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The Power to Exclude and the Power to Expel

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ABSTRACT

Property laws have far-reaching implications for the way people live and for the opportunities they and their children will have. They also have important consequences for property developers and businesses, both large and small. It is not surprising, therefore, that modern developments in property law have been so strongly influenced by political pressures. Unfortunately, those with the most economic resources and political power have had the most telling influences on the development of property laws in the United States during the twentieth century. This Article introduces a simple game—the "Not-In-My-Backyard Game"—to illustrate the motivations of various parties with interests in the direction of American property law. As the analysis indicates, affluent residents and owners of upscale businesses have incentives to pressure suburban governments for zoning regulations that effectively exclude less affluent residents from their neighborhoods. Affluent residents and corporations who want to relocate into urban neighborhoods have incentives to pressure city governments to use eminent domain to facilitate urban redevelopment projects, and the takings that ensue often effectively expel many less affluent residents and smaller businesses from their neighborhoods. The analysis accords with the historical evidence. In the early twentieth century, suburban governments began to use zoning ordinances to exclude poor and less affluent residents from suburban neighborhoods. Around the middle of the twentieth century, city governments began to use takings to effectively expel less affluent residents and smaller businesses from urban neighborhoods. The United States Supreme Court upheld the powers of local governments to exclude and expel, and state courts acquiesced to them. The consequences are high and rising land prices, unaffordable housing, homelessness, and the perpetuation of the de facto segregation of the American people by income, wealth, race, ethnicity, religion, and national origin.

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I. INTRODUCTION

Property laws have far-reaching implications for the way people live and for the opportunities that they and their children will have. They also have important consequences for property developers and businesses, both large and small. It is not surprising, therefore, that developments in property law have been so strongly influenced by political pressures. Unfortunately, those with the most economic resources and political power have had the most telling influences on the way property laws developed in the United States during the twentieth century. Thus, modern American property law strongly favors the interests and aspirations of those with the most economic and political power and disfavors poor and marginalized groups.[1]

This Article uses a simple normal form game—the "Not-In-My-Backyard Game"—to illustrate the motivations of various parties with interests in the direction of American property law. Affluent and wealthy people who want to escape the grime and blight of urban neighborhoods by relocating to the suburbs, as well as the upscale businesses that supply and serve them, have incentives to pressure suburban governments to enact zoning regulations that effectively exclude less affluent and less wealthy residents from their suburban neighborhoods. Affluent and wealthy people who want to enjoy an urban lifestyle, as well as many large corporations, may be reluctant to relocate into urban areas unless city governments redevelop entire neighborhoods to offer them the amenities of an upscale, urban environment. This puts pressures on city governments to use takings to facilitate urban redevelopment,[2] and the takings often will effectively expel many less affluent residents and smaller businesses from these urban neighborhoods.[3]

In response to political pressures, local governments initially began using zoning ordinances to exclude poor and less affluent people from suburban neighborhoods in the early twentieth century.[4] Sometime around the middle of the twentieth century, as pressure to gentrify urban neighborhoods mounted, local governments also began using takings to implement urban economic redevelopment plans, which often

[1] Harold A. McDougall, *Gentrification: The Class Conflict over Urban Space Moves into the Courts*, 10 FORDHAM URB. L.J. 177, 177 (1981).

[2] *Id.* at 178.

[3] *Id.*

[4] Bethany Y. Li, *Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification*, 85 FORDHAM L. REV. 1189, 1211 (2016).

effectively expelled poor and less affluent people from urban neighborhoods.[5] The legal and constitutional powers of local governments to enact zoning schemes and implement economic development takings were soon challenged. The United States Supreme Court has upheld those powers in sweeping and categorical terms[6] and thus, perhaps unintentionally, upheld the power of local government to exclude and expel. For the most part, state courts have also acquiesced to these powers.[7] Unfortunately, under political pressures from affluent groups and corporate interests, local governments have continued to use their powers to enact zoning schemes that exclude poor and middle-class people from suburban neighborhoods[8] and to implement urban redevelopment plans that displace poor and marginalized urban residents from urban neighborhoods.[9] This has contributed to rising land prices,[10] the unaffordability of housing,[11] homelessness,[12] and the perpetuation of the de facto segregation of individuals by income, wealth, race, ethnicity, religion, and national origin.[13]

Section II of this Article uses property theory to offer a legal analysis of the expansion in the scope of governmental zoning and takings powers. Section III presents the Not-In-My-Backyard Game and uses it both to illustrate the motivations of the various parties involved in urban redevelopment and explain how and why affluent homeowners and corporate interests have had inordinate political influence over the direction of American property law. Section IV describes and analyzes the way in which the government's power to exclude developed, and Section V describes and analyzes the way in which the government's power to expel developed. Section VI offers conclusions and a ray of hope for the prospect of fundamental reforms on the horizon.

II. A PROPERTY RIGHTS ANALYSIS

A. The Bundle of Sticks Analogy

The place to start any property analysis is with the theory of property rights. For the sake of the analysis, consider a fee simple in land to be the representative property interest.[14] The prevalent modern theory of property rights analogizes them to a "bundle

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[5] McDougall, *supra* note 1, at 178.

[6] Eric R. Claeys, Euclid *Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 731 (2004) [hereinafter Claeys, Euclid *Lives?*].

[7] *Id.* at 740–41.

[8] Adam P. Hellegers, *Eminent Domain as an Economic Development Tool: A Proposal to Reform HUD Displacement Policy*, 3 MICH. ST. U. DETROIT C. L. L. REV. 901, 943 (2001).

[9] Li, *supra* note 4, at 1211.

[10] *Id.* at 1208.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1210.

[14] For a classic treatment of estates in land, see POWELL ON REAL PROPERTY: MICHAEL ALLEN WOLF DESK EDITION (Michael Allen Wolf ed., LexisNexis Matthew Bender 2009), and SHELDON F. KURTZ & HERBERT HOVENKAMP, CASES AND MATERIALS ON AMERICAN PROPERTY LAW 246 (4th ed. 2003).

of sticks."[15] Thus, property rights consist of the legal rights and obligations of persons in regard to land or chattels.[16] We can think, therefore, of the property rights associated with a fee simple in land as a bundle of rights and obligations, in which the rights include the uses that may be made of the land,[17] the actions that can be taken on or with the land,[18] and the transactions that can be undertaken to convey rights and obligations in the land,[19] and in which the obligations include the duty to pay taxes on the land,[20] any other affirmative duties under public laws or regulations on the land,[21] and the duties associated with any affirmative private land use servitudes.[22] Public laws or regulations and private land use servitudes restricting land uses would typically eliminate or diminish specific rights in the bundle of sticks,[23] whereas public laws or regulations and private land use servitudes that impose affirmative duties on the owner would add obligations to the bundle of rights or augment existing ones.[24] An unregulated, unrestricted, and untaxed parcel of land would be a fee simple in the most absolute sense possible.[25]

B. Zoning Regulations

The bundle of sticks analogy can help clarify how government regulations, especially zoning regulations, affect private property rights. A regulation that restricts land uses eliminates certain rights in the owner's bundle, and a regulation that imposes affirmative duties on the landowner adds certain obligations. The mere fact that the government has the regulatory authority to eliminate certain rights in an owner's bundle implies that the government has something similar to a right of entry[26] against

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[15] *See, e.g.*, JESSE DUKEMINIER ET AL., PROPERTY 102–03 (2014).

[16] To be more precise, a well-defined system of property law defines the hierarchy of persons' rights regarding land or chattels. *Id*. at 33–34.

[17] Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 68 (2014).

[18] OHIO STATE BAR ASS'N, THE LAW & YOU 111 (14th ed. 2012) (1967), https://www.ohiobar.org/General%20Resources/LawandYou/TLAY_Complete.pdf.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Eric R. Claeys, *Bundle-of-Sticks Notions in Legal and Economic Scholarship*, 8 ECON. J. WATCH 205, 211–14 (2011).

[24] Robert C. Ellickson, *The Affirmative Duties of Property Owners: An Essay for Tom Merrill*, 3 PROP. RTS. CONF. J. 43, 48–49 (2014).

[25] Roger W. Andersen, *Present and Future Interests: A Graphic Explanation*, 19 SEATTLE U. L. REV. 101, 103–05 (1995).

[26] Under the common law—still followed in most states—a grantor who owns an estate in land can convey the estate to a grantee subject to the grantor's "right to enter" and take the estate back from the grantee. The government's power to regulate a privately-owned estate in land gives the government something analogous to a "right to enter" and eliminates certain rights in the owner's bundle.

those property rights even if the government never exercises its regulatory authority. If the constitutional scope of the government's regulatory powers is broadened, that augments the scope of the government's right to enter, thereby immediately diminishing the scope of private property rights.[27] The implication is that, as the Supreme Court narrowed the doctrine of substantive due process and expanded the scope of the government's regulatory powers during the twentieth century,[28] the Court narrowed the scope of private property rights, even when the government did not immediately exercise its new powers.

Of course, private property rights did not disappear as soon as the Supreme Court affirmed local governments' zoning powers, but private property did become subject to increased risks of being curtailed by governmental regulations.[29] And the effect was immediate. As soon as the scope of the government's regulatory power increased, all private property rights became subject to broader and, in a sense, larger "government-owned" contingent future interests.[30] Property rights thus became more encumbered by local governments' de facto right to enter and eliminate sticks from owners' bundles.[31] Moreover, when governments exercise their zoning powers, the regulations take "sticks" from the owners' bundles or add obligations that make their ownership more burdensome. From a historical perspective, when the United States Supreme Court upheld the government's right to enact zoning laws in *Village of Euclid*,[32] that immediately affirmed local governments' power to eliminate particular private property rights in land.[33] When local governments used their powers to enact zoning ordinances, they, in fact, eliminated particular private property rights in land.[34] The important question is: who controls the government's power to regulate private property?

C. Takings

We could ask the same question about the government's takings power. In fact, the United State Supreme Court also expanded the government's takings power during

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[27] Daniel B. Klein & John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium*, 8 ECON. J. WATCH 193, 195 (2011).

[28] The substantive due process doctrine defines the scope of the government's inherent powers. The United States Supreme Court applied the doctrine strictly in the early decades of the twentieth century and thus struck several governmental regulations in a number of important cases. BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 3 (1998). The matter nearly resulted in a constitutional crisis when President Roosevelt was impeded from implementing his New Deal legislation. *Id.* The Court then began to apply the substantive due process doctrine less strictly before President Roosevelt followed through on his "Court packing plan." *Id.* The scope of the government's regulatory powers was defined more broadly thereafter and private property rights were circumscribed more severely. *Id.*; *see generally* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

[29] *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 383 (1926).

[30] *Id.*

[31] *Id.*

[32] *See infra* Part IV.

[33] *Village of Euclid*, 272 U.S. at 383.

[34] *See infra* Part IV.

the twentieth century.[35] For practical purposes, a conventional or physical taking terminates the entire bundle of rights and obligations that a person owns in land or chattels.[36] A regulatory taking arises when regulations would eliminate so many or such important rights from the bundle of sticks or add so many obligations that the courts determine the regulations amount to a taking.[37] The property owners would then receive just compensation, but that compensation typically would be calculated to reflect the fair market value of the rights eliminated, the obligations added, or both.[38] A taking through exactions[39] is the most complicated case. In that case, courts would have to determine that the exactions demanded in return for a permit required under a set of regulations had neither the requisite connection to the purpose of the regulations or the proportionality to the adverse impact of the owner's proposed use to pass constitutional muster.[40] This determination would boil down to the courts deciding the regulators were demanding to eliminate so many rights or to place so many obligations in the bundle of sticks, or both, that the exactions amounted to a taking.[41] The court would then require that the party receive just compensation, calculated again with reference to the fair market values of the rights eliminated and the obligations placed in the bundle.[42]

The government does not actually violate anyone's property rights when it uses eminent domain to take private property. Given a well-defined corpus of takings law, when someone acquires property in land or chattels, they receive the property rights and obligations subject to the possibility that the government may be able to exercise the power of eminent domain to take some or all of the rights, to add additional obligations to their bundle of sticks, or both.[43] For practical purposes, the fact that private property can be subject to takings means that the government has a contingent future interest[44] in all private property (at least all private property within the reach of its takings powers). To again draw an analogy with future interests, it is as if the

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[35] *See infra* Part V.

[36] "In a physical taking, the government, or some private party authorized by the government, occupies private land in whole or in part." Richard A. Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99, 101 (2012).

[37] *Id.*

[38] Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 678 (2005). There are many nuisances. *See id.* at 682–703 (discussing types of nuisances).

[39] Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 611 (2004).

[40] *Id.*

[41] This is an intuitive way of describing the nexus and rough proportionality tests for exactions under the Supreme Court's takings jurisprudence. *See, e.g.*, Lee Anne Fennell, *Hard Bargain and Real Steals: Land Use Exactions Revisited*, 86 IOWA L.J. 1, 3 (2000).

[42] The courts typically apply the fair market value standard, even though it raises myriad conceptual and practical problems. *See, e.g.*, Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 252 (2007).

[43] Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 26 (2015).

[44] *See, e.g.*, Berman v. Parker, 348 U.S. 26, 35 (1954).

government retained a right of entry (or power of termination) when it initially granted property interests in land.[45] The only significant difference between a governmental taking and a grantor's exercise of a right of entry is that when a private grantor exercises a right of entry against her grantee, she typically has no obligation to provide the grantee with any compensation;[46] however, when the government exercises eminent domain by taking private property, the private property owner is entitled to just compensation.[47]

Nonetheless, when the United States Supreme Court issues an opinion that expands the scope of the government's takings powers, the holding immediately subjects all private property to increased risks that the government will exercise its takings powers.[48] Such an opinion augments the government's contingent future interest in all private property and thus diminishes individuals' private property rights.[49] Therefore, in a sense, the Supreme Court expands the government's contingent rights against private property as soon as it broadens the scope of the government's takings powers. This itself could be considered a kind of expropriation even though it is not a taking and just compensation is not required.[50] Of course, if the government exercised its expanded takings powers, obviously a further and more significant expropriation would occur.[51] But merely increasing the scope of the government's takings powers immediately infringes on private property rights.[52] The matter is far from merely academic because in the second half of the twentieth century, the Supreme Court significantly expanded the government's takings powers,[53] and local governments across the country began using their broadened powers to pursue political objectives, which often included redeveloping urban neighborhoods.[54]

D. The Levers of Government

Because an expansion in the government's regulatory and takings powers has such important implications, the obvious question is: who controls those powers? Of course, as a kind of public property, the government's powers to regulate and take private property are subject to political control.[55] The vagaries of the political process inevitably mean that this adds considerable uncertainty to the scope of an individual's private property rights. Because people are generally risk averse, other things equal,

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45 Smythe, *supra* note 43, at 26.

46 Wyman, *supra* note 42, at 249.

47 *Id.* at 252–53.

48 Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 536 (2009).

49 *Id.* at 562.

50 *See* Wyman, *supra* note 42, at 239.

51 *See* Bell, *supra* note 48, at 518–20.

52 *Id.*

53 *See, e.g.*, Berman v. Parker, 348 U.S. 26, 35 (1954).

54 *See infra* Part V.

55 Bell, *supra* note 48, at 520–21 (footnotes omitted).

the uncertainty would tend to decrease the value of private property to its owners.[56] But in this case, other things are not equal because political power and influence are not equal, and the political process has inherent biases and tendencies that likely more than offset the adverse impacts of the uncertainty on the market value of private property.[57] In fact, the way the political process works, the effect of politicizing private property by augmenting the government's regulatory and takings powers is almost certainly to put ongoing, upward pressure on the market value of private property rights.[58] The intuition is quite simple: those with the greatest vested interests dominate the local political processes that control zoning and governmental takings.[59] In addition, the people with the greatest vested interests are the ones who own and control the most private property.[60] The incentives of wealthy and influential property owners inevitably incline them to use their political influence to ensure that government regulations and takings drive private property values up rather than down and thus increase rather than decrease their wealth.

