ON ENGINEERING URBAN DENSIFICATION

STEVEN J. EAGLE*

ABSTRACT

City planning in America began as a Progressive Era exercise intended to preserve property values and implicitly incorporate the social norms of officials and planners. Over time, rigid zoning was replaced by flexibility accompanied by opaque bargaining between localities and developers. Still, even in vibrant large cities, homeowner preferences for low density largely prevailed over attempts to enhance agglomeration through increasing density. The effect is to reduce economic opportunity for individuals and make cities less prosperous.

One method of increasing agglomeration is the imposition of densification, utilizing the assembly of transient coalitions that could impose grand bargains between aldermen and strong mayors. Expert planners would devise detailed quotas for desirable and undesirable uses in different parts of the city, and recipients of favorable zoning would receive regulatory property that is locked in place by procedural and constitutional requirements. Roderick Hills and David Schleicher advocate this approach in City Replanning.

This Article reviews the history of idealistic, and later pragmatic, comprehensive planning and zoning. It then analyzes the case for agglomeration and how it might be obtained through density mandates. The Article subsequently reviews undesirable consequences of such mandates. It asserts that grand bargains attenuate democratic decision-making, significantly reinforce the perceived evils of the current system, and are apt to be ineffective.

---

* Professor of Law, George Mason University School of Law, Arlington, Virginia 22201, seagle@gmu.edu. This Article first was presented at the Eleventh Annual Brigham-Kanner Property Rights Conference, on October 31, 2014. It is written in honor of Michael M. Berger, the 2014 Brigham-Kanner Property Rights Prize recipient, the first practicing attorney to be so recognized and one of America's most distinguished takings lawyers. More importantly, in the more than twenty years that I have known him, Mike Berger has personified integrity and compassion.

INTRODUCTION

This Article considers the engineering and densification of vibrant American cities. By "engineering," I refer to something contrived or devised,[1] as opposed to something arising from spontaneous growth, as Jane Jacobs or F.A. Hayek might have understood it.[2] By "densification," I mean increasing population density. "Densification" is an ugly word, having the sole merit of accuracy.[3]

The Article has three themes. Densification has beneficial effects on societal productivity to the extent coincident with positive agglomeration. The process of engineering densification exacerbates some of the same problems that it was intended to overcome. The detriments of agglomeration, conventionally lumped together with the label "congestion," are more broad and deep than generally realized.

I. THE BENEFITS AND LURES OF AGGLOMERATION

Agglomeration theory has its roots in the observation of Alfred Marshall a century ago that the agglomeration of firms in the same industry within limited geographical confines conferred great benefit.[4] From this beginning, subsequent scholars explained how talented

---

1. The word is comes from the Latin *ingenium*, meaning "cleverness." OXFORD ENGLISH DICTIONARY (3rd ed., 2011).

2. *See* JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961) (envisioning cities as naturally growing communities not marked by sterile over-planning); 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER (1973) (generalizing theories of regulatory government from the decentralized character of market norms).

3. Some years ago, the municipal planner working on downtown revitalization in a major North American city confided in me that his staff used "densification" only among themselves. For public consumption, they used the term "smart growth."

4. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 271 (8th ed. 1920).

> When an industry has . . . chosen a locality for itself, it is likely to stay there long: so great are the advantages which people following the same skilled trade get from near neighbourhood to one another. The mysteries of the trade become no mysteries; but are as it were in the air, and children learn many of them unconsciously. Good work is rightly appreciated, inventions and improvements in machinery, in processes and the general organization of the business have their merits promptly discussed: if one man starts a new idea, it is taken up by others and combined with suggestions of their own; and thus it becomes the source of further new ideas. And presently subsidiary trades grow up in the neighbourhood, supplying it with implements and materials, organizing its traffic, and in many ways conducing to the economy of its material.

workers flock to areas rich in amenities and, perhaps more importantly, to areas where they could also interact with existing talented residents from whom they could learn new skills and thus raise their incomes.[5]

Scholars have long contrasted teeming cities with residential suburbs, where exclusionary zoning has been a barrier to employment opportunities for low-income residents of central cities.[6] More recently, however, commentators have argued that stringent land use restrictions in desirable cities themselves constitute "the new exclusionary zoning."[7]

A recent paper by Peter Ganong and Daniel Shoag[8] suggests that anti-growth regulation is a substantial cause of the high cost of housing in desirable large cities. The authors conclude that the United States is "increasingly characterized by segregation along economic dimensions, with limited access for most workers to America's most productive cities," and that their work might "highlight the role land use restrictions play in supporting this segregation."[9]

In recent decades, scholars have looked beyond the effects of urban growth restrictions on excluded socio-economic groups. They have focused on the effects of restrictions on workers more generally and, relatedly, upon the prosperity of the cities themselves and the Nation as a whole. Ganong and Shoag stated that there was a "striking" convergence in per capita incomes across U.S. states from 1880 to 1980 but that during the ensuing thirty years, that relationship had "weakened considerably, as observed at the metro-area level."[10] In

5. *See* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 89–102 (2013) (summarizing scholarship).

6. *See, e.g.*, Henry A. Span, *How Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 19 (2001) (noting that exclusionary zoning creates "a spatial mismatch between job opportunities and people with low incomes"). *But see* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning In It's Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667 (2013) (urging change of focus from municipal exclusionary practices to the needs of lower-income households for ready access to attractive mixes of services, taxes, and employment opportunities).

7. *See, e.g.*, John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 92 (2014) ("The anti-development orientation of certain cities is turning them into preserves for the wealthy as housing costs increase beyond what lower-income families can afford to pay.").

8. Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* (Harvard Kennedy Sch., Working Paper No. RWP12-028, 2013), *available at* http://ssrn.com/abstract=2081216.

9. *Id.* at 31.

10. *Id.* at 2.

explaining this shift, they noted the work of Christopher Berry and Edward Glaeser, who postulated "the clustering of skilled people in metropolitan areas is driven by the tendency of skilled entrepreneurs to innovate in ways that employ other skilled people and by the elasticity of housing supply."[11]

Consistent with the caveat of Berry and Glaeser that the benefits of agglomeration are in part dependent upon "the elasticity of housing supply," research by Chang-Tai Hsieh and Enrico Moretti likewise indicates that high housing prices in dynamic cities dampens productivity.[12] "It's as if we have some of the most productive metropolitan areas in the world, but we don't allow American workers to flow to these areas to take advantage of that high productivity."[13] The broader point is that preventing more workers from moving to highly productive cities is holding back the productivity of the U.S. economy.[14] A study by Glaeser and Joseph Gyourko similarly concluded: "In the places where housing is quite expensive, building restrictions appear to have created these high prices."[15] In Manhattan, density restrictions were found to increase the cost of housing by almost 50 percent.[16]

The concerns about growth restrictions in highly productive cities are buttressed by a recent empirical study by Vicki Been and associates.[17] Although restrictions on development long have been associated in the literature with suburban local government, their analysis

---

11. *Id.* (citing Berry, Christopher R. & Edward L. Glaeser, *The Divergence of Human Capital Levels Across Cities*, 84 REG'L SCI. 407, 407 (2005)).

12. Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 21154, 2015) *available at* http://www.nber.org/papers/w21154.pdf.

13. Emily Badger, *How Big Cities that Restrict New Housing Harm the Economy*, WASH. POST WONKBLOG (July 25, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/25/how-big-cities-that-restrict-new-housing-harm-the-economy/ (quoting Enrico Moretti).

14. *Id.* (referring to Moretti's research with Chang-Tai Hsieh, *supra* note 12).

15. Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, 9 ECON. POL'Y REV. 21, 23 (2003).

16. Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why is Manhattan So Expensive? Regulation and the Rise in House Prices*, 48 J. L. & ECON. 331, 350–51 (2005).

17. Vicki Been, et al., *Urban Land Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEG. STUD. 227 (2014). Their research is based on a database created by the authors of about 811,000 lots in New York City. Been taught at NYU Law School and was Director of NYU's Furman Center for Real Estate and Urban Policy when the article was written. She now is on leave as Commissioner of the New York City Department of Housing Preservation and Development.

suggests that large cities also are responsive to homeowners' desire for restraints on growth and not, as generally thought, the pecuniary imperatives of developers, financiers, consultants, and politicians to foster a "growth machine."[18]

One approach to increasing urban density and agglomerative benefits is that municipal governments use condemnation to acquire large tracts of land from their multiplicity of owners and transfer reconfigured super parcels to private developers who would maximize positive externalities.[19] A similar proposal would simply authorize private takings of land by those who presumably could use it better.[20]

A frontal attack on regulations resulting in insufficient density in leading cities has been urged by Roderick Hills and David Schleicher,[21] who propose "city replanning" to achieve increased residential density through grand legislative bargains. Like the original wave of comprehensive planning almost a century ago, urban replanning is predicated on a set of experts devising plans to which others would adhere. However, Hills and Schleicher's main operative mechanism would lock in urban growth through the development of regulatory property and procedural techniques to make deals politically and legally difficult to unwind.[22]

Justice Holmes wrote of our proclivity to place new wine into old bottles[23] in order to meet the felt imperatives of the times.[24] In this manner, land use regulation has evolved from common law nuisance to Progressive Era comprehensive planning, then turned to flexibility and deal making, and now perhaps will cycle back to top-down comprehensive planning. These swings reflect in part the alternating supremacy of our quest for certainty in the law and recognition of the need for flexibility and for adjusting to changing circumstances.[25]

---

18. *Id.* at 229 ("[O]ur results show considerable evidence that homeowners have much more influence on land-use policy than the received wisdom . . . would predict.").

19. Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211 (2012) (condemnation for retransfer to private developers for positive externalities).

20. Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517 (2009).

21. Roderick M. Hills, Jr. & David Schleicher, *City Replanning* (George Mason Univ. Law & Econ. Research Paper No. 14-32, 2014) [hereinafter Hills & Schleicher, *City Replanning*], *available at* http://ssrn.com/abstract=2477125.

22. *Id.* at 45–59.

23. OLIVER W. HOLMES, THE COMMON LAW 5 (1881).

24. *Id.* at 1.

25. *See* Michael G. Faure, et al., *The Regulator's Dilemma: Caught between the Need for*

But who decides if a resurgent growth machine is worth the cost and whether refurbished comprehensive land use plans or similar devices will achieve that end? Those issues are explored here.

The present author is sympathetic to the removal of artificial barriers that restrict density in vibrant large cities. As I have elaborated upon elsewhere, limitations on density lead to the creation of regulatory property, which is of value only insofar as others are excluded from similar activities.[26] Such bounty is conceived in interest group politics, and its distribution nurtures the culture of crony capitalism.[27] Also, zoning and similar regulations are coarse-grained instruments, and their effects are elusive.[28]

The imposition of new municipal regulatory schemes to enhance local prosperity is problematic. The "citywide bargains"[29] proposed by Hills and Schleicher would enshrine regulatory property on a grand scale and likely serve as a straight jacket that would hinder further city adaptation to change. Furthermore, the positive advantage sought by such grand bargains is not densification as such but rather agglomeration.

In her recent paper *Agglomerama*,[30] Lee Anne Fennell illustrated the subtleties of agglomeration and how it differs from densification. The provision of more housing in large cities is not necessarily coextensive with the synergies to be derived from achieving a critical mass of talented people. Achieving optimal agglomeration, if possible at all, would require a plethora of regulations, just as fastening Jell-o to the wall would require a lot of nails. Moreover, as I have explicated elsewhere,[31] mandates that attempt to mimic spontaneous ordering are oxymoronic and come about largely through a misreading of Jane Jacobs' classic book *The Death and Life of Great American Cities*.[32]

Flexibility and the Demands of Foreseeability. Reassessing the Lex Certa *Principle*, 24 ALB. L.J. SCI. & TECH. 283 (2013).

26. *See* Steven J. Eagle, *The Perils of Regulatory Property in Land Use Regulation*, 54 WASHBURN L.J. 1 (2014).

27. Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023 (2011).

28. *See* Steven J. Eagle, *Urban Revitalization and Eminent Domain: Misinterpreting Jane Jacobs*, 4 ALBANY GOV'T L. REV. 106 (2011).

29. Hills & Schleicher, *City Replanning*, *supra* note 21, at 26.

30. Lee Anne Fennell, *Agglomerama*, BYU L. REV. (forthcoming) (citations omitted), *available at* http://ssrn.com/abstract=2532270.

31. *See* Eagle, *supra* note 28, at 106.

32. JACOBS, *supra* note 2.

It is true, of course, that urban land use planning has been a fixture of American municipal life for almost a century, and there is much that we have learned from observing it. On the other hand, moving from the relatively modest goal of preventing nuisance-like land use incompatibilities to the ambitious goal of optimizing urban prosperity leaves lots of room for unintended consequences, some of which are noted here.

Hills and Schleicher argue "the common law of property is far less important than it once was as a method for regulating real property ownership and use."[33] To a certain extent this is true, but the principle of increasing subordination of property rights to government controls can be self-justifying as well as self-leveraging. As District of Columbia Circuit Judge Stephen Williams summed up the spiral of increased regulation and decreased owner expectations that, in turn, justified more regulations—"regulation begets regulation."[34]

As we contemplate the comprehensive replanning of great American cities, we must ask if we would be doomed to repeat the same cycle of overly prescriptive regulation followed by tortuous ad hoc workarounds.

II. COMPREHENSIVE PLANNING: FROM IDEALS TO EXACTIONS

This Part discusses the evolution of American land use regulation, beginning with its origins in common law nuisance. The early twentieth century was marked by the growth of comprehensive planning, which generally provided rigid requirements with development as of right if the requirements were met. Later in the century, zoning rules were modified to provide flexibility. However, development as of right was replaced by land use approvals conditioned on governmental review based on vague criteria and typically involving bargaining with developers for development exactions.

A. From Common Law Nuisance to Prophylactic Regulation

Before the twentieth century, American land use regulation was primarily a function of the private law concept of nuisance, which

33. Hills & Schleicher, *City Replanning*, *supra* note 21, at 1.

34. Dist. Intown Props. Ltd. P'ship v. District of Columbia, 198 F.3d 874, 887 (D.C. Cir. 1999) (Williams, J., concurring).

precluded owners from using their parcels in ways that detracted from the rights of neighbors to reasonable use and enjoyment of their lands,[35] although, to be sure, it coexisted with the concept of property as enhancing civic virtue.[36] This was based on a non-instrumental view of property as an expression of human nature,[37] a view carried over from natural rights theory to the United States Constitution.[38]

However, common law nuisance did not deal well with urban aesthetic problems or with protecting public health in congested apartment blocks. Towns in America were "largely unattractive, muddy, cluttered clusters of buildings. Individual residences sported trash-strewn alleys and yards, and there was little monumental civic architecture."[39] In the cities, reformers such as Jacob Riis denounced "old-law" urban tenements, which were bereft of light and air and full of contagious disease.[40]

The aspiration to replace urban tenements with standard housing motivated a significant segment of the Progressive reform community in the decades around the turn of the twentieth century. These Progressives "believed that changing surroundings would change behavior. Advances in public health, sanitation, and social science

---

35. *See generally* Steven J. Eagle, *The Common Law and the Environment*, 58 CASE W. RES. L. REV. 583 (2008). This approach did not preclude uncompensated state prohibitions of uses that clearly were injurious to the public's health, safety, and welfare. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887) (upholding, pursuant to state prohibition of alcoholic beverages, the uncompensated loss of value of a now-unusable brewery).

36. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 821 (1995) (asserting that civic republicans, as contrasted to Lockeans, "see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by the common interest."); *see also* Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273 (1991).

37. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003). "Most modern property theory is strongly utilitarian; the nineteenth-century cases justified the free use of property as an extension of the moral freedom inherent in being human." *Id.* at 1549; *see also* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982) (arguing, from a Hegelian perspective, the instantiation of personhood in property).

38. *See* Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367 (1991); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988).

39. DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING & LAND DEVELOPMENT CONTROL LAW 16 (2d. ed. 1986). This discussion borrows from STEVEN J. EAGLE, REGULATORY TAKINGS § 3-1 (5th ed. 2012).

40. JACOB A. RIIS, HOW THE OTHER HALF LIVES (1890).

allowed positive environmentalists to theorize about designing urban environments that would lead people to make better moral decisions about the structure of their lives."[41] "Control over land use would be removed from the amoral hand of the market and entrusted to expert elites removed from politics and business. . . ."[42]

Against this backdrop, the City Beautiful movement, often traced to the Chicago World's Fair of 1893, led to the creation of over one thousand municipal associations by the turn of the century. At the first National Conference on City Planning and the Problems of Congestion in 1909, the renowned landscape architect Frederick Law Olmsted proposed "police rules," which would include building codes and the "districting" of land.[43]

These impulses for reform resulted in now-familiar zoning rules. "[Z]oning is a quintessential Progressive concept" because it relied on experts to design and enforce regulations that would create a more pleasant environment that, in turn, would "foster healthy, responsible citizens."[44] This "embodied the progressive movement's belief that the application of expertise to a problem would produce better outcomes, a notion underlying the *Euclid* decision."[45]

Pecuniary interests, as well as public health and aesthetics, drove the widespread adoption of zoning in the early part of the last century. Many Progressives shared the "decidedly negative view of the immigrants, particularly southern and eastern Europeans, who from the 1880s to the mid-1920s poured into America's cities in 'alarming' numbers."[46] In New York City, concerns about loft building manufacturing and housing for waves of immigrants led business leaders to protect prosperous residential neighborhoods and upscale retailing

41. Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 601 (2001) (quoting PAUL BOYER, URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920, at 221–23 (1978)) (noting that Boyer described positive environmentalism as a strategy to discourage urban vice by the provision of healthy social substitutes).

42. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 21 (1993).

43. *Id.* at 16–19. Olmstead's many projects included designing New York City's Central Park.

44. MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *EUCLID V. AMBLER* 30 (2008).

45. Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 630 (2011) (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), and asserting a much more recent transformation to zoning by contract between municipalities and developers).

46. WOLF, *supra* note 44, at 30–31.

through a 1916 ordinance, the first comprehensive zoning plan in the nation.[47] The issue involved "Fifth Avenue versus the garment industry" and was asserted to manifest "racism with a progressive, technocratic veneer."[48]

A more general motivation for the widespread adoption of zoning was that surging ownership of automobiles gave more mobility to those less well off. Buyers, real estate agents, and mortgage lenders envisioned zoning as ensuring the stability of eagerly sought-after new, expensive residential districts.[49]

The U.S. Supreme Court gave its imprimatur to comprehensive zoning in 1926 in *Village of Euclid v. Ambler Realty Co*.[50] The opinion's author, Justice George Sutherland, was one of the "Four Horsemen" of economic substantive due process.[51] Nevertheless, he apparently thought zoning to be consistent with his conservative philosophy as a means to protect against urban contagious diseases and overpopulation that would threaten social stability.[52]

Euclid adjudicated a facial challenge to zoning brought under the rubric of substantive due process. However, it gave cities considerable latitude in as-applied cases as well, since it declared that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[53] Even as Sutherland explained that zoning was a justified use of the police

---

47. HAGMAN & JUERGENSMEYER, *supra* note 39, at 20–21.

48. William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 31, 40–41 (Charles M. Haar & Jerold S. Kayden eds., 1989) (quoting SEYMOUR I. TOLL, ZONED AMERICA 29 (1969)).

49. Peter L. Abeles, *Planning and Zoning*, *in* ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 122, 126–27 (Charles M. Haar & Jerold S. Kayden eds., 1989).

50. 272 U.S. 365 (1926).

51. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525 (1923) (opinion by Sutherland, J., invalidating minimum wage for women in the District of Columbia as violative of freedom of contract and due process). For a revisionist view, see Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 560–61 (1997) (describing Justices Van Devanter, McReynolds, Sutherland, and Butler as "closet liberals . . . who struck a reactionary pose to remain in the good graces of the conservative sponsors to whom they owed their positions . . . while in legions of low-profile cases they quietly struck blows for their own left-liberal agendas").

52. *See* JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 126–27, 166, 242–43 (1951); HADLEY ARKES, THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS 70–71 (1994).

53. *Euclid*, 272 U.S. at 388 (citing Radice v. New York, 264 U. S. 292, 294 (1924)).

power,[54] he emphasized its continuity with private ordering through the doctrine of nuisance.[55]

B. The Comprehensive Plan

1. From Long-Term Planning to Short-Term Improvisation

One of the most successful model statutes is the Standard Zoning Enabling Act (SZEA), drafted by a Department of Commerce advisory committee in 1928.[56] The SZEA was the "prototype" of most state enabling legislation and divides communities into districts, each of which proscribes uniform use restrictions and size restrictions for structures.[57] SZEA Section 3 provides that ordinances shall be drawn "in accordance with a comprehensive plan." In Charles Haar's explication, "[t]hese words appear to be a directive to put zoning on a base broader than and beyond itself, and a warning that an ordinance not 'in accordance with a comprehensive plan' is ultra vires the enabling act."[58] The plan is predicated on "comprehensive surveys analyses of existing social, economic, and physical conditions in the community," and, "clarified by planning experts," it "directs attention to the goals selected by the community" and selects means to achieve them.[59]

Professor Haar made clear that the comprehensive plan is a "long-term, general outline of projected development."[60] However, that was easier said than done. Eight years after Haar's pronouncement, a leading planner expressed forebodings in one of the profession's principal journals:

> [P]lanning requires relatively long-range projections of future conditions. . . . Yet, our ability to forecast future conditions in

54. *Id.* at 387.

55. *Id.* ("In solving doubts, the maxim 'sic utere tuo ut alienum non laedas' [use your rights so as not to injure the rights of others] which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew.").

56. ADVISORY COMMITTEE ON CITY PLANNING AND ZONING, U.S. DEP'T OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT (1928).

57. Charles M. Haar & Barbara Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary?*, 74 HARV. L. REV. 1552, 1552–53 (1961).

58. Charles M. Haar, *In Accordance with A Comprehensive Plan*, 68 HARV. L. REV. 1154, 1156 (1955).

59. *Id.* at 1155.

60. *Id.* at 1156.

> society is notoriously poor. The record of population forecasts is a dismal one. The record of land use forecasting is far worse and no one correctly foresaw such a major innovation as the automobile or its consequences for urban growth. . . . Until some radical change in the quality of forecasts becomes possible, only a system of continuously revising projections and of continuously calculating the consequences of current investments can provide the best possible degree of knowledge for current or future decisions.[61]

The needed radical change in the quality of forecasts did not come about. Instead, comprehensive planning increasingly has become a short-term process. "Land use planning is sometimes associated with the now-repudiated practice of dreaming about how a community might appear on a specific date far in the future."[62]

> By around 1980, virtually all planning professionals had come to recognize both the limits of rationality and the unpredictability of modern civilization. Planners thus have tended to become less ambitious in the dimensions of space and time. . . . Many planners also have come to believe that the planning period should not stretch beyond 25 years (at the very most) and that detailed planning should concentrate on the next five years or so. There also is agreement that plans have to be continually revised to take account of new information and events. In sum, flexible, middle-range planning has come to replace long-range, end-state planning.[63]

One result of this, as predicted in 1965, is that "the fundamental distinction between planning and other specialties is likely to become progressively more blurred."[64] The comprehensive plan's increasingly

---

61. William L.C. Wheaton, *Operations Research for Metropolitan Planning*, 29 J. AM. INST. PLANNERS 250, 256–57 (1963), *available at* http://dx.doi.org/10.1080/01944366308978074. Wheaton headed the Institute of Urban and Regional Development at the University of California, Berkeley, taught planning at the University of Pennsylvania and Harvard, and was on the board of the American Institute of Planners, a forerunner of the American Planning Association.

62. ROBERT C. ELLICKSON, ET AL., LAND USE CONTROLS: CASES AND MATERIALS 69 (4th ed. 2013) (noting that, in the middle of the twentieth century, the year 2000 was a popular target).

63. *Id.* at 70.

64. Alan Altshuler, *The Goals of Comprehensive Planning*, 31 J. AM. INST. PLANNERS 186, 186 (1965), *available at* http://dx.doi.org/10.1080/01944366508978165.

short time horizon makes it hard to distinguish from periodically adjusted zoning ordinances, if it is not altogether superfluous.

2. Planning and Its Biases

Daniel Mandelker and Dan Tarlock observed that the planning profession "has defined the ideal zoning decision as one based on technical criteria and accepted by open and informed political debate."[65] However, they added that, in practice, zoning decisions are "too often ad hoc, sloppy and self-serving," and this affects "the judge's 'sense' of the legitimacy of the institution that produced the decision."[66] The "self-serving" nature of planning is illustrated by the summary of a leading planner effectively equating the profession's predilections to natural law:

> The planners' biases are quite clear. They regard the present pattern of scattered development as inherently evil. Often in planning literature this needs no demonstration: like natural law, it is obvious to all right-thinking people. . . .
>
> A second universal planners' bias is one in favor of the preservation of open space. . . . Somehow, if open space can be preserved and if people will but go to see it, their lives will be elevated and mankind will be the better. . . .
>
> A third traditional bias of the planner favors the maintenance of a strong central business district and the preservation of the density pattern of past cities. Here it is assumed that the city must have a high-density core, containing a high proportion of the area's shopping, banking, commercial, managerial, civic, public, educational, and cultural functions. Because central districts have in the past provided for a large proportion of the cities' tax revenue, it is argued that they must do so in the future. . . .
>
> The fourth planners' bias is that the journey to work should be reduced by shortening the distance between places of residence and places of employment. . . .
>
> Finally, . . . [m]ost planners will express a greater preference for row houses, garden apartments, and elevator apartments than for single-family houses, and most will express a greater

65. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 2–3 (1992).

66. *Id.* at 2.

> preference for central or urban locations as opposed to suburban locations. It is assumed that the American public has similar preferences but is deprived by the operation of the housing market of opportunities to express them in the purchase or rental of homes.[67]

The last statement is particularly remarkable, since it assumes that any discrepancy between planners' preferences for dense residential living and the existing predominance of single-family homes surely results from the public's will being thwarted. Perhaps unsurprisingly, however, there is a strong correlation between people's views about housing and residential density and their overall political preferences.[68]

Perhaps another reason for popular dislike of densification is its architecture. "For too long, our profession has flatly dismissed the general public's take on our work, even as we talk about making that work more relevant with worthy ideas like sustainability, smart growth and 'resilience planning.'"[69] "We're attempting to sell the public buildings and neighborhoods they don't particularly want, in a language they don't understand."[70]

Also, regulations ostensibly pertaining to the use of land use increasingly were designed to achieve social purposes such as mandating "in lieu art fees" as a development condition for private buildings in *Ehrlich v. City of Culver City*.[71] Dozens of local governments have adopted "anti-agglomeration zoning" against undesired businesses, such as payday lenders, apparently in a misguided effort to protect consumers by limiting competition among them.[72] David Schleicher refers to the facilitation of social evils, such as crime, as

---

67. Wheaton, *supra* note 61, at 254–55 (emphasis added).

68. *See* Press Release, Pew Research Ctr., Political Polarization in the American Republic: How Increasingly Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life (June 12, 2014), *available at* http://www.people-press.org/files/2014/06/6-12-2014-Political-Polarization-Release.pdf. For discussion, see *infra* text accompanying note 207.

69. Steven Bingler & Martin C. Pedersen, *How to Rebuild Architecture*, N.Y. TIMES, Dec. 16, 2014, at A29.

70. *Id.*

71. Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (upholding mandatory fee in lieu of art as aesthetic control).

72. *See* Sheila R. Foster, *Breaking Up Payday: Anti-Agglomeration Zoning and Consumer Welfare*, 75 OHIO ST. L.J. 57 (2014).

"negative agglomeration."[73] Socio-economic population patterns and neighborhood character also sometimes are taken into account[74] and may lead to requiring developer subsidization of affordable housing.[75]

But, the *Ehrlich* 1 percent art fee did not result from the new development using up all of the space for art available to the community.[76] Likewise, a blithe statement that a 15 percent set-aside requirement for below-market housing was simply a "land use ordinance," and therefore "a valid exercise of the police power," did not make it so.[77]

This broad scope of planning's regulatory reach is consistent with the growth of the administrative state,[78] a phenomenon that mostly eludes judicial review.[79] Those facts, coupled with polarization along political and cultural lines of popular attitudes about ideal communities,[80] also lead to a perceived lack of legitimacy of the land use planning enterprise.

Perhaps most indicative of the hubris of planning has been the destruction and recreation of entire neighborhoods in the mid-twentieth century. The leading case of *Berman v. Parker*[81] is a paradigmatic example.[82] There, the Federal government bulldozed a neighborhood

---

73. *See* David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1737 (2013).

74. *See* Chinese Staff & Workers Ass'n v. City of New York, 502 N.E.2d 176 (N.Y. 1986) (declaring proposed high-rise luxury condos on vacant lot must be reviewed to determine environmental impact on socio-economic character of neighborhood).

75. *See* California Bldg. Indus. Ass'n v. City of San Jose, 157 Cal. Rptr. 3d 813, 824 (Ct. App. 2013), *review granted and opinion superseded by* California Bldg. Indus. Assn. v. City of San Jose, 307 P.3d 878 (Cal. 2013) (conditioning housing development permit on the set aside of 15% of units for below-market affordable housing). *See infra* text accompanying notes 327–29.

76. *See* Gideon Kanner, *Tennis Anyone? How California Judges Made Land Ransom and Art Censorship Legal*, 25 REAL EST. L.J. 214, 231 (1997) (observing: "Just how construction of new housing and businesses diminishes the availability of artistic resources no one has bothered to explain.").

77. *California Bldg. Indus. Ass'n.*, 157 Cal. Rptr. 3d at 824.

78. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that the post-New Deal administrative state contravenes the Constitution's design); Edward L. Glaeser & Andrei Shleifer, *The Rise of the Regulatory State*, 41 J. ECON. LIT. 401 (2003) (asserting that Progressive Era reformers eroded the nineteenth-century belief that private litigation was the sole appropriate response to social wrongs).

