

Commentary

Reflections on Private Property, Planning, and State Power

Steven J. Eagle

INTRODUCTION

Most planners and land use attorneys are familiar with the debate between private property rights advocates and those dubbed by Professor Daniel Mandelker, FAICP, as “police power hawks.” While everyone may agree that the U.S. Supreme Court’s regulatory takings jurisprudence has been doctrinally incoherent and practically unhelpful, there is a familiar split as to where the Court went wrong and what is to be done about it.

This commentary attempts to treat land use regulation, and, by extension, the appropriate role of planners, in a manner beyond that associated with the usual debate about property rights and regulatory takings law. Thus, while these reflections were stimulated by a Bettman Symposium session on “Private Property Rights, Today, and Tomorrow” at the American Planning Association’s 2008 Annual Conference,¹ my goal is less to disagree with some of the views expressed than to put them in a broader context.

Property rights and government are societal institutions—both are impor-

tant and pervasive structures for social order and cooperation. Both exert powerful claims on members of society and evoke substantial emotion. Both ultimately derive their legitimacy as expressions of the individual and collective will of the people. However, despite adherents’ overarching claims to the contrary, neither property rights nor government powers have been fully defined.

It is an important aspirational principle that professional planners seek a broad perspective.

Our primary obligation is to serve the public interest and we, therefore, owe our allegiance to a conscientiously attained concept of the public interest that is formulated through continuous and open debate. . . . the work we do in pursuit of our client or employer’s interest . . . shall always be consistent with our faithful service to the public interest.²

A survey conducted in 2008 by the American Planning Association found that 67 percent of the planners responding work for public agencies, while 25 percent of planners work for private consulting firms and eight

percent work elsewhere. Sixty-three percent of planners work in cities, 21 percent in suburbs, 11 percent in small towns, and three percent in rural areas.³ In addition to professional norms, these planners are subject to the constraints that the rule of law imposes upon public employees. As Supreme Court Justice William J. Brennan famously observed in a case where he found municipal overreaching, “A policeman must know the Constitution, then why not a planner?”⁴ Given the occasional disparagement of various Justices on the grounds that their views on takings and other issues reflect alleged partisanship, Justice Brennan’s admonition is quoted here partly as a counterpoint to his otherwise favorable view of the constitutionality of land use regulation, epitomized by his subsequent opinion in the leading case in regulatory takings law, *Penn Central Transportation Co. v. City of New York*.⁵ Had Brennan’s dissent in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287 (1981), been a majority opinion, the Court’s takings jurisprudence might now be

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1. See <http://www.planning.org/nationalconference/news/coverage/bettman.htm> for a summary.

2. See <http://www.planning.org/ethics/conduct.html>.

3. Source: <http://www.planning.org/salary/closerlook.htm>.

4. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621,

661 n.26 (1981) (Brennan, J., dissenting).

5. 438 U.S. 104 (1978).

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very different. Then-Justice William Rehnquist favored Brennan's view on the merits, but, for reasons of principle involving procedural aspects of the case, concurred and cast his decisive vote with the majority.

A half-century earlier, Justice George Sutherland, one of the "Four Horsemen" of economic substantive due process, broke ranks with his conservative brethren to uphold comprehensive zoning in *Village of Euclid v. Ambler Realty Co.*⁶ Sutherland genuinely feared the threat of contagious disease and urban unrest in growing districts of urban tenements, and saw in the police power of the State a necessary remedy. In all of these instances, the Justices acted in good faith.

More generally, good faith requires, at a minimum, that heated rhetoric not give rise to intimidation. There are accusations that property rights supporters have engaged in such behavior.⁷ More troubling, federal courts have found credible that agents of the U.S. government have abused their power by engaging in such behavior. For instance, in *Wilkie v. Robbins*,⁸ the Supreme Court noted a pattern of trespass and harassment following a landowner's refusal to grant easements to the Bureau of Land Management. In *United States v. 341.45 Acres of Land*,⁹ the court noted that a National Park Service land acquisition officer, at a public meeting, apparently offered potential condemnees 30 cents on the dollar of value, threatening ruinous delays and attorney fees as an alternative.

LAND USE PLANNING AND THE NIRVANA FALLACY

In the Anglo-American legal tradition, developed over 1,000 years, the public interest is instantiated in the rule of law. This both protects individuals

from arbitrary or oppressive government conduct and permits the State to advance the public's health, safety, and welfare and to promote its well-being. Since government officials are subordinate to the law, conscientious citizens cannot take officials' word alone as definitive of what the public interest is.

