

Planning an Affordable City

Roderick M. Hills, Jr.* & David Schleicher**

ABSTRACT: In many of the biggest and richest cities in America, there is a housing affordability crisis. Housing prices in these cities have appreciated well beyond the cost of construction and even faster than rising incomes. These price increases are a direct result of zoning rules that limit the ability of new supply to meet rising demand. The high cost of housing imposes a heavy burden on poorer and younger residents and, by forcing residents away from these human capital rich areas, has even reduced regional and national economic growth. While scholars have done a great deal to identify the problem, solutions are hard to come by, particularly given the strong influence of neighborhood “NIMBY” groups in the land-use process that resist any relaxation of zoning limits on housing supply.

In this Article, we argue that binding and comprehensive urban planning, one of the most criticized ideas in land-use law, could be part of an antidote for regulatory barriers strangling our housing supply. In the middle of the last century, several prominent scholars argued that courts should find zoning amendments that were contrary to city plans ultra vires. This idea was, however, largely rejected by courts and scholars alike, with leading academic figures arguing that parcel-specific zoning amendments, or “deals,” provide space for the give-and-take of democracy and lead to an efficient amount of development by encouraging negotiations between developers and residents regarding externalities from new building projects.

We argue, by contrast, that the dismissal of plans contributed to the excessive strictness of zoning in our richest and most productive cities and regions. In contrast with both planning’s critics and supporters, we argue that plans and comprehensive remappings are best understood as citywide deals that promote housing. Plans and remappings facilitate trades between city councilmembers who understand the need for new development but refuse to have their

* William T. Comfort, III, Professor of Law, New York University Law School.

** Associate Professor, Yale Law School.

Many thanks are due to Vicki Been, Annie Decker, Bob Ellickson, Chris Elmendorf, David Fontana, Heather Gerken, John Mangin, Carol Rose, Kenneth Stahl, John Witt, Thomas Witt, Katrina Wyman, and participants at workshops at Yale Law School and the Furman Center for Real Estate and Urban Policy for their comments. Also to Jeremy Greenberg, Daniel Rauch, and Bryn Williams for their terrific research assistance.

neighborhoods be dumping grounds for all new construction. Further, by setting forth what can be constructed as of right, plans reduce the information costs borne by purchasers of land and developers, broadening the market for new construction. We argue that land-use law should embrace binding plans that package together policies and sets of zoning changes in a number of neighborhoods simultaneously, making such packages difficult to unwind. The ironic result of such greater centralization of land-use procedure will be more liberal land-use law and lower housing prices.

I. INTRODUCTION.....	93
II. THE DEBATE OVER PLANS AS IMPERMANENT CONSTITUTIONS	96
A. CHARLES HAAR’S CASE FOR THE “IMPERMANENT CONSTITUTIONS” OF PLANNING.....	97
B. THE LAW’S EQUIVOCAL ADOPTION OF THE PLAN AS IMPERMANENT CONSTITUTION.....	100
C. THE CASE AGAINST PLANS AS “IMPERMANENT CONSTITUTIONS”	104
1. Carol Rose and the Case Against the Politics of Planning.....	104
2. Fischel, Nelson, and the Economic Case Against Planning.....	106
III. A REVISED CASE FOR PLANS: PLANS AS CITYWIDE BARGAINS TO INCREASE THE MARKETABILITY OF URBAN PROPERTY.....	108
A. PLANS AS A MECHANISM FOR ENFORCING CITYWIDE DEALS	111
1. Distributive Politics in Land Use.....	111
2. Plans as a Solution to the “Ironclad Rule of Aldermanic Privilege”	112
3. Why Sorting Doesn’t Solve the Problems of Excessive Land-Use Restriction.....	115
B. PLANS AS A MEANS TO INCREASE THE MARKET FOR PROPERTY: THE ROLE OF PLANS IN REDUCING INFORMATION COSTS FOR BUYERS.....	116
1. Property Law and Information Costs: From Bundles of Sticks to the Greatest Grid.....	117
2. The Case for Plans as a Method of Reducing Information Costs and Increasing the Marketability of Land	120

IV. MECHANISMS FOR CITYWIDE DEALS AND GREATER CERTAINTY IN LAND USE.....	123
A. THE PLAN AS A CITYWIDE DEAL: BUDGETING PRINCIPLES FOR PLANNERS.....	124
B. STANDARD “PRICE SHEET” FOR DENSITY INCREASES.....	129
V. CONCLUSION: WHAT HAPPENED TO REAL PROPERTY IN MODERN PROPERTY LAW THEORY?	134

“Plans are worthless, but planning is everything.”—Dwight D. Eisenhower

I. INTRODUCTION

America faces a housing affordability crisis in its most economically dynamic cities, including metropolises like New York City, San Francisco, Los Angeles, and Boston where prices are rising faster than construction costs.² Over the past three decades, the price of housing and office space in many of the biggest and richest cities in America has increased wildly, a result of both increasing demand and substantial zoning and other restrictions on new construction.³ Such cities increasingly look like collections of exclusive suburbs, with neighborhoods filled with homeowners stopping the construction of needed commercial and residential development.⁴ The result is that working- and middle-class citizens cannot afford to live where their labor would be most productive, instead settling for cities where housing is cheaper but human capital spillovers are lower and jobs are less plentiful and less remunerative.⁵ Moreover, accumulating evidence demonstrates that these

1. President Dwight Eisenhower, Speech to the National Defense Executive Reserve Conference in Washington, D.C. (Nov. 14, 1957), in NAT'L ARCHIVES & RECORDS SERV., PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER 818 (1957).

2. See EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER 184–93, 240–42 (2011); Edward L. Glaeser et al., *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331, 331–33 (2005); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1692–98 (2013).

3. See RYAN AVENT, THE GATED CITY loc. 860–81 (2011) (ebook); Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81, 85 (2011); Schleicher, *supra* note 2, at 1692–98.

4. This is stark contrast with the long-dominant belief that big cities are dominated by “growth machine” coalitions of developers and allies in labor and elsewhere, as famously argued by Harvey Molotch. See Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 309–10 (1976). Molotch’s view was pretty universally held until a few years ago. See Schleicher, *supra* note 2, at 1672–73. For empirical evidence that many big cities do not look like growth machines, see generally Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014).

5. See AVENT, *supra* note 3, at loc. 883–98; Schleicher, *supra* note 2, at 1692–98; Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* 1 (Harvard

zoning restrictions do not produce benefits that offset their burdens on prospective buyers and renters.⁶ Big-city land-use constraints have also had a serious negative effect on the efficiency of regional property markets and even on national economic growth.

The solution to this housing crisis is economically simple but politically difficult. As a matter of economic rationality, local governments should deregulate their housing markets to allow an increased housing supply to meet a rising demand for housing. As a political matter, however, incumbent residents who already own housing vociferously and effectively protest against the reduction of zoning restrictions.

How, then, to free up urban land markets from the stranglehold of zoning driven by NIMBY (not-in-my-back-yard)⁷ neighbors? We argue, paradoxically, that the solution to excessive zoning is centralized, comprehensive, and binding land-use planning.

Our position that binding, centralized plans can serve the goal of libertarian deregulation of land markets is, admittedly, counterintuitive. As we explain in Part II, although comprehensive planning was once defended by scholars like Charles Haar and Daniel Mandelker as the “constitution” that ought to undergird zoning, it is now scholarly conventional wisdom that comprehensive planning is based on an unwarranted hubris that bureaucrats can outperform markets. Economists like Bill Fischel and Robert Nelson have argued that parcel-by-parcel bargains between developers and neighbors over custom-tailored zoning rules lead to efficient regulation of externalities from new building projects.⁸ Legal scholars like Carol Rose argue that comprehensive plans’ prohibition on the ad hoc bargains of politicians and developers prevents the give-and-take of local democracy.⁹ On either theory, comprehensive planning is undemocratic and inefficient, at best superfluous and at worst pernicious.

Kennedy Sch., Working Paper No. RWP12-028, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2081216; Edward L. Glaeser, *Houston, New York Has a Problem*, CITYJ. (Summer 2008), http://www.city-journal.org/2008/18_3_houston.html.

6. See Matthew A. Turner et al., *Land Use Regulation and Welfare*, 82 *ECONOMETRICA* 1341, 1341–42 (2014). The literature on the welfare effects of zoning focuses on the difficult question of figuring out whether the reduction in supply of housing, which presumably reduces welfare, is offset by the increase in demand promoted by reductions of externalities allegedly caused by unregulated construction. Price increases could result from either effect in a jurisdiction with land having no adequate substitutes outside the jurisdiction.

7. See Schleicher, *supra* note 2, at 1672.

8. WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 75–101 (1985); ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION* 22–51 (1977).

9. See generally Carol M. Rose, *New Models for Local Land Use Decisions*, 79 *NW. U. L. REV.* 1155 (1985) [hereinafter Rose, *New Models*]; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 *CALIF. L. REV.* 837 (1983) [hereinafter Rose, *Planning and Dealing*].

When housing markets are thwarted by excessive local zoning, however, we argue that centralized planning can be the savior, not the scourge, of decentralized markets. As we explain below, apparently flexible and decentralized lot-by-lot bargaining gives NIMBY neighbors excessive power over nearby lots by raising the costs for prospective developers when determining the building rights that come with the purchase of a parcel of land. The result is that individual city council members and well connected insiders in the local land-use industry are empowered, but housing production suffers.

The argument proceeds in two parts. First, we argue in Part III.A that binding, comprehensive plans allow legislators to create “contracts” across electoral districts that are otherwise impossible when zoning proceeds through piecemeal lot-by-lot bargaining. In a legislature unstructured by partisan competition (the dominant partisan character of big cities’ councils), every member defers to every other legislator’s decision with respect to zoning decisions in each member’s own district.¹⁰ Even when voters and legislators all acknowledge the overall need for more housing, individual legislators oppose individual developments in their own districts for fear of getting more than their fair share of housing growth. Binding comprehensive plans—that is, plans and maps that cover the entire city and that are difficult to unwind with subsequent amendments—can offer a way out of this prisoner’s dilemma by allowing legislators to create “contracts” across electoral districts, aided by mayors, who, as a result of their citywide constituencies, are usually the most pro-development figures in local governments.¹¹

Second, we argue in Part III.B that parcel-by-parcel bargaining imposes high information costs on outside investors, thereby reducing the market for investment in new housing to a handful of local insiders with incentives to constrain supply. In the lot-by-lot bargaining system, outsiders must hire well connected zoning “fixers” who can grease the skids of the zoning approval process. These costs not only add to the price of new housing and lead to substantial delay in its construction but also deter outsiders from proposing new housing construction at all. Defining the rights to build *ex ante* in a comprehensive and binding plan that bars deals makes the land market more transparent, encouraging investment by a larger number of players by reducing information costs.

Binding comprehensive plans play the same role in the public law of zoning that the *numerus clausus* principle plays in the private doctrines limiting restraints on the alienability of land. As Thomas Merrill and Henry Smith have famously argued, because property rights are good against the

10. Schleicher, *supra* note 2, at 1677–78; see also Rob Gurwitt, *Are City Councils a Relic of the Past?*, GOVERNING (Apr. 2003), <http://www.governing.com/topics/politics/Are-City-Councils-Relic-Past.html>.

11. Of course, citywide property-holder cartels could form. But in big cities, it is just more likely that citywide solutions will allow for more development than neighborhood specific ones.

world, not just one party, their contractual customization creates costs for outsiders trying to determine their entitlements or duties with respect to property holders.¹² Property theorists have, however, overlooked the idea that the very same numerus clausus principle counsels against ad hoc lot-by-lot bargaining to define a parcel's zoning, and for precisely the same reason.

Our claims on behalf of planning have important implications both for policy and for property theory. We set forth some of these policy prescriptions below in Part IV, including the idea that mayors and city planning departments ought to regularly redraw the citywide zoning map to comprehend all pending development proposals, a process that would look something like an annual budgeting process. Other proposals include fixed prices, defined ex ante in the zoning ordinance, for additional building rights and prohibitions on any downzoning until citywide housing goals, defined with hard figures like vacancy rates or building permits issued, are met. We argue that the costs of such negotiating inflexibility will likely be outweighed by the advantages of pricing transparency in expanding the market for property.

Beyond these specific policy prescriptions, however, we invite a larger discussion in Part V of how the insights of private law translate to "public law" regulatory contexts like zoning. Property theory's focus on the information costs imposed by contractual customization of rights suggests that property theorists ought to focus on the process and institutions by which rights are defined as much or more than the substance of the rights themselves. This focus on process suggests that scholars should direct their attention away from the increasingly marginal role played by common law doctrines and instead make an "institutional turn" towards the predicted political behavior of legislatures, bureaucrats, and executive politicians.¹³ This Article is an effort in this institutional direction.

II. THE DEBATE OVER PLANS AS IMPERMANENT CONSTITUTIONS

Although, as Stewart Sterk has noted, "it has fallen from academic favor during the last quarter century," the idea that master plans should be the standard by which subsequent zoning decisions ought to be judged was once

12. See, e.g., Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. 577 (2011) [hereinafter Merrill & Smith, *More Coasean*]; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) [hereinafter Merrill & Smith, *Numerus Clausus*]; Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) [hereinafter Merrill & Smith, *What Happened*].

13. See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) ("The central question is not 'how, in principle, should a text be interpreted?' The question instead is 'how should certain institutions, with their distinctive abilities and limitations, interpret certain texts?').

at the cutting edge of land-use sophistication in America.¹⁴ We explain below the initial appeal and subsequent downfall of the planning ideal.

A. CHARLES HAAR'S CASE FOR THE "IMPERMANENT CONSTITUTIONS" OF PLANNING

The idea that zoning ought to be guided by planning was present at the dawn of zoning, when Herbert Hoover, then-Secretary of Commerce, promulgated the Standard State Zoning Enabling Act ("SZE") in 1926.¹⁵ Hoover, himself an engineer, had an engineer's enthusiasm for Frederick Winslow Taylor's idea that the efficiency of government and the market could both be vastly improved through the prescriptions of expert planners. Accordingly, the SZE not only called for cities to divide their territory into zones specifying the heights, bulk, densities, and uses of the buildings therein¹⁶ but also specified that the zoning ordinances should be drawn "in accordance with a comprehensive plan."¹⁷

States and cities eagerly embraced zoning, but they were less enthused about planning.¹⁸ Each city's leadership drew up zoning districts to accommodate whatever buildings actually existed in a particular neighborhood and entertained proposals from landowners to change this zoning status quo in the form of a "map amendment."¹⁹ Although a lay body of local volunteers called a "planning commission" would make an initial recommendation with respect to these map amendment proposals, the final decision rested with the local legislature (usually a city council), and state law generally did not require, nor did local law generally provide for, this discretion to be cabined by any written comprehensive plan separate from the zoning ordinance itself.²⁰

14. Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 B.U. L. REV. 227, 246 (2011).

