



12-15-2020

A Case for Zoning

Christopher Serkin

Associate Dean for Academic Affairs, and Elizabeth H. & Granville S. Ridley, Jr. Chair in Law, Vanderbilt Law School

Follow this and additional works at: <https://scholarship.law.nd.edu/ndlr>



Part of the [Land Use Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

96 Notre Dame L. Rev. 749 (2020)

This Article is brought to you for free and open access by the Notre Dame Law Review at NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

A CASE FOR ZONING

*Christopher Serkin**

Due to a remarkable convergence of criticisms from both the right and the left, zoning is under more sustained attack than at any time in the last seventy-five years. A consensus is building that zoning is what ails America. Simultaneously, the traditional justifications for zoning, like separating incompatible uses, have become increasingly anachronistic in an age of mixed-use development and a desire for vibrant, dynamic places. This Article offers an updated defense of zoning, and in particular density regulations. Today, local governments deploy zoning not primarily to keep industry (or apartment buildings) out of residential neighborhoods, but to preserve community stability by regulating the pace of change, protect property values, and allocate the costs of development and growth. Zoning serves important but unappreciated purposes that must be included in the ledger when evaluating zoning reform.

INTRODUCTION

For nearly a century, zoning has shaped the way we live in America. Born out of the Industrial Revolution, it was designed to keep industry and other incompatible uses out of residential neighborhoods and to impose a measure of rational planning on the development process. It has endured its share of controversy and criticism. Some decried its restrictions on property owners' development rights.¹ Others bemoaned the homogenous single-use residential suburbs that it created.² And still others worried that it had

© 2020 Christopher Serkin. Individuals and nonprofit institutions may reproduce and distribute copies of this Article in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to the *Notre Dame Law Review*, and includes this provision in the copyright notice.

* Associate Dean for Academic Affairs, and Elizabeth H. & Granville S. Ridley, Jr. Chair in Law, Vanderbilt Law School. My thanks to Ganesh Sitaraman for encouraging me to write this piece and for early comments. Thanks also to Jim Ely, John Infranca, Lee Fennell, Richard Schragger, participants at the 2019 Progressive Property Conference, and at the 2019 Zoning Reform Roundtable. Wendy Barcelona and Peter Cornick provided research assistance.

1 See, e.g., Orlando E. Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 ME. L. REV. 261, 263 (1984); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 31 (1981); Jan Z. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 752–53 (1980); see also John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351, 353 (1997) (describing libertarian influence on conservative opposition to regulation of property rights).

2 See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 263–82 (6th prtg. 1994); BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 87–92 (1972); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact*

become a tool for rapacious local governments to extort developers.³ These criticisms and concerns have produced changes in many local zoning ordinances and legal reforms meant to curtail some of zoning's excesses and abuses.⁴ Nevertheless, while zoning has evolved in important ways since the 1920s, the basic structure of American land use regulation has been more or less stable for a very long time. Until now.

Due to a remarkable convergence of criticisms from both the right and the left, zoning is under more sustained attack than at any time in the last seventy-five years.⁵ This is especially true in thriving cities, where urban zoning is blamed as the source of exclusion and unaffordability in the urban core. The nascent YIMBY (Yes In My Back Yard) movement in California is representative but by no means alone.⁶ And YIMBYs have been joined by economists and so-called "liberalarians" who have focused on zoning's role in decreasing residential mobility and thereby exacerbating regional inequality and inefficiencies in labor markets.⁷ They argue that zoning—and restrictions on building density in particular—has produced artificial constraints on housing supply in America's most prosperous cities, which in turn has prevented workers from moving to the better jobs these places offer. The macroeconomic consequence is a mismatch between labor demand and supply, with a meaningful impact on national GDP that some have calculated to be as high as nine percent.⁸ That is a staggering number.

on *Economic Legislation*, 76 B.U. L. REV. 605, 660–61 (1996); see also Echeverria, *supra* note 1, at 365 (describing conservative views); Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 3 (2017).

3 See, e.g., WILLIAM A. FISCHER, *ZONING RULES!: THE ECONOMICS OF LAND USE REGULATION* 289–307 (2015).

4 See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987); Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 360–61 (1999).

5 See, e.g., Richard Florida, *The Flip Side of NIMBY Zoning*, BLOOMBERG CITYLAB (Oct. 26, 2017), <https://www.citylab.com/equity/2017/10/the-flip-side-of-nimby-zoning/543930/> ("It's become perhaps the most widely accepted truism in urban development and economic policy circles: NIMBY zoning and overly restrictive land-use policies and building codes keep housing prices high, making superstar cities like New York and San Francisco less affordable. . . . Remedying this has won wide support from urban economists and city builders on both sides of the political aisle.").

6 See, e.g., Benjamin Schneider, *YIMBYs Defeated as California's Transit Density Bill Stalls*, BLOOMBERG CITYLAB (Apr. 18, 2018), <https://www.citylab.com/equity/2018/04/californias-transit-density-bill-stalls/558341/>.

7 See, e.g., Jason Furman, Chairman, Council of Econ. Advisors, *Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents 1* (Nov. 20, 2015), (transcript available at https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151120_barriers_shared_growth_land_use_regulation_and_economic_rents.pdf) ("[E]xcessive or unnecessary land use or zoning regulations have consequences that go beyond the housing market to impede mobility and thus contribute to rising inequality and declining productivity growth."). See generally David Schleicher, *Stuck! The Law & Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017).

8 See Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, AM. ECON. J.: MACROECON., Apr. 2019, at 1, 25–26.

A consensus is therefore building, at least among academics and elite activists, that zoning is a problem to be overcome. There is a growing call for a massive deregulatory project with respect to zoning—and urban zoning in particular—to loosen density restrictions in order to unlock development, make vibrant places accessible, remedy decades of racial segregation, and supercharge the economy.⁹ Some governments have begun to heed the call. Most notably, California recently enacted a series of measures allowing accessory dwelling units as of right and reducing the procedural hurdles to development.¹⁰ Minneapolis approved a new comprehensive plan that prohibits single-family residential zones in the city, effectively eliminating one of the conventional cornerstones of traditional zoning.¹¹ The state legislature in Oregon recently passed a measure that does the same thing statewide in all cities with at least 25,000 people.¹² And San Francisco removed parking requirements for new development, dramatically increasing the density of permissible development.¹³

Zoning has few champions these days in academic or policy circles.¹⁴ That is understandable. In addition to current policy concerns, zoning's his-

9 See Christopher Serkin, *Divergence in Land Use Regulations and Property Rights*, 92 S. CAL. L. REV. 1055, 1059–60 (2019) (describing changed political landscape); see also Ilya Somin, Opinion, *The Emerging Cross-Ideological Consensus on Zoning*, VOLOKH CONSPIRACY (Dec. 5, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/12/05/the-emerging-cross-ideological-consensus-on-zoning/>.

10 Press Release, Sen. Bob Wieckowski, Governor Newsom Signs Wieckowski Bill to Jump Start Construction of Accessory Dwelling Units (Oct. 9, 2019), <https://sd10.senate.ca.gov/news/2019-10-09-governor-newsom-signs-wieckowski-bill-jump-start-construction-accessory-dwelling>; see Liam Dillon, *How Lawmakers Are Upending the California Lifestyle to Fight a Housing Shortage*, L.A. TIMES (Oct. 10, 2019), <https://www.latimes.com/california/story/2019-10-10/california-single-family-zoning-casitas-granny-flats-adus>.

11 See Henry Grabar, *Minneapolis Confronts Its History of Housing Segregation*, SLATE (Dec. 7, 2018), <https://slate.com/business/2018/12/minneapolis-single-family-zoning-housing-racism.html> (describing change); Elliot Kaufman, Opinion, *Housing Deregulation in Progressive Clothes*, WALL ST. J. (Dec. 21, 2018), <https://www.wsj.com/articles/housing-deregulation-in-progressive-clothes-11545435296>; see also Robert C. Ellickson, *Zoning and the Cost of Housing: Evidence from Silicon Valley, Greater New Haven, and Greater Austin* 9 (Jan. 14, 2020) (unpublished manuscript) (available at <https://ssrn.com/abstract=3472145>) (“Exclusionary zoning, although hardly the exclusive cause of residential segregation by social class, certainly aggravates it.”).

12 See Will Parker, *Does Oregon Have the Answer to High Housing Costs?*, WALL ST. J. (Oct. 23, 2019), <https://www.wsj.com/articles/does-oregon-have-the-answer-to-high-housing-costs-11571823001>; Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning>.

13 See Joshua Sabatini, *Minimum Parking Requirements on Their Way Out in SF*, S.F. EXAM’R (Dec. 4, 2018), <http://www.sfoxaminer.com/minimum-parking-requirements-way-sf/>; Henry Grabar, *San Francisco Legalizes Itself*, SLATE (Dec. 18, 2018), <https://slate.com/business/2018/12/san-francisco-eliminates-parking-minimums-its-a-trend.html>.

14 See, e.g., Florida, *supra* note 5. This academic opposition to zoning is not an entirely new phenomenon. Twenty-five years ago, one commentator noted that “academic literature has been almost as uniformly critical of zoning as public policy has been uniformly in

tory is tinged if not saturated with racism and classism.¹⁵ Furthermore, many early justifications of zoning describe a regulatory system that essentially no longer exists; municipalities' use of zoning has evolved significantly from its origins in the 1920s when it was focused on keeping industry and intensive land uses out of residential neighborhoods.¹⁶ It therefore seems increasingly anachronistic.

This Article nevertheless sounds a note of caution. Zoning, and density limits in particular, continue to serve important functions that go beyond its conventional justification of controlling externalities by separating incompatible uses. Today, zoning is primarily concerned with regulating the pace and costs of community change.¹⁷ It does this primarily by maintaining community character, enhancing property values, and allocating the costs of development between insiders and outsiders. Zoning remains an important tool in municipal toolkits, but more for these modern purposes than for the traditional ones.

Controlling change is at the heart of land use regulation. Zoning sometimes seeks to stimulate new development in new places, but much more often slows or constrains change.¹⁸ In-place property owners often commandeer the land use process to protect the existing character of their neighborhoods and to keep out new development, to the fullest extent they are able.¹⁹ Where affluent neighborhoods regulate out multifamily or more affordable housing options, this looks like "opportunity hoarding" and naked exclusion.²⁰ But controlling the pace of community change can be an important function for land use regulation. Housing consumers, after all, select where to live based in large measure on community characteristics. When those change—especially when they change quickly—the result can impose a real cost. In-place property owners should not be entitled to lock in the status

favor of it." Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENV'T L. 45, 46 (1994) (footnote omitted).

15 See *infra* Section I.A.

16 See *infra* Section I.B.

17 See Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 11 AM. BAR FOUND. RSCH. J. 709, 710 (1987) ("[Z]oning has evolved into a mechanism that conserves and protects existing residential communities by moderating the pace of development and change."). Steele's account focuses on the participatory aspects of zoning decisionmaking and argues for zoning as a forum for neighborhood "voice." *Id.* at 749. This process-based account is therefore different from the substantive account offered here.

18 See, e.g., Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400–02 (1977) (describing the use of zoning to limit growth).

19 See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 80–81 (2001) (describing the political power of local homeowners).

20 See RICHARD V. REEVES, *DREAM HOARDERS* 104–08 (2017); see also Olatunde C.A. Johnson, *Inclusion, Exclusion, and the "New" Economic Inequality*, 94 TEX. L. REV. 1647, 1655 (2016) (describing "opportunity hoarding"); Carrie Engel, *Play the Dream Hoarders Game*, BROOKINGS (July 13, 2017), <https://www.brookings.edu/blog/brookings-now/2017/07/13/play-the-dream-hoarders-game/> (providing simple arcade-style game demonstrating the phenomenon).

quo, and they should expect some reasonable measure of change. But change that happens too quickly or too dramatically can undermine the sorting function that motivates leading accounts of municipal politics.²¹ Zoning has an important role to play in satisfying consumer preferences by constraining the pace of change.

Zoning also plays an increasingly important role in allocating the costs of new development.²² From a developer's perspective, zoning and land use regulations of all sorts amount to a kind of implicit tax on the development process. The effect—like the effect of any tax—is to increase development costs. Those costs may not be borne by developers, however; depending on elasticity in housing markets, they may instead be borne by housing consumers in the form of higher prices. Where that is true, zoning amounts to a kind of wealth transfer from newcomers to in-place property owners, who see their property values increase.²³ This tradeoff is most explicit where cities adopt exactions or impact fees as part of the land use process. Those fees seek to shift at least some of the infrastructure and other public costs of new development away from property taxes on in-place property owners and to developers and their customers. Whether or not that is appropriate, however, requires a normative view about who *should* bear those costs—a question that is too often ignored in current policy debates. Zoning is the regulatory framework for resolving these conflicts.

Indeed, this use of zoning has been important in spurring reurbanization in America. Loosening zoning to increase access to the urban core would be an ironic if not perverse change. Suburbs pioneered and perfected exclusionary zoning.²⁴ Partly—if not largely—as a result, they spent the last half of the twentieth century winning decisively in the competition for mobile capital. White flight from the urban core and the widespread suburbanization of America seemed inevitable.²⁵ And yet some cities—today's superstar cities—managed to turn themselves around. The causal story is complex and contested.²⁶ But targeted investments and the cultivation of neighborhoods stabilized property values and allowed the seeds of a rebirth to take root. These efforts often included increased land use regulation and the protection of in-place communities. Increasing property values was not necessarily a result of urban reinvestment, but instead went hand in hand with attracting capital back into cities. In short, zoning protection

21 See *infra* Section II.A.

22 See *infra* Section II.C.

23 See *infra* text accompanying notes 192–93.

24 See *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 717 (N.J. 1975) (describing efforts by suburb to exclude people based on income and wealth).

25 See Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 789–90 (1993) (describing the fiscal and social costs of white flight and subsequent exclusionary zoning).

26 See RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 4 (2016) (“[W]e should be modest about asserting particular causes for urban growth and decline.”).

helped to make urban property a good investment again. Walking back this protection for property and property values in cities may tilt the balance back to the suburbs and simply reinvigorate even more pernicious land use regulations in the form of hyperrestrictive private covenants in suburban homeowners' associations ("HOAs").²⁷ If housing consumers demand some control over neighborhood land uses and public regulation cannot provide it, then they may rely more on HOAs, whose covenants are usually more restrictive and less amenable to change than zoning. This outcome would undermine the goals of zoning reforms and would exacerbate all of zoning's worst effects.

Part I provides a very brief history of zoning in the United States and articulates its traditional justifications as well as leading critiques. Part II then offers a modern case for zoning in regulating the pace of community change and, in the process, promoting stability, enhancing property values, and allocating the costs of growth. Part III evaluates these modern justifications in light of current critiques and argues that zoning and density controls remain important toolkits for cities, in particular, in the ongoing competition with suburbs.

I. A (VERY) BRIEF HISTORY OF ZONING IN AMERICA

The history of zoning is well-trodden ground in the land use literature. It needs no comprehensive introduction here. Nevertheless, a brief history frames three important observations that are important for the argument that follows: first, zoning's original justifications are no longer so compelling given changes in urban development; second, municipalities use zoning for different reasons than at its inception; and, third, traditional justifications and uses of zoning are implicated in pernicious outcomes, from racial segregation to the affordability crisis in many cities. This Part therefore surveys zoning's original uses and justifications, describes how zoning has evolved over the last century, and also highlights some of the leading criticisms of zoning. This sets the stage for the discussion in Part II, offering an updated justification for zoning in light of this history.

A. *The Origins of Zoning*

Zoning and land use regulations have a long history in the United States, parts of which are extremely ugly. Some of the earliest efforts involved explicitly race-based zoning.²⁸ In 1910, for example, Baltimore passed an ordinance that created separate neighborhoods for African Americans and for whites.²⁹ Louisville, Kentucky, also passed an ordinance prohibiting Afri-

27 See *infra* Section III.C.

28 For a useful assessment, see Christopher Silver, *The Racial Origins of Zoning in American Cities*, in *URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY: IN THE SHADOWS* 23–39 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

29 See Gretchen Boger, *The Meaning of Neighborhood in the Modern City: Baltimore's Residential Segregation Ordinances, 1910–1913*, 35 J. URB. HIST. 236, 236 (2009); Garrett Power,

can Americans from moving to any block that was majority white.³⁰ The NAACP engineered a legal challenge to the ordinance by a white seller who objected to being prohibited from selling to a willing African American buyer.³¹ The Supreme Court struck down the ordinance in the important case of *Buchanan v. Warley*,³² holding that explicitly race-based zoning violated the Equal Protection Clause.³³ Zoning's origins in this country therefore began with segregation, although explicitly racial zoning was short-lived.

Most histories of zoning begin slightly later, in 1922, when the Commerce Department promulgated the Standard Zoning Enabling Act (SZE).³⁴ It was intended as model legislation for states to adopt to authorize local governments to zone. It served an important purpose because states at the time followed Dillon's Rule, limiting local governments' powers to those expressly delegated to them by the state.³⁵ The SZE provided a model for that delegation.³⁶

Shortly thereafter, Euclid, Ohio, adopted a new zoning ordinance dividing the municipality into different zones that were subject to different use and bulk limits, consistent with the SZE.³⁷ Specifically, Euclid adopted six different use designations, U-1 through U-6, that allowed increasingly intensive uses.³⁸ U-1 permitted only single-family residential uses. U-2 added two-family dwellings. Intensity of uses continued up through U-6, which allowed garbage dumps and the like.³⁹ Simultaneously, "area limits" subjected property to different height limits as well as setbacks from property lines and lim-

Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910–1913, 42 MD. L. REV. 289, 289 (1983).

