The Constitutional Case Against Exclusionary Zoning

Joshua Braver* and Ilya Somin**

We argue that exclusionary zoning—the imposition of restrictions on the amount and types of housing that property owners are allowed to build—is unconstitutional because it violates the Takings Clause of the Fifth Amendment. Zoning has emerged as a major political and legal issue. A broad cross-ideological array of economists and land-use scholars have concluded that it is responsible for massive housing shortages in many parts of the United States, thereby cutting off millions of people—particularly the poor and minorities—from economic and social opportunities. In the process, it also stymies economic growth and innovation, making the nation as a whole poorer.

Exclusionary zoning is permitted under Village of Euclid v. Ambler Realty, *the 1926 Supreme Court decision holding that zoning is largely exempt from constitutional challenge under the Due Process Clause of the Fourteenth Amendment, and by extension also the Takings Clause. Despite the wave of academic and public concern about the issue, so far, no modern in-depth scholarly analysis has advocated overturning or severely limiting* Euclid. *Nor has any scholar argued that exclusionary zoning should be invalidated under the Takings Clause, more generally.*

We contend Euclid *should be reversed or strictly limited, and that exclusionary zoning restrictions should generally be considered takings requiring compensation. This conclusion follows from both originalism and a variety of leading living constitution theories. Under originalism, the key insight is that property rights protected by the Takings Clause include not only the right to exclude, but also the right to use their property. Exclusionary zoning violates this right because it severely limits what owners can build on their land. Exclusionary zoning is also unconstitutional from the standpoint*

* Assistant Professor of Law, University of Wisconsin Law School.

** Professor of Law, George Mason University. For helpful comments, suggestions, and criticism, we thank Vicki Been, Molly Brady, Bryan Caplan, Anuj Desai, Ezra Rosser, Bill Treanor, Eric Claeys, Chris Elmendorf, Richard Epstein, Ethan Blevins, Jim Burling, David Schleicher, Gerald Dickinson, James Ely, James Fleming, Gary Lawson, Michael Wolf, Julia Mahoney, Christopher Serkin, Joseph Fishkin, Daniel Rodriguez, Kathy Zeiler, and participants in the Pacific Legal Foundation symposium on *Penn Central v. City of New York*, and the Boston University Law and Economics Seminar. We also thank Ian Davis, Clayton Goetz, Leigha Wentz, Tyler Lardieri, and William Sandberg for valuable research assistance.

of a variety of progressive living constitution theories of interpretation, including Ronald Dworkin's "moral reading," representation-reinforcement theory, and the emerging "anti-oligarchy" constitutional theory. The Article also considers different strategies for overruling or limiting Euclid, *and potential synergies between constitutional litigation and political reform of zoning.*

Introduction

Exclusionary zoning has emerged as a major political and legal issue. A broad, cross-ideological array of economists and land-use scholars have concluded that it is responsible for massive housing shortages in many parts of the United States, and that it cuts off millions of people—particularly the poor and minorities—from economic and social opportunities.[1] In the

1. *See generally* RICHARD D. KAHLENBERG, EXCLUDED: HOW SNOB ZONING, NIMBYISM, AND CLASS BIAS BUILD THE WALLS WE DON'T SEE (2023) (examining exclusionary zoning as a form of social engineering that reinforces racial disparities and exacerbates the affordability crisis); ROBERT C. ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING (2022) (observing that exclusionary zoning policies, many of which have their roots in classism and racism, impose substantial economic costs on excluded parties); JAMES S. BURLING, NOWHERE TO LIVE: THE HIDDEN CAUSES OF AMERICA'S HOUSING CRISIS (2024) (arguing that the affordable housing crisis is a result of residential zoning policies implemented to maintain economic and racial segregation); *Increasing the Supply of Affordable Housing: Economic Insights and Federal Policy Solutions*, *in* COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 143 (2024) (summarizing the causes of, effects from, and federal solutions to persistent market failure in housing through a survey of the social science and historical literature on the topic); BRYAN CAPLAN, BUILD, BABY, BUILD: THE SCIENCE AND ETHICS OF HOUSING REGULATION (2024) (describing the causes and impact of housing regulation shortages); Philip G. Hoxie, Donald Shoag & Stan Veuger, *Moving to Density: Half a Century of Housing Costs and Wage Premia from Queens*

process, it also stymies economic growth and innovation, making the nation as a whole poorer.

Scholars and policy analysts across the political spectrum have advocated policy changes to cut back on exclusionary zoning.[2] A number of states have, in recent years, enacted reform legislation.[3] But serious problems remain in many parts of the country, and some reform efforts have failed or stalled.[4]

Despite the wave of academic and public concern about the issue, so far, no modern in-depth scholarly analysis has advocated overturning or severely limiting *Village of Euclid v. Ambler Realty*,[5] the 1926 Supreme

to King Salmon, 222 J. PUB. ECON. 1 (2023) (finding zoning restrictions greatly reduce labor mobility); Edward Pinto & Tobias Peter, *How Government Policy Made Housing Expensive and Scarce, and How Unleashing Market Forces Can Address It*, 25 CITYSCAPE, no. 3, 2023, at 123 (summarizing extensive evidence and history of the racial and economic effects of zoning and recommending the adoption of light-touch density policies to gradually increase the housing supply); Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS., no. 1, 2018, at 3 (reviewing extensive literature on the economic effects of housing regulations and recent attempts to soften zoning laws); Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism Revisited* (N.Y.U. L. & Econ. Rsch. Paper Series, Working Paper No. 24-12, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4629628 [https://perma.cc/HWQ9-ZTAG] (reviewing the impacts of housing supply on housing affordability and critiquing reasons for "supply skepticism"); David Schleicher, *Stuck! The Law and Economics of Residential Stability*, 127 YALE L.J. 78 (2017) (arguing that state and local microeconomic policies have created substantial barriers to interstate mobility, causing declining rates of interstate mobility which have in turn "created problems for federal macroeconomic policymaking"); Joseph Gyourko, Jonathan Hartley & Jacob Krimmel, *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26573, 2019), https://www.nber.org /system/files/working_papers/w26573/w26573.pdf [https://perma.cc/Y6AK-GY5W] (analyzing how local housing development regulation affects prices and affordability and acknowledging that such regulations can negatively impact affordability for low- and middle-income households); Ezra Rosser, *The* Euclid *Proviso*, 96 WASH. L. REV. 811, 824–49 (2021) (reviewing extensive evidence of how zoning impacts the "racial and economic status quo"); Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS INST. (Apr. 24, 2017), https://www.brookings.edu /research/reforming-land-use-regulations/amp/ [https://perma.cc/PM8X-Q2FZ] (evaluating the economic impacts of land use regulations and advocating for certain reforms); Gilles Duranton & Diego Puga, *Urban Growth and Its Aggregate Implications*, 91 ECONOMETRICA 2219 (2023) (developing an urban growth model to assess the effect of zoning regulations on economic growth); Alex Horowitz & Ryan Canavan, *More Flexible Zoning Helps Contain Rising Rents*, PEW CHARITABLE TRS. (Apr. 17, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/04/17/more-flexible-zoning-helps-contain-rising-rents [https://perma.cc/7ZWL-ZYZ4] (considering the effect of relaxed zoning laws on rent growth).

2. *See* sources cited *supra* note 1 (presenting wide range of arguments for zoning reform).

3. For an overview of recent efforts, see Eli Kahn & Salim Furth, *Breaking Ground: An Examination of Effective State Housing Reforms in 2023*, MERCATUS CTR. (Aug. 1, 2023), https://www.mercatus.org/research/policy-briefs/breaking-ground-examination-effective-state-housing-reforms-2023 [https://perma.cc/35RG-THGH].

4. *See*, *e.g.*, *id.* (describing failed reform efforts in Arizona, Colorado, and New York).

5. 272 U.S. 365 (1926).

Court decision holding that exclusionary zoning is largely exempt from constitutional challenge under the Due Process Clause of the Fourteenth Amendment, and by extension also the Takings Clause of the Fifth Amendment, which requires the government to pay "just compensation" whenever it takes "private property."[6] Nor has any argued that exclusionary zoning should be invalidated under the Takings Clause, more generally.

Scholars such as Eric Claeys, Richard Epstein, and Bernard Siegan have briefly criticized *Euclid*, arguing it was wrongly decided.[7] But they have not outlined a strategy for reversing or limiting the ruling, nor related their critiques to more general originalist or living constitutional theories of interpretation.

This Article fills that gap. We contend that *Euclid* should be reversed or strictly limited, and that exclusionary zoning restrictions should generally be considered takings requiring compensation. We further contend this conclusion follows from both originalism and a variety of leading living constitution theories.

By "exclusionary zoning," we mean the imposition of restrictions—mostly by state and local governments—on the amount and types of housing that property owners are allowed to build on their land. We especially have in mind single-family zoning (which bars multifamily residences), minimum lot size requirements, and other restrictions that preclude the construction of housing affordable to potential lower-income residents. We do not, at least in this Article, address zoning restrictions on other types of construction and land uses, though some of our analysis may have implications for those kinds of policies.[8]

Part I of this Article briefly outlines the history and extent of exclusionary zoning, and the enormous harm it causes. Part II explains why exclusionary zoning is generally unconstitutional under originalist understandings of the Takings Clause. That applies from the standpoint of both 1791 (when the Fifth Amendment was first enacted) and 1868, when it became applicable against state governments as a result of the Fourteenth

6. U.S. CONST. amend. V.

7. *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1627, 1634–35 (2003) (contending that the *Euclid* court "turned a blind eye to the discrepancies between zoning and nineteenth-century conceptions of the police power"); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 131–34 (1985) (criticizing *Euclid*'s failure to analyze whether the ordinance in question's stated ends justified its means, thereby giving "carte blanche" to overbroad modern zoning); BERNARD H. SIEGAN, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 90–97 (1997) (taking issue with, among other things, *Euclid*'s logical inconsistency with other contemporaneous cases prioritizing Fourteenth Amendment freedoms over the police power, as well as its failure to discuss less-restrictive means of protecting health and safety).

8. Most obviously, we do not consider construction for commercial and industrial uses.

Amendment. The key point here is that the understanding that the property rights protected by the Takings Clause included the right to use property, as well as the right to prevent physical occupation and appropriation of land. Some constraints on the right to use arise from the police power—government's authority to protect health and safety. These constraints provide a limiting principle for the extent of protection for the right to use under the original meaning. But the police power exception cannot justify most exclusionary zoning.

Part III addresses exclusionary zoning from the standpoint of a variety of living constitution theories of interpretation, including Ronald Dworkin's "moral reading," representation-reinforcement theory, and the emerging "anti-oligarchy" constitutional theory.[9] All three provide support for at least some substantial judicial intervention to curb exclusionary zoning. Finally, Part IV briefly considers different strategies for overruling or limiting *Euclid* and synergies between constitutional litigation and political reform strategies. The history of previous constitutional reform movements—including efforts to protect property rights—suggests that litigation and political reform efforts are complements, not substitutes. Each can reinforce the other.

It is worth noting that our project is itself an example of how this issue cuts across conventional ideological and theoretical divides. One of us (Braver) is a progressive and a living constitutionalist. The other (Somin) is a libertarian and generally sympathetic to constitutional originalism. We differ on many things, but agree here.

I. The Problem of Exclusionary Zoning

Zoning policy emerged in the early twentieth century as a tool of social planning, including addressing harmful uses of land arguably exacerbated by the industrial revolution.[10] In order to achieve these goals, industrial uses were, in many cases, separated from residential ones, and residential construction was limited as well.[11] These seemingly benign motivations for

9. For the "anti-oligarchy" constitutional theory, we focus on JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022). For another account of the relationship between economic equality and constitutionalism that shares much of the same spirit as the Fishkin–Forbath book, see GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (1st ed. 2017).

10. For an overview of the development of zoning, see SONIA A. HIRT, *Roots*, *in* ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 90 (2014); *see also* STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 183–90 (2011) (recounting the implementation and legal history of city ordinances in the United States starting in the early twentieth century).

11. Hirt, *supra* note 10, at 107–08.

zoning were coupled with extensive efforts to promote residential segregation by race and class.[12] Planners and local governments sought to bar racial minorities—particularly blacks—from settling in majority-white neighborhoods, and the poor from moving into middle-class and wealthy areas.[13] As leading property scholar and legal historian Stuart Banner puts it, "[f]rom the beginning, zoning was as much about excluding undesirable people as about excluding undesirable uses of land."[14]

In 1917, the Supreme Court's ruling in *Buchanan v. Warley*[15] explicitly invalidated racial zoning ordinances, which openly restricted residential mobility based on race.[16] In the aftermath of *Buchanan*, many local governments around the country enacted facially neutral zoning restrictions that were nonetheless intended to exclude minority groups based on race, and did so on an enormous scale.[17] Legal challenges to facially race-neutral zoning restrictions also emerged, the most significant being claims that it violated the Due Process Clause of the Fourteenth Amendment, the Takings Clause of the Fifth Amendment, and various provisions of state constitutions.[18] The Supreme Court ultimately rejected those challenges in its famous 6–3 ruling in *Village of Euclid v. Ambler Realty* in 1926.[19]

Euclid upheld severe zoning restrictions that categorically banned the construction of multi-family housing in large parts of the city of Euclid, a suburb of Cleveland.[20] The majority opinion by Justice Sutherland held that there was no unconstitutional infringement of property rights because the measures in question come within the scope of the state's "police power" to protect health, safety, and public welfare.[21] Moreover, the Court was very deferential in reviewing government claims that police power objectives

12. For extensive overviews of how zoning was used to promote segregation, see RICHARD ROTHSTEIN, THE COLOR OF LAW: THE FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017); JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITIES IN AMERICAN CITIES 85–100 (2018); and Christopher Silver, *The Racial Origins of Zoning: Southern Cities From 1910–40*, 6 PLANNING PERSPS. 189 (1991).

13. *See* works cited *supra* note 12 (presenting evidence on the use of zoning ordinances to promote race and class segregation); BANNER, *supra* note 10, at 183–86 (recounting the evolution of city ordinances by local governments throughout the United States).

14. BANNER, *supra* note 10, at 190.

15. 245 U.S. 60 (1917).

16. *Id.* at 82.

17. *See* works cited *supra* note 1 (summarizing the literature of zoning ordinances in the United States); BANNER, *supra* note 10, at 183–85 (discussing the enactment of zoning restrictions around the United States).

18. For overviews of early zoning challenges, see BANNER, *supra* note 10, at 187–88; and MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *EUCLID V. AMBLER* 21–23 (2008).

19. 272 U.S. 365 (1926); for a detailed history of the case, see WOLF, *supra* note 18, at 22–23.

20. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 381–82 (1926).

21. *Id.* at 387–91, 397.

would actually be achieved by the restrictions, favorably quoting a Louisiana state court decision that had upheld exclusionary zoning on the grounds that "'[i]f the municipal council deemed any of the reasons which have been suggested, or any other substantial reason, a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council.'"[22]

In adopting this highly deferential approach, the Court ignored trial court findings indicating that the true purpose of the Euclid zoning restrictions was in fact to promote economic segregation: excluding the poor and working class from middle-class areas. As the district court opinion by Judge David Westenhaver found:

> The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth . . . .[23]

From the standpoint of at least some of the justices in the Supreme Court majority, this exclusionary aspect of the zoning restrictions was likely a feature, not a bug. Justice Sutherland and his conservative colleagues on the Court were ready to strike down the zoning restrictions at issue, until the dissenting justices apparently convinced him otherwise; in his opinion, Sutherland adopted language from a late-filed brief by Alfred Bettman of the National Conference on City Planning, which pointed out that doing so might make it easier for poor and working-class people to move to affluent neighborhoods.[24] Three conservative justices still dissented without opinion.

