

ZONING: A REPLY TO THE CRITICS

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I. INTRODUCTION

In November 1993 voters in Houston narrowly rejected a referendum to establish zoning in that city.¹ This was the third time in a half-century that Houston voters had rejected zoning. Thus Houston remains the only major city in the United States without zoning. To zoning's supporters, Houston represents an unenlightened backwater that has stubbornly resisted the tide of twentieth century land use regulation. To zoning's critics, Houston stands as a lonely beacon of economic rationality, or at least a living laboratory in which alternatives to zoning can be fairly tested.²

Extensive academic literature critical of zoning has accumulated in the last twenty years, beginning with Bernard Siegan's landmark 1970 study lauding Houston's non-zoning approach,³ and followed shortly

* J.D. 1994, Yale Law School. Law Clerk, Hon. Patricia M. Wald, U.S. Court of Appeals, D.C. Circuit. The author thanks Robert Ellickson for helpful comments on earlier drafts. The author also thanks Ann Mongoven and Emma Karkkainen Mongoven for their support and patience, without which this article would not have been possible.

¹ The margin was 52% to 48%. R. A. Dyer, *Zoning Defeated by Narrow Margin*, HOUSTON CHRON., Nov. 3, 1993, at A1; Peter Cooney, *Houston Voters Reject Zoning for Third Time*, REUTERS NEWS SERVICE, Nov. 3, 1993, available in LEXIS, Nexis Library. Pre-election polls predicted the referendum, backed by the mayor, a city council majority, and many civic organizations, was headed for passage. Sam Howe Verhovek, "Anything Goes" Houston May Go the Limit: Zoning, N.Y. TIMES, Oct. 27, 1993, at A14. Several factors explain this pre-election discrepancy. With an incumbent mayor facing token opposition, voter turnout was low, and expectations that the referendum would pass may have lulled supporters into staying home. Second, zoning opponents spent about four times the amount of supporters in promoting their position, see Cooney, *supra*, suggesting that opponents had more intense (though perhaps narrower) support, superior resources, and superior organizing tactics, see Dyer, *supra*. Third, pro-zoning forces aroused populist opposition by trying to adopt zoning through city council action rather than by referendum in a city where voters had twice previously rejected zoning. Finally, despite charges that they were engaging in unprincipled racial scare tactics, opponents apparently convinced lower-income minority communities that zoning would mean costlier housing and racial segregation: 72% of Black voters and 58% of Mexican-Americans opposed the referendum. *Id.*; cf. RICHARD F. BABCOCK, THE ZONING GAME 25-28 (1966) (stating that in the 1948 and 1962 referenda, which were lost by wider margins, opponents outspent proponents and the strongest "no" vote came from low-income minority communities).

² For the moment at least. Zoning proponents in Houston, confident that public opinion and sound public policy are on their side, have vowed to continue their efforts to enact a zoning ordinance. See Dyer, *supra* note 1.

³ Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970) (arguing that land use patterns in Houston are similar to those in other cities, but the patterns are achieved more efficiently because of the absence of zoning).

thereafter by Robert Ellickson's broader theoretical critique of zoning.⁴ Subsequent academic literature has been almost as uniformly critical of zoning⁵ as public policy has been uniformly in favor of it. Although few academic defenders of zoning have stepped forward, governmental decision-makers have proceeded with zoning apace, apparently untroubled by the academic onslaught. By some estimates, 9,000 municipalities, large and small, in every region of the country and representing at least 90% of the nation's population, have zoning schemes in place.⁶ The closeness of last November's vote, and Houston's status as the only major holdout against zoning, can give little cheer to zoning's critics. No trend toward abolishing zoning appears on the horizon, and indeed, non-zoning in Houston hangs by a thread.

Why is this? How do we account for the fact that this nearly universal feature of local government enjoys such disrepute in academia? Are local governments simply in the grip of irrationality? Have local officials hoodwinked the public on a massive scale? Or have the academic critics somehow missed the mark?

This article argues that the academic critiques of zoning, though based on insights that have some validity, are often overstated. They simply prove less than their authors think they prove. In particular, this article argues that in some circumstances, such as in mature neighborhoods in large urban centers, zoning can be a rational and justifiable public policy response to very real problems and can be made to work at least as well as any of the alternatives the critics propose.⁷ The analysis of this article is descriptive in part, illustrating

⁴. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 779-80 (1973) [hereinafter Ellickson, *Alternatives*] (recognizing the need for land use regulation to control negative externalities, but arguing that restrictive covenants, modified nuisance law, and administrative fines would operate more efficiently and fairly than zoning).

⁵. See, e.g., WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* (1985); ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND USE REGULATION* (1977); Douglas W. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. Pa. L. Rev. 28 (1981); Jan Z. Krasnowiecki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980); Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 Yale L.J. 617 (1991).

⁶. Ellickson, *Alternatives*, *supra* note 4, at 692; FISCHER, *supra* note 5, at 22-23 (stating that for all practical purposes, we may assume zoning is a universal feature of local government in the United States).

⁷. Cf. Eric H. Steele, *Participation and Rules—The Functions of Zoning*, 1986 AM. B. FOUND. RES. J. 709, 713 (1987) (finding that despite academic criticism, "[r]esistance to changing the basic nature of zoning springs from a widespread, if unarticulated, perception that the institution is serving some vital social function.").

zoning at its best, in rather limited circumstances.⁸ Yet principally this article is normative, discussing zoning as it might be made to work, in a way that is justifiable and that meets many of the objections offered by its critics. Therefore, the purpose of this article is not to offer a general defense of zoning. Its task is the more modest one of showing that many of the critiques, despite the broad claims of their authors, should not be taken as general indictments of zoning, but rather as indicators of particular dysfunctions that must be addressed if zoning is to work effectively.

II. TRADITIONAL JUSTIFICATIONS FOR ZONING

Initially, the question of why we even have zoning must be addressed. Zoning's proponents traditionally have offered two rationales, neither of which stands up to close scrutiny. First, zoning advocates suggest that zoning is necessary to protect or enhance property values,⁹ particularly the values of residential properties (and especially single-family homes).¹⁰ On this analysis, zoning serves principally to protect property owners from the negative externalities of new developments. Without zoning (or some comparable system of land use regulation), residential property owners would face plummeting property values if a development with significant

⁸ Cf. *id.* at 722-23 (describing zoning in Evanston, Illinois, as a participatory process designed to preserve existing well-established mature urban neighborhoods). My analysis is also descriptive in the sense that it tries to capture the core unarticulated purposes of zoning —the "vital social function" it is thought to perform, even though in many instances actual performance falls short of the perceived ideal.

⁹ BABCOCK, *supra* note 1, at 116-17. Advocates of the nation's first comprehensive zoning ordinance, enacted by New York City in 1916, argued that zoning was necessary to protect property values. See City of New York, Board of Estimate and Apportionment, Committee on the City Plan, Final Report of the Commission on Building Districts and Restrictions, June 12, 1916, at 12-14, reprinted in ROY LUBOVE, *THE URBAN COMMUNITY: HOUSING AND PLANNING IN THE PROGRESSIVE ERA 95-98* (1967) (arguing for enactment of zoning ordinance principally as a means to protect existing property values). See also Daniel P. McMillen & John F. McDonald, *Could Zoning Have Increased Land Values in Chicago?*, 33 J. URB. ECON. 167, 168 (1993) (proponents of Chicago's first zoning ordinance claimed it would raise property values by one billion dollars over 25 years by eliminating negative externalities and objectionable land uses). For instance, much of the impetus for the early New York ordinances came from carriage-trade Fifth Avenue retailers who saw their business threatened by the encroachment of the garment industry's loft-type manufacturing buildings northward from lower Manhattan. SEYMOUR I. TOLL, *ZONED AMERICAN* 110-16, 158-61 (1969). See *infra* pp. . Other early supporters of zoning, however, argued that mere enhancement of some property owners' financial interests at the expense of other owners' property rights would not be constitutionally permissible insofar as it would not provide a valid "police power" justification for zoning. See EDWARD M. BASSETT, *ZONING* 52-53 (1936).

¹⁰ BABCOCK, *supra* note 1, at 1, 115; Marc A. Weiss, *Skyscraper Zoning: New York's Pioneering Role*, 58 J. AM. PLAN. ASS'N 201 (1992) (stating that although from the beginning zoning in New York was principally concerned with large commercial developments, in other cities the central focus has been on protecting residential neighborhoods).

negative externalities—a junkyard or brick factory, for example—moved in next door. Moreover, the mere prospect that such a development could move in would tend to depress the value of residential property. The solution is to divide the municipality into zones so that industries are sited near other industries, commercial enterprises near other commercial enterprises, and residential properties with other residential properties.¹¹ This rationale has some intuitive appeal, based on the real or imagined horrors of entirely unregulated development.

A significant problem with the property values rationale for zoning, however, is that such a rationale is difficult to support with empirical evidence. It has not been clearly established that zoning results in higher market values for residential property.¹² Another problem with this rationale is that zoning's advocates have not clearly established that zoning is the only means, or even the most effective or efficient means, of controlling externalities.¹³

Second, zoning is defended as a tool of a broader scheme of comprehensive urban planning.¹⁴ However, in many smaller

11. This approach seems to presuppose that the external effects of a particular type of land use (e.g., industrial) are not negative externalities with respect to neighboring land uses of the same type. A factory, for example, will produce equivalent amounts of air pollution, odor, noise, vibration, and heavy truck traffic regardless of where it is sited; but these effects, which are negative externalities if its neighbors are residential properties, are not negative externalities if its neighbors are other factories. A full explanation of the externalities theory would need to account for not only zoning by type of land use, but also zoning by density, minimum lot size, and building height and bulk, which are other typical features of a comprehensive zoning scheme. These arguments, while perhaps not impossible, are more tenuous; it is arguably less clear, for example, why a two-flat building in a neighborhood otherwise composed of single-family homes would produce significant negative externalities.

12. See, e.g., McMillen & McDonald, *supra* note 9, at 168-69 (study of historical data shows no increase in residential property values over a period of years after Chicago adopted its first zoning ordinance). The empirical literature on this and related questions is reviewed in William A. Fischel, *Do Growth Controls Matter? A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulation*, LINCOLN INSTITUTE OF LAND POL'Y 1990. Fischel finds the empirical evidence inconclusive. While it has not been definitively established that zoning results in higher residential property values over time, Fischel argues that this result is nonetheless consistent with the hypothesis that zoning is working well to steer developments with substantial negative externalities to sites where they do the least harm. *Id.* at 12; cf. Steele, *supra* note 7, at 714 (suggesting that density and congestion, while regarded as undesirable and regulated under most zoning schemes, are not correlated with reduced property values). Furthermore, while zoning may not increase the value of a particular property, it may prevent the decrease of that property's value by limiting land uses that can have a negative impact on that particular property.

13. See *infra* notes 59-77 and accompanying text.

14. BABCOCK, *supra* note 1, at 120-25; NELSON, *supra* note 5, at 59; Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154 (1955) (stating that unless zoning conforms with a comprehensive plan broader in scope than the zoning scheme itself, zoning "lacks coherence and discipline in the pursuit of goals of public welfare which the whole municipal regulatory process is supposed to serve" and is therefore constitutionally

communities that cannot afford their own planning agencies, zoning is often not accompanied by comprehensive planning.¹⁵ Furthermore, critics suggest that in bigger cities that do have planning departments, planners often find zoning a bothersome, time-consuming, and highly technical distraction from what they regard as their more important planning functions, i.e., charting the future of that area. Therefore, it is not clear that zoning has ever been well-integrated with the other tools at a planner's disposal.¹⁶ In particular, with regard to mega-developments that often preoccupy big-city planning departments, traditional zoning appears to play a relatively minor role among the array of available planning tools.¹⁷ Finally, Houston, which has never had a zoning ordinance, does have an active and apparently effective

infirm). Progressive, reform-minded advocates of New York's 1916 zoning ordinance also cited zoning's role as a tool of comprehensive, scientific urban planning similar to that then practiced in Bismarck's Germany, which they admired. See TOLL, *supra* note 9, at 128-31, 140; LUBOVE, *supra* note 9, at 13-14 (stating that Progressive Era social reformers supported zoning as a tool of comprehensive urban planning aimed at improving social conditions and beautifying cities). In New York, as in many cities, however, once zoning was in place, the push for broader forms of urban planning was largely abandoned. TOLL, *supra* note 9, at 178-80, 279.

¹⁵ FISCHER, *supra* note 5, at 31; Robert F. Benitendi, Comment, *The Role of the Comprehensive Plan in Ohio: Moving Away from the Traditional View*, 17 DAYTON L. REV. 207 (1991)(arguing that a "comprehensive plan" requirement in a state zoning enabling act is deemed to be met by a comprehensive zoning ordinance; in fact, many small zoned municipalities do little or no "planning").

¹⁶ BABCOCK, *supra* note 1, at 62-65. It is sometimes said that zoning, which by its very nature consists of a series of "negative" local prohibitions on particular kinds of land uses, cannot serve as an effective planning tool because it can neither compel nor encourage any particular kind of development. See, e.g., LUBOVE, *supra* note 9, at 13-14. This broad generalization probably overstates the case, however. If there is sufficient market demand for gas stations, for example, then prohibiting them in residential zones but permitting them in commercial zones will almost certainly result in gas stations being sited in commercial zones, even though public officials cannot literally compel such a result. What is not likely to work is what some courts and commentators have insisted upon: a zoning scheme that embodies a comprehensive, inflexible, expert-designed community master plan. See BABCOCK, *supra*, at 123-24 (arguing that although planning may be desirable, planning may be just as arbitrary and irrational as zoning); cf. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1160-64 (1985) (criticizing this "adjudicatory" model of zoning as "problematic"). See also FISCHER, *supra* note 5, at 33 (arguing that in most communities, zoning is driven by political interests, not professional planning); NELSON, *supra* note 5, at 77-83 (arguing that the notion that a community can conform its development trajectory to an expert-designed master plan is just misguided wishful thinking); *contra* Haar, *supra* note 14 (arguing for this kind of professional planning); *Fasano v. Board of County Comm'rs*, 507 P.2d 23 (Or. 1973) (requiring all zoning decisions to conform to comprehensive land use plan).

¹⁷ See Robin Paul Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67, 73-82 (1987) (describing zoning as one tool, along with "co-financing," grants and tax incentive programs, by which municipalities try to influence large developments); Weiss, *supra* note 10 (describing role of innovative zoning techniques such as transferable development rights and planned unit developments, along with special districts, negotiated development, and "linkage" exactions, as tools municipalities use to steer large-scale developments).

planning department. This suggests that zoning is not a necessary component of successful urban planning.¹⁸

More recently, some zoning advocates have suggested the prevention of "fiscal freeloading" as a third rationale.¹⁹ According to this view, some new developments place a greater burden on public services than they contribute in new taxes. Zoning is a means by which such developments can be screened out in favor of developments that pay their fair share.²⁰ This may indeed be one of the ways zoning is used in some exclusive, and exclusionary, suburban communities,²¹ but it does not appear to be a major factor in big-city zoning schemes.²² Moreover, where the fiscal freeloading rationale is

¹⁸ Siegan, *supra* note 3, at 73.

¹⁹ This view is most prominently associated in academic literature with Bruce Hamilton. See, e.g., Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, URB. STUD., June 1975 (arguing that, in a metropolitan area with a large number of competing municipal jurisdictions, the use of zoning as a neutral fiscal device can make residential property taxes function as an efficient price for public services).