30 See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 119–26 (1996) (providing background to *Buchanan v. Warley*).

31 See Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 124–28 (2002) (describing history of the litigation).

32 245 U.S. 60 (1917).

33 *Id.* at 62–64. See generally Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence of the "Progressive Era,"* 51 VAND. L. REV. 787 (1998).

34 See, e.g., John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 CITYSCAPE, no. 1, 2005, at 69, 71. Other histories sometimes go back to the German city of Frankfurt-on-the-Main. See, e.g., ANTHONY SUTCLIFFE, *TOWARDS THE PLANNED CITY: GERMANY, BRITAIN, THE UNITED STATES, AND FRANCE 1780–1914*, at 32 (1981); Thomas H. Logan, *The Americanization of German Zoning*, 42 J. AM. INST. PLANNERS 377, 379–80 (1976). Others start with the 1916 New York City zoning ordinance. See, e.g., SEYMOUR I. TOLL, *ZONED AMERICAN* 164 (1969); see also GREGORY F. GILMARTIN, *SHAPING THE CITY: NEW YORK AND THE MUNICIPAL ART SOCIETY 188–202* (1995); Raphaël Fischler, *The Metropolitan Dimension of Early Zoning: Revisiting the 1916 New York City Ordinance*, 64 J. AM. PLAN. ASS'N 170 (1998).

35 See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109–13 (1980) (discussing Dillon's Rule).

36 See, e.g., CHRISTOPHER SERKIN, *THE LAW OF PROPERTY* 218 (2d ed. 2013) (providing history).

37 See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379 (1926).

38 *Id.* at 380.

39 *Id.* at 380–81.

its on maximum lot coverage. This kind of regime, still colloquially called Euclidean zoning, was entirely conventional and precisely what the SZEA had envisioned: separating incompatible uses from each other.⁴⁰

Ambler Realty sued, challenging the zoning ordinance for designating some of its property for residential use that was considerably more valuable as industrial property. This prohibition on industrial uses allegedly deprived Ambler Realty of nearly three-quarters of its value, reducing it from \$10,000 per acre as industrial property to merely \$2500 per acre as residential.⁴¹ Importantly, however, the plaintiffs did not challenge the specific application of the zoning ordinance to its land, but rather launched a facial attack on the very project of zoning itself, arguing that dividing property into different zones was arbitrary and irrational and violated substantive due process.⁴²

While perhaps frivolous seeming to a modern eye, the plaintiffs had reason for optimism about the merits of their claims. The case—*Euclid v. Ambler Realty*⁴³—was decided in 1926, during the heart of the *Lochner* era, when the Supreme Court regularly invalidated regulations that interfered with private rights.⁴⁴ Minimum wage laws and other restrictions on working conditions met a buzz saw in the form of the Supreme Court’s application of substantive due process. Plaintiff’s challenge in *Euclid* was consistent with those other cases, at least superficially.⁴⁵

In fact, the trial court in the litigation did invalidate zoning. District court Judge Westenhaver reasoned that the government’s primary interests were to “regulate the mode of living” and also to pursue development “conceived by the village council to be attractive and beautiful.”⁴⁶ Judge Westenhaver was skeptical that either purpose was strong enough to justify the infringement on property rights. But the opinion went further and said that the interest of the state in segregating by race was much stronger than the interest at stake in nonracial zoning. In invidious language, he wrote, “The blighting of property values and the congesting of population, whenever the

40 See, e.g., *Euclidean Zoning*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/Euclidean%20zoning> (last visited Sept. 10, 2020) (defining “Euclidean Zoning” as “a system of zoning whereby a town or community is divided into areas in which specific uses of land are permitted”).

41 See *Euclid*, 272 U.S. at 384.

42 *Id.* at 384, 386.

43 272 U.S. 365.

44 See, e.g., Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002); Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 CASE W. RESV. L. REV. 617 (2001); Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REGUL. 91 (2011); cf. Joseph Gordon Hylton, *Prelude to Euclid: The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900–1920*, 3 WASH. U. J.L. & POL’Y 1, 2 (2000) (noting that in the decades before *Euclid* the Court repeatedly found that “the police power was sufficiently broad to warrant restrictions on the use of land”).

45 See Haar & Wolf, *supra* note 44, at 2159–60.

46 *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924).

colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance."⁴⁷ And so, he implied, if even race-based zoning was unconstitutional under *Buchanan*, then use-based zoning clearly was too.⁴⁸

In something of a surprise, the Supreme Court reversed.⁴⁹ Writing for the majority, Justice Sutherland recognized that private rights are zero sum.⁵⁰ While zoning burdened the rights of property owners, it protected the property rights of their neighbors. Prohibiting Ambler Realty from using its property for industrial uses imposed a significant burden on the plaintiff, but in so doing protected the adjacent residential neighborhood.

Specifically, the Court concluded that separating industrial from residential uses was analogous to an application of nuisance law and therefore was justified as a valid exercise of the state's police power.⁵¹ More complicated was the extension of that reasoning to separating different kinds of residential uses from each other, like keeping multifamily housing out of single-family residential neighborhoods. Nevertheless, the Court found that this, too, was legitimate because of the "evils" of apartment buildings.⁵² The Court reasoned that apartment buildings are parasitic on single-family residential areas because they consume open space and create all manner of congestion costs and social ills.⁵³ The Court also justified its nuisance-based reasoning by observing that a nuisance may be a "pig in the parlor," or a permissible use in the wrong place.⁵⁴ It was therefore wholly rational and thus permissible for a government to seek to separate different intensity residential uses from each other. Even if apartment buildings would not rise to the level of a common-law nuisance, a government could nevertheless justify excluding them from single-family residential areas on similar grounds.

It is also zoning's original sin.⁵⁵ Analogizing apartment buildings to parasites and pigs in parlors has not aged well. It reflects naked classism and

47 *Id.* at 313.

48 ROBERT C. ELLICKSON, VICKI BEEN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, *LAND USE CONTROLS* 93–94 (4th ed. 2013).

49 *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

50 *Id.* at 365; see Steven J. Eagle & William H. Mellor III, *Regulatory Takings After the Supreme Court's 1991–92 Term: An Evolving Return to Property Rights*, 29 CAL. W. L. REV. 209, 215 n.60 (1992) ("Justice George Sutherland . . . intended a 'conservative' result in *Euclid*—the protection of established residential districts from urban disruption."); Garrett Power, *Advocates at Cross-Purposes: The Briefs on Behalf of Zoning in the Supreme Court*, 22 J. SUP. CT. HIST. 79, 85 (1997) (emphasizing the property rights at issue on both sides).

51 *Euclid*, 272 U.S. at 388.

52 *Id.* at 388, 394–95.

53 *Id.* at 394 ("[T]he 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.").

54 *Id.* at 388.

55 See Christopher Serkin, *Capitalization and Exclusionary Zoning*, in *MEASURING THE EFFECTIVENESS OF REAL ESTATE REGULATION: INTERDISCIPLINARY PERSPECTIVES* 15, 17–18 & n.1 (Ronit Levine-Schnur ed., 2020) (quoting comment by Nestor Davidson at a conference).

barely coded racism. It explicitly privileges a neighborhood's "desirability as a place of detached residences," where children enjoy "the privilege of quiet and open spaces for play."⁵⁶

Despite these pernicious undertones, the benefits of relying on ex ante zoning regulation instead of ex post nuisance litigation were clear. For one, nuisance litigation imposes enormous costs. These include both litigation costs, as well as the dead weight costs on the loser (either the nuisance maker who is forced to close or move, or the neighbor who is forced to endure a use she finds objectionable).⁵⁷ For another, regulation tends to provide more certainty and predictability. The ad hoc character of piecemeal nuisance litigation creates risk and uncertainty and enormous costs to the entire system.⁵⁸

Most states quickly adopted the SZEA and zoning became a ubiquitous part of the land development process.⁵⁹ The SZEA therefore provides the fundamental DNA for most zoning regulations in this country.⁶⁰ Even though land use regulation is fundamentally a local enterprise, and wide variation exists, it has this common ancestry and therefore shares key features.

For one, zoning is intended to implement planning.⁶¹ In the words of the SZEA, zoning must be "made in accordance with a comprehensive plan."⁶² The Commerce Department put a lot of faith in the developing discipline of urban planning.⁶³ Burgeoning fields of scientific and social scientific inquiry sought to pursue rational order in the world, and municipal planning was no different. Early planners championed the benefits of a well-ordered city.⁶⁴ They were motivated in part by advances in ecology at the

56 *Euclid*, 272 U.S. at 394.

57 See Brian Galle, *In Praise of Ex Ante Regulation*, 68 VAND. L. REV. 1715, 1724 (2015) ("[Z]oning laws restrict development before it results in unwanted burdens on neighbors, while nuisance suits impose liability after the damage has begun.").

58 John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 18–32.

59 See 1 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 2.11, Westlaw (database updated April 2020) (noting that by 1930 the SZEA "had been adopted as a whole or in part by 35 state legislature[s]" (quoting KARL B. LOHMANN, PRINCIPLES OF CITY PLANNING 235 (1931))).

60 Serkin, *supra* note 9, at 1055 ("[Z]oning across the country shares a common DNA.").

61 See Karkkainen, *supra* note 14, at 47–50 (identifying two broad justifications for zoning: (1) enhancing property values; and (2) furthering urban planning).

62 See STANDARD STATE ZONING ENABLING ACT § 3 (U.S. DEP'T OF COM. 1926).

63 See Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 15 (2003) (describing then Secretary of Commerce Herbert Hoover's support of and collaborations with planning professionals).

64 See Eric R. Claeys, Essay, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 750 (2004) ("Progressives measured a city's well being by the extent to which it was planned in advance, [and] they saw nineteenth-century regulation as an invitation to anarchy.").

time that had embraced a theory of “end-state” planning.⁶⁵ They believed that ecological change was progressing to a “climax state” of perfect equilibrium.⁶⁶ Planners imported this goal of identifying that “climax state” of development and then designing zoning to implement that goal.⁶⁷

The early focus of zoning was on achieving rational, well-ordered urban plans that minimized the costs of incompatible uses. The implicit vision was for everything to have its own place—industry in one area, commercial uses in another, and people’s homes still somewhere else.⁶⁸ The *raison d’être* was to create a residential sphere protected from the vicissitudes of commerce and industry, while ensuring adequate space and infrastructure for the latter.⁶⁹ It resembles Henry Ford’s 1908 invention of the assembly line, where every person had a single, discrete task, but applied to urban development where every parcel would serve a single purpose that would fit together into a more coherent whole.

Zoning accomplished these goals through a system of “use” and “bulk” regulations, as in Euclid. Use limits created a hierarchy of intensity and in most instances created only a ceiling for permissible uses, with single-family residential zones being the most favored.⁷⁰ In other words, under the standard “cumulative zoning” regime, a property owner can always put property to a less intensive use than the one defined by the ordinance. Bulk limitations operate the same way, defining minimum lot sizes, setbacks from property lines, height limits, and so forth. The SZA also proscribes certain forms of flexibility, allowing governments to build in “conditional uses” that are permissible only if certain additional conditions are met and variances if the

65 Christopher Serkin & Gregg P. Macey, *Post-Zoning: Alternative Forms of Public Land Use Controls*, 78 BROOK. L. REV. 305, 307–08 (2013); see also Claeys, *supra* note 64, at 743–44 (describing origins of zoning in evolutionary biology); John Mixon & Kathleen McGlynn, *A New Zoning and Planning Metaphor: Chaos and Complexity Theory*, 42 HOUS. L. REV. 1221, 1247 (2006) (“Land use planning that postulates a terminal state of affairs—a defined land use future—may be as likely, or even more likely, to produce adverse consequences as to produce an ideal environment.”).

66 See Serkin & Macey, *supra* note 65, at 307–08.

67 See *id.* at 308.

68 See Claeys, *supra* note 64, at 739 (“Euclidean zoning institutes a centralized, command-and-control style of land-use regulation. It operates on the principle, ‘a place for everything, and everything in its place.’”).

69 See NICOLE STELLE GARNETT, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* 28 (2010) (“The Progressive-era reformers who championed zoning were avowed ‘positive environmentalists,’ who firmly believed that the chaos of the industrial city was morally corrupting, and, moreover, that order-construction regulations—that is, zoning rules that segregated commercial and industrial establishments from residences, and, importantly, single-family homes from all other uses—would curb the social disorders plaguing those cities.”).

70 See Gerald A. Fisher, *The Comprehensive Plan Is an Indispensable Compass for Navigating Mixed-Use Zoning Decisions Through the Precepts of the Due Process, Takings, and Equal Protection Clauses*, 40 URB. LAW. 831, 835–36 (2008) (describing cumulative “pyramid” system of zoning with single-family classification the highest use).

application of the zoning ordinance works an undue hardship on any particular parcel. Zoning still has these basic features.

B. *The Evolution of Zoning*

Zoning has changed significantly from the days of *Euclid*. The broad structure outlined by the SZEAL has remained largely intact in most places, but zoning's use and application bear little resemblance to its origins.

Perhaps most importantly, the idea that zoning could predict and codify some perfect urban form seems woefully naïve. Indeed, the planning profession no longer aspires to some ideal urban layout and instead sees land development as a fluid process with shifting needs.⁷¹ In a sense, planners have recognized their inability to predict the future and therefore have become more modest in their aspirations.⁷² Planners today generally recognize that what counts as an appropriate use in a place today may become inappropriate in the near future, and vice versa. For example, the transformation of Nashville's Music Row from music studio headquarters to high-end residential housing would have seemed outlandish just a few years ago.⁷³ As a result, the overall planning process is now more dynamic, and most comprehensive plans are regularly revisited and updated. This is no longer seen as a failure of planning, but instead its natural course.

An additional fundamental change was to move away from a planning model altogether and to migrate to more of a "dealing" model, a formulation made famous by Carol Rose.⁷⁴ Under a dealing model, a zoning designation does not necessarily represent a municipality's best judgment about the most appropriate use for the property, but instead amounts to a kind of opening offer to developers, who must then seek discretionary governmental approval for most developments.⁷⁵ This places developers in the role of supplicants and gives municipalities the opportunity to seek concessions—in design, in

71 See Mixon & McGlynn, *supra* note 65, at 1246 n.102 ("While modern comprehensive plan theory has discarded the overly simplistic notion of a static, inflexible plan, contemporary land use planning theorists have not rejected long-term planning outright." (quoting Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions—Installment One*, 24 STAN. ENV'T L.J. 3, 53–54 (2005))).

72 See, e.g., 1 AM. PLAN. ASS'N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE ch. 7 (Stuart Meck ed., 2002); see also ELLICKSON ET AL., *supra* note 48, at 79 (describing a "wry" take on planning).

73 See Serkin, *supra* note 9, at 1080–85 (describing transformation of Music Row); cf. Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525 (2015) (describing conservation efforts in Nashville and other cities).

74 See generally Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983).

75 For one recent thorough account of this transformation in American zoning, see Steven J. Eagle, *Land Use Regulation and Good Intentions*, 33 J. LAND USE & ENV'T L. 87, 105–09 (2017); see also Ellickson, *supra* note 11, at 15 ("[Z]oning ordinances increasingly make land-use decisions discretionary.").

in-kind community benefits, and sometimes even in cash transfers through impact fees or other exactions.⁷⁶

Piecemeal land use regulation through “conditional use zoning” has embraced a kind of dealing model. In many places, municipalities acceding to development will not upzone the property to a new general zoning category but will instead rezone for the specific project being proposed. For example, a developer might buy property zoned for single family use and seek permission to develop multifamily housing. Instead of rezoning the property to a general multifamily district, municipalities might rezone that individual parcel to permit the specific project being proposed, where the actual plans and conditions on development are made part of the zoning change.⁷⁷ In Nashville, Tennessee, for example, almost all rezonings to accommodate development take this form, with property designated “SP,” or “specific plan.” A zoning map of Nashville reveals an urban core dotted with SP zones.⁷⁸

Zoning has also become much more complex in many places. Compare Euclid, Ohio’s zoning ordinance that created six different use zones with the modern New York City ordinance that defines more than 200.⁷⁹ And it is not just a proliferation of different zoning definitions that has changed. Zoning ordinances today often incorporate overlay districts and subdivision requirements that add additional layers of regulatory restriction.⁸⁰ The rise of historic preservation creates still another hurdle for development in some places, further shaping how and where development happens.⁸¹

There are still other regulatory or quasi-regulatory interventions that also make navigating the land development process more complicated than

76 For a thorough discussion of this phenomenon, see *infra* Section II.C. For the characterization of developers as “supplicants,” see FISCHER, *supra* note 19, at 16.

77 Cf. Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 478 (2004) (“With this device, the landowner requests a rezoning to a conditional use district and a conditional use permit. After rezoning to a conditional use district, the local government must issue a conditional use permit before any desired use will be permitted.” (footnote omitted)).