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22. *Id.* at 393 (quoting State v. City of New Orleans, 154 La. 271, 283 (1923)).

23. Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

24. *See* Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946) (suggesting that Sutherland changed his mind after submission of the brief and a discussion of the case with the then-dissenting justices); Richard H. Chused, Euclid*'s Historical Imagery*, 51 CASE W. RESERVE L. REV. 597, 613–14 (2001) (discussing how Sutherland adopted the imagery and phrasing of Bettman's brief in his opinion).

But Justice Sutherland and Chief Justice William Howard Taft cast crucial votes for the majority that were likely influenced by the Bettman brief.[25]

The district judge also presciently warned that upholding the *Euclid* ordinance would set a precedent empowering municipalities to use zoning ordinances for purposes of racial exclusion. Analogizing the *Euclid* restrictions to the racial segregation in *Buchanan*, he suggested that:

> [T]he next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance.[26]

The judge's bigoted assumptions about the effects of allowing "colored or certain foreign races" to move into an area should not blind us to the validity of his point.

Euclid did not categorically ban all takings claims or other constitutional challenges to zoning ordinances. It left open the possibility that some more extreme ones might still be unconstitutional, at least on an as-applied basis.[27] But the highly deferential approach adopted by Justice Sutherland in practice blocked virtually all meaningful challenges.[28]

In the immediate aftermath of *Euclid*, the Supreme Court seemed to limit its impact by striking down zoning restrictions in two later cases.[29] But these two decisions ended up having little effect, and *Euclid* over time became the dominant precedent in the field.[30]

It is arguable that *Euclid* only applies to challenges to zoning under the Due Process Clause of the Fourteenth Amendment, not the Takings Clause of the Fifth Amendment.[31] The Supreme Court's decision only cites the former, without any reference to the latter,[32] though Judge Westenhaver also relied on takings liability in the lower court ruling.[33] The Supreme Court's

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25. *Euclid*, 272 U.S. at 379, 397; *see also* Chused, *supra* note 24, at 613–14 (suggesting that the majority opinion was heavily influenced by the Bettman brief).

26. *Euclid*, 297 F. at 313.

27. *Euclid*, 272 U.S. at 397.

28. Banner, *supra* note 10, at 189.

29. Nectow v. City of Cambridge, 277 U.S. 183,189 (1928); Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122–23 (1928). For an analysis of these two decisions, and their potential to limit the effects of *Euclid*, see SIEGAN, *supra* note 7, at 99–102.

30. SIEGAN, *supra* note 7, at 102.

31. The implications of this point are further developed in Part IV, *infra*.

32. *Euclid*, 272 US. at 395–97.

33. Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 313 (N.D. Ohio 1924) (noting that the case implicated constitutional protections "against a taking without compensation" under both the Federal and state constitutions).

stance was based on the fact that, during this period, the Supreme Court had not yet recognized the Takings Clause as incorporated against state and local governments; as a result, challenges to state and local takings in federal court could only be brought under the Due Process Clause.[34] Indeed, the Supreme Court has—to this day—never explicitly decided a case that incorporates the Takings Clause. It has instead read incorporation back into late-nineteenth century cases that did *not*, in fact, incorporate the Clause.[35]

In principle, today, zoning restrictions can still be challenged under the 1978 *Penn Central* decision, which sets out three factors that must be weighed in determining whether a regulatory action that doesn't involve a physical invasion of property is a taking: "[t]he economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the government action."[36] None of the three elements of the test are individually dispositive.

Penn Central-balancing-test cases are often difficult to evaluate because of the vagueness of the three criteria and the lack of precise guidance on how to weigh them against each other. Nonetheless, courts generally apply the *Penn Central* test in ways that favor the government.[37] In 2002, the Supreme Court majority itself indicated that the *Penn Central* test had become the "polestar" of its regulatory takings jurisprudence in large part because it shielded from invalidation "numerous practices that have long been considered permissible exercises of the police power."[38] In combination with *Euclid*, *Penn Central* makes it almost impossible for takings claims to prevail against exclusionary zoning restrictions.

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34. For a discussion on this point, see ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* & THE LIMITS OF EMINENT DOMAIN, 124–26 (The Univ. of Chi. Press rev. ed. 2016).

35. *See id.* (describing how early Supreme Court takings cases rested on the application of the substantive due process clause under the Fourteenth Amendment, *not* the Fifth Amendment Public Use Clause); Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings 'Muddle,'* 90 MINN. L. REV. 826, 844–55 (2006) (discussing the confused history of Takings Clause incorporation).

36. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

37. *See, e.g.*, Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 HARV. ENV. L. REV. 339, 344 (2006) (arguing that the majority of the Court's justices apply the *Penn Central* test in a way that is generally deferential to the government and noting that the "conventional wisdom" among "land-use lawyers" interprets the Court's application of the test that way); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 333 (2007) (noting that property owners rarely prevail in the Supreme Court under the *Penn Central* test); James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM & MARY L. REV. 1, 59, 63–64 (2017) (finding that only 9.9% of regulatory takings claims are successful and concluding that such claims almost always fail unless they fall under a per se rule).

38. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 326 n.23, 335 (2002) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001)).

The harmful effects of the exclusionary zoning licensed by *Euclid* and later cases are enormous. In an important recent study, economists Gilles Duranton and Diego Puga found that abolition of zoning restrictions in seven major U.S. urban areas would increase per capita U.S. output by almost 8%.[39] Nationwide reforms would likely have even bigger effects.

This is not surprising given that, as of 2019, some 75% of all land zoned for residential uses in most American cities was limited to single-family residences only.[40] In California, a recent analysis found that over 95% of all residential areas are zoned for single-family homes only.[41] SB 9, a recent reform enacted in 2021, allows owners of single-family homes to subdivide their property;[42] but a recent court decision held that the provision is illegal under the state's constitution as applied to California's 121 charter cities.[43] Such widespread restrictions are severe constraints on the construction of multifamily housing affordable to working and lower-middle class people.

Estimates of the impact of zoning are only imprecise approximations. But even if they greatly overstate the benefits of zoning deregulation and the real benefits are only one-half or one-third as large as studies suggest, the effects would still be enormously significant. Even such relatively modest restrictions as minimum lot size requirements can also have big effects in reducing the availability of housing and increasing its price.[44] Recent research also finds large negative economic effects of zoning restrictions on commercial development.[45]

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39. Gilles Duranton & Diego Puga, *Urban Growth and Its Aggregate Implications*, 91 ECONOMETRICA 2219, 2222 (2023).

40. Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES: THE UPSHOT (June 18, 2019), https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html [https://perma.cc/ZM94-HM4N].

41. Stephen Menendian, Shahan Shahid Nawaz & Samir Gambhir, *Single-Family Zoning in California: A Statewide Analysis*, OTHERING & BELONGING INST. (May 22, 2024), https://belonging.berkeley.edu/single-family-zoning-california-statewide-analysis [https://perma.cc/KRF4-L9SM].

42. CAL. GOV'T CODE § 66411.7 (West, 2024) (held unconstitutional Apr. 22, 2024).

43. City of Redondo Beach v. Bonta, No. 22STCP01143, 2024 WL 1860434 at *8 (Cal. Super. Ct. Apr. 22, 2024).

44. *See, e.g.*, Joseph Gyourko & Sean McCulloch, *Minimum Lot Size Restrictions: Impacts on Urban Form and House Price at the Border* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31710, 2023), https://www.nber.org/papers/w31710 [https://perma.cc/422L-NRRC] (finding that the most restrictive lot size regulations increase prices by 11% relative to the least restrictive).

45. *See* Fil Babalievsky, Kyle F. Herkenhoff, Lee E. Ohanian & Edward C. Prescott, *The Impact of Commercial Real Estate Regulations on U.S. Output* (Nat'l Bureau of Econ. Rsch., Working Paper No. 31895, 2023), https://www.nber.org/papers/w31895 [https://perma.cc/L45S-FFUW] (creating a model to identify how commercial development decisions are distorted by zoning and other restrictive regulations).

An influential 2019 article by economists Chang-Tai Hsieh and Enrico Moretti, which also found that zoning has large growth-stifling effects,[46] has come under serious criticism for possible calculation errors.[47] As of this writing, the debate over its validity remains unresolved, as Hsieh contends the critique of the results by economist Brian Greaney is wrong.[48] But there is extensive evidence of the massively harmful effects of exclusionary zoning, even aside from the Hsieh–Moretti study.

While there is broad agreement among scholars that current zoning regulations are excessive and severely harmful, some nonetheless offer at least qualified defenses of exclusionary zoning on the grounds that it protects the interests of local property owners, and that eliminating it may not significantly increase housing supply, in part due to the possibility that public land-use restrictions will simply be replaced by private ones organized by homeowners' associations (HOAs) and similar organizations.[49] We do not attempt to fully evaluate this debate here, as our Article is largely focused on constitutional issues. But we believe the main tenets of the new defenses of zoning have been effectively rebutted by critics such as David Schleicher, Ezra Rosser, and Vicki Been and her coauthors.[50] One of us has previously addressed the argument that HOA restrictions on land-use are comparable to

46. Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS Apr. 2019, at 1–2.

47. For overviews of the methodological controversy, see Salim Furth, *An Autopsy of Hsieh & Moretti (2019)?*, MKT. URBANISM (Nov. 13, 2023), https://marketurbanism.com/2023/11/13/an-autopsy-of-hsieh-moretti-2019/ [https://perma.cc/77SQ-6MM3] and Ilya Somin, *Controversy Over an Important Article Finding Large Negative Effects of Zoning*, REASON: VOLOKH CONSPIRACY (Nov. 29, 2023, 3:26 PM), https://reason.com/volokh/2023/11/29/controversy-over-an-important-article-finding-large-negative-effects-of-zoning/ [https://perma.cc/6D66-P6P7].

48. See Somin, *supra* note 47, for links to the critique, Hsieh's response, and Greaney's rejoinder, all of which at this time are still unpublished.

49. *See, e.g.*, Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1810 (2021) (arguing that the consensus on zoning deregulation cannot address the full issue of geographic inequality); Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 754 (2020) (stating that homeowners associations could be even more restrictive to change than zoning regulations); Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PENN. L. REV. 125, 129, 131–32 (2021) (contending that centralized deregulation regarding state-level land use may benefit investors over residents).

50. *See generally* David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WISC. L. REV. 1315 (2021) (contending that zoning in rich cities and regions continues to be a substantive issue); Been, Ellen & O'Regan, *supra* note 1 (concluding that the increased supply of homes makes housing more affordable but notes evidence gaps); Rosser, *supra* note 1 (arguing that zoning needs to move towards more permissive regional or state approaches).

exclusionary zoning[51] and outlined reasons why current homeowners can often benefit from zoning reform.[52]

As already noted, the harms of exclusionary zoning are enormous even if their true size is "only" a third or a half of what economists estimate. One leading defender of zoning even concedes that he "does not contest the chief harms of exclusionary zoning . . . ."[53] It would take a lot to outweigh the benefits of eliminating those harms, and defenders of zoning have so far failed to come up with anything approaching that magnitude.

II. Originalism

Because zoning did not emerge until the early twentieth century,[54] its constitutionality was not directly considered either at the time of the enactment of the Fifth Amendment in 1791, or when the Fourteenth Amendment made it and all or most of the rest of the Bill of Rights applicable against state and local governments (the levels of government that enact almost all zoning restrictions) in 1868. Thus, there is no absolutely definitive originalist evidence on the question of whether exclusionary zoning violates the Takings Clause.

But there is highly relevant evidence nonetheless. It arises from the principle that the "private property" protected by the Takings Clause includes not just the right of exclusion and the right to transfer property, but also a right over the use of the property. Individuals acquire property for a vast range of purposes of uses, such as building rental facilities, housing one's own family, or operating a business. And within these broad categorical buckets, there is an almost infinite range of choice of use, such as the size of the building, the color, height, and more. Judge Westenhaver highlighted the significance of the right to use in his lower court opinion, overruled by the Supreme Court in *Euclid*:

> The argument supporting this ordinance proceeds, it seems to me, both on a mistaken view of what is property and of what is police power. Property, generally speaking, defendant's counsel concede, is protected against a taking without compensation, by the guaranties of the Ohio and United States Constitutions. But their view seems to be that so long as the owner remains clothed with the legal title thereto

51. ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION AND POLITICAL FREEDOM 86–87 (rev. ed. 2022).

52. Ilya Somin, *Beyond NIMBY vs. YIMBY—How Current Homeowners Can Benefit from Zoning Deregulation*, REASON: VOLOKH CONSPIRACY (June 15, 2022, 4:27 PM), https://reason.com/volokh/2022/06/15/beyond-nimby-vs-yimby-how-current-homeowners-can-benefit-from-zoning-deregulation/ [https://perma.cc/BM9J-AEFL].

53. Schragger, *supra* note 49, at 125.

54. *See* discussion *supra* Part I.

> and is not ousted from the physical possession thereof, his property is not taken, no matter to what extent his right to use it is invaded or destroyed or its present or prospective value is depreciated. This is an erroneous view. The right to property, as used in the Constitution, has no such limited meaning. As has often been said is substance by the Supreme Court: "There can be no conception of property aside from its control and use, and upon its use depends its value." See *Cleveland, etc., Ry. Co. v. Backus*, 154 U.S. 439, 445 . . . [55]

Judge Westenhaver relied on late-nineteenth-century Supreme Court precedent to emphasize the significance of "control and use."[56] But that position had deep roots in the dominant legal conceptions of property in both the Founding Era and 1868.

Modern originalists differ among themselves as to whether the relevant original understanding of provisions of the Bill of Rights applied against the states is that of 1791 or 1868. We do not attempt to resolve that dispute here.[57] Instead, we consider both periods. Both suggest that the relevant property rights included a right to use, not merely a right against physical seizure of property by the state. And any plausible right to use surely includes a right to build housing. This conclusion is relevant not only to claims that use rights are left unprotected because of a narrow definition of "property," but also those who claim that the meaning of "take" encompasses only physical acquisitions or occupations.[58]

The right to use protected by the original meaning of the Takings Clause is not unlimited. It is subject to the "police power" exception for measures that protect the public against significant threats to health and safety.[59] Although the police power exception has never been precisely defined, it generally applies to regulations that protect against significant threats to health and safety, such as fire, flooding, environmental harms, and disease. Thus, at the very least it would permit public-health sanitation requirements; building code regulations to prevent the spread of fire; and the rules on the

55. Ambler Realty Co. v. Vill. of Euclid, 297 F. 307, 313 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

56. *Id.*

57. Focusing on 1791 is the more traditional approach. For the view that 1868 is the relevant timeframe, see generally, for example, AKHIL REED AMAR, *Refining Incorporation*, *in* THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 215 (1998) and Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729 (2008).

58. *See, e.g.*, John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1103 (2000) (arguing that the Takings Clause was originally understood to refer only to the physical appropriation of property, not its regulation); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782–83, 792–97 (1995) (same).

59. *See infra* subpart I(C).

disposal of toxic waste and other industrial pollution.[60] But that exception does not cover most forms of exclusionary zoning.

A. The Original Meaning of 1791

The iconic definition of "property" known to Founding Era American jurists was that of William Blackstone, who famously wrote that "[t]he third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land."[61] The qualification that property might be limited by the "law of the land" may be seen as nullifying the right to "use" in any situation where the state has enacted a law restricting it. But to the extent that this qualification nullifies takings liability as applied to "use," it equally does so with respect to "enjoyment" and every other aspect of "property" as defined by Blackstone. Such a thoroughgoing pure "positivist" theory of property rights was recently unanimously repudiated by the Supreme Court in *Tyler v. Hennepin County*,[62] where the Court ruled that "[s]tate law is one important source [of property rights]. But state law cannot be the only source. Otherwise, a State could sidestep the Takings Clause by disavowing traditional property interests in assets it wishes to appropriate."[63]

John Locke, whose understanding of property rights was a major influence on many thinkers of the Founding Era, famously argued that the right to property arose from "*appropriation* of any parcel of *Land*, by improving it."[64] And, once appropriated through "improvement," the owner could continue further construction and improvement. If improving previously unowned land creates property rights, owners logically have rights to make further improvements once they acquire the land. Such additional improvements might even further cement the owner's rights over the property.