²⁰ See Michelle J. White, *Fiscal Zoning in Fragmented Metropolitan Areas*, in FISCAL ZONING AND LAND USE CONTROLS 31-33 (Edwin S. Mills & Wallace E. Oates eds., 1975) (arguing that most zoning is done for fiscal purposes, either on a neutral basis in which newcomers pay exactly the marginal cost of the services they consume, or on a "fiscal-squeeze" basis in which newcomers are required to pay more than the marginal cost of services in order to benefit long-term residents). White argues, however, that even where zoning is fiscally motivated, the legal rationale is typically cast in terms of controlling externalities. *Id.* at 33.

²¹ Techniques typically employed in exclusive suburbs include large minimum lot sizes, minimum house sizes, and exclusion of multi-family housing developments. Legal challenges to exclusionary zoning, based on state rather than federal constitutional requirements, were briefly successful in New Jersey in both *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713, 724-25 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975) (Mt. Laurel I) (holding exclusionary zoning violates New Jersey constitution), and *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390, 452, 467 (N.J. 1983) (Mt. Laurel II) (establishing numerical quotas for low-income housing and authorizing courts to grant "builder's remedies," i.e., court orders allowing proposed low-income housing developments to be built in order to achieve compliance with numerical goals). Communities have continued to find creative ways to resist compliance with the Mount Laurel decisions, however. See RICHARD F. BABCOCK & CHARLES L. SIEMON, *THE ZONING GAME REVISITED* 214-33 (1985).

²² I do not mean to suggest that planners in big cities are insensitive to the fiscal impact of proposed developments, and especially of large-scale developments. But as I previously suggested, big cities typically address such concerns through planning tools other than, or in addition to, zoning. See *supra* note 17. Moreover, the notion of excluding the poor is a concept largely alien to big cities, where large numbers of the poor already reside. Thus, a low-income multi-family rental housing development that would be disfavored for fiscal reasons in some suburbs may be welcomed in the central city, where such a development is likely to be seen not as attracting new low-income residents, but rather as benefiting current low-income residents. Although big-city zoning has been used to exclude the poor from particular neighborhoods, see *infra* notes 36-37 and accompanying text, such decisions usually result in relocation of the proposed developments to poorer city neighborhoods, so the fiscal impact on the municipality is negligible.

Some public policy analysts have suggested that the central cities' generosity in providing welfare benefits to the poor is at best pointless and perhaps self-defeating. Rather than ending poverty, they suggest, these programs merely encourage the poor to remain in the central cities, where jobs and economic opportunities are scarce; thus, the poor stay poor and in the

employed, it has troublesome normative implications. Typically, it is lower-income, multi-family rental housing developments that are thought not to "pay their own way."²³ Such developments often increase the demand for public services by the sheer increase in numbers of new residents they bring to the community. This effect may be compounded if low-income residents require more public services per capita than higher-income residents. Yet, low-income housing is generally less costly (and therefore has a lower taxable value) per household and per capita than the housing of more affluent residents; consequently, ad valorem property tax revenues will be lower per new resident.²⁴ If allowed to proceed, such lower-income housing developments might permit lower-income persons to share in a higher quality of public services than otherwise would be available to them, including public schools with better funding and higher quality academics. Such developments might allow low-income persons to reside in closer proximity to what are often the fastest-growing job markets.²⁵ Thus, the fiscal freeloading argument may become a rationale for excluding lower-income (and often minority) persons from suburban residency and opportunities for economic advancement.²⁶

central cities—to the detriment of both the poor and the cities. See Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795 (1991). To my knowledge, no one has advanced a similar argument concerning the central cities' "generosity" with respect to zoning, but conceivably it could be argued that the cities' willingness to accommodate low-income housing through their zoning standards has a similar self-defeating effect, keeping the poor in the cities where they are likely to stay poor. Liberals are unlikely to make such an argument because it implies a harsher approach toward the poor.

Free-market conservatives, who typically favor less government regulation, are unlikely to make this argument because it implies more regulation, in the form of stricter big-city zoning. Instead, they would argue for leveling the playing field at a lower level of regulation by lowering zoning barriers to low-income housing in the suburbs. See *id.* at 831-52; *infra* notes 35-46 and accompanying text.

²³ Schill, *supra* note 22, at 812-14; Siegan, *supra* note 3, at 120. But cf. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 406 n.55 (1977) [hereinafter Ellickson, *Growth Controls*] (stating that because tenant families usually have fewer school-age children and apartment buildings are often subject to higher effective property tax rates, apartments are more likely to "pay their own way" in property taxes than are modest single-family homes).

²⁴ Ad valorem property taxes are still the principal local revenue source in most municipalities. See JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE AND LOCAL TAXATION* 8-12 (5th ed. 1988). Other local tax revenues, based on income or consumption, would also tend to be lower per capita on low-income residents.

²⁵ Schill, *supra* note 22, at 796-97.

²⁶ Cf. Ellickson, *Alternatives*, *supra* note 4, at 704 (finding that exclusionary zoning "may cause substantial inefficiencies by widely separating housing for working-class families from industrial job opportunities."). In addition, it has been suggested that suburban fiscal zoning may result in an undersupply of low-cost housing throughout the metropolitan area, including in the central city. See White, *supra* note 20, at 98.

III. THE CRITIQUES

Most of the critiques of zoning fall into four broad categories. Two concern fairness or equity and the other two are based on considerations of economic efficiency. Zoning is said to be: (A) unfair because it benefits some landowners at the expense of others; (B) exclusionary, and therefore unfair to those excluded from a particular community; (C) inefficient insofar as it adds large transaction costs to development decisions, outweighing the benefits (if any) of zoning; and (D) inefficient in that it "distorts" land use allocation decisions, resulting in inefficient patterns of land use. Let us briefly consider each of these arguments.

A. *Zoning Is Unfair To Some Property Owners*

Some critics contend that zoning is fundamentally unfair because it grants special privileges to some property owners (typically, current owner/occupants of single-family homes) at the expense of others, including principally those (usually non-resident) owners who wish to develop their property for non-residential purposes.²⁷ Stated this way, the argument concedes that zoning confers a real benefit to some property owners, e.g., single-family homeowners.²⁸ In this common non-utilitarian or deontological version of the argument, it is enough to assert that a fundamental norm of fairness is violated when property-owners are treated differently. This argument rests on the normative judgment that the benefit to homeowners does not justify the harm to would-be developers. A variant of this argument is the utilitarian version, which argues that the wrong is the fact that the

²⁷. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 263-66 (1985) (zoning frequently results in uncompensated taking of private property in violation of constitutional principles and fundamental norms of fairness). Epstein recognizes, however, that zoning sometimes has beneficial outcomes such as controlling nuisances or benefiting the regulated party along with her neighbors, "so it is out of the question to invalidate all zoning per se." *Id.* at 265; Ellickson, *Alternatives*, *supra* note 4, at 699 (arguing that zoning reduces some property values while raising others; the losers are typically not compensated, and the winners reap a windfall); Ellickson, *Growth Controls*, *supra* note 23, at 438-40 (arguing that some forms of land use controls effectively allow current homeowners to skim off developers' profits, violating principles of horizontal equity); Robert C. Ellickson, *Three Systems of Land-Use Control*, 13 HARV. J.L. & PUB. POL'Y 67, 72-73 (1990) [hereinafter Ellickson, *Three Systems*] (stating that political processes of zoning are biased in favor of local residents).

²⁸. Some more radical economic critiques, however, suggest that zoning provides no benefit to homeowners, or at least that such benefits are isolated, fortuitous, and incidental results of a fundamentally misconceived regulatory scheme. See, e.g., McMillen & McDonald, *supra* note 9, at 187 (concluding that Chicago's first zoning ordinance had no overall beneficial effect on property values and may have created as many externality problems as it solved).

harm to would-be developers outweighs the benefit to homeowners.²⁹ Yet the basic unfairness argument need not go this far. Therefore, under this critique, even if the benefit to homeowners outweighs the harm to would-be developers, zoning is wrong.

At one time, this argument was of constitutional dimensions,³⁰ but *Village of Euclid v. Ambler Realty Co.*³¹ settled the dispute by holding that zoning is constitutionally permissible, at least on due process grounds.³² Absent a constitutional or positive law norm prohibiting unequal treatment of different classes of property owners, advocates of this position must rely on some deeper moral principle. Yet our legal system recognizes many other kinds of unequal burdens by type of property, such as differential tax treatment. This suggests that under contemporary notions of property, the moral and legal norms implicated here are at best very weak. Ultimately, this type of critique must rest on a highly controversial (and ultimately insupportable) natural rights notion of property in which property rights are seen as having some nearly-inviolable, pre-political status.³³

B. Zoning Is Exclusionary

²⁹. Since the "harms" and "benefits" in this utilitarian calculus are thought to be economic harms and benefits, the utilitarian version of the fairness argument thus appears to collapse into economic arguments about efficiency. See discussion *infra* notes 56-77 and accompanying text.

³⁰. See *supra* note 9 (showing that some early advocates of zoning feared that protection of property values from negative externalities, thus benefiting some property owners at the expense of others' property rights, provided inadequate "police power" justification to pass constitutional muster).

³¹. 272 U.S. 365, 389-90 (1926) (upholding local zoning ordinance against claims that it unconstitutionally deprived landowners of property without due process of law).

³². In cases where zoning imposes extreme burdens on some property owners to benefit others, especially if the burdens are unrelated to the purposes of the regulation, the jurisprudence of regulatory takings may still have some bite. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987) (establishing requirement of a "nexus" between regulatory purpose and burden imposed on property owner). But these cases involve claims by property owners against the government for compensation for a "taking" of private property; unequal treatment may be a relevant consideration, but in itself is neither necessary nor sufficient to establish a takings claim. Moreover, the remedy for a taking is typically compensation, not invalidation of the zoning scheme. Nor is the equal protection doctrine likely to help those seeking to overturn zoning; since would-be developers are not likely to be a "suspect class," all the government needs to show is that the classification passes a "rational basis" scrutiny, i.e., that under some imaginable set of facts it would be rational to impose these classifications. Thus, it is enough to show, for example, that the legislature could have thought that the benefit to homeowners outweighs the harm to would-be developers.

³³. See, e.g., EPSTEIN, *supra* note 27, at 36 (describing property rights as pre-political "natural rights" with which government may interfere only if it provides dollar-for-dollar compensation). As Epstein recognizes, however, claims based on this theory are ultimately takings claims, resting on the notion that the government's action diminishing the value of A's property is wrong, regardless of how the government treats B. *Id.*

This argument, in its attenuated form, has already been alluded to in the prior discussion on fiscal freeloading.³⁴ In its more general form, the argument is that zoning, because it is prohibitory in nature, is fundamentally a device of exclusion. It is further argued that, in fact, zoning is widely used to exclude racial groups, economic classes, and economic activities that are deemed to be undesirable.³⁵ These arguments are more commonly directed at suburban zoning³⁶ because big cities, by their very nature, tend to be less exclusionary, taking all comers.³⁷ It does appear, however, that while big cities do not use zoning to exclude groups entirely, some neighborhoods within the cities do use zoning as an exclusionary device.³⁸ At first glance these arguments have some appeal, but they often are stated vaguely. Once we unpack them, it becomes clear that they should not stand as a general indictment of zoning.

The idea that some racially discriminatory applications of zoning should somehow taint all zoning is a peculiar one. If zoning is consciously used to achieve racial segregation, then a serious problem exists. But this problem should be addressed by constitutional and statutory equal protection claims, not by scrapping zoning.³⁹ Many

³⁴ *Supra* notes 19-26 and accompanying text.

³⁵ See Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59, 71-77 (1993) (arguing that zoning is inextricably tied to invidious forms of racial and class exclusion).

³⁶ See, e.g., Leonard Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 J.L. REFORM 625 (1972); Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 791 (1969). Some critics suggest that zoning is most important in the suburbs, because that is where the largest numbers and greatest dollar value of new land use decisions are made and where zoning restrictions are often the strictest. See, e.g., FISCHER, *supra* note 5, at 34. This may lead to the non-sequitur that, since zoning is of greatest importance in the suburbs, and suburban zoning is exclusionary, therefore zoning in general is exclusionary and ought to be abolished. It does not follow from the premise that since zoning may be exclusionary in some places, it must be exclusionary everywhere. Nor does it follow that where zoning is now practiced with exclusionary motives or results it must necessarily remain exclusionary.

³⁷ NELSON, *supra* note 5, at 24 (stating that history of zoning in big cities is non-exclusionary; exclusionary uses of zoning are closely tied to suburban regulation of undeveloped land); *but cf.* Kosman, *supra* note 35, at 60-61 (arguing that even in big cities zoning is aimed at exclusion by social class).

³⁸ *Cf. Gautreaux v. Chicago Hous. Auth.*, 304 F. Supp. 736, 741 (N.D. Ill. 1969) (holding that Chicago's public housing authority had violated the 14th Amendment equal protection rights of black public housing residents by failing to build public housing developments in predominantly white neighborhoods). The Housing Authority claimed it was unable to build the developments without zoning approval from the city, and city council members from those neighborhoods had blocked the necessary zoning changes in response to racial animus in their communities.

³⁹ *Cf. Ellickson, Growth Controls, supra* note 23, at 418 (suggesting that constitutional remedies should be available for racially-motivated growth restrictions). Certainly some early zoning schemes were explicitly aimed at excluding blacks or segregating housing patterns along racial lines. See BASSETT, *supra* note 9, at 50 n.1 and cases cited therein; *Buchanan v.*

powers and institutions of local government, including public schools, police functions, criminal sentencing, the taxing power, various licensing powers, and powers to hire public employees, grant government contracts, and award public services have been used in unlawfully discriminatory ways. Yet this does not lead to the conclusion that all those powers and institutions should be scrapped.⁴⁰ Whenever the zoning power is misused, strong action should be taken. But stripping local government of the zoning power is inappropriate unless it can be shown that the zoning power is incapable of being put to valid uses. Since it is not zoning on its face, but rather its application that results in discrimination, those particular applications, and not all zoning, should be eradicated.

More difficult is the claim that zoning is used to exclude persons by economic class, resulting in the side effect of racial exclusion, because racial minorities generally are not as affluent as the white majority.⁴¹ Again, this charge is typically made against suburbs rather than big cities because big cities embrace a greater diversity of income classes.⁴² The problem with this claim is that our legal and political culture is at best ambivalent about the principle of equal treatment on the basis of economic status.⁴³ Even if society were committed to that principle, the appropriate remedy would not be to reject zoning as an institution, but to challenge particular applications of the zoning power based on impermissible categories of economic status.⁴⁴

Warley, 245 U.S. 60, 82 (1917) (invalidating, on due process grounds, a Louisville ordinance establishing racially segregated residential zoning, because it infringed upon a white seller's property rights to select a buyer).

⁴⁰. Cf. *BABCOCK*, *supra* note 1, at 124-25 (arguing that it is an error to confuse the zoning power with the goals or purposes to which the zoning power is applied).

⁴¹. Cf. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977) (holding that absent showing of racial animus, a suburban zoning scheme excluding a low-income housing development does not violate the Equal Protection Clause, even though it has racially disproportionate impact).

⁴². But again, it is entirely likely that big cities exclude the less affluent from particular neighborhoods through minimum lot sizes and other requirements that contribute to making housing unaffordable for lower-income households.

⁴³. Compare *Goldberg v. Kelly*, 397 U.S. 254, 264-66 (1970) (recognizing welfare benefits as an interest worthy of due process protection) and *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (holding that a state may not discriminate against newly-arrived residents in awarding welfare benefits, based on constitutionally-protected freedom of interstate travel) with *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (holding that a zoning decision excluding low-income multi-family rental housing, based on fiscal considerations, does not violate equal protection principles, even though its ultimate effect is to exclude racial minorities). *Goldberg* and *Shapiro* represent the high-water mark of constitutional protection for the poor; since *Arlington Heights* was decided, it is clear that constitutional doctrine affords little protection against classifications based on economic status, even where economic status is strongly correlated with race.