78 See *Specific Plan District*, NASHVILLE.GOV, <https://www.nashville.gov/Planning-Department/Land-Development/Zoning-Changes/Specific-Plan-Districts.aspx> (last visited Oct. 9, 2020) (follow the “SP Viewer” hyperlink). Tennessee state law, interestingly, does not require that zoning be consistent with a plan. See LIBBY THURMAN & BILL TERRY, TENN. ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., *LAND USE AND PLANNING IN TENNESSEE: PART II: LAND USE AND TRANSPORTATION PLANNING* 62 (2011), <https://www.tn.gov/content/dam/tn/tacir/documents/LandUseAndPlanning.pdf>.

79 See *Zoning Districts & Tools Overview*, NYC DEP’T OF CITY PLAN., <https://www1.nyc.gov/site/planning/zoning/districts-tools.page> (last visited Oct. 30, 2019); *Appendix A—Index of Uses*, NYC PLAN. ZONING RESOL., <https://zr.planning.nyc.gov/appendix-index-uses> (last visited Oct. 30, 2019).

80 See generally NAHB RSCH. CTR., *STUDY OF SUBDIVISION REQUIREMENTS AS A REGULATORY BARRIER* (2007), https://www.huduser.gov/portal/publications/subdiv_report.pdf; *Property Topics and Concepts: Overlay Zones*, AM. PLAN. ASS’N, <https://www.planning.org/divisions/planningandlaw/propertytopics.htm#Overlay> (last visited Oct. 9, 2020).

81 See *infra* text accompanying notes 242–44 (describing historic preservation).

ever. State environmental review can require developers to mitigate environmental impacts, broadly construed.⁸² In some municipalities, developers are encouraged—sometimes strongly—to enter into community benefits agreements directly with community groups that cover topics as varied as affordable housing set asides, the use of unionized workers, preservation of trees and green space, and so forth.⁸³ Some municipalities have their own land use regulatory process to ensure community engagement, and these can create their own hurdles.⁸⁴

All of this complexity has created an increasingly tangled thicket of regulatory restrictions governing the land use development process. Meeting regulatory requirements can be difficult, time consuming, and expensive, and the ultimate results are unpredictable.

C. *Revisiting Zoning's Original Justifications*

Conventional justifications for zoning focused on separating incompatible uses of land. This remains an important regulatory goal, at least generally. However, it has also become increasingly contested in application.

One problem is that what count as incompatible uses have changed significantly over the decades, and in ways that have outpaced many zoning regimes. In the post–Jane Jacobs urban core, people tend to favor some measure of the messy chaos where many different uses are concentrated together.⁸⁵ People may generally agree about the broadest strokes, like keeping bucolic residential neighborhoods free from industry, adult uses, gas stations, car dealerships, or other unusually intensive uses. But the original goal of separate zones where everything is in its own homogenous place has given way to New Urbanism with a focus on dynamic communities with mixed uses and walkable neighborhoods.⁸⁶ Traditional Euclidean zoning does not permit let alone encourage this form of development, and so municipalities—both cities and suburbs—have innovated to produce these kinds of develop-

82 See, e.g., *SEQR*, N.Y. DEP'T OF ENV'T CONSERVATION, <https://www.dec.ny.gov/permits/357.html> (last visited Oct. 30, 2019).

83 See generally Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010) (describing community benefits agreements).

84 See, e.g., *Step5: Uniform Land Use Review Procedure (ULURP)*, NYC DEP'T OF CITY PLAN., <https://www1.nyc.gov/site/planning/applicants/applicant-portal/step5-ulurp-process.page> (last visited Oct. 30, 2019).

85 See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (offering leading account of organic city growth and effectively opposing the centralized planning of Robert Moses in New York); Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1 (2004).

86 See Doris S. Goldstein, *New Urbanism: Planning and Structure of the Traditional Neighborhood Development*, PROB. & PROP., Nov./Dec. 2003, at 9, 9 (“New Urbanism is a land planning philosophy advocating compact, mixed-use, pedestrian-friendly development.”); see also Garnett, *supra* note 85, at 32–35.

ment patterns.⁸⁷ Some adopt overlays, others designate specific zones explicitly for mixed use.⁸⁸ Some have departed even more dramatically from the SZEA model and have enacted form-based codes that focus only on the form of buildings and not the uses at all.⁸⁹ The Euclidean dream of separate residential, commercial, and industrial uses, each in their own spheres, looks more like 1950s nostalgia than like modern zoning.

Another way of articulating the goal of separating incompatible uses of land is in terms of regulating negative externalities. This broader framing suffers from the same problem of indeterminacy. A polluting factory is one thing, but in all but the most extreme cases, what counts as a harm is largely in the eye of the beholder.⁹⁰ The problem here is that all development imposes costs on neighbors. This can take the traditional form of noise and smell. But it can also include simple congestion of existing infrastructure, aesthetic harms, or burdens on schools. Where externalities are ubiquitous, this justification for zoning becomes an empty vessel that can be used for almost any purpose.

Consider, for example, using zoning to control environmental harms. Many local governments have invoked environmental protection to justify aspects of a zoning ordinance, like preserving open space and trees and vegetation for shade and for ecological preservation.⁹¹ To a modern eye, this reflects a kind of *aesthetic environmentalism* focused more on maintaining a

87 See Goldstein, *supra* note 86, at 10 (discussing how developments separate residential and commercial sections, but also allow mixture of uses in residential sections).

88 For an example of explicit mixed-use zoning, see City of Seaside Zoning Ordinance 83-10 (1983). See Samantha Salden, *The Seaside Code: The Poster That Started It All*, SEASIDE RSCH. PORTAL, <https://seaside.library.nd.edu/essays/the-code> (last visited Oct. 9, 2020) (discussing the Seaside Code as the first application of New Urbanism form-based code); see also Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 785 (2003) (discussing application of flexible techniques such as overlay zoning to rigidity of single-use districts); Scott B. Osborne, *Planning Issues in Mixed-Use Developments*, PRAC. REAL EST. LAW., July 2005, at 29, 30 (discussing new urbanist zoning through conditional use permits and special zoning designations).

89 For a description of form-based codes, see generally Nicole Stelle Garnett, *Upscaling the Neighborhood* (2018), HOOVER INST., https://www.hoover.org/sites/default/files/upscaling_the_neighborhood_-_nicole_stelle_garnett.pdf.

90 See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1024 (1992) (“[T]he distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder.”).

91 See, e.g., *2.0 Current Environmental Regulations*, HUNTERSVILLE PLAN. DEP’T, <https://www.huntersville.org/732/20-Current-Environmental-Regulations> (describing importance of preserving trees and vegetation); see also JOHN R. NOLON, *PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND 11* (2014); Stephan Schmidt & Kurt Paulsen, *Is Open-Space Preservation a Form of Exclusionary Zoning?: The Evolution of Municipal Open-Space Policies in New Jersey*, 45 URB. AFFS. REV. 92, 95 (2009) (positing that support for open-space initiatives is the result of “an intensification of or widespread acceptance of environmental awareness in response to the rapid pace of suburban development and its attendant degradation or destruction of landscapes”).

feeling of nature than on actual environmental protection.⁹² Today, people have become increasingly aware that these kinds of land use goals are actually environmentally harmful, and perhaps even catastrophically so.⁹³ They promote large-lot zoning and the preservation of undeveloped land in every lot. Large-lot zoning produces suburban sprawl, increases vehicle miles traveled, and contributes substantially to climate change, the pressing environmental issue of our time.⁹⁴ Indeed, most environmentalists today recognize that the best development patterns from an environmental perspective combine dense urban living with the preservation of large swaths of undeveloped land—the antithesis of sprawling large-lot suburban zones. Nevertheless, keeping dense housing out of suburban areas is often justified in terms of environmental externalities.⁹⁵ In short, the conventional goals of separating incompatible uses and regulating externalities remain important in the easy cases, but are so contested in many settings that they provide little guidance to local governments or to courts reviewing zoning practices.

Traditional justifications for zoning also focus on the benefits of planning and the efficiencies that come from predictability and from a holistic approach to municipal infrastructure and design.⁹⁶ The flexibility in modern zoning ordinances, however, undermines the benefits of predictability.⁹⁷

92 Today, some places have become more sophisticated, for example, adopting wildlife overlay districts that seek to preserve wildlife pathways. *Critical Paths for Vermont Wildlife*, NAT'L WILDLIFE FED'N, <https://www.nwf.org/Our-Work/Habitats/Wildlife-Corridors/Northeast> (last visited Oct. 3, 2018). These remain rare.

93 See Rob McDonald, *In Some Places, Environmentalists Should Be Arguing for More Development. Here's Why.*, COOL GREEN SCI. (Sept. 30, 2015), <https://blog.nature.org/science/2015/09/30/environmentalists-development-houses-zoning-urban-sprawl-suburbs-conservation/>; see also Ellickson, *supra* note 11, at 8–9 (“Although exclusionary zoning practices commonly are defended on environmental grounds, their net environmental effects tend to be negative.”).

94 See Margaret E. Byerly, *A Report to the IPCC on Research Connecting Human Settlements, Infrastructure, and Climate Change*, 28 PACE ENV'T. L. REV. 936, 940–41 (2011) (“Single family, detached homes on large lots contribute to climate change because of increased energy consumption associated with the heating, cooling and transportation to and from these homes.”); Morgan E. Rog, *Highway to the Danger Zone: Urban Sprawl, Land Use, and the Environment*, 22 GEO. INT'L ENV'T L. REV. 707, 707 (2010) (“[V]ehicle travel that is made necessary by the sprawling built environment is also responsible for a substantial portion of human-related greenhouse gases.”); see also István László Bart, *Urban Sprawl and Climate Change: A Statistical Exploration of Cause and Effect, with Policy Options for the EU*, 27 LAND USE POL'Y 283 (2010). For the significance of climate change, see Christopher Serkin & Michael P. Vandenbergh, *Prospective Grandfathering: Anticipating the Energy Transition Problem*, 102 MINN. L. REV. 1019, 1021–22 (2018).

95 Josh Harkinson, *Yes in My Backyard*, MOTHER JONES (May/June 2010), <https://www.motherjones.com/environment/2010/06/urban-density-environmentalists/> (discussing hypocrisy of environmentalism that opposes taller buildings and new high rises in downtown, whose developers would have financed new public transit and a park, while urging cities to take real action to address the causes of global warming).

96 See *supra* text accompanying notes 57–58.

97 See *supra* notes 74–76 and accompanying text (discussing the “dealing” model of land use planning).

A dealing model means that developers cannot assess ahead of time what uses will be permitted on a particular parcel. That uncertainty creates risk for developers, which necessarily increases costs. It also creates an advantage for those developers who are sophisticated at navigating a particular municipality's land use process, which imposes high information costs on everyone else.⁹⁸ Moreover, in-place property owners are always on the defensive, worried that local officials will approve developments inconsistent with the current zoning. That uncertainty is its own cost and requires property owners to invest heavily in monitoring local land use decisions. Participating in a community organization will reveal immediately just how much time and attention this often takes.

Nor does local planning necessarily produce more efficient use of infrastructure. In suburbs, zoning can—sometimes⁹⁹—concentrate development in those places where there is already excess infrastructure capacity, or where it is easy (or easier) to extend service. Some places within a jurisdiction can better accommodate growth than others. But the parochial lens of municipal planning makes it too easy to ignore extralocal advantages and disadvantages.

Consider, for example, zoning in the urban core that seeks to push new development into neighborhoods with excess capacity and to protect neighborhoods where infrastructure is already burdened. From that city's perspective, this looks like a sensible approach to minimize infrastructure costs. However, the comparator is important. The development pressures on protected neighborhoods may push new development into neighboring suburbs instead of into other places within the urban core. That would produce less rational results because it is almost always easier and less expensive to accommodate growth in cities than elsewhere. Water, wastewater, and storm water systems, for example, all depend on physical pipes. The more people served by a particular length of pipe, the lower the costs both of delivery and of maintenance.¹⁰⁰ A very similar equation also applies to solid waste collection and police and fire protection.¹⁰¹ Any density restrictions in urban zoning will tend to push development out into the suburbs where infrastructure costs are inevitably higher. The benefits of land use planning for rational

98 Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Getting It Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process* 16 (Feb. 2018) (unpublished manuscript) (available at https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting_It_Right.pdf) (“[W]ell-capitalized developers with existing relationships and experience in specific jurisdictions are the best situated to navigate these complex local contexts, providing them a competitive advantage.”).

99 The text presents what is admittedly a rosy account of zoning. In fact, typical zoning ordinances exacerbate sprawl. Minimum lot sizes—the bread and butter of Euclidean zoning—ensure that development consumes more, not less, space. See generally ANDRES DUANY, ELIZABETH PLATER-ZYBERK & JEFF SPECK, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000).

100 See SMART GROWTH AM., *THE FISCAL IMPLICATIONS OF DEVELOPMENT PATTERNS: A MODEL FOR MUNICIPAL ANALYSIS* 2 (2015).

101 See *id.* at 2–3.

infrastructure development are therefore overstated if the organic nonregulated results will naturally be more compact and denser than zoning is likely to produce.¹⁰²

D. *The Costs of Zoning*

Zoning's original justifications are increasingly unconvincing. Simultaneously, critics of zoning decry its impacts on housing markets and on the economy more generally.

There is a significant affordability crisis in many of the country's most successful cities.¹⁰³ Average prices in Manhattan recently reached \$1773 per square foot, with San Francisco at \$902 per square foot.¹⁰⁴ For comparison, the price per square foot in 1997 was \$158 in San Francisco, \$76 in Columbus, and \$56 in Pittsburgh.¹⁰⁵ The same trends are reflected in median values for houses. The national average in 2020 was \$256,663, but that number hides enormous regional variation.¹⁰⁶ Median home values in New York City (not just Manhattan) were \$654,683; in San Francisco were \$1,416,879; in Columbus were \$180,899; and in Pittsburgh were \$167,172.¹⁰⁷ Move into less populous places and the numbers are even more striking.¹⁰⁸

102 This, again, depends in part on whether limiting or eliminating urban zoning will result in more suburbanization, not less. The goal of deregulating urban space is to increase density. But if the effect is growth in suburban HOAs, then this is the worst of all worlds from the perspective of rational infrastructure development. See *infra* Section III.B.

103 See Lisa Wirthman, *3 Great Initiatives Revolutionizing Affordable Housing in the U.S.*, FORBES (Oct. 3, 2018), <https://www.forbes.com/sites/nuveen/2018/10/03/3-great-initiatives-revolutionizing-affordable-housing-in-the-us/#2fcea911d4dd> (“Driven by soaring home prices, a shortage of affordable housing and a rising number of cost-burdened renters, many U.S. cities are facing an ‘affordability crisis.’”).

104 Catherine Clifford, *Manhattan Real Estate Is the Most Expensive in the US Per Square Foot with Some Properties Topping \$10,000: Study*, CNBC (Aug. 11, 2018), <https://www.cnn.com/2018/08/11/manhattan-real-estate-is-the-most-expensive-in-the-us-per-square-foot.html> (“Manhattan real estate is an average of \$1,773 per square foot, according to NeighborhoodX. The next most expensive area on a per square foot basis is San Francisco, which averages \$902 per square foot. That’s followed by Boston at \$586 per square foot, Washington D.C. at \$515 and Miami Beach at \$504.”).

105 Stephan D. Whitaker, *Trends in Housing Prices Per Square Foot*, FED. RESRV. BANK OF CLEVELAND (Jan. 19, 2012), <https://www.clevelandfed.org/newsroom-and-events/publications/economic-trends/2012-economic-trends/et-20120119-trends-in-housing-prices-per-square-foot.aspx>.

106 *United States Home Values*, ZILLOW, <https://www.zillow.com/home-values/> (last visited Oct. 9, 2020).

107 *New York Home Values*, ZILLOW, <https://www.zillow.com/new-york-ny/home-values/> (last visited Oct. 9, 2020); *San Francisco Home Values*, ZILLOW, <https://www.zillow.com/san-francisco-ca/home-values/> (last visited Oct. 9, 2020); *Columbus Home Values*, ZILLOW, <https://www.zillow.com/columbus-oh/home-values/> (last visited Oct. 9, 2020); *Pittsburgh Metro (Pittsburgh) Home Values*, ZILLOW, <https://www.zillow.com/pittsburgh-pa/home-values/> (last visited Oct. 9, 2020).

108 For example, Buffalo, New York, had median home values of \$113,790 in 2020. *Buffalo Home Values*, ZILLOW, <https://www.zillow.com/buffalo-ny/home-values/> (last visited Oct. 9, 2020).

The resulting affordability crisis in thriving cities has a number of dimensions. One is on the lack of affordable housing for the very poor.¹⁰⁹ In its most recent report, the National Low Income Housing Coalition identified a shortage of more than 7.2 million rental units available to extremely low-income households and found that only 35 exist for every 100 units that are needed.¹¹⁰ Here, again, the distribution of housing need for low-income families is wildly uneven, with Las Vegas and Los Angeles having the smallest supply relative to demand at 10 and 17 units per 100 households, and Providence and Louisville having the most, although they still have only 47 and 46 units per households, respectively.¹¹¹

The problem extends beyond the very poor, however. Housing cost burdens appear throughout income levels.¹¹² “Nearly one-third of all US households paid more than 30 percent of their incomes for housing in 2016. For renters alone, however, the cost-burdened share is 47 percent.”¹¹³ In New York City, for example, nearly 50% of middle-income households—those earning between \$45,000 and \$74,999—are housing cost burdened.¹¹⁴

Zoning is at the heart of the affordability crisis. By restricting density and limiting the amount of developable property, zoning restricts housing supply, which increases the cost of housing.¹¹⁵ The dynamics are easy to see. In thriving metropolitan areas, like New York and San Francisco, housing prices have increased dramatically, but this run-up has not been accompanied by new building. Instead, these places have seen reductions in new construction.¹¹⁶ The housing market is not responding to demand the way one would usually expect. In the past, local economic booms have led to significant increases in residential development.¹¹⁷ But zoning and land use regu-

109 See, e.g., Bryce Covert, *The Deep, Uniquely American Roots of Our Affordable-Housing Crisis*, NATION (May 24, 2018), <https://www.thenation.com/article/archive/give-us-shelter/> (“Nationwide, there are just 35 affordable and available rental homes for every 100 extremely low-income families—those who either live in poverty or earn less than 30 percent of the median income in their area.”).

