LAND USE REGULATION AND GOOD INTENTIONS

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This Essay surveys contemporary issues in American land use regulation. Its central claim is that, despite good intentions, regulations often have either been ineffective or exacerbated existing problems. The problems underlying regulation include contested understandings of private property rights, continual economic and social change, and a political process prone to ad hoc deal making. Together, they result in regulation that is conceptually incoherent and continually provisional.

The Essay briefly reviews how land use philosophy has changed from early nuisance prevention, through Progressive Era comprehensive planning, to modern views of regulation as transactional. It examines our regulatory takings framework for delineating between private property rights and legitimate government regulation. The Essay reviews such contentious issues as affordable housing. Finally, it asserts that, in the absence of a generally agreed upon understanding of land use goals, comprehensive grand bargains among factions and public-private partnerships would facilitate entrenchment and favoritism. The ensuing uncertainty and lack of housing opportunities in cities where workers would be most productive harms individual advancement and the national economy.

Keywords

Land-use planning, zoning, property rights, Progressive Era, affordable housing, fair housing, housing subsidies, eminent domain, regulatory takings, transferable development rights.

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I. INTRODUCTION

This Essay broadly considers contemporary issues in American land use regulation. Its central claim is that, despite good intentions, regulations often have either been ineffective or exacerbated existing problems. This state of affairs results from contested understandings regarding the meaning and importance of private property rights, economic and social dynamism, and a political process prone to producing general aspirational statements and ad hoc dealmaking. Together, they result in regulation that is conceptually incoherent and

continually provisional. This leads to uncertainty, which undermines financial and social investment in communities.

As an initial illustration, Americans desire to live in communities with great economic prosperity, fine natural and manmade amenities, and low housing prices. Alas, on this vale of tears any two of those desirable things are available, but not all three. A common response has been for various interest groups to declare the states of affairs that they hope to achieve, and sheath them in terms that others would seem to be churlish to oppose, such as "affordable housing."[1]

The Essay briefly reviews how land use philosophy has changed from early nuisance prevention, through Progressive Era comprehensive planning, to modern views of regulation as transactional. It also examines our legal framework for delineating the boundary between private property rights and legitimate government regulation. Finally, it asserts that, in the absence of a generally agreed upon understanding of land use goals, suggestions for comprehensive grand bargains among factions and public-private partnerships would facilitate entrenchment and favoritism.

II. PROPERTY IN AMERICA

The extent to which property should be regulated by the State is predicated upon whether "property" primarily serves as a shield to protect individual autonomy, for which the accumulation of property protects against dependence on government, as well as enhancing many nonpecuniary values.[2] From this perspective, property is a prepolitical right, which government does not create, but rather protects.[3]

In contrast, Progressive Property focuses on property as entailing responsibilities to society. Professor Gregory Alexander, thus, refers to "governance property" as a construct where fragmentary and coincident rights to possess, use, and transfer assets require the creation of norms to govern

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1. *See infra* Part IV for discussion of affordable housing issues.

2. *See, e.g.*, Donald J. Kochan, *The Symbiosis of Pride & Property* (Jan. 17, 2017) (*available at* https://ssrn.com/abstract=2891716) (noting that authentic pride is evolutionarily useful, and may manifest itself through property ownership).

3. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Right*s, 88 CORNELL L. REV. 1549, 1568 (2003). "Property is a 'natural'—inherent, prepolitical, and prelegal—right because its pursuit secures a wide range of natural goods [, such as] self-preservation, the preservation of one's family, and the wealth needed to practice other virtues that require some minimum of material support." *Id.*

relations among interest holders.[4] "The moral foundation of governance property is human flourishing. This pluralistic conception of human flourishing means that property serves multiple values and that these values are incommensurable."[5]

A. The Lockean Tradition and Property Rights

After the English Glorious Revolution of 1688, the "new understanding" was that "ultimate political authority derived not from the divine right of kings, but from the consent of the governed."[6] English and Scottish Enlightenment authors were closely associated with the Glorious Revolution, and the best known of these to eighteenth-century Americans was John Locke, whose *Second Treatise of Government* declaimed, "lives, liberties, and estates, which I call by the general name, property." [7]

"By the late eighteenth century, 'Lockean' ideas on government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition."[8] The prepolitical nature of property rights[9] was reflected in the Preamble of the Virginia Constitution, which was drafted by George Mason and adopted on June 12, 1776. It declared, "All men are born equally free and independent and have certain inherent and natural rights . . . among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[10] The right to private property was presupposed in the Fifth Amendment

4. Gregory S. Alexander, *Governance Property*, 160 U. PA L. REV. 1853, 1856 (2012).

5. *Id.* at 1876–77 (internal citations omitted) (citing as pluralistic values "personal autonomy, individual security, self-development or self-realization, social welfare, community and sharing, fairness, friendship, and love.").

6. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1431 (1987).

7. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT §123, at 204 (Peter Laslett ed., New York: New American Library 1965) (1690).

8. PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 87 (Vintage Books 1st ed. 1997).

9. *See generally*, Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL.U. L. REV. 367 (1991); *See also*, Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413 (2017) (focusing on the connection between human labor and flourishing).

10. PENNSYLVANIA GAZETTE, June 12, 1776, *as reprinted in* MAIER, *supra* note 8, at 126–27.

of the United States (U.S.) Constitution,[11] and memorably was described by Professor James Ely as the "guardian of every other right."[12]

B. Progressive Property and Societal Constraints

In contrast with the Framers' Lockean orientation, the noted historian Gordon Wood wrote that the revolutionary American form of Civic Republicanism "meant . . . more than eliminating a king and instituting an elective system of government; it meant setting forth moral and social goals as well. Republics required a particular sort of independent, egalitarian, and virtuous people . . . ."[13]

A contemporary manifestation of Civic Republicanism is progressive property,[14] particularly in its emphasis that property ownership entails owners' responsibility.[15] Professor Alexander emphasized that we should reject that property is a "black box" from which owners deal with outside non-owners and focus instead on the "internal life" of property; that is to say, the relationship among its stakeholders.[16]

Together with Professors Eduardo Peñalver, Joseph Singer, and Laura Underkuffler, Alexander issued a short manifesto entitled *A Statement of Progressive Property*,[17] which suggested, among other things, that property "implicates plural

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11. U.S. CONST. amend. V.

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

13. Robert W. Bennett, *Of Gnarled Pegs and Round Holes: Sunstein's Civic Republicanism and the American Constitution*, 11 CONST. COMMENTARY 395, 395 (1994) (reviewing CASS R. SUNSTEIN THE PARTIAL CONSTITUTION (1993)) (quoting Gordon S. Wood, *Republicanism, in* Leonard W. Levy, ed., ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 448, 449 (Supp I, MacMillan, 1992)).

14. *See*, *e.g.*, Gregory S. Alexander, *Property As Propriety*, 77 NEB. L. REV. 667 (1998).

> Attacking legally-created privileges as un-American was established as a common theme in political-legal tracts in the revolutionary era, and it continued to be prominent well into the nineteenth century, especially among Jacksonians. The Jacksonian interpretation of republicanism emphasized its democratic possibilities, in contrast with the Federalist-Whig interpretation, which stressed its belief in social hierarchy and political order.

Id. at 682.

15. *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 747–48 (2009).

16. Alexander, *supra* note 4, at 1854–55.

17. Gregory S. Alexander, et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

and incommensurable values," including individual wants and needs, environmental stewardship and civic responsibility, and human dignity.[18]

Professor Lee Anne Fennell has challenged what she termed the "fee simple obsolete," which "most plainly gets in the way" of better reconfiguration and coordination of property rights.[19] She asserted that reliance on the fee simple as the predominant ownership vehicle made sense when "temporal spillovers loom large, interdependence among parcels is low, most value is produced within the four corners of the property, and cross-boundary externalities come in forms that governance strategies can readily reach."[20] Now, however, the fee simple's "rootedness" and "endlessness" augur for new ways to reconfigure urban land.[21]

III. THE TRADITION AND LAW OF LAND USE PLANNING

A. Planning and Common Law Nuisance

Since its colonial beginnings "land use planning" has grown from modest regulations akin to protection from common law nuisance to expert plans attempting to fine-tune the use of individual parcels for the benefit of society.

A study of Los Angeles, for instance, noted that regulations began in 1573, when laws promulgated by Philip II of Spain, "included detailed instructions for the location of 'slaughter houses, fisheries, tanneries, and other businesses which produce filth.'"[22] In nineteenth-century America, the location of livery stables was an important urban concern.[23] In modern times, zoning regulation attenuates such concerns, but does not eliminate them.[24]

"Dirty industrial activities in the middle of residential communities and unsightly and aesthetically offensive developments such as tanneries and slaughterhouses

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18. *Id*. at 743.
19. Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1464 (2016).
20. *Id*. at 1457.
21. *Id*. at 1489–90.
22. James M. Anderson, et al., *Reducing Crime by Shaping the Built Environment with Zoning: An Empirical Study of Los Angeles*, 161 U. PA. L. REV. 699, 709–10 (2013) (internal citations omitted).
23. *E.g.*, *City of Chicago v. Stratton*, 44 N.E. 853 (Ill. 1896) (upholding ordinance requiring that neighbors consent to the siting of a livery stable in a residential block).
24. *See*, *e.g.*, OLIVER GILLHAM, THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE 16 (2002) ("If you invest in building a house, you don't know for sure that a tannery or a pulp mill won't get built next door someday.").

depressed the values of adjacent business and residential properties."[25] There are scholars who have emphasized that colonial experience included broader land use controls, most notably Professor John Hart.[26] Historical experience was the subject of an exchange in *Lucas v. South Carolina Coastal Council*[27] between Justice Antonin Scalia, who alluded to the apparently Lockean "historical compact recorded in the Takings Clause that has become part of our constitutional culture,"[28] and Justice Harry Blackmun, who countered that "[i]t is not clear from the Court's opinion where our 'historical compact' or 'citizens' understanding' comes from, but it does not appear to be history."[29]

Reflecting the owners' affirmative rights of use in common and natural law, Justice Scalia, writing for the Court in *Nollan v. California Coastal Commission*,[30] declared that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'government benefit.'"[31] In recently quoting this language in *Horne v. Department of Agriculture*,[32] the Court made clear that the Fifth Amendment's protection against uncompensated takings is as applicable to personal property as to real property.[33]

Public nuisance was closely associated with modern comprehensive land use regulation from the beginning. In the seminal case upholding zoning, *Village of Euclid v. Ambler Realty Co.*,[34] the Supreme Court noted that, "[i]n solving doubts, the maxim '*sic utere tuo ut alienum non laedas*,' which lies at the foundation of so much of the common l[a]w of

25. Barbara Clark, *An Expanded Role for the State in Regional Land Use Control*, 70 CAL. L. REV. 151, 177 n.14 (1982).

26. *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (asserting greater regulation than now generally assumed).

27. 505 U.S. 1003 (1992).

28. *Id.* at 1028.

29. *Id.* at 1055–56 (Blackmun, J., dissenting).

30. 483 U.S. 825 (1987).

31. *Id.* at 835 n.2.

32. 135 S. Ct. 2419 (2015).

33. *Id.* at 2430–31 (distinguishing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). In *Monsanto,* the mandatory disclosure of trade secrets was upheld, because the case involved "dangerous chemicals," whereas the raisins at issue in *Horne* were a "healthy snack." *Id.*

34. 272 U.S. 365 (1926).

nuisance, ordinarily will furnish a fairly helpful clew."[35] More recently, in *Lucas*,[36] the Court declared, with reference to "regulations that prohibit all economically beneficial use of land," that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[37] However, Justice Scalia's attempt in *Lucas* to devise a bright line rule was not successful, and, perhaps confounding his expectations, the principal role of the case has been to fortify municipalities' argument that stringent regulations are based on background principles.[38]

B. The Rise of Comprehensive Planning

While public land use planning in America has some earlier antecedents,[39] modern planning regulation began with New York City's comprehensive ordinance in 1916.[40] The Department of Commerce promulgated its model Standard Zoning Enabling Act (SZEA) in 1928.[41] The Act was extremely successful and serves as a basis for state enabling laws in all 50 states.[42] Section 3 of SZEA required that zoning ordinances be drafted "in accordance with a comprehensive plan."[43] In a landmark article,[44] Professor Charles Haar discussed that the "comprehensive plan" requirement appeared to be a "directive to put zoning on a base broader than and beyond itself . . . ."[45]

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35. *Id*. at 387 (stating the maxim "the use of one's property should be limited so as not to injure that of another").

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

37. *Id*. at 1029.

38. *See* Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005).

39. *See generally* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW (3d ed. 2013).

40. *Id*. at 41.

41. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT, S. Doc. No. 13-29 (1926) [hereinafter SZEA], https://planning-orguploadedmedia.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnabling Act1926.pdf.

42. *See* Gary D. Taylor & Mark A. Wyckoff, *Intergovernmental Zoning Conflicts Over Public Facilities Siting: A Model Framework for Standard State Acts*, 41 URB. LAW. 653, 683 (2009).

43. SZEA, *supra* note 41, § 3, at 6–7. Under §3 of the Standard Act, zoning was required to be "in accordance with a comprehensive plan."

44. Charles M. Haar, *In Accordance With a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955).

45. *Id*. at 1156.

Given that the comprehensive plan was the vehicle that associated the police power of the State with the details of local regulations, Haar subsequently referred to it as the "impermanent constitution" against which courts would measure disputed regulations.[46]

"A nuisance," Justice George Sutherland declared in *Euclid v. Ambler Realty Co*.,[47] "may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[48] Thus, zoning was, at least in large measure, an attempt to assign incompatible land uses to different geographical areas.

Professor Haar stressed that "by [the comprehensive plan's] requirement of information gathering and analysis, controls are based on facts, not haphazard surmises—hence their moral and consequent legal basis; by its comprehensiveness, diminished are the problems of discrimination, granting of special privileges, and the denial of equal protection of the laws."[49] Another important proponent of the importance of the comprehensive plan was Professor Daniel Mandelker, who detailed why and how it should be implemented.[50]

State courts have interpreted the comprehensive planning requirement in different ways. A few continue to state that the comprehensive plan is to be found in the zoning ordinances and maps; the trend has been that the existence of a separate plan is at least a factor in judicial deference to zoning regulations, and in a few states there is a mandate for a separate comprehensive plan.[51] All of this recently led Professor Mandelker to note that in recent decades courts have considered spot zoning cases using "nebulous rules applied on an erratic basis."[52] "Wealth transfer and capture by developer or neighbor interests can occur," he added, and multifactor tests generally have been "not helpful."[53] Reiterating his earlier

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46. Charles M. Haar, *The Master Plan: An Impermanent Constitution*, 20 L. & CONTEMP. PROBS. 353, 353, 365–66 (1955).

