LIST (Oct. 30, 2018), https://www.apartmentlist.com/research/renter-voting-preferences [https://perma.cc/A2JT-BD99] ("Although 34.9 percent of Americans live in rental housing, renters comprise just 24 percent of the voting population. This mismatch is attributable to a number of factors . . . [including that] [v]oting-eligible renters are less likely to be registered to vote than homeowners.").

267 *See, e.g.*, Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017) (discussing the effects of using data-driven decision systems in policing crimes in neighborhoods of color); Lyndsay N. Boggess & John R. Hipp, *Violent Crime, Residential Instability and Mobility: Does the Relationship Differ in Minority Neighborhoods?*, 26 J. QUANTITATIVE CRIMINOLOGY 351 (2010) (examining whether the racial and ethnic compositions of neighborhoods affect the instability-violent crime relationship).

housing tenure figures into these disparities and how anti-tenancy manifests in public safety laws, such as crime-free housing ordinances and anti-nuisance ordinances.

Popularized in the 1980s, crime-free housing ordinances have been adopted in hundreds of localities across the country.[268] These laws typically set up a system in which governmental employees—police officers, civilian staff, or both—monitor crime reports for crimes occurring at local rental properties or by renters living within the jurisdiction.[269] The government then shares that information with landlords, with the goal of reducing criminal activity.[270] Participation in the programs may be mandatory for landlords, and it may be a civil or criminal offense if a landlord fails to evict a tenant after being notified of suspected criminal activity.[271] The ordinances may also require that leases include crime-free lease addenda that provide for eviction "for any crime, committed anywhere, by any household member or guest,"[272] or establish a dedicated police unit which then serves as an extra monitoring presence for rental properties.[273]

These ordinances impose monitoring requirements on rental properties and renters exclusively; our research has not revealed a single U.S. jurisdiction similarly monitoring the criminal activity of homeowners or informing mortgage lenders of any such activity. While sometimes adopted for objectively neutral reasons, or supported by landlords seeking greater safety and security for their tenants, as well as by tenants themselves,[274] these

268 For example, over 147 counties and cities in California (more than a quarter of the local governments statewide) had adopted such ordinances as of 2020. *See* Liam Dillion, Ben Poston & Julia Barajas, *Black and Latino Renters Face Eviction, Exclusion Amid Police Crackdowns in California*, L.A. TIMES (Nov. 19, 2020, 3:00 AM), https://www.latimes.com/homeless-housing/story/2020-11-19/california-housing-policies-hurt-black-latino-renters [https://perma.cc/UZR5-6H5U].

269 *See* Leora Smith, *When the Police Call Your Landlord*, ATLANTIC (Mar. 13, 2020), https://www.theatlantic.com/politics/archive/2020/03/crime-free-housing-lets-police-influence-landlords/605728 [https://perma.cc/U6T2-BVUC] (describing such a program in Faribault, Minnesota).

270 *See, e.g.*, NILES, ILL., ORDINANCES § 22-591(a) (1995) (requiring owners and property managers to attend a mandatory training session provided by the Niles Police Department); SAN DIEGO, CAL., REGUL. ORDINANCES § 32.1213 (2010) ("Whenever it appears by [police] inspection that conditions or practices exist which are in violation of . . . any applicable laws and regulations, the Sheriff's Department . . . shall serve the owner or operator with a Notice of Violation.").

271 *See, e.g.*, NILES, ILL., ORDINANCES § 22-591(a) (1995) (stating this requirement); SAN DIEGO, CAL., REGUL. ORDINANCES § 32.1213 (2010) (same); Smith, *supra* note 269 (same).

272 Smith, *supra* note 269.

273 *See id.* (describing the establishment of such a police unit in a program in Kansas City).

274 *See* Hensleigh Crowell, Note, *A Home of One's Own: The Fight Against Illegal Housing Discrimination Based on Criminal Convictions, and Those Who are Still Left Behind*, 95 TEX. L. REV. 1103, 1109 (2017) ("Landlords may justify banning individuals with criminal convictions by citing concerns about the safety of their tenants . . . ."); Smith, *supra* note 269 (describing a tenant who "welcomed programs that might keep her child safe" but who was concerned "that she might lose her home for simply being in the wrong place, or with the wrong people, at the wrong time").

ordinances have been widely recognized as being both racially motivated and as having a disproportionate impact on low-income people and people of color.[275] As a *Los Angeles Times* investigation in 2020 found, "[a] map of the programs' expansion has left a distinct pattern: As Black and Latino people moved to the suburbs in search of safer neighborhoods and cheaper housing, crime-free housing policies often came soon after."[276] Scholars have identified numerous concerns associated with these types of ordinances: they can lead to eviction and loss of shelter for tenants who have committed no crime at all;[277] they create ongoing negative impacts on tenants' ability to find housing;[278] and their invasiveness raises privacy concerns.[279] In light of these problematic impacts, at least some local governments have begun to reexamine their crime-free housing programs.[280] However, many other jurisdictions continue to enforce these laws in ways that impose disproportionate impacts by design on tenants' access to and continuity of shelter.

Anti-nuisance ordinances are similar to crime-free housing ordinances in that they involve governmental monitoring of properties for activities deemed undesirable—specifically, anything that would qualify as a public nuisance.[281] Unlike crime-free housing ordinances (which are targeted

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275 *See, e.g.*, Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173, 179 (2019) ("By using contact with the criminal legal system as a tool for exclusion, documented racial biases in policing and the criminal legal system are imported into the private housing market, furthering systemic racial exclusion and residential segregation.").

276 *See* Dillion et al., *supra* note 268. The *Times* reviewed five years of eviction data for one program that covers four of California's largest cities, finding that "[n]early 80% of those targeted for eviction from 2015 through 2019 were not white. In Oakland, Black tenants faced eviction at twice their share of the city's renter population." *Id.*

277 Some ordinances require eviction for any arrest, regardless of whether the individual is ultimately convicted, while others require eviction if any guest of the tenant engages in criminal activity. *Id.*

278 *See id.* (describing a tenant's challenges in finding safe and habitable shelter after the tenant was convicted and served time for a past crime).

279 *See, e.g.*, Eva Rosen, Phillip M. E. Garboden & Jennifer E. Cossyleon, *Racial Discrimination in Housing: How Landlords Use Algorithms and Home Visits to Screen Tenants*, 86 AM. SOCIO. REV. 787, 790 (2021) (noting that landlords often use invasive screening practices against tenants of color and "behave in ways that reflect their prejudices and assumptions regarding their tenants").

280 *See* Ariana Gill, *Tampa Revamps Police Program Alerting Landlords to Arrests*, WTSP (Sept. 20, 2021, 1:04 PM), https://www.wtsp.com/article/news/crime/changes-to-tampa-policing-program-alerting-landlords-to-arrests/67-1de7590a-75bf-4133-9c7a-ba3e73336ef8 [https://perma.cc/M3G9-4AU5] (discussing how the city of Tampa is revising its program so that police officers do not report misdemeanor or juvenile crimes by tenants).

281 Nuisance activities may or may not qualify as a triggering activity under a crime-free housing ordinance. *See* U.S. DEP'T HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE ENFORCEMENT OF LOCAL NUISANCE AND CRIME-FREE HOUSING ORDINANCES AGAINST VICTIMS OF DOMESTIC VIOLENCE, OTHER CRIME VICTIMS, AND OTHERS WHO REQUIRE POLICE OR EMERGENCY

specifically to rental properties and renters), anti-nuisance ordinances are typically designed to apply broadly to both rental properties and owner-occupied residences in the jurisdiction.[282] However, the ramifications of anti-nuisance ordinances differ significantly for homeowners as compared to tenants.

A homeowner who is notified that they are in violation of the anti-nuisance ordinance must pay a fine or cure the violation; if they fail to do so, there may be civil or criminal penalties.[283] Crucially, however, the mere violation of an anti-nuisance ordinance does not pose a direct and immediate risk of the homeowner losing their home.[284] In contrast, when the triggering activity occurs at a rental property, the property owner/landlord is notified and must pay a fine or cure the violation; if they fail to do so, they may face civil or criminal penalties. At this juncture, the anti-tenancy design of these ordinances creates different likely outcomes for the tenant as opposed to the homeowner, since the landlord's "cure" for the violation is often to evict the tenant who has allegedly caused the nuisance activity.[285] Thus, for a tenant, unlike a homeowner, the anti-nuisance ordinance poses a direct risk of loss of shelter. This risk is further compounded by selective enforcement of these ordinances by local governments against members of protected classes,[286] as

SERVICES 5 (2016) [hereinafter GUIDANCE ON LOCAL NUISANCE ORDINANCES], https://www.hud.gov/sites/documents/finalnuisanceordgdnce.pdf [https://perma.cc/GG5M-3BYD] (describing anti-nuisance ordinances and crime-free housing ordinances as raising related legal concerns, but analyzing each separately).

282 *See id.* at 2 ("These ordinances . . . require the landlord or homeowner to abate the nuisance under the threat of a variety of penalties.").

283 *I Am not a Nuisance: Local Ordinances Punish Victims of Crime*, ACLU, https://www.aclu.org/other/i-am-not-nuisance-local-ordinances-punish-victims-crime [https://perma.cc/C3QM-YFCW].

284 A homeowner's risk of losing their home is far more attenuated: if the jurisdiction imposes civil or criminal fines, and if the homeowner fails to pay those fines, and if the jurisdiction imposes a lien on the property for failure to pay, and if the lien is foreclosed upon (or if the owner's mortgage lender had a provision making such a scenario grounds for foreclosure), only then would a homeowner be at risk of losing their home. *See* Emma Ockerman, *She Owes Over $12K for 911 Calls. Now She Could Lose Her Home*, VICE NEWS (Sept. 27, 2021, 10:35 AM), https://www.vice.com/en/article/4avzpn/anti-nuisance-laws-calling-911-home-foreclosure [https://perma.cc/RUS4-UGAE] (describing a case in Ohio where a homeowner risked losing her home after years of continuous anti-nuisance ordinance violations).

285 *See* Alisha Jarwala & Sejal Singh, *When Your Emergency is a "Nuisance"*, SLATE (July 9, 2019, 11:45 AM), https://slate.com/news-and-politics/2019/07/nuisance-ordinances-study-disabilities-domestic-violence-eviction.html [https://perma.cc/3E7S-35NQ] (describing a landlord's eviction of a tenant to avoid fines related to the tenant calling 911 for help).

286 *See* Rachel Smith, *Policing Black Residents as Nuisances: Why Selective Nuisance Law Enforcement Violates the Fair Housing Act*, 34 HARV. J. RACIAL & ETHNIC JUST. 87, 110 (2018) (analyzing the selective targeting of protected groups for aggressive anti-nuisance ordinance law enforcement); *see also* GUIDANCE ON LOCAL NUISANCE ORDINANCES, *supra* note 281, at 10=11 (discussing the circumstances associated with an intentional discrimination claim under the Fair Housing Act of 1968 (FHA) due to selective enforcement of anti-nuisance ordinances).

well as the punitive impact on those experiencing domestic violence (who are more likely to be women, people of color, and LGBTQ+ individuals).[287]

2. Hazard Risk and Disaster Relief

Every year brings multiple natural disasters—hurricanes, wildfires, floods—to communities across the country. Preparing for and responding to such disasters is crucial to all residents as climate change creates the conditions for more frequent and intense disaster events. Yet the law puts tenants at greater risk than homeowners of being both underprepared for future disasters and undercompensated for past disasters.

a. *Before a Disaster: Hazard Risk*

Flood risk provides a particularly stark example of how the law places tenants at a disadvantage prior to a disaster as compared to similarly situated homeowners. Despite the fact that flooding can have devastating effects on both renter- and owner-occupied residences, in most states, hazard disclosure laws are only applicable to prospective homebuyers, not prospective tenants. While most states require that a seller notify a prospective buyer if the residence is in a flood zone or has been flooded,[288] only three states—California, Georgia and, as of 2022, Texas—require any type of disclosure be made to prospective renters before they sign a lease.[289]

At the federal level, renters also face barriers to obtaining flood insurance through the National Flood Insurance Program (NFIP). While the NFIP is technically open to renters, only two percent of the five million current NFIP policies are held by renters (though far more than two percent of the

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287 *See, e.g.*, Noah M. Kazis, *Fair Housing for a Non-Sexist City*, 134 HARV. L. REV. 1683, 1704 (2021) ("In a study of Milwaukee's nuisance ordinance . . . domestic violence was the second most commonly specified nuisance activity, after noise violations. . . . These nuisance citations were also heavily concentrated in Black neighborhoods and especially in racially integrated Black neighborhoods."); Ocen, *supra* note 162, at 1546 (discussing the over-policing of Black women in certain rental housing); ACLU, *supra* note 283 (summarizing recent ACLU legal actions challenging local anti-nuisance ordinances for their disproportionate impacts on such tenants). In recognition of these concerns, the U.S. Department of Housing & Urban Development (HUD) issued guidance to local governments in 2016 seeking "to ensure that the growing number of local nuisance ordinances and crime-free housing ordinances do not lead to discrimination in violation of the [Fair Housing] Act." GUIDANCE ON LOCAL NUISANCE ORDINANCES, *supra* note 281, at 1.

288 *See* Heiman, *supra* note 14, at 793-96 (describing the limitations of the state laws); *see also* Rebecca Hersher, *Most Tenants Get No Information About Flooding. It Can Cost Them Dearly*, NPR (Oct. 22, 2020, 4:50 AM), https://www.npr.org/2020/10/22/922270655/most-tenants-get-no-information-about-flooding-it-can-cost-them-dearly [https://perma.cc/PT65-SAVY] ("In more than half of the states, people who purchase homes receive information about flood risk.").

289 *See infra* Conclusion (discussing Texas's new state law). A few local governments have also adopted flooding disclosure laws that require landlords to notify tenants of flood risk. *See Heiman*, supra note 14, at 796-97 (discussing a municipal ordinance in Lambertville, NJ).

population living in flood insurance eligible properties are renters).[290] While there is little data on why so few renters who qualify for NFIP policies have them, likely explanations include the lack of knowledge that they qualify (as noted above, most states do not require disclosures about flood risk to tenants), as well as cost considerations.[291]

Further, there are no legal requirements for landlords who own residential rental property in NFIP-eligible locations to actually purchase flood insurance.[292] Thus, a renter living in an area at risk of flooding has far less control over managing their risk than does a neighboring homeowner. While renters can purchase an NFIP policy for their personal property, they cannot demand that their landlord purchase an NFIP policy for the building itself. And while landlords should purchase a policy to protect their own investment, landlords of older, deteriorated properties—the types of properties where many low-income renters reside—may lack the economic incentives to do so.[293]

b. *After a Disaster: Disaster Relief*

In the aftermath of a disaster, a complex system of federal, state, and local disaster relief programs exists to address the needs of communities impacted by the disaster. Many of these programs offer assistance to affected individuals, regardless of their status as tenants or homeowners. However, when it comes to housing-related assistance, disaster relief programs often distinguish between similarly situated renters and homeowners in ways that result in disproportionately greater relief to homeowners. While each natural disaster differs, as do the precise relief efforts launched in response, the disaster relief response to one of the costliest recent natural disasters in the

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290 *Get to Know Your Clients*, FED. EMERGENCY MGMT. AGENCY (2022), https://agents.floodsmart.gov/marketing/messaging [https://perma.cc/X8L9-UGZQ].