110 NAT’L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 2 (2018), https://nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf.

111 *Id.* at 9.

112 See JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION’S HOUSING 2018, at 31–32 (2018), http://www.jchs.harvard.edu/sites/default/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf (describing distribution of housing cost burdens by income level and geography).

113 *Id.* at 30.

114 Samuel Stebbins, *Cities Where the Middle Class Can No Longer Afford a Home*, 24/7 WALL ST. (July 25, 2018), <https://247wallst.com/special-report/2018/07/25/cities-where-the-middle-class-can-no-longer-afford-a-home/>.

115 See Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 267 (2009).

116 See Edward L. Glaeser, Joseph Gyourko & Raven E. Saks, *Why Have Housing Prices Gone Up?*, AM. ECON. REV., May 2005, at 329, 329.

117 See Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations/> (“Historically, when parts of America experienced outsized economic success, they built enormous

lations have limited the supply of new buildings, which in turn has driven up housing and land prices. Since the 1980s, construction costs have remained relatively stable when adjusted for inflation, but land prices have increased significantly.¹¹⁸ The increase in costs is attributable to restrictions on supply.¹¹⁹

Zoning's impacts on housing markets impose costs on the economy more generally. For the first three-quarters of the twentieth century, poor and minority households had a relatively clear path up the economic ladder: move from the South to the Northeast or to the Midwest.¹²⁰ Wages were higher—and often much higher—in New York than in Alabama, for example, and so a worker who could relocate would enjoy much greater economic opportunity. The result was a significant migration from struggling places to more successful ones.

That interregional mobility began to slow in the 1980s, however, and is now at historic lows.¹²¹ Wage differentials persist, but the economic opportunity they represent has largely disappeared in many places because of higher housing costs. In an influential paper, economists Peter Ganong and Daniel Shoag demonstrate that the higher wages in the Northeast in particular are increasingly capitalized into local housing costs because of the scarcity created by zoning and land use controls.¹²² There is no real economic benefit of moving from a low-wage to high-wage region if the wage differential is completely consumed by higher rents and housing prices. High housing costs can mean that workers do not move, that jobs go unfilled, and that

amounts of housing. . . . Between 1880 and 1910, bustling Chicago's population grew by an average of 56,000 each year. Today, San Francisco is one of the great capitals of the information age, yet from 1980 to 2010, that city's population grew by only 4200 people per year.”).

118 See ADAM MILLSAP, SAMUEL STALEY & VITTORIO NASTASI, JAMES MADISON INST., *ASSESSING THE EFFECTS OF LOCAL IMPACT FEES AND LAND-USE REGULATIONS ON WORKFORCE HOUSING IN FLORIDA* 17 (2019) (reviewing literature); Glaeser et al., *supra* note 116, at 333.

119 This is less obvious than it might sound. When zoning restrictions are eased in thriving places, the resulting development is usually market rate and often at the high end of the market. Affordability-based objections to developing market-rate housing include: (1) that scarce land in high-cost cities should instead be devoted to affordable housing; (2) that adding high-cost supply will do little or nothing for lower income households; and (3) that adding luxury or high-end housing will actually stimulate additional demand and therefore push prices even higher. See Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 27–28 (2019) (summarizing arguments). The best evidence, however, supports that contrary intuition and that high-end market-rate housing improves affordability throughout the city simply by increasing supply. *Id.* at 27.

120 See Aoki, *supra* note 25, at 753–55; Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76, 76 (2017).

121 See *CPS Historical Migration/Geographic Mobility Tables*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/geographic-mobility/historic.html> (last visited Nov. 23, 2020) (follow the “Table A-1. Annual Geographic Mobility Rates, By Type of Movement: 1948–2019” hyperlink).

122 See generally Ganong & Shoag, *supra* note 120.

productivity declines as a result. Some economists have estimated that zoning's interference with housing supply has reduced GDP by as much as nine percent. More conservative estimates peg that number closer to two percent, but that is still a significant impact on national economic output.¹²³

To be clear, opposition to zoning is not one size fits all. Conservatives often object to the very project of zoning.¹²⁴ Liberal opposition is focused primarily on density restrictions, especially in the urban core.¹²⁵ Indeed, most still see an important role for increased regulation of some aspects of land use and the development process.¹²⁶ However, efforts to address affordability and access to thriving places are not focused exclusively on density limits but also on the complexity of zoning itself.¹²⁷ Zoning functions like a kind of regulatory tax on development, and the more complex it is, the heftier the levy. Proposals and reforms are numerous and varied.¹²⁸ Regardless of their specific form, relaxing density limits and streamlining regulatory

123 Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, J. ECON. PERSPS., Winter 2018, at 3, 25; Hsieh & Moretti, *supra* note 8, at 25–26; *see also* Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL L. STUD. 227, 230 (2014) (summarizing studies). Zoning is not the only impediment to agglomeration. People point to occupational licensing regimes, to place-based housing subsidies, and any regulatory regimes that make it more difficult for people to move to satisfy labor demand. *See, e.g.*, Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CALIF. L. REV. 1567, 1568 (2017); Schleicher, *supra* note 7, at 117 (discussing occupational licensing).

124 *See supra* note 1 (citing sources).

125 *See, e.g.*, Vicki Been, *City NIMBYS*, 33 J. LAND USE & ENV'T L. 217, 243 (2018) (describing opposition to density controls).

126 For example, Vicki Been and her coauthors acknowledge that the price effects of increased supply are still not likely to benefit the very poor. *See* Been et al., *supra* note 119, at 33; *cf.* Ginia Bellafante, *How Luxury Developers Use the 'Void' to Build Sky High*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/nyregion/luxury-developers-extell-void.html> (describing efforts to close a zoning “loophole” that allows building taller buildings without increasing the number of units in a building).

127 *See* Kristoffer (Kip) Jackson, *Regulation, Land Constraints, and California's Boom and Bust*, 68 REC'L SCI. & URB. ECON. 130, 141 (2018); Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENV'T L.J. 1, 5–6, 58–59 (2019) (explaining findings that timelines for approval of entitlements does not appear to correspond with the stringency of environmental regulation or local entitlement processes).

128 *See, e.g.*, JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 112, at 36 (proposing streamlined regulations); MILLSAP ET AL., *supra* note 118, at 20 (“[M]unicipalities could increase affordability at the lower end of the housing market by reducing some of their land-use regulations or streamlining their permitting process to reduce delays.”); *see* Been et al., *supra* note 119, at 12 (“To ensure that a range of income groups are seeing the benefits of the jurisdictions’ growth through new housing, local governments may want to use subsidies, together with a variety of housing policy tools such as density bonuses or mandatory inclusionary zoning, to achieve visible additions to supply at a variety of price points.”); Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST. POL'Y ANALYSIS, Oct. 18, 2017, at 1, 10 (arguing for conditioning state funds on reducing regulatory burdens); Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RESV. L. REV. 81, 82 (2011) (proposing innovating “zoning budget”);

restrictions start to resemble a broader deregulatory project. Criticisms of zoning are now varied and widespread. Zoning broadly construed is often viewed as a problem that needs to be overcome.¹²⁹

II. MODERN USES OF ZONING

While elite consensus has been coalescing around opposition to strict density limits, especially in the urban core, there has been little effort to offer a modern account of the important uses of zoning, and density limits in particular.¹³⁰ This Part offers that account. What zoning primarily does today is regulate the pace, and costs, of community change.¹³¹ It does so in three distinct but interrelated ways: creating community stability, generating economic benefits, and allocating the costs of growth. Interestingly, there are intimations of these purposes in zoning's progressive origins.¹³² They are

see also Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 129 (2015) (same) [hereinafter Hills & Schleicher, *Planning*].

129 *See, e.g.*, CLARA HENDRICKSON, MARK MURO & WILLIAM A. GALSTON, BROOKINGS INST., COUNTERING THE GEOGRAPHY OF DISCONTENT: STRATEGIES FOR LEFT-BEHIND PLACES 28 (2018) ("Policies that relax zoning restrictions will enable the construction of new housing units and bring down housing costs."); Kriston Capps, *2018 Was the Year of the YIMBY*, BLOOMBERG CITYLAB (Dec. 28, 2018), <https://www.citylab.com/equity/2018/12/single-family-housing-zoning-nimby-yimby-minneapolis/577750/> ("Could this be the blueprint for a housing wave—a strategy that unites social justice warriors, type-A transit maximalists, and Howard Roark-ian libertarians? After the success of Minneapolis 2040, the better question might be, how could it not?"); Richard Florida, *Why America's Richest Cities Keep Getting Richer*, ATLANTIC (Apr. 12, 2017), <https://www.theatlantic.com/business/archive/2017/04/richard-florida-winner-take-all-new-urban-crisis/522630/> (identifying "New Urban Ludites" who oppose growth, and whose "desires are codified in the enormous and complex thicket of zoning laws and other land-use regulations that restrict the supply of housing in many cities"); Gillian B. White, *How Zoning Laws Exacerbate Inequality*, ATLANTIC (Nov. 23, 2015), <https://www.theatlantic.com/business/archive/2015/11/zoning-laws-and-the-rise-of-economic-inequality/417360/> ("[Z]oning regulations help create artificial scarcity, and the price of land skyrockets as a result."); Matthew Yglesias, *The Real Driver of Regional Inequality in America*, VOX (Aug. 18, 2017), <https://www.vox.com/policy-and-politics/2017/8/18/16162234/regional-inequality-cause> ("[T]he gains to increasing the housing supply (whether through zoning changes to allow more market-rate housing or through the direct construction of social housing) would produce large economic benefits.").

130 Some important criticisms of zoning have made an effort to identify zoning's benefits, at least in passing. *See* Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 361–66 (2005) (attempting to price the benefits of protecting views and limiting congestion); *see also* Ellickson, *supra* note 11, at 7 (attributing popularity of zoning to its "promise to raise home values, limit traffic congestion, prevent the invasion of obnoxious uses, and otherwise bring peace of mind in an uncertain and rapidly changing world").

131 *See* Steele, *supra* note 17, at 714 ("[Z]oning evolved as a conserving force moderating the pace of change and acting as a governor to the ever accelerating cycles of invasion and succession, or destruction and rebuilding, and the pressure of increasing density.").

132 *See* Claeys, *supra* note 64, at 749 (describing progressive land use goals in the 1920s as including beautification, maintaining neighborhood stability, and preserving property values).

not so much new as newly ascendant in practice. They are, however, outside our mainstream understanding of zoning's conventional rationale: separating incompatible uses of land.¹³³

Perhaps needless to say, these uses of zoning can easily shade into NIMBYism ("Not In My Back Yard") and naked exclusion. This Part explores the benefits and the associated costs, setting the stage for the final Part to offer suggestions about how best to evaluate the tradeoffs.

A. *Creating Community Stability*

One of the principal uses of zoning today is to create and maintain stable community character.¹³⁴ When people buy property, they are typically buying a constellation of bundled goods and services that best satisfy their preferences.¹³⁵ They are buying a house, yes, but also membership in a community with a particular character. Significant increases in density, or changes in the nature of nearby uses, can implicate that character.¹³⁶ The result is not necessarily to make a place worse, or objectively less desirable. But it can change its appeal to in-place residents who sought a particular set of characteristics. That is a cost.

This can be framed through the lens of the Tiebout Hypothesis.¹³⁷ Charles Tiebout, writing about the provision of public goods, proposed a

133 See *supra* Section I.A (describing history of zoning); see also William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 319 (2004) (arguing that progressive theorists were not essential to the adoption of zoning).

134 Others have made this point in passing. See, e.g., LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* 39 (2009) ("Land use controls . . . work as 'product stabilizers,' reducing the uncertainty associated with lengthy time horizons and fragmented, interdependent influences."); Karkkainen, *supra* note 14, at 73 ("Zoning is aimed at preventing, or at least limiting, . . . changes in the use of property that are disruptive of a neighborhood's character because they are inconsistent with current uses of the neighborhood commons."); Steele, *supra* note 17, at 725 (identifying zoning outcomes as turning in part on the extent of "disruption of existing community").

135 See FENNEL, *supra* note 134, at 25 ("Buying a home means . . . buying a set of near neighbors, a neighborhood living environment, a particular degree of proximity to points of interest such as one's workplace, a bundle of services and amenities provided by the local jurisdiction . . . and a political and social address."); SCHRAGGER, *supra* note 26, at 31 (describing cities' bundled goods and services); Karkkainen, *supra* note 14, at 69 ("[Neighborhood] commons consists of open-access . . . communally-owned property, such as streets, sidewalks, parks, playgrounds, and libraries. It also includes restricted-access but communally-owned property, such as public schools, public recreational facilities, and public transportation facilities.").

136 See Claeys, *supra* note 64, at 750 ("As soon as the confidence of the home owner in the maintenance of the character of the neighborhood is broken down through the coming of the store or of the apartment, his civic pride and his economic interest in the permanent welfare of the section declines." (quoting Herbert S. Swan, George B. Ford & Robert H. Whitten, *Zoning and Living Conditions*, in PROCEEDINGS OF THE THIRTEENTH NATIONAL CONFERENCE ON CITY PLANNING 22, 25 (1921))).

137 See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417-20 (1956).

model whereby people select the particular mix of services and property taxes that best satisfy their preferences. In his model, people would sort into an infinite number of internally homogenous jurisdictions, each offering its own unique menu of public goods at a particular cost. Subsequent work reinforced the model in heterogeneous places.¹³⁸ But the underlying premise is that housing consumers can satisfy their preferences for services and taxes (and other characteristics) by choosing where to live. That premise, however, relies on a significant measure of stability in community character.

The Tiebout Hypothesis, then, assumes relatively static communities coupled with fluidity in residential mobility so that people can satisfy their housing preferences by moving easily when they want. One could imagine the opposite: limited residential mobility coupled with fluid communities. People could move anywhere and then effect change. But that would make sorting more difficult, and force others who object to those changes to relocate somewhere that better suits their preferences. And that, of course, is expensive. Change in the character of a place therefore imposes burdens on in-place property owners in ways that zoning can reduce.

Zoning constrains these changes in community character by explicitly managing size and density. As Sheila Foster has explored in detail, some urban and community resources can usefully be viewed as communal assets.¹³⁹ These are not pure public goods, however, because they are rivalrous in the sense that they can be consumed, or at least can become overly congested and therefore less valuable. Good schools, for example, attract families to a community. But if more people move to take advantage of the schools than the system can handle, the resource that originally attracted people will degrade. Similarly, developers can fill open space and thereby, in effect, “consume” the character of the community.¹⁴⁰ The individual decisions of families seeking good schools and developers taking advantage of available open space in a bucolic neighborhood are entirely rational decisions individually. But collectively, they may reduce the value of the underlying resource for everyone.

138 See generally Levon Barseghyan & Stephen Coate, *Property Taxation, Zoning, and Efficiency in a Dynamic Tiebout Model*, AM. ECON. J.: ECON. POL'Y, Aug. 2016, at 1; James C. Dyer IV & Michael D. Maher, *Capitalization of Intra-jurisdictional Differences in Local Tax Prices: Comment*, 69 AM. ECON. REV. 481 (1979); Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975); Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969).

139 See generally Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011). See also A. Dan Tarlock, *Toward a Revised Theory of Zoning*, in LAND USE CONTROLS ANNUAL (Frank S. Bangs, Jr. ed., 1972), reprinted in 1 MANAGEMENT & CONTROL OF GROWTH 228, 229 (Randall W. Scott, David J. Brower & Dallas D. Miner eds., 1975).

140 See Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281, 296 (2016) (“Urban land is being quickly consumed and its availability is slowly disappearing, raising many of the questions of commons management and governance that beset other unregulated open access resources.”).

As Professor Foster points out, this dynamic resembles a kind of tragedy of the commons.¹⁴¹ Zoning is, in part, a response to this dynamic. By limiting housing supply, it can constrain demand for those communal resources. In effect, it can help to ensure that those municipal resources remain valuable by preventing their overconsumption and preserving community character.¹⁴²

Consider transportation infrastructure as perhaps the clearest example of this broader concern. Fights over new development often involve vociferous objections by neighbors to burdens on traffic, or even on specific intersections.¹⁴³ This is often an objection to the shifting scale and character of a place and to the quality of life there. Traffic concerns are not just the bureaucratic problem of transportation experts, but directly implicate the day-to-day lives of residents. People often choose where to live specifically because of the nature of the daily commute. Qualitative changes resulting from increased traffic can significantly interfere with those expectations. And, indeed, studies of hedonic adaption suggest that reducing the time spent commuting is perhaps the easiest and best way to affect overall happiness and well-being.¹⁴⁴ By constraining the pace of change, zoning helps to protect the expectations of in-place property owners.