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[56] This is an established principle of economics. *See, e.g.*, CHRISTIAN GOLLIER, THE ECONOMICS OF RISK AND TIME 20–21 (2001) (discussing the risk premium that a rational person would pay to eliminate a risk); *see also* Dennis R. Capozza & Gregory M. Schwann, *The Value of Risk in Real Estate Markets*, 3 J. REAL EST. FIN. & ECON. 117, 117–18 (1990) [hereinafter Capozza & Schwann, *The Value of Risks*].

[57] Not surprisingly, studies have found the effect of regulatory risks on real estate prices quite complicated. *See, e.g.*, Dennis R. Capozza & Gregory M. Schwann, *The Asset Approach to Pricing Urban Land: Empirical Evidence*, 17 AM. REAL EST. & URB. ECON. ASS'N J. 161, 161 (1989); Capozza & Schwann, *The Value of Risks*, *supra* note 56, at 117–18; Karsten Lieser, *Pricing of Specific Real Estate Market Risks for 66 Countries Worldwide* 1–3 (IESE Bus. Sch. Univ. of Navarra, Working Paper No. 940, 2011), http://www.iese.edu/research/pdfs/di-0940-e.pdf. The effects of regulatory risks are especially complicated because some regulations might actually reduce other risks and increase land values overall. This phenomenon is consistent with the thesis presented in this Article.

[58] There is substantial empirical evidence showing that zoning laws and urban redevelopment have increased land values and housing prices. For studies that examine the effects of zoning, see Edward L. Gleaser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329 (2005); John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 CITYSCAPE: J. POL'Y DEV. & RES. 1, 69 (2005); Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 1–35 (Nat'l Bureau of Econ. Research, Working Paper No. 8835, 2002). The effects of the government's takings powers are more complicated to evaluate because they have been intertwined with urban renewal and redevelopment programs. For evidential support, see William J. Collins & Katharine L. Shester, *Slum Clearance and Urban Renewal in the United States*, 5 AM. ECON. J. APPLIED ECON. 239 (2013); Veronica Guerrieri et al., *Endogenous Gentrification and Housing Price Dynamics* 1–55 (Nat'l Bureau of Econ. Research, Working Paper No. 16237, 2010).

[59] *See* McDougall, *supra* note 1, at 177.

[60] The groups may vary depending on the neighborhood and context, but they typically include homeowners, businesses, bankers, real estate speculators, and property developers. For a variety of viewpoints that largely agree about the important actors, see TODD DONOVAN ET AL., STATE & LOCAL POLITICS 378 (Carolyn Merrill ed., 2009); WILLIAM A. FISCHEL, ZONING RULES!: THE ECONOMICS OF LAND USE REGULATIONS ix (2015); RUTHERFORD H. PLATT, LAND USE AND SOCIETY 200 (3d ed. 2014).

III. THE NOT-IN-MY-BACKYARD GAME

A. A Worm's Eye View

The basic problem can be clarified with a simple normal form game.[61] A normal form game is described by the players, their strategic options, and the payoffs that each of them would earn under all the possible combinations of their actual decisions.[62] Games can be described more completely in extensive form,[63] but normal form games often provide a convenient way of explaining and remembering a general kind of strategic problem.[64] To that end, normal form games often seem to caricature the players by boiling their alternatives down to their essential strategic elements.[65] Although that is certainly true of the Not-In-My-Backyard Game, there is nothing funny about it; in fact, the game represents an unfortunate but important problem and suggests less than flattering ulterior motivations for the way many people have influenced the development of modern property laws.[66]

Assume there are two players: for convenience, call them "Rich" and "Poor." Rich can be thought of more generally as an upper-middle or middle-class person or family, and Poor can be thought of more generally as a working-class or poor person or family. Assume each of the two players has two strategic options: "Urban" or "Suburban." Urban is a decision to live in the downtown core of the city; Suburban is a decision to live on the outskirts of the city in a suburban neighborhood. Assume that if Rich and Poor both choose to live in the same area, whether Urban or Suburban, Rich will earn a "High" payoff and Poor will earn a "Low" payoff.[67] Assume, however, that if Rich and Poor choose to live in different areas of the city, regardless of whether Rich chooses Urban and Poor chooses Suburban or whether Rich chooses Suburban and Poor chooses Urban, Rich will earn a "Very High" payoff and Poor will earn a "Very Low" payoff. The entire normal form game can be depicted as follows:[68]

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[61] For a nontechnical introduction to game theory, its history, and its methods, see MORTON D. DAVIS, GAME THEORY (1997); WILLIAM POUNDSTONE, PRISONER'S DILEMMA (1992). For introductions to game theory written specifically for legal professionals, see HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS 34–50 (2003), and DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994) (providing general background material for legal professionals).

[62] *See* BAIRD ET AL., *supra* note 61, at 4.

[63] Theodore L. Turocy & Bernhard von Stengel, *Game Theory* 7 (Encyclopedia of Info. Sys., Working Paper No. LSE-CDAM-2001-09, 2002).

[64] *Id.*

[65] *Id.*

[66] See the discussion *infra* Sections III.2 and III.3.

[67] Economists typically equate the players' payoff to their utilities or their profits (if the players are business firms). It is assumed that the players want to maximize their payoffs regardless of the form they take. The specific numerical values of "Very High," "High," "Low," and "Very Low" do not matter in this game. All that matters to the analysis is that Very High > High > Low > Very Low. If that is true, all of the analysis logically follows from the assumption that the players will try to maximize their own payoffs.

[68] As a matter of convention, the payoffs of each player from any combination of their strategies are indicated in the cells of the matrix. The payoffs of the player who is identified on the left-hand side of the matrix are written inside the cell first, and the payoffs of the player who

Not-In-My-Backyard Game

		Poor: Urban	Poor: Suburban
Rich	Urban	High, Low	Very High, Very Low
	Suburban	Very High, Very Low	High, Low

The rationale for the payoff structure is simple: if Rich and Poor live in different areas of the city, there will be no cross-subsidization between them, and Rich will be able to live in an upscale neighborhood with well-kept homes and manicured landscaping.[69] All of Rich's property and sales taxes will help to fund public services that Rich alone will enjoy, such as schooling and policing; Poor will have to fund all of her own consumption of public services from her own taxes, and Rich will be left much better off than Poor. In addition, Rich will enjoy his surroundings living in an upscale neighborhood, but Poor will not be able to share the aesthetic pleasure of seeing well-kept homes and beautiful lawns and gardens.

If Rich lives in the same area of the city as Poor, however, Rich's property and sales taxes will help to subsidize Poor's consumption of public services; moreover, Rich will not necessarily be able to enjoy living in such an upscale neighborhood. Although Poor's taxes will help to fund Rich's consumption of public services, because Rich pays more taxes than Poor, Rich will provide a significant net subsidy to Poor, thereby reducing Rich's payoff and raising Poor's payoff relative to the outcomes in which they each live in different areas of the city. In addition, Poor may enjoy living nearer to Rich's well-kept home with its manicured landscaping, although Rich may not derive so much pleasure from living closer to Poor's more modest housing situation. The structure of the payoffs in the Not-In-My-Backyard Game thus captures the kernel of the strategic problem: Rich has an incentive to live in a different area than Poor, but Poor has an incentive to live in the same area as Rich.[70]

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is identified on the top of the matrix are written in the cell second. The diagrammatic representation of the game thus describes the players, their strategic options, and how their strategic choices would determine their payoffs. That makes it a complete normal form representation of the game.

[69] The game represents the problem metaphorically. Thus, references to "Rich" or "Poor" in the singular can be taken as references to rich people or affluent people generally. In other words, if all rich people live together and away from poor people, then all their taxes will be spent on public services for themselves. If rich and poor people live together, however, then the rich people's taxes will help to finance the public services enjoyed by poor people.

[70] Because the game represents the problem metaphorically, it focuses on the core of the problem. That is one of the strengths of using a normal form game. It also oversimplifies problems and makes people seem much more self-serving and uncompassionate than they may be. Nonetheless, almost everyone has heard people explain that they moved to a new neighborhood because the schools are better, or they wanted to live in a safer neighborhood, or they wanted to live in a "nicer" neighborhood. While people who say those things may not be

Describing a normal form game is often easier than predicting how it will be played. Game theory usually predicts the play of games using some solution concept.[71] The most compelling predictions about the play of a game arise when the game has a dominant strategy equilibrium.[72] A dominant strategy equilibrium is an outcome of a game in which each player chooses a dominant strategy;[73] a dominant strategy is one that is always best for the player no matter what strategy the other players choose.[74] In a sense, therefore, a game does not have a strategic problem when it has a dominant strategy equilibrium because each player has a strategic option that is always best no matter what the other players choose to do. Unfortunately, the Not-In-My-Backyard Game has a very difficult strategic problem at the core, and it certainly does not have a dominant strategy equilibrium. In fact, most non-trivial games do not have dominant strategy equilibria.[75] The Nash equilibrium solution concept is therefore much more commonly used to predict the play of games.[76]

A Nash equilibrium is an outcome of a game in which each player's strategy is best against the other players' strategies.[77] Every normal form game has at least one Nash equilibrium, although the Nash equilibrium might be "mixed."[78] A Nash equilibrium is "mixed" if it entails a player randomly choosing between two or more "pure"[79] strategies with certain probabilities.[80] For example, in the school yard game of "Stone, Paper, Scissors," the mixed strategy Nash equilibrium is for each player to randomize his or her choice between the three alternatives with a one-third probability for each.[81] That probably accords with most people's memories of actually playing the game. Unfortunately, mixed strategy Nash equilibria are often not particularly compelling. Although they might make sense for a school yard game like "Stone, Paper, Scissors," they do not seem to provide intuitive rationales for the play of important real-world games in which the players have large payoffs at stake and time

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as self-serving and uncompassionate as "Rich," what they say reflects the same kind of motivations.

[71] *See* Turocy & von Stengel, *supra* note 63, at 4–5.

[72] *Id.* at 12.

[73] *Id.*

[74] *See* JACKSON ET AL., *supra* note 61, at 44–45.

[75] *See* Turocy & von Stengel, *supra* note 63, at 10.

[76] The Nash equilibrium concept is named after John Nash, who was made famous by the film "A Beautiful Mind." For the book that the film was based upon, see SYLVIA NASAR, A BEAUTIFUL MIND (1998).

[77] *See* JACKSON ET AL., *supra* note 61, at 44–49.

[78] *Id.*; *see* BAIRD ET AL., *supra* note 61, at 14; POUNDSTONE, *supra* note 61, at 55–59.

[79] A "pure" strategy is simply one of the discrete strategic options described in the game. For example, in the "Not-In-My-Backyard Game," each player has two pure strategic options: "Urban" or "Suburban." *See* BAIRD ET AL., *supra* note 61, at 14.

[80] *See* Turocy & von Stengel, *supra* note 63, at 3.

[81] *See id.* at 17.

to think through their options.[82] Pure strategy Nash equilibria, however, are often intuitively compelling if they exist and if they are unique.[83]

A pure strategy Nash equilibrium is an outcome of a game in which each player's pure—or non-randomized—strategy is best against the other players' pure strategies.[84] For example, in the well-known Prisoner's Dilemma Game,[85] the unique pure strategy Nash equilibrium is for both of the prisoners to confess.[86] When a unique pure strategy Nash equilibrium exists, most game theorists would use it to predict the way the players would play the game, especially if the players were knowledgeable about the rules and experienced with the play of the game.[87] Unfortunately, the Not-In-My-Backyard Game does not have a pure strategy Nash. In the Not-In-My-Backyard Game, Poor is always best off choosing the same strategy as Rich, but Rich is always best off choosing a different strategy than Poor. For example, if Rich chooses "Urban," then Poor's best strategy is to also choose "Urban." But, if Poor chooses "Urban," then Rich's best strategy is to choose "Suburban." The sad fact about the strategic problem is that Poor always aspires to be near Rich, but Rich always aspires to escape from Poor.[88]

Of course, the housing game has a mixed strategy Nash equilibrium, but the strategy is completely implausible. If both players picked "Urban" and "Suburban" with fifty percent probabilities, their strategies would be best against one another's strategies.[89] But people do not choose where to live randomly, even with fixed

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[82] To make matters worse, some games have multiple Nash equilibria. When there are multiple equilibria, finding any compelling reason to believe that any one of them is more likely to be played than the others can be difficult.

[83] Game theorists say there is a unique Nash equilibrium if there is one and only one Nash equilibrium. *See, e.g.*, Turocy & von Stengel, *supra* note 63, at 14 (showing the prisoner's dilemma as a game that has a unique Nash equilibrium).

[84] *See* JACKSON ET AL., *supra* note 61, at 45–46.

[85] Here is a version of the Prisoner's Dilemma Game: Two suspects have been arrested. The district attorney separates them and says to each, "if you do not confess, and your accomplice does, you'll get twenty years in jail and he'll get a suspended sentence (with no prison time); if you confess and your accomplice does not, you'll get a suspended sentence (with no prison time) and he'll get twenty years." But both suspects know that if neither of them confesses they'll only get five years each, and if they both confess they'll both get ten years. It is easy to reason in the Nash equilibrium of the game that both suspects will confess. For a similar but slightly different rendition, see *id.* at 42–43.

[86] *See* BAIRD ET AL., *supra* note 61, at 16.

[87] THOMAS J. NECHYBA, MICROECONOMICS 883 (2010).

[88] The depiction of the players, especially "Rich," is admittedly bleak. But people often aspire to move to neighborhoods that are "nicer," have "better schools," or are "safer." If they thought about it more, they might acknowledge that "nicer," "safer" neighborhoods with "better schools" usually are in affluent neighborhoods and that the neighborhoods are affluent because there are no (or relatively few) poor residents living in them.

[89] This is easy to prove: if Poor was equally likely to choose Urban or Suburban, then Rich would be indifferent between Urban and Suburban. If he chose either of them with a fifty percent probability, that would be the best he could do. If Rich was equally likely to choose Urban or Suburban, then Poor would be indifferent between them, and if she chose either of them with a fifty percent probability, that would be the best she could do.

probabilities. Thus, with no pure strategy Nash equilibrium and an implausible mixed strategy Nash equilibrium, predicting how the players in the Not-In-My-Backyard Game would actually play is challenging.

The purpose of describing the Not-In-My-Backyard Game is not to realistically predict people's actual behavior so much as to expose some of the underlying motivations that contribute to an important social phenomenon and have influenced modern developments in property law. That said, the game is not empirically irrelevant either; it depicts a scenario in which Rich will attempt to move away from the vicinity of Poor, and Poor will attempt to move into the vicinity of Rich. Over the last several decades, housing markets have frequently been roiled by significant migrations of people and complete transformations of neighborhoods.[90] The Not-In-My-Backyard Game suggests the kind of turmoil and discontent that have characterized some local housing markets for many years, as well as some of the motivations that have contributed to the problems. But by itself, the game seems incomplete because there are broader dimensions to the problems that the game does not capture. In fact, a larger game is at play in people's actual behavior—an inherently political game in which the courts and legislatures determine the laws that shape people's housing options and decisions. The true purpose of the Not-In-My-Backyard Game is to shed light on those larger forces.

B. A Bird's Eye View

To fully comprehend the larger forces requires a broad perspective. But the Not-In-My-Backyard Game provides a useful vantage point from which to take a bird's eye view of the matter. One can summarize the kernel of the game with the observation that Poor wants to live near Rich, but Rich wants to live away from Poor. Therefore, both Rich and Poor have incentives to try to change the rules of the game to achieve their preferred outcomes. Poor has an incentive to lobby for and, if possible, to help devise laws and practices that will enable her to live near Rich. Rich, in contrast, has an incentive to lobby for and, if possible, to help devise laws and practices that will enable him to live away from Poor.