291 *See* Heiman, *supra* note 14, at 792 ("Renters may, at their discretion, buy into the NFIP. Doing so requires a renter to first be in the [Special Flood Hazard Area], to know that they are at risk of flood damage, and to believe the cost of flood insurance is worth the saliency of the risk." (footnote omitted)); *see also* Alice Kaswan, *Domestic Climate Change Adaptation and Equity*, 42 ENV'T L. REP. 11125, 11140-41 (2012) (noting that renters are more likely to be made economically insecure as a result of a disaster, and are less well prepared before a disaster). Further, tenants with a renters insurance policy may assume that it covers flood damage (even though it does not). *See* Heiman, *supra* note 14, at 784 ("[R]enters' insurance, which is often required by landlords, does not cover flood damage.").

292 Courtney Lauren Anderson, *Climate Change and Infrastructure*, 18 HOUS. J. HEALTH L. & POL'Y, 2018, at 8 (explaining that mortgages of rental properties are not subject to mandatory flood insurance provisions and, as a result, tenants are hit the hardest by flooding and/or natural disasters because there may not be insurance to help them rebuild).

293 Kaswan, *supra* note 291, at 11129 ("Renters face special challenges in obtaining insurance and strengthening their homes, because renters have the right incentives but no control, while property owners have control but less incentive.").

U.S.—Hurricane Harvey in 2017—offers a representative snapshot of how similarly situated homeowners and renters can end up receiving very different legal relief in the wake of a natural disaster.[294]

At the outset, it is worth noting that homeowners whose residences are damaged or destroyed by natural disasters often will have a greater financial loss than tenants whose residences are similarly damaged, simply because of the value of the owned property compared to the value of the leasehold. Thus, it can be appropriate for homeowners to receive proportionately greater disaster relief assistance to reflect that difference. However, as the analysis below shows, homeowners often receive *disproportionately* greater disaster relief assistance, as well as access to disaster relief programs that tenants are entirely left out of or provided disproportionately less access to.[295]

For example, after Hurricane Harvey caused devastating flooding in the Houston area in 2017, federal and state agencies authorized the distribution of $5.6 billion in Community Development Block Grants for disaster relief.[296] Both renters and homeowners were displaced from their residences by the damage caused by the hurricane: fifty-eight percent of housing units in

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294 The disaster relief disparities discussed here are not unique to Hurricane Harvey. For example, after Hurricane Sandy in 2012, funding for housing recovery disproportionately went to homeowners as opposed to renters. *See* FAIR SHARE HOUS. CTR., HOUS. & CMTY. DEV. NETWORK OF NJ, LATINO ACTION NETWORK & NAACP N.J. STATE CONF., THE STATE OF SANDY RECOVERY: FIXING WHAT WENT WRONG WITH NEW JERSEY'S SANDY PROGRAMS TO BUILD A FAIR AND TRANSPARENT RECOVERY FOR EVERYONE 3 (2014), https://www.hcdnnj.org/assets/documents/report%20state%20of%20sandy.pdf [https://perma.cc/3XLU-THAX] (discussing how in New Jersey, forty percent of homes damaged or destroyed by Sandy were renter-occupied and sixty percent were owner-occupied, yet only twenty-five percent of the total amount of funding for housing recovery was allocated for renters, with seventy-five percent allocated for homeowners).

295 *See* Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W.L. REV. 21, 24-25 (2006) ("[Analyzing] the specific ways in which FEMA's emergency disaster relief and housing assistance have proved particularly, almost deliberately, ineffective for the most vulnerable and marginalized families—those in predominantly minority communities, those with lower incomes and limited savings, and renters."). In part, these disparities in disaster relief reflect the imbalanced programmatic focus of FEMA on disaster recovery for single-family homeowners, resulting in relief efforts that are misaligned with the needs of the communities FEMA is supposed to be aiding. *See* FURMAN CTR. FOR REAL EST. & URB. POL'Y & MOELIS INST. FOR AFFORDABLE HOUS. POL'Y, SANDY'S EFFECTS ON HOUSING IN NEW YORK CITY 8 (2013), https://furmancenter.org/files/publications/SandysEffectsOnHousingInNYC.pdf [https://perma.cc/3CDU-PSR5] (noting this programmatic focus limited "FEMA's ability to respond to the full range of needs created by Sandy" in New York City, where only one in ten properties affected by Sandy were single-family homes, and the vast majority (seven in ten) were properties in multifamily buildings with five or more units).

296 *Hurricane Harvey Recovery Funds*, TEX. GEN. LAND OFF.: CMTY. DEV. & REVITALIZATION, https://recovery.texas.gov/hurricane-harvey/recovery-funds/index.html [https://perma.cc/YXA8-ZVK9].

Houston are renter-occupied.[297] Yet only twenty-five percent of the funds for direct housing needs were allocated for renters, with the remaining seventy-five percent of the funds going to homeowner-only programs.[298] The funds allocated for homeowners included not only programs for long-term rebuilding and new construction, but also a program for direct payment to eligible homeowners for replacement housing costs.[299] The funds allocated for renter needs had no comparable direct payment program and included just a single program with funds available for developers and builders to build replacement rental housing.[300]

As a 2019 lawsuit filed on behalf of Black and Latinx renters points out, tenants affected by Hurricane Harvey were arguably in need of more, not less, disaster relief assistance than homeowners.[301] Rental housing is often

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297 *QuickFacts: Houston City, Texas*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/houstoncitytexas [https://perma.cc/V8WG-UZWK]. Hurricane Harvey extended beyond the city of Houston itself, into areas with lower renter occupancy. But even in these areas, the percentage of renters still exceeded twenty-five percent. For example, in Harris County (the county in which Houston is located), where flooding damage from Harvey was also widespread, forty-six percent of housing units are renter-occupied. *QuickFacts: Harris County, Texas*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/fact/table/harriscountytexas/PST045221 [https:// perma.cc/PX8A-6RJW].

298 Kriston Capps, *Texas Renters Are Still Waiting for Recovery Relief from Hurricane Harvey*, BLOOMBERG NEWS (Aug. 31, 2020), https://www.bloomberg.com/news/articles/2020-08-31/hurricane-relief-still-has-a-racial-equity-problem [https://perma.cc/9FHZ-UUPS]; *see also* Complaint at 2, Bob v. U.S. Dep't Hous. & Urb. Dev., No. 4:19-CV-04404 (S.D. Tex. Nov. 8, 2019) [hereinafter HUD Complaint] (noting the approved allocation of funding to meet unmet housing needs). For a full breakdown of Hurricane Harvey relief, see *Hurricane Harvey State Action Plan*, TEX. GEN. LAND OFF.: CMTY. DEV. & REVITALIZATION, HURRICANE HARVEY STATE ACTION PLAN (2022), https://recovery.texas.gov/documents/action-plans/2017-hurricane-harvey/harvey-state-action-plan-overview.pdf [https://perma.cc/8QSR-7WNL].

299 Complaint at 13, Wharton v. U.S. Dep't Hous. & Urb. Dev., No. 2:19-CV-300 (S.D. Tex. Mar. 3, 2020) [hereinafter Wharton Complaint] ("The State Plan allocates funds for . . . Homeowner Assistance Programs, which provide repairs to disaster-damaged owner-occupied primary residences . . . [and] Homeowner Reimbursement Programs, which reimburse homeowners for out-of-pocket repair expenses up to $50,000 . . . .").

300 *See id.* (detailing four specific FEMA program benefits denied to renters that were provided to homeowners).

301 *Id.* at 20; *see also* Manny Fernandez, *Two Years after Hurricane Harvey, One Group Says it Has Been Overlooked: Renters*, N.Y. TIMES (Oct. 11, 2019), https://www.nytimes.com/2019/10/11/us/hurricane-harvey-lawsuit-texas.html [https://perma.cc/AV8S-QJQK] ("Many of these tenants are low-income Texans, who are [B]lack or Hispanic, and who were living in some of the most vulnerable locations at the time . . . . lacked renter's insurance and had difficulty tapping into and navigating their way through local, state and federal agencies and resources."); ANDREW AURAND, DAN EMMANUEL, DAN THREET & CATHERINE PORTER, NAT'L LOW INCOME HOUS. COAL., LONG-TERM RECOVERY OF RENTAL HOUSING: A CASE STUDY OF HIGHLY IMPACTED COMMUNITIES IN NEW JERSEY AFTER SUPERSTORM SANDY 3 (2019), https://nlihc.org/sites/default/files/Sandy-Rental-Recovery-Report.pdf [https://perma.cc/2JP9-GYT6] ("Renters have lower incomes, fewer financial resources, and fewer neighborhood social networks to plan for and recover from disasters. When their homes are damaged, renters have little, if any, control over their repair because they do not own the properties. Low-income renters are at even

more likely to be located in low-lying, flood-prone areas, thereby putting tenants at greater risk of housing loss than homeowners.[302] Renters on the whole have less wealth and lower incomes than homeowners,[303] and are less likely to have insurance to cover their housing and personal property losses.[304] Furthermore, the unequal allocations of relief funds between homeowners and renters can compound pre-existing racial inequalities: "[b]y setting aside so much more aid for homeowners, the state distributes a disproportionate share of federal recovery dollars to white neighborhoods where homeownership predominates."[305]

The COVID-19 pandemic—while a different type of disaster—elicited a similar pattern of homeowners receiving disproportionately broader, earlier, and more robust access to relief than renters.[306] As we detailed in our recent scholarship on the subject, uniform legal protections for homeowners emerged early on at the federal level, requiring lenders to provide mortgage forbearance.[307] Renters, however, received no analogous direct, uniform protection under federal law until nearly six months later, in September 2020, when the CDC issued a temporary nationwide eviction moratorium for certain qualifying tenants.[308] Even that protection was relatively short-lived:

greater risk because rental housing affordable to them is often of lower physical quality and located in less desirable and risk-prone areas." (citations omitted)).

302 *See* Kathleen J. Mee, Lesley Instone, Miriam Willians, Jane Palmer & Nicola Vaughan, *Renting Over Troubled Waters: An Urban Political Ecology of Rental Housing*, 52 GEOGRAPHICAL RSCH. 365, 374 ("The shift from owner-occupied to rental housing in flood-prone areas and areas assessed as vulnerable to sea level rise could result in a disproportionately high number of tenants among those at risk or affected by any natural disaster." (citation omitted)).

303 STATE OF THE NATION'S HOUSING 2022, *supra* note 10, at 5.

304 Only forty-one percent of renters have renters' insurance, compared to ninety-five percent of homeowners having homeowners' insurance. *Only 41 Percent of Renters Carry Renters Insurance*, RENTAL HOUS. J. (Aug. 15, 2018), https://rentalhousingjournal.com/only-41-percent-of-renters-carry-renters-insurance [https://perma.cc/8XWM-SS2L].

305 Capps, *supra* note 298; *see also* Wharton Complaint, *supra* note 299, at 3 ("The policies cause the discriminatory effect of disadvantaging the disproportionally Hispanic and African American tenant household group as compared to the disproportionately [w]hite non-Hispanic group of homeowners.").

306 *See generally* Schindler & Zale, *supra* note 1.

307 *Id.*; *see also* CARES Act, 15 U.S.C. § 9056(b)(2) (2020) (requiring that, when a borrower requests a forbearance, it shall be granted for up to 180 days).

308 *See* Matthew Goldstein, *U.S. Orders Eviction Moratorium for Most Through Year's End*, N.Y. TIMES (Oct. 1, 2020), https://www.nytimes.com/2020/09/01/business/eviction-moratorium-order.html [https://perma.cc/SG27-YDLN]. The CARES Act, enacted in March 2020, contained a very limited eviction moratorium that applied only for federally related rental housing (such as public housing) and lasted for only 120 days (expiring on July 24, 2020). CONG. RSCH. SERV., IN11516, FEDERAL EVICTION MORATORIUMS IN RESPONSE TO THE COVID-19 PANDEMIC 1 (2021), https://crsreports.congress.gov/product/pdf/IN/IN11516 [https://perma.cc/VZ5R-TMQH]. Under the more broadly applicable CDC order, which applied to all rental housing, tenants were technically still required to pay rent; the CDC order only prevented landlords from obtaining the

in August 2021, less than a year after it was enacted, the Supreme Court struck down the federal moratorium as unconstitutional (while leaving in place mortgage forbearance protections for homeowners).[309] Tenants were also obligated to pay all of the past due rent once any applicable moratoria expired.[310] However, federal rental assistance programs were not implemented until nearly a year into the pandemic and were plagued by programmatic delays.[311] Further, the programs only provided funds to tenants if their landlords agreed to participate, and many landlords chose not to, leaving tenants unprotected from eviction after moratoria expired.[312]

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remedy of eviction for non-payment of rent. *Id.* at 2. Thank you to Kathryn Sabbeth for drawing the authors' attention to this detail.

309 Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2486 (2021); *see also* Schindler & Zale, *supra* note 1, at 150 (discussing the interplay of the federal, state, and local laws that may have protected certain qualifying tenants from eviction in the wake of the COVID-19 pandemic).

310 Schindler & Zale, *supra* note 1, at 150.

311 The federal Emergency Rental Assistance program was enacted in two parts: $25 billion was made available to states, territories, tribes, and local governments under the Consolidated Appropriations Act of 2021, enacted on December 27, 2020, and an additional $21.55 billion was made available under the American Rescue Plan Act of 2021, which was enacted on March 11, 2021. *See Assistance for State, Local, and Tribal Governments*, U.S. DEP'T TREASURY (2022), https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program [https://perma.cc/42YL-F656] (overviewing the enactment process of the program); *see also* Jason DeParle, *Federal Aid to Renters Moves Slowly, Leaving Many at Risk*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/04/25/us/politics/rental-assistance-pandemic.html [https://perma.cc/WU9X-GCHK] (describing some of the challenges with implementation of the federal Emergency Rental Assistance program, in part because states and localities had to create entirely new administrative schemes for making the funds available to tenants); Phil McCausland, *Mississippi Will Send Back Fed's Rental Aid, Even as Housing Needs Remain High*, NBC NEWS (Aug. 13, 2022, 6:00 AM), https://www.nbcnews.com/news/us-news/mississippi-will-send-back-cash-federal-rental-aid-program-even-renter-rcna42547 [https://perma.cc/Z8CN-EZZ8] (describing Mississippi's program for federal rental assistance as being "difficult to access, particularly in a state that struggles with high illiteracy rates and low broadband availability"). Some states have also refused to utilize the full amounts of available federal funding for emergency rental assistance for ideological reasons. *See id.* (noting that several states with Republican governors, including Mississippi, Arkansas, and Nebraska, rejected or returned hundreds of millions of dollars in federal funding intended to assist renters, "claiming they were shielding residents from socialist programs they didn't need," even as there was documented evidence of tenants in those states in need of rental assistance due to inflation and rising rents).

312 *See* Jacob Haas, Jasmine Rangel, Juan Pablo Garnham & Peter Hepburn, *Preliminary Analysis: Eviction Filing Trends After the CDC Moratorium Expiration*, EVICTION LAB (Dec. 9, 2021), https://evictionlab.org/updates/research/eviction-filing-trends-after-cdc-moratorium [https://perma.cc/7EHM-WD4J] (showing that eviction filings spiked after the federal moratorium was lifted in August 2021 in locations where there were no local or state protections for tenants, such as Las Vegas and Houston, while remaining at fairly consistent levels in locations where there were ongoing local or state protections for tenants, such as New York City).