79. *See* Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. 259 (2015).

80. *See infra* text accompanying notes 207–10.

81. 348 U.S. 26 (1954) (establishing aesthetics as well as public health as valid bases for exercise of the police power for neighborhood-wide urban renewal).

82. *See* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010) (providing a detailed account of *Berman* and its background).

in Southwest, Washington, D.C. The cost to existing residents, and their wistfulness for their demolished neighborhood, was reported by the *Washington Post* in 1999.[83] A recent account in the *New York Times* noted that redevelopment of the Southwest was "once a symbol of urban renewal's high hopes and then of its crushing failure."[84]

> Southwest was the nation's first urban renewal project, approved in 1946 to replace what were then considered slums with a modern community that would include federal buildings, town homes and a variety of amenities. What it did, primarily, was displace thousands of residents, mostly African-Americans. That gave rise to the pejorative term "Negro removal" applied to urban renewal and derived from this failed experiment, and destroyed a viable commercial waterfront.[85]

A new $2 billion mixed-use project is being built in Southwest "to correct what is now regarded as an egregious error imposed on the city by people then thought to be visionary planners."[86] The city's selected developer lauded it: "It's a critical mass, the Big Bang theory."[87]

3. Lack of Knowledge Leads to Use of Heuristics

In attempting to make sense of the staggering array of inputs that inform land use decisions, it is tempting to rely on the conclusions of experts who employ heuristics. It is ironic that the problems with which the present generation of planners must wrestle result largely from the decisions of a previous generation of experts and that the early errors of overreaching, from which planners slowly have withdrawn, now come back in new forms.[88] Yet experience dictates that humility is imperative. As Federal Circuit Judge Jay Plager observed, "yesterday's Everglades swamp to be drained as a mosquito haven

---

83. Linda Wheeler, *Broken Ground, Broken Hearts; In the '50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, at A1.

84. Eugene L. Meyer, *Contrite over Failed Urban Renewal, Washington D.C. Refreshes a Waterfront*, N.Y. TIMES, Nov. 19, 2014, at B10.

85. *Id.*

86. *Id.*

87. *Id.* (quoting Monty Hoffman, chief executive of PN Hoffman).

88. *See generally* Steven J. Eagle, *Reflections on Private Property, Planning and State Power*, 61 PLAN. & ENVTL. L. 3, 5 (2009).

is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring, or how the market will respond to it."[89]

For this reason, there is a great deal to be said for the incremental change that marked the common law[90] for the taking into account tacit knowledge[91] and harnessing the combined insight of all who might enter into transactions.[92] Good development is dependent on evaluating the myriad of interrelated details in a proposed project.[93] When attempting to plan for positive benefits of agglomeration, that problem is compounded.

C. From Idealism to Zoning for Dollars

Comprehensive plans also have become less idealistic. In mid-century, local planning commissions "helped to create wholly new communities, the suburbs, which for many embodied the vision of the future America."[94] By the waning years of the century, however, "recurrent stresses" resulted in American society "put[ting] its faith in economic pragmatism. A shorter view dominated planning processes, replacing comprehensiveness with a focus on narrower and more immediate strategic opportunities. Local plans no longer reflected a sense of community need; instead, they were bent to serve entrepreneurial opportunity."[95]

As will be discussed later, the high transactions costs implicit in bargaining for favorable development regulation on a parcel-by-parcel

---

89. Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1566 (Fed. Cir. 1994) (citation omitted).

90. *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 925 (1996) (noting that "the common law can serve as a model for incremental change in society as a whole, as it did for [Edmund] Burke").

91. *See generally* MICHAEL POLANYI, TACIT DIMENSION (1966) (dealing with impressionistic or tacit knowledge, gained from experience, that is difficult to convey to others).

92. *See generally* F. A. HAYEK, THE FATAL CONCEIT (1988) (urging use of prices as a mechanism by which millions of individuals can send signals as to what kinds of goods and services they are willing to supply or demand under various circumstances, thus contributing insights to the store of public knowledge).

93. *See* Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1, 57 (2014).

94. David J. Allor, *Toward a Longer View and Higher Duty for Local Planning Commissions*, 60 J. AM. PLAN. ASS'N. 437, 438 (1994).

95. *Id.*

basis[96] is a principal reason asserted in support of comprehensive urban replanning.[97]

However, land economist William Fischel supports such bargaining as economically efficient.[98] He notes that a developer seeking to acquire land owned by a privately governed community might want to build eight houses instead of the four the community permits. "The amount by which the value of eight building lots exceeds the value of four larger lots is economic rent, which the developer and the homeowners association with power to grant permission will share in a bargaining process."[99]

Fischel then asserts that the exact same principles should apply if the development permission must be sought from public land use regulators. Restrains on the ability of the municipality to engage in such bargaining "are inefficient in that they retard exchanges that would be mutually beneficial to the parties involved."[100] However, what is the source of a municipality's claim to ownership of all development rights beyond existing development? Perhaps it is a Georgian notion that growing value of land is caused by actions of society and of government.[101] Perhaps it is based upon the United Kingdom's Town and Country Planning Act of 1947, which nationalized development rights with payment of only very limited compensation.[102]

The clash between idealistic shaping of communities and pragmatic acceptance of strategic imperatives has an effect on judicial perceptions of the legitimacy of planning and zoning. To be sure, it has been almost ninety years since *Euclid* was decided[103] and thirty-five years since *Penn Central Transportation Co. v. City of New York*.[104]

---

96. *See infra* Part III.B.1.

97. Hills & Schleicher, *City Replanning*, *supra* note 21, at 6.

98. William A. Fischel, *The Economics of Land Use Exaction: A Property Rights Analysis*, 50 L. & CONTEMP. PROBS. 101 (1987).

99. *Id.* at 101–3.

100. *Id.* at 104.

101. *See* HENRY GEORGE, PROGRESS AND POVERTY THE REMEDY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH 406 (1940) (asserting the efficiency of a single tax on the value of land, without improvements as a substitute for all other taxes). This reasoning motivated much of the opinion of the New York Court of Appeals in *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff'd on other grounds*, 438 U.S. 104 (1978).

102. *See* Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*, 15 SUP. CT. ECON. REV. 141, 163 (2007).

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

104. 438 U.S. 104 (1978).

Whatever the theoretical merits of carefully distinguishing between "planning" and "regulation," to demand that courts do so now, as the Supreme Court observed in a different context, "would be asking us to disinvent the wheel."[105] While the demand for zoning by homeowners and its supply by officials and planners were interactive, William Fischel suggests that an indication of which factor is more important is the failure of planners to obtain the speedy elimination of all prior nonconforming uses, without which planners regarded zoning districts as seriously flawed.[106]

As noted earlier, comprehensive planning has changed its focus from long-term to short-term[107] and from "the vision of the future America" to "entrepreneurial opportunity."[108] In his influential article *Zoning for Dollars*, Jerold Kayden described "incentive zoning" as the process by which "cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features."[109]

Kayden explored the implications of government approval of development in excess of that normally permitted in exchange for receipt of some benefit[110] and concluded that "government will manipulate the base matter of right zoning FAR [floor-area ratio] to a lower level than otherwise necessary in order to obtain amenities at no marginal physical planning cost."[111] Similarly, in *Nollan v. California Coastal Commission*,[112] Justice Scalia noted that a restriction on development could be a legitimate exercise of the police power but that the restriction would fail if there were no nexus between the restriction and an unrelated condition that would excuse adherence to it. "In

105. Barefoot v. Estelle, 463 U.S. 880, 896 (1983) (rejecting suggestion, despite evidence to the contrary, that it would be erroneous to permit psychiatrists to predict dangerousness).

106. William A. Fischel, *The Persistence of Localism*, *in* PROPERTY IN LAND AND OTHER RESOURCES 259, 277 (Daniel H. Cole & Elinor Ostrom, eds. 2012). Fischel argues that the seminal Supreme Court decision in *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915), which upheld the uncompensated closure of a brickyard that was subsequently surrounded by residential areas, both involved what was akin to a traditional nuisance and has not, as a practical matter, resulted in the termination of most nonconforming uses. *Id.* at 277–82.

107. *See supra* text accompanying notes 60–63.

108. *See supra* text accompanying note 95.

109. Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the* Municipal Art Society *and* Nollan *Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991) (describing bargaining for incentive zoning fees to fund various community needs and amenities).

110. *Id.* at 3.

111. *Id.* at 46.

112. 483 U.S. 825 (1987).

short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[113] Scalia presciently added: "One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulations which the State then waives to accomplish other purposes. . . ."[114]

By making it clear that aspirational planning for the ideal city differs from regulation to ensure the safe and healthy city, spheres for community protection and landowner autonomy could be fostered.[115] If it is to possess integrity, planning must instantiate important police power boundaries. As Kayden observed, the fact that it has become the polity's opening bid in a bargaining process "intrinsically delegitimizes the entire regulatory system."[116]

In any event, planners simply do not have the ability to say "how much" development should be allowed. As I have noted elsewhere, planners cannot readily apply their tools in any linear sense, since the question is not how much development will be permitted but, rather, how to evaluate the myriad of interrelated details in the application.[117] Likewise, sheer density might be measured in a gross sense by the number of dwelling units per acre, but that would not be a useful measure of the housing stock, much less the subtle issues involved in the interactions among residents and others that would have a bearing on positive agglomeration.

III. THE NEW COMPREHENSIVE REPLANNING AND ITS INFIRMITIES

This Part of the Article discusses proposals for enhancing the prosperity of vibrant cities through densification and the ensuing

113. *Id.* at 837 (quoting J.E.D. Associates, Inc. v. Atkinson, 432 A.2d 12, 14–15 (1981)).

114. *Id.* at 837 n.5.

115. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

116. Kayden, *supra* note 109, at 7 ("Zoning expresses conclusions about theoretically objective physical planning criteria such as street, sidewalk, sewer, and water pipe capacity; light and air availability at ground level; and compatibility of new buildings with the existing neighborhood. Thus, any overriding of that zoning, no matter what the proposed amenity, intrinsically delegitimizes the entire regulatory system. This critique gains particular currency when the amenity is geographically or conceptually unrelated to the development project obtaining the incentive.").

117. Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1, 57 (2014).

benefits of positive agglomeration. It notes that the benefits are uncertain. Furthermore, long-term comprehensive planning proved unworkable in a dynamic society and was replaced by short- to intermediate-term flexible (*i.e.*, improvisational) recipes for municipal opportunistic bargaining with developers. Although proposals for densification stress "replanning," the actual mechanism by which they would work is not planning at all but rather the creation and lock-in of regulatory property. The political grand bargain needed to achieve this requires the purchase of political support from powerful landowners and others. As is the case of regulatory property generally, the benefits that they receive inure from government deprivation of the property rights of others less well placed or less lucky.

A. Expertise Redux—the New Comprehensive Planning

As noted earlier, planning and zoning were "quintessential" Progressive ideas.[118] Adherents of the somewhat disparate strands of Progressivism were united in their belief that "the talents of experts drawn from the newly professionalized ranks—chiefly economists, political scientists, social workers, lawyers, and teachers—should be harnessed by government at all levels to help individual Americans reach their full potential."[119] Soon enough, urban planners joined this elite.[120] From this perspective, "property" is marked by land use governance,[121] and individuals' autonomous ownership of land underlying Lockean property is described as "depend[ent] upon social and public values for conceptual coherence."[122]

The new comprehensive planning asserts that the proper basis for urban land use planning is the city as a whole,[123] that neighborhood

118. *See* WOLF, *supra* note 44 and accompanying text.

119. *Id.* at 30.

120. *See* LEWIS MUMFORD, THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS 484–85 (1961) (noting that the profession of planning dates to the Progressive Era).

121. *See generally* Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

122. *See* Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1287 (2014).

123. This term is employed here to echo "parcel as a whole," an apparently simple exposition in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Alas, the term is rife with subjectivity and complexity. *See*, *e.g.*, Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003); Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549 (2012).

autonomy ("localism") is deleterious, and that economic productivity is the desideratum. Once a proper citywide bargain is imposed, it should be locked in place. The lock-in serves to solidify current planning views of the social nature of cities in property law and is reminiscent as well of the similar goal of locking in government licensure and largess that Charles Reich's *The New Property*[124] expounded a half century ago. *Plus ça change, plus c'est la même chose.*

According to *City Replanning*, the importance of common law property is attenuated, and legislative and administrative actions now "determine most of the rules government how real property is used and purchased."[125] Furthermore, in a view akin to the United Kingdom's Town and Country Planning Act, Hills and Schleicher suggest "the community is entitled to new value created by a change in the land-use *status quo*."[126]

It is true that in 1926 the Supreme Court in *Euclid* gave localities great deference in land use regulation.[127] Furthermore, the Court's 1978 opinion in *Penn Central Transportation Co. v. City of New York*[128] introduced an ad hoc, multifactor analysis of regulatory takings that incorporated elements of subjectivity and fairness that defies operationalization and essentially leaves local political decisions intact except in cases of egregious abuse.[129]

One practical constraint on the ability of localities to impose onerous regulation is the need to compete with other localities for residents.

---

124. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (arguing that the key to ensuring continued enjoyment of government licensure and largess is to accord them the same rights as traditional property).

125. Hills & Schleicher, *supra* note 21, at 1.

126. *Id.* at 57 (noting that too low a charge for a development permit "might be regarded as distributively unjust" under this presumption). This view is similar to that of the English Town and Country Planning Act of 1947, 10 & 11 Geo. 6, c. 51, which expropriated development rights to all land and established a special fund to provide small and gratuitous payments to aggrieved landowners. *See also* MALCOLM GRANT, URBAN PLANNING LAW 63 (1982).

127. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

128. 438 U.S. 104 (1978).

129. For explication, see Eagle, Penn Central *and Its Reluctant Muftis*, *supra* note 117 (emphasizing the nature of the *Penn Central* doctrine and its uneasy embrace of substantive due process); Steven J. Eagle, *The Four Factor* Penn Central *Regulatory Takings Test*, 118 PENN. ST. L. REV. 601 (2014) (emphasizing the development and application of the conventional "economic impact," "investment-backed expectations," and "character of the regulation" factors, and advocating recognition of the equal status of a fourth spatial and temporal "relevant parcel" factor).

The sorting model developed by Charles Tiebout postulates that localities will compete for residents through offering varying packages of amenities and taxation.[130] However, Hills and Schleicher assert that Tiebout's sorting model does not solve the problem of excessive land use regulations because there are "notorious limits" on the mobility of existing residents.[131] The "immobility of land and the uniqueness of cities" give municipalities "pricing power."[132] Many large cities, they add, "have no adequate substitutes, because they create agglomeration economies that rivals cannot duplicate."[133]

Yet the very agglomeration that Hills and Schleicher seek to nurture already fosters the differentiation of thriving regions.[134] Also, in New York, "middle-class outer-borough homeowners remain a potent force in the City's politics."[135] It remains true that property ownership and use conveys distinctions of status,[136] and housing is a vital source of self-identity and of presentation of the self to others.[137]

A reminder of consequences of experts riding roughshod over communities is the saga of urban renewal underlying *Berman v. Parker*.[138] As detailed by Amy Lavine,[139] in the mid-twentieth century the federal government engaged in massive redevelopment in Southwest, Washington, D.C., bulldozing neighborhoods, sound buildings included. Three decades later the *Washington Post* recounted costs to existing residents and their wistfulness for their demolished neighborhood.[140] The *New York Times* recently described that

130. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

131. Hills & Schleicher, *City Replanning*, *supra* note 21, at 34.

132. *Id.* at 35.