More precisely, the incentive for Poor to lobby for laws that will allow her to live near Rich is the difference between earning Low and Very Low payoffs. Conversely, the incentive for Rich to lobby for laws that will allow him to live away from Poor is the difference between Very High and High payoffs. To be sure, at this level of generality, it is not clear whose incentive is the strongest.[91] As a practical matter, however, the incentive effects are almost inevitably dominated by other important factors, especially the relative power, influence, and political acumen of the parties.

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[90] The saddest and most obvious example is from observations of "racial tipping" and "white flight." In some cities, white residents have emigrated from historically white neighborhoods as immigration of black residents into the neighborhood has reached a "tipping point." For seminal articles discussing this topic, see Thomas C. Schelling, *Models of Segregation*, 59 AM. ECON. REV. 488, 488 (1969); Thomas C. Schelling, *Dynamic Models of Segregation*, 1 J. MATH. SOC. 143, 143 (1971) [hereinafter Schelling, *Dynamic Models*].

[91] In other words, it is not clear whether Very High minus High exceeds Low minus Very Low. It might be possible to concoct some kind of explanation about why the former should exceed the latter, but the matter is probably less important than other political considerations.

One of the conundrums in the early literature on public choice was the purportedly poor predictive power of Director's Law.[92] Aaron Director[93] proposed that in a democracy, the net redistributive effect of the public sector should be to divert resources from the poor and rich to the middle class.[94] His reasoning was that the middle class comprises the largest number of voters and thus should dominate political outcomes.[95] If people are rational and significantly self-interested, therefore, the political process should result in government tax and expenditure policies that primarily work to the advantage of the middle class.[96]

The theory is that middle class voters will use their voting power to elect legislators who will levy taxes that disproportionately burden the rich and poor and use the tax revenues for government programs and services that disproportionately benefit the middle class.[97] The poor and rich thus would end up subsidizing the middle class's consumption of public goods and services.[98] The idea is compelling but has questionable empirical relevance.[99] Evaluating the theory presents a problem because of the difficulty in assessing the distribution of the benefits of government programs and services,[100] but the size of the impact, if any, seems less significant than one might have imagined.[101] Perhaps middle class voters are not as selfish as some might have thought. It seems even more likely, however, that the influence of a political group depends on much more than just the number of its votes and that wealth, income, education, and social networks probably dwarf raw voting numbers in determining political outcomes.[102]

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[92] Although the idea is commonly attributed to Aaron Director, he never published it. For the seminal article on this topic, see generally George J. Stigler, *Director's Law of Public Income Redistribution*, 13 J. L. & ECON. 1 (1970). As an empirical matter, Director's Law was confounding because it was compelling intuitively, but the evidence was generally ambiguous. For a recent survey, see Philipp Mohl & Oliver Pamp, *Income Inequality, Redistributional Spending & Director's Law—An Empirical Investigation* 1–2 (Paper presented at the Annual IPES Meeting Philadelphia, Nov. 14–15, 2008).

[93] Douglas Martin, *Aaron Director, Economist, Dies at 102*, N.Y. TIMES (Sept. 16, 2004), http://www.nytimes.com/2004/09/16/us/aaron-director-economist-dies-at-102.html.

[94] Stigler, *supra* note 92, at 1.

[95] *Id*. at 9.

[96] *Id.*

[97] *Id*. at 2.

[98] *Id.* at 3.

[99] *See, e.g.*, Mohl & Pamp, *supra* note 92, at 26. A more recent comparative study suggests that Director's Law might have more empirical support in some political systems than in others. *See* Lars P. Feld & Jan Schnellenbach, *Political Institutions and Income Redistribution: Evidence from Developed Economies* 1 (CESifo, Working Paper No. 4382, 2013).

[100] *Id.* at 7.

[101] *Id*. at 1.

[102] As Joseph Stiglitz has observed, the connection between wealth and political influence can lead to a vicious circle: "with the rich having more and more influence, they write the rules of the political game to give themselves more power and influence, which means economic inequality gets even more translated into political inequality, and the political inequality gets translated into ever more economic inequality." JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY

There are many ways in which upper-middle class and wealthy voters wield inordinate political influence. Their greater wealth and income allows them to contribute more generously to political campaigns than less affluent voters.[103] Their educations and professional expertise also provide them with a better understanding and awareness of how political options impact their own interests and probably enable them to participate in the process and pursue their interests much more effectively than less educated and less professional voters.[104]

Moreover, because they often attend the same schools and work in the same jobs as future legislators and judges,[105] upper-middle class and wealthy voters generally have considerably more social contacts with important political leaders than other voters. This likely not only gives them a greater sense of ease in communicating their interests and views to people in important political positions, it probably also gives them considerably more opportunity to do so. Additionally, because judges, legislators, and other political leaders are more likely to come from upper-middle class or wealthy families, the political values, attitudes, and interests of political leaders often coincide with the political values, attitudes, and interests of the upper-middle class and rich voters.[106] Nothing is more persuasive than shared beliefs and interests.

The inordinate influence of upper-middle class and rich voters on the political process by itself tends to result in laws and policies that generally favor the affluent at the expense of the less affluent.[107] But there are other important forces at play. Corporate actors play an often invisible but powerful role in politics at every level and at every stage of the process,[108] and corporate interests almost invariably coincide with those of the voters who own the most property;[109] those voters, of course, are

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13 (2014), http://www.pas.va/content/dam/accademia/pdf/es41/es41-stiglitz.pdf. Moreover, after analyzing the strength of an extensive study of policy making over a period of twenty years, Martin Gilens and Benjamin I. Page concluded that "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence." Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 572 (2014); *see generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE (2014); JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2012).

103 Gilens & Page, *supra* note 102, at 566.

104 JEFFREY A. WINTERS, OLIGARCHY 31 (2011). This is not to suggest that elites know what is best for country better than others; it is a suggestion that they are probably more adept at using the political process. Gilens and Page reject the idea that elites "know better" in the former sense. Gilens & Page, *supra* note 102, at 576.

105 Some theories of elite dominance emphasize such social connections. *See* Gilens & Page, *supra* note 102, at 566.

106 *Id*.

107 Gilens and Page find that economic elites have a significant and independent impact on public policy. In other words, their preferences have an effect on policy outcomes that is separate from the effect of business or corporate interests. *Id.* at 572.

108 Dirk Matten & Jeremy Moon, *Corporate Citizenship: Introducing Business as an Actor in Political Governance*, *in* CORPORATE CITIZENSHIP 2 (Dirk Matten et al. eds., 2013).

109 Charles Wheelan, *It's Official: In America, Affluence Equals Influence*, U.S. NEWS & WORLD REP. (Apr. 22, 2014), https://www.usnews.com/opinion/blogs/charles-

predominantly upper-middle class or wealthy.[110] Land speculators, property developers, sports franchises, and large corporate employers with capital to invest in property developments all have a huge influence on local governments and property laws and policies.[111] These influencers also appear to have had an important sway on courts on matters ranging from mundane technical questions about the application of land use regulations to important constitutional questions that laid the framework within which modern property developments are undertaken.[112]

In general, the fortunes of corporate actors are far more tightly intertwined with those of upper-middle class and affluent voters than they are with those of the working-class and poor.[113] The upper-middle class and wealthy elites who occupy many of the white collar managerial and professional jobs in major corporations, not surprisingly, also (directly or indirectly) own a disproportionate share of the stock of most publicly traded corporations.[114] Perhaps most importantly, many corporations have stronger economic incentives to develop real properties, manufacture goods, or provide services for upper-middle class and wealthy buyers than for less affluent buyers.[115] There are more expected profits from building luxury condominiums than from building low-cost or affordable apartment buildings, or from developing expensive beach front properties than from developing cheap land in neighborhoods

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wheelan/2014/04/22/study-shows-wealthy-americans-and-businesses-control-politics-and-policy?src=usn_tw.

[110] The ways in which corporate actors influence political outcomes have been discussed from a variety of perspectives. *See* THOMAS FERGUSON, GOLDEN RULE 347 (1995) (emphasizing campaign financing); CHARLES LINDBLOM, POLITICS AND MARKETS 170 (1977) (emphasizing the economic power and privileges of corporations); WINTERS, *supra* note 104, at xvi (discussing corporations as instruments of elitist oligarchies); Gilens & Page *supra* note 102, at 567 (discussing "biased pluralism").

[111] The relative influence of these groups, however, probably depends on the context and issues. As William A. Fischel explains, "landowner-developers" have more influence in urban and rural areas than in suburban ones where residents have such strong influence. Moreover, land speculators may have more impact on urban sprawl through their economic decisions than their influence on politicians. Corporations and sports franchises may have the most influence when they are making locational decisions that encourage competition between municipalities for their investments and spillover benefits. WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS 209–16, 265–66, 305–13 (1985).

[112] Notably, corporations figured prominently in each of the three most important constitutional cases bearing on land use developments during the twentieth century. *See infra* Parts IV & V.

[113] Thus, Gilens and Page find the correlation between business lobby groups and economic elites' interests is not statistically significant, but the correlation between business interest groups and average citizens' interests is negative and statistically significant. Gilens & Page, *supra* note 102, at 571. As they point out, the association between the elites' preferences and the business interest groups' preferences probably depends on the issues. *Id.* But there is no question about who owns a proportionately larger stake in the corporate sector. *See id.*

[114] *Id.* at 566.

[115] Daniel Denvir, *The Big, Big, Big, Big Money Behind Tall Buildings*, CITYLAB (June 11, 2015), https://www.citylab.com/equity/2015/06/the-big-money-behind-tall-buildings/395690/.

near wharfs or public transportation lines.[116] In the real estate market, therefore, corporate profit incentives typically align much more strongly with the interests of the affluent people who will buy high-end properties than they do with the less affluent people who might help to build them.[117] Not surprisingly, corporate actors also typically favor property laws and policies that facilitate upper-middle class families' interests in living separately from working-class and poor families in orderly, affluent communities.[118]

For all these reasons and possibly others, property laws and policies tend to favor the affluent at the expense of those less fortunate.[119] The consequences are obvious. To draw on the Not-In-My-Backyard Game analogy, it is as if Rich is able to fashion new rules for the game that will enable him to exclude Poor from his environs. Of course, there are two very different ways in which laws can help Rich achieve those objectives. If Rich lives in an area with Poor as a neighbor and other areas are undeveloped, he can devise laws that will prevent Poor from following him after he decamps to an undeveloped area. Alternatively, if Rich lives near Poor and both the city and the suburbs have been developed, he can devise laws that will allow him to force Poor out of his neighborhood.

The former strategy is in many ways more discrete because it works by Rich essentially building barriers that prevent Poor from taking action (moving to be closer to Rich).[120] Neither Rich nor Poor may think much about their motives or the consequences.[121] The latter strategy is more obtrusive because it works only by Rich actively using the law to force Poor from an area in which she already lives.[122] Both strategies, however, are overtly exclusionary, whether either player ever consciously thinks about them.

In fact, one of the challenges in addressing the problem is that people often do not seem to consciously think about the ways in which their choices and actions affect

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[116] This is possible because the land is owned by the developer, who wants to develop the land to maximize the return on investment. But supply and demand conditions in the real estate markets are also a factor. *See id.*

[117] *See id.*

[118] Corporate interests may not always align with those of the upper-middle class and wealthy elites. Economic elites tend to favor small governments, and this puts them at odds with the preferences of many business lobby groups that would prefer higher government spending on health care or defense. *See* Gilens & Page, *supra* note 102, at 571. But it is almost certainly true in the real estate industry.

[119] Konstantin Sonin, *Why the Rich May Favor Poor Protection of Property Rights*, 31 J. COMP. ECON. 715, 716 (2003); *see* Wheelan, *supra* note 109.

[120] Poor's inaction—her failure to follow Rich—might not be noticed; often, actions are noticed more that inaction.

[121] Rich may support zoning laws that ensure his neighborhood will remain upscale without thinking about the fact that those laws will make the neighborhood unaffordable for Poor. Similarly, Poor may realize that Rich supports laws that make his neighborhood upscale, but she might not think that Rich supports those laws to make his neighborhood unaffordable for her.

[122] The action necessary to expel Poor would be observable, and Poor might very well resist it, making it all the more evident.

others.[123] For example, well-educated, young urban couples who move to the suburbs when they want to start having children normally do not think about the impact that their migration will have on the educational opportunities for the children of less affluent parents.[124] If they do, they probably do not connect the matter with the larger questions about zoning and housing policies.[125] Even those who do understand the problem might not translate their awareness into concrete support for legal reform, let alone make alternative decisions about their own housing.

The externalities, of course, create a difficult collective action problem.[126] Many progressive or liberal parents might prefer the idea of their children studying at schools where the student body proportionately reflects the demographic and socioeconomic diversity in their communities, but they may still be reluctant to send their children to a school at which the students are disproportionately poor or from minority groups (other than their own, if they happen to belong to a minority group themselves).[127]

The same can be said about urban gentrification. A childless professional couple might want to live closer to work, but they might not be enticed to do so if the urban environment is blighted and offers few amenities and entertainment options. One of the ways in which a city might make urban residency more attractive to affluent taxpayers is by planning and helping to implement an urban renewal project that facilitates residential and commercial property developments that will be attractive to them.[128]

A major urban renewal project typically requires that other land uses be terminated so that the properties can be redeveloped.[129] Because the owners of those properties

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[123] Kathryn Buonantony, *Mindfulness: Being Fully Aware of How Your Actions Affect Others*, ODYSSEY (July 6, 2016), https://www.citylab.com/equity/2015/06/the-big-money-behind-tall-buildings/395690/.

[124] Joshua Rosenblat & Tanner Howard, *How Gentrification Is Leaving Public Schools Behind*, U.S. NEWS & WORLD REP. (Feb. 20, 2015), https://www.usnews.com/news/articles/2015/02/20/how-gentrification-is-leaving-public-schools-behind.

[125] *See id.* On a more mundane level, how many parents who seek extra attention for their children in school because they feel their children are being insufficiently challenged consciously recognize that this would divert resources from other children?

[126] A single couple might rightly doubt whether their principled decision to remain in a neighborhood with weaker schools would make any appreciable difference. Of course, if a hundred couples made a decision to remain in the neighborhood, that might make an important difference.

[127] The point is to explain the parents' preference for living in an upscale neighborhood rather than to rationalize or justify their beliefs about the educational quality of the schools in poorer neighborhoods. There is reason to believe that there is no simple fix for the problem of improving children's educational opportunities. The evidence from studies of voucher programs under which children from poor families have attended schools in upscale neighborhoods is quite mixed. One recent study suggests the poor children had even worse outcomes. *See* Atila Abdulkadiroglu et al., *School Vouchers and Student Achievement: First-Year Evidence from the Louisiana Scholarship Program* 2–3 (Sch. Effectiveness & Inequality Initiative, Working Paper No. 2015.06, 2015).

[128] *See infra* Part V.