E. *Consumer Protection and Contract Law*

This subpart considers how consumer protection and contract law reflect anti-tenancy in a variety of contexts: (1) consumer credit; (2) utility services; and (3) consumer protection laws.[313]

1. Consumer Credit

Credit reports and credit scores are an essential part of economic life, necessary for everything from securing a car loan or credit card to moving into a new home or getting hired.[314] Thus, a low or nonexistent credit score can have wide-reaching repercussions.[315] In recent years, credit reporting agencies (CRAs) have come under criticism for how data and modeling systems often result in significant barriers to access to credit for lower-income individuals, younger people, and people of color;[316] less well-recognized is

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313 There are other aspects of consumer law that also reflect anti-tenancy. For example, state laws generally do not require landlords to carry liability insurance. *See* Allyson E. Gold, *Insuring Justice: Racial Bias in Insurance Regulations*, 101 N.C. L. REV. (forthcoming 2023) (manuscript at 42), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4040331 [https://perma.cc/G327-TH39] (noting that most states do not require landlords to carry this type of insurance, with Rhode Island as the "sole exception"). Thus, if a tenant is harmed through no fault of their own on the rental premises or due to the conditions of the home they rent, there is often no monetary compensation through insurance coverage available to them. *Id.* at 31. Another insurance-related disparity relates to bundling discounts: while both renters and homeowners can receive discounts if they bundle their home insurance policy with their auto policy, homeowners tend to get a larger discount (for example, Progressive offers, on average, a five percent discount on auto insurance to homeowners but only a three percent discount to renters). *Compare Renters Insurance*, PROGRESSIVE, https://www.progressive.com/renters [https://perma.cc/T6FW-ZJG8], *with Homeowners Insurance*, PROGRESSIVE, https://www.progressive.com/homeowners [https://perma.cc/5PZQ-R2B9]. While it is possible that this difference reflects the fact that homeowners' policies tend to be more expensive, it again results in a situation where parties with more average wealth (homeowners) benefit, while renters, who have less wealth on average, get a lower discount. Anti-trust concerns may also be implicated by certain pricing practices used for residential rental property, resulting in higher shelter costs for tenants as a result. *See* Complaint at 14-19, Bason v. RealPage, Inc., No. 22-CV-01611-WQH-MDD (S.D. Cal. Oct. 18, 2022) (alleging collusion by landlords using a pricing algorithm to set rents and bringing a class action claim that it violates the Sherman Act).

314 *See* Fred Galves, *The Discriminatory Impact of Traditional Lending Criteria: An Economic and Moral Critique*, 29 SETON HALL L. REV. 1467, 1468 (1999) ("Fair accessibility to financial credit is important because it is usually the initial and critical first step in purchasing a home or another big-ticket item." (footnote omitted)); *see also* Lea Shepard, *Seeking Solutions to Financial History Discrimination*, 46 CONN. L. REV. 993, 995 (2014) ("[S]ixty percent of employers consult applicants' credit reports in making hiring decisions . . . ." (footnote omitted)).

315 *See* Joanne Gaskin, *FICO Applauds FHFA Inclusion of Rental Data in Underwriting*, FICO BLOG (Aug. 16, 2021), https://www.fico.com/blogs/fico-applauds-fhfa-inclusion-rental-data-underwriting [https://perma.cc/4AH6-MCV3] ("There are 53 million consumers who don't have sufficient data in the traditional credit bureau files to generate a credit score today.").

316 *See* Request for Information Regarding Use of Alternative Data and Modeling Techniques in the Credit Process, 82 Fed. Reg. 11183, 11184 (Feb. 21, 2017) ("[T]he use of traditional data and modeling techniques has left some important gaps in access to mainstream credit for certain

how credit reporting systems have also systematically disadvantaged tenants.[317]

A homeowner's mortgage payment history—whether positive or negative—is near-universally reported to CRAs and thus taken into account when calculating homeowners' credit scores; on-time payments are a factor that increases scores, and missed or late payments are a factor that can decrease scores.[318] In contrast, tenants are subjected to a one-way, negative ratchet by credit reporting systems: except as noted below, rental payment history is not reported to CRAs and thus the data is not utilized in calculating the credit scores of the vast majority of tenants.[319] As a result, credit reporting systems deprive tenants, who may have years of successful on-time rent payments, of using their housing payment history to build positive credit and increase their credit scores. At the same time, any history of missed rent payments and resulting eviction filings is almost invariably reported to CRAs, thereby negatively impacting the credit of tenants.[320] Thus, while missed or late housing payments can impact the credit scores of both renters and homeowners, only homeowners benefit from the positive credit impacts of a history of on-time payments.

These uneven reporting practices have produced stark disparities. For example, tenants are seven times more likely than homeowners to be deemed to have "unscorable" credit due to lack of data, a status that is typically viewed

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consumer groups and segments . . . . [Affected individuals] are disproportionately Black and Hispanic, low-income, or young adults.").

317 Tenants may also be disadvantaged by the largely unregulated "shadow" screening reports that many landlords utilize. *See* Erin Smith & Heather Vogell, *How Your Shadow Credit Score Could Decide Whether You Get an Apartment*, PROPUBLICA (Mar. 29, 2022, 6:00 AM), https://www.propublica.org/article/how-your-shadow-credit-score-could-decide-whether-you-get-an-apartment [https://perma.cc/JQD6-QNP9] ("Tenant screening companies compile information beyond what's in renters' credit reports, including criminal and eviction filings . . . . A ProPublica review found that such ratings have come to serve as shadow credit scores for renters. But compared to credit reporting, tenant screening is less regulated and offers fewer consumer protections—which can have dire consequences for applicants trying to secure housing.").

318 *See* MICHAEL TURNER & PATRICK WALKER, U.S. DEPT. HOUS. & URB. DEV., POTENTIAL IMPACTS OF CREDIT REPORTING PUBLIC HOUSING RENTAL PAYMENT DATA 5 (2019), https://www.huduser.gov/portal/sites/default/files/pdf/Potential-Impacts-of-Credit-Reporting.pdf [https://perma.cc/DN7T-SZMZ] (explaining that "homeowners with a mortgage . . . almost universally have [a] full file payment history reported to the credit agencies each month" and providing an analysis of how similar reporting would impact low-income tenants in public housing).

319 *See* Joanne Gaskin, *Leveraging Alternative Data to Extend Credit to More Borrowers*, FICO BLOG (May 22, 2019), https://www.fico.com/blogs/leveraging-alternative-data-extend-credit-more-borrowers [https://perma.cc/3N9K-A5GS] (noting that according to 2019 data, "of the roughly 80 million U.S. adults who live in rental housing, just 1.8 million (2.3 percent) have a rental trade line reported in their traditional credit file").

320 TURNER ET AL., *supra* note 318, at 46 ("[P]roperty managers typically report credit transgressions but not 'good' credit behavior.").

by creditors as equally risky as a low credit score.[321] And according to a recent analysis of federal lending, if the rental payment histories of applicants for federally-backed mortgages had been taken into account, "17% of borrowers who were recently declined would have been approved" for the mortgages for which they applied.[322] In other words, almost one in five otherwise credit-worthy mortgage applicants were denied because of their former status as a tenant and the associated failure of CRAs to take their rental payment history into account in calculating their credit score.

CRAs have acknowledged the value of rental payment history in calculating credit scores and risks, but justify their failure to take it into account due to logistical impracticalities, stemming from the highly fragmented nature of rental markets, especially as compared to the relatively consolidated sources of data for obtaining mortgage payment histories of homeowners.[323] Yet while compiling payment history for renters into credit score calculations may require different approaches to data gathering, recent reform efforts show it is far from infeasible.[324]

2. Utility Service: Monopolization and Disconnection

Another way that anti-tenancy imposes harm on renters is through two issues related to utility services. First, homeowners often have choices when selecting which internet or cable provider to use.[325] However, for tenants who live in large apartment complexes, that choice has often been made for them. Until recently, it was increasingly common for large landlords to enter

321 Rocio Rodarte, *SB 1157 Becomes Law: California's First-in-the-Nation Rent Reporting Bill*, MISSION ASSET FUND (Dec. 8, 2020), https://www.missionassetfund.org/sb-1157-becomes-law-californias-first-in-the-nation-rent-reporting-bill [https://perma.cc/W5UD-ZTSA].

322 Georgia Kromrei, *Fannie Mae's Rental Payment Change Worries Some: Positive Rental Payment History Will Be Considered in Underwriting Process*, HOUSING WIRE (Aug. 13, 2021, 6:44 PM), https://www.housingwire.com/articles/fannie-maes-rental-payment-change-worries-some [https://perma.cc/D4SU-MZG3].

323 See Joanne Gaskin, *Truth Squad: Can Scoring Rental Data Vastly Improve Credit Access?*, FICO BLOG (May 10, 2017), https://www.fico.com/blogs/truth-squad-can-scoring-rental-data-vastly-improve-credit-access [https://perma.cc/PAD5-AXVZ] ("The challenges of achieving broad national scale in rental reporting [to CRAs] are significant. The first is the disaggregation of the furnisher market—much of the rental market is single property landlords. The second is a regulatory compliance hurdle—there is a general aversion among potential furnishers to take on the operational and compliance risks posed by becoming a CRA data furnisher.").

324 *See infra* Conclusion (discussing recent federal and state reforms to enable rental payment history to be factored into credit reports).

325 Of note, in some areas there is only a single internet service provider, which means no one really has a choice. *See* Christopher Mitchell & Katie Kienbaum, *Report: Most Americans Have No Real Choice in Internet Providers*, INST. FOR LOC. SELF-RELIANCE (Aug. 12, 2020), https://ilsr.org/report-most-americans-have-no-real-choice-in-internet-providers [https://perma.cc/5YW4-X2KZ] ("[A]t least 83.3 million Americans can only access broadband through a single provider.").

contracts with a single internet service provider (ISP).[326] These contracts required anyone who rents in that complex to use that internet service. These anticompetitive agreements often resulted in higher prices for internet service and prevented renters from making alternative choices even if the service was degraded.[327] President Biden issued an Executive Order calling on the FCC to address this issue, which they finally did in February 2022.[328]

A second issue relates to energy efficiency. Installing efficient appliances and weatherization can dramatically lower utility bills.[329] Homeowners thus have reason to invest in efficient improvements because it lowers their bills and often increases their property values.[330] Indeed, some energy efficiency programs expressly target homeowners, yet exclude renters.[331] For example,

326 *See* Todd Shields, *Landlords Risk Losing Grip on Tenants' Internet Under Biden Plan*, BLOOMBERG (July 16, 2021), https://www.bloomberglaw.com/bloomberglawnews/tech-and-telecom-law/XMHNUTG000000?bna_news_filter=tech-and-telecom-law#jcite [https://perma.cc/JU9W-DKMU] ("What we saw happening was a modern form of payola, where cable companies and building owners were colluding to keep out competition." (quoting attorney Dennis Herrera)). Although the FCC previously prohibited exclusive access contracts, landlords and ISPs have found workarounds. *See, e.g.*, Jenna Leventoff, *Your Landlord Might Be Making Deals with Broadband Providers. We Want Them to Stop.*, PUB. KNOWLEDGE (Sept. 10, 2019), https://publicknowledge.org/your-landlord-might-be-making-deals-with-broadband-providers-we-want-them-to-stop [https://perma.cc/QL8T-ENNR] (describing procedural loopholes used by ISPs, such as non-exclusive agreements, "bulk billing" agreements, or guaranteed revenue-sharing agreements, to minimize competition).

327 Tyler Cooper, *Apartment Landlords are Holding Your Internet Hostage*, BROADBANDNOW (Oct. 21, 2022), https://broadbandnow.com/report/apartment-landlords-holding-internet-hostage [https://perma.cc/S3LV-J2D2] (describing how these agreements force renters to "pay inflated costs for sub-par service").

328 *See* Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 14, 2021); *see also FACT SHEET: Executive Order on Promoting Competition in the American Economy*, WHITE HOUSE (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy [https://perma.cc/97NL-BR6M] ("[These agreements] impact[] low-income and marginalized neighborhoods, because landlord-ISP arrangements can effectively block out broadband infrastructure expansion by new providers."); Press Release, FCC, FCC Adopts Rules to Give Tenants in Apartments and Office Buildings More Transparency, Competition and Choice for Broadband Service (Feb. 15, 2022), https://www.fcc.gov/document/fcc-acts-increase-broadband-competition-apartment-buildings-0 [https://perma.cc/ZYZ4-SEFF] ("The [FCC] . . . has adopted rules to unlock broadband competition for those living and working in apartments, public housing, office buildings, and other multi-tenant buildings.").

329 *See Low-Income Households Pay a Lot for Energy. Efficiency Can Help Cut Costs*, ALL. TO SAVE ENERGY (Nov. 6, 2018), https://www.ase.org/blog/low-income-households-pay-lot-energy-efficiency-can-help-cut-costs [https://perma.cc/5ZQT-7DH2] (describing the ability of such appliances to lower utility bills); *see also* U.S. DEP'T ENERGY, ENERGYSAVERS: TIPS ON SAVING MONEY & ENERGY AT HOME 3 (2011) ("An energy-efficient home will keep your family comfortable while saving you money.").

330 *Multiple Benefits of Energy Efficiency*, IEA (Mar. 2019), https://www.iea.org/reports/multiple-benefits-of-energy-efficiency [https://perma.cc/M2DB-8KNT].

331 *See, e.g.*, Nicole Ogrysko, *Maine's Heat Pump Business is Booming. But They Can Still Be a Tough Sell for Low-Income Households*, ME. PUB. (May 19, 2022, 8:17 AM), ttps://www.mainepublic.org/environment-and-outdoors/2022-05-19/maines-heat-pump-business-is-

the recent Inflation Reduction Act provides homeowners with tax credits and rebates that are unavailable or unlikely to be beneficial to renters.[332] Landlords, however, have little incentive to invest in energy efficiency measures, given that it is often the tenants who pay the bills, and thus would recoup the savings.[333] Therefore, tenants often use more energy, and wind up with higher utility bills, than homeowners in similarly-sized residences.[334] This is especially difficult for low-income tenants.[335]

3. Consumer Protection Laws

Renters, like homeowners, are consumers, yet state and federal consumer protection laws under-protect renters compared to homeowners. As Eric Sirota has highlighted in his research, a number of state courts have determined that their states' Unfair or Deceptive Acts and Practice (UDAP) statutes—which are the broadly applicable state consumer protection laws used to protect consumers with regard to a wide range of goods and services—

booming-but-theyre-still-a-tough-sell-for-some-homeowners [https://perma.cc/2EUS-LLRV] ("A MaineHousing program will pay for the full costs and installation of a heat pump for eligible Maine homeowners . . . . renters aren't eligible."). Compounding this problem, although heating systems are required in most rentals, cooling typically is not. Samantha Fields, *Extreme Heat is Becoming More Common. Should Tenants Have a Right to Air Conditioning?*, MARKETPLACE (June 14, 2022), https://www.marketplace.org/2022/06/14/extreme-heat-is-becoming-more-common-should-tenants-have-a-right-to-air-conditioning [https://perma.cc/DBS9-K24F]. This is despite the fact that climate change is causing rising temperatures, and deaths from heat-related causes appear poised to be a bigger threat moving forward than deaths from cold-related causes. Donna Lu & Lisa Cox, *Extreme Temperatures Kill 5 Million People a Year with Heat-Related Deaths Rising, Study Finds*, GUARDIAN (July 7, 2021, 6:30 PM), https://www.theguardian.com/world/2021/jul/08/extreme-temperatures-kill-5-million-people-a-year-with-heat-related-deaths-rising-study-finds [https://perma.cc/SBF7-WRMY].

332 Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat 1818; *see also* Rebecca Mann & Jenny Schuetz, *The U.S. Needs Better, More Accessible Home Weatherization Programs*, BROOKINGS INST. (Oct. 10, 2022), https://www.brookings.edu/blog/the-avenue/2022/10/10/the-u-s-needs-better-more-accessible-home-weatherization-programs [https://perma.cc/5XQX-99PA] ("Rental housing continues to be a blind spot for policymakers in designing energy-efficient retrofits. Landlords can use [Weatherization Assistance Programs] to upgrade rental homes, but it is most often used by homeowners; in 2010, 80% of weatherized units were in one- to four-family homes. The Inflation Reduction Act's subsidies for energy upgrades are structured as tax credits or rebates for homeowners—leaving out the one-third of Americans who rent their homes.").