47. 272 U.S. 365 (1926).

48. *Id*. at 388.

49. Harr, *supra* note 46, at 365–66.

50. *See generally* Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976).

51. *See* Edward J. Sullivan & Jennifer Bragar, *Recent Developments in Comprehensive Planning*, 46 URB. LAW. 685, 687–97 (2014).

52. Daniel R. Mandelker, *Spot Zoning: New Ideas for an Old Problem* 48 URB. LAW. 737, 782–83 (2016).

53. *Id*. at 782.

view, Mandelker concluded: "Consistency with a comprehensive plan, as the only test for spot zoning, addresses these concerns."[54]

1. Expert Decision Makers in the Progressive Tradition

The rise of comprehensive zoning very much is part of the broader story of the Progressive Era in which professionalism came of age.[55] Professionalism "thrived in a time in which science and expertise occupied an exalted position in the collective imagination," and in which "government and society in general turned to the well-trained expert to help preserve fairness, justice, and progress in an increasingly complex industrial world."[56] Professor Michael Allen Wolf described zoning as a "quintessential Progressive concept," because it relied on experts to design and enforce regulations that would create a more pleasant environment that, in turn, would "foster healthy, responsible citizens[.]"[57]

Notably, Professor Bruce Ackerman wrote 40 years ago of "Scientific Policymakers" who would apply expert regulation in allocating rights in things among claimants,[58] as opposed to addressing the ownership of things from a more foundational and holistic perspective.[59] This was part and parcel of Ackerman's more general view of the Progressive Era, which applauded the "independent and expert administrative agency creatively regulating a complex social problem in the public interest."[60]

Ackerman's assertions might be viewed as a high-water mark of faith in expertise. The subsequent decline in the

54. *Id*. at 783.

55. *See* LEWIS MUMFORD, THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS, 484–85 (1961).

56. Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEG. ETHICS 649, 650 (2016).

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

58. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 11 (1977).

59. *See* Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 619–20 (2009).

60. *See* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR, OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT 1 (1981) ("The rise of environmental consciousness in the late 1960s coincided with the decline of an older dream the image of an independent and expert administrative agency creatively regulating a complex social problem in the public interest.").

concept of professionalism,[61] and distrust of authority, are reflected in the recent cultural awareness of the pervasiveness of "alternative facts" and the concept of a "post truth" society.[62]

A more immediately relevant problem is that planners themselves have lost their belief in long-term planning, and thus their work now focuses on the shorter-term.[63] The tendency to focus planning on "how a community might appear on a specific date far in the future" seemed to crest before 1980, when "virtually all planning professionals had come to recognize both the limits of rationality and the unpredictability of modern civilization. . . . [F]lexible, middle-range planning has come to replace long-range, end-state planning."[64] This seems sensible, given that "one thing that is certain about planning for the future is that the future is uncertain, whether because of unforeseen shifts in demographics, technological advancements, natural disasters, or other unpredictable events."[65] While this turn has made planning more flexible and pragmatic, it has reduced the stability that encourages development and lends doubt to regulatory decisions.[66]

Shorter time horizons do not necessarily change planners' normative perspectives. In 1963, one senior planner wrote that his colleagues regarded low-density development as "inherently evil," that they "assume[] that the city must have a high-density core," and that most "express a greater preference for row houses, garden apartments, and elevator apartments than for single-family houses."[67] Similarly, "[i]n the early 1990s, land use planners turned to the concept of 'smart growth' to help control the impacts of urban sprawl."[68]

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61. Roiphe, *supra* note 56, at 650 ("Professionalism was a casualty of the 1970s. It was lost in the shuffle as the culture shifted from one that emphasized the importance of the social and the value of a carefully coordinated national community to one that focused on the power of the individual and smaller more parochial groups.").

62. *See*, *e.g.*, S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 137–38 (2017). [However], "social scientists from a variety of fields, most notably political science and psychology, have long been interested in how and why individuals and institutions adopt behaviors or beliefs that are patently at odds with observable reality." *Id.*

63. ROBERT C. ELLICKSON, ET AL., LAND USE CONTROLS: CASES AND MATERIALS 69–70 (4th ed. 2013).

64. *Id.*

65. Richard K. Norton, *Who Decides, How, and Why? Planning for the Judicial Review of Local Legislative Zoning Decisions*, 43 URB. LAW. 1085, 1090 (2011)

66. *Id.*

67. William L.C. Wheaton, *Operations Research for Metropolitan Planning*, 29 J. AM. INST. PLANNERS 250, 254–55 (1963), http://dx.doi.org/10.1080/01944366308978074.

68. Francesca Ortiz, *Biodiversity, the City, and Sprawl*, 82 B.U. L. REV. 145, 177 (2002).

While the strong policy preferences of many planners might yield to a pragmatic, short-term application of planning principles, they might be susceptible to weariness, or even cynicism. Professor Carol Rose has noted:

> Land use issues might to some degree be regarded as specialized matters, but on closer examination their specialized quality evaporates. It is true that local governments are advised by planning commissions, but the commissioners are normally ordinary citizens with no special expertise. Planning commission advisory staffs are professionals, but even professional planners have come to see their tasks as more political than technical.[69]

2. Regulation Expands Beyond Nuisance-Like Activity

The Supreme Court's emphasis in *Euclid* was that zoning could be viewed as a prophylactic, such as for prevention of contagious disease, as opposed to literal nuisance regulation.[70] Many subsequent cases have gone further, however, and have used zoning to fine tune the municipal tax base,[71] or the socioeconomic composition of neighborhoods.[72]

Low-density land use often is pejoratively labeled as "sprawl," and higher-density uses often are labeled as "smart growth." Dean Janice Griffith encapsulated that view:

> Many people in the United States prefer living in a rural environment with low density. They will keep moving farther and farther out from the central city when further development engulfs their suburban

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69. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls As Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 868–69 (1983).

70. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–88 (1926). "[T]he law of nuisance[s] … may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies" as to "exclude[] from residential sections … structures *likely to* create nuisances." *Id.* (emphasis added).

71. *See, e.g.*, 99 Cents Stores Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1129–30 (C.D. Cal. 2001), dismissed by 60 F. App'x 123 (9th Cir. 2003) (finding pretextual condemnation to augment municipal tax revenue); Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1209 (C.D. Cal. 2002) (involving church parcel condemned for re-transfer to a big box store that would generate sales taxes).

72. *See, e.g.*, Chinese Staff and Workers Ass'n v. Bloomberg, 26 Misc. 3d 979, 980 (N.Y. Sup. Ct. 2009) (holding that the State Environmental Quality Review Act necessitated a "hard look at the socioeconomic impact" of a proposed luxury high-rise in a socioeconomically diverse neighborhood).

> residences. North Americans value independence and freedom from public regulation. Before they are willing to adopt more compact living, they must come to believe that the benefits of smart growth outweigh the detriments of sprawl. Greater density living will not be palatable until the harms caused by sprawl-congested highways, air pollution, diminished water quality, and loss of open space-are viewed as unsolvable without the use of more smart growth techniques. Thus, even if planners and lawyers draw up a perfect smart growth code, political pressures may prevent its adoption or compromise its administration once adopted.[73]

At the same time as he apparently condescended in opining "even the most unenlightened realize [that sprawl] needs rethinking," Robert Burchell nevertheless described the fruits of low-density development in what most Americans would regard as almost rhapsodic terms.[74]

IV. FROM TRADITIONAL PLANNING TO "ZONING FOR DOLLARS"

A. Is Planning "Social Engineering"?

For better or worse, the past century of American land use planning has been marked by "social engineering,"[75] a phrase often used as a pejorative connoting overly-intrusive or unnecessary regulation.[76] The results often are mixed. The Federal Housing Administration (FHA), for instance, has been "one of the most important U.S. housing policy institutions of

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73. Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019, 1024 (2001).

74. Robert W. Burchell, *The Evolution of the Sprawl Debate in the United States*, 5 HASTING W.N.W. J. ENVTL. L. & POL'Y 137, 159–60 (1999). "It provides safe and economically heterogeneous neighborhoods that are removed from the problems of the central city. In low-density, middle-class environments, life is lived with relative ease, and when residents wish to relocate, they typically leave in better financial condition-the result of housing appreciation." *Id.* at 160.

75. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1635 (2003). "*Euclid* is now understood, in one leading casebook's characterization, 'as a generous endorsement of social engineering in the name of public health, safety, and welfare.'" *Id.* (*citing* Vill. of Euclid v. Ambler Realty Co., 260 U.S. 393, 415 (1922) and *quoting* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1010 (5th ed. 2002)).

76. *See, e.g.*, Harry W. Richardson & Peter Gordon, *The Implications of the Breaking the Logjam Project for Smart Growth and Urban Land Use*, 17 N.Y.U. ENVTL. L.J. 529, 543 (2008) (describing as "stunning" the notion that changes in land use regulation can remedy the obesity problem).

the 20th and 21st centuries,"[77] although for much of its history it affirmatively furthered racial segregation.[78] Likewise, the Interstate Highway System was the major impetus to suburbanization and all it entails.[79]

Claims of social engineering have arisen recently as a result of the Department of Housing and Urban Development (HUD) promulgation in 2015 of its final rule on "Affirmatively Furthering Fair Housing," that establishes the predicate for much stricter federal enforcement of fair housing laws.[80] Two weeks earlier, the Supreme Court made it easier to establish violations of the Fair Housing Act[81] in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*.[82] At that time, Dr. Ben Carson, now Secretary of HUD, castigated the regulation as social engineering, asserting that "government-engineered attempts to legislate racial equality create consequences that often make matters worse. . . . [B]ased on the history of failed socialist experiments in this country, entrusting the government to get it right can prove downright dangerous."[83]

B. Markets and Land Regulation

In *The Problem of Social Cost*,[84] Ronald Coase demonstrated that in a world without transaction costs the initial assignment of property rights would not matter, since rights easily could be acquired and recombined by the person placing the highest value upon them.[85] His conclusion

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77. James H. Carr, *The Complex History of the Federal Housing Administration: Building Wealth, Promoting Segregation, and Rescuing the U.S. Housing Market and the Economy*, 34 BANKING & FIN. SERVS POL'Y REP. 10, 10 (Aug. 2015) (noting that the FHA issued the first government-guaranteed mortgages in the U.S., which were "a major contributor to both the post-World War II housing boom, particularly in the suburbs, and accelerated home ownership" (internal citations omitted)).

78. *See infra* notes 297–299 and accompanying text.

79. *See* ARTHUR C. NELSON & JAMES B. DUNCAN, GROWTH MANAGEMENT PRINCIPLES AND PRACTICES 2–5 (1995) (noting that the system opened huge areas of rural land to development).

80. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 92, 92, 570, 574, 576, and 903). *See also* Steven J. Eagle, *"Affordable Housing" as Metaphor*, 44 FORDHAM URB. L. J., 1, 27 (2017).

81. Civil Rights Act of 1968, 42 U.S.C. §§ 3601–06 (2012).

82. 135 S. Ct. 2507, 2518 (2015) (upholding the use of "disparate impact" as a test for determining if local housing regulations or actions violate the Fair Housing Act).

83. Ben S. Carson, *Experimenting With Failed Socialism Again*, WASH. TIMES, July 23, 2015, http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housingrules-try-to-accomplish-/ [https://perma.cc/KJ3C-49QT].

84. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

85. *See id*. at 2–8.

depended upon the crucial assumptions that property rights were fully specified, and also that the cost of determining the existing ownership of rights and negotiating, contracting for, and monitoring their assignment was zero.[86]

A key insight of *The Problem of Social Cost* was that untoward results often result from the propinquity of land uses that are separately desirable, but also incompatible, and that each might be seen as inflicting harm (negative externalities) upon the other.[87] Professor David Spence observed that, in this Coasean framework, the "most efficient solution to externality problems is not regulation but a compensation agreement produced by private bargaining among the affected parties."[88]

As noted earlier,[89] the judicial imprimatur for comprehensive zoning in *Euclid v. Ambler Realty Co*.[90] was, at least in large measure, an attempt to assign incompatible land uses to different geographical areas. However, zoning on a citywide scale is by its nature too coarse-grained to take into account preferable uses of individual parcels of land. Thus, Professor Robert Nelson argued that zoning should be treated as collective rights of residents of individual neighborhoods.[91] He,[92] and also Professor William Fischel,[93] advocated that private bargaining could more efficiently achieve goals embodied in zoning. In *City Unplanning*,[94] Professor David Schleicher observed that "[t]he idea that a government planner should decide the best uses for private real property may seem like an odd economic theory, but it has a basis in the economics of property law."[95] He restated Nelson and Fischel's basic proposition:

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86. *Id.* at 15. Coase was building an economic model, and realized that a world of zero transactions costs was fanciful. Indeed, in such a world reallocations of resources would take place instantaneously. RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 14–15 (1988).

87. Coase, *supra* note 84, at 2.

88. David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 413 n.187 (2014).

89. *See supra* note 47-48 and accompanying text.

90. 272 U.S. 365 (1926).

91. *See* Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 834 (1999).

92. ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 39–511 (1977).

93. *See e.g.,* WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 72–149 (1985).

94. David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013).

95. *Id.* at 1681.

> If landowners have an absolute right to build, and a landowner wants to build something that has a negative effect on her neighbors, the transaction costs and collective action problems of getting all the neighbors together to pay the property holder not to build (or to build less) would be prohibitive. If, on the other hand, local governments, representing the interests of property holders in a city, have the ability to deny a landowner the right to build for any reason, the potential developer can simply pay the city for the right to build. The assignment of the right should not matter if transaction costs are low, as Coasean bargaining between the developer and the city should ensure that we get to the optimal amount of development.[96]

As Schleicher noted, some problems with this approach are that local officials represent what Fischel calls their "homevoter" constituents, who are concerned with the value of their homes.[97] Thus, these constituents try to raise property values through restricting the supply of homes,[98] and also try to avoid responsibility for paying taxes for the poor.[99]

From the perspective of private property rights, Schleicher's summary elides over two fundamental problems. First, transactional purchasers of rights pertaining to land are unwilling to pay for the subjective value placed on those rights by previous owners. In consensual transactions, those losses of idiosyncratic value are inframarginal, since the prior holders nevertheless are willing to sell.[100] However, that is not the case when government appropriates property through eminent domain, since the measure of compensation is only the objective "fair market" value.[101] That led Judge Richard Posner

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96. *Id.*at 1682 (internal citation omitted).