The automatic assumption that government officials can discern and effectuate the public interest is an example of what economist Harold Demsetz referred to as the "Nirvana fallacy."¹⁰ That type of fallacious reasoning compares the real-world, everyday operations of one institution with an idealized conception of another. It is appealing to think that the current governmental structure embodies the public interest, and that honest, effective, and prescient officials always apply it. Thus, one Bettman Symposium speaker, University of Wisconsin professor Harvey Jacobs, wrote in the *Journal of the American Planning Association* that:

Conservatives, the promoters of a strong private property rights perspective, view landowners . . . as stewards. . .

In counterpoint, critics (liberals?) argue that landowners are trapped in a tragedy not of their own making, but one in which their efforts to maximize individual self-interest do not further society's interests. . . .

Individuals thus make land use management decisions that take into account neither the broader public interest nor a more expansive economic calculus. What results is a litany of common land use problems: . . . that arise from a version of what Garrett Hardin (1968) called "the tragedy of the commons." In these instances, the tragedy is that individual landowners make decisions that are economically and socially sensible to them, but are not judged to be as beneficial to the broader public.¹¹

First, the world of private landownership is not as atomistic as Jacobs suggests. While one of the three great bodies of the common law is property, the other two are contract and tort.

Landowners are under pressure to be good stewards, because it is they who bear the cost of the reduced value of their land that would result from bad stewardship, and market value takes into account all that is now known about the future, including the distant future. Furthermore, under the law of contract, landowners have a powerful incentive to sell to those whose better stewardship leads them to make attractive purchase offers.

Even more germane, the common law refutes the notion that landowners' self-interest leads them to ignore the effects of their actions on their neighbors. Where coordination among neighbors would lead to higher aggregate values of their land, common law property and contract provide mechanisms for cooperation, such as real covenants and equitable servitudes. Neighbors who enter into such agreements share the increased value that they generate. Furthermore, the possibility of lawsuits for private and public nuisance deters landowners from harming their immediate neighbors and the broader community, respectively.¹²

The most remarkable aspect of Jacobs's analysis, however, is its simple and serene assumption that public officials would do things better than private owners. The switch in voice from an active recitation of a "litany" of problems, to a passive conclusion that landowner decisions "are not judged" sufficiently beneficial to the public, leads us to wonder what brooding omniscience, to use Holmes's phrase, has rendered the decree.

I will return to Garrett Hardin's "The Tragedy of the Commons," a

6. 272 U.S. 365 (1926).

7. See, e.g., Dana Clark and David Downes, *What Price Biodiversity? Economic Incentives and Biodiversity Conversion in the United States*, 11 J. ENVTL. L. & LITIG., 9, 79 (1996) and DAVID HELVARG, *THE WAR AGAINST THE GREENS* (1994).

8. 127 S. Ct. 2588 (2007).

9. 751 F.2d 924 (8th Cir. 1984).

10. Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON., 1 (1969).

11. Harvey M. Jacobs, *Fighting Over Land: America's Legacy . . . America's Future?* JOURNAL OF THE AMERICAN PLANNING ASSOCIATION, 65:2, 141, 143 (Spring 1999).

12. For an expansion of these points, see Steven J. Eagle, *The Common Law and The Environment*, 58 CASE WESTERN RES. L. REV. 583 (forthcoming 2009).

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short article that is immensely more influential than it is read. For now, I would note one aspect of Jacobs's argument, that involving the distant future. In the case of petroleum reserves, to take an example, both government and private organizations avidly seek information as to their potential size, practicality of exploitation, availability of substitutes, and factors that might affect the desirability of their use, such as climate change. The same holds true for the availability of good farmland, fresh water, and other important natural resources.

If private organizations have equal competence in obtaining information pertaining to resource economics, is government better at placing a social value upon them? Jacobs assumes this is the case, but the vast literature and acrimony concerning government cost-benefit analysis suggests that the nature and degree of society's "regard . . . for those several generations off" is undefined and contested. Opinion ranges from those who refuse to apply any discount rate, on the grounds that we have no better claim to resources than our progeny in the distant future, to those who extrapolate from long-term trends that show that human societies are becoming more wealthy over time, and argue that we must deal with our current problems instead of sacrificing current well-being for the conjectural benefit of wealthier generations that will follow.

On a more practical level, public officials find making choices to be difficult, but largely unavoidable, when it comes to resource allocations among existing constituents. Such choices regarding allocations between existing constituents and their unborn progeny are even more difficult, but much more easily avoidable. It is common to apply the label NIMBY (not in my back yard)

to constituents not sufficiently enlightened as to see the merits in siting land uses near their homes that are locally undesirable, but regionally necessary. It is less common, but just as accurate, to apply the label "NIMTOO" to officials who recognize the need for their constituents to swallow bitter medicine, but whose operative stance is "not in my term of office."