Blackstone's definition of "property" as including "use" was widely cited by jurists and Framers of the Constitution.[65] For example, James Wilson, a key Framer of the Constitution and later a Supreme Court Justice,

60. For more detailed discussion, see *infra* subpart II(C).

61. 1 WILLIAM BLACKSTONE, COMMENTARIES 134 (The Univ. of Chi. Press ed. 1979) (1765).

62. 143 S.Ct. 1369 (2023).

63. *Id.* at 1375 (citations omitted) (internal quotation marks omitted).

64. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 33 (Ryerson Univ. 2022) (1689) (emphasis added). On the influence of Lockean property theory in the Founding Era, see, for example, Johnathan O'Neill, *Property Rights and the American Founding: An Overview*, 38 J. SUP. CT. HIST. 309, 313–16 (2013) (summarizing its impact).

65. Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568–69 (2003).

described property as the "right to possess, to use, and to dispose of a thing."[66] James Madison, the primary Framer of the Takings Clause,[67] advocated an even broader definition of property rights in his famous 1792 essay "On Property." After quoting Blackstone, he wrote that "[i]n its larger and juster meaning," the term "embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage."[68] That surely encompasses the right to use and build. In the 1790s, as today, building housing was a crucial ordinary aspect of the "use" of property. Indeed, in a nation with a rapidly growing population, new housing construction was especially important. If the right to "use" was part of the definition of "property" protected by the Takings Clause, using land to build housing was surely a part of that use.

In introducing what became the Bill of Rights, James Madison originally included a preamble stating that "Government is instituted and ought to be exercised for the benefit of the people; which consists in the enjoyment of life and liberty, with the right of acquiring and *using* property."[69] This preamble never became part of the Constitution, and is certainly not binding law. But, as Andrew Gold points out, it "suggests that Madison believed his proposed Bill of Rights would function to protect the right of using property, and by implication, this meant the Takings Clause would help to protect that right where regulations were concerned."[70]

These points have implications for arguments about the meaning of "take" as well as those focused on the meaning of "property." The Takings Clause would provide little or no protection for Madison's "right of acquiring and using property" if it were limited to physical invasions and appropriations. In that event, the government could abrogate or even completely eliminate those rights simply by enacting regulations forbidding transfer and use, even in the absence of any physical seizure or invasion. As Laurence Tribe puts it, "telling [a property owner] 'you can keep it, but you can't use it'—is at times indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else."[71]

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66. 2 THE WORKS OF JAMES WILSON 711 (Robert G. McCloskey ed., 1967).

67. On Madison's key role in drafting and enacting the Takings Clause, see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 77–79 (1998).

68. James Madison, *Property*, *in* 1 THE FOUNDERS' CONSTITUTION 598 (Philip B. Kurland and Ralph Lerner eds., 1987). It is not entirely clear what Madison meant by "leaves to every one else the like advantage." But presumably it requires that each person must allow others to exercise similar control over their own property.

69. 1 ANNALS OF CONGRESS 451 (Joseph Gales ed., 1834) (emphasis added).

70. Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far,"* 49 AM. U. L. REV. 181, 195 (1999).

71. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 593 (2nd ed. 1988).

Some prominent scholars have nonetheless argued that the 1791 original meaning of the Takings Clause encompasses only a right against physical appropriation of property by the state.[72] They contend that extensive regulation of property rights by state and local governments undercuts the notion that the Takings Clause could apply to restrictions on use.

However, the Takings Clause initially applied only to the federal government—which may not have even had a power of eminent domain except in federal territories—and therefore there was little occasion to use it to constrain state and local takings.[73] This point undercuts claims that state and local regulations during the colonial and early Republic delineate the scope of the Takings Clause protection for property rights.[74] In addition, as Nicole Garnett has emphasized, "unlike many other provisions of the Constitution, the Takings Clause had no colonial or British antecedents."[75] This makes it difficult to infer its scope from prior and contemporaneous practices.[76] It is a mistake to assume that any forms of state regulation prevalent in the colonial era or the early Republic were necessarily immune from takings liability, if enacted by a jurisdiction subject to the Fifth Amendment, which—until incorporation—only constrained the federal government.

Moreover, the fact that some uncompensated restrictions were permitted in order to protect the health and safety of the public under the police power does not suggest that all restrictions on use were exempt from takings liability. The natural rights understanding adopted from Blackstone and Locke was understood to allow uncompensated restrictions in cases of threats to the public, but not a general power to do so.[77] This understanding was at the root of the "police power" exception to takings liability, discussed later in this Article.[78]

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72. *See, e.g.*, John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253 (1996) (using colonial land use restrictions to critique modern regulatory takings doctrine); Hart, *supra* note 58, at 1100–01 (disputing the regulatory takings doctrine based on pre-Constitution colonial and state legislation regulating property use); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995) (using an originalist theory to dispute the accuracy of the regulatory takings doctrine).

73. For a detailed overview of this point, see generally William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738 (2013).

74. *See* Nicole Stelle Garnett, *"No Taking Without a Touching?" Questions from an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 762–63 (2008) (emphasizing this point).

75. *Id.* at 766.

76. *Id.* at 766–67.

77. On this point, see Claeys, *supra* note 65, at 1553–70. *See also* Gold, *supra* note 70, at 239–41 (discussing the natural rights understanding of takings); *infra* subpart II(C).

78. *See infra* subpart II(A).

In addition, some regulations that James Madison apparently supported—and that are cited by advocates of a narrow definition of takings rights—actually were not limitations on use, but constraints on property owners who chose *not* to use their land. For example, John Hart cites Madison's support of Virginia and Kentucky laws penalizing landowners who chose not to improve their land within a certain period of time.[79] But, of course, penalizing lack of use is compatible with the Lockean view of property rights as arising from use and "improvement."[80] The same point applies to Hart's reliance on Madison's seeming approval of three early federal laws that imposed penalties on owners who failed to use or improve their land.[81] Indeed, Hart acknowledges that Madison and others at the time believed "that acquisition and use of land enjoys a higher degree of constitutional protection than speculative, passive ownership."[82]

William Treanor, another leading advocate of the view that the Takings Clause was originally intended to protect only against physical invasion appropriation, nonetheless suggests a rationale for the distinction that could also justify concluding that zoning is a taking. He argues that the takings clause of the Northwest Ordinance of 1786—a precursor to that of the Fifth Amendment—was motivated in part by a desire to protect non-resident property owners against legislative hostility and therefore "illustrates the recognition of the vulnerability of those who lacked the vote and whose voice was weakened by distance."[83] Exclusionary zoning, of course, also victimizes those who "lack the vote and whose voice is weakened by distance": people hoping to move into the jurisdiction from elsewhere.[84]

This scenario is an exception to Treanor's general argument that the Framers assumed the political process would effectively protect property rights against non-physical compensation.[85] To the extent that the Takings Clause is intended to offer protection for people lacking influence in the political process, exclusionary zoning qualifies.

To be sure, the people lacking influence here may not be the property owners themselves, but those seeking to buy or rent from them. However, as Blackstone, Locke, and Founding-era jurists recognized, the right to acquire property was also an essential element of property rights.[86] Indeed, James Madison famously emphasized the importance of "the protection of different

79. Hart, *supra* note 58, at 1127–30.
80. *See supra* text accompanying notes 64, 77–78.
81. Hart, *supra* note 58, at 1140–43.
82. *Id.* at 1136.
83. Treanor, *supra* note 72, at 834.
84. *See infra* subpart III(B) (discussing this issue in detail).
85. Treanor, *supra* note 72, at 834.
86. *See* quotes from Blackstone, Locke, and Madison *supra* text accompanying notes 61–69.

and unequal faculties of acquiring property" in *Federalist* 10.[87] He refers to the protection of these faculties as "the first object of government."[88] If so, it suggests an additional originalist rationale for using the Takings Clause to curb exclusionary zoning—one that applies even if most other regulatory restrictions on property rights are not covered by the Clause. People seeking to move to a community with greater economic opportunity are almost unavoidably seeking to acquire property, as well—either by purchasing housing or leasing it. And a leasehold estate is, of course, a form of property.

B. The Original Meaning of 1868

The evidence that the "property" protected by the Takings Clause included a right to use is even stronger for the original meaning as of 1868, when the Fourteenth Amendment was enacted, applying the Takings Clause against state and local governments.

During the early nineteenth century, many state courts applying state takings clauses interpreted them in the narrow way defended by Hart and Treanor, as applying only to physical appropriation of property.[89] But by the 1850s and 1860s, courts had begun to shift to an understanding of property rights as including protection against damage and restrictions on use.[90]

In 1871, just three years after the enactment of the Fourteenth Amendment, the Supreme Court decided the famous case of *Pumpelly v. Green Bay Co.*,[91] one of the most widely cited early takings precedents. The Court reasoned that "there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken."[92] In addition, the Court rejected the idea that takings liability is limited to cases of physical appropriation, emphasizing that

> [i]t would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total

87. THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

88. *Id.*

89. For an overview of these states' narrow interpretation of takings liability, see BANNER, *supra* note 10, at 47–52.

90. *Id.* at 58–59.

91. 80 U.S. (13 Wall.) 166 (1871).

92. *Id.* at 179 (citations omitted).

> destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.[93]

For these reasons, Justice Samuel Miller's opinion held that compensation was owed in a case where the government had flooded the owner's land, thereby seriously impeding his ability to use it.[94] While this decision construed the takings clause of the Wisconsin state constitution, rather than the federal one, Miller emphasized that "the court rests its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights," thus holding that the reasoning was a general principle of takings law.[95]

The Supreme Court also suggested that the property rights protected by takings principles includes a right to use, in the less famous case of *Yates v. Milwaukee*,[96] decided a year before *Pumpelly*. In *Yates*, an agency of the City of Milwaukee sought to force the owner of riparian property bordering a river to remove a wharf he had built on his land, citing authority granted by a Wisconsin state law.[97] The Supreme Court ruled that Yates was

> entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, *the right to make a landing, wharf or pier for his own use or for the use of the public*, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public.[98]

Justice Samuel Miller's opinion for the Court went on to say that "[t]his riparian right is property, and is valuable" and that "the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, *upon due compensation*."[99] The Court also noted that, if Milwaukee could bar a wharf merely by declaring it to be a nuisance, "[t]his would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities."[100]

As in *Pumpelly*, the *Yates* Court clearly assumed that the right to use is part of the "property" protected by the state and federal takings clauses. Otherwise, barring a riparian owner from operating a wharf on his land would not require "due compensation."[101] In warning that a contrary ruling would

93. *Id.* at 177–78.
94. *Id.* at 179.
95. *Id*. at 180.
96. 77 U.S. (10 Wall.) 497 (1870).
97. *Id*. at 498–99.
98. *Id*. at 504 (emphasis added).
99. *Id*. (emphasis added).
100. *Id*. at 505.
101. *Id*. at 504.

threaten "all the property of the city,"[102] the Court also highlighted the importance of use rights to the protection of private property generally.

Some scholars have cited *Yates* as an early indication of the Court's endorsement of the idea of "regulatory" takings.[103] Here, we focus on it as a further indication that the property protected by the Takings Clause included the right to use. Unlike in *Pumpelly*, here that right was applied to a situation where there was no physical invasion, seizure, or destruction of the owner's land—just a purely regulatory restriction on use.

In *Eaton v. Boston, Concord & Montreal Railroad*,[104] a highly influential decision issued just one year after *Pumpelly*,[105] the Supreme Court of New Hampshire ruled that "[p]roperty is the right of any person to possess, use, enjoy, and dispose of a thing."[106] The court emphasized that the right to use "is an essential quality or attribute of absolute property, without which absolute property can have no legal existence," and therefore "[f]rom the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.'"[107] *Eaton* involved the flooding of property caused by the construction of a state-authorized railroad.[108]

Some argue that the principles of *Pumpelly* were undermined by *Northern Transportation Co. v. City of Chicago*,[109] an 1878 decision, where the Supreme Court held that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."[110] But *Northern Transportation Co*. is distinguishable from *Pumpelly* and *Yates* because in the former case there was neither a direct physical invasion of property (as in

102. *Id*. at 505.

103. *See, e.g.*, James W. Ely, Jr., *"To Protect All the Essential Elements of Ownership:" Late Nineteenth Century Emergence of the Regulatory Takings Doctrine*, BRIGHAM-KANNER PROP. RTS. J. (forthcoming) (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4655194 [https://perma.cc/A6AP-6V3W]; Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1267; Gold, *supra* note 70, at 235.

104. 51 N.H. 504 (1872)

105. On *Eaton*'s influence, see BANNER, *supra* note 10, at 60–63.

106. Eaton v. Boston, Concord, & Montreal R.R., 51 N.H. 504, 511 (1872) (quotation omitted).

107. *Id*.

108. *Id*. at 504.

109. 99 U.S. 635 (1878).

110. *Id.* at 642. *See, e.g.*, Ely, *supra* note 103, at 6 (suggesting that *Northern Transportation* undermines *Pumpelly* in that "the Court confined *Pumpelly* to permanent and physical invasions").

Pumpelly) nor a regulatory restriction on use (as in *Yates*).[111] In *Northern Transportation*, the construction of a tunnel temporarily blocked access to neighboring private property.[112] But it did not damage or destroy that property, nor did it take away any of the owners' legal rights to use it. Thus, "[a]ll that was done was to render for a time its use more inconvenient."[113] The Court did not hold that direct regulatory restrictions on use are not takings.[114] Nor did it consider the possibility of a permanent indirect impediment to use.

Eaton and *Pumpelly* were "enormously influential" rulings that reflected the dominant legal views of the time.[115] They were embraced and echoed by state court decisions, and by leading legal treatises and theorists.[116] While these two cases and *Yates* were decided two to four years after ratification of the Fourteenth Amendment in 1868, there is no reason to think there was a sea change in attitudes during that brief period. Michigan Supreme Court Justice Thomas Cooley's influential 1868 work, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, was published the same year the Fourteenth Amendment was ratified. In his discussion of the Takings Clause in that work, he wrote "any injury to the property of an individual which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation."[117] Housing is pretty obviously part of the "ordinary use" of property, both in Cooley's time and today.

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111. The *Northern Transportation* decision distinguishes *Pumpelly* and *Eaton* on the grounds that: "In those cases, there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiffs' lot." *N. Transp.*, 99 U.S. at 642. However, it does not indicate that a regulatory restriction on use wouldn't qualify as a taking; it merely suggests a "physical invasion" is necessary in cases where there isn't such a constraint. *Id.*; *see also* John M. Groen, *Takings, Original Meaning, and Applying Property Law Principles to Fix* Penn Central, 39 TOURO L. REV. (forthcoming 2024) (manuscript at 58–59), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4444574 [https://perma.cc/M8F9-RGJT] (explaining why *Northern Transportation* doesn't impose a general rule that a physical invasion is required for takings liability).

112. *N. Transp.*, 99 U.S. at 635–37.

113. *Id*. at 642.

114. For a more detailed explanation of the reasons why *Northern Transportation* does not undermine *Pumpelly*'s protection of the right to use, see Groen, *supra* note 111, at 58–59.