⁴⁴. Again, the critics seem to confuse the zoning power with the uses to which it is put. Suppose we retained zoning, but adopted as a matter of constitutional law the principle that

Alternatively, the states or perhaps Congress could enact statutes prohibiting the use of zoning to exclude on the basis of economic status.

More fundamentally, exclusion on the basis of economic status appears to be the entire *raison d'être* for the most exclusive suburbs. Although zoning is one tool used to achieve that goal, it is not the only tool, and abolishing zoning would not necessarily effect a cure.⁴⁵ Finally, even if all public regulation of land use were abolished, private devices like restrictive covenants might still be used to achieve the goal of exclusion.⁴⁶

Another variant on the exclusion argument is not concerned with exclusion by economic status, but with exclusion of certain legal but locally undesirable (yet socially necessary) land uses. This is the NIMBY (Not-In-My-Back-Yard) syndrome. It is said that zoning benefits the best-organized and politically most powerful residents who are able to block the siting of locally undesirable economic activities in their own communities. Yet those same residents get some

zoning may not be used to exclude persons on the basis of economic status. Thus, intentional exclusion by economic status would be an impermissible goal, just as intentional racial exclusion is now. This would severely curtail some uses of the zoning power, especially in exclusive suburbs (and in exclusive big-city neighborhoods). It would not, however, curtail all uses of the zoning power. Most zoning decisions based on density, or on the mixing of commercial and industrial uses with residential uses, would still be permitted.

⁴⁵ See Peter Marks, *Home Rule's Exclusive, Costly Kingdoms*, N.Y. TIMES, Feb. 1, 1994, at A1 (stating that numerous small suburban home-rule municipalities are administratively inefficient and intentionally exclusionary, fostering "separateness and racial and economic exclusion"); Fischel, *supra* note 12, at 34 (arguing that although exclusion of the poor motivates some suburban zoning, other evidence suggests segregation by income is primarily a matter of individual decisions and, clear patterns of income segregation pre-date zoning and persist in unzoned communities like Houston); *id.* at 54 (stating that judicial efforts to curb exclusionary zoning helped spawn broad, across-the-board growth controls, "seemingly beyond judicial reproach on exclusionary grounds because they democratically exclude everyone."). It seems unlikely that "mature" exclusionary suburbs like Scarsdale, Grosse Pointe or Winnetka would suddenly be open to a flood of lower-income immigrants from the Bronx, Detroit, or Chicago if zoning were abolished simply because the existing housing stock is prohibitively expensive. Moreover, if those communities were required (through stronger measures than abolition of zoning) to absorb a population of diverse socio-economic status, it seems likely that many of their current residents would flee to other exclusive enclaves through purchases of large private tracts of land, perhaps reincorporating into new, smaller municipalities. See Marks, *supra* (describing division of eastern Long Island into minuscule municipalities, which are easier to keep "exclusive" under the social norms of a handful of property owners).

⁴⁶ Cf. Ellickson, *Alternatives*, *supra* note 4, at 714 ("[R]estrictive covenants are widely used as a device to exclude lower income groups."). A solution to this would be to recognize discrimination based on economic status as a violation of equal protection, in which case those provisions of private covenants that exclude by economic status might be unenforceable. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that restrictive covenants discriminating by race are unenforceable because enforcement violates the 14th Amendment guarantee of equal protection). Even then, however, it would be difficult to prevent the affluent from practicing their own private forms of exclusion through purchases of large private tracts of land, or private developments of large homes on large lots, enforced by informal social norms.

portion of the social benefits of those activities when they take place in other, less politically powerful communities. For example, a noxious factory is unlikely to be sited in an exclusive suburban community, even though the wealth that factory produces may directly benefit some residents of the affluent community and indirectly benefit all community residents insofar as they enjoy the economic benefits of the entire metropolitan region.

Like economic and racial exclusion, the NIMBY syndrome is more symptomatic of suburban than big-city zoning.⁴⁷ Big cities are usually able to offer some site for almost any legal activity.⁴⁸ Indeed, early zoning advocates argued that in order to pass constitutional muster, zoning must provide a place for every otherwise-legal activity.⁴⁹ Although contemporary big-city zoning advocates are unlikely to accept this as a realistic goal, much less a legal requirement, big-city

⁴⁷. Cf. *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1628-29 (1978) (distinguishing "separation" zoning, which "carries the message that the use is incompatible with others and must therefore be located elsewhere in the community to maximize overall welfare," from "selection" zoning which "operates by encouraging some uses while disfavoring or excluding other uses"). Big-city zoning typically "separates" uses, while suburban zoning schemes are often "selective," i.e., exclusionary.

⁴⁸. But the NIMBY syndrome may operate in big cities to exclude certain activities from certain neighborhoods, with the neighborhoods having the most political clout often bumping undesirable activities to less politically powerful neighborhoods. This kind of political power is often (though not always) correlated with socio-economic status and race, so that poor and minority communities often shoulder a disproportionate burden of undesirable land uses. See Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1001-03 (1993) (stating that locally undesirable land uses ("LULUs"), such as waste disposal sites, homeless shelters, and drug and alcohol treatment centers, have diffuse benefits and locally concentrated costs; typically, these are resisted by affluent communities and concentrated in poor and minority communities which lack the political effectiveness to stop them). In addition, city planners have had increasing difficulty in siting some land uses, such as landfills and incinerators, at all.

In a sense, all zoning decisions are NIMBY decisions; that is, they exclude some presumptively undesirable activities from particular neighborhoods. But discussion of the NIMBY syndrome usually focuses on two harms: first, that some socially necessary activities will be unable to be sited at a reasonable cost, and second, that some undesirable but necessary activities will be "dumped" on the politically powerless. Although many of these political battles are determined through the zoning process, the political dynamic of NIMBY is by no means co-extensive with zoning; many zoning decisions are unrelated to these NIMBY-like results, and many NIMBY-like results are achieved through market forces and/or levers of political power other than zoning. Thus it is by no means clear that abolition of zoning would curtail the NIMBY phenomenon. Houston, for example, which has never had zoning, nonetheless has its share of NIMBY-like land use patterns. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1400-06 (1994) (citing studies showing environmentally undesirable land uses in Houston are concentrated in poor and minority communities and suggesting that market forces may play a greater role than siting decisions).

⁴⁹. BASSETT, *supra* note 9, at 80-81 (stating that New York's ordinance did not seek to "exclude any use that was necessary or desirable for civilized life"); NELSON, *supra* note 5, at 24.

zoning probably comes much closer to achieving this ideal than suburban zoning.

The critics' recurring mistake is confusing the zoning power itself with the application of that power to achieve a goal they find objectionable. If suburban zoning is too restrictive and produces NIMBY-like results, then perhaps the problem is not with zoning generally, but with the particular goals and practices of suburban zoning, or even with the existence of suburbs themselves as exclusive enclaves within the larger metropolitan community. Some suburbs are intended to be communities that keep out certain kinds of economic activities; zoning is but one tool used to achieve that result.⁵⁰ If NIMBY is a problem, then perhaps the solution is a return to the requirement that zoning allow all otherwise-legal economic activities to take place somewhere within its bounds.

A final variant on the exclusion argument is that politically well-connected developers are often able to win the zoning changes they need, while political neophytes and outsiders are disadvantaged.⁵¹

⁵⁰. To state the point more strongly, some suburban communities arguably were established to have a parasitic relationship upon the larger metropolitan community —reaping the benefits of participation in the metropolitan economy while avoiding its negative consequences. In that sense, exclusion of persons by economic status and exclusion of locally undesirable economic activities are two aspects of the same phenomenon. There is at least *prima facie* evidence that zoning has been a crucial tool allowing suburbs to achieve these goals.

If the goals and the results are impermissible, there are several alternatives to abolishing zoning, which in my view would unnecessarily cripple non-exclusionary uses of zoning in the cities. One is to effectively abolish suburbs as we know them through metropolitan government or at least substantial consolidation of crucial local governmental functions like zoning. In the Baltimore metropolitan area, for example, the suburban zoning power rests at the county level rather than with individual suburban municipalities. By administering zoning over a such a large area, a zoning scheme could be designed to accommodate all otherwise legal uses. *But cf.* Ellickson, *Growth Controls*, *supra* note 23, at 430-35 (arguing that metropolitan zoning, large-scale suburban zoning, and statewide land use controls would create monopoly zoning power and increase "rent-seeking" behavior, thus exacerbating inequities and inefficiencies); Hamilton, *supra* note 19 (arguing that competition among municipalities tends toward efficiency in zoning).

Requiring each zoning ordinance to make sufficient provision for all otherwise-legal land uses is another possibility; thus, suburban communities themselves would decide, jointly or in combination, how to accommodate industrial and commercial uses, multi-family residential housing, and other uses that might be considered undesirable. A final possibility is to allow decentralized zoning, but to create a metropolitan-wide or statewide override mechanism to protect those uses that might otherwise have difficulty finding a home. Many states, for example, have already created override mechanisms for siting waste disposal facilities, and a few states have experimented with statewide authorities for siting low-income housing. NELSON, *supra* note 5, at 37 (citing Massachusetts and New York as examples).

⁵¹. Campaign contributions to key decision-makers, large fees to politically-connected attorneys, outright bribes, and personal relationships with planning professionals and politicians are said to be crucial elements in this equation. *See* Ellickson, *Growth Controls*, *supra* note 23, at 407-08 (arguing that large central cities are more vulnerable to "capture" by pro-development interests than are elite suburbs, where homeowners' exclusionary interests predominate); *but cf.* FISCHER, *supra* note 5, at 212-14 (arguing that in addition to the influence

An even harsher version is that self-seeking, entrepreneurial local officials are able to use the zoning power to "shake down" developers for campaign contributions, bribes, patronage jobs, and other private benefits. Only those who "ante up" are awarded the zoning approvals they need. There is substantial evidence that these practices do take place.⁵² This has led some to conclude that land use regulation should be more rule oriented.⁵³ Others argue that the solution is to make zoning more scientific and professional, and less political.⁵⁴ Still others argue that these practices are so widespread, and such an unavoidable part of the zoning power, that no solution short of abolition of zoning will suffice.⁵⁵ This article addresses these concerns

of developers' money on politicians, large cities tend to be more pro-development because city residents tend to be concerned about the jobs that accompany development; in this respect, big-city attitudes toward development are similar to those of smaller cities isolated from metropolitan areas). Public officials might also reasonably regard a developer's reputation for fiscal probity, demonstrated ability to secure financing and bring proposed developments to a successful completion, and track record of having produced developments that make ongoing positive contributions to the community as relevant factors that would tend to weigh in favor of granting zoning approval to "insiders" while being more wary of proposals by neophytes and outsiders. See Krasnowiecki, *supra* note 5, at 731 ("There is no local government that is not interested in a developer's financial capacity, reputation for quality, and record of good management," and "local governments have a legitimate interest in a developer's capacity to complete and manage the project and they should have the right to reject a developer who does not demonstrate such a capacity.").

⁵². See Harlan Draeger, *A Crime Waive for Aldermen*, CHI. SUN-TIMES, Jan. 1, 1992, at 1 (stating that of 18 Chicago aldermen convicted of criminal offenses since 1970, seven were convicted for zoning-related bribery or extortion); Ellickson, *Growth Controls*, *supra* note 23, at 408 n.62 (citing incidents of zoning-related graft). See *infra* notes 154-55 and accompanying text.

⁵³. Cf. Kmiec, *supra* note 5, at 43-46 (arguing that to counter procedural unfairness zoning decisions should be less "legislative" and more "adjudicatory" in nature). But cf. *id.* at 52-53 (simultaneously arguing that rule-like zoning regulations are often too inflexible).

⁵⁴. See, e.g., Haar, *supra* note 14, at 1155 (arguing that zoning must conform to a master plan "[b]ased on comprehensive surveys and analyses of existing social, economic, and physical conditions in the community and of the factors which generate them . . . direct[ing] attention to the goals selected by the community from the various alternatives propounded and clarified by planning experts.").

⁵⁵. See Kmiec, *supra* note 5, at 31 ("Zoning . . . as presently constituted should be eliminated and replaced by an alternative free enterprise development system . . ."). Even Kmiec would retain some measure of public land use controls, however. *Id.*

Cf. Krasnowiecki, *supra* note 5, at 752-53 (concluding that, while nominally operating as a set of categorical rules, "short zoning" in undeveloped areas in fact results in "an arbitrary permit granting system" in which political favoritism is inevitable; in the interest of candor and effective judicial review, zoning in such areas should be abolished in favor of explicit case-by-case permitting, accompanied by a requirement that the municipality give cogent reasons for denial of a permit). Note that despite the provocative title of his article, Krasnowiecki would not abolish zoning in already-developed areas, such as central cities. *Id.* at 750. His general view appears to be that zoning, designed to meet the needs of the big cities, works tolerably well there, so long as additional flexibility is built into the zoning process, *id.* at 723-27. But zoning is terribly mismatched when applied to undeveloped suburban areas "in the path of development." *Id.* at 726; cf. NELSON, *supra* note 5, at 189 (arguing on efficiency grounds that zoning was designed for, and with modifications may still make sense in, developed urban neighborhoods but should be abolished in undeveloped areas).

in Part IV, arguing that zoning decisions must be policed both from the top-down and from the bottom-up, using processes that encourage neighborhood residents to participate actively in decision-making.

C. Zoning Adds Unnecessary Transaction Costs

Most proponents of this argument concede that some form of local land use regulation is necessary to control the negative effects of certain types of land uses. Typically, they argue that some alternative form of regulation would be more efficient than zoning because of lower transaction costs.⁵⁶ The direct governmental administrative costs of zoning are generally conceded to be relatively low.⁵⁷ The higher costs are shifted to developers, especially when the development requires approval for a variance, special use permit, amendment, or planned unit development.⁵⁸ Yet these transaction costs are only part of the total cost equation.

Though critics of zoning contend that zoning advocates focus only on the costs of the externalities they seek to prevent (ignoring the transaction costs added by the zoning system itself), the critics themselves may focus only on the transaction costs.⁵⁹ In particular, some critics would rely, in whole or in part, on private covenants to

⁵⁶ See, e.g., Ellickson, *Alternatives*, *supra* note 4, at 697-98 (finding that in addition to governmental costs of administering zoning, developers bear the costs of obtaining information, winning approval, developing strategies to cope with uncertainty and delays in allowing a development to go forward); Krasnowiecki, *supra* note 5, at 727-44 (contending that "short zoning" effectively allows local governments to regulate the timing and design of developments, adding to costs; furthermore, the relationship between nominal zoning regulations and actual bases of decision results in frequent litigation, adding further delays and costs); Kmiec, *supra* note 5, at 46-49 (arguing that zoning's inflexibility prevents experimentation with more efficient designs; process delays add to development costs; campaign contributions and bribes further inflate transaction costs).

⁵⁷ See Ellickson, *Alternatives*, *supra* note 4, at 697 (finding that the direct governmental administrative costs of zoning are relatively low); *but cf.* Ellickson, *Three Systems*, *supra* note 27, at 72-73 (arguing that governmental administrative costs of zoning are high and are growing as regulation becomes increasingly complex).

⁵⁸ Krasnowiecki argues that, as a result of "short zoning," such approvals are required for almost every development. Krasnowiecki, *supra* note 5, at 734. Fischel notes that most of these transaction costs are attributable to legal restrictions on the terms of trade. Developers cannot "buy" zoning rights through outright cash payments, but instead must arrange complex and circuitous barter agreements to remain within legally permissible boundaries. In addition, cumbersome public decision processes, which involve many parties with their own private agendas, make bargaining difficult. FISCHEL, *supra* note 5, at 131-35.

