



## National & World Affairs



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# No place for home

Harvard property law expert Molly Brady explains how zoning law shaped our cities and helped fuel the current housing crisis

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The rent, as one candidate for governor of New York put it in 2010, “is too damn high.”

Across the United States, home prices and rent have soared in the wake of the pandemic. As more Americans struggle to afford a place to live, and homelessness surges to historic highs, politicians on both sides of the aisle are worried.

One way both Democratic and Republican administrations have sought to increase the supply of new housing is through clawing back some of local governments’ ability to set housing policy. These laws often target zoning — local ordinances that lay out where different types of buildings may be situated, along with other land use regulations, such as how many parking spaces a development must have.

For example, in Massachusetts, every town within the service area of the MBTA — the regional transit authority — is required to designate at least one area where multifamily housing may be built. Since 2017, the state of California has passed more than 100 bills to make it easier to add new housing units — including a law that allows homeowners to construct accessory dwelling units, or so-called “granny flats,” on their property. And Florida’s Live Local Act, which was signed by Governor Ron DeSantis in early 2023, largely prevents local governments from hampering multifamily housing projects that contain affordable units for local workers.

But the bills are not without controversy, and homeowners and other stakeholders have begun to push back with lawsuits against what they see as an unacceptable power grab by state governments against local communities.

Maureen “Molly” Brady, the Louis D. Brandeis Professor of Law at Harvard, says that some, but not all, of the nation’s housing crunch can be blamed on zoning. But she cautions that there are no easy solutions. “Overall, there are a huge number of things that all work together to lead to these problems, and a huge number of reasons why we’re in this mess,” she says.

In an interview with Harvard Law Today, Brady explains why zoning emerged in the U.S., how some states are trying to balance the need for housing with local interests, and what role the federal government might play moving forward.





## **Harvard Law Today: How did people try to control how land was used before the existence of zoning?**

**Molly Brady:** Before there was zoning, there were two legal mechanisms by which people tried to control other people's land uses. There was the law of nuisance, which is a tort law concept authorizing suits against other parties for unreasonable uses of land, and the law of covenants, such as deed restrictions that prevent your neighbor from engaging in a particular use. So, I could sign an agreement with my neighbor that would say that neither one of us will put a slaughterhouse on our property, and if my neighbor started to build a slaughterhouse, I could sue them for violating our agreement.

There was a perception beginning around the turn of the 20th century that this was leading to a patchwork of development in many of the urban centers in the United States. And this is a perfect moment for the birth of the idea of city planning: If we make cities beautiful and orderly, it'll make them more healthful, it'll make transportation better, it'll lead to an overall better quality of life. All this leads to an organic push for the state to step in and do some of the work, which then became work for local governments, because the problem to which they were responding was perceived as a very localized problem: New York City had different land use problems than White Plains. From a responsiveness perspective, local governments were where a lot of these early pro-zoning advocates targeted their efforts.

### **HLT: When and where did zoning originate?**

**Brady:** One of the earliest efforts is New York City's zoning ordinance, which is from 1916. New York's zoning ordinance is partially associated with a particular building: the Equitable Building, which is a big, imposing structure that is very close to the street and casts a multiple-acre shadow over Manhattan. Whether deservedly or not, those in favor of zoning pointed to it as embodying everything wrong with uncontrolled development.

The 1916 zoning ordinance divided the city into three different use districts, which were residential, business, and unrestricted. It also regulated the heights of buildings by the width of the street. People were worried about the heights of buildings for a few reasons. The first is fire — this is an era of great fires, and they are worried that if buildings are too tall or have inadequate stairways, there could be issues with safety. But we also have to talk about a tension at the heart of zoning, because tall buildings included things like tenements, and so even from the beginning, it's hard to divorce undesirable land uses from “undesirable” people.

After zoning takes off in New York, it is adopted in a couple of other places, including Cambridge, Mass. in the '20s. At this time, there is even some federal interest in zoning. The



Secretary of Commerce, Herbert Hoover, facilitates the creation at the federal level of something called the Standard State Zoning Enabling Act, which is a piece of model legislation that was intended for states to be able to adapt to authorize their localities to zone.