133. *Id.*

134. *See infra* text accompanying notes 257–59 for discussion.

135. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island As A Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 847 (1992).

136. *See*, *e.g.*, Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757 (2009).

137. *See*, *e.g.*, Edward K. Sadalla et al., *Identity Symbolism in Housing*, 19 ENV'T & BEHAV. 569, 572 (1987) ("The house, being a fixed and fairly permanent piece of sign equipment, may be viewed as an especially significant tool employed in the performances of its users.").

138. 348 U.S. 26 (1954) (establishing aesthetics as well as public health as valid bases for exercise of the police power for neighborhood-wide urban renewal).

139. Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010).

140. Wheeler, *supra* note 83.

redevelopment as "once a symbol of urban renewal's high hopes and then of its crushing failure."[141]

> Southwest was the nation's first urban renewal project, approved in 1946 to replace what were then considered slums with a modern community that would include federal buildings, town homes and a variety of amenities. What it did, primarily, was displace thousands of residents, mostly African-Americans. That gave rise to the pejorative term "Negro removal" applied to urban renewal and derived from this failed experiment, and destroyed a viable commercial waterfront.[142]

A new $2 billion mixed-use project is being built in Southwest, "to correct what is now regarded as an egregious error imposed on the city by people then thought to be visionary planners."[143] The city's selected developer lauded it in perhaps an inadvertent paean to agglomeration: "It's a critical mass, the Big Bang theory."[144]

B. Economic Concerns Driving Densification

Enrico Moretti asserted that "for each new high-tech job in a metropolitan area, five additional local jobs are created outside of high tech in the long run[,]" but that "attracting one job in traditional manufacturing generates 1.6 [new] jobs."[145] College-educated young people, unlike others, "continue to move at a high clip," and "[w]here they end up provides a map of the cities that have a chance to be the economic powerhouses of the future."[146] Booming high tech industries, environmental amenities, and "cultural cool" are important factors.[147]

---

141. Meyer, *supra* note 84.

142. *Id.*

143. *Id.*

144. *Id.* (quoting Monty Hoffman, chief executive of PN Hoffman).

145. ENRICO MORETTI, THE NEW GEOGRAPHY OF JOBS 60–61 (2012) (incorporating research based an analysis of 11 million American workers in 320 metropolitan areas).

146. Claire Cain Miller, *Hello, Buffalo: Urban Migration of College Graduates is Expanding*, N.Y. TIMES, Oct. 20, 2014, at A15.

147. *Id.* (noting that "Denver has become one of the most powerful magnets," and that it has "many of the tangible things young people want . . . including mountains, sunshine, and jobs in booming industries like tech"). Contributing to "cool" are "microbreweries and bike-sharing and an acceptance of marijuana and same-sex marriage." *Id.*

At the heart of current concerns driving densification is a problem that affects the prosperity and productivity at all skill levels.

> When housing supply is completely elastic, workers of all skill types gradually move to the productive locale, generating convergence. Low-skilled workers are more sensitive to changes in housing prices, and as housing supply becomes constrained, low-skill workers stop moving to the productive locale, leading to a decline in convergence.[148]

Furthermore, a paper by Chang-Tai Hsieh and Moretti estimates that the economic effects of high housing costs resulted in a potential reduction in output in the United States of 13 percent between 1964 and 2009.[149]

1. Unclear Development Rights Lead to High Transactions Costs

While property rights have the effect of delegating to owners the ascertaining of the best use of a resource,[150] it is a vital predicate that owners know what their property rights are.[151] As Carol Rose observed, "crystalline rules" discourage rent-seeking behavior by legislative and other decision-makers, who otherwise might sell clarifications of muddy rules to the highest bidder. "Hard-edged rules define assets and their ownership in such a way that what is bought stays bought and can be safely traded to others, instead of repeatedly being put up for grabs."[152]

In the era of improvisational land use regulation that followed the demise of long-term comprehensive planning, an important example of poorly defined property rights involves the extent and intensity of development that will be permitted a developer. Even when zoning ordinances purport to allow nominally fixed development as of right, ostensibly crystalline ordinance provisions are understood by all to

148. Ganong & Shoag, *supra* note 8, at 3.

149. Hsieh & Moretti, *supra* note 12.

150. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–56 (2004).

151. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19 (1960) ("[I]f market transactions were costless, all that matters (other than questions of equity) is that the rights of the various parties should be well-defined and the results of legal actions easy to forecast.").

152. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 591 (1988).

be the city's opening bid. Indeed, as Kayden recognized, the ordinance level of development might be considerably less than the locality thinks appropriate so that it could sell rezoning to a reasonable level.[153]

The argument is based upon Ronald Coase's seminal insight into the importance of transaction costs.[154] Thomas Merrill and Henry Smith subsequently placed the conceptual development of property rights within the Coasean tradition[155] and explored the importance of having standardized property rights that were easily understood and tradable.[156] Merrill argued more generally that property rights should be delineated by mechanical rules instead of judgment-based standards in order to facilitate transactions.[157] Along the same lines, Gary Libecap and Dean Lueck asserted development and land transactions were eased by urban land being platted in a rectangular grid.[158]

2. Soaring Housing Prices and Their Consequences

The argument that restrictive land use regulation is the culprit for high housing costs was set forth a decade ago by Edward Glaeser and associates:

> In Manhattan, housing prices have soared since the 1990s. Although rising incomes, lower interest rates, and other factors can explain the demand side of this increase, some sluggishness in the supply of apartment buildings is needed to account for high and rising prices. In a market dominated by high-rises, the marginal cost of supplying more housing is the cost of adding an extra floor to any new building. Home building is a highly competitive industry with almost no natural barriers to entry, and yet prices in

153. *See* Kayden, *supra* note 109, at 46 (observing that "officials might set a base FAR [floor-area ratio] at an artificially low twelve rather than a planning-supported fifteen, and then offer three FAR bonuses in exchange for desired amenities").

154. Coase, *supra* note 150.

155. Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S79 (2011).

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

157. Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights,* 14 J. LEGAL STUD. 13 (1985).

158. Gary D. Libecap & Dean Lueck, *Land Demarcation Systems*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (Kenneth Ayotte & Henry E. Smith eds., 2011).

> Manhattan currently appear to be more than twice their supply costs. We argue that land use restrictions are the natural explanation for this gap. We also present evidence that regulation is constraining the supply of housing in a number of other housing markets across the country. In these areas, increases in demand have led not to more housing units but to higher prices.[159]

While one might think that supporters of lower housing prices would focus on impediments to enhanced supply, which has not been the case. Instead, "affordable housing" advocates have concentrated on distributional issues related to inequality and on hostility to "market interests."[160] As earlier observed, many planners believe that market interests thwart the popular desire for denser housing as well.[161]

In *Levin v. City and County of San Francisco*,[162] a federal district court noted the city's "affordable housing crisis of remarkable proportions."[163] It explained that this was due to "deep structural problems in the housing market" in a city that has not produced housing to meet its expanding population.[164] The city's response was not to permit new housing but rather, among other things, to replace existing rules requiring landlords to pay the relocation expenses of tenants evicted without fault with draconian new conditions on erstwhile landlords who withdrew apartments from the rental market.[165]

In evaluating housing affordability from the perspective of the individual, instead of focusing on the ratio of housing costs to income in various locales, we might focus on the ratio of income net of housing costs in the same locations. That might suggest that housing costs

---

159. Glaeser, Gyourko & Saks, *supra* note 16, at 331.

160. *See, e.g.*, Marcia Rosen & Wendy Sullivan, *From Urban Renewal and Displacement to Economic Inclusion: San Francisco Affordable Housing Policy 1978–2014*, 25 STAN. L. & POL'Y REV. 121 (2014) (celebrating how San Francisco, "which consistently has amongst the nation's highest housing costs, counteract[s] destructive redevelopment practices and market interests to preserve and enhance housing opportunities for low-income families and create inclusive communities"). *Id.* at 122–23.

161. *See supra* text accompanying note 67.

162. ___ F.3d ____, 2014 WL 5355088 (Oct. 21, 2014). *Notice of Appeal filed* Mar. 4, 2015.

163. *Id.* at *2.

164. *Id.*

165. *Id.* at *3–4 (noting payments to departing tenants were pegged to their rents, which results in high-income tenants, who could afford high rents, sometimes being entitled to in excess of a quarter-million dollars).

should rise in the high-cost locale, "so that after-housing earnings were equalized" between it and the low-cost location.[166] However, it also suggests the gains that would inure to society through agglomeration are stymied by actions of existing residents. One reason why residents resist change might be excessive risk aversion.[167]

> Other local government theorists, led by William Fischel, focus instead on the political power of homeowners and their "mercenary concern with property values." In this view, policymakers cater to homeowners' demands for low property taxes (for homeowners, anyway), high levels of public services, uncongested public amenities, and protection from competition in the housing market when it comes time to sell.[168]

While the empirical case for replanning is based on very high rents in New York, San Francisco, and a few other highly desired cities, the conceptual case is built upon the urban agglomerative model that people flock to the most desirable cities because those they desire to associate with already live there.[169] Thus, just as agglomeration attracts people, its related congestion repels them, and the task is to try to find a good balance.[170]

> The location decisions of households are influenced less by workplace accessibility than by availability of amenities, recreational opportunities, and public safety. In addition, the locations of firms are clearly becoming more footloose under the influence of the information revolution, just at a time when core *agglomeration diseconomies* (pollution, congestion, crime, fiscal instability, etc.) appear to be outweighing the original agglomeration economies

166. Edward L. Glaeser & Abha Joshi-Ghani, *The Urban Imperative: Toward Shared Prosperity* (World Bank Pol'y Research, Working Paper No. 6875, 2014), *available at* http://ssrn.com/abstract=2439697.

167. Been, et al., *supra* note 17, at 228. However, given their inability to protect against loss in value to their major asset, homeowners' aversion might not be so excessive. *See infra* text accompanying notes 219–21.

168. Been, et al., *supra* note 17, at 228 (quoting WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT, TAXATION, SCHOOL FINANCE AND LAND-USE POLITICS 18 (2001)).

169. *See* Glaeser, Gyourko & Saks, *supra* note 16.

170. *See* Jeffrey C. Brinkman, *Congestion, Agglomeration, and the Structure of Cities* (Fed. Reserve Bank of Phila., Working Paper No. 13-25, 2013), *available at* http://ssrn.com/abstract=2272049 (analyzing methods of optimizing relationship).

> that pulled people and economic activities together. In this view, the central cities are not coming back any time soon.[171]

3. Positive Economics Does Not Mandate Densification

While agglomeration might be economically more productive, that is not dispositive of whether it should be embraced.

From a utilitarian perspective, a practice is desirable if it maximizes happiness.[172] Where individuals freely transact in the marketplace, the resulting bargain appears value maximizing for them, without the need for external evaluative criteria.[173] However, this principle does not provide a solution where legislation takes into account the interests of others. Some commentators, notably Judge Richard Posner, have argued that the maximization of "welfare," or "utility," best can be considered as maximization of pecuniary wealth.[174] On the other hand, scholars have argued that this approach slights subjective values[175] and that calculations of "value" might result from "trivializing anything that cannot be reduced to economic efficiency."[176] Tellingly, James Buchanan warned that the "'value-maximization' perspective cannot be extended from the market to politics since the latter does not directly embody the incentive compatible structure of the former."[177] More generally, all desirable things might not be commensurable, *i.e.*, measurable by the pecuniary metric of the

---

171. Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 137, 151 (1999).

172. The classic exposition is JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789).

173. James M. Buchanan, *The Constitution of Economic Policy*, 77 AM. ECON. REV. 243, 244 (1987).

174. Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979). Posner referred, inter alia, to the fact that the wealth principle is "more definite" than the happiness principle, that wealth generally is obtained through productive activities that benefit others, and that obtaining wealth generally results from adhering to "conventional pieties" such as honesty in dealings. *Id.* at 122–23.

175. Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's the Economics of Justice*, 34 STAN. L. REV. 1105, 1114 (1982).

176. Bruce A. Ackerman, *Foreword: Law in an Activist State*, 92 YALE L.J. 1083, 1119 (1983) (asserting that "[j]ust as some true believers simplify their Coasean statement of the facts by refusing to take pervasive market failure seriously, so too they may simplify their statements of value by trivializing anything that cannot be reduced to economic efficiency").

177. Buchanan, *supra* note 172; *see also* James M. Buchanan, *The Limits of Market Efficiency*, 2 RMM J. 1, 2 (2011) ("For the market to generate fully efficient results, all valued goods must be 'private', that is, both excludable and rivalrous.").

marketplace.[178] Some things, like love, or perhaps rootedness in place, are not instrumental.[179] That should be kept in mind in evaluating statements like "[m]obility and flexibility are key principles of the modern economy. Home ownership limits both."[180]

C. The Virtues of Localism

1. A Sense of Place and Its Disregard

For many, density intuitively detracts from the well-being that comes from being rooted in a place.

> Americans are of two minds as to how we ought to live. Publicly we say harsh things about urban sprawl and suburbia, and we encourage activity in the heart of town. In theory, but only in theory, we want to duplicate the traditional compact European community where everyone takes part in a rich and diversified public life. But at the same time most of us . . . feel a deep and persistent need for privacy and independence in our domestic life. That is why the freestanding dwelling on its own well-defined plot of land . . . is so persistent a feature of our landscape. That is why our downtown areas, however vital they may be economically, are so lacking in what is called a sense of place.[181]

This view of "place" engenders scant sympathy from those in more urbane precincts who view "sprawl" as the "ogre of land use and urban policy."[182] That said, many residents of cities or older suburbs who dislike low-density growth in the hinterlands absolutely detest "infill" growth if it takes place in the neighborhoods in which they are settled and comfortable.[183]

---

178. *See, e.g.*, JOSEPH RAZ, THE MORALITY OF FREEDOM 322 (1986) ("*A* and *B* are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.").

179. *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 6 (1995) ("Love is its own end. My contention is that, in this respect, private law is just like love.").

180. RICHARD FLORIDA, THE GREAT RESET: HOW NEW WAYS OF LIVING AND WORKING DRIVE POST-CRASH PROSPERITY 173 (2010).

181. JOHN BRINCKERHOFF JACKSON, A SENSE OF PLACE, A SENSE OF TIME 157 (1994).

182. Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 172 (2000).

183. *See, e.g.*, Sandra Fleishman, *The Debate Over Infill Developments: There Goes the Neighborhood?*, WASH. POST, Feb. 5, 2000, at G1.