⁵⁹ *But see* Ellickson, *Alternatives*, *supra* note 4, at 694 ("The pertinent goal is minimization of the sum of nuisance, prevention, and administrative costs."). Like other critics, Ellickson argues that the "prevention" and "administrative costs" of zoning outweigh any reduction in "nuisance costs" (i.e., negative externalities prevented as a result of zoning). *Id.* at 693. *Cf.* Kmiec, *supra* note 5, at 46; Siegan, *supra* note 3, at 141. The evidence to support this assertion consists largely of anecdotes, hypotheticals, and arguments from theory, however.

perform some of the nuisance-avoidance functions of zoning.⁶⁰ As has been frequently noted, however, the transaction costs of getting all residents of an existing neighborhood to agree to restrictive covenants are prohibitively high.⁶¹ Thus, private covenants are likely to be effective only in previously undeveloped areas where a private developer can impose them as part of the subdivision of a large parcel.

Moreover, that alternative schemes of land-use regulation would result in lower transaction costs is both a controversial and unproven assertion. Ellickson, for example, proposes establishing "Nuisance Boards" empowered to declare certain land uses presumptive nuisances and to adjudicate nuisance claims.⁶² Other commentators have suggested that such a scheme might actually involve higher transaction costs.⁶³ To his credit, Ellickson himself acknowledges that the case supporting his proposal on the basis of transaction cost efficiency is a problematic one.⁶⁴

D. Zoning Produces Inefficient Land Use Allocation Decisions

In its purest form, an economic critique of zoning might argue that zoning (or any scheme of land use regulation) is inherently inefficient because it forces landowners to make land use allocation decisions other than those they would make in a free market. According to classical economic theory, free markets efficiently allocate economic resources, and neither legislative-type categorical regulations nor case-by-case decisions by bureaucratic regulators can make such decisions

⁶⁰. See Siegan, *supra* note 3, at 142; Ellickson, *Alternatives*, *supra* note 4, at 711-19 (urging expanded use of covenants as substitute for zoning).

⁶¹. Ellickson, *Alternatives*, *supra* note 4, at 718; Fischel, *supra* note 12, at 14. The result of this argument is that, while the transaction costs associated with zoning are real and visible for all to see, the transaction costs associated with private covenants are effectively hidden —the costs are so high (in the context of already-established neighborhoods) that the transaction never takes place. Thus, simply referencing the transaction costs of zoning is highly misleading.

⁶². Ellickson, *Alternatives*, *supra* note 4, at 762-66.

⁶³. See, e.g., Krasnowiecki, *supra* note 5, at 721-22 (arguing that Ellickson's proposed system of land use regulation would "in practice be even more costly and chaotic than zoning" because developers would not be able to predict *ex ante* the nuisance damages to which they would be subject). In addition, of course, a system dependent on case-by-case adjudications of damage awards is likely to produce wildly uneven outcomes, and entail enormous litigation costs. See FISCHEL, *supra* note 5, at 27. Nor would Ellickson's proposal to give adjudicatory jurisdiction to administrative Nuisance Boards necessarily reduce litigation costs, since due process principles would almost certainly require that administrative adjudications be subject to appeal. Ellickson, *Alternatives*, *supra* note 4, at 762 ("The major drawback of the nuisance approach is potentially excessive administrative costs.").

⁶⁴. Additionally, others such as Fischel find the empirical evidence inconclusive. Fischel, *supra* note 12, at 53 ("Abolition of zoning and related controls would create a demand for alternative controls, and it is not clear that the alternatives are less costly to administer or more efficient in their effects than zoning.").

as efficiently as the market. Thus, land use decisions made under a regulatory scheme inevitably result in inefficient distortions of the market.⁶⁵

The classic objection to such a pure *laissez-faire* approach is that it does not take into account externalities or spillovers from land uses. Internalizing the externalities requires some kind of regulatory scheme.⁶⁶ The *laissez-faire* response argues that land-use conflicts involve highly localized and concentrated externalities. Therefore, only a few neighboring properties are significantly affected.⁶⁷ No major obstacles exist to Coasean bargaining⁶⁸ to resolve that conflict efficiently. In addition, the existing common law of nuisance offers landowners remedies for negative "spillovers" from noxious uses of neighboring properties. This common law should produce efficient results where neighbors recover damages for such negative spillovers.⁶⁹

Surprisingly, no major critic of zoning makes this *laissez-faire* argument in quite so pure a form. Perhaps Bernard Siegan comes the closest.⁷⁰ At some points Siegan seems to argue that the Houston

⁶⁵. See, e.g., Siegan, *supra* note 3, at 142-43 (contending that free market land use decisions tend to follow rational and efficient patterns, which are distorted by zoning).

⁶⁶. Even renowned critics of zoning, such as Ellickson, recognize that land uses may produce powerful negative externalities impinging on neighboring property owners. See, e.g., Ellickson, *Alternatives*, *supra* note 4 (arguing for a variety of regulatory schemes to control negative externalities of noxious land uses).

⁶⁷. See John P. Creche et al., *Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J.L. & ECON. 79, 95 (1967); but cf. Mingche M. Li & H. James Brown, *Micro-Neighborhood Externalities and Hedonic Housing Prices*, 56 LAND ECON. 125 (1980) (finding that neighborhood externalities are important factors in determining housing values).

⁶⁸. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (positing that in a world free of transaction costs parties will bargain to efficient outcomes regardless of initial assignments of entitlements). Here, it is suggested that with few parties affected, transaction costs are low, and parties will be more likely to bargain to efficient outcomes.

⁶⁹. Ellickson, *Alternatives*, *supra* note 4, at 722-48. Ellickson, however, regards traditional nuisance law as doubly inadequate to this task. First, traditional nuisance law does not give a remedy for all negative externalities. Second, the traditional nuisance remedy, an injunction against the noxious use, provides too much protection for the injured property owner. Ellickson would reformulate nuisance law to allow nuisance remedies in broader circumstances and, at the same time, to limit nuisance remedies to a) damages or b) a novel Calabresian remedy in which the party making the nuisance claim pays the tortfeasor to stop the noxious activity. *Id.* at 738-48; cf. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1116 (1972) (traditional tort remedies are incomplete insofar as they omit an efficiency-maximizing remedy, that of having the tort victim compensate the tortfeasor to refrain from the tort-producing activity).

Ellickson also recognizes, however, that some negative externalities of land uses are sufficiently widespread and diffuse that bargaining, backed up by bi-polar nuisance litigation, may not work effectively to prevent or compensate injuries. Therefore, Ellickson would add a regulatory scheme consisting of fines, mandatory prohibitions or both. Ellickson, *supra*, at 772-79.

⁷⁰. Siegan, *supra* note 3, at 142-43.

market creates a "rational" pattern of land use allocation decisions that results in relatively few, highly localized, and concentrated negative externalities.⁷¹ The implication is that no regulatory scheme is needed.⁷² Similarly, Andrew Cappel suggests that prior to the adoption of New Haven's first zoning ordinance, the market produced a rational pattern of land use allocation that at least equaled, and possibly surpassed, the efficiency of land use allocation under zoning.⁷³ Elsewhere, both Siegan and Cappel seem to argue that zoning merely replicates the allocation of land uses that the market would make—but at a higher cost due to higher transaction costs.⁷⁴

Most of zoning's critics recognize the need to control negative externalities through some regulatory scheme, but do not make the pure *laissez-faire* "market distortions" argument.⁷⁵ Since any regulatory scheme is arguably subject to the *laissez-faire* market distortions objection, their objections to zoning principally turn on

⁷¹ *Id.*

⁷² *Id.* Siegan's point is that generally the negative externalities of land use allocations are no worse in unzoned Houston than in zoned cities; but overall, Houston's land use is more efficient because, for example, under a free market more apartment buildings are built, which keeps rental housing prices lower.

⁷³ Cappel, *supra* note 5. Cappel suggests that zoning in New Haven was a "solution" to a non-existent problem because the market was already allocating land use efficiently and rationally with few significant negative externalities. But Cappel recognizes that land use patterns in New Haven had been affected by previous, less stringent land use regulations, such as building set-back requirements.

⁷⁴ See Siegan, *supra* note 3, at 142 ("[I]n general, zoning in the major cities, which contain diverse life styles, has responded and accommodated to most consumer demands. This has not occurred usually in the more homogeneous suburbs."); Cappel, *supra* note 5, at 636 (arguing that with minor exceptions, New Haven's zoning ordinance "simply confirmed existing patterns of development" and therefore "may well have brought zoning to [a community] where it was not really needed."). Note, however, that *most* early zoning ordinances, including New York's, did not attempt radical surgery on existing patterns of land use, but instead were seen as prophylactic. TOLL, *supra* note 9, at 186 (finding that despite claims that zoning was an instrument of "planning," New York's first zoning ordinance generally adopted status quo in land use); BASSETT, *supra* note 9, at 53 (finding that New York's ordinance was adopted in conformity with principle that "[z]oning should not ordinarily be used to force a change to a status not existing."); McMillen & McDonald, *supra* note 9, at 185-86 (arguing that Chicago's first zoning ordinance simply incorporated existing land use patterns). Given that Cappel's findings concerning New Haven fit a broader pattern applicable to even the largest cities, it is not clear what significance we should attach to Cappel's study.

⁷⁵ Cf. Ellickson, *Alternatives*, *supra* note 4 (arguing private covenants, expanded nuisance law, fines, and some mandatory prohibitions are necessary to control negative externalities); Krasnowiecki, *supra* note 5, at 753 (stating land use control "is dictated by some urgent social and political realities, many of which are not intrinsically bad," but proposing elimination of zoning in undeveloped areas in favor of explicit case-by-case permitting process); Kmiec, *supra* note 5, at 66-70 (recognizing need to regulate intensity of land use); FISCHER, *supra* note 5, at 163-73 (arguing some form of zoning or alternative land use regulation is necessary to protect local public goods); NELSON, *supra* note 5, *passim* (arguing some form of public control over land use is necessary, but should be more flexible and responsive to market forces than current forms of zoning).

equity and transactional efficiency arguments. Many critics suggest that zoning produces some distortions in land use decisions. For example, both Ellickson and William Fischel contend that restrictive suburban zoning and growth controls contribute to suburban sprawl (together with the related ills of transportation inefficiencies, air pollution, and loss of "agglomeration economies" for business) and inflated housing costs.⁷⁶

Jane Jacobs' classic critique of zoning⁷⁷ might be considered a sociological variant on the distortions argument. Jacobs argues that healthy, lively, innovative, and economically dynamic cities are founded upon diversity within their neighborhoods.⁷⁸ Zoning renders cities sterile and uncreative, by stifling the diversity of land uses within neighborhoods and generally segregating land uses by type. Thus, to Jacobs, zoning distorts the natural allocation of land use within cities in a way that is detrimental not only to economic innovation and growth but also to the flowering of culture and the natural pleasures of city life.

IV. ZONING: ANOTHER LOOK

A. Zoning To Protect The Neighborhood Commons

This article contends that both supporters and critics of zoning have misconceived the nature of zoning. Zoning is only partially about protecting individual property owners against the effects of "spillovers" or negative externalities that adversely affect the market values of their property.⁷⁹ Specifically, zoning protects a homeowner's consumer surplus in a home and in the surrounding

⁷⁶. Ellickson, *Alternatives*, *supra* note 4, at 695; Ellickson, *Three Systems*, *supra* note 27, at 72; Fischel, *supra* note 12, at 56-57. An agglomeration economy refers to the production and consumption advantages gained by having people in close proximity, such as in a large city. For further discussion on agglomeration economies, see FISCHEL, *supra* note 5, at 252-54.

⁷⁷. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961).

⁷⁸. *Id.*

⁷⁹. *Cf.* NELSON, *supra* note 5, at 7-10 (describing zoning's origins in nuisance law). According to Nelson, the legal justification offered for zoning, from the earliest zoning ordinances to contemporary schemes, relies on an analogy to nuisance law in order to invoke the police power to protect public health, safety, and welfare. Traditional nuisance jurisprudence was widely regarded as unsatisfactory, however, because case-by-case and highly context-dependent adjudication made it impossible to predict with any certainty what would and what would not be considered a nuisance; *but cf.* BASSETT, *supra* note 9, at 79, 93-95 ("Zoning is not based to any extent on the doctrine of nuisance."). According to Bassett, although some uses may be both nuisances and violative of zoning regulations, nuisance and zoning serve different purposes: one, the protection of private property rights, and the other a public purpose of protecting "the health, safety, morals, comfort, convenience, and general welfare of the whole community."

neighborhood, that lies above the market value of that home. This consumer surplus has essentially been overlooked and is fundamental to an understanding of zoning.

Arguably, protecting against the effect of negative externalities on market values can be achieved more efficiently by providing property owners with what Guido Calabresi and A. Douglas Melamed call "liability rule" protection.⁸⁰ Armed with such protection, neighbors would either bargain with would-be developers to achieve efficient outcomes or bring suit to recover their losses.⁸¹ On its face, however, zoning appears to function as what Calabresi and Melamed call an "inalienability rule," categorically prohibiting any development proscribed by the zoning ordinance.⁸² As numerous commentators have suggested the reality is much different. In fact, zoning functions more like a "property rule," allowing neighborhood residents (or their governmental representatives) to enjoin a proposed development that does not conform to current zoning, while leaving room for the would-be developer to "buy" the entitlement to build through design concessions, campaign contributions, and the like.⁸³ But property rule

⁸⁰. Calabresi & Melamed, *supra* note 69, at 1106-10. A "liability rule" protects an entitlement by awarding damages for breach. A "property rule" protects an entitlement by awarding injunctive relief. An "inalienability rule" is an absolute, categorical prohibition, usually enforced by criminal sanctions. Calabresi and Melamed point out that where damages are easy to determine, liability rules typically lead to economically efficient outcomes since if the nuisance-producing activity is more valuable than the harm it causes, the nuisance producer will simply compensate the injured party.

⁸¹. This is the core of Ellickson's proposed alternative to zoning, although Ellickson also proposes expanded use of private covenants and, in limited circumstances, mandatory rules backed by fines. Ellickson, *Alternatives*, *supra* note 4, *passim*.

⁸². Calabresi & Melamed, *supra* note 69, at 1111.

⁸³. See Krasnowiecki, *supra* note 5, at 734; Ellickson, *Alternatives*, *supra* note 4, at 709-10. The analogy to a "property rule" in the Calabresi-Melamed sense is imperfect. In a true property rule, each individual property owner would have a right to enjoin a proposed development that harmed his property. Consequently, to buy the right to develop, the developer would need to reach an agreement with and compensate every adversely affected property owner. This obviously gives each property owner enormous bargaining leverage, and encourages rent-seeking holdouts; moreover, in most situations the costs of identifying all affected property owners and bargaining with each of them would be prohibitively high. In zoning, by contrast, only the municipality has a property rule-type right to enjoin which it theoretically exercises on behalf of local residents. Calabresi and Melamed recognize that such hybrid rules—in effect, property rules in which the right to enjoin is held by a collective entity (here, the municipality)—may be desirable in situations where large numbers of parties are involved and the costs of individualized injury valuations are high, as with zoning. Calabresi & Melamed, *supra* note 69, at 1122 n.62.

