9-2022

Brigham-Kanner Property Rights Journal, Volume 11

William & Mary Law School

Brigham-Kanner Property Rights Journal

Volume 11

September 2022

THE ROLE OF EMPIRICAL RESEARCH
September 30–October 1, 2021

Conference Authors

Joseph T. Waldo
Vicki Been
Carol M. Rose
Robert C. Ellickson
Julia D. Mahoney
James W. Ely, Jr.
David L. Callies & Erin Dung
James Burling
Christopher Serkin

A Publication of the Property Rights Project of

William & Mary Law School

BRIGHAM-KANNER PROPERTY RIGHTS JOURNAL

Volume 11
2022

Cite as:
11 BRIGHAM-KANNER PROPERTY RIGHTS J. ___ (2022)

A PUBLICATION OF THE PROPERTY RIGHTS PROJECT OF
WILLIAM & MARY LAW SCHOOL
POST OFFICE BOX 8795
WILLIAMSBURG, VIRGINIA 23187-8795

The *Brigham-Kanner Property Rights Journal* [ISSN Number: 2326-7437] is published by the Property Rights Project of William & Mary Law School. Our mailing address is *Brigham-Kanner Property Rights Journal,* William & Mary Law School, Post Office Box 8795, Williamsburg, Virginia 23187-8795. E-mail address: jgabbo@wm.edu. The views expressed in the *Journal* are those of the authors and do not necessarily reflect the policies or opinions of the *Brigham-Kanner Property Rights Journal,* its editors and staff, or William & Mary.

History of the William & Mary Law School

Chartered in 1693 by Queen Mary II and King William III of England, William & Mary is the second oldest institution of higher learning in the United States. The Chair of Law at William & Mary was created in 1779 by the Board of Visitors at the request of Thomas Jefferson, and was the first established in the United States. The first occupant of the Chair was George Wythe, in whose offices studied Thomas Jefferson, John Marshall, James Monroe, and Henry Clay. The growth of the law school was halted by the beginning of the Civil War in 1861. Sixty years later, the study of law was revived in a modern program that attracts students from all regions of the nation.

Copyright Notice

Subscriptions

The *Brigham-Kanner Property Rights Journal* is published once a year by the Property Rights Project of William & Mary Law School. Subscriptions to the *Journal* are considered to be continuous and, absent receipt of notice to the contrary, will be renewed automatically each year. The subscription price is $15.00 per issue. Correspondence related to subscriptions should be addressed to: Jan Abbott, Assistant Editor, *Brigham-Kanner Property Rights Journal,* William & Mary Law School, Post Office Box 8795, Williamsburg, Virginia 23187-8795.

BRIGHAM-KANNER PROPERTY RIGHTS JOURNAL

VOLUME 11 SEPTEMBER 2022

BRIGHAM-KANNER PROPERTY RIGHTS JOURNAL

VOLUME 11 SEPTEMBER 2022

THE ROLE OF EMPIRICAL RESEARCH
SEPTEMBER 30–OCTOBER 1, 2021

PANEL 4: THE DISTRIBUTIONAL IMPLICATIONS OF LAND USE REGULATION

TRIBUTE TO TOBY PRINCE BRIGHAM, PROPERTY RIGHTS LAWYER AND VISIONARY[1]

COMMENTATORS
Lynda L. Butler, *Chancellor Professor of Law, Emerita, and Director, Property Rights Project, William & Mary Law School*
Joseph T. Waldo, *Waldo & Lyle, P.C., Norfolk, VA*

BUTLER. Good morning. It's so nice to have people attending the conference again and to have a big audience that is virtual as well. We're going to start with a remembrance of Toby Brigham, a giant in the field. Joe Waldo is going to give a short presentation, a very nice presentation, about Toby. Joe.

WALDO. Thank you, Lynda. Before I start, I wanted to thank—actually I wanted to salute—Lynda Butler, Andrew Brigham, and the committee that puts this conference together. Lynda, you all have done a wonderful job again. And then I want to say to Dean Spencer: Dean, we appreciate your enthusiasm for this program and your support. It means so much and thank you very much. Then I have to say that if Toby were here, I think, Vicki Been, he would be congratulating you and he would speak about how proud he would be about your service, and I wish Toby was here to see you win this prize and give your lecture today.

1. This is a transcript of the remarks delivered to the Brigham family and the audience at the opening of the 18th Annual Brigham-Kanner Property Rights Conference as a tribute to the life and legacy of Toby Prince Brigham (1934–2022).

Let me tell you about Toby Prince Brigham. Over eighteen years ago when we were forming this conference on property rights, we were trying to figure out how to make it successful. And it was decided that if it was going to be successful, it not only had to have the academy, but the practicing bar. And if the two came together each year for a national conference—sometimes it's been international in Beijing and at the World Court in the Hague—if it was going to be successful every year, then what it would need is the interchange between the academy and the practicing bar. So how did it get its name? Well, it was decided that the name and the namesakes would represent the academy and the practicing bar. So Gideon Kanner, who had focused his entire career on takings law and eminent domain at Loyola University Law School and was an emeritus professor, was chosen for the namesake of the academy. And Toby Prince Brigham, surely one of the greatest property rights attorneys in our nation, was chosen to represent the practicing bar. So that's how we came up with the Brigham-Kanner Property Rights Conference name.

Toby focused his entire life on three things: on his faith, on his family, and on property rights. Now I'm not going to talk about his faith today, except to say that this is Toby's and Kay's family church, Old Cutler Presbyterian Church—what a beautiful sanctuary. That church and that sanctuary would not be there without Toby Brigham's leadership. He and his wife Kay were instrumental in their faith and outreach to the community. They believed in serving others, and through their faith, they had outreach programs that served many, many people of all walks of life throughout Miami and in other places, too.

Toby was devoted to Kay his entire life. He loved Kay and was devoted dearly to her. I think a great example of that was the night before Toby passed away in March. The night before he passed away, he told his daughter Amy, who is here today, that when he passed away and he was gone, if Amy saw stars falling from the heavens, that was Toby pushing the angels out of the way to get to Kay. That was Toby: right up until the day he passed away, he was devoted to Kay. But I said it was his family, and I've got EFP's picture here. That's Toby's father on the left on horseback in the early 1920s. He was the first generation Brigham in the property

rights field. EFP is what they called him—EFP Brigham. So then you see the whole family there, and you see Edward and Amy (in the middle) and you see Andy (on the left) and Tim (on the right). And Toby took great interest in all the careers of all his children. I think he was very pleased that Amy and Andrew carried on that tradition of property rights as third generation property rights attorneys.

Now Toby was incredibly successful in his career with cases literally around the country. But as I think about Toby Brigham, there are so many words that would have described Toby. Let me mention just a few now: he was sincere, respectful, dignified, collegial, and humble. Toby was many more things than that, but he was certainly those. And with respect to respect: Toby had many very bitter cases where, for his clients, he was fighting what's called "the right to take" where they believed—property owners—that their property was being taken for a use that was not a public use and it wasn't legitimate. And it would be contentious in the courtroom, and his clients sometimes would have great animosity to the opposing attorney. And Toby would tell them and every lawyer and everybody else that you must have respect for the other side, and he would tell his clients, "They're just doing their job as they see it under the Constitution, just like I'm doing my job for you under the Constitution." That's the way Toby practiced. He didn't think it was just about dignity—it involved human dignity. If you didn't have respect, there couldn't be dignity, and Toby, no matter what a person's walk of life, no matter their situation, he believed in human dignity and that respect.

Collegiality. I always associate that trait with Toby. Toby and Gideon headed up the American Law Institute's longest running and one of its most successful programs ("Eminent Domain and Land Valuation Litigation"). Before a panel began, Toby typically started at the back of the conference room or in the hallway, and he would go up to somebody with that big smile and introduce himself, saying "I'm Toby Prince Brigham. Can you tell me where you're from?" And he would ask them all about why they were there and what they were doing. That was Toby. He was such a gracious and friendly person and genuinely interested in other people.

Humble. Well I told you about all those newspaper articles on the many, many, many stories of Toby's successes. Toby was a very successful lawyer. He won almost all his cases. But Toby was humble.

It was never about "me"—it was about the cause of what Toby said was property rights. And what was that? What was the cause of property rights that made Toby so sincere when he was in a courtroom and made him so believable? Because he was believable. He believed that property rights divided power, that owning property—whether it was your family's home, your family's business, whether it was your condo, or your apartment, or your tract, just a piece of land—invested you in our democracy. And the more people invested in our democracy, the safer our democracy would be. The American Bar Association says that their mission is to defend liberty and to protect and ensure justice—that's what they're all about. Well that was Toby's mission because he believed that property rights were a civil right, a civil right often neglected. He believed that that civil right was what Jim Ely would write about in his book, *The Guardian of Every Other Right*. Without the right and protection of private property, we couldn't have the other rights that we have—freedom of religion, freedom of speech. And all of those civil rights, they're grounded also in property rights, and you cannot have one without the other. That's what Toby believed sincerely and genuinely, and he practiced that his entire career.

Let me just give you a couple of examples of how Toby practiced law. He worked hard. He did so many things—it wasn't just his sincere belief in the cause of the civil right of private property and its protection. He worked incredibly hard. Kay would say that it was nothing for Toby three weeks before trial to work in his office all night long, come home, take a shower, and go back to work the very next morning. That's how hard he worked. But he was brilliant, as Gideon Kanner would say, in taking complex cases and complex causes and breaking them down so that a judge in a courtroom, where things are moving incredibly fast with a lot of moving parts and juries, would be able to make the case understandable. And how did he do that? Well, the famous Paramount Theatre case in Portland, Oregon, is an example.

Many years ago, two businessmen—one from New York City and one a member of the minority community of Portland—bought the old Portland Theatre. Their mission was to remake that theater into a beautiful theater and bring Broadway shows to Portland. And as their local attorney said, "Neither one of my clients were very respected in Portland." Of course, that would not have bothered Toby

at all. And so this attorney called Miami, Florida and asked if Toby Prince Brigham would come to Portland because the City of Portland had decided it was a great idea to have that theater. They would condemn it and take it for the city. And that's what they did. They condemned these two men's project that was already underway, that they had thought up, and for which they had taken the risk. The whole situation just didn't seem fair, especially since the two appraisals for just compensation were millions of dollars apart. But Toby would tell you it wasn't about just compensation, it was about respect and dignity. Because when something is taken from you and you feel like you haven't been treated fairly, you tend not to respect that system. So Toby flies to Portland, Oregon and after the owners tell Toby their story, he replies that he has heard this story many times (City leaders taking an owner's idea and property). Then, as soon as Toby got out of the airport door and into a cab, the first question for the cab driver was "How does a Miami trial lawyer convince a jury here in Portland that my client is right, that they deserve justice?" And Toby wouldn't quit asking the cab driver questions: "Here are the facts of the case, what do I do?" And so on. They said he didn't give up when he got to the hotel: every night at dinner he asked the waiter or the waitress, or the cab driver the next morning, "What do you think?" You see what Toby did his whole career was get dozens and dozens of different perspectives because Toby listened to everybody. And he wanted to take in that information. Most of it wasn't helpful, but all he needed was a nugget here and a nugget there, and it helped him win cases. And Toby's appraiser's value, of course, was millions of dollars apart, but Toby won that case even though he was from Miami, Florida.

Another classic example: Toby had a case where the government had only taken a relatively small piece of land, but it was a big parcel. And in closing arguments, at the end of the case, the government's lawyer got up there and said, "Well, Mr. Brigham's client is entitled to just compensation for what we took. But that parcel was so big and we took so little, he should not get any damages for his client for what we didn't take." And Toby, of course, always in suit and tie, stepped in front of the jury and he held up his tie and he said, "If I just cut off the bottom of my tie, it's still damaged." And then Toby, when he had their attention, went on to explain how this

large piece of property—all but only a small piece had been taken—was damaged. Of course, that was another win for Toby.

So how do you describe the greatness of a person like Toby Brigham in just a few minutes? Impossible just hearing a few snippets about Toby's life. But Toby was remarkable. He helped literally thousands of property owners in Florida and others across the nation. Every time a lawyer wanted help, wanted assistance in learning about property rights, Toby was there for them. If you didn't get him on the phone right then, by that evening or night, you'd get a call. And Toby would take all the time that was necessary to help somebody in what he believed was the cause of property rights and of liberty and of dignity—human dignity. That's the way he practiced. He formed an organization, the Owners' Counsel of America, to raise the bar and the professionalism of property rights attorneys. In every turn somewhere in his career, he was doing other things besides being just a trial lawyer. And that's why he really was so special. So I would say today, in closing, to those who are listening here or around the nation: we all hope that when that day comes and we're gone, that we've made the world a little better place. But we can say for Toby Prince Brigham that not only did he make his community a better place, but his service to others—his entire life and his entire career—made, I think, this nation a better place. That's remembering Toby Prince Brigham. Thank you.

BUTLER. That was very nice, Joe. I loved hearing the snippets about Toby's life as a person and a practitioner. His life of service offered invaluable lessons to us all.

EIGHTEENTH ANNUAL BRIGHAM-KANNER PRIZE: DINNER PRESENTATION AND AWARD RECIPIENT SPEECH

AWARD RECIPIENT

Vicki Been, *Judge Edward Weinfeld Professor of Law at NYU School of Law, Affiliated Professor of Public Policy at the NYU Wagner Graduate School of Public Service, a faculty director of NYU's Furman Center for Real Estate and Urban Policy, and New York City's Deputy Mayor for Housing and Economic Development*

INTRODUCTION

Andrew Brigham, *Managing Partner, Brigham Property Rights Law Firm, PLLC*

Lynda L. Butler, *Chancellor Professor of Law, Emerita, and Director, Property Rights Project, William & Mary Law School*

A. Benjamin Spencer, *Dean and Trustee Professor, William & Mary Law School*

SPENCER. Welcome everyone to the 18th annual Brigham-Kanner Property Rights Conference. I am A. Benjamin Spencer, Dean of William & Mary Law School, and it is my pleasure to extend greetings to you from the university, from the Law School, and the William & Mary Property Rights Project. We're gathered this evening in William & Mary's Wren Building. It has a special place in legal history. The teaching of law in a university setting began here in 1779. The Wren Building was built around 1695, and, suffice to say, has persisted over centuries. So if you need an example of staying power, this is it.

Now the annual Brigham-Kanner Property Rights Conference is named in honor of Toby Prince Brigham, founding partner of Brigham Moore LLP, and Gideon Kanner, professor of law emeritus at Loyola Law School in Los Angeles. Mr. Brigham died earlier this year in Miami. A true legend in the law, he was esteemed by colleagues for the invaluable knowledge and skill he possessed and shared so generously.

A highlight of this conference is the presentation of the Brigham-Kanner Property Rights Prize. It goes to an individual whose work has advanced property rights and contributed to an awareness of property's role in the broader scheme of liberty. Later in the program,

we will honor Professor Vicki Been of New York University School of Law with this year's prize. Professor Been joins us here with her husband, Professor and Dean Emeritus Richard Revesz.

I am pleased that three of the conference's mainstays are also here with us tonight. The first is our alumnus Joe Waldo. We're also glad to welcome Joe's wife Ashby—she's here as well. Joe's mission in life has been to represent property owners and ensure that they are treated fairly by the government. As the new dean, I really wish I could clone Joe. Few people match Joe's enthusiasm for the law, and fewer have demonstrated such a sincere interest in providing opportunities for law students, and, I must add, in supporting the Law School. I really appreciate everything that you do for William & Mary Law School. And we also have Chancellor Professor of Law, *Emerita*, Lynda Butler, here tonight. Now I knew before I came to William & Mary of Lynda's reputation as a trailblazer. She is esteemed for her service to the bar and to the academy. Her contributions as a teacher, mentor, and colleague are unmatched. And then finally we have Andrew Prince Brigham. It is my pleasure to introduce Mr. Brigham who is joining us via Zoom this evening. He has the rare distinction of being a third generation trial lawyer and is the son of one of the conference's namesakes. He is a leading eminent domain and property rights attorney. The Property Rights Project and the Law School are deeply indebted to him for his work on behalf of the conference. Mr. Brigham.

BRIGHAM. Thank you, Ben. I appreciate the warm welcome. Good evening. It's certainly a privilege to represent the practicing bar and provide a few comments while bestowing the Brigham-Kanner Prize to its recipient this evening. The foundation for the Brigham-Kanner Property Rights Conference is, of course, deeply set in the legacy of the William & Mary Law School. Indeed, law professor George Wythe's ideal of a citizen lawyer was not only clearly evident in his most notable students, but can be seen today amongst those who in the fall come to the fount of this conference to drink of the virtue and the value of the civil right of private ownership. Both Wythe and his most famous citizen lawyer protégé, Thomas Jefferson, signed the Declaration of Independence. And while Jefferson, of course, penned the document, those signing for Virginia left the very top space for Wythe's signature showing great respect and honor to

their mentor and to their friend. We at times remember historical figures best for their thinking, how they thought, and what they thought. It is their thoughts in so many ways that live on. In regards to our Founding Fathers, we remember well their thinking, and perhaps because it was accompanied by such an exceeding need for immediate application: the birth of a nation, a fledgling republic, a new form of democracy, an entirely novel vision of a centralized federal government functioning alongside independent, sovereign states. Their thinking was not solely the fruit of their scholarship or their adept skills as lawyers or orators, but of their ideals concerning citizenry, a participatory government, the rule of the state balanced by the inherent sovereignty of the individual, and inspired liberty.

This evening I want to pause to give special thanks to another property rights champion, Rob Kinzer, a William & Mary alum whose generosity, early on, helped us begin our initial conferences here at William & Mary Law School. And yes tonight, Rob and Karen, thank you for underwriting our award ceremony this evening. It is altogether apropos for me to refer back to the naming of our Property Rights Conference. The conference was named after two individuals who epitomized the combined forceful ingenuity of scholar and lawyer in their own collaboration: Gideon Kanner and Toby Prince Brigham. As was mentioned, my dad passed in March of this year so this has been a year full of memories, and I'm looking forward to tomorrow when Joe Waldo will begin our conference with remarks about my father. And Gideon, thank you as well for what you've written about your friend, Toby.

With respect to Gideon and Toby, I can recall occasions from my youth when the professor from Los Angeles would come and stay with my family and work with the trial lawyer from Miami. I remember Gideon would rise early. He'd be there reading his paper, and he'd be contemplatively looking out at the Florida scenery next to our home—it included this beautiful Florida hammock with banyan and oak trees—and then my father would come down. And even as a young person just listening, the sparks would be flying. These two men shared a passion for ideas, for life, for law, for things that matter. And to be able to see what they were able to do together, working together, was quite something. You know, brilliant people don't always make room for other brilliant people, but the two of them—the scholar and the practitioner—made way for one

another to bring about great thinking together to share in building an argument, to see more deeply and broadly than they would have been able to see or think just on their own. And that's undoubtedly one of the great strengths of our conference: one of a kind, or maybe amongst a very few, that bring the academy together with the practicing bar. And once again, that fulfills in many ways the ideal of George Wythe, citizen lawyer.

Vicki Been—You yourself have excelled in the academy, particularly in the classroom and, of course, with the casebook you co-authored with Bob Ellickson. But you've expanded beyond the classroom with your empirical research and with your implementation of programs and reforms and affordable housing in one of our nation's largest urban landscapes, New York City. Notwithstanding her many accomplishments, Vicki, like my father, also stands out for her endearing warmth as a person and her bright infectious smile. We are glad to honor you this year with the Brigham-Kanner Prize. And now here is my dear friend, Lynda Butler, to bestow the award upon you. Thanks everyone.

BUTLER. That was beautiful, Andy. Thank you, and good evening to all of you. As Dean Spencer said, we are gathered in William & Mary's Wren Building, which is the oldest academic building in continuous use in the United States. It has been the site of some significant historical events. If these walls could talk, they would tell you that not only was this the first law school where the first legal education began, they would also tell you that the Wren Building was once referred to as the main building of the College because it included all the essentials: classrooms, library, of course a faculty room, kitchen, and housing for students and even for the College president. This Great Hall also served as a meeting place for the House of Burgesses, the beginning of the American democracy in the 1700s. The portraits on the walls in this Great Hall also tell the history of William & Mary. Besides the portraits of King William and Queen Mary behind me, and James Blair, in between, who was the College's founding president, you also see a mighty portrait of Queen Anne above the fireplace. She paid for the reconstruction of the Wren Building after the fire of 1705. And then across from me you see portraits of a number of our alumni graduates of various

programs of the College. I'm going to let you figure out who they include. See if you can recognize them.

The Brigham-Kanner Conference continues William & Mary's tradition of promoting a close dialogue between professors and their students (for our purposes, future lawyers). The Brigham-Kanner Prize is awarded annually to someone who has thought deeply about property's relationship to the human condition, and about the importance of property to fundamental rights and societal well-being. Prior recipients have included some of the nation's leading property scholars, a Supreme Court Justice, a nationally known practitioner, and a well-known Peruvian economist. This year's recipient, Vicki Been, stands firmly in this tradition of excellence. She is by all accounts an innovative scholar who does not shy away from difficult issues, testing positions and proposals in the field with empirical methods. As Panel One will discuss, her empirical analysis has stood the test of time, providing important lessons about the intersection of land use controls, environmental laws, and property rights. "Inspiring" is the word that has been most used to describe Vicki's contributions to the academy, to the bar, and to society—inspiring as a professional, as a colleague, and as a person.

Her publications display an impressive understanding of the complexity of property as an institution. She has produced numerous articles addressing a wide variety of complex topics, including the housing crisis, mortgage default, environmental justice, and, of course, takings. Her casebook, begun with Bob Ellickson, is widely considered to be one of the leading land use casebooks. And at the core of much of her scholarship is her use of New York City as her laboratory. Vicki's leadership of NYU's Furman Center in particular has shown others how to use their work and their research to, in the words of Carol Rose, "make a real difference in the world."

Her professional activities provide an inspiring model of how to serve. For years, Vicki has guided junior colleagues with much grace and encouragement. To a junior colleague, her style of mentorship is a welcomed and inspiring gift. And at the zenith of her career, when she could have glided a bit, just a bit, she instead accepted several significant appointments in the New York City administration. Now that's service.

Currently holding the Judge Edward Weinfeld Chair, Professor Been got her JD from NYU before clerking for the judge for whom her chair is named. She then went on to the U.S. Supreme Court, clerking for Justice Harry Blackmun. Vicki, it is clear that you have excelled at everything and are held in very high esteem. We are deeply honored that you are here to receive the Brigham-Kanner Prize. Please come forward and I will present to you this really heavy, beautiful crystal, which we will mail to you so you don't have to take it on the plane.

BEEN. Thanks so much to all of you. And thank you to Lynda. I was so thrilled and honored to get a call from Lynda asking me about this award. Lynda is somebody all of us know as a trailblazer and an incredible role model for so many in the academy. It's really humbling to hear your kind remarks because I think so highly of you and of William & Mary. Thank you, Dean, for having me and for bestowing this honor. I am humbled to be selected to join the incredibly talented group of scholars and practitioners and Justices who have received the Brigham-Kanner Property Rights Prize.

I've been blessed over the years to be at many, many of these conferences and to watch the incredible people before me get this award. And I've been blessed to work with so many of the smart, talented, creative, dedicated and compassionate people in this room. From collaborating with Bob Ellickson and then Chris Serkin and Rick Hills on our casebook, to drafting amicus briefs with John Echeverria, to sharing drafts with Bill Fischel and Julia Mahoney and so many others in the room, to hearing the stories of people like Toby and Gideon and Mike Berger and Joe Waldo and so many of the great litigators and practitioners in this field, it's been a privilege to learn from so many leaders in the property field. And, of course, there are the constant dinnertime talks, walks, and other companionship with my husband, Ricky Revesz, who is not only an amazing husband but, of course, is a leading scholar in his own right. It's such a joy to get to work with and to be married to him. We share two children, who also keep me on my toes by bringing property issues up regularly.

The journey to my interest in property and land use stems very directly from my childhood. I grew up in a very small town of 400—it got to 1000 during a boom in the uranium market one year, but

usually it was about 400—located in southwestern Colorado. So much of what I have studied over the years, and so much of what drives me in what I study and what I do, is what I saw in that town. The western slope of Colorado was, and still is, a hotbed of land use and property disputes. Not far from my hometown of Naturita was the site of an infamous war between cattle herders and sheep ranchers. During that war, allegedly, the cattle ranchers led hundreds of sheep over the cliff to their death to keep them from grazing on the land that the cattle owners wanted for their herds.

As I was growing up, many of our dinner time conversations were around land use disputes. There were disputes constantly between the ranchers and the uranium prospectors about who got to use the BLM land. There were constant disputes about the Union Carbide plant that processed uranium into vanadium in a nearby company town and later became one of the country's worst CERCLA cleanup sites. There were fights between Union Carbide and many of its employees, the federal, state, and local governments, and the environmentalists who were new arrivals to Telluride, a ski town that was just then getting started. I was fascinated by those fights and intrigued by the attachment to place and the views of liberty that they represented. I was absolutely consumed by why it is that people are so passionate about land, and wanted to know more about what drives that passion, and what causes these kinds of land use disputes. And at the same time, I was really horrified by the precariousness of many of Naturita's residents, almost all of whom, like my family, were quite poor. They were far from any services—we drove a hundred miles to go to a dentist or to see a doctor—and they were stuck in dangerous jobs and had really no access to education, to job training, or to a way out of those jobs.

My childhood was spent in the basement and back portion of a Quonset hut (which is like a tin can cut down the middle and stuck on a cement slab) that was my parents' auto repair garage and parts store. We all pitched in to survive the ups and downs of a small business. The experiences of working in my parents' shop, seeing my parents struggle to survive, and watching the role they had in the community, are seared in my consciousness forever. My father for a while was a lay justice of the peace. People who were facing foreclosure or eviction would come to him to try to get help and try to get a stay of the action. I remember seeing those families and their

desperation. But the even worse experiences were accompanying my father to the Navajo reservation nearby where he would go to either try to collect payments on the cars and pickups that he had sold to them on credit, or in the worst cases, to have to repossess the cars. I will never forget the feeling, when I was just ten or twelve, of seeing how critical it was to have a car or a pickup and to have stable housing, but also seeing how precarious people's situations were.

So in my early teens, I began to make connections between all of these things: the land use disputes that I was seeing, the harshness of the housing market, and the effect of poverty on people's access to opportunity. I read everything that I could find in the bookmobile (we didn't have a library, but a bookmobile came once a month from the town 100 miles away). I remember reading Oscar Newman's *Defensible Space* and though I had never seen public housing—I had never seen housing above two stories—I was fascinated by his description of how the design of the New York City Housing Authority contributed to crime and kept the residents from feeling a sense of ownership, a sense of pride in where they were. So I became absolutely consumed with how housing and neighborhoods can improve or harm people's lives.

I've had lots and lots and lots of good luck. Because there were many mouths to feed, and my mother and father were working around the clock in the parts store, I took over the family cooking when I was twelve. I was able to go to college because I won a cooking contest that then gave me a scholarship. I studied what was called "consumer science"—basically home economics from a consumer protection point of view—and journalism. Thankfully, my journalism professor encouraged me to actually send a story idea to Consumer Reports, which was exactly where I wanted to be, writing about housing and consumer issues. He saw something in me, and thanks to his encouragement, I was lucky to secure an internship at Consumer Reports. I moved to New York never having been east of the Mississippi or been in a real city, but I thought New York sounded just great, so I should give it a try. I went to the library, and I found that there was a residential hotel for women on 34th Street and Ninth Avenue that Macy's had provided for their sales girls. It was very safe, no men above the first floor, all of those things. I was able to come to New York precisely because of that kind of affordable, safe housing that also provided a community of similarly striving women

who I could be friends with. It's very fitting that I'm now trying to figure out how that hotel for women—which you can't build anymore in New York City because of the zoning rule—can be reinvented for the 21st century. So it comes full circle.

But all of this is, by way of saying, you can take the girl out of the country, but the values and desire to tackle the challenges that I saw in Naturita's land use and housing issues never left me. My mother eventually became mayor of the town. She beat back a recall petition over a land use and environmental justice fight, and she made the first improvements that the town had ever been able to build using federal or state money. I learned from her the importance of local government, the pathologies of local government, and the complexity of issues like environmental justice. I'm sure she never realized that she was planting the seeds of my preoccupation with making local governments work better and with using property rights to make people's lives better. But she was the genesis. And all of that history makes me just immensely grateful for this award and for all the lucky breaks and the generous people who helped me get from Naturita to New York City, which was a little bit of a leap.

I catch some grief from my progressive colleagues at City Hall, as well as from some of you, about my concern for property rights, my belief in public-private partnerships, my sometimes-quixotic quest to put policy and principle above politics, just as I catch grief from some of you about my involvement in policies like inclusionary housing. But one of the things that I've always treasured about this conference and this award is the tradition of people with very different perspectives coming together, listening to each other, learning from each other, and coming away as better advocates, better scholars, and better people. The quality of minds and the character of the people who have received this award in the past are really daunting. I am humbled to be asked to join that group, and I will do my level best to live up to the honor.

Toby Brigham, when he was alive, and Gideon Kanner taught me so much by example and through our conversations, and have challenged me to put myself in the shoes of the homeowners, the small business owners, the ranchers and farmers, and others for whom property rights are not just about their love of the land or their love of their home or their quest to get ahead, but also about respect and equality and fairness. And when I've heard Toby or Gideon or Mike

or Joe or others talk passionately about the injustices that they've seen, I've thought about the hard work of my neighbors in Naturita just trying to eke out a living. And I thought about the abuses. I thought about my town's efforts in my father's last days to take the portion of our property that my brother's trailer sat on. But the conversations in this conference also made me think harder about the ever-present need to strike a balance between protecting against abuse and arbitrariness or greed, on the one hand, and allowing society to learn from its mistakes, to remedy past injustices, and to give those who have been shut out of an opportunity a fair chance.

I will miss Toby and all that he taught me, and I look forward to learning still from so many of you in the room and on Zoom. As the past few years have shown, we have many, many problems to solve. I'm grateful to have gotten the chance to work with all of you in finding fair, equitable, and efficient solutions. I look forward to our discussions tomorrow and to returning to work again with you from NYU in January. My present job sometimes doesn't even let me return phone calls, but I look forward to being back where I can actually think and collaborate with all of you.

I also want to thank Toby's family and, of course, Gideon for inspiring this award, and for inspiring generations of scholars and practitioners. Thank you, Joe, for imagining the effect that this award and this conference could have, and thanks to Lynda, to all those who put this conference together and who are participating. I'm very, very humbled and appreciative for all that you've bestowed on me. Thank you.

SPENCER. Thank you, Professor Been, for sharing your story and how it ties into the person that you've become today and your inspiration for focusing on property rights, and reminding us all of why property rights are extremely important—humanizing it. It's really one of the bedrocks of liberty in our democracy, and that's why this conference and this award are so important to us.

This is just the beginning. We're going to have a full day of presentations and engagement tomorrow that we're very much looking forward to, so tonight's event has concluded. I want to thank you for joining us this evening. I want to extend my congratulations again to Professor Been and to the conference organizers.

OPENING REMARKS: THE ROLE OF EMPIRICAL RESEARCH

AWARD RECIPIENT

Vicki Been, *Judge Edward Weinfeld Professor of Law at NYU School of Law, Affiliated Professor of Public Policy at the NYU Wagner Graduate School of Public Service, a faculty director of NYU's Furman Center for Real Estate and Urban Policy, and New York City's Deputy Mayor for Housing and Economic Development.*

BEEN. Thank you, Lynda and Dean Spencer. Joe, thank you for that heartfelt and heartwarming description of exactly who Toby was. And also thank you to Toby's family: it is an honor to be here with Amy and to have Andy on Zoom. And I will just say again how delighted and humbled I am to receive the award named after Toby and to join the incredibly amazing group of people who have received the award before me.

I want to talk this morning about empirical legal scholarship, which I define as research that employs economic tools to use data and other information to examine legal phenomena—the players, the actors, the institutions, and the processes that relate to or interact with the law. That scholarship has gained a lot of ground over the past few decades. Given the increasingly demanding and acrimonious debates about property rights across the country—whether we are talking about the current emphasis on landlord-tenant issues, the racial homeownership gap, the need to better integrate communities, the crisis of housing affordability, or the demands of resiliency given climate change—it is a propitious time to evaluate the contributions, the promise, and the limits of empirical scholarship.

Let me turn first to some of the positive contributions that empirical legal scholarship has made to those debates, talk a little bit about the constraints and limits of the scholarship, and then talk about some of the remaining potential. Now, I have to confess that being deputy mayor during a pandemic, and the ensuing economic and other crises, has not left me a lot of time to keep up with all the literature. I am looking forward to being back at NYU where I can do all of that reading, but I'm going to focus my examples on the two areas that as deputy mayor I deal with on an hourly basis: landlord-tenant issues and land use issues. I apologize to all those whose scholarship I have missed.

To examine the contributions empirical legal scholarship has made, we need to articulate first what the scholarship can tell us. The first thing that it is able to tell us is whether or not the current legal system is working: is the law even being used (and often it isn't), and if so, by whom and under what circumstances; is the law achieving its intended goals; is it the most efficient way of achieving those goals; does the law have inefficient or unfair consequences (intended or unintended). Let me just highlight a few examples of scholarship that has helped answer those questions—again with apologies to all those whose work I neglect. The pandemic has resulted—and here I'll speak specifically about New York—in billions of dollars of rent arrears over the course of the pandemic. Policymakers across the country have really struggled to anticipate exactly what will happen when the eviction moratorium ends; how governments can best mitigate the effects of the evictions that will undoubtedly follow the lifting of the moratoria; and how to mitigate the effects that the rent arrears are causing to landlords, to the housing market, and to the surrounding neighborhoods. All of that requires an understanding of how the eviction process actually works: how often does the process actually result in evictions (in New York, very few eviction filings actually result in evictions, for example); the characteristics of the landlords and the tenants who end up in housing court; the effect that evictions have on the tenants, landlords, neighbors; how the assignment of counsel matters in that process; what success eviction prevention and early intervention programs have; and things like how mediation or other alternatives to eviction actually work. Though there's a lot more that we need to understand, real progress has been made in our understanding of those questions because of empirical legal scholarship.

Here I would cite just a few examples: Eva Rosen's and Phil Garboden's work on how landlords use the threat of eviction;[1] Peter Hepburn's, Lillian Leung's, and Matt Desmond's work on serial evictions—people who constantly are being evicted or getting eviction filings, not necessarily being evicted;[2] and Nicole Summers' recent

1. Philip ME Garboden & Eva Rosen, *Serial Filing: How Landlords Use the Threat of Eviction*, 18 CITY & CMTY. 638 (2019).

2. Lillian Leung et al., *Serial Eviction Filing: Civil Courts, Property Management, and the Threat of Displacement*, 100 SOC. FORCES 316 (2020).

University of Chicago Law Review piece*, The Limits of Good Law: A Study of Housing Court Outcomes*.[3] All of those recent pieces have taught us a great deal about the context in which evictions are taking place, and the ways that eviction processes are being used by different kinds of landlords. Even more progress has been made in identifying and quantifying the possible costs and benefits of mitigating the harms of eviction and uncollected arrears. Several studies by Matt Desmond and his colleagues at Princeton's Eviction Lab, work by Rob Collinson and Davin Reed at the Federal Reserve,[4] and a recent National Bureau of Economic Research paper by John Eric Humphries and his colleagues[5] are just a few of the empirical studies that have pointed to the private and the societal benefits of intervening long before a case ever reaches the point of an eviction filing.

A second way that empirical research can inform legal thought is by telling us whether there are problems that the law or other institutions need to solve. The numerous studies that have addressed whether low-income residents of a neighborhood are displaced by gentrification are a good example. The work of so many economists, some lawyers, and some sociologists have found little evidence of displacement despite all of the debate over displacement. My NYU colleagues, Kacie Dragan, Ingrid Ellen, and Sherry Glied, for example, used Medicaid data to track the movements of families with children over seven years in rapidly gentrifying neighborhoods, and found no evidence that gentrification was contributing to higher rates of mobility among those families.[6] That is not to say that there is not displacement in some circumstances, but the scholarship tells us that we have not gotten to the bottom of what the problem is, or how widespread it is, and therefore we need to tread carefully before imposing solutions.

---

3. Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145 (2020).

4. Robert Collinson & Davin Reed, *The Effects of Evictions on Low Income Households* (Feb. 2019) (unpublished manuscript), https://robcollinson.github.io/RobWebsite/jmp_rcollinson.pdf.

5. Robert Collinson et al., *Eviction and Poverty in American Cities* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26139, 2022), https://www.nber.org/system/files/working_papers/w26139/w26139.pdf.

6. Kacie Dragan et al., *Does Gentrification Displace Poor Children? New Evidence from New York City Medicaid Data* (Nat'l Bureau of Econ. Rsch., Working Paper No. 25809, 2019), https://www.nber.org/system/files/working_papers/w25809/w25809.pdf.

Third, empirical research can tell us what is actually causing a particular problem or a perceived problem. Recent empirical work on the effects that new buildings have on rents and prices in the host neighborhood is a good example. Advocates and many policymakers claim that building market-rate housing (which is always described as luxury housing no matter what its price point) will raise prices in the neighborhood, cause gentrification, and result in displacement. But work in the last few years—Kate Pennington's 2021 paper, for example, looking at construction in San Francisco;[7] Xiaodi Li's work on high-rises in New York City;[8] and the 2020 work by Brian Asquith, Evan Mast, and Devon Reed on the effects the construction of large new apartment buildings has on the neighborhood[9]—all show that new construction of market-rate housing decreases prices and rents in the surrounding neighborhood rather than increasing prices, spurring gentrification and possibly displacement.

Fourth, empirical legal scholarship can help us understand how a particular world works, so that we can craft the law to give incentives that actually will work given the practices and characteristics of the industry. The work that I mentioned earlier on evictions is a really good example of this, because it shows that large property managers and small building landlords operate in two completely different worlds. We should not be thinking that the things that would work in large property management situations are going to work when it comes to small landlords.

And lastly, empirical legal scholarship can tell us whether the assumptions on which a particular law or a proposed law is based are accurate. And not to be self-referential here, but I would point to my own work—looking at the pattern of up-zonings and down-zonings in New York City to test the assumption, held by many courts, that the so-called "growth machine" controls the land use processes and therefore that neighbors' concerns should be given more deference

7. Kate Pennington, *Does Building New Housing Cause Displacement?: The Supply and Demand Effects of Construction in San Francisco* (Urb. Econ. & Reg'l Stud. EJournal, Working Paper, 2021), https://www.gwern.net/docs/economics/2020-pennington.pdf.

8. Xiaodi Li, *Do New Housing Units in Your Backyard Raise Your Rents?*, J. ECON. GEOGRAPHY (2021), https://academic.oup.com/joeg/advance-article-pdf/doi/10.1093/jeg/lbab034/40257286/lbab034.pdf.

9. Brian J. Asquith et al., *Local Effects of Large New Apartment Buildings in Low-Income Areas*, REV. ECON. & STAT. (2021), https://doi.org/10.1162/rest_a_01055.

than developers' and owners' concerns—as an example.[10] I'm sure that you all can think of many more examples, and that is really my point: empirical legal scholarship has helped shape our understanding of the problems that the law is trying to solve, the actors and institutions that are involved in those problems, the ways in which the legal institutions work, the efficacy of current legal regimes, and the correctness of the underpinnings of those regimes.

But empirical legal scholarship, like all scholarship, has its flaws, limits, and constraints. I am not going to catalog all of them, but I want to suggest a few, and here I am going to put on my current hat as a policymaker reading empirical studies and trying to glean from them what we in government should do as a matter of policy. First, the question that a study is asking, or its relevance to actual policy decisions, too often is unclear. Often I read an empirical study and wonder "what are they really asking, and does the evidence that they gathered and analyzed actually answer the question they said they were asking?" Relatedly, too many studies lack a sound theoretical basis for the questions they ask. If a researcher does not have a theoretical basis for the hypothesis—a view about what could cause the hypothesis to be true or false—then what the researcher learns about the hypothesis may not be all that helpful for the policymakers trying to design a solution or response to the problem being studied.

Even clear and precise questions are not always framed in ways that will make the research helpful to policymakers. Sometimes researchers think that they should not make policy recommendations based upon their empirical work because empirical work is rarely as clear in its answers to questions as policymakers would like it to be. But pushing to try to answer actual policy questions, and to then make suggestions about ways in which policymakers can actually use that evidence, is extremely helpful.

Some studies offer false precision—I cannot tell you how many times advocacy organizations use interns who just took statistics, and they come in with evidence of something like "if you do X, 0.7 fewer people will be evicted every half hour." Maybe that level of precision is justified, but often what the study really shows is much more nuanced and dependent on assumptions. When you're a policymaker trying to budget funds for a particular program, you need a

10. Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014).

general sense of the order of magnitude of the results you should expect, but you should not over-promise, and should instead be humble about all that could affect those results. More generally, one has to understand that an empirical study is never enough. Just like any one piece of legal scholarship may change the way that we think about a problem but leave lots of unanswered questions, one piece of empirical scholarship is rarely going to provide everything you need to know to tackle a problem. And here I would give as an example all the work that has been done on the question of whether gentrification, however it is defined, displaces low-income residents from the neighborhood. As I mentioned earlier, there are dozens of different studies that do not find evidence of displacement. But those results are not satisfying to policymakers, in part because the studies do not explain how lower income households manage to stay in neighborhoods when rents and housing prices increase, and in part because they are not able to distinguish between what people in the neighborhood perceived as displacement and "normal" rates of turnover. Because the legal context is so idiosyncratic and varies from city to city and state to state, because of the differences between small and large properties, local government structures, market cycles, and so on, the generalizability of any study is going to be called into question. So it is usually going to take a series of studies that are really probing the underlying theories and differences in contexts for us to believe the results.

Let me end by suggesting that there is enormous need for and promise of empirical legal scholarship. The problems that we face today—and again I am going to focus on landlord-tenant issues here for a moment—are huge: we know very little about how the arrears that are piling up, and the evictions that may come when moratoria are lifted, will affect local governments, the real estate industry, the housing stock, and most importantly, the welfare of our households; and an enormous amount is at stake. You have got policymakers under enormous pressure to "do something." Having the kind of information that empirical legal scholarship can bring is so critical. We do not know, for example, how often, and under what circumstances, landlords and tenants worked out informal means of dealing with people's loss of income during the pandemic. How did legal rules facilitate or hinder those kinds of informal mechanisms? How did the availability of moratoria and the promise of rent relief programs

affect the behavior of tenants and landlords? We are finding in New York enormous difficulty in getting tenants to apply for rent relief—why? Similarly, we are having enormous trouble getting landlords and tenants to cooperate in applying for rent relief that would make them both whole. What does that tell us about the relationship between landlords and tenants and ways that we may need to repair and strengthen that relationship? How does the law shape incentives to cooperate or not cooperate? How are the arrears incurred during the pandemic going to affect the housing market? What are they doing to housing quality? How are landlords managing, if at all, to maintain their properties in these situations? And again, how does the law hinder or facilitate all of that? These are the questions that governments, the industry, philanthropy, and advocates all across the United States are struggling to understand, so that we can shape policy in a way that will be efficient and fair rather than providing the wrong incentives. These are the kinds of things that empirical legal scholarship can help us understand. So the need for, and the promise of, empirical research are tremendous. I very much look forward to being back at NYU and to the thousands of hours that I'm going to spend reading and catching up on all of the literature, but also working with scholars—many of you in the room and on Zoom—to try to tackle some of these questions. Thank you very much.

WHAT EJ HAS TO DO WITH IT: VICKI BEEN'S EMPIRICISM IN THE FORGE OF ENVIRONMENTAL JUSTICE

CAROL M. ROSE*

Vicki Been is well-known for her insistence that her views on law have empirical support. Of course, she is well-known for other things too—notably her scholarly contributions to legal issues in land use and housing, and her willingness to step out of the academy and into the heated commotion of New York's housing administration. But in these endeavors too, she has insisted on empirical evidence to justify policy.

How did Vicki's empirical bent get started? That is the subject of this Essay, focusing on her first major foray into empirical work. The subject of this early work was in the environmental area, and more specifically it concerned the distributional aspects of environmental problems. Her main contributions in this area took place during a period of a little over a year in 1993–1994, and this Essay will center on that brief but significant year.

During 1993–1994, while Vicki was still a junior professor at New York University Law School,[1] she came out with a series of articles on what was initially known as "environmental racism" and later as "environmental justice" or sometimes "environmental equity." Because of the heated controversies around this topic, the year of Vicki's most intense involvement was probably not the happiest or smoothest in her career. But the year was certainly productive; it included a flurry of six articles, including four conferences and conference papers. Moreover, and most important for this Essay, Vicki's powerful engagement with environmental issues marked a distinct turn to empiricism. This is not to say that the signs were not already on the wall. Just a short time before, Vicki had published a *Columbia Law Review* article that was to be widely cited on issues of land use exactions; it too made considerable use of empirical

* Ashby Lohse Professor of Water and Natural Resource Law, University of Arizona Rogers College of Law (emer.); Gordon Bradford Tweedy Professor of Law and Organization (emer.), Yale Law School; JD Univ. of Chicago, 1977; PhD Cornell Univ., 1970.

1. At the time of the Brigham-Kanner Property Rights Conference in Vicki's honor in October 2021, her husband Ricky Revesz told me that she was also pregnant during much of that year.

material.[2] But in Vicki's rendezvous with environmental justice, empirical issues were sharply contested and thus front and center.

Much of the disquiet over what is called "environmental racism" or "environmental justice" has involved and continues to involve the location of polluting facilities in or near communities of color or low-income areas. A more general concern over the siting of undesirable uses has a long history in land use, and such uses had even acquired a name by 1981: "LULU" for "locally unwanted land use," a name invented in that year by Frank Popper, a land use scholar of the 1970s and the following decades.[3] Some of the earlier LULU issues included funeral homes in residential neighborhoods[4] and the operation of adult bookstores,[5] followed by neighborhood objections to half-way houses[6] and low-income housing.[7]

LULUs, as the name discloses, raise issues of land use, and Vicki was undoubtedly familiar with these siting issues by the early 1990s because of her interest in land use. A decade earlier, however, the discussion of LULUs had crossed paths with concerns over racism, and specifically over the burden of environmental hazards in predominantly minority or low-income areas. In 1983, the Government Accounting Office (GAO) published a study of a few large hazardous waste sites in predominantly African-American areas.[8] In the same year, sociologist Robert Bullard published an article—to be followed by his many other articles and books—about the relatively high number of environmentally hazardous facilities in predominantly

---

2. Vicki Been, *Exit As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 511–28 (1991) (discussing empirical evidence for thesis that local governments compete for residents).

3. Frank Popper, *Siting LULUs*, 47 PLANNING, no. 4, 1981, at 9.

4. *See, e.g.*, Rockenbach v. Apostle, 47 N.W.2d 636 (Mich. 1951) (in spite of zoning compliance, funeral home enjoined as nuisance after neighbors' complaints that it would cause increased traffic, air pollution, reminder of death).

5. *See, e.g.*, State *ex rel.* Field v. Hess, 540 P.2d 1165 (Okla. 1975) (upholding injunction against adult bookstore's display of materials considered obscene as public nuisance).

6. *See, e.g.*, Gilda M. Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 MASS. L. REV. 125, 135 (1981) (describing community objections to half-way houses, including concern of overload on particular communities).

7. *See, e.g.*, Nucleus of Chicago Homeowners Ass'n. v. Lynn, 524 F.2d 225 (1975) (ruling HUD action arbitrary and capricious for failing to conduct NEPA review before siting low-income residential project in middle-class neighborhood).

8. U.S. Gen. Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983).

African-American areas of Houston.[9] The United Church of Christ followed in 1987 with a study of the siting of hazardous waste facilities in predominantly minority and low-income areas.[10]

All these early studies claimed that the siting of environmental hazards was due at least in large part to racism. The implication was that waste facilities and other centers of environmentally harmful activities were sited where they were because of intentional discrimination, or at least casual indifference to the harm that they could cause to the minority and low-income residents of the affected areas. More publications followed over the next few years in the later 1980s and early 1990s, with Professor Bullard becoming a chief spokesperson for claims of racism in these environmental siting issues.

In 1993, junior law professor Vicki Been from New York University exploded onto this academic scene with an article entitled *What's Fairness Got to Do with It?: Environmental Equity and the Siting of Locally Undesirable Land Uses*.[11] The article came out in the *Cornell Law Review*, and despite its attention-grabbing title—explicitly referencing Tina Turner's hit song, "What's Love Got to Do with It?"[12]—the article was heavily and carefully researched. I was teaching Environmental Law shortly after the article appeared, and in a note to my class on recent writings on environmental justice issues, I referred to it as a friendly corrective to some of the previous work in the area (and I also commented on its astonishing number of footnotes).

I may have overstated the friendliness aspect in my comment, however, because in retrospect it appears that love may indeed not have had much to do with the whole subject. What Vicki's article had to do with was not love but data and the inferences that one could reasonably draw from data. One takeaway from the article, and probably the most notable one, was the following: one cannot assert that facility siting has discriminated against racial minorities

9. Robert Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOCIO. INQUIRY 273 (1983).

10. United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race In the United States: A National Report On the Racial and Socio-Economic Characteristics of Communities Surrounding Hazardous Waste Sites* (1987).

11. Vicki Been, *What's Fairness Got to Do with It? Environmental Equity and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

12. *Id.* at 1001.

and low-income groups simply by observing the current demographics of the sites, because the current population statistics may have resulted at least in part from the operation of a free market in housing.[13] That assertion poses the question, did African-American and low-income persons arrive before the siting decision? Or did the siting of a LULU make the surroundings decline in value, making them more affordable for lower-income and predominantly minority residents? As Vicki reeled off paragraph after paragraph, and citation after citation, the message was clear: if you do not have a grip on causation issues and their directions, you cannot realistically address solutions to the very real issue of the disproportionate environmental burdens on disadvantaged groups.[14]

Another major theme of the article was less noticed at the time, but still important: Vicki argued that the then-current environmental justice literature lacked a well-articulated position about goals—that is, what fairness would really mean in this context.[15] I will come back to her arguments on that topic shortly, but for now simply note that the causation issue was the one that took center stage in the debates that ensued over the next year. That was the issue that dominated the series of articles and conferences that Vicki took part in during 1993–1994.

I am probably making some errors, but as closely as I can piece together the dates in this tumultuous year, the first was a conference at the University of Maryland in April 1993,[16] in which I believe Vicki presented the outlines of her first big environmental justice article, *What's Fairness Got to Do with It?* Just from looking at the list of participants, none of whom would have been on the defensive about Vicki's comments, my guess is that conference was relatively calm. Vicki's big *What's Fairness* article then came out in the fall of 1993.

The next significant step came in January 1994, at a session on environmental justice at the Association of American Law Schools'

---

13. *Id.* at 1016–18.

14. *See, e.g.*, Vicki Been, *Market Dynamics and the Siting of LULUs: Questions to Raise in the Classroom About Existing Research*, 96 W. VA. L. REV. 1069, 1071 (1994).

15. Been, *supra* note 11, at 1027–68 (Section III of article, laying out possible conceptions of fairness and complications).

16. *See* Richard Lazarus, *The Meaning and Promotion of Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1 (1994) (dating conference as April 2, 1993).

section meeting on environmental law.[17] I have a hunch that the temperature was going up at this conference; the *What's Fairness* article had been out long enough to attract some attention and no doubt some responses. More conferences on environmental justice followed in the spring of 1994: one at Fordham Law School in New York, which appears from the subsequent symposium issue to have had a mix of views;[18] and then soon afterwards a conference at West Virginia University College of Law.[19] The latter was probably quite heated, given that Robert Bullard was a participant.

While all this was going on, Vicki was publishing the results of her research, in language that was always calm but pulled no punches. She had a major piece in the *Yale Law Journal* in 1994, entitled *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*[20] As the title suggests, this article again stressed the importance of distinguishing between siting discrimination and market dynamics, and it drilled down hard on the empirics of this question.

At this point I am not entirely sure of the sequence, but I believe the next publication came after the Yale article, with the appearance of a different article based on the paper she had given at the Fordham conference earlier in the year.[21] This article explored the topic of compensating local communities for the siting of LULUs, but it also discussed the difficulties of comparing one LULU to another. Shortly after that came two brief articles from the University of Maryland conference,[22] and another follow-up article from the conference at West Virginia University.[23]

---

17. *See* Patrick C. McGinley, *Environmental Injustice and Racism: Making the Connection in Classrooms and Courtrooms*, 96 W. VA. L. REV. 1017, 1022–23 (1994) (describing AALS section meeting and participants in January 1994).

18. *See* Bruce A. Green, *Foreword*, 21 FORDHAM URB. L.J. 425 (1994) (introducing symposium).

19. *See* John Douglas Moore, *Environmental Justice: A Growing Union*, 96 W. VA. L. REV. 1015 (1994) (introducing symposium).

20. 103 YALE L.J. 1383 (1994).

21. Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787 (1994).

22. Vicki Been, *Conceptions of Fairness in Proposals for Facility Siting*, 5 MD. J. CONTEMP. LEGAL ISSUES 13 (1994); Vicki Been, *Siting of Locally Undesirable Land Uses: Directions for Further Research*, 5 MD. J. CONTEMP. LEGAL ISSUES 105 (1994).

23. Been, *supra* note 14, at 1069.

Now let me pause to let all that sink in: these appearances and articles were all compressed into a period of a little over a year in 1993–1994. There were two lagging articles on the causation issue in environmental justice sitings, one in 1995[24] and a second co-authored piece in 1997.[25]

My surmise is that this flurry of activity and writing was a genuine turning point in Vicki's academic career. It must have been a grueling period, and she dropped the topic of environmental justice after those articles. But despite that fact, those articles gave a certain preview of what was to come later.

First, after all that activity and all those publications, it was entirely predictable that any views that Vicki Been put forth were going to have sensible arguments backed up by careful analysis of a mass of data. And second, it was entirely predictable that she was the kind of person who would be courageous enough to take on some genuinely difficult real-world tasks—like the administration of housing policy in New York City. One cannot predict either of those traits about very many other people.

But now, I want to turn to a few more specific observations about Vicki's scholarship on issues relating to environmental justice. One is on that central question of causation. Vicki's chief antagonist appears to have been the well-known UCLA sociologist Robert Bullard, whose work she criticized most clearly.