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

98. Schleicher, *supra* note 94, at 1684 (2013) (citing inter alia, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977)).

99. *Id.*

100. *See* James M. Buchanan and Wm. Craig Stubblebine, *Externality*, 29 ECONOMICA 371 (1962) (describing as irrelevant, changes that do not actually affect decision making).

101. United States v. 50 Acres of Land, 469 U.S. 24, 25–26 (1984) ("The Fifth Amendment requires that the United States pay 'just compensation'—normally measured by fair market value—whenever it takes private property for public use.") (citing United States v. Miller, 317 U.S. 369, 374, (1943) ("what a willing buyer would pay in cash to a willing seller")).

to observe that "[c]ompensation in the constitutional sense is . . . not full compensation."[102]

Second, if local government "represent[s] the interests of property holders in a city,"[103] the concept of representation apparently is based on one of two meanings. In the *parens patriae* sense, it refers to the police power of the state to protect its citizens, which is quite distinct from the takings power. From the other perspective, where the state is deemed to be the transactional agent of its citizens, the implicit suggestion is either that property owners in a city have identical interests with respect to local land use actions that affect some much more than others, which is at best an overstatement, or that local government otherwise will ensure that things even out through the concept of reciprocity of advantage. The phrase "average reciprocity of advantage" was famously used by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*[104] to refer to the kind of implicit, in-kind compensation that might occur, for instance, when the benefit derived from neighbors being subject to a restriction at least offsets the loss that the restriction inflicts on any given property owner.[105]

Reciprocity of advantage is the basis for detailed private restrictions issued by homeowners' associations, and some commonplace public regulations, such as those requiring wide setbacks from the street for all houses on a boulevard.[106] The concept also is applicable within some well-defined districts, such as preservation of building facades within the French Quarter of New Orleans.[107] But the doctrine is inherently problematic where the unusual and valuable assets possessed by a few are restricted for the benefit of the many. A classic instance occurred in *Penn Central Transportation Co. v. City of New York*,[108] which upheld the landmarking of some 400 buildings in New York City, including Grand Central Terminal,

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102. Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

103. Schleicher, *supra* note 94, at 1682.

104. 260 U.S. 393, 415 (1922).

105. *See*, *e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195–215 (1985).

106. *See, e.g.,* Richard A. Epstein, *Property Rights, State of Nature Theory, and Environmental Protection*, 4 NYU J.L. & LIBERTY 1, 30–31 (2009) (noting that height and setback restrictions can secure average reciprocity of advantage, thereby leaving "[a]ll group members . . . better off," with the regulation "overcom[ing] transactional obstacles that prevent cooperation").

107. *See* City of New Orleans v. Dukes, 427 U.S. 297 (1976).

108. 438 U.S. 104 (1978).

to benefit the City's millions of residents. Then-Justice William Rehnquist filed a vehement dissent invoking that tremendous disparity.[109]

Agglomeration was suggested by Professor Schleicher as the *deus ex machina* to deal with the problem of non-reciprocal reciprocity.[110] Through agglomeration, as Alfred Marshall observed nearly a century ago, workers skilled in a specialized trade gather where there are many potential employers, firms specialized in that industry gather where there are many suitable employees, and the "mysteries of the trade" are explicated and advanced through informal conversation everywhere.[111] As economist Robert Lucas memorably explained: "What can people be paying Manhattan or downtown Chicago rents for, if not for being near other people?"[112]

But if agglomeration increases the size of the pie of urban prosperity, it does not give the local government ownership of its slices. While Schleicher states that cities do redistribute income, "largely because of the existence of agglomeration economics,"[113] that does not confront the reciprocity problem. Perhaps, as the *Armstrong* principle sought to invoke, "public burdens" should not be disproportionately concentrated on the few.[114] As Dr. Samuel Johnson observed three centuries ago "[r]eciprocity long has been recognized as a necessity ingredient in human relations."[115]

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109. *Id.* at 140 (Rehnquist, J., dissenting) ("Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case—several million dollars-with no comparable reciprocal benefits.").

110. *See* David Schleicher, *The City as a Law and Economics Subject*, 2010 U. ILL. L. REV. 1507, 1515–29 (2010) (providing an overview of agglomeration economics).

111. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 156 (8th Ed. 1890). Other leading works on agglomeration include: EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 186 (2011); EDWARD L. GLAESER & JOSEPH GYOURKO, RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE 58 (2008).

112. Schleicher, *supra* note 94, at 1687 (quoting Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 39 (1988)).

113. *Id.* at 1684 n.37 (citing CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS 72-105 (2011)).

114. Armstrong v. United States, 364 U.S. 40, 49 (1960) (*quoted in* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 125, 133–34 (1978)).

115. JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON, LL.D. 245 (London: 1830) (letter to James Boswell, ca. March 15, 1774) ("Life cannot subsist in society but by reciprocal concessions.").

If common-law ownership includes rights to reasonable development, then agglomeration does not make the takings issue superfluous. If agglomeration has the effect of making a community more prosperous, it could increase taxes, but the imposition of taxes must not be conflated with the arrogation of property rights. The Supreme Court recently observed that "[i]t is beyond dispute that '[t]axes and user fees ... are not "takings."'"[116]

Without formal theorizing, Chief Judge Breitel of the New York Court of Appeals built upon the premise that property rights are more valuable if the property is located within a thriving community. In that court's opinion in *Penn Central*,[117] he stated:

> [T]he extent to which government, when regulating private property, must assure what is described as a reasonable return on that ingredient of property value created not so much by the efforts of the property owner, but instead by the *accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings*.[118]

Under Chief Judge Breitel's reasoning, as Professor Fischel noted, government is "entitled to appropriate to itself all of the advantages of civilization."[119]

C. Zoning for Dollars

The movement away from long-term comprehensive planning and Euclidean zoning, where designated uses are permissible "as of right,"[120] has given rise to a number of schemes to facilitate land use planning and bargaining.[121]

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116. Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586, 2600–01 (2013) (*quoting* Brown v. Legal Found. of Wash., 538 U.S. 216, at 243, n. 2 (2003) (Scalia, J., dissenting)).

117. Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

118. *Id.* at 1272–73 (emphasis added).

119. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 50 (1995). For additional discussion of this point, see Steven J. Eagle, *Public Use in the Dirigiste Tradition*, 38 FORDHAM URB. L.J. 1023, 1071 (2011).

120. *See* Lee Anne Fennell, Eduardo M. Peñalver, *Exactions Creep*, 2013 S. CT. REV. 287, 342 (2013) (noting that "[i]n the usual Euclidean zoning law," within individual land use zones, "certain uses are permitted as of right, certain uses are prohibited, and others are permitted with special approval, provided certain conditions are met").

121. *See infra* Part V.B.

To a large extent local governments have asserted the right to control development on individual parcels. They might do so through comprehensive zoning but, as previously noted, many cities have concluded instead that a parcel-by-parcel bargaining process would be superior.[122] The result is that contemporary land use planning typically proceeds in "piecemeal fashion . . . [whereby] regulators have discretion to block a project or permit it to go forward, and they bargain with the landowner over the terms on which they will approve the project."[123]

In his classic article *Zoning for Dollars*,[124] Jerold Kayden described "incentive zoning" as the process by which "cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features."[125] While developer-funded amenities are beguiling, the concept has two obvious problems. One is that the invitation to "disregard" existing zoning calls the planning enterprise into question. As Kayden put it, it "intrinsically delegitimizes the entire regulatory system."[126] The other problem is that the lack of a stable and objective baseline for as-of-right development invites the sale and purchase of the police power and also corruption.[127]

Kayden tried to avoid those problems by asserting that developers are entitled to "first tier" zoning "without obligation" and that "[g]overnment invents *ex nihilo* development rights above the first tier and offers them strictly in its discretion . . . ."[128] However, government does not invent development rights *ex nihilo*—out of nothing. Those rights generally do not spring full-blown from the imagination of planners after the basic zoning is codified. Rather, they present a perhaps irresistible invitation to zoning authorities to

122. *See supra* notes 84–96, and accompanying text.

123. Fennell & Peñalver, *supra* note 120, at 300.

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

125. *Id.* at 3 (including as examples affordable housing and parks).

126. *Id.* at 7.

127. *See, e.g.*, Nestor M. Davidson, *Values and Value Creation in Public-Private Transactions*, 94 IOWA L. REV. 937, 985 n.56 (2009).

128. Kayden, *supra* note 124, at 38.

downsize the first tier bundle with the expectation of selling the withheld rights to developers later.[129]

Local officials greatly influence the scope of development in many ways other than through zoning and permitting. For instance, they facilitate tax increment financing (TIF), which is the most widely used development tool in the country.[130] TIF projects are financed using bond financing subsidized by the federal government, and real estate taxes on the "incremental" value of the improved land is diverted from general local government to servicing the bond. [131]"Scant public reporting of TIF expenditures and revenues, 'guided by the invisible hand of lobbyists, political action committees and campaign contributions,' does nothing to allay suspicions of favoritism and corruption."[132]

As I have discussed elsewhere, "the execution of good public policy inherently is improvisational and opportunistic."[133] Unfortunately, this flexibility leaves officials with ample latitude to make off-the-record demands, benefitting the municipality, that are blunt and overbearing,[134] and perhaps inuring to their own benefit, as well. One example of the latter is the acquisition by a political leader of land adjacent to that upon which there soon would be built a desirable municipal improvement, a process that a Tammany chieftain referred to as "honest graft."[135] There are many alternatives to corrupt politicians accepting cash payments.[136]

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129. *See*, *e.g.,* Christopher Serkin, *Penn Central Take Two*, 92 NOTRE DAME L. REV. 913, 927 (noting that "[this] argument is undoubtedly correct" with regard to transferable development rights (TDRs)).

130. *See generally* Richard Briffault, *The Most Popular Tool: Tax Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 65 (2010).

131. *See* George Lefcoe, *Finding the Blight That's Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 998–99 (2001) (illustrating how TIF diverts substantial funds from schools and county services).

132. George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing*, 43 URB. LAW. 427, 473 (2011) (quoting Ike Wilson, *Study: Young Businesses Grow Faster*, FREDERICK NEWS-POST, Apr. 30, 2009, http://www.fredericknewspost.com/sections/archives/display_detail.htm?StoryID =96285).

133. Steven J. Eagle, *The Perils of Regulatory Property in Land Use Regulation*, 54 WASHBURN L.J. 1, 2 (2014).

134. *See infra* Part IV.

135. Eagle, *supra* note 133, at 6 (describing the activities of New York City's legendary leader of Tammany Hall, George Washington Plunkitt).

136. *See*, *e.g.*, Abraham Bell & Gideon Parchomovsky, *The Hidden Function of Takings Compensation*, 96 VA. L. REV. 1673, 1694 (2010) ("[I]n most contexts, even thoroughly corrupt politicians will be unable to or unwilling to take undisguised cash payments. Rather, corrupt politicians will seek to get paid indirectly. The payments may take a variety of forms, such as campaign contributions, business contracts with associates of the politician, and so forth."). This example was quoted in Gregory M.

Local officials do not want to harm their communities or their personal standing as a result of failed development projects, and it is difficult for them to acquire the foundational knowledgeable for astute bargaining without the expert assistance of experienced developers, who are apt to want a piece of the action as a quid pro quo.[137] As Professor George Lefcoe observed: "Politically connected developers confer informally with public officials about the possibility of striking a redevelopment deal long before the formal redevelopment process begins."[138]

Well-connected local developers who have done successful projects in the past have a large advantage because they are known to be reliable and discreet. This opens the possibility of "crony capitalism," which has been defined in this context as the "tendency of ostensible public-sector regulatory authorities reaching out to help their 'friends' in the private sector."[139] While it might be viewed from an economics perspective simply as a type of special interest regulation "by forcing us to see the particular cronies involved in shady deals, an emphasis on crony capitalism may be politically more useful than the more standard analysis."[140]

Finally, the "zoning for dollars" problem works two ways. State and local business development agencies might have to incentivize businesses to locate or remain in the area. This might involve provision of infrastructure or job training, but also could involve government condemnation of numerous small parcels, with the resulting "superparcel" made available for new commercial development.[141] I have argued that, if such

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Stein, *Reverse Exactions*, 26 WM. & MARY BILL OF RTS. J. *1, *8 (forthcoming 2017) (https://ssrn.com/abstract=2933013)(making counterpoint to assertion that dangers of corruption are low in the exactions context).

137. *See* Eagle, *supra* note 119, at 1079.

138. George Lefcoe, *After Kelo, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 80 (2008).

139. Timothy A. Canova, *Banking and Financial Reform at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT'L L. REV. 1571, 1583 (1999) (reporting on American crony capitalism, conflicts of interest, and lack of transparency). *See also* Shawn Boburg, *How Kushner Funded a Luxury Tower*, WASH. POST, June 1, 2017, http://wapo.st/2qGLDSz?tid=ss_mail&utm_term=.66c57f8af25a (describing how Kushner consultants worked with New Jersey state officials to devise a map that connected the project location to an area including "some of the city's poorest and most crime-ridden neighborhoods" four miles away, while at the same time they excluded some wealthy neighborhoods only blocks away).

140. Paul H. Rubin, *Crony Capitalism*, 23 SUP. CT. ECON. REV. 105, 106–07 (2015).

141. Classic cases include Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004) (upholding condemnation of entire ethnic neighborhood for construction of

practices are to occur, the former owners should have a realistic opportunity to acquire an equity stake in the resulting redevelopment.[142]

Notably, while government actions that discriminate *against* out-of-state firms run afoul of the "dormant Commerce Clause," the Supreme Court has not considered whether state incentives that operate *in favor* of out-of-state firms to relocate should be included.[143]

D. Exactions and Regulatory Property

1. The Pervasiveness of Exactions in Planning

How might we best view the demand of a municipality that a landowner provide a *quid pro quo* as a condition for obtaining a development permit? Exactions might range from dedicating land within a large subdivision for a new elementary school or a turn lane at the entrance, through providing funds to expand off-site infrastructure serving the project, to contributing for uses such as distant job retraining centers with only the most attenuated connection to the proposed development.[144] As Professors Lee Anne Fennell and Eduardo Peñalver have described, American land use planning has been replete with "exactions creep."[145]

The Supreme Court's analysis of exactions began with *Nollan v. California Coastal Commission*,[146] where it required that an "essential nexus" exist between a legitimate state

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Cadillac assembly plant); Kelo v. City of New London, 545 U.S. 469 (2005) (holding condemnation for regional economic revitalization to constitute valid "public use").