15. For some discussions of the history and provisions of the SZE and its runaway success, see ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 75-76 (3d ed. 2005); SEYMOUR I. TOLL, *ZONED AMERICAN* 201-05 (1969); and Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637, 652-54 (2006). See also Herbert Hoover, *Foreword to A STANDARD STATE ZONING ENABLING ACT* (DEP'T OF COMMERCE 1926) ("The importance of this standard State zoning enabling act can not well be overemphasized.")

16. See A STANDARD STATE ZONING ENABLING ACT §§ 1-5 (DEP'T OF COMMERCE 1926).

17. *Id.* § 3.

18. Among our favorite accounts of the history of zoning are RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 3-18 (1966) (the classic work on the history of the politics of zoning); ERAN BEN-JOSEPH, *THE CODE OF THE CITY: STANDARDS AND THE HIDDEN LANGUAGE OF PLACE MAKING* 3-74 (2005) (laying out a history of city planning); and TOLL, *supra* note 15 (reviewing the early history of zoning).

19. A STANDARD STATE ZONING ENABLING ACT § 7 (DEP'T OF COMMERCE 1926).

20. A separate body, the board of adjustment, was to rule on applications for minor variances from zoning rules due to hardship and interpret the zoning ordinance's ambiguities on appeal from the building inspector's initial ruling. ELLICKSON & BEEN, *supra* note 15, at 285.

In an effort to boost the ideal of planning, Herbert Hoover promoted a second model statute, the Standard City Planning Enabling Act (“SCPEA”), which gave cities the power to develop a master plan, including a “zoning plan.”²¹ The SCPEA was, however, less widely adopted by state legislatures than the SZE, and many local governments continued to exercise zoning authority without promulgating any master plan separate from the zoning ordinance itself.²²

Until the 1950s, the relationship between planning and zoning was not particularly clear or important as a legal matter.²³ Most courts followed local governments’ lead in treating zoning maps themselves as comprehensive plans.²⁴ Following the pattern set by Secretary Hoover, however, the federal government continued to nag states and local governments to take planning more seriously. Starting in the 1940s, federal programs offered grants to subnational governments only on the condition that they adopt some sort of plan for spending it, and lawyers responded by reconsidering the relationship between planning and zoning.²⁵ The central figure in the academic revival of planning was Charles Haar, a Harvard Law School professor who argued that the “in accordance” language in the SZE meant that courts should review map amendments for failure to comply with a city’s comprehensive or master plan.²⁶ In his famous phrase, a master plan should be treated as an “impermanant constitution.”

What was so “constitutional” about plans? For Haar, plans supplied the long-term and expert thinking that ought to undergird zoning. They were the textual embodiment of “information, judgments, and objectives collected and formulated by experts to serve as both a guiding and predictive force” for the future development of a city.²⁷ Haar had a sunny optimism about the cognitive capacities of planners to set the course for every physical detail of a city. “The various land-uses and physical installations—the physical expression of the myriad of human activities in the city—are combined into a coordinated

21. A STANDARD STATE ZONING ENABLING ACT § 6 n.41 (DEP’T OF COMMERCE 1926).

22. Charles M. Haar, “*In Accordance with a Comprehensive Plan*,” 68 HARV. L. REV. 1154, 1155–56 (1955).

23. That zoning was a tool of planning was always part of the public justifications for zoning, but key figures like Edward Bassett, co-author of New York City 1913 zoning code and the probably the most important figure in pushing zoning across the country, acknowledged as early as the 1920s that zoning, in practice, had little to do with broad principles of planning. TOLL, *supra* note 15, at 189–95.

24. *See infra* Part II.B.

25. This classic article is Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25 (1967).

26. Haar, *supra* note 22, at 1157; Charles M. Haar, *The Master Plan: An Impermanant Constitution*, 20 L. & CONTEMP. PROBS. 353, 365–66 (1955).

27. Haar, *supra* note 22, at 1155.

system,” Harr declared. “In so far as possible, each piece of property is to be in the right location for its particular use.”²⁸

From a legal point of view, Haar was not merely elevating the role of the plan but transforming the purpose of zoning. Contrary to the U.S. Supreme Court’s idea in *Village of Euclid v. Ambler Realty Co.*²⁹ that zoning was merely a codification of common-law nuisance principles, Haar took properly planned zoning to be a communal effort to wrest control of a community’s development away from land-use markets—what he called “the evil of uncontrolled growth” and the “principle of profit maximization.”³⁰ It logically followed that the “in accordance” language in the SZEA, rightly construed, meant that courts should review zoning amendments, particularly small “spot zoning” amendments, and reject those that were not in accordance with the broader plan a city has set out for itself.³¹ This quality of trumping local zoning laws gave plans their “constitutional” status.

Underlying all of these specific reforms of planning was the idea that the public did not pay enough attention to zoning and particularly to zoning amendments. Local officials and lobbyists took advantage of this lack of attention, making zoning amendments sources of “discrimination, granting of special privileges, and the denial of equal protection of the laws.”³² The written comprehensive plan, drawn up by land-use experts, would curb developers and politicians from shaping zoning to their immediate desires.

28. Haar, *supra* note 26, at 360.

29. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Needless to say, the Court in *Euclid* did not limit zoning ordinances to resolving common-law nuisances, but rather says that the common law provides a “helpful aid of its analogies in the process of ascertaining the scope of, the power.” *Id.* at 387–88.

30. Charles M. Haar, *Reflections on Euclid: Social Contract and Private Purpose*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 333, 344–48, 351 (Charles M. Haar & Jerold S. Kayden eds., 1989) (“If the original and fragile coalition’s broadly shared assumptions about the certainty of progress and the perfect[i]bility of city life have fallen victim to a less sanguine reality, one binding element in the consensus still persists and could operate today to foster a new coalition: an agreement on the evil of uncontrolled growth The principle of profit maximization can, in the land development market more than in other markets, take on a distinctly ugly face”); see also DANIEL R. MANDELKER, *THE ZONING DILEMMA: A LEGAL STRATEGY FOR URBAN CHANGE* 54 (1971) (“It was here, especially, that we found a more positive role for the planning and zoning process than the mere regulation of externalities at the neighborhood level.”). For a contemporary argument that the interdependence of land uses requires extensive comprehensive planning, see generally LEWIS D. HOPKINS, *URBAN DEVELOPMENT: THE LOGIC OF MAKING PLANS* (2001). To see why this argument does not make much sense, see Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 *GEO. MASON L. REV.* 637, 652–62 (2012).

31. Haar, *supra* note 22, at 1155–73.

32. Haar, *supra* note 26, at 365–66.

Daniel Mandelker took up Haar's banner, becoming the leading legal academic advocate for city planning in the 1970s.³³ Mandelker argued that local governments undermined expert planning by creating "holding zones" that permitted development only after the city approved a developer's specific proposal for a map amendment custom tailored for the developer's specific development proposal.³⁴ To curb such ad hoc deal making, Mandelker called for courts to treat small-scale rezonings by city councils as administrative ("quasi-judicial") acts to be evaluated by their consistency with the local plan.³⁵

The central paradox in Haar's and Mandelker's ideas about plans is that the same flawed local legislature that made ad hoc determinations about map amendments would also be responsible for approving written comprehensive plans. How would the local legislature avoid the same parochial and short-term pressures that governed map amendments when they voted on the comprehensive plan? Later in life, Haar tried to solve the paradox by putting his faith in judicial oversight: the local legislature would make the first cut at planning, but the courts would step in as a "disinterested and objective referee" to correct the distortions created by local legislative incentives.³⁶ As we explain in the next section, this faith in courts turned out to be misplaced.

B. THE LAW'S EQUIVOCAL ADOPTION OF THE PLAN AS IMPERMANENT
CONSTITUTION

State lawmakers were not completely indifferent to Haar's and Mandelker's call for the elevation of planning. Numerous state statutes now require local governments to adopt a written plan distinct from their zoning

33. See Edward J. Sullivan, *The Rise of Reason in Planning Law: Daniel R. Mandelker and the Relationship of the Comprehensive Plan in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 323, 336-38 (2000) (noting influence of Mandelker in land-use law).

34. Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 972 (1976) [hereinafter Mandelker, *Local Comprehensive Plan*]. Mandelker and Haar differed sharply on how to deal with the problem of exclusionary zoning. Mandelker thought cities should be required to consider the need for housing for all income groups, but opposed any effort to require towns to provide a "fair share" of a region's need for affordable housing. As a result, Mandelker attacked the New Jersey's Supreme Court's decision in the *Mount Laurel* case for judicial "disrupt[ion of] the planning policies of local governments." Daniel R. Mandelker, *The Affordable Housing Element in Comprehensive Plans*, 30 B.C. L. REV. 555, 564 (2003). Haar disagreed, supporting the *Mount Laurel* decisions "as among the most significant judicial opinions of our time . . . on a par with *Brown v. Board of Education*." CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 10 (1996).

35. Mandelker, *Local Comprehensive Plan*, *supra* note 34, at 972.

36. HAAR, *supra* note 34, at 176; Haar, *supra* note 30, at 347. Haar's belief in the unimpeachable quality of court decision making is somewhat astounding. In 1996, he wrote: "[T]he court by its nature is a disinterested and objective referee in cases of major institutional breakdown, answerable to no special interests or narrow loyalties and subservient only to the fair and equitable application of the law as formulated by the framers of the constitution and legislators and as construed by judges." HAAR, *supra* note 34, at 176.

ordinances.³⁷ These planning mandates come in a bewildering variety, but they can be usefully categorized along three parameters—in their scope (the number and detail of topics the final plan must contain), force (the degree to which the plan binds the local government’s decisions), and beneficiaries (whether the plan’s benefits accrue to current residents or other groups, such as future homebuyers or neighboring communities). When one considers planning mandates’ scope, force, and beneficiaries together, the overall impression is that planning’s effect on zoning is marginal—a mandate of weak force, limited scope, and a generally narrow category of beneficiaries.

Consider first, scope. Most state courts do not require that the comprehensive plan be codified in a separate written document distinct from the zoning ordinance. Instead, if a zoning map designates a neighborhood as a residential zone, then this classification is said to contain an “immanent” plan that the neighborhood be residential. This generalization is incomplete, however, because some state legislatures have required local governments to adopt elaborately specified written plans containing detailed “elements” governing topics like capital expenditures, affordable housing, open space, and environmental quality.³⁸ These mandated planning requirements can occupy dozens of pages of the state code,³⁹ and courts do occasionally enforce such requirements.⁴⁰ In terms of their scope, therefore, such planning mandates can be broad and detailed.

37. Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 120 (2002). For three examples, see CAL. GOV’T CODE § 65300 (Deering 2011) (“[T]he legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical development of the county or city”); FLA. STAT. ANN. § 163.3167(2) (LexisNexis 2014) (“Each local government shall maintain a comprehensive plan”); and ME. REV. STAT. ANN. tit. 30-A, § 4312(2)(A) (2012) (“The Legislature declares that it is the purpose of this Act to . . . [e]stablish, in each municipality of the State, local comprehensive planning and land use management . . .”).

38. See, e.g., FLA. STAT. ANN. § 163.3177; MINN. STAT. ANN. § 473.859(1) (2014); MISS. CODE ANN. § 17-1-1(c) (West 2014); R.I. GEN. LAWS §§ 42-11-10, 45-22.2-5 (2014).

39. Florida’s enumeration of elements is especially detailed, mandating, for instance, that the future land-use plan element meet eight criteria ranging from “[e]ncourag[ing] the location of schools proximate to urban residential areas to the extent possible” to “[e]nsur[ing] the protection of natural and historic resources.” FLA. STAT. ANN. § 163.3177(6)(a)(3)(a)–(h). On top of these criteria, the statute also mandates that the land-use element discourages “the proliferation of urban sprawl,” helpfully defining such discouragement with 13 “primary indicators” of not discouraging sprawl such as “[p]romot[ing], allow[ing], or designat[ing] for development substantial areas of the jurisdiction to develop as low-intensity, low-density, or single-use development or uses.” *Id.* § 163.3177(6)(a)(9)(I)–(XIII).

40. See, e.g., *Miami Sierra Club v. State Admin. Comm’n*, 721 So. 2d 829 (Fla. Dist. Ct. App. 1998) (holding invalid state commission’s approval of county plan for reuse of former Homestead military base for lacking plans for stormwater, wildlife and its habitats, and noise). For a review of scholarship on the effectiveness of actual comprehensive plans, see generally Emily Talen, *Do Plans Get Implemented?: A Review of Evaluation in Planning*, 10 J. PLAN. LITERATURE 248 (1996).

Even when the scope of state planning mandates is more detailed, however, the legal force of the plans is, outside of a handful of states, weak. A parcel's zoning is said to be "in accordance with a comprehensive zoning plan" so long as its treatment serves the "general welfare" and is not dramatically different from nearby sites.⁴¹ Again, there are exceptions to this rule. The Oregon Supreme Court provided a pioneering decision in *Baker v. City of Milwaukie*, concluding that the city's plan was a "constitution for all future development within the city," citing the work of Charles Haar, and held that the plan "must be given preference over conflicting prior zoning ordinances" because "[z]oning . . . is the means by which the comprehensive plan is effectuated."⁴² In so holding, *Baker* reinforced the Oregon Court's earlier decision in *Fasano v. Board of County Commissioner of Washington County*, which held that a parcel-specific map amendment's consistency with the local plan must be evaluated as an administrative or "quasi-judicial" matter.⁴³ Under the *Fasano* standard, a local legislative body's rezoning decisions must be supported by some specific evidence in the record.⁴⁴ In principle, therefore, mandates for local plans with specific "elements" open the door for more vigorous court involvement.

Yet even in states where the planning mandate has detailed scope and significant legal force, the power of the plan to trump zoning is substantially limited by the identity of the plan's beneficiaries. In particular, court intervention will vary significantly based on unwritten assumptions about who the plan is supposed to protect from whom. Lenin's question of "who, whom" (who benefits at the expense of whom)⁴⁵ is critical for understanding when and why courts take planning seriously. For example, in the 1970s, when Oregon was first developing the notion of a plan as a "constitution" controlling zoning, the plan was intended largely as a tool with which environmentalists could fight proposed developments.⁴⁶ In light of this, Oregon courts in this period placed special emphasis on enforcing the plan when doing so led to greater restrictions on development than ordinary zoning would have imposed. When plans provided landowners with more building rights than the zoning ordinance, courts found that they did not trump the zoning on the ground that the legislature needed discretion to

41. See *Rodgers v. Vill. of Tarrytown*, 96 N.E.2d 731, 735 (1951); *id.* at 734 (describing zoning that is not in accordance with comprehensive plan as the "singling out a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners").