333 Jesse Melvin, *The Split Incentives Energy Efficiency Problem: Evidence of Underinvestment by Landlords*, 115 ENERGY POL'Y 342, 343-44 (2018).

334 *See id.* at 349 (noting that tenants who pay their own energy bills often pay approximately two percent more than homeowners).

335 *See* Stephen Bird & Diana Hernández, *Policy Options for the Split Incentive: Increasing Energy Efficiency for Low-Income Renters*, 48 ENERGY POL'Y 506, 507 (2012) ("Low-income renters often spend the highest percentages of their income on energy and heating costs, yet they receive the lowest amounts of energy per dollar spent because the weatherization and efficiency measures in their rental units are often at the lowest levels of efficiency.").

are inapplicable to tenants.[336] Furthermore, even in states where the laws do apply to tenants, states' attorneys general offices often fail to treat tenants as consumers and rarely utilize state consumer protection laws to litigate on their behalf.[337] While state landlord-tenant laws may offer somewhat comparable protections to tenants, the onus under those legal regimes is on tenants to initiate—and pay for—legal protections, unlike state consumer protection lawsuits brought by the state attorney general office. Landlord-tenant laws also offer fewer measures of relief than consumer protection laws, which "often allow for the recovery of not only pecuniary loss, but also attorneys' fees, exemplary damages, emotional distress damages, and for the imposition of equitable relief."[338] As Sirota notes, the under-protection of renters in state consumer protection law regimes is particularly troubling, given that "[t]enants, who are often low income and who must litigate their claims in a summary court process with potential homelessness hanging over their head, are uniquely disadvantaged by the[] asymmetries"—of information, money, and power between consumer and industry—that the public enforcement of consumer protection laws are intended to address.[339]

F. *Tax Law*

At the federal level, several features in the tax code provide tax benefits to filers who are homeowners, but do not provide those same benefits to renters. These include the deduction for mortgage interest payments; the deduction for state and local property tax; the exclusion of capital gains on the sale of a principal residence from tax liability; and the non-taxation of imputed rent.[340] While these tax code features have often been framed in

336 Eric Sirota, *The Rental Crisis Will not be Televised: The Case for Protecting Tenants Under Consumer Protection Regimes*, 54 U. MICH. J.L. REFORM 667 (2021).

337 *Id.* at 724.

338 *Id.* at 672 (footnote omitted).

339 *Id.* at 720. Furthermore, individual litigation of tenant rights under landlord-tenant law is not a substitute for public enforcement of tenant rights under state consumer protection: "[the former is] focused on achieving the tenant's immediate needs, be it allowing the tenant to stay in the home for the long or short term or designing a move-out plan that least damages the tenant's credit." *Id.* at 721. But public enforcement actions "can focus more deliberately on the systemic regulation of an industry. Public enforcement agencies, likewise, can act as aggregators of tenant grievances. Further, public enforcement efforts are, by design, more specifically targeted and higher profile than private litigation." *Id.* (footnotes omitted).

340 The literature on each of these tax code provisions is extensive. For an overview of the first three, see Kenya Covington & Rodney Harrell, Policy Essay, *From Renting to Homeownership: Using Tax Incentives to Encourage Homeownership Among Renters*, 44 HARV. J. LEGIS. 97, 103-06 (2007). For a primer on the imputed income exclusion, see Richard Goode, *Imputed Rent of Owner-Occupied Dwellings Under the Income Tax*, 15 J. FIN. 504, 507-12 (1960) (estimating yield from taxing imputed net rent), and Henry Ordower, *Income Imputation: Toward Equal Treatment of Renters and Owners*, *in* CONTROVERSIES IN TAX LAW: A MATTER OF PERSPECTIVE 57 (Anthony C. Infanti ed., 2015)

positive terms as promoting homeownership, in recent years, they have come under increasing criticism by economists, policymakers, and even some politicians for their distorting effects on housing markets.[341] For example, the mortgage interest deduction—intended to encourage renters to become owners—has been shown to have almost no effect on individual decisions about whether to own or rent a home.[342] Similarly, when an owner sells their home, up to $500,000 in capital gains can be excluded from tax liability,[343] meaning a homeowner's capital gains are treated differently under tax law than any other type of capital gain (such as gains from the sale of stocks or investment properties). This exclusion provides an outsized government welfare benefit to homeowners at a cost of hundreds of billions to the public annually, and does little to promote homeownership, since there is no requirement that the capital gains be used to purchase a new primary residence.[344]

While economists have focused on the economic inefficiency of these tax code provisions, these features of federal tax law also reflect the law's anti-tenancy bias. For example, the mortgage interest deduction provides an economic benefit to homeowners that covers part of their costs of shelter, with no corresponding benefit to renters: "[t]ax law says you don't deduct rent because that's a personal family or living expense . . . Well, so is a home,

(arguing that exclusion of imputed income from owner-occupied housing contributes to wealth disparities and disproportionately benefits homeowners).

341 For example, the 2017 Tax Cuts and Jobs Act (passed by a Republican-led Congress and signed into law by former President Trump) included changes to the tax code intended to reduce the use of the mortgage interest tax deduction. *See* Jason Harrison, *Reviewing How TCJA Impacted Mortgage Interest and State and Local Tax Deductions*, TAX FOUND. (Oct. 14, 2021), https://taxfoundation.org/mortgage-interest-deduction-tcja [https://perma.cc/X6XH-H56G] (describing the impact of the 2017 Act on taxpayers regarding the mortgage interest deduction).

342 *See* BROWN, *supra* note 75, at 73 ("[E]conomists generally agree that the mortgage interest deduction does virtually nothing to encourage people to buy homes. Instead, research suggests that it rewards a behavior that was probably going to occur anyway" and by encouraging the purchase of more expensive homes it "[induces] a market response that increases home prices in general, making it more difficult for first-time homeowners to be able to afford to purchase.").

343 *See Topic No. 409 Capital Gains and Losses*, INTERNAL REVENUE SERV. (Aug. 29, 2022), https://www.irs.gov/taxtopics/tc409 [https://perma.cc/7NPJ-J6YN] (describing capital gains and losses for tax purposes). The exclusion allows married couples who sell their home at a profit to keep $500,000 tax free (unmarried individuals can keep up to $250,000 tax free). *See Topic No. 701 Sale of Your Home*, INTERNAL REVENUE SERV. (Oct. 7, 2022), https://www.irs.gov/taxtopics/tc701 [https://perma.cc/R2NR-6E6C].

344 *See* JANE G. GRAVELLE, CONG. RSCH. SERV., RL32978, THE EXCLUSION OF CAPITAL GAINS FOR OWNER-OCCUPIED HOUSING 1 (2022), https://crsreports.congress.gov/product/pdf/RL/RL32978 [https://perma.cc/4YEF-WQZ7] (describing the two basic requirements for qualifying for the exclusion: the owner has lived in the property for two out of past five years and owned the property for two out of the past five years).

but we allow a mortgage interest deduction."[345] Furthermore, these tax code provisions have had disparate impacts on people of color—especially Black families—in part because they are more likely to be tenants.[346]

Several features of state and local tax law also disadvantage tenants. State and local governments provide tax relief to residents through a variety of legal mechanisms, ranging from a simple reduction in the tax rate applicable to all who pay a particular type of tax (whether property, sales, or income tax) to specialized mechanisms only applicable to certain taxpayers, such as homestead exemptions, which are available exclusively to homeowners.[347]

While there is little empirical data comparing the frequency with which different forms of tax relief are utilized by state and local governments, one particular form of tax relief—the homestead exemption—appears to be heavily favored.[348] There are policy arguments in favor of providing tax relief through the homestead exemption, since it can provide a progressive form of tax relief to lower- and middle-income homeowners, who may have home

345 Brentin Mock, *The Cumulative Tax Burden of Being Black in the City*, BLOOMBERG (May 20, 2021, 7:27 AM), https://www.bloomberg.com/news/articles/2021-05-20/three-ways-tax-policies-disadvantage-black-americans [https://perma.cc/NG54-QX9T] (quoting DOROTHY A. BROWN, THE WHITENESS OF WEALTH (2021)); *see also* Covington et al., *supra* note 340, at 107 ("[R]enters effectively pay the costs of mortgage interest and real property taxes, although they do not receive the associated tax deductions. The resulting situation, in which owners receive federal tax deductions for the costs of mortgage interest and real property taxes but renters do not, creates a discriminatory effect against renters because renters, unlike owners, must use taxable income to pay their full housing costs." (footnote omitted)).

346 Even when they are homeowners, Black families are often less likely to reap the benefits of these tax provisions because they are less likely to itemize, and because their homes often appreciate more slowly than white families' homes. *See* BROWN, *supra* note 75, at 73 (noting that neither the mortgage interest deduction nor the capital gains exclusion "work in black families' favor"); *see also* Heather K. Way, *Informational Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 127-30 (2009) (noting that people of color and lower income people are more likely to purchase homes outside the formal mortgage system, and thus "receive little or no benefit from government homeownership subsidies").

347 Homestead exemptions remove part of a home's value from taxation, thereby lowering the owner's property taxes. In most states, only the owner-occupied, primary residence of a homeowner qualifies for the exemption. *See* NAT'L CONF. OF STATE LEGISLATURES, A GUIDE TO PROPERTY TAXES: PROPERTY TAX RELIEF 6-7 (2002) [hereinafter NCSL GUIDE TO PROPERTY TAX RELIEF], https://www.leg.state.nv.us/73rd/otherDocuments/PTax/NCSL-gptrelief.pdf [https://perma.cc/G4F6-A3UE] (tabulating which of three common forms of property tax relief are provided in all fifty states and showing that homestead exemptions are the most widespread).

348 *Id.*; *see also* Adam H. Langley, *How Do States Spell Relief?: A National Study of Homestead Exemptions & Property Tax Credits*, LINCOLN INST. OF LAND POL'Y (2015), https://www.lincolninst.edu/publications/articles/how-do-states-spell-relief [https://perma.cc/FTY6-HP3C] ("Among the most commonly adopted [property tax relief] programs are homestead exemptions and property tax credits; all but three states have at least one of these programs.").

values that have risen faster than their incomes.[349] However, because homestead exemptions are used as a favored form of tax relief over alternatives that could apply more broadly to both owners and renters—such as across-the-board cuts in the tax rate, or circuit breaker provisions[350]—these exemptions creates another anti-tenancy disparity in the law; only homeowners benefit from the tax relief homestead exemptions provide.[351]

The use of property tax classifications also has the effect of imposing a disproportionate tax burden on renters as a class compared to homeowners. In a number of states, property tax rates are substantially higher for multifamily properties than single-family residences, in part because multifamily properties are categorized differently (as commercial or multifamily properties) than single-family residential properties and taxed at a higher property tax rate in these states.[352] While the extent of the property tax differential varies across states (and some states do not utilize classifications in their property tax systems), a 2005 Harvard Joint Center for Housing Studies report found that multifamily rental property bears an effective tax rate at least twenty-five percent higher than the rate on single-family owner-occupied housing for the nation overall.[353] As a result of this differential, property tax rates for renters in multifamily buildings are thirty-

349 *See* INST. ON TAX'N & ECON. POL'Y, PROPERTY TAX HOMESTEAD EXEMPTIONS (2011), https://itep.org/property-tax-homestead-exemptions [https://perma.cc/UMB5-ZAC7] (describing policy justifications for homestead exemptions).

350 Circuit breaker provisions "are property tax relief programs that target relief to low-and moderate-income homeowners and renters. Program specifics vary by state, but, in general, benefits are inversely proportional to income—meaning as income increases, benefits decline . . . . [Programs] for homeowners may be designed in two ways: sliding scale or threshold. Under the sliding scale approach, the state sets rebate amounts [either a fixed amount or a percentage of tax paid] for qualified homeowners and renters." NCSL GUIDE TO PROPERTY TAX RELIEF, *supra* note 347, at 16. On the other hand, "[t]hreshold [programs] . . . ensure that property taxes do not exceed a certain percentage of the household's income." *Id.* Sixteen states have circuit breaker programs that are available to both homeowners and renters. *See* Karen Lyons, Sarah Farkas & Nicholas Johnson, *The Property Tax Circuit Breaker: An Introduction and Survey of Current Programs*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 21, 2007), https://www.cbpp.org/research/the-property-tax-circuit-breaker [https://perma.cc/Q9Y8-F45R].

351 *See* NCSL GUIDE TO PROPERTY TAX RELIEF, *supra* note 347, at 15 ("One of the key drawbacks to homestead exemption and credit programs, even those that are carefully targeted to low-income taxpayers, is their inability to provide tax relief to renters."); *see also* Shayak Sarkar & Josh Rosenthal, *Exclusionary Taxation*, 53 HARV. C.R.-C.L. L. REV. 619, 623 (2018) (arguing that certain exclusionary tax policies may be in violation of the Fair Housing Act's disparate impact liability).

352 JACK GOODMAN, JOINT CTR. FOR HOUS. STUDS. OF HARV. UNIV., HOUSES, APARTMENTS, AND PROPERTY TAX INCIDENCE 2-4 (2005), https://www.jchs.harvard.edu/sites/default/files/w05-2.pdf [https://perma.cc/6QWA-9BF8]; *see also* LINCOLN INST. OF LAND POL'Y & MINN. CTR. FOR FISCAL EXCELLENCE, 50-STATE PROPERTY TAX COMPARISON STUDY 3-4 (2018), https://www.lincolninst.edu/sites/default/files/pubfiles/50-state-property-tax-comparison-for-2017-full_1.pdf [https://perma.cc/5H4N-5JAP].

353 GOODMAN, *supra* note 352, at 6.

nine percent higher than that of homeowners with the same income.[354] Yet because of the structure of our property tax system, tenants are unlikely to even know about this disparity: unlike homeowners who pay property taxes directly, "residential tenants are often unaware of their building's property taxes . . . . Tenants will bear a portion of the property tax burden if their rent is increased because of the tax, but they usually have no way of calculating this impact."[355]

II. SOURCES OF THE ANTI-TENANCY DOCTRINE

As Part I of this Article has demonstrated, the law writ large has a clear but underacknowledged anti-tenancy bent, treating tenants and homeowners differently across a wide range of policy areas. So, one might wonder, why does the law do this? Why does it use housing tenure status as a basis for vastly different legal treatment? We identify five distinct sources of anti-tenancy: (1) the legacy of feudalism; (2) racism; (3) culture of homeownership; (4) NIMBYism; and (5) the influence of conservative property frames. This Part unpacks each of these in turn, analyzing both how they operate as structural drivers of the Anti-Tenancy Doctrine and why they raise normative concerns.[356]

A. *The Legacy of Feudalism*

Anti-tenancy is in large part a natural outcome of the freeholder-leaseholder distinction that is deeply embedded in the common law of property. Modern U.S. property law can trace a direct line back to legal rules established hundreds of years ago in feudal England.[357] This was a time when the deep inequities between owners and non-owners were not seen as social

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354 *Id.* at 14-17 (explaining the analysis used to reach this result and noting the challenges in comparing renter and homeowner payment of property taxes directly (since renters pay taxes indirectly through a portion of their rent)).

355 JOAN YOUNGMAN, LINCOLN INSTITUTE OF LAND POLICY, A GOOD TAX 92 (2016), https://www.lincolninst.edu/sites/default/files/pubfiles/a-good-tax-full_2.pdf [https://perma.cc/X3G3-6LRD]; *see also* GOODMAN, *supra* note 352, at 18-19 (noting that the disparities in property tax rates between owner-occupied residential housing and multifamily rental properties also has implications for housing affordability and sprawl, since "the higher tax on apartments promotes low density development" and "property taxes are a greater share of the total operating costs of lower rent housing").