[129] *Urban Renewal: Acquisition of Redevelopment Property by Eminent Domain*, 1964 DUKE L.J. 123, 123 (1964).

sometimes refuse to sell them at the prices the redevelopers offer, the plans often can be implemented only if the city exercises its takings powers.[130] Until recently, local governments' takings powers were limited in ways that constrained urban renewal projects.[131] The expansion in those takings powers has allowed cities to implement redevelopment plans that redevelop non-blighted neighborhoods and transfer private property rights from some owners to others.[132] The redevelopments often cannibalize low-cost housing, replacing it with upscale urban condominiums or duplexes that are priced beyond the means of the existing residents.[133] The affluent buyers of the new properties rarely think about that. They often, however, pressure the city and police to "clean up" their neighborhoods even further after they move in, by which they often mean controlling or relocating the homeless and the services for poorer residents.[134]

The problem is akin to the familiar one of racial tipping and white flight.[135] But it is much more pervasive because at its core, it does not depend on the presence of racism or any kind of social animus between or toward any social groups.[136] People want the American Dream: they want to live in spacious homes on large, landscaped lots in orderly, well-maintained neighborhoods; they want their children to go to the best schools possible; and they want their entire families to feel safe and secure from crimes and other hazards.[137] They want as few nuisances from their neighbors as possible, and they want the best public and private services possible.[138] Even those who cannot afford to live the American Dream may still have it; they may at least have hopes of upward social mobility and the affluence that typically comes with it.[139]

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130 *See id.* at 124. References to the city here mean to include corporations or other agencies established by the city for the purpose of encouraging urban redevelopment.

131 *See id.* at 125.

132 *See infra* Part V.

133 Wendell E. Pritchett, *The Public Menace of Blight-Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 46 (2003).

134 For example, see a story about the pressures on the city of San Diego to control the homeless population in the wake of a spate of major urban redevelopments that were spurred by a now-discontinued urban redevelopment agency. Lisa Halverstadt, *Chaos and Confusion Pervade Homeless Camps Downtown*, VOICE OF S.D. (July 20, 2017), http://www.voiceofsandiego.org/topics/news/chaos-and-confusion-pervade-homeless-camps-downtown/.

135 *See* Schelling, *Dynamic Models*, *supra* note 90, at 181.

136 Of course, the phenomenon of racial tipping and white flight can occur even if only some residents are or are perceived to be racist. When people's behavior is interdependent, it is difficult to draw inferences about individual preferences from collective outcomes. *Id.* at 146.

137 *See* Heather Long, *The American Dream: Rich Are Fearful for Its Survival, but Poor Still Believe*, CNN (Oct. 14, 2016), http://money.cnn.com/2016/10/14/news/economy/american-dream-poor-still-believe/index.html.

138 *See id.*; *see also* MyBankTracker, *Why Your Decision to Live Upstairs or Downstairs Will Floor You!*, HUFFINGTON POST (Sept. 9, 2014), https://www.huffingtonpost.com/mybanktracker/why-your-decision-to-live_b_5574747.html.

139 *See* Long, *supra* note 137.

C. Changing the Rules of the Game

Property laws have been developed and used in the modern era to facilitate affluent and rich peoples' aspirations to escape from the problems and nuisances of living in poor neighborhoods in two important ways. One was through the enormous expansion in the scope of government land use regulations and policies.[140] The Supreme Court of the United States in *Village of Euclid v. Ambler Realty*[141] legitimized and facilitated this important legal development, which has transformed land uses and housing opportunities all around the country, allowing affluent suburban communities to enact zoning regulations that effectively exclude less affluent groups from their neighborhoods.[142]

The other way was through the significant expansion in the scope of the government's power of eminent domain, which occurred through holdings by the Supreme Court of the United States in *Berman v. Parker*[143] and more recently in *Kelo v. City of New London*.[144] The expansion in eminent domain has increasingly allowed private developers and corporations to use their political influence to encourage government takings to implement redevelopment projects that redound to their own benefit and the benefit of affluent city residents,[145] often at the expense of much less affluent and politically marginalized groups that have effectively been expelled from the redeveloped urban neighborhoods.[146] The sad truth is that land use regulations have facilitated the flight of the affluent to neighborhoods where the poor and less affluent cannot follow them,[147] and government takings have often been used to gentrify poor neighborhoods to make them more attractive to corporate investors and affluent residents, often cannibalizing affordable housing in the process and driving less affluent residents out of the neighborhoods they have lived in for many years.[148]

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[140] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); Berman v. Parker, 348 U.S. 26 (1954); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[141] *Village of Euclid*, 272 U.S. at 365.

[142] Melvyn R. Durchslag, Village of Euclid v. Ambler Realty Co*., Seventy-Five Years Later: This Is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645, 647 (2001).

[143] *Berman*, 348 U.S. at 26.

[144] *Kelo*, 545 U.S. at 469.

[145] Bianka Alexandria Bell, *From 1890 to Today, Nothing's Changed: Gentrification in Harlem and the Abuse of Eminent Domain* 21 (Spring 2016) (Senior Projects, Barc College), https://digitalcommons.bard.edu/cgi/viewcontent.cgi?article=1185&context=senproj_s2016.

[146] *Id.* at 21–23.

[147] *Id.* at 28.

[148] The problems have been widely documented in the media. *See, e.g.*, Richard Florida, *This Is What Happens After a Neighborhood Gets Gentrified*, ATLANTIC (Sept. 16, 2015), https://www.theatlantic.com/politics/archive/2015/09/this-is-what-happens-after-a-neighborhood-gets-gentrified/432813/.

IV. ZONING: THE POWER TO EXCLUDE

Cities in the United States became interested in the use of local ordinances to regulate land uses after the turn of the twentieth century.[149] As city populations burgeoned, nuisance problems became more acute;[150] because the common law of nuisance provided at best a weak mechanism for resolving the conflicts and mitigating the problems,[151] cities used ordinances to regulate land owners' behavior instead.[152] The earliest public land use regulations thus were essentially nuisance ordinances.[153]

Later, as the automobile and electric railcars reduced transportation costs and improved transportation opportunities, affluent residents left the inner cities to live the American Dream of a house with a white picket fence and green lawn in suburban neighborhoods.[154] As cities grew and the suburbs expanded, suburban residents came into conflict with the farm owners, small businesses, and other land owners who preceded them.[155] The tendency at the time was for cities to expand by annexing new suburban communities.[156] The cities would then enact ordinances to regulate the nuisance problems.[157] In early cases, the United States Supreme Court upheld the nuisance ordinances against constitutional attacks.[158]

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[149] MICHAEL ALLAN WOLF, THE ZONING OF AMERICA 22 (Peter Charles Hoffer et al. eds., 2008).

[150] *Id.*

[151] *Id.*

[152] Cities tried other ways of mitigating the problems. Individual owners brought private nuisance suits, local governments brought public nuisance suits, and developers tried making estates land defeasible and then began using restrictive covenants. But no way has proved as effective as zoning. *Id.* at 17–22.

[153] *Id.* at 26.

[154] The conception of the "American Dream" has evolved as the country has evolved, and it has not always or only been about living in a house with a white picket fence. *See* LAWRENCE R. SAMUEL, THE AMERICAN DREAM 4, 9–10 (2012). The idea of the white picket fence and green lawn probably dates to the garden city movement, which actually originated in a book by an Englishman. *See* EBENEZER HOWARD, GARDEN CITIES OF TOMORROW 9 (F.J. Osborn et al. eds., M.I.T. Press Paperback ed. 5th prtg., 1973) (1902); *see generally* STANLEY BUDER, VISIONARIES AND PLANNERS (1990); KENNETH T. JACKSON, CRABGRASS FRONTIER (1985). Jane Jacobs, possibly the most famous urban planning scholar of the twentieth century, even though she did not have a college degree, derided the idea in JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

[155] WOLF, *supra* note 149, at 17–22.

[156] This was the pattern in Cleveland before the Village of Euclid case. *Id.* at 13.

[157] *Id.* at 17–22. The early problems contributed to the "City Beautiful" movement, which focused on fostering clean streets, fresh air, and improvements in sanitation as well as parks and attractive residences. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 10 (1998).

[158] In particular, see Hadacheck v. Sebastian, 239 U.S. 394 (1915).

A. The Origins of Zoning in the United States

The early nuisance ordinances did not, however, regulate land uses in a comprehensive and systematic way. Most significantly, they did not separate land uses in the way that zoning ordinances typically do.[159] The first city to adopt a comprehensive scheme of zoning ordinances was New York.[160] After the turn of the twentieth century, New York absorbed waves of new European immigrants and spawned an array of new manufacturing firms, which often employed the new immigrants.[161] The commingling of older residents with new ones and nuisance-some commercial and industrial businesses created an avalanche of nuisance issues and congestion problems.[162]

Some New Yorkers learned about the uses of local laws to regulate similar problems in Germany, and they looked to the experiences of German cities to advocate for similar laws in New York.[163] New York thus enacted the first zoning laws in the United States in 1916.[164] Other cities, including Cleveland, soon followed.[165] In fact, Cleveland, and most of the other followers, looked to New York for inspiration.[166] The United States Department of Commerce aided the zoning movement and sponsored the drafting of the Standard State Zoning Enabling Act ("SSZEA").[167] Most states subsequently adopted SSZEA, and it helped clarify and institutionalize city governments' authority to enact zoning laws.[168]

Progressive reformers played an important role in pressuring city governments to adopt zoning schemes.[169] During the early twentieth century, Progressive reformers believed that professional experts could use laws and regulations to create better communities and provide better lives for American citizens.[170] Progressives during

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159 *See* JUERGENSMEYER & ROBERTS, *supra* note 157, at 22.

160 *See id.*

161 WOLF, *supra* note 149, at 140–41.

162 This comingling also fostered some xenophobia and racism. *Id*.

163 As advocates attempted to rally support for a comprehensive zoning scheme in New York City, they sought to publicize their ideas in the media. As an example, see an article written by Frank B. Williams, Special Counsel to the New York Heights of Buildings Committee. *See generally* Frank B. Williams, *Germany Can Aid New York in Skyscraper Problem*, N.Y. TIMES, Sept. 21, 1913.

164 The impetus for a zoning scheme in New York was significantly increased by upscale Fifth Avenue retailers who wanted to prevent textile factories, with large numbers of immigrant employees, from moving into their area. WOLF, *supra* note 149, at 140–41.

165 *Id.*

166 *Id.*

167 *Id.* at 29.

168 *Id.*

169 *Id.* at 23–31.

170 *Id.* at 30.

that era, however, often advocated various kinds of segregation.[171] In fact, there is little doubt that cities were often motivated to adopt zoning schemes not just to alleviate true nuisance problems, but also to help more affluent property owners exclude "undesirables" who might migrate into their neighborhoods.[172] The "undesirables" typically included anyone who was not Caucasian and Christian; in the early twentieth century, they were often recent immigrants from Eastern Europe.[173] In New York City, for example, upscale retailers on Fifth Avenue made concerted and coordinated efforts to exclude garment factories and their poor Eastern European immigrant employees from their proximity and ultimately supported New York's first zoning laws.[174] The retailers' motivations may have reflected racial and ethnic animus, but they also reflected economic interests because the retailers wanted to preserve upscale environments for their upscale stores.[175]

There is significant evidence that anti-Semitism provided some motivation for the enactment of zoning laws,[176] but there is little question that they were also motivated by property owners' interests in "stabilizing" property values—in other words, in preventing property values from declining because of an influx of "undesirable," low-income residents into their neighborhoods.[177] The property owners' prejudices and self-interests typically coincided with those of the reformers because many Progressives regarded the immigrants as impediments to good government and orderly communities and believed that the further development of suburbs populated by white, middle-class homeowners would spur social reform.[178] The Progressives' advocacy of socio-economic and ethnic segregation should come as no surprise because it is well-known that during the same period, they also usually advocated for racial segregation.[179]

At the time, the United States Supreme Court frequently used the liberty of contract doctrine to declare government regulations unconstitutional and thus to limit the scope of the government's regulatory powers.[180] Many pundits thus believed the Court would

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171 MICHAEL MCGERR, A FIERCE DISCONTENT 187–94 (2003). As McGerr documents, many Progressive reformers around the turn of the twentieth century were overt racists by today's standards. *Id.*

172 WOLF, *supra* note 149, at 138–43.

173 *Id*.

174 *Id.* at 140.

175 *Id.*

176 *Id.* at 83–84.

177 *Id.*

178 *Id.* at 31.

179 MCGERR, *supra* note 171, at 187–94.

180 David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 563–64 (2009). Interestingly, Professor Mayer argues that the Supreme Court's application of the liberty of contract doctrine during the early twentieth century often protected vulnerable groups from exploitation by others. *Id*. at 644–45. So does James Ely, who observed that the substantive due process doctrine "often safeguarded the interests of vulnerable and powerless segments of society," James W. Ely, Jr., *Reflections on* Buchanan v. Warley*, Property Rights, and Race*, 51 VAND. L. REV. 953, 972 (1998).

soon enough declare the use of zoning ordinances to regulate land uses unconstitutional, too.[181] Nonetheless, some time passed before the question was put to the Court. In fact, the earliest challenges against zoning schemes were made in state courts.[182]

In *Clement v. McCabe*, the Supreme Court of Michigan struck down a Detroit zoning ordinance on the grounds that the city did not have the inherent power to enact such laws and the state had not delegated the power through any zoning enabling act.[183] In *In re Opinion of the Justices*, the Supreme Judicial Court of Massachusetts advised the state legislature that a proposed zoning scheme would be constitutional.[184]

Similar questions had been posed in Ohio courts before the United States Supreme Court addressed them. In *State ex rel. Morris v. East Cleveland* in 1919, an Ohio court treated a landowner's takings claim as a substantive due process claim and held that the East Cleveland zoning law under which a developer was denied a permit to build an apartment house was within the city's police powers.[185] In *State v. Durant*, an Ohio court affirmed the denial of a building permit for an apartment building as a matter of state law, even though the court acknowledged that the constitutionality of zoning laws was questionable as a matter of federal law.[186] It remained to be seen, however, whether the United States Supreme Court would uphold the new zoning schemes.

B. Euclid

Village of Euclid v. Ambler Realty Co. was the first legal challenge launched against a comprehensive zoning scheme in a federal court.[187] The Village of Euclid's zoning laws were modelled on the template provided by New York City, featuring use, height, and area restrictions[188] and defining the use restrictions cumulatively.[189] Perhaps surprisingly, Ambler Realty challenged Euclid's zoning scheme because some of the land it owned near the Nickel plate railroad had been restricted against industrial uses, not because it had been restricted against any residential uses.[190]

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[181] WOLF, *supra* note 149, at 119.

[182] *Id.* at 43.

[183] Clements v. McCabe, 177 N.W. 722, 726 (Mich. 1920).

[184] *IN RE* OPINION OF THE JUSTICES, 127 N.E. 525, 532 (MASS. 1920).

[185] State *ex rel.* Morris v. City of East Cleveland, 22 Ohio N.P. (n.s.) 549, 549 (1920).

[186] State v. Durant, 2 Ohio Law Abs. 75, 75 (1923).

[187] WOLF, *supra* note 149, at 43.

[188] The entire area of the village was divided into six use districts, three height districts, and four area districts. The use districts regulated land uses, the height districts regulated the heights of structures, and the area districts established the minimum lot sizes for particular uses. The scheme also regulated lot widths as well as front and rear yards. Village of Euclid v. Ambler Realty Co., 272 U.S. 265, 380–92 (1926).

[189] The most restricted zones limited uses to single-family residences and a small number of other uses that would not destroy the single-family residence character of the neighborhood, and each successively less restricted zone allowed additional uses cumulatively. Thus, single-family residential uses were allowed in all zones, but duplexes and apartment houses were not. *Id.* at 380–81.

[190] *Id.* at 379–80.

Ambler's complaint alleged that the zoning laws significantly diminished the value of their land because it would be worth much more in industrial uses.[191] Ambler claimed that the laws therefore deprived it of property without due process of law under the Fourteenth Amendment.[192] At the time, courts and litigants frequently confounded substantive due process claims and takings claims.[193] Nonetheless, Ambler clearly was challenging the zoning scheme as a whole, rather than the application of some part of the scheme against it.[194]

There were many ways in which the Euclidean zoning scheme promised to increase the property values of affluent homeowners as well as commercial and industrial land users and probably also to limit the housing opportunities of poor and working-class people.[195] First, the scheme clearly limited the supply of land available for commercial and industrial uses.[196] Because Ambler's land was adjacent to the railroad line, it would have been particularly useful for business purposes; although some of the land was zoned to allow industrial uses, much of it was not.[197] Of course, the scarcity of commercial and industrial land could only increase its value per acre. In fact, if all of Ambler's land had been zoned for industrial uses, Ambler probably would not have challenged the ordinance and might even have been pleased about it.[198]

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[191] *Id*. at 384–85.