42. *Baker v. City of Milwaukie*, 533 P.2d 772, 775-76 (Or. 1975).

43. *Fasano v. Bd. of Cty. Comm'r*, 507 P.2d 23, 26-27 (Or. 1973).

44. *Id.* at 28.

45. CHRISTOPHER READ, *LENIN: A REVOLUTIONARY LIFE* 248 (2005).

46. Governor Tom McCall called for statewide land-use planning in a 1973 speech to the legislature castigating "sagebrush subdivisions, coastal condominiums, and the ravenous rampages of suburbia." Audio file: Tom McCall Makes Famous Speech to the Legislature (1973), <http://www.oregon.gov/lcd/pages/history.aspx>.

decide whether the time was ripe to implement the plan's prescription for more development.⁴⁷

Planning, therefore, generally provided just another mechanism for neighbors to prevent local legislatures from weakening restrictions on development. Such a device did nothing to limit the power of neighbors themselves. When either state legislatures or courts attempted to elevate planning above the zoning wishes of the neighbors, the effort inspired an immediate and intense backlash that defeated the planning mandate. The most spectacular battles over land-use planning were fought over the question of whether plans' requirements for affordable housing trumped local zoning that excluded low-cost higher-density housing such as apartments or attached townhouses. In Oregon, for instance, developers and environmentalists entered into an uneasy alliance in the 1980s under which the latter would support greater residential densities in urban areas in return for protection of areas outside the urban growth boundary from development.⁴⁸ The result of this alliance was the Metro Housing Rule⁴⁹ requiring local plans to accommodate minimum residential densities ranging from six to ten units per acre depending on the size of the city. In New Jersey, the New Jersey Supreme Court and, later, the Council on Affordable Housing, mandated that local plans accommodate specific percentages of a state-defined regional need for low- and moderate-income housing. Both measures proved politically controversial, as they pitted neighbors' desire to preserve the zoning status quo against prospective renters and homeowners seeking new construction of cheaper units.⁵⁰ In Florida, a lower court self-consciously enlisted planning requirements as a tool to limit what it took to be the overweening power of neighbors in zoning fights but was reversed on appeal—and, on this point, was promptly overruled.⁵¹ The California courts have occasionally used state planning mandates to strike down egregiously populist measures that radically

47. *Marracci v. City of Scappoose*, 552 P.2d 552, 553 (Or. Ct. App. 1976) (“The . . . plan contains no timetable or other guidance on the question of when more restrictive zoning ordinances will evolve toward conformity with more permissive provisions of the plan.”).

48. PETER A. WALKER & PATRICK T. HURLEY, *PLANNING PARADISE: POLITICS AND VISIONING OF LAND USE IN OREGON* 42–75, 114–18 (2011).

49. OR. ADMIN. R. 660-007-0035 (2015). For an overview of Oregon's system of urban growth boundaries and mandated densities, see generally Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 J. MARSHALL L. REV. 357 (2012).

50. For an account of the political controversy, see generally Roderick M. Hills, Jr., *Saving Mount Laurel?*, 40 *FORDHAM URB. L.J.* 1611 (2013).

51. *Snyder v. Bd. of City Comm'rs*, 595 So. 2d 65, 80 (Fla. Dist. Ct. App. 1991) (finding denial of right to build when master plan would have permitted such building to be an arbitrary quasi-judicial decision), *overruled by* *Bd. of City Comm'rs v. Snyder*, 627 So. 2d 469, 474–75 (Fla. 1993) (overruling finding that zoning decisions are quasi-judicial but rejecting a rule that a zoning determination that limited growth but was inconsistent with the master plan should be overruled).

limited growth,⁵² but state planning mandates requiring affordable housing seem to have trivial effects on California's housing supply.⁵³

That judicial attitudes towards plans as "constitutions" can vary based on beneficiary is hardly surprising: it is common knowledge that constitutions are intended to protect persons who are otherwise vulnerable to underrepresentation in the ordinary political process. Courts that view local politics as dominated by deal-making developers cast a cold eye on zoning that exceeded the plan's limits but shrugged nonchalantly over zoning that was more restrictive than the plan. As courts' misgivings about the power and incentives of neighbors to exclude affordable housing grew, their willingness to enforce plans as ceilings on zoning restrictiveness grew as well. But only in a handful of states—notably Oregon and New Jersey—have courts been willing to enforce planning mandates against neighbors' desires to exclude affordable housing, and, even in these states, the judicial effort, resented by homeowners and assailed by their elected representatives, has had a tenuous existence.⁵⁴

C. THE CASE AGAINST PLANS AS "IMPERMANENT CONSTITUTIONS"

While the judicial acceptance of Haar's argument for treating plans as impermanent constitutions was limited, it retained a central place in the scholarly literature until roughly the 1980s. It then faced two major challenges: Carol Rose's savage takedown of its understanding of local politics and Robert Nelson's and Bill Fischel's argument that piecemeal, unplanned zoning change led to an efficient market in land-use rights as long as governments could "sell" the right to develop through conditional approvals. These arguments eviscerated the case for treating plans as impermanent constitutions.

1. Carol Rose and the Case Against the Politics of Planning

In two classic articles, Carol Rose attacked the case for treating plans as impermanent constitutions.⁵⁵ At the heart of Rose's case against the planning advocates was the internal inconsistency buried in the idea that comprehensive plans approved by local legislatures would somehow improve local legislatures' decision-making. Planning advocates offered no evidence that legislatures performed better when drawing plans than they did when considering parcel-specific map amendments. Rose, as well as other critics like

52. See, e.g., *Leshar Commc'ns, Inc. v. City of Walnut Creek*, 802 P.2d 317 (Cal. 1990).

53. See generally Jessie Agatstein, *The Suburbs' Fair Share: How California's Housing Element Law (and Facebook) Can Set a Housing Production Floor*, REAL EST. L.J. (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2592020 (acknowledging that California's planning process has had little effect on housing supply but remaining optimistic about its future).

54. Hills, *supra* note 50, at 1614–18.

55. See generally Rose, *New Models*, *supra* note 9; Rose, *Planning and Dealing*, *supra* note 9; Sterk, *supra* note 14, at 246 (crediting Rose's work with the turn away from plan jurisprudence).

Dan Tarlock, argued that the opposite was more likely.⁵⁶ When making plans in advance of any real dispute or proposal, local governments would be forced to speculate about what market participants or citizens will want in the future. As a result, “local governments have a good reason for keeping their land use plans rather fuzzy: they may not want a fixed plan because they cannot realistically see very far into the future. Neither can anyone else.”⁵⁷ Fuzzy plans, however, did not provide much of a standard against which to review subsequent decisions. Rose noted that city planners had long-ago abandoned the idea of a city plan as the blueprint for an ideal “end-state,” precisely because of the cognitive and political limits of local government.⁵⁸

According to Rose, “plan jurisprudence” failed to grasp the true basis of local governments’ legitimacy—not planners’ expertise but rather legislators’ close ties to local opinion.⁵⁹ Local tastes are likely to be idiosyncratic: two projects that look similar to an outsider expert in terms of their effects on a community may seem very different to the local insider. In order to express idiosyncratic taste preferences, local governments needed to make individualized determinations about proposed building projects rather than ex ante neutral determinations. Power over land use could not be removed from politics and handed to impartial planners, because land-use decisions are inherently political: they involve conflicts between different types of property rights claims and different values.

Instead of thinking about zoning in terms borrowed from administrative or constitutional law, Rose argued that it was better to think about local legislatures as mediators of disputes between incumbent homeowners and developers. But why trust local legislatures to mediate disputes fairly, and what role should courts take in policing such parcel-specific mediations? Following Albert Hirschman,⁶⁰ Rose suggests that local governments provide citizens with representation both through voice in decision-making, as representatives are close to voters, and exit, because people can choose to leave, putting pressure on local governments to be fair.⁶¹ These pressures “legitimize” local decision-making in ways that are different from the justifications we give for the decisions of the national government. Thus, in land-use cases, courts should examine whether the local government worked according to its own terms—i.e., whether relevant interests were involved in the process and

56. See generally Rose, *New Models*, *supra* note 9; Rose, *Planning and Dealing*, *supra* note 9; A. Dan Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69 (1975).

57. Rose, *New Models*, *supra* note 9, at 1163.

58. Rose, *Planning and Dealing*, *supra* note 9, at 876–78.

59. *Id.* at 867–70, 908–11; cf. Tarlock, *supra* note 56, at 86. (“Many of the conflicts that the plan seeks to resolve or minimize are disputes over fundamental values.”).

60. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

61. Rose, *Planning and Dealing*, *supra* note 9, at 889–910.

whether the government explained its decisions in terms that the public could grasp. Courts should also ask whether the land-use process was sufficiently predictable such that individuals could decide to move to a town (or not move there) without having their investment unfairly expropriated due to regulatory surprise. If piecemeal changes met these fairly minimal tests for interest-group representation and minimal publicity, then they should be treated as legitimate “mediations,” such that “their ‘dealing’ aspects are not an undesirable aberration but natural parts of the dispute resolution.”⁶²

Rose’s challenge, in sum, attacked every aspect of Haar’s claim. Planning did not provide an expertly drawn end-state against which to judge politics but rather was an ongoing act of politics. Local politics was not the enemy of good land-use decision-making but rather was its essence. Deal making should not be shunned, but praised for serving as a form of mediation between interests. The question for courts, in short, was not whether an amendment today violated some fixed-end plan from yesterday, but rather whether an amendment was reached through a predictable and open process today.

2. Fischel, Nelson, and the Economic Case Against Planning

Around the time that Rose was preparing her assault on planning, another attack emanated from the law and economics of zoning. In the 1960s and 1970s, law and economics scholars like Bernard Siegan and Robert Ellickson criticized zoning for reducing the supply of housing, distorting development patterns, and failing to outperform nuisance law and contractual covenants in reducing inefficient external costs.⁶³ These economic attacks on zoning, however, did not rest on any theory that planning was responsible for the maladies of zoning. The problems with zoning resulted instead from the inflexibility of zoning categories and the incentives of incumbents to discourage the construction of competing land uses.

In the late 1970s, two economists, Robert Nelson and Bill Fischel, simultaneously developed an argument in favor of zoning that rested squarely on a rejection of comprehensive plans. At the heart of this argument was the Coasean insight⁶⁴ that zoning could be broadly efficient so long as local governments could “sell” the right to develop.⁶⁵

62. *Id.* at 891.

63. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 682 (1973); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977) [hereinafter Ellickson, *Suburban Growth Controls*]; Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 91–129 (1970). See generally BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* (1972).

64. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). The reliance on Coase is implicit in Nelson, but explicit in Fischel. FISCHEL, *supra* note 8, at 100 (“[B]y looking at zoning as a collectively held entitlement, one can examine it in terms of the framework of the Coase theorem.”).

65. See FISCHEL, *supra* note 8, at 75–101. See generally NELSON, *supra* note 8.

Giving neighbors a “collective property right” through the zoning rules would reduce the transaction costs of bargaining between developers and neighbors harmed by the new development. Ad hoc zoning invited developers to propose new projects to the local government along with side payments to compensate for spillover burdens on neighbors. Developers would reveal the preferences of potential purchasers of proposed structures in their bid for development rights.

This method of revealing preferences through parcel-specific bids requires the rejection of comprehensive citywide plans that restrict ad hoc deals. The local legislature must enjoy the power to amend the zoning map parcel by parcel to accommodate the individual proposals of developers.⁶⁶ Nelson argued, in particular, that such limits on a community’s individualized responses to developers’ parcel-specific proposals rendered zoning an inflexible straitjacket indifferent to the joint preferences of potential residents and incumbent neighbors.⁶⁷

Fischel developed powerful responses to the criticism that unplanned development was dominated by a pro-development coalition that ignored the median voters’ interests and regional interests. Harvey Molotch had pressed the former claim, arguing that local governments do not represent the median voter but instead a coalition of real estate brokers, developers, unions, and lenders, a “growth machine” that approves more new development than the median voter desires.⁶⁸ Fischel responded, however, that officials in local governments with smaller and more homogenous populations are highly responsive to the economic interests of what he called “homevoters”—owners of owner-occupied housing—because zoning changes pose an uninsurable risk to the value of those homevoters’ most valuable asset, motivating them to monitor their representatives’ approvals of new developments.⁶⁹ (It turns out

66. It also imagines that there are no legal impediments to “selling” permission to build. The Takings Clause, state law limits on developer impact fees, and direct limits on using cash as part of zoning negotiations all limit the ability of cities to sell zoning rights as imagined by Fischel and Nelson. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2603 (2013) (holding that requirements of cash payments for development approval are subject to review under the Takings Clause); *Mun. Arts Soc’y v. City of New York City*, 522 N.Y.S.2d 800, 804 (N.Y. Sup. Ct. 1987) (“Zoning benefits are not cash items.”); Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, in *EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA* 60, 61–77 (Robert H. Freilich & David W. Bushek eds., 1995). These limits force localities to make less efficient deals, substituting in-kind benefits for cash or simply denying projects that would be mutually beneficial if the developer also handed over some cash.

67. NELSON, *supra* note 8, at 84–87.

68. JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 230–32 (1987).

69. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 3–8 (2001).

that Fischel's rebuttal of Molotch is applicable even in big cities, for reasons we will discuss below.)⁷⁰

Fischel also argued that, following the work of Charles Tiebout, competition between local governments alleviates inter-local externalities.⁷¹ If one town does not want to have a factory or apartment complex, some other town might.⁷² Thus, like Rose, the Fischel–Nelson “collective property right” theory of zoning relies on inter-local competition and the threat of exit to rectify the failings of zoning.

The Tieboutian and Coasean moves made by Fischel and Nelson have been widely incorporated and expanded in the legal literature on zoning, particularly in the work of Vicki Been, Lee Anne Fennell, David Dana, and Christopher Serkin.⁷³ The result was the demolition of plan jurisprudence. There remain occasional attacks on ad hoc deal-making on the ground that it leads to favoritism for insiders and violates the rule of law.⁷⁴ Such objections, however, are rooted in the existence of agency costs that make local politicians faithless agents of their constituents—a problem that comprehensive planning does not purport to cure. Comprehensive plans remain—both in courts and scholarship—the unwanted stepchildren of zoning, grudgingly acknowledged but rarely the focus of loving attention.