142. *See* Steven J. Eagle, *Assembling Land for Urban Redevelopment: The Case for Owner Participation*, *in* PROPERTY RIGHTS: EMINENT DOMAIN AND REGULATORY TAKINGS RE-EXAMINED 7 (Bruce L. Benson ed., 2010).

143. *See generally* Dan T. Coenen, *Business Subsidies and the Dormant Commerce Clause*, 107 YALE L.J. 965 (1998) (analyzing issues); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1096 (2008) (noting that "cities are apt to engage in behavior that might be too solicitous of mobile capital, by forcing current residents to subsidize the entry of new or preferred arrivals").

144. *See* Kayden, *supra* note 124, at 3 ("[C]ities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training.").

145. *See* Fennell & Peñalver, *supra* note 120, at 342.

146. 483 U.S. 835 (1987).

interest and the "permit condition."[147] Next, where such a nexus did exist in *Dolan v. City of Tigard*,[148] the Court held that requirement to be a predicate to more penetrating inquiry, in which the municipality would have to demonstrate that there was a "rough proportionality" between the required exaction and the impact of the proposed development, and that this be supported by an "individualized determination" as opposed to a more general study of the area.[149]

Most recently, in *Koontz v. St. Johns River Water Management District*,[150] the Court applied the *Nollan-Dolan* principle to cases where the landowner was given the alternative of providing cash instead of an interest in real property, and also where the landowner refused to submit to the permit conditions. Writing for the Court, Justice Samuel Alito stated that the Court had "little trouble" distinguishing between the alternative of paying money in lieu of submitting to an exaction of real property and, as the respondents had suggested the case involved, exercising the "power of taxation."[151] In response to the contention that there was no taking where the permit conditioned upon an exaction was declined by the landowner, the Court responded:

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.[152]

Justice Alito further stated that government may not "engage[] in 'out-and-out ... extortion'" by ". . . leverag[ing] its legitimate interest in mitigation" of police power burdens

147. *Id.* at 837 (holding that the Commission's statutory powers to protect the view of the ocean from the public highway in front of a home did not justify a demand for an public easement of way behind the home, along the shore).

148. 512 U.S. 374, 376 (1994).

149. *Id.* at 391.

150. 133 S. Ct. 2586 (2013).

151. *Id.* at 2602.

152. *Id.* at 2596.

caused by the proposed development."[153] *Nollan, Dolan*, and *Koontz* all involved exaction demands "adjudicated" by agency administrators, rather than legislated by a city council. Notably, the Court has not yet extended *Nollan-Dolan* to legislative exactions, and Justice Thomas recently reiterated that he "continue[d] to doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'"[154] Scholarly reaction to *Koontz* has been mixed, with some enthusiastically in favor,[155] some qualifying support to adjudicative exactions,[156] and some dismissing the idea that extortion plays a significant role in the exactions process.[157]

Professor Timothy Mulvaney has warned that scholars favoring a Progressive view of property should not be too quick to defend the adjudicative-legislative distinction, since conceding that legislative actions had greater legitimacy would have untoward effects.[158] First, "the argument to immunize legislative exactions from heightened scrutiny is necessarily imbued with a tacit criticism of administrative exactions," which might produce "spillover effects on the many eminent domain and regulatory takings situations that involve administrative acts unrelated to exactions."[159] In addition, it might result in "a pronounced shift in land use policy toward broad, unbending legislative measures to avoid . . . heightened scrutiny," which would preclude finer-grained administrative regulation would take into account "the personal, political, and economic identities of those persons or groups" affected by land use conflicts.[160]

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153. *Id*. at 2595.

154. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., dissenting from denial of certiorari) (*quoting* Parking Assn. of Ga., Inc. v. Atlanta, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting from denial of certiorari)).

155. *See, e.g.*, Christina M. Martin, *Nollan and Dolan and Koontz-Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, but No More*, 51 WILLAMETTE L. REV. 39, 41–42 (2014) ("*Koontz* will protect property rights while also protecting the community by ensuring that developers bear the full costs of their projects.").

156. *See* Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. 105, 106 (2016) ("[L]egislative actions are subject to public hearings and are generally directed to resolving issues affecting the community as a whole. But when individual decision making is involved, there is considerable concern about self-dealing, special interests, and the potential for abuse of power.").

157. *See* Daniel P. Selmi, *Takings and Extortion*, 68 FLA. L. REV. 323 (2016) (rejecting the extortion narrative underlying the *Koontz* holding).

158. *See* Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137 (2016).

159. *Id*. at 141.

160. *Id*. at 142.

Also lending support to a broad view of exactions, but from more of an economic perspective, Professor Gregory Stein suggests that permitting exactions do not result from attempts to enhance the public fisc at the expense of developers and their buyers, but rather to offset the negative externalities that the proposed development would impose on other landowners.[161] In some cases, however, restrictions are imposed not to eliminate ostensible negative externalities imposed by the landowner, but rather to create positive externalities when bestowed on recipients favored by local officials.[162]

Undoubtedly, exactions do often offset negative externalities, a point readily acknowledged in *Koontz* by Justice Alito.[163] However, he also noted that "[s]o long as the building permit is more valuable than any just compensation the owner could hope to receive for the [property right taken], the owner is likely to accede to the government's demand, no matter how unreasonable."[164]

As I have elaborated upon elsewhere,[165] municipalities have informal mechanisms for demanding "volunteered" exactions from one-time applicants that elude the formal record, and many more ways of ensuring compliance from local developers who are repeat players. "Zoning for dollars" is not an academic exercise. Unless closely offsetting negative externalities that in fact are generated by the project, in a residential context it operates as a tax on homebuilders, the incidence of which

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161. Stein, *supra* note 136, at *3 ("[T]he objective of an exaction is not for the government to acquire a property right for its own use or to enrich itself in some other way. Rather, the government seeks to ensure that other stakeholders that will suffer as a result of the applicant's more intensive use do not bear an unfair portion of the cost of that new development.").

162. *See, e.g.,* George Lefcoe, *Redevelopment Takings After Kelo: What's Blight Got to Do with It?*, 17 S. CAL. REV. L. & SOC. JUST. 803, 841 (2008) (noting that in many subsidized redevelopment projects, "the local agency typically consults informally with private developers before going forward," and that "blatant cronyism or corruption might elude easy detection").

163. Koontz v. St. Johns River Water Mgt. Dist., 133 S. Ct. 2586, 2595 (2013) ("A . . . reality of the permitting process is that many proposed land uses threaten to impose costs on the public that dedications of property can offset.").

164. *Id.*

165. Steven J. Eagle, *Koontz in the Mansion and the Gatehouse*, 46 URB. L.J. 1, 28–29 (2014) (noting how developers or their attorneys may be engaged in undocumented informal bargaining or subject to blunt demands outside of the formal development application process). The title analogizes Yale Kamisar's *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* CRIMINAL JUSTICE IN OUR TIME 1 (A.E. Dick Howard ed., 1965) (comparing respect for defendants' rights in the "mansion" of the courtroom with abusive preliminary conduct in the "gatehouse" of the police station).

largely is passed on to homebuyers, thus ironically making housing less affordable.[166] That result would truly be a mark of good intentions gone astray.

2. Regulatory Property

If small-scale urban land use regulation often is marked by exactions from developers, important incentives for their cooperation are the awarding of "regulatory property" and entrenched rights Property rights are based on sources such as state law.[167] One type of asserted right that is particularly dubious is "regulatory property," which comprises grants of government authority to engage in conduct that is unlawful for others.[168] The monopoly on accepting street hails from passengers by New York City taxicabs that possess City-issued medallions is a classic example.[169]

An increasingly general and pervasive form of regulatory property is occupational licensure. While only some five percent of workers required licenses to pursue their occupations in the 1950s, nearly a third do today.[170] While ostensibly promulgated to improve product safety and quality, they do so only marginally, while increasing prices and reducing availability.[171] "[T]hanks to the doctrine of *Parker* antitrust immunity, the one entity that can most effectively engage in anti-competitive conduct—the government—may do so with impunity, and states may effectively nullify federal antitrust laws on behalf of private monopolists."[172]

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166. *See* Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 SO. CAL. L. REV. 1167, 1170 (1981) (asserting that "most 'inclusionary' programs are ironically titled," since they "are essentially taxes on the production of new housing").

167. Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

168. *See* Bruce Yandle & Andrew P, Morriss, *The Technologies of Property Rights: Choice Among Alternative Solutions to Tragedies of the Commons*, 28 ECOLOGY L.Q. 123 (2001) (coining term). *See also* Carol M. Rose. *The Several Futures of Property: Of Cyberspace and Folk Tales. Emission Trades and Ecosystems,* 83 MINN. L. REV. 129, 164–65 (1998).

169. *See generally* Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125, 168 (2013) (supplying details).

170. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1096 (2014).

171. *Id*. at 1096–98.

172. Timothy Sandefur, *Freedom of Competition and the Rhetoric of Federalism*: *North Carolina Board of Dental Examiners v. FTC*, CATO SUP. CT. REV. 195, 196 (2015)

Companies that have expended considerable sums in reliance upon governmental restrictions that subsequently are relaxed or eliminated may claim that, as a result, those costs are "stranded" (i.e., non-recoverable) and they have suffered "deregulatory takings."[173] Those arguments have not fared well in the courts.[174]

An assertion of regulatory property particularly germane to land use was a claim that the loss in value of the transferable development rights (TDRs) featured in the *Penn Central* case[175] constituted a taking. The TDRs were given to the railroad to "mitigate" what otherwise might have been a regulatory taking of its air rights above Grand Central Terminal.[176] Owners of the TDRs would be permitted instead to develop some 1.2 million square feet of air rights in the vicinity of Grand Central in excess of that permitted owners of those parcels under generally applicable zoning.[177]

As recounted by Professor Christopher Serkin, 40 years later the air rights were still unused, and had been purchased by Midtown TDR Ventures, which planned to sell them for a substantial sum in booming Midtown Manhattan real estate market.[178] However, a change in city zoning restrictions on nearby parcels, allegedly at the behest of a neighboring owner, deprived the TDRs of value, and Midtown TDR sued.[179] The action was dismissed after the neighboring owner paid what were described as nominal damages.[180]

(discussing Parker v. Brown, 317 U.S. 341, 350 (1943) (upholding anti-competitive compacts where they "derived its authority and its efficacy from the legislative command of the state").

173. *See* J. Gregory Sidak &Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851 (1996) (coining term).

174. *See* U.S. Commodity Futures Trading Comm'n. v. Oystacher, 203 F. Supp. 3d 934, 941 (N.D. Ill. 2016) (explaining that businesses affected by regulation likely will know the law and seek clarification if necessary) (citing Cruz v. Town of Cicero, No. 99 C 3286, 2000 WL 369666, at *3 (N.D. Ill. Apr. 6, 2000).

175. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). For a discussion of TDRs, see *infra* Part III.E.3.

176. *Penn Cent. Transp. Co.*, 438 U.S at 137.

177. Serkin, *supra* note 129, at 914.

178. *Id.*

179. Complaint ¶ 5, Midtown TDR Ventures LLC v. City of New York, No. 1:15-cv-07647 (S.D.N.Y. Sept. 28, 2015); *see also* Charles V. Bagli, *Owner of Grand Central Sues Developer and City for $1.1 Billion Over Air Rights*, N.Y. TIMES, Sept. 28, 2015, http://www.nytimes.com/2015/09/29/nyregion/owner-of-grand-central-sues-developer-and-city-for-1-1-billion-over-air-rights.html (describing litigation).

180. Complaint for Notice of Dismissal, No. 1:15-cv-07647 (S.D.N.Y. Aug. 10, 2016); Charles V. Bagli, *Owners of Grand Central Drop Lawsuit, Clearing Way for a 1,401-Foot-Tall Skyscraper*, N.Y. TIMES, Aug. 10, 2016.

A somewhat similar attempt to assert that government benefits were entrenched as constitutional property occurred in *Kaufmann's Carousel, Inc. v. City of Syracuse Industrial Development Agency*.[181] There, the plaintiffs unsuccessfully resisted the condemnation of easements on grounds including that they had acquired their lease as the result of a previous condemnation, which they asserted was a determination of "public use," so that the subsequent condemnation could not be for a public use.[182]

While these cases might be deemed of passing interest, they point to a much more profound problem—that of recipients of government largesse attempting to entrench those benefits in the form of constitutionally protected property.[183] We are likely to see more attempts to treat stranded costs as "property," given the disruptions that new internet-based platform companies are having on established, regulated industries.[184]

Thus, there is a danger that what seem to be "mitigations" based on fairness, such as the award of TDRs, might be ossified as entrenched property with a harmful result.

E. Other New Land Use Regulatory Techniques

While development exactions as a condition for project approvals are perhaps the most common technique for localities seeking land use flexibility and revenue, others have played a prominent role, as well.

1. Grand Bargains

One device, building upon traditional local politics, urges the formation of transitory coalitions of disparate interest groups, assembled ad hoc to seize the moment and enact and entrench zoning grand bargains.[185] However, such a plan would create vested property rights on a grand scale and, one again, hinder future adaptation to change.[186] The argument for entrenchment is undermined by the fact that "uncertainty

181. 750 N.Y.S.2d 212 (N.Y. App. Div. 2002).

182. *Id.* at 221.

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

184. Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 112 (2016).

185. *See* Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015).

186. *See* Steven J. Eagle, *On Engineering Urban Densification*, 4 BRIGHAM-KANNER PROP. RTS. CONF. J. 73, 78–79 (2015).

concerning government policy is analytically equivalent to general market uncertainty. The prevailing assumption in our society that market solutions for allocating risk are preferable to government remedies is therefore equally applicable when the risks to be allocated arise from legal transitions."[187]

2. Public-Private Partnerships

Public Private Partnerships for real estate development project are long-term contractual agreements between government agencies and private developers, whereby "the skills and assets of each sector are shared in delivering a development project."[188] The private entity might own a ground lease and manage the project, with the agency maintaining control through ownership of the fee simple and, perhaps, an equity interest.[189] One form of public-private partnership is a "business improvement district" (BID), in which businesses located in specified geographical areas consent to the assessment of taxes to pay for enhanced amenities such as security and sanitation.[190]

Public Private Partnerships have been attacked for alleged failures to provide adequate protection for individual rights and democratic values.[191] "The eclipse of traditional land use planning procedures by cities' wholehearted embrace of development agreements and similar bilateral negotiated approaches leaves next to no room for the public."[192] More specifically, BIDs have been criticized as resulting from "a

187. Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 520 (1986).