When people buy property in a place (or choose to remain in a place) because of a certain set of characteristics, they will experience some disutility if those characteristics change. Of course, they could move to a place that is again more consistent with their preferences, but that imposes its own costs.¹⁴⁵

The value of stability is evidenced by the premium people will pay to live near conserved land, property that is entrenched against change. According to one study, the premium is more associated with stability than with the open space.¹⁴⁶ And it is commonplace for prospective homebuyers to look not only at the land uses nearby, but also to consider how entrenched they

141 *Id.* at 298 (discussing “tragedy of the urban commons”).

142 In economic terms, it does this by ensuring that the value of local services is capitalized into local property values and housing costs. Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 899 (2007).

143 See Nate Berg, *Stop Development, Stop Traffic?*, PLANETIZEN (Oct. 27, 2008), <https://www.planetizen.com/node/35771> (advocating for annual development caps to stem traffic); David Downey, *Long Beach Residents Feel City’s Plans for More Density Will Destroy Neighborhoods*, PRESS-TELEGRAM, <https://www.presselegram.com/2017/09/04/long-beach-residents-feel-citys-plans-for-more-density-will-destroy-neighborhoods/> (Sept. 5, 2017) (describing objections to high density development proposals around eastside traffic circle because it would aggravate traffic flow).

144 See Alois Stutzer & Bruno S. Frey, *Stress That Doesn’t Pay: The Commuting Paradox*, 110 SCANDINAVIAN J. ECON. 339, 339 (2008).

145 See FENNELL, *supra* note 134, at 84 (describing the costs of shifting community preferences and priorities, including the costs of unsatisfied residents moving).

146 See Elena G. Irwin, *The Effects of Open Space on Residential Property Values*, 78 LAND ECON. 465, 478 (2002) (“The evidence suggests that the public’s demand for open space preservation is motivated more by the fact that open space implies no development rather than being driven by particular features of open space landscapes.”).

are against change.¹⁴⁷ In short, stability is valuable to property owners, and zoning can be used to create community stability.

The same is also true of aesthetic preferences, which can be seen as a distinct subset of preferences for stable community character.¹⁴⁸ There is a longstanding question whether aesthetics alone justify land use regulation.¹⁴⁹ Courts have often balked, looking instead for alternative justifications for rules prohibiting billboards for example. But regardless of the validity of explicit aesthetic review in zoning ordinances, local governments regularly deploy zoning and other land use regulations—like historic preservation—to protect the look and feel of a place.

Sometimes this is done expressly. Santa Fe, New Mexico, is perhaps the most famous and successful American city to have embraced a set of aesthetic guidelines for building and development. As one writer observed, “Nearly a century ago, the elders of Santa Fe devised a way to attract tourists: their building code, based on the ancient pueblo adobe style. . . . What has set Santa Fe apart from all other American cities is not that it is old but the foresight of the decision to make it look old.”¹⁵⁰ Coupled with aggressive historic review, Santa Fe has preserved a very distinct aesthetic style, which has been the goal of the land use regime.¹⁵¹

In many settings, local decisionmaking is motivated by aesthetic and community preservation concerns, even if land use regulations do not include so explicit a focus as in Santa Fe. Examples are legion, if not ubiquitous. In 2019, in Half Moon Bay, California, a developer proposed a new building that was consistent with existing zoning rules, but that some council members found ugly and out of scale with the existing community. As one council member said, “For me, it’s huge. It’s so tall. . . . It’s so different from

147 See FENNEL, *supra* note 134, at 30 (“[T]he homebuyer’s assessment of the home’s value would be adjusted to incorporate information about the changes that might transpire in the surrounding environment and the projected probabilities of them occurring.”).

148 According to Professor Claeys, some early proponents of zoning saw aesthetics as a central justification. See Claeys, *supra* note 64, at 749 (“[C]ities and suburbs alike were expected to zone to make themselves more presentable and more beautiful.”).

149 See generally J.J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218 (1955); Comment, *The Place of Aesthetics in Zoning*, 14 DEPAUL L. REV. 104 (1964).

150 Henry Shukman, *The Art of Being Santa Fe*, N.Y. TIMES (Feb. 4, 2010), <https://www.nytimes.com/2010/02/07/travel/07santafe.html>.

151 See SANTE FE, N.M., CODE OF ORDINANCES ch. 14, art. 14-5, § 14-5.2(A)(1) (2020) (“In order to promote the economic, cultural, and general welfare of the people of the city . . . it is deemed essential by the [city council] that the qualities relating to the history of Santa Fe . . . be preserved, some of these qualities being . . . a general harmony as to style, form, color, proportion, texture and material between buildings of historic design and those of more modern design.” (emphasis omitted)); see also DESIGN REVIEW: CHALLENGING URBAN AESTHETIC CONTROL 97–100 (Brenda Case Scheer & Wolfgang F.E. Preiser eds., 1994).

the existing character of Moss Beach.”¹⁵² The city council proposed amending the zoning in response to prohibit the development. In Ketchum, Idaho, new modern buildings caught the attention of the local press, which characterized community concerns: “For some people, at least, the new direction raises the question of whether Ketchum will lose its mountain-town identity and begin to look like towns being built all over the world.”¹⁵³ While some residents actively embraced modernizing local designs, one local architect sought to reassure residents about his goal of protecting the local aesthetic, noting: “It doesn’t mean modern doesn’t have its place. The question is whether it will give the same feeling to the community.”¹⁵⁴

The rise of form-based codes is a nod toward this set of preferences. It acknowledges implicitly that people care less about what use is next door than what form it takes. Neighbors sometimes give up their objections even to a new McDonald’s if they can control its look and feel, including perhaps transforming the golden arches into something a little more turquoise that blends in with the community.¹⁵⁵

This stability obviously comes at a cost. Preserving community character can push the burdens of growth onto other places. In-place property owners might have their commute times protected, but excluded residents will have to move further and further away from their jobs and schools, increasing vehicle miles traveled, commute times, and traffic burdens on everyone else. While zoning is an essential tool in preserving community character, that goal represents a normative tradeoff between people who benefit from the character and those whom that goal necessarily excludes. It also does not sufficiently acknowledge the in-place property owners who may prefer growth and dynamic change to the conservation of community character which, from another perspective, can look like stagnation. These tradeoffs are considered more explicitly in the next Part. Here, the point is to recognize that one of zoning’s central roles today is to protect consumer preferences by preserving community character.

152 See Ashlyn Rollins, *Midcoast Councilman: 8-Unit Apartment Proposal ‘Would Be a Disaster,’* HALF MOON BAY REV. (July 3, 2019), https://www.hmbreview.com/news/midcoast-councilman—unit-apartment-proposal-would-be-a-disaster/article_55ece7c6-9db8-11e9-95cb-5bd58ba29015.html.

153 Greg Moore, *Ketchum Architecture Goes Modern,* IDAHO MOUNTAIN EXPRESS (Nov. 2, 2018), https://www.mtexpress.com/wood_river_journal/features/ketchum-architecture-goes-modern/article_1b4b0f2c-de13-11e8-933f-7be13c199256.html.

154 *Id.*

155 See Emily Rella, *McDonald’s in Sedona, Arizona Is the Only One in the World with Turquoise Arches,* AOL (March 29, 2017), <https://www.aol.com/article/finance/2017/03/29/mcdonalds-sedona-turquoise-arches-arizona/22017422/>.

B. *Economic Benefits*

A related goal is promoting community stability by preserving property values.¹⁵⁶ Property owners and local governments often favor density regulations in zoning for the same reasons that affordable housing advocates object: the economic benefits to in-place property owners. Whether this is a bug or a feature depends on one's perspective.

For homeowners, after all, property represents both a place to live and a financial investment. People make those investment decisions—choosing where to live—based in part on expectations about return on investment. Those expectations are obviously subject to a lot of risks and uncertainties. Some, like fire and flood, can be insured. Others, like the gradual decline of a neighborhood, are much more difficult for property owners to hedge against.¹⁵⁷ Those risks have a significant impact on the value of property ownership. Concerns about the investment value of property are not limited to sophisticated investors, but are even more salient to the average property owners whose houses represent their single largest investment.¹⁵⁸ For them, whether they think explicitly in these terms or not, the financial stakes are high, and they tend to be very risk averse about changes that might impact property values.¹⁵⁹ If property owners perceive some risk that property values will decline—or that their return on investment would be significantly higher somewhere else—they may well leave. By protecting property values, zoning can promote community stability and help to prevent the most destructive death spirals that can develop if mobile capital starts to leave a place.

As noted already, zoning accomplishes this first, and most obviously, by reducing supply and so creating a kind of mini cartel of existing housing stock.¹⁶⁰ But zoning and land use regulations also create economic benefits for in-place property owners by reducing the extent of the cross subsidy embedded in local property taxes, which can have a significant impact on property values.¹⁶¹

Urban economists have long studied the cross subsidies inherent in heterogeneous places with an assortment of housing options and diverse preferences surrounding taxes and services.¹⁶² At the extreme, people living in low-valued property with school-aged children receive an implicit subsidy

156 Some progressives saw this, too, as an early goal of zoning. See Claeys, *supra* note 64, at 749 (“[C]ities and especially suburbs were expected to use regulatory powers to stabilize the price of home values.”).

157 For one creative approach to facilitating such hedges, see generally Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008) (proposing innovative options market).

158 See Fisher, *supra* note 70, at 885–87.

159 See *id.* at 835.

160 See *supra* note 115 and accompanying text.

161 Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 521–22 (1991).

162 See generally Oates *supra* note 138.

from owners of high-valued property with fewer or no children in the public school.¹⁶³ As heterogeneity increases—as when an influx of new residents seek lower-cost housing—the cross subsidy increases. As Professors Mieszkowski and Mills describe:

Those who move to the suburbs often seek to form homogenous communities, for several reasons. There is the preference for residing among individuals of like income, education, race, and ethnicity. By residing in income-stratified communities, the affluent avoid local redistributive taxes. Homogenous community formation is also motivated by varying demands for local public goods, caused by income and taste differences. Homogenous groupings enhance the quality of education, as there is evidence that peer-group effects are important in the production of educational achievement.¹⁶⁴

Many owners of higher-valued property will tolerate cross-subsidizing lower-valued property to a significant extent.¹⁶⁵ The nature of living in any kind of diverse community means tax burdens and public services are distributed unevenly. There is a limit, however. If the cross subsidy grows too high, and if the level of public services falls, then people will predictably search for alternative places to live and to work that better meet their needs, where a greater share of their property taxes go to services that benefit them directly.¹⁶⁶

Zoning, by limiting or eliminating the lowest cost housing in a municipality, reduces that cross subsidy and so helps to retain mobile capital that might otherwise leave the taxing jurisdiction. Zoning was therefore central to the rise of suburbs. Mieszkowski and Mills again explain:

[L]and use controls . . . have clearly been an important part of the suburban homogenization process at least since World War II. Once a relatively homogenous group has collected in a suburban jurisdiction, they can exclude people whose housing demands are very different by land use controls on residences. To some extent, they can exclude other types of people by similar controls on commercial development.¹⁶⁷

To see this clearly, imagine a stylized version of the Tiebout model in which people can move effortlessly between jurisdictions. There is a significant economic advantage to living in the cheapest house in town, like buying a mobile home in a rich suburb. That place is likely to have high quality schools, good services, and the other trappings that come with affluence. Without limits on supply, one would expect strong demand for mobile homes (or low-cost housing) in such a place, and the quick in-migration of lower-income households. But that would lead higher-income households to depart for places where they could again create a more homogenous place.

163 See Fisher, *supra* note 70, at 864.

164 See Peter Mieszkowski & Edwin S. Mills, *The Causes of Metropolitan Suburbanization*, J. ECON. PERSPS., Summer 1993, at 135, 137.

165 See SCHRAGGER, *supra* note 26, 135–90; Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 Nw. U. L. REV. 1057, 1064–65 (2007).

166 See Serkin, *supra* note 55, at 18.

167 Mieszkowski & Mills, *supra* note 164, at 137.

The caricatured result would be a kind of caravan of perennial moving, with the more affluent trying to stay one step ahead of the less affluent who keep pursuing them (and their tax base).¹⁶⁸

Zoning limits the chase. It is a regulatory barrier that helps to preserve the relative homogeneity of the community. The troubling result is that “affluent communities are not simply inaccessible to the poor because they are expensive; instead, they are expensive in part *because* they are inaccessible to the poor.”¹⁶⁹

If this all sounds too abstract, consider the real-world dynamics of municipalities fighting tooth and nail to exclude affordable multifamily housing and other lower-cost housing options.¹⁷⁰ Some of this may, of course, be racism or naked classism. But some of it is undoubtedly concern about the impact on property values.¹⁷¹

This, of course, creates predictable winners and losers. Used this way, zoning benefits in-place property owners at the expense of excluded outsiders. It protects the investment value of property, but at the expense of access by others. Attacks on zoning have embedded an implicit assumption that returns on investment for property owners are higher than they need to be and are perhaps too high to be defensible. That may well be right, but it is fundamentally a normative claim, which is considered in more detail in Part III.

C. *Allocating the Costs of Growth*

Zoning also has an increasingly important role to play in allocating the costs of growth.¹⁷² While this happens implicitly in any siting decision, it happens quite explicitly through the imposition of exactions, which are fees

168 See Wallace E. Oates, *The Use of Local Zoning Ordinances to Regulate Population Flows and the Quality of Local Services*, in *ESSAYS IN LABOR MARKET ANALYSIS* 201, 201 (Orley C. Ashenfelter & Wallace E. Oates eds., 1977); see also FENNELLS *supra* note 134, at 39 (citing and describing the phenomenon as explained by Bruce Hamilton).

169 See Serkin, *supra* note 55, at 23.

170 Sarah Maslin Nir, *For Westchester, 11th Time Is Charm in Fight Over Fair Housing*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/westchester-fair-housing-hud-trump.html> (describing Westchester County’s opposition to affordable housing).

171 See *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 717 (N.J. 1975) (accepting representation of the municipality that the regulatory scheme was adopted to exclude prospective residents only on the basis of their limited income and not on the basis of race, origin, or social incompatibility); Jacqueline Rabe Thomas, *Separated by Design: How Some of America’s Richest Towns Fight Affordable Housing*, CT MIRROR (May 22, 2019), <https://ctmirror.org/2019/05/22/separated-by-design-how-some-of-americas-rich-est-towns-fight-affordable-housing/> (describing how residents “talk about property values, safety and preserving open space” but clearly intend to prevent development of an economically and racially diverse housing population).

172 See Ellickson, *supra* note 18, at 400 (“Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding.”).

or dedications of land imposed as a condition on development.¹⁷³ As Part I explained, land use regulations today have evolved from traditional technocratic planning into a more flexible set of regulations creating a framework that lets local governments “price” the impact of specific development.¹⁷⁴ Zoning has therefore become a kind of opening offer, with governments imposing exactions or otherwise negotiating over the elements of the development.

Sometimes these negotiations are codified in a schedule of preset impact fees. In these places, a developer has what amounts to a price list for different kinds of development. For example, a developer in Citrus Heights, California, will have to pay \$1500 per unit in “road and transit fees.”¹⁷⁵ Developers of commercial office space there must pay \$0.97 per square foot toward affordable housing and \$1519 per 1000 square feet toward a transportation mitigation program.¹⁷⁶ In other contexts, local governments allow more density in exchange for certain predetermined amenities: provision of affordable housing, inclusion of public space like an atrium or park, development of transit, and so forth.¹⁷⁷

In other settings, exactions are more ad hoc.¹⁷⁸ Local governments may ask for open space, road improvements, wastewater expansion, or any number of other items.¹⁷⁹ The dynamics are familiar to any land use maven. A developer proposes a large new residential apartment building in a neighborhood zoned for less intensive use. Zoning officials meet with the developer to discuss a variance, or perhaps a rezoning, but express concerns about impacts on traffic, on local schools, on other infrastructure, or on the character of the neighborhood. In response, the developer may seek to allay local officials’ concerns by offering to invest in transit or infrastructure improvements, to set aside open space, to work on landscape design, or even to pay money directly to the municipality.

Exactions are not a recent phenomenon. They arose out of much earlier efforts to fund infrastructure expansion in residential subdivisions. As

173 See Been, *supra* note 161, at 481; see also Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENV’T L. REV. 137, 138 (2016) (explaining distinction); Jim Rossi & Christopher Serkin, *Energy Exactions*, 104 CORNELL L. REV. 643, 654–59 (2019) (summarizing exactions).

174 See *supra* Section I.B; see also Been, *supra* note 83, at 12 (“[Z]oning has moved from a set of rigid prescriptive rules about land use to a more flexible set of standards, which allow the specifics of the requirements imposed on each proposed development to vary with the threatened impacts of the project and the concerns of the various interest groups affected by the proposal.”).

175 Rossi & Serkin, *supra* note 173, at 258.

176 *Id.*

177 ELLICKSON ET AL., *supra* note 48, at 329.

178 See Timothy M. Mulvaney, *Exactions for the Future*, 64 BAYLOR L. REV. 511, 521 (2012) (explaining that exactions on developers can be qualitatively linked and quantitatively proportionate to the public harm caused by the proposed project).