115. BANNER, *supra* note 10, at 61.

116. For an overview of the influence of *Eaton* and *Pumpelly* on legal theory on takings during the late nineteenth century, see *id*. at 61–64.

117. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 787 (Victor H. Lane ed., Little, Brown, and Company 1903) (1868). For discussions of Cooley's extensive influence, see generally ALAN ROBERT JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS

In his later 1880 treatise, *The General Principles of Constitutional Law in the United States of America*, Cooley wrote that "[t]he property which the Constitution protects is anything of value which the law recognizes as such, and in respect to which the owner is entitled to a remedy against any one who may disturb him in his enjoyment."[118] Once again, the right to build housing surely qualifies.

Cooley's work is notable because of its great influence, and because it came out in the very year the Fourteenth Amendment was ratified. Other leading treatise writers of the era also adopted broad interpretations of the Takings Clause as protecting the right to use.[119] For example, Christopher Tiedeman, in an influential 1886 treatise, wrote that "[w]henever the use of land is restricted in any way . . . it constitute[s] as much a taking as if the land itself ha[s] been appropriated."[120] In his 1879 treatise on eminent domain, Henry Mills similarly emphasized that any "encumbrance on property" qualifies as a "taking within the meaning of the constitution."[121] John Lewis, author of an influential 1888 treatise on the same subject, wrote that the property rights protected by the Takings Clause included the "right of user [sic], the right of exclusion and the right of disposition," and that "when a person is deprived of any of those rights, he is to that extent deprived of his property, and, hence, that his property may be taken, in the constitutional sense, though his title and possession remain undisturbed."[122]

To the extent that the relevant original public meaning is that understood by leading lawyers and jurists, the views of Cooley, the Supreme Court in *Pumpelly*, and state court judges like those that decided the *Eaton* case are highly relevant. Many originalists contend that original meaning should be understood as the view of either legally sophisticated contemporaries or

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MCINTYRE COOLEY: A STUDY IN THE HISTORY OF IDEAS (Harold Hyman & Stuart Bruchey eds., 1987) and James W. Ely, Jr., *Thomas Cooley, "Public Use," and New Directions in Takings Jurisprudence*, 2004 MICH. STATE L. REV. 845 (2004).

118. THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 336 (1880).

119. *See* BANNER, *supra* note 10, at 61–65 (explaining that many courts have interpreted interference with use to violate the Takings Clause).

120. CHRISTOPHER TIEDEMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES 397 (1886).

121. HENRY E. MILLS, A TREATISE ON THE LAW OF EMINENT DOMAIN 33 (Fred B. Rothman & Co. 1982) (1879).

122. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN 41, 45 (1888). On Lewis's influence as a writer, see, for example, ROBERT JAY GOLDSTEIN, ECOLOGY AND ENVIRONMENTAL ETHICS: GREEN WOOD AND THE BUNDLE OF STICKS, 43–44 n.89 (2004) (noting "there is no doubt that Lewis's *Treatise* was influential," and it was quickly cited in state supreme court litigation, and by the U.S. Supreme Court, as well as numerous other cases) and Treanor, *supra* note 58, at 799 (explaining Lewis's influence on state supreme courts' decisions expanding constitutional property rights).

hypothetical readers who are assumed to have a high degree of legal knowledge.[123] On this approach, the understanding of prominent legal elites is highly probative.

It is worth noting, also, that the decisions in cases like *Pumpelly* and *Eaton* and treatise writers like Cooley and Tiedeman did not rigorously differentiate between the meanings of "property" and "take," and suggest that a narrow definition of the latter could vitiate the broad definition of the former. Tiedeman specifically noted that "it is not necessary that there should be an actual or physical taking of the land" for takings liability to be incurred.[124] Cooley wrote that takings liability applies to government restrictions of both "tangible" and "intangible" interests.[125] He gives abrogation of an exclusive "franchise" for a "turnpike" as an example of the latter, and notes there is a taking if the state abrogates such a franchise by allowing a competitor to enter the market (though not if the original franchise wasn't supposed to be exclusive).[126] By definition, such "intangible" interests cannot be physically invaded or appropriated. Cooley clearly did not believe that such appropriation or invasion was necessary for there to be a taking.

Similarly, the *Eaton* court noted that "[f]rom the very nature of these rights of user [sic] and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property.'"[127] This suggests the means of the "material abridgement" is irrelevant, whether it involves physical invasion or not. The court also emphasized that "[t]he framers of the constitution intended to protect rights which are worth protecting; not mere empty titles, or barren insignia of ownership, which are of no substantial value."[128] If the Takings Clause does not protect against restrictions on use that do not involve physical invasion, the government could easily turn a property right into an "empty titl[e]," one that is hardly "worth protecting."[129]

To be sure, *Eaton* itself involved a case of physical invasion—the deliberate flooding of property.[130] The court noted that the infliction of a

123. *E.g.*, Ilya Somin, *Originalism and Political Ignorance*, 97 MINN. L. REV. 625, 633–37 (2012); *cf*. John O. McGinnis & Michael B. Rappaport, *What Is Original Public Meaning?*, San Diego Legal Studies Paper No. 24-017, Northwestern Public Law Research Paper No. 24-27 (2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4948825 [https://perma.cc/ZRK3-HLE4] (defending the view that original public meaning is determined by contemporary expert understandings).

124. TIEDEMAN, *supra* note 120, at 397.

125. COOLEY, GENERAL PRINCIPLES, *supra* note 118, at 336.

126. *Id*. at 337.

127. Eaton v. Boston, Concord & Montreal R.R., 51 N.H. 504, 511 (1872).

128. *Id*. at 512.

129. *Id*.

130. BANNER, *supra* note 10, at 60.

"physical injury to the land itself" was one of the two factors that distinguish this case from ones where regulations merely impose "a mere personal inconvenience or annoyance to the occupant."[131] But the second distinguishing factor noted by the court was that the interference with property rights in question "would clearly be actionable if done by a private person without legislative authority."[132]

That point also applies to restrictions on building. If a private individual used the threat of force to prevent owners from building housing on their land, he or she could surely be held liable for doing so. Such coercion would also "clearly be actionable if done by a private person without legislative authority."[133]

Some original meaning originalists focus on the actual understanding of the general public at the time.[134] For example, Justice Antonin Scalia wrote in his majority opinion for the Court in *District of Columbia v. Heller*[135] that "normal meaning" is preferable to "secret or technical meanings that would not have been known to ordinary citizens in the founding generation."[136] We do not have any systematic data on what ordinary people in 1791 and 1868 believed to be the proper scope of compensation under the Takings Clause. But it is worth noting that the idea that property includes a right to use your land and build on it is highly intuitive and fits normal lay understandings of the notion. John Lewis directly addressed this point in his 1888 treatise, arguing that the term "property" in the Takings Clause should be interpreted in accordance with ordinary meaning, and that the ordinary meaning includes a "bundle of rights," including the right to "use and disposition," not just security against physical appropriation:

> ["Property"] should be given a meaning that accords with the ordinary usage and understanding of the people who made the instrument. We do not refer to the small body of persons who actually formulated the instrument, but the large body of citizens who gave it vitality by their votes. The sovereign people say to their agents and servants, the executive and legislative officers of the State: We delegate to you all of our sovereign powers, but you must not take our private property

131. *Eaton*, 51 N.H. at 513.

132. *Id*.

133. *Id*.

134. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA 144 (1990) ("[W]hat counts is what the public understood."); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 951–52 (2009) (arguing for the use of contemporaneous lay understandings of original meaning).

135. District of Columbia v. Heller, 554 U.S. 570 (2008).

136. *Id.* at 576–77 (2008); *see also* United States v. Sprague, 282 U. S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning[.]").

> for public use without making us a just compensation therefor. What did they mean by property? The dullest individual among the people knows and understands that his property in anything is a bundle of rights.[137]

Moreover, it is also important to emphasize that a key reason why the drafters of the Fourteenth Amendment sought to impose the Takings Clause against the states was to prevent southern states from undermining the property rights of white southerners who had remained loyal to the Union during the Civil War. As Representative John Bingham,[138] the leading congressional framer of the Fourteenth Amendment, explained, the purpose was "to protect the thousands and tens of thousands and hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation."[139] The property rights of both blacks and white loyalists in the South were threatened by hostile state and local authorities.[140]

If states retained a free hand to restrict the use of property, so long as they did not physically appropriate it, they could use that power to persecute loyal property owners, even if they could not seize the property outright. As the *Eaton* court recognized,[141] severe restrictions on use could be almost as onerous as total confiscation, and indeed effectively amount to such. This would be true regardless of whether the restrictions on use were upheld based on a narrow definition of "property" or based on a narrow definition of "take." An ordinary citizen aware of this goal of incorporation would therefore likely assume that states were barred from uncompensated abrogation of use rights, as well as outright seizure. At the very least, this would be true of severe restrictions like those imposed by exclusionary zoning.

C. The Police Power Exception

From early on, it has been understood that some government actions that might otherwise be considered takings are exempt from the requirement to pay "just compensation" because they are exercises of the "police

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137. LEWIS, *supra* note 122, at 43 (emphasis omitted).

138. For an account of Bingham's crucial role in drafting the Amendment and shepherding it through Congress, see GERARD MAGLIOCCA, AMERICAN FOUNDING SON: JOHN BINGHAM AND THE INVENTION OF THE FOURTEENTH AMENDMENT (2013).

139. CONG. GLOBE, 39th Cong., 1st Sess. 1065 (1866) (remarks of John Bingham).

140. *See, e.g.*, Erik Mathesen, *"It Looks Much Like Abandoned Land": Property and the Politics of Loyalty in Reconstruction Mississippi*, in AFTER SLAVERY: RACE, LABOR, AND CITIZENSHIP IN THE RECONSTRUCTION SOUTH 79 (Bruce Baker & Brian Kelly, eds., 2013) (explaining that those deemed disloyal to the Confederacy were in danger of losing their property).

141. *See supra* discussion accompanying notes 105–108.

power."[142] But, as Bradley Karkkainen notes, the scope of this exception has always been unclear because "[t]he police power was always a spongy, indefinite concept; courts readily acknowledged that its uncertain contours could never be fully specified."[143] In this subpart, we refer to the police power "exception," but we recognize that it can also be considered a background principle of property law;[144] we use the term "exception" because it is simpler and more intuitive.

We do not attempt to definitively resolve the issue of the scope of the police power exception, merely to explain why any plausible originalist understanding of it would not immunize exclusionary zoning from takings liability. The key factor is that the exception focuses on uses of property that pose a serious threat to public health or safety. Few, if any, exclusionary zoning rules limiting housing construction qualify, as multifamily housing does not in itself severely threaten health and safety. It is arguable that the police power also encompasses some "morals" regulation, curbing activities such as gambling and prostitution.[145] But that, too, cannot justify exclusionary zoning.

The police power question considered here—whether exclusionary zoning is exempt from takings liability because it protects public health, safety, and welfare—is distinct from the argument that it is exempt because it does not involve a physical appropriation of property. The latter issue has already been addressed above.[146]

The Reconstruction-era Supreme Court defined the "police power" to include "the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights."[147] Later, courts also added a nebulous category of protection of the "public welfare" to the scope of the police power.[148]

But if this later broad expansion of the police powers were correct, and any legislation or regulation that might enhance the health or welfare of the public in some way is exempt from takings liability, then the Takings Clause and its state equivalents would be virtually nullified. After all, any use of

142. For overviews of the debate surrounding takings and police power, see, for example, Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004); Karkkainen, *supra* note 35, at 893–905; William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980); and Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

143. Karkkainen, *supra* note 35, at 893.

144. *Id*. at 894–95.

145. *See infra* discussion accompanying notes 154–155.

146. *See supra* subparts II(A–B).

147. Patterson v. Kentucky, 97 U.S. 501, 504 (1878).

148. Karkkainen, *supra* note 35, at 895–96.

property of any kind might potentially pose at least a small threat to public health or safety. If new housing construction leads to even a small increase in population, for example, it is always possible that one of the new residents might commit a crime, spread contagious disease, or otherwise pose a threat to health or safety. Similarly, any such construction could potentially reduce public "welfare" by a variety of means, such as increasing congestion or lowering the prices of at least some nearby properties. The same goes for virtually any other land use. Commercial, religious, and charitable uses all might also potentially attract additional people, thereby creating at least a small risk of congestion, crime, disease, or other danger.

But the scope of the police power was not generally understood to be this broad around the time of the framing and ratifying of the Fourteenth Amendment. Chancellor Kent, a highly influential antebellum legal theorist, wrote in his *Commentaries on American Law* that the police power was limited to "general regulations [that] interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens."[149] Kent's view became the dominant one in antebellum police power jurisprudence.[150] In his influential 1868 treatise on constitutional law, Justice Thomas Cooley likewise emphasized that the police power could only be used to restrict "a particular use of property" that was previously lawful if it had become a "public nuisance, endangering the public health or the public safety."[151] Here, "public nuisance" is used as a broad concept encompassing activities threatening to public health and safety.[152]

There is no evidence that use of land for housing purposes, including multi-family housing, could in and of itself be considered a public nuisance or any kind of serious threat to health and safety, even if it could be argued that it increased some types of risks at the margin. As examples of what might qualify as such a "nuisance," Cooley listed the use of church lands for cemeteries (presumably because of the health risks created by dead bodies), "[t]he keeping of gunpowder in unsafe quantities in cities or villages, the sale of poisonous drugs, unless labelled [sic]; allowing unmuzzled dogs to be at large when danger of hydrophobia is apprehended; or the keeping for sale

149. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 340 (Oliver W. Holmes, Jr. ed., 12th ed. 1873).

150. Karkkainen, *supra* note 35, at 894–95.

151. COOLEY, LIMITATIONS, *supra* note 117, at 595.

152. *Cf.* Thomas W. Merrill, *Public Nuisance as Risk Regulation*, 17 J. L. ECON. & POL'Y 347, 348–50 (2022) (describing history of "public nuisance" law as a tool for regulating activities that impose "a risk of harm on the general public").

unwholesome provisions."[153] These uses obviously create far greater risks than the construction of multifamily housing. Cooley also noted that property uses can be restricted to protect "public morals," by means such as banning the sale of "indecent books or pictures" and banning gambling.[154] Housing, including multifamily housing, obviously does not pose any such danger to "morals."[155]

In a famous 1887 Supreme Court decision, *Mugler v. Kansas*,[156] Justice John Marshall Harlan's opinion for the Court held that the police power allowed the government to ban "noxious" uses of property without paying compensation, but not "unoffending" ones.[157] The line between the two is far from a clear one. But it seems unlikely that mere use of property for housing—including multifamily housing—would qualify as "noxious." Harlan indicated that "noxious" uses are ones that are "prejudicial to the health, the morals, or the safety of the public,"[158] which is similar to other formulations of the scope of the police power exception described above.

These understandings of the scope of the police power are similar to Randy Barnett's interpretation of Reconstruction-era evidence as supporting the view that the police power included "prohibiting wrongful and regulating rightful private behavior that may injure the rights of others, [and that] the state may also manage government controlled public space so as to enable members of the public to enjoy its use."[159] By contrast, they probably allow more regulation to fall within the police power exception than does Richard Epstein's theory that the exception should be limited to measures that "protect individual liberty and private property against all manifestations of force and fraud," which he interprets as including regulation of common-law nuisances, but not most types of environmental regulations.[160]

As we have seen,[161] prominent nineteenth-century takings decisions required compensation even in some cases where the government action at

153. COOLEY, LIMITATIONS, *supra* note 117, at 595–96. "Hydrophobia" is a somewhat archaic word for rabies, a deadly disease spread by animal bites.

154. *Id.* at 596.