188. Thomas M. Gallas & Cheryl A. O'Neill, *Public Private Partnerships: Design and Finance Transforming Urban Neighborhoods*, 42 REAL ESTATE REV. J., Art. 2 (2013).

189. *Id.*

190. *See* Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999) (describing BIDs as "one of the most intriguing and controversial recent developments in urban governance" and "[c]ombining public and private, as well as city government and neighborhood elements").

191. *See* Alfred C. Aman, Jr. & Joseph C. Dugan, *The Human Side of Public-Private Partnerships: From New Deal Regulation to Administrative Law Management*, 102 IOWA L. REV. 883 (2017).

192. David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. LAW. 657, 661 (2007) (quoting Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions, Installment One*, 24 STAN. ENVTL. L.J. 3, 36–37 (2005)).

series of flawed and contentious Supreme Court decisions preferring localism over equality and privatization over free speech."[193]

Furthermore, sales and long-term leases of municipal infrastructure to private entities that will run them often have proved ill-advised and used to temporarily buttress the finances of distressed cities.[194] "Unfortunately, all of these stabilization methods are characterized by short-term cash infusions that produce disproportionate future expenses or lost future revenue."[195]

3. Transferable Development Rights

TDRs are issued by government and permit the recipients to transfer development precluded by regulation of their existing parcels to other parcels they own or acquire. "Simply put, TDR programs separate the development potential of a parcel from the land itself and create a market where that development potential can be sold."[196] Thus, an owner in a "sending" zone receives TDRs in lieu of development in that area that government wishes to protect, and can utilize the TDRs to develop acquired property in a designated "receiving" zone more intensively than its former owner was permitted.[197]

The classic example of the use of TDRs was to "mitigate" what otherwise might have been a taking in *Penn Central*.[198] As the Court explained: "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact

193. Wayne Batchis, *Business Improvement Districts and the Constitution: The Troubling Necessity of Privatized Government for Urban Revitalization*, 38 HASTINGS CONST. L.Q. 91, 92 (2010).

194. *See, e.g.*, Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1168–69 (2014) (describing a problematic long-term lease of parking meters by a "desperate" city of Chicago, whereby an investment group would receive $11.6 billion from "a deal that paid the city $1.15 billion for a one-time budget fix").

195. Samir D. Parikh & Zhaochen He, *Failing Cities and the Red Queen Phenomenon*, 58 B.C. L. REV. 599, 610 (2017).

196. Julian Conrad Juergensmeyer et. al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 446 (1998).

197. *Id.* at 446–48.

198. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978). For discussion, see *supra* notes 175–177 and accompanying text.

of regulation."[199] Notably, the shifting of development rights considered in *Penn Central* were from one part of the same tract of land to another.[200]

I have elsewhere criticized TDRs as wrongfully depriving owners in the receiving zones of property without just compensation.[201] First, as in exactions schemes generally, the ability of localities to benefit from the sale of development approvals for what Jerold Kayden in *Zoning for Dollars* described as in excess of "first tier" rights encourages over-regulation and corruption.[202] In addition, if dense development is permissible on a certain parcel when the applicant owns TDRs, that development should have been permissible had the applicant for the same exact project been the original landowner.[203]

Professor Serkin has argued that, while my argument about over-regulation was "undoubtedly correct," the "strong form" of my argument "misconstrues the kinds of tradeoffs that are ubiquitous in land use controls."[204] He added that "zoning is much more fluid than this and frequently represents dynamic tradeoffs," so that a city may desire density limitations in the receiving area, but "may have an even greater interest in protecting a historic building."[205] Awarding TDRs in this situation "represents nothing more than a straightforward cost-benefit analysis."[206]

The division of a municipality into zoning districts does represent a judgment regarding relative value among permissible uses being situated in one area as opposed to another. Also, the establishment of new uses in one part of town might legitimately occasion rebalancing of other uses in a different part of town.

However, ad hoc decisions awarding TDRs also constitute ad hoc decisions reducing ownership rights. The point is that local officials are not making abstract decisions that historic features should be preserved and other abstract decision that

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199. *Id.*

200. *Id.* at 130–31 ("In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'")

201. Eagle, *supra* note 133, at 34–36.

202. *See* Kayden, *supra* note 124. For discussion, see *supra* notes 123–128, and accompanying text.

203. Eagle, *supra* note 133, at 34–36.

204. Serkin, *supra* note 129, at 926–27.

205. *Id.*

206. *Id.* at 927.

more development might be permissible in another area. Rather, as Professor Juergensmeyer and his colleagues more aptly put it, the idea is to "separate the development potential of a parcel from the land itself and create a market where that development potential can be sold."[207] The potential of "a parcel" is "sold" in essentially a barter transaction to the aggrieved owner of the historic site.

Concerns about TDRs mostly have involved the extent to which they were adequate substitutes for reductions in the rights of property owners.[208] However, I distinguish TDR schemes in which owners of land in the sending areas are compensated through reciprocity of advantage from those schemes in which the municipality arrogates to itself the benefits of restrictions giving value to the TDRs.

In *Barancik v. County of Marin*,[209] development in the Nicasio Valley north of San Francisco was stringently limited to preserve the "beautiful rural landscape" and agricultural use.[210] The TDR scheme "permitted ranchers in the valley to sell to other property owners in the valley the right to develop within the regulations of the community. A purchaser could accumulate more than one development right."[211] In response to the rhetorical question as to how the TDR scheme differed from the sale of the police power, the Ninth Circuit responded that buyers "are not being given a dispensation from zoning by payment of a fee to the state," but rather "are being permitted to accumulate development rights in the same area by a price paid to *the owner* of the rights."[212] The court added that the county "is rightly indifferent" as to who does the limited amount of development permitted, and "lets the market decide the price."[213]

In the prevalent *Penn Central* type of TDR scheme, the government is not at all indifferent as to who does the development, but rather insists that it be done by the entity to

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207. Juergensmeyer, *supra* note 196, at 446.

208. *See* Fred F. French Investing Co. v. City of New York, 352 N.Y.S.2d 762 (1973); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see also* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 356–57 (1998) (describing substantial practical problems faced by TDR recipients).

209. 872 F.2d 834 (9th Cir. 1988).

210. *Id.* at 835.

211. *Id.*

212. *Id.* at 837 (emphasis added).

213. *Id.*

which it has awarded rights or its assignee, for the purpose of staving off a possible need to pay just compensation for a restriction it imposed.

Professor Serkin correctly asserts that the protection of a "historic building" through use of TDRs might have greater benefit to society than the burden placed on owners in the receiving zone.[214] But conferring benefit on society is an attribute associated with both the police power *and* the takings power.[215] A feature implicit in *Penn Central* TDR schemes is that recipients who are singled out for worthiness are accorded special development rights in specified zones designed to be attractive to them. This seems counter to principles of fairness enunciated in *Armstrong*,[216] and the centuries-old observation reiterated in *Kelo v. City of New London*,[217] that "a law that takes property from A. and gives it to B . . . is against all reason and justice."[218]

Perhaps the best answer to preserving a "historic building" was enunciated just as TDRs first were coming into vogue: "Rather than utilizing unreliable methods of shifting preservation costs onto a select group (whether developers or ardent supporters of landmark preservation), as is done by TDR systems, the municipality itself should assume responsibility for saving landmarks."[219]

4. Land Use Regulation as Neighborhood Property

In *Fee Simple Obsolete*,[220] Professor Lee Anne Fennell suggested that government or another entity might be able to acquire a "callable fee," whereby property within a "callblock" would be available for subsequent repurposing.[221] While she would capture the value of large-scale redevelopment for the

214. Serkin, *supra* note 129, at 927.

215. *See*, *e.g.*, Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 853 (1987) (noting that a government action that is a "legitimate exercise of the police power does not, of course, insulate it from a takings challenge").

216. Armstrong v. United States, 364 U.S. 40, 49 (1960) (quoted in Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (asserting that public burdens" should not be "disproportionately concentrated" on the few.")).

217. 545 U.S. 469 (2005).

218. *Id.* at 477 n.3 (quoting Calder v. Bull, 3 Dall. 386, 388 (1798)).

219. Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1122 n.14 (1975)

220. Fennell, *supra* note 19.

221. *Id.* at 1482–85. "Properties within these 'callblocks' would be sold subject to a call option. These call options would make each new possessory owner subject to having her property repurchased later, along with the other properties in the callblock[.]" *Id.* at 1484.

community, the economist Robert Nelson argued that zoning instantiates collective neighborhood property rights belonging to the individuals in the neighborhood.[222] He proposed that supermajorities of owners in neighborhoods they define be able to sell all parcels, thus reaping for existing owners the monetary value of the one consolidated parcel in excess of the aggregate value of the many parcels that comprised it.[223] A similar proposal for "land assembly districts" was made by Professors Michael Heller and Rick Hills.[224]

However, these proposals permit a self-selected group of owners to custom design an area in which a super-majority can arrogate to itself property interests of the dissenters. That might result in land having more pecuniary value, but it would be at the cost of the autonomy of the unwilling participants.[225]

V. GOOD INTENTIONS AND AFFORDABLE HOUSING

One area where good intentions have been notably ineffective has been the provision of affordable housing. As I have discussed elsewhere, the popularity of affordable housing results from its being a metaphor, not a policy or even a shared specific goal for reducing housing prices in areas enjoying economic prosperity and fine natural and cultural amenities.[226]

Economic prosperity largely results from the presence of a deep pool of talented workers and competing firms who can utilize their specialized skills, together with those with the wherewithal and tastes to add vibrancy.[227] The resulting agglomeration makes for great cities. However, expanding

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222. Robert H. Nelson, *A Private Property Right Theory of Zoning*, 11 URB. LAW. 713 (1979).

223. Nelson, *supra* note 91, at 834 (proposing that owners of land with supermajorities by number of parcels or fair market value in neighborhoods they define have powers to designate use or sale).

224. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1468 (2008).

225. *See generally* Steven J. Eagle, *Devolutionary Proposals and Contractarian Principles*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 184–91 (F. H. Buckley, ed. 1999).

226. *See* Eagle, *supra* note 80.

227. *See generally* GLAESER *supra* note 111.

cities tend to become congested, which offsets agglomerations benefits.[228] Sometimes agglomeration enhances activities that are undesirable, as well.[229]

"Amenities" is an expansive term encompassing those attributes that make residential living aesthetically pleasing and vital. One way municipalities can jumpstart the process, which is associated with Richard Florida, is by providing the requisite amenities to lure the "creative class."[230] Some have been skeptical of the concept,[231] and others thought that in many cases causation worked in the other direction, with prosperity leading to amenities.[232]

In his 2017 book *The New Urban Crisis*, Florida acknowledged that the high level of prosperity that the creative class brought to a few cities that he celebrated 15 years earlier was not an urban panacea.[233] While our urban crisis of the 1960s and 1970s, he asserted, was marked by "economic abandonment of cities" and "white flight," "persistent poverty," and crime,[234] one element of our "new urban crisis" involves the "deep and growing economic gap" between a handful of "superstar" cities and technology hubs and other areas, which Florida calls "winner-take-all urbanism."[235] Closely associated are the "extraordinary high and increasingly unaffordable housing prices and staggering levels of inequality" in superstar cities.[236] But broader dimensions include the "growing inequality, segregation, and sorting" within all cities, the movement of "poverty, insecurity, and crime" into the suburbs, and the "crisis of urbanization in the developing world."[237]

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228. *See* Nestor M. Davidson & John J. Infranca, *The Sharing Economy As an Urban Phenomenon*, 34 YALE L. & POL'Y REV. 215, 225 (2016) (noting that congestion is the "inverse" of the "many benefits that accrue from the proximity and density").

229. *See* Schleicher, *supra* note 110, at 1529 (referring to "factors that have increasing returns to scale but a negative effect" as "negative agglomeration").

230. *See* RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE (2002).

231. *See* Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229, 1262 (2010).

232. *See* Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 328 (2010) (noting that in many instances, such as Silicon Valley, it was economic prosperity that led to the creation of amenities).

233. RICHARD FLORIDA, THE NEW URBAN CRISIS: HOW OUR CITIES ARE INCREASING INEQUALITY, DEEPENING SEGREGATION, AND FAILING THE MIDDLE CLASS—AND WHAT WE CAN DO ABOUT IT (2017).

234. *Id.* at 5.

235. *Id.* at 5–6.

236. *Id.* at 6.

237. *Id.* at 7–8.

In outlying areas, the loss of manufacturing jobs has contributed to rural America being the "new inner city."[238] The plight of rural areas was highlighted by Anne Case and Angus Deaton's path breaking work on the increase in "deaths of despair"—death by drugs, alcohol and suicide.[239] "[F]or the first time, the Centers for Disease Control and Prevention (CDC) now reports declines in life expectancy among less-educated rural whites, especially in impoverished and remote counties of Appalachia."[240]

Recent evidence suggests that "[a]s young people and builders have shifted their focus toward trendier urban markets, overall housing construction has declined."[241] Recent census data indicates, though, that suburban growth is increasing again relative to growth in cities.[242] Some evidence suggests a mixed pattern, with increased growth in the urban core in some cities, and more sprawl in others,[243] with already-dense metropolitan areas becoming denser, and sprawling metro areas spreading out further.[244] "In some of the country's largest and most prosperous markets, such as New York, San Francisco, Boston and Los Angeles, housing construction has been stronger than normal in the urban core but weaker in the suburbs, where new housing can be built abundantly and more cheaply . . . "[245]

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238. *See* Janet Adamy and Paul Overberg, *Rural America is the New Inner City*, WALL ST. J., May 27, 2017 at A1, https://www.wsj.com/articles/rural-america-is-the-new-inner-city-1495817008.

239. Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROCEEDINGS NATIONAL ACADEMY OF SCIENCES 15078, 15078 (2015), http://www.pnas.org/content/112/49/15078. "This increase for whites was largely accounted for by increasing death rates from drug and alcohol poisonings, suicide, and chronic liver diseases and cirrhosis. Although all education groups saw increases in mortality from suicide and poisonings, and an overall increase in external cause mortality, those with less education saw the most marked increases." *Id*.

240. Daniel T. Lichter & James P. Ziliak, *The Rural-Urban Interface: New Patterns of Spatial Interdependence and Inequality in America*, 672 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 20 (2017).