356 For analytical clarity, this Part analyzes each of these causes of anti-tenancy separately, but the causes are often interconnected. For example, NIMBYism is often fueled by both racism and a culture of homeownership.

357 *See, e.g.*, CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 56 (2d ed. 1988) (discussing this history).

concerns for the law to respond to, but rather as normative givens.[358] Legal doctrine thus reflected the elevated social status of freeholders—those with seisin—compared to non-freeholders.[359] In fact, the leasehold estate itself originated not in recognition of the possessory status of leaseholders, but as a legal tool for property owners who needed a "money lending device designed to evade the Church's prohibition of usury."[360]

Leaseholds—and leaseholders—have thus had a disfavored legal status since the property interest was first recognized in the common law system. For example, to pursue many types of legal claims in the feudal court system, seisin was required.[361] The "absence of seisin in leaseholds . . . left early tenants largely without the protection of the courts," which, "[c]oupled with the landlord's preferred position within the legal system . . . often produced a hostile environment for tenants."[362] The result was that the feudal legal system "often regarded [tenants'] interests as somewhat scurrilous and less worthy of protection."[363]

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358 *See* David. A. Thomas, *Anglo-American Land Law: Diverging Developments from a Shared History Part II: How Anglo-American Land Law Diverged After American Colonization and Independence*, 34 REAL PROP. PROB. & TR. J. 295, 298-99 (1999) ("Property holdings reflected social status, and both the size of the landholding and the legal form of estate correlated closely with a person's social class . . . . the English considered people free if they were not bound in some way to the land under the manorial economy. These people held property interests called freeholds."); *see also id.* ("Conversely . . . [t]he English labeled the peasants' property interests non-freeholds or unfree tenures. Medieval serfs usually held land by arrangements akin to the modern leasehold . . . .").

359 *Id.* Seisin is a feudal concept regarding possession of property "by a man holding a freehold estate therein. Thus, seisin is much more than possession." *See* CORNELIUS J. MOYNIHAN & SHELDON F. KURTZ, INTRODUCTION TO THE LAW OF REAL PROPERTY 28 (3d ed. 2002). Seisin was such an important concept in feudal law that "[m]ost of that law concerned itself with seisin, remedies to recover seisin, and the consequences of loss of seisin." *Id.* at 26-27; *see also* Daniel E. Wenner, Note, *Renting in Collegetown*, 84 CORNELL L. REV. 543, 547 (1999) ("The freehold estates provided a family with economic stability within a community, while the property system treated the term of years [leasehold] differently. The leasehold estate did not have social significance in the feudal system." (footnote omitted)).

360 *See* MOYNIHAN, *supra* note 357, at 56 (explaining the origins of leasehold estates in 13th century England, and noting that if an owner needed cash, he would lend a portion of his land to "recoup both principal and profit"); *see also* Christopher Wm. Sullivan, Note, *Forgotten Lessons from the Common Law, the Uniform Residential Landlord and Tenant Act, and the Holdover Tenant*, 84 WASH. U. L. REV. 1287, 1293 (2006) ("The freehold was a family estate, providing monetary sustenance and stability for a household, but the leasehold [was] developed primarily as an incident to monetary loans used to circumvent ecclesiastical prohibitions against charging interest." (footnotes omitted)).

361 Sullivan, *supra* note 360, at 1292-93.

362 *See id.* ("A freeholder held a higher status than nonfreeholders and was afforded protection in the courts against those who might try to take the land.").

363 *See* Thomas, *supra* note 358, at 300 ("[J]udicial service was not available to holders of leaseholds."); *see also id.* at 301 ("Feudal leaseholds were technically outside the laws governing real property because the English distinguished early leaseholds from freehold tenures and treated them as chattels.").

While the feudal system is now a historical legacy, the freehold-leasehold distinction remains a core part of the common law of property.[364] As discussed in Part I, it has served as the explicit basis for a variety of laws in the U.S., including property ownership requirements for voting, jury service in the pre-civil rights era, and similar requirements that continue to exist today for certain types of specialized elections or juries.[365] As sociologist Peter Drier observed, "the virtues attached to property ownership (and property owners), and the presumed absence of such virtues among propertyless tenants, have remained remarkably similar over the years. It is perhaps one of the few core values that has persisted throughout the more than two centuries of U.S. society."[366]

And yet, as property scholars have recognized, we live in a society today where the freehold-leasehold distinction—and the historical basis for it—is archaic.[367] This is not to say that the distinction is meaningless or should be eliminated; as noted in this Article's Introduction, policy considerations may justify the use of housing tenure status as a distinction in certain contexts.[368] Further, as functional categories, homeowner or tenant status remains relevant to legal rules unique to each category (such as mortgage law for the former, and landlord-tenant law for the latter). But recognizing the classism underlying the freehold-leasehold distinction opens space to interrogate the common law's assumption that a leasehold interest is "lesser than" a freehold interest.[369]

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364 Indeed, colonial era leaders—most notably, Thomas Jefferson—emphasized the essential connection between land ownership and democracy. *See* A. Whitney Griswold, *The Agrarian Democracy of Thomas Jefferson*, 40 AM. POL. SCI. REV. 657, 661 (1946) ("[S]mall land holders are the most precious part of a state." (quoting Jefferson to Rev. James Madison, *Writings*, Oct. 28, 1785, at 196)).

365 *See* discussion *supra* Part I.C (discussing the history of property ownership requirements for voting); *see also supra* note 238 and accompanying text (discussing current laws imposing property ownership requirements for serving on a jury in eminent domain proceedings); *supra* note 260 (discussing cases upholding property ownership for eligibility to vote in elections in certain types of special districts).

366 Dreier, *supra* note 14, at 181.

367 *See, e.g.*, D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 13 (2009) ("[T]he freehold-leasehold distinction no longer has any legal significance."); WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 6.11 (3d ed. 2000) ("The freehold-chattel real distinction has lost most of its significance . . . .").

368 For example, as noted in Part I.D, *supra*, considerations around gun safety may weigh in favor of limiting the possession of firearms on rental property.

369 As Professor Joe Singer observed, property law does not exist simply as mechanism to minimize information costs (as the freehold-leasehold distinction admittedly does), but it also "shapes social life and both reflects and promotes fundamental values." *See* Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1291, 1315-16 (2014) (questioning whether residential tenants should be able to remain in their homes if their landlord is foreclosed on and suggesting that the answer to the normative question is more complicated than the answer to the descriptive question provided by black letter law).

B. *Racism*

As the discussion in Part I has made evident, anti-tenancy dramatically impacts low-income individuals and people of color.[370] Although a bare majority of all renters in the U.S. are white,[371] because the majority of Black and Latinx families are renters, they are disproportionately impacted by policies that disfavor renters.[372] Anti-tenancy thus exists as yet another form of structural racism, with tenancy serving as a proxy for race.[373] While certain anti-tenancy laws might be designed in an ostensibly neutral, constitutionally permissible way—since tenants are not a protected class—the impacts of these laws are not neutral: they have a disparate impact on people of color precisely *because* people of color are more often tenants.[374]

Although studies have shown that "homeownership is without question the single most important means of accumulating assets," people of color who are tenants have been prevented from building wealth in this way.[375] This

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370 *See* AMERICA'S RENTAL HOUSING 2020, *supra* note 24, at 8 ("Despite the recent increases in renting among white and native-born populations, minorities and immigrants remain major sources of demand for rental housing."). As of 2018, only twenty-three percent of renters earned $75,000 or more annually. *Id.* at 1.

371 The racial makeup of renters varies greatly by locality; in some areas, a large majority of renters are people of color. *See* U.S. DEP'T HOUS. & URB. DEV., AMERICAN HOUSING SURVEY 2017 RESULTS (2018), https://www2.census.gov/programs-surveys/ahs/2017/infographs/2017%20Housing%20Profile%20Renters%20Profile.pdf [https://perma.cc/74LF-7Q9C] (noting that fifty-one percent of renters are white; twenty-percent are Black; twenty-percent are Hispanic; six percent are Asian; and two percent are Indigenous). Of note, four of the top five states with the most renters (N.Y., Cal., Nev., Haw., and R.I.) are also the states with fewest white people; in contrast, many of the states with the fewest renters are among the whitest states (Me., W. Va., Iowa, Minn., and Miss.). *Compare* Julia Campbell, *Is It More Common to Rent or Own in Each State?*, MOVE.ORG (Jan. 21, 2019), https://www.move.org/states-with-highest-lowest-owner-occupied-homes [https://perma.cc/243J-7XTM], *with Race and Ethnicity in the United States: 2010 Census and 2020 Census*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html [https://perma.cc/2XYB-DXKY].

372 *See* Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 859 (discussing the disproportionate impact of the subprime housing crisis on Black and Latinx homeowners as another in a "long and striking list of episodes of involuntary divestment from ownership of minority property owners"); *see also* ROTHSTEIN, *supra* note 12, at 47-49 (discussing de jure public policies that led to systematic housing segregation and fewer opportunities for Black homeownership).

373 An exhaustive analysis of all areas in which housing tenure is used as a proxy for race is beyond the scope of this Article. The authors are developing this research in future work, which will further explore anti-tenancy as a form of structural racism.

374 Our future work will address in more depth the likelihood that certain aspects of the anti-tenancy doctrine have been entrenched into law specifically because of intentional discrimination against people of color.

375 MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH / WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 8 (1995). Of note, when Black and Hispanic families do own assets, they are typically valued lower than those owned by white people. *See* Hernandez

disparity has deep historical roots: after the Civil War, many Black people in the south were tenant sharecroppers and did not own land, which limited their ability to build wealth.[376] In the 20th century, racial zoning, racially restrictive covenants, exclusionary zoning, FHA policies, redlining, racial steering, and other legal and financial barriers to obtaining mortgages have limited and often prevented Black homeownership.[377] Although some of these policies are no longer in force, their impacts remain built into the structures of homeownership and intergenerational wealth as it relates to racialized minorities in the U.S. more broadly.[378] For example, even today, people of color are much less likely to be approved for mortgages than white people, even when they share similar financial profiles.[379] When they are approved, Black homeowners typically pay higher interest rates, mortgage insurance premiums, and property taxes, even as their homes are appraised at lower values than comparable homes owned by non-Black homeowners.[380]

Kent et al., *supra* note 11 ("Black and Hispanic families are less likely than white families to own various types of assets . . . and have lower-valued assets when they do.").

376 GUNNAR MYRDAL, RICHARD STERNER & ARNOLD ROSE, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 224 (1944) (discussing concerns of W.E.B. DuBois regarding post-war land reform).

377 *See, e.g.*, Schindler, *supra* note 12, at 1934 (discussing how wealthy Americans have "long used formal legal methods to keep the poor and people of color out of their communities"); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 217 (1987) (discussing the "lasting damage" of federal housing policies that created barriers to obtaining mortgages for racialized minorities); ROTHSTEIN, *supra* note 12, at 46-50 (analyzing how government policies promoted discriminatory housing patterns in American cities).

378 The median wealth of homeowners is close to eighty-nine times greater than the median wealth of renters. *See* Hays et al., *supra* note 8. Most household wealth derives from home equity and retirement accounts. *Id.* Further, while median white household wealth was $171,700 in 2017, median Black household wealth was $9,567, and Hispanic wealth was $25,000. *Id.* Asian household wealth was statistically similar to white household wealth. *Id.*; *see also* CARMEL FORD, NAHB ECON. & HOUS. POL'Y GRP., HOMEOWNERSHIP RATES BY RACE AND ETHNICITY (2018), https://www.nahb.org/-/media/2AD2B1E37B664484B0B846A6C5A09DEF.ashx [https://perma.cc/K7LX-VFY3] ("[H]omeownership rates are known to vary by race, ethnicity, educational achievement, and other demographic characteristics, and may partly explain why Hispanic or Latino and [B]lack family average wealth lagged behind at just 21 percent and 15 percent, respectively, of white family wealth in 2016.").

379 *See* Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, MARKUP (Aug. 25, 2021, 6:50 ET), https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms [https://perma.cc/FU5E-GTJJ] ("Nationally, loan applicants of color were 40%-80% more likely to be denied than their White counterparts. In certain metro areas, the disparity was greater than 250%.").

380 *See, e.g.*, MICHELLE ARONOWITZ, EDWARD L. GOLDING & JUNG HYUN CHOI, MIT GOLUB CTR. FOR FIN. & POL'Y, THE UNEQUAL COSTS OF BLACK HOMEOWNERSHIP 2-4 (2020), https://gcfp.mit.edu/wp-content/uploads/2020/10/Mortgage-Cost-for-Black-Homeowners-10.1.pdf [perma.cc/UFG3-YD3V] (discussing these disparities in mortgage costs); *Racial and Ethnic Valuation Gaps in Home Purchase Appraisals*, FREDDIE MAC (Sept. 20, 2021), https://www.freddiemac.com/research/insight/20210920-home-appraisals [https://perma.cc/UQ5F-WPHS] (finding a substantial appraisal gap for properties located in Census tracts defined as

Further, there is evidence that racism and white supremacy motivated at least some of the laws that treat tenants and owners differently.[381] As a baseline example, zoning ordinances and other laws that limit the construction of apartments or multifamily dwellings were often originally adopted for the purpose of excluding people of color.[382] Similarly, the aforementioned California state constitutional provision requiring voter approval for the construction of "low rent housing projects" was adopted in response to fears of integration.[383] The California Association of Realtors, who originally drafted the provision, have admitted as much.[384] Further,

minority tracts compared to white tracts); ANDRE PERRY, JONATHAN ROTHWELL & DAVID HARSHBARGER, BROOKINGS INST., THE DEVALUATION OF ASSETS IN BLACK NEIGHBORHOODS: THE CASE OF RESIDENTIAL PROPERTY 3 (2018), https://www.brookings.edu/wp-content/uploads/2018/11/2018.11_Brookings-Metro_Devaluation-Assets-Black-Neighborhoods_final.pdf [https://perma.cc/DW3X-NSLW] (finding that owner-occupied homes in Black neighborhoods are undervalued by $48,000 per home on average, amounting to $156 billion in cumulative losses).

381 Even laws purporting to address racial bias in housing employ tenancy as a proxy for race in ways that allow racial discrimination to persist. For example, the "Mrs. Murphy" exemption in the Fair Housing Act exempts people who own and reside in a building with four or fewer units from many of the Act's substantive provisions. A "Mrs. Murphy" landlord may refuse to rent to potential tenants of color, expressly because of their race, though such action would violate the FHA for other types of landlords. Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1135-37 (2010). Congressional debates over the exemption were taking place in the context of civil rights legislation; from these debates, it became clear that the exemption's intent was to allow individuals to decide not to rent to Black people. *See* Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951, 977 (2015) ("[E]xemptions for individuals who were posited to be mere racial bigots remain in the law fifty years later."). The "Mrs. Murphy" exemption is itself an example of anti-tenancy; it only applies to "Mrs. Murphys" who are owners, not tenants. While an owner could refuse to rent out a room in her house to a person of color for explicit discriminatory reasons, a tenant who tried to select a roommate for similar reasons would be in violation of the FHA. *See* 114 CONG. REC. 3345 (daily ed. Feb. 19, 1968) (statement of Sen. Stennis) (noting that the exemption "would not protect a person who was himself renting or leasing his home and taking in boarders," as this person would still be compelled to meet the requirements of the FHA).

382 Richard Schragger, *Consuming Government, the Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land Use Policies*, 101 MICH. L. REV. 1824, 1836 n.31 (2003) ("[O]ne of the primary motivations for limitations on multifamily housing: the race or ethnicity of the people who might occupy it.").