Even after Vicki's critical observations, Bullard continued to insist that the maldistribution of environmentally damaging sites was chiefly a problem of white racism.[26] But he may not have realized that the factor of market dynamics was actually far more radical than intentional discrimination, however odious the latter may be. As Vicki pointed out, the factor of market dynamics gives scholars the leverage to interrogate much more pervasive and subtle

---

24. Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENV'T. L. 1 (1995).

25. 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 (1997).

26. Robert D. Bullard, *Environmental Racism and Invisible Communities*, 96 W. VA. L. REV. 1037, 1040–41 (1994) (giving example of racist siting rather than "market dynamics" in scare quotes); Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 8 ST. JOHN'S J. OF LEGAL COMMENT. 445, 460 (1994) (describing discrimination as "chief cause of social, economic and environmental inequities"; disputing "market dynamics" as cause of disproportionate siting of unwanted environmental facilities in minority communities).

forms of discrimination, in many more areas than siting alone: employment, housing, lending practices, unequal provision of public services, to name just some; all these parts of the economy feed into market dynamics.[27] Ultimately, pursuing the impact of market dynamics could lend itself to a critique of the free market itself, particularly insofar as the market reflects aggregate preferences, including what economist Gary Becker famously called the "taste for discrimination."[28]

Vicki made important points about environmental justice aside from the debate about causation of siting, and here too she raised questions of continuing relevance. What, for example, are the ethics of compensation for undesirable, or at least unwanted, land uses? Is it just to pay people to accept land uses that may affect their health or their anxiety levels or both?[29] But from another perspective, if the producers of LULUs have to compensate the neighborhood, they might be incentivized to produce fewer or less undesirable products; and indeed, some neighborhoods might be willing to accept LULUs if offered compensation. How do those considerations weigh in the ethics of compensation?[30] Lest anyone think this is only a problem from the past, market approaches still raise these questions about current environmental issues, including trades of emission allowances.[31]

Another issue of continuing relevance appears in Vicki's very subtle discussion of the many possible meanings of fairness. This appears in that first *What's Fairness* article in the *Cornell Law Review*,[32] and in some others as well.[33] This issue too has continued to percolate in more recent discussions. A very crude version of the issue is whether the essence of fairness is *equality of opportunity* (or in this negative context, *equal chances of exposure to risks*); or whether, on the other hand, fairness means *equal outcomes.* This issue is reflected today in some subtle turns of language, contrasting *equal opportunity* to what is called *equity*.

---

27. Been, *supra* note 20, at 1391–92.

28. GARY BECKER, THE ECONOMICS OF DISCRIMINATION 14–17 (2d ed. 1971).

29. *See* Been, *supra* note 11, at 1040–46, 1052–60 (describing cost internalization but also some ethical and practical problems with compensation remedies).

30. Been, *supra* note 21, at 787–826 (describing rationales for compensation schemes in siting as well as studies and experience).

31. Michael J. Sandel, *It's Immoral to Buy the Right to Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.

32. Been, *supra* note 11, at 1027–68.

33. *See, e.g.*, Been, *supra* note 22 (discussing various meanings of fairness in environmental justice literature).

There is an empirical component to this issue too, particularly with respect to weighing one LULU against another: Is a landfill the equivalent of a chemical factory? How does either measure up against a series of half-way houses or homeless shelters? Among those affected, it is unlikely that all are affected equally or in the same way; should these differences be taken into account, and if so, how?[34]

Vicki raised those questions, and they continue to run through many environmental controversies. But these questions also go beyond empirics, and going beyond empirics is also a part of Vicki's work. They signal why her first big empirical contributions were so important when they first appeared, and why they continue to be important now. All these questions occurred in that flurry of investigation in 1993–1994. Vicki was then, and continues to be now, someone who investigates empirical matters. But she was then, and continues to be now, someone who also wants to investigate justice as well.

34. Been, *supra* note 11, at 1034; Been, *supra* note 22, at 19–20.

EMPIRICAL RESEARCH IN PROPERTY: VICKI BEEN AS ROLE MODEL

ROBERT C. ELLICKSON*

ABSTRACT

From the outset of her career, Vicki Been has written articles with an empirical focus. Her important works discuss, among other topics, exactions, environmental challenges to the location of locally unwanted land uses, and the effects of land uses on nearby property values. In 2014, she co-authored a standout article on the politics of rezoning in New York City. She and her co-authors found that, even in the nation's densest city, homeowners opposed to development usually have the power to thwart densification.

Law professors generally have done less than both economists and historians to reveal the functioning of property institutions. Nonetheless, legal analysts have made important contributions. In addition to the works of Vicki Been, the Essay highlights the findings of, among others, Thomas Merrill on public use issues, Krier and Sterk on takings, Ward Farnsworth on bargaining over a nuisance dispute, and Henry Hansmann on the rise of condominium ownership.

To be relevant, an empirical project needs a theoretical underpinning. The Essay concludes with a dab of theory. Scott Shapiro, a legal philosopher, stresses the importance of plan-making to individuals, families, business firms, and governments. I assert that predictable property rights are a prerequisite to successful planning. My confidence in attending this conference, for example, depended on stable property rules. The rules that underlie private property played an essential part, but the rules of public and communal property crucially supplemented them.

INTRODUCTION

Vicki Been exemplifies the virtues of empirical scholarship in property law. In this brief Essay, I document some of her many

* Walter E. Meyer Professor Emeritus of Property and Urban Law and Professorial Lecturer in Law, Yale Law School.

achievements, and highlight both what property scholars have accomplished on the empirical front and have yet to accomplish. Good empiricism, of course, requires an underlying theory that indicates the relevance of the results presented. I end the Essay with a dollop of theory. An unsung virtue of private property, indeed also of communal and open-access property, is its capacity to enable individuals, households, kinship groups, firms, and governments to pursue plans, confident that the future legal protection of property rights of all types will make those plans achievable.

I. EMPIRICISM, VICKI BEEN–STYLE

Vicki showed her empirical bent from the get-go. Her first major article, on development exactions, included a review of what was known about the practice.[1] She then wrote several articles on the siting of locally undesirable land uses ("LULUs"), such as waste dumps. These tend to be located in relatively impoverished neighborhoods. But does this pattern result from ex ante discrimination by sponsors of LULUs, or from an influx of poorer residents after a LULU had opened? According to Vicki, much evidence, although hardly all, supports the influx hypothesis.[2] Some of her more recent co-authored work has investigated, empirically, the effects of historic districts and community gardens on nearby property values,[3] the nature of inclusionary zoning practices,[4] and the use of Community Benefits Agreements.[5]

---

1. Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 478–83 (1991).

2. *See* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); *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, 9 (1997) (finding no substantial evidence that LULUs had been sited in predominantly African-American neighborhoods, but significant evidence that Hispanic neighborhoods had been targeted).

3. Vicki Been, Ingrid Gould Ellen, Michael Gedal, Edward Glaeser & Brian J. McCabe, *Preserving History or Restricting Development? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, 92 J. URB. ECON. 16 (2016); Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241 (2008) (finding positive effect).

4. Jenny Schuetz, Rachel Meltzer & Vicki Been, *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. AM. PLAN. ASS'N 441 (2009).

5. Vicki Been, *Community Benefits: A New Local Government Tool or Another Variation on the Exactions Theme*, 77 U. CHI. L. REV. 5 (2010).

Vicki and I have co-authored several editions of a casebook on land use. Recently Rick Hills and Chris Serkin have joined us as editors. Because Vicki and I share a passion for land use issues, I single out for highest praise a 2014 work that Vicki co-authored on the politics of zoning changes in New York City.[6] Because homeowners are unusually scarce in New York City, that jurisdiction is one of the last places where one would expect William Fischel's "homevoters"[7] to control the rezoning process. Vicki and her co-authors found, nevertheless, that New York City zoning officials tend to be responsive to homeowners' NIMBYish desires. Residential development has come to be overregulated in many parts of the United States, New York City included.

Early in her career, Vicki tended to undertake empirical work on her own. During the past two decades, by contrast, Vicki commonly has worked with co-authors more skilled than the average law professor at number crunching. The article I just referred to, *Are Homevoters Overtaking the Growth Machine?,* is illustrative. Vicki co-authored that article with two co-authors, one of them Simon McDonnell who had earned a PhD in economics. In this, and many other ways, Vicki has served as a role model.

II. LANDMARKS IN THE EMPIRICAL LITERATURE ON PROPERTY

To date, economists have been the leading empirical analysts of property institutions.[8] Historians arguably come next.[9] Work by law professors is on the rise, but literally infinite possibilities remain.

A century ago, property scholars primarily examined pertinent legal materials such as judicial opinions and statutes. These endeavors of course were useful, but risked saying little about the true functions of property law as a social institution. Some property scholars have

---

6. Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014).

7. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001).

8. *See, e.g.*, FISCHEL, *supra* note 7; Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426 (2011).

9. *See, e.g.*, HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 (1983); JOHN FREDERICK MARTIN, PROFITS IN THE WILDERNESS: ENTREPRENEURSHIP AND THE FOUNDING OF NEW ENGLAND TOWNS IN THE SEVENTEENTH CENTURY (1991).

intensely examined the facts of a particular lawsuit. Outstanding examples are Eric Kades's several articles on *Johnson v. M'Intosh*,[10] a case involving competing claims of land title;[11] Angela Fernandez's book on the famous litigation over ownership of a fox pelt (*Pierson v. Post*);[12] and the Baucells and Lippman article on a partition case (*Delfino v. Vealencis*).[13] Andrew Morriss and Gerald Korngold's *Property Stories*, first published in 2004, continues this emphasis on the dissection of particular property disputes.[14] Vicki, in fact, contributed a chapter to *Property Stories*.[15] She discussed *Lucas v. South Carolina Coastal Council*,[16] a famous takings decision that virtually all property casebooks include.[17]

Several scholars have striven, somewhat more ambitiously, to quantify the reported cases on a public law issue of particular concern to property professors. A first example is Thomas Merrill's study of appellate decisions on the issue of whether a government exercising the power of eminent domain was doing so for "public use." Merrill found that, between 1954 and 1986, no federal courts had ruled that a public use was lacking, but that 16% of state court decisions had so ruled.[18] A second valuable study is the Krier and Sterk tally of cases involving the takings issue. Krier and Sterk found that federal courts had provided a takings claimant relief in only 5% of cases (with half reversed on appeal), but that state courts had provided relief in 11% of cases.[19] Because land use regulation is

10. 21 U.S. (8 Wheat.) 543 (1823).

11. Eric Kades, *History and the Interpretation of the Great Case of* Johnson v. M'Intosh, 19 L. & HIST. REV. 67 (2001); Eric Kades, *The Dark Side of Efficiency*: Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065 (2000).

12. ANGELA FERNANDEZ, PIERSON V. POST, THE HUNT FOR THE FOX (2018) (discussing 3 Cai. R. 175 (N.Y. Sup. Ct. 1805)).

13. Manel Baucells & Steven A. Lippman, *Justice Delayed Is Justice Denied: A Cooperative Game Theoretic Analysis of Hold-Up in Co-Ownership*, 22 CARDOZO L. REV. 1191 (2001) (discussing 436 A.2d 27 (Conn. 1980)).

14. PROPERTY STORIES (Gerald Korngold & Andrew P. Morriss eds., 2004).

15. Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation*, *in* PROPERTY STORIES, *supra* note 14, at 221–58.

16. 505 U.S. 1003 (1992).

17. *See, e.g.*, JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL S. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 1179–95 (8th ed. 2014); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 1279–93 (3d ed. 2017).

18. Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 96 (1986).

19. James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 66, 77–78 (2016).

largely a state and local affair, federal judges seem inclined to steer clear of the public law issues involved. Both the Merrill and Krier-Sterk findings are in tension with the Priest-Klein hypothesis that a plaintiff can be expected to prevail in around 50% of cases.[20] Perhaps claimants in public-use and takings cases are driven in part by ideological objections to perceived overreachings by governments.

Land records, mostly maintained in the United States by county governments, contain a wealth of information that few historians have tapped. Law professors, more comfortable with this source, could do far more than they have. The cupboard, of course, is not entirely bare. N. William Hines found that in 1933, less than 1% of Iowa transferees had chosen to take title as joint tenants, but by 1954, the percentage had increased to 46%.[21] Two older studies document the popularity of real estate covenants. Helen Monchow's survey, published in 1928, examined 84 U.S. covenant schemes in various states, most imposed in the 1920s.[22] Zigurds Zile's study, which appeared in 1959, examined 100 covenant schemes in Waukesha County, Wisconsin, part of Greater Milwaukee.[23] Since 1959, however, law professors have not systematically sampled covenants in the land records. Today, the drafter of a deed is unlikely to use a defeasible fee. But no law professor studying recorded deeds has determined just how unlikely.[24] Of contemporary scholars, Maureen Brady stands out for her creative use of land records to divine prevailing legal practices.[25]

Other potentially fruitful topics are the dynamics of condominium associations and other common-interest communities. Henry Hansmann's outstanding empirical article sets the gold standard for

---

20. George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 20 (1984).

21. N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 586 n.16 (1966).

22. HELEN C. MONCHOW, THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT (Inst. for Rsch. in Land Econ. & Pub. Utils. 1928).

23. Zigurds L. Zile, *Private Zoning on Milwaukee's Metropolitan Fringe, Problems of Drafting—Part II*, 1959 WISC. L. REV. 451. Developers had recorded most of the covenants in Zile's sample in the early 1950s.

24. By 1985, fifteen states had sought to limit drafters' use of defeasible fees. Todd T. Erickson, Note, *Forfeiture of a Public School: A Need to Control the Defeasible Fee*, 63 WASH. U. L.Q. 109, 126–29 (1985).

25. *See, e.g.*, Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872 (2019); Maureen E. Brady, *The Failure of America's First City Plan*, 46 URB. LAW. 507 (2014).

work on that front.[26] Lee Anne Fennell and Paula Franzese, among others, also have usefully analyzed how these communities operate.[27] To my knowledge, however, no law professor has undertaken field studies of particular communities. We know little about the nature of resident gripes, the frequency of amendments to declarations of covenants, and whether large associations are less closely knit than small ones.

Nuisance law inspired a fine empirical study by Ward Farnsworth, a scholar of torts. Farnsworth investigated whether litigants actually engage in Coasean bargaining after final judgment in a nuisance case.[28] In the twenty cases he studied, he found none in which the parties had engaged in post-judgment bargaining. Animosity between the parties, Farnsworth speculates, obviated chances of later compromise.

Another frontier is the comparative study of property law. Over time, property law doctrines tend to converge on some issues and diverge on others. A few rules of property law appear to be virtually universal. Felix Cohen once famously implied, but did not assert, that all societies would award ownership of a newborn animal to the owner of the mother.[29] Most societies embrace the *numerus clausus* principle that limits the forms of private ownership[30] and permit the leasing of both real estate and chattels.[31] Yet property systems commonly diverge. Every state in the United States has a version of the doctrine of adverse possession, under which a squatter, even one in bad faith, can wrest title from a true owner.[32] Many nations, by contrast, have a system of title registration, as opposed to title recordation. In a nation with a registration system, an adverse possessor cannot oust a true owner. An ousted squatter, however, may have

---

26. Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25 (1991).

27. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829; Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553 (2002).

28. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373 (1999).

29. Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 366–69 (1954).

30. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

31. Thomas W. Merrill, *The Economics of Leasing*, 12 J. LEGAL ANALYSIS 221 (2020).

32. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV 1122 (1985).

a successful cause of action for damages against the government that operates the registration system.[33]

On the comparative study of property law, the leading scholar is Yun-chien Chang of Academia Sinica, Taiwan. Chang, who often publishes with co-authors, seeks to find both doctrinal commonalities and doctrinal divergences in private law doctrine.[34] In some of his work, Chang identifies clusters of nation-states that tend to be like-minded.[35]

Among property law professors, Vicki Been's empirical inclinations have been truly exemplary. More should follow her lead.

III. HOW PROPERTY LAW ENABLES ACTORS TO ACHIEVE THEIR PLANS

My colleague Scott Shapiro, a specialist in legal philosophy, has authored *Legality*, a lively book that includes a brief section on property.[36] One of Shapiro's central themes is that individuals and collectivities frequently develop *plans* to chart their future activities.[37] My central thesis in this section is that a stable system of property rights enables actors to develop plans with confidence that they will succeed.

To illustrate this point, I use the mundane example of my attendance at this year's Brigham-Kanner Property Rights Conference at William & Mary Law School. In making plans to attend this event, I was confident that I could rely on government enforcement of all three of the archetypal forms of property—namely, private property, open-access (public) property, and communal property.

First, I considered the role of private property. I started my trip by packing a bag of personal belongings, confident that social norms and the legal system would help assure the protection of these holdings.

---

33. Nadav Shoked, *Who Needs Adverse Possession?*, 89 FORDHAM L. REV. 2639 (2021) (contending that title registration is superior, but that the title insurance industry lobbies to keep the recordation system, and hence adverse possession law, in place).

34. *See, e.g.*, Yun-chien Chang & Henry E. Smith, *Convergence and Divergence in Systems of Property Law: Theoretical and Empirical Analyses*, 92 S. CAL. L. REV. 785 (2019).

35. Yun-chien Chang, Nuno Garoupa & Martin T Wells, *Drawing the Legal Family Tree: An Empirical Comparative Study of 170 Dimensions of Property Law in 129 Jurisdictions*, 13 J. LEGAL ANALYSIS 231 (2021).

36. SCOTT J. SHAPIRO, LEGALITY 158–61 (2011).

37. *See, e.g.*, *id.* at 118–53 (chapter 5, "How to Do Things with Plans").

I then drove my car from New Haven to Bradley Airport near Hartford, and at Richmond International Airport, arranged for a rental car. Institutions of private property enabled me to make those vehicular arrangements. Most important, in considering the trip, I assumed that I could afford the expenses involved. Legal protection of my financial resources gave me the confidence to attend.

Second, my trip to Williamsburg also was premised on open-access (public) property in some resources. The airplane that transported me from Bradley Airport to Richmond Airport passed over numerous private parcels of land. Traditionally, the private owner of land had ownership from the center of the earth to the heavens, and the theoretical power to enjoin overflights.[38] Courts and agencies rightly have rejected this traditional rule, making air travel possible.[39]

Third, I undertook my trip with confidence that the communal rights of William & Mary Law School would be protected. The success of a Brigham-Kanner conference, like any other conference, is largely determined by whether the sponsoring organization is entitled to exclude free riders, thereby limiting attendance to invitees. In coming to Williamsburg, I was confident that Virginia law would protect William & Mary's rights to put on an event restricted to invited communards. In sum, although private property primarily enabled me to attend this conference, I also relied on the protections of both open-access property and communal property.

Many different entities engage in the planning that Shapiro envisions. In a liberal society, individuals do much of the planning but also routinely coordinate with one another. A family that successfully meets for a Thanksgiving dinner has engaged in planning. In most nations, families and households are crucially involved in child-rearing responsibilities. The institutions of civil society, such as nonprofit organizations like William & Mary, also prepare plans, helped by a stable system of property rights. In a capitalist economy, also important are the plans of business firms, large and small. When property rights are predictable, the more successful business planning can be. Finally, governments themselves prepare plans. Governmental plans include legal rules such as those of property law.

---

38. A Latin maxim stated "cujus est solum, ejus est usque ad coelum et ad inferos" (he who owns the soil owns also to the sky and to the depths).

39. *See, e.g.*, Hinman v. Pacific Air Transport, 84 F.2d 755 (1936).

In a liberal society, governments enable the decentralization of planning capabilities to all of the entities mentioned—individuals, families, households, firms, governments, and the institutions of civil society. Libertarians commonly emphasize the rights of individuals. Much of property law, however, aims to soften inclinations to act individualistically.[40] It does this when it allows co-ownership and the creation of the institutions of civil society, including business entities. In a totalitarian society, in sharp contrast to a liberal society, the state aspires to monopolize the power to plan. This invariably proves to be a fool's errand, as history amply proves.

40. *See* Daniel B. Kelly, *The Right to Include*, 63 EMORY L.J. 857 (2014).

CEDAR POINT NURSERY AND THE END OF THE NEW DEAL SETTLEMENT

JULIA D. MAHONEY*

INTRODUCTION

In *Cedar Point Nursery v. Hassid*, the U.S. Supreme Court, in a 6–3 decision, ruled that a California state regulation granting labor organizations a limited "right to take access" to agricultural employers' property constitutes a *per se* physical taking.[1] Under the regulation at issue, a labor organization may come onto property of agricultural employers for up to four thirty-day periods in one year and remain on the property for a total of three hours each day.[2] Explaining that the effect of the access regulation is to grant "a formal entitlement to physically invade" land, the Court, per Chief Justice Roberts, deemed the regulation "simple appropriation of private property."[3]

The outcome and reasoning of the Court's decision in *Cedar Point* have sparked intense criticism. *Cedar Point* has been called a "potentially transformational development in the law of property rights," one "likely to hobble government land use regulation."[4] Senator Sheldon Whitehouse of Rhode Island, who along with four colleagues filed an

* John S. Battle Professor of Law, University of Virginia School of Law. Thanks to Eric Claeys, James DeLong, Richard Hynes, Paul Mahoney, Cynthia Nicoletti, Paul Stephan, Ilya Somin, Robert Thomas, G. Edward White, and Ann Woolhandler for helpful comments and conversations. Ari Anderson, Meghan Puchalapalli, and Killian Wyatt provided outstanding research assistance.

1. 141 S. Ct. 2063 (2021).

2. *Id.* at 2069.

3. *Id.* at 2080.

4. LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT 224 (2021); *see also* Mark Joseph Stern, *The Supreme Court's Latest Union-Busting Decision Goes Far Beyond California's Farmworkers*, SLATE (June 23, 2021), https://slate.com/news-and-politics/2021/06/supreme-court-union-busting-cedar-point-nursery.html (characterizing the *Cedar Point* majority opinion as "maximalist" and predicting its consequences for government regulation "will be swift and severe"); Nathan Newman, *This Supreme Court Case Could Wreck the New Deal Order*, NATION (Dec. 2, 2020), https://www.thenation.com/article/society/supreme-court-labor-unions/ (cautioning that a win for the agricultural property owners in the (at the time) pending *Cedar Point* case could signify a "roll back" of "large swaths of the regulatory state and civil rights laws").

amicus brief in the case,[5] released a public statement that begins: "The Court that Dark Money Built delivers again for big-money Republican donors."[6] Writing in the *Harvard Law Review*, constitutional historian Nikolas Bowie warns that the "principle" of *Cedar Point* could endanger all laws "that mitigate the harms of workplace hierarchies"[7] and asserts that the case "illustrates how the Supreme Court today is the ultimate supplier of antidemocracy in this country."[8] Property law scholar Lee Anne Fennell also takes a dim view of the Court's decision, seeing *Cedar Point* "as part of an ongoing campaign by the Court to *selectively* apply heightened scrutiny in the land use arena in ways that broadly entrench and maintain status quo patterns of property wealth."[9]

In this Article, I explain why the objections of *Cedar Point*'s detractors are misplaced. Far from disabling government regulation or fomenting stasis by favoring the "already haves," *Cedar Point* is best understood as another step in the "normalization" of property rights.[10] In this, *Cedar Point* is in accord with other recent Court

5. Brief of Senators Sheldon Whitehouse et al. as Amici Curiae Supporting Respondents, *Cedar Point*, 141 S. Ct. 2063 (2021) (No. 20-107).

6. Press Release, Sheldon Whitehouse, Whitehouse Slams Partisan SCOTUS Decision Hampering Agricultural Workers' Ability to Organize for Better Pay, Working Conditions (June 23, 2021), https://www.whitehouse.senate.gov/news/release/whitehouse-slams-partisan-scotus-decision-hampering-agricultural-workers-ability-to-organize-for-better-pay-working-conditions.

7. Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 161–62 (2021). *See also* Erin Mayo Adam, *The Supreme Court Struck Down a Key United Farm Workers Win: The Decision Has Some Infamous Echoes*, WASH. POST (July 2, 2021, 7:45 AM), https://www.washingtonpost.com/politics/2021/07/02/supreme-court-struck-down-key-united-farm-workers-win-decision-has-some-infamous-echoes/ (asserting that the Court's "conservative majority has dealt what could be a mortal blow" to the ability of farmworkers to combat "abusive labor practices" and suggesting that *Cedar Point* is a harbinger of a return "to an era characterized by judicial opinions that curtailed worker rights"); Meagan Day, *The Supreme Court Just Dealt a Blow to Farmworkers—And All Other Workers, Too*, JACOBIN (July 3, 2021), https://jacobinmag.com/2021/07/cedar-point-nursery-v-hassid-ufw-california-labor-relations-act-migrant-labor-farmworkers-agriculture (calling *Cedar Point* "a victory for agricultural employers" and "right-wing organizations" but "bad news for farmworkers and their unions" as well as "other kinds of workers"); Paul Gowder, *The Paradox of Property in the American Rule of Law*, LPE PROJECT (Jan. 17, 2022), https://lpeproject.org/blog/the-paradox-of-property-in-the-american-rule-of-law/ (maintaining that *Cedar Point* "protects the property rights of farmers by endangering every other legal right that their workers might happen to enjoy").

8. Bowie, *supra* note 7, at 162.

9. Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 3 (2022) (emphasis in original).

10. Michael W. McConnell, Horne *and the Normalization of Takings Litigation: A Response*

decisions, including *Horne v. Department of Agriculture*,[11] and *Knick v Township of Scott*.[12] These cases illustrate how constitutional recognition of property interests, duly enforced by the judiciary, can "serve to protect the interests of the working and middle classes."[13] That is no small thing, particularly at a time of well-justified concerns about the outsize influence of elites on the legislative and executive branches of government,[14] with its attendant worries that those who lack power to defend themselves in the political and administrative arenas are vulnerable to "redistribution up."[15]

It is true that this normalization of property rights amounts to a retreat from the "New Deal Settlement," under which courts declined to subject legislative and administrative actions affecting property rights to significant oversight.[16] But for anyone who cares about the economically vulnerable, the passing of the New Deal Settlement should be cause for celebration rather than alarm. Eighty years on,

---

to Professor Echeverria, 43 ENV'T L. REP. 10749, 10749 (2013) (explaining how in the early 2010s the Court "cut through the morass of arbitrary, clause-specific rules, complications, and obstacles to relief that have accrued" to treat "Takings Clause claims as normal constitutional claims, subject to the same procedural, jurisdictional, and remedial principles that apply to other constitutional rights").

11. 576 U.S. 350 (2015) (ruling that a reserve requirement imposed on raisin growers pursuant to an agricultural marketing program is a "clear physical taking").

12. 139 S. Ct. 2162 (2019) (overruling *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), to allow an owner of rural property that was subject to a cemetery access ordinance to resort to federal court without having to first pursue compensation in state court and emphasizing that the Fifth Amendment enjoys "full-fledged constitutional status" among the provisions of the Bill of Rights). *See also* Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 NOTRE DAME L. REV. 679 (2022).

13. James Burling, *Private Property for the Politically Powerful*, 6 BRIGHAM-KANNER PROP. RTS. CONF. J. 179, 182 (2017) (criticizing assertions that "the institution of private property, and the protections given to private property, serve only to protect the haves against the have-nots").

14. *See* Julia D. Mahoney, *Takings, Legitimacy, and Emergency Action: Lessons from the Financial Crisis of 2008*, 23 GEO. MASON L. REV. 299, 301 (2016).

15. *See* BRINK LINDSEY & STEVEN M. TELES, THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY 153–80, 207–10 (2017); Steven M. Teles, *The Scourge of Upward Redistribution*, 25 NAT'L AFFS. 78 (2015); *see also* Julia D. Mahoney, *Commentary on* Kelo v. City of New London, *in* FEMINIST JUDGMENTS: REWRITTEN PROPERTY OPINIONS 179 (Eloisa C. Rodriguez-Dod & Elena Maria Mary-Nelson eds., 2021).

16. *See* Frank I. Michelman, *The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court*, 94 TEX. L. REV. 1403, 1406 (2016) (explaining that under the "New Deal Settlement" it was understood that courts would leave the "field of political economy" to the political branches); Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265 (2012); *see also* 3 G. EDWARD WHITE, LAW IN AMERICAN HISTORY: 1930–2000 510–18 (2010).

it is evident that the costs to many poor communities of judicial abdication in the area of property rights were very high.[17] The careful readjustment now underway does nothing more than recognize property's status as a civil and human right,[18] one that needs serious constitutional protection if people are to flourish as citizens, family members, and workers.

I. THE RIGHT TO "TAKE ACCESS" AND THE RIGHT TO EXCLUDE

The dispute in *Cedar Point* arose from efforts by the state of California to facilitate the unionization of farm workers. To that end, in 1975 the California legislature passed the Agricultural Labor Relations Act ("ALRA"),[19] which provides that agricultural employees have the right to self-organize and that for employers to interfere with these worker rights constitutes an unfair labor practice.[20] Soon after the ALRA's passage, California's Agricultural Labor Relations Board promulgated a regulation to secure physical access by union organizers to agricultural employers' property for the purpose of interacting with and soliciting the support of employees.[21]

Two group of agricultural employers sued in state court, challenging the access regulation's validity on constitutional grounds, both state and federal. In 1976, the case reached the Supreme Court of California, which sustained the constitutionality of the access regulation.[22] The California Supreme Court's decision was a close one, with three of seven justices concluding that the access regulation

17. *See* Julia D. Mahoney, *Kelo's Legacy: Eminent Domain and the Future of Property Rights*, 2005 SUP. CT. REV. 103.

18. *Cf.* Robert H. Thomas, *Emerging Issues in Property Law*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 113, 113 (2019) ("I am a property lawyer, which means I am a civil rights lawyer and a human rights lawyer" as "private property is a civil right" and a "*federal* constitutional right").

19. CAL. LAB. CODE §§ 1140–1166 (West 2021).

20. CAL. LAB. CODE §§ 1152, 1153(a) (West 2021); *see also* Gerawan Farming, Inc. v. Agric. Lab. Rels. Bd., 405 P.3d 1087, 1089 (Cal. 2017) (explaining that as enacted in 1975, the ALRA "established an elaborate framework governing the right of agricultural workers to organize themselves into unions to engage in collective bargaining with their employers").

21. CAL. CODE REGS. tit. 8, § 20900 (2021). Originally promulgated as an emergency regulation, the regulation was soon certified by the Agricultural Labor Relations Board, thus rendering it indefinite in duration. *See* Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687, 692 n.1 (Cal. 1976); Petitioners' Brief on the Merits at 4, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107).

22. Agric. Lab. Rels. Bd. v. Superior Ct., 546 P.2d 687.

amounted to "an unwarranted infringement on constitutionally protected property rights."[23]

The California Supreme Court majority expressed approval of the "governmental policy in favor of collective bargaining,"[24] noting that while issues of union organizer access to employer property were not highly familiar to California courts, "our federal brethren have often considered it in the industrial labor context."[25] The California Supreme Court went on to discuss in detail *NLRB v. Babcock & Wilcox Co.*, a 1956 U.S. Supreme Court decision about access rights of union organizers to employers' property under Section 7 of the National Labor Relations Act ("NLRA").[26] Sidestepping constitutional issues, the Court stated that "when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."[27] The Court added that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property."[28] In 1972, in *Lechmere v. NLRB*, the Court characterized the inaccessibility exception laid out in *Babcock* as a "narrow one,"[29] that was "crafted precisely to protect . . . those employees who, by virtue of their employment, are isolated from the ordinary flow of information that characterizes our society."[30] *Lechmere* lists logging camps, mining camps, and mountain resort hotels as "classic examples" of situations in which the exception applies.[31]

---

23. *Id.* at 706 (Clark, J., dissenting). The employers' appeal to the Court was dismissed "for want of a substantial federal question." Pandol & Sons v. Agric. Lab. Rel. Bd., 429 U.S. 802 (1976).

24. *Agric. Lab. Rels. Bd.*, 546 P.2d at 694.

25. *Id.* at 695.

26. 351 U.S. 105 (1956).

27. *Id.* at 112.

28. *Id.* at 113.

29. 502 U.S. 527, 539 (1992).

30. *Id.* at 540.

31. *Id.* at 539; *see also* Cynthia L. Estlund, *Labor, Property, and Sovereignty After* Lechmere, 46 STAN. L. REV. 305 (1994) (criticizing *Lechmere* as unduly restrictive in its construction of union organizer access rights under the NLRA).

At the time California's access regulation was put in place, it was more common for agricultural workers to live on their employers' property.[32] In addition, the state of information technologies in the 1970s meant that union organizers had fewer means of contacting workers than is the case today,[33] with the consequence that access rights to employer property may have been of greater importance. Even so, it bears emphasis that in its nearly half century of existence the access regulation's effects on efforts to organize workers have been modest. Labor organizers have invoked the access regulation "sparingly,"[34] requesting access on only 113 occasions in a six year period from 2014–2020.[35]

What has not been modest is the access regulation's impact on agricultural enterprise, as even the prospect of intrusion can undermine employers' ability to run their businesses. In October 2015, Cedar Point Nursery, a producer of strawberry plants that employs roughly 100 year-round and 400 seasonal workers, none of whom live on the premises, suffered a significant operational disruption when United Farm Worker organizers entered their facility without providing prior notice. In Cedar Point Nursery's account, the union organizers moved through the plant nursery facility "with bullhorns, distracting and intimidating many of the hundreds of employees who were preparing strawberry plants."[36] In February 2016, Cedar Point Nursery filed suit, requesting declaratory and injunctive relief under 42 U.S.C. § 1983 and arguing that the access regulation constitutes a taking of property in contravention of the Fifth and Fourteenth Amendments of the U.S. Constitution.[37] Joining Cedar Point Nursery in this litigation was Fowler Packing Company, a shipper of citrus and grapes that employs an estimated 2,300 to 3,000 nonresident workers and was the target of an unfair labor practices

32. *See* Brief of Western Growers Ass'n et al. as Amici Curiae in Support of Petitioners at 20, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107).

33. *See* Brief of California Farm Bureau Fed'n as Amicus Curiae in Support of Petitioners at 11–13, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

34. Brief in Opposition at 9–10, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

35. *Id.*; *see also* Bowie, *supra* note 7, at 196 (noting that "[f]or its part, the United Farm Workers has rarely taken advantage of the access rule in the decades since the union was most active in the 1970s"); Day, *supra* note 7 (reporting that the United Farm Workers and the Farm Labor Organizing Committee "used the access rule on only sixty-two of California's sixteen thousand farms in 2015, and even less frequently in subsequent years").

36. Petitioners' Brief on the Merits at 11, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

37. *Id.* at 12.

charge filed by the United Farm Workers for interfering with union access rights.[38]

To pursue their case, Cedar Point Nursery and Fowler Packing Company secured high-octane legal representation in the form of the Pacific Legal Foundation, a public interest law firm with an impressive track record of victories in property rights and environmental cases. Experts in the convoluted constitutional doctrine of "takings" law, the Pacific Legal Foundation opted to argue on their clients' behalf that the access regulation amounted to a *per se* "physical taking" of property rights within the terms of the Court's precedents, including *Loretto v. Teleprompter*[39] and *Nollan v. California Coastal Commission*.[40] In *Loretto*, the Court held that "a minor but permanent physical occupation of an owner's property authorized by government"—in this instance, cables and boxes to provide cable television to tenants—was a taking,[41] emphasizing that it has consistently regarded "a physical invasion" as "a government intrusion of an unusually serious character" and that the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[42] *Nollan* involved an attempt by the California Coastal Commission to condition its issuance of a permit to rebuild a beachfront home on the owners' grant of a public easement to cross their property along the shore. Ruling in favor of the complaining property owners, the Court stated that the term "permanent physical occupation" comprises a situation in which "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[43]

In advancing this *per se* physical takings claim, the plaintiff growers in *Cedar Point* argued that the access regulation fell within one of "two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes."[44] (The second category,

38. *Id.* at 11–12.
39. 458 U.S. 419 (1982).
40. 483 U.S. 825 (1987).
41. 458 U.S. at 421.
42. *Id.* at 433, 435.
43. 483 U.S. at 832.
44. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005).

that of government actions that leave land "without economically beneficial or productive options for its use"[45] in contexts where "the proscribed use interests were not part of" the landowner's title "to begin with,"[46] was obviously not applicable, as the affected properties retained substantial value even though subject to the access regulation.) Relying solely on a *per se* takings claim meant the *Cedar Point* litigants avoided becoming embroiled in arguments about whether the access regulation runs afoul of the multifactor "*Penn Central* test."[47] Used by courts to determine whether government regulations that fall outside the two *per se* categories amount to takings of property, the *Penn Central* test consists of an *ad hoc* factual inquiry that takes into account "several factors" that "the Court's decisions have identified" as having "particular significance,"[48] most notably "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action."[49] Vigorously criticized as confusing and for failing to provide useful guidance to property owners, regulator, and courts,[50] the *Penn Central* framework is one under which property owners rarely prevail.[51]

Yet while the *per se* physical takings claim had the virtue of simplicity, it was not a certain winner. To be sure, the fact that California's "unique"[52] access regulation has few analogues makes it an "outlier" and thus potentially more vulnerable to constitutional challenge than a "non-outlier" government regulation on the same subject.[53] And the access regulation is clearly an abrogation of the

45. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1018 (1992).

46. *Id.* at 1027.

47. *See* Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978).

48. *Id.* at 124.

49. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979). In *Kaiser Aetna*, the Court clarified, or perhaps "recast," its analysis in *Penn Central*. THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES & POLICIES 1252 (3d ed. 2016).

50. *See, e.g.*, Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601 (2014).

51. *See id.*; Ilya Somin, Opinion, *Supreme Court's* Cedar Point *Property Decision Protects Both Sides*, HILL (June 23, 2021), https://thehill.com/opinion/judiciary/559914-supreme-courts-cedar-point-property-rights-decision-protects-both-sides/.

52. William H. Floyd III, *Supreme Court Reinvigorates Property Rights of Employers*, NEXSEN PRUET (June 30, 2021), https://www.nexsenpruet.com/publication-supreme-court-reinvigorates-property-rights-of-employers.

53. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 105

right to exclude, a right often called the "*sine qua non*" of property.[54] At the same time, most "outlier" regulations are never struck down as unconstitutional. As for the right to exclude, even those who assert the right is an essential attribute of property are quick to concede it is not an absolute one.[55] Put simply, Anglo-American property law has, and so far as I can tell has always had, a number of limitations on the ability of property holders to exclude government actors and private parties.[56]

Thus early American law recognized "numerous and robust rights to enter private property," many of which were rooted in English common law.[57] These exceptions included obligations of innkeepers and others pursuing public callings not to refuse service to members of the public without good cause,[58] the privilege of the public to access navigable waters that had overflowed onto private property,[59] and rights of individuals to seek refuge in situations of public or private necessity.[60] Government powers to enter private property to execute reasonable searches, prevent and abate public nuisances, and address imminent harms (such as preventing the spread of fire)

(2007); *see also* Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 997–98 (2014) (concluding that "the term's status as an essential word in the modern constitutional scholar's vocabulary appears secure" as it "readily conveys the Supreme Court's rejection of measures found in only a small number of states, a dynamic that applies to many opinions in constitutional law's canon").

54. *See* Thomas W. Merrill, *The Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 1 (2014) (explaining that *sine qua non* "is a Latin legal term meaning 'without which it could not be'" and arguing that the right to exclude is "a foundational attribute of property").

55. *See, e.g.*, *id.* at 8 (acknowledging that "exclusion is not absolute" and defining property as "a general right to exclude *after* certain exceptions grounded in common law and statutes have been subtracted")

56. *See* Eric Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 448 (2017) ("Historically, in Anglo-American law, property has not been understood as an unqualified right to exclude."); Brief of Property Law Professors as Amici Curiae in Support of Respondents at 20–22, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107).

57. Bethany R. Berger, *Eliding Original Understanding in* Cedar Point Nursery v. Hassid, YALE J. L. & HUMAN. (forthcoming 2022) (*available at* https://ssrn.com/abstract=3926372); *see also* Brief of Legal Historians as Amici Curiae in Support of Respondents at 6, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107) (surveying the historical record and concluding that "the law at the time of the Founders recognized multiple rights to enter when it served the public interest").

58. Brief of Legal Historians as Amici Curiae in Support of Respondents at 11–12, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

59. *See* Merrill, *supra* note 54, at 8.

60. *See generally* Shelley Ross Saxer, *Necessity Exceptions to Takings*, U. HAW. L. REV. (forthcoming 2021).

have also been long recognized in American law.[61] The growth of the "regulatory state" led to additional exceptions to exclusion rights, such that by the late twentieth century it was widely accepted that government officials have the power to enter onto commercial property to enforce laws designed to maintain public health and safety.[62] Property owners' exclusion rights have also been modified by the enactment of civil rights laws at the federal and state level.

Not all physical invasions by or authorized by government, in short, constitute takings. The precedents on point, however, are complicated. As Lynda L. Butler observes: "Permanence of the physical invasion, intent to repeat the invasion, actions of the property owner in opening the property to third parties, and the directness of the correlation between the invasion and the injury" have all influenced how courts evaluate takings claims in this area.[63] The upshot is that in application the "seemingly simple and clear" *per se* physical takings rule "has produced confusing and somewhat inconsistent results."[64]

Unsurprisingly given the complexity and unpredictability of takings doctrine, the grower plaintiffs confronted setbacks on their road to victory. At the federal District Court level, their motion for a preliminary injunction was denied,[65] and the Agricultural Labor Relations Board's motion to dismiss was granted.[66] Charactering Cedar Point Nursery and Fowler Packing as attempting "to escape the reach of *Penn Central*," the District Court stated that while "the creation of an easement *may* amount to a taking," the plaintiffs "go too far by equating this action with a categorical taking."[67] On appeal, a divided

---

61. *See* Brief of Oklahoma et al. as Amici Curiae in Support of Petitioners at 14–24, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107).

62. *See* See v. City of Seattle, 387 U.S. 541, 543–44 (1967); *see also* Brief of Local Governments as Amici Curiae in Support of Respondents at 5–8, *Cedar Point*, 141 S. Ct. 2063 (No. 20-107) (describing government inspections of slaughterhouses, fisheries, wastewater treatment systems, elevators, and massage parlors).

63. Lynda L. Butler, *The Governance Function of Constitutional Property*, 48 U.C. DAVIS L. REV. 1687, 1689 (2015).

64. *Id.* at 1690; *see also* Jessica L. Asbridge, *Redefining the Boundary Between Appropriation and Regulation*, 47 B.Y.U. L. REV. 809 (2022) (concluding that the Court has failed to apply the "physical takings doctrine consistently").

65. Cedar Point Nursery v. Gould, 1:16-cv-00185-LJO-BAM, 2016 WL 1559271 (E.D. Cal. Apr. 18, 2016).

66. Cedar Point Nursery v. Gould, 1:16-cv-00185-LJO-BAM, 2016 WL 3549408 (E.D. Cal., June 29, 2016).

67. *Gould*, 2016 WL 1559271, *5.

panel of the Court of Appeals for the Ninth Circuit affirmed.[68] Judge Paez distinguished the access regulation from the public easement in *Nollan*, stating that while the access regulation's duration is indefinite, it does not grant union organizers a "continuous right to pass to and fro."[69] A petition for rehearing en banc was rejected over a dissent by Judge Ikuta, which seven other judges joined.[70] Arguing that the Ninth Circuit majority's conclusion that the access regulation is not a permanent physical occupation contradicts Supreme Court precedent, Judge Ikuta noted that in its current version the access regulation is "not limited to situations where union organizers do not have reasonable access to employees" and gives "union organizers a permanent right to access" agricultural employer property.[71] The Court granted certiorari, and oral argument took place on March 22, 2021.

II. THE DECISION IN *CEDAR POINT NURSERY*

In the end, Cedar Point Nursery and Fowler Packing prevailed. The spectacle of a win for businesses at the apparent expense of union organizers and farm workers elicited cries of alarm, with fears expressed that the Court's decision represents an opening salvo in a war against the regulatory state[72] or a cynical gambit to elevate more powerful groups over more vulnerable ones.[73] Senator Whitehouse, who as Rhode Island's attorney general had argued on behalf of the state in the landmark takings case *Palazzolo v. Rhode Island*,[74] went so far as to accuse the Court of handing "another victory to big-money special interests, just as the armada of dark-money amicus groups in this case instructed."[75]

A careful reading of Chief Justice Roberts' majority opinion belies such worries. *Cedar Point* is not a radical decision, but an incremental

68. Cedar Point Nursery v. Shiroma, 923 F.3d 524 (9th Cir. 2019).

69. *Id.* at 532 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987)).

70. Cedar Point Nursery v. Shiroma, 956 F.3d 1162 (9th Cir. 2020).

71. *Id.* at 1166 (Ikuta, J., dissenting).

72. *See, e.g.*, GREENHOUSE, *supra* note 4; Adam, *supra* note 7.

73. *See, e.g.*, Bowie, *supra* note 7; Fennell, *supra* note 9; Elizabeth Pollman, *The Supreme Court and the Pro-Business Paradox*, 135 HARV. L. REV. 220, 228 (2021) (concluding that *Cedar Point* "takes a sweeping approach to Takings Clause jurisprudence in favor of" employers).

74. 533 U.S. 606 (2001).

75. Whitehouse, *supra* note 6.

one. The Court takes property rights seriously, carefully reviews the relevant precedents, and (slightly) clarifies takings doctrine. The majority notes that "we have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous" and states the "fact that a right to take access is exercised only from time to time does not make it any less a physical taking."[76] These statements are in accord with language in *Nollan* and other precedents to the effect that rights to physically invade property can amount to takings even if no particular person has the right to enter and remain on the property indefinitely. In focusing on the intermittent nature of the access right at issue in *Cedar Point*, the Court clarifies that not all *per se* physical takings involve invasions like the one in *Loretto*, which consisted of the placement of equipment that was expected to remain in place for the foreseeable future. The *Loretto* invasion was understandably termed a "permanent physical invasion," but with hindsight that appellation was a misleading one. Given how hard it is to predict the future of technological innovation or human preferences,[77] there was no way to know back in 1982 how long the cable television equipment installed on the Loretto property would remain. The approach of the *Cedar Point* majority makes more sense in that it focuses attention on how the access regulation confers upon union organizers a continual, as distinct from continuous, right to enter onto the plaintiff grower's properties.

To be sure, the Court sheds little light on where it will draw the line going forward. A continuous right to invade property is easier to discern than a continual one, which by its nature entails interruptions. We are told the outcome in *Nollan* would have been the same if the California Coastal Commission demanded an easement in force for only 364 days each year, and the Court suggests that had the *Nollan* easement been limited to daylight hours that would also have constituted a *per se* taking.[78] In addition, the Court mentions that the government overflights found to effect a taking in *United States v. Causby*[79] "occurred on only 4% of takeoffs and 7%

76. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2075 (2021).

77. *See* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002); Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RES. J. 573 (2004).

78. *See Cedar Point*, 141 S. Ct. at 2075.

79. 328 U.S. 256 (1946).

of landings at the nearby airport."[80] This is all mildly helpful, but many consumers of the Court's takings jurisprudence would likely appreciate a bit more guidance.

In a similar vein the Court clarifies, without substantially adding to our understanding of, the intersection of its takings jurisprudence role and what is known as "constitutional property federalism," meaning the "idea that the Constitution protects different interests in different jurisdictions, depending on the content of state-specific law."[81] While a federal system with variety in property rights has advantages,[82] there are concomitant dangers, including that state legislatures, courts, and executive agencies will abuse their powers to define property rights so as to evade the protections the Constitution affords property owners. In *Cedar Point*, the Court describes this problem clearly when explaining why it does not matter that the access right at issue fails to correspond with the definition of an easement in gross under California law. The Agricultural Labor Relations Board, cautions the Court, "cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law."[83] Confirming that it has "consistently" followed an "intuitive approach" so as to preclude such manipulation of property rights, the Court simply notes that when governments do not formally condemn property interests but invade property or authorize invasions by third parties, the Court recognizes a physical taking, notwithstanding the fact that the "intrusion does not vest" the government with "a property interest recognized by state law, such as a fee simple or a leasehold."[84]

Chief Justice Roberts's minimalist side is also evident in the majority opinion's ignoring what one might call an elephant in the room, for it fails to tackle the issue of remedies. Cedar Point Nursery and Fowler Packing sought not financial payment for California's appropriation of what they asserted (and the Court agreed) amounted to servitudes over their properties, but rather declaratory

80. *Cedar Point*, 141 S. Ct. at 2075.

81. Maureen E. Brady, Penn Central *Squared: What the Many Factors of* Murr v. Wisconsin *Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 56 (2017).

82. *See generally* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72 (2005).

83. *Cedar Point*, 141 S. Ct. at 2076.

84. *Id.*

and injunctive relief.[85] Justice Breyer's dissenting opinion, in which Justices Sotomayor and Kagan join, points this out,[86] noting that the text of the Takings Clause bars government takings of private use without "just compensation."[87] Justice Breyer goes on to argue, citing the Court's recent decision in *Knick v. Township of Scott*,[88] that on remand California should have the choice "of foreclosing injunctive relief by providing compensation."[89] To date, there is no indication California plans to pursue that path, but the point is an important one. If governments can simply "take and pay" for property intrusions, then in many instances owners will have little in the way of protection from loss of their property rights, as governments will not have to pay much.[90] *Cedar Point*, in short, may turn out to be less significant than its critics anticipate.[91]

Where *Cedar Point* breaks the most new ground is in its treatment of the right to exclude. The Court reaffirms the importance of this right, which, quoting *Loretto*, it describes as "one of the most treasured rights of property ownership."[92] At the same time, *Cedar Point* takes care to specify that the right to exclude has limits and lays out three categories of physical invasions that do not amount to takings of property. By this means, the Court adds welcome nuance to its pronouncements over the years concerning the right to exclude, a

85. *See supra* notes 37–38 and accompanying text.

86. *See Cedar Point*, 141 S. Ct. at 2089 (Breyer, J., dissenting).

87. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

88. 139 S. Ct. 2162, 2179 (2019).

89. *Cedar Point*, 141 S. Ct. at 2089 (Breyer, J., dissenting).

90. *See* Somin, *supra* note 51 (speculating that "some regulations that do qualify as takings under" the Court's decision in *Cedar Point* "may not be much impeded by it" due to the low value of the property interests taken).

91. At least one detractor of *Cedar Point* explicitly acknowledges this possibility. *See* Fennell, *supra* note 9, at 4 (maintaining that *Cedar Point* is "designed to preserve restrictions that broadly conserve the established interests of landowners while scrutinizing and financially burdening any property impositions that do otherwise" but admitting "vulnerability" in this "approach" if "the true goal is to knock out unwanted impositions on property owners" as the "Takings Clause allows the government to simply pay for what it takes"); *see also* Michael J. Hayes, *Points About Cedar Point: What Labor Access Survives, and What Should Survive (or be Restored)* (U. Balt. Sch. L. Legal Stud. Rsch. Paper 2021) (*available at* https://ssrn.com/abstract=3938382) (discussing the potential benefits of a "pay as it goes" system under which union organizers compensate employers for the (almost surely small) value of the property rights they "take").

92. *Cedar Point*, 141 S. Ct. at 2074.

number of which have been sweeping.[93] It also responds to charges, leveled by both the Agricultural Labor Relations Board and Justice Breyer's dissenting opinion, that, as the majority puts it, "treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property."[94] The *Cedar Point* majority disagrees, calling such accusations "unfounded."[95]

The Court's first category of physical invasions that do not constitute takings is trespass, by which it means "[i]solated physical invasions, not undertaken pursuant to a granted right of access," and thus evaluated as torts.[96] As the Court suggests, distinguishing sporadic, brief invasions from more serious and sustained ones—such as a government-created flooding that was found to be the taking of a flowage easement[97]—rarely poses serious challenges for decisionmakers. The second category comprises government-authorized physical invasions "consistent with longstanding background restrictions on property rights" such that they do not rise to the level of takings.[98] The Court's most famous explication of this concept is found in *Lucas*,[99] which explains that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[100] As with much of takings doctrine, there are some straightforward applications. Property owners cannot reasonably expect compensation for abating nuisances, tolerating the entry onto their lands of individuals responding to public or private necessity, or hosting public officials who are carrying out reasonable searches or enforcing the criminal law. This second category also includes many hard cases in which courts are called upon to take account of the dynamism of

93. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979) (stating that the "right to exclude" is "universally held to be a fundamental element of the property right").

94. *Cedar Point*, 141 S. Ct. at 2078.

95. *Id.*

96. *Id.*

97. *See id.* at 2078–79 (citing Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364 (2013)).

98. *Cedar Point*, 141 S. Ct. at 2079.

99. *See supra* notes 44–46 and accompanying text.

100. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

property law while not losing sight of the danger that the power to modify property rights can be misused to shield government from liability.[101]

The third and final category comprises access rights ceded by property owners in order to obtain government licenses, permits, and other public benefits, an increasingly common practice.[102] Under current constitutional doctrine, as articulated in *Nollan* and *Dolan v. City of Tigard*,[103] government-imposed conditions, at least in certain circumstances, must have both an "essential nexus" and be "roughly proportional" to the potential impact of the sought property use.[104] In delineating this third category, the Court explains that many public health and safety inspection regimes feature government access rights, including rights to enter onto the premises of participants in highly regulated industries such as pesticide manufacture and nuclear power, that are specifically granted as conditions of obtaining a license or permit and thus almost certainly comply with the *Nollan/Dolan* framework. Here the Court might have made clear that not all government health and safety property access rights stem from a voluntary grant by a property owner seeking to obtain a government benefit. That is, under the Court's own taxonomy, some government access rights that promote public health and safety slot better into its second category of government-authorized physical invasions "consistent with longstanding background restrictions on property rights." Had the *Cedar Point* majority opinion done so, it might have been more evident that the Court did not intend, as it has been accused of doing, to depart from the original public understanding of property rights under the U.S. Constitution.[105]

Criticisms aside, *Cedar Point* provides a solid foundation for future takings decisions. The Court affirms the centrality of exclusion rights to the institution of property while specifying how such rights are in no way absolute. In so doing, the Court recognizes that

---

101. *See* James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After* Lucas, 35 ECOLOGY L.Q. 1, 16–26 (2008); *see also supra* notes 57–61 and accompanying text.

102. *See generally* PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM (2021).

103. 512 U.S. 374 (1994).

104. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

105. *See* Berger, *supra* note 57, at 25 (maintaining that "*Cedar Point v. Hassid* elides the public understanding of property at the time of the founding").

the United States is, and indeed for its entire history has been, a sophisticated society that respects the autonomy of individuals and firms while subjecting them to reasonable government actions designed, for the most part, to prevent harms to the public.[106] Far from undermining the regulatory state, *Cedar Point* confirms its importance in American law and society. And while *Cedar Point* represents a victory of agricultural employers over a state government that had mandated access to its property by union organizers, it is not accurate to portray *Cedar Point* as a triumph for corporate behemoths and a stinging defeat for labor. As medium-sized enterprises in a highly competitive sector of the economy, both Cedar Point Nursery and Fowler Packing Company lack substantial political and economic power. Their victory in *Cedar Point* constitutes not an expansion of corporate rights, but a narrowly drawn judicial determination that a business has the right to choose not to allow potentially disruptive organizers on their property absent special considerations, such as, perhaps, the ones set out in *Lechmere*.[107] There is no reason to think that the interests of agricultural workers will be adversely affected by *Cedar Point*.

III. PROPERTY RIGHTS AND THE END OF THE NEW DEAL SETTLEMENT

Toward the close of the New Deal era, the Court looked poised to withdraw almost entirely from the project of "systematically enforcing constitutional rights against legislative majorities."[108] Judicial review would be for the most part limited to instances of egregious irrationality or obvious abuses by public officials, or so the standard narrative went. That did not happen. As time wore on, it became

106. *See* Sam Spiegelman & Gregory C. Sisk, Cedar Point: *Lockean Property and the Search for a Lost Liberalism*, 2020–2021 CATO SUP. CT. REV. 165, 166, 168 (2021) (documenting how courts have distinguished "public-harm-preventing" from "public-benefit-conferring" government actions and the importance of this distinction for determining the contours of the police power); *see also* Claeys, *supra* note 56, at 448–49.

107. *See supra* notes 29–30 and accompanying text.

108. David A. Strauss, *Why Was* Lochner *Wrong?,* 70 U. CHI. L. REV. 373, 375 (2003); *see also* Grant Gilmore, *The Storrs Lectures: The Age of Anxiety*, 84 YALE L.J. 1022, 1038 (1975) ("The conventional wisdom of the 1930s was that the judges had had their day, which would not come again" as law was "reduced to statutory form with most of the significant continuing problems being committed to the expertise of administrative agencies.").

apparent that the Court was again taking on the mantle of enforcer of constitutional rights.[109] In 1954, the Court decided the desegregation cases, *Brown v. Board of Education*[110] and *Bolling v. Sharpe*.[111] Roughly a decade later, in *Griswold v. Connecticut*,[112] the Court ventured onto the tricky terrain of reproductive rights.

In the area of property and economic rights, however, the Court continued to exercise a low level of scrutiny.[113] It is not that such rights became complete dead letters.[114] But judicial withdrawal went so far that in 1954, the same year it handed down *Brown* and *Bolling*, the Court shrugged off a constitutional challenge to a major urban renewal scheme for the District of Columbia. "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear," wrote Justice William O. Douglas for a unanimous Court in *Berman v. Parker*, rejecting the argument that the condemnation of lower and middle class owned properties was not for a "public use" and thus prohibited by the Fifth Amendment.[115] In the near term, *Berman* cleared a path for the displacement of tens of thousands of residents and businesses in the nation's capital,[116] together with increased racial and economic segregation.[117] In the longer term, hundreds of thousands of property owners in the United States were forced to relinquish their properties as "urban renewal was undertaken on a vastly larger scale."[118] with devastating results for communities.[119] The Court's

109. *See* Strauss, *supra* note 108, at 377.

110. 347 U.S. 483 (1954).

111. 347 U.S. 497 (1954).

112. 381 U.S. 479 (1965).

113. *See* WHITE, *supra* note 16, at 510–57.

114. *See* James W. Ely, Jr., *Still in Exile? The Current Status of the Contract Clause*, 8 BRIGHAM-KANNER PROP. RTS. J. 93 (2019); Woolhandler & Mahoney, *supra* note 12, at 697.

115. 348 U.S. 26, 33 (1954).

116. *See* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423, 469–75 (2010).

117. *See* Benjamin Ginsberg, Berman v. Parker*: Congress, the Court, & the Public Purpose*, 4 POLITY 48, 49 (1971) (observing that it was "not surprising" that "segregation accompanied redevelopment" in the District of Columbia given that "an examination of census data indicates that urban renewal and segregation have been synonymous in many American cities").

118. Lavine, *supra* note 116, at 423–24; *see also* Ginsberg, *supra* note 117, at 49 (characterizing *Berman* as "the crucial precedent for the use of the power of eminent domain" on a widespread basis).

119. *See* Wendall E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6 (2003) (describing how the

opinion in *Berman* gave no sign of any awareness, much less concern, about the consequences of its ruling.

Berman was no anomaly. In both analysis and outcome, the decision was in accord with a number of other "ultra-deference" decisions of the 1950s and 1960s in the area of property and economic rights, most notably *Williamson v. Lee Optical*, sustaining as constitutional a law protecting ophthalmologists and optometrists from competition from opticians,[120] and *Ferguson v. Skrupa*, rejecting a challenge to a statute restricting the "business of debt adjusting" except as incidental to legal practice.[121] As legal historian G. Edward White observes, the Court adopted a "nearly toothless deferential posture" in these cases, one that reversed "the familiar locution."[122] Instead of "affirmatively finding that a law bore some 'reasonable' connection to a regulatory power of the state," the Court "needed only to conclude that it could not say that such a connection did not exist."[123]

By the late 1970s, it was clear that the Court was taking property claims more seriously. In 1978, the Court decided *Penn Central*, which although resulting in a loss for the owner of New York City's Grand Central Terminal, which argued that the City's repeated rejections of its efforts to obtain permission to build a skyscraper over the terminal amounted to a taking of its property rights, at least subjected the government's conduct to more than cursory oversight.[124] Victories for property owners soon followed in a number of takings cases, including *Loretto v. Teleprompter*,[125] *Nollan v. California Coastal Commission*,[126] and *Lucas v. South Carolina Coastal Council*.[127] The trend was clear: property rights were looking more like other constitutional rights.

---

selection of "racially changing neighborhoods" for redevelopment "enabled institutional and political elites to relocate minority populations and entrench racial segregation"); *see also* Martin Anderson, *The Sophistry that Made Urban Renewal Possible*, 30 J.L. & CONTEMP. PROBS. 199, 199–200 (1965) (criticizing the Court's reasoning in *Berman* for enabling urban renewal programs with "strong racial overtones").

120. 348 U.S. 483 (1955).

121. 372 U.S. 726 (1963).

122. WHITE, *supra* note 16, at 556–57.

123. *Id.* at 556.

124. *See supra* notes 47–51 and accompanying text.

125. 458 U.S. 419 (1982); *see supra* notes 41–42 and accompanying text.

126. 483 U.S. 825 (1987); *see supra* note 43 and accompanying text.

127. 505 U.S. 1003 (1992); *see supra* note 101 and accompanying text.

The "Property Rights" movement did not win every case. Far from it. But even its highest profile defeat showed how far property rights had come. In 2005, in *Kelo v. City of New London*, the Court upheld the condemnation of fifteen homes in a lower middle-class neighborhood pursuant to an economic redevelopment scheme.[128] In contrast to *Loretto*, *Nollan*, and *Lucas*, in *Kelo* there was no dispute over whether the government sought to obtain title to the plaintiffs' properties. Rather, as in *Berman*, the issue before the Court was whether an economic development project counted as a "public use." While the government did win in *Kelo*, the victory was a close one, in contrast to the unanimous loss for property owners in *Berman*. Moreover, all the opinions in *Kelo*—the opinion for the Court by Justice Stevens, a concurrence by Justice Kennedy, who joined the five member majority, and dissenting opinions by Justices O'Connor and Thomas—departed from *Berman's* "robotic deference," instead displaying "at least some grasp of the potentially huge social costs of untrammeled government power to reconfigure property rights" as well as "awareness of the damage that expropriations can inflict on individual lives."[129]

A post-*Kelo* series of additional victories, culminating in the *Cedar Point* decision in June 2021, have further "normalized" property rights.[130] To many strong proponents of the modern regulatory and social welfare states, this development threatens institutions they see as essential to early twenty-first century life, including an effective social safety net and government protections of workplace safety. Yet to equate a greater role for the judiciary in protecting property rights with a move toward plutocracy is to misunderstand the Court's property rights jurisprudence. As in *Cedar Point*, the victors in property rights cases do not tend to be large for-profit companies, but smaller enterprises and individuals.[131] In fact, the "normalization" of property rights now underway appears more likely to enhance than subvert democracy. That is in significant part due to property's "distinct and irreducible role in empowering people,"[132] as having rights in property facilitates the creation and

128. 545 U.S. 469 (2005).

129. Mahoney, *supra* note 17, at 115.

130. *See supra* notes 124–27 and accompanying text.

131. *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 350 (2015); Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019).

132. HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 2 (2021).

execution of one's distinct projects. This, in turn, can lead to their becoming more effective citizens and community members.

Such considerations help explain why a key objective of the framers and ratifiers of the U.S. Constitution was the protection of property.[133] But that property rights were secure did not mean they were sclerotic. As *Cedar Point* makes clear, the history of American property rights is one of dynamism as well as stability. And while at first glance it may appear a "mystery" that a nation so committed to strong property rights also has a tradition of continual modification of property rights,[134] in fact there is no mystery. The readjustment of property rights has gone hand in hand with America's meteoric economic development,[135] as well as its solicitude for the public welfare.[136]

With reconfiguration of property rights comes danger. American history is replete with incidents in which "losers" have received no or inadequate compensation,[137] resulting in grievous financial and dignitary losses.[138] Not surprisingly, the brunt of these losses has been shouldered by the less powerful.[139] In recent years, the Court has made strides toward affording greater constitutional protection for property rights owners, including those who do not wield influence in the corridors of power. The result is that property rights are no longer an obviously lesser constitutional right.

---

133. *See* Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 HARV. J.L. & PUB. POL'Y 37, 46 (2021) ("The Framers designed the Constitution to further certain core principles of Enlightenment economic thought: protecting private property, enforcing contracts, preventing monopolies, and encouraging free trade among states and nations."); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 270 (1988) (detailing how the structure of the United States Constitution "is designed to promote economic stability and to insulate property rights from popular upheavals"); Woolhandler & Mahoney, *supra* note 12, at 684 ("The Constitution of 1787 manifests the Framers' desire to protect interests in property and contract in various provisions, including in its provision for federal courts").

134. Naomi R. Lamoreaux, *The Mystery of Property Rights: A U.S. Perspective*, 71 J. ECON. HIST. 275, 277 (2011).

135. *See, e.g.*, Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837); *see also* GORDON S. WOOD, THE POWER OF LIBERTY: CONSTITUTIONALISM IN AMERICAN REVOLUTION 160–62 (2021).

136. *See* Claeys, *supra* note 56, at 448–49; Spiegelman & Sisk, *supra* note 106, at 166, 168; *see also* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

137. *See* Lamoreaux, *supra* note 134, at 301.

138. *See* Nicole S. Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 148 (2006).

139. *See* Lamoreaux, *supra* note 134, at 300–01.

Up until now, the rehabilitation of property rights has been accomplished through a series of decisions that carefully parse existing precedents, many of which are notoriously muddled.[140] The result is that an already complex area of constitutional doctrine risks becoming ever more tortuous.[141] A way out of this thicket for the Court may exist, but at a minimum would require the substantial overhaul—and perhaps even the explicit overruling—of more of its precedents, including the highly problematic *Penn Central*. It is unclear whether the Roberts Court is as yet prepared to go this far.

CONCLUSION

Cedar Point represents an evolution, not a revolution, in the Court's property rights jurisprudence. In both outcome and reasoning, the majority opinion offers no surprises, instead confirming that property rights are important to the Roberts Court while for the most part coloring within the lines of existing precedent. To those who liken the enhanced security of property rights to the promotion of inequality and even oligarchy, *Cedar Point* represents a threat. But for those inclined to think that judicial protections matter most for property owners least able to defend their interests in the political arena, *Cedar Point* is a welcome, albeit minor, development.

140. *See generally* Lynda L. Butler, Murr v. Wisconsin *and the Inherent Limits of Regulatory Takings*, 47 FLA. ST. U. L. REV. 99 (2020); Jeffrey Manns, *Economic Liberty Takings*, 29 GEO. MASON L. REV. 73 (2021).

141. *See* Thomas W. Merrill, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. LAND USE & ENVTL. L. 1 (2018).

LIBERTY AND PROPERTY: INDIVISIBLY LINKED?

JAMES W. ELY, JR.*

In this brief Article, I seek to explore more fully the tie between private property and individual liberty. Since liberty is a capacious subject, I will focus on the exercise of free speech, often considered the paramount individual right. More years ago than I care to remember, I published *The Guardian of Every Other Right* in which I endeavored to recall the traditional view that private property was indivisibly linked to the enjoyment of liberty.[1] Such sentiment was commonplace in eighteenth-century America. "Property must be secured," John Adams succinctly proclaimed in 1790, "or liberty cannot exist."[2] Likewise, Alexander Hamilton asserted in 1795: "Adieu to the security of property adieu to the security of liberty. Nothing is then safe—all our favourite notions of national & constitutional rights vanish."[3] As historian John Phillip Reid aptly noted: "There may have been no eighteenth-century educated American who did not associate defense of liberty with property. Like their British contemporaries, Americans believed that just as private rights in property could not exist without constitutional procedures, liberty could be lost if private rights in property were not protected."[4] Echoing this position, Chief Justice John Roberts recently pointed out: "The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom."[5]

---

* Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, Vanderbilt University. This Article is an expanded version of remarks presented at the Eighteenth Annual Brigham-Kanner Property Rights Conference at William & Mary Law School on October 1, 2021. I am grateful to Polly J. Price for helpful comments on an earlier version of this Article. I wish to acknowledge the exemplary research assistance of Katie Hanschke of the Massey Law Library of Vanderbilt University.

1. JAMES W. ELY. JR, THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008).

2. John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS, 280 (Boston, Little, Brown & Co. 1852).

3. Alexander Hamilton, *Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973).

4. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 33 (1986).

5. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021).

This central premise that property was fundamental to the enjoyment of liberty persisted throughout the nineteenth century. In 1829 the eminent jurist Joseph Story emphasized:

> That government can scarcely be deemed to be free, where the rights of property left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of liberty and private property should be held sacred.[6]

At the end of the century, Justice Stephen J. Field, the most influential jurist of the Gilded Age, forcefully proclaimed: "It should never be forgotten that protection to property and persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other, and there can be neither prosperity nor progress where either is uncertain."[7]

I. DIVORCE OF PROPERTY AND LIBERTY

Although such expressions linking property and personal liberty occasionally surfaced throughout the twentieth and early twenty-first centuries,[8] there was an attitudinal sea change which had the

---

6. Wilkinson v. Leland, 27 U.S. 627, 657 (1829).

7. Stephen J. Field, *The Centenary of the Supreme Court*, 24 AM. L. REV. 351, 367 (1890), *reprinted in* 134 U.S. 729, 745 (1890). In an influential revisionist work, Michael Les Benedict persuasively asserted that the property-conscious jurisprudence of the late nineteenth century was shaped by a desire to protect individual liberty rather than to assist business interests. Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293 (1985).

8. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (Stewart J.) ("In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized."); Murr v. Wisconsin, 137 S. Ct. 1933, 1943 (2017) (Kennedy, J.) ("Property rights are necessary to preserve freedom, for property ownership empowers people to shape and plan their own destiny in a world where governments are always eager to do so for them."); Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 734 (2010) (Kennedy, J., concurring) ("The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation, and the right to own and hold property is necessary to the exercise and preservation of freedom."); *see also* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 526 (1999) ("Property rights and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.").

effect of splitting property rights from other personal rights. This proceeded in two stages. First, the Progressive movement of the early twentieth century sought a more active role for government and displayed little interest in any claims of individual rights.[9] Daniel T. Rodgers has pointed out that a "striking phenomenon of the late nineteenth and early twentieth centuries was the abandonment of rights talk by Americans who aligned themselves with the progressive movements of the day."[10] In the same vein, David M. Rabban concluded: "But progressives were not sympathetic to other assertions of individual constitutional rights, including claims based on the First Amendment."[11] Progressives took particular aim at constitutional protection of property, which they pictured as an obstacle to their regulatory agenda.[12] Much of this criticism was in fact misplaced, as the Supreme Court generally sustained the legislation associated with the Progressive movement.[13] Indeed, as early as 1914 one observer lamented that private property rights were disappearing.[14] Moreover, leading Progressives were highly dismissive of any constitutional doctrines, such as natural rights theory and the separation of powers, that restrained the authority of government to overhaul private property rights.[15]

---

9. James W. Ely Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL'Y 255 (2012); *see also* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM, 40 (2011) ("Leading Progressives were hostile or indifferent to many of the priorities of modern liberals, especially regarding what came to be known as civil liberties and civil rights. Progressives typically did not distinguish among different categories of rights. They instead thought that the very notion of inherent individual rights against the state was a regressive notion with roots in reactionary natural law ideology."). *See generally* RICHARD A. EPSTEIN: HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

10. Daniel T. Rodgers, *Rights Consciousness in American History*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 9, 18 (David J. Bodenhamer & James W. Ely Jr. eds., 3d ed. 2022).

11. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 3 (1997); *see also* MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 78–79 (1991) ("Most prominent early twentieth-century proponents of federal and state economic regulations also supported federal and state speech regulations.").

12. Ely, *supra* note 9, at 271–77.

13. James W. Ely Jr., *The Supreme Court and Property Rights in the Progressive Era*, 44 J. SUP. CT. HIST. 53, 53–70 (2019).

14. Daniel F. Kellogg, *The Disappearing Right of Private Property*, 199 N. AM. REV. 55, 62 (1914) (voicing concern that "the security of property is no longer looked upon, as it once was, as just as essential to the interests of society as the security of human life itself").

15. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 364–66 (2001) (observing that the legal realists "sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state

Second, the political triumph of the New Deal in the 1930s fundamentally altered the constitutional landscape. Building upon the Progressive legacy, New Dealers viewed the federal government as an instrument of social reform. Constitutional provisions that stood in the path of this goal were ignored or downplayed. Thus, structural restraints, such as the separation of powers, federalism, and substantive provisions protective of property, were sharply diluted.[16] A central feature of New Deal constitutionalism was a judicially fashioned dichotomy between the rights of property owners and other personal freedoms deemed fundamental. Property rights were placed in a subordinate category and were to receive virtually meaningless judicial review under a toothless "rational basis" standard.[17] Supine deference to the judgement of legislators regarding economic legislation became the new orthodoxy. In such a climate, little wonder that one commentator concluded that "property rights were essentially confined to a legal dust bin."[18]

Claims grounded in other provisions of the Bill of Rights, however, were to receive more exacting judicial scrutiny.[19] Freedom of speech was now exalted as a check on abusive government to replace the largely discarded structural restraints on government. Accordingly, free speech was reconfigured as an element of democratic governance rather than a private right sheltering individual autonomy from government. By the mid-twentieth century, freedom of speech was elevated to the preeminent position in constitutional

---

intervention in regulating and redistributing property"); Michael Zuckert, *On the Separation of Powers: Liberal and Progressive Constitutionalism*, 29 SOC. PHIL. & POL'Y 335 (2012) (examining attack on the separation of powers); James W. Ceaser, *Progressivism and the Doctrine of Natural Rights*, 29 SOC. PHIL. & POL'Y 177, 188–95 (2012) (analyzing Progressive critique of natural rights doctrine).

16. For example, the once potent contract clause was virtually eviscerated at the federal level by the New Deal Supreme Court in order to accommodate far-ranging exercises of governmental power over contracts. JAMES W. ELY JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY 216–34 (2016).

17. ELY, *supra* note 1, at 139–41. For the bifurcation between personal and economic rights, see *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938) (declaring that constitutionality of economic regulatory legislation would be presumed unless facts preclude the assumption that the legislation "rests upon some rational basis" within the experience of legislators).

18. James L. Oakes, *'Property Rights' in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 608 (1981).

19. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 346–47 (2d ed. 2009).

thought, as the quintessential preferred freedom.[20] The Supreme Court defended all manner of speech, in sharp contrast to its disinterest in property.[21]It was an article of faith on the political left that freedom of speech served to promote democracy and foster desired political change.[22] Two scholars explained:

> Judicial enforcement of First Amendment rights was once thought to be among the greenest pastures in the land of legal realism—the ideology that came to dominate the American legal academy in the 1960s and that sought to defend both the post-war welfare state and its reform by the Warren Court.[23]

To many of its champions, therefore, robust defense of free expression throughout much of the twentieth century served a particular political agenda.

II. CURRENT CHALLENGES TO PROPERTY AND FREE SPEECH

But time marches on. Many on the political left today have grown disenchanted with free speech and the marketplace of ideas. To them, free speech is not valuable as an individual right but only as a means to achieve certain political goals. They increasingly express alarm that free speech in fact is an obstacle to their vision of social

---

20. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 49–59 (1996). This is not to suggest that strengthened protection for free speech was applied evenly to all parties. Consider the question of employer speech in the context of union organizing campaigns. Employer speech urging employees not to join a union was sharply restrained. KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 226–30 (2004). In sharp contrast, union picketing, previously treated as conduct, was deemed constitutionally protected free speech. Thornhill v. Alabama, 303 U.S. 88 (1940) (5–4 decision). The effort to muffle employer speech, largely forgotten today, prefigured current moves to eliminate speech that does not advance a particular political agenda.

21. Richard A. Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, 31 TULSA L. REV. 543 (1996) (contrasting the activism of the Supreme Court under Chief Justice Earl Warren [1953–1969] on free speech, religious freedom, and criminal procedure with its lack of interest in the protection of property rights).

22. Burt Neuborne, *Blues for the Left Hand: A Critique of Cass Sunstein's* Democracy and the Problem of Free Speech, 62 U. CHI. L. REV. 423, 427 (1995) (book review) ("Since speech as an agent of change appeared to be the principal beneficiary of the First Amendment, and since change was a byword of the left, vigorous protection of speech and association fit comfortably into the left's agenda for much of the century.").

23. Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1961 (2018).

progress and fret that it may even reinforce the status quo.[24] Accordingly, free speech and inquiry are now seen by many on the left as a problem.[25] Some scholars have criticized First Amendment jurisprudence that treats all speakers alike, arguing that, in their view, such treatment serves to perpetuate the existing imbalance in political power.[26]

Another highly problematic line of attack has been to accuse the Supreme Court of "Lochnerizing" free speech. These critics allege that the Court has turned the First Amendment into a weapon to undermine the regulatory state.[27] A bit of history is in order. The much-maligned decision in *Lochner v. New York* (1905),[28] in which the Court upheld the liberty of contract doctrine as a constitutional right under the due process clause, is the subject of a vast literature which cannot be reviewed here. The Progressive historians fashioned *Lochner* into a laissez-faire bogeyman that somehow blocked their regulatory agenda.[29] But attempts to analogize recent free speech decisions to *Lochner* are wide of the mark. Quite apart from the fact that the *Lochner* case concerned economic regulations, not free speech, the Court rarely invoked the decision and upheld most

---

24. Neuborne, *supra* note 22, at 428–29 (observing that "expansive free speech no longer necessarily correlates with change; to the contrary, it may correlate with resistance to change. In such settings, genuine free speech may well aid the relatively affluent majority in opposing reforms designed to benefit the unfortunate minority that has been left behind. . . . [S]uch structural resistance to change has tempted some left-leaning reformers to consider censorship (often cloaked in a republican theory about seeking the common good) as a means of combatting rational, speech-driven attitudes that hinder the left's vision of progress.").

25. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH, at xix (1993) (urging "significant changes in our understanding of the free speech guarantee").

26. *See* Suzanne Sherry, *The First Amendment and the Right to Differ*, *in* THE BILL OF RIGHTS IN MODERN AMERICA 31, 39–45 (David J. Bodenhamer & James W. Ely Jr. eds., 3d ed. 2022) (analyzing critique of current First Amendment jurisprudence by "progressives" and warning of risks in allowing government to regulate speech).

27. Sorrell v. IMS Health Inc., 564 U.S. 552, 603 (2011) (Breyer, J., dissenting) (arguing that Court majority in a commercial speech case "reawakens *Lochner*'s pre–New Deal threat of substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue").

28. 198 U.S. 45 (1905) (Peckham, J.); *see* James W. Ely Jr., *Rufus W. Peckham and Economic Liberty*, 62 VAND. L. REV. 591, 606–12 (2009) (analyzing Peckham's commitment to the liberty of contract doctrine). *See generally* PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK (1990).

29. BERNSTEIN, *supra* note 9, at 55 ("Just as the story of *Lochner v. New York* itself has been grossly distorted into a tale of struggling workers versus big business supported by the Supreme Court, the received wisdom regarding the broader battle between Progressive lawyers and their 'conservative' opponents amounts to a facile 'government regulation good, Supreme Court intervention bad' interpretation of constitutional history.").

regulations against liberty of contract challenges.[30] Indeed, revisionist scholarship has destroyed the dark myth of *Lochner* fashioned by the Progressive historians.[31] A cartoonish version of *Lochner* is being employed as a foil to criticize robust free speech decisions disliked by scholars on the political left.[32] In short, there is a whiff of attempted guilt by association about the notion of First Amendment Lochnerism.

In this hostile climate, proposals to censor speech abound, and much suppression is being implemented by private platform providers and professional associations. Universities, which once basked in the self-image of open inquiry and commitment to free speech, have increasingly yielded to cancel culture and intolerance of ideas that clash with the prevailing campus orthodoxy.[33] Protestations to the contrary ring hollow. A recent poll indicated that only twenty-eight percent of Americans believe that the United States enjoys true free speech.[34]

Indeed, Mary Anne Franks has launched a full assault on current First Amendment jurisprudence. Lamenting a "fundamentalist" reading of the First Amendment, she charged that free speech doctrine has been transformed "into a tool of the most privileged and powerful members of society."[35] Franks even offered a proposal to revamp the language of the First Amendment in ways that would radically

30. KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 264 (2d ed. 2009) ("The *Lochner* decision was in many ways an aberration with limited impact."); Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 103, 108 (F.H. Buckley ed., 1999) (observing that "even during the period between 1885 and 1930, the supposed height of laissez-faire constitutionalism, the courts, federal and state, did not uniformly sustain the liberty of contract principle").

31. BERNSTEIN, *supra* note 9, at 125–29.

32. WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 123–25 (1988) ("*Lochner* has become in modern times a sort of negative touchstone. . . . We speak of 'lochnerizing' when we wish to imply that judges substitute their policy preferences for those of the legislature."); Benedict, *supra* note 7, at 295 ("Nothing can so damn a decision as to compare it to *Lochner* and its ilk.").

33. KEITH E. WHITTINGTON, SPEAK FREELY: WHY UNIVERSITIES MUST DEFEND FREE SPEECH (2018) 51–179 (detailing instances of speech obstruction and imposition of ideological boundaries on university campuses, and decrying lack of viewpoint diversity).

34. *Most Americans See Political Correctness as a Threat to Free Speech*, RASMUSSEN REPS. (Aug. 6, 2021), https://www.rasmussenreports.com/public_content/lifestyle/social_issues/most_americans_see_political_correctness_as_a_threat_to_free_speech.

35. MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION: OUR DEADLY DEVOTION TO GUNS AND FREE SPEECH 107 (2019).

diminish the right of free expression "in accordance with the principle of equality and dignity."[36] Such words have no fixed meaning and would open the door to government censorship and speech suppression.

In brief, despite continuing judicial support, respect for freedom of speech in significant segments of the academy and the polity has markedly eroded, and speech rights no longer occupy a preeminent status in much of society. One might well wonder how long courts will continue robust support for free speech if such a right is no longer highly regarded in the political culture.[37]

Private property, although receiving only modest judicial solicitude, has also been recently called into question. Mayor Bill de Blasio's 2017 blast against private property as the root of New York City's income inequality is symptomatic of this trend. "What's been hardest," he asserted, "is the way our legal system is structured to favor private property." He revealingly added:

> I think there's a socialist impulse, which I hear every day, in every kind of community, that they would like things to be planned in accordance to their needs. And I would too. Unfortunately, what stands in the way of that is hundreds of years of history that have elevated property rights and wealth to the point that that's the reality that really calls the tune on a lot of development.[38]

It is tempting to dismiss the mayor's comments, but it is just the visible tip of an iceberg.

Prominent scholars have argued that private property is merely a grant from the state and not really a right.[39] For example, Charles E. Lindblom insisted that "property is itself a form of authority created by government. . . . Property rights are consequently grants of authority made to persons and organizations, both public and

---

36. Mary Anne Franks, *Redo the First Two Amendments*, BOS. GLOBE (Dec. 15, 2021), https://apps.bostonglobe.com/ideas/graphics/2021/12/editing-the-constitution/redo-the-first-two-amendments.

37. Greg Lukianoff & Adam Goldstein, *Law Alone Can't Protect Free Speech*, WALL ST. J., Aug. 13, 2020, at A15.

38. Chris Smith, *In Conversation: Bill De Blasio*, N.Y. MAG. (Sept. 4, 2017), https://nymag.com/intelligencer/2017/09/bill-de-blasio-in-conversation.html.

39. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004) (arguing that rights are just grants from the government).

private, and acknowledged by other persons and organizations."[40] One prominent scholar has derided the concept of ownership as a myth.[41] A bloc of self-identified socialists occupies an important place in Congress and calls for massive redistributive measures which would undermine the security of property.

Since property and free speech are both under attack, this seems a propitious time to reconsider the relationship between the two. I propose to examine the historical affinity of property and liberty and ponder its continued viability.

III. SHIFTING STATUS OF PROPERTY AND FREE SPEECH

We should start by stressing that in the eighteenth century, English commentators, expressing Whig thinking, championed the need for constitutional restraints on government in order to safeguard liberty. Moreover, as John O. McGinnis has aptly pointed out, "In the Whig tradition, freedom of speech and property rights were seen simply as different aspects of an indivisible concept of liberty."[42] For example, John Trenchard and Thomas Gordon, important Whig writers in England, closely linked property and speech rights. Speaking of free speech, they declared: "This sacred privilege is so essential to free government, that the security of property; and the freedom of speech always go together."[43] Their arguments were widely reprinted in colonial newspapers and shaped the intellectual framework of the founding era.[44]

This Whiggish doctrine linking liberty and property found expression in constitutional documents. A number of state constitutions of

---

40. CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS 26 (1977).

41. JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP (1994).

42. McGinnis, *supra* note 20, at 63.

43. John Trenchard & Thomas Gordon, *Of Freedom of Speech: That the Same Is Inseparable from Public Liberty* (Letter No. 15, Feb. 4, 1720), *in* 1 CATO'S LETTERS, OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS, 96 (3d ed. 1733).

44. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 151 (expanded ed. 2001); *see also* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 57 (1992) (noting that "the colonists shared many ideas" with Trenchard and Gordon); CLINTON ROSSITER, SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY 41 (1953); HALL & KARSTEN, *supra* note 30, at 51 (pointing out the importance of Trenchard and Gordon in America after 1750).

the Revolutionary Era accorded equal value to liberty and property rights. The Massachusetts Constitution of 1780, for instance, proclaimed: "All men are born free and equal, and have certain natural, essential unalienable rights, among which may be reckoned rights of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property, in fine, that of seeking and obtaining their safety and happiness."[45] The early state constitutions, according to a leading scholar, manifested "a desire to guarantee not only freedom of expression and religious exercise but also the freedom to acquire property."[46] Similarly, the framers of the Constitution and Bill of Rights did not differentiate between property and other individual rights. Thus, the Fifth Amendment contains important property protections, such as the takings clause, along with procedural guarantees governing criminal proceedings. "Economic rights, property rights, and personal rights," Walter Dellinger cogently remarked," have been joined, appropriately, since the time of the founding."[47]

James Madison, the principal author of the Bill of Rights, amplified his thinking about property and liberty in a 1792 essay.[48] He attributed two meanings to property. The first encompassed the dominion over land, merchandise, and money. The second "embraces every thing to which a man may attach a value and have a right; and *which leaves to every one the like advantage*." "In the latter sense," Madison explained, "a man has a property in his opinions and the free communication of them." He added that "as a man is said to have a right to his property, he may be equally said to have a property in his rights."[49] To modern eyes, this is a curious formulation. It is not common to see freedom of speech defined as an aspect of property. Why would Madison do so? I suggest that Madison calculated that such an understanding would strengthen the protection afforded to free speech. After all, the protection of property rights at common law and in the American colonies was far better settled than the safeguards for free speech, the scope of which was

45. MASS. CONST. of 1780, pt. I, art. I.

46. ADAMS, *supra* note 44, at 192.

47. Walter Dellinger, *The Indivisibility of Economic Rights and Personal Liberty*, 2003–2004 CATO SUP. CT. REV. 9, 13.

48. James Madison, *Property* (Mar. 27, 1792), *in* 14 THE PAPERS OF JAMES MADISON 266–68 (Charles F. Hobson & Robert A. Rutland eds., 1983).

49. *Id.* at 266.

contested.[50] Jennifer Nedelsky maintained that "Madison was trying to draw on the accepted importance of property to lend sanctity to individual rights more generally."[51] Whatever the merits of this hypothesis, however, Madison clearly viewed free speech as a sort of property right inherent in the individual.[52]

It bears emphasis that throughout the nineteenth century the prevailing understanding of free speech was that formulated by William Blackstone. He barred prior restraint on speech, but allowed subsequent punishment of expression which threatened public peace and order.[53] In fact, the Supreme Court heard few important speech cases in the nineteenth and early twentieth centuries and narrowly construed expressive rights. There was, for example, no protected right for an individual to speak on public property. In 1897, the Court in a unanimous opinion ruled that the City of Boston could prevent public speeches in municipal parks without a permit from the mayor.[54] As late as 1907, the Court, in an opinion by Justice Oliver Wendell Holmes, concluded that the First Amendment only prevented previous restraint on speech and press, not subsequent punishment, and that the First Amendment did not apply to the states.[55]

To be sure, some commentators and judges urged a more robust reading of free speech guarantees. Thomas M. Cooley, a Michigan Supreme Court judge and the most influential constitutional theorist of the late nineteenth century, rejected the Blackstonian understanding. In his landmark *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States*, first published in

---

50. *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

51. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISON FRAMEWORK AND ITS LEGACY 21–22 (1990).

52. McGinnis, *supra* note 20, at 64–67.

53. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151 ("The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published.").

54. Davis v. Massachusetts, 167 U.S. 43 (1897) (analogizing public parks to private property and upholding an opinion by Holmes in Commonwealth v. Davis, 39 N.E. 113 (1895)). *Davis* was effectively abrogated by Hague v. Congress of Industrial Organizations, 307 U.S. 495 (1939) (defining streets and parks as public forums for First Amendment purposes). Justice Pierce Butler, dissenting in *Hague*, accurately observed that the majority's opinion was contrary to *Davis*. 307 U.S. at 533.

55. Paterson v. Colorado, 205 U.S. 454, 462 (1907).

1869, Cooley observed: "[I]t is still believed that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions."[56] Well known for his defense of property rights, Cooley also valued freedom of expression. He characterized the First Amendment as "almost universally regarded as a sacred right, essential to the existence and perpetuity of free government."[57] It is particularly striking, then, that Cooley explicitly equated free speech and property rights. Dissenting in an 1881 libel law case, he maintained that everyone must exercise rights with due regard for the rights of others. "This is as true of the right to free speech," Cooley observed, "as it is of right to free enjoyment of one's property."[58] To his mind, protection of free speech and private property were equally necessary for individual autonomy.

Cooley's opinion was echoed later in the nineteenth century by John W. Burgess, a prominent political scientist. In a treatise on comparative constitutionalism, he explored the essence of those rights constituting liberty. Burgess maintained that "individual liberty consists in freedom of the person, equality before the courts, security of private property, freedom of opinion and its expression, and freedom of conscience."[59] Again, we see private property and free speech linked as essential elements for the enjoyment of liberty. Burgess envisioned that these rights would work in tandem to protect liberty.

Cooley and Burgess were among a host of scholars and jurists who championed both private property and free speech. Mark A. Graber has identified a "conservative libertarian" tradition that maintained that freedom of expression could only exist if government safeguarded property rights. Conservative libertarians, he asserted, "did not separate the system of free expression and the system of private property."[60] Rather, they viewed speech rights as one aspect of personal liberty, and expected courts to defend all aspects of individual freedom.

---

56. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 421 (reproduced ed. 2002) (1868).

57. *Id.* at 414.

58. Atkinson v. Detroit Free Press Co., 9 N.W. 501, 520 (Mich. 1881).

59. JOHN W. BURGESS, POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW 178 (Boston & London, Ginn & Co. 1890).

60. GRABER, *supra* note 11, at 8.

A generation later, the jurisprudence of George Sutherland similarly exemplified the nexus between property and freedom of expression. Serving on the Supreme Court when some scholars and judges were beginning to embrace the notion that there should be different standards of judicial review for speech and economic regulations, Sutherland stoutly insisted that there should be the same standard of review for all claims of right. Indeed, he equated liberty and property, and regarded both as essential aspects of a free society.[61]

For example, consider Sutherland's opinion for the Supreme Court in *New State Ice Co. v. Liebmann* (1932).[62] At issue was an Oklahoma licensure scheme that had the effect of conferring a de facto monopoly on established ice houses by curtailing competition.[63] Sutherland struck down the law as an infringement of the due process right of others to pursue a lawful trade. During the 1930s, regulatory measures were often justified as experiments in economic planning. Sutherland, however, maintained that government could not brush aside the essentials of liberty in the name of experimentation. He ended his opinion with this telling observation: "[T]he theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection."[64] To Sutherland, the sanctity of speech and economic liberty were equally deserving of constitutional protection. But note the change in emphasis. Instead of the high constitutional status of private property providing a shelter for speech, Sutherland called for economic rights to be treated the same as freedom of expression.

Of course, as discussed above, the affinity between free speech and property rights was shattered with the triumph of New Deal

61. Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 323 (2002) ("For Sutherland, freedom of expression and economic liberty comprised complimentary facets of personal liberty, each vulnerable to the ephemeral whims of transient democratic majorities. As such, their protection of all forms of regulation warranted close judicial scrutiny."); *see also* Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VAND. L. REV. 639, 681–82 (2009).

62. 285 U.S. 262 (1932).

63. *Id.* at 278–79 ("The control here . . . does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it.").

64. *Id.* at 279–80.

jurisprudence, and has never been restored. The Supreme Court largely ignored property rights for decades, in marked contrast to its expansive readings of free expression.[65] Indeed, by 1968 Justice Hugo Black felt it necessary to remind his colleagues that "whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property."[66]

IV. HISTORIC NEXUS BETWEEN PROPERTY AND LIBERTY

Given the dismissive attitude toward the constitutional rights of property owners that prevailed during much of the twentieth century, it seems appropriate to inquire why so many prominent commentators in the eighteenth and nineteenth centuries perceived an intimate tie between private property and individual liberty. What accounts for this long-standing association of property and liberty? I submit that three core beliefs dovetailed to create an intellectual climate favorable to secure property rights.

First, Restraint of Government. Since Magna Carta, a major theme of Anglo-American constitutionalism has been the restraint of government. Secure private property constrains the scope of governmental authority over individuals. In other words, property provides a shelter for liberty because it sets limits on the reach of legitimate government. Widespread ownership tends to diffuse power and resources into many hands. Property held by many individuals functions as an independent source of authority. In such a decentralized society, a variety of personal and political liberties can flourish free of government control. Private property, therefore, serves as a bulwark against state power, a role which assumes ever greater significance in an era of strong centralized government.

Absence of guaranteed property rights, on the other hand, facilitates arbitrary government in which mere privileges, as distinct from rights, are enjoyed at the pleasure of the sovereign. Trenchard and Gordon cogently observed in 1722: "The only despotick Governments now in the World, are those where the whole Property is in the Prince."[67] When they wrote, of course, most people lived under the

---

65. Richard A. Epstein, *The Takings Jurisprudence of the Warren Court: A Constitutional Siesta*, 31 TULSA L.J. 643, 644 (1996) ("The question of property rights, their status and protection, was not an issue that much troubled or preoccupied the Warren Court.").

66. Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, 391 U.S. 308, 330 (1968).

67. John Trenchard & Thomas Gordon, *Property the First Principle of Power—The Error*

rule of absolute monarchs and had no claim to secure private property. But these words carry potent meaning into the modern era, where totalitarian regimes invariably either abolish or severely regulate private property. Communist Russia, of course, largely abolished private property in the early twentieth century.[68] As scholars have reminded us, there were significant socialist elements in the Nazi program for Germany, including property confiscation, rigid controls over the economy, and high taxes.[69] "Where the state claims ownership of all productive resources," Richard Pipes emphasized, "individuals or families have no means of asserting their freedom because economically they are entirely dependent on the sovereign power."[70]

Property ownership, on the other hand, serves to limit the sway of the sovereign. As Trenchard and Gordon explained, when the people have "as they think a Right to Property, they will always have some power, and will expect to be considered by their Princes."[71] In words that carry special resonance today, journalist Walter Lippmann warned in 1934: "It has become the fashion to speak of the conflict between human rights and property rights, and from this it has come to be widely believed that the use of private property is tainted with evil and should not be espoused by rational and civilized men." Lippmann insisted, in marked contrast, that such views "should not be allowed to obscure the truth that the only dependable foundation of personal liberty is the personal economic security of private property."[72]

---

of Our Princes Who Attended Not to This (Letter No. 84, July 7, 1722), *in* 3 CATO'S LETTERS, OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS, 152 (3d ed. 1733).

68. ANDREW BARNES, OWNING RUSSIA: THE STRUGGLE OVER FACTORIES, FARMS, AND POWER 27–31 (2006) (discussing sweeping nationalization and collectivization of property in Russia during the 1930s, and concluding: "The Stalinist system of ownership and control of property was thus remarkably extensive and coherent").

69. AVRAHAM BARKAI, NAZI ECONOMICS: IDEOLOGY, THEORY, AND POLICY 3 (1990) ("It is quite clear that there was no free market economy in Germany throughout those years, even in comparison with other advanced industrial countries, none of which had operated under conditions of 'pure competition' since the beginning of the century. The scope and depth of state intervention in Nazi Germany had no peacetime precedent or parallel in any capitalist country, Fascist Italy included."); *see also* GOTZ ALY, HITLER'S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE (2005), DAVID SCHOENBAUM, CLASS AND STATUS IN NAZI GERMANY, 1933–1939 (1966) ("But inconsistent as Nazi practice might have been, Nazi theory meanwhile systematically undermined the legal premises of private property.").

70. RICHARD PIPES, PROPERTY AND FREEDOM 117–18 (1999).

71. Trenchard & Gordon, *supra* note 67, at 153.

72. WALTER LIPPMANN, THE METHOD OF FREEDOM 100–01 (1934).

Second. Individual Autonomy. Private property makes people autonomous and thus encourages self-government. Again, Trenchard and Gordon are instructive. They explained in 1721:

> And therefore all Men are animated by the Passion of acquiring and defending Property, because Property is the best Support of that Independency, so passionately desired by all Men. . . . And as Happiness is the Effect of Independency, and Independency the Effect of Property, so certain Property is the Effect of Liberty alone.[73]

According to this thesis, property ownership nurtures the independence necessary for participation in a free society. Persons with a solid base of economic strength are more willing to challenge government or wealthy patrons and less likely to be intimidated into acquiescence. Gordon Wood pointed out that the Revolutionary generation viewed property "as a source of personal authority or independence. It was regarded not merely as a material possession but also as an attribute of a man's personality that defined him and protected him from outside pressure."[74] In the same vein, Lippmann explained that private property was "discovered to limit the authority of the king and to promote the liberties of the subject. Private property was the original source of freedom. It is still its main bulwark."[75] Lindblom, a skeptic about the role of private property in democratic society, acknowledged that property rights were a constraint on authority. He observed:

> Indeed, for good or bad, the law of property is perhaps the most fundamental of all political rules, reserving as it does a set of decisions for each individual and prohibiting interference by others, the ruler included. . . . Property rights carve out for each citizen a domain of free choice that the state does not easily invade.[76]

Consider, on the other hand, a society without property rights. How meaningful would the right to vote or voice one's opinion be in

---

73. John Trenchard & Thomas Gordon, *Property and Commerce Secure in a Free Government Only; With the Consuming Miseries Under Simple Monarchies* (Letter No. 68, Mar. 3, 1721), *in* 2 CATO'S LETTERS, OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 319 (3d ed. 1733).

74. WOOD, *supra* note 44, at 178.

75. LIPPMANN, *supra* note 72, at 101 (arguing that lack of property ownership facilitated the rise of absolutist states in Communist Russia, Nazi Germany and Fascist Italy).

76. LINDBLOM, *supra* note 40, at 127.

such a context? Without guaranteed property rights, the enjoyment of other liberties would be empty and largely theoretical.[77] Protection of the rights of owners provides the material basis for other civil liberties. As Richard Epstein forcefully recognized:

> [P]rivate property provides the private wealth necessary to support active participation in public debate. Private property, in a word, nourishes freedom of speech, just as freedom of speech nourishes private property. Can anyone find a society in which freedom of speech flourishes where the institution of private property is not tolerated?[78]

John Dickinson, an influential author and member of the First and Second Continental Congresses, contended in 1768: "[W]e cannot be happy without being free—that we cannot be free without being secure in our property—that we cannot be secure in our property, if, without our consent, others may, as by right, take it away."[79] Indeed, there are few examples, either historical or contemporary, of free societies that do not respect property rights. While a system of private property does not guarantee individual liberty, its absence renders personal and political freedom unlikely.[80]

Amplifying this theme, Justice Antonin Scalia insisted:

> Human liberties of various types are dependent on one another, and it may well be that the most humble of them is indispensable to the others . . . . I know of no society, today or in any era of history, in which high degrees of intellectual and freedom have flourished side by side with a high degree of state control over the relevant citizen's economic life. The free market, which presupposes relatively broad economic freedom, has historically been the cradle of broad political freedom, and in modern times the

77. D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 69 (2009) ("It is difficult to see how other freedoms to speech, religion, or association could be secure in a society without the institution of private property.").

78. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 138 (1985).

79. JOHN DICKINSON, LETTERS FROM A FARMER IN PENNSYLVANIA TO THE INHABITANTS OF THE BRITISH COLONIES 138–52 (Boston 1768).

80. PIPES, *supra* note 70, at 281 ("The right to property in and of itself does not guarantee civil rights and liberties. But historically speaking, it has been the single most effective device for ensuring both, because it rates an autonomous sphere in which, by mutual consent, neither the state nor society can encroach.").

> demise of economic freedom has been the grave of political freedom as well.[81]

Of course, in a free society inevitably some individuals hold little or no property. This fact has prompted frequent expressions of anti-property attitudes from the eighteenth century to the present.[82] Emphatically rejecting this approach, Chancellor James Kent of New York dismissed "modern theorists, who have considered . . . inequities of property, as the cause of injustice, and the unhappy results of government and artificial institutions."[83] He stressed the advantages of property ownership to the improvement of the human condition. Yet the question remains, how then does a system of private property protect the autonomy of persons without property? It bears emphasis that a system of private property, by dispersing power into many hands and limiting central control, also serves to safeguard the liberty of the propertyless. In 1944, F.A. Hayek insightfully explained:

> What our generation has forgotten is that the system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves. If all the means of production were vested in a single hand, whether it be nominally that of "society" as a whole or that of a dictator, whoever exercises this control has complete power over us.[84]

Violations of property rights, in other words, serve to solidify the authority of rulers at the expense of individual owners, thereby diminishing the freedom of society as a whole.

Third. Promotes Economic Growth. Stable property rights are a powerful inducement for the creation of wealth and prosperity, prerequisites for successful self-government. As many scholars have

---

81. Antonin Scalia, *Economic Affairs as Human Affairs*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 31, 31–32 (James A. Dorn & Henry G. Manne eds.,1987).

82. PIPES, *supra* note 70, at 39–58 (tracing the philosophical assault on private property which originated in eighteenth-century France).

83. 11 JAMES KENT, COMMENTARIES ON AMERICAN LAW 256–57 (1827).

84. F.A. HAYEKS, THE ROAD TO SERFDOM 115 (50th Anniversary ed. 1994).

pointed out, a system of private property and contractual stability encourages savings, investments, and trade.[85] Economic development, in turn, increases the wealth of society as a whole. This is a critical precondition for a climate which fosters individual liberty. The leaders of the founding generation broadly agreed that respect for private property was essential for economic growth. John Marshall, according to a leading scholar, "was convinced that strong protection of property and investment capital would promote national prosperity."[86] Similarly, Kent maintained: "The natural and active sense of property pervades the foundations of social improvement," leading to "the growth of the useful arts" and "the spirit of commerce."[87]

Conversely, the absence of strong protection of contracts and property is a recipe for economic stagnation. After a comprehensive survey of economic success and failure in different cultures over centuries, historian David S. Landes explained that "contingency of ownership stifles enterprise and stunts development, for why should anyone invest capital or labor in the creation or acquisition of wealth that he may not be allowed to keep."[88] Edmund Burke sagely articulated this point when he declared in 1765: "A law against property is a law against industry."[89]

Colonial America provides an instructive example of how prosperity could encourage claims of individual rights. In sharp contrast to England, land was abundant and was widely acquired by colonists. Even individuals without land shared the acquisitive spirit and hoped to obtain such property.[90] Indeed, many came to colonial America for the express purpose of having land of their own.[91] An English visitor

85. DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS 217–18 (1998) (maintaining that to achieve material progress a society should "secure rights of private property, the better to encourage savings and investment, . . . secure rights of personal liberty," and "enforce rights of contract"); *see also* NIALL FERGUSON, CIVILIZATION: THE WEST AND THE REST 12–13 (2011) (attributing the ascendancy of the West to, among other attributes, property rights).

86. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 75 (1996).

87. KENT, *supra* note 83, at 257.

88. LANDES, *supra* note 85, at 32.

89. Edmund Burke, *Tracts Relating to Popery Laws*, *in* 9 THE WRITINGS AND SPEECHES OF EDMUND BURKE 434, 476 (R. B. McDowell ed., 1991).

90. ADAMS, *supra* note 44, at 189 ("The acquisition and cultivation or exploitation of land was the very raison d'etre for the colonies. They were a 'possessive market society,' in which property was the central institution and the one that society was most concerned to protect.").

91. PATRICIA U. BONOMI, A FACTIOUS PEOPLE: POLITICS AND SOCIETY IN COLONIAL NEW YORK 195 (1971).

to New England complained in 1765: "Everybody has property, and everybody knows it."[92] In the same vein, South Carolina Chief Justice William Henry Drayton, in a charge to the Charleston District Grand Jury in October of 1777, observed: "The people of America are a people of property; almost every man is a freeholder."[93] Moreover, labor was scarce, and commanded high wages. This combination nourished a middle-class society and proved a fertile seedbed of rights consciousness and political liberty. "For most white Americans," Gordon Wood aptly pointed out, "there was greater prosperity than anywhere else in the world; in fact, the experience of growing prosperity contributed to the unprecedented eighteenth-century sense that people here and now were capable of ordering their own reality."[94] It followed that any perceived threat to the rights of property owners was quickly translated into a threat to liberty.[95]

V. ROSE CRITIQUE OF ARGUMENTS FOR PROPERTY'S CENTRAL ROLE IN PRESERVING RIGHTS

Carol M. Rose has thoughtfully questioned the efficacy of the time-honored arguments linking the constitutional rights of property owners and individual liberty, including some of the arguments advanced in this Article.[96] She stressed that the institution of property has been persistent over centuries and in difficult cultures, and yet, at the same time, fragile, depending for its existence on recognition by others in the society. Rose agreed that claims for property as a keystone right have been hardy and long-lasting. She observed that "there is at least a plausible case—or rather several plausible cases—that the security of property can set the stage for more thoroughgoing protections of other rights."[97] Indeed, Rose lent support to the contention that protected private property undergirds individual freedom. She forcefully maintained:

---

92. Lord Adam Gordon, *Journal of an Officer's Travels in America and the West Indies, 1764–1765*, *in* TRAVELS IN THE AMERICAN COLONIES 367, 404–06 (Newton D. Mereness ed., 1916).

93. S.C. & AM. GEN. GAZETTE, Nov. 6, 1777.

94. WOOD, *supra* note 44, at 169.

95. ELY, *supra* note 1, at 25; WOOD, *supra* note 44, at 169 ("[T]he people were acutely nervous about their prosperity and the liberty that seemed to make it possible.").

96. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996).

97. *Id.* at 362.

> Consider the right to vote, or to speak freely—rights that could easily be cited as the most important among the political rights. How far would they be likely to carry a citizenry whose property is at risk? What boldness, independence and creativity are to be expected without the backdrop of some security of property?[98]

Despite her reservations about the extent of property's protective function regarding other rights, Rose would seemingly agree that property rights continue to occupy a vital place in the constitutional order.

VI. TOWARD THE FUTURE

Any effort to predict the future course of private property and free speech in the United States is hazardous. History rarely proceeds in a linear fashion. It is entirely possible that the current attack on property and speech will be a passing storm. Both private property and free speech have deep roots and will not readily fade away. Americans have rarely shown sustained interest in redistributive measures.[99] But a more pessimistic scenario might prevail. The forces of censorship are powerful and might topple the First Amendment from its constitutional pedestal.[100] Social welfare schemes could further encroach on the rights of owners. They inevitably require the exercise of coercive governmental power to take property from existing owners and give it to others.

In the last days of the Soviet Union, a doctor operating a clinic articulated the values associated with property: "The political fight for power now is the fight for property. If people get property, they

---

98. *Id.* at 362–63; *see supra* text accompanying notes 73–84.

99. J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 426, 434 (2d ed. 1993) (maintaining that the American understanding of equality "did not imply equality in the distribution of material resources," and pointing out that in the political history of the United States "the question of the distribution of wealth seldom figured for long or for large numbers, as a national problem"); *see also* CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 135 (2004) (observing that "there can be little doubt that American culture is uneasy with large-scale programs for redistribution, and that uneasiness helps explain the absence of social and economic rights from the American Constitution").

100. *See* DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS (2003) (detailing threats to freedom of expression in the workplace and college campuses).

will have power. If not, they will forever remain hired hands."[101] This doctor recognized that neither democracy nor individual freedom can survive where the people are economically dependent and have little to call their own. The framers of our Constitution and Bill of Rights envisioned a very different society—one grounded on private property as a limit on the reach of government.