179 *Id.* at 518 (listing public projects developers might be expected to provide for, including wastewater facilities, schools, public parks, and fire stations).

Vicki Been explained in her history of the practice, local governments in the early part of the twentieth century sought to fund public improvements through special assessments—effectively fees levied on property owners according to some set formula.¹⁸⁰ During the Great Depression, however, many local governments were suddenly unable to recover the costs of improvements from insolvent homeowners. As a result, many began to impose their assessments ahead of time, instead of after the fact, essentially demanding that developers finance infrastructure improvements as a condition to building.¹⁸¹ This practice became more common as suburban residential subdivisions became ubiquitous. Local governments often required subdivision developers to build out streets and dedicate them to the public before approving development applications.¹⁸² Today, exactions are not limited to subdivisions but potentially arise whenever development requires some discretionary approval. When local officials have the right to say “no,” they usually have the power to negotiate for a “yes.”

One result is that zoning in many places is designed around these kinds of bargains. Some municipalities, for example, place substantial property into what are called “holding zones.”¹⁸³ These designations—often zoned for some extremely limited use like agriculture—do not represent a judgment about the most appropriate use for the property, but instead create a framework for bargaining since any development would require a zoning change. In other regulations, too, local officials may seek to retain discretion so that they can negotiate with developers.¹⁸⁴

This can start to look extortionate.¹⁸⁵ In a trio of cases, the Supreme Court held that these kinds of demands were subject to the unconstitutional conditions doctrine.¹⁸⁶ As a result, demands must be both related to, and

180 Been, *supra* note 161, at 479–80.

181 See *id.* at 479; see also R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 6 (1987) (describing history of exactions).

182 Been, *supra* note 161, at 479; see also Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1522–29 (2006) (describing the history of exactions).

183 See Hills & Schleicher, *Planning*, *supra* note 128, at 120 n.132 (“[C]ities have increasingly devoted land to ‘holding zones,’ or areas with no right to build, so that they can create conditions on all building.”); Rossi & Serkin, *supra* note 173, at 656–57 (describing use of “holding zones” to limit permissible uses).

184 See Rossi & Serkin, *supra* note 173, at 657; David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1713 (2013) (explaining that cities devote increasing amounts of property to holding zones “with the anticipation that landowners will negotiate their way out when they want to build”).

185 Douglas T. Kendall & James E. Ryan, “Paying” for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan, 81 VA. L. REV. 1801, 1803–04 (1995).

186 See *Koontz v. St. John’s River Water Mgmt. Dist.*, 570 U.S. 595, 606–09 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 407 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841 (1987).

proportional to, the burdens being imposed by the development.¹⁸⁷ The use of exactions and the constitutional limits on them remain a source of significant controversy.¹⁸⁸ But they can serve an important role, as well.

As the last Section made clear, new development can burden public services like roads, public schools, open space, and so forth.¹⁸⁹ These are typically financed by local taxpayers through property taxes. If a development increases the number of students in school or requires installing new turn lanes to deal with traffic, those are costs that the developer can typically ignore because they are shifted to all local property owners through property taxes. Exactions push some or all of those costs onto developers instead. By forcing developers to internalize the costs of development on the community, exactions should induce more efficient levels of development. If there is a complaint from this perspective, it is that exactions are not high enough to cover both the expansion of urban infrastructure and its maintenance over the life of the development.¹⁹⁰ By choosing which costs to shift to developers as a condition of development, zoning effectively allocates the costs of growth.

It is not clear who actually will bear those costs. If developers must pay exactions, they will try to include them in the costs of development and pass them onto housing consumers in the form of higher prices, depending on elasticity in local housing markets.¹⁹¹ If they cannot pass them on because buyers can find substitute property in neighboring municipalities that do not impose exactions, then the costs of the exaction may well be borne by owners of undeveloped land.¹⁹² Exactions, then, are a kind of wealth transfer from

187 *Koontz*, 570 U.S. at 599 (“[A] unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.”).

188 See generally John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENV’T L.J. 1 (2014) (strongly criticizing the *Koontz* application of the unconstitutional conditions doctrine). Lee Anne Fennell has argued that the doctrine impedes bargains that both sides would favor. See Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 70 n.248 (2000). Developers often assume that the outcome of robust constitutional review will be fewer governmental demands. But Sean Nolon has pointed out that the effect of the unconstitutional conditions doctrine may well be that local governments simply deny permission to build, instead of granting permission subject to conditions. See Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 210–11 (2015). That outcome might be worse for both sides. See *id.*; see also Christopher Serkin, *The Winners and Losers in Negotiating Exactions: A Response to Sean Nolon*, 67 FLA. L. REV. F. 9, 9–10 (2015).

189 See *supra* notes 139–42 and accompanying text.

190 See, e.g., Daniel Herriges, *Impact Fees Don’t Mean Development Is Paying for Itself*, STRONG TOWNS (Aug. 23, 2018), <https://www.strongtowns.org/journal/2018/8/23/impact-fees-dont-mean-development-is-paying-for-itself>.

191 See Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE, no. 1, 2005, at 139, 148–50; Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 211–13 (2006).

192 See Rosenberg, *supra* note 191, at 214.

housing consumers (or owners of undeveloped property) to in-place property owners who will not have to bear the costs of growth through higher property taxes. For zoning opponents, exactions are exclusionary, driving up the cost of new housing to the benefit of NIMBY owners. But to in-place owners, exactions look like an appropriate response to the burdens that new development puts on congestible municipal resources. This, again, resembles the same zero-sum tradeoff of the last two Sections.¹⁹³

Broadening the frame, it should also be clear that land use regulations allocate the cost of growth even in the absence of exactions, and simply by restricting supply or erecting regulatory barriers to development. A local government can use zoning to push development to locations where it will impose fewer costs, even if it is less desirable from a developer's perspective. In so doing, the local government is, in effect, imposing a kind of implicit tax or fee on the developer in order to minimize the costs of growth. And like a tax, regulatory hurdles are also redistributive; by increasing housing costs, they amount to an implicit wealth transfer from newcomers to in-place property owners. No one is collecting revenue from these land use restrictions, but they have much the same economic effect as development exactions. Whether this is inappropriate or problematic depends on a deeper normative case about how the costs of new development *should* be distributed.

III. EVALUATING THE MODERN CASE FOR ZONING

Zoning is not simply a tool for separating incompatible uses of land. It also moderates the pace of community change. In so doing, it creates community stability, enhances local property values, and allocates the costs of growth. Zoning reformers are likely to see in this list all of the problems with zoning and the very reasons for reform. But the distributional consequences of zoning militate for a more nuanced analysis, and one that is largely missing from current debates. First, it implicates an explicitly normative question about how much stability in-place property owners should reasonably expect. This is important to identify but difficult to resolve. It also invites a more careful treatment of the important role that zoning has played in the revitalization of many American cities—ironically, the very conditions that have led to so many challenges to modern urban zoning—and in the competition between public and private land use controls. Lastly, it ignores the possibility

193 Sometimes, there are reasons external to zoning and land use that militate in favor of allocating costs one way or another. For example, in recent work, Jim Rossi and I argued for energy exactions forcing developers to internalize the costs of development on the electricity grid. See generally Rossi & Serkin, *supra* note 173. The purpose of that use of exactions is to incentivize developers to adopt energy-saving building technologies and otherwise to minimize energy consumption. We argued that developers are in a better position than others to identify and effectuate these energy savings, and so energy exactions make sense because they better align incentives than the current system that views energy demand as exogenous. *Id.* at 668. This is in contrast to funding for public schools, however, where the positive externalities of a well-educated citizenry may militate in favor of broad taxpayer funding instead of more targeted exactions.

that housing consumers may substitute private for public land use regulations through homeowner associations. This substitution effect would produce similar but even higher costs than the density restrictions in most public zoning ordinances.

A. *Balancing Stability and Dynamism*

In recent work, I have argued the role of property law in the legal system is to protect reasonable reliance on resources by owners and nonowners alike.¹⁹⁴ Property, in this view, is not so much a collection of sticks in the proverbial bundle of rights, but is instead the locus of competing and shifting reliance interests.¹⁹⁵ Common-law property law mediates those conflicting interests through doctrines like adverse possession or the creation of easements by prescription, which protect reliance that evolves over time.¹⁹⁶ Zoning plays this same role, mediating between property owners and neighbors, and between insiders and outsiders in a community.

In practice, this means that zoning and property law more generally constrain the pace of change, but do not prevent change altogether. Dynamism is as important as stability in a functioning property system, but the timing matters.¹⁹⁷ Sudden changes are more disruptive than slow ones. This intuition should be immediately familiar, and the underlying psychological phenomenon is easy to see in everyday interactions:

If a parent grabs a toy from a child's hand, the child will likely cry. But if the parent gives a warning—"Five more minutes before you have to put that away"—the eventual transition can be smoother because the child's reliance on the toy is given a chance to shift more gradually. This is no guarantee of the absence of tears, but anyone with children understands that advance warning can have dramatic effects on a child's experience of the eventual wrench of loss precisely because it eases the transition over time.¹⁹⁸

194 See generally Christopher Serkin, *Property and Change* (2020) (unpublished manuscript) (on file with author).

195 See Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENV'T L. REV. 281, 333 (2002) (describing property as a web of interests).

196 See *id.* at 309, 343. For a discussion of adverse possession through this lens, see Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 292 n.36 (2009) ("While adverse possession has many elements, the most unwavering is the simple passage of time."); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897), *reprinted in* 110 HARV. L. REV. 991, 1008 (1997) ("A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it."). For a similar discussion of accretion and avulsion, see Nicholas Blomley, *Simplification Is Complicated: Property, Nature, and the Rivers of Law*, 40 ENV'T & PLAN. 1825, 1829 (2008) (describing but problematizing the distinction between accretion and avulsion); Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENV'T L.J. 305, 306 (2010) ("The law provides that when the water's edge shifts 'gradually and imperceptibly' (accretion), the property boundary moves with it.").

197 See generally Serkin, *supra* note 194.

198 *Id.* at 20.

Across a swath of doctrines, property serves to protect reliance by moderating the pace of change.¹⁹⁹ The common law of property often accommodates slow changes but resists quick ones.²⁰⁰

Zoning can serve the same purpose; it does not prevent change but instead regulates the pace of change. And this makes sense because people experience slow accretive change to a neighborhood much differently than they experience quick, avulsive changes, even if the ultimate results are exactly the same.²⁰¹ In fact, if the change is slow enough, in-place owners might not experience any meaningful harm at all. Zoning gives in-place property owners time to allow their expectations—their reliance on the community character—to change gradually and thereby reduces the disruption that comes from changes to a community. Of course, change that is too slow imposes costs on outsiders who have to wait longer for housing markets to open.

This level of generality reveals nothing about how much is too much, or how fast is too fast.²⁰² But it should at least refocus the discussion from whether more intensive use is desirable or appropriate to the derivative question about how quickly it should be encouraged or allowed to occur. And this framing deescalates the stakes on both sides, while appropriately recognizing how expectations change gradually.

Ultimately, zoning represents a tradeoff between stability and dynamism. Stability generally favors the interests of in-place property owners, dynamism the interests of outsiders seeking entry. This tension is manifested in property values, with increased development activity putting downward pressure on price.²⁰³

Housing advocates will invoke images of cloistered wealthy suburbs or superstar cities with stratospheric housing costs using zoning to keep prop-

199 See *id.* at 20–37 (surveying doctrines).

200 The clearest example is the distinction between accretion and avulsion of waterfront land. Property boundaries defined by water can change over time through slow accretion and erosion. The legal boundary then follows the physical boundary if the change is slow. But if the boundary changes suddenly, through an avulsive event like a hurricane or a flood, then the legal boundary does not change, and the property owners can restore the old property. See Sax, *supra* note 196, at 306 (“[W]here the shift is ‘sudden or violent’ (avulsion), the boundary stays where it was.”); see also Blomley, *supra* note 196, at 1829 (describing but problematizing the distinction between accretion and avulsion).

201 See Serkin, *supra* note 194, at 19–20 (“When changes occur slowly, reliance interests may evolve without much awareness at all. But sudden changes can be enormously disruptive to settled expectations.”).

202 Jeremy Bentham described this problem in the context of adverse possession:

But what length of time is necessary to produce this displacement of expectation? or, in other words, what period is necessary to legitimate property in the hands of a possessor, and to extinguish every opposite title? To this inquiry, no exact answer can be given. It is necessary to draw at hazard the line of demarcation, according to the kind and value of the property in question.

JEREMY BENTHAM, *THEORY OF LEGISLATION* 160 (R. Hildreth trans., London, Trübner & Co., Ludgate Hill, 5th ed. 1887).

203 See Been et al., *supra* note 119, at 28.

erty values high at the expense of newcomers and outsiders, thereby stifling development and reducing access and affordability.²⁰⁴ Advocates of in-place property owners, however, will point to suburbs and smaller cities overwhelmed by uncontrolled development and growth, causing overcrowding in schools, dramatic changes to the character of neighborhoods, congestion on roads, and burdens on insufficient infrastructure. Selfish NIMBYs on the one hand, rapacious and irresponsible developers on the other. Both happen, and often simultaneously; they are simply flip sides of the same coin.

In the most general terms, zoning protects the expectations and reliance interests of in-place property owners. However, the absence of change, and the refusal to accommodate growth, excludes people who want a share of the benefits that a community offers. There is a kind of Goldilocks problem here. Too much growth too quickly will disrupt owners' reasonable expectations with regard to property values, community character, and the costs and burdens of new development. But too little change, and the ossification of a community can inappropriately exclude others.

It is impossible to resolve these tensions in the abstract. Context, of course, matters a lot.²⁰⁵ A new apartment building in the middle of Manhattan is more consistent with reasonable expectations than the same building in Nashville, Tennessee. But it is possible to identify some of the relevant considerations and inquiries that should inform the appropriate pace of change.

Consider the zero-sum calculus of property values. Property owners should not reasonably expect local governments to protect their cartel by excluding all new housing. The resulting monopoly prices look exclusionary. But owners of property in a stable neighborhood bought into a community with zoning and can reasonably expect zoning to continue to limit supply at least to some extent. At the extreme, eliminating zoning and allowing any new development would interfere with their reasonable expectations. So what changes are appropriate?

It depends, in large part, on the extent of demand and the rate of change of property values in the relevant market, especially relative to other investments. Land and housing prices that grow to exorbitant levels signal an imbalance. Zoning can be a tool for securing property owners a reasonable rate of return, but should not generate windfalls, which come at the expense

204 See, e.g., HOUS. AFFORDABILITY & LIVABILITY AGENDA ADVISORY COMM., SEATTLE HOUSING AFFORDABILITY AND LIVABILITY AGENDA 25 (2015), http://murray.seattle.gov/wp-content/uploads/2015/07/HALA_Report_2015.pdf ("Seattle's zoning has roots in racial and class exclusion and remains among the largest obstacles to realizing the City's goals for equity and affordability." (footnote omitted)); Dan Bertolet, *Exclusionary Zoning Robs Our Cities of Their Best Qualities*, SIGHTLINE INST. (Apr. 20, 2016), <https://www.sightline.org/2016/04/20/how-exclusionary-zoning-robs-our-cities-of-their-best-qualities/> ("The height and density limits we impose on apartment buildings can also cause exclusion if they reduce the number of units that otherwise would have been built. In cities where lots of people want to live, less new housing means more upward pressure on prices.").

205 Cf. Blomley, *supra* note 196, at 1829 (describing but problematizing the distinction between accretion and avulsion).

of excluded outsiders. An appropriate balance is likely to be somewhere between the desires of the oligarchs who own many of Manhattan's most expensive apartments purely as investment vehicles and the fiercest advocates for affordable housing.

One way to think about this admittedly wide middle ground is to focus on the difference between construction costs and housing costs. In a seminal paper, Ed Glaeser and coauthors attribute that gap to "the power of land use controls in limiting new construction."²⁰⁶ They estimated as of 2005 that the costs of construction in Manhattan were approximately \$300 per square foot, while the house price was double that amount.²⁰⁷ That is a useful framework for estimating the impact of supply limits through zoning. But the point here is that the land-price premium should also not be zero. It is appropriate to protect in-place owners' expectations to some extent. It is only when that premium grows too large that more aggressive efforts to increase supply should be appropriate. This does not generate a specific ratio or number for policymakers to try to achieve. But it is important to see the compromise that this inquiry represents and to focus on these competing pressures when evaluating any zoning reform.

B. *Zoning and the Rebirth of American Cities*

Until very recently, the abiding concern of urban economists and policymakers was the suburbanization of America, and all the social and economic costs it entailed.²⁰⁸ City affordability was low on the list of worries. The resurgence of the urban core is one of the more astonishing economic stories of the past twenty-five years. Increasing property values are not only a consequence of that turnaround but were one of the driving forces. Current efforts to loosen density restrictions in order to satisfy housing demand in the urban core should therefore be greeted with some caution because land use regulation has, in part, created that strong demand.

The post-World War II decades were characterized by an exodus of mobile capital from the urban core. The causes were multifaceted and mutually reinforcing. From the 1940s through the 1970s, over four million African Americans moved from the South, primarily to cities in the Midwest and Northeast.²⁰⁹ The resulting demographic changes led to a large migration of whites from the urban core to suburbs.²¹⁰ This was undoubtedly caused in large part by racism.²¹¹ But the effects became systemic and difficult to overcome.