383 CAL. CONST. art. XXXIV, § 1; *see also* Beam, *supra* note 141 (describing the provision as one that was "added to the state constitution in 1950 to keep Black families out of white neighborhoods" and noting that it was adopted in 1950, "after a 1949 federal law that outlawed segregation in public housing projects"). For discussion of recent attempts to repeal Article XXXIV and how those efforts have stalled, see *Why It's Been So Hard to Kill Article 34, California's 'Racist' Barrier to Affordable Housing*, L.A. TIMES (Mar. 14, 2022, 3:56 PM), https://www.latimes.com/california/story/2022-03-14/why-killing-article-34-on-affordable-housing-has-been-hard [https://perma.cc/4G67-SP6K].

384 *See* Isabella Vanderheiden, *Meet Article 34: How Eureka's Old Fight Against Subsidized Apartments Led to One of the Nation's Strongest Anti-Affordable Housing Laws, and What Legislators are Doing to Repeal It*, LOST COAST OUTPOST (Mar. 30, 2022, 7:32 AM), https://lostcoastoutpost.com/2022/mar/30/state-lawmakers-rally-abolish-article-34-californi

consider the *Euclid* case, which upheld the constitutionality of zoning.[385] There, the Court found that apartments were akin to "parasite[s]," which could be excluded from single-family residential neighborhoods.[386] Although the Supreme Court decision failed to discuss race, the lower court expressly acknowledged that the ordinance was aimed at excluding Black and foreign-born persons.[387] Even after the Supreme Court struck down racial zoning as unconstitutional in *Buchanan v. Warley*,[388] some cities simply converted their former "whites-only" zones to single-family zones, while converting their Black zones to apartment districts. For example, prior to 1929, "Atlanta was divided into two residential zones: 'R-1 white district' and 'R-2 colored district.' After [*Buchanan*], 'R-1' became a 'dwelling house' zone and 'R-2' became an 'apartment house' district. To this day, much of Atlanta is still organized this way . . . ."[389] More recently, affluent white suburban property owners in Minneapolis were motivated by race to change existing multifamily zoning to single-family zoning.[390] Scholars have also documented how the former blue and green areas on redlining maps—which identified FHA lending standards and were tied to race—now often line up with the location of neighborhoods with exclusionary zoning that excludes people of color.[391]

Furthermore, as Part I demonstrated, tenancy continues to be used today as a proxy for race; it is evident in everything from source of income

[https://perma.cc/3DCZ-VVNV] ("One [argument] was playing on fears that public housing could result in projects with low-income, nonwhite residents being placed in white areas resulting in the integration of neighborhoods." (quoting Sanjay Wagle, senior vice president of government affairs for the California Association of Realtors)).

385 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

386 *Id.* at 394.

387 Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 313 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926) ("[T]he next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be *within* the judicial cognizance.").

388 245 U.S. 60, 82 (1917).

389 Brentin Mock, *The Housing Proposal That's Quietly Tearing Apart Atlanta*, BLOOMBERG (Nov. 22, 2021, 2:22 PM), https://www.bloomberg.com/news/articles/2021-11-22/buckhead-fights-atlanta-s-multifamily-housing-push [https://perma.cc/4K6L-MTXV].

390 *See* Kathleen McCormick, *Rezoning History*, LAND LINES, Jan. 2020, at 13 ("Minneapolis had a direct link from racially biased zoning to single-family zoning." (quoting Heather Worthington, director of the Minneapolis Department of Community Planning and Economic Development)); *see also* Myron Orfield & Will Stancil, *Why are the Twin Cities So Segregated?*, 43 MITCHELL HAMLINE L. REV. 1, 27 (2017) (describing how "racially motivated white opposition from affluent suburbs" led to exclusionary zoning).

391 *See* Amy DeNinno, *The Role of Zoning Regulations in the Perpetuation of Racial Inequality and Poverty: A Case Study of Oakland, California*, LINCOLN INST. OF LAND & POL'Y (June 2019), https://www.arcgis.com/apps/MapJournal/index.html?appid=e3f7c6fd337046ff978221e5dd370e20#map [https://perma.cc/MT4R-UURU] ("The blue and green areas (where lending was encouraged) . . . generally align with areas where exclusionary zoning now exists."); *see also* ROTHSTEIN, *supra* note 12, at 122 (describing a similar phenomenon in Milpitas, California).

discrimination for housing voucher holders,[392] to the adoption of anti-nuisance ordinances,[393] to the programmatic bias of federal disaster relief programs.[394] Even beyond these examples of laws where tenancy functions as a proxy for race, other laws that indirectly use housing tenure status have racially biased impacts. For example, studies indicate that whiter neighborhoods may be more likely to be downzoned—zoned to allow less density and thus likely, fewer apartments.[395] Exclusionary zoning ordinances continue to have the effect of excluding people of color today: as the amount of single-family zoning in a city increases, the percentage of white residents increases, as well.[396] Similarly, many cities have ordinances that prevent the

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392 In some states, landlords are permitted to discriminate against source of income, and thus choose not to rent to tenants with housing choice vouchers. *See* ALISON BELL, BARBARA SARD & BECKY KOEPNICK, PROHIBITING DISCRIMINATION AGAINST RENTERS USING HOUSING VOUCHERS IMPROVES RESULTS 1 (2018), https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results [https://perma.cc/3U8R-M5CJ] (noting that only one in three voucher households are protected by non-discrimination laws). Thus, even large-scale landlords who would not qualify for the "Mrs. Murphy" exemption can discriminate against renters of color by refusing to accept vouchers. Black households make up forty-five percent of all voucher users, and people of color more broadly make up sixty-five percent. *See Who Lives in Federally Assisted Housing?*, NAT'L LOW INCOME HOUS. COAL: HOUS. SPOTLIGHT, Nov. 2012, at 3, https://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf [https://perma.cc/3U8R-M5CJ]. Thus, voucher discrimination is being used as a proxy for race. *See* Jonathan Sheffield, *Cook County Prevents Source of Income Discrimination from Begetting Unlawful Race Discrimination and so Should Illinois*, 19 PUB. INT. L. REP. 86, 92 n.20 (2014) ("Landlords use HCV as a race discrimination proxy to prevent minorities from moving into predominantly white communities." (quoting Interview with John Bartlett, Exec. Dir., Metro. Tenants Org. (Feb. 26, 2014))).

393 *See* discussion *supra* Part I.D (discussing selective enforcement of anti-nuisance laws against members of protected classes).

394 *See* discussion *supra* Part I.D. The imbalance in FEMA's assistance to homeowners and renters is part of a legacy of explicit racial bias in federal disaster relief programs. For example, during the Mississippi Delta floods in the 1920s, three-quarters of those living in the area were Black, and most were sharecroppers. Although the floods had destroyed the livelihoods and homes of all who lived and farmed in the Delta—both owners and sharecropper tenants—Congress passed relief legislation explicitly providing compensation only to "landowners," thereby excluding most Black residents. *See "IT's" the RACISM, STUPID!*, TEX. RURAL VOICES (Sept. 12, 2020), https://texasruralvoices.com/2020/09/12/its-the-racism-stupid [https://perma.cc/6BE3-R6KA] (discussing this history). Thanks to Dean Leonard Baynes for alerting the authors to this analysis.

395 *See* Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUDS. 227, 258 (2014) (examining downzoning in New York).

396 *See* Stephen Menendian, Samir Gambhir & Arthur Gailes, *Racial Segregation in the San Francisco Bay Area, Part 5: Remedies, Solutions, and Targets*, OTHERING AND BELONGING INST. (Aug. 11, 2020), https://belonging.berkeley.edu/racial-segregation-san-francisco-bay-area-part-5 [https://perma.cc/ED5Q-CBQS] ("[S]ingle-family zoning[] reinforces and promotes racial residential segregation.").

construction of multifamily housing, which often also has the effect of excluding low-income individuals and people of color.[397]

In sum, many of the anti-tenancy laws that we have highlighted in Part I appear to have been developed with the intent, or at least the knowledge, that they would disproportionately impact and harm people of color. Thus, racism must be recognized as one of the key causes of anti-tenancy in the law, even though many anti-tenancy laws are seemingly race-neutral in using the categories of owner and tenant as the basis for different treatment. Because of the history of racism and the barriers to homeownership for people of color, the law perpetuates these existing racial inequalities by according second-class status to tenants.

C. *The Culture of Homeownership*

The "homeownership society" in the U.S. has been the subject of extensive commentary and scholarship—both positive and critical—for decades.[398] Law and policy in the U.S. has long promoted homeownership to a degree nearly unmatched by most other Western democracies.[399] The question of whether this approach is normatively desirable is a subject of

397 *See* Peter Hegarty, *Alameda Voters to Decide Whether to Abolish Law Restricting Housing*, EAST BAY TIMES (June 9, 2020, 10:44 AM), https://www.eastbaytimes.com/2020/06/05/alameda-voters-to-decide-whether-to-abolish-law-restricting-housing [https://perma.cc/7R6A-KLUQ] (discussing a municipal rule that prohibited triplexes and fourplexes, and the "results of this policy and hundreds like this that basically created this system of structural racism") (quoting Alameda councilman Jim Oddie).

398 The scholarly and popular media coverage of the topic is extensive. For example, a Google search of "U.S. homeownership policy" yields hundreds of thousands of results, ranging from media coverage to governmental analysis to op-eds to think tank white papers. Similarly, the legal literature on the benefits and drawbacks of encouraging homeownership is vast.

399 For discussion of housing policies in European countries with lower homeownership rates than the U.S., see Dreier, *supra* note 14, at 180, which comments that "tenant-landlord laws in some other advanced capitalist nations provide greater protections for tenants in terms of rent increases, security of residence, and participation in management. Tenants, therefore, have many of the benefits that are only provided by home ownership in the United States." For further general discussion of homeownership rates, see JENNY SCHUETZ, FIXER-UPPER: HOW TO REPAIR AMERICA'S BROKEN HOUSING SYSTEM (2022), which analyzes the impacts of pro-homeownership policies in the U.S. as compared to other countries. The lack of a robust social safety net in the U.S. has meant that homeownership serves as the primary source for wealth-building and savings for most Americans. *See* JONATHAN EGGLESTON & ROBERT MUNK, U.S. DEP'T COM., U.S. CENSUS BUREAU, NET WORTH OF HOUSEHOLDS: 2015, at 3 (2019) (noting that equity in owned homes makes up the largest portion of net worth for U.S. households); *see also* Derek Thompson, *BlackRock Is Not Ruining the U.S. Housing Market*, ATLANTIC (June 17, 2021), https://www.theatlantic.com/ideas/archive/2021/06/blackrock-ruining-us-housing-market/619224 [https://perma.cc/8DUK-4C3T] ("Through law and custom, the U.S. has encouraged people to buy and cherish their houses. But by asking Americans to see their homes as precious investment vehicles, these laws activate a scarcity mindset and sow the seeds of NIMBYism: Don't dilute my equity with new construction!").

significant scholarly debate.[400] This subpart, however, highlights the less well-recognized issue of how pro-homeownership attitudes in the U.S. have furthered the development of anti-tenancy by creating a societal expectation that rentership[401]—and the lesser legal status associated with it—is but a temporary inconvenience that will be more than made up for by the rewards of homeownership once it is achieved.

The belief that homeownership is a signal of civic virtue—in addition to being an essential feature of a capitalist society—is a consistent theme in U.S. society: "[u]nlike renters, homeowners are viewed as financially independent citizens who embody the core American values of individual freedom, personal responsibility and self-reliance."[402] Property ownership—and its role in promoting a democratic civil society—has been emphasized since this county's inception, and there have long been "concerted efforts to instill an ideologically grounded belief in the moral value of the owned home."[403] For example, at the turn of the 20th century, just as the law began to enshrine the single-family home as particularly worthy of protection by zoning laws, urban reformers like Jacob Riis were detailing the problems with multifamily tenement homes: "with its crowds, its lack of privacy, [the tenement] is the

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400 *See, e.g.*, Christopher E. Herbert, Daniel T. McCue & Rocio Sanchez-Moyano, *Is Homeownership Still an Effective Means of Building Wealth for Low-Income and Minority Households?*, *in* HOMEOWNERSHIP BUILT TO LAST: BALANCING ACCESS, AFFORDABILITY, AND RISK AFTER THE HOUSING CRISIS 50, 59-60 (Eric S. Belsky, Christopher E. Herbert & Jennifer H. Molinsky eds., 2014) (discussing the research on whether homeownership serves as wealth-building for poorer homeowners and homeowners of color and finding that it depends in part on "whether ownership is sustained over the long term," but "low-income and minority owners have a lower probability of maintaining homeownership for at least five years"); BROWN, *supra* note 75, at 46-50 (discussing the reasons homeownership can fail to build wealth for Black homeowners in particular); A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 189 (2009) (critiquing pro-homeownership policies for "virtually ignor[ing] the actual market realities [faced by] most lower- and middle-income potential homeowners").

401 The term "rentership" is used here as a corollary to the term homeownership; while not as commonly used as renting or tenancy, the term "rentership" appears in scholarship comparing the two forms of housing tenure and highlights the role each serves as a form of shelter. *See* Daniel Immergluck, *Renting the Dream: The Rise of Single-Family Rentership in the Sunbelt Metropolis*, 28 HOUS. POL'Y DEBATE 814, 815 (2018); *see also* AMERICA'S RENTAL HOUSING 2022, *supra* note 18, at 12 (comparing "rentership rates" of different demographic groups to homeownership rates).

402 Dickerson, *supra* note 400, at 190 (quotation marks omitted); *see also* Katherine Levine Einstein & Maxwell Palmer, *Land of the Freeholder: How Property Rights Make Local Voting Rights*, 1 J. HIST. POL. ECON. 499, 501-02 (2021) (describing how local political and electoral institutions in the U.S. created and reinforced an ideal of a "homeowner citizen").

403 Vale, *supra* note 14, at 15; *see also id.* at 17 ("[The U.S. is] a nation founded on the principle that real property ownership was the basis for good citizenship."). Vale continues: "[W]ell in advance of the policy initiatives that made widespread homeownership financially plausible, both government and industry had transformed homeownership into an ideological necessity and installed it at the very center of American housing policy, where it has remained enshrined." *Id.* at 39.

greatest destroyer of individuality, of character."[404] Similarly, statements of politicians in the 1950s linked homeownership with patriotism and capitalism, and government-constructed rental housing with communism.[405] And as will be discussed in the next Section, many homeowners today continue to oppose the construction of multifamily housing (particularly rental multifamily housing), concerned that it will lower existing home values or otherwise negatively affect the neighborhood.[406]

The flipside of the promotion of homeownership as a civic virtue and keystone of consumer society in the U.S. has been, at best, a lack of attention to—and at times, an active animus towards—those who are not homeowners.[407] In one of the few scholarly works examining how tenants have been systemically disfavored in the U.S., sociologist Peter Dreier observed in 1982: "[t]he desire to own a home is not simply a cultural preference. It is also built into the economic arrangements and policies of society. Tenants are the objects of pervasive patterns of discrimination in the economic, political, and social institutions of U.S. society."[408]

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404 JACOB A. RIIS, A TEN YEARS' WAR: AN ACCOUNT OF THE BATTLE WITH THE SLUM IN NEW YORK 33 (1900).

405 *See* AARON GLANTZ, HOMEWRECKERS: HOW A GANG OF WALL STREET KINGPINS, HEDGE FUND MAGNATES, CROOKED BANKS, AND VULTURE CAPITALISTS SUCKERED MILLIONS OUT OF THEIR HOMES AND DEMOLISHED THE AMERICAN DREAM, at xxvii (2019) ("President Woodrow Wilson argued that increasing homeownership was the key to preventing Communism in the United States. People who owned property, the [former President] reasoned, would be invested in the capitalist system.").