III. A REVISED CASE FOR PLANS: PLANS AS CITYWIDE BARGAINS TO INCREASE THE MARKETABILITY OF URBAN PROPERTY

We believe that this dismissal of planning is unwarranted, but we accept the force of the attacks on planning summarized above. Our defense of planning does not rely on planners' alleged special expert ability to predict the future nor on any confidence in their—or anyone else's—ability to guide

70. For evidence of the homevoter hypothesis at work in big cities, see *supra* notes 2–6 and accompanying text.

71. FISCHEL, *supra* note 8, at 96–97. Fischel suggested other solutions for problems that would not be solved by competition, including increased regulatory takings scrutiny and home value insurance. *Id.*

72. This argument, however, ignores the economic benefits of colocation. Having lots of local governments engaged in zoning can reduce the agglomerative efficiency of a region by disrupting the location of development in a region. See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1543. Fischel acknowledges this himself. See FISCHEL, *supra* note 8, at 252–65.

73. See generally Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exaction Revisited*, 86 IOWA L. REV. 1 (2000); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007).

74. See, e.g., Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2011) (arguing that increased reliance on contracts to define land-use entitlements undermines transparency, evenhandedness, and democratic norms of public participation). Selmi devotes only a few sentences to the danger that ad hoc bargains will impede adherence to a comprehensive plan. *Id.* at 635.

development efficiently over the long- or even medium-term. Zoning's benefits, in our discussion, result exclusively from reducing parcel-specific nuisances, not in setting forth grand visions of the city as a whole.⁷⁵ Further, we agree there is nothing wrong with cities' waiving their onerous zoning rules in return for compensation for the costs of such deregulation (although we also wish that cities were less zealous in imposing such onerous rules in the first place).

Despite all of this agreement with the major critics of planning, we nonetheless defend a (reformed) vision of comprehensive mapping and planning. Our argument is premised on the increasing restrictiveness of land-use regulation at both the regional and big city level.⁷⁶ In areas where demand is high, these supply restrictions have caused major increases in prices at the regional level over the last 40 years.⁷⁷ Edward Glaeser, Joe Gyourko, and Raven Saks have shown that nearly half the price of any housing unit in the San Francisco region, for instance, is due to land-use restrictions.⁷⁸ These dramatic increases in the cost of housing at the regional level have caused massive dislocations of people and broad economic harm. As Daniel Shoag and Peter Ganong show, for the entirety of American history prior to the 1970s, average incomes by state converged, as people from poorer states moved to richer ones.⁷⁹ But since the 1970s, convergence has slowed and now stopped as a result of land-use restriction in many rich states. Population no longer flows to boom areas like Silicon Valley (which lost population during the first dot-com boom and only barely gained population since 2000), because land-use restrictions cause prices to increase faster than incomes rise.⁸⁰ The national economy has suffered as workers cannot move to job-and-high-income dense areas. A new study by two of America's leading labor economists finds that land-use restrictions reduce average wages in the United

75. Determining whether zoning outperforms other methods of addressing land-use conflicts, from traditional nuisance to contracts to Ellickson's nuisance boards proposal, is well beyond the scope of this Article. Zoning is not going anywhere anyway. As Richard Babcock noted about zoning persistence despite severe academic criticism: "No one is enthusiastic about zoning except the people." BABCOCK, *supra* note 18, at 17.

76. See generally Hills & Schleicher, *supra* note 3; Roderick M. Hills, Jr. & David Schleicher, *The Steep Cost of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010); Schleicher, *supra* note 72; Schleicher, *supra* note 2.

77. See William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1515-16 (2010) (reviewing LEE ANNE FENNELL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009)).

78. See Edward Glaeser et al., *Urban Growth and Housing Supply*, 6 J. ECON. GEOGRAPHY 71 (2005); Edward Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329 (2005); Glaeser et al., *supra* note 2, at 360.

79. Ganong & Shoag, *supra* note 5, at 1.

80. See AVENT, *supra* note 3, at loc. 799-850.

States by roughly \$9000, as workers cannot flow to jobs.⁸¹ There may also be substantial negative effects on growth, as information spillovers in these areas go uncaptured.⁸²

Molotch's prediction that a "growth machine" would deregulate housing supply in big cities has turned out to be false. Despite predictions of growth machine coalitions, many of the most productive and richest urban areas have seen slow housing growth.⁸³ Cities like New York City, San Francisco, Los Angeles, and Boston, for instance, have seen housing growth well below the increase in national population, despite huge increases in prices. Slow population growth in the face of high wages is a result of supply constraints.⁸⁴

We argue that planning can help cities resist the political pressure to excessively restrict building and expand the market for property in cities.⁸⁵ First, citywide planning and mapping can provide cities lacking strong political parties with mechanisms for enforcing citywide deals on the allocation of land uses. Second, maps that make ex ante decisions about what can be built as-of-right reduce information costs for investors.

Before we proceed, we must make clear what we mean by "plans." For our purposes, a "plan" is defined by three characteristics: It is nothing more than: (1) a citywide or multi-neighborhood determination of permissible land uses (2) made simultaneously for all such neighborhoods that is (3) "sticky," as a practical matter, against future piecemeal alteration. "Sticky" does not mean inalterable: plans can be changed in response to changing circumstances, but the procedure for change must be onerous enough to deter parcel-specific deals from causing the multi-neighborhood bargain over land uses to unravel. We are catholic about the sorts of procedural constraints used to make plans

81. Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* 25–26 (Nat'l Bureau of Econ. Research, Working Paper No. 21154, 2015), <http://www.nber.org/papers/w21154>.

82. Glaeser, *supra* note 5 ("[I]t's a bad thing for the country that so much growth is heading to Houston and Sunbelt sister cities Dallas and Atlanta. These places aren't as economically vibrant or as nourishing of human capital as New York or Silicon Valley. When Americans move from New York to Houston, the national economy simply becomes less productive.").

83. Think cities like New York, Los Angeles, San Francisco, San Diego, Washington, and Boston (but not Houston, Miami, or Seattle). Each of these cities has high housing costs and low amounts of construction, far lower than the national average. See Stephen J. Smith, *Chart: Housing Growth in U.S. Cities, 2000–2010, From Detroit to Miami*, NEXT CITY (Mar. 7, 2014), <http://nextcity.org/daily/entry/chart-housing-growth-in-us-cities-2000-2010-from-detroit-to-miami>. For cities without problems producing housing or locating traditionally unwanted land uses, we see no reason to rely more extensively on planning. One should only take medicine when one is sick.

84. See Schleicher, *supra* note 2, at 1692–93.

85. Suburbs and smaller local governments are unlikely to have extensive cycling of local preferences and thus the procedural reforms discussed here are less likely to matter. However, the arguments we advance here should serve as a warning for those who believe that locating land-use authority in regional or state governments will necessarily produce more liberal outcomes. If big city land use can devolve into distributive politics, giving neighborhoods similar power to exclude as rich suburbs, the same thing could happen inside a regional or state zoning authority without procedural reforms of the sort discussed here.

“stick,” but the critical principle should be that many amendments should be bundled together into a single package to be approved without amendment by the local legislature through a simple up-or-down vote.

A. *PLANS AS A MECHANISM FOR ENFORCING CITYWIDE DEALS*

One central assumption in the political critiques of plan jurisprudence is that there is nothing special distinguishing the politics of planning and piecemeal zoning. Our argument to the contrary rests on an insight of positive political theory about city legislatures that lack competing political parties.

1. Distributive Politics in Land Use

As we have argued elsewhere, positive political theory about legislative process provides important lessons about land use.⁸⁶ As Kenneth Arrow famously showed, legislative preferences are not naturally transitive or stable: the same legislature can have cycling preferences, voting for *A* over *B*, *B* over *C*, and *C* over *A* with mere majority rule by itself unable to choose among the cycling outcomes.⁸⁷ Further, legislatures can face coordination problems, cases where agreements between legislators could improve outcomes for everyone but where legislators’ strategic games preclude such benefits because the legislators cannot make binding commitments to each other.⁸⁸

As Matt McCubbins has argued, political parties in legislatures can provide a solution to the problem of choosing the best of several equally possible voting outcomes. In order to avoid cycling or coordination problems, a group of legislators, or a caucus, forms a party that gives its leadership the power to both determine the voting order (and hence determine the voting outcome in the face of cycling preferences) and to enforce deals that solve cooperation problems.⁸⁹ Members of a party give power to the leadership to maximize their joint electoral gains. Leaders, therefore, have the right incentives to propose generally beneficial policies, as the gains to the caucus (and the potential caucus after the next election) must be relatively widespread across a jurisdiction if the leadership wants to build a stable majority. Party brands—that is, Democrats and Republicans—are a function of successive efforts by party leaders to produce policy results that are attractive to citywide majorities.

In most American cities, however, there is no party competition to produce these beneficial results. Often, elections are formally nonpartisan. Elsewhere, city elections are partisan but totally dominated by one party.

86. Hills & Schleicher, *supra* note 3, at 87; Schleicher, *supra* note 2, at 1699–717.

87. See KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 22–23 (2d ed. 1963).

88. Schleicher, *supra* note 2, at 1699–704.

89. See generally GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE (2d ed. 2007); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS (1991).

Further, because of legal impediments on party rebranding and the heavy weight of national party identification in local voting patterns, one-party domination in such city legislatures is likely to continue. (In previous work, one of us has explored the reasons for party-less local democracy.)⁹⁰ As the quality of local party performance does not matter much in one-party local elections, party leaders in city councils cannot provide the benefit of a “brand” with voters that will induce cooperation from individual members.

The absence of competitive party “brands” has two major implications for zoning politics. First, the formal procedure by which issues are considered has an outsize influence on policy outcomes. When there is party dominance, procedure is likely largely epiphenomenal: the party leadership usually chooses the procedure that best serves its ends. Absent effective party leadership, procedure determines the outcome selected by a cycling legislature. Second, weak parties cannot solve coordination problems among legislators. As Barry Weingast and John Ferejohn have shown, legislatures without strong parties can devolve into “distributive politics” if preferences take the form of a prisoner’s dilemma: members of a party-less legislature “distribute” goods broadly across electoral districts to minimize their risk of being excluded from the necessarily fluid and unpredictable winning coalition.⁹¹ Members may collectively, say, prefer lower taxes and lower spending to higher taxes and higher spending, but each member individually prefers pork in their districts paid for by taxpayers across the entire jurisdiction. Absent a party leader who can suppress individual efforts to secure district-specific spending, legislators may adopt an informal norm approving each other’s local expenditures as an insurance that they are not left out of the winning coalition for local benefits. The result is more spending than the legislature as a whole would prefer.

2. Plans as a Solution to the “Ironclad Rule of Aldermanic Privilege”

As we have previously argued, the procedure of voting on piecemeal zoning changes individually can lead local legislatures to form universal log-rolling coalitions. The very term “NIMBY” suggests neighbors’ preference not for the total exclusion of a use but merely its relocation elsewhere. The literature typically assumes that neighborhoods generally oppose development, while larger constituencies (e.g., big cities, citywide officials)

90. See, e.g., Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363; David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit nor Voice Substantially Limits Big City Corruption*, 42 LOY. U. CHI. L.J. 277 (2011) [hereinafter Schleicher, *I Would, but I Need the Eggs*]; David Schleicher, *What If Europe Held an Election and No One Cared?*, 52 HARV. INT’L L.J. 109 (2011); David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 430–38 (2007).

91. Barry R. Weingast, *A Rational Choice Perspective on Congressional Norms*, 23 AM. J. POL. SCI. 245, 249–53 (1979). See generally JOHN A. FERREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947–1968 (1974).

and individual owners (of lots or blocks) support it. The basic story—which distinguishes small cities from big ones, and neighborhood officials from citywide ones—is that property holders can use politics to form cartel-like agreements to limit competition among them and drive up their collective property values only if the political community does not get too large.⁹² At the size of a single city electoral district, property holders and the city council members who represent them have both incentives and capacity to limit development locally even where they support growth overall.

These preferences and capacities create the type of prisoner’s dilemma familiar in models of distributive politics in budgeting. Absent party discipline, such NIMBY preferences predictably lead to excessive “pork” in the form of too many zoning restrictions serving neighborhoods’ local interests. Individual members of city councils end up with exclusive control over land-use decisions in their districts with little incentive to consider citywide interests for an increased housing supply or the location of locally unwanted land uses.⁹³ This dominance of the individual local legislator in land-use politics has long been understood as a basic rule of local politics, known as the “ironclad principle of aldermanic privilege.”⁹⁴

The process of voting on map amendments in a piecemeal fashion retards the legislature’s collective ability to create deals between neighborhoods and their legislative representatives across individual projects that would take into account the legislators’ collective, as opposed to individual, interests.⁹⁵ Zoning map amendments are generally geographically specific, affecting only one area at a time. As a result, they are poor vehicles for spreading development across town. Moreover, the time and cost of getting a project through the amendment process means that the local legislature will not vote for a package of many projects simultaneously, thereby assuring each member that other neighborhoods will accept their fair share of new development. In the absence of political parties to whip deals into line, it is no wonder that councilmembers don’t agree to allow locally unpopular but needed growth to occur in their districts, since they can’t be sure that other members will do the same.

Both plans and comprehensive remappings are mechanisms for solving this type of breakdown. First, by their very nature, they are citywide votes, thereby reducing (if not eliminating) the pressures for NIMBY exclusion

92. Ellickson described landowner cartels in his study of suburban zoning, noting that zoning can turn the homeowner into a monopolist. Ellickson, *Suburban Growth Controls*, *supra* note 63, at 400, 424–30. Fischel notes that cities of under 100,000 people will be different from more populated cities, as homeowner/voters in small cities can learn what is going on in city government and force government to cave to their interest. FISCHEL, *supra* note 69, at 92–93.

93. Schleicher, *supra* note 2, at 1677.

94. Gurwitt, *supra* note 10.

95. Schleicher, *supra* note 2, at 1704–17.

characteristic of seriatim decisions.⁹⁶ Second, the typical process of citywide remapping can protect citywide interests against more parochial ones. Ordinarily, the Mayor's city planning department, or a newly created independent body appointed by politicians elected citywide, proposes a new plan or map to the city council after extensive hearings. The Mayor faces the broadest electorate and thus has the greatest incentive to be responsive to citywide concerns.⁹⁷ Putting the agenda-setting power in the Mayor's hands further promotes citywide interests. Particularly if the remapping is considered under a closed rule (i.e., no amendments are allowed), the Mayor is in a position to propose a map that goes as far to protect citywide interests as the legislature will bear.