[192] *Id.* at 384. Ambler made a variety of other claims too, but the case has come to stand for the Supreme Court's rejection of substantive due process claims against local governments' powers to enact zoning laws. *Id.* at 384, 387.

[193] In fact, the trial court struck the zoning scheme, questioning both its reasonableness and condemning the confiscation of Ambler's property without compensation. WOLF, *supra* note 149, at 55–56. The confusion is understandable because Ambler's argument included claims about the size of its economic losses even though the case arose long before the Supreme Court articulated a theory of regulatory takings. *Village of Euclid*, 272 U.S. at 384. The Supreme Court, however, appeared to treat the case as one about substantive due process. WOLF, *supra* note 149, at 103–05. To this day, courts and attorneys at times struggle to distinguish the government's police powers from its takings powers. WOLF, *supra* note 149, at 91. In fact, at least one scholar has argued that the Supreme Court continues to confound substantive due process takings cases, now more commonly using the Takings Clause to strike laws that should be stricken under the substantive due process doctrine. *See* Kenneth Salzberg, *"Taking" as Due Process or Due Process as "Takings"?*, 36 VAL. U. L. REV. 413, 414–16 (2002).

[194] *Village of Euclid*, 272 U.S. at 395–96.

[195] *Id.* at 384.

[196] As a general matter, single-family residential uses were the least restricted, multi-family residential uses were the next least restricted, commercial uses were the second most restricted, and industrial uses were the most restricted. In theory, the supply of land for particular uses would be greater the less restricted the uses. *Id.* at 380–81.

[197] The part of Ambler's tract that was closest to the railroad line was zoned for commercial and industrial uses, but the part closer to Euclid Avenue was not. *Id.* at 382.

[198] If all of Ambler's land allowed all industrial uses, it would have been unrestricted and Ambler would have had no grounds for any claim. Even if it had been subject to some minor restrictions on the types of industrial uses, however, Ambler may have been satisfied and even pleased with the scheme given the way it limited the supply of land for industrial uses and presumably raised its price.

In some sense, the case arose because Ambler did not get a cut of the pie, not because there was no pie to share.

Second, the Euclid scheme carved out a hierarchy of residential uses, with single-family residences at the apogee of the pyramid.[199] The scheme restricted multi-family residential uses more severely, thus allowing affluent homeowners to segregate themselves from less affluent residents in neighborhoods restricted to expensive single-family homes.[200] Moreover, the areas zoned exclusively for single-family residences generally were separated from particularly noxious uses that might significantly threaten the residents' health and safety by at least one other zone.[201] The scheme therefore not only facilitated the escape of affluent homeowners from the proximity of "undesirables" and less affluent residents who would not be able to afford the tonier neighborhoods, but it also promised to protect them from the most serious health and safety hazards.[202] This could only increase the value—and prices—of properties in single-family neighborhoods.[203] Of course, affluent homeowners would always be willing to pay the higher prices necessary to buy their way into the more expensive, exclusively single-family residential neighborhoods; less affluent and poor families generally could not afford to do so.[204]

Third, the Euclid scheme clearly limited the housing options for poor and working class families in ways that boded not only to limit their own life opportunities, but also those of their children.[205] For one thing, it created economic impediments to these groups' hopes to live in more affluent neighborhoods and consequently benefit from more effective schools, more attentive policing, quicker emergency response times, and better public services generally.[206] Poor and working class families might dream

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[199] *Id.* at 380–81.

[200] In fact, the restrictions on residential uses were even more specific: areas categorized U1 were limited to single-family residences (and some other conforming uses), areas categorized U2 also allowed two-family dwellings (and some other conforming uses), and areas categorized U3 also allowed apartment houses (and other conforming uses). The scheme thus allowed families who could afford single-family residences to segregate themselves from all others, and it allowed families who could afford two-family dwellings to segregate themselves from those who could only afford to live in apartment houses. *Id.*

[201] This is clear from perusing the city's 1922 zoning map, which is posted on the city's website. PLANNING & ZONING COMM'N, CITY OF EUCLID, 1922 ZONING MAP (1922), http://www.cityofeuclid.com/community/development/PlanningandZoningDivision/EuclideanZoningHistoricDocuments.

[202] *Village of Euclid*, 272 U.S. at 391.

[203] Although single-family residential uses were the least restricted of all, affluent homeowners would pay more to live in exclusively single-family residential neighborhoods, and the supply of land that was zoned exclusively for single-family residences was limited.

[204] Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924).

[205] *Id.*

[206] This is a common perception even if it is not always the reality. See, for example, the following quote attributed to Spike Lee about gentrification in his boyhood neighborhood in Brooklyn:

> I grew up here in Fort Greene. I grew up here in New York. It's changed. And why does it take an influx of white New Yorkers in the south Bronx, in Harlem, in Bed Stuy, in Crown Heights for the facilities to get better? The garbage wasn't picked up every . . .

of significantly improving their economic circumstances, but unless they actually realized their dreams, they would never be able to afford the high property prices in exclusive, affluent neighborhoods. Moreover, they could hardly be unaware that their economic circumstances might limit their children's futures as well as their own opportunities. And because they would normally be consigned to living in mixed use areas, the demand for scarce commercial and industrial land would drive up property prices even there.

Even more insidiously, however, the Euclid scheme would result in many poor and working class families living closer to health and safety hazards than more affluent families because areas zoned for multi-family dwellings were not separated from noxious or dangerous commercial and industrial land uses as much as areas zoned for single-family residences.[207] Because such dangerous and noxious land uses were among the most serious nuisance problems that the zoning laws were supposed to mitigate, this illustrates whose interests the laws primarily served. In fact, the Euclid scheme promised to make the poor and working class yearn for the relatively clean and safe tranquility of upscale suburban neighborhoods even more, which meant that this class would derive even less satisfaction from the neighborhoods they could afford.[208] The children of poor and working class parents would not only suffer the disadvantage of inferior public schools and congestion, they would also be more likely to contract diseases and illnesses and become the victims of accidents and crimes.[209]

C. Exclusionary Zoning

At the time the *Village of Euclid* case came up, the United States Supreme Court was wont to strike government regulations using the liberty of contract doctrine under the due process clause of the Fifth and Fourteenth Amendments.[210] Although the Court couched the liberty of contract doctrine in different language and applied it much more broadly, vestiges of the doctrine today reside in the Court's substantive due process jurisprudence.[211] Under the substantive due process doctrine today, the Court would strike down a regulation that impinges on non-fundamental rights only on the grounds

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> day when I was living in 165 Washington Park. P.S. 20 was not good. . . . The police weren't around.

Inae Oh, *Spike Lee's Incredible Gentrification "Rant" Is Backed by Solid Facts*, HUFFINGTON POST (Feb. 26, 2014) http://www.huffingtonpost.com/2014/02/26/ spike-lee-gentrification-_n_4856847.html.

[207] The City of Euclid's 1922 zoning map shows most of the land zoned U3 to allow apartment houses is adjacent to land zoned U6 to allow some of the heaviest types of industrial uses. *See* PLANNING & ZONING COMM'N, *supra* note 201 and accompanying text.

[208] *See generally* Claeys, Euclid *Lives*, *supra* note 6, at 731; Charles M. Haar & Michael Allan Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002).

[209] WOLF, *supra* note 149, at 59.

[210] Mayer, *supra* note 180, at 563–64.

[211] David Mayer argued that the Supreme Court's substantive due process jurisprudence transitioned from a presumption in favor of liberty to a rational basis analysis as the liberty of contract language phased out and the modern substantive due process doctrine emerged. *Id*. at 652–53.

that it was not rationally related to a legitimate state interest.[212] But even from a modern perspective, one can argue that the Euclid zoning scheme—and myriad other zoning schemes then and now—raises a substantive due process issue. Was the Euclid scheme rationally related to a legitimate state interest? Is there any legitimate state interest in segregating people by income and wealth or in protecting some children from noxious harms and not others? Or were some important parts of the Euclid scheme, in the Supreme Court's own language, "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare?"[213]

One of the hallmarks of Euclid's zoning scheme—and the hallmark of Euclidean zoning schemes still today—is the system of cumulative land uses.[214] The cumulative land uses not only apply across qualitatively different types of uses, such as residential, commercial, and industrial, they also apply within those types of uses.[215] Thus, some zones are restricted to single-family residences, meaning that the owners of the single-family residences will be protected against the risk of having multi-family dwellings in their neighborhoods.[216] Of course, this means that anyone who cannot afford a single-family residence in such a restricted neighborhood will be restricted against living in one.[217] But this raises the question: why is there any legitimate state interest in preventing people from living in multi-family dwellings near single-family residences?

It is not possible to base any plausible answer to the question on nuisance principles. One might, for example, argue an apartment building would block sunlight or air or cause traffic congestion and assert this justifies restricting some residential neighborhoods against tall apartment buildings.[218] But if a tall apartment building might create such nuisances, why not make it subject to a special permit based on criteria that would mitigate and control the nuisances? Moreover, it would be well to remember that the Euclid zoning scheme—and many modern Euclidean zoning schemes—included height and area restrictions as well as use restrictions;[219] the height restrictions could have been devised to prevent tall apartment buildings in any residential neighborhood whether or not the scheme restricted types of residential uses. Not all multi-family dwellings—or apartment buildings—are tall, block air and light, or create inordinate congestion. Duplexes, row housing, and two- or three-story apartments may not, and multi-family housing does not, necessarily create those kinds of nuisance problems.

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212 *Id*. at 653–54.

213 Village of Euclid v. Ambler Realty Co., 272 U.S. 265, 395 (1926).

214 JUERGENSMEYER & ROBERTS, *supra* note 157, at 82–84.

215 *Id.* at 83.

216 *Id.* at 82.

217 *Id.* at 83.

218 Justice Sutherland made references to nuisances such as these in his *Village of Euclid* opinion, but his references were not persuasive or compelling. *See Village of Euclid*, 272 U.S. at 394.

219 *Id.* at 380–81.

In fact, the Euclid zoning scheme itself undermines any nuisance rationale. For one thing, it allowed electric railway stations in zones restricted to single-family residences,[220] which likely would have created significant congestion.[221] Perhaps that congestion was tolerated because it was caused by facilities that would benefit more affluent residents of single-family dwellings and not by residents of multi-family dwellings.[222] Regardless, the tolerance of some congestion nuisances undermines any congestion rationale for the restrictions against multi-family dwellings. Moreover, if residential restrictions have a nuisance rationale, one could ask why this rationale only applies to affluent people who can afford single-family residences. Why does it not also protect residents of multi-family dwellings from buildings that block air, sun, and congestion? Perhaps most important of all, one could ask why the scheme protects affluent families in single-family homes from commercial and industrial uses but not families who live in multi-family dwellings. Are regulations that protect the health, welfare, safety, and morals of affluent families but not poor ones rationally related to any legitimate state interest? Where is the rationality in that?

There are other characteristics of Euclid's zoning scheme that obviously increase the cost of housing and have other exclusionary effects.[223] Most of these—and others—are still manifest in zoning laws across the country. For example, area, setback, and frontage requirements can all increase the cost of housing in upscale residential neighborhoods.[224] These requirements have all been criticized for having exclusionary effects, whether or not that was the intent.[225]

It is debatable whether there is any legitimate state interest in many restrictions like these too.[226] Although some of them may mitigate nuisances (e.g., minimum setbacks may reduce fire risks), this does not explain why the restrictions should be more binding in some residential zones than in others.[227] If reducing fire risk between single-family residences (or duplexes or apartment buildings) requires some minimum

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220 *Id.* at 380.

221 *Id.* at 391.

222 *Id.* at 394.

223 This was especially true of the area restrictions. *Id.* at 381–82. The Euclid scheme also had setback, yard size, and other requirements that would have increased housing costs. *See* CITY OF EUCLID, ZONING ORDINANCE NO. 2812 AND AMENDING ORDINANCE NO. 5421, §§ 16–22 (1927), http://www.cityofeuclid.com/community/development/PlanningandZoningDivision/EuclideanZoningHistoricDocuments.

224 THOMAS F. GESELBRACHT, ILLINOIS ZONING, EMINENT DOMAIN AND LAND USE MANUAL, §§ 3-3(b)(2)(i)–(v) (2017).

225 The Supreme Court of New Jersey famously struck Mount Laurel's zoning scheme because it included exclusionary restrictions such as these. S. Burlington Cty. NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 729 (N.J. 1975).

226 *A Practical Guide to Understanding Zoning Laws*, PROPERTYMETRICS (Jan. 6, 2017), https://www.propertymetrics.com/blog/2017/01/06/zoning-laws/.

227 *Id.*

setback, such setbacks should be the same regardless of the zone.[228] The restrictions are usually defined in ways that suggest they have aesthetic purposes.[229]

The United States Supreme Court has interpreted state interests to extend to aesthetic considerations,[230] but many disagree with the idea that the government should regulate the aesthetic character of our residential communities rather than let the communities themselves do so through private land use restrictions.[231] After all, beauty is and should be in the eyes of the beholders, not those of judges or justices sitting on courts of law.

At the time of *Village of Euclid*, one can easily imagine how and why the Euclidean zoning scheme might be struck. In fact, the trial judge did strike the scheme.[232] His opinion cut straight to the core of the scheme's issues and accurately predicted how zoning schemes like the one in Euclid would ultimately segregate people along socioeconomic lines as well as other characteristics, such as race, ethnicity, and religion that might be correlated with them.[233] In a famous opinion, Judge Westenhaver observed:[234]

> The plain truth is that the true object of the ordinance in question is to place all the property in . . . a strait-jacket . . . . In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service.[235]

In fact, Judge Westenhaver predicted at the outset of his opinion that the case would reach the United States Supreme Court.[236] The Supreme Court, for its part, could hardly have been unaware of the ways in which Euclidean zoning would segregate people in light of Judge Westenhaver's trenchant opinion.[237] In fact, the

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228 *Id.*

229 *See* JUERGENSMEYER & ROBERTS, *supra* note 157, at 559–76.

230 Berman v. Parker, 348 U.S. 26, 33 (1954).

231 Not surprisingly, many have criticized *Berman*. *See, e.g.*, Martin Anderson, *The Sophistry That Made Urban Renewal Possible*, 1 LAW & CONTEMP. PROBS. 200, 206–07 (1965); Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013, 1026–31 (1990); *see generally* JUERGENSMEYER & ROBERTS, *supra* note 157, at 559–76.

232 Ambler Realty Co. v. Village of Euclid 297 F. 307, 316 (N.D. Ohio 1924).

233 *Id.*

234 *Id.* at 308.

235 *Id.* at 316.

236 *Id.* at 308.

237 That is not to mention the extensive representations that were made to the Court by advocates and experts. *See generally* WOLF, *supra* note 149, at 57–93. In fact, the issues were

underlying issues were as transparent then as they are now, and there is compelling evidence that the Supreme Court justices understood them.[238] Given the propensities of the conservative justices on the Court at the time, many attorneys predicted that the Court would strike the Euclidean scheme.[239] But perhaps the pundits underestimated those justices' empathy with the affluent and influential parties who stood to benefit from the Euclid scheme[240] because, quite to the surprise of many, the Court's opinion provided a sweeping endorsement of local land use regulations.[241]

Most people interpreted the decision to authorize many of the exclusionary restrictions that most local governments continue to use to this day.[242] Unfortunately, the language in which the Court couched its opinion reeked of elitism and socio-economic prejudice.[243] In hindsight, the *Village of Euclid* opinion ranks among the Court's greatest embarrassments, but the Court's social attitudes reflected some of the underlying motivations for many zoning laws at that time and to the present day.