Jacobs's implicit contention that government is better at taking into account immense amounts of information, and devising from it dynamic and intricate economic and social plans that would best satisfy an amorphous conception of the "public interest," is not self-evidently correct. Some information consists of hard data, but much is impressionistic or consists of tacit knowledge, gained from experience, that is difficult to convey to others. Economies, societies, and biospheres are dynamic, and in a command and control system, even small errors multiply with every iteration.

This is why large, centralized planning bureaucracies, such as existed in the former Soviet Union and India, proved inadequate to their task. A much better solution, laid out in F. A. Hayek's *The Fatal Conceit* (1988), uses prices as a mechanism by which millions of individuals can send signals as to what kinds of goods and services they are willing to supply under various circumstances, and what kinds of goods and services they demand and how much they value them. Through willingness to buy and sell, every person contributes his or her insights to the store of public knowledge.

One tempting shortcut to making sense of a staggering array of inputs is to rely on the conclusions of experts. This was the hallmark of the Progressive Era, the formative years of zoning regulation. It is ironic that the

problems with which the present generation of planners must wrestle result largely from the decisions of a previous generation of experts, and that the early errors of overreaching, from which planners slowly have withdrawn, now come back in the form of municipal industrial policy and more aggressive local environmental controls.

PROGRESSIVISM

Leadership by disinterested experts, in lieu of decision making by political machines and ignorant voters, was the leitmotif of the Progressive Era. This was the period during the later part of the 19th century and early part of the 20th century that marked, among other things, the development and broad implementation of zoning. Progressives thought that zoning would constitute a proactive and prophylactic advance over traditional nuisance law. It would permit a community to regulate against the potentially harmful effects of incompatible land uses by separating them in advance, as opposed to litigating under nuisance law afterwards.

The notion of the Progressive Era that society could be reshaped if experts were in charge existed to an extent that most people now would find appalling. "Many of the most activist reformers of the Progressive Era were also staunch supporters of the eugenics movement and believed that compulsory sterilization of defectives was an essential part of comprehensive state planning," writes Herbert Hovenkamp.¹³ The echoes that follow society's allowing experts to determine population policy resound as well in Garrett Hardin's "The Tragedy of the Commons."¹⁴ While many scholars, such as Professor Jacobs, quote Hardin's essay approvingly, few note that the overproduction that Hardin found tragic was the overproduction of

13. Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305, 334-335 (1993).

14. 162 SCIENCE (NS), 1243 (1968).

The move to shorter time frames and greater flexibility makes planning more realistic and useful.

children, and that the purpose of his essay was to marshal support for mandatory birth control.

Hardin's "Tragedy of the Commons" also undermines the point for which Professor Jacobs enlisted its support. The area described by Hardin actually was not a "commons" as that term is properly understood, but rather an open access regime. A true commons, such as a home owners association swimming pool or clubhouse, is used in common only by its owners. As far as outsiders are concerned, it simply is the private property of others. In Hardin's essay, use of the pasture land was open to all, and consequently exploited by all to their mutual detriment. Buyers flock to residential subdivisions with home owners associations not because they are tragic, but rather because their amenities are monitored and regulated by a board of managers to ensure that the owners derive enjoyment from it. The real moral of Hardin's story is that it is insufficient private property rights that lead to a tragic waste of resources.

On the more general point of Progressive regulation of land use, Professor Dennis Coyle declared that "[t]he early enthusiasts for zoning . . . were fighting a holy war against the libertarian sins of nineteenth-century development Control over land use would be removed from the amoral hand of the market and entrusted to expert elites removed from politics and business. . . ."¹⁵

The reformers nevertheless had sympathetic allies among blue-chip merchants, realtors, and others threatened by the employment of recently arrived immigrants in downtown loft buildings, and by the increasing availability of the automobile to a broad spectrum of social classes. The story is well told in

Seymour I. Toll's *Zoned America* (1969). The rapid adoption of Euclidean zoning during the 1920s was the fruit of uneasiness with social change. The trial judge presciently declared in *Euclid*: "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."¹⁶

Over time, the notion that urban spatial planning would establish the final, or at least long-term, character of a polity yielded to recognition of the dynamism and spontaneous growth of communities and more closely resembled a Hayekian model than a static one.

By about 1980, virtually all planning professionals had come to recognize both the limits of rationality and the unpredictability of modern civilization. Planners thus have tended to become less ambitious in the dimensions of space and time. . . . Many planners also have come to believe that the planning period should not stretch beyond 25 years (at the very most) and that detailed planning should concentrate on the next 5 years or so. There also is agreement that plans have to be continually revised to take account of new information and events. In sum, flexible, middle-range planning has come to replace long-range, end-state planning.¹⁷

The move to shorter time frames and greater flexibility makes planning more realistic and useful. Correspondingly, however, it makes the expectations of landowners less settled, and the rights of landowners more susceptible to the discretion of officials.