101. As quoted in DAVID REMNICK, LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE 445 (1993).

DEVELOPMENT AGREEMENTS: AN OVERVIEW

DAVID L. CALLIES* & ERIN DUNG**

I. WHY DEVELOPMENT AGREEMENTS?

Developers and local governments face two difficult problems in the land development approval process. Local governments are unable to exact dedications of land or fees of the "impact" or "in-lieu" variety without establishing a clear connection or nexus between the proposed development and the dedication or fee.[1] The developer is unable to "vest" or guarantee a right to proceed with a project until that project is commenced.[2]

The development agreement offers a solution to both landowner/developers and local governments. Often authorized by statute to help avoid reserved power and Contract Clause problems discussed below, a well-structured agreement can be drafted to deal with a

---

* Kudo Chair in Law, Emeritus, William S. Richardson School of Law, BA, DePauw University, JD, University of Michigan, LLM (Planning Law), Nottingham University, Life Member, Clare Hall, Cambridge University, Fellow, American Institute of Certified Planners. This Article is derived from a paper presented on March 25th at the spring meeting of the American College of Real Estate Lawyers.

** Class of 2023, Editor, University of Hawaii Law Review.

1. For more detailed treatment of this subject, see DAVID L. CALLIES ET AL., DEVELOPMENT BY AGREEMENT: A TOOL KIT FOR LAND DEVELOPERS AND LOCAL GOVERNMENTS (2012) [hereinafter CALLIES ET AL., DEVELOPMENT BY AGREEMENT]; DAVID L. CALLIES ET AL., BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS AND THE PROVISION OF PUBLIC FACILITIES (2003); David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RSRV. L. REV. 663 (2001); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1017–20 (1987) (describing the "rational nexus" test adopted by a majority of jurisdictions to assess the reasonableness of provisions requiring exactions of property in development agreements, and the expansion of the doctrine governing exactions to address the use of "impact fees"); Lyle S. Hosada, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. HAW. L. REV. 173 (1985); TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* chs. 4, 9–11 (David L. Callies ed., 1996).

2. *See* John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL'Y 603, 607–08 (2000) (noting that many states require action such as construction or expenditure of funds in reliance on a development permit for the permit to be valid).

variety of common issues which arise in the land development process between landowners/developers and local governments.[3]

II. THE BASIC PROBLEM: BARGAINING AWAY THE POLICE POWER AND RESERVED POWER

The first issue is whether the local government has bargained away its police power by entering into an agreement under which it promises not to change its land use regulations during the life of the agreement. Specific statutory authorization is helpful so as to make clear that these agreements effectuate a public purpose recognized by the state. Thirteen states have so far adopted legislation enabling local governments to enter into development agreements with landowner/developers.[4]

A. "Freezing" and the "Contracting Away" Issue

It is black letter law that local governments may not contract away the police power,[5] particularly in the context of zoning decisions.[6]

---

3. *See generally* ROCKY MOUNTAIN LAND USE INST., DEVELOPMENT AGREEMENTS: ANALYSES, COLORADO CASE STUDIES, COMMENTARY (Erin J. Johnson & Edward H. Ziegler eds., 1993); URB. LAND INST., DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS (Douglas R. Porter & Lindell L. Marsh, eds., 1989); DAVID J. LARSEN, INST. FOR LOC. SELF GOV'T, DEVELOPMENT AGREEMENTS MANUAL: COLLABORATION IN PURSUIT OF COMMUNITY INTERESTS (2002). For commentary on the British experience with development agreements, see David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 URB. LAW. 221 (1991). See Appendix XVI for a checklist on drafting agreements, and Appendices XI, XIV and XV for sample development and annexation agreements, all in CALLIES ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1.

4. *See* ARIZ. REV. STAT. ANN. § 9-500.05 (2021); CAL. GOV'T CODE § 65864 (West 2022); COLO. REV. STAT. §§ 24-68-101 to -106 (2021); FLA. STAT. § 163.3220 (2021); LA. STAT. ANN. § 33:4780.22 (2021); NEV. REV. STAT. § 278.0201 (2021); N.J. REV. STAT. § 40:55D-45.2 (2021); OR. REV. STAT. § 94.504 (2021); VA. CODE ANN. § 15.2-2303.1 (2021) (applying only to counties with a population between 10,300 and 11,000 and developments consisting of more than 1,000 acres); WASH. REV. CODE § 36.70B.170 (2021).

5. *See* Carlino v. Witpain Invs., 453 A.2d 1385, 1388 (Pa. 1982) (noting that "individuals cannot, by contract, abridge police powers which protect the general welfare and public interest").

6. *See* Cederberg v. City of Rockford, 291 N.E.2d 249, 251–52 (Ill. App. Ct. 1972) (voiding restrictive covenant and rezoning ordinance because the law "condemns the practice of regulating zoning through agreements or contracts between the zoning authorities and property owners"); Hous. Petroleum Co. v. Auto. Prod. Credit Ass'n, 87 A.2d 319, 322 (N.J. 1952)

Stated another way, government cannot bind itself to not exercise its police powers. It is thus usually considered to be against public policy to permit the bargaining of zoning and subdivision regulations for agreements and stipulations on the part of developers to do or refrain from doing certain things. Because land use and development regulations represent exercises of police power, a development agreement binding a local government not to exercise these regulatory powers arguably violates the reserved powers doctrine[7] and is, therefore, ultra vires.

Under this doctrine, bargaining away the police power is the equivalent of a current legislature attempting to exercise legislative power reserved to later legislatures.[8] However, an analysis of the cases indicates that what the courts generally inveigh against is such bargaining away forever, or at least for a very long time. The source of the doctrine, *Corporation of the Brick Presbyterian Church v. Mayor of New York*,[9] involved the municipal abrogation of a lease executed over fifty years before. While a few later cases do involve invalidation of municipal action just a few years old,[10] the majority deals with behavior further back in time. The dominant view is that development agreements, drafted to reserve some governmental

---

("Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations."); V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952) ("Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.").

7. *See, e.g.*, Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for Its Application*, 1 J. LAND USE & ENV'T L. 451, 464–69 (1985) (discussing the reserved powers doctrine and the inability of local governments to contract away police powers); Bruce M. Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29, 37–45 (1981) (discussing the history and current viability of the reserved powers doctrine in the context of development agreements).

8. *See* Stone v. Mississippi, 101 U.S. 814, 818 (1880) (noting that "no legislature can curtail the power of its successors to make such laws as the may deem proper in matters of police"); Corp. of the Brick Presbyterian Church v. Mayor of N.Y., 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826) (noting that local governments have "no power to limit their legislative discretion by covenant"); Kramer, *supra* note 7, at 37–39.

9. 5 Cow. at 538–42.

10. *See, e.g.*, Hartnett v. Austin, 93 So.2d 86, 89–90 (Fla. 1956) (en banc) (affirming the lower court's permanent injunction of a proposed revision of a zoning ordinance that had not yet taken effect); *V.F. Zahodiakin*, 86 A.2d at 131–32 (affirming the lower court's invalidation of a decision made earlier by the local board of adjustment that purported to grant a "variance" from zoning requirements).

control over the agreement, do not contract away the police power, but rather constitute a valid present exercise of that power. Good analogous authority exists for the premise.[11]

A subsidiary question under the reserved powers doctrine is whether a city council, in exercising its power to contract, can make a contract that binds its successors. In *Carruth v. City of Madera*,[12] the city contended that obligations under an annexation agreement executed by a predecessor council were invalid because they deprived the successor city council of the power to determine city policy and act in the public interest. The court, however, held that the city was bound, and that a contract was made by the council or other governing body of a municipality and was fair, just, and reasonable at the time of its execution.[13] The court concluded that the contract was neither void nor voidable merely because some of its executory features may operate to bind a successor council.[14]

One of the clearest rejections of the application of reserved power and bargaining away the police power comes from the wide-ranging Nebraska Supreme Court opinion upholding development agreements in *Giger v. City of Omaha*.[15] The objectors to the agreement claimed that development agreements were a form of contract zoning.[16] However, the Nebraska Supreme Court preferred to characterize such agreements as a form of conditional zoning that actually increased the city's police power, rather than lessened it, by permitting more restrictive zoning (attaching conditions through agreement) than a simple *Euclidean* rezoning to a district in which a variety of uses would be permitted of right.[17]

---

11. *See, e.g.*, Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (holding that the effect of the general rule is to void only a contract which amounts to a city's "surrender" or "abnegation" of its *control* of a properly municipal function, and that the city's reservations of control over the land subject to an annexation agreement, as well as the "just, reasonable, fair and equitable" nature of the agreement, rendered the agreement valid and enforceable against the city).

12. 43 Cal. Rptr. 855 (Cal. Ct. App. 1965).

13. *Id.* at 860–62.

14. *Id.* at 860–61; *see also* Denio v. City of Huntington Beach, 140 P.2d 392, 397 (Cal. 1943) (holding that a "fair, just and reasonable contract entered into by a governing body of a municipality "is neither void nor voidable merely because some of executory features may extend beyond the terms of office of the members of [the governing] body"), *overruled by* Fracasse v. Brent, 494 P.2d 9 (Cal. 1972).

15. 442 N.W.2d 182 (Neb. 1989).

16. *Id.* at 189.

17. *Id.* at 192 ("In sum, we find that there is not clear and satisfactory evidence to support

Similarly, a recent California appeals court squarely upheld a development agreement that was challenged directly on "surrender of police power" grounds, holding that a "zoning freeze in the Agreement is not . . . a surrender or abnegation [of the police power]."[18] In *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors (SMART)*, an area residents' association contended that because San Luis Obispo County had entered into a development agreement for a project before the project was ready for construction, freezing zoning for a five-year period, the county improperly contracted away its zoning authority.[19] In holding for the county, the court noted that land use regulation is an established function of local government, providing the authority for a local government to enter into contracts to carry out the function.[20] The county's development agreement required that the project be developed in accordance with the county's general plan, did not permit construction until the county had approved detailed building plans, retained the county's discretionary authority in the future, and allowed a zoning freeze of limited duration only.[21] The court found that the zoning freeze in the county's development agreement was not a surrender of the police power, but instead "advance[d] the public interest by preserving future options."[22]

In *Stephens v. City of Vista*, the Stephenses purchased property in 1973 to develop an apartment complex of approximately 140 to 150 units.[23] Subsequently, the City of Vista lowered the access street to the property, frustrating the Stephens' contemplated use, and downzoned the property.[24] The Stephenses sued.[25] The city and the Stephenses eventually entered into a settlement agreement providing for a specific plan and zoning that permitted construction of a maximum of 140

---

the appellants' contention that the city has bargained away its police power. The evidence clearly shows that the city's police powers are not abridged in any manner and that the agreement is expressly subject to the remedies available to the city under the Omaha Municipal Code. Further, we find that the agreement actually enhances the city's regulatory control over the development rather than limiting it.").

18. Santa Margarita Area Residents Together v. San Luis Obispo Cnty. Bd. of Supervisors (*SMART*), 100 Cal. Rptr. 2d 740, 748 (Cal. Ct. App. 2000).

19. *Id.*

20. *Id.* at 748–49.

21. *Id.* at 747–48.

22. *Id.* at 748.

23. 994 F.2d 650, 652 (9th Cir. 1993).

24. *Id.*

25. *Id.*

units.[26] After rezoning the property, the city denied a site development plan, in part because it wanted the Stephenses to reduce the density.[27] The Stephenses then renewed their lawsuit against the city.[28]

The city argued that the settlement agreement unlawfully contracted away its police power.[29] The court disagreed.[30] The court first noted that when the city entered into the settlement agreement, it understood it was obligated to approve 140 units.[31] Further, relying on *Morrison Homes Corp. v. City of Pleasanton*,[32] which upheld the validity of an annexation agreement, the court held that while generally a local government cannot contract away its legislative and governmental functions, this rule only applies to void a contract which amounts to a "surrender" of the local government's control of a municipal function.[33] Therefore, the city could contract for a guaranteed density and exercise its discretion in the site development process without surrendering control of all of its land use authority.[34] The court awarded $727,500 in damages for breaching the agreement based on the difference between the value of the property with an entitlement of 140 units and the value of the property with a developable density of 55 units (the current zoning).[35] Similarly, a development agreement that obligates a local government to permit a certain density and type of development should be enforceable by the developer.

Finally, in *Povey v. City of Mosier*, property owners sought to void the development agreement between the city and their predecessors in interest obligating the successors to construct and dedicate roads to the city if they developed the parcels.[36] The owners argued the agreement was void because it failed to comply with the requirements of Oregon's development agreement statutes (Or. Rev. Stat. 94.504–94.528 (2007)).[37] The court, however, held the development

26. *Id.*
27. *Id.* at 653.
28. *Id.*
29. *Id.* at 654.
30. *Id.* at 655.
31. *Id.* at 655–56.
32. 130 Cal. Rptr. 196 (Cal. Ct. App. 1976).
33. *Stephens*, 994 F.2d at 655.
34. *See id.* at 656–57.
35. *Id.* at 657.
36. 188 P.3d 321, 322 (Or. Ct. App. 2008).
37. *Id.*

agreement was a valid "nonstatutory agreement enforceable according to its terms" because development agreements give local governments a new planning mechanism and are wholly voluntary and optional.[38] Moreover, the court concluded the legislative intent in creating development agreements was to give local governments and developers security in knowing that the agreement cannot be attacked "as an unlawful attempt to bind future lawmaking body."[39]

In sum, the current application of the reserved powers clause to abrogate government/private contracts has been rare, and courts have attempted to find other grounds to uphold those contracts which are fair, just, reasonable, and advantageous to the local government.[40] It is unlikely that courts will fall back on the reserved powers clause to invalidate development agreements passed pursuant to state statute, especially if the agreements have a fixed termination date and that date is not decades away.[41]

B. The Contracts Clause and Reserved Powers

It is also arguable that the Contracts Clause of the U.S. Constitution provides protection for development (and annexation) agreements in the face of a reserved power challenge: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[42] Although statutorily defined as either a legislative or administrative act, a development agreement will be treated as a contract "when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."[43]

Once the parties enter into a development agreement, strict application of the Contracts Clause would prohibit government from

38. *Id.* 322–23.

39. *Id.* at 324.

40. *See, e.g.*, Carruth v. City of Madera, 43 Cal. Rptr. 855, 860–61 (Cal. Ct. App. 1965) (holding contract entered into by city can be enforced, even if it extends beyond the legislative term, if the contract is fair, just reasonable, and advantageous to the city); *see also* Kramer, *supra* note 7, at 41 (discussing *Carruth*).

41. *See, e.g.*, 65 ILL. COMP. STAT. 5/11-15.1-1 (1993) (restricting the term of any annexation agreement to twenty years).

42. U.S. CONST. art. I, § 10, cl. 1.

43. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977). For a full discussion, see Wegner, *supra* note 1, at 995–1003 (making the case that although writers have simply assumed that development agreements are contractual in nature, it would be more correct to characterize development agreements as possessing a hybrid contractual-regulatory nature).

passing any law or regulation that would subsequently impair the resulting contractual obligations. Further, any such act would be unconstitutional, notwithstanding the fact that the new regulation may be required by a genuine health, safety, or welfare crisis. Certainly this result would not be tolerated, and therefore one must conclude that if a development agreement, subject to the Contract Clause, irrevocably binds government to not exercise its police power in promotion of the public interest, then the agreement violates the reserved powers doctrine and is ultra vires.

The limitation of the Contract Clause is, however, neither literal nor absolute.[44] The Supreme Court has held that the Contracts Clause limitation cannot operate to eclipse or eliminate "'essential attributes of sovereign power' . . . necessarily reserved by the States to safeguard the welfare of their citizens."[45] The test in *United States Trust Co.*, as refined in *Allied Structural Steel Co. v. Spannus*,[46] ultimately requires a balancing of the exercise of the police power against the impairment resulting from the exercise of such police power. The decisions suggest that any exercise of the police power that impairs any obligations under a development agreement would be subject to strict scrutiny, and, therefore, must be justifiable as an act "reasonable and necessary to serve an important public purpose."[47] Just what constitutes an "important public purpose" sufficient to justify the impairment of contract obligations is a factual determination. In *United States Trust Co.*, bondholders' security interests outweighed the state's interest in pollution control, rapid transit, and resource conservation.[48] Similarly, in *Allied Structural Steel*, the state's interest in protecting its citizens' pensions failed to prevail over a private company's rights in its own pension plan.[49]

---

44. *See* Eric Sigg, *California's Development Agreement Statute*, 15 SW. U. L. REV. 695, 720–22 (1985) (discussing tension between the Contracts Clause and the "reserved powers" doctrine, as well as describing various tests to determine whether a particular contract surrenders an essential attribute of a state's sovereignty).

45. *U.S. Trust Co.*, 431 U.S. at 21 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934)).

46. 438 U.S. 234 (1978).

47. *U.S. Trust Co.*, 431 U.S. at 25.

48. *Id.* at 28–32.

49. *Allied Structural Steel Co.*, 438 U.S. 234 at 244–51. For a thorough discussion of the *United States Trust Co.—Allied Structural Steel Co.* test, see *Anthony v. Kualoa Ranch, Inc.*, 736 P.2d 55 (Haw. 1987), in which the Hawaii Supreme Court applied the Contracts Clause doctrine to strike down a state statute requiring landlords to pay for leasehold improvements, at the tenant's option, as an unconstitutional impairment of contractual rights. *See also*

III. LIMITS ON CONDITIONS AND EXACTIONS IN DEVELOPMENT AGREEMENTS

While every governmental action must be invested with a public purpose, there are few conditions, exactions, or dedications that a local government may not legitimately bargain for in negotiating such agreements. Thus, local governments may require landowners and developers to make reasonable contributions toward whatever services and other resources the government will need to provide as a result of an annexation or development.[50] But this is so under existing law on development conditions and exactions entirely apart from such agreements.[51] The question is whether the local government may go further, since the development agreement is in theory a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute. So long as the agreement is in fact voluntary, the

---

Quality Refrigerated Serv., Inc. v. City of Spencer, 908 F. Supp. 1471 (N.D. Iowa 1995) (granting city's motion to dismiss, in part because plaintiff failed to state a cause of action under the Contract Clause of the U.S. Constitution where it failed to show that city zoning ordinance substantially impaired a contractual relationship, or that legitimate government interests would not justify such an impairment if it existed); William G. Holliman, Jr., *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44, 52 (1981) (concluding that "*United States Trust* and *Allied Structural Steel* suggest that any subsequent exercise of the police power which impairs the obligations under a development agreement would be subjected to a strict scrutiny test for reasonableness and necessity"); Kramer, *supra* note 7, at 35 (concluding that "[s]ubsequent legislative action seeking to amend, modify, or repeal [a] development agreement would undoubtedly impair the obligation of the contract and if less onerous alternatives were available to the legislature to achieve the same policy goals they would have to be taken"); Sigg, *supra* note 44, at 720–22 (concluding "it would appear that impairment by a city or country of its own development agreement would have to survive the heightened scrutiny of a 'reasonable and necessary to serve important state purposes' test"). For an exhaustive discussion of the reserved powers doctrine and its applicability to local government contracts (and its Contract Clause limitations), see Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990).

50. *See, e.g.*, Vill. of Orland Park v. First Fed. Sav. & Loan Ass'n, 481 N.E.2d 946, 950 (Ill. App. Ct. 1985) ("Additional positive effects of such agreements include controls over health sanitation, fire prevention and police protection, which are vital to governing communities.").

51. *See* David L. Callies, ZONING AND LAND USE CONTROLS ch. 9 (Eric Damian Kelly ed., 2001); *see also* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the Takings Clause of the Fifth Amendment requires that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834–35 (1987) ("We have long recognized that land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. . . . [A] broad range of governmental purposes and regulations satisfies these requirements.") (internal quotations omitted).

answer is almost certainly yes.[52] Whether or not development agreements successfully avoid or survive nexus and proportionality challenges may depend, however, upon how willing the courts are to accept the underlying "voluntary" rationale.

The argument has been made that exactions agreed to under a voluntary development agreement must bear a rational nexus to the needs created by the development.[53] The argument goes like this: the "rational nexus" and "substantial advancement" standards of *Nollan* are not limited to just those instances where the municipality requires an exaction from an uncooperative landowner, but also apply to voluntary permit conditions. The type and extent of exactions permissible under development agreements would not differ from the type and extent available under other traditional exaction mechanisms such as impact fees. The rationale is that requiring the *Nollan* standard to be satisfied serves to prevent governmental abuse of the mechanism, as it is "difficult to tell whether a landowner's acceptance of a condition is truly voluntary or is instead a submission to government coercion."[54] Thus:

> A municipality could use . . . regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.[55]

---

52. *See* City of Annapolis v. Waterman, 745 A.2d 1000, 1025 (Md. 2000) (stating conditions agreed to by the subdivider as part of an earlier subdivision agreement were not an unconstitutional taking of the subdivider's property). For a contrary view which would impose the same strict nexus and proportionality requirements upon such agreements as upon "freestanding" local government development dedications, exactions, and other conditions, *see generally* Sam D. Starritt & John H. McClanahan, *Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After* Dolan v. City of Tigard, *114 S. Ct. 2309 (1994)*, 30 LAND & WATER L. REV. 415 (1995).

53. *See* Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)*, 22 URB. LAW. 23, 27 (1990) ("In applying this standard, courts considered . . . the cost of existing public facilities and their manner of financing, the extent to which existing development has already contributed to the cost of these facilities, and the extent to which the proposed project will contribute to the cost of the existing facilities in the future.").

54. *Id.* at 46.

55. Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (upholding a statute authorizing municipalities to require dedication of land or payment of fees as condition of subdivision approval as constitutional since enabling legislation and implementing ordinance limited the amount of land to be dedicated to a "reasonable" percentage of the property).

Thus, for example, the Hawaii development agreement statute provides that, "Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements. Such benefits may be negotiated for in return for the vesting of development rights for a specific period."[56] According to one commentator:

> [T]he government can require the developer to provide public benefits unrelated to the proposed project in exchange for the municipality granting her the right to develop. . . . [T]he statute leads municipalities to believe that the granting of development rights confers a governmental benefit on the developer. This is not the case. *Nollan* clearly holds that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"[57]

However, while it is true that the right to develop on one's own land is not a governmental benefit, the right to develop is not the bargaining chip being tendered by the government in a development agreement. The authorities cited in support of the above-quoted argument concern exactions imposed as required conditions to development. In the case of a development agreement, the municipality is not granting the landowner the right to develop nor imposing conditions on such development, but instead is promising to protect the developer's investment by not enforcing any subsequent land use regulation that may burden the project. Since the developer does not require any such guarantee to exercise his right or privilege to build, and may certainly choose to avail himself of such a guarantee and to negotiate for it, it could be argued that the development agreement does indeed convey a "governmental benefit" upon the developer, since "[i]t is well established that there is no federal Constitutional right to be free from changes in land use laws."[58] The municipality should therefore be free to negotiate its best terms in exchange for the benefit conferred, regardless of nexus. Because development agreements are adopted as a result of negotiations between a local

---

56. HAW. REV. STAT. § 46-121 (1993).

57. Crew, *supra* note 53, at 49 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 826, 833 (1987)).

58. Lakeview Dev. Corp. v. City of S. Lake Tahoe, 915 F.2d 1290, 1295 (9th Cir. 1990).

government and a developer, they are not subject to the *Dolan* or *Nollan* decisions.[59]

Thus, in *Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, the court held that a valid development rights and responsibilities agreement ("DRRA") "is not required to confer an enhanced public benefit upon a local governing body."[60] The court stated that development agreements provide a benefit for both developers and local governments by establishing what rules and regulations will govern for developers, as well as "greater certainty in the comprehensive planning process" and "an opportunity to ensure the provision of necessary public facilities" for local governments.[61]

In *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, the court held that the developer, who had failed to establish entitlement to vested rights to develop an oil business on property leased from the city, could have protected itself from subsequent regulatory changes by asking that the city enter into a development agreement.[62] The court noted that it was likely that the city would have demanded additional consideration for either a risk-adjustment provision in the existing lease or a separate development agreement, and that having at least implicitly decided to forego such protection against future regulatory changes, the developer must accept the consequences of its judgment to do so.[63]

A trial court held that developers' rights vested at the time of signing the development agreement, and thus a city could not use wording within the agreement to allow it to raise sewer connection fees.[64] Developers and the city entered into a fifteen-year written agreement allowing for the development of a residential subdivision, allowing that the city may charge any "new taxes, assessments or development impact fees on the implementation of the Project" only if those same charges are levied on all other similar developments

---

59. *See* Leroy Land Dev. Corp. v. Tahoe Reg'l Plan. Agency, 939 F.2d 696 (9th Cir. 1991) (holding the settlement agreement was not subject to *Nollan*); *see also* Callies & Tappendorf, *supra* note 1.

60. Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc., 173 A.3d 549, 569 (Md. 2017).

61. *Id.* at 571.

62. 103 Cal. Rptr. 2d 447 (Cal. Ct. App. 2001).

63. *Id.* at 558.

64. Referred to in the subsequent appeal in *Operating Engineers Funds, Inc. v. City of Thousand Oaks*, No. B137879, 2002 WL 44253 (Cal. Ct. App. Jan. 14, 2002) (holding that because the plaintiffs did not succeed in each of its claims, they could not qualify for attorney fees).

within the city.[65] Six years after the parties signed the contract, the city raised the monthly wastewater connection fees and initial capital surcharge for each residential unit during the period covered by the contract, and the developers sued for breach of contract because their development rights had vested at the time of the initial agreement.[66] A trial court agreed, but said that plaintiffs could not challenge the increased costs for potential future homeowners.[67]

Moreover, in *North Murrieta Cmty., LLC v. City of Murrieta*, the court held that development agreements are enforceable contracts and that vesting tentative maps do not create separate rights.[68] The court rejected the developer's argument that the vesting tentative map provided a separate source for their rights.[69] Therefore, the court concluded that the city was allowed to impose new development mitigation fees to improve transportation for the health, safety, and welfare of residential and non-residential users due to the increased traffic from the development project as negotiated in the development agreement.[70] The development agreement validly changed the developer's rights and allowed the city to impose new mitigation fees under the agreement's terms.[71]

In *City of North Las Vegas v. Pardee Construction Company of Nevada*, a developer lost an appeal to define a cost-based fee as an impact fee in order to invalidate it through the parties' development agreement, which only prohibited impact fees.[72] Here, the municipality regulated water issues on a regional level. To respond to Nevada's growth spurt, the region passed a capital improvements plan to supplement the existing, overstrained water supply system.[73] The city had to join the regional water authority because its own water supply did not allow for any more growth.[74] Upon joining, the city

65. *Id.* at *1.

66. *Id.*

67. *Id.* at *2. Moreover, most courts hold that, absent specific language so providing, homeowners residing on the subject property lack standing to sue for enforcement of the agreement. *See, e.g.*, Doyle v. Vill. of Tinley Park, 115 N.E.3d 1069 (Ill. App. Ct. 2018).

68. North Murrieta Cmty., LLC v. City of Murrieta, 263 Cal.Rptr.3d 589, 598–99 (Cal. Ct. App. 2020).

69. *Id.* at 597–98.

70. *Id.* at 598.

71. *Id.* at 595 n.2.

72. 21 P.3d 8 (Nev. 2001).

73. *Id.* at 9.

74. *Id.*

was required to pay for the connection to the new system through citywide assessments and water delivery, connection, and commodity fees.[75] To meet these payments, the city passed the costs on to the consumers at a direct rate—not making any profit.[76] Plaintiffs contended that these new charges were really impact fees and violated the terms of their development agreement.[77] Because the city does not make a profit, but bases the charges on those charges it must pay to the regional authority, with no money going toward capital improvements, the court found that the charge was simply cost-based and within the parameters of the development agreement.[78]

Courts regularly label sewer systems as a typical government function, but consider general water and storm water systems to be proprietary. Thus, on balance, a development agreement often provides that the subdivision developer install the water and sewer lines needed both within the subdivision and to connect the subdivision to existing lines. Sometimes the development agreement also requires payments for upgrades to the city's water facilities to manage the greater flow requirements of the new development. In return for the improvements, the city agrees to maintain the pipe infrastructure within and connected to the subdivision.

IV. STATUTORY AUTHORITY: IMPORTANT FOR DEVELOPMENT AGREEMENTS

Courts that condemn zoning by agreement inveigh against the abridgment of powers protecting the general welfare and the "bartering . . . [of] legislative discretion for emoluments that had no bearing on the merits of the requested amendment."[79] This makes statutory authority important, if not critical. Indeed, an Iowa court held that a city's promise to later widen a street and construct a sidewalk amounted to an illegal contract to perform a governmental function in the future.[80] This it could not do without statutory

75. *Id.*

76. *Id.* at 10.

77. *Id.*

78. *Id.* at 11.

79. Hedrich v. Vill. of Niles, 250 N.E.2d 791, 796 (Ill. App. Ct. 1969). *But see* Povey v. City of Mosier, 188 P.3d 321–22 (Or. Ct. App. 2008), discussed *supra* at notes 36–39 and accompanying text.

80. *See* Marco Dev. Corp. v. City of Cedar Falls, 473 N.W.2d 41, 44 (Iowa 1991) (holding

authority.[81] The court opined that the same reasoning would also apply to the city's exercise of its police power.[82]

A. Protection of General Welfare

The first issue—protection of general welfare—is probably disposed of by strong public purpose-serving language. California,[83] Florida,[84]

---

that the same limitation that prohibits a legislature from binding successive legislative bodies applies to a legislature's grant to a city, through a home-rule amendment to the state constitution, of "the power to contract for the exercise of its governmental or legislative authority").

81. *Id.*

82. *Id.*

83. The California Code provides:

> The Legislature finds and declares that:
>
> (a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.
>
> (b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.
>
> (c) The lack of public facilities, including, but limited to, streets, sewerage, transportation, drinking water, school, and utility facilities, is a serious impediment to the development of new housing. Whenever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities.

CAL. GOV'T CODE § 65864 (West 1997). See Appendix VII for the full text of the California statute.

84. The Florida code provides:

> (2) The Legislature finds and declares that:
>
> (a) The lack of certainty in the approval of development can result in a waste of economic and land resources, discourage sound capital improvement planning and financing, escalate the cost of housing and development, and discourage commitment to comprehensive planning.
>
> (b) Assurance to a developer that upon receipt of his or her development permit or brownfield designation he or she may proceed in accordance with existing laws and policies, subject to the conditions of a development agreement, strengthens the public planning process, encourages sound capital improvement planning and financing, assists in assuring there are adequate capital facilities for the development, encourages private participation in comprehensive planning, and reduces the economic costs of development.
>
> (3) In conformity with, in furtherance of, and to implement the Local Government Comprehensive Planning and Land Development Regulation Act and the Florida State Comprehensive Planning Act of 1972, it is the intent of the Legislature to encourage a stronger commitment to comprehensive

and Hawaii[85] all have such language in their development agreement statutes.

---

and capital facilities planning, ensure the provision of adequate public facilities for development, encourage the efficient use of resources, and reduce the economic cost of development.

(4) This intent is effected by authorizing local governments to enter into development agreements with developers, subject to the procedures and requirements of ss. 163.3220–163.3243.

FLA. STAT. § 163.3220 (2000).

85. The Hawaii code provides:

Findings and purpose. The legislature finds that with land use laws taking on refinements that make the development of land complex, time consuming, and requiring advance financial commitments, the development approval process involves the expenditure of considerable sums of money. Generally speaking, the larger the project contemplated, the greater the expenses and the more time involved in complying with the conditions precedent to filing for a building permit.

The lack of certainty in the development approval process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public.

Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements. Such benefits may be negotiated for in return for the vesting of development rights for a specific period.

Under appropriate circumstances, development agreements could strengthen the public planning process, encourage private and public participation in the comprehensive planning process, reduce the economic cost of development, allow for the orderly planning of public facilities and services and the allocation of cost. As an administrative act, development agreements will provide assurances to the applicant for a particular development project, that upon approval of the project, the applicant may proceed with the project in accordance with all applicable statutes, ordinances, resolutions, rules, and policies in existence at the time the development agreement is executed and that the project will not be restricted or prohibited by the county's subsequent enactment or adoption of laws, ordinances, resolutions, rules, or policies.

Development agreements will encourage the vesting of property rights by protecting such rights from the effect of subsequently enacted county legislation which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project. Development agreements are intended to provide a reasonable certainty as to the lawful requirements that must be met in protecting vested property rights, while maintaining the authority and duty of government to enact and enforce laws which promote the public safety, health, and general welfare of the citizens of our State. The purpose of this part is to provide a means by which an individual may be assured at a specific point in time that having met or having agreed to meet all of the terms and conditions of the development agreement, the individual's rights to develop a property in a certain manner shall be vested.

HAW. REV. STAT. § 46-121 (1993). See Appendix VII for the full text of the Hawaii statute.

B. Requirements

As to the bartering away of unrelated (to land use) emoluments, a well-drafted statute generally limits such agreements to specific land use matters, with a catch-all for related matters. Florida's development agreement statute contains such language.[86] What the statutes contemplate is the tradeoff of zoning for development-generated public infrastructure needs (whether or not, it should be added, such public infrastructure needs are generated by the instant development). This is confirmed by cases upholding cooperative and annexation agreements;[87] low-rent housing for zoning;[88] annexation,

86. The Florida code provides:

(1) A development agreement shall include the following:
(a) A legal description of the land subject to the agreement, and the names of its legal and equitable owners;
(b) The duration of the agreement;
(c) The development uses permitted on the land, including population densities, and building intensities and height;
(d) A description of public facilities that will service the development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development;
(e) A description of any reservation or dedication of land for public purposes;
(f) A description of all local development permits approved or needed to be approved for the development of the land;
(g) A finding that the development permitted or proposed is consistent with the local government's comprehensive plan and land development regulations;
(h) A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety, or welfare of its citizens; and
(i) A statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction shall not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, term, or restriction.
(2) A development agreement may provide that the entire development or any phase thereof be commenced or completed within a specific period of time.

FLA. STAT. § 163.3227 (2000).

87. *See* Hous. Redevelopment Auth. v. Jorgensen, 328 N.W.2d 740, 742–43 (Minn. 1983) (holding that a cooperation agreement entered into between the city and the housing and redevelopment authority required the city to issue conditional permits for development of low-income housing project).

88. *See* Hous. Auth. v. City of L.A., 243 P.2d 515, 524 (Cal. 1952) (holding that the city was bound by cooperative agreement with housing authority that approved development and construction of low-rent housing project).

zoning, and sewer connections for annexation and annexation fees;[89] and redevelopment agreements.[90]

The Hawaii, Florida, Nevada, and California statutes contain minimum standards for describing the basic character of a proposed development subject to a development agreement.[91] These include the size and shape of buildings. In a decision that clearly signals the extent of flexibility possible in California, a California court of appeals upheld a development agreement containing no such precise standards.[92] According to the court, it was sufficient that the zoning ordinance contained height and use limitations in the zone where the proposed project was to be constructed.[93]

This clearly indicates the importance of a well-drafted statute in advancing the legality of the development agreement, particularly in the face of a reserved powers/bargaining away of the police power challenge. Indeed, there is only one state supreme court case upholding a development agreement against this and other challenges without the benefit of such a statute.[94] It is therefore worth examining what other basic provisions a typical development agreement statute contains. Thirteen states[95] presently have such statutes. The most detailed comes from Hawaii, and so the citations that follow are primarily to that statute. However, California remains the state in which the vast majority of development agreements appear to be negotiated and in effect.

---

89. *See* Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 201–03 (Cal. Ct. App. 1976) (holding that the annexation agreements entered into between the city and the developer required the city to provide sewage service to planned development were binding and enforceable against the city); Meegan v. Vill. of Tinley Park, 288 N.E.2d 423, 425–26 (Ill. 1972) (dismissing the developer's mandamus action for issuance of building permit to build a gasoline station pursuant to annexation agreement within a reasonable time after expiration of annexation agreement's statutory five-year period of validity).

90. *See* Mayor of Balt. v. Crane, 352 A.2d 786, 791–92 (Md. 1976) (holding that where the developer conveyed a strip of property to the city for highway purposes under the zoning ordinance that allowed developer's proposed development to contain the same density of dwelling units as if the land had not been conveyed, the developer acquired vested contractual rights that were enforceable against the city).

91. *See* HAW. REV. STAT. § 46-121 (1993); FLA. STAT. § 163.3220 (2000); NEV REV. STAT. §§ 278.02591, 278.02598 (2021); CAL. GOV'T CODE § 65864 (West 1997).

92. *See SMART*, 100 Cal. Rptr. 2d 740, 743 (Cal. Ct. App. 2000) (upholding a development agreement that froze zoning on the proposed development property in exchange for the developer's commitment to submit a specific construction plan in compliance with county land use requirements).

93. *Id.* at 747.

94. *See* Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989).

95. *See supra* note 3.

V. A STATUTORY CHECKLIST

A. Enabling Ordinance

A preliminary issue is whether an enabling statute is sufficient to grant local government the authority to enter into development agreements. There is some authority for requiring a local government to pass an enabling ordinance setting out the details of development agreement procedures and requirements. Thus, the Hawaii[96] and Florida[97] statutes appear to require that local governments desiring to negotiate development agreements first pass a local resolution or ordinance to that effect. In Hawaii, the state legislature has delegated the authority to the county to enter into development agreements, provided, however, that the county first passes an enabling ordinance establishing the procedures that the county executive branch must follow.

---

96. The Hawaii code provides:

> General authorization. Any county by ordinance may authorize the executive branch of the county to enter into a development agreement with any person having a legal or equitable interest in real property, for the development of such property in accordance with this part; provided that such an ordinance shall:
>
> (1) Establish procedures and requirements for the consideration of development agreements upon application by or on behalf of persons having a legal or equitable interest in the property, in accordance with this part;
>
> (2) Designate a county executive agency to administer the agreements after such agreements become effective.
>
> (3) Include provisions to require the designated agency to conduct a review of compliance with the terms and conditions of the development agreement, on a periodic basis as established by the development agreement; and
>
> (4) Include provisions establishing reasonable time periods for the review and appeal of modifications of the development agreement.
>
> Negotiating development agreements. The mayor or the designated agency appointed to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements; provided that the county has adopted an ordinance pursuant to section 46-123.
>
> The final draft of each individual development agreement shall be presented to the county legislative body for approval or modification prior to execution. To be binding on the county, a development agreement must be approved by the county legislative body and executed by the mayor on behalf of the county. County legislative approval shall be by resolution adopted by a majority of the membership of the county legislative body.

HAW. REV. STAT. §§ 46-123 to -124 (1993).

97. *See* FLA. STAT. § 163.3223 (2000) ("Any local government may, *by ordinance*, establish procedures and requirements, as provided in ss. 163.320–163.3243, to consider and enter into a development agreement with any person having a legal or equitable interest in real property located within its jurisdiction.") (emphasis added).

While the language of the Hawaii statute does not clearly require such an ordinance, all four of Hawaii's four counties have drafted them. According to attorneys in California, those California local governments that have executed development agreements have also passed such ordinances. Indeed, recent amendments to the California statute—by making it mandatory that local governments pass such ordinance at the request of landowners to ensure that there is a process available for negotiating such agreements—appear to make it clear that such ordinances are a prerequisite.

B. Approval and Adoption

Although one governmental body may enter into the negotiation stage of the development agreement, another may be authorized to approve the final product. In Hawaii, for example, the mayor is the designated negotiator, with the final agreement presented to the county legislative body (city council) for approval. If approved, the city council must then adopt the development agreement by resolution.[98] In California, a development agreement must be approved by ordinance.

A development agreement may also be entered into early in the planning process.[99] In *SMART,* an association comprised of area residents contended that a development agreement entered into by San Luis Obispo County was invalid because the project in contention had not been approved for actual construction.[100] In rejecting this contention and holding for the county, the court stated that the development agreement statute should be liberally construed to permit "local government to make commitments to developers at the

98. The Hawaii code provides:

> Negotiating development agreements. The mayor or the designated agency appointed to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements, including negotiating and drafting individual development agreements; provided that the county has adopted an ordinance pursuant to section 46-123.
>
> The final draft of each individual development agreement shall be presented to the county legislative body for approval or modification prior to execution. To be binding on the county, a development agreement must be approved by the county legislative body and executed by the mayor on behalf of the county. County legislative approval shall be by resolution adopted by a majority of the membership of the county legislative body.

HAW. REV. STAT. § 46-124 (1993).

99. *SMART*, 100 Cal. Rptr. 2d 740 (Cal Ct. App. 2000).

100. *Id.* at 745.

time the developer makes a substantial investment in the project."[101] The court found that the agreement entered into by the county conformed to the statute because, by focusing on the planning state of the project, the agreement met rather than evaded the purpose of the statute.[102] The county's agreement maximized the public's role in final development, increased control over the inclusion of public facilities and benefits, and permitted the county to monitor the planning of the project to assure compliance with its existing land use regulations.[103]

C. Conformance to Plans and Other Reviews

Development agreements must often comply with local government plans as a condition of enforceability, either by statute or because of the rubric that the zoning bargained for must accord with comprehensive plans. The Hawaii[104] and California[105]development agreement statutes both so require. In California, the development agreement must be consistent with the general plan and any applicable specific plans.[106] A fully negotiated development agreement is a "project" under the California Environmental Quality Act ("CEQA"), California Public Resources Code § 21000 *et seq.*, and as such is subject to environmental review. This is true even when the development agreement is not directly approved by the local government but is instead submitted to the voters for approval.[107]

If, prior to incorporation of a new city or annexation to an existing city, a county has entered into a development agreement with the developer, the development agreement remains valid for the duration

---

101. *Id.* at 746.

102. *Id.* at 745.

103. *Id.*

104. *See* HAW. REV. STAT. § 46-129 (1993) ("No development agreement shall be entered into unless the county legislative body finds that the provisions of the proposed development agreement are consistent with the county's general plan and any applicable development plan, effective as of the effective date of the development agreement.").

105. *See* CAL. GOV'T CODE § 65867.5 (West 1997) ("A development agreement is a legislative act which shall be approved by ordinance and is subject by referendum. A development agreement shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan.").

106. *Id.* § 65867.5(c).

107. *See* Citizens for Responsible Gov't v. City of Albany, 66 Cal. Rptr. 2d 102 (Cal. Ct. App. 1997).

of the agreement, or for eight years from the effective date of the incorporation or annexation, whichever is earlier, or for up to fifteen years upon agreement between the developer and the city.[108] This statute applies to incorporations where the development agreement was applied for prior to circulation of the incorporation petition and entered into between the county and the developer prior to the date of the incorporation election.[109] The statute also allows the incorporating or annexing city to modify or suspend the provisions of the development agreement if it finds an adverse impact on public health or safety in the jurisdiction.[110]

The importance of the plan is demonstrated by the Idaho Supreme Court in *Sprenger, Grubb & Associates, Inc. v. City of Hailey*.[111] There, the court upheld a rezoning over the objections of the developers of property subject to what the court called a development agreement, on the ground that the applicable plan was sufficiently broad in that it supported the contested downzoning.[112] Largely to the same effect is a recent California court of appeals decision where the existence of, and need to conform to, applicable plans, was critical in upholding a development agreement in the face of a broad and direct challenge to such agreements generally.[113]

D. The Legislative/Administrative Issue

One of the thorniest problems in land use regulation is whether the amendment or changing of such a regulation is legislative or quasi-judicial/administrative.[114] Legislative decisions like zoning amendments are subject to initiative and referendum, whereas quasi-judicial decisions, like the granting of a special use permit, are not in many jurisdictions. Legislative decisions like rezonings are, when appealed, usually heard *de novo* whereas quasi-judicial decisions, like

---

108. CAL. GOV'T CODE § 65865.3 (West 1997).

109. *Id.*

110. *Id.*

111. 903 P.2d 741 (Idaho 1995).

112. *Id.* at 750 ("The Council's conclusion that the 'downzoning' . . . is consistent with Hailey's comprehensive plan is not clearly erroneous, and is affirmed.").

113. *See* SMART, 100 Cal. Rptr. 2d 740 (Cal. Ct. App. 2000).

114. *See, e.g.*, Town v. Land Use Comm'n, 524 P.2d 84, 90–91 (Haw. 1974) (holding a reclassification of land by a state land use commission to be quasi-judicial); Fasano v. Bd. of Cnty. Comm'rs, 507 P.2d 23, 26 (Or. 1973) (holding a rezoning to be the same, despite the general rule that such "rezonings" are generally held to be legislative in character).

the granting of a special use permit, are decided on the record made before the permitting agency, usually under a state's administrative procedure code.[115] What about the development agreement? On this issue, California and Hawaii appear to differ—in the former, it is a legislative act,[116] whereas it is an administrative act in the latter.[117]

As with zoning, what follows from the statutory declarations—legislative in California, administrative in Hawaii—is more than a matter of form. Legislative decisions are subject to referendum.[118] Administrative ones may not be.[119] Given the common use of the referendum in both California and—until relatively recently—Hawaii to address land use issues, development agreements in Hawaii, at least, are likely to be "referendum-proof," as well as protected against government change, during the life of a development agreement. However, California limits the opportunity to repeal a development agreement to thirty days from the date the local government approved the agreement.[120] Thereafter, both the agreement and the proposed land development are immune from subsequent changes by referendum.[121] Moreover, in *Midway Orchards*, a California court held a development agreement was invalid because the general plan amendment relied on for consistency was timely submitted to a referendum[122]:

---

115. *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING CONTROL LAW §§ 531, 533, 538 (1998); *see also* David L. Callies et al., *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U.J. URB. & CONTEMP. L. 53 (1991).

116. *See* SMART, 100 Cal. Rptr. 2d at 744.

117. *See* HAW. REV. STAT. § 46-131 (1993) ("Each development agreement shall be deemed an administrative act of the government body made party to the agreement.").

118. *See* CAL. GOV'T CODE § 65867.5 (West 1997) ("A development agreement is a legislative act . . . and is subject to the referendum.").

119. *See* DAVID L. CALLIES & ROBERT H. FREILICH, CASES AND MATERIALS ON LAND USE 309 (1986); DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 3.12 (1986). *But see* City of Cuyahoga Falls v. Buckeye Cmty. Found., 538 U.S. 188 (2003).

120. *See* Midway Orchards v. Cnty. of Butte, 269 Cal. Rptr. 796, 804–06 (Cal. Ct. App. 1990) (holding that where development agreements are approved by a legislative act of resolution that does not include a referendum mechanism, the constitutional right to referendum requires a thirty-day delay in effectiveness of the agreement to allow for a referendum procedure).

121. *See* Daniel J. Curtin, Jr., *Protecting Developers' Permits to Build: Development Agreement in Practice in California and Other States*, 18 ZONING & PLAN. L. REP. 85 (1995) ("A development agreement is . . . subject to repeal by referendum. However, the opportunity for such repeal expires 30 days after the city's adoption of . . . the agreement, and thereafter the project is immune to subsequent changes in zoning ordinances and land use regulations . . . inconsistent with those . . . in the agreement.").

122. *Midway Orchards*, 269 Cal. Rptr. at 798.

> The development agreement was therefore unlawfully approved and executed. A contract entered into by a local government without legal authority is "wholly void," ultra vires and unenforceable. Such a "contract" can create no vested rights. Therefore, Midway can claim no right to develop its property based on a development agreement void from the beginning.[123]

When a development agreement is construed to be a legislative act, a local government's decision not to enter into a development agreement need not be supported by findings.[124]

Similarly, in *Center for Community Action & Environmental Justice v. City of Moreno Valley*, a California court emphasized that a "development agreement is a 'legislative act' that is 'subject to referendum'" that is "exclusively delegated to the local legislative body for approval."[125] Therefore, the court held that the city's adoption of an initiative to approve a development agreement was invalid because an initiative excludes the crucial step of negotiation and allowing changes before adoption, which a referendum includes.[126] Thus, an initiative is incompatible with the California development agreement statute.[127]

The California development agreement statute does not require mutuality of consideration. As a practical matter, however, it is usually present since the developer obtains a "freeze" on applicable land use regulations while the public often obtains increased control over the development, certain assurances that the project will go forward, and perhaps other concessions from the developer that could not be obtained through the standard land use exaction process.

E. Public Hearing

Another issue arising frequently is whether a public hearing is required before a development agreement can be entered into, and,

---

123. *Id.* at 807 (internal citations omitted); *see also* 216 Sutter Bay Assocs. v. Cnty. of Sutter, 68 Cal. Rptr. 2d 492 (Cal. Ct. App. 1997) (holding that an interim urgency zoning ordinance and a parallel "ordinary" urgency ordinance, adopted by a newly elected board of supervisors within the thirty-day "referendum period," successfully stopped a development agreement adopted by the preceding, lame-duck board).

124. Native Sun/Lyon Cmtys. v. City of Escondido, 19 Cal. Rptr. 2d. 344 (Cal. Ct. App. 1993).

125. Ctr. for Cmty. Action & Env't Just. v. City of Moreno Valley, 237 Cal. Rptr. 3d 296, 298, 302 (Cal. Ct. App. 2018).

126. *Id.* at 309.

127. *Id.*

if so, what proceedings are required. Both Hawaii[128] and California[129] explicitly require that a public hearing be held prior to adoption of the development agreement.

However, in California because the approval of a development agreement is a legislative act, no procedural due process rights attach.[130] In *San Francisco Tomorrow v. City and County of San Francisco*, tenants of residential units argued that the development agreement to redevelop the complex was an "entitlement" subject to due process protections to be approved.[131] The court held that it was impracticable to give everyone a voice in the adoption of the development agreement encompassing 152 acres and affecting renters of more than 1,500 units due to the immense area and numerous people being affected.[132] Moreover, the court reiterated that "it has long been held that no procedural due process rights attach" to legislative acts.[133]

F. Binding of State and Federal Agencies

Hawaii and California diverge on another key point: the binding inclusion of state or federal agencies. Hawaii seeks to bind them;[134] California does not.[135] California initially appears to limit agreements

---

128. *See* HAW. REV. STAT. § 46-128 (1993) ("No development agreement shall be held by the planning agency and by the legislative body.").

129. The California code provides:

> A public hearing on an application for a development agreement shall be held by the planning agency and by the legislative body. Notice of intention to consider adoption of a development agreement shall be given as provided in Section 65090 and 65091 in addition to any other notice required by law for other actions to be considered concurrently with the development agreement.

CAL. GOV'T CODE § 65867 (West 1997).

130. S.F. Tomorrow v. City and Cnty. of S.F., 176 Cal. Rptr. 3d 430, 453 (Cal. Ct. App. 2014).

131. *Id.* at 452.

132. *Id.*

133. *Id.* at 453.

134. The Hawaii code provides:

> In addition to the county and principal, any federal, state, or local government agency or body may be included as a party to the development agreement. If more than one government body is made party to an agreement, the agreement shall specify which agency shall be responsible for the overall administration of the agreement.

HAW. REV. STAT. § 46-126(d) (1993).

135. The California code provides:

> A development agreement shall not be applicable to any development project located in an area for which a local coastal program is required to be prepared and certified pursuant to the requirements of Division 20 (commencing with

to cities and counties, though it contemplates coastal commissions as parties under certain circumstances.[136] Hawaii, on the other hand, appears determined to permit state and federal agencies to participate in development agreements and, if they participate, be bound.[137]

G. Amendment or Cancellation of the Agreement

Generally, mutual consent of both parties is needed to amend or cancel the agreement.[138] In Hawaii, if the proposed amendment would substantially alter the original agreement, a public hearing must be held.[139] In California, a local government may terminate or modify a development agreement if it finds and determines, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with its terms or conditions.[140]

H. Breach

There are essentially two kinds of breaches that commonly occur during the period of an agreement: change in land use rules by local government, and failure to provide a bargained-for facility, dedication, or hook-up by either party.

1. When Local Government Changes the Land Development Rules

Recall that the overriding concern of the landowner in negotiating development agreements is the vesting of development rights or the freezing of land development regulations during the term of the

---

> Section 30000) of the Public Resources Code, unless: (1) the required local coastal program has been certified as required by such provisions prior to the date on which the development agreement is entered into, or (2) in the event that the required local coastal program has not been certified, the California Coastal Commission approves such development agreement by formal commission action.

CAL. GOV'T CODE § 65869 (1997).

136. *See id.*

137. *See* § 46-126(d).

138. *See* CAL. GOV'T CODE § 65868 (West 1997) ("A development agreement may be amended, or canceled, in whole or in part, by mutual consent of the parties to the agreement or their successors in interest."); HAW. REV. STAT. § 46-130 (1993) ("A development agreement may be amended or canceled, in whole or in part, by mutual consent of the parties to the agreement, or their successors in interest.").

139. *See* HAW. REV. STAT. § 46-130 ("[I]f the county determines that a proposed amendment would substantially alter the original development agreement, a public hearing on the amendment shall be held by the county legislative body before it consents to the proposed amendment.").

140. CAL. GOV'T CODE § 65865.1 (West 1997).

agreement. Whether these regulations are changed just prior to the execution of the agreement, and whether the landowner may need further permits which are not subject to a particular agreement, raise different, but related, questions. Here, we deal only with the effect on the landowner and the agreement should the local government change development regulations during term of the agreement. Development agreement statutes usually contemplate such a freeze.[141]

Thus, the California Supreme Court, in *City of West Hollywood v. Beverly Towers*,[142] made it abundantly clear in a footnote that landowner protection from development regulation changes is a major factor in executing development agreements:

> Development agreements . . . between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. Unless otherwise provided in the agreement, the rules, regulations, and official policies governing permitted uses, density, design, improvement, and construction are those in effect when the agreement is executed.[143]

The purpose of a development agreement, said the court, was "to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations."[144]

---

141. For example, the California code provides:

> Unless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations, and official policies in force at the time of execution of the agreement. A development agreement shall not prevent a city, county, or city and county, in subsequent actions applicable to the property, from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein, nor shall a development agreement prevent a city, county, or city and county from denying or conditionally approving any subsequent development project application on the basis of such existing or new rules, regulations, and policies.

CAL. GOV'T CODE § 65866 (West 1997).

142. 805 P.2d 329 (Cal. 1991). Timing is also important. *See* Ranucci v. City of Palmettto, 317 So. 3d 270 (Fla. Dist. Ct. App. 2021) (holding the City could not start a legal proceedings thirteen years after an alleged breach).