Localism seems a manifestation of and a way to develop "social capital," which "refers to the ways in which individuals and communities create trust, maintain social networks, and establish norms that enable participants to act cooperatively toward the pursuit of shared goals."[184] Thus, annexation of small communities by larger ones has been deemed a threat to liberty.[185] In this sense, rent control has been defended as an impetus for long-term social capital.[186]

Evidence of such assortative matching is the explosive growth of homeowner association communities.[187] Because of their more fine-grained appeal, they can allocate resources and provide public goods that satisfy minority preferences better than local governments.[188] Indeed, homeowner association covenants "are not only meant to keep property values from declining; they are meant to preserve community character, *even when threatened by actions that increase property values*."[189]

Economic analyses purporting to demonstrate the "irrationality" of homeowner behavior may well miss these nonpecuniary motivations. While the existence of private property has long been the bête noire of romantics,[190] property involves more than market wealth,

184. Sheila R. Foster, *The City As an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 529 (2006).

185. *See* Christopher J. Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. 505, 520 (2012) ("Annexation is now widely perceived as a threat to individual liberty and autonomous self-government, pitting metropolitan region residents against metropolitan region central city governments.").

186. *See* Curtis J. Berger, *Home is Where the Heart Is: A Brief Reply to Professor Epstein*, 54 BROOK. L. REV. 1239, 1240 (1989) ("Rent control, in New York City and elsewhere, makes it possible for tenants to regard their apartment as a home, and to think of themselves as belonging to a community.").

187. *See, e.g.*, Paul Boudreaux, *Homes, Rights, and Private Communities*, 20 U. FLA. J.L. & PUB. POL'Y 479, 481 (2009) (noting that "[i]n some regions during the housing boom of the early 2000s, more than half of all new housing construction was in communities in which residents were bound by a panoply of covenants").

188. Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1388–93 (1994).

189. Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759, 777 (2011) (emphasis added).

190. *See, e.g.*, Jean Jacques Rousseau, *Discourse on the Origins and Foundations of Inequality Among Men* (1755), *in* THE FIRST AND SECOND DISCOURSES 141 (Roger D. Masters ed., 1964) ("[T]he fruits belong to all and the earth to no one!"); Pierre-Joseph Proudhon, WHAT IS PROPERTY? 13 (Donald R. Kelley & Bonnie G. Smith eds. & trans., Cambridge Univ. Press 1994) (1840) ("[P]roperty is theft."). *Cf.* Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 22 (1987) ("So, for Proudhon's 'property is theft,' the economist is likely to substitute 'government is theft.' This insight provides the essential underpinning for proposals to constitutionalize laissez-faire.").

and a system of property rights cannot survive "unless property ownership is infused with moral significance."[191] The "genius" of individual ownership of land is commended both from its morality in inculcating individual responsibility and in its productivity as giving the owner the fruits of his or her labor.[192]

Those fruits represent more than pecuniary gain. For many, individual autonomy is the key so that property and contract are valued not because they are economically efficient but rather because they "best serve[] our preference for private ordering."[193] One aspect of the quest for autonomy is the instantiation of personality through things, or, put another way, our ownership and use of real property both reflects and help shape individuals' sense of personhood.[194]

With "community" itself being a transmogrified and sometimes abused term,[195] it is easy to overlook that the *relevant* community has more to do with the normative values of the discerner than with objective principles. Those values certainly have much to do with our reaction to stringent and arguably appropriative regulation.

On a national scale, people outside leading cities bristle at being labeled *provinciaux* by Parisians or inhabitants of "flyover country" in bicoastal America. In the New York metropolitan area, people residing in the "outer boroughs" or, to include those in New Jersey, "bridge and tunnel people," feel similarly not amused by the perceived arrogance of Manhattanites, which most memorably is encapsulated in Saul Steinberg's iconic *New Yorker* cover.[196] While it might

---

191. *See* Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850 (2007) (noting the genius of making the owner "account for all events pertaining to his property, large and small").

192. Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1327–28 (1993) (citing Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 350 (Pap. & Proc. 1967)).

193. *See* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Scholarship*, 82 CORNELL L. REV. 856, 896 n.199 (1997); *see also* Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 55, 90 (1987) (noting the consistency between the division of landed property into "discrete parcels separated by rigid boundary lines," and "a society whose members highly value individualism and autonomy").

194. *See* Radin, *supra* note 37.

195. The term "community" has its origins in the Latin noun *communitas*, referring to the unstructured commonality of people marked by social equality. In contemporary usage, it typically refers instead to a distinct subset of the general population (e.g., arts community, gay community) or as a euphemism for what the American founders referred to as a "faction" (e.g., underwriting messages on a Washington, D.C. public radio station are sponsored by the "aerospace community").

196. The *New Yorker* cover, *View of the World from 9th Avenue*, appeared on March 29, 1976. It has spawned many parodies and also a well-known copyright case, *Steinberg v.*

be economically justifiable, the notion that government should cut back on assistance to ailing communities and refocus its efforts on assisting individuals to resettle among the more educated and productive also leads to a sense of estrangement.[197]

These perceptions of existing city residents are fueled in large part by the rise of income inequality, which is particularly acute in vibrant cities,[198] and its attendant justification of "meritocracy." That term originated as a sardonic commentary on a system where those who succeed believe that they deserve their fate.[199] When we consider sweeping land use change to effectuate massive economic goals, it is easy to overlook those with whose plight we do not associate. Carol Rose noted that past expropriations of property from those for whom we feel distaste "gave rise to no demoralization among us. . . . They were not members of our moral and political community. . . ."[200]

Mary Ann Glendon, observing the destruction of the entire close-knit and blue-collar Poletown neighborhood in Detroit for the creation of a General Motors auto assembly plant, declared that "no amount of compensation . . . could repair the destruction of roots, relationships, solidarity, sense of place, and shared memory that was at stake."[201]

Economists have suggested that propinquity for social interaction and the presence of numerous restaurants and cultural amenities

---

Columbia Pictures, 663 F. Supp. 706 (S.D.N.Y. 1987) (claiming that the movie *Moscow on the Hudson* infringed).

197. *See* Edward L. Glaeser & Joshua D. Gottlieb, *The Economics of Place-Making Policies*, 39 BROOKINGS PAPERS ON ECON. ACTIVITY 155, 155–56 (2008) (asserting that "the mere existence of agglomeration externalities does not indicate which places should be subsidized," that "there appear to be human capital spillovers, whereby concentrations of educated people increase both the level and the growth rate of productivity," and that "the case for national policy that favors specific places must depend more on efficiency—internalizing externalities—than on equity"). On the other hand, there is evidence that judicial mandates leading to improved schools in central cities facilitate the return of suburbanites, and, presumably, agglomeration. *See* Zachary D. Liscow, Are Court Orders Responsible for the "Return to the Central City"? The Consequence of School Finance Litigation 69–70 (Jan. 16, 2015) (unpublished manuscript), *available at* http://ssrn.com/abstract=2551082.

198. Douglas Rae, *Two Cheers for Very Unequal Incomes*, *in* JUSTICE AND THE AMERICAN METROPOLIS 105, 105 (Clarissa Rile Hayward & Todd Swanstrom eds., 2011) (observing that "healthiest central city economies . . . turn out to have *very* unequal income structures").

199. MICHAEL YOUNG, THE RISE OF THE MERITOCRACY 69–72, 122–23 (1958) (introducing term).

200. Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 29 (adding that the disruption of the property of British loyalists or Southern slave-holders "seemed to carry very little threat to the property of insiders").

201. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 29–30 (1991).

might mean that urban life is conducive to the production of social capital.[202] However, "[d]enser places appear to have less, rather than more, social capital."[203] This, too, might reinforce voters' taste for localism.

From the perspective of a city's economic prosperity, however, substantial income inequality may well be a good thing. It largely reflects that affluent individuals have stopped moving out to the suburbs and started moving back to the central city.[204] Also, in New York, "[h]ouseholds earning more than $100,000 a year . . . pay two-thirds of the personal income taxes collected by the city, even though they account for a mere 11 percent of all those who file."[205]

2. Housing Choices Reflect Personal Values

While cities are centers of human creativity, "generating most of our art, culture, commerce and technology," they also "represent the excesses of human activity, which encroach upon and alter our way of life in profound and often indelible ways."[206] "Modern land use regulation grows directly out of efforts to control particular excesses and impacts from city life and urban growth."[207]

According to a recent Pew Research Center report on *Political Polarization in the American Public*,[208] individuals' residential land use preferences very much reflect their cultural and political values. To be sure, "[m]ost Americans, regardless of their ideological preferences, value communities in which they would live close to extended family and high-quality schools."[209] However, there are differences between right and left that go beyond disagreements over politics, friends, and neighbors. Most germane here, if they could choose anywhere to live, three-quarters of consistent conservatives prefer a community where "the houses are larger and farther apart, but schools, stores, and restaurants are several miles away."[210] The preferences

202. Nicole Stelle Garnett, *The People Paradox*, 2012 U. ILL. L. REV. 43, 56.

203. Garnett, *supra* note 201, at 56 (quoting Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275, 1295 (2006)).

204. *See generally* Rae, *supra* note 197.

205. Steven Malanga, *Bloomberg to City: Drop Dead*, 13 CITY J. 27–35 (Winter 2003).

206. Foster, *supra* note 183, at 527.

207. Foster, *supra* note 183, at 527–28.

208. Pew Research Ctr., *supra* note 68.

209. *Id.* at 12.

210. *Id.*

of consistent liberals are almost the exact inverse, with 77 percent saying they'd chose to live where "the houses are smaller and closer to each other, but schools, stores, and restaurants are within walking distance."[211]

The notion that adoption of a comprehensive plan will signal closure on a values debate and change the arena to technical issues of conformity are unrealistic. Dan Tarlock observed that Charles Haar made the "unwarranted assumptions" that the planning process will "generate consensus over time," as people accept its allocations, and that "the plan can embody reasoned choices that command wide acceptance."[212] Tarlock asserted instead "[p]rocedures that rest on expertise and attempt to gain acceptance for general principles . . . will do little to resolve fundamental value conflicts."[213]

One way of recognizing and harmonizing the importance of localism, as Jane Jacobs argued, is that cities should be divided into diverse districts of intermediate size: "The chief function of a successful district is to mediate between the indispensable, but inherently politically powerless, street neighborhoods, and the inherently powerful city as a whole."[214]

In *Balancing the "Zoning Budget*,"[215] Hills and Schleicher noted that, at least in theory, "developers could simply bribe the neighbors into accepting greater housing density in their neighborhood whenever they actually wanted to build."[216] Yet when Edward Glaeser and Bryce Ward studied land use controls in Greater Boston and enumerated regulatory barriers to new construction,[217] their "primary puzzle" was that communities were not "choosing density levels to maximize their land values."[218] Glaeser and Ward conjectured that this was related to zoning being based on historical considerations,

---

211. *Id.*

212. A. Dan Tarlock, *Consistency with Adopted Land Use Plans As a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69, 86 (1975) (discussing Charles M. Haar, *The Master Plan: An Inquiry in Dialogue Form*, *in* LAND-USE PLANNING 745 (Charles M. Haar, ed., 3d ed. 1971)).

213. Tarlock, *supra* note 211, at 86–87.

214. JACOBS, *supra* note 2, at 121–40; *see generally* Steven J. Eagle, *Urban Revitalization and Eminent Domain: Misinterpreting Jane Jacobs*, 4 ALB. GOV'T L. REV. 106 (2011).

215. Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RES. L. REV. 81, 94 (2011).

216. *Hills & Schleicher, Zoning Budget*, *supra* note 214, at 94–95.

217. Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265 (2009).

218. Glaeser & Ward, *supra* note 216, at 277.

the difficulty of transfers of wealth between developers and current owners, and the possibility of (unspecified) "global externalities."[219]

William Fischel also adopted the hypothesis that "the local electorate exercises its land use authority in ways that look economically rational."[220] He found a "more coherent explanation" for homeowners' reluctance to trade in risk aversion. "The concentration of their wealth in their homes and the inability of most homeowners to insure against neighborhood decline seem to offer a better explanation" of why suburbanites are "wary of value-enhancing transactions that would promote the higher-density development desired by both profit-minded developers and public-spirited promoters of smart growth."[221]

Indeed, the value of homes is fragile and affected by many things. Even the designation of a neighborhood school under the No Child Left Behind Act as "in need of improvement" has been shown to result in a substantial decrease in neighborhood property values.[222]

D. Are Local Officials Over Solicitous of Homeowner Concerns?

There are some land uses that are useful to society, like airports or trash transfer stations, that are not nuisances per se but to which people say "not in my back yard" (NIMBY). This gives rise to the chronic complaint that local officials are indulgent of homeowners' NIMBYism.

The notion that local officials should be responsive to the desires of their electorate regarding the character of the community hardly is novel. Generally speaking, courts defer to local decisions, unless the result is to place unfair burdens on individuals,[223] arbitrarily deprives

---

219. *Id.* at 278.

220. Fischel, *supra* note 106, at 260.

221. *Id.* at 271.

222. Alexander Bogin & Phuong Nguyen-Hoang, *Property Left Behind: An Unintended Consequence of a No Child Left Behind "Failing" School Designation*, 54 J. REG'L SCI. 788, 789 (2014). The authors add: "Additional analyses suggest that this home price effect is largely due to strong perceptions of poor school quality or social stigma surrounding a 'failing' designation." *Id.* at 788.

223. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (The Just Compensation Clause of the Fifth Amendment is "designed to bar Government from forcing some people along to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."). The Supreme Court has continually reaffirmed this principle, most recently in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

them of due process of law[224] or cuts too deeply against the broader public interest.[225]

In smaller, more homogeneous, residential communities, the attentiveness of public officials to homeowners' concerns and desires was accepted as a given.[226] Employing public choice analysis,[227] William Fischel suggested that this results from homeowners' "mercenary concern with property values."[228] On the other hand, in large cities, where voters were thought too heterogeneous to fight for exclusionary policies, the "growth machine" of elites was thought to prevail.[229]

Vicki Been and associates recently revisited these views in light of a large dataset of New York City rezoning proposals.[230] They reiterated that the "growth machine is typically thought to describe urban land-use politics, while the homeowner theory explains suburban land use."[231]

> Recently, however, cities have begun to engage in land use practices long associated with suburbs—downzoning land to more restrictive regulations, imposing substantial fees for development approval, and taking significant quantities of land off the market through programs to preserve historic landmarks and open space. That shift should lead to a reexamination of received wisdom about urban land use politics.[232]

---

224. *See, e.g.*, Nectow v. City of Cambridge, 277 U.S. 183 (1928) (holding zoning as "residential" of sliver of land in manufacturing area to be arbitrary).

225. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). The Court cautioned that it did not mean "to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 389–90.

226. *See generally* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977) (analyzing officials' deference to the desire of suburban majorities for exclusionary zoning).

227. Public choice economics describes government activity through the lens of a marketplace where favorable legislation and regulation are exchanged for votes and campaign contributions. Foundational works include KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (3rd ed. 2012) (1951); ANTHONY DOWNS AN ECONOMIC THEORY OF DEMOCRACY (1957); and JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

228. FISCHEL, *supra* note 167, at 18.

229. *See, e.g.*, JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE (1987).