TRUTHS ABOUT PROPERTY

Another speaker at the Bettman Symposium, University of Illinois law professor Eric Freyfogle, reiterated

some themes from his recent commentary in these pages. Freyfogle presented seven "partial truths," to the effect of diminishing the importance of individual property rights. He declared:

First . . . [o]ur right to property is in reality a demand to have control over the use of police, courts, and other public resources. Second, there is the coercive element of property, the fact that ownership by one person denies other people the chance to use the same resource. Individual liberty, of course, is another of our key rights, so we have strong individual rights on both sides of our conflict.¹⁸

It is true that the presence of rights in some people detract from what otherwise would be the privileges available to others. But one possesses rights only with respect to other people; that is the nature of rights. Also, property rights must be supported by the State, but that does not mean that the enforcement of private preferences makes them the preferences of the State. The fact that I might enlist the help of a police officer to eject a political candidate unwilling to leave my home does not mean that the State is complicit in my disagreement with that candidate's views. Sometimes claims to property rights do clash. But conflicting claims are the basis of common-law nuisance, which limits a landowner's reasonable enjoyment of property so as to ensure his or her neighbors' rights to enjoy their property.

Professor Freyfogle posits that, while there is a right to private property, it is derivative from the benefit that society receives from private ownership. When government decides that an intended land use would be harmful, he asks, why should it permit the

15. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION, 21 (State University of New York Press, 1993).

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

17. ROBERT C. ELLICKSON AND VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS, 52 (Aspen Law & Business, 3d ed., 2005).

18. Eric T. Freyfogle, *Private Property—Correcting the Half-Truths*, PLANNING & ENVIRONMENTAL LAW, 59:10 at 3, 8 (October 2007).

The fact that the *institution* of property is beneficial does not mean that every exercise of a property right that is not criminal or tortuous must affirmatively add to society's benefit.

owner to engage in behavior that is not socially beneficial? "If development in [a] floodplain is ecologically damaging, where is the social benefit in giving out property rights to engage in it?"¹⁹

Property rights indeed are intimately related to the well-being of society, but the fact that the *institution* of property is beneficial does not mean that every exercise of a property right that is not criminal or tortuous must affirmatively add to society's benefit. In 2001, the U.S. Supreme Court adjudicated a case where a state promulgated a regulation prohibiting a landowner from building on a wetland and argued that the prohibition alone would mean that a subsequent purchaser of the land could have no valid takings claim. Justice Anthony Kennedy, writing for the Court, declared:

The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

The State may not put so potent a Hobbesian stick into the Lockean bundle.²⁰

The somewhat obscure reference to Thomas Hobbes and John Locke encapsulates the Anglo-American view of the relationship between the individual and the State. In *The Leviathan* (1660), Hobbes declared that the life of man was "solitary, poor, nasty, brutish, and short," and that life under an absolute Sovereign, whose word was law, was far preferable to anarchy. Locke's

Two Treatises of Government (1690), on the other hand, argued that the State exists to preserve the natural rights of its citizens. These rights, including the right to property, were antecedent to the State which itself was derived from a compact established to protect citizens' rights.

According to historian Forest McDonald, the entitlement to property and liberty of which the Framers' generation was "so proud" was not really new but was part and parcel of the historic "rights of Englishmen."²¹ Jennifer Nedelsky, a University of Toronto scholar whose work focuses on feminist theory and American constitutional history and interpretation, added that "[t]he great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty."²²

Over time, our understanding of what uses of property do, or do not, unreasonably interfere with the rights of others necessarily varies with circumstances and technology. Common-law courts slowly adjusted to these circumstances, through the accretion of case precedent. Where the legislature wants to make quick changes, prohibiting uses of property that were not inconsistent with public health and safety under common law nuisance, it is free to arrogate those rights from the owner to the State. However, as the Fifth Amendment provides, the taking must be for a "public use," and the owner must be given "just compensation."²³ This constitutional right would lose its meaning if states and localities could avoid paying compensation through the simple expedient of redefining property rights. As the Supreme Court noted in a case involving the retroactive repudiation of state bond covenants, there is a heightened need

for judicial oversight when "the State's self-interest is at stake."²⁴

OVERREACHING BY LANDOWNERS BEGETS OVERREACHING BY REGULATORS

In an insightful essay, then-Yale law professor Carol Rose observed that the overreaching by private property owners that led to subsequent land use regulation has been replicated in the overreaching by the regulators themselves:

The key point is that regulatory regimes have an evolution, too. In many ways, the evolution of regulatory regimes replicates, at a meta-level, the evolution of private property regimes. Just as we used to say, "anything goes" about private land uses, and just as private landowners became accustomed to uncontrolled use of their land, we have also gone through a period when we said "anything goes" for the regulation of private land uses. During this time, land use regulators became accustomed to believing that they were entitled to regulate anything that they pleased under the auspices of Euclidean zoning. But with an increasing scarcity of land resources, we do not need just any regulatory regime; we need a good one. We need a regulatory regime that helps us to internalize externalities—a regulatory regime that induces us to think carefully about the way we use land, without distorting our decision-making process or diverting us from activities that are worthwhile and valuable.²⁵

The perils of such overreaction are easy to see. Classic Euclidean zoning, although prescribing rigid use, height, bulk, area, density, and other restrictions, permitted development by right if the criteria were met. Modern flexible land use ordinances allow creative mixtures of uses and other design ele-

19. *Id.* at 9.

20. *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-627 (2001).

21. FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION*, 13 (University Press of Kansas, 1986).

22. JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY*, 92 (The University of Chicago Press, 1990).

23. U.S. Constitution, Amendment V ("Nor shall private property be taken for public use without just compensation").

24. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977).

25. Carol M. Rose, *Property Rights, Regulatory Regimes, and the New Takings Jurisprudence—An Evolutionary Approach*, 57 *TENN. L. REV.* 577, 589 (1990).

All zoning is exclusionary zoning, in the sense that to zone “in” some uses is to zone “out” others.

ments, but permit nothing as of right. Landowners want to know what they can build and courts, unfairly, place upon planners the burden of dealing with that issue. A planner can say, based on his or her professional judgment, that a development application does, or does not, satisfy the established criteria. But it is impossible to reduce all applicable criteria to one metric, which would be required for a planner to conclude how much development an applicant was entitled to.

This situation lends itself to overreaching. On one hand, developers may bluster about litigation due to lack of objective criteria. On the other, localities may deny applications based on the vague personal whims of officials. A classic example is *Anderson v. City of Issaquah*.²⁶ They may deny application after application, even though the applicant has complied with every modification that the locality requested in the previous round. This refusal to take “yes” for an answer was central in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,²⁷ where the U.S. Supreme Court upheld a large monetary award for a regulatory taking. The proposed project initially was presented at considerably lower density than zoning restrictions would allow, and had gone through five years of administrative review, with no fewer than 19 different site plans submitted and five formal administrative decisions made. Perhaps not coincidentally, the city had tried to purchase the land earlier and actually did buy it during the pendency of the litigation.

In the more common case, however, the locality’s right of approval of development projects, coupled with generalized approval criteria, results in a bargaining process. As Jerold Kayden

concluded in his classic article, “Zoning for Dollars”:

Under utilitarian calculations, the private developer seeks to maximize the amount of development on a fixed quantity of land and enters an incentive zoning deal if the value of additional building rights exceeds the amenity’s cost. Confronting decreased federal support and louder cries for social services, local governments view incentive zoning as an off-budget mechanism to meet public needs.²⁸

At worst, this mechanism is one of outright extortion. At best, it violates the principles of transparency, generality, and clear rules announced in advance that are important indicia of the rule of law.

THE PERILS OF FINE-TUNING LAND USE

As noted earlier, planners recognize that short- and medium-term planning is more realistic than long-range planning. It is difficult to project over long periods what would be a good land use for a geographic area, given changes in society and technology and unanticipated events. Despite this salutary development, many localities are adopting development requirements that call for even more omniscience. Rather than focusing on allowing good uses of land, they are moving to requiring what they regard as the best use of land.

Public Choice Theory

Some writers, falling into the Nirvana fallacy, adopt a far less critical stance toward the motives and capabilities of public officials than they do toward developers and other market actors. The underlying notion is that people serving as public officials or public employees

have more altruistic motives than people employed in other capacities.

Public choice theory, on the other hand, applies economic principles to the study of legislation and public administration. Its principal insight is that elected officials and agency administrators are motivated by the same types of incentives that motivate their counterparts in the private sector. Elected officials are in a position to supply, or revoke, statutes and ordinances. Regulators have the ability to produce rules and interpretations. Various interest groups, and powerful individuals, form alliances and coalitions in order to trade resources, including power, influence, and money.²⁹

The idea that public officials and administrators might act with their own interest in mind is not new. Nor is the idea that others would work with them for mutual benefit. Harold L. Lasswell, an eminent political scientist, summed the matter up in the title of his important book, *Politics: Who Gets What, When, How* (1936).