241. Laura Kusisto, *Why Millennials Are (Partly) to Blame for the Housing Shortage*, WALL ST. J., May 22, 2017, https://www.wsj.com/articles/why-millennials-are-partly-to-blame-for-the-housing-shortage-1495445403.

242. Thomas H, Frey, *City Growth Dips Below Suburban Growth, Census Shows*, BROOKINGS, May 30, 2017).

243. Jed Kolko, *Seattle Climbs but Austin Sprawls: The Myth of the Return to Cities*, N.Y. TIMES, May 22, 2017, https://nyti.ms/2rKDQ70.

244. *Id*. (contrasting dense cities such as New York, Chicago, and San Francisco with sprawling cities such as Austin and San Antonio).

245. Kusisto, *supra* note 241.

> This combination of faster population growth in outlying areas and bigger price increases in cities points to limited housing supply as a curb on urban growth, pushing people out to the suburbs. It's a reminder that where people live reflects not only what they want — but also what's available and what it costs.[246]

It is important to note that neither population growth nor diversity necessarily contributes to prosperity since, as Professor Lee Anne Fennell observed, prosperity has a function of "agglomeration-friendly and congestion-mitigating traits," and "[t]he challenge is to assemble participants together whose joint consumption and production activities will maximize social value."[247] Furthermore, even beyond the incompatibility of productive uses, a lack of proper controls of open city spaces can result in a "tragedy of the urban commons"[248] in which "chronic street nuisances" drive out other users.[249]

A. Preservation of Community

Political entitles have their own character, which is another way of saying that they favor the particular values and desires of existing residents over those of putative possible residents, or over what some might fancy to be the universal values of a better world. The perceptive land use practitioner and scholar Richard Babcock referred to this tendency as "municipal primogeniture."[250] Since *Euclid*, we have recognized that parochial interests sometimes must yield to the common good.[251] One basic problem, however, is discerning what the common good is.

While the term "intersectionality" generally is associated with problems pertaining to race that are complex, intertwined,

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246. Kolko, *supra* note 243.

247. Lee Anne Fennell, *Agglomerama*, 2014 B.Y.U. L. REV. 1373, 1375 (2014) (internal citations omitted).

248. Sheila R. Foster & Christian Iaione, *The City as a Commons*, 34 YALE L. & POL'Y REV. 281, 298–99 (2016).

249. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning,* 105 YALE L.J. 1165, 1169 (1996) (defining "chronic street nuisances" as protracted annoying behavior in public spaces, such as aggressive panhandling or graffiti, that drives out other users).

250. RICHARD BABCOCK, THE ZONING GAME 150 (1966).

251. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 389–90 (1926) ("It is not meant by this [upholding of local autonomy], however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.").

and thus particularly difficult to solve,[252] many other land use problems have similar characteristics. The great environmentalist John Muir made the point over a century ago that "[w]hen we try to pick out anything by itself, we find it hitched to everything else in the universe."[253]

The ties that bind people within neighborhoods exemplify interrelationships. An especially valued amenity is preservation of neighborhood character. This term relates to the deep satisfaction that many people enjoy in being deeply rooted in a community.[254] Established communities are important to the creation and maintenance of what we now refer to as "social capital."[255]

In the affordable housing context, rootedness leads to preferences that often conflict. Upper-middle class neighborhoods cling tenaciously to preservation of their character as stable, low-density areas of handsome single-family homes, sometimes adjoining quaint shopping areas or scenic natural vistas.[256] Such residents, and the local officials they elect, seek to protect their way of life from those who would settle for housing that is less attractive, but more affordable.[257] The large inequality between the growing upper-middle class and the lower socioeconomic classes has a "physical dimension in that most metropolitan areas differ greatly by the size and price of the homes in their neighborhoods and communities."[258] Recent data analysis suggests that there is a growing disparity of incomes within

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252. *See* Kimberle W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politic*s, 1989 U. CHI. LEGAL F. 139, 140 (1989) (introducing term into the legal literature).

253. JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 110 (Sierra Club Books 1988) (1911).

254. *See generally*, JOHN BRINCKERHOFF JACKSON, A SENSE OF PLACE, A SENSE OF TIME (1994).

255. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 19 (2000) ("Whereas physical capital refers to physical objects and human capital refers to properties of individuals, social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them.")

256. For a pertinent example, see DAVID BROOKS, BOBOS IN PARADISE: THE NEW UPPER CLASS AND HOW THEY GOT THERE (2000) (describing the folkways of "bobos," the contemporary meld of bourgeoisie and bohemians, who lead expansive upper-middle class lifestyles while professing devotion to the verities of the simple life through consumption of very expensive kitchen equipment, primitive art, and eco-tourism).

257. *See* FISCHEL, *supra* note 97, at 18 (describing how the "mercenary concern with property values" of "'homevoters' and their elected representatives shape zoning in homogeneous communities").

258. Stephen J. Rose, *The Growing Size and Incomes of the Upper Middle Class* 14 (Urban Institute Income and Benefits Policy Center, June 2016).

neighborhoods of large American cities, and that this results in lifelong effects on international mobility and opportunity for children exposed to it.[259]

This proclivity of the upper-middle class to protect its position and pass its status on to its children, which largely takes the form of exclusionary zoning, with the ensuing exclusive school districts, recently was criticized by Richard Reeves in his book *Dream Hoarders*.[260] As Thomas Edsall recently added, upper-middle class Democrats might support redistributive taxation, but not affordable housing or having a child lose a place at Princeton to a poorer worthy student.[261]

In a similar manner, traditional working class neighborhoods, often built around shared ethnicity, faith, and extended family, cling to their heritage.[262] In both cases, neighborhood preservation has the effect of impinging upon fair housing, which might be looked at as intentional,[263] or alternatively resulting from the fact that "the very notion of community, however broadly conceived, depends on exclusion."[264]

Similar impulses for neighborhood preservation have led inner-city residents to protest "gentrification." Recent evidence suggests that gentrification might result in substantial part from an increase in the number of higher-income households with a reduced tolerance for commuting,[265] with recent lower

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259. Andreoli Francesco & Eugenio Peluso, *So Close Yet so Unequal: Spatial Inequality in American Cities*, (Luxembourg Inst. of Socio-Econ. Research (LISER) Working Paper Series 2017-11, July 13, 2017), https://ssrn.com/abstract=3003959 (using Geni-type indices investigate patterns and consequences of spatial inequality in American cities over the last 35 years).

260. RICHARD V. REEVES, DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM AND WHAT TO DO ABOUT IT (2017) (asserting that "opportunity hoarding" among the upper middle class through devices such as zoning, occupational licensing, schooling and college application procedures, reduces mobility and results in a less open society and less competitive economy).

261. Thomas B. Edsall, Opinion, *Has the Democratic Party Gotten Too Rich for Its Own Good?,* N.Y. TIMES, June 1, 2017, https://nyti.ms/2sqAqXI.

262. *See generally*, ALAN EHRENHALT, THE LOST CITY: THE FORGOTTEN VIRTUES OF COMMUNITY IN AMERICA (1996).

263. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 437 (2006) ("Developers will select common amenities not only on the basis of which amenities are inherently welfare-maximizing for the residents, but also on the basis of which amenities most effectively deter undesired residents from purchasing homes therein.").

264. Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 492 (2017).

265. *See* Lena Edlund, et al., *Bright Minds, Big Rent: Gentrification and the Rising Returns to Skill* 2 (U.S. Census Bureau Ctr. for Econ. Studies, Working Paper No. CES-WP-16-36, 2016), https://www2.census.gov/ces/wp/2016/CES-WP-16-36.pdf.

urban crime rates also playing a role.[266] Residents who are homeowners may want to sell to upscale and often-young buyers at what they consider inflated prices. But inner-city tenants are squeezed out by dramatically higher rents, without the consolation of a handsome return.[267]

The interaction between urban displacement and gentrification can be "sensitive to income inequality, density, and varied preferences for different types of spatial amenities."[268] On the other hand, sometimes decaying neighborhoods are spruced up, and ensuing higher real estate tax collections permit often-strapped municipalities to make vitally-needed improvements to local schools, roads, and hospitals.[269]

In a more general sense, attempts at historic preservation of existing structures and patterns of human association can be at variance with urban culture itself, which might be "defined by dynamism, vitality, and an ability to adapt to and accommodate population and market shifts."[270] A recent study by Ann Owens found that "the geographic deconcentration of assisted housing, the result of several housing programs initiated since the 1970s, only modestly reduced metropolitan-area poverty concentration from 1980 to 2009. . . . Even though a substantial policy shift occurred, its effectiveness in reducing poverty concentration was tempered by the existing context of durable urban inequality."[271] As one supporter of fair and affordable housing concluded:

> [T]he road to the current land use regulatory context in the United States is a full century long. The first six decades of that process took on the appearance of a

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266. *See* Ingrid Gould Ellen, et al., *Has Falling Crime Invited Gentrification*? (U.S. Census Bureau Ctr. for Econ.Studies Paper No. CES-WP-17-27, 2017), https://ssrn.com/abstract=2930242.

267. *See generally*, Miriam Zuk, et al., *Gentrification, Displacement and the Role of Public Investment: A Literature Review* (Fed. Reserve Bank of San Francisco, Working Paper 2015–05, 2015).

268. Geoff Boeing, *The Effects of Inequality, Density, and Heterogeneous Residential Preferences on Urban Displacement and Metropolitan Structure: An Agent-Based Model* 1, (Dec. 20, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939933.

269. *See* J. Peter Byrne, *Two Cheers for Gentrification*, 46 HOW. L.J. 405, 405–06 (2003).

270. Anika Sing Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L.J. 1525, 1525 (2015).

271. Ann Owens, *Housing Policy and Urban Inequality: Did the Transformation of Assisted Housing Reduce Poverty Concentration?*, 94 (1) SOC. FORCES 325, 326 (Sept. 2015).

> headlong race toward exclusionary policies while the last four decades have been marked by occasional but ultimately not transformative attempts to press the brakes and restore balance. None of those attempts have fundamentally reshaped how people in communities on the ground think about land use regulation.[272]

B. Assistance to the poor and inner cities

The clearest intentions regarding affordable housing relate to the provision of homes for low- and moderate-income families. Even here, however, a number of different goals work at cross-purposes. Government subsidies for the construction of low-income housing seems the most direct affordable housing device, with the major exception of public housing projects, which in many cases proved disastrous.[273]

In his reflections on the first 25 years of the Journal of Affordable Housing and Community Development, Professor Tim Iglesias advocated that fair housing was "joined at the hip" with the Journal's principal concerns, and that the Journal has a "unique opportunity to provide a forum for integrating fair housing issues" into its existing affordable housing and community development focus.[274] Another need for a holistic approach advanced by Professor Iglesias relates to whether racial and socioeconomic residential segregation should be dealt with the using "traditional integration model," which focuses on the community as a geographical and social unit, or using the "individual access to the opportunity structure model," which focuses on the location of households vis-à-vis good schools, workplaces, medical facilities, cultural amenities, and the like.[275]

One of the more successful affordable housing programs has been the Low Income Housing Tax Credit (LIHTC), which "is one of the few government resources dedicated to helping low

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272. Thomas Silverstein, *State Land Use Regulation in the Era of Affirmatively Furthering Fair Housing,* 24 J. AFFORD. HOUS. 305, 328 (2015).

273. *See* EUGENE J. MEEHAN, THE QUALITY OF FEDERAL POLICYMAKING: PROGRAMMED FAILURE IN PUBLIC HOUSING 66–87 (1979) (discussing the demolition of the infamous Pruitt-Igoe Housing Project and the St. Louis Housing Authority).

274. Tim Iglesias, *Affordable Housing, Fair Housing and Community Development: Joined at the Hip, We Need to Learn to Walk Together*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 195, 198 (2017).

275. Tim Iglesias, *Two Competing Concepts of Residential Integration* 24, (Univ. of S.F. Law Research Paper No. 2017-09, 2017), https://ssrn.com/abstract=2965214.

income families find safe, decent and affordable housing."[276] "In its simplest form, LIHTC 'subsidizes the acquisition, construction, and/or rehabilitation of rental property by private developers.'"[277] However, after its recent review of federal housing finance data, *The New York Times*, while noting that LIHTC is the nation's "biggest source of funding for affordable housing," concluded that in the largest metropolitan areas housing utilizing LIHTC is "disproportionately built in majority nonwhite communities."[278] Furthermore, the value of the tax credits is highly dependent on the level of corporate taxation, so that contemplated Trump administration reductions in rates already suggests significant cutbacks in their use.[279] Another popular program, which does not require subsidies for capital investment, is Section 8 housing,[280] which subsidizes rents in scattered private residential buildings. However, as Section 8 contracts expire, the housing might revert to market rate, and federal funding for the program might be cut substantially.[281]

Another major issue, largely intersecting with questions of race, is affordable housing in more affluent suburbs. In 1968, the Fair Housing Act (FHA) forbade the denial of housing opportunities on the basis of "race, color, religion, or national origin."[282] Yet in 2015, writing for the majority in *Texas Department of Housing and Community Affairs v. Inclusive*

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276. Lance Bocarsly & Rachel Rosner, *The Low Income Housing Tax Credit: A Valuable Tool for Financing the Development of Affordable Housing*, 33 THE PRAC. REAL EST. LAW. 29, 30 (2017).

277. Courtney Lauren Anderson, *Affirmative Action for Affordable Housing*, 60 HOW. L.J. 105, 140 (2016) (*quoting* Paul Duncan et al., *Tax Incentives for Economic Development: What is the Low-Income Housing Tax Credit?, in* TAX POLICY CTR, THE TAX POLICY BRIEFING BOOK (2009)).

278. John Eligon, et al., *Program to Spur Low-Income Housing is Keeping Cities Segregated*, N.Y. TIMES, July 2, 2017, https://nyti.ms/2tBQ06t (citing the claim of fair-housing advocates that "the government is essentially helping to maintain entrenched racial divides, even though federal law requires government agencies to promote integration.").

279. *See* Robert McCartney, *Trump's Budget Plans Have Already Cut Financial Support for Low-Cost Housing*, WASH. POST, July 1, 2017, http://wapo.st/2sz1cNj?tid=ss_mail&utm_term=.d1046d506a85 (noting that "the loss of tax-credit financing has had its most severe impact in rural areas, towns or small cities, where investors are wary of financing affordable housing in the first place").

280. *See generally* 24 C.F.R. § 982 (2015) (the program is more formally known as the Federal Housing Choice Voucher program).