D. The Long Road Ahead

Once regulations that have important redistributive effects become entrenched, they are very difficult to repeal, especially if they redistribute wealth in favor of those with the most political power and influence. Thus, even though many widely acknowledge the exclusionary effect of zoning,[244] there is little to no chance of unraveling zoning schemes at the local level of government in established neighborhoods.[245] In fact, the efforts to address exclusionary zoning at the state and city levels have typically been limited to the enactment of inclusionary zoning laws.[246]

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well-known, and several state courts had upheld the segregation of single-family residential neighborhoods from apartment houses. *Id.* at 108–10.

[238] By the time the case rose to the Supreme Court, planning experts, politicians, and attorneys had already had wide-spread discussion and debate about zoning. There was wide-spread support for zoning laws that cut across fields of expertise and political parties as well as every region of the nation. *Id.* at 118–19.

[239] Milton Handler, who would later become a renowned professor at the Columbia University Law School, was a clerk of Justice Stone at the time, and he thought the conservative justices on the Court would combine to strike the Euclid ordinance. He described the outcome as surprising because of the way both Justice Sutherland and Justice Taft changed their alliances. *Id.* at 89–90.

[240] Much of the advocacy in support of the Euclid zoning scheme emphasized its "positive" effects on property prices. Experts from a variety of fields, politicians from both ends of the political spectrum, and editorial writers widely agreed and publicized the matter. *Id.* at 89, 119.

[241] *Id.* at 111.

[242] *Id.* at 110.

[243] Justice Sutherland's opinion is famous for its "pig in the parlor" metaphor, but other parts of it can make one cringe. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). In particular, the part in which he writes that "the apartment . . . is a . . . parasite" reflected a callous indifference to the dignity of people who could only afford to live in apartment houses. *Id*. at 394.

[244] JUERGENSMEYER & ROBERTS, *supra* note 157, at 268–301.

[245] *Id.* at 284.

[246] *Id.* at 282–85.

In some respects, inclusionary zoning laws simply entrench the inequalities even deeper.[247] By increasing the cost of housing in the already tony affluent neighborhoods, they make them even less affordable to working class and poor families.[248] Affordable housing provided through inclusionary zoning laws is typically constructed in less affluent neighborhoods and is often, as one might expect, multi-family housing.[249] Housing remains segregated, but the laws at least provide some cover for political leaders who can claim to be doing something about it.[250] In the meantime, the rich get richer and market rate housing becomes even more unaffordable for working class and poor families.[251]

There is no simple solution to the problems that bad zoning laws have created. One thing seems clear, however: since government actions created the problem, it would be foolish to rely on further government actions to solve it. In the long-run, the best solution to the problem would be to limit governments' zoning powers so that those with inordinate political influence are not able to use it to their advantage.[252] Because state governments are unlikely to amend their zoning enabling statutes, courts could help by using the substantive due process doctrine to strike zoning laws that restrict some residential uses against other residential uses or that serve no purpose other than to raise housing costs.[253] This would not immediately change the way anyone lived, or cause any significant and pervasive changes in housing prices, because homeowners in well-established, upscale neighborhoods would not immediately alter their land uses; but it would allow for more incremental changes in land uses.[254] Perhaps over the longer course, as the existing housing stock depreciates and renovations are required, neighborhoods would become more integrated, and some of the damage could be undone.

It would take great courage for the Supreme Court to revise its zoning jurisprudence, but that would also set the law and the country on a freer and fairer

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[247] *Id.* at 284.

[248] This concern was expressed relatively soon after inclusionary zoning laws were first enacted. *See* Robert C. Ellickson, *The Irony of Inclusionary Zoning*, 54 S. CAL L. REV. 1167, 1170 (1981) [hereinafter Ellickson, *The Irony of Inclusionary Zoning*]. There is still not much systematic empirical evidence, but some of it certainly suggests that the concerns were well-founded. *See, e.g.*, *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington DC and Suburban Boston Areas*, FURMAN CTR. REAL EST. & URB. POL'Y (Mar. 2008), http://furmancenter.org/files/publications/IZPolicyBrief.pdf; Benjamin Powell & Edward Stringham, *Housing Supply and Affordability: Do Affordable Housing Mandates Work?*, REASON FOUND. (Apr. 1, 2004), http://reason.org/news/show/housing-supply-and-affordabili.

[249] Myron Curzan & Marta Lopez, *Affordable Multifamily Housing: Paths to a Painless Solution*, URB. LAND (June 26, 2014), https://urbanland.uli.org/industry-sectors/residential/producing-affordable-multifamily-housing-paths-painless-solution/.

[250] Ellickson, *The Irony of Inclusionary Zoning*, *supra* note 248, at 1206–09 (arguing that inclusionary zoning is sometimes an exclusionary tactic in disguise).

[251] Powell & Stringham, *supra* note 248.

[252] Bell, *supra* note 48, at 568.

[253] This may seem unlikely too, at least in some states. Perhaps alternative routes could be taken in different jurisdictions.

[254] *See* Bell, *supra* note 48, at 557–73.

course. If the United States Supreme Court is unwilling to strike exclusionary zoning laws, state supreme courts should do so under their state constitutions. This would at least advance justice in some states, and that justice might become contagious. Of course, state courts have not rushed to strike exclusionary zoning laws either, and we would be foolish to wait with bated breath for that to happen. In the long run, perhaps the greatest hope is for a change in social attitudes and political ideals that might then drive a more fundamental change in judicial attitudes and political outcomes.

V. TAKINGS: THE POWER TO EXPEL

The State's power of eminent domain raises special concerns "because it requires the use of the State's coercive powers against an individual."[255] Government takings therefore are inherently problematic, but the dangers are compounded when the government's takings powers are wielded on behalf of powerful special interests.[256] Just compensation must be provided,[257] but is rarely sufficient "to compensate expropriated property owners fully for the subjective values that they place on [their properties]"[258] because it is generally calculated using estimates of market values rather than the owners' true subjective values."[259]

> [T]he market price in a well-functioning, competitive market (which is the usual assumption for real estate markets) reflects the marginal valuation of what is being sold–intuitively, the marginal value of the last property of that type sold. Almost all buyers in such a market, however, are infra-marginal, and they value the properties they buy more than the prices they pay for them. That is why a well-functioning competitive market generates . . . surplus [for buyers]. The surplus earned by any individual buyer is the difference between the value they place on whatever it is they are buying and the price they must pay to make the purchase. If a property owner is compensated for a taking in an amount exactly equal to the market price, she will lose all of the surplus value she enjoyed from her property. This .

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[255] Smythe, *supra* note 43, at 26–27. In a conventional taking, the State's power is used to take possession of land away from the individual owner. *Id.* at 27. The individual owner could be a natural person or a corporate person. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005) (applying the takings clause to individuals); Russian Volunteer Fleet v. United States 282 U.S. 481 (1931) (applying the takings clause to a corporation). Because all of the sticks in the owner's bundle are taken, the intrusion is much greater than that caused by a government regulation, unless the regulation amounts to a regulatory taking. *See* Coniston Corp., v. Hoffman Estates, 844 F.2d 461, 466 (7th Cir. 1988). Moreover, the government must take some overt action against the individual; that overt action always makes the exercise of the government's coercion more obvious. *See id.*

[256] *Id.*; *see infra* Part V.

[257] *Id.* at 27; Bell, *supra* note 48, at 525.

[258] Smythe, *supra* note 43, at 27; *see* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) ("Compensation in the constitutional sense is therefore not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property.").

[259] *Coniston Corp.*, 844 F.2d at 464; Smythe, *supra* note 43, at 27.

> . . explains why most property owners are disgruntled when they are subjected to a taking.[260]

Nonetheless, the government's takings power is deeply rooted in the feudal antecedents of American law.[261] In fact, during the Colonial period, the Crown's power of eminent domain was apparently almost unrestricted and did not require just compensation.[262] The Magna Carta was the first written doctrine expressly restricting eminent domain, and it forbid takings by the sovereign without some form of due process.[263]

Although the extent of the due process requirement was subsequently disputed, it manifested itself in the requirement, at the very least, for a hearing prior to any confiscations of property by the Crown.[264] As the law developed, Sir Edward Coke expounded on the common law restraints against the sovereign's exercise of eminent domain in his series on the Institutes of the Laws of England,[265] and William Blackstone subsequently stressed the role of the common law as a restraint on the power of the sovereign in his Commentaries on the Laws of England.[266] The record is clear on not only the English sovereign's power of eminent domain, but also on some important restraints on that power that were entrenched under the common law by the time English colonies were established on the North American continent.[267]

The American Revolution reflected a widespread belief among colonial Americans that the power of the English sovereign was, and should be, limited.[268] The Declaration of Independence expressly stated the right of the people to revolt against their governments when the governments abused and exceeded their rightful powers,[269] and the Bill of Rights, including the Fifth Amendment with its Takings Clause, was incorporated into the United States Constitution to forestall the federal government

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[260] *Coniston Corp.*, 844 F.2d at 464; Smythe, *supra* note 43, at 27; *see* DAVID M. KREPS, MICROECONOMIC FOUNDATIONS I: CHOICE AND COMPETITIVE MARKETS 296–303 (2013).

[261] Edward J. Sullivan, *A Brief History of the Takings Clause*, GARVEY SCHUBERT BARER (Nov. 11, 2013), http://www.gsblaw.com/newsroom-publications-A_Brief_History_of_the_Takings_Clause. The sovereign's exercise of its takings powers was often challenged by the landed gentry and the emerging middle-class, but the sovereign undoubtedly claimed takings powers. *See id.*

[262] William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695 (1985).

[263] *Id.* at 698; Sullivan, *supra* note 261.

[264] Sullivan, *supra* note 261.

[265] *Id*.

[266] *Id*.

[267] *See* Treanor, *supra* note 262, at 697–98. The restraints did not, however, include a just compensation requirement. *Id*.

[268] *See id.* at 705.

[269] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). But the Declaration of Independence did not challenge the government's right to take private property. *See* Treanor, *supra* note 262, at 700.

from assuming too much power.[270] The United States Supreme Court eventually incorporated the federal Takings Clause against the state governments under the Due Process Clause of the Fourteenth Amendment in *Chicago, Burlington and Quincy R.R. v. City of Chicago*.[271] Ironically, although the Fifth Amendment (as well as the Fourteenth Amendment) included a Due Process Clause that provided the justification for various restrictions on governments under the substantive due process doctrine,[272] the United States Supreme Court's Takings Clause jurisprudence developed through completely different precedents than its substantive due process jurisprudence.[273]

This is unfortunate because the law might have developed more coherently if the Supreme Court's takings jurisprudence had evolved along with the doctrine of substantive due process. The Court's modern test for a breach of substantive due process for a law or regulation that implicates a non-fundamental right is whether the law is rationally related to a legitimate state interest.[274] Because the Court has defined the scope of legitimate state interests to extend to almost any matter involving the public's health, welfare, safety, or morals, the modern substantive due process doctrine places few limits on government powers.[275] Yet because the Court developed its takings jurisprudence separately, there is now a body of cases in which the Court has held that government laws or regulations have gone so far in impinging on private property rights that they constitute takings and just compensation is required.[276] In fact, although the Court has not yet held so, it seems only logical that there may be potential cases in which a law or a regulation actually exceeds the government's takings powers altogether. In such a case, the Takings Clause would limit government powers but substantive due process probably would not, given the way the doctrine has been applied in modern cases.[277] That seems absurd because if a law or regulation

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[270] *See* Treanor, *supra* note 262, at 694, 708.

[271] Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233–34 (1897).

[272] *See* U.S. CONST. amends. V, XIV § 1.

[273] For an overview of the literature, see Salzberg, *supra* note 193, at 416–23.

[274] John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 499 (1997).

[275] As the Supreme Court wrote in *Berman v. Parker*:

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide the Nation's Capital should be beautiful as well as sanitary, there is nothing in the *Fifth Amendment* that stands in the way.

Berman v. Parker, 348 U.S. 26, 33 (1954).

[276] Salzberg, *supra* note 193, at 414–19. Professor Salzberg discussed and critiqued the regulatory jurisprudence. He argued that the courts should confine takings law to physical takings and use the substantive due process doctrine to discipline the legislature's regulatory powers. *Id.* at 414, 418.

[277] *See id.* 416–19.

is beyond the government's takings powers, how could it be rationally related to a legitimate state interest?[278]

> The United States Constitution expressly limits the government's power of eminent domain to cases where the taking is for a public use. The Supreme Court's definition of a public use thus defines the scope of the government's takings powers. . . . Historically, the Court defined public uses narrowly, limiting the power of eminent domain to takings of land for uses that would make the land open to the public or provide it to private carriers who would make their transportation services open to the public.[279]

"In . . . recent cases, however, the Supreme Court has gradually expanded the scope of permissible public uses" and it has even implied that it would allow takings for almost any public purpose, including the redevelopment of blighted urban neighborhoods[280] and more recently the redevelopment of "non-blighted neighborhoods as part of integrated redevelopment plans."[281] As a consequence, government takings have become more common and the power of eminent domain encumbers private property rights more than ever. Not surprisingly, this has generated a profusion of legal scholarship, much of which has been critical of the Supreme Court's recent takings cases.[282]

A. The Limits of State Coercion

Most people abhor being subjected to coercion, whether it is by the government or by other individuals. But most people probably believe that the government would be justified in using coercion if such coercion was to prevent the exercise of coercion by others. In this regard, it is well to note that coercion does not have to be physical. Friedrich Hayek,[283] for example, observes that a monopolist could exercise

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[278] This of course corroborates Professor Salzberg's concerns. *See id.* 424–25.

[279] Smythe, *supra* note 43, at 27–28. The Fifth Amendment of the Constitution contains the express limitation of the government's power. U.S. CONST. amend. V. For a useful overview of the historical development of the public use requirement, see Justice O'Connor's dissenting opinion in *Kelo*. Kelo v. City of New London, 545 U.S. 469, 494–504 (2005) (O'Connor, J., dissenting).

[280] Berman v. Parker, 348 U.S. 26, 35 (1954); Smythe, *supra* note 43, at 28.

[281] *Kelo*, 545 U.S. at 503–04; Smythe, *supra* note 43, at 28.

[282] For a sample of this legal scholarship, see Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 HARV. J. L. & PUB. POL'Y 491 (2006); Daniel H. Cole, *Why* Kelo *Is Not Good News for Planners and Developers,* 22 GA. ST. L. REV. 803 (2006); Orlando E. Delogu, Kelo v. City of New London*—Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 ME. L. REV. 18 (2006); Ashley J. Fuhrmeister, *In the Name of Economic Development: Reviving "Public Use" as a Limitation on the Eminent Domain Power in the Wake of* Kelo v. City of New London, 54 DRAKE L. REV. 171 (2005); Gideon Kanner, Kelo v. New London*: Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201 (2006).

[283] Hayek was an economist and a philosopher during the era of the Great Depression. *Keynes v. Hayek: Two Economic Giants Go Head to Head*, BBC (Aug. 3, 2011), http://www.bbc.com/news/business-14366054.

coercion.[284] He offers the example of an oasis that the owner purchased when alternative water sources were plentiful.[285] If the alternative water sources dried up, and nearby residents had "no choice but to do whatever the owner of the spring demanded of them if they were to survive," this would be a "clear case of coercion."[286] This scenario does not imply that a monopolist always exercises coercion.[287] Hayek explains that a monopolist would only exercise coercion when he controlled "an essential commodity on which people were completely dependent."[288] In other words, "unless a monopolist is in a position to withhold an indispensable supply, he cannot exercise coercion."[289]

Hayek's conception of coercion might allow for distinctions by matter of degree, but it requires sufficient control of a person that he is forced to serve the ends of another.[290] In fact, there are many contexts in which monopoly power might be considered coercive. One of them is the classic hold-up problem that is often used to justify government takings.[291] Consider the classic hold-up scenario: suppose the city wants to build a public hospital on some city block. Assume that the city assigns a value of $100 million to the hospital. Assume that the specific location of the hospital does not matter, but the project requires an entire city block. Suppose the city has budgeted $10 million for the purchase of all ten of the privately-owned properties on a particular block, reasoning that each of the properties has a market value of less than $1 million and that it should, therefore, be able to purchase each of them for $1 million.