155. For a discussion of the history of the "morals" element of the police power, see, for example, Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 760–61 (2007).

156. 123 U.S. 623 (1887).

157. *Id.* at 669.

158. *Id.*

159. Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 493 (2004). *See also* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT 306–13 (2021) (expounding this idea in detail).

160. EPSTEIN, *supra* note 7, at 112, 120–21.

161. *See supra* subpart II(B).

issue protected safety and welfare far more clearly than exclusionary zoning could be said to do. The influential 1872 *Eaton* decision required compensation where a government-authorized railroad firm flooded a farmer's land in the course of constructing a railroad.[162] Railroad construction undeniably benefits the public welfare, especially in an era when railroads were the principal means of relatively fast transportation by land and played a vital role in economic development.[163]

In *Pumpelly v. Green Bay Co.*, discussed above, the Supreme Court recognized the flooding of land during canal construction as a taking that required payment of compensation.[164] Like railroads, canals were crucial to public welfare, given their vital importance to the nineteenth-century economy.

Modern courts need not be bound by the specific examples listed in Reconstruction-era court decisions and legal treatises as falling within the police power exception. But, at least from an originalist point of view, they are bound by the general understanding of that era: that the exception applied only to uses of property that pose unusually grave risks to health and safety. Eliminating minor risks or creating some benefit to the public is not enough to trigger the exception; otherwise the exception would swallow the rule, given that almost any restriction on property rights may eliminate some small risk or create some small benefit.

Modern regulatory takings doctrine has also required liability in situations where the potential benefit to public safety and welfare was far clearer than in the case of exclusionary zoning. Most famously, in the landmark case of *Pennsylvania Coal Co. v. Mahon*,[165] the Supreme Court ruled compensation was required for a regulation that restricted mining in order to protect surface property from subsidence and collapse.[166] More recently, in *Arkansas Game and Fish Commission v. United States*,[167] the Supreme Court unanimously ruled that takings liability is possible in a case where the Army Corps of Engineers flooded property in order to reduce flooding elsewhere, and thereby enable farmers in the region to get a longer growing season.[168] Reducing flooding harmful to agriculture clearly benefits

162. Eaton v. Boston, Concord & Montreal R.R., 51 N.H. 504, 510–12, 516 (1872).

163. *See* ROBERT FOGEL, RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY 2–8, 237 (1964) (providing a well-known account of the crucial role of railroads in nineteenth century economic growth).

164. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 181 (1871).

165. 260 U.S. 393 (1922).

166. *Id*. at 414–16.

167. 568 U.S. 23 (2012).

168. *Id*. at 26–27.

public welfare and safety, yet that did not lead the Court to rule there was an exception from takings liability.[169]

To the extent that the original meaning of the Takings Clause should be interpreted in accordance with "ordinary meaning" as understood by members of the general public,[170] that also argues against the idea that the police power exception is broad enough to encompass exclusionary zoning. Such a broad exception would also cover almost any restriction of land use, thereby massively undermining the whole point of having a Takings Clause in the first place. It seems unlikely that ordinary people would understand the Takings Clause as having an exception so broad as to largely swallow the rule.

Along related lines, an expansive police power exception would also undermine the immediate purpose of incorporating the Takings Clause against state governments, which was to protect the property rights of white southerners loyal to the Union against hostile southern state governments.[171] Such a broad exception could easily have been used to target the property of these groups, under the pretext of promoting public health or welfare in some way.

The police power exception might apply to unusual cases where the construction of new housing creates a significant risk of flooding or land subsidence, or some other similar serious threat to health or safety. But it could not justify sweeping restrictions on multi-family housing, and other traditional exclusionary zoning tools.

The exception does have stronger applicability to at least some industrial and commercial land uses, as opposed to residential ones. Most obviously, uses that spread dangerous pollution or toxic waste are much more plausibly regarded as threats to public health and safety than is housing. The Supreme Court recently reaffirmed the notion that health and safety inspections are exempt from Takings Clause liability, even in situations where they entail physical intrusions on property that would otherwise qualify as per se (automatic) takings.[172] The police power exception would also likely encompass public-health sanitation requirements and building-code regulations that prevent the spread of fire.

169. The Court did not definitively rule there was a taking, but merely established some criteria for assessing whether repeated flooding qualifies as a taking. *Id*. at 32–37. The Federal Circuit did find a taking upon remand. *See* Ark. Game & Fish Comm'n v. United States, 736 F.3d 1364, 1369 (Fed. Cir. 2013).

170. *See* discussion of this possibility *supra* subpart II(B).

171. *See supra* subpart II(B).

172. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2079 (2021).

We do not attempt, in this Article, to comprehensively assess the scope of the police power exception.[173] But it is worth noting that the applicability of the exception to these situations undercuts concerns that using the Takings Clause against exclusionary zoning would create a slippery slope leading to invalidation of environmental regulations and other restrictions that protect against serious threats to human health. The possibility of relatively broad police power exceptions for some types of industrial uses also potentially differentiates our approach from that of Richard Epstein in his classic book *Takings*, which posits that almost all significant restrictions on land-use would qualify as takings requiring compensation.[174]

III. Living Constitutionalism

At first glance, living constitutionalism and a more aggressive takings doctrine might seem incompatible. Regulation of the apparent inequities and brutalities of the market are at the heart of progressivism, as usually understood. For that reason, many progressives are often outraged at the thought of a conservative judiciary aggressively protecting property rights, whether it is through the takings doctrine or another vehicle. And most modern living constitutionalists are, of course, progressives.

Indeed, in its origins, the progressive movement mobilized against cases of the *Lochner* era, which forbade maximum hour and minimum wage laws in many settings.[175] For years, the progressive response, best embodied in the philosophy of jurists like Oliver Wendell Holmes and Felix Frankfurter, was to preach judicial restraint, and such a philosophy strongly discourages judges from interfering in the housing market. But in the 1950s, progressive judicial restraint gave way to courts that were much more active in protecting civil liberties and minority rights, which in turn spurred a whole new set of philosophies in academia about how and when the courts should intervene.[176] In comparison to the original progressive philosophy of judicial restraint, these new theories of interpretation envisioned a more aggressive role for the judiciary, but they remained wary of meddling with laws that regulated the economy.

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173. For a broad new overview of the police power and its interpretation, see DANIEL B. RODRIGUEZ, GOOD GOVERNING: THE POLICE POWER IN THE AMERICAN STATES (forthcoming 2024).

174. EPSTEIN, *Takings Prima Facie*, *in supra* note 7, at 35.

175. Lochner v. New York, 198 U.S. 45, 64 (1905).

176. Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEXAS L. REV. 215, 245–49 (2019). *See generally* KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW (2004) (describing the history of this shift in detail).

We argue that the most prominent theories of living constitutionalism counsel in favor of striking down exclusionary zoning regulations. But which regulations? Zoning is composed of an elaborate and tangled weave of rules that may be beyond the expertise of the judiciary to fully police. Concerns about judicial administrability are paramount here, and living constitutionalism has usually taken such concerns seriously, particularly in the sphere of economics. The common line is that certain rights are "judicially under-enforced."[177]

While originalists disagree among themselves about whether and how prudence should restrain the judiciary, living constitutionalists usually are willing to cabin judicial action in light of the difficulties of implementation. Furthermore, insofar as original meaning can be found, originalism must rigidly adhere to it while living constitutionalism has relatively more flexibility in its interpretation. Still, living constitutionalism restrains and guides judges, and institutional competence is an additional concern. Hence, living constitutionalism is likely less aggressive than originalism on policing housing regulations.

To ensure competent and appropriate judicial action on zoning, we argue that leading versions of living constitutionalism can at least enforce three bright-line bans: (1) no single-family zoning,[178] (2) no minimum parking requirements, and (3) no minimum floor area and minimum lot size requirements.[179] This list is provisional; other forms of exclusionary zoning might be added. But to be consistent with living constitutionalism these extensions must be relatively amenable to judicial enforcement. Since these are absolute prohibitions, they are relatively easier to enforce.[180] However,

177. For the foundational article for this idea, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

178. Such zoning is extensive. According to some estimates, around 75% of residential land is zoned for single-family housing. Nathaniel Meyersohn, *The Invisible Laws that Led to America's Housing Crisis*, CNN: CNN BUSINESS (Aug. 5, 2023, 3:12 AM), https://www.cnn.com/2023/08/05/business/single-family-zoning-laws/index.html [https://perma.cc/D29T-RDQP]. Until recently Los Angeles and Chicago, two of the nation's densest central cities, permit the building of only a detached house on, respectively, 75% and 79% of the areas they zone for residential use. In suburban areas, the percentage typically is far higher. "[T]hirty-seven suburbs studied in Silicon Valley, Greater New Haven, and Greater Austin set aside 91 percent of their residentially zoned land (71 percent of their total land area) exclusively for detached houses." ROBERT C. ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING 113 (Yale Univ. Press, 2022).

179. For M. Nolan Gray, these are three of the four "low-hanging fruit" for zoning reform. M. NOLAN GRAY, ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT 111 (2022). *See also* discussion of the impact of these types of regulations *supra* Part I.

180. Of these reforms, the abolition of single-family zoning too has been most widely adopted. Eli Kahn & Salim Furth, *supra* note 3, at 7; Laurel Wamsley, *The Hottest Trend in U.S. Cities? Changing Zoning Rules to Allow More Housing*, NPR (Feb. 17, 2024, 6:00 AM),

they must be enforced in ways that prevent the more sweeping and pernicious forms of circumvention.

This form of limited enforcement is imperfect. It probably would not be as effective in preventing circumvention as the originalist approach discussed in Part II, which is based on a relatively broad right to use property, subject only to the police power exception.[181] And even the most effective anti-circumvention rules probably would not single-handedly solve the housing crisis. Local governments are experts at evading restrictions on their authority.[182] But even partial enforcement of constitutional constraints on exclusionary zoning could have a significant impact, by eliminating the most sweeping and effective exclusionary policies, and the most obvious ways to circumvent restrictions. Furthermore, while the political movement against exclusionary zoning is gaining steam, it has usually focused on the lowest hanging fruit of zoning reform, such as single-family zoning. And even then, it has only won in a minority of states. But if the judiciary effectively addressed the most blatant forms of exclusionary zoning, political movements could focus on the next frontier of zoning regulations and issues.

This Part covers three versions of living constitutionalism: representation-reinforcement, the moral reading, and the anti-oligarchic reading. We have chosen the representation-reinforcement and moral reading because those two philosophies have most animated the progressive wing of the Court since the end of the New Deal. But progressives are in search of new alternatives as times have changed. A new generation of progressives, representing the left wing of the movement, has a more ambitious and aggressive agenda for government than its moderate forebearers. In

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https://www.npr.org/2024/02/17/1229867031/housing-shortage-zoning-reform-cities [https://perma.cc/RM4B-7XY2]. For a comprehensive list of zoning reform changes, see Joshua Cantong, Stephen Menendian & Samir Gambhir, *Zoning Reform Tracker*, OTHERING & BELONGING INST. (Nov. 13, 2023), https://belonging.berkeley.edu/zoning-reform-tracker [https://perma.cc/AN53-XFC9]. So far California is the only state to abolish parking requirements, but there is significant progress on the city level with thirty-five cities banning them since 2017, including Nashville, Minneapolis, Berkeley, Raleigh, and Seattle. For information on California, see Richard Lawson & Randyl Drummer, *California Becomes First State to Broadly End Parking Mandates as Proposals Spread Nationally*, COSTAR (Sept. 27, 2022, 7:56 PM), https://www.costar.com/article/1225624756/california-becomes-first-state-to-broadly-end-parking-mandates-as-proposals-spread-nationally [https://perma.cc/847F-CP4Y]. For progress in other cities, Michael J. Coren, *Why free street parking could be costing you hundreds more in rent*, WASH. POST (May 3, 2023), https://www.washingtonpost.com/climate-environment/2023/05/02/eliminating-parking-minimums-liveable-cities [https://perma.cc/NQ2B-4LZ9].

181. *See infra* subpart II(C).

182. *See, e.g.*, Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 83–84 (2019) (describing this problem). *See generally* Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719 (2023) (describing a variety of strategies by which local governments can use regulation to stifle housing construction).

constitutional interpretation, the best fit for this sensibility is the anti-oligarchic theory of the Constitution, and thus we include it in our discussion.

A. Representation-reinforcement

In his classic book, *Democracy and Distrust*, John Hart Ely theorized a "participation-oriented, representation-reinforcing approach to judicial review."[183] For Ely, the Constitution was democratic; it did not impose fundamental values but rather created a framework and process that enabled decision-making by elected majorities.[184] But Ely worried that democracy, if not properly policed, would carry the seeds of its own destruction. The first destructive seed was that incumbents and their constituents, seeking to maintain their power and privileges, would minimize political competition.[185] The second internal threat to democracy was that certain groups were subject to prejudice and hostility by the majority and would always be on the losing end of all decisions.[186] The internal threats to democracy have to be at least partly addressed by a force outside of it: Article III judges. Since Article III judges are unelected and have life tenure, they have a comparative advantage over the legislature in tackling these two problems.[187] Hence, to counteract the first problem and ensure political competition, the judiciary should protect freedom of speech and voting rights; for the second problem of protecting vulnerable minorities, legislation concerning these groups should be subject to strict scrutiny.[188] By sticking to these two issues, the judiciary would avoid imposing its own values and instead would facilitate democracy.

Exclusionary zoning is a perfect example of Ely's fear of the first problem—of the "ins [] choking off the channels of political change to ensure that they will stay in and the outs will stay out."[189] In this case, the "ins" are the current residents of the jurisdiction, and the "outs" are nonresidents who want to move in. Residents vote for politicians who will work to prevent new construction that would entice newcomers. While the impetus for

183. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).

184. *See id.* at 44–72, 102 (categorizing and criticizing approaches to judicial review that involve the imposition of substantive values, such as natural law, reason, tradition, and predicting progress).

185. *Id.* at 102–03.

186. *Id.* at 103.

187. *Id.* (arguing that since judges are "comparative outsiders" they are in a better "position objectively to assess claims . . . that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are").

188. *Id.* at 105, 117, 145–46.

189. *Id.* at 103.

exclusionary zoning may be classist or racist, it may also be a rational pursuit of narrow self-interest. Exclusionary zoning may protect the value of most homeowners' single biggest asset: their houses.[190] Furthermore, if poorer people move into the neighborhood, then current wealthy residents may have to pay more to maintain the neighborhood public services like schools and parks.[191]

But outsiders to the neighborhood have the exact opposite incentives and preferences: an increased supply of housing would increase the chances of them finding an affordable house or apartment in a desirable neighborhood. Given a voice at city councils, nonresidents would likely choose a different housing regime.[192] The incentives to block construction are not only held by current homeowners but by local politicians who represent them. These politicians, of course, must cater to the wishes of current homeowners to be reelected, but the electoral incentives go even deeper. Elected politicians would like to run with the same coalition they won with in the last election, and new construction would bring in new voters who might prefer a different coalition or politician that better aligns with their distinct interests.[193]

While in the previous paragraph, we assume the validity of the traditional explanation of NIMBYism as due to insider self-interest,[194] NIMBYism may also be explained by simple ignorance or, more specifically, public misunderstanding of housing markets.[195] Even when the public

190. Although this point is now quite common, the classic and foundational work for it remains WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001).

191. *See* Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 622–25 (2002) (arguing that, without an exclusionary device to prevent it, poor people will follow wealthy people to communities "to enjoy premium services cheaply"). *See generally* RICHARD V. REEVES, DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT (2017) (discussing the goal of reducing opportunity hoarding).