Consider, as an example, the recent rewriting of the zoning code in Philadelphia. In 2011, Philadelphia revised the text of its zoning code, consolidating the number of zoning categories, which had not been substantially altered since 1962, and redrew its zoning map.⁹⁸ The impetus for these revisions was the impossibility of building new projects except by piecemeal variances or map amendments that gave individual councilmembers excessive power to decide which projects would go forward. The city created a zoning code commission to propose a set of recommendations to the council that it was required to approve or reject under a closed rule. The commission's recommendation, enacted by the council, radically simplified and relaxed the zoning code by creating more as-of-right construction and allowing both taller downtown high-rises and taller row-houses.⁹⁹ The revision process used an independent commission rather than the city planning department in order to overcome aldermanic privilege,

96. Imagine the fiscal impact, if instead of passing budgets, we just passed individual appropriations bills whenever someone proposed a new project!

97. A neat example of this just arose in Washington D.C. The Planning Commissioner, a mayoral appointee, asked Congress to revise the Height of Buildings Act, which sets maximum heights for buildings in D.C. The proposal was to increase the maximum height by 25% in the traditional "L'Enfant" party of the city and to eliminate it for outlying areas. The city council voted against the proposal, even though it would have left much more power in the hands of the city (as it would have more choices about building heights). Representative Darrell Issa noted during a hearing that it was extremely out of the ordinary for politicians to turn down authority: "I did not expect people to say, 'Please don't give me authority, I can't be trusted.'" Aaron Wiener, *Issa Offers Hope for D.C. Autonomy on Building Heights*, WASH. CITY PAPER (Dec. 2, 2013, 1:37 PM), <http://www.washingtoncitypaper.com/blogs/housingcomplex/2013/12/02/issa-offers-hope-for-d-c-autonomy-on-building-heights>.

98. See Patrick Kerkstra, *City Council Set to Act Selflessly: Anthropologists Should Come to Philly to Study Rare Phenomenon*, PHILA. MAG. (Dec. 14, 2011, 9:22 AM), <http://www.phillymag.com/news/2011/12/14/philadelphia-city-council-reduces-power> (noting that rezoning was designed to reduce control of individual councilmembers over zoning); Inga Saffron, *Changing Skyline: New Zoning Code: Toward a More Competitive, Livable City*, PHILLY (Aug. 25, 2012), http://articles.philly.com/2012-08-25/news/33367899_1_new-code-variances-livable-city. The closed rule provisions is part of the PHILA., PA., HOME RULE CHARTER § 4-1300(d) (2015).

99. See Saffron, *supra* note 98. The remapping process, however, which was supposed to following the rewriting, has stalled.

inducing councilmembers to support greater density in their own neighborhoods with assurance that all parts of the city would accept some of the new construction.

In 2006, Dallas officials adopted an approach similar to Philadelphia's. Recognizing that its code had become complicated, the mayor persuaded the council to appoint a special planning commission to standardize zoning categories across the city. As the lead planning consultant noted, "zoning needs to be ready-to-wear, not custom fit The more tailored the ordinance becomes, the harder it is to work with."¹⁰⁰ When the special commission returned its plan, the city's staff proposed an alternative that called for greater density throughout the city. The City Council adopted this more aggressive approach.¹⁰¹ Although the plan "preserves[s] existing neighborhoods," it also explicitly states that it "[p]rovide[s] housing choices for people at various income levels" and "[p]ursue[s] redevelopment and revitalization."¹⁰²

3. Why Sorting Doesn't Solve the Problems of Excessive Land-Use Restriction

Why does competition between cities not solve the problem of excessive zoning restrictions without revision of the zoning process? Relying on Charles Tiebout's famous insight that citizen-consumers can sort themselves among competing local governments based on their assessment of taxes and services,¹⁰³ scholars like Vicki Been and Lee Fennell have argued that local governments have incentives not to overregulate land in ways that deter development.¹⁰⁴ There are, however, notorious limits to citizen-consumer mobility as a constraint on local regulation.¹⁰⁵ In particular, the immobility of land and the uniqueness of cities give many local governments pricing "power," meaning that the threat of exit (or non-entry) does not fully constrain them.¹⁰⁶ Many cities have no adequate substitutes, because they

100. David Dillon, *Forward Dallas: Land Use: The Zoning Code Is Handcuffing Dallas, Which Needs a Smarter Guide to Development*, *David Dillon Says*, DALL. MORNING NEWS, May 7, 2006, 2006 WLNR 10176980 (quoting planning consultant John Fregonese).

101. Dave Levinthal, *Forward Dallas Proposal Approved: Council Backs City Staff's Land-Use Plan, Reject Panel's Version*, DALL. MORNING NEWS, June 15, 2006, 2006 WLNR 10259827.

102. CITY OF DALL., FORWARD DALLAS!: COMPREHENSIVE PLAN: VISION 10-13 (2006), <http://dallascityhall.com/departments/pnv/strategic-planning/DCH%20Documents/pdf/Vision.pdf>. A city councilwoman even invoked her inner Charles Haar: "[T]he Comprehensive Plan is like our zoning and land use Constitution." *Forward Dallas—Comprehensive Plan Public Meetings*, PEAK'S ADDITION HOMEOWNER'S ASS'N (Feb 11, 2006, 10:28 AM), http://www.peaksaddition.org/mt/archive/2006/02/forward_dallas.html (quoting Angela Hunt).

103. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956).

104. See generally Been, *supra* note 73; Fennell, *supra* note 73.

105. See Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1834-35 (2003) (reviewing FISCHEL, *supra* note 69, critiquing Tiebout and Fischel).

106. See Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 858-67 (1992).

create agglomeration economies that rivals cannot duplicate.¹⁰⁷ Living in a big city, for instance, gives residents access to deep local labor markets, allowing them to specialize, search for employers more easily, and gain insurance against the failure of any one employer.¹⁰⁸ City residents also benefit from location-specific information spillovers (for instance, contacts and information about being an internet entrepreneur simply by living in Silicon Valley).¹⁰⁹ Therefore, while the threat of exit puts substantial pressure on suburban governments that generate fewer agglomeration benefits, exit is less of a constraint on the regulatory excesses of big cities.¹¹⁰

Cities' financing mechanisms also limit their incentives to deregulate land to attract migrants. Cities' reliance on property taxes gives their residents incentives to build smaller structures on smaller lots to avoid tax liability while receiving 100% of city services.¹¹¹ To prevent citizens from escaping average tax burdens through below-average houses, local governments restrict their residents' power to build smaller structures on smaller lots: local officials have incentives not to attract residents but to drive them away.¹¹² These fiscal incentives to exclude can be socially harmful, because they undermine agglomeration economies, which depend on people being able to locate near others of their choosing.¹¹³ To the extent that people sort in order to get cheaper public services, they are not locating in their optimal location. Tiebout sorting thus reduces agglomerative efficiency.

None of this is to say that exit does not put any pressure on local governments when making land-use decisions. Surely it does. But many local governments have some degree of "pricing power" due to agglomeration economies and the tax system provides incentives to limit development in order to limit the number of people who can access services.

B. PLANS AS A MEANS TO INCREASE THE MARKET FOR PROPERTY: THE ROLE OF PLANS IN REDUCING INFORMATION COSTS FOR BUYERS

Piecemeal zoning restricts housing not only because it prevents citywide bargaining but also because it reduces the marketability of land through high information costs. Under such a regime, any potential developer has to figure

107. CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS 99–100 (2011); Schleicher, *supra* note 72, at 1515–29; *see also* Hills & Schleicher, *supra* note 3, at 94–95 n.32.

108. *See* Rodriguez & Schleicher, *supra* note 30, at 642; Schleicher, *supra* note 72, at 1535–40.

109. *See* Schleicher, *supra* note 72, at 1525–29.

110. *See id.*; Schleicher, *I Would, but I Need the Eggs*, *supra* note 90, at 278–79. Ellickson noted the broad differences between the effects of zoning in unique and non-unique places more than 40 years ago. *See generally* Ellickson, *Suburban Growth Controls*, *supra* note 63. Our point here is simply that all places are a little unique and that big cities are particularly so.

111. *See* Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 208–09 (1975).

112. Sterk, *supra* note 106, at 836–40.

113. *See* Schleicher, *supra* note 72, at 1540–46.

out the preferences of local landowners and how the city's politics works before they can even consider whether buying into a city makes any sense. A comprehensive map that sets out what can be built as-of-right will produce higher property values than a system in which the government would allow the same amount of development through an ad hoc amendment process.

1. Property Law and Information Costs: From Bundles of Sticks to the Greatest Grid

In the most important move in modern property law theory, Tom Merrill and Henry Smith attacked the idea that “property” is best understood as a “bundle of sticks” in which each separate “stick” in the bundle—that is, each of the rights that an owner enjoyed against other individuals—could be sold, used, taken by the government, or regulated by law without affecting the other “sticks.”¹¹⁴ This “bundle of sticks” metaphor, dominant in law-and-economics scholarship, transforms property into a species of contract, an infinitely divisible set of claims, customizable by different users for different purposes.¹¹⁵ Rejecting this line of thinking root and branch, Merrill and Smith argued that, because property claims run not only against some specific other individual but against the world, property rights’ informational content must be simpler than, say, contract rights, which only run against people who sign a contract.¹¹⁶ Instead, because of their in rem nature, property rights must be packaged in a limited menu of forms, allowing third parties encountering a piece of owned property to know that their responsibilities to the owner take one (or, at most, a few) potential forms.¹¹⁷ Infinitely varied, contract-style customization of the rights and forms of ownership over a piece of property would increase information costs for third parties, whether travelers or potential purchasers. Various property law principles, such as the numerus

114. For discussions of the “bundle of sticks” metaphor, see generally Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617 (2009) (reviewing THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2007)); and Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 ECON. J. WATCH 215 (2011).

115. Merrill & Smith, *What Happened*, *supra* note 12, at 365–70. On the importance of the “bundle of sticks” idea to Ronald Coase’s analysis of property, see Merrill & Smith, *More Coasean*, *supra* note 12, at S80.

116. Apologies for extending the arboreal metaphor. It was almost unavoidable. See, e.g., Merrill & Smith, *More Coasean*, *supra* note 12, at S81; Merrill & Smith, *Numerus Clausus*, *supra* note 12; Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001); Merrill & Smith, *What Happened*, *supra* note 12, at 115; see also Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004) [hereinafter Smith, *Exclusion and Property Rules*]; Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002); Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097 (2012); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

117. See Merrill & Smith, *More Coasean*, *supra* note 12, at S89–93; Merrill & Smith, *Numerus Clausus*, *supra* note 12, at 8–20; Merrill & Smith, *What Happened*, *supra* note 12, at 365.

clausus principle, reduce such customization for the purpose of reducing these information costs.

The same basic intuition applies not only to the rights permitted by the common law of property but also to the rules defining the physical shapes of lots. The easier it is to tell who owns how much land, the easier it is for outsiders to figure out how to behave in relation to it and to determine whether they want to buy it. A clearly demarcated piece of property with boundaries that are easily determined thus should be worth more than a similar piece of property with less clearly demarcated boundaries, as outsiders will be able figure out what it contains without first obtaining specific local knowledge. The cost of investigation is lower and thus the number of potential purchasers is higher.

Dean Lueck and Gary Libecap have confirmed empirically that the existence of easily ascertained boundaries can substantially increase property values.¹¹⁸ Comparing “metes and bounds” lots, the boundaries of which are defined by irregular and individualized lines often following natural boundaries like hills, trees and streams, with “rectangles and squares,” a system that originally allocated properties in standardized rectangular and square lots, Lueck and Libecap determined that “rectangles and squares” demarcation results in property values that are roughly 30% higher than “metes and bounds”—an effect persisting 200 years after the original demarcation.¹¹⁹ Lots defined by rectangles and squares attracted more population, urbanized more quickly, and, despite the legal power of property owners to customize their lots after the initial demarcation, retained their geometrical boundaries long after they were initially demarcated.¹²⁰

Manhattan’s street grid suggests a similar effect of simple, uniform, and rectangular lot lines. In 1811, when New York was a city of just under 100,000 people residing almost entirely south of Houston Street, the state legislature authorized three street commissioners to create a uniform street grid covering almost all of Manhattan Island, thereby creating enough lots to accommodate a city with “a greater population than is collected at any spot on this side of

118. Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426, 446–50 (2011) [hereinafter Libecap & Lueck, *The Demarcation of Land*]; Gary D. Libecap & Dean Lueck, *Land Demarcation Systems*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 257, 288 (Kenneth Ayotte & Henry E. Smith eds., 2011); Gary D. Libecap et al., *Large Scale Institutional Changes: Land Demarcation Within the British Empire* 3 n.6 (Nat’l Bureau of Econ. Research, Working Paper No. 15820, 2010), <http://www.nber.org/papers/w15820>.

119. Libecap & Lueck, *The Demarcation of Land*, *supra* note 118, at 432–50. Libecap and Lueck relied on a natural experiment in Ohio, part of which was governed by Virginia’s system of “metes and bounds” and part, by the standardized squares created by the Northwest Ordinance of 1785. They note that, for extremely rough topography, the data suggest that metes and bounds may outperform rectangles and squares. *Id.* at 441–50; *see also* Gary D. Libecap et al., *A Legacy of History: 19th Century Land Demarcation and Agriculture in California* 29 (Apr. 2015) (unpublished manuscript), <http://www.econ.pitt.edu/sites/default/files/Lueck.dean.15.pdf>.

120. *See* Libecap et al., *supra* note 118, at 5–7.

China.”¹²¹ Avoiding the model set by Pierre L’Enfant’s city plan for Washington D.C., which used many diagonal avenues to create “circles, ovals and stars” for monuments and civic buildings, the 1811 street plan also completely ignored Manhattan Island’s streams and hills (“Manhatta” was the Lenape word for Island of Many Hills), some of which were later flattened as part of the laying out of the street plan.¹²² They also ignored all existing property lines north of Houston, using eminent domain to take property necessary for the streets from land owners.¹²³

With few deviations,¹²⁴ the result was a uniform grid of numbered streets and avenues that, according to the Commissioners, would lower the cost of construction, as “strait-sided and right-angled houses” were cheap and easy to build.¹²⁵ The grid had another “unstated advantage”: it promoted “an easy format for the subdivision and development of land,” because the rectangular blocks virtually assured rectangular lots.¹²⁶ Rectangular lots made property rights easy to ascertain, reducing property disputes between neighbors.¹²⁷ And it made it easier, as grid surveyor John Randel noted, for outsiders to engage in the “buying, selling and improving of real estate.”¹²⁸ By creating many lots of relatively uniform size and shape that could be traded as commodities by a large number of investors and developers, the grid fostered a boom in the real estate market.¹²⁹ Standardized lots allowed these buyers and sellers to rely on easily obtained information in the deeds and maps, surveys, and records held by the Real Estate Exchange.¹³⁰ Studying border areas in Manhattan—that is,

121. THE GREATEST GRID: THE MASTER PLAN OF MANHATTAN 1811–2011, at 27, 41 (Hilary Ballon ed., 2012) [hereinafter THE GREATEST GRID].