143. *Beverly Towers*, 805 P.2d at 334 n.6*; see also* Curtin, *supra* note 121, at 131 (discussing various tests for determining when a developer's rights have vested and local government is estopped "from enacting or applying subsequent zoning changes to prevent the completion of the project or substantially reduce the return upon the developer's investment").

144. *Beverly Towers*, 805 P.2d at 334–35.

The few courts that have dealt with local government changes in land use regulations have no difficulty in finding them inapplicable to the property subject to the agreement, provided the agreement itself is binding. Thus, in *Meegan v. Village of Tinley Park*, the Illinois Supreme Court held that the original zoning of the subject property was valid during the term of an agreement and any change by the Village was void during that time.[145] Indeed, since the Village's attempted zoning change was void, said the court, there was no breach by the Village.[146]

Moreover, in *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, the Ninth Circuit held that Oakland breached a development agreement by enacting an ordinance prohibiting bulk shipping facilities from shipping coal.[147] The court reasoned that the development agreement "did not limit the types of bulk goods that could be shipped through the terminal" and Oakland knew coal was a potential commodity when entering into the agreement.[148] Therefore, the agreement froze all existing regulations and by enacting the ordinance preventing the shipment of coal, a breach occurred.[149]

On the other hand, careful drafting is necessary to avoid the later application of land development regulations of a different sort than those contemplated in the agreement. Thus, in the California case of *Pardee Construction Co. v. City of Camarillo*, the court held applicable to the subject property a transportation impact fee on the ground that it was different from the land development regulations listed in the agreement as frozen.[150] While this seems to require a certain amount of prescience from the landowner at first blush, a local government can hardly be estopped from exercising its police power in enforcing a new breed of land development regulations that were not contemplated years before by either party, under the exercise of its police power. *Country Meadows West Partnership v. Village of Germantown* represents an entirely different perspective where the

145. 288 N.E.2d 423, 425–26 (Ill. 1972).

146. *Id.* at 426; *cf.* Cummings v. City of Waterloo, 683 N.E.2d 1222, 1230 (Ill. App. Ct. 1997) (holding the city's amendment to its zoning ordinance that was contrary to the provisions of an annexation agreement was unenforceable against property subject to the annexation agreement).

147. Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 960 F.3d 603, 607 (9th Cir. 2020).

148. *Id.* at 608.

149. *Id.* at 619.

150. 690 P.2d 701 (Cal. 1984).

court struck down the Village's imposition of a new impact fee against a subdivider, holding that because of a subdivision agreement between the Village and the subdivider, the latter was not obligated to pay the impact fee.[151]

Most development agreement statutes either contain a limitation on the duration of such agreements,[152] or provide that the agreement must recite one.[153]

2. Nonperformance of a Bargained-for Act: Dedications, Contributions, and Hook-Ups

Equally common is the failure of a landowner or local government to live up to the other terms of the agreement, generally by failing to provide a public facility or money therefor, or by refusing to provide utility services to the subject property.[154] Under such circumstances, courts have been strict in forcing the parties to live up to their bargains, even when unusual difficulties would appear to render such performance nearly impossible. Thus, in the California case of *Morrison Homes Corp. v. City of Pleasanton*, the court of appeals directed the local government to provide sewer connections to the landowner's property, as agreed in the agreement, even though a superior governmental entity, a state regional water quality control board, ordered the local government not to do so.[155] After deciding that the agreement did not amount to the city's illegally contracting away its police power, the court stated: "The onset of materially

151. 614 N.W.2d 498 (Wis. Ct. App. 2000).

152. *See, e.g.*, 65 ILL. COMP. STAT. 5/11-15.1-1 (1993) ("The agreement shall be valid and binding for a period of not to exceed 20 years from the date of its execution."); 65 ILL. COMP. STAT. 5/11-15.1-5 ("Any annexation agreement executed prior to October 1, 1973 . . . is hereby declared valid and enforceable as to such provisions for the effective period of such agreement, or for 20 years from the date of execution thereof, whichever is shorter.").

153. *See, e.g.*, CAL. GOV'T CODE § 65865.2 (West 1997) ("A development agreement shall specify the duration of the agreement."); HAW. REV. STAT. § 46-126 (1993) ("A development agreement shall . . . (4) Provide a termination date.").

154. For other items bargained for and litigated, see *Van Cleave v. Vill. of Seneca*, 519 N.E.2d 63, 64 (Ill. App. Ct. 1988) (disputing exemptions from real estate taxes), and *O'Malley v. Vill. of Ford Heights*, 633 N.E.2d 848, 849 (Ill. App. Ct. 1994) (disputing an exemption from environmental ordinances, which did not survive legal challenge).

155. 130 Cal. Rptr. 196 (Cal. Ct. App. 1976). *But cf.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987) (upholding a governmental refusal to perform a development agreement when a health and safety issue is involved); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593–94 (1962) (reaching the same holding as in *DeBenedictis*).

changed conditions is not a ground for voiding a municipal contract which was valid when made, nor is the contracting city's failure to have foreseen them."[156]

Furthermore, in the Washington case of *Columbia Park Golf Course, Inc. v. City of Kennewick*, the court held that the city breached a development option agreement ("DOA") for a recreational vehicle ("RV") park by entering into another DOA with a different developer for a multipurpose community center and blocking the development of the RV park.[157] The court concluded that the original DOA acknowledged a substitution for a driving range with a RV park and granted the operator exclusive rights to develop the RV park.[158] Moreover, the city and council granted a shoreline permit allowing the operator to remove and replace the existing driving range with an RV park.[159] Therefore, there was sufficient evidence establishing that the city approved the operator's DOA with the right to operate an RV park.[160] The court noted that "[d]amages for breach of an agreement to negotiate may be . . . the same as the damages for breach of a final contract[,]" under certain circumstances.[161] Thus, under these circumstances the operator was entitled to recover damages because the city breached the DOA by blocking the development of the RV park with the intention of entering into a different DOA.[162]

Finally, municipalities cannot justify breaching a development agreement by nonperformance by relying on objections from other administrations.[163] In *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, the developer sued a town for anticipatory breach of the development agreement because the town refused to continue with the hotel/condominium project unless the Federal Aviation Administration's ("FAA") objections were resolved.[164] The court held that the FAA's objection did not excuse the town's performance of the development agreement because development agreements

156. *Morrison Homes Corp.*, 130 Cal. Rptr. at 202.

157. Columbia Park Golf Course, Inc. v. City of Kennewick, 248 P.3d 1067, 1070–77 (Wash. Ct. App. 2011).

158. *Id.* at 1075.

159. *Id.* at 1072–73.

160. *Id.* at 1078–79.

161. *Id.* at 1077.

162. *See id.*

163. Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 120 Cal. Rptr. 3d 797 (Cal. Ct. App. 2010).

164. *Id.* at 802.

freeze promises between the municipality and the developer.[165] Furthermore, the town withheld the knowledge that the FAA had reservations concerning the development agreement and thus, the developer did not consent to the FAA's approval for grant assurances.[166] Therefore, the town officials' refusal to cooperate without resolving the FAA's objections constituted a repudiation of the contract by demonstrating the town's intent to not be bound by the development agreement.[167] The court awarded the developer damages for lost profits.[168]

I. Bankruptcy and Surety

What occurs following a bankruptcy of a signatory is complicated, but generally subject to federal bankruptcy laws. The same is true with respect to sureties and suretyship.[169]

CONCLUSION

In sum, the development agreement is an excellent tool to manage large land developments from the perspective of both landowner and government. The landowner-developer gains assurance of applicable land planning and development regulations as they exist at the time the agreement is executed, and for a fixed negotiated period of time—in other words, vested rights to proceed with the project as approved at that time. Local—and sometimes state—government gets a lot of say about how such large projects should look and the sequence of development. Most important, government can bargain for land development conditions and community benefits beyond those to which it is entitled by simply exercising its police power, limited as it is by the requirements of nexus and proportionality to the needs generated by the proposed land development project. While issues of police power bargaining and reserved powers are often raised, nearly every court of record that has dealt with development agreements has approved them, particularly if negotiated within the framework of a statute.

---

165. *Id.* at 805.
166. *Id.* at 819.
167. *Id.* at 822, 824.
168. *Id.* at 829.
169. *See, e.g.*, *In re* Banning Lewis Ranch Co., 532 B.R. 335 (Bankr. D. Colo. 2015); City of Elgin v. Arch Ins. Co., 53 N.E.3d 31 (Ill. App. Ct. 2016).

EQUITY AND GOVERNMENT CONSTRAINTS ON HOUSING SUPPLY[1]

JAMES BURLING*

The cost of housing is becoming an increasing challenge for many Americans. While there are nations where the average housing costs as a percentage of income are even higher than they are in the United States, that is not terribly comforting. And while there are some places in the nation where housing costs are more reasonable, the residents of our larger cities—especially those cities near the coasts, and especially the West Coast—are often struggling to pay rent or purchase a family home.

A recent study finds that California is short, *at a minimum,* a staggering two million housing units when compared per capita to other states like New Jersey or New York.[2] Over a forty-year period, this report notes that California "added only 325 homes for every 1,000 additional people. During the same period, New York and New Jersey added 1,007 and 681 homes for every 1,000 additional people."[3] In more recent times, from 2005 to 2014, California has added only 308 units to New York's 549 units per 1,000 population added.[4] In other words, California is among the worst states, but even the best state lags behind population gains.

Causes for the anemic statistics are many. They include growth controls, excessive amounts of large-lot zoning, and other manifestations of exclusionary zoning. Even where building is lawful within a particular zoning scheme, builders face additional obstacles from environmental and NIMBY litigation as well as broken permitting regimes.[5] Moreover, what we do build today has become more expensive

---

1. An earlier modified version of this Article was presented to an ALI-CLE program, January 29, 2022, Scottsdale, Arizona.

* Vice President for Legal Affairs, Pacific Legal Foundation.

2. MCKINSEY GLOBAL INST., A TOOL KIT TO CLOSE CALIFORNIA'S HOUSING GAP: 3.5 MILLION HOMES BY 2025 at 2–4 (Oct. 2016), https://www.mckinsey.com/~/media/mckinsey/industries/public%20and%20social%20sector/our%20insights/closing%20californias%20housing%20gap/closing-californias-housing-gap-full-report.pdf.

3. *Id.* at 2 n.2.

4. *Id.* at 2, exhibit 2.

5. *See, e.g.*, M. Nolan Gray, *Opinion: How NIMBYS and CEQA Undermined a World-Class California University*, TIMES OF SAN DIEGO (Mar. 3, 2022), https://timesofsandiego.com/opinion/2022/03/03/opinion-how-nimbys-and-ceqa-undermined-a-world-class-california-university/.

because of overly strict building codes, exactions, and mandates that range from parking minimums to solar roofs.[6] Additionally, traditional housing for the poor, such as single room occupancy hotels, dormitories, and boarding houses, have largely been driven out of existence by regulation and price pressures.

The law of supply and demand is inexorable. Because we do not build enough housing to meet the demand for supply, prices continue to rise faster than household incomes. Numerous studies have identified a direct correlation between the strictness of zoning policies and home prices.[7]

As a result, an increasing number of households are cost-burdened in meeting their need for decent housing. More than one-half of California renters pay more than thirty percent of their incomes in rent. One study notes that "nearly half of California's households cannot afford the cost of housing in their local market."[8] That is 9.5 million "cost-burdened" households in the state. That is not surprising considering that the median value of a home has increased eighty percent since 2011, to $544,900.[9] Among the state's poorest populations, "nearly 100 percent are unable to afford the local cost of housing."[10]

Nationally, more than thirty-one percent of Americans are cost-burdened, twenty-two percent of homeowners and forty-seven percent of renters.[11] Worse still, more than fifteen percent of American households are *severely* cost-burdened, meaning they pay more than one-half of their incomes for housing.[12]

---

6. *See, e.g.*, Kerry Jackson, *Opinion: Green Building Mandates Will Increase the Cost of Housing in California*, TIMES OF SAN DIEGO (Aug. 24, 2021), https://timesofsandiego.com/opinion/2021/08/24/green-building-mandates-will-increase-the-cost-of-housing-in-california/.

7. *See generally* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395 (2021); Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST. (Oct. 18, 2017), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf.

8. Ellickson, *supra* note 7, at 2.

9. Liam Dillon, *Experts Say California Needs to Build a Lot More Housing. But the Public Disagrees*, L.A. TIMES (Oct. 21, 2018, 3:00 AM), https://www.latimes.com/politics/la-pol-ca-residents-housing-polling-20181021-story.html.

10. MCKINSEY GLOBAL INST., *supra* note 2, at 5.

11. JOINT CTR. HOUSING STUDS. HARV. UNIV., THE STATE OF THE NATION'S HOUSING 4 (2019), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_of_the_Nations_Housing_2019%20%281%29.pdf.

12. *Id.* at 31.

Clearly, the cost of housing is too high. But that does not mean it cannot be worse. While the average cost of housing in the United States is nearly four times the mean annual income, that ratio varies widely. Census data shows that in mid-sized cities in the East, the ratio is often less than three percent, in larger eastern cities around five percent, but for the larger cities in the West, the ration ranges from eight to nearly ten percent in San Jose.[13]

Unlike other commodities that have become better and cheaper over time through technology and innovation, housing has remained stubbornly the same and housing prices have increased over time. While we now use cheaper plastic pipe, some modular construction, and better insulation than in the 1960s, sticks and bricks are essentially the same sticks and bricks. The construction industry has not undergone the sort of revolution we have seen in computer technology. There is no Moore's Law of homebuilding. And where the average home in the United States was 2.1 times income in 1960, it is now over 3.6.[14]

So, with the right (or wrong) policies, people could wind up paying a lot more for housing. And it could be worse. Just as large coastal cities are more expensive than smaller cities, the cost of housing in most foreign nations is even more expensive than in the United States. One comparison suggests that while the housing cost to income ratio in the United States is 5.5%, it is 16.2% in the United Kingdom, 20.2% in France, and 39.6% in South Korea.[15] To a significant degree, legal doctrines and regulatory regimes bear responsibility for the lack of housing affordability. Government policies—often well-intended policies—often fail to consider their long-term impacts on housing supply and thus housing affordability. While the free market is often imperfect, government policies are often much more imperfect.

---

13. Eylul Tekin, *A Timeline of Affordability: How Have Home Prices and Household Incomes Changed Since 1960?*, CLEVER (Aug. 3, 2021), https://listwithclever.com/research/home-price-v-income-historical-study/.

14. *Id.* Other ways of calculating home prices to median income ratios can yield different—but similarly increasing—numbers. For example, figures based on the Case-Shiller Home Price Index say that the ratio has increased from less than five percent to more than seven percent today. *See Home Price to Income Ratio (US & UK)*, LONGTERMTRENDS, https://www.longtermtrends.net/home-price-median-annual-income-ratio/ (last visited Aug. 31, 2022).

15. *Global Cost of Property*, COMPARE THE MARKET, https://www.comparethemarket.com.au/home-contents-insurance/features/global-cost-of-property/ (last visited Aug. 31, 2022). As always, numbers like these should be taken with a grain of salt, but while the raw numbers may or may not be accurate, the overall conclusion that housing is more expensive elsewhere is likely accurate.

That is because once a policy is in place, there is no mechanism for self-correction. Home suppliers who fail to meet market demands can adjust or go out of business, to be replaced by more astute competitors. But unlike the private sector, governments are perpetual, and policy failures are built upon policy failures. Rarely do governments get to start things over from scratch. Accountability is limited, especially in regimes heavily dominated by one party or the other. And the demands on a democratically elected government often results in wealth-distribution policies that can disincentivize the construction of new or the improvement of existing housing.

This outline will focus on two intertwined legal issues that make housing unnecessarily expensive today—environmental litigation and zoning.[16] If we do not reform both of these impediments to home building, housing will be even more costly in the future. Readers will notice that there is some focus in this Article on California. Take it as a threat. It has often been said that many trends, good and bad, get their start in California—that has certainly been true for a variety of land use initiatives.

I. THE USE OF ENVIRONMENTAL LITIGATION TO STOP PROJECTS

The easiest way to stop a housing project is to file a lawsuit based on environmental allegations. After all, anything that involves bringing more people into a region or even a neighborhood, anything that moves some dirt, and in fact, anything that changes the status quo will have an environmental impact. And if the flap of every butterfly wing is not adequately studied, recorded, and mitigated, then there can be a need to halt the project, pending more study, recordation, and mitigation. While many states have robust environmental laws, one state stands out above all the others.

While states like Texas and Arizona have been building lots of new homes, that has not been the story in California. That state's continuing fixation on no-growth is the spawn of California's unholy

16. There are other causes as well ranging from excessive exactions to rent control. The author has discussed these issues at length elsewhere. *See* James Burling, *The Modern Resurgence of Rent Control and Property Rights*, 10 BRIGHAM-KANNER PROP. RTS. J. 111 (2021); James Burling, *The Constitutionality of Legislatively Imposed Exactions*, 8 BRIGHAM-KANNER PROP. RTS. J. 211 (2019); James Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 STAN. ENV'T L.J. 397 (2009).

alliance between NIMBYism and environmentalism. NIMBYs come in two flavors: progressives who express concern for the poor and working classes, and conservatives who profess support for free market principles.[17] But both are united in their desire to maintain their exclusive upper-middle class (and beyond) neighborhoods against any form of meaningful change. As for the environmentalists, they purport to be concerned for the welfare of the earth and species who inhabit it, especially non-humans. While they too often express concern for the poor, and while some are not inherently opposed to the free market, their concerns for the environment can trump all other concerns.

Together these constituencies have united in using environmental laws in pursuit of NIMBY opposition to the development of new housing. Both progressives and conservatives have joined with environmentalists to create a legal regime where it is increasingly difficult to build new housing in outlying areas, and increasingly easy to confine the working classes to their existing and deteriorating neighborhoods—unless the poor are being displaced by gentrification.

Gentrification happens when the economically privileged urban knowledge class targets the only areas left in California and elsewhere available for new homes—infill projects in existing, usually working-class neighborhoods. Indeed, this trend has been called the "Green Jim Crow."[18] As attorney Jennifer Hernandez explains, "Another inconvenient truth is that LA CEQA [California Environmental Quality Act] housing lawsuits disproportionately target new housing in whiter, wealthier, healthier communities."[19] This makes it difficult to impossible for minority populations to find newer housing in more desirable areas outside their often depressed and environmentally marginalized neighborhoods.

By forcing infill development into poorer areas, existing residents may be displaced either by replacement of their housing with newer

17. Emily Badger, *The Bipartisan Cry of 'Not in My Backyard*,' N.Y. TIMES (Aug. 21, 2018), https://www.nytimes.com/2018/08/21/upshot/home-ownership-nimby-bipartisan.html?smid=tw-upshotnyt&smtyp=cur.

18. Jennifer Hernandez, *Green Jim Crow: How California's Climate Policies Undermine Civil Rights and Racial Equity*, BREAKTHROUGH INST. (Aug. 16, 2021), https://thebreakthrough.org/journal/no-14-summer-2021/green-jim-crow.

19. Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS L.J. 21, 32 (2018).

market-rate housing, or by price appreciation in a neighborhood being transformed by such new development. Such gentrification could be avoided if it were easier to build in areas other than the low-hanging fruit of working-class neighborhoods.

But it is certainly not easy to develop in undeveloped areas. As difficult as it is to build in already partly developed neighborhoods filled with potential NIMBYs, it is becoming even more difficult to build in undeveloped "greenfields." Take the saga of Tejon Ranch, which won approvals in late 2021 for 19,300 "zero-emission" homes on 6,700 acres about 70 miles north of Los Angeles. Of the nearly 20,000 homes, 3,500 units will be "affordable."[20] While 20,000 homes sounds like a success, it is not. For over twenty years, project opponents have used laws ranging from the Clean Water Act, the Endangered Species Act, and the National Historic Preservation Act—among others—to whittle down the Tejon Ranch development project:

- The ranch first proposed developing a larger project on its 270,000 acres in 1999.[21]
- The developers were immediately threatened with litigation by a host of environmental reasons relating to sprawl under the California Environmental Quality Act, among other causes of action, by the Sierra Club, Audubon California, the Natural Resources Defense Council, and others.[22]
- Tejon Ranch settled with most of the environmentalists in 2008, promising to set aside 240,000 acres for open space, leaving 30,000 acres for 34,780 homes and commercial development. The homes were to be divided in three separate developments: the Grapevine Project (12,000 homes), Tejon

20. *See* Louis Sahagun, *Environmental Group and Tejon Ranch Agree on Plan to Build 19,300 Zero-Emission Homes*, L.A. TIMES (Dec. 1, 2021, 12:46 PM), https://www.latimes.com/california/story/2021-12-01/tejon-ranch-will-build-19-300-zero-emission-homes; Maanvi Singh, *California Developers Want to Build a City in the Wildlands. It Could All Go Up in Flames*, THE GUARDIAN (June 29, 2021, 6:00 AM), https://www.theguardian.com/us-news/2021/jun/29/tejon-ranch-housing-centennial-california-wildfires.

21. Jesus Sanchez, *L.A. County's Growth Spurt Pushes North*, L.A. TIMES (Nov. 23, 1999, 12:00 AM PT), https://www.latimes.com/archives/la-xpm-1999-nov-23-mn-36719-story.html ("the owners of the 270,000-acre Tejon Ranch envision that it will one day serve in part as a bedroom community for the Santa Clarita Valley").

22. Jane Braxton Little, *Development Plans Test a Decade-Old Conservation Deal*, HIGH COUNTRY NEWS (Feb. 7, 2019), https://www.hcn.org/issues/51.5/deserts-was-californias-great-environmental-compromise-worth-it.

Mountain Village (3,450 homes), and the Centennial Project (19,300 homes).[23]

- The 21,000-page environmental impact report was completed in 2009. It comprised of "14 notebooks, 13 of them 5.5 inches thick, two others adding four more inches, plus two rolls of large maps. They add up to a tower nearly six feet tall."[24]
- Much litigation has been filed by the Center for Biological Diversity, an organization that is dedicated to stopping all development on undeveloped land. To accomplish this, according to one of its founders, "[w]e will have to inflict severe economic pain."[25] No doubt, they have accomplished at least that at Tejon Ranch.
- In 2009, the Center for Biological Diversity, which had pulled out of the 2008 settlement talks, sued to stop the Tejon Mountain project, alleging inadequate environmental review and concerns with Chumash Indian sites, air quality, and traffic. They lost in 2010 in trial court and 2012 in the court of appeal.[26]
- In 2009 the Kawaiisu Tribe sued, claiming an interest in portions of the ranch. That claim was ultimately rejected by the Ninth Circuit in 2015.[27]
- In 2013, the U.S. Fish and Wildlife Service approved a 5,200-page Habitat Conservation Plan for the developments to protect the California condor, among other species.[28]
- In 2016, Kern County approved the Grapevine Project. The Center for Biological Diversity sued and stopped the project in 2018 for allegedly inadequate environmental review. More environmental review was conducted, and in 2019 the Grapevine

---

23. *Id.* A copy of the settlement agreement filed with the Securities and Exchange Commission can be found at https://www.sec.gov/Archives/edgar/data/96869/000119312508138009/dex1028.htm.

24. Patrick Hedlund, *Tejon Mountain Village Impact Report Review Clock Ticking Down*, THE MOUNTAIN ENTER. (June 5, 2009), https://mountainenterprise.com/story/tejon-mountain-village-impact-report-review-clock-ticking-down-15D6/.

25. Nicolas Lemann, *No People Allowed*, THE NEW YORKER (Nov. 22, 1999), https://www.newyorker.com/magazine/1999/11/22/no-people-allowed.

26. *Tejon Mountain Village*, WIKIPEDIA, https://en.wikipedia.org/wiki/Tejon_Mountain_Village (last visited Aug. 31, 2022).

27. *Id.*

28. Patric Hedlund with Katy Penland, *Habitat Plan and Federal Analysis Show Major Flaws*, THE MOUNTAIN ENTERPRISE (Apr. 10 & 17, 2009), https://mountainenterprise.com/story/habitat-plan-and-federal-analysis-show-major-flaws-part-1-and-2-161D/.

project was again approved. Once more, the Center for Biological Diversity sued. That suit was lost in January of 2021.[29]

- In 2019, the Center for Biological Diversity sued the U.S. Fish and Wildlife Service, alleging infirmities in the Habitat Conservation Plan (nearly six years after it was completed) because a proposed golf course would impact the habitat of the California condor. Also, because the condor is allegedly a Native American "cultural artifact," the development allegedly would violate the National Historic Preservation Act. A trial court rejected those allegations in December 2020. On February 2, 2021, the Center announced an appeal.[30] The Center dismissed the appeal in October 2021.[31]
- Another pair of lawsuits were filed in 2019 by Climate Resolve, the Center for Biological Diversity, and the California Native Plant Society—all who were not part of the original 2008 settlement. This suit stopped the Centennial Project in early 2021 over allegations that the environmental review did not fully address grassland wildfire danger and the homes were not net-zero. (The developer asserted that the law did not require net-zero.)[32]
- On December 2, 2021, Climate Resolve settled its part of the litigation after the developers agreed to install 30,000 charging stations and provide incentives for 10,500 electric autos, buses, and trucks. Additionally, the developers will ensure that 3,500 of the units will be "affordable." A total of 19,333 homes will be built on 6,700 acres. No doubt, the remaining units will be

29. Sam Morgan, *Tejon Ranch Grapevine Project Prevails in Court Against Lawsuit from Center for Biological Diversity*, BAKERSFIELD.COM (Jan. 25, 2021), https://www.bakersfield.com/news/tejon-ranch-grapevine-project-prevails-in-court-against-lawsuit-from-center-for-biological-diversity/article_a0a0ea84-5f5d-11eb-a6b5-2750d6b7c175.html.

30. Press Release, Ctr. for Biological Diversity, Appeal Targets U.S. Wildlife Agency's Refusal to Consider California Condor's Significance to Tribal Groups in Approving Luxury Resort (Feb. 2, 2021), https://biologicaldiversity.org/w/news/press-releases/appeal-targets-us-wildlife-agencys-refusal-to-consider-california-condors-significance-to-tribal-groups-in-approving-luxury-resort-2021-02-02/.

31. Press Release, Tejon Ranch, Federal Court Ruling Upholding Habitat Conservation Plan on Tejon Ranch Stands (Oct. 5, 2021), http://ir.tejonranch.com/news-releases/news-release-details/federal-court-ruling-upholding-habitat-conservation-plan-tejon.

32. Jeff Collins, *A Tale of Two Housing Projects: Tejon Ranch and Newhall Ranch Developers Take Different Paths on Global Warming*, WHITTIER DAILY NEWS (Apr. 20, 2021, 12:12 PM), https://www.whittierdailynews.com/2021/04/20/a-tale-of-2-housing-projects-tejon-and-newhall-ranch-developers-take-different-paths-on-global-warming/.

commensurately less affordable. Or, as put by a Tejon Ranch spokesperson, "These measures will come at a cost, which makes it increasingly difficult to build houses that people can afford, which is at cross purposes with other state priorities."[33]

- On January 14, 2022, a trial court revived the lawsuit brought by the Center for Biological Diversity and the Native Plant Society against a portion of the development that would provide homes for 57,000 people. The court found that the settlement with Climate Resolve did not affect this separate suit.[34]

If the settlement holds, the carbon-neutral homes will be surrounded by lovely open space, but at what cost? There is a problem when third parties can drag out a substantial housing project for over twenty years, with no end in sight, while California is experiencing an ever-worsening housing crisis. While Tejon Ranch had the assets to fight through two decades worth of lawsuits, it is no wonder that many other less-capitalized landowners and developers are forced into bankruptcy, abandon projects, or look to opportunities in other states. This is no way to build out of a housing shortage.

There have been thousands upon thousands of instances of the California Environmental Quality Act ("CEQA") being used to slow and stop housing projects since it was enacted in 1970. With each round of litigation, the gauntlet through which home builders must run gets tighter and tighter. Here are just a few recent examples:

- In 2016, a Bay Area suburb, Redwood City, approved a Habitat for Humanity twenty-unit affordable housing project downtown and near transit lines.[35] The project was stopped by Geoff Carr, an attorney who did not like the impact on the view from his office located in a two-story home.[36] He sued under CEQA and related laws alleging the added residents

33. *Id. See also Settlement Agreement reached in Centennial Lawsuit*, TEJON RANCH (Dec. 1, 2021), https://tejonranch.com/settlement-agreement-reached-in-centennial-lawsuit/.

34. Press Release, Ctr. for Biological Diversity, California Judge Revives Lawsuit Against Controversial Tejon Ranch Development (January 14, 2022), https://biologicaldiversity.org/w/news/press-releases/california-judge-revives-lawsuit-against-controversial-tejon-ranchcorp-development-2022-01-14/.

35. Janice Bitters, *After Second Redwood City Project Approval, Habitat for Humanity Braces for Lawsuit*, SILICON VALLEY BUS. J. (May 23, 2017), https://www.bizjournals.com/sanjose/news/2017/05/23/redwood-city-habitat-for-humanity-housing-lawsuit.html.

36. *Id.*

would increase traffic and block his view.[37] The case eventually settled in 2018, but only after the costs increased by millions of dollars.[38] The same lawyer boasts that he stopped dead another nearby project with 91 condominium units.[39] And because he got in the CEQA game late, he laments that he was able to reduce another project by only one story.[40] Carr was not alone in his NIBMY opposition. In a series of Facebook posts, residents said such things as "I'm all for affordable housing but I'm [sic] against any particular person or group making decisions for others. . . . [and robbing] people of their natural source for Vitamin D" and "Next up: tenements!" and "[the] crisis is not Redwood City's alone to solve," and "the ugly has to stop somewhere!"[41]

- In 2019, led by a prominent property attorney, opponents of a proposed homeless shelter to be located on a San Francisco parking lot formerly used for busses started a GoFundMe drive to raise $100,000 in order to file a CEQA lawsuit to stop the shelter.[42]
- Likewise, residents near Venice Beach in Los Angeles filed a suit—for which they raised $220,000—to stop a proposed shelter.[43]
- Just as CEQA is used to stop small projects, it and other environmental laws are used to stop larger ones. In 2015, the

37. Ben Bradford, *Is California's Legacy Environmental Law Protecting the State's Beauty or Blocking Affordable Housing?*, KQED (July 10, 2018), https://www.kqed.org/news/11679835/is-californias-legacy-environmental-law-protecting-the-states-beauty-or-blocking-affordable-housing.

38. *Id.*; Press Release, Holland & Knight, Holland and Knight Achieves Favorable Settlement for Habitat for Humanity in Legal Battle over Proposed Affordable Housing Development (July 26, 2018), https://www.hklaw.com/en/news/pressreleases/2018/07/holland--knight-achieves-favorable-settlement-for.

39. *Id.*

40. *Id.*

41. Comments on Facebook page, Redwood City Residents Say: "What?", FACEBOOK (Mar. 23, 2017), https://www.facebook.com/groups/709200909129615/permalink/1231874330195601/.

42. Christian Britschgi, *While Homeless Population Balloons, San Francisco Residents Use Environmental Lawsuit to Stop Homeless Shelter*, REASON (July 15, 2019, 3:30 PM), https://reason.com/2019/07/15/while-homeless-population-balloons-san-francisco-residents-use-environmental-lawsuit-to-stop-homeless-shelter/; *see also* Liam Dillon & Benjamin Oreskes, *Homeless Shelter Opponents Are Using This Environmental Law in Bid to Block New Housing*, L.A. TIMES (May 15, 2019), https://www.latimes.com/politics/la-pol-ca-ceqa-homeless-shelter-20190515-story.html.

43. Dillon & Oreskes, *supra* note 42.

California Supreme Court halted the Newhall Ranch project, which would have provided 20,885 homes for over 58,000 residents to be developed over 20 years. The CEQA analysis, which was one of several prepared and shot down since the first one was approved in 1999, had not adequately studied the project's impact on greenhouse gas emissions.[44] By 2021, however, the developer began to build homes after agreeing to make them net-zero, subsidize electric vehicles, and build charging stations, and to replace "tens of thousands of cooking stoves to mitigate for greenhouse gas" in Africa (essentially what Tejon Ranch eventually capitulated to).[45] In other words, housing costs in California will be higher in order to subsidize cooking stoves in Africa.

- CEQA is an equal-opportunity destroyer of housing projects. Just as it has been used to stop homeless shelters and affordable housing, it has also been employed against luxury homes. In 2019, after a fourteen-year battle based on CEQA and other California environmental statutes, a five-home luxury-home project in the hills above Malibu was scuttled over a jurisdictional defect. The project was the brainchild of David Evans, also known as "the Edge," who must start over with the promise of many more CEQA challenges ahead.[46] In the meanwhile, the streets will continue to have no names.

Under California's law, environmental documents must study over 100 different "environmental" topics.[47] Any person may anonymously challenge a project in court under CEQA grounds at little cost and have about a fifty-fifty chance of stopping the project—requiring it to be restudied from scratch, modified, or abandoned. If a court orders

---

44. Ctr. for Biological Diversity v. Dep't of Fish and Wildlife, 361 P.3d 342, 345 (Cal. 2015).

45. *See* Collins, *supra* note 32.

46. *See* The Sierra Club v. Cal. Coastal Comm'n, No. B283652, 2019 WL 1292887 (Cal. 2d Dist., Mar. 21, 2019); *see also* Samuel Braslow, *The Edge's 14-Year Battle to Build a Malibu Compound Comes to an End*, L.A. MAGAZINE (June 21, 2019), https://www.lamag.com/citythinkblog/the-edge-u2-malibu/.

47. For an extensive and critical look at CEQA over a three-year period from 2010–2012, see Jennifer L. Hernandez & David Friedman, *In the Name of the Environment: Litigation Abuse Under CEQA*, HOLLAND & KNIGHT (Aug. 2015), https://www.hklaw.com/en/insights/publications/2015/08/in-the-name-of-the-environment-litigation-abuse-un#:~:text=Analyzing%20all%20CEQA%20lawsuits%20filed,social%20equity%20and%20economic%20priorities. For a follow-up of the subsequent three years, see Hernandez, *supra* note 19.

new studies, the results of those studies can be stopped in new litigation ad infinitum. There are many cases where dozens of lawsuits have been filed over the span of two or more decades. But primary targets of CEQA lawsuits are not the usual suspects of industrial development or developments on pristine land, but of residential development within already developed cities—so-called "infill" development. In fact, over eighty percent of CEQA lawsuits in the Los Angeles area target housing and other projects in existing cities and towns as opposed to open spaces.[48] Such litigation is a contributing factor in pushing new development into undeveloped areas where there are fewer neighbors with a penchant to sue. But even that is no guarantee of a smooth process, as the experiences of Tejon Ranch and Newhall Ranch amply show.

But activist environmental organizations are not the only people halting development. At their core, the attitude of California's regulatory agencies is antidevelopment. Nowhere is this exemplified better than by the remarks of Peter Douglas, the late former director of the California Coastal Commission. In one speech, he boasted that "many of the most significant accomplishments in my specific area of work, coastal management, are things one canNOT see—the wetlands not filled . . . scenic vistas not spoiled, the subdivisions not approved. . . ."[49] But it was not just subdivisions that the director opposed, it was everything from single-family homes to hotels and to the very foundations of capitalism, or as Douglas described it, "dehumanizing, amoral corporate capitalism and imperialism."[50] What we needed, Douglas opined, was a "holistic cerebral vision therapy" to reorient human thinking from capitalism and consumerism to environmentalism.[51] Put simply, the Commission has been on a decades-long mission from Gaia, and it has not been shy in wielding

48. *See* Hernandez & Friedman, *supra* note 47.

49. Peter M. Douglas, Keynote Speech to Surfrider Foundation's 15 Anniversary Event: Making Waves: Making a Difference (Aug. 28, 1999), https://beachapedia.org/Keynote_Speech_at_Surfrider_Foundation%27s_15_Anniversary_Event#:~:text=Peter%20Douglas%20at%20the%20Surfrider%20Summit%20MAKING%20WAVES%3A,%E2%80%94%20growth%20in%20membership%2C%20vision%2C%20effectiveness%2C%20and%20credibility.

50. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. ENV'T L. & POL'Y 247, n. 242 at 289 (2004) (quoting Peter Douglas, Shades of Green: Buying and Selling Environmental Protection, Address to the Yosemite Environmental Law Conference (Oct. 26, 2002) (Copy available from author).

51. *Id.* at 17.

its almost-absolute power almost absolutely. The Coastal Commission's penchant for denial has had an impact. Of all the areas where housing prices have increased the most, California's coastal zone is the most dramatic.[52]

Protecting the environment is important. Building an adequate number of new homes to meet demand is also important. Unfortunately, the ability to reach a balance has been elusive.

II. THE USE OF ZONING TO MAINTAIN THE STATUS QUO—AND TO EXCLUDE WORKING CLASS AND MINORITY POPULATIONS

A. The Rise of Racial Zoning

The collapse of housing affordability began over a century ago with the rise of zoning. On its face, zoning seems like a fair enough policy, designed to keep neighborhoods safe, clean, and healthy. But its roots are much more sinister than that. Indeed, the history of zoning has been a history of confining poor and not-so-poor black people to the ghettos. It started out with explicit attempts to zone out blacks. When that was declared unconstitutional, it transformed into a more scientific and rational way of preserving good neighborhoods, so that the front door next door would not be darkened by those who were different.

Zoning for the purpose of economic and racial segregation had its start in 1910, when Jim Crow moved to Baltimore, Maryland. As the 19th century turned into the 20th, the Eutaw Place neighborhood was a very fashionable, affluent, tree-lined, and all-white neighborhood in the heart of Baltimore. Only a few blocks to the west, there were black neighborhoods which had been expanding into the white areas as the city's black population had been increasing since the end of the Civil War. And as black citizens became better established, they naturally sought to leave the slums and move to some of the nicer parts of the city.[53]

---

52. Mac Taylor, *California's High Housing Costs, Causes and Consequences*, LEGISLATIVE ANALYST'S OFFICE (Mar. 17, 2015), https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf.

53. To read more about this story, *see generally* Roger L. Rice, *Residential Segregation by Law, 1910–1917*, 34 J.S. HIST. 179 (1968); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913*, 42 MD. L. REV. 289 (1983).

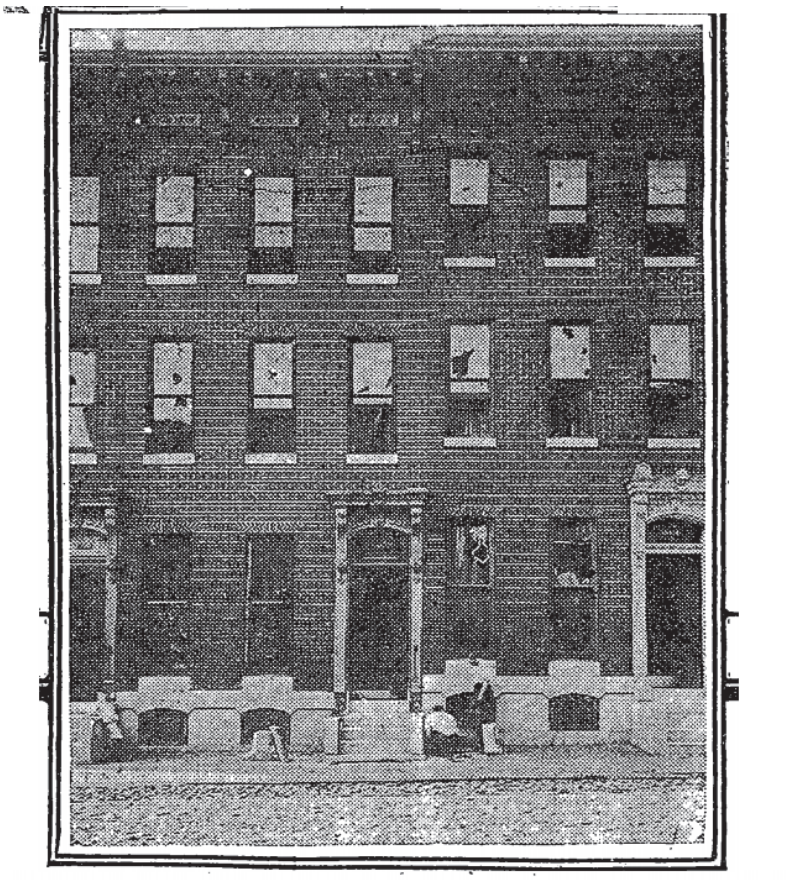
In the summer of 1910, a successful Yale-educated attorney named George W. F. McMechen and his schoolteacher wife moved to a three-story red brick row home at 1834 McCulloh Street, in the heart of Eutaw Place. While his new neighbors were all white, Mr. McMechen and his family were all black. When the move became known, all hell broke loose.

Figure 1[54]
George McMechen's home at 1834 McCulloh Street in Baltimore's Eutaw neighborhood, June 2019

White citizens saw McMechens' move as the first step in the destruction of another white neighborhood. They had seen this before as the black population expanded and entered into formerly white neighborhoods. Previously, there had been isolated instances of vandalism by whites when blacks moved into white neighborhoods. As Garett

54. Image capture June 2019 ©Google.

Power notes, "Windows were broken and black tar was smeared on white marble steps. And when a black family moved into a house on Stricker Street they were attacked and the house was stoned. But white terrorism was no match for the combined purchasing power of housing-hungry blacks. Money talked."[55]



House 1,834 McCulloh Street in Which a Negro Lawyer Named McMechen Moved in June, 1910, and Which Promptly Had Its Windows Broken, as Shown in the Cut.

Figure 2[56]

55. Power, *supra* note 53, at 298 (internal citations omitted).
56. *Baltimore Tries Drastic Plan of Race Segregation*, N.Y. TIMES (Dec. 25, 1910), https://

When word got out about George McMechen's move to Eutaw Place, white Baltimoreans held a protest meeting in order to agitate for a halt to the perceived further destruction of their all-white neighborhoods.[57] White teens harassed the McMechens.[58] Citizens presented a petition to the mayor and city council asking them to, "take some measures to restrain the colored people from locating in a white community, and proscribe a limit beyond which it shall be unlawful for them to go."[59] Milton Dashiell, a lawyer with an undistinguished reputation, took it upon himself to draft an ordinance to stop blacks from moving into white neighborhoods, like his own.[60]

There were strong objections from the black community to a proposal to create segregation by zoning. The Baltimore *Afro-American* newspaper spearheaded the opposition, not because, it said, black people necessarily wanted to move into white neighborhoods, but because segregation was "anti-American" and "mischievous."[61]

Despite the opposition, the city obliged its white constituency. By a party-line vote, and over objections from the Republicans, black leadership, and some members of the real estate business, the city council complied. In December of 1910, the city adopted the nation's first racial apartheid law.[62] The ordinance was straightforward and declared: "That no negro can move into a block in which more than half of the residents were white." And in a cynical hat tip to equality, it continued: "That no white person can move into a block in which more than half of the residents are colored."[63] The law had teeth. It threatened: "That a violator of the law is punishable by a fine of not more than $100 or imprisonment from 30 days to 1 year, or both."[64]

---

timesmachine.nytimes.com/timesmachine/1910/12/25/105900067.pdf [hereinafter *NY Times 1910*].

57. Rice, *supra* note 53, at 180.

58. *Id.*

59. Petition to the Mayor and City Council, Baltimore City Archives Mahool Files, File 406 (July 5, 1910) as cited in Power, *supra* note 53, at 298–99.

60. Power, *supra* note 53, at 299.

61. Rice, *supra* note 53, at 181.

62. All Democrats voted in favor, Republicans against. Power, *supra* note 53, at 299. While the word "apartheid" has its origins from South Africa in the mid-twentieth century, there is no better term for describing an effort to create geographical separation of the races.

63. *Id.*

64. *Id.*

The city solicitor, Edgar Allan Poe, a grand nephew of the American poet, opined that the law was constitutional, because "close association on a footing of absolute equality is utterly impossible between [whites and negroes and] . . . wherever negroes exist in large numbers in a white community, [there is] invariably . . . irritation, friction disorder and strife."[65] This sentiment was widely shared: the notion that black populations were irredeemable and had to be quarantined to avoid infecting the white population with their blight. The city's progressive and reform-minded mayor signed the legislation in December 1910.[66]

It made national news. In a two-page Christmas day story in the *New York Times*, notes its significance:

> Nothing like it can be found in any statute book or ordinance on record in the country. It seeks to cut off from men of a certain class—black in one set of circumstances, white in another—the right to purchase and enjoy property anywhere within the limits of Baltimore, under a certain limitation saying: "Thus far shalt thou come no further." It deprives such a man of the right to enjoy property that he may own . . . .[67]

The *Times* article had a few photographic illustrations of the "problem," one reflecting a racist trope of the day by showing a block of well-built homes captioned, "Where the Negro Invasion Has Depreciated Values."[68]

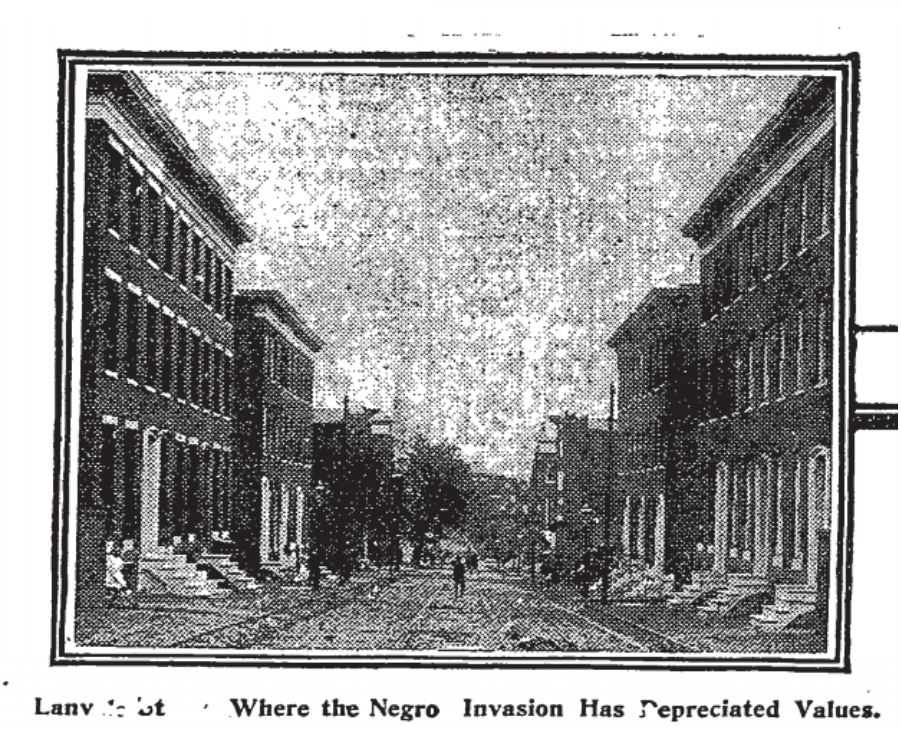
---

65. *Id.* at 300 (citing Memo from Edgar Allan Poe to Mayor J. Barry Mahool, Baltimore City Archives, Mahool Files, File 451 (Dec. 17, 1910)).

66. Power notes that many progressives had often come to believe the only solution to what came to be known as the "negro problem" was for blacks to be "quarantined in isolated slums" to prevent their contagion from spreading. *Id.* at 301.

67. *See NY Times 1910*, *supra* note 56.

68. See *infra* Figure 3.



Lanv .: ot · Where the Negro Invasion Has Depreciated Values.

Figure 3[69]

Baltimore Mayor J. Barry Mahool defended the ordinance, telling the *New York Times* that "one of the first desires of a negro, after he acquires money and property, is to leave his less fortunate brethren and nose into the neighborhood of the white people."[70] Moreover, "Many blocks of houses formerly occupied exclusively by whites have now a mixture of colored—and the white and colored races cannot live in the same block in peace and with due regard to property security." Later on, he claims that the ordinance "was not passed in a spirit of race antagonism; most of us concerned in its passage are the best friends the colored people have . . . ."[71]

69. *See NY Times 1910*, *supra* note 56.
70. *Id.*
71. *Id.*

The mayor next described the vandalism caused by McMechen's move and that of few blacks that followed that year: "Window-glasses of the negroes' houses were broken with stones; skylights were caved in by bricks, descending bomb-like from the sky: there were mutterings of plots to blow up the houses; in short, we were on the verge of riot . . . ."[72]

The *Times* sought other opinions. It quoted Solicitor Poe who defended the law because as not being "mere race prejudice but because experience and time have conclusively proved that the commingling the white and colored races is an absolute impossibility and that any attempt to bring about such a result invariably leads to grave public disaster."[73]

The newspaper continued with this quote from an unnamed "lady high in Baltimore's most sacred circles" that combines racism with paternalism:

> It is a most deplorable thing that even the best of the well-to-do colored people should invade our residential districts. I am sure the colored race has no better friend than I . . . . From my earliest recollection my feeling for the race has been one associated with affection; my old negro 'mammy,' my little nurse-girl playmate, all are among my happiest recollections. But the idea of their assuming to live next door to me is abhorrent.[74]

After noting the rampant vandalism of the black-inhabited homes in the neighborhood, George McMechen told the *Times*,

> We did not move up there because we wished to force our way among the whites; association with them in a social way would be just as distasteful to us as it would be to them. We merely desired to live in more commodious and comfortable quarters.
>
> . . . .
>
> . . . [I]t is my opinion as a lawyer that [the ordinance] is clearly unconstitutional, unjust, and discriminating against the negro . . . .

---

72. *Id.*

73. *Id.* Poe continues to compare the Baltimore ordinance to other Jim Crow laws in the South.

74. *Id.*

> So far from having any disposition to live among the whites, I vastly prefer living in the midst of my own kind. But I cannot get the comfort there that my purse permits me—and which I think I am entitled to, under the law, if I pay for it . . . .
>
> . . . We certainly have the right, as American citizens, to the pursuit of happiness and comfort.[75]

Figure 4[76]
George McMechen

The law was immediately challenged by both black and white citizens of Baltimore. White real estate interests were especially unhappy and wrote the mayor that they would lose "thousands of dollars" if white landowners could not rent to blacks in already mixed neighborhoods where blacks were in the minority.[77] Others

75. *See NY Times 1910*, *supra* note 56.

76. *Black History Month*, OMEGA PSI PHI FRATERNITY, INC., https://www.opp2d.org/black-history-month (last visited Aug. 31, 2022).

77. Power, *supra* note 53, at 302.

complained that they would suffer hardship if they could not rent to whites where they were in the minority.[78]

Within a month, twenty-six criminal enforcement cases were in court, with the defendants, white and black, challenging the constitutionality of the law.[79] They initially had some success. The county court struck the ordinance down on a technical drafting error.[80] But the city fathers were undeterred and adopted a new version in 1911.[81] Several challenges and versions later, the law remained, its fourth iteration ultimately surviving challenges in the state courts.[82] The effects of the ordinance and other subsequent segregating laws were devastating to the black community. As its population increased, the supply of new housing was stifled; prices rose and quality declined.[83] Crowding increased and disease became more prevalent.[84]

The ordinance proved to be wildly popular throughout the southern and border states.[85] In only a few short years, a dozen or so cities adopted ordinances based on the Baltimore model.[86] One such city was Louisville, Kentucky.[87]

W.D. Binford, an employee of the mechanical department of two of the local Louisville newspapers, started the segregation ball rolling.[88] He made his first presentation to a group of white real estate men, calling for support of the Baltimore plan.[89] Otherwise, they would awake "to find a Negro family had purchased and was snugly ensconced in a three-story residence in one of the best and most exclusive white squares in the city."[90] Their purpose was "purely mercenary" and "to exact a prohibitive bonus from white residents to leave the neighborhood."[91] His audience pretty much ignored him. But, as the Boston Guardian reported, a small element of Louisville's

78. *Id.*
79. *Id.* at 303.
80. *Id.*
81. *Id.* at 304.
82. *Id.* at 303–06.
83. Power, *supra* note 53, at 307–09.
84. *Id.*
85. *Id.* at 310.
86. *Id.*
87. *Id.*
88. Rice, *supra* note 53, at 182.
89. *Id.*
90. *Id.*
91. *Id.*

poverty-stricken whites, spurred on by the *Louisville Times* soon enough succeeded in getting the Baltimore copycat ordinance adopted.[92] While there was organized opposition from blacks and white businessmen, arguments from working-class whites that blacks could destroy property values won the day.[93] The ordinance was adopted on May 11, 1914.[94]

William Warley was the first president of the Louisville branch of the NAACP. When Louisville passed its own Baltimore-style apartheid ordinance, the NAACP had been in existence for five years. And it was looking to take on racial zoning in the Supreme Court. It knew it would not be easy.

Only eighteen years before, the Supreme Court had upheld segregation in southern Pullman railroad cars in *Plessy v. Ferguson*, a case that created the notorious "separate but equal" doctrine.[95] And in 1908 the Supreme Court upheld a new Kentucky segregation in education law that forced a long-established integrated Berea Christian college to expel all of its black students.[96]

The NAACP knew it had a big challenge ahead. At a meeting in a local black church, J. Chapin Brinsmade, NAACP's new lawyer from Washington, D.C., told the crowd that "[t]he results in Louisville will be of the utmost importance in determining whether or not the Negro is to be segregated. It will not be easy to void the ordinance in the courts . . . Louisville has drawn its ordinance very carefully . . . ."[97]

The Thirteenth, Fourteenth, and Fifteenth Amendments were adopted after the civil war to ensure that slavery would never again find a home in the United States, that all persons were entitled to the same liberties as every other person no matter what their color may be, and that no one could be denied the right to vote on account of race.[98] But as Jim Crow took hold in the South, many of the rights

92. *Id.* at 183.

93. *Id.* at 184.

94. *Id.* at 185.

95. Plessy v. Ferguson, 163 U.S. 537 (1896). In dissent, Justice Harlan prophetically announced that, "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."

96. *See* Berea College v. Kentucky, 211 U.S. 45, 53–57 (1908). The Court decided the case on a narrow technicality of Kentucky corporation law and essentially punted the larger issue of the Equal Protection Clause.

97. Rice, *supra* note 53, at 185.

98. U.S. Const. amends. XIII, XIV, XV.

guaranteed by the Civil War Amendments became more illusory than real for black citizens.

The title of Louisville's new law said it all:

> An ordinance to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare, by making reasonable provisions requiring, as far as practicable, the use of separate blocks, for residences, places of abode, and places of assembly by white and colored people respectively.[99]

It had the supposedly separate but equal provisions: Just as no black person could buy property and move into a predominantly white neighborhood, so too could no white person buy property and move into a mostly black neighborhood. But the equality was a sham and served to keep black Louisvillians stuck in poorer and more run-down neighborhoods rather than keeping whites out of the better black neighborhoods.