281. *See* Jose A. DelReal, *Trump Administration Considers $6 Billion Cut to HUD Budget*, WASH. POST, March 8, 2017, http://wapo.st/2mDrIps?tid=ss_mail&utm_term=.3a9a5ccc0c9c ("Budgets for public housing authorities—city and state agencies that provide subsidized housing and vouchers to local residents — would be among the hardest hit. Under the preliminary budget, those operational funds would be reduced by $600 million, or 13 percent.").

282. Civil Rights Act of 1968, 42 U.S.C. §§ 3601–06 (2012).

Communities Project,[283] Justice Kennedy related that patterns of racial segregation had continued.[284] The petitioners had argued that Texas allocated tax credits intended to assist low-income families obtain affordable housing disproportionately to predominately black inner-city areas.[285] The 5-4 majority held that petitioners could utilize evidence of disproportionate impact on protected groups in establishing their case, and need not show discriminatory intent.[286] Three weeks later, the HUD issued rules on "Affirmatively Furthering Fair Housing" ("AFFH") that required localities to collect detailed statistical data as a prelude to stricter enforcement.[287]

However, as noted by Professor Kenneth Stahl, "[e]fforts to break down these zoning barriers have faced fierce political resistance,"[288] and "the issue of affordable housing threatens to break up the democratic party coalition between affluent white suburbanites and lower-income minorities."[289] Perhaps the best-known litigation involving the duty of localities accepting HUD funds to affirmatively further affordable housing involved Westchester County, N.Y., an affluent area north of New York City.[290] In July 2017, HUD reversed the long-asserted view it held during the Obama administration and during the first few months of the Trump administration that Westchester had not complied with the affordable housing promises it made as a condition of receiving HUD subsidies.[291]

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283. 135 S. Ct. 2507 (2015).

284. *Id.* at 2515–16.

285. *Id.* at 2514.

286. *Id.*

287. *See generally* "Affirmatively Furthering Fair Housing," 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, et al.).

288. Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 491 (2017).

289. *Id.* at 491 n.16 (citing Thomas B. Edsall, Opinion, *Can Hillary Manage Her Unruly Coalition*, N.Y. TIMES, Aug. 18, 2016, http://www.nytimes.com/2016/08/18/opinion/campaign-stops/can-hillary-manage-her-unrulcoalition.html?smprod=nytcore-ipad&smid=nytcore-ipad-share).

290. *See, e.g.*, U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., 668 F. Supp. 2d 548, 570 (S.D.N.Y. 2009) (holding that the county made false certifications to HUD to obtain federal funding for housing and community development, but that the fact issue of whether the falsity was intentional precluded summary judgment).

291. Sarah Maslin Nir, *For Westchester, 11th Time Is Charm In Fight Over Fair Housing*, N.Y. TIMES, July 21, 2017, https://www.nytimes.com/2017/07/21/nyregion/westchester-fair-housing-hud-trump.html. ("The agency's decision, delivered to the county in a July 14 letter, was based on a review of a zoning analysis, versions of which had been rejected 10 times under the Obama administration as insufficient proof that the problem had been fixed." A spokesman for County Executive Rob Astorino declared the new HUD position a "vindication for Westchester County.")

Dr. Ben Carson, the Trump administration HUD secretary, earlier had condemned "government-engineered attempts to legislate racial equality… ."[292] However, in July 2017 Carson resisted calls to rescind the AFFH rule, saying instead that HUD would "reinterpret" it.[293] "I probably am not going to mess with something the Supreme Court has weighed in on [in *Inclusive Communities*]," Carson said, "[i]n terms of interpreting what it means—that's where the concentration is going to be."[294]

1. Dignity

Human dignity is an important norm, but it is not well defined. For present purposes, a good beginning is "the Kantian injunction to treat every [person] as an end, not as a means."[295] More germane here, Professor Carol Rose recently explored the extent to which devices such as racially restrictive covenants running with the land, which were legally enforceable in the United States during the first half of the last century, deprived racial minorities of their dignity.[296] Furthermore, while the Federal Housing Administration (FHA) has had an "immense" impact in housing development, early on it equated neighborhood stability with racial segregation,[297] and in many ways its record with respect to the African-American community has been "terrible."[298] "The FHA began redlining

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292. Ben S. Carson, *Experimenting With Failed Socialism Again*, WASH. TIMES, July 23, 2015, http://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housingrules-try-to-accomplish-/.

293. Joseph Lawler & Al Weaver, *Ben Carson: HUD Will "Reinterpret" Obama Housing Discrimination Rule*, WASH. EXAMINER, July 20, 2017, http://www.washingtonexaminer.com/ben-carson-hud-will-reinterpret-obama-housing-discrimination-rule/article/2629178.

294. *Id.*

295. Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INTL. L. 848, 849 (1983) (adding that "[r]espect for the intrinsic worth of every person should mean that individuals are not to be perceived or treated merely as instruments or objects of the will of others").

296. *See* Carol M. Rose, *Racially Restrictive Covenants—Were They Dignity Takings?*, 41 L. & SOC. INQUIRY 939 (2016).

297. *See generally* John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 L. & SOC. INQUIRY 399 (2007). "If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values." *Id.* at 405 (quoting 1938 FHA underwriting manual).

298. *See* David J. Reiss, *The Federal Housing Administration and African-American Homeownership*), A.B.A. J. AFFORDABLE HOUSING & COMMUNITY DEV. (forthcoming) (manuscript at 1), https://ssrn.com/abstract=2954157.

African-American communities at its very beginning. Its later days have been marred by high default and foreclosure rates in those same communities."[299]

In present-day New York City, critics have assailed the "poor door," a separate lobby for moderate-income units required in luxury buildings as a condition of tax subsidies, "as reminiscent of Jim Crow segregation and symbolic of the increasing and perverse levels of economic inequality in our cities."[300] Some elected officials have advocated legislation providing that lower-income tenants admitted to an apartment building through such considerations as the mandates of government subsidy programs have access to the same amenities as market-rate tenants.[301] The amenity-related policies of landlords to which they object were characterized by one state senator as a "form of apartheid,"[302] and the recent "poor door" controversy in Manhattan is a notable case in point.[303]

While dignity typically is regarded as a moral imperative, it need not be instantiated in the level of housing amenities one possesses. The philosopher Harry Frankfurt recently distinguished between equality and sufficiency.[304] Along the same lines, another philosopher, Michael Walzer, distinguished between those spheres where it was important that all possess the wherewithal for basic life activities (for example, transportation) and those in which the market should govern (for example, new luxury automobiles as opposed to well-worn used cars).[305]

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299. *Id.*

300. Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 530–31 (2017) (citing Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 595 (2015)).

301 *See* Corinne Lestch, *Elected Officials Want to Ban 'Poor Doors' Approved by Bloomberg Administration*, N.Y. DAILY NEWS, July 26, 2014, http://www.nydaily news.com/new-york/elected-officials-ban-poor-doors-approved-bloomberg-administration-article-1.1880874 (noting demands for zoning change precluding the practice).

302. Lauren C. Wittlin, *Access Denied: The Tale of Two Tenants and Building Amenities*, 31 TOURO L. REV. 615, 616 (2015) (citation omitted).

303. *See* Mireya Navarro, *"Poor Door" in a New York Tower Opens a Fight Over Affordable Housing,* N.Y. TIMES, Aug. 26, 2014, https://www.nytimes.com /2014/08/27/nyregion/separate-entryways-for-new-york-condo-buyers-and-renters-create-an-affordable-housing-dilemma.html?mcubz=0 (discussing a proposed luxury apartment building in which mandated affordable units would have a separate entrance, lobby, and street address).

304. *See* HARRY G. FRANKFURT, ON INEQUALITY (2015).

305. *See* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 10–17 (1983).

2. People or Places

There has been a lively debate as to whether government programs to relieve poverty should be people-based or place-based.[306] This conventional bifurcation, according to Professor Nestor Davidson, distinguishes between strategies to "invest in individuals, often with the explicit goal of allowing those individuals to move to a better life," and programs that "seek to reinvigorate distressed neighborhoods."[307] This problem pertains not only to distressed inner cities, but also to many parts of rural America that suffer from "the decline of manufacturing and farm consolidation."[308] However, "while lots of struggling residents see leaving as the best way to improve their lives, a surprising share remain stuck in place" because of high home prices in prosperous cities, reliance on locally-based social service networks and benefits, and cultural dissonance, so that "they no longer believe they can leave."[309]

Davidson asserts that the Manichean nature of the "people or places" debate presents an "unnecessary distraction," and that "[e]very policy that seeks to alleviate individual poverty is constrained by location and, if successful, alters communities. Every policy that seeks to respond to the spatial concentration of poverty works through individuals."[310]

From the perspective of Progressive Property, Professor Ezra Rosser stated that "targeted interventions in the ordinary workings of property law can be used to protect vulnerable populations by changing the power dynamics of the market," and discussed strategies for doing so for people in a "geographically defined space" (place-based) and "to particular parties who have shared characteristics" (people-based), and also a blend of strategies designed to achieve law reform.[311]

Some question the advantages of infrastructure expenditures in lagging communities. In discussing the aftermath of Hurricane Katrina, the land use economist

306. *See, e.g.,* Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development Policy*, 16 GEO. J. ON POVERTY L. & POL'Y 1 n.1 (2009) (citing articles taking both positions). *See also infra* Part VI.B.

307. Davidson, *supra* note 306, at 1.

308. Janet Adamy & Paul Overberg, *Struggling Americans Once Sought Greener Pastures—Now They're Stuck*, WALL ST. J., Aug. 2, 2017, https://www.wsj.com/articles/struggling-americans-once-sought-greener-pasturesnow-theyre-stuck-1501686801.

309. *Id.*

310. Davidson, *supra* note 306, at 6.

311. Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 455–56 (2015).

Edward Glaeser asked whether New Orleans residents would be better off having $200,000 in their pockets or $200 billion spent on city infrastructure, which would be unlikely to revive its economy in any event.[312] He added that "there is a big difference between rebuilding lives and rebuilding communities. Given limited funds, the two objectives may well conflict, and the usual lesson from economics is that people are better off if they are given money and allowed to make their own decisions, much as they are with car insurance."[313]

In what might spark renewed interest in the "people or places" debate, President Trump recently declared that "[w]hen you have an area that just isn't working like upper New York state . . . you can leave, it's OK, don't worry about your house."[314] Programs that offer extensive tax credits to companies creating jobs in upstate New York have been "pushed" by Gov. Andrew Cuomo, but "[these] measures have been criticized as "inefficient," and the state's population decreased by 2,000 in the year ending in 2016.[315]

VI. TAKINGS AND EXACTIONS

Until about the time of the Civil War, American courts regularly explained the power of eminent domain with reference to natural law principles.[316] John Locke provided the alternative explanation that, although the sovereign could not appropriate private property, the conveyance of property for public use could be done by the owner, or by the legislature through its power delegated by the owner.[317] In the U.S., the Fifth Amendment provides, among other limitations on government power, "nor shall private property be taken for public use, without just compensation."[318] This did not constitute a new power of the federal government, but rather a "tacit recognition of a preexisting power to take private property for public use."[319] In 1875, in *Kohl v. United States*,[320]

312. Edward L. Glaeser, *Should the Government Rebuild New Orleans, or Just Give Residents Checks?*, THE ECONOMISTS' VOICE (Sept. 2005), https://doi.org/10.2202/1553-3832.1121.

313. *Id* at 2.

314. Mike Vilensky, *Trump Remark Stings Upstate New York, Sparks Debate*, WALL ST. J., July 28, 2017, at A9A.

315. *Id.*

316. *See* J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931).

317. Locke, *supra* note 7, § 138.

318. U.S. CONST. amend. V.

319. United States v. Carmack, 329 U.S. 230, 241–42 (1946).

the Supreme Court declared that the eminent domain power "is essential to [the U.S. government's] independent existence and perpetuity."[321] Four years earlier, the Court made clear that the duty to compensate did not require an affirmative government appropriation of title, but could result from the government's actions, such as the authorization of a dam that would permanently flood private land upstream.[322]

In *Pennsylvania Coal Co. v. Mahon*,[323] Justice Holmes famously declared: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[324] There, a state law had forbidden the company to mine seams of coal which would provide support for private structures, although earlier Mahon had purchased only surface rights and not the right of support.[325] Holmes opinion is very cryptic, and is not explicitly based either on the Takings Clause or on the company's right to due process of law.

In *Penn Central Transportation Co. v. City of New York*,[326] the Supreme Court's most important regulatory takings case, it evaluated a New York City historic preservation ordinance that precluded the railroad from constructing an office building on top of the architecturally acclaimed Grand Central Terminal. Justice Brennan, writing for the Court, observed that defining a taking "has proved to be a problem of considerable difficulty."[327] He declared:

> [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses

320. 91 U.S. 367 (1875).
321. *Id.* at 371.
322. *See* Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) (private land permanently flooded in course of building government-authorized dam).
323. 260 U. S. 393 (1922).
324. *Id.* at 415.
325. *Id.*
326. 438 U.S. 104 (1978).
327. *Id.* at 123.

> proximately caused by it depends largely "upon the particular circumstances [in that] case."[328]

Justice Brennan then added what has become known[329] as the three-factor *Penn Central* ad hoc balancing test:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. [1] The economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is [3] the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[330]

Since interference with "expectations" is a subset of "economic impact," and since the Court's enumeration is only of factors having "particular significance," there is no clear reason why a three-factor analysis was employed.[331] In any event, there is nothing talismanic about having three factors.[332]

Later, in *First English Evangelical Lutheran Church*,[333] the Court added that a temporary regulation might require compensation in an appropriate case, a proposition it elaborated upon in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[334] There it declared that "we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the

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328. *Id.* at 124 (citation omitted).

329. *See*, *e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 546 (discussing an earlier holding in which the Court had "applied the three-factor regulatory takings analysis set forth in *Penn Central*").

330. *Penn Central,* 438 U.S. at 124 (citations omitted).

331. See Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 655 (2012) ("[T]he intellectual fashions of the day demanded three- and four-part tests.").

332. *See* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PA. ST. L. REV. 601, 615–16 (2014) (discussing other enumerative schemes).

333. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

334. 535 U.S. 302 (2002).

other."[335] The Court declared as well that *Penn Central* remained its "polestar" in regulatory takings cases.[336]

As I have elaborated upon elsewhere, the *Penn Central* doctrine has two principal flaws. First, although conventionally described as a three-factor test, as the brackets above indicate, the duration of a regulation is just as important a factor as the others.[337] Also the *Penn Central* doctrine "has become a compilation of moving parts that are neither individually coherent nor collectively compatible."[338] As Professor Gideon Kanner added: "The vagueness and unpredictability of [*Penn Central*'s] rules, or more accurately the 'factors' deemed significant by the Court which declined to formulate rules, have encouraged regulators to pursue policies that have sharply reduced the supply of housing and are implicated in the ongoing, mind-boggling escalation in home prices."[339] That said, some have found a virtue in *Penn Central*'s vagueness.[340]

Second, while the mechanics of *Penn Central* are ungainly, the more fundamental problem is that it purports to be based on the Takings Clause, whereas it fits better under the rubric of substantive due process.[341] "Takings" refers to the government's appropriation of property, for which the owner is entitled to just compensation. "Burdens," on the other hand, refers to the owner's deprivation, relative to the owner's overall wealth. "Investment-backed expectations" even more explicitly is concerned with the owner and not with the asset.[342] *Armstrong*, upon which *Penn Central* is predicated, states that "justice and fairness" abjure disproportionate burdens of government actions being placed on a few individuals.[343]

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335. *Id*. at 337.

336. *Id*. at 336.

337. *See* Eagle, *supra* note 332.

338. *Id.* at 602.

339. Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York,* 13 WM. & MARY BILL RTS J. 679, 681 (2005)

340. *E.g.,* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

341. *See* Steven J. Eagle, *Penn Central and Its Reluctant Muftis*, 66 BAYLOR L. REV. 1 (2014); *see also*, Kenneth Salzberg, *"Takings" as Due Process, or Due Process as "Takings"?*, 36 VALPARAISO U. L. R. 413 (2002) (Advocating use of due process analysis in reviewing land use regulations); Peter A. Clodfelter & Edward J. Sullivan, *Substantive Due Process Through the Just Compensation Clause: Understanding* Koontz's *"Special Application" of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine's History*, 46 URB. LAW. 569, 616–19 (2014) (asserting that *Koontz* engages in a heightened substantive due process style of judicial review under the guise of takings jurisprudence).

342. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

343. *Id.* at 123–24 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

Pennsylvania Coal itself is much better viewed as a due process case than as a takings case.[344] However, the Court's conservative justices have been unwilling to look at deprivations of land use through what they have regarded as an unconstrained lens,[345] and its progressive justices have viewed it in terms of the Court's pre-New Deal emphasis on property and contract rights.[346] Takings law ought to refer to the property taken, and not to, as *Penn Central* had it, the "economic impact" upon the particular owner of that property, nor that person's "expectations," nor the "character" of the government's action (apart from whether it was arbitrary or not for a public use).[347]

In practice, the *Penn Central* ad hoc, multi-factor balancing test has not proved auspicious for property owners. For instance, the U.S. Court of Federal Claims, which has jurisdiction over takings claims against the federal government, "generally has relied on value losses 'well in excess of 85 percent' in finding takings."[348] As Professor Joseph Singer notes, "It turns out that it is really hard to win a regulatory takings claim."[349]

Penn Central's lack of definitiveness, together with the flight from meaningful long-term planning,[350] seems suited to produce a reign of bargaining and delay and an invitation to arbitrary conduct, which fulfills neither adherence to the rule of law nor the goal of an adequate supply of housing.

A. New Flavors of "Takings"

A permanent appropriation of private land for government use, deemed a "physical taking," requires just compensation.[351] Likewise, restrictions on property that have the effect of

344. Eagle, *supra* note 341, at 25–27.

345. *See, e.g.*, United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (describing substantive due process as an "oxymoron").

346. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 406–07 (1994) (Stevens, J., dissenting) (warning that due process-based compensation for takings of property had an "obvious kinship" with Lochnerism).

347. *Penn Cent.*, 438 U.S. at 124.

348. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOL. L.Q. 307, 335 (2007) (quoting Brace v. United States, 72 Fed. Cl. 337, 357 & n.32 (2006) (collecting cases)).

349. Joseph William Singer, *Justifying Regulatory Takings*, 4 OHIO N.U. L. REV. 601, 606 (2015).

350. *See supra* notes 63–66 and accompanying text.

351. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–35 (1982) (real property); Horne v. Dep't of Agric., 135 S.Ct. 2419, 2426–27 (2015) (personal property).

"forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" may be deemed "regulatory takings" under *Penn Central*'s multi-factor, ad hoc, balancing test.[352] Restrictions that deprive an owner of all economically viable use of land constitute categorical regulatory takings since they do not require the application of a balancing test.[353]

In addition to these familiar, judicially established categories of compensable takings, new varieties have been proposed. Professors Abraham Bell and Gideon Parchomovsky have argued that physical and regulatory takings should be augmented by the category of "derivative takings,"[354] by which they define as "a hybrid of their more familiar close cousins" that occurs when a taking "diminishes the value of surrounding property."[355] More recently, Bell and Parchomovsky have proposed study of what might be styled a "Givings Clause."[356] Under this rubric, parallel to their three categories of takings, would be physical, regulatory, and derivative "givings." Those might require compensation be paid from the recipient to the government.[357]

Justice Elena Kagan's dissenting opinion in *Koontz v. St. Johns River Water Management District* articulated fears that increased Takings Clause liability would lead local governments to grant development approvals that would create negative externalities for the community. [358] In that event, Professor Gregory Stein recently postulated, members of the public should be able to sue for a "reverse exaction."[359] While this kind of citizen lawsuit might be effective with respect to

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352. *Penn Cent.*, 438 U.S. at 123–24 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960).

353. *See* Lucas v. S.C.. Coastal Council, 505 U.S. 1003, 1016 (1992).

354. Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277 (2001).

355. *Id.* at 280–81. Derivative takings:

> resemble regulatory takings in that they reduce the value of property without physically appropriating it. Yet, they are distinct from regulatory takings in that they may arise as the result of a physical taking. And, unlike its cousins, the derivative taking never appears alone; it must always be preceded by a physical or regulatory taking.

Id. (footnote omitted).

356. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547 (2001).

357. *Id.* at 564–74 (setting forth their taxonomy).

358. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2608 (2013) (Kagan, J., dissenting) (asserting that the majority "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money").

359. Stein, *supra* note 136.

egregious cases of cronyism or outright corruption, the overall effect might be to empower local NIMBYs who simply do not want change nearby.

B. Contemporary Takings Issues

1. Varied Views of Regulatory Takings

Professor Christopher Serkin recently advocated that the Takings Clause does not merely provide property owners with negative rights, but rather might be the basis for compensation where government fails its affirmative duty to protect property, perhaps for permitting "passive takings" with respect to sea level rise.[360]

On the other hand, Professor Hanoch Dagan asserted that the "broad consensus" that the taking of private property generally deserves compensation does not apply to regulatory takings law.[361] There, "some progressive authors advocate a regime that sanctions, indeed expects, significant civic sacrifices extending to all economically beneficial uses of one's land. These authors perceive most government injuries to private property as ordinary examples of the background risks and opportunities assumed by property owners."[362]

2. Simple Disregard of Property Rights

Sometimes, the intent of administrators and court seems to be that state governments can reconfigure infrastructure more inexpensively by disregarding property rights. A recent example is *Bay Point Properties, Inc. v. Mississippi Transportation Commission*.[363] There, the state supreme court upheld the commission's determination that condemned land should be valued as if it were subject to an apparently abandoned highway easement, on the ground that state law gave the highway department the power to prevent legal

360. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L REV. 345 (2014).

361. Hanoch Dagan, *Eminent Domain and Regulatory Takings: Towards a Unified Theory* *4 (Oct. 31, 2016), https://ssrn.com/abstract=2861844.

362. *Id.* (footnote omitted).

363. 201 So.3d 1046 (Miss. 2016), *petition for cert. docketed*, Mar. 7, 2017, No. 16-1077.

abandonment as a matter of law. The dissenting justices argued that this would violate the owner's right to just compensation.[364]

3. Government Takings of Less (Or More) than the "Whole Parcel"

The archetypical takings case involves a parcel of land appropriated by the government. Thus, common law property and equity establish relationships of land to land, without any need to focus on the identity of the individuals involved.[365] However, especially in government infrastructure projects such as highway construction, less than a given owner's entire parcel is taken, and condemnation might have significant impacts on adjoining owners, as well.

Professors Bell and Parchomovsky recently have argued that the practical difficulties in dealing with the burdens and benefits of severance should lead to the affected owner having the right to demand that the government entity engaging in an "incomplete taking" be forced to acquire the owner's fee simple, instead.[366] While good intentions lead to "severance damages" when partial takings reduce the value of parts of the owner's parcel that were not taken, a countervailing concern is the benefits the owner derives from the project for which land is taken, which might inure particularly to the owner ("special benefits") or to the area generally. States have attempted to take these factors into account in differing ways.[367]

Another practical problem that affects land development involves the "relevant parcel" with regard to which the relationship between lot size and development rights, and also government takings liability, is to be measured. In *Penn Central*, the Supreme Court stated that: "In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . ."[368] Unfortunately, there is no definitive

364. *See id.* at 1059–160 (Kitchens, J., dissenting).

365. *See* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 VT. L. REV. 549, 559 (2012).

366. Abraham Bell & Gideon Parchomovsky, *Incomplete Takings*, COLUM. L. REV. (forthcoming).

367. *See generally* NICHOLS ON EMINENT DOMAIN § 8A.03 (3d ed. 2015) (summarizing the different state and federal approaches to offsets).

368. Penn Cent. Transp. Co. v. City of New York, 438 U. S. 104, 130–31 (1978).

answer as to how the "relevant parcel" is determined.[369] The Supreme Court's recent decision in *Murr v. Wisconsin*[370] held that reasonable investment-backed expectations should be taken into account in determining the relevant parcel to which it and the other *Penn Central* factors should be applied.[371] The principal dissent, by Chief Justice Roberts, stressed that "in all but the most exceptional circumstances," the boundaries of deeded parcels should "determine the parcel at issue," and that "[c]ramming [the *Penn Central* factors] into the definition of 'private property' undermines the effectiveness of the Takings Clause as a check on the government's power to shift the cost of public life onto private individuals."[372] A separate dissent by Justice Thomas emphasized that the Takings Clause was not deemed to encompass "regulatory takings" before *Pennsylvania Coal Co. v. Mahon* in 1922, and that "it would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment."[373]

VII. REGULATION, HOUSING PRICES, AND PROSPERITY

A. Regulation and High Housing Prices

A classic example of good intentions producing bad results is the tendency of regulations promulgated to provide better housing instead resulting in less housing and less affordability. California, particularly in its coastal cities, is facing a housing affordability crisis. "Median rents across the state have increased 24 percent since 2000, while at the same time median renter household incomes have declined 7 percent."[374] While these rising rents result from a number of factors:

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369. *See generally* Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003).

370. 137 S. Ct. 1933 (2017) (considering whether the statutory merger of two contiguous parcels under the same ownership constituted a regulatory taking).

371. *Id.* at 1945, 1949.

372. *Id.* at 1953–54 (Roberts, C.J., dissenting) (joined by Thomas and Alito, JJ.).

373. *Id.* at 1957 (Thomas, J., dissenting) (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

374. Cal. Hous. P'ship Corp., *Confronting California's Rent and Poverty Crisis: A Call for State Reinvestment in Affordable Homes*, (2016), https://www.issuelab.org/resource/confronting-california-s-rent-and-poverty-crisis-a-call-for-state-reinvestment-in-affordable-homes.html.

> [I]t is clear that supply matters, and there is an urgent need to expand supply in equitable and environmentally sustainable ways. Over the past three decades, California has added only about half the number of units it needs to keep housing costs in line with the rest of the United States.[375]

Overly stringent land use regulations account for much of this problem.[376]

B. Residential Mobility and National Prosperity

The issue of whether government should provide benefits to people or places, discussed earlier,[377] has broad implications for regional and national prosperity. From a macroeconomics perspective, Professor David Schleicher recently has asserted that people are "stuck" in place because state and local governments have created a "huge number of legal barriers to inter-state mobility," including land use laws, differing homeownership subsidies, and differing eligibility standards for public benefits.[378] Those collectively limit exit areas with less opportunity. He added that "public policies developed by state and local governments more interested in local population stability than in ensuring successful macroeconomic conditions."[379]

Those concerns are very much in line with the recent work of economists Chang-Tai Hsieh and Enrico Moretti, who point out that regional and national prosperity is enhanced by workers moving to areas where agglomeration would facilitate their higher productivity. [380] However, they might be discouraged from doing so, because the lower pay in cities where they would add less value to the economy would be more than offset by the lower housing prices there.[381]

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375. Carolina K. Reid et al., *Addressing California's Housing Shortage: Lessons from Massachusetts Chapter 40B*, 25 J. AFFORD. HOUS. & COMMUNITY DEV. L. 241, 241 (2017) (footnote omitted).

376. *See* Edward Glaeser, *Land Use Restrictions and Other Barriers to Growth*, CATO INST. (2014), https://www.cato.org/publications/cato-online-forum/land-use-restrictions-other-barriers-growth.

377. *See supra* Part IV.B.2.

378. David Schleicher, *Stuck! The Law and Economics of Residential Stability*, 127 YALE L.J. *1(forthcoming).

379. *Id.* at *1.

380. Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, (May 18, 2017), http://eml.berkeley.edu//~moretti/growth.pdf.

381. *Id.* at 1–3.

VIII. CONCLUSION

The law of land use planning is marked with good intentions, from the faith of the original Progressives in objective and expert administration, through landowner-centered wariness of regulation of supporters of property rights, to the social-democratic views of the Progressive Property advocates. Yet none have created a substantive framework for regulation that receives general acclaim or even general support. Economic prosperity brings dislocation and inequality. Preserving community inherently is unwelcoming to substantial numbers of outsiders. Affordable housing is fine in the abstract, but different socio-economic groups have very different understandings of how it should work and whom it should benefit.

Likewise, legal mechanisms for policing the boundary between private property rights and permissible government regulation, most notably the Supreme Court's *Penn Central* doctrine, largely leave public officials and judges to their own devices. In the absence of any unifying vision, the particularities of time and place transcend earlier notions of expert long-term planning. Local officials often have imposed ponderous regulatory schemes that inhibit the production of housing and sometimes try to leverage the police power through public-private partnerships that are apt to benefit private participants more than the public.

The American public generally has good intentions, but in the absence of serious debate that might lead to the formation of coherent aspirations and goals based on the discrete needs of various segments of the population and also of places, land use regulation cannot be do other than reflect disarray.