**HLT:** How did the model legislation empower local governments to regulate land use?

**Brady:** The way that local government works is that powers that the local government has are regulated by the state. Essentially, the state can delegate power to localities, and it can usually take power away from localities. The model legislation I just referred to was meant to give states something to take off the rack and enable their local governments to act. That legislation was adopted pretty quickly by about 35 states. This is what I think leads to the massive expansion of the city planning profession and the facilitation at the federal level and state level of local zoning.

**HLT:** Today, many Americans still live in neighborhoods that are highly segregated by race and income. What role did the government play in the way our communities look?

**Brady:** There are so many different aspects of the legal system that are working together to produce the physical layouts that we see now. The segregation of people by race, by class, by all sorts of different dimensions, aren't just from zoning. Early zoning was explicitly racial, but that flowed from the fact that there had been racially restrictive covenants on properties in many cities. Basically, those private agreements typically restricted ownership by Black residents.

Baltimore has the first racial zoning ordinance. It prevented Black residents from moving to majority white blocks, and white residents from moving to majority Black blocks — separate but “equal,” right? This kind of zoning gets struck down very early, in 1917, in a case called *Buchanan v. Warley*, which, oddly enough, is about a white landowner's capacity to sell to whomever he wished.

And so, zoning becomes not explicitly racial, but of course, there are indirect methods to achieve the same end, chiefly by exploiting the racial wealth gap. So, if you make housing more expensive, if you make lot sizes bigger, if you make land prices higher, if you restrict multifamily housing, you are going to explicitly prevent certain people of certain classes from living in particular places. And by proxy, you will also create effects on race.

By the way, those private racial covenants — whereby a landowner promises not to sell to people of certain races — continue after racial zoning is struck down. Those don't get invalidated until 1948, in a landmark decision called *Shelley v. Kraemer*.

The last thing that I think needs to be included here is discriminatory mortgage lending. Many people are familiar with the concept of redlining, which was how the federal government mapped locations in conjunction with some private entities based on the “riskiness” of loans — which was explicitly keyed to the race of the inhabitants of a particular zone. By being marked in the “red zones,” you would be less likely to be given a loan on your property, or to buy property in that area. And so, the mortgage lending process also contributed to the racial wealth gap and residential segregation.

As you can see, there are all these different ways that the government is structuring the physical landscape, and they’re all working together. It’s tempting to think of what we have now as produced by markets, but that’s not at all the case.

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**HLT:** How about today? How much do local zoning ordinances impact the housing crisis?

**Brady:** It’s once again a problem with many, many causes, one of which is surely zoning. It is particularly a problem in our biggest cities, where zoning can prevent development, often of multifamily housing, which is cheaper per unit and therefore cheaper for renters. The restrictions on multifamily housing or housing of a certain height certainly contribute to supply problems. It’s Economics 101: If you have high demand and low supply, this will lead to higher prices.

But there are other pieces. There still are restrictive covenants, though not enforceable racially restrictive ones. In some states, like California, you have a lot of gated communities where there are private agreements restricting housing to single family housing. That can impose quite a barrier. In addition, things like historic preservation can be an obstacle to developing additional housing.

Overall, there are a huge number of things that all work together to lead to these problems, and a huge number of reasons why we’re in this mess.

**HLT:** To tackle the housing shortage, some states, such as Montana, have passed laws essentially restricting the ability of local governments to block certain types of developments, such as apartments or duplexes. How do these laws work, and what are the arguments in favor of these laws?

**Brady:** The hot topic of the day is preemption more generally. This is the idea that the state is going to take back some of its power from local governments. In fact, we're seeing preemption not just in the housing area, but in other areas, too. During the pandemic, for example, there were states preempting local mask mandates. There is a big structural argument here about who should be setting policies – cities or states.

In this area, you're typically seeing blue states taking action against their own blue cities, but also against red or blue suburbs. The idea is to prevent these local governments from responding to interested citizens who will be typically voting against increased density, against multifamily housing and against other forms of supply increases like accessory dwelling units or granny flats, on the grounds that they may increase traffic or the number of students in schools, or have environmental impacts, or consequences on property values.

Once again, I think the motives can sometimes be hard to disentangle. Are the objections really about those things, or are they about preventing people of a particular class from moving into these neighborhoods and protectionism around the amenities that you get if you live in a richer single-family area?