Just three months after the ordinance was adopted, the city prosecuted its first case. In August, Arthur Harris moved into a house in a white block. He was summoned to appear before a police court and found guilty of violating the new law. In December, the court upheld the conviction, stating that the ordinance "was extremely mild in its operation," that it had a "scrupulous regard for property," and that while the ownership of property was important, it could be regulated by the government—as settled by the Supreme Court in the *Plessy* "separate but equal" railroad car case.[100] This would be the first criminal conviction based on the law. But it was Mr. Warley's subsequent civil suit that would put it to the most serious test.

William Warley wanted to challenge the new law. So did Charles Buchanan, a white businessman who bought and sold real estate. Together, they concocted a plan. They found a block in the City that had ten households—eight of which were occupied by white families. Two were occupied by black families. Mr. Warley contracted to buy from Mr. Buchanan an undeveloped lot on the block so that Mr.

---

99. Buchanan v. Warley, 245 U.S. 60, 70 (1917).

100. Rice, *supra* note 53, at 186.

Warley could build his family a home. The contract, however, had a rather unusual provision:

> It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence.[101]

Warley immediately attempted to back out of the contract, citing the Louisville ordinance as the reason why he could not go through with the purchase. Buchanan sued Warley, seeking to enforce the contract and make Warley buy the property. While Warley claimed the ordinance prevented him from buying the property, Buchanan replied that the law was unconstitutional. Thus, there was the odd circumstance of a white businessman arguing in court that the segregation ordinance was unconstitutional, while Warley, the local black NAACP president, was relying on the ordinance to avoid a contractual obligation. It may have been a setup, but it was brilliant. And it needed to be brilliant considering the obstacles the opponents of residential segregation faced.

With Jim Crow becoming more and more firmly entrenched in the South, and with no indication from the Court that things were about the change, the NAACP looked for a new strategy. It found it with a case decided only nine years earlier—*Lochner v. New York*.[102] The *Lochner* Court had found a regulation of working conditions interfered with the freedom of contract between employers and employees and in doing so violated the substantive due process rights guaranteed by the Constitution. It was then, as now, a controversial doctrine.

But it was a doctrine that the NAACP had found some use for. Knowing that an argument under the Equal Protection Clause of the Fourteenth Amendment would not be well-received in light of *Plessy* and the *Berea College* cases, the NAACP had no choice but to avoid heavy reliance on the fundamental principle that segregation is an evil proscribed by the Constitution's guarantee of equal protection.

---

101. Brief for the Plaintiff in Error, at 1, Buchanan v. Warley, https://babel.hathitrust.org/cgi/pt?id=coo.31924032799805&view=1up&seq=7; *see also* Rice, *supra* note 53, at 186.

102. Lochner v. New York, 198 U.S. 45 (1905).

Instead, it relied on *Lochner* and the Court's embrace of economic rights. If the Court could not understand the conflict between the Equal Protection Clause and the "separate but equal" doctrine, perhaps it could understand the importance of the right of a white landowner to sell his property to whomever he wanted—even if the buyer were black.

Lochner involved New York's regulation of working conditions in bakeries. For generations, the *Lochner* decision has been derided by progressive scholars as a case that elevated property and economic rights over the ability of government to protect working people. More recent scholarship has called that narrative into doubt.[103] Nevertheless, *Lochner's* defense of economic rights was a doctrine that the NAACP could put to use.

Effective advocates in any court understand that even the best legal arguments can often lose if a party is unsavory or the idea of giving a win for the litigant makes the judges uncomfortable. While some courts can overcome their distaste for an individual and rule in that person's favor if the law is compelling enough, not so if the law is uncertain. That is why lawyers try to paint their clients in the best light possible and try to make the court understood all the good that can out of the correct decision. The NAACP attorneys understood this well.

The NAACP's brief opposing the law was carefully tailored for its intended audience—a Court that was comfortable with the philosophy of "separate but equal." Recognizing that the prejudices of the justices ran deep, the NAACP's principal brief begins by setting up its own cringeworthy dichotomy between good blacks who were trying to better themselves and a "degraded and worthless class of negroes":

> That if the ordinance in question is enforced it will result in preventing the better and more prosperous element of the colored inhabitants from obtaining residences in a better locality, will have a tendency to confine those members of the colored race who are anxious to improve their condition to undesirable quarters of the city, where they and their offspring will be constantly thrown in close touch with and contaminated by the

103. *See generally* DAVID E. BERNSTEIN, REHABILITATING LOCHNER, DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

> degraded and worthless class of negroes, which element predominates in those sections to which the colored race are now almost exclusively confined, and will thereby have a tendency to lower the standard of citizenship in the State among the colored citizens rather than raise it.[104]

This is difficult language to read today, and it highlights the difficulty of NAACP's task within a society that failed to appreciate the worth of all members of society. To further reassure the Court, the brief continues that the plaintiffs are seeking only a return to the status quo ante, rather than the more radical and pernicious course inherent in the ordinance:

> The purpose of the enactment . . . is to establish a Ghetto for the colored people of Louisville . . . . After white and colored people have lived side by side all over the country for nearly fifty years since the Civil War, there has come an outbreak of race prejudice, and legislation like the ordinance under consideration has been attempted in various cities. It is a disease which is spreading as new political nostrums constantly spread from State to State.[105]

And next, after making the Court comfortable with the thought of ruling for the plaintiff, the NAACP next provides a palatable legal reason for doing so that is based in the economic rights of property owners. Such rights, the NAACP argues, the ordinance "destroys without compensation rights which had become vested long before it took effect."[106] The brief admits that governments have the "police power" to regulate economic activity. But tying the economic argument to the antidiscrimination theme, the NAACP continues that such regulations must be applied uniformly:

> We rest our case upon the fundamental principle that, while a State may make police regulations which forbid many acts which would otherwise be lawful and may add restrictions respecting the use of property to those existing at common law, such restrictions must affect all citizens without discrimination.[107]

---

104. Brief for Plaintiff in Error, at 10, Buchanan v. Warley, https://babel.hathitrust.org/cgi/pt?id=coo.31924032799805&view=1up&seq=7.

105. *Id.* at 14.

106. *Id.* at 16.

107. *Id.* at 22.

The brief is careful to make no attempt to call for a reversal of the "separate but equal" cases of *Plessy* or *Berea College*, or to even suggest that those cases would be incompatible with a favorable outcome in Louisville. Instead, whereas *Plessy* and *Berea College* advanced some [ersatz] notion of "equality," the whole point of the Louisville ordinance was only to advance *inequality*: "Such an ordinance cannot fail to keep the negro in that condition of inferiority as respects his opportunities for advancement and self-improvement which it was the prime object of the Fourteenth Amendment to put an end to."[108] And again, "No one . . . would imagine for an instant that the predominant purpose of this ordinance was not to prevent the negro citizens of Louisville, however industrious, thrifty, and well-educated they might be, from approaching that condition vaguely described as 'social equality.'"[109]

Working through the double negative in that passage, the NAACP was making it clear that a victory for them would not be a threat to "separate but equal." That would have to wait for a later generation. But to win in 1917, the NAACP was compelled to agree that "Counsel for defendant are right in saying that the Fourteenth Amendment does not compel social equality."[110]

While the city and its supporting friends of the Court—which included the City of Baltimore—argued mightily that *Plessy* and *Berea College* protected the segregation ordinance against challenge, the NAACP would have none of it. And, more importantly, neither did the Supreme Court.

On November 5, 1917, the Court issued its opinion. The Court was far more interested in protecting rights in property than allowing segregation. First, the Court emphasized the importance of property rights in American law:

> The Fourteenth Amendment protects life, liberty, and property from invasion by the states without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Property consists of the free use, enjoyment, and disposal of a

108. *Id.* at 28.

109. *Id.* at 32.

110. Brief for Plaintiff in Error, at 32, Buchanan v. Warley, https://babel.hathitrust.org/cgi/pt?id=coo.31924032799805&view=1up&seq=7.

> person's acquisitions without control or diminutions save by the law of the land.[111]

Property rights was the key to defeating the law, because they were the one area where discrimination could not be tolerated. "Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on the account of race."[112]

As for *Plessy*, the Court paid it little mind, simply saying that *Plessy* dealt with the "classification of accommodations [which] was permitted upon the basis of equality for both races."[113]

Also, by 1917, a few other lower courts around the country had been able to get around *Plessy* when ruling that Baltimore-style copycat laws violated the federal constitution. In *Buchanan*, the Supreme Court found particularly persuasive the way the Georgia Supreme Court dealt with *Plessy* in a case from Atlanta and proceeded to quote from the Georgia opinion:

> The most that was done [in *Plessy*] was to require him as a member of a class to conform to reasonable rules in regard to the separation of the races. In none of them was he denied the right to use, control, or dispose of his property, as in this case. Property of a person, whether as a member of a class or as an individual, cannot be taken without due process of law.[114]

And because a white man could not sell his property to a black man, just as the black man could not buy the property of a white man, the Court found not only a lack of equality but a violation of property rights.

> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.[115]

---

111. *Buchanan*, 245 U.S. at 74 (citing 1 BLACKSTONE'S COMMENTARIES 127 (Cooley's Ed.)).
112. *Id.* at 78–79.
113. *Id.* at 79.
114. *Id.* at 80 (quoting Carey v. City of Atlanta, 84 S.E. 456, 459 (Ga. 1915)).
115. *Id.* at 82.

That was pretty much the end of explicit racial zoning. Overt apartheid was dead. While a few other cities tried from time to time to pass similar laws in the hope that the courts would overlook them or reverse *Buchanan*, those attempts were promptly struck down by the courts. But in the end, it did not much matter. Cities soon found a more sophisticated way to protect white neighborhoods not only from blacks but also from the "degraded and worthless class" of all races. The era of economic and exclusionary zoning was about to begin.

B. Zoning Arrives in New York City, Moves to Euclid, Ohio, and Travels to the Supreme Court

In 1916, New York City enacted the nation's first comprehensive zoning law.[116] A rationale to justify the zoning came from the collaboration of the academic Robert H. Whitten and New York attorney Edward M. Bassett. They were well aware of the challenge before them. As Bassett put it, "We must reckon with the fact that Americans take for granted their right to do on their own property anything they please regardless of their neighbors."[117] While this may have overstated the legal environment quite a bit because there was no right to inflict harm upon neighbors, it did show that these early planners recognized that the legal acceptance of their vision of land use zoning was not guaranteed.

According to Professor Revell, the "zoning advocates overcame what they perceived to be a persistent, obstructive constitutional preference for property rights, apparently in contempt of public

---

116. David w. Dunlap, *Zoning Arrived 100 Years Ago. It Changed New York City Forever.*, N.Y. TIMES (July 25, 2016), https://www.nytimes.com/2016/07/26/nyregion/new-yorks-first-zoning-resolution-which-brought-order-to-a-chaotic-building-boom-turns-100.html. Berkeley, California, also passed a zoning ordinance in 1916, "to prevent a prominent negro dance hall from locating on a prominent corner." *See* Jesse Barker, *Berkeley Zoning Has Served for Many Decades to Separate the Poor from the Rich and Whites from People of Color*, BERKELEYSIDE (Mar. 12, 2019, 11:34 AM), https://www.berkeleyside.org/2019/03/12/berkeley-zoning-has-served-for-many-decades-to-separate-the-poor-from-the-rich-and-whites-from-people-of-color (citing Marc A. Weiss, *Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*, 3 U.C. BERKELEY PLAN. J. 7, 18, 1986). However, from the prominence of the city, New York's ordinance was most influential.

117. Keith Revell, *Road to* Euclid v. Ambler*: City Planning, State-Building, and the Changing Scope of the Police Power*, 13 STUD. IN AM. POL. DEV. 50, 50 (1999) (quoting Appended Report, Zoning and Districting, Minutes of the Heights of Buildings Commission, June 9, 1913, Heights of Buildings Commission, NEW YORK CITY MUNICIPAL ARCHIVES, Box 2507).

rights, by finding innovative ways to expand the police power."[118] Prior to the adoption of the New York law, there was much debate amongst the planners as to how to best overcome the perceived limitations placed upon the police power.[119] Courts were unsympathetic to aesthetic zoning, yet aesthetics seemed to play a role in the need to separate apartments from single-family homes. Some planners worried more about constitutional challenges than others, but they all eventually agreed that the status quo was unacceptable. As Professor Revell put it, "Because they believed zoning required the subordination of individual property rights to broader community goals embodied by a city-wide zoning plan, they saw themselves on a collision course with the Constitution."[120]

Whitten and Bassett understood that to succeed they had to encourage "a transition in police power decision-making from categorical legal reasoning to the modern balancing approach."[121] To do this, they envisioned the creation of *comprehensive* zoning, devised by experts and characterized by interlocking parts that stood together. This would serve as a new type of police power health and safety-based regulation of property. While any one tree in the forest might not relate to the *public's* health and safety, the entire forest of comprehensive regulations would. As Alfred Bettman, another advocate for planning and zoning from Ohio, later wrote in the *Harvard Law Review*, "[C]omprehensiveness . . . puts the 'reason' into 'reasonableness.'"[122]

New York City's zoning ordinance was adopted in the right place at the right time in history for zoning to be accepted. There was popular will to stop the tenements that 19th century reformers like Jacob Riis so abhorred.[123] Indeed, leading supporters of the zoning plan came from Fifth Avenue merchants who were upset by the spread of garment factories in their midst—factories usually occupied by immigrant Jews. Other than a few builders and real estate

118. *Id.* at 56.

119. *Id.* at 72.

120. *Id.* at 75 (citing Edward M. Bassett, *A Survey of the Legal Status of a Specific City in Relation to City Planning*, PROC. FIFTH NAT'L CONF. ON CITY PLAN. 46, 57 (1913)).

121. *Id.* at 55.

122. Alfred Bettman, *The Constitutionality of Zoning*, 37 HARV. L. REV. 834, 845 (1924).

123. JACOB A. RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK (1890) (describes in lurid detail and criticizes both the tenements of New York City and the ethnic minorities who inhabited those slums); *see also How the Other Half Lives*, WIKIPEDIA, https://en.wikipedia.org/wiki/How_the_Other_Half_Lives (last visited Aug. 31, 2022).

interests, there was no political support for more tenement construction. That was especially true when helter-skelter construction of high-density, low-income housing combined with newly built tall office buildings might depress the value of existing neighborhoods and office buildings. Moreover, the future residents in these tenements were an inchoate political force that usually consisted of politically ineffectual and widely loathed immigrant populations. In terms of modern public choice theory, the interests of future residents of new not-yet-constructed housing and future office tenants were no match for the entrenched residents and owners who desperately wanted to maintain the status quo—a status quo that could be codified with a zoning code.

On top of that, some like Professor Revell have argued that a citywide zoning code, by separating single-family residential uses from the "strange mix of tenements, factories, offices and apartment buildings" found in Manhattan would encourage more homes built in the outlying boroughs, thus relieving pressure for even more density in Manhattan.[124]

The advocates of zoning also had some very recent favorable legal precedents they thought they could use. By this time, the Supreme Court upheld a ban on horse stables in residential areas of Little Rock and let stand a Los Angeles ordinance banning a brickyard (which involved much smoke) in a residential neighborhood. Both cases were decided under variations of a public nuisance theory. These cases built upon a much earlier Supreme Court decision upholding Kansas's ban on alcoholic beverages long before the national prohibition became a reality.[125] But the planners also knew that despite these precedents, they needed to be careful. In prior years, the same Court also struck down a safety regulation banning wooden laundries because the law was squarely aimed in a discriminatory fashion against the Chinese.[126] And a year before the laundry case, the Court found that cigar-making in tenements was not a serious health risk and could not be banned.[127]

---

124. Revell, *supra* note 117, at 57.

125. *See generally* Mugler v. Kansas, 123 U.S. 623 (1887).

126. *See generally* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

127. *See generally In re* Jacobs, 498 U.S. 1076 (1885). Cigar making in tenement homes was a substantial cottage industry in the late nineteenth century. The tobacco leaves smelled, and some neighbors complained. But, underlying this law was some fairly blatant discrimination against immigrants. For more on that, see BERNSTEIN, *supra* note 103; and RIIS, *supra* note

After the usual back and forth of political jockeying, the city adopted its new code in 1916. Unlike a height limitation here, or a specific ban on a noxious use there, this code regulated down to the block level what could or could not be done on the land: residential uses here, business uses there, and unrestricted uses elsewhere. With each use various height and setback, standards were imposed. As Professor Revell put it, "By carefully balancing incidental private losses against greater public benefits, the meticulous work of the planning bureaucracy—Bassett, Whitten, safety experts, fire marshals, physicians—ensured that a comprehensive ordinance was a proper exercise of the police power."[128] Or so they had hoped. As with any such code involving extensive line drawing, there were winners and losers. And wherever there are winners and losers, litigation ensues. But while the code survived local challenges, no case from New York City managed to reach the Supreme Court. That would take a bit longer.

The popularity of New York style ordinances soon spread across the nation like wildfire It made sense. While the severity of the tenement crisis was rarely as bad in the rest of the nation as it was in New York City, no town wanted those problems—or all those immigrants. This was an era of a new-found faith in the power of government to solve all manner of social and economic problems. As summarized by Professor Michael Allan Wolf, cities across the United States copied New York City and adopted their own zoning ordinances upon the convergence of four factors:

> (1) The shortcomings of traditional, common-law methods for regulating land use; (2) the growing influence of planning ideas and the planning profession in urban America; (3) the importation of zoning ideas from New York City and from the model act circulated by the U.S. Department of Commerce; and (4) the prevailing social and political ethos of the Progressive Era, during which great faith was placed in expert-based governmental solutions to social and economic problems.[129]

123, at 16 (describing the life of Bohemian cigar making home businesses as not "less healthy than other in-door workers").

128. Revell, *supra* note 117, at 95.

129. MICHAEL ALLAN WOLF, THE ZONING OF AMERICA, *EUCLID V. AMBLER* 17 (2008). In this detailed history of Euclid, its zoning ordinance and the legal challenge, Professor Wolf takes an overall sympathetic view towards zoning, though he does recognize its limitations and flaws.

To put it simply, the influence of the early progressive movement was gaining momentum. Above all, the progressives called for more judicial deference to legislative bodies when they relied on the police power to enact laws and regulations for the public good—even when those laws curtailed individual rights. As Justice McKenna put it in the Los Angeles brickyard case, "There must be progress, and if in its march private interests are in the way they must yield to the good of the community."[130] Such a sentiment would have been an anathema to most Supreme Court justices in earlier generations. But such an approach to the law in 1916 and beyond made it possible for cities across the nation to embrace zoning schemes that might have been inconceivable only a few decades earlier.

One city in particular is noteworthy: Euclid, Ohio. As described by the Supreme Court, the village of Euclid was a suburb of Cleveland with a population "between 5,000 and 10,000, and its area from twelve to fourteen square miles."[131] Although it lived in the shadow of industrial Cleveland, it was not beset with the degree of urban ills that were found in New York City, or even in Cleveland. But as was the case in a lot of suburbs, there was fear that the village would be subsumed by its larger neighbor, changing its character forever. Overall, there was little that was either special or unique about Euclid. But as unremarkable as Euclid may have been as a suburb, it is where zoning met its greatest test before the Supreme Court.

As described by the Court,

> On November 13, 1922, an ordinance was adopted by the Village Council, establishing a comprehensive zoning plan for regulating and restricting the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc.[132]

---

130. Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

131. Euclid v. Ambler Realty Co., 272 U.S. 365, 379 (1926). According to the United States census, the population in 1920 was only 3,363. Despite attempts to zone out progress, it steadily rose to 71,552 in 1970. From that time, it has steadily declined to under 50,000. *See Historical Population, Euclid, OH*, HOMEAREA.COM, https://www.homearea.com/place/euclid-city-ohio/3925704/#historical_population (last visited Aug. 31, 2022). According to the trial court, "If fully built up as a city, it will accommodate a population of several hundred thousand, but its present population is only a few thousand." Ambler Realty Co. v. Euclid, 297 F. 307, 309 (N.D. Ohio 1924).

132. *Euclid*, 272 U.S. at 379–80.

Over time, such comprehensive planning has become known as "Euclidean zoning," named not after the city where it was invented, but after the town where it survived its first major constitutional challenge. Such zoning is characterized by arbitrary line drawing that attempts to confine certain uses to defined geographic areas. The lines are usually drafted to accommodate political pressure and can lack any measure of economic, demographic or market reality. When local politicians face pressure from voters to limit or stop growth, they task the professional planners to draw neat lines on large colored maps. One zone may allow light industrial. Another may allow residential at one home per quarter acre, while another zone may limit homes to one per five, ten, forty, or even larger acre lots. On top of these zones, there may be protective overlays for riparian zones, animal habitat, public recreation corridors and so on. Plans will sometimes encourage jobs, especially high-tech clean jobs, but not the housing needed to accommodate the workers. They can commute in from elsewhere, adding to a region's job-residence imbalance as seen most starkly today in places like California's Silicon Valley.

Of course, purveyors of contemporary zoning declare that today, zoning is different because it does not as rigidly segregate land uses in order to prevent apartments or commerce from invading residential areas. They often call it "smart growth" because there are more mixed-use zones in some modern plans, where apartments above and retail stores below are allowed to coexist, just like in the old days. There is also more emphasis on "walkable" developments, where people are supposed to be able to walk to their jobs and shopping or at least to a bus or transit stop. How many people will actually walk or bike to do their grocery shopping or commuting, especially in bad weather, is an open question. In any event, the impetus to limit new housing growth, especially multifamily affordable housing, remains strong. The Not-in-My-Backyard anti-growth movement, also known as "NIMBYism," has not been tempered by modern zoning codes, no matter how smart they purport to be.

Moreover, zoning advocates today have adopted the mantle of a new moral imperative that is greater than simply preserving existing residential neighborhoods from change. Today they lay claim to an ethic that will save the planet. Zoning now seeks to preserve environmental amenities such as wetlands, habitat, and open space. It can reduce traffic impacts—including those related to climate change. Zoning can be used to keep agricultural lands in agriculture

as well as preserving the value of residential neighborhoods. But what these noble goals manage to do in practice is often little different from what the old-style zoning laws tried to do explicitly: keep the poor people out of the neighborhoods of those people agitating for zoning laws. But to better understand what zoning is today, it is useful to understand what happened in Euclid.

In the town of Euclid, the idea for a zoning plan to emulate New York City's arose out of concern that Cleveland's industrialization was creeping towards Euclid.[133] Some, like Ambler Realty, fully embraced that prospect and bought property in anticipation, hoping to capitalize. Others who already owned less intensely developed properties, wanted to stop the process in its tracks for fear that Euclid's semi-developed semi-rural charm would be lost, and that their property values would be lowered.

One of the leading advocates for zoning was a Cincinnati attorney named Alfred Bettman, who was a member of a variety of state and national associations dedicated to advocacy of modern planning. When questioned about the constitutionality of such schemes, he wrote,

> A comprehensive city plan, based on a thorough, expert study and upon the promotion of the health, safety, and comfort of the whole community, will surely sooner or later—and probably sooner—be upheld by the [S]upreme [C]ourt of the United States as a modern form of the regulation of the use of private property for the promotion of general public safety, health, comfort, and welfare; especially as it can be demonstrated, if the ordinance is based upon a thorough study of the situation, that the effect of a city planning ordinance will tend to be toward the stabilizing of values, rather than destroying or diminishing values.[134]

This was the template followed in the city of Euclid. After much study and some debate, it adopted its own comprehensive zoning plan on November 13, 1922. The proponents argued that zoning was needed to stop the march of industry, that the rural character of the town must be preserved, and that the water supply was inadequate to support industry or multifamily housing. During the public debate on the ordinance, there was strenuous opposition from William

133. WOLF, *supra* note 129.
134. *Id.* at 26.

Ambler, whose family owned the sixty-eight acres that he believed would be dramatically reduced in value by the ordinance. Neither the opposition nor the supporters of the ordinance were overtly racially motivated; there were no merchants clamoring to stop Jewish sweatshops as in New York City, and there was no outright zoning by race as in Baltimore and Louisville. But what was not perhaps well understood at the time was that the ability to restrict apartments in favor of sprawling residential neighborhoods would in time contribute to the forces that confined minority populations to urban ghettos. Apparently oblivious to those concerns, and despite the opposition from the real estate industry, the plan was unanimously adopted six to nothing.[135]

The landowners were determined to fight back. The prospect of filing a lawsuit in state court was unpromising. The state's trial courts had been upholding other Ohio towns' zoning limits on apartment buildings and the like. One trial court described in particular the "evils of apartment houses, the rapaciousness of landlords, and the health dangers posed by overpopulation."[136] In a passage that turned out be prescient to the Supreme Court's ultimate diatribe against apartment buildings in *Euclid*, the trial court here found, "The number of apartment houses, terraces and tenement blocks in Cleveland, Lakewood and East Cleveland, and the rapidity with which their construction is increasing, is appalling. They may be numbered by the thousand."[137]

In Euclid, fifteen landowners joined forces and hired Newton Baker, an extraordinarily successful and expensive attorney who at one time had served as President Wilson's Secretary of War. But he was in it for more than the money. He also had a strong personal aversion to zoning based on both his respect for private property and his representation of a Jewish-run orphanage that was prohibited from opening a facility due to a racially motivated enforcement of a local zoning law. As Baker once wrote, the town's "so-called zoning committee" denied the project "because they did not think it would be good for the village to have a large number of Jewish children in

135. *Id.* at 34.

136. *Id.* at 46 (describing trial court opinion in Morris v. East Cleveland, 31 Ohio Dec. 98 (1919)).

137. *Id.* at 47 (quoting Morris v. East Cleveland, 31 Ohio Dec. 98, 115 (Oct. 1, 1919)).

it."[138] That was not an isolated incident. As Professor Wolf wrote, "[T]here was an undercurrent of anti-Semitism in several of the struggles to implement and defend zoning in Metropolitan Cleveland."[139]

Recognizing the perils of filing another suit in state court, Baker took a new tack: In May of 1923, he filed in federal court. Then, as now, landowner attorneys often seek to vindicate their rights in federal as opposed to state court. That is because they believe they are less likely to be "hometowned" by local parochial interests. Local state court judges are often dialed into the local political establishment and are often loath to rule against their friends. Moreover, they face reelection challenges, and the force of NIMBYism can be a powerful motivator in the electorate.

Filing a lawsuit of this nature in federal court was a bit unusual as evidenced by the series of lawsuits across the nation that had already been filed in state courts. That made sense. Many attorneys then, as now, are uncomfortable with the more formal nature of federal court litigation and prefer the venue they know: state courts. But Baker probably realized federal court was his best shot, and one that could very well land before the U.S. Supreme Court.

At that time, to get into federal court, Baker had to allege that Ambler Realty, the landowner chosen to lead the charge, had suffered over $3,000 in damages, and that the zoning law violated the federal constitution. But Ambler was not seeking damages—it was seeking to have the law declared unconstitutional so it could not be enforced. There would be no factual arguments over damages. Because the challenge depended on legal issues only, the case could be tried directly before a judge without a jury.

Euclid's first response was to alter the law so its financial impact on Ambler Realty was diminished to less than $3,000—to cause it to lose jurisdiction in federal court. James Metzenbaum took up the defense for the town and moved to dismiss the case, arguing that the impact on the property owner was not all that significant. Baker had a stroke of luck, however. The federal judge assigned to the case was D.C. Westenhaver who had been a mentor to Baker and his former law partner.[140] The case was not dismissed.[141]

---

138. *Id.* at 83.
139. *Id.* at 84.
140. *Id.* at 49.
141. *Id.* at 51.

Ambler Realty ultimately argued that the facts mattered less than the unconstitutional nature of the ordinance while counsel for the town argued the facts—and that they proved Ambler was not much hurt by the law. The town also argued that Ambler was better off because zoning helps everyone by creating a better community.[142]

Judge Westenhaver's ruling, which came down on January 14, 1924, was not based on the precise amount of harm to the property owners. He brushed that dispute off, saying "there is no substantial denial that this damage is not only in excess of the jurisdictional amount [of $3,000] but is substantial."[143]

Judge Westenhaver found the ordinance to be facially unconstitutional.[144] It was a remarkable decision. The core of the ruling was the judge's statement:

> Nor, in my opinion, can it be doubted that the ordinance is void because its provisions are in violation of . . . [the] Constitution of Ohio . . . of [S]ection 1 of the Fourteenth Amendment to the Constitution of the United States, which provides, "Nor shall any state deprive any person of life, liberty, or property, without due process of law."[145]

Westenhaver began his analysis with an examination of prior building codes, land use laws, and rent regulations that had been previously upheld, finding that some (such as the rent regulations) were only temporary and none of them went as far as the Euclid ordinance. He next turned to decisions where laws had been overturned, in particular, *Pennsylvania Coal v. Mahon*, one of the first modern regulatory takings cases.[146] In that decision, the first twentieth-century case invoking the doctrine of regulatory takings, the Court struck down a Pennsylvania law that prevented a mining company from mining its coal.[147]

Next, Judge Westenhaver turned his attention to *Buchanan v. Warley*. In a passage that is a stunning reflection of the prejudice of the times, he wrote:

---

142. *Id.* at 48–52.
143. Ambler Realty Co. v. Euclid, 297 F. 307, 308 (N.D. Ohio 1924).
144. *Id.* at 310.
145. *Id.*
146. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).
147. *Id.*

> Compare . . . *Buchanan v. Warley* . . . in which an ordinance of the city of Louisville, held by the state Supreme Court to be valid and within the legislative power delegated to the city, districting and restricting residential blocks so that the white and colored races should be segregated, was held to be a violation of the Fourteenth Amendment and void. It seems to me that no candid mind can deny that more and stronger reasons exist, having a real and substantial relation to the public peace, supporting such an ordinance than can be urged under any aspect of the police power to support the present ordinance as applied to plaintiff's property. And no gift of second sight is required to foresee that if this Kentucky statute had been sustained, its provisions would have spread from city to city throughout the length and breadth of the land. And it is equally apparent that the 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.*[148]

In other words, according to Westenhaver, in *Buchanan* the Court struck down a law that was so popular that laws like it would have spread across the land, not only to segregate by race, but also to keep immigrants out of nice white neighborhoods as well. The judge thought that if a popular law such as Louisville's racial zoning law with its supposedly worthy goal of segregating property by race could not be upheld, then neither could Euclid's with its less important economic segregation goals. Somewhat ironically, as will be shown, when the Supreme Court got a hold of the *Euclid* case on appeal, it would turn back the clock—justifying Euclid's law with an appeal to racial and ethnic prejudice.

The *Buchanan* Court reached the result that it did based on its recognition of the importance of the affected property interests and because no relevant exercise of the police power could justify the harm to the property the law would cause. Likewise, Judge Westenhaver, after citing extensively from *Buchanan's* discussion of property, concluded,

---

148. *Ambler Realty*, 297 F. at 312–13 (emphasis added).

> A law or ordinance passed under the guise of the police power which invades private property as above defined can be sustained only when it has a real and substantial relation to the maintenance and preservation of the public peace, public order, public morals, or public safety. The courts never hesitate to look through the false pretense to the substance.[149]

As for the actual purpose of the Euclid law, the judge spelled it out in terms of class segregation. In a passage that resonates with very recent criticisms of zoning laws, the judge saw what Euclid was trying to do in "furthering class tendencies":

> The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service.[150]

With hindsight, we understand today that it is zoning that has helped confine the poor, minorities, and immigrants to often overcrowded inner cities. As Westenhaver seemed to understand, zoning would divide classes as never before. What not even he understood, and certainly not any of the proponents of zoning realized, was that their creation would lead to the present housing crisis with its obscenely inflated prices and exceedingly limited supply of affordable homes. Indeed, in the above paragraph lay the seeds of future challenges to restrictive land use laws. As Professor Wolf wrote, "Today, long after its author's passing, Westenhaver's one, key paragraph could serve as a primer for law students interested in finding successful theories to be employed by property owners who choose to attack government regulation of land."[151]

---

149. *Id.* at 314.
150. *Id.* at 316.
151. WOLF, *supra* note 129, at 56.

The judge wrapped it all up, stating,

> My conclusion is that the ordinance involved, as applied to plaintiff's property, is unconstitutional and void; that it takes plaintiff's property, if not for private, at least for public, use, without just compensation; that it is in no just sense a reasonable or legitimate exercise of police power.[152]

The town, however, may have been defeated but it had not yet lost. It would appeal. In 1924, any federal constitutional case could be appealed directly to the Supreme Court.[153] The rules did not allow the Court to turn down cases that were properly filed, unlike today when the Court refuses to hear from ninety-six to almost ninety-nine percent of the petitions brought to its attention.[154] The history of the town's appeal, however, was messy, convoluted and eyebrow raising by today's standards.

The first salvo in the appeal came when James Metzenbaum filed what he called a "short and concise" 140-page brief for the town.[155] It focused on the facts and several key legal arguments. After arguing that the facts of the case supported the town because of the minimal impact of the zoning on Ambler Realty, he argued for an expansive and "very wide" understanding of the police power.[156] This was a key element of his argument: he did not think that the existing understanding of the police power was adequate to justify zoning and that the concept of the police power must be expanded in light of modern conditions. As he put it, the towns and cities adopting these ordinances "have felt that the Police Power necessarily must keep step with and

---

152. *Ambler Realty*, 297 F. at 217.

153. *See Certiorari*, WIKIPEDIA, https://en.wikipedia.org/wiki/Certiorari (last visited Aug. 31, 2022) (discussing Judiciary Act of 1925).

154. Statistics vary. *Compare* Ralph Mayrell & John Elwood, *The Statistics of Relists over the Past Five Terms: The More Things Change, the More They Stay the Same*, SCOTUSBLOG (Jan. 4, 2022), https://www.scotusblog.com/2022/01/the-statistics-of-relists-over-the-past-five-terms-the-more-things-change-the-more-they-stay-the-same/#:~:text=Relists%20and%20cert%20grants%3A%20Together%20forever&text=For%20the%20court's%202016%20to,were%20relisted%20at%20least%20once (last visited Aug. 31, 2022) (1% of all petitions granted in the past five years), *with Success Rate of a Petition for Writ of Certiorari to the Supreme Court*, SUPREME COURT PRESS, https://supremecourtpress.com/chance_of_success.html (last visited Aug. 31, 2022) (from 2.1 to 4.2% from 2014 to 2017).

155. WOLF, *supra* note 129, at 58.

156. *Euclid*, 272 U.S. at 367 (arguments of James Metzenbaum for appellants Ambler Realty).

must keep pace with the new and daily problems presented by the complexities of modern civilization, transportation and conditions."[157]

The police power of a state refers to its authority to protect the health, safety, and welfare of its citizens. The power does not have to be spelled out in detail in a state's constitution because it is an inherent power that makes the sovereign a sovereign. It includes much more than maintaining a police force to stop crime. It may also include a state's power to set working conditions, to provide for the welfare of its poor and elderly, and to regulate the professions. What was unclear at the beginning of the twentieth century is whether the police power included the ability to zone land uses in advance. (It should also be noted that because it is limited to only those powers expressly set out in the U.S. Constitution, the federal government does not have the police power—its authority to regulate must be found within those powers specifically enumerated—such as the power to regulate interstate commerce that is spelled out in the Commerce Clause.)

Under a section he labeled the "Philosophy of Zoning," Metzenbaum arguing for the City sought to distinguish the sort of aesthetic regulations that courts had struck down from the comprehensive type of zoning pioneered in New York City and followed in Euclid.[158] Next was a call for courts to defer to the judgments of legislative bodies, meaning that since the town concluded that the zoning law here was necessary and within its police power, the courts should not second-guess such decision-making. Metzenbaum also pointed to all the state court cases that had upheld local zoning and other land use laws over the previous several years.[159]

As a backup argument, he argued that because Ambler Realty had not even applied for a building permit it could not prove any injury and had no right to file a complaint in federal court.

Lastly, Metzenbaum channeling the sentiment against multifamily housing, and those who occupy such homes, quoting from Herbert Hoover before the National Association of Real Estate Boards where the future president exclaimed, "Nothing is worse than an increased tenantry and landlordism in this country."[160] To stop it,

157. WOLF, *supra* note 129, at 60.

158. *Id.* at 59.

159. *Euclid*, 272 U.S. at 369–70 (arguments of James Metzenbaum for appellants Ambler Realty).

160. WOLF, *supra* note 129, at 62.

"The municipalities through the enactment of zoning laws should cooperate."[161] But this was only a hint.

Years later, Metzenbaum elaborated on the importance of the arguments he made in the case, suggesting that at stake was whether "the Constitution was meant so to hamper and restrict the American people, or was intended to protect them in their right to make their cites, large and small, livable and tenantable for the present as well as for the coming generations."[162]

Newton Baker with his partner Robert Morgan responded that industrial development was highly suitable for Ambler Realty's property and that the zoning "erects a dam to hold back the flood of industrial development" which would be contrary to "the operation of natural economic laws" and thus "destroys value without compensation to the owners."[163]

Moreover, the zoning regulation here was not to prevent any nuisance, but instead was focused on "mere questions of taste or preference." Finally, Baker concluded by saying,

> That our cities should be made beautiful and orderly is, of course, in the highest degree desirable, but it is even more important that our people should remain free. Their freedom depends upon the preservation of their constitutional immunities and privileges against the desire of others to control them, no matter how generous the motive or well intended the control which it is sought to impose.[164]

Shortly after the briefs were filed, the Court held oral arguments on January 27, 1926, before eight of the nine justices. Justice Sutherland was off vacationing that week in the South. Baker was a brilliant and polished advocate. Metzenbaum was not. And he knew it. Although there is no transcript of the argument, we know that Metzenbaum was disturbed enough by the visual picture that Baker painted of the damage the ordinance caused, that he decided

---

161. *Id.*

162. Garrett Power, *Advocates at Cross Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 2 J. SUP. CT. HIST. 79, 83–84 (1997) (quoting JAMES METZENBAUM, 1 THE LAW OF ZONING, 57 (2d ed. 1955)).

163. For summaries of the briefs, see *Classic USSC Case on Public Health Rationale for Zoning—Village of Euclid, Ohio v. Ambler Realty Co.*, CLIMATE CHANGE & PUB. HEALTH LAW SITE, https://biotech.law.lsu.edu/cases/zoning/euclid.htm.

164. *Id.*

that he must file an additional reply brief. On his way home from Washington, his train was caught in a snowstorm, preventing him from returning to his office in time to send a telegram to the Court asking for permission to file a new brief. As Metzenbaum told the story years later, he handwrote the request on the train. And then,

> As the train slowed down along a siding where a great string of freight cars were being shoveled out of the snow, I opened the door of the car in which I was riding, leaned out from the car platform and shouted to one of the men who was engaged in the work of shoveling; wrapping the money around the telegram and tossing it to him. I saw it light on a great bank of snow. This was done with the trust that the man would understand what was wanted.[165]

Apparently, it worked. Chief Justice Taft gave permission to both parties to file additional briefs. This also gave time for both sides to solicit amicus, or "friend of the court," briefs.

Baker solicited and received amicus support from George Simpson on behalf of several Minnesota corporations that were concerned over the impact that zoning could have on their ability to grow. Simpson emphasized that zoning was fraught with corruption as local politicians, noted for their "incompetency and dishonesty," tended to favor with cronies by making their land the most profitable. On top of that, the very notion of zoning was alien to the "*Anglo-Saxon* conception of the *right of the owner* to *own, use, and enjoy* his or her property." Indeed, Simpson argued, it was an attempt "to import into this country the European view that government is one of men and not of law."[166]

Before the first oral argument, Alfred Bettman, the chief advocate of zoning from Cleveland, attempted to file a friend-of-the-court brief on behalf of the National Conference on City Planning, the National Housing Association, and other pro-planning groups from Ohio and Massachusetts. However, he made a blunder of the sort only made by novice attorneys: He missed the filing deadline by two weeks. But, with the new briefing underway, he had another opportunity to file a brief. His brief, which diverged significantly from the strategy taken by Metzenbaum, is widely considered to have been crucial

165. WOLF, *supra* note 129, at 70.
166. *Id.* at 85.

to the ultimate outcome. The differences revolved around the government's inherent ability to regulate to protect public health and safety—the so-called "police power."[167]

Where it was widely recognized that the police power could be used by government to abate nuisances, there was concern that zoning went well beyond merely preventing nuisance use of private property. To get zoning within the police power, there were two choices. First, the police power itself must be expanded to go beyond merely preventing nuisances. Alternatively, the understanding of how to contain a nuisance must be modernized.

Metzenbaum argued the former. In a section of the brief he titled "The Philosophy of Zoning," he told the Court that the conception of the police power had to be expanded in order to encompass zoning.[168] If the police power were expanded to include improving the general welfare, then zoning could be within that power. This was an implicit admission that zoning went mere beyond the traditional abatement of nuisances. The danger in that argument was that an otherwise conservative court might be reluctant to invent a whole new police power for the sake of Euclid's desire to keep industrial uses out of Euclid in favor of maximizing residential areas.

Bettman, however, argued that zoning was well within the existing conception of the police power. By crafting a comprehensive plan written by experts, the zoning plan fit together like the pieces of a jigsaw puzzle all designed to best prevent the use of property from becoming a nuisance. It was just a modern way of keeping nuisances from happening. As Professor Power notes, the members of the Court were upper class and acutely aware of the threat posed by the masses:

> Zoning regulations . . . had a social dimension. They were well-conceived to put everything, and everybody in the appropriate place. Smokestacks, slaughterhouses, and stables were placed on the other side of the railroad tracks, and apartment flats and row houses that accommodated second class people (including colored people and foreigners) were not permitted in such first-class neighborhoods.[169]

---

167. The Bettman amicus brief is reproduced in Alfred Bettman, Village of Euclid v. Ambler*: The Bettman Amicus Brief*, 58 PLAN. & ENV'L L. 3, 3 (2006).

168. WOLF, *supra* note 129, at 59–60.

169. Power, *supra* note 162, at 85.

But there was a danger with Bettman's argument as well. A legal regime designed to exclude minorities directly or even indirectly might sit uneasy with a Court that had outlawed racial zoning in *Buchanan* only a decade earlier. But if the racist motivations could be buried, albeit shallowly, with euphemisms and the patina of expert analysis, then the scheme was just another way of stopping traditional nuisances. Moreover, the *Buchanan* Court's *primary* rationale was the adverse impact on private property rights, not its impact on African Americans.

Bettman was careful to distinguish the zoning from mere aesthetic regulations, a key criticism made by Baker and Morgan for Ambler Realty. Zoning was for health and safety:

> When we put the furnace in the cellar rather than the living room, we are not actuated so much by the dictates of good taste or aesthetic standards, as by the conviction that the living room will be a healthier place in which to live and the house a more generally healthful place.[170]

Likewise, for "the man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet."[171]

So with Metzenbaum arguing that the impact on Ambler Realty was manageable, and with Bettman claiming that this was just a modern exercise of the traditional nuisance prevention police power, the pair—although not in agreement on the rationale—managed to cobble together a powerful justification for zoning.

The second oral argument was held on October 12th, 1926. Over the years there has been speculation as to why the Court decided to hold a second oral argument. The most likely reason is that with only eight Justices at the January argument, there was no consensus for the result. A four-to-four tie vote would mean the lower court's opinion would stand without setting any national precedent. Others say the reargument was engineered by the absent Justice Sutherland who was truly conflicted. One story by a former clerk is that Justice Sutherland had originally decided to rule against Euclid. It was only after he was talked out of this by Justice Stone, that he switched sides

170. *See* WOLF, *supra* note 129, at 88.
171. *Id.*

and voted to uphold the ordinance in the opinion that he wrote for the Court. Debate continues to this day whether any of this is true.[172]

Oral argument for Metzenbaum was according to one witness, "quite a disaster," with Metzenbaum spending an inordinate time attacking trial judge Westenhaver.[173] Baker, on the other hand, was described as being "magnificent and . . . extraordinary."[174] But there is an old adage among attorneys: cases can only be lost at oral argument, not won. Apparently, the Court was inclined to uphold the zoning scheme, and Metzenbaum's poor showing was not enough to reverse course.

On November 22, 1926, the Court issued its long-awaited opinion.[175] It was a resounding victory for Metzenbaum, Bettman, Euclid, and exclusionary zoning everywhere. Justice Sutherland began the decision with a detailed description of the zoning scheme, describing the various districts and listing what could be built where—including a detailed description of where apartment houses were banned.

The Court then proceeded by explaining that while the erection of a particular building might be perfectly innocuous in one location, it could be a nuisance in another. Taking up Bettman's "furnace in the cellar rather than the living room" analogy, the Court provided a more loaded analogy:

> Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.[176]

To make the meaning of this analogy plain, Justice Sutherland added later in the opinion a passage that reflects a patrician antipathy towards apartments and presumably those who inhabit them.

---

172. *See* WOLF, *supra* note 129, at 76–78.
173. *See id.* at 90.
174. *Id.*
175. *Euclid*, 272 U.S. at 365.
176. *Id.* at 388.

While more refined than the language used by Jacob Riis to describe the tenements, the meaning is the same:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.[177]

Clearly, Justice Sutherland would not have welcomed affordable housing in *his* neighborhood. The lawfulness of zoning was now the law of the land. The ramifications of the Court's decision reached far beyond this ordinary suburb. The language used by the Supreme Court in affirming Euclid's zoning ordinance turned out to be a gateway drug to bigoted exclusionary zoning laws far and wide for decades to come. Though this was not bigotry with an iron fist, it was a more subtle bigotry that wore a velvet glove while writing and defending the pages of the nation's zoning codes. What started in Baltimore, and died in Louisville, would be reincarnated in Euclid.

When it comes to the transfer of the control over established rights in property and wealth, nothing has come close to the revolution engendered by the widespread adoption of zoning and land use

177. *Id.* at 394–95.

controls in the United States. Once, land use decisions were exclusively made by owners of the land, subject mostly only to the proscriptions against creating common-law nuisances. Today, these decisions rest in myriad boards, commissions, and regulatory agencies at the neighborhood, local, state, and federal level, all of whom have one or more hands in the decision-making process. This curtailment of an individual's liberty to choose how to use her property is the functional equivalent of the impressment of various easements and negative covenants on the property. Thus, while neighbors could once have voluntarily negotiated the terms of neighboring land uses through easements containing, for example, height or density restrictions, in the new zoned America these same restrictions are imposed on a broader scale by political bodies.

C. Legal Challenges to Exclusionary Zoning

Starting in the late 1960s, a few local Black residents of Mt. Laurel Township, some of whom were descendants of freed slaves from the Revolutionary War era, formed a community group to address the growing unaffordability of housing for the town's poor.[178] Too many of the Black residents were living in deplorable housing. With suburbanization, many more realized that their children would never be able to afford to live in their centuries-old community. They needed new, sanitary, and affordable housing. Led by Ethel R. Lawrence, the group obtained a federal grant and sought to build thirty-six affordable garden apartments on thirty-two acres.[179] To accomplish this, the residents needed to rezone the thirty-two acres because the town prohibited multifamily apartments. While they knew the increasingly prosperous suburbanizing town was concerned about its tax base, they thought they had a chance. They had submitted their plans to the town and after several revisions were awaiting a response. It was not what they had hoped for.

Sixty members of the African Methodist Episcopal Church gathered in Jacob's Chapel on a hot October Sunday morning in 1970 to hear the verdict from a local committeeman. He was blunt and told

178. The story of the attempt by the residents to build affordable housing is retold in DAVID L. KIRP ET AL., *OUR TOWN, RACE, HOUSING AND THE SOUL OF SUBURBIA* (Rutgers Univ. Press 1997).

179. *Id.*

his audience that "the township council would never approve the community group's request."[180] The town did not want more poor people in their town, especially from nearby communities. Just to make sure they heard, he explained—to families who had lived in the town for well over two centuries—"If you people can't afford to live in our town, then you'll just have to leave."[181] Those words turned Ethel Lawrence and the sponsors of the modest housing plan into activists who would embark on a fifteen-year legal battle that changed the course of housing in New Jersey and would influence jurisdictions across the nation.

The NAACP decided it had to file a test case because the single-family zoning excluded the poor, the working class and, concomitantly, minorities. But the NAACP realized that federal court precedents were not on their side. So, hoping that the New Jersey Supreme Court might be more politically sympathetic, the lawyers filed in state court and based their arguments on the New Jersey state constitution. The trial court agreed with the plaintiffs and held that the zoning was unlawfully exclusionary.[182] The township filed an appeal that changed the state's history.

The New Jersey Supreme Court began it decision with a statement that belongs in the "more things change the more they stay the same" file:

> There is not the slightest doubt that New Jersey has been, and continues to be, faced with a desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families. The situation was characterized as a 'crisis' and fully explored and documented by Governor Cahill in two special messages to the Legislature—A Blueprint for Housing in New Jersey (1970) and New Horizons in Housing (1972).[183]

To the court, there was no mystery why there was crisis: "[T]he effect of Mount Laurel's land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources."[184] Giving the township officials the benefit of the doubt, it assumed there was no proof

180. *Id.* at 2.
181. *Id.*
182. S. Burlington Cnty. NAACP v. Mt. Laurel, 290 A. 2d 465, 473 (N.J. Super. Ct. 1972).
183. S. Burlington Cnty. NAACP v. Mt. Laurel, 336 A. 2d 713, 716–17 (1975).
184. *Mt. Laurel*, 336 A. 2d at 717.

of any unlawful discriminatory intent: "In this connection, we accept the representation of the municipality's counsel at oral argument that the regulatory scheme was not adopted with any desire or intent to exclude prospective residents on the obviously illegal bases of race, origin or believed social incompatibility."[185]

In response to the lawsuit, the township protested that even if had been practicing economic (and non-racial) discrimination, it had the right to do so to protect the fiscal interests of the town. Put bluntly, it wanted newcomers only if they could pay a lot of taxes and would not need much in the way of services. In other words, the welcome mat was out for the rich and upper middle class. Others need not apply.

As in *Euclid*, the township argued it had broad authority under the police power to enact regulations designed to promote the "public health, safety morals or the welfare" of the town in any way it saw fit and it was not for a court to second-guess a town's police decision.[186] The New Jersey Supreme Court, however, found that there must be a change in such a deferential judicial approach, "as mandated by change in the world around us."[187] In others, we've learned something since *Euclid*—that zoning can create a housing crisis and then make it worse.

And this was not just a circumstance unique to this particular suburb because the same conditions could be found in "any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas."[188] As the court continued,

> This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. Almost every one acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing.[189]

185. *Id.*
186. *Id.* at 725.
187. *Id.* at 726.
188. *Id.* at 717.
189. *Id.* at 723.

Accepting at face value the town's protestations that its motives were pure, and even if everyone else was acting in the same manner, the court held the zoning needed to be made more inclusive:

> We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.[190]

The court based its decision striking down the exclusionary zoning in Mt. Laurel on the state's General Welfare Clause,[191] finding that such zoning was incompatible with the general welfare. While the result may have been just, it was a highly creative interpretation of the constitution's text, one easily branded as judicial activism. There was no basis in precedent or in the history of the state's constitution to support the use of the General Welfare Clause to strike down exclusionary zoning. Perhaps a better strategy would have been to go back to the property rights theory used to strike down the race-based zoning in *Buchanan*. Recall, that the Court there did not strike down the zoning simply because it discriminated, it struck it down because of its impact on the rights of property owners.[192] But in the 1970s, judicial respect for property rights had long been dormant. The NAACP did not take the *Buchanan* path and the New Jersey Supreme Court had to find some other way to reach the result that it did.

The court may have thought it was compelled to act boldly simply because the legislature had failed to act at all. It may have thought that its ruling would cause the township and similar municipalities to remove regulatory barriers to affordable housing. It may have thought its ruling would pave the way for the Mt. Laurel activists and others to build more affordable housing. It thought wrong.

---

190. *Id.* at 724.

191. The decision referred to the advancement of the "general welfare" over a dozen times throughout the opinion. *See generally* S. Burlington Cnty. NAACP v. Mt. Laurel, 336 A. 2d 713 (1975).

192. *Buchanan*, 245 U.S. at 82 (objecting to "this attempt to prevent the alienation of property").

After losing, the township adopted the Southern states' strategy towards the U.S. Supreme Court's civil rights rulings: compliance "with all deliberate speed," meaning no speed at all.[193] After almost a decade of slow-walking reforms, Mt. Laurel Township ended up back at the state supreme court. The town had made virtually no progress. In a 125-page follow-up opinion, the court wrote:

> After all this time . . . Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.[194]

This was more than a mere reduction of regulatory restraints; it was the imposition of an affirmative duty to do something proactive. The court established a procedure that was essentially "build first, ask questions later." Recognizing this was an extraordinary remedy, it noted that it meant to put an end to the municipal stalling: "Municipalities will not be able to appeal a trial court's determination that its ordinance is invalid, wait several years for adjudication of that appeal, and then, if unsuccessful, adopt another inadequate ordinance followed by more litigation and subsequent appeals."[195]

If the original *Mt. Laurel* decision was activist, this one was turbocharged activism. The court simply shrugged off any concerns over being too activist, "here being a constitutional obligation, we are not willing to allow it to be disregarded and rendered meaningless by declaring that we are powerless to apply any remedies other than those conventionally used."[196]

Despite this rebuke, the town's mayor Andrew August was somewhat contemptuous of the court's ruling, telling the *New York*

193. It was, of course, in Brown v. Board of Education, 349 U.S. 294, 301 (1955) that the Court ordered desegregation to occur with "all deliberate speed." That ambiguous phrasing led to a sort of deliberate noncompliance in many southern states. Thus, in Griffin v. County School Board, 377 U.S. 218, 234 (1964) the Court was forced to declare, "The time for mere 'deliberate speed' has run out." So too, in Mt. Laurel. Because the state court did not set any deadlines, Mt. Laurel did not feel compelled to move with any sense of alacrity.

194. S. Burlington Cnty. NAACP v. Mt. Laurel, 456 A. 3d 390, 410 (N.J. 1983).

195. *Id.* at 458.

196. *Id.* at 456.

Times, "That's pretty harsh. Nobody ever sat down and said we should be exclusionary to any group of people. We'd just like to see our town develop in a nice way. We should have the right to run our own town."[197] But the mayor spoke in coded contradictions: to be a "nice" town meant exclusion of the poor. He was indignant that this activist court was meddling in the town's traditional affairs and right to zone however it pleased. None of this would have been necessary if towns like Mt. Laurel had resisted the lure of exclusionary zoning, or if the U.S. Supreme Court had itself resisted blessing schemes that stifled the right of property owners to build to meet demand, rather than conform to a town's prejudices.