230. Been, et al., *supra* note 17, at 228–29. The data set was based on 200,000 lots considered by the New York City Planning Commission for rezoning between 2002 and 2009. *Id.* at 227.

231. *Id.* at 229.

232. *Id.*

For its advocates, densification is a collective action problem,[233] in which numerous small interest groups are able to take advantage of the checks and balances of a pluralist system to block change that would be salutary for society as a whole. Its political manifestations are popularized using terms such as "demosclerosis"[234] and "vetocracy."[235] Of course, when change is salutary is a matter of opinion.

IV. THE GRAND BARGAIN OF REPLANNING

The heart of the Hills and Schleicher argument for comprehensive replanning is that it is "a mechanism for enforcing citywide deals."[236] They define a "plan," in this context, as "(1) a citywide or multi-neighborhood determination of permissible land uses (2) made simultaneously that is (3) 'sticky,' as a practical matter, against future piecemeal alteration."[237] In important result would be to counteract the anti-agglomerative bias that Schleicher previously asserted was present in local government law.[238]

A. Expertise Coupled with a Strong Mayor

David Schleicher has argued that political parties provide legislatures with their basic organizing principles, that in legislatures with strong political parties, members have an incentive to vote with their leaders so as to burnish the party's "brand" and ultimately ensure their reelection.[239] Similarly, as Roderick Hills and Schleicher add, in cities where strong parties vie for control, "the leadership of the prevailing party can impose a citywide plan and thus supervene

233. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

234. JONATHAN RAUCH, DEMOSCLEROSIS: THE SILENT KILLER OF AMERICAN GOVERNMENT (1994).

235. Thomas L. Friedman, Op-Ed., *Down with Everything*, N.Y. TIMES, Apr. 22, 2012, at SR11, *available at* http://www.nytimes.com/2012/04/22/opinion/sunday/friedman-down-with-everything.html.

236. Hills & Schleicher, *City Replanning*, *supra* note 21, at 28.

237. *Id.*

238. David Schleicher, *The City as a Law and Economic Subject*, U. ILL. L. REV. 1507, 1561–62 (2010).

239. *See* Schleicher, *City Unplanning*, *supra* note 73, at 1700 (citing, inter alia, GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 84–97 (2d ed. 2007)).

the power that district legislators otherwise would exercise through 'aldermanic privilege.'"[240]

However, in most cities the local legislature is formally nonpartisan or totally dominated by one political party.[241] Without strong partisan leadership, there is a collective action problem, in which individual members opt to protect the special interests of their constituents, as opposed to what generally is understood as the common good.[242] The result is "the 'ironclad principle of Aldermanic privilege,'" where every legislator must approve land use regulatory changes in his or her own fiefdom.[243] This creates a prisoner's dilemma problem, in which members collectively prefer lower spending but individually steer "pork" to their districts and veto locally undesirable land uses.[244]

Hills and Schleicher propose to counter the problem of piecemeal land use votes on individual zoning changes, with its Aldermanic privilege and NIMBYism, with comprehensive replanning.[245]

> Ordinarily, the Mayor's city planning department, or a newly created independent body appointed by politicians elected citywide, proposing a new plan or map to the city council after extensive hearings. The Mayor faces the broadest electorate and thus has the greatest incentive to be responsive to citywide concerns. Putting the agenda-setting power in the Mayor's hands further promotes citywide interests. Particularly if the remapping is considered under a closed rule (i.e. no amendments are allowed), the Mayor is in a position to propose a map that goes as far to protect citywide interests as the legislature will bear.[246]

While professional planners and perhaps an "independent body" devise a system that addresses the entire city's concerns,[247] implementation requires the kind of political skills and backroom deals honed by aldermen through the ages.[248]

---

240. Hills & Schleicher, *City Replanning*, *supra* note 21, at 30–31.

241. *See* David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419 (2007).

242. Hills & Schleicher, *City Replanning*, *supra* note 21, at 31–32.

243. *Id.*

244. *Id.* at 30 (citing, inter alia, Barry Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 249–53 (1979)).

245. *Id.* at 32.

246. *Id.* at 32–33.

247. *See supra* text accompanying notes 118–22. Disinterested expertise as a mark of original Progressive Era comprehensive planning.

248. *See infra* Part IV.C.3.

B. Selling Density Increases Through a Standard "Price Sheet"

Hills and Schleicher suggest that standardization of densification, in the form of uniform development rights in individual neighborhoods, accompanied by an upzoning "price sheet," will facilitate enhanced land use by reducing transaction costs.[249] In effect, this would revive development as of right. *City Replanning* posits that transparency in the allocation of development rights best can be achieved through municipal pricing and sale of development rights. "A comprehensive map that sets out what can be built as of right will produce higher property values than a system in which government would allow the same amount of development through an *ad hoc* amendment process."[250]

In what might be an inadvertently potent aside, Hills and Schleicher state that if the uniform price sheet sets prices for new development that are "too low," the "money left on the table might be regarded as [] distributively unjust (*at least if one presumes that the community is entitled to new value created by the change in the land-use* status quo)."[251] This telling parenthetical reveals an important aspect of the mechanism that *City Replanning* work. After utilizing adroit procedure to present the local legislature with only one non-amendable choice, the mayor will appropriate development rights in private land, and sell those rights to present owners or interested developers. How the city comes to own future development rights is left unclear.[252]

As Hills and Schleicher indicate, a "price sheet" regime would mean the loss of the "potentially useful information" that city officials might glean from developers' "custom-tailored proposals."[253] Officials are not experts at the creative ferreting out subtle opportunities; imaginative developers are. But developers will not disclose such information only to have it incorporated into uniform price sheets or respecting condemnation where bidding for redevelopment is open to all. They will share such information only when they can

249. Hills & Schleicher, *City Replanning*, *supra* note 21, at 54 (noting that "[s]uch uniform definitions of use rights would allow buyers to have a clearer idea of the uses accompanying title").

250. *Id.* at 36.

251. *Id.* at 57 (emphasis added).

252. *See supra* notes 101–2 and accompanying text.

253. Hills & Schleicher, *City Replanning*, *supra* note 21, at 57.

capitalize on it.[254] While uniformity reduces costs, valuable private information is expensive. In that sense, urban revitalization through stealth coordination—often associated with "crony capitalism"—can be worth the price.[255]

A top-down plan imposed on local legislatures might encourage the kind of homogeneous development that Jane Jacobs explained was bad for the development of a heterogeneous and organic vibrant neighborhood.[256] Jacobs also rejected government-sponsored "spontaneity"[257]

However, there are many paths to development. Silicon Valley and Houston both have become economic powerhouses, although their cultures have led to different growth models. The former is based on technology and the latter on energy, which reflects our growing economic pluralism and diversity.[258] "The Bay Area is the hands-down winner when it comes to creativity and charm. But it's a luxury region, unaffordable and wildly unequal. Houston wins when it comes to livability, especially for people who want to have children."[259] While densification is prescribed as a corrective, the differences in cities reflect not only economics but, more fundamentally, social and political polarization. "Each economic sector attracts different kinds of people and nurtures different kinds of values."[260]

Ian Ayres and Joshua Mitts recently analyzed one-size-fits-all regulations for development permit applications.[261] They conceded "it's easier for bureaucrats to monitor compliance if all licenses convey the same privileges and obligations."[262] However, they argued that there are circumstances in which such uniformity requirements are affirmatively harmful and must be met by countervailing "anti-herding" rules. One reason is that "anti-herding regulation can reduce the kinds of systemic risk that occur when there is excessive behavioral

254. *See generally* Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023, 1079 (2011).

255. *Id.* at 1078–80.

256. JACOBS, *supra* note 2.

257. *Id.* at 441 (arguing against a deductive approach to planning methodology by stating that "[c]ity processes in real life are too complex to be routine, too particularized for application as abstractions").

258. *See* David Brooks, *The Sorting Election*, N.Y. TIMES, Oct. 13 2014, at A25.

259. *Id.*

260. *Id.*

261. Ian Ayres & Joshua Mitts, *Anti-Herding Regulation*, 5 HARV. BUS. L. REV. 1 (2015), *available at* http://ssrn.com/abstract=2399240.

262. *Id.* at 3.

uniformity."[263] The other reason is that "anti-herding regulation can produce socially beneficial information. Inducing separating equilibria among the regulated can, for example, avoid the inefficiency of informational cascades and help steer both private and public actors toward better evidence-based outcomes."[264]

Even if it is correct that building in a specified city is more expensive because engaging in a bargaining process is daunting to out-of-town developers, and a coterie of local developers have monetized the advantages of familiarity and trust, developers with specialized knowledge of the planning and approval process also are apt to have specialized knowledge of local markets. Their incentive to come up with innovative plans depends upon the possibility of executing them. Even as officials and developers have an eye towards exactions, campaign contributions, and profits, all will benefit if projects are completed and successful.[265]

C. Devices to Make Replanning "Sticky"

In order for replanning to work, Hills and Schleicher require that plans must be "sticky" in the sense that "they must resist the individual legislators' constant temptations to defect from the commitment" under pressure from community groups and when asked to "fine-tune" by developers and neighbors.[266] Their goal of is to prevent backsliding to parcel-by-parcel bargaining, although that had been the history of earlier comprehensive planning.[267]

1. Replanning and the Collective Action Problem

City Replanning outlines how comprehensive plans might successfully address the NIMBY problem. Generally, the mayor or planning

263. *Id.*

264. *Id.*

265. *See, e.g.*, George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 995 (2001) (quoting BERNARD J. FRIEDEN & LYNNE B. SAGALYN, DOWNTOWN, INC.: HOW AMERICA REBUILDS CITIES 23 (1990)) (describing how, in proposing urban renewal projects for subsidies, officials and developers seek out "'the blight that's right'—places just bad enough to clear but good enough to attract developers").

266. Hills & Schleicher, *City Replanning*, *supra* note 21, at 45.

267. *See infra* Part II.B.1.

commission or independent commission would propose a new plan to the city council after extensive hearings.[268]

> The Mayor faces the broadest electorate and thus has the greatest incentive to be responsive to citywide concerns. Putting the agenda-setting power in the Mayor's hands further promotes citywide interests. Particularly if the remapping is considered under a closed rule (i.e. no amendments are allowed), the Mayor is in a position to propose a map that goes as far to protect citywide interests as the legislature will bear.[269]

The fact that the mayor, elected citywide, puts comprehensive rezoning to the local legislature on a take-it-or-leave-it basis gives it substantial advantage. However, the mayor might have other considerations, such as seeking reelection or another office, and networks of friends, business associates, and campaign contributors. Some other sweetener might be needed. Also, the plan must be "sticky" (*i.e.*, have staying power).[270]

One answer supplied by *City Replanning* is that the new plan would distribute in equitable fashion denser housing and other locally desirable and undesirable land uses (LULUs) across neighborhoods using a "zoning budget."[271]

> Such a budget would specify an overall goal of locally undesirable land uses, or simply quantity goals for different types of housing, for the entire jurisdiction. It would also allocate those land uses across neighborhoods, seeking to allay concerns from council members about being dumping grounds for new construction and to capture the benefits of cross-neighborhood trades. Finally, the budget would include an enforcement mechanism, creating some sort of presumptive entitlement for developers to build the budgeted use until the citywide goal is met.[272]

They add: "[T]he entire scheme relieves individual legislators of political pressure to unbundle the package and force a vote on the site-specific decision."[273]

---

268. Hills & Schleicher, *City Replanning*, *supra* note 21, at 32.
269. *Id.* at 32–33.
270. *Id.* at 45.
271. *Id.* at 46; *see also* Hills & Schleicher, *Zoning Budget*, *supra* note 214.
272. Hills & Schleicher, *City Replanning*, *supra* note 21, at 46.
273. *Id.* at 47.

However, the granularity of cities is such that aldermanic districts often are much larger than locales that are generally regarded as neighborhoods or that might identify and organize themselves as neighborhoods if sufficiently threatened. It is of little recompense to homeowners in a residential subdivision faced with an adjacent looming condominium tower if a trash transfer station is to be built across town.

Many landowners who would benefit from denser development would seek a "presumptive entitlement." One might assume that such entitlements would be distributed only "until the city-wide goal is met." However, municipal officials sometimes make promises beyond budgetary constraints. Even within the budget, there still is the issue of determining recipients. The likely outcome is that a frenzy of wheeling, dealing, and cashing of political IOU's from political leaders and others would ensue.

Hills and Schleicher attempt to avoid that result by stating that planners might constitute an "extra-legislative body" that could bundle together many site-specific zoning decisions as to dissuade legislators from trying to unravel it.[274] This is possible but requires political as well as planning acumen. It also requires a working knowledge of pressures and lures, political, financial, and otherwise, to which legislators are subject.

In "hot button" situations where legislators might feel too much political heat, such as inclusionary zoning requiring the construction of low- or moderate-income housing together with market-rate housing, they propose that the "local legislature could delegate the task to an expert planning staff led by the mayor. . . . [T]he staff would provide additional political cover for legislators in sensitive districts, allowing them to endorse the general idea of inclusionary zoning while feeling free to rail against the formula that the planning staff ultimately presents."[275]

While here and elsewhere *City Replanning* cites the Congressional Base Closure and Realignment Act (BRAC) as an example of the success of such expert bundling schemes, its post-2005 history not inspire confidence.[276]

---

274. *Id.* at 47–48.
275. *Id.* at 52.
276. *See infra* notes 352–55 and accompanying text.

2. The Retrenchment Problem and Regulatory Property

When one engineers an important legislative advance, the obvious next move is to lock it in place so that legislators (or their successors) cannot retreat. "A literal example of this principle was recounted by Thomas Schelling: In World War I, German soldiers were sometimes chained to their machine guns so that they could not act on an impulse to flee."[277]

While soldiers during war are not permitted to flee, the rules for legislators are somewhat different. Efforts to ensure "sticky" legislation must confront the doctrine of entrenchment, which the Supreme Court has described as the principle of constitutional law holding that "one legislature may not bind the legislative authority of its successors."[278] This principle prevents legislative bodies from making their ordinary legislation unrepealable.[279]

The entrenchment doctrine does not prevent governments from entering into contracts, and government breach or arrogation of counterparties' contract rights gives rise to claims under the Contracts Clause,[280] or Takings Clause,[281] respectively. "Takings law, for example, interferes (or should interfere) with the ability of interest groups to lobby for property transfers that come at the expense of particular members of the public."[282] Therefore, local governments "have become increasingly adept at using private law mechanisms like contracts and property conveyances to make binding precommitments into the future."[283] Christopher Serkin notes that "[t]he first and perhaps most obvious form of entrenchment comes from the creation of property rights. The vested rights doctrine is the best example."[284]

---

277. Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 46 (2001).

278. United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *90).

279. *See generally* Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

280. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . . .").

281. *Id.* amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

282. Posner & Vermeule, *supra* note 278, at 1690 (citing RICHARD A. EPSTEIN, TAKINGS (1985)).

283. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879 (2011).

284. *Id.* at 898.