192. The desire of individuals to move into neighborhoods with better services is uncontroversial, but it is a separate question from whether individuals support additional housing construction. For investigations of that issue, see Elmendorf, *supra* note 182, at 83–85; Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473, 473 (2018); and Clayton Nall, Christopher S. Elmendorf & Stan Oklobdzija, *Folk Economics and the Persistence of Political Opposition to New Housing*, 5–6 (Apr. 29, 2024), https://papers.ssrn.com/abstract=4266459 [https://perma.cc/3MWN-XKZA].

193. *See* Elmendorf, *supra* note 182, at 134–35 (arguing that incumbent officeholders in homogenous neighborhoods have a greater incentive to block the entrance of new residents to protect their positions).

194. For a recent study indicating that self-interest may be a major factor with homeowners who might otherwise be ideologically inclined to support new housing construction, see William Marble & Clayton Nall, *Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Housing Development*, 83 J. POL. 1747, 1749–50 (2021).

195. Nall, Elmendorf & Oklobdzija, *supra* note 192, at 32, 35.

understands that an increase in supply will result in a decrease in price in other contexts, many do not grasp this basic logic when considering the impact of increasing housing stock.[196] Thus, they may not understand how they—and the community as a whole—may stand to benefit from easing zoning restrictions. This includes both renters and homeowners, including those owners who would like lower prices, perhaps so that their children might live closer.[197] If these homeowners truly understood the benefits of increasing the supply of housing for lowering prices, they might reject exclusionary zoning.[198]

The fact that non-residents still have the vote at the city and state level does not solve the problem of geographic misrepresentation for several reasons. Many people who might want to move to a given locality may not live in the same state. Thus, they do not have the right to vote in state elections. Moreover, regardless of where they currently live, many may not even know they might potentially want to move to the area in question, unless and until housing becomes more affordable. They may not know that zoning restrictions are what prevent them from getting housing that would enable them to move. In addition, constitutional law does not recognize that representation at a higher level excuses the deprivation of the right to vote at a lower level.[199] More generally, if the potential ability to seek the aid of a higher-level government is enough to foreclose judicial review here, the same argument can be used against federal judicial protection of most other rights against violation by state and local governments.

Appeal to the federal government cannot fully mitigate the democratic malfunction at the state level because the federal government arguably lacks the power to directly regulate zoning.[200] At best, it can indirectly regulate by

196. *Id.* at 32.

197. *Id.* at 33.

198. Indeed, in general, knowledgeable but narrowly selfish voters might actually be less of a danger than ignorant but public-spirited ones. With the former, there is the possibility of mutually beneficial win–win deals, but it is much harder to "fix" the latter. ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE: WHY SMALLER GOVERNMENT IS SMARTER 68–71 (2d. ed. 2016). Of course, win–win deals are more difficult to make in the case of exclusionary zoning because nonresidents who might try to move in usually lack the opportunity to bargain effectively.

199. None of the classic cases of violations at city and state level even consider this argument. *See* Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (invalidating racially discriminatory gerrymandering that violated the Fifteenth Amendment); Reynolds v. Sims, 377 U.S. 533, 558, 568 (1964) (establishing the "one person, one vote" principle, requiring state legislative districts to be roughly equal in population under the Equal Protection Clause); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (striking down poll taxes in state elections as a violation of the Equal Protection Clause of the Fourteenth Amendment).

200. *Cf.* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580 (2012) (ruling that Congress lacks the power, under the Commerce Clause, to create an individual mandate to buy health

tying conditions on federal spending grants to the states, but that indirect route can only be effective up to a point because the conditions cannot be excessively coercive, and must be related to the federal interest in the funds to which the condition is tied.[201]

Whatever the explanation of resident opposition to an increase in the supply of housing, whether it be self-interest, ignorance, or some combination of the two, the main beneficiaries of housing construction (would-be residents plus people in other parts of the country who benefit from growth and innovation) are excluded from the relevant local political process, which is a problem under Elyean representation-reinforcement.

It is worth pausing to consider just how dire the situation is for nonresidents who have no say. Many schools of thought in constitutional theory, including, as we discuss in more detail shortly, Ely's representation-reinforcement theory, have long recognized the plight of minorities as justification for more aggressive judicial review. But in situations where minorities at least have the right to vote, politicians have some incentive to consider their views, and other groups could potentially make alliances with them. By contrast, most victims of exclusionary zoning have no leverage at all over the governmental bodies that impose the policies that harm them.[202]

Ely recognized the problem of geographic misrepresentation and was at least partly attuned to the kind of remedies necessary to solve them. He noted that "nonresidents are a paradigmatically powerless class politically."[203] In writing this line, Ely was focused on unfair legislation by state governments against nonresidents, but the logic applies equally well to city governments too. What is unintuitive in both cases is the remedy to this problem. Usually, the solution to lack of representation is simple: grant representation. In other words, the judiciary should grant or protect the citizen's right to vote.

For that reason, for constitutional scholars, the paradigmatic Ely Supreme Court decisions are the "one-person one-vote" line of cases, and today many would argue that the Supreme Court should strike down

insurance and placing limits on Congress power to condition spending); Murphy v. National Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018) (holding that Congress cannot "dictate[] what a state legislature may and may not do"). We do not claim these precedents definitively resolve the question. But they suggest that there are limits to the scope of federal mandates, and that Congress may not be able to use its powers to directly force state legislatures to ban exclusionary zoning, or even to refrain from authorizing local governments to create such zoning rules.

201. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–85 (2012).

202. *See* ILYA SOMIN, *supra* note 34, at 99–102 (The Univ. of Chi. Press rev. ed. 2016) (summarizing arguments in favor of judicial review on behalf of those affected by eminent domain and exclusionary zoning policies through Ely's representation-reinforcement theory).

203. ELY, *supra* note 183, at 83.

gerrymandering on Elyean grounds.[204] But in an exclusionary zoning context, analogous decisions would be absurd: residents of one state cannot have a vote in another. It would be absurd for California residents to elect a representative to the Texas legislature. Such granting of representation would undermine the entire system of federalism. So, too, with municipal governments: It is neither reasonable nor feasible for outsiders to have representation in the government of a city to which they might like to move. In many cases, potential future residents might not even realize they might be interested in moving to the area in question, unless and until housing prices go down.

In response to exclusionary zoning, the judiciary cannot grant nonresidents political rights. Local governments must maintain their right to make decisions over matters that are primarily local, such as schools, policing, and parks. But housing is different; the interests affected by housing go far beyond any one jurisdiction: housing profoundly affects "inequality, climate change, low productivity growth, obesity, and even falling fertility rates."[205] Indeed, the phrase "housing theory of everything" has caught on in policy circles.[206]

And housing is the key that allows individuals to move into the neighborhood and gain a voice in the local government. Nonresidents deserve a chance to decide whether they wish to bear reasonable costs to move into a new neighborhood. The question thus is what kind of remedy is representation-reinforcing but still respects the right of residents to have an exclusive right to vote in their state or cities?

Even when the granting or protection of voting rights was unavailable, Ely believed the judiciary should still protect non-residents through other clauses of the Constitution. His examples included the judicial enforcement of the Privileges and Immunities Clause of Article IV that barred states from

204. On Ely's close association with the one-person, one vote line of cases, see generally Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769 (2022); Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329 (2005); Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299 (2002); Jane S. Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004); and Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981). On Ely and gerrymandering, see generally Vikram David Amar, *Insights from* Democracy and Distrust *Bearing on* Rucho *and Partisan Gerrymandering*, 36 CONST. COMMENT. 333 (2021) and Louis Michael Seidman, Rucho *Is Right—But for the Wrong Reasons*, 23 U. PA. J. CONST. L. 865 (2021).

205. John Myers, Sam Bowman & Ben Southwood, *The Housing Theory of Everything*, WORKS IN PROGRESS (Sept. 14, 2021), https://worksinprogress.co/issue/the-housing-theory-of-everything/ [https://perma.cc/PK26-2JXL].

206. Annie Lowrey, *Everything Is About the Housing Market*, ATLANTIC (Feb. 18, 2023), https://www.theatlantic.com/ideas/archive/2023/02/us-housing-market-shortage-costs-san-francisco-cities/673121/ [https://perma.cc/NDA4-ZD5L].

discriminating against non-residents' civil and economic rights; the Dormant Commerce Clause that prohibits legislation that unduly burdens interstate commerce; and *McCulloch v. Maryland*'s striking down of a Maryland tax targeting of a branch of the national bank.[207] In other words, the exact constitutional provision would vary with the context, but it would involve the direct striking down of legislation that treated nonresidents unfairly. Here in the case of exclusionary zoning, the violation is of the Takings Clause.

Exclusionary zoning is also an example of majoritarian prejudice against and oppression of racial minorities. Some of the most prominent scholars on zoning argue that "[d]ensity zoning is now *the most important mechanism* promoting class and racial segregation . . . in the United States."[208] Given zoning's origins, this is unsurprising. To be sure, many early supporters of zoning believed it was a public health measure to segregate residents from industrial uses. But the segregation was also racial. Starting in 1910 in Baltimore, Southern cities began to racially zone to preserve Jim Crow.[209] After the Supreme Court struck down racial zoning in *Buchanan v Warley*,[210] courts held the line and struck down the efforts of many Southern cities to defy that decision.[211] To evade *Buchanan*, southerners brought in northern progressive planners to use new racially

207. ELY, *supra* note 183, at 83–86.

208. DOUGLAS S. MASSEY ET AL., CLIMBING MOUNT LAUREL: THE STRUGGLE FOR AFFORDABLE HOUSING AND SOCIAL MOBILITY IN AN AMERICAN SUBURB 19 (2013) (emphasis added). *See also* Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 269, 272 (2009) (finding that white neighborhoods are associated with stringent minimum lot sizes); Michael C. Lens, *Zoning, Land Use, and the Reproduction of Urban Inequality*, 48 ANN. REV. SOCIO. 421, 426 (2022) (discussing the racially discriminatory intent of historical decision-makers in implementing single-family zoning); Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 J. AM. PLAN. ASS'N. 125, 125, 140 (2000) (noting how density-zoning has been used as a "thin cover" to exclude racial minorities following the prohibition of racial zoning); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 779, 801 (2009) (arguing that anti-density zoning reduces affordable housing in white neighborhoods, therefore increasing racial segregation); Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation*, 114 AM. POL. SCI. REV. 443, 453 (2020) (arguing racial segregation has been maintained in part by stringent land use restrictions).

209. SONIA HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 164 (2014).

210. 245 U.S. 60, 82 (1917).

211. *See* David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591, 631–40 (2004) (book review) (arguing the *Buchanan* decision had a significant impact); *cf.* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 90–93 (2004) (arguing the *Buchanan* decision had little impact in actually reducing racial segregation).

neutral zoning measures, such as single-family zoning, that could both keep neighborhoods white and survive a constitutional challenge.[212]

While the North never explicitly zoned by race, its zoning measures had a racist underbelly. In 1916, Berkeley, California, pioneered single-family zoning.[213] The effort was spearheaded by a developer who fretted about the possibility of a black-owned dance hall moving into the neighborhood next door.[214] Another milestone was New York City's adoption of zoning in 1916 in which "[c]lass- and race-based exclusion was a conscious rationale . . . from its very first days."[215] And the federal government convened a commission which released an influential model zoning code in 1921.[216] While the guidelines never mentioned race, the commission members were quite explicit in their public comments that preventing "the coming of colored people into a district" was one of the most important motivations behind zoning codes.[217] In her dissent in *Students for Fair Admissions v. Harvard*,[218] defending the legality of affirmative action, Justice Ketanji Brown Jackson rightly notes that "racially exclusionary zoning" was a major factor in inhibiting blacks from finding housing during the "Great Migration" to the North in the early to mid-twentieth century.[219] Zoning reached new heights in suburbs in response to the 1968 Fair Housing Act, which made illegal a host of discriminatory practices.[220]

The problem persists today. Extensive studies show that the more a city is zoned to prevent density, the whiter it is, and that white people are systematically more likely to support stringent land use regulations "even after controlling for wealth and homeowner status."[221] In addition, poor and

212. *See, e.g.*, ROTHSTEIN, *supra* note 12, at 48–49 (describing how *Buchanan* "provoked urgent interest in zoning as a way to circumvent the ruling").

213. HIRT, *supra* note 10, at 164–65.

214. Jesse Barber, *Berkeley Zoning Has Served for Many Decades to Separate the Poor from the Rich and Whites from People of Color*, BERKELEYSIDE (Mar. 12, 2019, 11:34 AM), http://www.berkeleyside.org/2019/03/12/berkeley-zoning-has-served-for-many-decades-to-separate-the-poor-from-the-rich-and-whites-from-people-of-color [https://perma.cc/335X-28RM].

215. Lens, *supra* note 208, at 424 (quoting Raphael Fischler, *Health, Safety, and the General Welfare: Markets, Politics, and Social Science in Early Land-Use Regulation and Community Design*, 24 J. URB. HIST. 675, 676 (1998)).

216. ROTHSTEIN, *supra* note 12, at 51.

217. *Id.* at 52.

218. 143 S. Ct. 2141 (2023).

219. *Id.* at 2266 (Jackson J. dissenting) ("[Black people's] so-called Great Migration northward accelerated during and after the First World War. Like clockwork, American cities responded with racially exclusionary zoning (and similar policies). As a result, Black migrants had to pay disproportionately high prices for disproportionately subpar housing.") (citations omitted).

220. RICHARD D. KAHLENBERG, EXCLUDED: HOW SNOB ZONING, NIMBYISM, AND CLASS BIAS BUILD THE WALLS WE DON'T SEE 74–75 (2023).

221. Trounstine, *supra* note 208, at 452.

minority children derive particularly great benefit from being able to "move to opportunity"[222] and therefore suffer the greatest harm from exclusionary zoning.

Exclusionary zoning also continues to have a major effect in preventing school integration and cutting off blacks and other minority groups from moving to areas with better quality schools.[223] For that reason, it inhibits the full realization of the integrationist promise of *Brown v. Board of Education*.[224]

But should the Takings Clause be the tool for remedying exclusionary zoning against oppressed racial groups? In both case law and in scholarship on Ely, the equal protection clause is normally the doctrinal route to address this problem. But the Supreme Court has foreclosed that option. In cases where there is no explicit classification by race, the Court will only apply strict scrutiny under the Equal Protection Cause if there is a racist purpose.[225] Such purpose can be smoked out by looking at the totality of the circumstances. In one of the foundational cases for this line of doctrine, *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,[226] the Supreme Court ruled that a garden-variety case of exclusionary zoning through a detached single-family housing requirement did not violate the Equal Protection Clause because the purpose of the zoning designation was to preserve property values and to serve as a "buffer" between single-family development and commercial and manufacturing districts.[227] These motives of forcing poorer families to live next to manufacturers or to deny them opportunities to preserve high housing prices are abhorrent, but they are not violations of the Equal Protection Clause.

Even though the origins of exclusionary zoning are in large part racist, and even though its effects are racist, racist motivation will still be difficult

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222. *See, e.g.*, Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 859 (2016) (finding "substantial gains" for young children who moved to lower-poverty neighborhoods).

223. For recent overviews on how exclusionary zoning laws continue to prevent school integration today, see generally Glynnis Hagins, *Separate and Still Unequal: How Neighborhood Zoning Laws Keep U.S. Schools Segregated*, J.L. & EDUC., Fall 2022 and Sara Zeimer, *Exclusionary Zoning, School Segregation, and Housing Segregation: An Investigation into a Modern Desegregation Case and Solutions to Housing Segregation*, 48 HASTINGS CONST. L.Q. 205 (2020).

224. 347 U.S. 483 (1954). For a more detailed discussion of the tension between *Brown* and exclusionary zoning, see Ilya Somin, Brown, *Democracy, and Foot Voting*, AM. J.L. & EQUAL. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4815212 [https://perma.cc/2HFD-73RT].

225. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that disproportionate impact alone does not trigger application of strict scrutiny).

226. 429 U.S. 252 (1977).

227. *Id*. at 258–59, 265, 270.

to prove. Unlike in the early twentieth century, today's zoning proponents rarely explicitly avow a racial purpose, in part because openly racist statements are increasingly unacceptable in the twenty-first century.[228] Those wishing to defend current zoning can hide behind other motivations that are legal, such as reducing noise congestion, keeping up housing values, and preserving the quality of public services. Indeed, the *Arlington Heights* case was explicit that even more nefarious motives such as confining the poor to areas adjacent to manufacturing districts are legal.[229] And since all of these motivations are so thoroughly intertwined, it is often difficult to know when the legal motivations end and the racist ones begin. Even where illicit motives are likely present, they are often hard to prove.

In this difficult situation, Ely believed that judges should turn away from the Equal Protection Clause and towards other provisions in the Bill of Rights that would greatly reduce the decision-maker's options. Where there is illicit motive but it is difficult to prove, "indirect controls, prophylactic measures, are needed."[230] Rather than wait for the discrimination, the Court should apply preventive rules or standards.

For example, since "proof of an invidious motive in singling a person out for arrest or search" is difficult to find, the Fourth Amendment requires a warrant and reasonable cause.[231] Ely also illustrated this idea with the Supreme Court's decisions to suspend the death penalty, create the void for vagueness doctrine, and engage in close review of discretionary licensing.[232] In each of these cases, there are equal protection concerns, but the possibility of smoking out illegal motive is often so low that the Court must turn to another provision to solve the problem.

The danger is that this logic can be taken too far; every provision of the Constitution can be expanded to combat ostensibly hidden prejudice. But zoning is different; its origins are explicitly racist,[233] and today it is perhaps the single biggest contributor to racial segregation in the United States.[234] Under representation-reinforcement theory, the inability to prove motive today should not stop the Court from addressing one of the greatest, longest-

228. *See* Elizabeth Winkler, *Snob zoning is racial zoning by another name*, WASH. POST (Sept. 25, 2017, 9:48 AM), https://www.washingtonpost.com/news/wonk/wp/2017/09/25/snob-zoning-is-racial-housing-segregation-by-another-name/ [https://perma.cc/YJ34-BF3B] (noting that exclusionary zoning or snob zoning "often achieve[s] the same results as racial zoning rules").

229. *Arlington Heights*, 429 U.S. at 258–59, 265, 270.

230. ELY, *supra* note 183, at 172.

231. *Id.*

232. *Id.* at 173, 176–77.

233. *See supra* text accompanying notes 209–220.

234. *See* works cited *supra* note 208.

standing, and most persistent violations of the Equal Protection Clause and source of racial inequality in the United States.

Lastly, representation reinforcement is against exclusionary zoning because Ely advocated a "right to relocate."[235] He extrapolated from Supreme Court cases striking down durational residency requirements to be eligible for certain state services.[236] These cases were not just about the right to travel or the right to pass through a state, but the right to become a resident in a new place, a right Ely called "the right to relocate."[237]

When majorities rule, there will always be those on the losing side of the vote who must accept the results as legally binding on that community. But perpetual losers in the democratic process should have the option "of exiting and relocating in a community whose values he or she finds more compatible."[238] Whereas many of the rights Ely champions are a "kind of handmaiden of majoritarian democracy," the right to relocate by contrast is about escaping majorities to find a place where there are more like-minded voters.[239] Exclusionary zoning has made this incredibly difficult by pricing out residents from many of the most cosmopolitan and desirable cities.

These are exactly the kind of cities that those who are a bad fit for more conservative or small communities would traditionally escape to. Because of exclusionary zoning, minorities can't relocate to Hollywood to become part of the entertainment industry, to Silicon Valley to govern with tech entrepreneurs, or to Washington, D.C. to join the political class. And it's not only cosmopolitan super-star cities, but also mid-size cities in states like Vermont and Maine whose housing prices have transformed both mid-size and smaller cities into enclaves for wealthier, aging white residents.[240] For

235. ELY, *supra* note 183, at 178.

236. *Id.*

237. *Id.* Ely theorizes the right to relocate as about protecting minorities, not as a form of political participation. But there is a separate and related tradition of seeing moving as a form of political participation known as "voting with your feet." *See generally* ILYA SOMIN, FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM 15–44 (2020) (discussing the intellectual history of "voting with your feet" and the advantages over traditional ballot-box voting). This form of political choice falls outside Ely's conception of a political right, but it is close cousin of the right to relocate. Certainly, striking down exclusionary zoning would promote moving as a form of political freedom. When people choose to move from one jurisdiction to another, differences in government policy are often major factors in their decisions. Foot voting can empower many people—especially the poor and disadvantaged—to exercise more meaningful freedom of choice about the government policies they live under.

238. ELY, *supra* note 183, at 179.

239. *Id.*

240. *See* Anne Wallace Allen, *Housing Crisis Is Slowing Vermont's Population Growth, Treasurer Says*, SEVEN DAYS (Nov. 6, 2023, 5:36 PM), https://www.sevendaysvt.com/news/housing-crisis-is-slowing-vermonts-population-growth-treasurer-says-39459994

many in Vermont, the available options are to either leave or become homeless, as the lack of affordable housing has caused it to become the state with the second highest per-capita rate of homeless.[241]

B. The Moral Reading of the Constitution

Proponents of the moral reading of the Constitution believe, in Ronald Dworkin's words, that interpreters should "bring[] political morality into the heart of constitutional law."[242] But this political morality should not impose whatever idiosyncratic ideals the interpreter possesses. Rather, the interpreter must start with the text of the Constitution. Much of that text is composed of clear rules such as the terms of officeholders or the minimum age for the president. Moral readers emphasize that other clauses such as "equal protection" and "freedom of speech," are "drafted in exceedingly abstract moral language"[243] and "interpretation of those principles require[s] normative judgments about how they are best understood."[244] The interpreter must, like a philosopher, contemplate what is the best understanding of freedom of speech. While conservative, liberal, and libertarian interpreters will interpret these principles differently, moral readers argue that interpretation is still constrained.[245] Even abstract principles have their limits. For example, the pioneer of the moral reading approach, Ronald Dworkin, believed that "equality of resources" is the most important political value, but he conceded that nothing in the text of the Constitution supports the kind

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[https://perma.cc/SCC6-58Q5] (noting that "departing residents cited housing difficulties as their No. 1 reason for leaving the state in 2021 and 2022"); AnnMarie Hilton, *Maine Has Made Substantial Investments in Housing but Still Can't Keep Up with Demand*, ME. MORNING STAR (Oct. 4, 2023, 3:14 PM), https://mainemorningstar.com/2023/10/04/maine-has-made-substantial-investments-in-housing-but-still-cant-keep-up-with-demand [https://perma.cc/LJ9M-9FH8] (noting that "a person needs to make more than $100,000 to afford the median home price in Maine . . . [b]ut the median household income for Mainers is well below that at $63,200").

241. Lola Duffort, *Vermont's Rates of Homelessness Are (Almost) the Worst in the Country*, VTDIGGER (Feb. 7, 2023, 7:56 PM), http://vtdigger.org/2023/02/07/vermonts-rates-of-homelessness-are-almost-the-worst-in-the-country [https://perma.cc/F7QH-4Q9J].

242. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996).

243. *Id.* at 7.

244. The quote is from JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 3 (1st ed. 2015) [hereinafter FLEMING, FIDELITY]. But the point is common to all moral interpreters of the Constitution. *See, e.g.*, DWORKIN, *supra* note 242, at 2 ("Most contemporary constitutions declare individual rights against the government in very broad and abstract language . . . . The moral reading proposes that we . . . interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.").

245. *See* DWORKIN, *supra* note 242, at 2–3 (explaining that the moral reading is built on a shared understanding that the Constitution's abstract language invokes "moral principles about political decency and justice").

of extensive redistribution he championed; indeed, he admitted the Constitution does not even guarantee minimal social welfare rights.[246]

Furthermore, precedent limits moral interpretation. The judge "must take care to see that what they contribute fits with the rest" so that the decisions together "elaborate a coherent constitutional morality."[247]

The imperative to read the Constitution morally is rooted in a theory of how constitutional democracy provides opportunities for its citizens to live meaningful lives. Proponents of the moral approach reject sheer majoritarianism as a crude vision of democracy. While it is true that the Constitution protects some vision of democracy, individuals exist not just for the sake of society; they have their own individual goals and needs. Rights provide space for individuals to pursue their own vision of the good life. Scholars of the moral theory differ considerably on exactly what constitutional democracy entails and how it relates to rights and case law. Although we believe that these variations would not change our conclusion, for the sake of simplicity, we focus mostly on the work of James E. Fleming.

One might have thought that we would focus on Ronald Dworkin because he is the foundational theorist of the moral reading. But after his passing, the torch in large part passed to Fleming to bring these theories into contemporary debates about Supreme Court law. And while Fleming builds on Dworkin, Fleming takes precedent and case law much more seriously and therefore his work is closer in style to how judges and constitutional law scholars would likely think through and apply the moral approach to exclusionary zoning.[248]

Rights that protect deliberative autonomy, Fleming states, "enable citizens to apply their capacity for a conception of the good to deliberating

246. On Dworkin's theory of equality as one of resources, see generally Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFS. 283 (1981). On equality of resources and welfare rights in the U.S. Constitution, see DWORKIN, *supra* note 242, at 11, 36.

247. DWORKIN, *supra* note 242, at 10.

248. Dworkin's theory of interpretation takes precedent seriously. Fleming acknowledges, however, that when Dworkin applied the moral reading approach to constitutional cases, he did "not do the concrete groundwork necessary to show that his interpretations of the Constitution adequately fit the historical materials that include . . . precedents." FLEMING, FIDELITY, *supra* note 244, at 94. For that reason, his critics made credible charges that Dworkin "too readily rejects as mistakes any historical materials that do not fit his political theory." *Id*. In Fleming's application of the moral theory, he tries to "'[d]o as Dworkin says, not as he does.'" *Id*. Furthermore, Fleming writes that Dworkin's essays on the Supreme Court were written "in a style designed to reach and persuade a larger audience of citizens" and "not in a technical style to demonstrate to constitutional lawyers and scholars that he had done his historical homework." *Id*. In so doing, Dworkin "may have diminished the appeal of his theory and his work to some constitutional lawyers and scholars." *Id.* In Dworkin's collection of essays that most focuses on individual cases, Dworkin cautions the reader that "I discuss relatively few cases, and I do not attempt to prove my general claims by citations to secondary sources. . . . Nor do I much discuss technical legal doctrine, except when this is absolutely necessary." DWORKIN, *supra* note 242, at 35.

about and deciding how to live their own lives."[249] This ideal does not prescribe one way of life but rather provides liberties that "are significant for everyone"[250] who is struggling with and contemplating how, in the words of Justice Anthony Kennedy, "to define one's own concept of existence, of meaning, of the universe."[251]

Although deliberative autonomy is conducive to many ways of life, it still has limits: It is not mere license or the right to do whatever one wants for any reason as long as it doesn't harm anyone else. Certainly, many libertarians and progressives embrace such ideals, but this would lead to results that the moral reader might disavow. For example, some libertarians and progressives argue that heroin should be legal. It is a victimless crime that only involves the user's own individual body with which one should have the right to do whatever one "damn well pleases"; why should society interfere? But champions of Fleming-esque autonomy would likely note that the benefits of heroin have little to do with self-development or betterment and indeed may be a way to avoid confronting these challenges. Furthermore, heroin is highly addictive and dangerous, sometimes leading to poverty, crime, alienation, and even death. Few believe that such disastrous consequences are conducive to a good life. Deliberative autonomy is open to many ways of life, but that of a heroin addict may not be one of them.

What rights are necessary for deliberative autonomy and how does the interpreter figure that out? Working from case law, Fleming lists rights such as "liberty of conscience and freedom of thought; . . . the right to live with one's family, whether nuclear or extended; the right to travel or relocate; . . . [and] the right to direct the education and rearing of children."[252] These rights are relatively uncontroversial. But by reasoning from these precedents, in a form of common-law constitutionalism, the moral reader will have to contend with more controversial rights as well. And indeed, that is Fleming's reading of what happened when the Supreme Court recognized the right to marry regardless of one's gender and the right to terminate a pregnancy.[253] The contentiousness of the case changes nothing about the

249. JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 3 (2006) [hereinafter FLEMING, CONSTITUTIONAL DEMOCRACY].

250. JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 42 (2022) [hereinafter FLEMING, BASIC LIBERTIES].

251. FLEMING, CONSTITUTIONAL DEMOCRACY, *supra* note 249, at 47 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

252. FLEMING, BASIC LIBERTIES, *supra* note 250, at 34.

253. FLEMING, BASIC LIBERTIES, *supra* note 250, at 39–40; *see* FLEMING, FIDELITY, *supra* note 249, at 105 (articulating an obligation to give fidelity to constitutional "ends, principles, and basic liberties").

moral interpreter's duty to extend the principles elaborated in past cases to new ones.[254]

Is the right against exclusionary zoning or the Takings Clause necessary for individual autonomy? Fleming does not address zoning or takings, as such. But in response to the related question of "economic liberties"—under which the right to zoning would likely fall—Fleming answers with a kind of "yes but." The "yes" is that Fleming recognizes that "economic liberties and property rights, like personal liberties, are fundamental liberties."[255] They are in fact "fundamental in the constitutional scheme" and "sacred in the constitutional culture."[256] While Fleming does not discuss his reasoning here extensively, it is not hard to justify this assertion: Our choice of jobs, our acquisition of property, our investments are all major exercises in, or preconditions for, self-definition. The ability to develop our landed property, within reasonable limits, too, is part of building a good life. The same applies, with even greater force, to seeking economic and social opportunity through freedom of movement, which exclusionary zoning denies to millions of people, especially the poor and disadvantaged.[257] "Moving to opportunity" can be a life-transforming experience for many—one that zoning blocks.[258] In addition, as in the case of Ely,[259] Fleming's acceptance of a right to relocate argues for striking down exclusionary zoning, which is a major obstacle to effective use of any such right.

Nonetheless, Fleming might argue that even if there was a right against exclusionary zoning, the judiciary is not bound to enforce it, because "there is every indication that [economic rights] can and do fend well enough for themselves in the political process."[260] Since politics protects economic rights, the judiciary need not interfere. Fleming invokes the famous

254. FLEMING, BASIC LIBERTIES, *supra* note 250, at 39–40; FLEMING, FIDELITY, *supra* note 244, at 105.

255. FLEMING, BASIC LIBERTIES, *supra* note 250, at 141.

256. *Id.*

257. Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 859 (2016); Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility I: Childhood Exposure Effects*, 133 Q.J. ECON. 1107, 1114 (2018); Emily Badger & Quoctrung Bui, *Detailed Maps Show How Neighborhoods Shape Children for Life*, N.Y. TIMES: THE UPSHOT (Oct. 1, 2018), https://www.nytimes.com/2018/10/01/upshot/maps-neighborhoods-shape-child-poverty.html [https://perma.cc/MR86-W593]; Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 6–7 (2016); David Leonhardt, *'Friending Bias,'* N.Y. TIMES: THE MORNING (Aug. 1, 2022), https://www.nytimes.com/2022/08/01/briefing/economic-ladder-rich-poor-americans.html [https://perma.cc/E5M8-WUYG].

258. Chetty, Hendren & Katz, *supra* note 257, at 859.

259. *See supra* subpart III(A).