The court's two rulings were hardly the end of the matter. While the legislature adopted a fair housing law to implement the *Mt. Laurel* holdings, opponents to growth for environmental and other reasons have steadfastly opposed affordable housing developments. They claim it is not about excluding poor people, but something else. It is always something else. Even as late as 2017, the state Supreme Court was still at it, decrying the failure of the state to implement "fair-share" regulations that would direct municipalities how much affordable housing they must have.[198] In this decision, the Court concluded "that municipalities have a constitutional obligation to use their zoning power in a manner that creates a 'realistic opportunity for the construction of [their] fair share' of the region's low- and moderate-income housing."[199] Because of the failure by the state and municipalities to implement a meaningful fair share housing program, the court disbanded the derelict state agency that was supposed to oversee the fair share law. Instead, the court put the whole mess into the hands of the trial courts to resolve, municipality by municipality. The judges would now be responsible for upzoning and implementing affordable housing mandates. This is judicial activism at warp speed.

---

197. Robert Hanley, *After 7 Years, Town Remains Under Fire for Its Zoning Code*, N.Y. TIMES, Jan. 22, 1983, at 31 (*available at* https://timesmachine.nytimes.com/timesmachine/1983/01/22 /issue.html).

198. *See In re* N.J.A.C. 5:96 & 5:97, 110 A.3d 31 (N.J. 2015); *In Re* Declaratory Judgment Actions Filed by Various Municipalities, 152 A. 3d 915 (N.J. 2017).

199. *In re* Declaratory Judgment Actions Filed by Various Municipalities, 152 A.3d 915, 918 (2017).

D. Zoning and Housing Costs

In 1982, Ronald Reagan established a Presidential Commission on Housing. The Commission's report suggested that

> [to] protect property rights and to increase the production of housing and lower its cost, all State and local legislatures should enact legislation providing that no zoning regulations denying or limiting the development of housing should be deemed valid unless their existence or adoption is necessary to achieve a vital and pressing governmental interest. In litigation, the governmental body seeking to maintain or impose the regulation should bear the burden for proving it complies with the foregoing standard.[200]

The report continued with a series of suggestions, such as preventing restrictions on converting farmland to housing, growth controls, minimum lot sizes, density restrictions, and so on if the restrictions would limit housing production.[201] Not much changed, however, in the ensuing decades.

In 1991, President George H.W. Bush commissioned a commission to study America's housing crisis. It began by noting a depressing lack of progress:

> In the past 24 years, no fewer than 10 federally sponsored commissions, studies or task forces have examined the problem . . . . In the decade since 1981, the regulatory environment has if anything become a greater deterrent to affordable housing, regulatory barriers have become clearly more complex, and apparently more prevalent.[202]

The study continued by noting that "[m]illions of Americans are being priced out of buying or renting the kind of housing they otherwise could afford were it not for a web of government regulations."[203]

---

200. William F. McKenna & Carla A. Hills, *The Report of the President's Commission on Housing* 200 (1982), https://www.huduser.gov/portal//Publications/pdf/HUD-2460.pdf.

201. *Id.* at 203–05.

202. Thomas H. Kean & Thomas Ludlow Ashley, *Not in My Back Yard: Removing Barriers to Affordable Housing*, *Report to President Bush and Secretary Kemp by the Advisory Commission on Regulatory Barriers to Affordable Housing* 1 (1991), https://www.huduser.gov/portal//Publications/pdf/NotInMyBackyard.pdf.

203. *Id.* at 3.

That was thirty-one years ago, and we could replace the number twenty-four with fifty-six and repeat the same grim assessment, word for word.

In more recent times, others have noted the problems caused by zoning. Jason Furman, chairman of the Council of Economic Advisers under President Obama, put it this way,

> While land use regulations sometimes serve reasonable and legitimate purposes, they can also give extra-normal returns to entrenched interests at the expense of everyone else . . . . Zoning regulations and other local barriers to housing development [can] allow a small number of individuals to capture the economic benefits of living in a community, thus limiting diversity and mobility.[204]

Economist Jonathan Rothwell posited that "[a] change in permitted zoning from the most restrictive to the least would close 50% of the observed gap between the most unequal metropolitan areas and the least, in terms of neighborhood inequality."[205] Noting the disparities in education quality between rich and poor neighborhoods, and commenting on Rothwell, Richard Reeves adds that "[l]oosening zoning regulations would reduce the housing cost gap and by extension narrow educational inequalities."[206]

The understanding that zoning and other land use restrictions impact housing costs cuts across the political spectrum. Echoing the report from President Bush's commission issued in 1991, President Obama's White House said pretty much the same thing:

> Local policies acting as barriers to housing supply include land use restrictions that make developable land much more costly than it is inherently, zoning restrictions, off-street parking requirements, arbitrary or antiquated preservation regulations, residential conversion restrictions, and unnecessarily slow permitting processes.[207]

---

204. RICHARD V. REEVES, DREAM HOARDERS, HOW THE MIDDLE AMERICAN MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM AND WHAT TO DO ABOUT IT 105 (2017) (quoting Jason Furman, "Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents," remarks delivered to the Urban Institute, The White House (Nov. 20, 2015)).

205. *Id.* at 106 (quoting Jonathan Rothwell & Douglas Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1123–43 (2010)).

206. *Id.*

207. WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2 (Sept. 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf.

In remarks he made to the U.S. Conference of Mayors, President Obama said, "We can work together to break down rules that stand in the way of building new housing and that keep families from moving to growing, dynamic cities."[208] Adding to the bipartisan chorus, President Trump, who had some experience as a developer, issued an Executive Order stating,

> It shall be the policy of my Administration to work with Federal, State, local, tribal, and private sector leaders to address, reduce, and remove the multitude of overly burdensome regulatory barriers that artificially raise the cost of housing development and help to cause the lack of housing supply. Increasing the supply of housing by removing overly burdensome regulatory barriers will reduce housing costs, boost economic growth, and provide more Americans with opportunities for economic mobility.[209]

Not only does excessive zoning and other land use regulations deliberately exclude the poor, when combined with building regulations, they have also raised prices for everyone else. Multiple studies by economists have demonstrated the relationship between zoning and other land use regulations and housing costs. For example:

- In 1980, the relationship between growth control and costs was apparent. Lawrence Katz and Kenneth T. Rosen wrote for the Center on Real Estate and Urban Economics that "[l]and-use and environmental regulations can have important impacts on almost every component of housing costs" and "growth moratoria and growth control plans have raised prices between 18–28% in those San Francisco communities where they are present."[210]
- In 1988, Cynthia Kroll and others with the Center for Real Estate and Urban Economics wrote that growth caps in San

208. President Obama, Remarks at U.S. Conference of Mayors (Jan. 21, 2016) (transcript *available at* https://obamawhitehouse.archives.gov/the-press-office/2016/01/21/remarks-president-us-conference-mayors).

209. Exec. Order No. 13,878, 84 Fed. Reg. 30,854 (June 25, 2019) (*available at* https://www.govinfo.gov/content/pkg/FR-2019-06-28/pdf/2019-14016.pdf).

210. Lawrence Katz & Kenneth T. Rosen, *The Effects of Land-Use Controls on Housing Prices* 47 (Ctr. on Real Est. and Urb. Econ., Working Paper No. 80-13, 1980) (*available at* https://escholarship.org/uc/item/48d6q2nz).

Diego "will have significant housing and income impacts on some segments of the population without resolving the county's very serious problems of traffic congestion and infrastructure constraints."[211]

- In 1996, economist Stephen Malpezzi concluded, "Our results suggest that regulation raises housing rents and values and lowers homeownership rates."[212]
- In 2002, economists Edward L. Glaeser and Joseph Gyourko reached the remarkable conclusion that "America is not facing a nationwide affordable housing crisis. In most of the country, home prices appear to be fairly close to physical costs of construction. . . . Only in particular areas . . . do housing prices diverge substantially from the costs of new construction."[213] Where the prices are excessive, they wrote, "Zoning, and other land use controls, are more responsible for high prices where we see them. . . . Measures of zoning strictness are highly correlated with high prices."[214]
- In 2006, Edward L. Glaeser and Bryce Ward concluded that "each extra acre of minimum lot size decreases new construction by roughly 40 percent and increases housing prices by roughly 10 percent."[215]
- In 2014, Joseph Gyourko of the Wharton School and Raven Malloy of the Federal Reserve estimated that home prices were sixty percent greater than real construction costs, with "man-made constraints" (largely regulations) playing an important role.[216]

---

211. Cynthia Kroll et al., *Assessing the Impacts of Residential Growth Caps—The San Diego Experience* (Ctr. On Real Est. and Urb. Econ., Working Paper No. 88-149, 1988) (*available at* https://escholarship.org/uc/item/6wg532c7).

212. Stephen Malpezzi, *Housing Prices, Externalities, and Regulation in the U.S. Metropolitan Areas*, 7 J. HOUS. RSCH. 209, 236 (1996).

213. Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability* 21 (Nat'l Bureau of Econ. Rsch., Working Paper No. 8835, 2002) (*available at* http://www.nber.org/papers/w8835).

214. *Id.*

215. Benjamin Harney, *The Economics of Exclusionary Zoning and Affordable Housing*, 38 STETSON L. REV. 459, 471 (2009) (citing Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston* (NBER Working Paper No. 12601, 2006)).

216. Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply* 3 (Nat'l Burea of Econ. Rsch., Working Paper No. 20536, 2014) (*available at* https://www.nber.org/system/files/working_papers/w20536/w20536.pdf).

- In 2021 Gyourko from Wharton and Jacob Krimmel of the Federal Reserve Board calculated the "zoning tax" in various cities to range from an insignificant amount in lightly zoned cities to over $100,000 per quarter-acre in many coastal cities and even $410,000 per quarter-acre in San Francisco.[217]
- For the poor and working-class populations, housing supply is inelastic. As noted by the National Bureau of Economic Research, "policies and regulations that raise rents by creating artificial shortages in housing supply . . . may have particularly concerning distributional consequences."[218] In other words, slight impacts on housing supply may cause large price impacts for already struggling Americans.

As to what President Biden might actually do, there is some indication from a White House fact sheet issued on March 31, 2021, that accompanied the rollout of his infrastructure bill.[219] The fact sheet includes this aspirational passage:

> Eliminate exclusionary zoning and harmful land use policies. For decades, exclusionary zoning laws—like minimum lot sizes, mandatory parking requirements, and prohibitions on multifamily housing—have inflated housing and construction costs and locked families out of areas with more opportunities. President Biden is calling on Congress to enact an innovative, new competitive grant program that awards flexible and attractive funding to jurisdictions that take concrete steps to eliminate such needless barriers to producing affordable housing.[220]

The ineluctable fact remains that suburban land use patterns discourage working class and minority populations. And yet it is just

---

217. Joseph Gyourko & Jacob Krimmel, *The Impact of Local Residential Land Use Restrictions on Land Values Across and Within Single Family Housing Markets* 45–46 (Nat'l Bureau of Econ. Rsch, Working Paper No. 28993, 2021) (*available at* http://www.nber.org/papers/w28993).

218. David Albouy et al., *Housing Demand, Cost-of-Living Inequality, and the Affordability Crisis* 28–29 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22816, 2016) (*available at* http://www.nber.org/papers/w22816).

219. Infrastructure Investment and Jobs Act, H.R. 3684, 117th Congress (2021–2022).

220. WHITE HOUSE, FACT SHEET: THE AMERICAN JOBS PLAN (Mar. 31, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

as inescapable a fact that suburban constituencies like just fine the status quo of quiet places where yards are wide and poor people few.

By limiting the supply of new housing, the price of existing homes rises because the restricted supply cannot meet market demand. Existing homeowners benefit from the appreciated prices—at least until their children need to find homes. As such, in addition to maintaining the status quo of uncrowded open-space-rich suburbs, the increase in home values gives existing owners a source of capital for discretionary spending. In other words, they have little incentive to support an influx of new and perhaps more affordable housing in their existing neighborhoods.

Economist William Fischel wrote extensively on this phenomenon in *The Homevoter Hypothesis*[221] where he explained that since the home is the primary and largest asset of most homeowners, they have every reason to vote for politicians and policies that will best preserve the value of their homes—whether that policy be good schools, robust municipal services, or restrictive land use policies that favor the status quo over new development. As Fischel put it in describing Washington State's failure to allow adequate metropolitan growth, its statewide "smart growth" planning law known as the Growth Management Act "has little to recommend it so far. It seems to act more like a cartel for those already in possession of suburban homes than as a rationalizer of metropolitan development patterns."[222]

The losers in this state of affairs are those who cannot yet vote in a community because they have not yet moved into a community and will not move until new homes are built or existing homes are vacated upon death or transition to assisted living facilities. To be sure, some types of homes may be more appropriate in some locations over others. Homes to be occupied by the working class should ideally be near transit, jobs, and shopping that can best meet their needs. Under more ideal circumstances, a free market and a savvy developer community would combine to build what is needed where it is needed. We could think less about artificial market band-aids such as building subsidized affordable housing in upscale neighborhoods because we would not have the wound of inadequate housing supply in the first place.

---

221. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS (Harv. Univ. Press, 2001).
222. *Id.* at 259.

E. An End to Single-Family Zoning as We Know It?

There has been a push in several cities and in California to end or modify single-family zoning. In 2018, Minneapolis allowed duplexes and triplexes in land zoned for single-family homes.[223] Similarly, Oregon passed a bill restricting single-family zoning in designated urban areas.[224]

In 2020, Portland, Oregon, went further and adopted an ordinance that allows more duplexes, triplexes, fourplexes, and accessory dwelling units on land zoned for single-family residential.[225] Even greater density is allowed for affordable units. The bill passed the city council by a three to one vote, with the only "no" vote from the only city councilmember who owns a home.

Most dramatic, and controversial, in 2021 California adopted SB9 and SB10, two bills designed to limit the force of single-family zoning statewide. SB9 mandates ministerial approval of development of no more than two residential units within single-family residential zones.[226] There are several caveats. The new units cannot displace existing low-income housing as recorded by deed or covenant or rent control or occupied by tenant for more than three years, the new development cannot replace more than twenty-five percent of existing walls, and the area cannot be designated as historic. Most significantly, the California Environmental Quality Act will not apply.

SB10 allows local governments to zone any parcel for ten units per parcel if the parcel is located near transit or an urban infill site.[227] It requires a 2/3 vote of the legislative body if the ordinance supersedes any zoning restriction adopted by local initiative.

---

223. *See* Daniel Harsha, *Minneapolis Is Using Zoning to Tackle Housing Affordability and Inequality*, HARVARD KENNEDY SCHOOL ASH CENTER FOR DEMOCRATIC GOVERNANCE AND INNOVATION, https://ash.harvard.edu/minneapolis-using-zoning-tackle-housing-affordability-and-inequality (last visited Aug. 31, 2022).

224. Nigel Jaquiss, *Oregon House Bill 2001 Ended Single-Family Zoning Across the State. That's Causing Some Pushback*, WILLAMETTE WEEK (Nov. 6, 2019, 5:44 AM), https://www.wweek.com/news/2019/11/06/oregon-house-bill-2001-ended-single-family-zoning-across-the-state-thats-causing-some-pushback/.

225. Rebecca Eliss, *Portland Overhauls Zoning Code to Allow for Duplexes, Triplexes, Fourplexes*, OPB (Aug. 12, 2020, 10:23 PM), https://www.opb.org/article/2020/08/12/residential-infill-project-portland/; *see also Residential Infill Project*, CITY OF PORTLAND, https://www.portland.gov/bps/rip (last visited Aug. 31, 2022).

226. SB 9 is codified in Cal. Gov't Code § 66452.21 and Cal. Gov't Code § 66411.7.

227. SB 10 is codified in Cal. Gov't Code § 65913.5.

Previously, California adopted laws permitting the development of accessory dwelling units ("ADUs") on single-family parcels.[228] There has been some pushback and resistance from local governments, who have attempted to adopt permitting roadblocks to new ADUs.[229] These have been met with litigation.[230]

But SB9 and SB10 have been especially ill-received. Suburban NIMBY front groups like Livable California have joined with the uber left-leaning Aids Healthcare Foundation (which sponsored two hugely expensive and unsuccessful initiatives to adopt statewide rent control) to fight the implementation of SB9 and SB10, calling them paths to gentrification and, ironically, harmful to people of color. First, the Aids Healthcare Foundation ("AHF") and its affiliate "Housing is a Human Right" took out full-page ads to oppose passage.[231] When that effort failed, AHF sued, arguing the measures interfere with the right of the voters to establish zoning via the ballot box.[232] The AIDS Healthcare Foundation is also bankrolling an initiative to overturn these measures.[233] The Foundation claimed that seventy-one percent of Californians opposed the new laws.[234] Yet, according to a L.A. Business Council Institute/L.A. Times poll, fifty-five percent of California voters support the new laws, while twenty-seven percent are opposed.[235]

---

228. Cal. Health and Safety Code § 65583(c)(7).

229. Daniel Woislaw, *California Law Gives People the Right to Build ADUs. Cities Need to Let Them*, DAILY JOURNAL (Sept. 17, 2021), https://www.dailyjournal.com/articles/364327-california-law-gives-people-the-right-to-build-adus-cities-need-to-let-them; Brian Hodges, *Still No Place to Live: The Local Barriers to the Accessory Dwelling Unit Revolution*, PACIFIC LEGAL FOUNDATION (July 29, 2021), https://pacificlegal.org/still-no-place-to-live/.

230. Pacific Legal Foundation has a litigation project dedicated to supporting the right to build ADUs. *See, e.g.*, *Holding Local California Governments Accountable for Banning "Granny Flats"*, PACIFIC LEGAL FOUNDATION, https://pacificlegal.org/case/riddick-adu/.

231. Ged Kenslea, *SB 9 and SB 10: In SacBee Ad, 'Housing Is A Human Right' Urges Newsom to Oppose Both Bills*, BUSINESS WIRE (Aug. 26, 2021, 3:39 PM), https://www.businesswire.com/news/home/20210826005733/en/SB-9-and-SB-10-In-SacBee-Ad-%E2%80%98Housing-Is-A-Human-Right%E2%80%99-Urges-Newsom-to-Oppose-Both-Bills#:~:text=Housing%20Is%20A%20Human%20Right%2C%20the%20housing%20advocacy,the%20construction%20of%20more%20affordable%20and%20homeless%20housing.

232. City News Service, *AIDS Healthcare Foundation Files Lawsuit Against Controversial Housing Bill*, KFI AM 640 (Sept. 23, 2021), https://kfiam640.iheart.com/content/2021-09-23-aids-healthcare-foundation-files-lawsuit-against-controversial-housing-bill/.

233. Rick Cole, *California Cities Find Ways to Live with SB 9*, PRESS ENTERPRISE (Dec. 11, 2021), https://www.pe.com/2021/12/11/california-cities-find-ways-to-live-with-sb-9/ (last updated Feb. 16, 2022).

234. *See* Kenslea, *supra* note 231 (AIDS Healthcare Foundation advertisement).

235. *See* Cole, *supra* note 233.

The fear of gentrification expressed by these opponents is real. But gentrification comes in different flavors. First, the most extreme example is urban redevelopment wherein affordable units are destroyed to make way for tax-generating development. In *Berman v. Parker*,[236] the Court upheld an urban redevelopment project that displaced thousands of low-income residents while building only a relative handful of affordable units.[237]

Next, is the kinder and gentler redevelopment that is the classic model of gentrification. Here is the repurposing of existing lower-income housing into more expensive market-rate housing. In his history of the YIMBY (Yes in My Backyard) movement, Conor Dougherty describes one such instance from North Fair Oaks, California, an impoverished suburb halfway between San Francisco and San Jose. There, an investment company purchased an apartment building where the typical rent for a three-bedroom apartment was $1,850 per month. After largely cosmetic improvements and yuppie-attractive amenities like Nest thermostats, the new owners raised the rents to $2,750 per month.[238] That is the sort of gentrification that occurs when there is a tremendous unmet demand and capital for housing and the only low-hanging fruit for new market-rate housing is in undercapitalized lower-income neighborhoods.

Another type of gentrification occurs when commercial and industrial properties are repurposed for new housing. While such developments do not directly displace existing lower-income tenants, such developments can change a neighborhood's character with an influx of richer residents. This can be good for owners, but not so good for renters if the new development attracts more demand for housing in the area—which in turn can lead to the sort of private redevelopment of existing tenants.

The extent to which either AB9 or AB10 will cause new units to be added into existing lots, or cause the replacement of existing single-family homes with more expensive duplexes, triplexes, and quads, remains to be seen. Ultimately, increasing the supply of housing will reduce the price appreciation on a regional scale. But

---

236. Berman v. Parker, 348 U.S. 26 (1954).

237. See James Burling, *Property Rights for the Politically Powerful*, 6 BRIGHAM-KANNER PROP. RTS. J. 179, 196 (2017).

238. CONOR DOUGHERTY, GOLDEN GATES: FIGHTING FOR HOUSING IN AMERICA 47–48, 179 (2020).

for those particular neighborhoods where more market-rate housing moves in and displaces existing lower-income housing, the local effects may include some amount of gentrification.

CONCLUSION

The high and rising cost of housing is in large part due to governmental policies that, intentionally or otherwise, restrict the construction of new housing development. If we are to address the causes of high housing prices, we will need more than new government reports and studies. We will need to rethink the way we limit the use of land through zoning and urban limit lines. We will need to balance legitimate environmental concerns against the susceptibility of those concerns to being hijacked by NIMBYism. We will need to stop treating home developers as ATM machines that finance everything from low-income housing subsidies to cooking stoves in Africa. We will need to recognize that our existing patterns of zoning serve to exclude the poor, minority, and working-class populations from huge swaths of the American landscape. We need to recognize that government policies are largely responsible for the present disaster in housing exclusion and affordability, and that it is unlikely that even more governmental interference will make things any better. In short, we must allow people to use their property and capital to build the homes that people want to live in and where they want to live. Respecting the property rights of Americans to use their property for housing opportunities will be far more effective for meeting demand than more layers of government.

CREATING DENSITY: THE LIMITS OF ZONING REFORM

CHRISTOPHER SERKIN*

INTRODUCTION

Zoning has become extraordinarily controversial in contemporary policy circles.[1] Current views about land use and regulatory reform

* Elizabeth H. & Granville S. Ridley, Jr. Chair in Law, Vanderbilt Law School. This Article was written in honor of Vicki Been on her receipt of the prestigious Brigham-Kanner Prize. I thank her for her years of mentorship. Thanks to Nestor Davidson, Ezra Rosser, Richard Schragger and Ganesh Sitaraman for excellent comments on earlier drafts. Thanks to A.J. Johnson for research help.

1. *See* Vanessa Brown Calder, *Zoning, Land Use Planning, and Housing Affordability*, CATO INST. (Oct. 18, 2017), https://www.cato.org/policy-analysis/zoning-land-use-planning-housing-affordability (arguing the costs of land use regulations outweigh the cost to housing prices and affordability); Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS (Apr. 24, 2017), https://www.brookings.edu/research/reforming-land-use-regulations; Paul Krugman, Opinion, *Why a Blue City Is Feeling the Blues*, N.Y. TIMES (Jan. 17, 2022), https://www.nytimes.com/2022/01/17/opinion/new-york-city-wall-street-economy.html ("And in the case of New York, NIMBYism is ultimately the reason a great global city has become a one-industry town, leaving it unusually vulnerable to pandemic-driven economic dislocations.").

have coalesced around a single goal: reducing zoning restrictions to allow development to respond more freely to market demand.[2] An emerging "liberaltarian consensus" objects to the costs of land use regulations.[3]

In this account, zoning interferes with market forces that would otherwise produce more development and density.[4] In the absence of zoning—or with much more permissive zoning—multifamily housing and apartment buildings would proliferate where jobs are plentiful and the economy is thriving.[5] Silicon Valley would become affordable again as developers add more options to satisfy the housing demands of people who are not tech millionaires.[6] Even New York City, which is already the most dense place in America, could accommodate more density, putting downward pressure on housing prices and allowing more people to access its economic and cultural advantages.[7] And this push towards greater density would produce all manner of benefits. It would create macroeconomic gains by unlocking agglomeration—the value of co-locating synergistic businesses in places that amplify their productivity.[8] It would undermine zoning's exclusionary power to perpetuate racial segregation.[9]

---

2. *See, e.g.*, Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1059–60 (2019).

3. Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1810–15 (2021).

4. *See id.* at 1812–14.

5. *See* Glaeser, *supra* note 1.

6. *See* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 405–07 (2021) (describing the emergence and protection of single family housing at the expense of multifamily housing in Silicon Valley). *See generally* Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin*, 42 CARDOZO L. REV. 1611, 1613–14, 1634–49, 1690 (2021) (describing the politics and policies restricting development in Silicon Valley and highlighting that "[i]n 2020, the sale price of an Eichler tract house in . . . south Palo Alto was $2.6 million, ten times the median nationwide").

7. *See* Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 32–33 (2019) [hereinafter Been et al., *Supply Skepticism*]; Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine*?, 11 J. EMPIRICAL LEGAL STUD. 227, 252, 259 (2014) (suggesting that NIMBYism is present in New York City and may prevent more dense development from an empirical study of rezoning decisions that revealed six to fifteen percent of lots were downzoned in less than a decade).

8. EDWARD L. GLAESER, CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM 5–8 (2008) (identifying and discussing agglomeration).

9. Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 801 (2009) (suggesting that "metropolitan

It would enhance health and educational outcomes for children and families who could access more dynamic places.[10] And it would produce climate benefits by offering smaller housing units in less car-dependent locations.[11] In other words, increasing density is a response to many of the most pressing societal problems, and zoning is standing in its way.

What, then, is standing in the way of zoning reform? For reformers, zoning is the product of protectionist and NIMBY insiders.[12] They have labeled zoning "opportunity hoarding" by in-place property owners.[13] Homeowners have disproportionate political power at the local level, and they exercise it to exclude new development.[14] Local land use decisions are a kind of unfair battleground pitting insiders against outsiders, except that outsiders do not even know they are involved in a battle or where it is being fought. The key, then, is to defang the political power of local homeowners, either through state preemption of local land use regulations, procedural reforms, or strengthening legal protection for development rights.[15]

---

areas that allowed higher density development moved more rapidly toward racial integration than their counterparts with strict density limitations"); *see* Robert J. Reinstein et al., *A Case of Exclusionary Zoning*, 46 TEMP. L.Q. 7, 9–11 (1972) ("The Bucks County local zoning ordinances are based upon a general welfare rationale, but they inevitably result in the exclusion of low-income families, and, given the unfortunate facts of modern-day America, this means, to a disproportionate extent, racial minorities.").

10. Sitaraman et al., *supra* note 3, at 1777 (describing health disparities in different places).

11. *See* John R. Nolon, *The Land Use Stabilization Wedge Strategy: Shifting Ground to Mitigate Climate Change*, 34 WM. & MARY ENV'T L. & POL'Y REV. 1, 5–6 (2009) ("By shifting ground from predominately single-family to predominately urban settlements, which fosters more energy efficient buildings and transportation systems, we can lower per capita CO2 emissions significantly."); *see also* Devin Edwards, *Green Houses and Greenhouse Gases: Why Exclusionary Zoning Is a Climate Catastrophe*, GEO. PUB. POL'Y REV. (Nov. 5, 2019), http://gppreview.com/2019/11/05/green-houses-greenhouse-gases-exclusionary-zoning-climate-catastrophe/ (summarizing arguments).

12. *See generally* KATHERINE LEVINE EINSTEIN ET AL., NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS (2020) (documenting who participates in local land use meetings).

13. *See* RICHARD V. REEVES, DREAM HOARDERS 104–08 (2017); *see also* Olatunde C.A. Johnson, *Inclusion, Exclusion, and the "New" Economic Inequality*, 94 TEX. L. REV. 1647, 1655 (2016) (describing "opportunity hoarding"); Carrie Engel, *Play the Dream Hoarders Game*, BROOKINGS (July 13, 2017), https://www.brookings.edu/blog/brookings-now/2017/07/13/play-the-dream-hoarders-game/ (providing simple arcade-style game demonstrating the phenomenon).

14. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 80–81 (2001) (describing the political power of local homeowners); Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENV'T L. 217, 219–23 (2018) (documenting the rise in "homevoter" power even in cities).

15. *See, e.g.*, John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing*

These are powerful insights and the zoning reform wave is gaining momentum.[16]

There is no real question that zoning has contributed to many pressing problems and that increasing density in many places would produce the benefits that reformers tout. But the benefits of zoning reform are likely to be more context-dependent than reformers like to admit, and reform is also likely to produce costs that reformers have ignored.[17] Specifically, zoning reform will not necessarily lead to more density. Some American cities with the lightest land use regulation, like Houston and Phoenix, are also the *least* dense. And zoning reform imposes costs of its own. It risks disrupting expectations of property owners who selected where to live based on a broad mix of community characteristics, exacerbating regional inequality, and developing past fragile ecological limits.[18]

Notwithstanding simplistic mischaracterizations to the contrary, these are obviously not reasons to reject reform efforts.[19] Nevertheless, telling a Panglossian story about zoning reform and pretending these costs do not exist risks pushing too far. Indeed, a real problem with the current debate over zoning reform is the failure to be clear about the endgame, making these tradeoffs difficult to evaluate. In fact, what appears to be a growing consensus for reform hides three very different possible goals of reform efforts.

Crisis, 60 B.C. L. REV. 823 (2019) (arguing for preemption in some cases); Kenneth Stahl, *"Yes in My Backyard": Can a New Pro-Housing Movement Overcome the Power of NIMBYs?*, 41 ZONING & PLAN. L. REP. 3 (2018) (surveying responses to NIMBYism); *see also* Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954 (2019) (arguing for recalibrating state preemption of local laws to more fully recognize the limits of local authority); Ezra Rosser, *The* Euclid *Proviso*, 96 WASH. L. REV. 811, 824 (2021) (arguing for greater state preemption to take better account of regional and statewide interests).

16. *See, e.g.*, Richard Florida, *The Flip Side of NIMBY Zoning*, CITYLAB (Oct. 26, 2017), https://www.citylab.com/equity/2017/10/the-flip-side-of-nimby-zoning/543930/ ("It's become perhaps the most widely accepted truism in urban development and economic policy circles: NIMBY zoning and overly restrictive land-use policies and building codes keep housing prices high, making superstar cities like New York and San Francisco less affordable. . . . Remedying this has won wide support from urban economists and city builders on both sides of the political aisle.").

17. *See generally* Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749 (2020) (describing costs of zoning reform).

18. *See infra* Part II (describing these in detail).

19. *See generally* David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315 (reductively describing recent articles as defending exclusionary zoning).

The first is simply incrementalism and a desire to remove unnecessarily burdensome regulations. This is not a vision of radical deregulation, but rather one of identifying opportunities for marginal improvements in current zoning regimes.[20] Zoning always reflects tradeoffs, and these kinds of reforms are easy to embrace where they respond to evolving local needs and provide important, if discrete, regulatory improvements.

Second, reform efforts might be reflecting a view about optimal city size. This somewhat broader perspective focuses on the benefits of density and growth and promotes zoning reform to make cities grow. But it does not embrace unrestrained growth. While reformers in this camp believe that zoning limits in thriving urban centers are currently drawn too restrictively, they do not reject regulatory limits on growth and density everywhere. Implicitly, this view promotes expanding development up to some new equilibrium. At that point, presumably, housing prices would again start to rise and current dynamics around affordability and sprawl would begin to repeat themselves.

The third possible endgame is considerably more radical and ideologically anti-regulatory. It implicitly presumes that development and housing supply should always keep pace with demand and that local conditions essentially do not matter. There will not be a new equilibrium because zoning should never stand in the way of growth and this view therefore seeks to eliminate density limits and other regulatory limits on development wherever they are found.

The current state of the debate over zoning reform glosses over these different possible endgames and so hides what may be real disagreements between reform advocates. This failure to confront the ultimate objectives of zoning reform also makes it possible to avoid weighing some of its real costs.

Part I examines the current case against zoning and the view of reformers that development should be allowed to be more responsive to market forces. Part II explores reasons for caution. Part III explores the ultimate agenda of zoning reformers and then responds to some specific criticism in the emerging literature.

---

20. *See infra* Section III.B.

I. ZONING AND HOUSING SUPPLY: THE CASE FOR REFORM

There is a housing crisis in the United States.[21] In thriving places like New York and San Francisco, housing prices have risen dramatically over the last decade.[22] The number of people who are housing cost-burdened, defined as spending more than 30% of income on housing, similarly increased from 42% to 48% from 2001 to 2017.[23]

Partly, this is the result of rising regional inequality.[24] Economic activity is increasingly concentrated in fewer places, and so the economic benefits of moving to New York or Silicon Valley have never been higher.[25] The strong desire of workers to relocate to these and other thriving places puts tremendous pressure on local housing markets to satisfy demand. This is pressure that developers have

---

21. *See, e.g.*, Florida, *supra* note 16; Ben Winck, *Everywhere You Look America's Housing Crisis Is Getting Worse*, BUS. INSIDER (Aug. 3, 2021, 4:50 PM), https://www.businessinsider.com/america-housing-crisis-getting-worse-home-prices-apartment-rental-market-2021-8 (describing housing crisis).

22. *See, e.g.*, Jeff Andrews, *NYC Home Prices Nearly Doubled in the 2010s. What Do the 2020s Hold?*, CURBED (Dec. 19, 2019), https://ny.curbed.com/2019/12/13/21009872/nyc-home-value-2010s-manhattan-apartments (discussing New York City housing prices); *see also* Rosser, *supra* note 15, at 828–31 (presenting data on the extent of the housing crisis). *See generally* U.S. GOV'T ACCOUNTABILITY OFF., RENTAL HOUSING: AS MORE HOUSEHOLDS RENT, THE POOREST FACE ACCOUNTABILITY AND HOUSING QUALITY CHALLENGES, GAO-20-427 (2020), https://www.gao.gov/assets/gao-20-427.pdf (evaluating rental prices nationally).

23. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 22 ("Rental affordability declined from 2001 to 2017. In 2017, 48 percent of renter households were rent burdened—that is, they paid over 30 percent of income for rent—which is 6 percentage points higher than in 2001.").

24. *See generally* Sitaraman et al., *supra* note 3.

25. *See* Richard Florida, *Why America's Richest Cities Keep Getting Richer*, ATLANTIC (Apr. 12, 2017), https://www.theatlantic.com/business/archive/2017/04/richard-florida-winner-take-all-new-urban-crisis/522630 [https://perma.cc/P9LZ-WLB5] (adopting the term "superstar cities" to refer generally to thriving places); Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 78 (2017) (emphasizing that wages are higher for workers in New York than in more rural areas but net income is lower now than historically due to higher housing prices); Conor Dougherty, *California Is Booming. Why Are So Many Californians Unhappy?*, N.Y. TIMES (Dec. 29, 2019), https://nyti.ms/2tevpa6 [https://perma.cc/KL5W-NBMD] (noting that while California's economy "has grown more than previous generations had thought possible," the state "has mostly put higher-value jobs . . . in expensive coastal enclaves, while pushing lower paid workers and lower-cost housing to inland areas like the Central Valley," and describing the "challenge of continuing to add jobs without affordable places for middle- and lower-income workers to live"). *But see* Emily Badger & Eve Washington, *The Housing Shortage Isn't Just a Coastal Crisis Anymore*, N.Y. TIMES, July 14, 2022 (describing extent of housing crisis across the country).

traditionally embraced.[26] Indeed, surging demand has historically driven a concomitant boom in housing development.[27] That has not been true recently, however, and many people blame zoning.[28]

Zoning is, fundamentally, a regulatory restriction on supply that constrains developers' ability to meet demand.[29] It caps density expressly through bulk limits on height, floor area ratio, and lot size. It also constrains supply more structurally by creating regulatory hurdles that are expensive and time-consuming to overcome.[30] Reformers therefore blame zoning for insufficient new development and the fact that housing starts in many places have not kept pace with demand.[31]

This supply-side consensus of zoning critics is relatively new. Despite long-standing economic criticisms, zoning has been a traditional part of the regulatory toolkit to promote housing affordability, not a barrier to affordability.[32] Efforts like inclusionary zoning regimes

---

26. *See* Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 331–33 (2005) (arguing that growth in the housing supply from increased development stabilized housing prices despite large increases in population in Las Vegas and historically in New York).

27. *See* Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 265 (2008) ("After all, without increasingly inelastic supply, an increase in demand should lead to higher prices and more construction."); Glaeser, *supra* note 1 ("Historically, when parts of America experienced outsized economic success, they built enormous amounts of housing.").

28. Ganong & Shoag, *supra* note 25, at 76–78, 89–90. *See generally* Glaeser et al., *supra* note 26.

29. *See, e.g.*, Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place*, 40 FORDHAM URB. L.J. 1667, 1682 (2016) ("There is a sense in which zoning is always and inherently exclusionary. To the extent it restricts supply—and that, after all, is what zoning primarily does—it should have the effect of increasing prices, at least as compared to the alternative of no density controls."); *see also* Glaeser & Ward, *supra* note 27, at 265, 267.

30. *See, e.g.*, Moira O'Neill et al., *Getting It Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process* 16 (Feb. 2018) (unpublished manuscript) (*available at* https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting_It_Right.pdf) ("[W]ell-capitalized developers with existing relationships and experience in specific jurisdictions are the best situated to navigate these complex local contexts, providing them a competitive advantage.").

31. *See* Glaeser, *supra* note 1 (describing history of housing starts); Rosser, *supra* note 15, at 852 ("Increasing housing supply should be a priority for those committed to the values of an ownership society as well as for those concerned about increasing inequality and housing affordability.").

32. *See, e.g.*, Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L.J. 359, 369–84 (1995) (surveying approaches). *But see* Robert C. Ellickson, *The Irony of "Inclusionary Zoning,"* 54 S. CAL. L. REV. 1167 (1981) (arguing that inclusionary zoning is destined to increase prices and distribute benefits unjustifiably).

and restrictions on high-end market-rate housing have long been championed as regulatory responses to rising costs.[33] But over the last decades, scholars like Vicki Been have demonstrated the downsides of such approaches. In a pioneering study from 2007, Been and her co-authors examined the impact of inclusionary zoning regimes in and around several cities including Boston.[34] Contrary to the expressed intention of Boston's more affluent suburbs, almost no affordable housing units came online under aggressive inclusionary zoning programs.[35] According to the economic model that Been and her co-authors tested, inclusionary zoning can act as a kind of tax on new development that actually increases housing prices.[36] Although the effects were modest, the perverse impact of inclusionary zoning was to make housing *less* affordable.[37]

The effect of zoning on housing prices goes beyond inclusionary policies. In another highly influential paper, Been and her co-authors tackled liberal orthodoxy that increasing the supply of market-rate housing will drive up prices.[38] There is a widespread gentrification anxiety that development will make places unaffordable.[39] The intuitions are often unstated but Been and her co-authors identify

33. *See, e.g.*, Kriti Ramakrishna, *Inclusionary Zoning*, URB. INST. (Jan. 2019), https://www.urban.org/sites/default/files/publication/99647/inclusionary_zoning._what_does_the_research_tell_us_about_the_effectiveness_of_local_action_2.pdf (describing history of inclusionary zoning and its questionable impact on development of affordable housing). *See generally* Andrew Dietdrich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996) (challenging the economic consensus that inclusionary zoning will further decrease housing supply and drive up housing prices).

34. *See generally* Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. AM. PLAN. ASS'N 441 (2009) [hereinafter Schuetz et al., *Flavors of Inclusionary Zoning*]; Jenny Schuetz et al., *Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets in the United States*, 48 URB. STUD. 297 (2011) [hereinafter Schuetz et al., *Silver Bullet or Trojan Horse?*].

35. *See* Schuetz et al., *Flavors of Inclusionary Zoning*, *supra* note 34, at 452 (noting only one-fifth of Boston communities with inclusionary zoning had reported producing some affordable units through the program); Schuetz et al., *Silver Bullet or Trojan Horse?*, *supra* note 34, at 315 (noting that thirty percent of the jurisdictions around Boston with inclusionary zoning programs adopted before 2000 had reported some affordable units, but that forty-three percent of jurisdictions with programs adopted by 2004 reported no affordable units under the program).

36. *See* Schuetz et al., *Silver Bullet or Trojan Horse?*, *supra* note 34, at 315–18 (suggesting that inclusionary zoning "put upward pressure on single-family home prices in Boston-area suburbs between 1987 and 2008, particularly during hot housing markets").

37. *See id.* at 315–18, 321.

38. *See* Been et al., *Supply Skepticism*, *supra* note 7, at 25.

39. *See id.*

four common arguments opposing development to promote affordability. First, land scarcity means that any market-rate housing comes at the expense of affordable housing that could have been built instead.[40] Second, market-rate housing will not filter down to the lower-priced segment of the market.[41] Third, new development will induce even more demand, and so the increase in supply will further exacerbate the housing crunch.[42] And fourth, economic spillovers from high-cost housing will displace more affordable housing.[43] The paper surveys the best empirical literature to conclude that, in fact, increasing supply will have a moderating effect on local housing costs.[44] Building new high-end housing will prevent affluent homeowners from rehabilitating lower-cost housing, leaving it intact as a more affordable option (avoiding, for example, carriage houses in Brooklyn becoming high-end housing).[45] Plus, there is little empirical evidence supporting the other supposed effects.[46] In short, central to the efforts of affordability should be reducing zoning's restrictions on development and housing supply, even if the immediate result is more market-rate housing.

These arguments, and the empirical support for them, have gone a long way to realigning debates over zoning and land use regulation. Instead of pitting pro-development, free-market conservatives against champions of regulation to control development's negative externalities, both liberals and conservatives have come together to decry zoning's effect on housing markets.[47]

This has macroeconomic consequences, as well. High housing costs reduce or eliminate the economic advantages of moving to a thriving place. In economic terms, the wage advantages are capitalized into housing costs.[48] Indeed, residential mobility has been declining in

40. *Id.* at 27–28.
41. *Id.* at 28–29.
42. *Id.* at 29–30.
43. *Id.* at 30–31.
44. *Id.* at 26.
45. *Id.* at 28–29.
46. *Id.*
47. Christopher Serkin, *The New Politics of New Property*, 42 VT. L. REV. 1, 13–15 (2017) (describing political realignment); Ilya Somin, Opinion, *The Emerging Cross-Ideological Consensus on Zoning*, VOLOKH CONSPIRACY (Dec. 5, 2015), https://www.washington-post.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-con-sensus-on-zoning/ (same).
48. *See, e.g.*, Christopher Serkin, *Capitalization and Exclusionary Zoning*, *in* MEASURING

recent years, and economists like Peter Ganon and Daniel Shoag point to zoning as a primary cause.[49] They claim that the resulting distortions in labor markets reduces the value to businesses of co-locating in thriving places. And it otherwise impedes labor supply. Economists have pegged these costs at between two and nine percent of GDP, which is quite a wide range.[50]

At the same time, zoning is increasingly blamed for non-economic harms, as well. Zoning was born from classist and racist impulses of exclusion.[51] While explicitly race-based zoning did not last long in this country, efforts to restrict apartments and multifamily housing from single-family residential zones were based squarely in racism and classism.[52] It is hard to wash this stink off zoning's origins.[53]

Zoning is also responsible for incalculable environmental harms in this account. With its focus on single-use zones, zoning encouraged the homogenous American suburb that is synonymous with sprawl.[54] Automobile-dependent single-family homes, located far from urban centers, consume open space and produce higher carbon emissions than housing in the urban core.[55]

THE EFFECTIVENESS OF REAL ESTATE REGULATION: INTERDISCIPLINARY PERSPECTIVES 15, 26 (Ronit Levin-Schnur ed., 2020) (describing capitalization).

49. Ganong & Shoag, *supra* note 25, at 89–90.

50. Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 5, 25 (2018).

51. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW 41–48 (2017) (describing municipal efforts to enact explicitly racial zoning); Serkin, *supra* note 17, at 754–60 (summarizing history of zoning).

52. *See* Serkin, *supra* note 17, at 755 ("Zoning's origins in this country therefore began with segregation, although explicitly racial zoning was short-lived."); *see also* Serkin, *supra* note 48, at 23 ("[A]ffluent communities are not simply inaccessible to the poor because they are expensive; instead, they are expensive in part because they are inaccessible to the poor.").

53. *See* Serkin, *supra* note 48, at 17–18 & n.1 (quoting comment by Nestor Davidson at a conference that *Euclid*'s naked classism—and racism—is zoning's "original sin").

54. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER 238–43 (1985) (describing the proliferation of assembly line construction and low cost suburbs after World War II); 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 (discussing the prevalence of single-family zoning across the United States and how some cities and states are responding to increase density).

55. *See, e.g.*, Edward J. Sullivan & Jessica Yeh, *Smart Growth: State Strategies in Managing Sprawl*, 45 URB. L. 349, 350–51 (2013) ("Sprawl's uncoordinated pattern of development contributes to environmental degradation. Where there are great distances placed between destination points, residents are likely to drive those distances, increasing automobile emissions, including greenhouse gas (GHG) emissions, and reducing air quality.").

Given this wide range of harmful effects, it is no wonder that zoning is currently in the crosshairs for reformers across the political spectrum. The underlying intuition is that if developers could simply build where they wanted, they would produce more housing, and would also be able to cater to housing consumers' demands for dense, urban living, which would generate economic, environmental, and social benefits.[56]

II. GROWTH, DENSITY AND CHANGE: THE CASE FOR CAUTION

The case for zoning reform seems compelling. Reducing regulatory limits will unlock development, moderate housing prices, and lead to greater density, with attendant economic, environmental, and social benefits. But the relationship between growth and density is more complex than zoning reformers usually acknowledge, and zoning reform comes with its own costs. These are not reasons to reject zoning reforms, but they are important to consider when tallying the costs and benefits.

A. The Uncertain Relationship Between Zoning and Sprawl

Animating much of the zoning reform debate is an implicit assumption that relaxing zoning limits will produce not only more growth but also more density. Indeed, it seems almost tautological that eliminating a prohibition on multifamily housing or unlocking taller apartment buildings, for example, will produce more compact and, simply, *more* housing. In many places, zoning is the principal mechanism for NIMBY opposition to density, and so defanging zoning limits is likely to produce density.

In fact, however, the relationship between zoning and density is not so straightforward. The extreme example, of course, is Houston, Texas. There, the absence of municipal zoning has not produced dense, urban form. Quite the opposite. Houston is among the least dense cities in the country.[57] And Houston is not alone. Cities throughout

56. *See* Been et al., *Supply Skepticism*, *supra* note 7, at 28–29.

57. *See* Jed Kolko, *The Downtown Decade: U.S. Population Density Rose in the 2010s*, N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/2021/09/01/upshot/the-downtown-decade-us-population-density-rose-in-the-2010s.html (discussing extensive population growth in dense urban areas but noting that the fastest growing neighborhoods were in low-density suburbs like those around Houston).

the sun belt tend to be both loosely zoned and also quite sprawling.[58] In these places, it is much harder to blame zoning for sprawl and the lack of density.

Growth without density—that is, through sprawling suburban development—may still help to moderate housing costs in the region and may be reason enough to reform zoning in some places. But growth alone does not provide some of the other important benefits that reformers claim, like reduced carbon emissions and more sustainable development patterns. It is important, then, to explore the reasons that zoning reform might not always result in greater density.

1. Available Substitutes

One culprit is the persistence of many consumers' preferences for single-family homes in single-family communities and the availability of ready substitutes like homeowner associations (HOAs) to satisfy them. According to a famous quote, "No one is enthusiastic about zoning except the people."[59] If zoning does not produce the development patterns that some people want, there are other regulatory and private regimes that can.[60] Indeed, most new development in sun belt cities relies on restrictive HOAs to maintain single-family communities with detailed specificity.

Homeowner associations are typically governed by a master deed that can impose much more intrusive regulatory prescriptions than typical municipal zoning.[61] Minimum house sizes in addition to maximum ones, rules governing aesthetics of all kinds, and even rules governing conduct, are all commonplace.[62] These should be

58. *See id.* (highlighting that many of the lowest-density metro areas are loosely zoned southern cities).

59. RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 17 (1966).

60. Serkin, *supra* note 17, at 794–95 (describing these substitution effects). *See generally* Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827 (1999) (advocating to replace municipal zoning with private HOAs).

61. *See* Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 713–14 (2010) (describing content of HOA regulations).

62. *See, e.g.*, Barbara C. McCabe, *The Rules Are Different Here: An Institutional Comparison of Cities and Homeowners Associations,* 37 ADMIN. & SOC'Y 404, 405 (2005) ("HOAs are often compared with cities: Both provide services, levy taxes, and regulate individual behavior."); Paula Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 555–56 (2002) ("[C]ovenants have been devised to regulate

seen as private substitutes for public land use controls. The availability of nearby homeowner associations means that limiting local land use regulations might drive housing consumers to seek these private regulations if zoning does not meet their regulatory preferences. If this seems abstract, imagine a choice faced by a young family considering two different but similar single-family houses. One is in a developed urban neighborhood—say an inner-ring suburb from the 1950s—with access to a park and a playground nearby. Another is in a subdivision governed by an HOA, also with access to open space and a playground in the subdivision. Those choices might look very similar unless development pressures are overtaking the municipality, leading to unpredictable changes. This particular family might worry that the housing and community characteristics they want, and that both options *currently* have, will be much more stable in the latter. This can put a thumb on the scale for homeowners' associations.

"So what?" some might say. If certain kinds of families prefer stable manicured HOAs, they can depart the more dynamic urban core for the bland *Edward Scissorhands* suburbs.[63] That is their preference (and probably their loss). If the "cost" of their choosing to move to an HOA is that more multifamily housing is built in the inner ring to accommodate development pressure, that is all to the good. But the move to HOAs produces its own costs. HOAs tend to be more restrictive and less flexible than zoning. They are more associated with sprawl and racial segregation.[64] Replacing zoning with HOAs—as has happened not only in Houston but in other sunbelt cities[65]—creates all of the problems that reformers identify in zoning but amplified.

---

everything from whether pets are limited or prohibited, to the permissibility and style of one's screen and storm doors, to the ratio of grass, trees and shrubs allowed on one's property. Restrictions are imposed to regulate the mounting of basketball hoops, the retrieval of dog droppings, the posting of for-sale signs, the trimming of bushes and the color of window curtains.").

63. EDWARD SCISSORHANDS (20th Century Fox 1990).

64. *See* Serkin, *supra* note 17, at 798 ("People who study HOAs suggest that residential subdivisions 'intensify social segregation, racism, and exclusionary land use practices.'"); EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 57 (1994) ("Before and during the post–World War II housing boom, large-scale developers used homeowner associations and restrictive covenants in middle-class housing to market exclusion rather than exclusivity."); *cf.* SETHA LOW, *BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA* 11 (2004) ("Gated residential communities . . . intensify social segregation, racism, and exclusionary land use practices already in place in most of the United States.").

65. *See infra* notes 127–32 (discussing Phoenix).

Consumer preferences and the availability of ready substitutes will vary considerably by region and housing market. There is an almost insatiable demand for housing in the heart of New York City, for example, meaning that new housing there will almost inevitably create more density. But that is less obvious in other parts of the country. Unleash the unregulated market in places like Naples, Florida, or Tuscaloosa, Alabama, and the result will not necessarily be greater density, especially if new development in those places occurs primarily in HOAs.[66]

HOAs are not the only competition for municipal zoning, either. Where zoning does not provide the stability that housing consumers appear to want, they increasingly turn to other regulatory tools. The most familiar is historic preservation.[67] Today, the preservation of historic buildings is often just a byproduct of the real goal: resisting neighborhood change.[68] Rules limiting or prohibiting the destruction of contributing buildings, in conjunction with limits on in-fill subdivisions, can significantly slow the pace of urban redevelopment.[69]

---

66. *Cf.*, *e.g.*, William Fulton et al., *Who Sprawls Most? How Growth Patterns Differ Across the U.S.*, BROOKINGS (July 1, 2001), https://www.brookings.edu/wp-content/uploads/2016/06/fulton.pdf (identifying cities—like Tuscaloosa—that were dramatically expanding in developed land to accommodate growth). Tuscaloosa over the study period saw a density loss of forty-two percent. *See id.* at 8.

67. *See* David E. Clark & William E. Herrin, *Historical Preservation Districts and Home Sale Prices: Evidence from the Sacramento Housing Market*, 27 REV. REG'L STUD. 29, 29 (1997) ("During the past two decades, land use ordinances have evolved in a different direction in metropolitan areas where historic preservation has become popular."); N. Edward Coulson & Robin M. Leichenko, *Historic Preservation and Neighborhood Change*, 41 URB. STUD. 1587, 1587 (2004) ("[D]esignation and preservation of historic properties and historic districts has become an important tool in efforts to preserve central-city neighborhoods and to promote economic development in blighted urban areas.").

68. William A. Fischel, *Neighborhood Conservation Districts: The New Belt and Suspenders of Municipal Zoning*, 78 BROOK. L. REV. 339, 340, 345–46 (2013) ("Historic districts provide one way for a distinct neighborhood to establish additional land use regulations that are resistant to citywide changes.").

69. *See* Vicki Been et al., *Preserving History or Restricting Development? The Heterogeneous Effects of Historic Districts on Local Housing Markets in New York City*, 92 J. URB. ECON. 16, 25, 27–28 (2016) (finding that housing production dropped in areas designated for historic preservation but that the impact on housing prices varied across neighborhoods and their prior development potential); Adam M. Millsap, *Historic Designations Are Ruining Cities*, FORBES (Dec. 23, 2019), https://www.forbes.com/sites/adammillsap/2019/12/23/historic-designations-are-ruining-cities/?sh=3baabd6f57af ("Today, in cities around the country entire neighborhoods of marginal historical value are frozen in time, hindering the ability of cities and their residents to adjust their built environments in response to changing economic circumstances."); Jaelynn Grisso & Taijuan Moorman, *Do Columbus' Historic Districts Save History or Price People out?*, MATTER (Oct. 15, 2021), https://www.matternews.org/developus/historic-preserva

Moreover, historic rules are often stickier than zoning. Developers seeking to increase density can apply for variances, take advantage of incentive zoning or transferable development rights, or utilize some of the other tools built into many zoning ordinances to create flexibility.[70] Historic preservation, by contrast, usually requires a kind of certificate of appropriateness from a historic commission, which focuses on narrow factors that do not typically include the benefits of the intended redevelopment.[71] As people become more insecure about the community protections that zoning affords, they may rely increasingly on historic preservation, which would produce worse outcomes. Hobbling municipal zoning could supercharge alternative regulatory regimes that are even less flexible than zoning.[72]

2. The Timing of Development

Growth begets growth. There can be a virtuous cycle to urban development. Literature on agglomeration suggests that each new person moving to New York can be more productive and have a greater economic impact than a new person in Poughkeepsie.[73] Moreover, the development industry—famously labeled the "growth machine"[74]—also benefits from new development, generating its own economic output with attendant job creation.[75] As a result, a growing

tion-columbus-development-expensive (discussing a community's plan to establish a historic zone over itself to protect its community character by preventing encroaching development around Ohio State University from occurring in the area).