122. *Id.* There was substantial flattening of property to make it level, although the extent to which this was done has been overstated by some. *Id.* at 80. But the fact that the grid did not accommodate the “island of many Hills” is remarkable. As Rem Koolhaas argues: “The Grid is, above all, a conceptual speculation. In spite of its apparent neutrality, it implies an intellectual program for the island: in its indifference to topography, to what exists, it claims the superiority of mental construction over reality. Through the plotting of its streets and blocks it announces that the subjugation, if not obliteration, of nature is its true ambition.” REM KOOLHAAS, DELIRIOUS NEW YORK: A RETROACTIVE MANIFESTO FOR MANHATTAN 15 (1978).

123. THE GREATEST GRID, *supra* note 121, at 16–18, 37–40. They used assessments on properties that went up in value to pay for cost of compensation.

124. Most of today’s deviations from a perfect grid—e.g., Central Park, Broadway north of 23rd street, Madison Square, superblocks for developments like Lincoln Center—were not part of the original map. There were a few exceptions—a military parade, a market place, and some accommodations for existing roads. *See id.* at 35–36.

125. *Id.* at 40.

126. *Id.* at 87.

127. Robert C. Ellickson, *The Law and Economics of Street Layouts: How a Grid Pattern Benefits a Downtown*, 64 ALA. L. REV. 463, 479 (2013); *see also* Libecap & Lueck, *The Demarcation of Land*, *supra* note 118, at 450–54.

128. JOHN W. REPS, *THE MAKING OF URBAN AMERICA: A HISTORY OF CITY PLANNING IN THE UNITED STATES* 299 (1965) (quoting John Randel).

129. THE GREATEST GRID, *supra* note 121, at 87.

130. *Id.* at 88–90.

areas that were on the grid and neighboring areas that were not gridded—Trevor O’Grady confirmed that properties on gridded blocks are both more valuable and more densely developed.¹³¹

In sum, standardized forms of property increase property’s value in part because they are more easily sold to a larger market of people. This basic insight suggests how ex ante comprehensive planning expands the market for development in cities.

2. The Case for Plans as a Method of Reducing Information Costs and Increasing the Marketability of Land

Rectangular boxes in the air above each lot that are defined by local zoning laws should have the same benefits as rectangular lots. Where local zoning laws define plain as-of-right entitlements to build, it is easier for outsiders to determine the value of lots. Simplicity and predictability in zoning enlarge the market for urban land. In contrast, seriatim and parcel-specific zoning amendments that custom tailor the uses and bulk for each lot shrink the market.

Custom-tailored, parcel-specific zones defended by Bill Fischel and Robert Nelson impose very high informational costs on buyers and developers. Imagine a municipality that followed a pure-Nelson/Fischel style zoning process. There would be no as-of-right building at all. If a developer wants to build, she has to negotiate with the local government by proposing a specific use for that lot, paying the city off for any negative effect on incumbent neighbors.¹³² Nelson and Fischel argue that the developers’ proposals and local governments’ demands would efficiently reveal the relative preferences of neighbors and nonresident buyers or renters.

But they ignore the market-shrinking effect of such custom-tailored zoning. The market for development would be limited to developers and investors with inside knowledge of what the local government and neighbors would likely charge for the proposed development. This requires developers to determine residents’ idiosyncratic tastes for light, air, aesthetics, and

131. Trevor O’Grady, *Spatial Institutions in Urban Economies: How City Grids Affect Density and Development* 52 (Jan. 2014) (unpublished manuscript) (on file with author).

132. Lest you think this as ridiculous, remember that cities have increasingly devoted land to “holding zones,” or areas with no right to build, so that they can create conditions on all building. ELLICKSON & BEEN, *supra* note 15, at 90. Even in big cities, we see officials acting as if all building needs their approval. Julia Vitullo-Martin described the reign of former New York City Planning Department Director Amanda Burden thusly: “Development has become a game of second-guessing What will Amanda think of my project? What will I need to compromise on? There really doesn’t seem to be any true as-of-right development anymore.” Julie Satow, *Amanda Burden Wants to Remake New York. She Has 19 Months Left.*, N.Y. TIMES (May 18, 2012), http://www.nytimes.com/2012/05/20/nyregion/amanda-burden-planning-commissioner-is-remaking-new-york-city.html?_r=0. In Washington, a city council member has proposed that even as-of-right building of certain densities be subject to community review. Mark Lee, *Doing to Development What Broke Down Booze*, WASH. BLADE (Apr. 10, 2013, 4:01 PM), <http://www.washingtonblade.com/2013/04/10/mary-cheh-doing-to-development-what-broke-down-booze> (discussing a proposal by “Queen of the NIMBYs” Council Member Mary Cheh).

subjective value for the status quo. Developers also need expertise in local politics and bureaucracy. Just as bazaars where all prices are negotiated are intimidating to tourists, cities where all building rights are negotiated parcel by parcel are especially costly for out-of-town developers. Nelson's and Fischel's parcel-specific amendments create information costs that reduce the value of property because these costs decrease real estate's trade as a commodity in an impersonal market.

Fischel's and Nelson's proposal, in other words, can be attacked on the same grounds that Smith and Merrill invoke against the "bundle of sticks."¹³³ Property law balances the private desire for customization against the information costs that customization imposes on outsiders. Zoning law must likewise balance these benefits and costs of customization. Negotiations between a landowner/developer and neighboring land owners (represented by the local government) may lead to an optimal amount of development in that particular case, as the cost of negotiating is low. But the general practice of such ad hoc bargaining increases the costs borne by third parties who might otherwise have invested in the jurisdiction but are deterred by the information costs imposed by the zoning system as a whole. By shrinking the market of buyers as well as preventing scale economies in construction,¹³⁴ these information costs reduce overall property prices within any local government governed by Fischel's and Nelson's bargaining regime. The implication is that lots with as-of-right building rights based on only a few simple zoning categories should have higher property values and more development than lots on which the city allows the exactly identical amount of building through a seriatim amendment process.¹³⁵

There is no systematic study akin to Libecap's and Lueck's for lot boundaries that measures the gains from the standardization of use rights.

133. Merrill & Smith, *More Coasean*, *supra* note 12, at S88–90. Put another way, Fischel and Nelson's ideas are explicitly derived from Coase and they are thus subject to the same critique that Merrill and Smith make of Coasean thinking about property.

134. This effect is not only on investors in property, but applies to building contractors. Barry LePatner has shown that the construction industry largely consists of small operators and has not seen the corporatization we have seen in other industries. BARRY B. LEPATNER, *BROKEN BUILDINGS, BUSTED BUDGETS: HOW TO FIX AMERICA'S TRILLION-DOLLAR CONSTRUCTION INDUSTRY* 49–56 (2007). One reason for this are wildly varying zoning and building code regulations. The information cost of learning local rules, interpretations of local rules, and workarounds are sufficiently high as to make working across jurisdictions costly for construction firms. The result is less efficient scale and higher costs. *Id.* at 123–31.

135. One other implication is that having a few, regular categories is better than having lots of specific-to-location rules. Zoning rules have gotten far more complicated over time. The zoning map in *Euclid* had only six categories. See TOLL, *supra* note 15, at 216. By contrast, New York City has hundreds of different designations to deal with different zoning categories, special purpose districts, commercial overlay districts and their interactions. N.Y.C. Dep't of City Planning, *Zoning Districts: Introduction to Zoning Districts*, NYC PLANNING, <http://www.nyc.gov/html/dcp/html/zone/zonehis2.shtml> (last visited Sept. 18, 2015).

Anecdotal evidence, however, suggests that the gains from reducing zoning uncertainty are sizeable. As the Mayor of Lakewood, Colorado noted,

[r]ezonings are deadly. . . . If we're going to track investment, there's one thing that's more important than anything else right now and that's certainty. What level of certainty does the investment have once it enters your community? . . . The important message here is that the entitlements are in place. So if an investor wants to come in, they don't have to go through an expensive and unpredictable zoning process, whose outcome is always less than certain.¹³⁶

There is undoubtedly a tradeoff between the gains from reducing third party's information costs and the gains from the fine-grained lot-specific information acquired through custom-tailored zoning. Having a few types of zoning (e.g., just residential, commercial and manufacturing with common rules about uses and heights for each) will reduce third-party investor information costs. But such parsimony has a cost with respect to tailoring lot regulation to conditions peculiar to a neighborhood or block.

The problem with a zoning process that lacks binding comprehensive plans, however, is that the city cannot practically make such a tradeoff in favor of lower information costs and less custom tailoring. To reduce information costs through comprehensive planning, such plans have to be difficult to change even when there could be gains from tweaking the plan to improve regulation of a specific lot. None of the parties immediately involved in an effort to custom-tailor a lot's zoning, however, have any incentive to safeguard the general value of transparent zoning. Neither the immediate neighbors resisting a development that the comprehensive plan allows nor the developer seeking a special waiver of a restriction that the plan imposes will internalize the general value of zoning transparency for third parties not involved in the transaction.¹³⁷ Thus, absent some legal mechanism by which the city can tie its hands, there is always a hydraulic pressure by parties with the most immediate interests to deviate from plans.

Philadelphia's revision of its zoning code illustrates the dilemma. The revision made the city's zoning regime easier to navigate by reducing the

136. Kathleen Lavine, *Lakewood Mayor Bob Murphy Talks About the City's Plans*, DENVER BUS. J. (Feb 18, 2011, 4:00 AM), <http://www.bizjournals.com/denver/print-edition/2011/02/18/lakewood-mayor-bob-murphy-talks-about.html>.

137. Opponents of building projects therefore oppose efforts to remove discretion from zoning policy. For instance, Madison, Wisconsin's zoning map was redrawn last year "to streamline . . . the approval process" so that infill development could proceed with public review. A few months later, an opponent of a small apartment development was shocked: "The developer could do basically whatever he or she wanted as long as it fit the letter of the law in the zoning code." Mike Ivey, *Neighbors of Building Projects Find Influence Diminished by New Zoning Code*, MADISON (May 8, 2013), http://host.madison.com/news/local/writers/mike_ivey/neighbors-of-building-projects-find-influence-diminished-by-new-zoning/article_1202a018-ed6e-522c-96fb-e9cfc52b1a53.html#ixzz2vCDoVjBU.

number of use categories and making zoning rules easier to understand.¹³⁸ The City Council, however, almost immediately began undermining these advantages through changes allowing lot-specific alterations, as has the Board of Zoning Appeals by continuing to grant variances at a high rate.¹³⁹ Parcel-specific map amendments and variances would certainly allow fine-tuning that might improve the regulation of a specific lot, but the advantages of that fine-tuning could be outweighed by the overall losses from a more opaque land-use process.

In this sense, plans are citywide contracts creating commitments across time. Cities can face time inconsistency in their preferences about development. Setting out development possibilities *ex ante* creates a benefit for all lots in the city by promoting the marketability of city land to third parties, but any given individual *ad hoc* deviation from that commitment could increase value for the city with respect to that specific lot. A binding plan or map allows a local government to limit its power to approving amendments, even those amendments that make sense when they are proposed, in the service of reducing information costs borne by investor-developers overall.

While this logic does not tell us exactly when to rely on parcel-specific amendments or comprehensive plans, it should be clear that Fischel and Nelson are wrong to think that there are never non-distributional differences between allocating the right to build to a city and allocating the right to build to a developer.¹⁴⁰ There are differences, and the differences lie in the cost of acquiring information about the value of a piece of property. The decreased commodification of property caused by a system of holding zones and amendments means there is a smaller market of buyers and developers of property.

IV. MECHANISMS FOR CITYWIDE DEALS AND GREATER CERTAINTY IN LAND USE

The revised defense of planning offered here does not rest on planners' superior information or Olympian impartiality about how an ideal city ought to grow. Instead, we offer a defense based on local governments' needs to make binding commitments across neighborhoods and time that the ordinary legislative process does not provide. Implementing plans, therefore, means creating legal mechanisms for making such commitments. Plans must be "sticky" in the sense that they must resist the individual legislators' constant

138. ALAN GREENBERGER ET AL., ONE-YEAR ZONING CODE REVIEW: A REPORT TO CITY COUNCIL 2, 4 (2013), <http://www.phila.gov/CityPlanning/projectreviews/PDF/OneYearReport.FINAL.pdf>.

139. *See id.* at 8 (noting continued stream of variances); *see also* Holly Otterbein, *Philadelphia City Council Already Tinkering with Massive Zoning Overhaul*, NEWSWORKS (Nov. 8, 2012), <http://www.newsworks.org/index.php/local/philadelphia/46732-philadelphia-city-council-already-tinkering-with-massive-zoning-overhaul> (noting immediate efforts by City Council to change zoning code).

140. For a discussion of Fischel's and Nelson's argument, *see supra* Part II.C.2.

temptations to defect from the commitment when pressured by neighborhood activists. They also must resist pressures to fine-tune the plan from developers or neighbors whose ad hoc proposals threaten to make the entire process for future and potential buyers and developers more opaque.

The scope, force, and beneficiaries of the planning mandate, therefore, ought to be tailored for the need to overcome such temptations to defect from planning commitments. Suggested below are some examples of plans that address the weaknesses of the local legislature's bargaining capacity. The suggestions are neither exhaustive nor exclusive but merely illustrative examples of how a plan can provide an inter-neighborhood structure and trans-jurisdictional transparency to land-use politics that an unaided legislature might not be capable of providing.

A. *THE PLAN AS A CITYWIDE DEAL: BUDGETING PRINCIPLES FOR PLANNERS*

Recall that local legislatures typically lack party leadership capable of forcing individual members to accept local costs for the common good. This is especially so when those costs are inflicted over a lengthy period of time during which each member and neighborhood is uncertain that their sacrifice will later be repaid. The problem is acute for maintaining an adequate housing supply insofar as no member has a reason to welcome new housing into their district absent assurance that their colleagues will do the same.