A fortunate developer who obtains an entitlement for a high-density, high-rise residential tower is apt to commence work quickly or take whatever other action is required under state law for vesting of that development right as a protected property interest.[285] The developer may express gratitude to officials making the award, in one form or another. That might offset the animosity engendered among adjoining single-family home residents and developers whose applications are denied. But that raises the issue of how the fortunate parcel and its owner were selected.

3. The Creation of Regulatory Property and Cronyism

"Regulatory property" is a property right that is created and allocated by government and derives its value from the fact that holders are permitted to engage in activities forbidden to others.[286] A land use example is the "transferable development right" (TDR), which gives the holder a government entitlement to develop a parcel in the area in which it could be used ("receiving area") more intensely than other parcels located there.[287] The Supreme Court has adjudicated the rights of TDR recipients[288] but never ruled on the rights of owners in the receiving areas. Assuming that denser development of parcels in the receiving area is not inimical to the public health, safety, or welfare, owners may claim that their land has been downzoned so that now-valuable TDRs could be sold or given to owners of other parcels to mitigate what otherwise would be takings.

---

285. *See generally* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 31 (1996) ("Generally, the black-letter rule for acquisition of vested rights provides that a landowner will be protected when: (1) relying in good faith, (2) upon some act or omission of the government, (3) he has made substantial changes or otherwise committed himself to his substantial disadvantage prior to a zoning change.").

286. *See* Bruce Yandle & Andrew P. Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123, 129 (2001) (originating term).

287. *See generally* Matthew C. Garvey, Note, *When Political Muscle is Enough: The Case for Limited Judicial Review of Long-Distance Transfers of Development Rights*, 11 N.Y.U. ENVTL. L.J. 798 (2003).

288. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978) (holding that TDRs "mitigate" financial burdens imposed on landowners by stringent land use regulation rather than constituting (inadequate) just compensation).

It might be, however, that "density-mixing TDRs . . . constitute a valid and rational exercise of the police power in most instances."[289] But that view conflates density mixing with government sale of development rights. Assume, for instance, that 50 lots in a district of 1,000 lots might be developed as six-unit buildings and the other 950 lots restricted to single-family homes. Should government have a right to sell TDRs, permitting 50 buyers to construct the multifamily structures? How might that differ from selling any other zoning?

That problem involves what Lee Anne Fennell termed "lumpy property,"[290] where the size or other attributes of parcels in the area under consideration for a certain purpose do not comport with the functional need. In the case of TDRs, for instance, the receiving area where mixed density would be appropriate is not congruent with individual parcels. A single owner of the entire receiving area presumably could apply for a development permit for 950 single-family residences and 50 six-unit buildings. There would be no mismatch serving as a justification for TDRs.

If the right to limited multifamily development thus is intrinsic to the receiving area, every landowner should own an aliquot share. As Professor Fennell stated: "When market transactions prove unequal to the task of shifting from one scale of use or form of ownership to another, the government may turn to coercive reconfiguration, as through eminent domain or partition."[291]

This is the same principle as has been applied in other land-based common pool situations, such as regulatory unitization of petroleum reserves located beneath the lands of multiple owners.[292] Likewise, in *Barancik v. County of Marin*,[293] the county revised its countywide and local plans to provide for TDRs. The amendments were "[d]irected specifically to the homogeneous community of Nicasio Valley" and treated it "as one complete land forum."[294] Interestingly, TDRs had been given to landowners deprived of development rights in a case decided by

289. Garvey, *supra* note 286, at 799–800.

290. Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955 (2012).

291. *Id.* at 1971.

292. *See, e.g.*, Richard A. Forster, *Oil and Gas: The Corporation Commission's Role in Evaluating the Prudence of Operations in Statutory Unitization*, 24 WASHBURN L.J. 191, 193–95 (1985) (noting and describing how numerous states have enacted compulsory unitization statutes responding to "the physical and economic waste that often result from the drilling of unnecessary wells and promotion of oil and gas conservation").

293. 872 F.2d 834 (9th Cir. 1988).

294. *Id.* at 835.

the U.S. Supreme Court on a narrow standing issue, *Suitum v. Tahoe Regional Agency*.[295]

This analysis of TDRs directly implicates the "zoning budget" recommended as an element of comprehensive replanning by Hills and Schleicher.[296] The budget would "allocate . . . land uses across neighborhoods," and it would "include an enforcement mechanism, creating some sort of presumptive entitlement for developers to build the budged use until the city-wide goal is met."[297]

In large cities with high housing prices, presumptive entitlements that are in short supply would be most desirable. Those who obtain development rights within the quota will have land worth much more than those who do not. Should developers (or, more likely, indigents hired for the purpose) camp out on the street at the entitlement office days in advance of the acceptance of applications? Should applicants procure testimonials to their (often expensive) good works from civic and religious leaders, as applicants for new TV channel licenses were wont to do, thus dissipating associated economic rents?[298]

Might a point system be devised so that development applications are graded based on established criteria?[299] Would that even be permissible in light of Hills and Schleicher's desire for a "presumptive entitlement for developers" and their strong proclivity "in favor of lower information costs and less custom-tailoring?"[300] The "standard 'price sheet' for density increases" they propose[301] might help in getting away from parcel-by-parcel development negotiation, but it is hard to

---

295. 520 U.S. 725 (1997) (holding that the landowners' claims were ripe for judicial review, since disbursement of the TDRs was the agency's final determination).

296. *See supra* text accompanying notes 270–71.

297. *Id.*

298. *See* J. Gregory Sidak, *An Economic Theory of Censorship*, 11 SUP. CT. ECON. REV. 81, 98 (noting that FCC interpretations of a Supreme Court ruling gave it the right "to force all competing applicants for a particular radio or television frequency into a self-destructive process of mutual rent dissipation"); *see also* James M. Buchanan, *Rent Seeking and Profit Seeking*, *in* TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 4 (James M. Buchanan, Robert Tollison & Gordon Tullock eds. 1980) ("Rent seeking is designed to describe behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus."); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987) (asserting that politicians and bureaucrats create rents through legislation and regulation and extract them from applicants through campaign contributions, votes, and political favors).

299. *See* Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291 (1972) (upholding comprehensive plan providing for point system for development applicants).

300. Hills & Schleicher, *City Replanning*, *supra* note 21, at 43.

301. *Id.* at 53–54.

envision this being done with sufficient granularity to take into account relevant circumstances in particular neighborhoods or blocks.

Finally, the frantic activity likely at the time when replanning budget entitlements are distributed is a magic moment when great profits are to be made or lost and in which those whose expertise or favor are necessary to deals are apt to prosper.[302] In the area of land use, this is exactly when the Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District*[303] is most relevant. *Koontz* states: "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."[304]

Explicit or even implicit municipal exactions of development applicants for cash or in-kind benefits, such as paving off-site streets or paying for nearby parks, might be treated as "extortionate demands." While there is yet little case law indicating how far *Koontz* will be extended, the myriad of ways for localities to engage in low-visibility extortionate practices makes that course of action tempting.[305]

One unintended consequence of *Koontz* might be an increase in the conditioning of development on developer accession to arguably extortionate demands. As local officials become more cautious about the possibility of unconstitutional claims, they well may concentrate their receptivity to proposals from developers who are local repeat players and who play the game with discretion.[306] This, in turn, would exacerbate problems with cronyism and corruption. Favored developers might supply tips about opportunities for tax-favored or otherwise subsidized projects on lands they control or that might be acquired

---

302. *See* KURT VONNEGUT, GOD BLESS YOU, MR. ROSEWATER 4 (1998) (1965) ("In every big transaction, there is a magic moment during which a man has surrendered a treasure, and during which the man who is due to receive it has not yet done so. An alert lawyer will make the moment his own, possessing the treasure for a magic microsecond, taking a little of it, passing it on."); *see also Shark Attack: Why American Firms Cannot Do Deals Without Being Sued*, ECONOMIST, June 2, 2012, *available at* http://www.economist.com/node/21556248 ("Like so many novelists, [Vonnegut] was talking bosh. No alert lawyer takes only 'a little.'").

303. 133 S. Ct. 2586 (2013).

304. *Id.* at 2596. "As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury." *Id.*

305. *See generally* Steven J. Eagle, Koontz *in the Mansion and the Gatehouse*, 46 URB. LAW. 1 (2014).

306. *Id.* at 14–16.

for their subsequent redevelopment on targeted sites that might be acquired through municipal condemnation.[307]

While Hills and Schleicher do not spell out the nature of advisory commissions, enforcement mechanisms, presumptive entitlements, zoning budgets, and interactions between private and publically subsidized projects that they have in mind, the integrity of the development process rests on this myriad of details and not on the formulation of a "citywide deal," as such.[308]

D. Densification and Agglomeration are Different Concepts

Charles Tiebout postulated that business people and professionals in a metropolitan area would sort themselves into one of its rings of suburbs based on the mixes of amenities and taxes that they offered.[309] Similarly, one might assume that cities might compete for achieving a critical mass of firms and workers specialized in one industry or another.[310] However, to the extent that lifestyle provides the ultimate agglomeration, it is plausible to think that, like London or Paris in their respective countries, a handful of American cities might predominate in all fields.

Furthermore, increased densification in the name of promoting the wealth effects of agglomeration tend to be resented by those who feel disrespected and displaced. While plans for engineering densification implicitly aim at overcoming their resistance, the estranged majority votes in large numbers and otherwise has influence.[311]

1. "Congestion" in Its Broader Aspect

David Schleicher noted that agglomeration economists generally conflate the detriments of density under the heading of "congestion costs."[312] "True congestion costs are the increased expenses caused

307. *See* Eagle, *supra* note 27, at 1078–81.

308. Hills & Schleicher, *City Replanning*, *supra* note 21, at 45–53.

309. Tiebout, *supra* note 130.

310. *See, e.g.*, MARSHALL, *supra* note 4.

311. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 847 (1992); *see also supra* notes 134–37, 195, and accompanying text.

312. Schleicher, *City Unplanning*, *supra* note 73, at 1737.

by many people crowding into a small area. Higher land costs are the primary congestion cost, but traffic and things like noise or other forms of pollution also fall into this camp."[313]

A few cities, such as London, impose congestion fees on automobiles entering the center during business hours, which presumably is less of a burden on the finally well off, who presumptively are more productive.[314] But might we impose a Pigovian congestion tax on residents in areas such as Greenwich Village who do not make positive agglomerative contributions, perhaps those who declare their occupations as lawyers or bankers rather than artists? Aside from this suggestion's political impracticality, "[v]irtually every author points out that we do not know how to calculate the ideal Pigouvian tax or subsidy levels in practice, but because the point is rather obvious rarely is much made of it."[315]

Likewise, since the end of World War II, highways in the United States have been thought of as a way of dispersing the talented and prosperous from the center city. However, mass transit might have the opposite effect in making it easier for workers who add lesser value to commute into the center city.[316] Might Pigovian taxes on center city "space eating slugs" subsidize such congestion-relieving measures?[317] The Article next focuses on problems of increased density resulting from population growth parasitic on agglomeration and from displacement of community.

2. Agglomeration Benefits are Difficult to Achieve

In her article *Agglomerama*, Lee Anne Fennell characterizes urban spaces a "type of commons" which could be overcrowded or,

313. *Id.*

314. *See generally* Michael H. Schuitema, Comment, *Road Pricing as a Solution to the Harms of Traffic Congestion*, 34 TRANSP. L.J. 81 (2007).

315. Stephen W. Salant & Nathan Seegert, *Private Access Fees and Congestion: Is there a Role for Government After All?*, at 29 (Resources for the Future Discussion Paper 14-26, 2014), *available at* ssrn.com/abstract=2537848 (quoting William J. Baumol & Wallace E. Oates, *The Use of Standards and Prices for Protecting the Environment*, 73 SWEDISH J. ECON. 42, 42 (1971)).

316. Badger, *supra* note 13 (quoting Enrico Moretti) ("California high-speed rail has always been thought of as a fast way to move people from Los Angeles to San Francisco, as competing with the plane. . . . But it might be that actually its most meaningful economic impact would be as a way to allow people in Central Valley low-wage cities to commute to the Bay Area.").

317. *See infra* text accompanying note 320.

alternatively, "fail[] to attract parties who are well suited to generate agglomeration benefits."[318] "The challenge," she added, "is to assemble participants together whose joint consumption and production activities will maximize social value."[319]

In discussing urban spaces as commons, Fennell noted that every firm or household is eager to incorporate positive externalities of others into its own private income but is "largely indifferent to the magnitude or sign of its own contributions to the collective."[320]

Furthermore, market mechanisms and self-sorting cannot be depended upon to generate optimal agglomerations. "If cash prices were the sole basis for allocating urban locations, a buzz builder who would add a large premium in kind to the community could be outbid by a space-eating slug."[321] This problem occurs in many contexts, notably the downtown shopping district, where the most desirable merchants cannot capture the positive spillovers of the traffic they draw to the area. The privately owned regional shopping center facilitates internalization of positive externalities so that "anchor" stores pay much lower rents per square foot than merchants parasitic on the traffic anchors generate.[322]

This problem is difficult to overcome using traditional public land use controls. Some general designations might help, such as those discouraging "formula" stores and restaurants in favor of those that are more novel and would attract business to the neighborhood[323] or preserving urban manufacturing loft buildings by forbidding conversion to residential use.[324] However, zoning is not sufficiently fine-grained to capture synergies that swirl among entrepreneurs and artisans at a given time, much less keep current with dynamic changes over short periods of time.

---

318. Fennell, *supra* note 30, at 102–3.

319. *Id.* at 103.

320. *Id.* at 113.

321. *Id.* at 120.

322. *See, e.g.*, Marcus Gerbich, *Shopping Center Rentals: An Empirical Analysis of the Retail Tenant Mix*, 15 J. REAL EST. RES. 283, 284–86 (1998).

323. *See, e.g.*, Frona M. Powell, *Economic Regulation and the Power to Zone*, 38 REAL EST. L.J. 421, 422 (2010) (noting some polities "are not receptive to Wal-Mart and other large formula stores locating within their community, and they rely on their zoning codes or in some cases state environmental laws to limit or block [them] entirely").

324. *See* Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010).

Another possible solution is what Fennell calls "differential pricing,"[325] where the government strikes individualized bargains in the context of permit applications, such as incentives for legitimate theaters in the most propitious locations. This is similar to "performance zoning" designed to generate positive externalities, such as guarantees of foot traffic to stores by requiring firms to eliminate employee lunchrooms or limit telecommuting.[326] However, such custom solutions arrived at through bargaining regarding uses of individual parcels goes directly against the goal of comprehensive replanning to limit transactions costs.[327]

Higher housing costs that result from increased density might well result in demands for more affordable housing, and developers, who typically agitate for higher density, might be allowed to build more luxury units if the construct affordable housing units.[328] In her current capacity as Commissioner of New York City's Department of Housing Preservation and Development, Professor Vicki Been has announced that her department is being reorganized to implement Mayor Bill de Blasio's plan to create and preserve 200,000 units of low-cost housing during the next decade.[329] Been's department will "oversee the 'cornerstone' of the effort: Mandatory inclusionary housing," and in every neighborhood the city will "target for development through rezonings. . . . every single housing project will be required to include affordable housing."[330] Regardless of the social benefit thereby created, increased density without positive agglomerative effects creates congestion that discourages agglomeration.