Fiscal Zoning

One increasing manifestation of the desire of public officials to fine-tune land use is the increasingly aggressive employment of regulation for fiscal purposes. All zoning is exclusionary zoning, in the sense that to zone “in” some uses is to zone “out” others. Municipalities long have used their zoning powers to encourage attractive uses that bring extensive tax revenues and require few government services. Manicured office parks for corporate headquarters buildings are a prime example. On the other extreme, inexpensive, multibedroom garden apartments generate little revenue and create heavy demands for government educational and social services. Often

26. 851 P.2d 744 (Wash. Ct. App. 1993), 726 U.S. 687 (1999).

27. 526 U.S. 687 (1999).

28. Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game?* 39 WASH. U. J. URB. & CONTEMP. L. 3, 51 (1991).

29. See generally, ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (Harper, 1957); JAMES BUCHANAN AND GORDON TULLOCK, *THE CALCULUS OF*

CONSENT (University of Michigan Press, 1962).

Modern fiscal zoning is a part of fine-tuning the locality's tax base.

these fiscal considerations have gone hand in hand with more invidious motives.

In practice, the term "exclusionary zoning" has been limited to zoning that attempts to engender racial or fairly explicit class separation. The epitome of judicial attempts to combat such practices is the elaborate *Mount Laurel II* opinion by the New Jersey Supreme Court, which fills 165 pages of the *Atlantic Reporter* with detailed prescriptions and requirements.³⁰

Efforts to eliminate exclusionary zoning have been largely unsuccessful, so that in recent years efforts have swung toward "inclusionary zoning," which typically involves government subsidies to entice developers to mix below-market-rate housing with their standard products. The principal enticement has been the provision of "density bonuses," so that developers otherwise permitted to build four residential units per acre might be allowed eight, so long as two were priced below market. Such entitlements are examples of regulatory property—which is to say that the right to build eight units, on a parcel where such density evidently is practical, is of value to developers only because government artificially limits the existing owner to four units. Inclusionary zoning may not be a very effective or fair way of helping those with moderate incomes.³¹

Modern fiscal zoning is a part of fine-tuning the locality's tax base. In a classic case, *Cottonwood Christian Center v. Cypress Redevelopment Center*,³² a church wanted to use its parcel, on a major thoroughfare, for a new school and church offices. Its development application was denied because the city preferred a big box retailer for the site, which would generate substantial sales

tax revenues. The church won, but only because the court substituted the heightened scrutiny mandated by the federal Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1, et seq., for the extremely deferential review normally accorded land use regulation.

The fiscal zoning in *Cottonwood Christian Center* bears a basic similarity to that in *Kelo v. City of New London*.³³ Here, an owner was forbidden a perfectly lawful and legitimate use of its property, and the city would permit only the use that it preferred. In *Kelo*, owners were deprived of their long-term residences, for transfer to private developers, who would use the land for purposes that local officials preferred.

Kelo and Municipal Industrial Policy

Shortly after the U.S. Supreme Court handed down its 5–4 decision in *Kelo v. City of New London*, I discussed the decision at the Cato Institute, a libertarian think tank, and at the American Constitution Society (ACS), the progressive organization of lawyers and students modeled after the conservative Federalist Society. While the audience at Cato was outraged at what it viewed as the Court's affront to individual rights, the judges and lawyers at ACS simply were puzzled. Why, they asked, were the media and the public making such a fuss about an extension of Supreme Court doctrine that was both modest and entirely predictable?

Indeed, *Kelo* has engendered a tremendous wellspring of denunciation, ranging from libertarian and conservative groups to the National Association for the Advancement of Colored People, as well as among average citizens. *Kelo* has also resulted in legislation being introduced in al-

most every state. Effective legislation has tended to be enacted in states with strong pro-property rights cultures, and, at most, palliative legislation has been enacted in states where condemnation for retransfer for private revitalization is a more realistic possibility.³⁴

Justice John Paul Stevens justified the Court's decision that the condemnation of nonblighted houses for retransfer for private economic revitalization was a "public use," largely on the grounds that the Court's precedents in cases involving condemnation of parcels or rights needed by locally predominant industries consistently had equated "public welfare" with the constitutionally mandated language of "public use."

Kelo had such extensive impact for several reasons. The Court's modern public use cases were in the context of elimination of urban blight³⁵ and the elimination of quasi-feudalism.³⁶ Also, the publicity attendant upon *Kelo* made citizens aware that, without much publicity or public knowledge, condemnation for retransfer to private entities had become a substantial part of state and local industrial development efforts. Unlike the earlier location-specific or industry-specific instances of condemnation for retransfer that the Court had approved, *Kelo* stood for the proposition that well-connected developers and financiers were appointed private revitalizers general, in effect, with roving commissions to ferret out instances where they, and at least ostensibly the community, could benefit by condemning private land and by splitting the assembly profits that would inure from converting many smaller parcels into one much more valuable superparcel.