One benefit of plans can be to facilitate cross-neighborhood bargains by giving the parties confidence that costs will be equitably distributed and citywide benefits will ultimately be achieved. It is helpful to think of such a plan as a "zoning budget," in which regulatory restrictions are the costly item being allocated among neighborhoods. The purpose of such a "zoning budget" is to make cross-neighborhood commitments to limit such restrictions that, in the absence of partisan leadership, are difficult to supply.

Such a budget would specify an overall goal of locally undesirable land uses, or simply quantity goals for different types of housing, for the entire jurisdiction. It would also allocate those land uses across neighborhoods, seeking to allay concerns from councilmembers about being dumping grounds for new construction and to capture the benefits of cross-neighborhood trades. Finally, the budget would include an enforcement mechanism, creating some sort of presumptive entitlement for developers to build the budgeted use until the citywide goal is met.

None of these elements requires special apolitical expertise on the part of planners. The point is not that the plan represents some higher wisdom about the best uses of land in a city. Instead, the budget's goal simply solves a collective-action problem from which local legislators otherwise suffer, because the goal is not focused on any particular neighborhood. The mayor's ordinary political incentives to make accurate demographic predictions should ensure that the housing goal will be superior to a bargaining free-for-

all in which goods are excluded everywhere. The advantage of the planners is simply that they work for the Mayor (and hence have a citywide constituency) and can therefore be trusted to be impartial among neighborhoods.

The critical challenge is designing an enforcement mechanism that can resist the centrifugal tendencies of aldermanic privilege. Once developers propose any specific new structures for particular neighborhoods, the neighbors so targeted have an incentive to enlist a universal coalition against the proposal. Can any enforcement mechanism resist these pressures?

As we have explained elsewhere, “issue bundling” has been a successful method for making generally beneficial policies that have district-specific costs.¹⁴¹ The legislature can overcome its own centrifugal tendencies by delegating to an extra-legislative actor the job of bundling together locally controversial district-specific decisions with general policies that the legislature as a whole endorses. The bundle can overcome NIMBY pressures to the extent that the entire scheme relieves individual legislators of political pressure to unbundle the package and force a vote on the site-specific decision. Congress’ Base Closure and Realignment Act is an example of one such successful bundle: by delegating the closing of obsolete military bases to the executive branch in the form of a Base Realignment and Closure Commission, Congress gave political cover to individual congresspersons who might otherwise have felt pressured to unravel the base-closing plan on behalf of constituents wanting to preserve jobs resulting from wasteful military bases.¹⁴²

A similar system of issue bundling might prevent NIMBY-minded neighbors from overturning a comprehensive housing plan. Planners can act as an extra-legislative body, charged with bundling together many site-specific upzoning decisions into some more general scheme. In theory, an individual legislator could reverse the former by proposing the repeal of the latter. In practice, however, the general scheme would likely provide sufficient political cover to reduce the incentives of other legislators to go along with the proposal or even induce a legislator affected by the specific upzoning to forbear from making the proposal at all.

As an example of a successful zoning issue bundle for one neighborhood, consider New York City’s creation of a Special Theater Subdistrict in 1982. Adopted in the wake of the demolition of the historic Morosco and Helen Hayes Theaters, the Subdistrict initially subjected 36 theaters to a special administrative process before they could demolish their structures, while simultaneously compensating them with transferable development rights (“TDRs”) that could be sold to lots that were contiguous to or across a street

141. Hills & Schleicher, *supra* note 3, at 104–06.

142. *Id.* at 108–12.

from the theater.¹⁴³ The City eventually landmarked 28 theaters within the Subdistrict, but the theater owners argued that, absent some compensation, they still would not produce plays in the preserved buildings.¹⁴⁴ Enlisting the Broadway Initiative, Actors Equity, and other theater-workers' unions, these owners pressed for expansion of the use of TDRs to create incentives for staging dramatic productions.¹⁴⁵ As approved by the City Council in 1997, the Subdistrict's TDR system allowed theater owners to transfer their unusable air rights to any lot within the Subdistrict. Unlike the TDRs provided under the City's ordinary landmarking law, the Subdistrict's TDRs could be transferred "by certification" rather than through a special permit process, meaning that the Planning Commission would have no discretion to turn down the transfer "as long as th[e] transfer would increase the [Floor-Area Ratio ("FAR")] of the receiving site [by] no more than twenty percent of the site's 'baseline' FAR limit."¹⁴⁶ In return for the right to sell air rights to other lots in the Subdistrict, the theater owners had to continue the "use of the property as a legitimate theater" and "contribut[e] . . . ten dollars per square foot of transferred floor area . . . to [a] Theater Subdistrict Fund."¹⁴⁷

In effect, the theater owners received the unilateral power to sell substantial new building rights within prime commercial real estate on the West Side of Manhattan. Eventually, theaters transferred the right to build 450,000 square feet through the Subdistrict.¹⁴⁸ Unsurprisingly, the neighbors of this new construction and their elected representatives launched bitter legal and political attacks on the transfers of air rights, arguing that such extra construction reduced their property values and the quality of their neighborhood.¹⁴⁹ But the nondiscretionary character of the system set up by the Subdistrict law—transfer by certification—ensured that the legal challenges could succeed only if the law itself were deemed an unconstitutional deprivation of property.

The courts' rejection of such legal challenges left only political avenues available to the aggrieved neighbors. But their efforts to modify or repeal the Subdistrict law were stymied by the law's clever use of issue-bundling. By tying together the issues of expanding the supply of commercial space with the protection of New York City's theater industry, the law insulated the former from political attack.¹⁵⁰ Mayor Ed Koch seemed to care little about preserving

143. Michael Kruse, *Constructing the Special Theater Subdistrict: Culture, Politics, and Economics in the Creation of Transferable Development Rights*, 40 URB. LAW. 95, 111–12 (2008).

144. *Id.* at 113.

145. *Id.* at 111–13.

146. *Id.* at 115.

147. *Id.* at 116.

148. Vicki Been & John Infranca, *Transferable Development Rights Programs: "Post-Zoning"?*, 78 BROOK. L. REV. 435, 448 (2013).

149. *See* Kruse, *supra* note 143, at 117–28.

150. *Id.* at 126–27.

legitimate theater, but he supported the Subdistrict law as a convenient mechanism for enlisting allies in the theatrical community for expanding commercial real estate. “Broadway’s devoted constituency” provided “political capital” with which the city council could resist pressures to repeal the law.¹⁵¹ Political leaders like Manhattan Borough President Virginia Fields railed against the effects of the transferred air rights on abutting land, but neither she nor anyone else placed repeal of the entire program on the City Council’s agenda. Manhattan Community Board 5, representing the Hell’s Kitchen/Clinton area where the extra construction was transferred, ruefully acknowledged how the tying of commercial real estate to the cause of theaters immunized the former from effective political attack.

Could cities engineer a similar bundling of issues at the citywide level to protect housing construction from NIMBY pressures? The Special Theater Subdistrict suggests some generalizable lessons for the design of an effective enforcement mechanism. First, the Subdistrict law provided general benefits—support for theater—that could provide political cover for politicians from accusations that they were developers’ stooges. Second, the siting decision was inextricably linked to this general benefit. Nothing in the system provided any venue for opponents to challenge individual siting decisions, putting neighbors to new development in the awkward position of having to support repeal or modification of the entire scheme rather than simply rejection of the scheme’s application to their neighborhood. Third, although the ratio of benefits was ratified by the City Council, it was rooted in formulae devised by planning staff and voted on as a bright-line rule. Finally, political opposition was minimized through the careful drawing of the Subdistrict’s boundaries, carving out the most potentially powerful opponents like unionized workers in the Garment District.

We do not pretend to have the political expertise to devise a foolproof bundle appropriate for all cities or even any particular city. But we can offer a rough outline of how the problem of housing could be addressed with an effective enforcement mechanism.

As with the Theater Subdistrict, the basic enforcement mechanism should bundle some generally popular citywide benefits with locally unpopular site-specific upzonings. With housing the traditional benefit is “affordable housing,” promoted through some sort of system of inclusionary zoning, although it could just as easily be transportation benefits or tax breaks. Inclusionary zoning systems differ importantly in their details, but their essential characteristic is that, in return for some sort of right to construct market-rate units, developers provide units sold or rented below market rate to persons who otherwise could not afford the housing.¹⁵²

151. *Id.* at 127–28 (footnote omitted).

152. Jenny Schuetz et al., 31 *Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, D.C. and Suburban Boston* 10–13 (Furman Ctr. for Real Estate & Urban Policy,

The familiar problem with inclusionary programs is that their mandates on developers act as a tax on new housing construction, deterring developers from constructing new market-rate units. The absence of such market-rate units prevents current occupants from leaving their existing market-rate housing, thereby preventing aspiring renters and owners from moving into these existing units as they “filter” downwards with the expansion of the housing supply.¹⁵³ Indeed, as Robert Ellickson noted more than 30 years ago, inclusionary requirements can be a covert way of excluding genuinely affordable housing, if the neighbors impose them for the purpose of driving away most new development while camouflaging their purpose with a few trophy units of affordable housing to show their lack of animus towards the poor or racial minorities.¹⁵⁴ Courts in New Jersey have expressly endorsed Ellickson’s suspicion about inclusionary zoning as an exclusionary tool, noting that inclusionary zoning that does not provide developers with sufficient upzoning benefits and “provides municipalities with an effective tool to exclude the poor by combining an affordable housing requirement with large-lot zoning.”¹⁵⁵

Determining the ratio of inclusionary to market-rate units, however, presents the legislature with a dilemma. On one hand, inclusionary units provide the political cover necessary to bring along the votes of the entire legislature for greater density, the same way pork-barrel spending can grease passage of important laws. On the other hand, legislators might be pressured into demanding an unrealistic ratio by neighborhood activists seeking to stop “incompatible” (read, any substantially denser) residential development. Even though the legislature as a whole might agree to increase the housing supply, with affordable housing providing political cover, they also are at risk of being waylaid by NIMBY neighbors—intent on simply stopping new development—using affordable housing requirements instrumentally to drive up the cost of development.

Planners provide an escape from this dilemma. Rather than attempt to devise the ratio themselves, the local legislature could delegate the task to an expert planning staff led by the mayor. Like a military base-closing commission, the staff would provide additional political cover for legislators in sensitive districts, allowing them to endorse the general idea of inclusionary zoning while feeling free to rail against the formula that the planning staff ultimately presents. These areas where the plan proposes new development can be spread around the city to avoid suspicions of dumping. Further,

Working Paper No. 08-02, 2008), <http://furmancenter.org/files/publications/31flavorsofZ9-9-08.pdf>.

153. See, e.g., Richard K. Green et al., *Metropolitan-Specific Estimates of the Price Elasticity of Supply of Housing, and Their Sources*, 95 AM. ECON. ASS’N. PAPERS & PROC. 334 (2005) (describing the economics of filtering).

154. Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981).

155. *In re Adoption of N.J.A.C.*, 6 A.3d 445, 461 (N.J. Super. Ct. App. Div. 2010).

planners can help break up an antidevelopment coalition by designating general criteria for growth areas where developers would presumptively be entitled to build upon proffering the staff-determined amount of affordable housing. This would make opposition take the form of opposing the goodies as well as the development. Finally, to ensure that the legislative attacks go no further than railing, the legislature could agree to debate the planning staff's proposal under a closed rule barring amendments: the price of opposition would thus be scuttling the entire deal.

Affordable housing is far from the only goodie that could be tied in fixed packages for zoning approvals. We particularly like the idea of tying packages of transportation upgrades to increases in the zoning envelope along the path of the upgrade. For instance, a Mayor could propose to the city council the development of an express train or simply greater frequency on a subway line (or the development of a rapid bus transit line) but state that the upgrades are contingent on a zoning amendment allowing increased development along the entire line. The council could, of course, order the Mayor to engage in the transportation upgrade even if it does not approve the set package of zoning changes. But the Mayor's ability to control the operation of the transportation system (and the threat that she would not let the project work without the full package) may be enough to hold together a whole set of zoning changes against opposition in individual neighborhoods. Further, if some form of "value capture" is used, such that revenue from new construction is being used to fund the transportation upgrades, the desire among residents to get the transportation upgrade may be enough to make the council approve the entire package of zoning changes.¹⁵⁶

Planners, in short, can advance the zoning budget by relieving the legislature of the politically sensitive task of designing the zoning budget tradeoffs by presenting the legislature with "take-it-or-leave-it" packages that are designed to be taken rather than left.

B. STANDARD "PRICE SHEET" FOR DENSITY INCREASES

A second proposal emanates from the insight of recent property theory that customization of property rights imposes costs on third parties. The idea that custom-tailored zoning erodes value by generally impeding the smooth functioning of land markets suggests that a comprehensive plan might be designed to serve the same function as New York City's 1811 grid. The grid standardized the packages in which real estate are purchased to rectangular city blocks of roughly 200 by 780 feet,¹⁵⁷ typically sold off in smaller rectangles

156. "Value capture" involves funding infrastructure improvements through taxes or special assessments on properties near the improvement, "capturing" the increased value created by the improvement. See Jeffrey Baltruzak, *The Core Plan or How I Learned to Stop Worrying and Love the Central City: Shifting Control of Regional Mass Transit to the Central City*, 5 PIERCE L. REV. 271, 284 (2007).

157. See Richard Howe, *Notes on 19th Century Lot Sizes*, GOTHAM CTR. FOR N.Y. CITY HIST. (Sept. 13, 2012), <http://www.gothamcenter.org/blog/notes-on-19th-century-lot-sizes>. The north-south

divisible by 25 feet in width. Such standardization of use rights is impractical, because the ideal use of land varies more widely than the ideal parcel size did in the 19th century.¹⁵⁸ The ideal intensity of uses for different neighborhoods varies radically, ranging from the quiet residential brownstone to the noisy and smelly factory.

Nevertheless, even though zoning should distribute use rights with less uniformity than parcel size and assign different packages of use rights for lots in different neighborhoods, the rights for each neighborhood could still be defined transparently, without customizing the rights for each lot within each neighborhood based on the owner's bargains with the city. Such uniform definitions of use rights would allow buyers to have a clearer idea of the uses accompanying title, thereby facilitating a cheap and quick market for real estate. By requiring that "[a]ll [zoning] regulations shall be uniform for each class or kind of buildings throughout each district,"¹⁵⁹ section 2 of the Standard Zoning Enabling Act could be understood as serving the same end as the *numerus clausus* principle, facilitating the marketability of land by constraining the multiplicity of customized rules.