406 *See* discussion *infra* Part II.D; *see also* Shaila Dewan, *As Renters Move In, Some Homeowners Fret*, N.Y. TIMES (Aug. 28, 2013), https://www.nytimes.com/2013/08/29/business/economy/as-renters-move-in-and-neighborhoods-change-homeowners-grumble.html [https://perma.cc/8KZ2-BJ5E] (discussing homeowners' concerns about more rental properties in their neighborhoods and that "the decline in homeownership . . . reduce[s] home values, lower[s] voter turnout and political influence, less[ens] social stability and [increases] crime"). *But see* OBRINSKY ET AL., *supra* note 26, at 10 (presenting data indicating a slight increase in property values after the construction of nearby multifamily housing).

407 Vale, *supra* note 14, at 19 ("[T]he advancement of homeownership ideals continues to be coupled with moral disdain for those who rent.").

408 Dreier, *supra* note 14, at 184; *see also id.* at 180 ("All this suggests that the 'dream' of home ownership is not universal, but is rather a product of political ideology and conflict . . . ."); Vale, *supra* note 14, at 40 (observing that there are "social and psychological gains" associated with ownership).

D. *NIMBYism*[409]

As discussed above, "[t]he assumption that homeowners are (much) better local citizens dominates property theory and legal scholarship."[410] This assumption is informed, in part, by Professor Bill Fischel's "homevoter hypothesis," which suggests that the outcome of most municipal decisions (especially in the suburbs) make sense when viewed from the perspective of a homeowner.[411] These homeowners will vote in a way that protects and enhances their most important asset: their home. Thus, if a proposed project will increase property values, most homeowners will vote to support it (or will encourage their local elected officials to do so); but if they believe a project will lower their property values (even if there is no evidence of this effect), they will vote against it.[412] While some policies that homeowners support may generate positive externalities,[413] "homevoter anxieties tend to generate exclusionary impulses . . . [and] land use policies [] protect home values by enshrining those impulses, including zoning rules favoring single-family homes and excluding multifamily housing."[414] Indeed, Fischel himself acknowledges that homevoters are often NIMBYs, and thus may seek to exclude apartments—and the tenants who reside within them—from their communities.[415]

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409 The NIMBY in NIMBYism stands for "Not in my backyard." The term is defined as the "opposition to the locating of something considered undesirable (such as a prison or incinerator) in one's neighborhood." *See* *NIMBY*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/NIMBY [https://perma.cc/TAF2-U6KM]; *see also* Conor Dougherty, *Twilight of the NIMBY*, N.Y. TIMES (June 5, 2022), https://www.nytimes.com/2022/06/05/business/economy/california-housing-crisis-nimby.html?referringSource=articleShare [https://perma.cc/TAF2-U6KM] ("NIMBY . . . describe[s] neighbors who fight nearby development, especially anything involving apartments.").

410 Stern, *supra* note 263, at 890.

411 *See generally* FISCHEL, *supra* note 28.

412 *Id.* at 4. The primary countermodel to the homevoter hypothesis is the "growth machine" theory of local politics, wherein developers control local decision-making, especially in large urban centers. *See generally* Harvey Molotch, *The Political Economy of Growth Machines*, 15 J. URB. AFFS. 29 (1993).

413 *See* Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519, 525 (2013) ("[P]olicies that help stabilize property values are also socially beneficial.").

414 *Id.*; *see also* Schragger, *supra* note 382, at 1836 ("Local government works for the homevoter only because she has been empowered to keep lower-income, higher-cost newcomers out of her neighborhood.").

415 FISCHEL, *supra* note 28, at 9-10. Of note, some recent research suggests a positive correlation between the construction of multifamily or affordable housing and nearby property values. *See* Sarah Holder, *What Does Affordable Housing Do to Nearby Property Values?*, BLOOMBERG (May 2, 2022, 10:47 AM), https://www.bloomberg.com/news/articles/2022-05-02/does-affordable-housing-lower-property-values [https://perma.cc/V3RY-22UN] ("Homes located within a typical block of the affordable housing developments saw property values increase, on average, by a small but still significant 0.9%."); *see also* Richard Voitch, Jing Liu, Sean Zielenbach, Andrew Jakabovics,

Furthermore, the civic virtue messaging around homeownership discussed above is also part of the homevoter story: homeowners lobby and vote to exclude rentals from their neighborhoods because they believe that having other homeowners as neighbors (rather than renters) will increase their own property values and enrich their own experiences in their communities.[416] This is because homeowners—and homeownership itself—are purportedly associated with many positive externalities: taking better care of property, being more invested in the community,[417] being more likely to engage in solving local problems,[418] and generally showing "higher levels of civic engagement than renters."[419] There has recently been some pushback to these alleged positive externalities associated with homeownership. At best, the data is mixed,[420] and many of the purported benefits of homeowners are equally as valid for renters who have been in a place for a long period of time.[421] However, homeowners continue to exercise their voice in ways that reflect these assumptions about the relative worth of homeownership versus rentership.

Brian An, Seva Rodnyansky, Anthony W. Orlando & Raphael W. Bostic, *Effects of Concentrated LIHTC Development on Surrounding House Prices*, 56 J. HOUS. ECONS. 1, 13 (2022), https://www.sciencedirect.com/science/article/pii/S1051137722000134 [https://perma.cc/A7BH-FJPY] (explaining that LIHTC developments in Cook County, Illinois generate positive price spillover effects on the surrounding neighborhoods, while also noting that subsequent LIHTC projects do not affect prices negatively).

416 FISCHEL, *supra* note 28, at 12; *see also* Boqian Jiang, *Homeownership and Voter Turnout in U.S. Local Elections*, 41 J. HOUS. ECONS. 168, 176 (2018) (describing empirical evidence that renters are less likely to vote in local elections than homeowners).

417 FISCHEL, *supra* note 28, at 80-81; *see also* Jiang, *supra* note 416, at 176 ("[H]omeowners are more financially invested in the community . . . .").

418 *See* Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens*? 45 J. URB. ECONS. 354, 365 (1999) (explaining that renters are less likely than homeowners to know the names of local political leaders).

419 Vale, *supra* note 14, at 40. It is possible the homevoter hypothesis omits one important variable: invitation. Rather than homeowners being inherently more interested in participating in local democracy, perhaps homeowners participate more at least in part because they're invited to participate more. *See* discussion *supra* Part I.A. Thank you to Michael Pollack for raising this point.

420 *See* Stern, *supra* note 263, at 912 ("The social benefits of homeownership accrue most strongly in the areas of voting and . . . personal property upkeep. In contrast . . . homeownership has only a modest impact on local contribution to social capital and participation in local collective action." (footnote omitted)).

421 *Id.* at 892 ("Where owners do make greater social contributions, length of residence, rather than ownership per se, appears to mediate many of the effects." (footnote omitted)); *see also* William M. Rohe & Michael A. Stegman, *The Impact of Home Ownership on the Social and Political Involvement of Low-Income People*, 30 URB. AFFS. Q. 152, 167 (1994) ("Home ownership in itself does not necessarily lead to greater social [and political] participation.").

E. *The Influence of Conservative Legal Frames*

A final source of anti-tenancy stems from the influence of conservative legal theory in the development of the common law of property.[422] The notion of property ownership as "sole and despotic dominion" has been an enduring frame for centuries.[423] The owner's right to exclude others is often said to be the most important stick in an owner's bundle of property rights.[424] Thus, the theoretical foundation for property laws and policies tends to give heightened importance and benefits to private property ownership in general, and homeownership specifically.[425]

It is not a surprise, then, that property law as seen through a traditional, conservative frame—which focuses on the rights of owners—would encourage people to own and improve their property, and thus view homeownership as a goal. However, conservative frames cannot adequately explain or balance the competing interests associated with ownership, which include not only the interests of the owner, but also the interests of non-owners, other property owners, and the public generally.[426] Indeed, when we

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422 *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 750 (2009) ("In recent years, law-and-economics analysis has dominated property scholarship."); *see also* Jessica L. Roberts, *Progressive Genetic Ownership*, 93 NOTRE DAME L. REV. 1105, 1113 (2018) ("[T]he neoclassical economic approach . . . has been the dominant theoretical lens for understanding property law for decades." (footnote omitted)). For examples in contracts and tort law, see Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 75 (2008), which focuses on contract law, and Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1431-32 (2000), which focuses on tort law.

423 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

424 *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154, 159-60 (Wis. 1997) ("[T]he private landowner's right to exclude others from his or her land is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting Dolan v. City of Tigard, 512 U.S. 374, 384 (1994)).

425 *See, e.g.*, Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 254-55 (2019) (noting that efforts to address housing affordability and stability, particularly for low-income residents, are "regularly met with fierce opposition from critics who often appeal to arguments about the fundamental nature of property" and that "[h]ousing justice campaigns proceed with advocates regularly ceding the theoretical domain" to conservative legal frames, opting "instead [to make] pragmatic data-driven appeals or technical precedential arguments that lack a more coherent theoretical basis").

426 *See* Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1112 ("[T]he dominant conception of property today, which focuses on protecting individual property rights and maximizing the efficient distribution of resources, is inadequate both for conflict resolution and for institutional design."); *see also* Roberts, *supra* note 422, at 1114 ("[N]eoclassical economics . . . fails to explain certain intuitions and behaviors related to ownership. For instance, it would not distinguish between an owner who recently purchased a house as a rental property and an owner who inherited a home her family had lived in for generations. Instead, it would predict that both owners are motivated to extract the most value possible from their properties.").

examine the homeowner-tenant distinction through other frames, the justifications for the supremacy of homeownership recede.

For example, scholars, policymakers, and the public often speak of the special importance of the home.[427] And in many ways, the home *is* treated uniquely under the law: common law doctrines such as curtilage and the castle doctrine provide heightened legal protections to the home and the space around it.[428] These greater protections have been justified in part on the grounds that the home is constitutive of the self.[429] Yet, as Part I demonstrates, anti-tenancy accords tenants second-class status, even though their homes—though rented, not owned—may be similarly constitutive of self.[430] For example, some renters have lived in the same house for thirty years, while some homeowners purchase a house as an investment vehicle, only to rent it out as a short-term rental.[431] Thus, if we recognize property as personhood—as many scholars do—anti-tenancy in the law should give us pause.

Similarly, a progressive property framework might focus on human flourishing, and the idea that, at times, an owner's right to exclude should bend in the face of the interests of non-owners and other broader public interests.[432] These obligations to others that inhere in property ownership would suggest less primacy for the owner and a less robust right to exclude.[433] Thus, if we view property law through a progressive property frame, the role of property as shelter—regardless of the housing tenure status of the occupant—would be given greater consideration, and anti-tenancy doctrines such as those we have identified should come under greater scrutiny.

CONCLUSION

Part I of this Article identified and exposed the Anti-Tenancy Doctrine as a pervasive, harmful, and systemic pattern across many areas of the law.

427 *See* discussion *supra* Part II.B.

428 *See* discussion *supra* Part I.C.

429 *See* Radin, *supra* note 245, at 362 (discussing the "personhood" interests that residential tenants may have in their leasehold).

430 *See* Sabbeth, *supra* note 92, at 65-66 ("Access to housing, whether rented or owner-occupied, shapes educational and employment opportunities.").

431 *See* Stern, *supra* note 14, at 1125-27 (suggesting pro-homeownership laws often fail to account for these types of considerations).

432 *See generally* Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

433 *Id.*; *see also* Weiss, *supra* note 425, at 273-74 ("The notion that 'the government can't tell you what to do with your property' resonates strongly. What competing theoretical frame could challenge this model? Again, progressive property theory could provide an answer. It reframes the question from, 'Does an absolute right to set prices at any level exist?' to questions such as, 'What are the underlying, and potentially competing, multivariate values at stake?'").

Part II unpacked the deep-rooted and complex causes of anti-tenancy. In this Conclusion, we discuss how this Article's findings should inform future work. In doing so, we aim to jumpstart a dialogue about how to respond to anti-tenancy and suggest avenues for future research as policymakers, courts, and scholars grapple with the ongoing legacy of the Anti-Tenancy Doctrine.

Because anti-tenancy appears in so many different doctrinal contexts, a comprehensive account of prescriptive solutions exceeds the scope of a single article. Thus, this Conclusion is intended as a preliminary roadmap, leaving a more detailed analysis of anti-tenancy solutions to future scholarship. Two broad points about this preliminary roadmap are worth mentioning here.

First, we suggest that policymakers seeking to address the harms identified in this Article find ways to elevate the status of tenants through legislation and litigation, rather than solely pursuing methods to help existing tenants become homeowners—which has been the focus of most U.S. policy and legal scholarship.[434] While such efforts have been a valuable part of a holistic housing policy, for many individuals, homeownership is not a viable option; they are and will remain tenants. Further, even if it were feasible to somehow transform all tenants into homeowners, we cannot simply assume that this shift in housing tenure status will cure the ills discussed herein; thus, we need to better account for the interests of tenants.[435]

Second, a number of the responses to anti-tenancy we identify below build on the on-the-ground organizing and activism that has been ongoing for decades by tenant organizers and advocates in the context of landlord-tenant law.[436] At the same time, in identifying the Anti-Tenancy Doctrine and unpacking how it accords renters a second-class status across a broad swath of doctrinal areas, this Article has sought to recalibrate the structural

434 *See, e.g.*, Jared Ruiz Bybee, *In Defense of Low-Income Homeownership*, 5 ALA. C.R. & C.L. L. REV. 107, 137 (2013) (discussing the Community Development Block Grant program, which is the federal government's "principal community development program" and focuses on initiatives designed to encourage homeownership); Covington et al., *supra* note 340, at 113-14 (proposing a universal renter to homeowner program). Some of the solutions discussed herein that aim to bring greater parity to the legal treatment of tenants and homeowners also reflect the influence of this dominant model of promotion of homeownership. *See, e.g.*, NAT'L CONSUMER L. CTR., EVEN THE CATCH-22S COME WITH CATCH-22S: POTENTIAL HARMS AND DRAWBACKS OF RENT REPORTING (2022) [hereinafter POTENTIAL HARMS AND DRAWBACKS OF RENT REPORTING], https://www.nclc.org/wp-content/uploads/2022/10/IB_Catch_22_Rent.pdf [https://perma.cc/3F3D-ASR2] (describing how rent reporting to credit bureaus may benefit tenants who are seeking to build their credit in order to become homeowners, but may carry risks for other tenants).

435 In offering this response to anti-tenancy, the authors do not suggest that there should never be differences in legal treatment based on housing tenure status. As noted in the Introduction, policymakers may, at times, need to make tradeoffs to accommodate competing underlying values. *See* discussion *supra* Part I.C(2) (discussing competing policy concerns regarding gun safety in the context of the Second Amendment).

436 *See generally infra* note 455 and accompanying text.

framing of how advocates think about tenant advocacy: not just as a group whose rights must be balanced against those of landlords, but as a group with shared interests in the context of the broader political economy.[437]

Turning to our preliminary recommendations, one set of responses to anti-tenancy involves legislative actions that could be implemented—and in some cases, which have been enacted—by localities, states, or the federal government to address specific aspects of anti-tenancy identified in Part I.[438] For example, to provide tenants with a closer approximation of the security of tenure and predictability in costs that most homeowners enjoy, a handful of jurisdictions have adopted good-cause eviction statutes.[439] While still allowing for evictions where the tenant has violated the lease, and in limited other circumstances,[440] such statutes do not allow a landlord to evict a tenant simply because they "want more rent."[441] Other jurisdictions have considered enacting laws that would provide existing tenants with a right of first opportunity to purchase multifamily housing that is at risk of foreclosure or

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437 *See* Conor Dougherty, *The Rent Revolution Is Coming*, N.Y. TIMES (Oct. 15, 2022), https://www.nytimes.com/2022/10/15/business/economy/rent-tenant-activism.html [https://perma.cc/V6QD-BYAH] (discussing "an idea that has become a refrain among tenant groups" and advocating for "fostering a broad tenant identity that will inspire a wide range of renters to organize and vote with a shared interest" known as "tenants as a class"); *see also id.* ("'Embedded in tenant organizing are deeper questions about the structure of our political economy . . . . It's getting people to think about not just how you can leverage power against your landlord or get the city council to help you, but also questions like: Why does the economy seem to be rigged against people like you so systematically?'" (quoting Jamila Michener, professor of government and public policy at Cornell)).