The municipality could, obviously, hold out until it has captured all the economic rent that is available. But the municipality's incentives are mixed; the decision is subject to competing political pressures, including pressures from neighborhood residents (who may favor, oppose, or be apathetic about the development), fiscal considerations (which may weigh for or against the development), and pressures from political leaders who may or may not be influenced by political contributions (or outright bribes) from the developer or other interests (such as

protection in this kind of situation theoretically allows property owners (or the municipality acting as their proxy) to hold out for more than the damages they would actually suffer (in the form of reduced market values for their property) from the proposed development.⁸⁴

Yet the notion that property owners should merely be protected by a liability rule compensating them for the loss in market values suffered at the hands of a new development does not square with our intuitions about the entire package of values zoning seeks to protect. Consider this example, which is a true story from Houston. In a quiet residential neighborhood, a new neighbor moves in and promptly opens a loud marble-grinding business in his backyard. This forces neighbors to contemplate either expensive (and probably only partly effective) sound-proofing of their homes, or moving out. As a long-time neighborhood resident put it: "He's cutting and grinding and polishing all day. It's nuts."⁸⁵ Most people would feel the long-time resident has a legitimate grievance, and that merely compensating him for any decreased market value of his home is not an adequate remedy. Clearly one's home is more than a monetary investment.

Zoning in urban neighborhoods is not merely a system for protecting the market values of individual properties,⁸⁶ but rather is a device to protect neighborhood residents' interests in their entirety, including consumer surplus in their homes, as well as their interests in what this article calls the neighborhood commons.⁸⁷

building trades unions, which may favor the development). See FISCHEL, *supra* note 5, at 189, 212-13. Furthermore, bargaining between the municipality and the developer is constrained by legal restrictions on the terms of trade, and by procedural rules that require participation by large numbers of people, further complicating bargaining. *Id.* at 74-78, 131-35.

⁸⁴ See Ellickson, *Growth Controls*, *supra* note 23, at 424-40. Fischel notes that quite the opposite problem arises if the municipality's public officials deal on their own behalf, rather than that of the homeowners they represent: they will sell out too cheaply. Not only will the wrong party (the politician rather than the homeowners) be compensated, but from a pure economic efficiency standpoint, the politician is likely to settle for a bribe (or campaign contribution) that is less than the collective cost to the homeowners. FISCHEL, *supra* note 5, at 72.

⁸⁵ Lianne Hart, *Houston May Break New Ground on Land Use; Voters Fed Up With a Wide-Open Mix of Businesses and Homes Could Soon Approve the City's First Zoning Law*, L.A. TIMES, Oct. 25, 1993, at A5.

⁸⁶ Indeed, zoning does not necessarily protect market values. Some proposed developments that would be prohibited under zoning schemes may have positive spillover effects on market values. For example, New York's Fifth Avenue was a prime residential street before it was developed for retail and other commercial uses. Had a zoning scheme been in place, possibly those retail and other commercial developments would have been prohibited, even though they undoubtedly increased the values of properties in the path of commercial development.

⁸⁷ See *infra* note 91; cf. NELSON, *supra* note 5, at 11 (arguing that the practical underlying purpose of zoning is to "protect neighborhoods from uses that threatened in some way to reduce the quality of the neighborhood environment"); Steele, *supra* note 7, at 711 (contending that zoning protects not just objectively measurable values but "subjective values" such as what changes are destructive and communities are viable); Ellickson, *Alternatives*, *supra* note 4, at

Although typically not addressed in the literature, which generally discusses only objectively measurable market values, the notion of consumer surplus in an individual parcel of property is quite straightforward.⁸⁸ The concepts of "home" in general, and "home ownership" in particular, are areas where consumer surplus are particularly important.⁸⁹ What distinguishes a mere "house" from a "home" is the consumer surplus we have in the latter. "Home" provides continuity, security, familiarity, and comfort for our most intimate and satisfying life experiences. The intimately bound ideas of home and family strike deep emotional chords in our culture. Since

735-36 (recognizing the concept of consumer surplus, consisting of "experience in using this particular house and sentimental memories connected to it," and proposing that nuisance damage awards include a "consumer surplus bonus," calculated as a percentage of market value damages, to compensate for lost consumer surplus).

⁸⁸ Cf. FISCHER, *supra* note 5, at 106 (discounting notion that consumer surplus in homes should be recognized, "People may get consumer's surplus from their clothes or automobiles, but arguments that either good should be allocated by anything but the market are heard less frequently."); *but cf.* Ellickson, *Alternatives*, *supra* note 4, at 711 (recognizing homeowner's consumer surplus in his "non-fungible" individual property, and proposing that nuisance damage awards include "consumer surplus bonus"). Ellickson recognizes that consumer surplus in a home is likely to increase over time, as "experience" and "memories" grow richer. Ultimately, however, his proposed accommodation of consumer surplus —adding a modest "consumer surplus bonus" to nuisance damages awards —trivializes the concept. Consumer surplus is not necessarily proportional to market value; nor will every instance of lost consumer surplus coincide with a loss of market value sufficient to reach the threshold of substantial harm justifying a money damages award in Ellickson's scheme. We also should not be quick to accept Ellickson's characterization of homeowners with high levels of consumer surplus as "hypersensitive" and not entitled to protection.

⁸⁹ Cf. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 362 (1986) (suggesting that conventional economic arguments against rent control do not consider that "very high subjective welfare almost always . . . inheres in being able to maintain the same residence."). Radin ultimately rejects this argument from consumer surplus as a basis for her defense of rent control. Instead she argues that one's home falls into a special category of property that is "bound up with one's personhood" insofar as its continuity is tied up with our sense of our own continuity and personal identity, and therefore is normatively deserving of greater protection than "property that is held merely instrumentally or for investment and exchange." *Id.* I believe Radin articulates a powerful intuition in describing one's home as being "bound up with one's personhood"; in my view, however, this is precisely what explains why consumer surplus is so strong with respect to one's home, and there is no need to rely on separate metaphysical categories of "personal" (in Radin's sense) as opposed to "fungible" property.

Dennis Coyle notes an interesting convergence of Radin's social constructivist argument with libertarian arguments for protecting private property as a bulwark of individual liberty. Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 839 (1993) (describing importance of private property in protecting "preferred rights" like free expression, privacy, and liberty interests generally). See also Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1353 (1993) ("[L]and remains a particularly potent safeguard of individual liberty. Like no other resource, land can provide a physical haven to which a beleaguered individual can retreat."). I contend that this "physical haven" to which one retreats is, typically and paradigmatically, residential property, and more specifically one's *home*. To the extent homeowners value these liberty interests, it further contributes to their consumer surplus in their homes.

most people feel that these values cannot be reduced to dollars, people tend to be especially sensitive when the use and enjoyment of the home is threatened.⁹⁰ In part, this reflects the importance of a homeowner's financial stake, which typically represents a substantial part of that homeowner's net worth. If the only concern were to protect financial investments, however, monetary compensation for any loss of market value would be acceptable. Part of zoning's appeal lies in the fact that it allows homeowners to protect *all* the value we place in a home, including the consumer surplus that lies above and beyond the market price of the home.

The failure of zoning's critics to account for the importance of "home" to the homeowner suggests that their critiques are based on an incomplete cost-accounting. But the notion of individuals' consumer surplus in their homes, by itself, is not sufficient to explain or justify zoning. An adequate account of zoning must also deal with the *collective* values zoning seeks to protect. Zoning is a device that protects a neighborhood from encroachments by land uses inconsistent with its character, regardless of the positive or negative effects of a proposed development on the market values of individual properties.

Neighborhoods are not just made up of individual parcels, but include collective resources comprising a neighborhood commons,⁹¹ and the property rights of an urban neighborhood dweller typically

⁹⁰. Additionally, psychological studies have demonstrated that people consistently place a higher subjective value on property they already own than on property they do not own. FISCHER, *supra* note 5, at 136. We might surmise that this psychological effect, which appears even with low-value and easily replaced property, may be magnified in the case of non-fungible and highly valued property, such as a home.

⁹¹. A commons is a resource used collectively by the members of a community. See Ralph Townsend & James A. Wilson, *An Economic View of the Tragedy of the Commons*, in THE QUESTION OF THE COMMONS 311 (Bonnie J. McKay & James M. Acheson eds., 1987) (distinguishing "common property" used collectively by members of a well-defined community, from an "open access regime" in which anyone may use the resource). Examples of commons (or open access regimes) include common pastures, fisheries, public parks, streets, and the atmosphere.

We typically think of a commons as consisting of some particular tangible resource. What this article describes as the neighborhood commons, by contrast, includes intangible elements (e.g., human institutions such as churches, schools, and clubs) and mixed tangible/intangible elements (e.g., public accommodations). In addition, rather than constituting a single, clearly-defined resource, the neighborhood commons as described is multidimensional, consisting of a web of sometimes-overlapping and sometimes-unrelated resources that may be used in different combinations or not used at all by members of the neighborhood community, and some parts of which are "open-access" in that they may be used by non-residents as well. Thus, some may wish to contest the choice of the term commons. Nonetheless, even if we should decide that the proper use of the term commons should be reserved for a narrower category of isolable tangible resources, I believe it is still instructive to look at the neighborhood as a commons in a *metaphorical* sense as a set of local tangible and intangible resources in which neighborhood residents share a stake.

consist both in specified rights in an individual dwelling and inchoate rights in a neighborhood commons. This commons consists of open-access (but use-restricted) 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.

It further includes privately-owned "quasi-commons" to which the public generally is granted access, but with privately-imposed restrictions as to use, cost, and duration. These generally include restaurants, nightspots, theaters, groceries, and retail establishments.⁹² It will include (risking the appearance of an oxymoron) "private commons," like churches, temples, private schools, political organizations, clubs, and fraternal and civic organizations. These are essentially private associations, but are characterized by some substantial degree of open access to members of the community.⁹³ Finally, the neighborhood commons will include other intangible qualities such as neighborhood ambiance, aesthetics, the physical environment (including air quality and noise), and relative degrees of anonymity or neighborliness.

These features together make up the "character" of a neighborhood. They are what give the neighborhood its distinctive flavor. A purchaser⁹⁴ of residential property in an urban neighborhood buys not only a particular parcel of real estate, but also a share in the neighborhood commons. Typically, differences in the neighborhood commons may be as crucial to a decision to purchase as differences in individual parcels.⁹⁵

To some extent, differences in the neighborhood commons will be reflected in the market values of individual parcels.⁹⁶ If, for example, other things being equal, neighborhood A has better public schools and more desirable parks than neighborhood B, property in

⁹². Some retail establishments have more of a "commons" character than others. A restaurant or tavern, for example, holds itself out to public use and enjoyment in a rather different way than a dry cleaner or a jeweler.

⁹³. These may or may not be associated with particular parcels of real property.

⁹⁴. By "purchasers," I mean to include renters as well as property owners. The positive and negative values of the neighborhood commons will be reflected in market rents in much the same way they are reflected in home values. Moreover, renters are likely to make rental decisions taking neighborhood considerations into account, in much the same way that homeowners make their decisions to purchase. The difference, of course, is that a rental decision usually does not reflect the same level of long-term commitment, and therefore long-term expectations, that accompany the purchase of a home.

⁹⁵. See Li & Brown, *supra* note 67 (arguing that neighborhood "amenities" are significant factors in market value of residential real estate).

⁹⁶. *Id.*

neighborhood A will have a higher market value than similar property in neighborhood B. But because different people value different features in a neighborhood, not all such neighborhood differences will be reflected in property values.

For many people, a high level of consumer surplus may attach to particular features of a neighborhood commons.⁹⁷ I may be particularly attached to my church, for example, or to a particular local club or political organization, or to a particular spot in a local park where I am accustomed to walk at sunset. These values are highly subjective and may not be widely shared by people who have never lived in the neighborhood, so they may add little or nothing to the market value of the property. Moreover, these resources are for the most part non-fungible and therefore irreplaceable. To me, enjoying the use of these resources is precisely what it means to live in my neighborhood. In addition to protecting the market value of my home and my consumer surplus in that particular piece of real estate, I will naturally want to protect those collective resources of my neighborhood that I care about most, whether they are reflected in the market value of my property or are part of my consumer surplus.⁹⁸ These values can be almost priceless, especially for long-term neighborhood residents. Like one's home, one's neighborhood may be centrally bound up in one's definition of self and sense of his or her place in the world.

Apart from consumer surplus, even those neighborhood features that are capitalized in market value come in different mixes from neighborhood to neighborhood. I may be more concerned about parks and less concerned about public transportation, and you vice-versa. While better parks and better public transportation may both make positive contributions to market values, I may prefer a neighborhood with good parks and mediocre public transportation, while you prefer a neighborhood with good public transportation and mediocre parks. Properties in the two neighborhoods may be similarly priced, but you and I will place entirely different values on the characteristics unique to each neighborhood.

⁹⁷. As with a homeowner's consumer surplus in an individual home, we might expect that a neighborhood resident's consumer surplus in a neighborhood will increase over time. I take it as axiomatic that those features of a neighborhood that attract new residents will be reflected in the market values of homes in the neighborhood. But consumer surplus accumulates over time, as the convenient butcher shop becomes "my butcher"; the church becomes "our church" and so on.

⁹⁸. Cf. Ellickson, *Growth Controls*, *supra* note 23, at 416 (finding that if the homeowners' subjective value of the house is reduced due to rapid growth, the loss of consumer surplus is "a true welfare loss, albeit one not reflected in market prices.").

Some neighborhood differences are simply inconsistent. For example, I might prefer a quiet, neighborly, low-density neighborhood of single-family homes, with access to parks and good neighborhood schools; you might prefer the faster pace, excitement and anonymity of a high-rise condominium in a high-density neighborhood featuring interesting restaurants, bistros, music venues, and trendy boutiques. Yet my house and your condo may have identical market values because some people are willing to pay the same price for my house as others are willing to pay for your condominium. In this example, the individual properties are themselves not interchangeable, but additional subjective value attaches to the features of the neighborhood that we each find desirable.

However, some of the same neighborhood features that add value to your property in your neighborhood might detract value from my property in my neighborhood. A hot new jazz club, for example, might be a welcome addition in your lively, trendy neighborhood, but would be a nuisance in my quiet neighborhood. To some extent, the spillover effects on your individual property are different; noise, traffic congestion, and heavy pedestrian traffic are presumably of less concern to you.

This example illustrates that *some* land uses are incompatible with the neighborhood commons that current property owners have come to rely on. It further illustrates that negative externalities are contextual. A land use that would have severe negative externalities in my neighborhood may be an amenity in your neighborhood.⁹⁹

It is not always the case, however, that inconsistent uses will lower market values. Suppose my quiet single-family neighborhood is located within a few blocks of some successful high-rise developments. Absent some system of land-use control, a developer might acquire the previously single-family parcels adjacent to mine, and proceed to put up more high-rises. The value of my *house* may go

⁹⁹ This is a problem for Ellickson's proposal to create standard metropolitan-wide categories of presumptive nuisances. See Ellickson, *Alternatives*, *supra* note 4, at 762-63 (metropolitan-wide nuisance board would "publish regulations stating with considerable specificity which land activities are considered unneighborly by that metropolitan population at that time.") (emphasis added). Thus, as I understand it, under Ellickson's scheme, the hot new jazz club would either be an unneighborly land use, or it wouldn't, regardless of neighborhood context. Ellickson tries to address this with an additional "substantial harm" requirement, *id.* at 766-67, under which few high-rise neighbors of the "unneighborly" jazz club would be able to show sufficient harm to recover nuisance damages. Yet Ellickson's scheme seems to create a great deal of perpetual uncertainty for owners of jazz clubs if jazz clubs are declared "unneighborly," and inadequate protection for residents of quiet neighborhoods if jazz clubs are *not* declared "unneighborly." Under most zoning schemes, by contrast, neighborhood context counts; the hot new jazz club would probably be prohibited in my quiet residential neighborhood, and probably allowed in your trendy high-density neighborhood.

down because of spillover effects from the new high-rise, but the value of my *land* may increase, as my property becomes attractive as a potential site for additional high-rise developments.¹⁰⁰ Under a market value based system, I would be entitled to no relief since my property is worth exactly what it was before. Yet under these circumstances many homeowners would feel aggrieved by this development. In part this is because the direct spillovers (e.g., noise and aesthetics) would interfere with the use and enjoyment of my home. To recoup that loss by selling my home would subject me to the additional cost and inconvenience of moving.¹⁰¹ More importantly, however, my loss of consumer surplus in this particular home would go uncompensated.¹⁰²

Additionally, my neighbors and I may be equally concerned about the effect of the new high-rise development on the neighborhood. The coming of the first high-rise means, at least initially, more intensive uses of the neighborhood commons (e.g., streets, sidewalks, on-street parking, public transportation facilities, etc.) which means that more people are competing for diminishing shares of fixed resources (e.g., on-street parking). Again, since land prices may rise, the result may be that I suffer no net financial loss.¹⁰³ But what I suffer now (in addition to my uncompensated loss of consumer surplus in my own home) is a loss of consumer surplus in my interest in the neighborhood commons. In short, the neighborhood is taking the first step toward

¹⁰⁰. Cf. Siegan, *supra* note 3, at 86-88 (describing how, in the absence of land use restrictions, market values of homes along busy thoroughfares and in areas where demand for apartments is high will increase, even though the desirability of these sites for single-family homes will decline). Siegan cites this phenomenon as an argument *against* zoning. In his view, it undercuts the argument that zoning is necessary to preserve market values of residential property. *Id.* at 91. This article contends that it shows precisely why an analysis of zoning based only on market values is deeply flawed. Furthermore, it demonstrates why nuisance law, pegged to loss of market value, is not an adequate substitute for zoning.