A comprehensive plan should serve the function of such a customization-limiting constraint on zoning. One could imagine such a plan as a standard price sheet for use rights, defining with minute detail the conditions entitling a parcel's owner to a particular land use just as a menu specifies the price of an entrée.¹⁶⁰ Current uses and uses "as-of-right" would have a price of zero, as they could be unconditionally undertaken. Uses that were conditional on the fulfillment of some condition—building a plaza, donating money to a mass transit trust fund, widening a road, installing sewage lines, and so forth—would specify with precision the exact sort of amenity to install or the precise sum of money to pay for the right to build. Such a plan might also contain a timetable, specifying a schedule for enlarging uses or changing prices upon the occurrence of certain contingencies. The plan, for instance, might specify that if the vacancy rate for rental housing declines to a particular level, the

sides of the blocks under the 1811 plan varied between 181 and 206 feet but the average was almost exactly 200 feet. *Id.* The east-west sides averaged 780 feet varied much more, ranging from as short as 610 feet to as long as 920 feet. *Id.* According to Richard Howe, the only blocks that could be perfectly divided into rectangles evenly divisible by 25-foot wide lots are the 650-foot blocks between First and Second Avenues and 800-foot blocks between Sixth and Twelfth Avenues. *Id.*

158. Until building technology made it economically feasible to construct a tower using a substantial portion of a city block, there was little need to face the excruciating holdout problems accompanying the reassembly of many 25 x 100-foot rectangles into a supersized lot. Under modern building conditions, when the ideal lot size might vary much more radically, some sort of reaggregation device other than voluntary transactions or eminent domain might make sense. See generally Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465 (2008).

159. A STANDARD STATE ZONING ENABLING ACT § 2 (DEP'T OF COMMERCE 1926).

160. Lee Anne Fennell proposes something similar to this, although less tied to political process and with more sophisticated pricing mechanisms. FENNELL, *supra* note 77, at 103-06 (proposing "entitlements subject to a self-made option" as methods of pricing externalities).

permissible floor-area ratio for residential apartments shall automatically increase by a particular percentage. The critical characteristic of such an idealized plan-as-uniform-price sheet is transparency: anyone could see the uses accompanying title to land without haggling or making an ad hoc offer to enlarge the uses in exchange for an unlisted amenity.

While obviously an impractical fiction, such an idealized price sheet is nevertheless a useful heuristic to exhibit the costs of customization. The advantage of transparency is that it allows land-use markets to dispense with the costly machinery of negotiation—the lawyers, consultants, fixers, lobbyists, and accompanying hearings and negotiations—that clog the process by which land is bought and sold.¹⁶¹ Further, it allows purchasers to make comparisons between investment opportunities in different cities. Like the expensive and time-consuming title searches obviated by a simple grid, the expenses of the zoning negotiation game are a deadweight loss that serves neither the local government nor the real estate owner in a world in which the plan revealed the local government's ideal allocation of uses. The complaints of local government officials and landowners alike suggest that haggling at the zoning bazaar comes at a considerable cost. As William Stern, a former Chairman and Chief Executive of the New York State Urban Development Corporation noted that

complying with New York's Kafkaesque zoning code and its banana-republic process for approving building projects requires first and foremost a Herculean exercise in politics. It is hugely time-consuming and very expensive, not only because time is money, but because a developer has to schmear people, both publicly and sometimes not so publicly, every step of the way. One high-powered city developer put it bluntly: "You have to be a conniver to get things done."¹⁶²

Note that the gist of Stern's and others' complaint is not simply or even primarily that the process of individualized zoning negotiations is corrupt. Even honest negotiations are, per Stern, "time-consuming and very expensive."¹⁶³ This cost does not merely or primarily consist of fees for fixers and delay in breaking ground. Like the costs of an opaque title system, in which the expense of hearing a title search might be small potatoes compared

161. For an account of the magnitude of these expenses in New York City, see Eric Lipton, *Lobbyists Putting Muscle Behind Real Estate*, N.Y. TIMES (July 11, 2000), <http://www.nytimes.com/2000/07/11/nyregion/lobbyists-putting-muscle-behind-real-estate.html>.

162. William J. Stern, *Why Gotham's Developers Don't Develop*, CITY J. (Autumn 2000), http://www.city-journal.org/html/10_4_why_gothams.html. For similar complaints, see Peter Salins, *Simple Rules for a Complex Society: Redesigning New York's Zoning*, CITY J. (Winter 1993), <http://www.city-journal.org/article01.php?aid=1149>; Roger Starr, *How to Fix New York's Heavy-Handed Zoning Laws*, MANHATTAN INST. FOR POL'Y RES. (Apr. 1998), http://www.manhattan-institute.org/html/cb_12.htm.

163. Stern, *supra* note 162.

to the burden of transactions foregone because of legal uncertainty, the main costs of an opaque zoning system may well be the unseen and difficult-to-measure loss of bidders, as buyers drop out of the market, discouraged by their capacity to determine what land is really worth. The dominance of a few insiders who can bear the scale economies required for defining use rights leaves projects that are too small to bear the freight of land-use negotiating process unbuilt.

Why not dispense with this cost by plainly stating up front what can be built? There are three potential objections, one rooted in politics, another in the cost of determining best uses, and a final one from constitutional law.

First, complete transparency might trigger the collective action problem described in Part III.A.2 above. Neighbors are better organized than prospective users of proposed uses, such that plain rules clearly describing land-use entitlements would trigger activism by the former but not the latter. A plain statement that some existing structure could, for a price, be replaced by a bulkier or noisier structure upon fulfillment of specific conditions might cause the neighbors to shut down any such opportunities for additional development even though the benefits of the change in the status quo exceed the costs.

Second, in a world without such plan transparency, developers' custom-tailored proposals to change the land-use status quo might reveal potentially useful information that the local government might otherwise forgo. Local governments typically do not know the developer's bottom line, because developers do not open up their books to the public. The value of a change in the status quo, therefore, is unknown to local officials. Such ignorance might have both undesirable distributive and allocative inefficiency consequences. If the uniform price sheet sets the price "too low" such that the developer pays less than the value of a new land use, then the money left on the table might be regarded as distributively unjust (at least if one believes that the community is entitled to new value created by a change in the land-use status quo). If the price sheet sets the price too high, then developers might be deterred from building even when the benefits of going forward with a new structure exceed the costs imposed on the local government's constituents.

Neither of these objections, however, is fatal to the idea of increasing the transparency of zoning through a comprehensive plan. The need to keep land's development potential opaque to mute neighborhood protests, for instance, assumes that there is no "zoning budget" enforcement mechanism to keep NIMBY pressures in check. The plan itself can serve as such a measure, as described above in Part IV.A. Moreover, even if one worried that complete transparency would add to the political advantages of neighbors, one could modify the "price sheet" concept without wholly abandoning the advantages of a transparent market for land uses. The price sheet, for instance, could specify the land-use intensity not for particular parcels but rather for a

neighborhood, thereby diluting opposition that might mobilize against a particular level of intensity on a particular block. Such a diffuse specification of a neighborhood's average residential density would provide less information to potential buyers, but it would provide more than a zoning system that left the question entirely up for grabs. If the plan specified that proposals would be presumptively approved if they moved the neighborhood closer to the level of intensity described in the price sheet, then the plan would give buyers a reason to bid more for lots in the neighborhood.

As for information revealed through the bargaining process, its value must be discounted not only by the loss of transactions caused by the opacity of bargaining but also by local officials' inability to bargain effectively to acquire such information. If one sets up a bazaar and no one comes because they are deterred by the hassle of bargaining, then one has not gotten any useful information about consumer demand.¹⁶⁴ Uniform prices undoubtedly risk leaving money on the table, as no single price can perfectly capture the distinctive values associated with a land use at a unique site.¹⁶⁵ It is not, however, obvious that local officials have the expertise to induce developers to reveal their bottom line. As William Whyte noted with respect to "incentive zoning" schemes, the rents that developers derived from FAR bonuses under a vague discretionary conditional use procedure routinely exceeded the aesthetic and social value of the infrastructure that they proffered in return.¹⁶⁶ Whyte's prescription was specification in minute detail of precisely the sort of plazas that developers should supply in exchange for extra FAR (i.e., a uniform price sheet).¹⁶⁷

Finally, the Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District* might be understood to require such clear conditions to be subject to review under the Takings Clause, which would undermine the benefits of clarity.¹⁶⁸ It is hard to say exactly what *Koontz* means and how important it will turn out to be, but if it ends up meaning that transparency in land-use deals is impossible, it will have the ironic effect of being a decision that sounds protective of the interests of developers but turns out to harm them as a class.

164. For an example of a bazaar that was defeated by such transaction costs, see Hiten Samtani, *Developers, Wary of Cost and Delay, Spurn City's Landmark Transfers Program for Air Rights*, REAL DEAL (Jan. 29, 2013, 2:00 PM), <http://therealdeal.com/blog/2013/01/29/developers-spurn-citys-landmark-transfers-air-rights-program> (noting that New York City's system granting developers TDRs in exchange for landmarked buildings is rarely used because of the costs of the discretionary system of TDR approval).

165. See generally FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, *BUYING SKY: THE MARKET FOR TRANSFERABLE DEVELOPMENT RIGHTS IN NEW YORK CITY* (2013), http://furmancenter.org/files/BuyingSky_PolicyBrief_21OCT2013.pdf.

166. WILLIAM H. WHYTE, *CITY: REDISCOVERING THE CENTER* 229–55 (2009).

167. *Id.* We are not endorsing the specifics of Whyte's proposal, but rather the clarity of the demand.

168. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

V. CONCLUSION: WHAT HAPPENED TO REAL PROPERTY IN MODERN PROPERTY LAW THEORY?

In addition to offering a set of policy prescriptions, we also suggest a new focus for academic theories of property law, away from the substance of common-law rules and towards the processes and institutions that govern land more generally. Private law substance and public law process are so seamlessly connected to each other that a “unified field theory” covering both is essential for any theory of private entitlements.

The promise of and necessity for such a unified theory of private and public law is suggested by Thomas Merrill and Henry Smith’s path breaking work on information costs and the common law of in rem rights. Merrill and Smith fundamentally altered legal academic thinking about private property by focusing on how the common law protects third parties from the information costs inflicted by owners’ customization of in rem rights through contract.¹⁶⁹ Their insight, however, invites an “institutional turn” towards analyzing how to minimize information costs in legislative settings. Merrill and Smith themselves provide little such analysis beyond their hypothesis that customization should be left to legislatures rather than courts, because legislatures will somehow provide more comprehensive, stable, and clear determinations of property rights than the judiciary.¹⁷⁰ As our discussion of unplanned bargaining over zoning map amendments indicates, however, this optimism about local legislatures is unwarranted: the deals struck by developers and local legislatures tend to be individualized and opaque, imposing substantial costs on third parties seeking to purchase land within a community where they are not well connected insiders. (Third-party prospective purchasers are not the only ones burdened by the opacity of zoning deals: ordinary users often cannot determine whether or not they are trespassers or entitled beneficiaries on the plazas and parks that developers provide to cities in exchange for zoning bonuses.)¹⁷¹

The penchant of local legislatures for opaque, ad hoc deals rather than transparent and comprehensive rules is no accident. Local legislatures’ internal organization—in particular, their lack of partisan competition—gives them systematic incentives to delegate customization of zoning rights to their

169. “Merrill and Smith’s writings have permanently altered legal academic thinking about the nature of private property.” Ellickson, *supra* note 114, at 218.

170. Merrill & Smith, *Numerus Clausus*, *supra* note 1212, at 8.

171. For instance, consider questions about who can use New York City’s “privately owned public spaces,” plazas that developers of office towers build in return for density bonuses. *See generally* JEROLD S. KAYDEN, PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK CITY EXPERIENCE (2000). The information costs for owners—50% of whom are not in compliance with the law—and the public created by this complex legal regime became national news, as one of these spaces, Zuccotti Park, was the location of the Occupy Wall Street protest. Lisa W. Foderaro, *Privately Owned Park, Open to the Public, May Make Its Own Rules*, N.Y. TIMES (Oct. 13, 2011), <http://www.nytimes.com/2011/10/14/nyregion/zuccotti-park-is-privately-owned-but-open-to-the-public.html>.

individual members who, in turn, have little incentive to pay attention to the citywide goals of easily marketable land and abundant housing supply. Merrill and Smith paid little attention to these incentives, because they paid no attention to public law, instead focusing on hoary common-law doctrines to the neglect of zoning, subdivision law, environmental impact review, and other procedures through which agencies and legislatures impose ad hoc conditions on development that can dwarf in importance the ancient lights doctrine, spite fences, and the Rule Against Perpetuities or other staples of the 1L Property curriculum.¹⁷²

By focusing on processes and institutions of public law rather than the substance of common law, property scholarship can take an “institutional turn” familiar from other areas of the law.¹⁷³ The most promising work in property scholarship already has taken that turn, merging private- and public-law concepts to focus on how different institutions and processes from overlapping jurisdictions, public and private, govern land.¹⁷⁴ Because the common law has been increasingly subsumed as a minor subset of the constitutional, administrative, and statutory rules governing land, modern property theory should focus on how those rules are shaped by the institutions and processes that govern legislatures, courts, and agencies. This Article focuses on planners, nonpartisan or one-party local legislatures, and mayors, but these are only a handful of the law-making institutions that are part of the mix. By moving away from debating what the common law’s rules ought to be and instead examining how decision-making bodies will predictably behave to

172. As indication of how increasingly marginal common-law doctrines like nuisance are compared to zoning as a mechanism for land-use control, consider that Smith’s 2004 article on nuisance quotes as many cases from the 1900 and 1910s as it does from the 1990s and 2000s (which is particularly notable because most of the cases from after 1990 are not nuisance cases, but are takings and possession cases used to establish general propositions). Smith, *Exclusion and Property Rules*, *supra* note 116 (citing 11 cases after 1990, 11 from 1900 to 1920, and 11 from 1860 to 1890).

173. See, e.g., Heather K. Gerken & Michael S. Kang, *The Institutional Turn in Election Law Scholarship*, in RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 86, 89 (Guy-Uriel E. Charles et al. eds., 2011) (advocating an institutional turn in election law scholarship); Sunstein & Vermeule, *supra* note 13, at 889–95 (advocating for an “institutional turn” in constitutional law); William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006)) (discussing no fewer than three separate institutional turns in statutory interpretation).

174. See, e.g., Abraham Bell & Gideon Parchomovsky, *Governing Communities by Auction*, 81 U. CHI. L. REV. 1 (2014); Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72 (2005); Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607 (2010); Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751 (2009); Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 2000 (2012); Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888, 891–92 (2006); Serkin, *supra* note 73; Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53; Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004).

produce better rules, property theory will finally be able to focus on the principles and actors that define how rights in land are really customized, standardized, restricted, and enlarged.