Suppose that after spending $9 million on nine of the properties, the tenth property owner refuses to sell. The tenth property owner has a monopoly on the last property that the city needs to buy to build the hospital on that city block. On a superficial level, it might appear that the tenth owner merely exercises her property rights by declining to transfer her title to the city. But upon a little reflection, it seems clear that the tenth owner is much more likely exercising the leverage of an owner with hold-up monopoly power.

If the city's only alternative is to buy up the properties on some other block, the city theoretically would be willing to pay at least as much as the total cost of another block to the tenth owner for that tenth property—that would be at least $10 million. In theory, the owner of the tenth property would be in a position to extract from the city at least the price of an entire city block for a property that was worth perhaps a tenth of that amount on the market. Even if in reality the tenth owner has less leverage than in theory, the scenario confers upon her a significant degree of coercive monopoly power. The obvious solution to the problem is for the city to exercise the power of

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284 FRIEDRICH A HAYEK, THE CONSTITUTION OF LIBERTY 203 (Ronald Hamowy ed., 2011).

285 *Id.*

286 *Id.*

287 *Id.*

288 *Id.*

289 *Id.*

290 Hayek defined coercion as "such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced . . . to serve the ends of another." *Id.* at 71.

291 DUKEMINIER ET AL., *supra* note 15, at 1108–09 (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 70–71 (8th ed. 2011)).

eminent domain. In this context, the use of eminent domain would forestall the exercise of coercion and advance liberty.[292]

B. "Expulsionary" Takings

The State's exercise of eminent domain is problematic, however, when it is not necessary to forestall coercion.[293] Unfortunately, in the wake of *Berman v. Parker* and *Kelo v. City of New London*,[294] the government's power of eminent domain is being exploited for the gain of some individuals at the expense of others.[295] Government takings have become an instrument that politically influential and powerful individuals can and do use to exercise the levers of State coercion against politically less influential and less powerful individuals.[296] The most common abuses have occurred through urban redevelopment programs under which takings have been used to expel long-time residents and business owners from inner city areas to facilitate economic development and urban gentrification.[297] Stripped of all the rhetoric, the motives for many of these urban redevelopment projects are similar to the motives for many zoning laws,[298] except they are better described as "expulsionary"[299] than exclusionary, because the redevelopments actually expel nuisance-some or undesirable occupants or residents from a neighborhood and replace them with others who will be attractive to more affluent residents and the businesses that serve them.[300]

C. Economic Development Takings and Gentrification

Kelo v. City of New London raised red flags in the early 2000s because it extended the State's power to take private property for the purposes of economic development in areas that are not economically depressed.[301] In *Kelo*, the City of New London devised a plan to redevelop an area of the city that was not at all blighted.[302] The plan was motivated, it seems, by the city government's wish to stimulate the local economy and improve employment opportunities for residents.[303] To that end, the city's plan sought to encourage new private commercial and industrial investments by condemning a large number of non-blighted, privately-owned residential properties

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[292] Unsurprisingly, Hayek had little to say about takings. *See* HAYEK, *supra* note 284.

[293] Smythe, *supra* note 43, at 26–27.

[294] Kelo v. City of New London, 545 U.S. 469 (2005); Berman v. Parker, 348 U.S. 26 (1954).

[295] Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 39–40 (2006).

[296] *See* Smythe, *supra* note 43, at 45 (explaining that the government's coercive powers could be used against the weak).

[297] S. Burlington Cty. NAACP v. Twp. of Mt. Laurel, 336 A.2d 713, 736 (N.J. 1975).

[298] *Id.*

[299] This is not usually recognized as a word, but perhaps it should be. See *infra* note 337.

[300] *S. Burlington Cty., NAACP*, 336 A.2d at 736.

[301] Kelo v. City of New London, 545 U.S. 469, 484 (2005).

[302] *Id.* at 483.

[303] *Id.*

and transferring them to private commercial and industrial investors.[304] Several of the private homeowners challenged the city's power to condemn their properties on the grounds that the takings were not for a public use.[305] The case provides the Supreme Court's most recent statement on the scope of the public use requirement under the Fifth Amendment.[306]

A majority of the Supreme Court held that the taking of property from some private owners for its transfer to other private owners as part of an integrated development plan is a public use under the Fifth Amendment, regardless of whether the properties taken are blighted.[307] The opinion extended the government's power to take private property for the sake of stimulating economic development.[308]

In *Berman v. Parker*, the United States Supreme Court had already upheld the government's power to take property in a blighted neighborhood from some private owners for its transfer to other private owners for economic development purposes,[309] but *Kelo* extended that power to any properties, whether in a blighted neighborhood or not.[310] Although fostering economic development in blighted neighborhoods rather than in non-blighted neighborhoods arguably may serve a greater purpose, the political furor that *Kelo* caused was disproportionate to its constitutional significance.

Much of the political furor caused by *Kelo* seemed to derive from the government's use of eminent domain to stimulate economic development in non-blighted neighborhoods and not from the government's use of eminent domain to transfer property from some individuals to others.[311] The controversy was probably greater

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[304] *Id.*

[305] *Id.* at 475.

[306] *Id.*

[307] As Justice Stevens wrote for the majority:

> Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman,* to resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the *Fifth Amendment*.

Id. at 484.

[308] As Justice O'Connor wrote in her dissenting opinion:

> In moving away from our decisions sanctioning the condemnation of harmful property use, the Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure.

Id. at 501 (O'Connor, J., dissenting).

[309] Berman v. Parker, 348 U.S. 26, 29 (1945).

[310] *Kelo*, 545 U.S. at 484.

[311] This is understandable because the Supreme Court had already upheld the use of eminent domain to transfer private property from some owners to other private owners to promote economic development in blighted neighborhoods. *Berman*, 348 U.S. at 26.

because many people believe blighted neighborhoods benefit from economic development more than non-blighted ones, and the government should not undertake economic redevelopment projects in non-blighted neighborhoods.[312] In those respects, and perhaps others, economic development in blighted neighborhoods may be closer to a public good in the traditional sense than economic development in non-blighted neighborhoods.[313]

But "economic development is not a public good,"[314] and the concept of a public good was obviously not within the contemplation of the drafters of the Bill of Rights when they drafted the public use requirement for the exercise of the government's takings powers.[315] Moreover, there is little reason to believe that economic development in blighted neighborhoods provides more benefits to the residents in those neighborhoods than economic development elsewhere in the city would or that it provides more positive externalities.[316]

One could question why the government's takings power should be used to promote economic development at all and why the power has been extended to facilitate transfers of land from some private owners to others. In a well-functioning market economy, parties who wish to acquire land for commercial or industrial purposes can and should do so through the market.[317] In fact, private parties purchase land for large hotels, resorts, and manufacturing plants all the time.[318] Even though they may need relatively large parcels, they are not typically impeded by hold-up problems, possibly because they are able to make their purchases stealthily or because

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[312] *See, e.g.*, Leonard A. Zax & Rebecca L. Malcolm, *Economic Development, Eminent Domain and the Property Rights Movement*, Spring 2005, REAL EST. FIN. J. at 4; Ingrid Gould Ellen et al., *Building Homes, Reviving Neighborhoods: Spillovers from Subsidized Construction of Owner-Occupied Housing in New York City*, 12 J. HOUSING RES. 185, 186 (2001).

[313] A pure public good is one that is both non-excludable and non-rival in consumption, in the sense that it is impossible to exclude people from enjoying the benefits of its availability, and there is no reason to exclude them from enjoying the benefits because their consumption does not diminish the availability of the good for others. *See* David E. Van Zandt, *The Lessons of the Lighthouse: "Government" or "Private" Provision of Goods*, 22 J. LEGAL STUD., 47, 50 (1993). The classic example is the lighthouse that provides a benefit to all ships that pass; one ship's use of it does not make the lighthouse any less available or helpful to other ships. *Id.*

[314] Arthur J. Rolnick & Phil Davies, *The Cost of Kelo*, FED. RES. BANK OF MINNEAPOLIS (June 1, 2006), https://www.minneapolisfed.org/publications/the-region/the-cost-of-kelo.

[315] Kelo v. City of New London, 545 U.S. 469, 473 (2005).

[316] Miriam Zuk et al., *Gentrification, Displacement and the Role of Public Investment: A Literature Review* 46 (Fed. Res. Bank of S.F., Working Paper No. 2015-05, 2015) (concluding that most studies agree that gentrification in blighted neighborhoods displaces both homeowners and renters and that economic redevelopment would provide scant benefits to people who the redevelopment displaced).

[317] *See generally* Steven J. Eagle, *Private Property, Development and Freedom: On Taking Our Own Advice*, 59 SMU L. REV. 345 (2006); *How to Purchase Commercial Real Estate*, INC. (July 8, 2010), https://www.inc.com/guides/2010/07/how-to-purchase-commercial-real-estate.html.

[318] *See* John R. Nolon & Jessica Bacher, *Zoning and Land Use Planning*, 37 REAL EST. L.J. 234, 240 (2008).

they are not tightly bound to make them in any specific locations.[319] When the government does not coordinate private investments by implementing large scale, integrated development plans, private investors can make purchases of separately-owned parcels through intermediaries without the separate owners even realizing that some party is buying up a larger parcel of land.[320] Moreover, if the investors do encounter an individual owner who tries to exercise hold-up power, they are free to sell off their newly purchased parcels and find a new location for their venture. While the investors might not recoup their transaction costs and the next best alternative location might not be quite as desirable, they are not as vulnerable to the hold-up problem as a government redevelopment agency that is in the throes of redeveloping a targeted neighborhood under an integrated development plan.

The greater problem with the Supreme Court's takings jurisprudence is that it creates the potential for some individuals to use the government's power of eminent domain against other individuals for their own private gain. "Takings for public uses that involve making the land open to the public or providing it to public carriers who will make their services open to the public" might be justified on the grounds that they help to mitigate the holdup problems that could impede the provision or drive up the costs of goods and services to the general public.[321] But government takings that "reallocate properties from some private owners to others simply for the purpose of encouraging economic development" are another matter.[322] "[T]he use of State coercion against some individuals for the benefit of others opens the door to an abuse of the State's powers by those who are the most wealthy and influential" and against those who are the least wealthy and influential.[323] Economic development takings thus raise the possibility—perhaps even the likelihood—that "the State could serve as an instrument for exactly the kind of coercion that it is supposed to prevent."[324] If the primary purpose of government in a just society is the protection and advancement of

[319] A simple Google search of "anonymous real estate purchases" will yield myriad websites offering advice about how to make stealthy land purchases and many offers to help—of course, for a fee.

[320] See *The Secret Florida Land Deal that Became Walt Disney World*, MIAMI HERALD ARCHIVES (May 16, 2017), http://www.miamiherald.com/news/state/florida/article150733437.html, for a recent story about the acquisition of land for Walt Disney World in Orlando during the 1960s.

[321] Smythe, *supra* note 43, at 28.

[322] ILYA SOMIN, THE GRASPING HAND: KELO V. CITY OF NEW LONDON AND THE LIMITS OF EMINENT DOMAIN, 5, 16 (2015) [hereinafter SOMIN, THE GRASPING HAND] (observing that the Pfizer corporation not only strongly influenced the City of New London's economic redevelopment plan, but it also lobbied the city's redevelopment agency extensively to encourage it to exercise its takings powers); Smythe, *supra* note 43, at 28.

[323] Smythe, *supra* note 43, at 28. In her dissenting opinion in *Kelo*, Justice O'Connor warned:

> [T]he fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporation and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

Kelo v. City of New London, 545 U.S. 469, 505 (2005).

[324] Smythe, *supra* note 43, at 28–29; *see* Cohen, *supra* note 282, at 495.

its citizens' liberty, "the power of eminent domain should be confined to cases where it is essential to the provision of public good."[325]

In fact, *Berman* should actually raise more concerns than *Kelo*. Because the properties subject to the takings in *Kelo* were generally not blighted and the owners therefore probably had more means, the exercise of State coercion was more likely to meet resistance.[326] But in *Berman*, the properties subject to the takings were generally blighted, and it was less likely that any individual owner or group of owners would mount serious resistance against the exercise of State coercion.[327] As it turns out, the challenge against the taking in *Berman* was made by a commercial property owner whose property was not considered blighted.[328] Except for that owner, a challenge might never have been made. As it turns out, the challenge failed, and the case set a precedent for further exercises of State coercion of the same kind.[329] Moreover, because there was no political backlash like the one in New London after *Kelo*, the redevelopment plan proceeded and over five thousand mostly poor African-American residents in the District of Columbia were displaced.[330]

If a government takes properties in a poor, blighted neighborhood to implement some integrated economic redevelopment plan, the property owners will generally be less able to challenge the takings, both legally and politically, than if the government takes properties in a well-maintained, middle- or upper-middle class neighborhood.[331] In the wake of *Berman* and *Kelo*, property development companies, sports franchises, and corporations are now able to use the power of State coercion against poor and politically marginalized individuals.[332] In fact, they have already done so.[333] *Kelo* was

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[325] Smythe, *supra* note 43, at 29. This would make the definition of a public good central to the scope of the government's takings powers, and, to some extent, simply change the focus of the debate. But the traditional public uses much more clearly satisfy the public good requirement than controversial redevelopment plans such as those in *Kelo*.

[326] In fact, several plaintiffs filed suit in the *Kelo* case, and the political backlash their suit caused probably increased the amount of compensation the city ultimately paid to them. SOMIN, THE GRASPING HAND, *supra* note 322, at 233. In 2012, the Mayor of New London issued an apology to the displaced property owners. *Id.* at 235. Ironically, ten years after the case, the condemned properties remained undeveloped and unused. *Id.*

[327] Berman v. Parker, 348 U.S. 26, 34 (1954).

[328] *Id.* This is not surprising because the owners of the blighted properties probably lacked the means or the incentives to challenge the takings.

[329] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005); Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp., 503 U.S. 407 (1992); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008).

[330] SOMIN, THE GRASPING HAND, *supra* note 322, at 58.

[331] Cohen, *supra* note 282, at 557.

[332] *See id.* at 547; *see also* Erin A. Stanton, *Home Team Advantage?: The Taking of Private Property for Sports Stadiums*, 9 N.Y.C. L. REV. 93, 94 (2005).

[333] Takings in blighted neighborhoods since *Berman* have displaced hundreds of thousands of people—mostly non-white—from their homes. SOMIN, THE GRASPING HAND, *supra* note 322, at 87–88; *see* U.S. COMM'N ON CIVIL RIGHTS, THE CIVIL RIGHTS IMPLICATIONS OF EMINENT DOMAIN ABUSE 56 (2014) (documenting claims that redevelopment takings have often targeted

rare because governments generally have not attempted to implement economic development plans in non-blighted neighborhoods against middle- or upper-middle class property owners.[334] This is probably not just because economic redevelopment plans in middle- and upper-middle class or non-blighted neighborhoods would not provide as much economic stimulus; it is probably also because the plans would meet political and legal resistance from more influential citizens.[335]

Beginning with *Berman*, the Supreme Court's takings cases since the middle of the twentieth century have opened the door to the abuse of the government's takings powers for "expulsionary"[336] purposes and not just exclusionary purposes.[337] In fact, the presumption that urban redevelopment requires an "integrated development plan"[338] derives from the fact that the affluent residents that cities seek to attract want to live in attractive, orderly neighborhoods with businesses and public services that support an affluent upper-middle class lifestyle.[339] These affluent residents' decisions to relocate into the cities from the suburbs[340] are facilitated by large-scale redevelopment plans that help to ensure that they have enough affluent neighbors and upscale amenities such as grocery stores, retail shops, coffee shops, bakeries, and

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neighborhoods with disproportionate numbers of racial minority and socio-economically marginalized residents).