¹⁰¹. These additional losses are also objectively measurable in dollars, however, and theoretically could be compensated under an appropriately designed liability rule scheme.

¹⁰². Note that even under Ellickson's nuisance scheme, which recognizes consumer surplus, I would get no relief, since *ex hypothesi* I have suffered no loss of market value.

¹⁰³. A number of zoning's critics have suggested that, due to "agglomeration economies" of commercial and industrial developments, an unregulated land market will produce a high degree of separation of commercial and industrial from residential uses. See Siegan, *supra* note 3, at 111; Ellickson, *Alternatives, supra* note 4, at 693-94. But this "invisible hand" of the real estate market is no comfort to homeowners faced with the incursion of an unwelcome type of development in their neighborhood. They will reasonably suspect that this first development merely signals that market conditions are ripe for similar developments. Thus, homeowners will typically argue not about the direct spillovers from *this particular development*; instead, they argue about what will follow if a precedent is set for allowing *this kind of development*.

As Calabresi recognizes, the mere fear of such disruptive changes "will be a significant factor for most people and a crucial one for some." GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 221 (1970).

becoming something other than the neighborhood where I chose to live. Although difficult to place in quantitative terms, the loss is great.

What's wrong with this? Well, nothing, I suppose, unless you were that homeowner who had been quite happy with your home and neighborhood but now find them to be no longer what they were. Of course you can move, but it may not be easy (and in some crucial respects is impossible) to replicate those features of your old home and neighborhood that made your life what it was.

Zoning is aimed at preventing, or at least limiting, precisely these kinds of 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.¹⁰⁴ These include changes in density, as well as shifts from residential to commercial or industrial uses.¹⁰⁵

Furthermore, inconsistent uses of neighborhood commons are not limited to residential neighborhoods. Seymour Toll argues that although advocates of New York's first zoning ordinance tried to justify it in terms of protecting property values and instituting comprehensive planning, the impetus to enact the ordinance came largely from the desire of Fifth Avenue retailers to protect themselves against incursions by garment manufacturers.¹⁰⁶ To be successful the retailers needed a particular kind of neighborhood commons, one with many high-quality retail establishments in close proximity to one another, with a sufficient critical mass to attract shoppers. This area also needed to be free from competing uses that would detract from the ambiance their affluent customers preferred.¹⁰⁷ Now it may well be

¹⁰⁴. Cf. Steele, *supra* note 7, at 711 (arguing that zoning seeks to protect viable residential communities against "overly rapid," "traumatic" and "destructive" change, as defined by subjective values of neighborhood residents); NELSON, *supra* note 5, at 11 ("[zoning] protect[s] neighborhoods from uses that threaten[] in some way to reduce the quality of the neighborhood environment"); *id.* at 14 ("[zoning] maintain[s] the character of the best residential districts . . . by severely restricting the scope for new development or changes in the intensity and type of use of existing property . . .").

¹⁰⁵. Cf. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Hardin's classic article describes one kind of tragedy of the commons—a tragedy of overuse, because no individual has adequate incentives to refrain from adding marginally more intensive uses. I contend that an equally serious problem with a commons is inconsistent uses. For example, in the conquest of the American West, white settlers wishing to use open rangeland for cattle grazing did battle with Native Americans seeking to preserve the use of that rangeland for their nomadic hunter-gatherer lifestyle based on the buffalo. In the next phase, cattlemen fought sheepmen over inconsistent uses of open rangelands, which presumably could have sustained substantial numbers of sheep or cattle, but not both. Zoning, I submit, is a scheme to limit both the intensity of use (i.e., density) and simultaneously to prevent inconsistent uses of the neighborhood commons.

¹⁰⁶ TOLL, *supra* note 9, at 110, 158-61.

¹⁰⁷. Incursions by garment manufacturing loft buildings interfered in several ways: they directly displaced retail establishments, threatening to reduce the density of retailing necessary

that the encroaching garment manufacturers reduced the market value of retail properties along Fifth Avenue, but equally plausible is that the demand for loft manufacturing space drove up the price of properties along Fifth Avenue. In either case the market value of property along Fifth Avenue was not really the central concern. Instead, the impetus for New York's original zoning ordinance came from a desire to maintain Fifth Avenue as a particular kind of neighborhood commons—one in which it was possible for carriage-trade retailers to conduct their business.¹⁰⁸

This insight is implicit in the writing of Eric Steele, who concludes that zoning is only partially concerned with "aggregate welfare economics."¹⁰⁹ In a mature urban setting, Steele argues, zoning instead serves principally to "conserve viable [residential] communities."¹¹⁰ While Steele is correct that zoning does function to preserve viable residential communities, this may actually *contribute to aggregate welfare* by allowing neighborhood residents to preserve their consumer surplus in their neighborhoods and in their individual homes.¹¹¹

If zoning serves to protect not just market values but the consumer surplus of neighborhood residents in their homes and neighborhoods,

to sustain a critical mass. At the same time, the noise and traffic congestion caused by transportation of materials and finished goods, combined with the heavy pedestrian traffic of labor-intensive manufacturing, reduced the attractiveness of Fifth Avenue as a shopping district.

¹⁰⁸. In the Fifth Avenue example, of course, the retailers' loss is not a loss of consumer surplus, but a loss of business profits, objectively measurable in dollars. Those profits, in turn, were predicated upon the retailers' location in a particular kind of commons, amidst a critical mass of high-quality retailing along a great thoroughfare in close proximity to one of the world's greatest concentrations of disposable wealth and income. Such an advantageous retailing situation may not be easily replicated elsewhere, even in Manhattan. Presumably, the right kind of liability rule could compensate these retailers for their losses. But note that their loss is not strictly a loss of market real estate values; while the reduced value of Fifth Avenue sites for retailing would be capitalized in lower real estate prices, that loss may have been offset, in whole or in part, by demand for those sites for manufacturing.

¹⁰⁹. Steele, *supra* note 7, at 710.

¹¹⁰. *Id.*; see also Radin, *supra* note 89, at 368 (rent control may be justified if it serves to preserve continuity of existing communities, "even at some expense to fungible property interests of others."). Both Steele and Radin would say that "community preservation" is an independent value that in some instances should trump "aggregate welfare economics."

¹¹¹. Ultimately, I would not rest a defense of zoning upon the controversial and unverifiable claim that these consumer surpluses are always (or even usually) sufficiently large to make zoning an efficient welfare-maximizing institution. I would, however, suggest that the case *against* zoning on efficiency grounds is also not clear-cut once we take consumer surplus into account. Given that we are necessarily uncertain about which course of action will maximize aggregate welfare, it is reasonable to choose a course, zoning, that would simultaneously protect the stability of existing neighborhoods and likely maximize the welfare of current neighborhood residents. Thus this argument differs from that of Steele and Radin, *supra* notes 109-110; community preservation may not trump welfare maximization, but it can act as a tie-breaker when (as here) we are simply uncertain as to the course of action that maximizes welfare.

then why isn't a liability rule a more efficient substitute? The answer is obvious: consumer surplus is notoriously difficult to measure.¹¹² Faced with that problem, homeowners' consumer surplus might simply be ignored, and they would only be compensated for losses of market value.

In that case, homeowners are forced to bear the full costs of lost consumer surplus, whatever that cost may be.¹¹³ If consumer surpluses in our homes and neighborhoods are small, this may make little difference; but the converse is also true. First, where the surpluses are high, current neighborhood residents would be made to bear a substantial part of the cost of new developments. Second, many unzoned neighborhoods would become less stable. Homeowners, fearing potential risks, would have reduced incentives to invest in their homes and neighborhoods and greater incentives to move to areas where they perceive the risks of unwelcome development to be lower.¹¹⁴

Another possibility would be to rely upon a liability rule, while also adding some fixed amount or percentage to the damages award to account for lost consumer surplus.¹¹⁵ Fixed damage schedules are likely to be highly inaccurate, however. Some homeowners would

¹¹². CALABRESI, *supra* note 103 at 97-100, 203-05, 221.

¹¹³. *Id.* at 204.

¹¹⁴. *See id.* at 215-16, 221. Some early advocates of zoning appear to have recognized this core insight. For example, Robert Whitten wrote in 1921:

As soon as the confidence of the home owner in the maintenance of the character of the neighborhood is broken down with the coming of the store or apartment, his civic pride and his economic interest in the permanent welfare of the section declines. As the home owner is replaced by the renting class, there is a further decline of civic interest and the neighborhood that once took a live and intelligent interest in all matters affecting its welfare becomes absolutely dead in so far as its civic and social life is concerned. Zoning is absolutely essential to preserve the morale of the neighborhood.

Robert H. Whitten, *Zoning and Living Conditions*, 13 PROC. NAT'L CONF. ON CITY PLANNING 22, 25 (1921), *quoted in* Kosman, *supra* note 35, at 82. While there is an obvious and unfortunate class bias to Whitten's argument, it does reflect a sensitivity to neighborhood dynamics. It is often true that homeowners, who typically have a longer-term commitment to a particular neighborhood, make greater investments of time and energy in the "civic and social life" of the neighborhood. When they lose confidence in the neighborhood's long-term viability as the kind of place they want to live, they are likely to stop making those investments.

¹¹⁵. This is part of Ellickson's proposed approach. *See supra* note 88.

then be severely undercompensated for their loss of consumer surplus, and others dramatically overcompensated.¹¹⁶

Calabresi suggests that in such circumstances where it is simply too costly (or impossible) to calculate the subjective value of a loss, "specific deterrence" (either a property rule or an inalienability rule) may be justified.¹¹⁷ Since the true costs are unascertainable there is no way to decide how to allocate them fairly or efficiently. In effect, we must decide whether to err on the side of developers (by adopting a rule that ignores or discounts homeowners' consumer surplus) or on the side of homeowners (by adopting a rule that protects their consumer surplus). If, as I have argued, consumer surplus in one's home and neighborhood is likely to be quite substantial, a "specific deterrence" rule may be the preferable approach, on grounds both of fairness and efficiency.¹¹⁸

But what kind of "specific deterrence" approach should be adopted? In addressing this question we are once again confronted with zoning's ambiguity: while zoning appears facially similar to what Calabresi and Melamed call an inalienability rule it appears to function in practice like something more akin to a property rule. The municipality (theoretically acting on behalf of neighborhood residents) may stop a proposed development inconsistent with the zoning scheme, and the developer may "buy" the development rights through various kinds of concessions.¹¹⁹

Some critics have suggested that zoning ought to be refashioned into something more explicitly resembling a property rule in the Calabresian sense.¹²⁰ These critics propose that zoning ought to be

¹¹⁶ CALABRESI, *supra* note 103, at 221.

¹¹⁷ *Id.* at 97-100, 203-05.

¹¹⁸ Note, however, that in eminent domain situations we generally do not recognize consumer surplus. CALABRESI, *supra* note 103, at 203-04. And when consumer surplus is taken into account for purposes of eminent domain valuations, it is usually with an add-on of some relatively small fixed percentage of market value. Arguably, this might reflect a societal calculation that consumer surplus in residential property is generally quite small; but on the other hand, it may merely reflect parsimonious governmental management. Perhaps more instructive is the fact that proposals for eminent domain takings of viable residential neighborhoods (for example, for urban expressways or airport expansions) typically produce enormous political resistance and organized community opposition. This, I take it, is *prima facie* evidence that at least some neighborhood residents' consumer surplus in their homes and neighborhoods must be quite large in these situations, because absent consumer surplus they would be content to receive fair market value. Cf. FISCHER, *supra* note 5, at 135 (arguing more generally that because there are heavy start-up costs to organizing, it will not be worthwhile to do so unless there is a sufficiently large economic interest at stake).

¹¹⁹ See *supra* note 83 and accompanying text.

¹²⁰ NELSON, *supra* note 5, at 208-14. See also FISCHER, *supra* note 5, at 189-92 (communities should have alienable property rule protection for "normal" and "subnormal" land use regulations, but only liability rule protection for "supernormal" regulations). Fischer's concern is that full property rule protection would give communities an incentive to establish

"freely alienable," that is, that neighborhood residents should be allowed to sell zoning rights for cash, in-kind compensation, or whatever equitable trade-off is deemed appropriate.¹²¹ In addition to the high administrative costs of such a system,¹²² it is unsound on other grounds. Compensating individuals in cash for their willingness to sacrifice community resources may be utility-maximizing in the short run. In the long run it reinforces norms of individual gain at the expense of shared community resources, which ultimately may be destructive of the sense of community that zoning aims to protect. More fundamentally, such a system is deeply contrary to our most cherished democratic and legal traditions.¹²³ For these reasons, such a system seems to be inadvisable.

This article has argued that, although ultimately we can never be certain, zoning may be welfare-maximizing.¹²⁴ Since we must decide amidst uncertainty, we should choose the course that appears most likely to simultaneously protect the welfare of current neighborhood residents and reinforce community values, resources and institutions (which themselves contribute to the welfare of current and future neighborhood residents). We should also recognize that the limits of our knowledge mean that our initial choice of zoning regulations may sometimes be wrong. Sometimes a neighborhood may be willing to accept a proposed development not permitted by the regulations in

excessively strict ("supernormal") land use regulations in order to extract economic rents from developers. In addition, unlike Nelson, Fischel would continue traditional legal limitations on the terms of trade so that developers would not be allowed to offer cash in exchange for zoning rights, but instead could offer only local public goods. *Id.* at 70-71.

¹²¹. *Id.*

¹²². One way to administer such a system would be to hold an election for every proposed zoning change. See Ellickson, *Alternatives*, *supra* note 4, at 709-10. Not only are elections costly to conduct, but the burden on the citizenry of absorbing so much information would be excessive; turnout would be low, and because outcomes may be easily manipulated by payments to a small number of voters, the results would not be fairly representative. Such a system might also taint other well-established electoral processes by establishing norms of vote-buying and low voter participation.

Alternatively, Nelson proposes placing collective property rights in private neighborhood associations which would have power to "sell" zoning rights on behalf of the neighborhood. NELSON, *supra* note 5, at 206-13. However, the administrative costs of establishing, maintaining and policing these associations may be prohibitively high, and there is little reason to believe they would be less prone to corruption and self-dealing than established political processes.