Here, however, it is useful to focus on the demand for residences in agglomerative neighborhoods by what might be deemed as high-income but "parasitical" new residents. The principal difference between

---

325. Fennell, *supra* note 30, at 133.

326. *Id.* at 137.

327. *See infra* Part III.B.1.

328. *See* David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42/43 URB. LAW. 307, 322 (2010) (noting that "California Density Bonus Law requires local governments to 'reward developers that agree to build a certain percentage of low-income housing' with increased density bonuses above those permitted by applicable local regulations").

329. Ryan Hutchins, *H.P.D. Plans Major Changes to Jump-Start Affordable Housing Development*, CAPITAL PLAYBOOK, Oct. 1, 2014, *available at* http://www.capitalnewyork.com/article/city-hall/2014/10/8553747/hpd-plans-major-changes-jump-start-affordable-housing-development.

330. *Id.*

the apartment house for lower-income persons, gratuitously described in *Euclid* as a "mere parasite,"[331] and new luxury buildings to be occupied by their ostensible betters is that the affluent pay higher taxes but might have more potential for diluting the agglomerative aspects of the neighborhood that foster economic productivity.

Individuals seeking to move to areas possessing strong positive agglomerations of cultural amenities and where productive businesses prevail must bid against each other for that privilege. Housing prices, taxes, and regulatory burdens tend to be high, and the level of government services tends to be low.[332] Those whose efforts and presence collectively provide the value of agglomeration are trapped into paying more and more to enjoy the value that they themselves created and that is enjoyed by residents who do not add agglomerative value. This is the opposite of mutualization, whereby members of private clubs collectively internalize the joint value of their relationships.[333]

Recent books by Richard Florida[334] have trumpeted the notion that attracting the "creative class"—well-educated young people with an entrepreneurial bent—is the key to urban prosperity.[335] Richard Schragger notes that amenities attracting such young people include "waterfront parks, arts districts, the creation of edgy urban streetscapes, and the repurposing of downtown turn-of-the-century industrial warehouses."[336] He added that these would augment amenities,

---

331. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (noting that, in sections of detached homes, "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").

332. Schleicher, *supra* note 237, at 1511–12 (noting that "[a]gglomeration gains at the local level give otherwise mobile residents a reason not to move, even when governmental policies affect them in a negative way").

333. James M. Buchanan, *An Economic Theory of Clubs*, 32 ECONOMICA 1 (1965) (explaining strong preference of elite individuals to join social clubs with mutual ownership, as opposed to proprietary clubs whose owners could charge high dues for the benefits of mutual association).

334. RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE (2002); FLORIDA, THE GREAT RESET, *supra* note 179; RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS (2005). Florida's "creative class" has been the subject of considerable debate. *See, e.g.*, Joel Kotkin, *Biscotti and Circuses: Richard Florida Concedes the Limits of the Creative Class*, THE DAILY BEAST (Mar. 20, 2013, 4:45 AM), http://www.thedailybeast.com/articles/2013/03/20/richard-florida-concedes-the-limits-of-the-creative-class.html.

335. FLORIDA, THE GREAT RESET, *supra* note 179, at 173.

336. Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231, 234 (2013).

such as "art museums, symphony orchestras, theaters, and parks," that James Buchanan earlier had recommended as a way for cities to attract and retain the wealthy.[337] The city, on this account, is a consumer good that needs to create a brand that will appeal to a particularly desirable demographic.

However, what if a city's "brand" becomes so important that it swamps the traditional measure of agglomeration—the propinquity of many firms and workers specializing in a particular trade? One current example is the move of General Motors' Cadillac division from Detroit to New York. For generations, Cadillac was located in Detroit and was GM's prestige division.[338] Alas, Cadillac—it last was America's top-selling luxury car in 1997. "Since then, its executives have tried seemingly everything—from new models to new management to new marketing—to revive its flagging fortunes, with little to show for it."[339]

On September 23, 2014, General Motors announced that Cadillac headquarters would move from Detroit to New York's "trendy" SoHo neighborhood.[340] The *New York Times* reported that Cadillac's new head, Johan de Nysschen, "was convinced that to reinvent the struggling brand, it needed more autonomy, more focus and more of a connection to what is cool and fashionable."[341] As the *Wall Street Journal* added, "GM's brass feels being in Manhattan will help Cadillac better reach luxury buyers."[342] There was no indication that New York had an agglomeration of automotive engineering excellence. Instead, as Mr. de Nysschen added, "[t]here is no city in the world where the inhabitants are more immersed in a premium lifestyle."[343]

However, the wealthy in general prefer a "premium lifestyle," as do well-remunerated physicians, lawyers, and bond traders. A *New York Times Magazine* account of life in Greenwich Village questioned how

337. *Id.* at 234 (quoting James M. Buchanan, *Principles of Urban Fiscal Strategy*, 11 PUB. CHOICE 1, 14 (1971)).

338. *See generally* Generations of GM—Cadillac, GM HERITAGE CENTER, https://history.gmheritagecenter.com/wiki/index.php/Cadillac (last visited May 15, 2015).

339. Aaron M. Kessler, *Cadillac Tries to Make a Fresh Start in New York*, N.Y. TIMES, Sept. 23, 2014, at B1.

340. *Id.*

341. *Id.*

342. Jeff Bennett & John D. Stoll, *Cadillac Seeks Brighter Future in New York*, WALL ST. J., Sept. 23, 2014, at B7.

343. *Id.* (quoting Johan de Nysschen).

its local shops could "survive extreme gentrification."[344] It said that the impact of the tremendous growth of the financial industry since the 1970s "may be most evident in the Village. The artists, weirdos and blue-collar families . . . are long gone. They've been replaced, in large part, by guys in suits."[345]

The saga of Greenwich Village indicates how easy it is for those attracted to neighborhoods made vibrant by the "creative class" to raise density and rents and thus dissipate the agglomerative creative energies of the artists and entrepreneurs whose presence they sought. The transition from creators to parasites, so to speak, is hastened by increasingly effective means of signaling by their home address that the arrivistes are both wealthy and cultivated.[346]

Also, in the most vibrant American cities, many wealthy people, including a substantial number from abroad, acquire residences in prime neighborhoods as pieds-à-terre, investment apartments, and as hedges against unrest or currency devaluations at home.[347] A recent series of *New York Times* articles on "towers of secrecy" asserts that shell corporations own a substantial number of the most expensive new condominiums, with beneficial ownership traced to oligarchs who derived their fortunes through questionable means.[348] In New York City, "[t]wenty-four percent of co-op and condo apartments citywide are not the primary residence of their owners."[349] Substantial numbers of vacant units also drain agglomerative interactions from a neighborhood.

E. Would a Grand Bargain Last?

Just as the Progressives envisioned comprehensive land use planning as a one-time exercise, so contemporary reformers, such as Hills and Schleicher,[350] see comprehensive city replanning as a

344. Adam Davidson, *Jane Jacobs vs. Marc Jacobs*, N.Y. TIMES SUN. MAG., June 5, 2012, at MM16.

345. Davidson, *supra* note 343.

346. *See generally* Michael Spence, *Signaling in Retrospect and the Informational Structure of Markets*, 92 AM. ECON. REV. 434 (2002) (illustrating the basic signaling model in which expensive credentials proxy desirable characteristics not directly ascertainable).

347. Julie Satow, *Why the Doorman is Lonely*, N.Y. TIMES, Jan. 11, 2015, at RE1 (quoting George V. Sweeting, deputy director of the New York City budget office).

348. *See, e.g.*, Louise Story & Stephanie Saul, *Hidden Wealth Flows to Elite New York Condos*, N.Y. TIMES, Feb. 8, 2015, at A1.

349. Satow, *supra* note 346.

350. *See* Hills & Schleicher, supra note 21, at 45–59.

way to cut the Gordian knot and establish the framework for long-term progress.

However, despite efforts to thwart them through procedural obstacles and vested rights,[351] grand bargains have a way of eroding. It is instructive to consider Milton Friedman's critique of the Tax Reform Act of 1986,[352] which reduced rates and abolished special preferences wholesale. "[A]s of 1986 . . . the tax system had gotten so complicated, you had filled up the blackboard essentially so that Congressmen had nothing more to sell, and they were therefore willing to wipe the slate clean and start over again. . . ."[353]

An example of a highly lauded grand bargain was the military base closure process devised by Congress to shelter individual members from constituent demands that obsolete local bases be kept open. It resulted in the Base Closure and Realignment Act (BRAC), which resulted in more than 350 installations being closed in five rounds ending in 2005.[354] Hills and Schleicher discuss BRAC as an example of a successful bundle.[355] However, the process was seen nevertheless as putting political careers in jeopardy,[356] and Congress barred the Pentagon from even planning future rounds.[357]

To the extent that a land use regime put in place by comprehensive replanning perseveres, its primary cause would be lock-in through regulatory property. However, I assert that the creation of regulatory property entails the same sort of deal making that Hills and Schleicher reject[358] and that losers in the scramble for regulatory property might obtain judicial vindication that would vitiate its achievements.[359]

---

351. *See infra* Part IV.C.

352. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986).

353. Lawrence Zelenak, *The Theory and Practice of Tax Reform*, 105 MICH. L. REV. 1133, 1148 (2007) (quoting remarks of Milton Friedman, Sixth Meeting of the President's Advisory Panel on Federal Tax Reform 117–18 (2005)).

354. *See* Pub. L. No. 100-526, 102 Stat. 2623 (1988) (codified and amended as 10 U.S.C. § 2687 (2006)) (providing authorization to facilitate the closure and realignment of military bases); Hills & Schleicher, *Zoning Budget*, *supra* note 214, at 107–8 and n.68 (outlining legislative process).

355. Hills & Schleicher, *City Replanning*, *supra* note 21, at 47.

356. *See* Carl Hulse, *Freshman Senator Can Finally Breathe Easy*, N.Y. TIMES, Aug. 27, 2005, at A10 (discussing removal from closing list of Ellsworth Air Force Base in South Dakota, a decision that would "decide [the] political fortunes" of Senator John Thune).

357. Walter Pincus, *Hagel Turns Up the Heat on Closing Surplus Military Bases*, WASH. POST, Mar. 18, 2014, at A15.

358. *See infra* Part IV.C.2.

359. *See supra* notes 301–4 and accompanying text.

V. SOME POSSIBLE SOLUTIONS

Comprehensive replanning, of course, is not the only possible answer to reforming land use so as to enhance density, agglomeration, and urban prosperity.

A. Privatization of Land Use Regulation

One possible alternative to comprehensive replanning is Robert Nelson's suggestion that zoning regulation is best regarded as a neighborhood property right.[360] Nelson railed against zoning abuse, concluding that it "ultimately served the political interests of the most powerful elements of the municipality, rather than any public interest."[361]

Nelson proposed instead that state law be changed so that supermajorities of landowners should have the right to organize a new type of neighborhood association. It would have sweeping powers to regulate land use, including the ability to sell rights of entry to convenience stores, "or even sell all the neighborhood property in one package for comprehensive redevelopment."[362] However, as I observed at the time, "[t]here is a certain irony in Nelson's privatization proposal: at the behest of interested parties, state law would impose a contractarian regime upon those who prefer a regulatory one."[363]

Another purported solution to the inefficient use of land, developed by Abraham Bell, would permit private takings in order to eliminate the monopoly on land use generally belonging to the incumbent owner.[364] Switching from individual parcels to neighborhoods, he and Gideon Parchomovsky "seek to harness the insights of auction theory to devise an improved governance model for common-interest communities, perhaps the most important real-property form today."[365]

---

360. ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS 22–51 (1977); Robert H. Nelson, Comment: *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713 (1979).

361. 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, 847 (1999) (citing BERNARD H. SIEGAN, LAND USE WITHOUT ZONING 231 (1972)).

362. Nelson, *supra* note 359, at 835.

363. Steven J. Eagle, *Devolutionary Proposals and Contractarian Principles*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 184, 187 (F. H. Buckley, ed., 1999).

364. Bell, *supra* note 20.

365. Abraham Bell & Gideon Parchomovsky, *Governing Communities by Auction*, 81 U. CHI. L. REV. 1, 2 (2014).

Likewise, Parchomovsky and Peter Siegelman suggest that government condemn large blocks of land and auction off the consolidated parcels.[366]

CONCLUSION

Many existing residents of vibrant cities object to densification, both because of the disamenities it imposes upon them and also because they perceive gentrification as embodying class-based arrogance. Others, perhaps the majority, are tepid at best. Yet agglomeration leads to enhanced material prosperity for the broader community and enriched lives for many.

Approaches advocating top-down agglomeration, such as that in *City Replanning*, are conducive to circumventing democratic values, insofar as they move from individual autonomy and subsidiarity towards decision-making by technocratic experts.[367] Rather, bargains are made and consolidated through transient alliances cemented, in part, by the liberal employment of regulatory property both as sweeteners and as constitutional roadblocks to further change. In fairness, Rick Hills and David Schleicher propose only general methods to ameliorate contemporary political paralysis and assume that equitable institutions, procedures, and results will follow.

History, however, suggests that salutary results should not be expected. Garrett Hardin insisted that overpopulation was a fundamental environmental problem,[368] justifying "the necessity of abandoning the freedom to breed"[369] through "mutual coercion, mutually agreed upon."[370] James Krier replied that a society capable of achieving consensus on coercing its members into cooperation is a society that can cooperate without coercion.[371] Likewise, a society where top-down urban planning might obtain good results in the long term is a society where more subsidiarity should work better.

366. Parchomovsky & Siegelman, *supra* note 19, at 251–52.

367. *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2125, 2125–27 (1990) (citing and discussing authorities).

368. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (introducing the term).

369. *Id.* at 1248.

370. *Id.* at 1247.

371. James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 337 (1992).

Alternatives to Progressive Era reliance on top-down mandates might be premised on the Burkean perspective that we build upon fallible human nature and make only incremental changes to customs and rules that have generally worked successfully, absent urgent reason for radical change.[372] Likewise, a Hayekian view that focuses on the importance of tacit or local knowledge, and the impossibility of central decision makers to gather all of the information needed for good planning, leads to the same results.[373]

Thus, the need for humility in land use planning suggests the importance of incremental steps and decentralized decision making. The predictions of individual landowners are not always going to correctly anticipate the future and might sometimes lead to pernicious consequences. However, individual owners are most apt to be knowledgeable about local conditions. With their own property on the line, they have a strong incentive to achieve satisfactory results.

It might be that grand bargains, such as that suggested in *Comprehensive Replanning*, will prove salutary. But they are leaps of faith, and the foibles of imperfect people will infiltrate the details.

372. *See, e.g.*, Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1208 (2002) ("Burke used the incremental and organic model of the common law as his metaphor for how social change should proceed generally.").

373. *See, e.g.*, F. HAYEK, THE CONSTITUTION OF LIBERTY 193–204 (1960) (noting legislation that is generalized, predictable, and impersonally applied to all as indicative of the rule of law).