206 Glaeser et al., *supra* note 130, at 366.

207 *Id.* at 367.

208 See, e.g., ROBERT W. BURCHELL ET AL., TRCP REPORT 74: COSTS OF SPRAWL—2000, at 9–17 (2002).

209 See Leah Platt Boustan, *Was Postwar Suburbanization "White Flight"? Evidence from the Black Migration*, 125 Q.J. ECON. 417, 417–18 (2010).

210 *Id.* at 418 ("[B]lack population share in northern and western cities [increased] from 4% in 1940 to 16% in 1970.").

211 See *id.*

Because local services are funded primarily by local property taxes, an influx of poor residents increases the relative tax burden on owners of expensive property. As discussed in Part II, if poor residents also consume more of a municipality's services, either through the public school or through expressly redistributive programs, the tax burden on more affluent property owners becomes increasingly burdensome either because taxes go up, or because property tax revenues are used to fund services that are less important to them, or both.²¹² The flight to suburbs in the latter half of the twentieth century was then partly a flight to homogeneity; the cross subsidy inherent in the property tax system is much smaller in places with less divergence in property values and with more consistent preferences for municipal spending among property owners.²¹³ Suburbanites then shut the door behind them, enacting restrictive exclusionary zoning rules that made suburbs inaccessible to poor people and families.²¹⁴ For much of the latter half of the twentieth century, suburbs were decisively winning in their competition against urban centers.²¹⁵ White flight, followed by the spiraling decay of many cities, meant that suburbs were dominant and ascendant.

The result was a kind of death spiral for cities.²¹⁶ Capital flight drove down property values. Urban property seemed like an increasingly risky investment, making it difficult to retain homeowners with the ability to move, let alone attract new homeowners back into the urban core. As property values declined, so did the tax base. Tax rates perversely had to increase as a result even as the quality of public services in cities declined.²¹⁷ Detroit, for example, recently had the highest tax rates in the state of Michigan, but also some of the worst municipal services.²¹⁸ This is the natural result of a tax base that was largely hollowed out by white flight and suburbanization. And

212 See *supra* note 166 and accompanying text. See generally Serkin, *supra* note 55.

213 See, e.g., Mieszkowski & Mills, *supra* note 164, at 137; Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 941 (2013) ("Suburbs have been more attractive than central cities as sites for settlement and investment, at least in part because their relatively smaller and more homogeneous populations have enabled suburbs to ensure that landowners' tax expenditures are concentrated on their own needs, rather than subjected to the redistributive claims of a variety of citywide interest groups."). See generally KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); Boustan, *supra* note 209.

214 See, e.g., Michael N. Danielson, *The Politics of Exclusionary Zoning in Suburbia*, 91 POL. SCI. Q. 1, 2 (1976) ("Lower-income and minority families which would benefit from relaxed suburban barriers are kept out of most communities by the high cost of housing and exclusionary policies . . .").

215 See Aoki, *supra* note 25, at 773; see also Fisher, *supra* note 70, at 845–47.

216 But see FISCHER, *supra* note 19, at 152–53.

217 See Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1139 (2014) ("Both poverty and population loss hit government revenues directly, as declining wealth and a declining number of city taxpayers produce lower revenues to fund current services and keep up with past debt.").

218 See Brent T. White, Simone M. Sepe & Saura Masconale, *Urban Decay, Austerity, and the Rule of Law*, 64 EMORY L.J. 1, 49 (2014).

to this day it makes it very difficult for Detroit to compete for new investments and to retain the tax base that it has.²¹⁹

Starting in the 1990s, however, some cities began to claw their way back.²²⁰ The causes of that urban resurgence are not entirely clear.²²¹ Some explanations focus on crime reduction, others on changes in drug policy (and preferences), as well as other social factors.²²² Some scholars claim that the emergent information economy was different from what had come before.²²³

Importantly, however, many interventions took the form of cities competing with suburbs at their own game.²²⁴ Suburbs had found a kind of formula to ensure that most of homeowners' taxes were spent on services that they valued. Suburbs had control over their tax rates and spending priorities, and, importantly, used land use regulation to limit the availability of low-cost housing in order to minimize "free-riding" on high-quality local services.²²⁵ Cities began to compete by empowering neighborhoods with their own economic and regulatory tools.²²⁶ It was difficult for cities as a whole to compete with suburbs' advantages, especially given the advantages of relative homogeneity. But individual neighborhoods served as anchors for reinvestment, what Professor Brian Berry called, "islands of renewal in seas of decay."²²⁷

219 Detroit has also recently seen something of a resurgence, demonstrating the power of the reurbanization pressures. See Quinn Klinefelter, *Detroit's Big Comeback: Out of Bankruptcy, a Rebirth*, NPR (Dec. 28, 2018), <https://www.npr.org/2018/12/28/680629749/out-of-bankruptcy-detroit-reaches-financial-milestone>.

220 See William H. Frey, *Will This Be the Decade of Big City Growth?*, BROOKINGS (May 23, 2014), <https://www.brookings.edu/opinions/will-this-be-the-decade-of-big-city-growth/> ("In the city versus suburb realm, the new numbers once again affirm a reversal that counters decades of suburban-dominated regional growth among metro areas with more than 1 million people. Now, for three years running, primary cities are growing faster than their suburbs.").

221 See SCHRAGGER, *supra* note 26, at 192 ("[S]cholars and policymakers are far from certain what has caused the urban resurgence, let alone what causes economic growth more generally.").

222 See Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275, 1288–89 (2006); Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. REV. 1828, 1867 (2017).

223 See, e.g., Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 323–30 (2010) (surveying possible causes).

224 Stahl, *supra* note 213, at 942 ("In recent decades, however, cities have experienced something of a renaissance, which many attribute to city officials' realization that in order to entice and retain investment in the face of suburban competition, cities must somehow provide the benefits that small size and homogeneity afford the suburbs.").

225 See *supra* notes 165–70 and accompanying text.

226 See Kathe Newman & Philip Ashton, *Neoliberal Urban Policy and New Paths of Neighborhood Change in the American Inner City*, 36 ENV'T & PLAN. 1151, 1164 (2004) ("[T]he city has used its leverage to facilitate the suburban style of development typified by recent construction in West Side Park.").

227 See Brian J.L. Berry, *Islands of Renewal in Seas of Decay*, in *THE NEW URBAN REALITY* 69 (Paul E. Peterson ed., 1985); see also Elvin K. Wyly & Daniel J. Hammel, *Islands of Decay in*

Neighborhood-level initiatives took many forms.²²⁸ Some of the most important gave neighborhoods more power to shape their local communities, both in fiscal priorities and in regulatory preferences. For example, many cities enabled neighborhood business groups to finance improved sub-local services through the use of Business Improvement Districts (BIDs).²²⁹ With BIDs, cities sought to enable the creation of commercial districts that could compete with suburban malls, offering enhanced levels of municipal services like street cleaning, lighting, infrastructure, safety, and so on.²³⁰ While the focus was on commercial property, they often created benefits for residential property in the district as well.²³¹ BIDs started to appear in large numbers in the early 1990s and have subsequently become a widespread example of sublocal empowerment.²³²

A similar story, following a similar timeline, is the proliferation of tax increment financing (TIF). TIF is a bit of a misnomer because it is not a tax at all. Instead, TIF is a way of financing municipal bonds, usually used to invest in infrastructure or other localized community benefits.²³³ The bonds are not general recourse, however, and are instead repaid through any increase in property taxes from the specific TIF area. TIF is meant to make targeted investments that increase property values and therefore property taxes in a specific place. The resulting increase in property tax revenue is used to pay back the bonds. This all amounts to a funding mechanism that

Seas of Renewal: Housing Policy and the Resurgence of Gentrification, 10 HOUS. POL'Y DEBATE 711, 711 (1999) (revisiting Berry's formulation).

228 Private investments from universities and other stakeholders in community success shored up property values in neighborhoods lucky enough to have farsighted ones, like the University of Pennsylvania in West Philadelphia. See Meghan Ashlin Rich & William Tsitsos, *New Urban Regimes in Baltimore: Higher Education Anchor Institutions and Arts and Culture-Based Neighborhood Revitalization*, 50 EDUC. & URB. SOC'Y 524, 530 (2017) (evaluating role of colleges and universities in stabilizing struggling communities in Baltimore). Community groups also provided important catalysts for reinvestment. See ALEXANDER VON HOFFMAN, *HOUSE BY HOUSE, BLOCK BY BLOCK: THE REBIRTH OF AMERICA'S URBAN NEIGHBORHOODS* 14 (2003) (“[S]mall nonprofit organizations emerged to take up the cause of the beleaguered communities.”).

229 See Richard Schragger, *Does Governance Matter? The Case of Business Improvement Districts and the Urban Resurgence*, 3 DREXEL L. REV. 49, 58–61 (2010).

230 See *id.* at 50; see also Wylly & Hammel, *supra* note 227, at 719 (identifying “spatially targeted mechanisms that might best be called ‘e-zones,’ depending on the nomenclature in vogue: economic development, enterprise, or empowerment”). Churches also played a role. See HOFFMAN, *supra* note 228, at 15.

231 See 2nd Roc-Jersey Assocs. v. Morristown, 731 A.2d 1, 13 (N.J. 1999) (rejecting claim that homeowners should contribute to BID despite benefits they receive); Ingrid Gould Ellen, Amy Allen Schwartz & Ioan Voice, *The Impact of Business Improvement Districts on Property Values: Evidence from New York City*, BROOKINGS-WHARTON PAPERS ON URB. AFFS., 2007, at 1, 29 (finding at best small impact of BIDs on property values).

232 See Schragger, *supra* note 229, at 50 (“[M]any policymakers and most politicians believe that BIDs have played an important role in central city revitalization.”).

233 For a description of TIF and how it works, see generally Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65 (2010).

allows TIF districts to prepay increases in property values, effectively allowing neighborhoods (or TIF districts, however defined) to capture the benefits of rising property values.²³⁴ TIF has been around for a long time, with a history dating back at least to the 1950s.²³⁵ However, it also proliferated in the late 1980s and the early 1990s.²³⁶

This same time period also saw the rise of sublocal control over neighborhood land use. New York City, for example, amended its Uniform Land Use Review Procedure (ULURP) in 1989 to give community boards more control over land use decisionmaking.²³⁷ Community groups and developers alike often decry ULURP's mandates, but ULURP did engage local community organizations in the land use process, giving them greater control over housing density and supply at the sublocal level.²³⁸

Community benefits agreements (CBAs) arose slightly later—in the early 2000s—to give community groups the formal ability to negotiate with developers to address the concerns “of the neighborhood most affected by the proposed development.”²³⁹ CBAs effectively allow community groups to trade their support for a development—or at least the absence of opposition—in exchange for things like preservation of open space, beautification or “aesthetic improvements,” affordable housing set-asides, and use of union labor, among others.²⁴⁰ With a CBA, community groups could blunt the most negative neighborhood effects of new development and even secure some additional benefits in the form of local amenities.

The proliferation of historic districts has also had the same effect. Although the ostensible purpose of historic preservation is to ensure that

234 Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 910–11 (2011) (discussing TIF).

235 See Jonathan M. Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405, 423 (1979).

236 See Briffault, *supra* note 233, at 69–70 (“There were 299 TIF areas in California in 1980 and 658 in 1990. . . . In 2003, Wisconsin had 789, or an average of 1.3 TIF districts per municipality. . . . In 2001, more than 10 percent of California’s property tax base was in a TIF district.”).

237 For a helpful summary of ULURP, see Barbara Eldredge, *What Is ULURP? And Why Do We Have It?*, BROWNSTONER (Nov. 24, 2015), <https://www.brownstoner.com/development/ulurp/>. See also TOM ANGOTTI, *LAND USE AND THE NEW YORK CITY CHARTER* 4–5 (2010), <http://www.hunter.cuny.edu/ccpd/repository/files/charterreport-angotti-2.pdf>.

238 See Been, *supra* note 83, at 21–22 (comparing ULURP to CBAs). ULURP has been widely criticized by developers, government officials, and academics alike. See, e.g., ANGOTTI, *supra* note 237, at 1. For a contemporaneous description of the effect of the 1989 amendments, see Alan S. Oser, *Perspectives: Charter Revision; Realigning the Powers in Land-Use Control*, N.Y. TIMES, Oct. 15, 1989, at R9 (“The system would enhance the power of localities to advance zoning changes effectively by giving them funds for environmental reviews and giving a Planning Commission minority the power to move them to the public review stage.”).

239 See Been, *supra* note 83, at 15. The first major CBA involved development of the Los Angeles Staples Center and was signed in 2001. *Id.* at 6.

240 See Thomas A. Musil, *The Sleeping Giant: Community Benefit Agreements and Urban Development*, 44 URB. LAW. 827, 829, 832, 836 (2012).

important historical resources are preserved for future generations, the use in practice has been to protect the character of certain neighborhoods in order to protect property values and to stimulate investment.²⁴¹ Historic preservation has also expanded dramatically over the latter half of the twentieth century. In New York City, for example, what began as the preservation of 700 different buildings grew by 2010 to include preservation of 25,000 buildings, 100 districts, and over 15% of Manhattan's developable land south of 96th Street.²⁴² The effect, especially of historic districts, was to create protected neighborhoods where property values increased, often dramatically, and that were competitive with suburbs for mobile capital.²⁴³

In a granular account of the gentrification of Chicago's Lincoln Park, Daniel Hertz identified historic preservation as a key driver of neighborhood investment several decades earlier. That neighborhood had been certified as a "conservation district," but it took over a decade for conservation funds to arrive. In the meantime, however, the mere designation of the area for conservation appeared to have a positive impact on values. As he explained, "For many people, conservation status signaled that the community would be stabilized, and that their investments in housing there would be safe, both socially—conservation status attracted middle-class home buyers . . . —and financially."²⁴⁴

Even in the absence of CBAs and formal land use reform like the amendments to ULURP, urban neighborhoods have simply become more effective at navigating the land use process and extracting concessions from developers. In important work, Vicki Been and coauthors have provided empirical evidence that urban land use decisions appear increasingly to be motivated by the interests of homeowners—confirming the rise of Fischel's "homevoter" hypothesis in cities.²⁴⁵ This is surprising because conventional accounts suggested that urban policies were driven more by the growth machine—developers, realtors, builders, architects, and lawyers, who all have

241 See David E. Clark & William E. Herrin, *Historical Preservation Districts and Home Sale Prices: Evidence from the Sacramento Housing Market*, 27 REV. REG'L STUD. 29, 29 (1997) ("During the past two decades, land use ordinances have evolved in a different direction in metropolitan areas where historic preservation has become popular."); N. Edward Coulson & Robin M. Leichenko, *Historic Preservation and Neighbourhood Change*, 41 URB. STUD. 1587, 1587 (2004) ("[D]esignation and preservation of historic properties and historic districts has become an important tool in efforts to preserve central-city neighborhoods and to promote economic development in blighted urban areas.").

242 See EDWARD GLAESER, TRIUMPH OF THE CITY 149 (2011).

243 See John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 106 (2014) ("When metropolitan regions experience an upsurge in demand, high-income, high-housing-cost neighborhoods will basically expand as housing in neighboring low-income, low-housing-cost neighborhoods gets bid up. In this sense, gentrification is fundamentally a *demand-side spillover phenomenon*.").

244 DANIEL KAY HERTZ, THE BATTLE OF LINCOLN PARK: URBAN RENEWAL AND GENTRIFICATION IN CHICAGO 59 (2018).

245 See Been et al., *supra* note 123, at 247, 257.

a stake in seeing growth.²⁴⁶ Been and her coauthors surmise that this homevoter power, even in a city like New York, has arisen through relatively recent changes to urban land use practice.²⁴⁷

The timing of these changes corresponded to the stabilization in urban property values that stemmed the tide of capital flight to the suburbs.²⁴⁸ In this account, zoning's impact on the affordability of cities is not the downside of America's urban resurgence, but one of its catalysts. This neighborhood-level control over land use, in particular, stabilized communities and property values, making investments in urban real estate appealing again.²⁴⁹ Although causation is difficult to prove, it appears that this increased sublocal control has at least partly driven the reinvestment in cities and has created the conditions for sustained economic success.²⁵⁰

High housing costs are not only an unfortunate byproduct of urban zoning, they are also often a driver of revitalization. They played and continue to play a central role in attracting investors back to the urban core. The problem, fundamentally, is that housing in an area cannot be both a good investment and affordable at the same time (at least absent regulatory intervention).²⁵¹ And if housing prices were to decrease significantly—if urban housing stopped being a good investment—the result could tilt the scales back to the suburbs.

Some will reject this framing. Unlocking density will only produce new housing if there is demand. The concern may seem to resemble the Yogi Berra quip: “Nobody goes there anymore. It’s too crowded.”²⁵² If cities continue to become denser, it is only because there is demand for more housing. However, the vibrancy of a neighborhood or even a city may be more fragile

246 See Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 492 (2009); Christopher J. Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. 505, 539–40 (2012).

247 Been et al., *supra* note 123, at 229 (“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.”).

248 Cf. Newman & Ashton, *supra* note 226, at 1154 (“[A] crucial outcome [of reinvestment in urban communities] has been a surge of liquidity for investments in inner-city neighborhoods.”).

249 See HERTZ, *supra* note 244, at 59 (“To assure potential renovators of a future market, then, [neighborhood groups] realized that it was important for their area to be *perceived* as ‘up and coming.’”).