¹²³. Cf. FISCHEL, *supra* note 5, at 70-71, 163 (allowing free sale or auction of zoning rights would contradict "police power" and "public purpose" rationales which are essential to legal justification of zoning and our traditional understanding of the bases of local government legitimacy; instead, "[z]oning should be used only to provide local public goods."). Fischel recognizes that zoning also entails private benefits to current neighborhood residents. This, he says, does not delegitimize zoning, so long as it can also be justified in terms of pure public goods, but "these private transfers ought not to be counted as part of the community benefits in evaluating the benefits and costs." *Id.* at 163.

¹²⁴. *Supra* notes 109-118 and accompanying text.

exchange for other benefits. By limiting the terms of that bargain to community benefits, however, we retain community-reinforcing norms.¹²⁵ Zoning thus can be seen as a peculiar kind of property rule—one in which developers can in limited ways "buy" the rights to develop contrary to the zoning entitlement, but only by compensating the community for its loss.

In this idealized model zoning gives current neighborhood residents a kind of "right of prior appropriation" over the neighborhood commons. This right trumps the right of other property owners to use their land in ways that interfere with, or are inconsistent with, current uses of the neighborhood commons. Developments may proceed as long as they are either consistent with current uses of the neighborhood commons, or in ways the neighborhood has agreed in advance (through the political process) to allow. This protects the expectations of neighborhood residents. Moreover, neighborhood residents have the right to change course and to agree to modify the rules to permit developments facially inconsistent with the presumptive prohibitions. But the only compensation that may be offered or accepted for such exceptions is compensation that benefits the community as a whole, i.e., that preserves a healthy and vibrant commons.

B. Normative Implications

This analysis has several further normative implications. First, zoning should not be understood solely as a means of protecting property market values. Instead, it protects values that may be only partially captured in market values. Second, it suggests that zoning should not be understood principally as a tool of rational/scientific urban planning. Indeed, the visions of planning bureaucrats may sometimes stand in sharp contrast to the values of neighborhood residents, who seek to protect the neighborhood in which they have chosen to live. This analysis further suggests that rather than seeking to impose a rigid uniformity over all residential neighborhoods, zoning should seek to accommodate diversity among neighborhoods.

Not all neighborhoods are alike, nor should they be. The whole point of urban land use zoning is to allow people to live in the kind of neighborhood they want. Imposed uniformity defeats that goal. Some residential neighborhoods, for example, may be more tolerant of

¹²⁵ This is broadly consistent with the precepts of "civic republicanism," which argues that our political system is designed to promote and crucially depends on public participation in defense of public values so that when these public values conflict with private welfare maximization, the public values ought to trump.

certain kinds of, or higher concentrations of, commercial activities than others.¹²⁶ Thus a zoning scheme should be designed with a sensitivity toward the neighborhood context, taking into account the particular needs, interests, and desires of the residents of particular neighborhoods.¹²⁷

A zoning scheme also should not attempt to freeze a neighborhood in time. Despite the apparent conservatism inherent in the notion of "protecting" a neighborhood against inconsistent changes in land uses, this does not imply that all changes are unwelcome.¹²⁸ For instance, a new restaurant may be entirely consistent with neighborhood residents' vision of the kind of neighborhood in which they have chosen to live, while a new liquor store may be inconsistent with that vision.¹²⁹ A properly designed zoning scheme should attempt to predict, from consultation with current neighborhood residents, what kinds of changes would be welcome in a particular neighborhood and accommodate those changes while presumptively (though not conclusively) ruling out other changes.

Such a prediction is bound to be at best only an estimation for several reasons. First, there are obvious epistemic limitations. No clear, objective measures of the preferences of neighborhood residents exist, and in the absence of detailed information about particular, concrete choices, residents themselves are likely to be unable to articulate their preferences. Perhaps the best evidence of these pref-

¹²⁶. Cf. JACOBS, *supra* note 77 (arguing that zoning is destructive of a healthy diversity within neighborhoods); NELSON, *supra* note 5, at 18 (positing that many neighborhoods would tolerate or even welcome a greater diversity of uses, especially small-scale commercial uses, than is permitted by overly-rigid categorical zoning regulations).

¹²⁷. A few cities have begun to recognize the need for sensitivity to particular neighborhood needs and interests. See Jerry Ackerman, *A Reshaping of the Future Boston; Zoning Code Revision Near*, BOSTON GLOBE, June 1, 1991, at 41 (showing that the Boston Redevelopment Authority is in the process of developing a new neighborhood-sensitive zoning code "replacing the traditional broad-brush classes of residential, industrial and commercial land use with carefully-tailored mandates" specific to each neighborhood).

¹²⁸. Steele suggests that zoning is principally aimed at controlling the rate of change in land use. Steele, *supra* note 7, at 711 ("[C]ontemporary urban zoning functions as a dynamic, participatory mechanism to protect existing viable residential communities from the destructive and traumatic impact of overly rapid changes in land use."). My analysis suggests that it is the character, as much as the rate, of change that is at issue.

¹²⁹. Cf. NELSON, *supra* note 5, at 18 (finding that although a neighborhood deli is an example of a kind of business that is frequently welcomed in residential neighborhoods, no provision is made in inflexible zoning ordinances to accommodate such changes). A problem with current zoning schemes, from this perspective, is that they may not be sufficiently fine-grained to serve the neighborhood's interests. Both a restaurant and a liquor store may fall within the same broad "commercial" classification, so that zoning to allow one would necessarily allow the other. Given a Hobson's choice—either your zoning scheme must allow *both* the restaurant and the liquor store, or it can allow *neither*—neighborhood residents may well opt for the scheme that allows *neither*.

erences is what currently exists in the neighborhood, which is why it seems eminently sensible that zoning should have started by simply incorporating the status quo of land uses into regulations.¹³⁰

Second, neighborhood values can change over time. This can be the result of such factors as the change of individual interests and points of view, the fluctuation in attractiveness of particular kinds of residences and businesses due to market conditions, and the influx of new residents, as well as the departure of old residents. Third, at some point a proposed development of an unanticipated kind may come along that is seen by neighborhood residents as consistent with the vision they had of their neighborhood all along, although the use falls outside what is permitted under the current zoning scheme.¹³¹ Fourth, it is possible that a proposed development prohibited under the existing zoning scheme could be so beneficial to the neighborhood that it would cause neighborhood residents to change their vision of what their neighborhood should be. Current neighborhood residents should not be rigidly bound by the preferences of past generations.¹³²

This underscores the need for flexibility in zoning.¹³³ Zoning should accommodate changes over time, through mechanisms that encourage individual variances and amendments when supported by neighborhood residents, as well as periodic comprehensive updates of the zoning scheme to reflect larger-scale shifts in neighborhood values.

C. Zoning And Bargaining

¹³⁰. See *supra* note 74.

¹³¹. For example, while the zoning in a residential neighborhood may categorically prohibit commercial uses, residents may be inclined to allow certain *kinds* of commercial uses, such as small scale businesses geared toward serving a local clientele. An ice cream parlor or small cafe may actually add to the neighborhood's charm and ambiance in ways consistent with residents' preferences.

¹³². This points to a problem with the Ellickson-Siegan solution of restrictive covenants. Since covenants run with the land, they explicitly bind future generations of owners, unless there is unanimous agreement to amend or abolish them. In that respect they are inherently less flexible than zoning, which in most jurisdictions can be changed at any time by ordinary legislative action. See FISCHER, *supra* note 5, at 27-28.

¹³³. Cf. Krasnowiecki, *supra* note 5, at 725-27 (arguing that the principal defect of big-city zoning is its inflexibility, which cities try to cure through variances, special use permits, planned unit developments and other devices). *But cf.* Kmiec, *supra* note 5, at 52 (finding that the frequency with which zoning variances and amendments are granted is a defect of zoning, and that actual performance is inconsistent with stated goals of zoning, and "a sub rosa system of individualized land use standards is unsatisfactory because it almost certainly leads to unfair and inefficient allocation practices.").

In part, my proposal is to legitimize flexibility in zoning by formalizing bargaining and bringing it out into the open. I acknowledge, however, that this goal stands in tension with the goal of providing neighborhood stability by protecting the expectations of neighborhood residents. See *supra* note 103 and accompanying text.

A zoning scheme, because it is inherently rule-like, may appear fundamentally incompatible with this kind of fine-grained contextual sensitivity to neighborhood preferences and flexible accommodation of changes over time. Rather than conceiving of zoning as consisting of legislative-type rules, we should understand zoning as establishing mere presumptions or baseline rules that precipitate and provide a convenient substantive starting point for negotiations between developers and representatives of neighborhood interests.¹³⁴

In a Coasean world, free of transaction costs, such bargaining would take place even in the absence of a zoning scheme.¹³⁵ But in our world such bargaining is unlikely because the transaction costs, and more particularly the problems of coordination among dozens or hundreds of neighborhood residents and property owners who would be affected by a proposed development, are simply too great. Zoning, however, can actually facilitate such bargaining and reduce information costs (an important part of transaction costs) in several ways.

Foremost, zoning establishes brightline rules under which some categories of land uses are automatically permitted. As a practical matter, bargaining is therefore unlikely to be necessary in these cases. The Coase theorem, of course, tells us that in the absence of transaction costs, bargaining to efficient outcomes will take place whatever the initial assignment of property entitlements. The transaction costs involved in organizing neighbors to oppose a proposed development that meets current zoning requirements, however, are sufficiently high that in most cases the developer can proceed with reasonable confidence. In these cases, zoning acts as a positive short-hand signal of the community's likely acceptance of the proposed development.

¹³⁴. See Carol Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837 (1983); Rose, *supra* note 16, at 1168-70 (arguing that zoning can be seen not as legislation or adjudication, but as negotiation); Steele, *supra* note 7, at 740 (contrasting "rule enforcement" conception of zoning with "participatory" model aimed at protecting community values through mediation and negotiation with developers); Ellickson, *Alternatives*, *supra* note 4, at 709-10 ("To the credit of the institution, many zoning decisions today are largely shaped by private bargaining between a potential developer and his neighbors."). Ellickson sees such bargaining as a highly desirable process that reduces the likelihood of arbitrary action by public officials, who are in a worse position than neighborhood residents to calculate the "nuisance costs" of proposed developments. However, Ellickson argues that prohibitively high administrative costs make a fully participatory model of zoning impractical.

¹³⁵. Note that in Coasean world without transaction costs, bargaining would take not only market values but consumer surplus into account. Thus, if the market value of a proposed new development's detrimental effect on my property was \$100, but I subjectively valued it at \$150, then I would either pay \$150 to prevent that development, or accept \$150 in compensation to permit it.

Secondly, zoning establishes categories of proposed land uses which are presumptively prohibited, signaling to the developer that the proposed development must win approval of the municipality, acting as the neighborhood's representative, in order to proceed.¹³⁶ The developer will then bargain for such approval (so long as the developer expects the costs of such bargaining, including both transaction costs and the costs of any additional concessions likely to be required to win approval, will be less than the benefits to the developer of the proposed development).¹³⁷

Third, by empowering an identifiable party to grant variances, amendments, and/or wholesale revisions of the zoning scheme, the zoning ordinance identifies a single party with whom the developer can initiate bargaining without the need to identify and bargain individually with all potentially affected homeowners. This promotes efficiency of both time and money.

Fourth, by placing bargaining power directly in the hands of elected officials (or, alternatively, in the hands of persons accountable to elected officials) zoning creates political incentives for the neighborhood's representative to bargain on the neighborhood's behalf.¹³⁸

Finally, by initiating such bargaining, zoning opens channels for the transfer of information between the developer and the neighbor-

¹³⁶. Cf. Steele, *supra* note 7, at 749 (finding that zoning rules provide "a checklist of objective physical characteristics that crudely and indirectly" stand as proxies for community preferences and values, signaling potential conflicts to would-be developers).

¹³⁷. The developer will, of course, also take into account the opportunity costs; if she is likely to get a better deal elsewhere, she will go there. In that sense, a multiplicity of competing municipalities arguably contribute to efficiency in zoning by constraining the degree to which municipalities can engage in rent-seeking behavior. FISCHER, *supra* note 5, at 306. On the other hand, a multiplicity of competing zoning schemes will presumably add to the developer's cost of acquiring information.

¹³⁸. This, of course, is a highly contestable proposition. Many recent critiques of zoning rest, implicitly or explicitly, on public choice theories telling us that public officials do not genuinely represent (or at least are unlikely to represent) the "public interest," including the "neighborhood interest" I have identified here. These theories variously tell us that there is no public interest but only competing private interests. Alternatively, they tell us if there is a public interest, it will invariably (or at least frequently) lose out to private interests, because elected officials (or public officials generally) are venal and self-seeking, and because some private interests are more skillful, better-organized, and more highly-motivated (because their interests are acute and concentrated) than the public generally, whose interests are weak and diffuse. These critiques, of course, raise deep and troubling questions about whether it is possible to have rational, responsible, public-spirited democratic decision-making. If they are valid, their implications would go far beyond zoning. I shall not undertake to answer these theories here, except to say that I do not share their extreme skepticism as to the possibility of democratic decision-making. I do, however, share their recognition of symptoms of disorders in our democratic processes, see *supra* notes 51-55 and *infra* notes 154-162 and accompanying text; in my view the disease is too little democracy rather than too much, and the cure is more democratic decision-making, not less.

hood. The neighborhood acquires the necessary information about the proposed development needed to gauge whether the proposed development is consistent with neighborhood interests, while the developer learns more about the needs and interests of the neighborhood and can gauge whether, given the costs and benefits, it is sensible to proceed.¹³⁹ Thus, zoning can actually reduce transaction costs, by supplying and channeling information useful to both community residents and potential developers.¹⁴⁰

D. Zoning As A Participatory Democracy

The core functions of zoning can best be served if zoning is decentralized¹⁴¹ and participatory.¹⁴² A decentralized and participatory neighborhood zoning process, which gives neighborhood residents a direct voice in zoning decisions affecting their neighborhood, is critical for several reasons. First, neighborhood residents, not planners or elected officials, are in the best position to evaluate their own consumer surplus in their homes and in their neighborhoods. To the extent zoning is designed to protect these values, the most effective way to elicit that information is through

¹³⁹. Steele, *supra* note 7, at 749-50. Steele also suggests that zoning disputes themselves tend to foster community organizing, with lasting residual benefits of community solidarity. *Id.* at 747-48. Such community organization and solidarity can, in my view, do much to reinvigorate the democratic process, and make public officials more responsive to community concerns; thus, participatory zoning can help to create a positive cycle of democratic participation in decision-making.

¹⁴⁰. *Cf.* FISCHER, *supra* note 5, at 95-96 (arguing that community participation in zoning can play a useful role in deciding preferences for "pure public goods" because the costs of acquiring information as to individual preferences for these goods are prohibitively high).

¹⁴¹. *Cf.* Ellickson, *Growth Controls*, *supra* note 23, at 407-08 (arguing that zoning in big cities is likeliest to follow an "interest group" model of politics, and therefore be subject to "capture" by developer interests). Ellickson notes, however, that this tendency may be different in cities with ward representation, because ward-level politics may more closely approximate the "median voter" model that typically characterizes suburban politics.

The author's personal experience as an assistant to a Chicago alderman (representing a ward of approximately 60,000 people in a city of 3,000,000) partially confirms Ellickson's hypothesis. Chicago aldermen, who by custom have something close to exclusive power over zoning matters affecting only their own wards, are extremely sensitive to ward-level voter concerns, and on ward-level zoning matters the "median voter" model usually predominates. But at the same time, the influence of developers' money, especially on decisions involving large-scale developments (most often in the central business district), is undeniable. Even at the ward level, however, some Chicago aldermen have been known to "sell" zoning for campaign contributions (which, if made to ward-level political party organizations, need not be disclosed under Illinois law) or take outright bribes. My hypothesis is that this kind of graft is inversely related to the actual level of citizen participation in zoning matters in the ward. See *infra* notes 161-162 and accompanying text.