**HLT:** Perhaps unsurprisingly, these bills aren't always popular among existing property owners, and there are pending lawsuits in multiple states aiming to strike these laws down. What are their arguments?

**Brady:** There are a bunch of interesting arguments, and they tend to be procedural, with the exception of Montana. In many suits to date, the argument is that the state didn't follow proper process in enacting legislation to liberalize zoning. In other words, it didn't provide the required notice under state law to people who might have objected, such as notice to neighbors, or it didn't perform sufficient environmental reviews, and thus, the process was broken, regardless of what outcome they ended up happening.

The Montana case is wild. Traditionally, when a landowner is affected by a land use change, they have a variety of constitutional arguments to draw on, at least at the federal level and through state analogs. One is the takings clause — the notion that the new zoning regulation deprives you of some property right. We're not seeing that many of those claims because of some big hurdles in federal takings, although we are starting to see them where there are



private agreements between neighbors – say, an agreement to only build single family housing — and the government destroyed that interest by saying everyone can build a duplex by right. You might be able to characterize that as a loss of property. Whether this argument succeeds is to be determined.

Another avenue is equal protection — basically, the claim is that the government has drawn an unreasonable line in how it's decided to treat one group. Another is substantive due process, which is basically a guarantee that the government can't act in an arbitrary way. Traditionally, meeting or making a substantive due process or equal protection challenge in the land use space has been really hard, because “arbitrary” is a high bar — you'd have to show that there is no good reason for treating one group differently than another. In the ordinary zoning case, the challenger must prove that the government lacks a rational basis for its actions, because most of the classifications do not involve a suspect class. And usually, the government has some reasonable basis, such as traffic safety or possibly even aesthetics.

In the Montana case that came down last December, which was a decision just on a preliminary injunction, the judge suggests that zoning liberalization is a substantive due process and equal protection problem. He validates the challengers' view that the state's law is “chaotic” and has “contradictions and irreconcilable differences” in certain provisions resulting from “little thought,” making it arbitrary and thus giving rise to a substantive due process problem. That's new to me.

The equal protection claim in that case is also wild. The Montana zoning liberalization statute specifically said, “we are not displacing private agreements,” probably to avoid the prospect of takings problems that I mentioned. And what the Montana judge said was the fact that it includes a carve out that allows restrictive covenants to stay in effect is itself an irrational line that treats two groups differently for no reason. Except one group entered into a contract, and the other group did not, which seems to me like a reason to treat groups differently.

**HLT:** Is there a role for the federal government in this area, if the goal is to increase housing production?

**Brady:** There are two ways the federal government can intervene right now. The first is it can condition funding to local governments based on whether they achieve various housing goals. This is what the government currently does. The issue, which is sort of the second prong here, is how well it enforces those requirements on local governments. So, if it says you can't have the money unless you do X, they actually have to withhold the money. Or if they say, we will sue you, if you don't achieve X or Y goal, they really have to sue. There is a carrot and stick problem here: I think the federal government often tries to work cooperatively with state and

local governments on housing, and there's great benefit to cooperative work. But when to bring out the stick and claw back its money — that's a challenge, because of course, it does hurt people at the end of the day.

**HLT:** In your view, should land use decisions be left to local governments, or should states and even the federal government step in? Does it depend on what our goals are for our communities?

**Brady:** This is such a hard question because, as with many problems in law, we need to ask to what extent should we use structure as a solution for substance. If the goal is more housing, then by my lights, it doesn't matter which level of government does it, as long as it achieves that. Generally, I'm a little bit of a decentralizer. I wish that locals were behaving better, and I think some locals are. But I think that where the local governments are slow to come along, that is a space for the state to start to examine the puzzle and get involved, because it has those same levers as the federal government does, such as controlling funding, which it can use to try to encourage localities to do the right thing and respond to the crisis in our midst. So that's, for instance, what Massachusetts is doing.

There's also generational change in the thinking on this — millennials and Gen Z tend to recognize that without serious change, we're not going to be able to afford housing to the extent previous generations have. These things make me hopeful.

*This interview was edited for length and clarity.*

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