250 See Stahl, *supra* note 213, at 943 (identifying “efforts to import into the city the most attractive features of suburban governance by devolving power to the smaller scale of the neighborhood, homogenizing the voting public through the restriction of the franchise to landowners, and insulating the group’s power from the politicking and vote-trading prevalent at the citywide level”).

251 Daniel Hertz, *Housing Can’t Both Be a Good Investment and Be Affordable*, CITY OBSERVATORY (Oct. 30, 2018), https://cityobservatory.org/housing-cant-be-affordable_and_be-a-good-investment/.

252 YOGI BERRA, *THE YOGI BOOK* 31 (2010).

than people today seem to think. Go back just a few decades and cities' position seemed altogether more dire if not intractable.²⁵³ And the dynamics around capital flight seemed like a death spiral that could plausibly result in the radical deurbanization of America.²⁵⁴ New York was very much on the ropes. While no one thinks that is on the horizon today, it is important to recognize that changes in the trajectory can be difficult to reverse. When people decide to buy a house or an apartment—or decide to stay in one—they are fundamentally making a prediction about the future of the property. The trajectory can therefore be much more important than the present reality.

Imagine that the stock of new buildings was to increase dramatically, with the result that housing prices not only stabilize but go down. People might not wait to see where the new equilibrium develops but might instead rush for the exits. The lag time during development also means that housing supply does not equilibrate very quickly, and it is not hard to imagine new supply continuing to come online as prices start to drop, exacerbating the decline and leading to soaring vacancy rates and plummeting prices.²⁵⁵

There is, of course, an empirical question here: How much supply can a neighborhood or a city absorb before the downward pressure on price becomes a problem for the city's long-term stability and viability? Agglomeration economists seem to assume that economic reality today makes urban investment very sticky—businesses will continue to locate in thriving cities, and people will continue to want to live there.²⁵⁶ We know that people will pay a lot of money for that privilege, but that is money they expect to get back in a climate of ever-increasing urban property values. It is worthwhile asking whether the same stickiness will exist if and when the regulatory environment changes and urban property is no longer such a solid-seeming investment.

C. Threatening the Return of "Private" Zoning

Zoning plays another related role in the competition between suburbs and cities. Despite current criticisms of zoning, most housing consumers embrace restrictive land use regulations.²⁵⁷ People love to hate zoning,

253 See *supra* notes 214–16 and accompanying text.

254 See *supra* note 216 and accompanying text.

255 The real estate markets in Florida and Arizona just prior to the Great Recession are salient modern examples. See Karl E. Case, *The Central Role of Home Prices in the Current Financial Crisis: How Will the Market Clear?*, in BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2008, at 161, 182–84; Vikas Bajaj, *In Arizona, 'For Sale' Is a Sign of the Times*, N.Y. TIMES (Nov. 7, 2006), <https://www.nytimes.com/2006/11/07/realestate/07land.html>.

256 See, e.g., David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1539; see also SCHRAGGER, *supra* note 26, at 54–55 (discussing agglomeration).

257 See RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 17 (1966), quoted in Been et al., *supra* note 123, at 227 (“No one is enthusiastic about zoning except the people.”); Kevin Drum, *Zoning and Sprawl*, MOTHER JONES: KEVIN DRUM (Mar. 18, 2010), <https://www.motherjones.com/kevin-drum/2010/03/zoning-and-sprawl/>

except when it comes to their own property. They want the benefits of zoning, whether stopping noxious uses nearby, preserving property values, or maintaining the character of the community. Even modest redevelopment of a neighborhood, replacing older houses with newer ones, can cause an uproar, and property owners crave the ability to control nearby uses.²⁵⁸

This could simply be dismissed as nothing more than problematic opposition to change. It is NIMBYism at its most obvious, and policymakers should not give voice to these worst instincts of in-place residents. The problem, however, is that homeowners have a ready substitute for zoning: private homeowners associations. If local governments—and particularly cities—cannot satisfy property owners’ desire for community stability, then homeownership may increasingly retreat to private suburban enclaves.²⁵⁹

This is not idle speculation. The proof of consumer preferences around restrictive land use regulation is evident in the proliferation of common interest communities and HOAs.²⁶⁰ They have increased in number from 10,000 in 1970, to 342,000 in 2016.²⁶¹ Residents living in HOAs over that same period have increased from 2.1 million to 69 million.²⁶² And HOAs typically provide far more restrictive land use controls than any government.²⁶³ The growth of HOAs therefore suggests that people regularly choose more restrictive regimes precisely because of the protection and governance they provide.²⁶⁴

HOAs are important because they demonstrate consumers’ revealed preference for more land use regulation and also because they provide a

(“[T]hese regulations aren’t something that’s been imposed by ‘government.’ They exist because people really, really, *really* want them.”); see also Fischel, *supra* note 133, at 322 (describing homeowners’ demand for zoning).

258 For a more theoretical account of this phenomenon and the reliance interests it implicates, see generally Serkin, *supra* note 194.

259 See Stahl, *supra* note 213, at 949 (“Over the last few decades, the deed-restricted homeowners association has soared in popularity because it provides neighborhoods with precisely these powers.”).

260 See, e.g., Barbara Coyle McCabe, *The Rules Are Different Here: An Institutional Comparison of Cities and Homeowners Associations*, 37 ADMIN. & SOC’Y 404, 405 (2005) (“Almost unheard of 50 years ago, HOAs now outnumber cities 13 to 1.”).

261 See CMTY. ASS’NS INST., NATIONAL AND STATE STATISTICAL REVIEW FOR 2016 COMMUNITY ASSOCIATION DATA 1 (2016), <https://www.caionline.org/AboutCommunityAssociations/Statistical%20Information/2016StatsReviewFBWeb.pdf>.

262 *Id.*

263 See McCabe, *supra* note 260, at 408 (“[Governing documents in HOAs] address a myriad of issues related to the development and generally serve to regulate taste. [They] address such matters as parking . . . sign posting, pet ownership, exterior colors, landscaping, architectural standards, play equipment, and decor, sometimes even interior decor visible from the street.”).

264 See Ron Cheung & Rachel Meltzer, *Why and Where Do Homeowners Associations Form?*, 16 CITYSCAPE, no. 3, 2014, at 69, 69 (2014) (“HOAs are appealing to homebuyers for their supplemental services and amenities and also for exclusivity. Residents tend to opt into these associations because they value, and are willing to pay for, more targeted service provisions and, in certain cases, greater control over their local communities.”).

ready alternative if municipalities cannot satisfy consumers' regulatory demands. HOAs are in competition with cities for homeowners, and restrictions on zoning in the urban core threaten to give HOAs an insuperable advantage.²⁶⁵

Of course, private HOA agreements are not, literally, zoning. Many conservatives who have traditionally decried zoning nevertheless embrace HOAs, preferring private governance to public regulation.²⁶⁶ The intuition appears to be that private covenants are voluntary in a way that zoning is not. But this is largely a specious distinction.²⁶⁷ HOAs are voluntary in the sense that people can choose where to live, and so opt into the covenants they want by choosing which house to buy. But precisely the same reasoning applies to zoning as well. People can also choose the zoning regime they want by choosing where to live. Local governments offer competing menus of options, including services, taxes, and regulatory options. People buy houses in municipalities that offer the best fit for them.²⁶⁸ Zoning ordinances are no more or less voluntary than HOAs in this sense.

Nor are zoning ordinances more oppressive, either in substance or in enforcement.²⁶⁹ Substantively, covenants governing HOAs tend to be much more restrictive than most zoning ordinances.²⁷⁰ The most restrictive covenants govern house color and even the color of the car one can buy. At the extreme, "HOA rules can . . . cover minute actions of daily life such as leaving your house by the back door or kissing your spouse by the front door."²⁷¹ Zoning is usually less restrictive than its private analogues. And, while zoning ordinances are enforced by the power of the state, the actual remedies for zoning violations resemble those for violations of private covenants in HOA agreements. Municipalities impose fines and sometimes order compliance with a zoning ordinance.²⁷² But HOAs also levy fines and impose liens on people's homes and can even seek specific performance. In neither case is

265 See, e.g., Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1547–48 (1982) (describing competition between governments and HOAs); cf. Stahl, *supra* note 213, at 951 ("City officials, seeking to prevent tax-paying landowners from fleeing to adjacent suburbs, have attempted to placate those landowners by giving them the direct power to approve or veto neighborhood changes, freeing the landowners from the need to lobby city hall.").

266 See, e.g., ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION* 207 (1977).

267 But see SCHRAGGER, *supra* note 26, at 15 (asserting that "[c]ities are different" from homeowners' associations).

268 See *supra* notes 137–38 and accompanying text (discussing Tiebout Hypothesis).

269 For a comparison, see McCabe, *supra* note 260, at 409.

270 See Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 713–14 (2010).

271 McCabe, *supra* note 260, at 409 (citing Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553 (2002)).

272 8 ZONING AND LAND USE CONTROLS § 50.02, LexisNexis (database updated 2020).

someone going to jail for violating land use rules, and so the state's coercive power is not qualitatively different from the enforcement of HOA rules.

Most importantly, both municipal zoning and HOAs have a similar positive impact on property values. One study compared the values of three types of property: zoned, subject to private covenants in HOAs, and unregulated.²⁷³ The study found no significant difference between the value of the first two categories, but found that both were significantly higher than unregulated property.²⁷⁴ In all meaningful respects, then, private covenants in HOAs are substitutes for municipal zoning. If consumers prefer or even demand the ability to control neighboring property, and cities are prevented from satisfying this demand, then one should anticipate more homeowners seeking the stability of HOAs.

Houston, Texas, provides strong evidence that property owners will search out private alternatives in the absence of municipal zoning. Houston is, of course, famous for its lack of comprehensive zoning.²⁷⁵ It is the only unzoned city in America. But as commentators have often noted, development in Houston is not unregulated; it is regulated through private covenants instead of through municipal zoning.²⁷⁶ A significant amount of development in Houston has happened in HOAs, giving owners substantial control over neighboring property.²⁷⁷ And the effect of reliance on these private land use controls is less density and more sprawl than in other places. According to the last census, Houston's population density is 266.1 housing units per square mile. Compared with Miami at 437.9, Philadelphia at 531.2,

273 See generally Janet Furman Speyrer, *The Effect of Land-Use Restrictions on Market Values of Single-Family Homes in Houston*, 2 J. REAL ESTATE FIN. & ECON. 117 (1989); see also Quigley & Rosenthal, *supra* note 34, at 80 (describing study).

274 See Quigley & Rosenthal, *supra* note 34, at 80.

275 See Ryan Holeywell, *Forget What You've Heard, Houston Really Does Have Zoning (Sort of)*, RICE: KINDER INST. FOR URB. RSCH. (Sept. 9, 2015), <https://kinder.rice.edu/2015/09/08/forget-what-youve-heard-houston-really-does-have-zoning-sort-of>.

276 See ALEXIUS MARCANO, MATTHEW FESTA & KYLE SHELTON, RICE: KINDER INST. FOR URB. RSCH., *Developing Houston: Land-Use Regulation in the "Unzoned City" and Its Outcomes* 3 (2017), https://kinder.rice.edu/sites/default/files/documents/Unzoned-City_0.pdf ("Instead of a formal zoning code, though, Houston has created its own land development approach—one that mixes private and public mechanisms to control the form and function of buildings in specific areas."); John Mixon, *Four Land Use Vignettes from Unzoned(?) Houston*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 166–67 (2010) (describing examples of private deed restrictions); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 79 (1970) ("Officials in Houston estimate that there are 7,000 to 8,000 (perhaps as many as 10,000) individual subdivisions and separate sections of subdivisions each of which may be subject to restrictive covenants of varying kinds. There is general agreement that at one time or another the vast majority were probably subject to restrictive covenants and that most of these covenants are still in force."); see also Holeywell, *supra* note 275 (cataloguing other municipal regulations that constrain land development in Houston).

277 See SIEGAN, *supra* note 2, at 35.

Boston at 681.4, or New York at 3,223.8, Houston is much less dense.²⁷⁸ More impressionistically, “[a]s the nation’s fourth most populous city, Houston is clearly an urban center, and yet, the lifestyle it provides is largely suburban.”²⁷⁹ The absence of comprehensive zoning has resulted in homeowners seeking substitute private land use regulations in the form of HOAs and therefore a much more sprawling city.

Another way to look at this density data is to recognize that other cities are unlikely to be able to replicate the Houston approach, even if they wanted to. Houston is simply enormous geographically, allowing suburban-style HOA development to occur within the city boundaries.²⁸⁰ People seeking land use regulations in Houston can buy into HOAs within the city. That is not true in dense places like Northeastern cities, where people seeking more restrictive land use rules would have to move into separate suburban municipalities to find HOAs.

For many of urban zoning’s opponents, this would be a perverse outcome. Private land use regulations in HOAs come with many of the same problems as municipal zoning. They tend to impose even greater limits on density, prohibit multifamily housing, and are geared specifically to keep housing prices high. Some HOAs impose not only bulk limits, but also bulk *minimums*.²⁸¹ The end result is that the exclusionary effect of suburban HOA development is often much greater than municipal zoning. Indeed, suburbs and HOAs were early pioneers in exclusionary land use regulations long before cities got into the game.²⁸²

278 See *Metropolitan Area Census Data: Population & Housing Density*, CENSUS-CHARTS.COM, <https://www.census-charts.com/Metropolitan/Density.html> (last visited Oct. 11, 2020).

279 See Hilary Ybarra, *How Urban or Suburban Is Sprawling Houston?*, RICE: KINDER INST. FOR URB. RSCH. (Sept. 21, 2017), <https://kinder.rice.edu/2017/09/21/how-urban-or-suburban-is-sprawling-houston>.

280 See Dan Solomon, *As If You Needed It, Further Proof That Houston Is So Much Bigger Than Most Cities*, TEX. MONTHLY (Apr. 30, 2014), <https://www.texasmonthly.com/the-daily-post/as-if-you-needed-it-further-proof-that-houston-is-so-much-bigger-than-most-cities/>.

281 *Covenants and Restrictions for Forrestridge and the Estates of Forrestridge*, FORRESTRIDGE HOMEOWNERS ASS’N, <http://www.forrestridge.net/covenants—restrictions.html> (last visited Oct. 11, 2020) (covenants requiring a minimum of 2600 square feet of air conditioned or heated living space); *Frequently Asked Questions: Bullard Creek Ranch*, SUBDIVISIONS OF EAST TEXAS, <https://subdivisionseasttexas.com/faq/bullard-creek-ranch/> (last visited Oct. 11, 2020) (requiring homes to be a minimum of 2200 square feet during the first development phase, and a minimum 1800 square feet during the second and third).

282 See, e.g., *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975) (striking down exclusionary zoning efforts in New Jersey municipality); see Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 RUTGERS L. REV. 849, 861 (2011) (describing suburban exclusionary zoning); James C. Quinn, Note, *Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches*, 4 FORDHAM URB. L.J. 147, 147 (1975) (same); see also Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 442–43 (2006) (describing exclusionary effects of gated golf communities and other HOAs that offer amenities that many members of minority groups do not value).

HOAs and private communities are also often implicated in racial exclusion at least as much as municipal zoning.²⁸³ People who study HOAs suggest that residential subdivisions “intensify social segregation, racism, and exclusionary land use practices.”²⁸⁴ If zoning is restricted so more people resort to private HOAs as substitutes, this will likely increase patterns of residential segregation, despite the fact that increasing density in the urban core is intended to have the opposite effect. Ultimately, zoning is important for cities to be able to satisfy people’s preferences for some measure of community stability.

Some states have begun to recognize the risk that housing consumers will substitute private zoning if public zoning controls do not satisfy their preferences. California recently adopted new limits on local governments’ ability to regulate accessory dwelling units. Remarkably, the State also prohibited HOAs from enforcing accessory dwelling unit restrictions.²⁸⁵ This holistic approach recognizes at least implicitly the central concern here that municipalities will find themselves at a disadvantage in the regulations that they can offer to consumers.²⁸⁶ This approach is both innovative and unusual and is unlikely to provide a blueprint that other states will follow.

CONCLUSION

Zoning’s future is in doubt. Its original justifications appear weak and insufficient to defend current practices against a growing affordability crisis. But there are other justifications for zoning beyond simply separating incompatible uses of land. Zoning is better seen as a tool for moderating the pace of community change and, in so doing, allocating costs between insiders and outsiders. These are more complex goals that require a more nuanced assessment of the competing pressures of stability and dynamism in our communities. Zoning no doubt has an ugly history, but when evaluated and utilized correctly, it could have a beautiful future.

283 See Cheung & Meltzer, *supra* note 264, at 70 (“HOAs do tend to exacerbate citywide racial/ethnic segregation.”).

284 See SETHA LOW, *BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA* 11 (2004); EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 57 (1994).

285 See CAL. CIV. CODE § 4751(a) (West 2020).

286 The governor signed AB 670 (codified at CAL. CIV. CODE § 4751), regulating HOAs, a few months before the other limits on municipal zoning. Nevertheless, the bills together were viewed by most commentators as a package of reforms. See, e.g., Louis Hansen, *Granny Flats May Get Easier to Build in California*, MERCURY NEWS (July 4, 2019), <https://www.mercurynews.com/2019/07/04/bills-would-ease-restrictions-on-in-law-units/>.