70. *See, e.g.*, ELLICKSON ET AL., LAND USE CONTROLS 355–59 (5th ed. 2019) (detailing ways in which developers can assemble density bonuses).

71. Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525, 1533–38 (2015) (describing the sometimes difficult task of convincing commissioners a new or re-development will meet the aesthetic standard of the neighborhood).

72. In Brooklyn, activists used superfund designation of the Gowanus Canal as a tool to resist development and gentrification. *See generally* Hamil Pearsall, *Superfund Me: A Study of Resistance to Gentrification in New York City*, 50 URB. STUD. 2293 (2013).

73. *See, e.g.*, John M. Quigley, *Urbanization, Agglomeration, and Economic Development*, *in* URBANIZATION AND GROWTH 123 (Michael Spence et al. eds., 2009) ("It has been widely reported that incomes have grown more rapidly in U.S. cities with high initial levels of human capital. . . . This finding is consistent with skill acquisition and diffusion through the interaction of workers in denser urban areas.").

74. Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOCIO. 309, 309–10 (1976) (coining the term "growth machine").

75. Corina Vanek, *In a Difficult Period for Construction Nationwide, Phoenix Led in Industry Job Growth*, PHX. BUS. J. (Jan. 6, 2021), https://www.bizjournals.com/phoenix/news

place is usually a thriving place and so creates more demand as economic opportunities increase in a kind of virtuous economic cycle. Indeed, this is at the heart of the economic attack on zoning, which constrains that growth.

New housing is still not counterproductive when it comes to housing affordability. In fact, Vicki Been and co-authors have persuasively argued—and found evidence to support—that increasing housing supply will ultimately have a moderating effect on housing prices despite the possibility of induced demand, because less than perfect elasticity in residential mobility means that new units will continue to exert downward pressure on price.[76] A new longitudinal study of residential moves in Helsinki, Finland, explains how high-end market-rate housing can promote affordability:

> As new residents move into the newly constructed units, they vacate their old units. These vacant units then get occupied by a new set of residents whose old units become vacant and so on. Through this process, new market-rate housing can have moderating price effects in the city's lower-income neighborhoods, not just in its immediate neighborhood, by effectively loosening the housing market in these areas through vacancies.[77]

But that does not fully account for the spatial implications of induced demand because of the timing of new development. Dense urban development, like a large new apartment building, takes considerable time to build. In 2014, the average build time nationally for larger multifamily housing was over fourteen months, with significant regional variation.[78] Total development time, from property

/2021/01/06/phoenix-led-nation-construction-job-growth.html?ana=knxv (discussing the connection between residential and non-residential development and construction jobs in Phoenix and other metro areas across the United States); *Construction: NAICS 23*, U.S. BUREAU LAB. STAT. (Mar. 31, 2022), https://www.bls.gov/iag/tgs/iag23.htm#iag23emp1.f.p (reporting more than seven million workers in construction nationwide). *But see* Sally Weller, *The Hollow Promise of Construction-Led Jobs and Growth*, CONVERSATION (Aug. 15, 2017), https://theconversation.com/the-hollow-promise-of-construction-led-jobs-and-growth-82317 (highlighting the downstream economic benefits of development as well as the dangers associated with too much economic reliance on construction).

76. Been et al., *Supply Skepticism*, *supra* note 7, at 29–30.

77. Cristina Bratu et al., *City-Wide Effects of New Housing Supply: Evidence from Moving Chains* 2 (VATT Inst. for Econ. Rsch., Working Paper No. 146, 2021) https://ssrn.com/abstract=3929243.

78. *See, e.g.*, Na Zhao, *How Long Does It Take to Build an Apartment Building?*, NAT'L

acquisition through design, permitting, and building, usually takes several years. Single-family development requires much less time.[79]

In thriving places, then, the development industry often cannot keep pace with demand in the urban core, pushing development out into suburbs, even in the absence of restrictive zoning.[80] Nashville, Tennessee, for example, has seen extraordinary population growth over the last ten years and an attendant explosion in new housing in the urban core because of a broadly permissive approach to development. Its urban high-rise district, the Gulch, has essentially sprung into existence in the last fifteen years, with an additional 4,000 residential units currently being developed.[81] Nevertheless, growth in Nashville's suburbs has been even greater than growth in the urban core, which has not kept pace with demand.[82] And despite the loose regulatory environment and full-throttle development activity, housing prices have still increased by over 120% in the last decade.[83]

ASS'N HOME BUILDERS (Aug. 26, 2015), https://eyeonhousing.org/2015/08/how-long-does-it-take-to-build-an-apartment-building/.

79. *See Average Length of Time from Start to Completion of New Privately Owned Residential Buildings*, U.S. CENSUS BUREAU, https://www.census.gov/construction/nrc/pdf/avg_starttocomp.pdf (last visited Aug. 29, 2022) (finding on average that single family homes across the United States were constructed in around seven months while multifamily housing required around fifteen months).

80. Nor do they want to get too far ahead of demand, often focusing on absorption rates to try to maximize returns on investment. *See, e.g.*, Cameron K. Murray, *Submission to the House of Representatives Standing Committee on Tax and Revenue's inquiry into Housing Affordability and Supply* 10 (Sept. 2021), https://osf.io/prsy4 ("Housing developers optimise both density and the rate of sales. Large housing developers landbank, holding undeveloped sites off market to ensure they match the rate of sales that maximises their total return on assets."); *see also* Cameron K. Murray, *A Housing Supply Absorption Rate Equation*, 64 J. REAL EST. FIN. & ECON. 228 (2022).

81. *See, e.g.*, Robert Looper III, *A Look At The 4,000+ Residential Units Underway In The Nashville Gulch Area,* NASHVILLE NOW NEXT (July 23, 2021), https://nashvillenownext.com/2021/07/23/the-2500-new-residential-units-either-under-construction-or-in-the-pipeline-for-nashvilles-gulch/ (describing current development); Getahn Ward, *Gulch Developers Project Big Changes for Area by 2030*, TENNESSEAN (May 4, 2014, 8:03 AM), https://www.tennessean.com/story/money/2014/05/04/gulch-developers-project-big-changes-area/8679939/ (describing history of the Gulch and including projections of growth that turned out to be far too conservative).

82. *See, e.g.*, Mariah Timms, *Nashville Suburbs Drive Rapid Growth*, TENNESSEAN, Sept. 14, 2021, at A1 ("Although Davidson County grew by more than 14% since 2010, gaining nearly 90,000 new residents, the surrounding suburban counties are attracting new residents at a far faster rate, new census data shows. Counties and towns around Nashville have seen growth higher than 20% across the board—in some places surpassing 30%.").

83. *See* Mark Santarelli, *Nashville Real Estate Market: Prices | Trends | Forecast 2021–2022*, NORADA REAL EST. (Nov. 3, 2021), https://www.noradarealestate.com/blog

The counterfactual is, of course, difficult to assess: Would Nashville's growth have been even more sprawling and decentralized with more stringent zoning in place? Maybe. It depends, in part, on the substance of the zoning regulations, as well as regional coordination.[84] Anti-sprawl zoning, like urban growth boundaries, would operate differently than large-lot zoning for the proliferation of sprawling development. The overall point is simply this: Although reformers argue that relaxing zoning rules will moderate housing prices and generate density, there are already places with permissive land use environments that nevertheless have seen dramatic increases in both sprawl and housing costs. Simply assuming that relaxed zoning will generate greater density is, at the very least, too facile without an account of places like Nashville.

3. Zoning as a Catalyst for Urbanization

Zoning and land use regulations can also be important tools for cities in their ongoing competition with their suburbs. Throughout much of the twentieth century, cities experienced disinvestment from the urban core.[85] Demographic changes in cities triggered white flight in many places, as more affluent and mostly white residents moved out of cities and into the suburbs.[86] These pressures were reinforced by a set of public policies like investments in roads to facilitate suburban commutes and regulatory "protection" for suburbs in the form of single-family residential zoning.

Typical suburban zoning accomplished two pernicious objectives simultaneously. First, it prohibited lower-cost multifamily housing and so was explicitly exclusionary. But more subtly, it reduced the opportunity to benefit from high-valued public services, like public schools, by promoting greater homogeneity in housing stock and

/nashville-real-estate-market/ ("Nashville has a record of being one of the best long-term real estate investments in the U.S. Since Oct 2011, the Nashville home values have appreciated by nearly 122%.").

84. Nashville is an unusual example because it merged with its county in 1962, giving it broad geographic reach. *See, e.g.*, *History of Metropolitan Nashville Government*, NASHVILLE.GOV, https://www.nashville.gov/departments/government/history-metro (last visited Aug. 29, 2022). Still, significant suburban-style development occurs in neighboring counties. *See* Timms, *supra* note 82 (describing development patterns).

85. *See, e.g.*, Serkin, *supra* note 17, at 786–87 (summarizing history and providing citations).

86. *See, e.g.*, William H. Frey, *Central City White Flight: Racial and Nonracial Causes*, 44 AM. SOC. REV. 425 (1979) (identifying factors leading to white flight from the urban core).

housing prices within a suburb. As Peter Mieszkowski and Edwin Mills explained:

> [Suburbanites] often seek to form homogenous communities, for several reasons. There is the preference for residing among individuals of like income, education, race, and ethnicity. By residing in income-stratified communities, the affluent avoid local redistributive taxes. Homogenous community formation is also motivated by varying demands for local public goods, caused by income and taste differences.[87]

This may sound somewhat abstract but it captures a straightforward and powerful intuition familiar to most homeowners. Because property taxes are levied uniformly across residential property, the owner of a high-valued house pays much more than the owner of a low-valued house for access to the same municipal services. This is a kind of cross-subsidy built into the structure of property taxation.[88] It is also normatively appropriate, given even modest assumptions about fairness in tax burdens. But the extent of the cross-subsidy is entirely a function of the width of the gap in property values. The narrower the gap between high-value and low-value houses in a community, the smaller the cross-subsidy. At the extreme, homogeneity will transform property taxes into a kind of user fee for public services.[89]

Suburban zoning created relatively affluent enclaves that were able to set and protect their own taxing and spending priorities and preferences, some of which imposed stratospheric property taxes to pay for extremely high-quality public schools, for example. Citywide services could not compete with the fiscal and policy self-determination that suburbs could promise, and so the decline of the urban core took on an air of inevitability through the latter half of the twentieth century.[90]

---

87. Peter Mieszkowsku & Edwin S. Mills, *The Causes of Metropolitan Suburbanization*, 7 J. ECON. PERSP. 135, 137 (1993).

88. *See, e.g.*, Serkin & Wellington, *supra* note 29, at 1670 (citing, *inter alia*, Bruce W. Hamilton, *Property Taxes and the Tiebout Hypothesis: Some Empirical Evidence*, *in* FISCAL ZONING AND LAND USE CONTROLS 15 (Edwin S. Mills & Wallace E. Oates eds., 1975)).

89. *See id.*

90. *See, e.g.*, Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 941 (2013) ("Suburbs have been more attractive than central cities as sites for settlement and investment, at least in part because their relatively smaller and more homogeneous populations have enabled suburbs to ensure that landowners' tax expenditures

But cities clawed their way back. They reversed the suburbanization trends and attracted people back into the urban core. There is no simple story that fully accounts for this transformation. It is partly the result of changes in the nature of the economy, crime reduction, and targeted investments in amenities to lure back the creative class.[91] Land use, however, may have played a role as well.

While it is difficult to document a causal relationship, the period of re-urbanization in the 1990s coincided with a set of municipal policies that had the effect of creating more sub-local, neighborhood level control over fiscal priorities, including the ability to exercise some control over new development to protect local amenities. These tools included, among others, the rise of tax increment financing and business improvement districts, both of which gave certain neighborhoods more control over municipal infrastructure and services.[92] Simultaneously, changes to local land use procedures, like ULURP in New York, combined with the rise of community benefits agreements, created more community involvement in the land use process.[93] These new tools all gained traction during the 1990s and may have contributed to stabilizing property values in some anchor neighborhoods, allowing them, in effect, to better compete with suburbs on their own terms.[94] Those neighborhoods saw property values stabilize and then increase and may have helped to attract investment back into the urban core.

These very same kinds of neighborhood land use controls are the ones that zoning reformers typically target as reinforcing NIMBY opposition to development.[95] And, indeed, they may well have gone too far in many places, in effect becoming victims of their own success. To the extent that these tools were responsible for helping to attract people back into the urban core, they simultaneously created development pressure and armed communities with the tools to

---

are concentrated on their own needs, rather than subjected to the redistributive claims of a variety of citywide interest groups.").

91. *See, e.g.*, EDWARD GLAESER, TRIUMPH OF THE CITY 106–14 (2012) (discussing the relationship between policing and crime rates and city success).

92. *See* Serkin, *supra* note 17, at 788–90 (describing changes during this period).

93. *See id.* at 790.

94. *See id.* at 792.

95. *See, e.g.*, John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 100 (2014) (criticizing ULURP for creating "multiple pressure points" to object to new development); DAVID MERRIMAN, IMPROVING TAX INCREMENT (TIF) FOR ECONOMIC DEVELOPMENT (2018) (finding that TIF often diverts revenues away from municipal budgets and school districts).

resist it. But if this story is true, it suggests an important caution about reform efforts. Urbanization trends are by no means inevitable and these tools may be important again for allowing cities to compete with the pull of their more sprawling suburbs.

B. The Costs of Zoning Reform

Even though zoning reform may not necessarily result in more dense development, it may still be important for other reasons. But there are costs that should at least be evaluated when considering zoning reform. Many reformers act as though zoning reform has only upside, and that opposition is the result of bad faith NIMBY self-interest.

1. Tiebout, Sorting, and the Costs of Change

YIMBY opponents of zoning will point to protectionist neighbors invoking stability as a kind of opportunity hoarding.[96] Yes, it may allow them to protect their preferences, but only by imposing enormous costs on excluded outsiders who cannot then find housing that meets their preferences. Notice, however, that these dynamics can feel very different depending on the neighborhood. It is one thing if members of an expensive Connecticut enclave invoke community stability to keep their manicured mansions sufficiently picturesque. It is something else entirely if low- or middle-income neighborhoods use zoning to try to protect precious social capital and resist gentrification.[97]

Moreover, change itself imposes costs, regardless of whether it takes the form of community investment or disinvestment. When people choose where to live, they are choosing a bundled collection of public and private goods. They are choosing a house with particular features—say three bedrooms and an attached garage—in a specific location for a given price. That location is also embedded in a particular jurisdiction which provides access to a collection of services, like schools and roads, all for some specific level of taxation.[98] The Tiebout Hypothesis predicts that people will sort themselves

96. Johnson, *supra* note 13, at 1655 (describing "opportunity hoarding").

97. *See generally* John Infranca, *Differentiating Exclusionary Tendencies*, 72 FLA. L. REV. 1271 (2020) (differentiating between exclusionary zoning in affluent and low-income neighborhoods).

98. *See, e.g.*, Serkin, *supra* note 17, at 771–72 (discussing Tiebout Hypothesis).

into local governments that best satisfy their individual preferences along these dimensions.[99]

What Tiebout proponents sometimes ignore, however, is that for geographic sorting to satisfy consumer preferences, there must be at least some measure of stability or the costs of constantly re-sorting will be prohibitively high. This is not the same well-trodden observation that zoning is a tool for keeping low-income households out of a community in order to minimize the cross-subsidies embedded in property taxes. The point here—subtly but importantly different—is that change itself is problematic for the Tieboutian sorting function. Even if newcomers buy exclusively at the higher end of the housing market (as in periods of gentrification) and dramatically *increase* the tax base and the quality of public services, this can still disrupt the choices that in-place residents implicitly made by buying into a community with a specific character. Where change is the challenge, not free-riding, zoning can serve the beneficial purpose of moderating the pace of that disruption.[100] Fast changes to a community are more disruptive of settled expectations than slower, controlled ones.[101]

These dynamics are ubiquitous and animate some of the gentrification anxiety in developing places. Gentrification creates predictable winners and losers. Urban pioneers often move into communities—usually communities of color—because they are betting on an influx of capital and services.[102] Change, in this instance, can drive up local prices but in the process drive out long-time residents. While some people benefit, these kinds of changes can impose significant costs on the community, fraying safety nets and eroding social capital.[103] The transformation of neighborhoods like Bedford Stuyvesant in

99. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

100. *See* Serkin, *supra* note 17, at 773.

101. *See* Christopher Serkin, *What Property Does*, 75 VAND. L. REV. 891 (2022). *See generally* HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 144 (2019) (discussing value of stability in property law).

102. *See* Miriam Zuk et al., *Gentrification, Displacement, and the Role of Public Investment*, 33 J. PLAN. LITERATURE 31, 32 (2018) (describing the potential motivations of gentrifiers and the subsequent increase in private and public investment that ultimately increases the cost of living in the neighborhood).

103. *See generally* Kenneth Temkin & William M. Rohe, *Social Capital and Neighborhood Stability: An Empirical Investigation*, 9 HOUS. POL'Y DEBATE 61 (1998) (examining empirically the relationship between social capital and neighborhood change).

Brooklyn, or East Nashville in Tennessee, show both the benefits but also the costs of change.[104] Changes to a community mean that some residents may find themselves living in a place that no longer meets their preferred mix of taxes, services, and housing costs. Where that happens, in-place residents are faced with the decision to suffer the disutility of living in a place that does not meet their preferences or incurring the substantial costs of moving.[105] Zoning can serve the important role of helping to moderate the pace of change, even if it should not be used to stop change altogether.[106]

Some might object that the housing crisis is sufficiently acute that dramatic changes are needed now. Others might worry that this use of zoning is simply cooking a frog slowly so it won't jump out of the pot. But nothing here specifies how fast is too fast in any particular context, or how much change to ultimately embrace. In some places, like New York and San Francisco, the gap between supply and demand is so extreme that the most aggressive zoning reforms are appropriate.[107] But in other places, the kind of knee-jerk opposition to zoning that is developing across the political spectrum will impose unnecessary costs on in-place property owners, costs that many zoning reforms seem to ignore.

2. The Costs of Relying on "Natural" Limits

Unregulated growth in many places will create significant environmental and human costs. Indeed, in parts of the West, promoting freer development without zoning limits on density runs headlong into water scarcity. There is a natural limit—not just a zoning limit—on

104. *See* Trymaine Lee, *A Merchant Watches as Bed-Stuy Gentrifies*, N.Y. TIMES (May 8, 2009), https://www.nytimes.com/2009/05/09/nyregion/09metjournal.html (describing the decline of minority owned businesses but also increasing safety and property values in Bedford-Stuyvesant, New York as a result of gentrification); Linda Ong, *Gentrification Is Having Mixed Impact in East Nashville Neighborhoods*, WKRN NASHVILLE (Jan. 18, 2019), https://www.wkrn.com/news/gentrification-is-having-mixed-impact-in-east-nashville-neighborhoods/ (juxtaposing the new restaurants, cafes, breweries, and businesses in East Nashville with the displacement of African Americans from communities that existed since the Civil War).

105. *See* Serkin, *supra* note 17, at 770–75 (arguing that one purpose of zoning is to moderate the pace of community change).

106. *See id.* at 783 ("[Z]oning and property law more generally constrain the pace of change, but do not prevent change altogether.").

107. *See* Glaeser et al., *supra* note 26 (arguing that the gap between building costs and housing costs is largely attributable to land use regulation).

the number of people who can live in Tucson or Las Vegas.[108] Without regulatory limits, however, population may climb past sustainable levels because the market will not necessarily respond quickly to long-term ecological constraints. Indeed, many places may have already passed that point.[109]

Similar dynamics play out in the context of sea level rise, natural disasters and climate change. Our understanding of vulnerable property is continuously evolving with historic rainfall in parts of the country causing unprecedented flooding and strengthening hurricanes that threaten larger swaths of coastal and even inland property.[110] Increasingly frequent and severe wildfires also threaten development that intrudes into the "wildland-urban interface."[111] These changes make development in some places increasingly risky, and zoning and land use regulations are key tools for keeping people

---

108. *See, e.g.*, Ian James, *'Our Own Survival Is at Stake': Arizona Is Using up Its Groundwater, Researchers Warn*, AZ. REPUBLIC (May 2021), https://www.azcentral.com/story/news/local/arizona-environment/2021/05/13/arizona-is-depleting-ground-water-in-many-areas-researchers-warn/5059471001/; Sarah Tory, *Rapid Growth in Arizona's Suburbs Bets Against an Uncertain Water Supply*, HIGH COUNTRY NEWS (June 1, 2021) (discussing the rapid growth of Phoenix to the fifth-largest city in the U.S., Arizona's declining groundwater supplies and measures to protect them, and the freeze on development in the Pinal management area because the state water department could not certify 100-year assured water supplies); Oliver Milman, *'We Live in a Desert. We Have to Act Like It': Las Vegas Faces Reality of Drought*, GUARDIAN (July 9, 2021), https://www.theguardian.com/us-news/2021/jul/09/las-vegas-climate-change-drought-water-conservation.

109. *See* Henry Fountain, *In a First, U.S. Declares Shortage on Colorado River, Forcing Water Cuts*, N.Y. TIMES (Aug. 6, 2021), https://www.nytimes.com/2021/08/16/climate/colorado-river-water-cuts.html (discussing the extent of the drought in the western United States and challenges to managing declining water supplies as irrigation and development increases in arid places); Jim Morrison, *Climate Change Turns the Tide on Waterfront Living*, WASH. POST (June 20, 2021), https://www.washingtonpost.com/magazine/2020/04/13/after-decades-waterfront-living-climate-change-is-forcing-communities-plan-their-retreat-coasts/ (discussing the challenges of waterfront living in the face of sea level rise); Chloe Johnson, *Charleston's Dilemma: How to Fix a Housing Crunch Without Building in Places that Flood*, POST & COURIER (Sept. 21, 2021), https://www.postandcourier.com/rising-waters/charlestons-dilemma-how-to-fix-a-housing-crunch-withoutbuilding-in-places-that-flood/article_884599c2-fb79-11eb-9370-2f48ec16b7c6.html (highlighting the tension between housing demand and sea level rise in growing coastal cities).

110. *See generally* Michael Dettinger et al., *Western Water and Climate Change*, 25 ECOLOGICAL APPLICATIONS 2069 (2015) (discussing potential shifts and increasing water availability problems throughout much of the western United States).

111. *See, e.g.*, Volker C. Radeloff et al., *Rapid Growth of the US Wildland-Urban Interface Raises Wildfire Risk*, 115 PROC. NAT'L ACAD. SCIS. 3314, 3316–17 (2018) (discussing increasing residential development in or near wildland vegetation that could both increase the prevalence and impact of wildfires).

and property out of harm's way. Density in New Orleans' Lower Ninth Ward, for example, would risk an enormous human and economic toll, even if it would produce lower housing costs throughout the city. Reforms that weaken zoning's ability to respond to ecological vulnerability may come with a high cost.

3. Regional Inequality

There is a deeper worry, as well: exacerbating regional inequality. As noted above, one strand of opposition to zoning regulation is based on macroeconomic concerns about the mismatch between labor supply and demand.[112] Zoning is a culprit because it prevents housing markets from responding to demand, and so keeps people from moving so easily to more flourishing places.[113] This claim embeds fundamentally libertarian assumptions that regulation is the problem to be overcome, and that the absence of regulation will unlock market forces that solve all manner of problems. This account, however, assumes both that demand is somehow naturally occurring, and that there are no costs to this deregulatory approach (or at least that the costs are outweighed by the economic benefits). Both are problematic.

In a recent article with Professors Ganesh Sitaraman and Morgan Ricks, we examined the evidence that regional inequality is increasing in this country.[114] After nearly a century of economic convergence, as predicted by economic theory, flourishing places have increasingly been pulling away from struggling ones.[115] Zoning reformers invoke all manner of economic phenomena to explain this change, highlighting the agglomeration benefits of co-location, and the economic advantages of dense places in the modern economy.[116] If only housing markets operated with less regulatory friction, people would be free to move to thriving places, improving both their own situation and also generating benefits for the economy as a whole.

Missing from this story, however, is any recognition of the role that regulatory policy has played in regional economic divergence.

---

112. *See supra* notes 25–27.

113. *See supra* note 30.

114. Sitaraman et al., *supra* note 3, at 1772–76.

115. *See id.* at 1774.

116. Schleicher refers obliquely to "technological changes" and "social shifts." Schleicher, *supra* note 19.

As we demonstrated, a series of deregulatory changes dating primarily back to the Reagan era promoted concentration in economic opportunity, giving rise to an increasingly winner-take-all economy with perennially left-behind places.[117] These changes included, primarily, deregulation of transportation and communication, lack of enforcement of anti-trust rules, and the centralization of trade policy in the executive branch.[118] These all operate somewhat differently, and the argument does not need to be repeated here. But each of these dramatic changes in regulatory policy had the result of making it more difficult for cities like Louisville or Memphis to compete with the superstar cities like New York and San Francisco. It is hard to run an international company with no direct flights to most places.[119]

If the reason for New York's economic advantages is a set of deregulatory policies, it is troubling to think that a further deregulatory response will produce better outcomes. A better target for reform are the regulatory choices that let New York, Chicago, and San Francisco pull further and further ahead of many places in the country, addressing housing affordability from the direction of demand instead of—or at least in addition to—supply.[120]

This is important because regional inequality produces its own harms. Population growth in a few thriving places comes at the expense of the places that are left behind. In a truly insightful treatment of zoning deregulation, Richard Schragger points out this cost of "the YIMBY 'build, build, build' demand."[121] According to a study he cites, eliminating regulatory limits on housing would produce employment gains of 787% in New York, 500% in San Francisco, and employment *losses* of 98% in Flint, Michigan.[122] There are distributional costs to such an extreme realignment of housing and jobs that are often ignored.

---

117. Sitaraman et al., *supra* note 3, at 1816.

118. *See id.* at 1785–1809.

119. *See id.* at 1791 ("Because travel to and from such inland cities has become much more expensive and inconvenient, corporate headquarters have fled.").

120. *See id.* at 1830–36 (proposing a range of structural responses).

121. Richard Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 180–81, 191–94 (2021) (discussing the difficulty of predicting future housing demand and potential consequences of unleashing uncontrolled housing development).

122. *See id.* at 186 n.285 (citing Andrés Rodríguez-Pose & Michael Storper, *Housing, Urban Growth and Inequalities: The Limits to Deregulation and Upzoning in Reducing Economic and Spatial Inequality*, 57 URB. STUD. 223, 238 (2020)).

In reality, no one suggests that everyone will—or should—move to a few thriving places. But it is predictably better educated and more affluent white people who take the most advantage of moving, putting further pressure on the places left behind.[123] And, even on the margins, accommodating greater population in a few thriving urban centers does further damage to our democratic system, where projections based on Census data predict that within two decades only sixteen senators will represent more than fifty percent of the population, and eighty-four will represent the other half.[124]

III. WHAT COMES NEXT

A. The Sad State of the Current Debate

Strident advocates of zoning reform have demonstrated an especially dismissive attitude towards any defenses of land use regulation, even modest and careful ones.[125] In a response to several recent articles, for example, David Schleicher lambasts any note of caution about zoning reform as naïve NIMBY pandering.[126] This scholarship of derision disguises a number of problematic assumptions that call for more careful attention.

In particular, in responding to my article *A Case for Zoning*, he dismisses the argument that zoning may have had any role to play in re-urbanization in the 1990s. He points out that "lightly zoned" cities like Phoenix also experienced dramatic growth during this period, suggesting that zoning was therefore not an important driver of re-urbanization.[127] This is an interesting argument, and it is useful to look to other cities for comparison, but Phoenix is a puzzling example.

---

123. Sitaraman et al., *supra* note 3, at 1818 ("Data from the Federal Reserve on internal migration show that white people are more likely to move than Black people, those with greater educational attainment are more likely to move than those with less, and higher-income people are more likely to move than lower-income people."); *cf.* Sheila R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J.F. 480, 489 (2017) ("In other words, one of the consequences of agglomeration economies—i.e., the clustering of talent and industry—is that it has become one of the main drivers of inequality.").

124. *See* Sitaraman et al., *supra* note 3, at 1781.

125. *See generally* Schleicher, *supra* note 19.

126. *See id.*

127. *See id.*

It is true that lightly zoned Phoenix was also growing when New York and other coastal cities were re-urbanizing. But the growth of that city was driven more by annexation and sprawl than by re-urbanization.[128] Between 1990 and 2000, the land area of Phoenix grew by thirteen percent, and population growth was concentrated at the urban fringe.[129] While Phoenix grew during this period, it was not through any process that resembled re-urbanization in places like New York and its formula for growth has produced generally worse outcomes on many dimensions.[130]

Indeed, structural features of Phoenix and discriminatory practices in the real estate industry there have perpetuated a segregated city where the relatively dense downtown area is predominantly Black and Latino and suffers from chronic disinvestment.[131] According to one damning account of this period of growth, "Within th[e] national context of downtown redevelopment, it is remarkable that the revitalization of downtown Phoenix took so long. The city holds the dubious honor of having the least interesting and profitable downtown area of any major city in America."[132] The growth of Phoenix has occurred much more through consumption of agricultural land and the sprawl of single-family housing on the outskirts.[133] This is hardly the example of urbanization without zoning that Schleicher suggests.

---

128. *See, e.g.*, PATRICIA GOBER, METROPOLITAN PHOENIX 3 (2006) (describing a "relentless push toward new land at the urban fringe, a push that continues today. Despite periodic efforts to reinvigorate its downtown, Phoenix has the least developed urban core of any large city in America.").

129. Carol E. Heim, *Border Wars: Tax Revenues, Annexation, and Urban Growth in Phoenix,* 36 INT'L J. URB. & REG'L RSCH. 831, 834 (2012). As one article explains in detail:

> Between 1990 and 1999, the population of Maricopa County, which includes metropolitan Phoenix, grew by 34.8 percent or 739,294 persons to 2,861,395 . . . . Residential growth occurred primarily at the urban fringe because land and development costs there are low, employment opportunities are available within a forty-five-minute commute, and growth management regulations are weak. To accommodate growth, Phoenix-area communities annexed a total of 214 square miles—the land mass of El Paso, Texas—between 1990 and 1997.

Patricia Gober & Elizabeth K. Burns, *The Size and Shape of Phoenix's Urban Fringe*, 21 J. PLAN. EDUC. & RSCH. 379, 384 (2002).

130. *See, e.g.*, PHILIP R. VANDERMEER, PHOENIX RISING 63 (2002) ("The absence of effective city planning or zoning encouraged 'leapfrog' development where builders sought land on the outskirts or outside of the current city boundaries.").

131. *Id.*

132. *Id.* at 177.

133. *See, e.g.*, Carol E. Heim, *Leapfrogging, Urban Sprawl, and Growth Management: Phoenix, 1950–2000*, 60 AM. J. ECON. & SOCIO. 245, 251–53 (2001) (describing development in Phoenix).

Schleicher next rejects the claim that there could be problematic substitution effects if homeowners choose private zoning in the form of HOAs over public land use regulations. Schleicher argues that HOAs cannot replicate zoning controls, and that zoning arose partly because "deed covenants could not successfully limit the construction of apartment buildings in New York City in the early 1900s."[134] HOAs, according to Schleicher, are not as protective and restrictive as zoning and so are preferable. And he points to Houston as proving his point.

Houston, he argues, demonstrates that relying on HOAs instead of zoning allowed population to increase dramatically without concomitant increases in housing prices, presumably because HOAs are less restrictive than comprehensive zoning and less protective of neighbors' rights. It is true that Houston has not seen housing costs rise at nearly the rate of other thriving municipalities.[135] It has experienced dramatic growth but without such a significant increase in property values (although prices have been rising recently).[136]

Houston, however, is another strange example to invoke as support for his claim. In fact, it corroborates the foundational observation that housing consumers do use HOAs as private substitutes for public zoning. Phoenix—Schleicher's other example—is similar. Just like

---

134. Schleicher, *supra* note 19.

135. Emily Hamilton, *Want More Housing? Ending Single-Family Zoning Won't Do It*, BLOOMBERG CITYLAB (July 29, 2020, 10:06 AM), https://www.bloomberg.com/news/articles/2020-07-29/to-add-housing-zoning-code-reform-is-just-a-start ("A typical house in Houston costs less than $200,000, compared with nearly $300,000 in Atlanta or a staggering $680,000 in San Diego. In other booming cities, more jobs and new residents have led to skyrocketing prices but few new homes.").

136. Florian Martin, *Rising Prices Are Making Houston Homebuyers Lower Their Expectations*, HOUS. PUB. MEDIA (April 30, 2021), https://www.houstonpublicmedia.org/articles/news/in-depth/2021/04/30/397115/rising-prices-are-making-houston-home-buyers-lower-their-expectations/ (highlighting that, although median home prices are still below the national median, "prices have grown so fast recently it's becoming harder for Houstonians to afford their dream house. From March 2020 to March 2021, Houston home prices went up by 16%—from just under $250,000 to $290,000."); R.A. Schuetz, *Houston Is Often Touted as One of the Most Affordable Cities. But Is It Really?*, HOUS. CHRONICLE (June 24, 2021), https://www.houstonchronicle.com/business/article/The-majority-of-Houston-renters-are-now-cost-162 65423.php (reporting that "Houston renters are now more cost burdened—and evicted at a higher rate—than renters in Dallas, Chicago or Atlanta" and that eviction rates are second only to New York City, a city twice Houston's size, between 2018 and 2020); Sarah Smith, *No City in America Has Enough Low-Income Housing. Houston Is One of the Worst*, HOUS. CHRONICLE (Mar. 18, 2021), https://www.houstonchronicle.com/news/houston-texas/houston/article/No-city-in-America-has-enough-low-income-housing-16033351.php ("Seventy-nine percent of the lowest-income renters [in Houston] pay at least half of their income toward rent and utilities.").

in Houston, housing consumers in Phoenix have opted significantly for private zoning in the form of HOAs. Since 1985, "[t]he majority of new residential developments in Phoenix . . . have been governed by HOAs . . . ."[137] Of course, individual HOAs will not constrain development of a whole area or community in the same way as zoning. But where they are ubiquitous, in places like Houston and Phoenix, they create a tapestry of private regulation that, in effect, restricts development in large areas and exacerbates sprawl.

Schleicher argues that zoning drives up costs, creates sprawl, and contributes to climate change. But if we are to take Houston and Phoenix as the models of growth with less zoning, the result is sprawl, segregation, and environmentally unsustainable development.[138] Does this make sense? "I suppose you can be the judge."[139]

B. The Unspecified Endgame

Part of the problem with the current debate is that zoning reformers have, by and large, not been particularly explicit about their ultimate goals or what they see as the endgame of their efforts. This creates the illusion of policy consensus when, in fact, deep disagreements may lurk beneath the surface.

One shared goal is simply incremental improvements in land use regulations to account for new information and changed conditions on the ground. In a comprehensive article, for example, Professor Wolf has argued for a host of zoning changes to respond to modern land use demands, such as allowing home occupations in more places, expanding permissible accessory uses, and accommodating more affordable housing, among others.[140] Changes in minimum parking requirements recognize the aspiration to have less car-dependent cities.[141]

---

137. *See* V. Kelly Turner & Dorothy C. Ibes, *The Impact of Homeowners Associations on Residential Water Demand Management in Phoenix, Arizona*, 32 URB. GEOGRAPHY 1167, 1168 (2011).

138. *See, e.g.*, Joe Cortright, *Where Does Houston Rank Among American's Least (and Most) Segregated Cities?*, KINDER INST. URB. RSCH. (Sept. 4, 2020), https://kinder.rice.edu/urbanedge/2020/09/04/houston-rank-america-least-and-most-segregated-cities ("Houston (defined as Harris County) has the 18th highest level of white/non-white segregation among urban counties in the U.S.").

139. Schleicher, *supra* note 19, at 1344.

140. *See generally* Michael Allen Wolf, *Zoning Reformed*, 70 U. KAN. L. REV. 171 (2021).

141. *See, e.g.*, Sara C. Bronin, *Rethinking Parking Minimums*, PLAN. MAG., Feb. 1, 2018, at 9.

Other important reform efforts along these lines recognize the increasing power that neighbors exercise in the land use process, tilting the balance of power towards NIMBY exclusion.[142] Focusing on those political dynamics suggests important reforms to reduce veto points in land use approvals.[143] Reforms can also be political, like upstreaming certain kinds of land use decisions to the state to avoid local gridlock, relying on planning to avoid self-interested myopia, or otherwise trying to activate groups in opposition to motivated NIMBYs.[144] This incremental approach looks simply to identify and correct pathologies in land use decision-making whenever and wherever possible.

Another related but distinct goal may be to create larger and, ideally, denser places. There is a vast literature on optimal size, with the efficiencies of infrastructure pushing up against the costs of congestion. That balance may be shifting in some places for any number of reasons.[145] For example, there may be excess infrastructure capacity in some places, or the costs of exclusion may now exceed the costs of increased congestion.[146] More generally, changes in technology and the modern economy may have increased the optimal city size.[147]

These zoning reform efforts are aimed at recalibrating density and growth limits and expanding allowable development. Reforms can be targeted, like the recent rezoning of Gowanus to allow an

142. *See* Moira O'Neill et al., *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENV'T L.J. 1, 49–71 (2019) (presenting granular findings); *see also* EINSTEIN ET AL., *supra* note 12, at 157–71 (focusing on changing who participates in land use decision-making); Been, *supra* note 14, at 245–46 (analyzing political dynamics around NIMBYism in cities).

143. Been, *supra* note 14, at 22 (citing Mangin, *supra* note 95).

144. *See, e.g.*, Infranca, *supra* note 15, at 875–86 (arguing for and surveying responses); Rosser, *supra* note 15, at 824 (discussing preemption); Alejandro E. Camacho & Nicholas J. Marantz, *Beyond Preemption, Toward Metropolitan Governance*, 39 STAN. ENV'T L.J. 125, 149–51 (2020) (arguing for realigning local control over land use regulation to promote housing affordability).

145. *See generally* Gilles Duranton & Diego Puga, *The Economics of Urban Density*, 34 J. ECON. PERSPS. 3 (2020) (highlighting the drivers and costs and benefits of more dense development).

146. *Id.* at 15–18; Alex Baca et al., *"Gentle" Density Can Save Our Neighborhoods*, BROOKINGS (Dec. 4, 2019), https://www.brookings.edu/research/gentle-density-can-save-our-neighborhoods/ (arguing that housing density can more "gently" increase in forms other than high-rise buildings that still increase housing supply and service efficiencies without the costs of sudden increases in population).

147. *See* Duranton & Puga, *supra* note 145, at 16 (noting that technological developments have allowed increased density in cities with taller buildings).

additional 8,500 new apartments in a well-established Brooklyn neighborhood.[148] Or they can be broader, like allowing ADUs as of right, reducing or eliminating off-street parking requirements, and making it easier to subdivide lots.[149] In California, for example, new statewide laws allow ADUs even in HOAs in communities that currently prohibit them.[150] And Minneapolis and other jurisdictions have all but banned single-family zones, dramatically increasing permissible development to increase the supply of housing.[151]

These kinds of reforms promise to transform many places, and often for the better. But these reforms do not fundamentally alter the underlying dynamics of urban development. Zoning still has a role to play in protecting infrastructure and services from too much congestion, even if cities today can accommodate significant growth in many places. Once development has consumed that excess capacity, zoning will again constrain change. The endgame, in other words, is not to do away with zoning, but is simply to accommodate additional growth now and to promote a new equilibrium with marginally larger and denser cities.

---

148. *See, e.g.*, David Brand, *NYC Council Approves de Blasio's Massive Gowanus Rezoning*, CITY LIMITS (Nov. 23, 2021), https://citylimits.org/2021/11/23/nyc-council-approves-de-blasios-massive-gowanus-rezoning/ (describing the rezoning).

149. *See, e.g.*, Assemb. B. 881, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (allowing accessory dwelling units); S.B. 13, 2019–2020 Leg., Reg. Sess. (Cal. 2019) (same); Laura Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NAT'L PUB. RADIO (July 1, 2019), https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning (discussing Oregon). For a brief overview of these kinds of reform efforts, with links, see Solomon Greene & Jorge González-Hermoso, *How Communities Are Rethinking Zoning to Improve Housing Affordability and Access to Opportunity*, URB. INST.: URB. WIRE (June 12, 2019), https://www.urban.org/urban-wire/how-communities-are-rethinking-zoning-improve-housing-affordability-and-access-opportunity.

150. *See* CAL. CIV. CODE § 4751 (2021); Assemb. B. 760, 2019–2020 Leg., Reg. Sess. (Cal. 2019); Benjamin Donel, *California's New Accessory Dwelling Units Laws: What You Should Know*, FORBES (March 12, 2020), https://www.forbes.com/sites/forbesfinancecouncil/2020/03/12/californias-new-accessory-dwelling-units-laws-what-you-should-know/?sh=1f02ec4e17a3.

151. *See Policy 1*, *Access to Housing: Increase the Supply of Housing and Its Diversity of Location and Types*, MINNEAPOLIS 2040, https://minneapolis2040.com/policies/access-to-housing/ (last visited Aug. 29, 2022); CAMBRIDGE CITY, MA., *Policy Order 2020 #289 Elimination of Single Family Zoning*, CAMBRIDGEMA.GOV (Dec. 14, 2020, 5:30 PM), https://cambridgema.iqm2.com/Citizens/Detail_LegiFile.aspx?Frame=&MeetingID=2757&MediaPosition=&ID=13192&CssClass=%3C; Wamsley, *supra* note 149 (discussing Oregon's decision to allow multiple units on plots as of right depending on the size of the locality and thus functionally eliminating single family zoning); S.B. 9, 2021–2022 Leg., Reg. Sess. (Cal. 2021); *see also Build, Baby, Build*: *California Ends Single-Family Zoning*, ECONOMIST (Sept. 25, 2021), https://www.economist.com/united-states/2021/09/23/california-ends-single-family-zoning.

Some zoning reformers may be arguing for something more radical, however: eliminating most if not all density limits and regulatory restrictions on development.[152] This goal is not about unlocking some amount of new growth, but is instead promoting a future where development decisions are made exclusively by the market, and planning and politics are sidelined.[153] Undergirding this view may be a sense that zoning has become irredeemably exclusionary and needs to be fundamentally reset, or a more ideological hostility to regulation.

But what is the endgame here? There are still "natural" constraints on growth. At certain levels of congestion people will choose to live elsewhere and growth will slow or stop. Where water becomes scarce or natural disasters more devastating, places will eventually become undesirable. Without regulatory constraints, however, developers may well blow right past those limits. Even if the market ultimately corrects, uncontrolled growth may impose significant costs in the meantime.[154] Schleicher himself has suggested that his dystopian anti-regulatory vision should include housing that is easier to dismantle so that it can simply be discarded as people chase jobs from place to place.[155] The deadweight costs are potentially staggering.

More fundamentally, this ideologically motivated endgame is troubling because it does not easily admit any weighing of the costs and benefits of growth, or any of the benefits of land use regulation. It is one thing to say that the voices of NIMBYs have grown too powerful in opposing development, a point that should draw consensus. It is something else entirely to say that growth is always an unalloyed good. There are costs to growth—costs that vary by place—and regulation remains an important tool for managing them. But finding the right balance will require a clear-eyed look at its costs and benefits.

It is easy to disguise the differences between these three camps because they are usually aligned on many of the discrete reforms that policymakers are considering today. Incrementalists, growth

---

152. *See* Serkin, *supra* note 17, at 770 n.129 (citing sources).

153. *See* Walter Block & Sarah Huddell, *The Case Against Zoning*, 37 INT'L J. ETHICS & SYS. 618, 625 (2021) ("The market is a tremendously powerful force that acts directly in line with human desires and tendencies. Therefore, the most effective way to plan, develop and design communities is to let the invisible hand guide us.") (internal citation omitted).

154. *See supra* Section II.B.

155. *See* David Schelicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 139 (2017) ("If housing was less durable, it would also presumably be less costly to produce ex ante.").

advocates, and idealogues all agree on issues like ADU reform. And indeed, these are changes that are easy to embrace. But what comes next? Without giving more careful thought to the next set of regulatory challenges and the affirmative goals that zoning should promote, it will be easy for all three camps to be swept up in anti-regulatory fervor that may well go too far. This is a dangerous path. Going forward, zoning reform efforts should be more attentive to both the costs and benefits of reforms and be more explicit about underlying values and ultimate goals.

C. What Comes Next?

Of course there are important opportunities to increase density in many places. There is no question that we have a housing crisis in many thriving places and that zoning is partly to blame. Zoning has contributed to a number of urgent problems. It has codified discrimination and segregation. And it has helped to produce the sprawling single-family development that contributes to climate change while simultaneously dissipating social capital. Many of our most vibrant cities should increase supply by increasing permissible density.

This Article is not an argument against regulatory reform. The interventions here are not intended to push back against these very real problems. They are, instead, intended to sound a note of caution about what comes next. Urban policy over the last century has not pointed in a single direction but has instead been a kind of pendulum.[156] It is important as the pendulum swings back away from regulation not to let it swing too far.

Zoning reformers seem to assume a kind of inevitability to the current trends of urban growth and development. They claim that urbanization is the result of changing consumer preferences and point to the appetite of younger workers, in particular, to live in denser urban places where cultural amenities are more readily available.[157]

---

156. *See, e.g.*, Serkin, *supra* note 17, at 754–66 (providing a brief history of urban planning and zoning and its shifts over time).

157. John R. Nolan, *Shifting Paradigms Transform Environmental and Land Use Law: The Emergence of the Law of Sustainable Development*, 24 FORDHAM ENV'T L. REV. 242, 255–57 (2017) ("For a variety of reasons . . . the majority of the projected 100 million new Americans [by 2050] will be inclined to shift ground [away from sprawling suburbs], preferring to live in dynamic, walkable neighborhoods in urban areas."); Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 257–60, 263, 266–69 (2006) (providing a brief synopsis of

When people think about dramatically increasing density in the urban core, they often imagine—at least implicitly—a kind of heterogeneous utopia with workforce housing intermixed with upscale apartments that attract the creative class, to use Richard Florida's formulation.[158]

Re-urbanization is not an inevitable force, however. If demand decreases as neighborhood stability becomes unsettled—especially among the more affluent who have other ways of purchasing neighborhood stability by buying in HOAs—then the result might be worse for cities. Shifts in consumer preferences could transform what has been a virtuous cycle of job creation and municipal revenue into the death spiral of the 1970s with a hollowing out of the tax base and the loss of municipal services.[159]

Such a change may be underway right now. Millennials' preference for dense, urban living appears to be less durable than many people have assumed. Even prior to COVID, millennials appeared to be shifting towards the suburbs.[160] COVID has accelerated that change.[161] Already, population growth in many suburbs is outpacing growth in the urban core.[162] COVID may accelerate these trends

---

New Urbanist ideas and the barriers to developers attempting to build in line with them). *But see* Dowell Myers, *Peak Millennials: Three Reinforcing Cycles that Amplify the Rise and Fall of Urban Concentration by Millennials*, 26 HOUS. POL'Y DEBATE 928, 930–32, 943–45 (2016) (discussing urbanism in the millenial generation and why urbanism may be temporary or shift as millennials age, priorities shift, and other housing opportunities emerge).

158. *See* Richard Florida, *Cities and the Creative Class*, 2 CITY & CMTY. 3, 7–10 (2003) (describing the success of places embracing the creative class and the desire for members of that class to live among one another and within diverse, vibrant communities).

159. *See, e.g.*, Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1139 (2014) ("Both poverty and population loss hit government revenues directly, as declining wealth and a declining number of city taxpayers produce lower revenues to fund current services and keep up with past debt.").

160. *See, e.g.*, Myers, *supra* note 157. *But see* Hyojung Lee, *Are Millennials Leaving Town? Reconciling Peak Millennials and Youthification Hypotheses*, 26 INT'L J. URB. SCIS. 68 (2022) (arguing that millennials are being replaced by the next generation of young people, who again prefer urban living).

161. *See, e.g.*, Avert Hartmans, *Millennials and Gen Z Are Fleeing Cities and Buying Up Homes in the Suburbs Amid the Coronavirus Pandemic*, INSIDER (Nov. 20, 2020, 11:05 AM), https://www.businessinsider.com/millennials-gen-z-leaving-cities-for-suburbs-amid-pandemic-2020-11 (describing "a noticeable migration among people ages 25 to 34 from urban areas to suburban ones"); *see also* PARAG KHANA, MOVE 106 (2021) ("Rising city costs, the Covid lockdown, and the explosion in telecommuting are also likely to bring about a substantial suburban revival.").

162. *See* Laura Kusisto, *Suburbs Outstrip Cities in Population Growth, Study Finds*, WALL ST. J. (Dec. 3, 2016, 7:00 AM), https://www.wsj.com/articles/suburbs-outstrip-cities-in-population-growth-study-finds-1480766402 (highlighting a study that found on average suburban

because people may once again start to prefer larger houses on larger lots after spending so much time at home. Moreover, COVID has demonstrated to many businesses that employees do not need to come to the office every day—or ever—and that they can be productive working remotely.[163] New living-working configurations may allow people to live wherever they want without giving up access to thriving economies.[164]

For cities to continue to compete in this changing landscape, they will need to offer more than access to good jobs and higher wages. Those "amenities" may be increasingly available to people wherever they choose to live. So cities will need to act to continue to foster and enhance the non-economic values that attract people to living in the dense urban core: community, diversity, urban amenities like cultural activities and restaurants, dynamism, and simply the aesthetic quality of urban life that suburbs cannot provide. Disarming local governments' regulatory arsenal will make it harder to respond when these pressures change.

As always, it is important not to be dogmatic in this caution. Cities can also sow the seeds of their own destruction by becoming such exclusive enclaves that the generative forces of economic and

---

areas around the fifty largest metropolitan areas in the country comprised seventy-nine percent of the population of each region, ninety-one percent of the population growth in the region between 2000–2015, and seventy-five percent of the population between twenty-five and thirty-four in these regions lived within suburbs); Richard Fry, *Prior to COVID-19, Urban Core Counties in the U.S. Were Gaining Vitality on Key Measures*, PEW RSCH. CTR. (July 29, 2020), https://www.pewresearch.org/social-trends/2020/07/29/prior-to-covid-19-urban-core-counties-in-the-u-s-were-gaining-vitality-on-key-measures/ ("Since 2000, the U.S. population has been increasingly concentrated in the 52 largest metropolitan areas, particularly their suburban counties. The population of the large suburban counties has increased by 25% in the new century, outpacing the nation's overall population growth (16%). The population in the urban core counties grew at the same pace as the national average.").

163. Lananh Nguyen, *Wall Street Grudgingly Allows Remote Work as Bankers Dig In*, N.Y. TIMES (Nov. 24, 2021), https://www.nytimes.com/2021/11/24/business/wall-street-remote-work-banks.html (highlighting that Wall Street banks posted record profits and revenue over the time period employees worked remotely); Claire Cain Miller, *The Office Will Never Be the Same*, N.Y. TIMES (Sept. 22, 2021), https://www.nytimes.com/2020/08/20/style/office-culture.html.

164. *See generally* KHANA, *supra* note 161 (describing these trends and offering a number of visions for the future of migration and development); AnnElizabeth Konkel, *Indeed US Job Postings Tracker: Data Through January 7*, INDEED HIRING LAB (Jan. 13, 2022), https://www.hiringlab.org/2022/01/13/job-postings-tracker-through-january-7/?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axioswhatsnext&stream=science (highlighting that the metropolitan areas with fastest growth in job postings were largely in the Sunbelt and Pacific Northwest and not in traditional "superstar" cities).

cultural dynamism dissipate or never take hold. There is a story, for example, that the most interesting music and theater scenes in New York have largely left for smaller, less expensive cities.[165] Addressing affordability and allowing communities to reconstitute themselves is essential. Dynamism, growth, and renewal are core features of thriving places, and considerable change and development are good. The point, simply, is that this can also go too far and that cities should have the tools to control the pace of change.

These pressures cannot all be addressed in the abstract, or through one-size-fits-all reforms. There is often a kind of regional myopia that infects the land use discourse. It is not surprising that most of the important voices in the field—and most of the important reform efforts—come from places facing the most acute development pressures: California, New York, Boston, and Washington, D.C., for example. But reforms look different in the sunbelt or in other regions where zoning is not the principal constraint on density and growth. Those are places that often suffer from too little planning and zoning, not too much. There is a careful balance to be struck, but it is a different balance in different places. The current debate often paints with too broad a brush and, again, risks unnecessary harm in the process.

CONCLUSION

As welcome efforts to reform zoning continue to gain traction in cities and states throughout the country, it is important to recognize that there is no secret sauce that cures all problems. Less restrictive zoning can unlock density, but it may not always do so. And zoning reform comes with its own costs. There is no serious question that zoning is now too restrictive in many places, but the goal of reform should be to recalibrate the balance between development and exclusion. Focusing more honestly on the ultimate goals of zoning reform will help to sharpen the terms of the debate.

---

165. *See* Alice Newell-Hanson, *Why New York's Young Artists Are Leaving the City and Moving Upstate*, VICE I-D (Dec. 6, 2016), https://i-d.vice.com/en_uk/article/qvb4q7/why-new-yorks-young-artists-are-leaving-the-city-and-moving-upstate (interviewing artists that left New York City to live in smaller cities with a lower cost of living that enabled them to focus more on their art); Kim Velsey, *Artist's Studio: How About the Living Room?*, N.Y. TIMES (Nov. 29, 2019), https://www.nytimes.com/2019/11/29/realestate/artists-working-from-home.html (describing how rising rents forced artists in New York City apart from one another and away from working in studio spaces).