30. *S. Burlington County NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (Mount Laurel II).

31. See generally, Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981).

32. *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

33. 545 U.S. 469 (2005).

34. See, e.g., Steven J. Eagle and Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 43 REAL PROP., PROB. & TR. J. 799 (2008).

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

36. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

Another reason for wariness of *Kelo*-type condemnations is that nonpecuniary aspects of the transfer are apt to harm affected landowners and their tenants.

Both Justice Stevens's majority opinion and Justice Kennedy's concurrence stressed that courts would be vigilant to ensure that eminent domain and retransfer for private economic development would serve predominantly public purposes, and not be employed pretextually for retransfers primarily for private benefit. However, early cases indicate the great difficulty implicit in reconciling assertive judicial inquiries with the deference to state and local legislative determinations that were *Kelo*'s hallmark.

In *Goldstein v. Pataki*,³⁷ property owners contested the condemnation of their property for the Atlantic Yards Arena and Redevelopment Project in Brooklyn, New York, which includes the construction of a sports arena and residential and commercial development. The property owners argued that the government's justification for the condemnation, which included blight, the creation of affordable housing and open space, and mass transit improvements, was merely a pretext to benefit the well-connected developer of the project, who had long planned to redevelop the area and was the only developer seriously considered by the government.

The court determined that, because the condemnation was based on "well-established" public uses, it constituted a valid use of eminent domain. It held that the property owners had not produced evidence that the redevelopment project's purpose was to confer a private benefit on the developer, and refused to read *Kelo* as requiring an inquiry into the subjective motivation of public officials who approved the project. Without objectors being given the opportunity to engage in extensive discovery, it is unlikely that such evidence ever could be obtained.

In any event, it is hard to see why the "primary benefit" test in *Kelo*-type condemnations should be probative. If city officials act for personal gain, they, and the redevelopers providing that gain, likely would be guilty of bribery. If the city officials act in good faith, it is nonetheless obvious that both sides expect mutual benefit. As long as the city obtains what is plausibly a reasonable deal, the exact proportion of benefit it derives is as irrelevant as it is difficult to determine.

Showcase Projects

Another example of the Nirvana fallacy is the general acquiescence of commentators and land use experts to public officials' demands for so-called "showcase projects."³⁸ In both states and cities, officials use wasteful redistribution and showcase projects as ways of consolidating power.³⁹ A 2005 study published by the Brookings Institution indicates that American cities have doubled their investment in convention centers despite a sharp drop in attendance.⁴⁰ These cities may be bulking up their infrastructure "in a type of arms race" with competing cities. Similarly, cities offer business incentives solely to win them from neighboring cities. Or perhaps expansion decisions are "predicated on the assumption that 'if you build it, they will come.'" The public's concern that officials do something to improve the local economy is the driving force behind business development subsidies,⁴¹ even though tax incentives do not achieve their purpose.⁴²

The Problem of Nonpecuniary Harm

Another reason for wariness of *Kelo*-type condemnations is that nonpecuniary aspects of the transfer are apt to harm affected landowners and their

tenants. While the loss of assembly gains to owners and uncompensated costs of relocation are important issues, nonmonetary losses are troubling, as well.

In *Berman v. Parker*, for instance, a *Washington Post* account 50 years after the bulldozing of the "blighted" Southwest neighborhood in Washington, D.C., indicated that many residents suffered lasting regret about the action undertaken ostensibly for their benefit. Some felt that "[e]liminating poverty wasn't one of the goals, but getting it out of sight was." The author concluded that Southwest "had worked as a community because of the intricate layering of income levels that comes with a neighborhood that evolves over decades. Poor residents as well as new arrivals could see industrious people right next door who held regular jobs and others who had become business owners, doctors and lawyers."⁴³

In *Chinese Staff & Workers Association v. City of New York*,⁴⁴ the New York Court of Appeals held that the state's Environmental Quality Review Act required the evaluation of the socioeconomic impact of the residential displacement in Manhattan's Chinatown that would result from the construction of a private luxury condominium tower.

While there is substantial difficulty in evaluating such analyses, and substantial question as to whether it should take place at all when dealing with purely private development, the case is much stronger in the case of eminent domain, where enhancing the public interest is the *raison d'être* of the entire enterprise.

'Smart Growth'

Traditional Euclidean zoning stressed the separation of uses. Manufacturing

37. 516 F.3d 50 (2nd Cir. 2008), cert. denied, 128 S.Ct. 2964 (2008).