438 These proposals are discussed largely in terms of legislation, but actions may also be taken through executive orders or agency rulemaking. For example, some federal agencies have adopted a "social vulnerability index," which takes housing type into account when developing guidelines to respond to infectious disease outbreaks and natural disasters. *At a Glance: CDC/ATSDR Social Vulnerability Index*, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, https://www.atsdr.cdc.gov/placeandhealth/svi/at-a-glance_svi.html [https://perma.cc/8RDN-VCMK].

439 *See* SHANE PHILLIPS, THE AFFORDABLE CITY: STRATEGIES FOR PUTTING HOUSING WITHIN REACH (AND KEEPING IT THERE) 146-47 (2020) (describing such statutes, which have been enacted in nearly every city in California for the purpose of defining the "circumstances under which landlords can evict their tenants and prohibit[ing] evictions for any other reason"). The current affordable housing crisis has led to a modest resurgence of rent control efforts at the local level. *See, e.g.*, Kriston Capps, *As Housing Costs Spike, Voters Look for Hope in Rent Control*, BLOOMBERG (Nov. 4, 2021, 9:47 AM), https://www.bloomberg.com/news/articles/2021-11-04/rent-control-scored-a-big-election-night-victory [https://perma.cc/GRK2-HVKF] (describing the approval of rent control in 2021 in Minneapolis and St. Paul); PHILLIPS, *supra*, at 143 ("Why shouldn't our rules regarding rental property be written with the basic needs of renters as the first priority, rather than the profits of [landlord] property owners? There's nothing forcing anyone to invest in rental property. If investors don't want to bother with a business model in which people come first, there are plenty of other places to invest their money." (quotation marks omitted)).

440 For example, in the circumstances of condo conversion or eminent domain actions. PHILLIPS, *supra* note 439, at 146.

441 *Id.*

sale to outside investors; such laws could help preserve existing, naturally-occurring affordable rental housing and reduce tenant displacement.[442]

In the land use context, there has been action at the local, state, and federal levels targeting the disproportionate amount of land zoned for single-family residences and encouraging more multifamily housing (which will often be rentals).[443] For example, Minneapolis recently passed a local ordinance to allow duplexes and triplexes in all neighborhoods in the city.[444] Oregon's state legislature passed a similar reform, allowing up to four units as of right in many areas.[445] At the federal level, in 2021, Congress considered a bill that would encourage more communities to follow suit by withholding federal funding from localities whose local land use policies restrict housing supply.[446]

442 *See, e.g.*, Julie Gilgoff, *Giving Tenants the First Opportunity to Purchase Their Homes*, SHELTER FORCE (July 24, 2020), https://shelterforce.org/2020/07/24/giving-tenants-the-first-opportunity-to-purchase-their-homes [https://perma.cc/Z68A-84PU] (describing versions of a law known as the "Tenant Opportunity to Purchase Act" that are currently being proposed in New York, California and Massachusetts); Lloyd Alaban, *San Jose Explores Policy Allowing Nonprofits to Purchase Affordable Housing*, SAN JOSE SPOTLIGHT (Mar. 31, 2021), https://sanjosespotlight.com/san-jose-explores-policy-allowing-nonprofits-to-purchase-affordable-housing [https://perma.cc/U9WC-WBF3].

443 It remains to be seen whether these efforts will successfully encourage low-density neighborhoods to densify. *See* Daniel Herriges, *What if They Passed Zoning Reform and Nobody Came?*, STRONG TOWNS (Sept. 3, 2020), https://www.strongtowns.org/journal/2020/9/2/what-if-they-passed-zoning-reform-and-nobody-came [https://perma.cc/5YVX-RMVM] (discussing whether zoning reform in Minneapolis will lead to the desired result of a system that didn't "sideline renters and low-income residents"). Thus, additional—and more far-reaching—reforms are likely needed. For example, if even just a portion of the massive amount of money spent on propping up homeownership—particularly through federal tax policies—were redirected by the federal government, more funding could become available for affordable rental programs, such as vouchers and LIHTC. *See* SCHUETZ, *supra* note 399, at 6-10 (proposing such reforms, as well as the establishment of more public pension programs to dampen the reliance of homeowners on home values for financial security). And because local governments also often oppose the construction of affordable rental housing within their jurisdictions, reforms are needed at the state level to reorganize taxing districts on a regional or even statewide scale to disperse the tax burden of affordable housing. *See, e.g.*, Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 317-30 (2016) (discussing upward shifts in tax schemes); Stewart E. Sterk, *Incentivizing Fair Housing*, 101 B.U. L. REV. 1607, 1653-65 (2021) (discussing tax incentives and affordable housing).

444 MINNEAPOLIS, MINN., ORDINANCE § 546.30 (2019).

445 *See* H.B. 2001, 80th Legis. Assemb., Reg. Sess. (Or. 2019) (codifying the reform at the state level); *see also* OR. REV. STAT. § 197.758 (2019) (proposing the ordinance reform).

446 *See* Build Back Better Act, H.R. 5376, 117th Cong. (2021) (giving the secretary of HUD power to create incentive programs for reforming zoning laws); *see also* Romina Ruiz-Goiriena, *Biden's Infrastructure Plan Calls for Cities to Limit Single-Family Zoning and Instead Build Affordable Housing*, USA TODAY (Apr. 14, 2021, 5:36 PM), https://www.usatoday.com/in-depth/news/nation/2021/04/14/zoning-biden-infrastructure-bill-would-curb-single-family-housing/7097434002 [https://perma.cc/6Z3R-7SE4]; Press Release, White House, President Biden Announces New Actions to Ease the Burden of Housing Costs (May 16, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs [https://perma.cc/F5U5-GTPD]

Other aspects of anti-tenancy in housing law have begun to be addressed in select jurisdictions, offering models for other communities. For example, a few states have enacted laws requiring landlords to allow in-home daycares in rental properties, while still allowing landlords to set reasonable limits on the number of children or hours of operation, as well as to require proof of insurance or to collect an additional security deposit from the renter.[447] With regard to the lack of notice to renters regarding proposed zoning changes, a handful of local ordinances do require that both renters and homeowners receive mailed notice of changes; these localities have managed to overcome informational hurdles.[448] With regard to consumer credit, California recently became the first state to require that some tenants be given the option to have their monthly rental payment history reported to credit reporting agencies.[449]

Significant reforms are needed to address the imbalance in how renters and homeowners are treated before and after disasters, but there has also been some action that offers promise in this context. For example, more states should adopt hazard disclosure laws like that recently enacted in Texas, which provides that landlords must give prospective renters the same disclosures about the property's flood (or other relevant hazard) risks that prospective homebuyers receive.[450] At the federal level, NFIP regulations should be amended to require that residential landlords purchase coverage for their

(describing the May 2022 Housing Supply Action Plan announced by the Biden Administration, which will reward jurisdictions that reform their zoning and land use processes—to provide for more affordable housing—with higher scoring in certain federal grant processes and additional federal funding for construction and preservation of affordable multifamily housing). More broadly, this type of conditional federal funding approach could be deployed to nudge state and local governments to take actions in other contexts where we have identified anti-tenancy concerns. For example, federal backing of flood insurance policies could be made contingent on state or local jurisdictions having laws in place that require risk disclosure notice to both prospective tenants and owners.

447 *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 1597.41(b)-1597.41(d) (West 2020).

448 *See supra* note 63 and accompanying text (discussing San Jose's approach to improving outreach policies).

449 S.B. 1157, 2020 Leg., Reg. Sess. (Ca. 2020); *see also* Rodarte, *supra* note 321. There has also been action at the federal level: in August 2021, the Federal Housing and Finance Agency (FHFA) indicated that going forward, it will include rental payment history in credit checks for federally backed mortgages. *See FHFA Announces Inclusion of Rental Payment History in Fannie Mae's Underwriting Process*, FED. HOUS. & FIN. AGENCY (Aug. 11, 2021), https://www.fhfa.gov/mobile/Pages/public-affairs-detail.aspx?PageName=FHFA-Announces-Inclusion-of-Rental-Payment-History-in-Fannie-Maes-Underwriting-Process.aspx [https://perma.cc/8HH7-SFQT]. *But see* POTENTIAL HARMS AND DRAWBACKS OF RENT REPORTING, *supra* note 434 (describing potential drawbacks of rent reporting for some tenants).

450 TEX. PROP. CODE § 92.0135 (West 2022). The Texas law requires landlords to notify tenants that standard renters' insurance policies do not cover flood damage and that flood insurance is available through the NFIP. *See id.*; *see also* Heiman, *supra* note 14, at 795-96 (recommending Texas's law as a model, and noting that only two other states—California and Georgia—have disclosure laws, but that these laws impose limited disclosure obligations on landlords compared to the Texas law).

properties[451] and FEMA procedures should be reformed to provide tenants with access to post-disaster monetary assistance.[452]

In the context of tax law, the mortgage interest deduction—which was already significantly reduced by the 2017 Jobs and Tax Act, with no measurable negative effect on homeownership rates—should be eliminated entirely.[453] And at the state level, more states should enact property tax relief in the form of circuit breaker provisions, which provide tax rebates to qualified homeowners and tenants below certain income levels or put caps on the maximum amount of property taxes paid (either directly by homeowners or indirectly by tenants).[454]

Advocates could also litigate to challenge specific aspects of the Anti-Tenancy Doctrine.[455] For example, the FHA prohibits intentional discrimination and discriminatory effects in housing transactions on the basis of race, color, religion, sex, national origin, familial status, or disability.[456] In some localities, many of the anti-tenancy laws and policies described in Part I have differential impacts on Black and Latinx communities that are sufficient for a prima facie case under the FHA. For example, after Hurricane Harvey, tenants filed a lawsuit alleging that state and federal disaster relief actions have a discriminatory effect; Harvey hit areas where most tenants were Black and Latinx, while most homeowners were white.[457] The lawsuit alleges that these disaster relief policies have made it more difficult for renters of color to get back on their feet than white homeowners.[458] Similarly, zoning that discriminates against subsidized housing, or that limits the use of single-

451 *See* Heiman, *supra* note 14, at 807 (suggesting that the NFIP program only pay residential landlords who have made required risk disclosures to tenants).

452 *See* AURAND ET AL., *supra* note 301, at 3 (suggesting FEMA reforms to offer assistance to renters post-disaster); *see also* HUD Complaint, *supra* note 298 (discussing the need for such reforms).

453 *See* BROWN, *supra* note 75, at 70-74, 89-95 (recommending the deduction be eliminated entirely).

454 *See* discussion *supra* Part I.F.

455 The FHA is likely the most promising litigation route, but there may be other grounds on which to challenge specific aspects of anti-tenancy, including claims based on Procedural Due Process, Equal Protection, or public policy grounds. For example, the state of New York preempted local zoning prohibitions on home-based childcare due to the state's interest in ensuring adequate and affordable childcare. In turn, courts in that state have interpreted the preemption as forming the basis to void, on public policy grounds, lease provisions and HOA rules that prohibit home-based childcare. *See, e.g.*, Carroll St. Props. v. Puente, 781 N.Y.S.2d 185, 189-90 (N.Y. Civ. Ct. 2004); Quinones v. Board of Managers of Regalwalk Cond. I, 673 N.Y.S.2d 450, 452 (N.Y. App. Div. 1998) ("[A]s a matter of public policy, the Board is prohibited from enforcing the condominium declaration to bar the use of the plaintiffs' unit as a group family day care home.").

456 42 U.S.C. §§ 3601, 3604 (2018).

457 HUD Complaint, supra note 298; Fernandez, *supra* note 301.

458 HUD Complaint, supra note 298.

family homes as rentals, could be challenged on these grounds.[459] And HOA covenants that prohibit renting via "no-lease covenants" are likely to have a disparate impact on people of color, who are more likely to be renters.[460]

If a plaintiff makes a prima facie case under the FHA, the defendant must show that the practice furthers a valid interest; the plaintiff then must show that there is not a less restrictive means of furthering that interest. It is typically not hard to find a "legitimate reason" for anti-tenancy policies. For example, zoning laws that limit the use of single-family homes for rentals are often justified on the grounds that they promote neighborhood stability, provide greater security of tenure, and protect against diminished property values.[461] However, these purported legitimate ends are challenged by recent research.[462] Further, even if a court accepts these objectives as valid, zoning that limits the use of single-family homes for rentals are generally not the least restrictive means of achieving those goals. For example, a city could achieve neighborhood stability through rent stabilization rather than limiting rentals altogether. Thus, plaintiffs might have success in FHA claims against anti-tenancy laws through this tailoring analysis.

Work remains to be done to develop comprehensive solutions to the harms of anti-tenancy. But by showcasing this range of responses, we suggest that there are politically feasible and legally promising tools to redress the second-class status of tenants.

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459 *See, e.g.*, Mhany Mgmt., Inc. v. Cnty. of Nassau, 819 F.3d 581, 623-24 (2d Cir. 2016) (remanding the district court's holding to determine whether a county's practice of steering subsidized housing targeted at majority-minority communities had a disparate impact).

460 *But see* Villas W. II of Willowridge Homeowners Ass'n, Inc. v. McGlothin, 885 N.E.2d 1274, 1283-84 (Ind. 2008) (holding that plaintiffs made a prima facie case because a "decrease in available rental housing caused by the no-lease covenant will predictably and disproportionately affect African Americans," but that the "Association asserted a legitimate, nondiscriminatory reason for its no-lease covenant"). Such claims will likely still be challenging to win; plaintiffs bear a significant burden of proof in disparate impact cases because of the belief that defendants should not be "held liable for racial disparities they did not create." Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., 920 F.3d 890, 902 (5th Cir. 2019) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 653 (1989)); *see also* TBS Grp., LLC v. City of Zion, No. 16-CV-5855, 2017 U.S. Dist. LEXIS 183060, at *25 (N.D. Ill. Nov. 6, 2017) ("But by that way of thinking, *every* Zion ordinance that addresses only rental property would be grounds for a disparate impact claim. . . . [R]acial imbalance is not alone sufficient to make out a disparate impact claim: causation is still required.").

461 *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

462 While claimed legitimate reasons often relate to the idea that rentals harm property values, or that they adversely impact neighborhood stability, as discussed in Parts II.C & II.D, more recent research suggests that is not always true. *See* OBRINSKY ET AL., *supra* note 26, at 10-11 (describing recent studies that found rental housing generally does not diminish property values).

Anti-tenancy systemically harms an entire group of people: renters. It exacerbates already dramatic problems of wealth inequality and disproportionately impacts low-income individuals and people of color, adding another layer of structural discrimination to the U.S. housing market. More than a third of Americans currently rent, and imbalances in the housing market make it likely that even more people will be locked out of homeownership in the future. Thus, given that tenancy will continue to be an important part of life in the U.S., we must move towards greater parity for renters and homeowners. This is not an easy fix. It will require reform across multiple areas of law and policy, and consideration of broader innovations as a form of reparations to address the historic inequities caused by the Anti-Tenancy Doctrine. In the end, it may also require a more sustained shift in how we think about rentership and homeownership—viewing housing as shelter and protective, rather than a commodifiable investment and source of profit. By providing a framework for determining what anti-tenancy looks like and articulating the reasons that using housing tenure as a determinant of legal rights is normatively problematic, this Article offers a crucial foundation for lawmakers, scholars, and advocates to engage in the work that will be required to address the second-class status of tenants.