¹⁴². *Cf.* Steele, *supra* note 7, *passim* (describing Evanston zoning as participatory democracy).

residents' participation in neighborhood zoning decisions.¹⁴³ Second, decentralized and participatory zoning is essential to shift zoning decision-making out of the "interest group" paradigm—in which neighborhood residents are just one of a number of competing interest groups, and a weak and disorganized one at that—into something more akin to the "median voter" model in which decision-making more clearly reflects neighborhood preferences.¹⁴⁴ Third, as I shall argue below, citizen participation is essential to combat bribery and the corrupting influence of political contributions by developer interests.

It must be mentioned that there is also a cost associated with increased citizen participation. As Fischel points out, citizen participation involves large numbers of people in some level of the negotiation process, making bargaining cumbersome and difficult.¹⁴⁵ This is partly a function of sheer numbers; but it also reflects the fact that idiosyncratic and self-seeking voices ("cranks") will have an opportunity to disrupt the bargaining.¹⁴⁶ Thus, we may expect that, other things being equal, the transaction costs of bargaining will be higher with more citizen participation.

Perhaps the best that can be said in response is that if, as I have suggested, citizen participation is the only way to elicit the true preferences of neighborhood residents, there can be no such thing as truly "efficient" decision-making in local land-use decisions. From the point of view of a developer, a well-placed bribe or campaign contribution

¹⁴³ Cf. Fischel's claim that political participation in the "median voter" model is the most effective way to elicit information about preferences for local public goods. FISCHEL, *supra* note 5, at 95-96. I take this as roughly the equivalent of my claim that zoning should account for homeowners' interest in what I call the neighborhood commons. But in addition, participatory zoning will elicit information about homeowners' consumer surplus in their own homes, which I have argued is a relevant factor in cost-benefit calculations of development decisions, *supra* notes 85-90 and accompanying text.

¹⁴⁴ Of course, the realities of big-city politics may prevent a complete transition from "interest group" to "median voter" politics. Campaign contributions, jobs, municipality-wide fiscal pressures and other factors will continue to play some role in zoning decisions, unless (as seems unlikely) the entire zoning power is transferred to neighborhood residents. But the middle ground between interest group and median voter politics may not be such a bad one. Ellickson, for example, characterizes big-city interest group politics as excessively (and corruptly) pro-developer, and suburban median voter politics as excessively (and exclusionarily) anti-development. Ellickson, *Growth Controls*, *supra* note 23, at 407-08. See also FISCHEL, *supra* note 5, at 207-16 (distinguishing big-city interest group from suburban median voter politics, but with a more nuanced conception of both interest group and median voter politics). A middle position, balancing elements of both models, could arguably provide an appropriate voice to both neighborhood residents and competing interests (e.g., developers, workers and persons in the broader municipality who may have some stake in a proposed development or in the economic and fiscal condition of the city).

¹⁴⁵ FISCHEL, *supra* note 5, at 133-35.

¹⁴⁶ *Id.*

may appear to be a more efficient transaction than a lengthy and messy process of neighborhood hearings and complex public negotiations. Yet as Fischel points out, from a utility-maximizing standpoint such a solution is not likely to be efficient at all (and certainly not equitable) because it ignores the relevant preferences of neighborhood residents who will be affected by the development.¹⁴⁷ Thus, the high transaction costs of community participation appear to be the price to be paid to ensure that the interests of neighborhood residents are adequately taken into account.

Just how this decentralization and participation should be accomplished is a more difficult question. Elections are too costly and cumbersome a process.¹⁴⁸ While Nelson proposes turning the zoning power over to formally constituted neighborhood associations, this is probably too extreme a solution, in part because it too is costly and difficult to administer.¹⁴⁹ In addition, because it is difficult to sustain high levels of community participation in such formal structures, they are subject to capture by cranks.

To some extent this is an inherent feature of participatory politics.¹⁵⁰ But in my view a more appropriate balance can be achieved by leaving ultimate decision-making power in the hands of an official elected to represent the neighborhood.¹⁵¹ This official must then sort out the cranks from the truly representative voices. The existence of this type of official can create more opportunities for democratic participation through required public notice and neighborhood hearings,¹⁵² and through ongoing structures of community representation in neighborhood zoning negotiations and decision-making, albeit in an advisory capacity.¹⁵³

¹⁴⁷. *Id.* at 72.

¹⁴⁸. See Ellickson, *Alternatives*, *supra* note 4, at 709-10 (discussing neighborhood voting schemes and dismissing them as too costly); see also *supra* note 122.

¹⁴⁹. See *supra* note 122 for criticism of Nelson's proposal on grounds of administrative costs.

¹⁵⁰. Cf. FISCHEL, *supra* note 5, at 133-35 (arguing that median voter politics typically suffers from complexities added by participation of individuals with their own agendas).

¹⁵¹. My proposal thus fits most neatly with the ward system of representation, *supra* note 141. I do not have specific proposals applicable to cities where all officials are elected on a citywide basis.

¹⁵². These requirements have traditionally been part of zoning law, FISCHEL, *supra* note 5, at 33-34; but in big cities they are not always tailored to promote neighborhood participation. Hearings, for example, may be held downtown instead of in the neighborhoods; are not always well-publicized in the neighborhoods; and may be held during normal business hours, when many neighborhood residents are working.

¹⁵³. An example in Chicago's 49th Ward is the 49th Ward Community Zoning and Planning Board. The 49th Ward (which perhaps not coincidentally shares a boundary with Evanston, and is roughly comparable in total population and demographic diversity, though overall somewhat less affluent) has, like Evanston, a well-established tradition of participatory

E. Corruption And Favoritism In Zoning

The problems of corruption and favoritism, which were identified in Part III, must be addressed in any normative account of zoning. To some extent, these are problems associated with government generally,¹⁵⁴ and especially local government.¹⁵⁵ If local government does tend toward corruption, it may appear sensible at first glance to strip local government of the zoning power (and any other powers it

democracy and "reform" politics. The current Alderman and his immediate predecessor have attempted to institutionalize community participation in zoning decisions by establishing a Community Zoning and Planning Board, made up of representatives of a cross-section of community organizations, interests, and demographic stripes. The Zoning Board has no official decision-making power (and it is doubtful whether under Illinois law a local official or the municipality itself could delegate such power); but it actively researches, publicizes, informs business and community groups, and advises the Alderman on all neighborhood zoning matters. In addition, the Zoning Board together with the Alderman make great efforts to inform individual neighbors, hold informal neighborhood meetings, and insist on formal hearings in the neighborhood on zoning matters of concern to the community. And finally, the Zoning Board is not merely a passive vehicle, responding to zoning issues as they come up; it proactively reviews the ward's zoning on an ongoing basis, an activity that demands consultation with individual citizens and organized local interests.

Skeptics will point out that these measures are entirely at the pleasure of, and subject to manipulation by, the Alderman. But I submit that the establishment of the 49th Ward Zoning Board has created norms and expectations of community participation in zoning decisions at a very high level, so that in practice it would be very difficult for the Alderman or any successor to retreat from these measures, or to compromise their integrity, without serious political costs. Thus, I conclude that it is possible to create something close to the "average voter" model of citizen participation in neighborhood zoning in a big city with ward representation.

Whether it is possible to create mandatory structures and processes that re-create this level of community participation in all of Chicago's 50 wards is another matter.

¹⁵⁴. For reasons that are not entirely clear, there appear to be fewer widely publicized cases of bribery or corruption involving state and federal government officials than local officials. One explanation is that, being more visible and prominent, state and federal officials refrain from corrupt practices because they run a greater risk of being caught. An alternative explanation is that state and local officials, being less visible and further removed from the public spotlight, are in fact engaging in similar behavior but are less frequently exposed. Institutional culture and incentives could play a role—state and federal officials are frequently career civil servants, and typically better-compensated than local officials; this arguably breeds a culture of professionalism and discourages corruption. Political considerations may also be at play. Local corruption is often exposed by politically ambitious state and federal prosecutors who use the attendant publicity to advance their careers; but prosecutorial incentives may be weaker with regard to corruption at the state and federal levels.

¹⁵⁵. In Chicago alone, more than 400 public officials and employees, including 18 aldermen or former aldermen, have been convicted over the past 20 years for soliciting and taking bribes, extortion, or embezzlement of public funds in connection with zoning, building permits, business licenses, liquor licenses or law enforcement; fixing cases in both the civil and criminal justice systems; the awarding of government contracts and jobs; "ghost payroll" schemes; and fraudulently purchasing tax-delinquent property. Additional illegal activities by public officials and public employees have taken place in connection with voting irregularities, theft or misuse of government property, perjury, and tax evasion. Ben Joravsky, *By Chicago Standards, Rosty Looks Honest*, L.A. TIMES, Aug. 1, 1993, at M1; Draeger, *Supra* note 52; Matt O'Connor, *Roti Fixed Zoning, His Lawyer Concedes*, CHI. TRIB., Jan. 13, 1993, at 6. Chicago, of course, is not typical, either in the frequency or brazenness of local government corruption; but it does suggest the range of corrupt practices that may be found in local government.

can do without), especially if an alternative regulatory scheme can accomplish the same ends with a lower risk of corruption.¹⁵⁶ When corruption and favoritism crop up periodically in other areas of local government, the problem usually brings about a call for prosecution of the individual offenders, institutional reforms, and more effective policing, not abolition of the police department, the judiciary, the building code, or whatever institution may have committed the offense. Is zoning somehow different? The critics might suggest that corruption is so prevalent in zoning that the institution simply cannot be salvaged. Further, they contend that such large financial interests are at stake in zoning decisions that corruption is particularly tempting.¹⁵⁷

I submit that zoning, while a particularly important power of local government, is not so different from other powers and institutions of local government. We should be concerned about corruption and work to eradicate it. Our response to corruption in other areas, in the form of swift and tough prosecution of offenders, more effective policing, institutional safeguards, and requirements of openness in

¹⁵⁶. Apart from the question of whether alternative institutions can accomplish the same ends equally effectively, it is not immediately apparent why other public or quasi-public bodies like Ellickson's proposed community nuisance boards or Kmiec's density controllers should be any less prone to self-dealing and outright corruption than zoning officials—except, perhaps, because they would provide a fresh start, free from a historic culture of corruption. Nor is there any basis in empirical evidence or economic theory to believe that private institutions are inherently less prone to corruption than public institutions. See SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY 197-99*, 208 (1978) (corruption is equally likely to occur in private as well as public institutions, and for similar reasons; but private corruption is less likely to be prosecuted and to receive exposure in news media); see also, e.g., Ralph Blumenthal, *A Contractor Speaks Out on Agent-Payoff Scheme*, N.Y. TIMES, Mar. 10, 1994, at B3 (describing pervasive pattern in New York City of demands by private commercial and residential building managers for kickbacks from plumbing repair contractors).

¹⁵⁷. See Ellickson, *Alternatives*, *supra* note 4, at 701 ("Given the huge amounts at stake, it is not surprising that special influence problems have plagued zoning from its inception."). Of the 18 Chicago aldermen convicted of corrupt practices over the past 20 years, seven were convicted of bribery in connection with zoning, although most of those were also convicted of other felonies as well. Draeger, *supra* note 52. These numbers are astonishingly high, and are probably just the tip of the iceberg, since it is likely that not all bribe-takers are caught and convicted. Still, to keep the zoning question in perspective, this means that substantially more aldermen were convicted of crimes unrelated to zoning; and of the approximately 400 other public officials and employees convicted of corrupt practices during that same 20-year period, very few were convicted of crimes related to zoning. While these figures hardly inspire confidence in local government, they do suggest that zoning is far from unique in its susceptibility to corruption. Moreover, corruption crops up in equally spectacular forms whenever the economic stakes are high. See, e.g., Clifford Kraus, *Giuliani Sets New Policy to Spur Drug Arrests by Officers on Beats*, N.Y. TIMES, Apr. 7, 1994, at A1 (recounting "systemic corruption" in New York City police department in 1970s when local precincts had authority over gambling and drug-related arrests).

transactions, should apply here as well.¹⁵⁸ Zoning may also require special policing, for example, through a special state agency with broad investigatory powers, established solely to monitor and investigate zoning corruption cases.

Ultimately, as with other avenues of municipal corruption, what matters most is effective policing from the bottom up through effective participatory democracy. As Steele has documented, the Chicago suburb of Evanston, with its tradition of citizen participation, has not experienced graft and influence-peddling in the zoning process.¹⁵⁹ It would be a mistake to assume that this is purely a function of the size of the municipality or the result of suburban homogeneity. Other municipalities in the Chicago metropolitan area of the same size or even smaller are notoriously corrupt,¹⁶⁰ and Evanston is one of the most diverse communities in the metropolitan area.¹⁶¹ But on the whole, graft becomes impossible (or at least ineffective, and therefore not worthwhile for the developer) under the watchful eyes of the citizenry and its active involvement in the zoning process.¹⁶²

Ironically, just around the turn of the last century a great wave of Progressive Era reform swept over municipal politics offering centralization and professionalization of big-city government as the solution to parochialism and petty graft. But centralization came at the cost of removing citizens in the big cities from active involvement in the day-to-day workings of their municipal government, and removing public officials from the watchful eyes of the citizenry, thus increasingly subject to the influence of organized interests.¹⁶³ Today a

¹⁵⁸. See ROSE-ACKERMAN, *supra* note 156, at 199 (corruption results when monitoring of agents is inadequate; "a well-informed public is a critical check on corruption" in both public and private sectors).

¹⁵⁹. See *generally*, Steele, *supra* note 7, for a description of a non-corrupt, highly participatory zoning process in a medium sized, "mature" Chicago suburb.

¹⁶⁰. Cicero and Chicago Heights are the most notorious examples.

¹⁶¹. See Steele, *supra* note 7, at 717-37.

¹⁶². When citizens are actively involved in the zoning process, campaign contributions by developer interests may actually prove more damaging than helpful to politicians seeking reelection if full disclosure of such contributions is required. Politicians will thus have an incentive to avoid the appearance of being "bought."

This could bring an unintended side effect of driving developer-politician transactions underground so that they take the form of bribes. But once again I would contend that the most effective antidote to bribery is citizen participation. The only way voters will know that a politician has sold out community interests is if those community interests are fully aired through a vibrant participatory process. Once those interests and preferences are fully aired, politicians will have a more difficult time carrying out their part of the bargain with a developer, at least if they hope to be re-elected.

¹⁶³. See FISCHER, *supra* note 5, at 208 ("When both voters and politicians are ignorant of one another's preferences and positions, there is an opportunity for special-interest groups to try to influence both of them.").

new wave of reform is needed, at least in the processes of zoning but perhaps in other aspects of municipal government as well. This time, I suggest, the reform should aim at increasing citizen participation.

V. CONCLUSION

This article has argued that, by limiting their analyses of zoning costs and benefits to monetizable values, both defenders and critics of zoning have substantially missed the mark. While zoning does have significant effects on the market values of individual parcels, and larger-scale economic consequences as well, a complete cost accounting must also consider zoning's role in protecting crucial, non-monetizable values. These include each homeowner's surplus in his or her home, as well as neighborhood residents' interest in preserving the unique set of common neighborhood resources—the neighborhood commons—upon which they rely. Far from being trivial, or mere ancillary values, "home" and "neighborhood" are central components of our identities. Precisely because these values are notoriously insusceptible to objective valuation, we afford them property rule protection in the form of zoning laws.

Thus conceived as a means of protecting the legitimate interests of current neighborhood residents, zoning regulations should be flexible to change over time, sensitive to unique neighborhood concerns and contexts, and based upon a participatory process. Citizen participation both gives voice to the interests of current neighborhood residents and provides the most effective safeguard against corruption of the zoning process.