38. Much of this material is taken from Steven J. Eagle, *Kelo, Directed Growth, and Municipal Industrial Policy*, 17 SUP. CT. ECON. REV. (forthcoming 2009), available at http://ssrn.com/abstract_id=1118398.

39. See, e.g., Edward L. Glaeser and Andrei Shleifer, *The Curley Effect: The Economics of Shaping*

the Electorate, 21 J. L. & ECON. 1, 1-2 (2005).

40. HEYWOOD SANDERS, SPACE AVAILABLE: THE REALITIES OF CONVENTION CENTERS AS ECONOMIC DEVELOPMENT STRATEGY, 1 (Brookings Institution, 2005).

41. See Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 393 (1996).

42. *Id.* at 397.

43. See Linda Wheeler, *Broken Ground, Broken Hearts: In '50s, Many Lost SW Homes to Urban Renewal*, WASH. POST, June 21, 1999, A-1.

44. 502 N.E.2d 176 (N.Y. 1986).

Climate change is a global problem, with every nation and city externalizing the benefits of its reduction of greenhouse gasses, but internalizing the costs.

operations could be separated from residential areas under common law principles, just as uses such as tanneries and slaughterhouses long had been separated. The justification for the separation of residential and commercial areas was less clearly justified, but was consistent with the Progressive Era belief that lots of fresh air, sunshine, and open spaces made for better people.⁴⁵ The strong class basis of *Euclid* was exemplified by Justice Sutherland's gratuitous references to the need to separate "residential" areas from apartment houses, which were "parasites."

Euclidean separation has abated to some extent, in part because of the persuasive argument that cities thrive only where a richly woven fabric of diverse uses is permitted to develop spontaneously. This was the thesis of the immensely acclaimed book by Jane Jacobs, *The Death and Life of Great American Cities* (1961). In suburban areas, though, the separation of residential areas from shopping, or areas of public assembly, remains strong.

In recent years, much emphasis has been placed on the need for what one downtown city planner privately informed me was "densification," and which, for public consumption, he referred to only as "smart growth." Considerable attention has been given to the relatively small number of suburban empty nesters who return to the city, and suburbs remain much maligned by many opinion leaders. Nevertheless, suburban and exurban life retains great attractiveness for many. Contrary to popular belief, low-density living is a preferred value in Europe as well as in the United States.⁴⁶

Given the higher expense of maintaining infrastructure in less dense

residential areas, and the significant cost to society of increased greenhouse gas (GHG) emissions associated with suburban and exurban lifestyles, it certainly seems reasonable to move in the direction of terminating government requirements for separation of uses and for large-lot residential development.

As recently summed up in these pages, American states and localities not only are litigating the federal government's substantial failure to regulate GHG emissions, but also are promulgating statutes, ordinances, and policies to achieve that goal.⁴⁷ While it is important that the federal government meaningfully deal with climate change, regulations at the state or local level might not be desirable.

Climate change is a global problem, with every nation and city externalizing the benefits of its reduction of greenhouse gasses, but internaliz-

ing the costs. The most appropriate solution, therefore, would be the assignment of burdens to individual nations by international treaty. If that is not feasible, the United States might resolve to reduce its own GHG emissions, perhaps to set an example. Within the United States, the best approach might be the imposition of a tax on fuels and other GHG generators to offset their social harm. Such a Pigovian tax, as economists call it, also would discourage GHG-generating activities. If appropriate, the tax structure could be modified to protect lower-income individuals. The result would be that every person would bear his or her fair share of the burden of dealing with the GHG emission problem, but in the manner that the individual finds most palatable.

From the perspective of land use regulation, the likely result of local decisions to require higher density, or discourage driving, or mandate smaller homes, would be to impose the personal preferences of elected officials or interest group members on others, with a net loss of social welfare. Some industries would benefit greatly from such impositions, as would individuals whose taste for virtue is partly sated by the imposition of sumptuary laws on others.

So long as each person is taxed on GHG generation, conflict between those who covet exurban minimansions versus those who prefer urban condos and private jets for Caribbean holidays is as unnecessary as it is divisive.

American land use planning has complex and conflicting responsibilities now, with many groups gaming the system for their own ends. Partial responsibility for solving world climate imperatives might not be a feasible addition to the list.

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45. See generally, JACOB RISS, *HOW THE OTHER HALF LIVES* (Bedford Books of St. Martin's Press, 1996; originally published in 1890).

46. ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* (2005).

47. Lora A. Lucero, *Climate Change Litigation and Policy—A Rapidly Shifting Landscape*, *PLANNING & ENVIRONMENTAL LAW*, 60:8, 3 (August 2008).