334 Chad J. Lersch, *Northern's Exposure: From Berman v. Parker to Kelo v. New London, an Illustration of the U.S. Supreme Court's Unwavering Private Application of the Public Use Clause of the Fifth Amendment*, 18 DUPAGE CTY. B. ASS'N BRIEF 26, 30 (2005).

335 It was not coincidental that the City of New London's redeveloped plan ended in failure but the District of Columbia's redevelopment plan did not. Ilya Somin, *The Grasping Hand: "Kelo v. City of New London" and the Limits of Eminent Domain*, CATO INST. (June 23, 2015) [hereinafter Somin, *Limits of Eminent Domain*], https://www.cato.org/publications/commentary/grasping-hand-kelo-v-city-new-london-limits-eminent-domain (explaining those with economic resources can fight government takings).

336 This is probably not a word, but perhaps it should be. Professor David Dana uses the term "exclusionary" to describe "the exercise of eminent domain that has the effect of excluding low-income households from an otherwise predominantly or entirely middle-class or wealthy neighborhood or locality, whether or not exclusion itself was the purpose of the condemnation." David A. Dana, *Supreme Court Economic Review Symposium on Post-Kelo Reform: Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 7–8 (2009). But when the government uses eminent domain to take properties from some private owners and transfers the properties to other private owners, the government exercises its powers to expel the initial owners from the neighborhood and not simply to exclude them. *See id.* at 48.

337 Professor Dana proposes an exclusionary eminent domain doctrine that would fully internalize the costs of economic development takings. *Id*. at 36–47. This Article, in contrast, rejects the idea that the government should have the power to engage in such takings.

338 Iyla Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo,* 15 SUP. CT. ECON. REV. 183, 235–36 (2007) [hereinafter Somin, *Controlling*].

339 In the *Kelo* case, Pfizer, Inc. was not the intended transferee of any of the properties that were subject to takings or any other properties that were intended to be redeveloped under New London's integrated development plan. Yet Pfizer knew that it would benefit from the redevelopment project because its middle-class and upper-middle class employees would benefit from the upscale housing, hotels, and restaurants that the neighborhood would attract. SOMIN, THE GRASPING HAND, *supra* note 322, at 16.

340 *Id.*

restaurants to make inner-city living attractive to them.[341] Once they have relocated to their new urban homes, the affluent residents of tony high-rise condominium buildings and refurbished townhomes are likely to make persnickety neighbors.[342] They are also likely to pressure the police and elected city officials to move the homeless further from their neighborhoods, provide better policing, and control what they consider nuisance-some activities.[343]

D. An Incoherent Jurisprudence

The Supreme Court's opinions in *Berman* and *Kelo* upheld an unreasonably expansive interpretation of the scope of the public uses allowed under the Fifth Amendment.[344] Writing for the majority in *Kelo*, Justice Stevens claimed that the Court had "repeatedly and consistently" interpreted "public use as 'public purpose.'"[345] Thus, the Court's task in *Kelo* was simply to decide whether the takings intended in that case served a public purpose, which he claimed the cases had defined broadly, "reflecting . . . [a] longstanding policy of deference to legislative judgments . . . ."[346] Justice Stevens quoted from *Berman*, in which the Court equated "public use" to a requirement that a taking advances the public welfare, noting that "[t]he concept of the public welfare is broad and inclusive" extending to values that are "spiritual as well as physical, aesthetic as well as monetary."[347] Justice Stevens further wrote that "[p]romoting economic development is a traditional and long-accepted function of government" and that "[t]here is . . . no principled way of distinguishing economic development from the other public purposes that we have recognized."[348]

Most of what Justice Stevens wrote in *Kelo* and what Justice Douglas wrote in *Berman* about the public use requirement was debatable to say the least.[349] The idea that the government should stimulate economic development is a relatively recent

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[341] *Id.*

[342] Spike Lee, for example, was reported to have alleged that his father, a jazz musician, practiced on his drums in the family neighborhood in Brooklyn for many years and no one ever complained until the neighborhood gentrified and some of the new residents began calling the police. Ray Sanchez & Steve Almasy, *Spike Lee Explains Expletive-Filled Gentrification Rant*, CNN (Feb. 27, 2014), http://www.cnn.com/2014/02/26/us/new-york-spike-lee-gentrification/index.html.

[343] *See, e.g.*, Lisa Halverstadt, *Authorities Can't Force the Homeless Off the Street. Here's What They Can Do*, VOICE OF S.D. (July 1, 2016), http://www.voiceofsandiego.org/topics/nonprofits/authorities-cant-force-the-homeless-off-the-street-heres-what-they-can-do/ (documenting the ways in which the San Diego police use nuisance ordinances to manage and control San Diego's homeless population).

[344] *See* Kelo v. City of New London, 545 U.S. 469 (2005); Berman v. Parker, 348 U.S. 26 (1954).

[345] *Kelo*, 545 U.S. at 480.

[346] *Id.*

[347] *Berman*, 348 U.S. at 33.

[348] *Kelo*, 545 U.S. at 484.

[349] In fact, Justice Stevens subsequently acknowledged that his opinion confounded precedents from substantive due process with those from the public use requirement. SOMIN, THE GRASPING HAND, *supra* note 322, at 8.

one;[350] it is therefore difficult to understand how the promotion of economic development could possibly be characterized as a "traditional and long-accepted function of government."[351] Beyond that, of course, it is disingenuous to suggest that the promotion of economic development cannot be distinguished from other public purposes. Moreover, it requires a leap of imagination to interpret the Court's early takings cases to have consistently interpreted the term "public use" as "public purpose" since the confounding of public uses with public purposes is an artifact of *Berman*.[352] And while the Court in *Berman* certainly did extend the conception of the public welfare to encompass spiritual and aesthetic values, the Court had not expressly done so until then, which is one reason why *Berman* was such an important opinion.[353]

But Justice Stevens's opinion mischaracterizes the Supreme Court's takings jurisprudence in an even more fundamental way. By equating the term public use with public purpose, it appears to imply that the Takings Clause will allow any taking as long as it is for a public purpose.[354] Yet Justice Stevens's opinion, like Justice Douglas's opinion in *Berman*, also draws a line between economic development takings that are part of an integrated development plan and those that are not, thereby suggesting that the former satisfy the public use requirement while the latter do not.[355] If economic development is a public purpose,[356] and a public purpose is a public use,[357]

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[350] *See, e.g.*, JOHN H. WOOD, A HISTORY OF MACROECONOMIC POLICY IN THE UNITED STATES 63 (2009).

[351] Most economic historians attribute the origins of the idea that the government can manage the economy to John Maynard Keynes, an early twentieth century economist whose influence in the United States was not evident until the 1930s. *See, e.g.*, *id.*

[352] In her dissenting opinion in *Kelo*, Justice O'Connor observed that until *Berman*, takings had only been allowed to "transfer private property to public ownership" and to "transfer private property to private parties, often common carriers, who make the property available for the public's use." *Kelo*, 545 U.S. at 498.

[353] *Id.* at 498–99.

[354] *Id.* at 480.

[355] Justice Stevens observed:

> [A] one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case. While such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot, the hypothetical cases . . . can be confronted if and when they arise.

Id. at 487.

[356] Justice Stevens acknowledges so by observing:

> [P]etitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. Putting aside the unpersuasive suggestion that the City's plan will provide only purely economic benefits, neither precedent nor logic supports petitioners' proposal. Promoting economic development is a traditional and long-accepted function of government.

Id. at 484.

[357] Justice Stevens wrote, "when this Court began applying the *Fifth Amendment* to the States at the close of the 19th century, it embraced the broader and more natural interpretation of public use as 'public purpose.'" *Id.* at 480.

why is an economic development taking that is part of an integrated development plan constitutional but an economic development taking that is not part of an integrated development plan is unconstitutional? There obviously is more to the Supreme Court's takings jurisprudence than Justice Stevens's opinion can coherently explain.

The equation of public uses with public purposes together with a distinction between economic development takings that are constitutional and those that are not implies that some economic development takings are for a public purpose and others are not. If some economic development takings are for a public use but others are not, then the concept of a public use must depend not only on the goals or objectives of the government's plan, but also on how broadly they provide benefits to the public. Thus, not all economic development serves a public purpose; in fact, for economic development to serve a public purpose, it must provide sufficiently broad benefits to the public as a whole.[358] The Court's requirement that an economic development taking be part of an integrated development plan is probably best understood as a way of preventing economic development takings that are not likely to provide broad public benefits.

If that is the rationale for the distinction, it is not very persuasive. On the one hand, if the government implements an integrated development plan in which it takes properties from some private parties and transfers them to other private parties, then that is a constitutional taking because the public use requirement is met.[359] The government will be obligated to pay just compensation, but it has the power to force the transfers.[360] Yet, on the other hand, if the government takes the same properties from the same private owners sequentially one at a time and transfers them one at a time to the same other private parties, then the takings would apparently not be constitutional because they would not be part of an integrated development plan.[361] In the end, the two sets of takings could have essentially the same effect on economic development, especially if the government undertakes the takings on the same schedule (and there is no reason, in principle, why it could not). It is difficult, therefore, to justify drawing the line between economic development takings that are for a public use and those that are not based on whether the takings are part of an integrated development plan.

The Supreme Court has defined the government's takings power too broadly and the power has been abused. Until the Court repairs the problem, it is likely that the power will be abused again. Private developers, perhaps working in conjunction with one another, may have enough at stake in the prospect of an integrated development plan to use their influence and political power to pressure government officials to develop and implement one, regardless of whether the prospective benefits will redound to the general public or are particularly significant or broad. The power of State coercion will thus be used against some private individuals on behalf of other private individuals, without in any way forestalling or mitigating the exercise of

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358 Patricia J. Askew, *Take It or Leave It: Eminent Domain for Economic Development: Statutes, Ordinances, & Politics, Oh My!*, 12 TEX. WESLEYAN L. REV. 523, 535 (2006).

359 *See* Kristi M. Burkard, *No More Government Theft of Property! A Call to Return to a Heightened Standard of Review After the United States Supreme Court Decision in Kelo v. City of New London*, 27 HAMLINE J. PUB. L. & POL'Y 115, 119 (2005).

360 *Id.*

361 Somin, *Controlling*, *supra* note 338, at 235–36.

coercive monopoly power. That will not only be anti-libertarian, as Justice O'Connor warned; it will probably also allow the rich and powerful to exploit the poor and weak.[362]

VI. CONCLUSION

Property laws have far-reaching implications and contribute to a plethora of contemporary social problems, including income inequality, the intergenerational transmission of poverty, de facto racial and ethnic segregation, and homelessness.[363] They also have important consequences for people's satisfaction with their lives and businesses' profits. It is not surprising, therefore, that modern developments in property law have been so strongly influenced by political pressures. As is generally the case, those with the most economic resources and political power have had the most telling influences on the way that property laws have developed in the United States since at least the early twentieth century to the present.[364]

This Article has used a simple normal form game—the Not-In-My-Backyard Game—to illustrate the motivations of various parties and the directions of the political influences. As the game illustrates, on the one hand, affluent and wealthy people who want to escape the grime and blight of urban neighborhoods to the suburbs have incentives to pressure local governments for zoning regulations that effectively exclude less affluent and less wealthy people from their neighborhoods. On the other hand, affluent and wealthy people and larger businesses who want to relocate into urban neighborhoods may be reluctant to do so unless city governments redevelop entire neighborhoods to offer the amenities of an upscale, urban environment. This puts pressure on city governments to use takings to facilitate urban redevelopment, and the takings will often effectively expel many less affluent residents and smaller businesses from their neighborhoods.

It was inevitable that local governments' powers to enact comprehensive zoning schemes with such extensive land use regulations would be challenged; it was also inevitable that local governments' takings powers would be challenged when they began using takings to implement economic redevelopment plans that required the transfer of property from some private owners to others.

In *Village of Euclid v. Ambler*, the Supreme Court upheld the power of local governments to enact zoning laws without pausing to address aspects of the zoning scheme that were blatantly exclusionary in purpose and effect.[365] In *Berman v. Parker*, and later in *Kelo v. City of New London*, the Court upheld the power of governments to take property from private parties and transfer it to other private parties as long as the taking was part of an integrated development plan, even though some of the dissenting Justices raised concerns about how those with significant political influence might use the government's power to expel poor and marginalized people and smaller businesses from their own neighborhoods.[366] Without in any way impugning the integrity of the Court, it is difficult not to suspect that the majority opinions in those

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362 *Kelo*, 545 U.S. at 505.

363 *See supra* note 9.

364 Cohen, *supra* note 282, at 495.

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

366 *See Kelo*, 545 U.S. at 490; Berman v. Parker, 348 U.S. 26 (1954).

cases reflected the same values and aspirations as those of the affluent and politically influential groups that typically benefit from Euclidean zoning and economic development takings.

The difficult question is: what can be done about it? The central thesis of this Article is that the abuse of government powers has caused these problems, and therefore the obvious solution is to limit government powers. In an ideal scenario, the United States Supreme Court would use the substantive due process doctrine to strike exclusionary zoning regulations. This would include any categorical restrictions against other types of residential housing in areas zoned for single-family residences. It would also include any zoning restrictions that applied different setback, area, or lot requirements for the same types of housing in different zones. Ideally, the United States Supreme Court would also limit the scope of public uses for the purpose of the Takings Clause to those that (1) transfer private property to a government, (2) transfer private property to a private party that will use it for a facility or carrier that will be open to the general public, such as a transportation carrier, or (3) in special circumstances, mitigate the exercise of coercion by destroying monopoly power.

The United States Supreme Court is unlikely to take such actions anytime soon. In the alternative, state supreme courts should take exactly the same actions as matters of state constitutional law. States have not yet taken such action, but many state legislatures have responded to the furor over *Kelo* by enacting statutes that limit local governments' takings powers.[367] In fact, at least forty-five states have enacted statutes of some kind in response to *Kelo*.[368] Most of the statutes, however, do not ban economic development takings in blighted areas, and they define blighted areas too broadly.[369] As the preceding discussion explains, takings to transfer property from some private owners to others in blighted areas actually raise more concerns than such takings in non-blighted areas because the subjects of the takings are less likely to have the economic resources and political influence to protect themselves against the takings.[370] Thus, while the state legislative responses are welcome, they have been inadequate.

Ultimately, the best hope for more fundamental change lies in the hearts and minds of the next generation. The door to a more equitable, inclusive, and just society will open if the rising generation of social and political leaders takes an open-minded look at how property laws developed during the twentieth century, asks why that happened, and questions whether the consequences have been socially constructive or destructive. Once the door is open, a clearer social conscience will prevail. People will see through the Not-In-My-Backyard Game for the veiled snobbishness and prejudice that lies at its core. Legislatures will become more responsive to marginalized citizens, and a new judicial attitude will begin to dominate the courts. City governments will be less inclined to use their powers to exclude or expel people from residential neighborhoods, and if they do, courts will begin to rein them in.

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367 *See, e.g.*, ALLISON TORRES BURTKA, ASS'N TRIAL LAWYERS AM., OHIO HIGH COURT REINS IN EMINENT DOMAIN 74 (2006).

368 Somin, *Limits of Eminent Domain*, *supra* note 335.

369 *Id.*

370 *Id.*