260. FLEMING, BASIC LIBERTIES, *supra* note 250, at 141.

footnote 4 of the *Carolene Products* decision and John Hart Ely's development of this idea in his book *Democracy and Distrust*.[261]

Both were written in the aftermath of the *Lochner* era of Supreme Court decisions in which the Court sought to protect economic rights in ways that appalled progressives, such as by striking down maximum hours and minimum-wage legislation. In response, footnote 4 and Ely stated that the Court should not interfere with economic legislation unless it interfered with democracy or targeted discrete and insular minorities.[262] Fleming concludes that economic rights are thus a "judicially underenforced norm," a constitutional right that the judiciary should leave alone.[263]

The most glaring problem with Fleming's thesis is that, at least when it comes to zoning, it is false. Economists and land-use experts, both on the left and the right, are part of a broad consensus that zoning restrictions are a major factor in causing the housing crisis, and that legislatures have systematically failed to address this problem. This "liberaltarian" consensus has become so widespread that it has repeatedly spilled over onto the top headlines of the most prominent popular publications such as *The New York Times* and *The Atlantic*.[264] It is heartening that Fleming may agree that legislatures are bound

261. *Id.* at 142.

262. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (holding that "prejudice against discrete and insular minorities may be a special condition" for which economic regulations may be held unconstitutional); *see generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (arguing that the Court correctly held there are only limited circumstances in which the Court should strike down economic regulations).

263. FLEMING, BASIC LIBERTIES, *supra* note 250, at 141.

264. For use of the term "liberaltarian," see Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 750 (2020). For examples of *New York Times* coverage, see Opinion, *Americans Need More Neighbors*, N.Y. TIMES (June 15, 2019), https://www.nytimes.com/2019/06/15/opinion/sunday/minneapolis-ends-single-family-zoning.html [https://perma.cc/EZ5E-EHGW]; Badger & Bui, *supra* note 257; Peter Coy, *The 100-Year-Old Reason U.S. Housing Is so Expensive*, N.Y. TIMES (Apr. 14, 2023), https://www.nytimes.com/2023/04/14/opinion/housing-nimby-zoning.html [https://perma.cc/NW6E-JQVL]; Cara Eckholm, Opinion, *When Did New York's Streets Get So Hollow?*, N.Y. TIMES (Feb. 7, 2024), https://www.nytimes.com/2024/02/07/opinion/new-york-economy-zoning.html [https://perma.cc/3L5L-TG6D]; Richard D. Kahlenberg, Opinion, *The 'New Redlining' Is Deciding Who Lives in Your Neighborhood*, N.Y. TIMES (Apr. 19, 2021), https://www.nytimes.com/2021/04/19/opinion/biden-zoning-social-justice.html [https://perma.cc/GG3N-GUF6]. For *The Atlantic*, see Jerusalem Demsas, *California Isn't Special*, ATLANTIC (Apr. 19, 2023), https://www.theatlantic.com/ideas/archive/2023/04/california-single-family-zoning-housing/673758/ [https://perma.cc/6BZJ-2VLP]; M. Nolan Gray, *Cancel Zoning*, ATLANTIC (June 21, 2022), https://www.theatlantic.com/ideas/archive/2022/06/zoning-housing-affordability-nimby-parking-houston/661289/ [https://perma.cc/FP38-Z98H]; Annie Lowrey, *The Anti-California*, ATLANTIC (Aug. 9, 2023), https://www.theatlantic.com/ideas/archive/2023/08/rural-montana-housing-crisis-supply/674950/ [https://perma.cc/Z9XP-KEVE]; Michael Waters, *Where Living with Friends Is Still Technically Illegal*, ATLANTIC (May 22, 2023), https://www.theatlantic.com/family/archive/2023/05/zoning-laws-nuclear-modern-family-definition/674117/

to protect prospective home-buyers against exclusionary zoning, but it stretches credulity to believes that legislatures have meaningfully met this obligation.[265] It is in exactly such circumstances that the judiciary must step in.

Fleming is sparring with libertarians; his fear is that once you include economic rights, then judicial "distrust of lawmakers" will become a "universal solvent that corrodes the legitimacy of all legislation."[266] But this Article's target is a relatively narrow one—zoning—and therefore need not push the judiciary into adjudicating all economic issues. The issue has now been carved out of the long-standing broader dispute about libertarianism in which Fleming is engaged. A wide variety of progressive thinkers, such as Ezra Klein and Jerusalem Demas,[267] have relentlessly pushed the issue of exclusionary zoning into the national spotlight. And due to their efforts and that of countless activists, most notably in liberal San Francisco, it is regularly covered by left-of-center outlets like *The New York Times* and *The Atlantic*.

Fleming's fight is with libertarians, but when the *Times*' Editorial Board begins its opinion piece with the statement that "[h]ousing is one area of American life where government really is the problem," it is a strong indication that the problem is not just the fixation of free marketers.[268] Nor is zoning a partisan issue. While Republicans are often considered the party of free markets, the largest and most highly influential anti-zoning movements (the YIMBY) are in large Democratic cities, and the most significant national figure taking a stand against zoning is Gavin Newsom, the governor of California.[269] Fleming and many progressives will likely continue to fight with libertarians over whether economic rights are under threat. But zoning is one area in which both sides agree that the political process has failed to protect the individual pursuit of autonomy.

[https://perma.cc/K3CB-S2UT]; Gillian B. White, *How Zoning Laws Exacerbate Inequality*, ATLANTIC (Nov. 23, 2015), https://www.theatlantic.com/business/archive/2015/11/zoning-laws-and-the-rise-of-economic-inequality/417360/ [https://perma.cc/T78S-CTDF].

265. *See supra* Part I.

266. FLEMING, BASIC LIBERTIES, *supra* note 250, at 143.

267. *See, e.g.*, The Ezra Klein Show, *Why Housing Is so Expensive – Particularly in Blue States*, N.Y. TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/opinion/ezra-klein-podcast-jenny-schuetz.html [https://perma.cc/U54R-8RV2] (addressing the exclusionary nature of zoning); Demsas, *supra* note 264 (advocating zoning deregulation on progressive grounds).

268. *Americans Need More Neighbors*, *supra* note 264.

269. *See Editorial: Watch Out, NIMBYs. Newsom Just Dumped Single-Family Zoning*, L.A. TIMES (Sept. 17, 2021, 3:40 PM), https://www.latimes.com/opinion/story/2021-09-17/newsom-housing-sb9 [https://perma.cc/FN9S-PVMY] (discussing Gavin Newsom signing anti-zoning legislation).

The more profound issue is that Fleming's embrace of judicial under-enforcement is unnecessary to, and perhaps inconsistent with, the moral reading of the Constitution. For Fleming, there are two free-standing questions: what the Constitution means and who should interpret it. Fleming writes that a moral reading is a "theory of . . . *how* [the Constitution] ought to be interpreted, not primarily a theory of *who* may authoritatively interpret it."[270] If the question of whether a right should be judicially enforced is a freestanding one, moral readers might take different positions on questions of divisions of responsibility for enforcing the Constitution and especially the issue of how much deference the judiciary should give the legislature. Under this interpretation, a moral reader has no obligation to agree with Fleming on any theory of judicial underenforcement.

But we want to push farther and at least suggest that Fleming's particular justification for judicial under-enforcement is inconsistent with his moral reading of the Constitution. Fleming invokes John Hart Ely's idea that the judiciary should only intervene to protect the majoritarian democratic process. But both Dworkin and Fleming reject this majoritarian conception of democracy and criticize Ely in doing so. Dworkin correctly notes that for majoritarians like Ely, since judges do not represent democratic majorities, every exercise of judicial review is suspect, and therefore needs some special grounding, and even when justified it is still unfortunate because "something of moral importance is lost or compromised."[271] For that reason, Ely seeks to limit judicial review as much as possible to those cases that are the most urgent to ensuring representation.

But Dworkin argues that since moral readers embrace a thicker conception of democracy than Ely, they deny that "something morally regrettable has happened" when the judiciary strikes down legislation because judicial review enforces the moral principles that underlie the entire constitutional order.[272] That means there is no moral presumption against judicial review, and no prima facie reason to avoid it. Under this reading, even if legislative interference with economic rights is rare, the judiciary is still morally obligated to act to rectify violations when they occur. If a right exists, the moral presumption is the Supreme Court should enforce it.

Even if we are right that Ely is of limited relevance to moral readers, moral readers still might argue for judicial under-enforcement of economic and other rights on pragmatic grounds. A moral reader might argue that the

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270. James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215, 241 (2000) (book review).

271. *See* DWORKIN, *supra* note 242, at 16, 21 (discussing the majoritarian premise insisting that something morally valuable is lost when a political decision contradicts the majority of citizens' preferences).

272. *Id.* at 16.

Supreme Court should conserve its limited resources for areas where rights are systematically under threat. But that criterion is fulfilled in the case of zoning because there is a housing crisis. Lawrence Sager coined the term judicial under-enforcement to describe those unfortunately necessary cases where the judiciary lacks institutional capacity because it involves difficult policy choices and expertise, such as with many positive rights.[273] We addressed this concern by limiting the judicial remedy to striking down most egregious examples of exclusionary zoning, along with potential circumventions.[274] For these reasons of judicial economy and institutional capacity, moral readers can potentially reject judicial enforcement of the vast majority of economic rights while still advocating for judicial engagement on exclusionary zoning laws.

C. The Anti-Oligarchy Constitution

In the *Anti-Oligarchy Constitution*, Joseph Fishkin and William Forbath seek to recover the lost "Democracy-of-Opportunity" tradition. This tradition is a constitutional discourse about political economy, about how the constitutional order presupposes and helps achieve just distributions of wealth and power.[275] The tradition, as they envision it, has three prongs. The first is restraints against oligarchy.[276] The Constitution must prevent and tear down oligarchs' attempts to accumulate vast riches which they use to corrupt and gain power in the political system. The second is a political economy that sustains a robust middle class that is open and broad enough to accommodate everyone.[277] The last is the principle of inclusion, that these middle-class opportunities must "extend to all the people, across lines of race, and later, sex and other invidious group-based distinctions."[278]

Exclusionary zoning is a violation of all three strands of the anti-oligarchic constitution. First, the conversion of wealth into political power is evident in how elite homeowners dominate their local city councils and the housing market as a whole. In the most extensive studies of political participation in zoning hearings, researchers have found that attendees and those who speak are systematically more like to be homeowners, white men,

273. LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 90–91 (2004).

274. *See supra* Part III (introduction).

275. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION 6–8 (2022).

276. *Id.* at 8–9.

277. *Id.* at 9–10.

278. *Id.* at 10.

and older.[279] And that class has extensively used its political power to reap financial rewards: In the last year American home buyers were "older, whiter, and wealthier than at any time in recent memory."[280]

Furthermore, it is the areas that are the highest in demand that have the strictest land use regulations. Second, exclusionary zoning is damaging to the middle class. Economic mobility is extensively tied to the ability to move to cities with the most opportunity, but the exact opposite has been happening because the cost of housing is too expensive for the poor in these traditionally thriving cities.[281] Furthermore, one of the greater predictors of earnings, education, and even marriage rates within a city is your zip code, as wealthier areas have greater access to better schools, grocery stores, and important social networks.[282] Poor people who are able to live in economically integrated cities see massive improvements in their life prospects. But zoning creates and exacerbates segregation by class.[283] Exclusionary zoning is a form of "opportunity hoarding" by wealthier citizens at the expense of those striving to reach the middle class.[284]

Lastly, all of these forms of economic oppression fall more harshly on marginalized racial minorities, especially black people. Zoning not only perpetuates class segregation, but also racial segregation.[285] This is in part by design: Ample evidence suggests that modern-day exclusionary zoning proliferated as a way to circumvent the Supreme Court's striking down of city ordinances that zoned explicitly on the basis of race.[286] But the connection between racial segregation and zoning continues today because

279. KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 37–42 (2020).

280. Ronda Kaysen, *Older, White and Wealthy Home Buyers Are Pushing Others Out of the Market*, N.Y. TIMES (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/realestate/housing-market-buyer-wealth-race.html [https://perma.cc/Z9WW-SD86]. To be clear, most Americans own their homes, and they are not oligarchs. Press Release, US Census Bureau, Quarterly Residential Vacancies and Homeownership, Second Quarter 2024 (July, 30 2024), https://www.census.gov/housing/hvs/files/currenthvspress.pdf [https://perma.cc/GK8W-EAES]. But trends are making such home ownership harder to achieve and opportunity hoarding is not just a matter of restricting access to homeownership, but also blocking access to more desirable neighborhoods. *Infra* notes 280–284.

281. GRAY, *supra* note 179, at 68.

282. Chetty & Hendren, *supra* note 257, at 1107; Raj Chetty et al., *Social Capital I: Measurement and Associations with Economic Mobility*, 608 NATURE 108, 108 (2022).

283. Lens & Monkkonen, *supra* note 257, at 7; Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1123 (2010).

284. REEVES, *supra* note 191, at 12.

285. Lens, *supra* note 208, at 423–25; *see generally* Rothwell & Massey, *supra* note 208 (arguing that density zoning regulations have increased racial segregation throughout the United States).

286. Lens, *supra* note 208, at 424. *See also supra* Part I and subpart III(A).

of the effects of discrimination, because Black people are disproportionately poor, and because racial prejudice sometimes continues to motivate zoning.[287]

Our analysis of exclusionary zoning and physical mobility as a key concern for today's anti-oligarchy constitution has antecedents in what Fishkin and Forbath describe as the prevailing vision of that same view during Reconstruction, the era that was the "high-water mark for the democracy-of-opportunity tradition."[288] Fishkin and Forbath analyze at length how a key belief of the post-Civil War Republican party was that the distribution of land was a "constitutional essential."[289] Republicans argued there was a constitutional "duty to dispose of the public lands in a fashion that helped the landless poor reach the middle class."[290] That entailed reversing the Jacksonian policy of selling western public lands to speculators and instead granting land in limited parcels of 160 acres to those willing to move to the land.[291] Today, that same opportunity to move and to acquire land is severely curtailed by zoning policy. Just as in Reconstruction, today's Constitution must have a vision on physical mobility and opportunity to rent or buy land.

Our analysis also fits with Forbath and Fishkin's calls on progressives to wake up, overcome their trepidation, and once again make constitutional arguments about economics. Progressives hesitated to abandon the New Deal settlement, "the ostensible détente over claims of constitutional political economy that followed the Supreme Court's retreat in 1937."[292] For years, the Court believed its role was to monitor and adjudicate the proper role of the state and federal government over the economy to preserve the power of big business and corporations over workers and citizens.[293] Eventually, a combination of pressure and personnel changes forced the Court to submit, and it abandoned its self-conception as an adjudicator of economic rights.[294] Fishkin and Forbath argue that the "unintended upshot" was that progressives

287. *See generally* RICHARD D. KAHLENBERG, EXCLUDED: HOW SNOB ZONING, NIMBYISM, AND CLASS BIAS BUILD THE WALLS WE DON'T SEE (2023) (arguing that economically discriminatory governmental policies have contributed to a bias against lower income individuals, thereby perpetuating racial segregation).

288. FISHKIN & FORBATH, *supra* note 275, at 109.

289. *Id.* at 122.

290. *Id.* at 123.

291. As Fishkin and Forbath note, such westward expansion was at the expense of Native Americans. *Id.* at 123. Furthermore, radical Republicans, the group most committed to Black equality and the anti-oligarchy constitution, never managed to achieve policy to redistribute the land of southern plantations to newly freed Black people. *Id.* at 126.

292. *Id.* at 18.

293. *Id.* at 139–48.

294. *Id.* at 287–93.

believed the Court should limit itself to protecting civil liberties and civil rights.[295] The progressive belief was that to enmesh policy issues with constitutional issues was inappropriate and would empower conservatives.[296] But Fishkin and Forbath observe that conservatives "never agreed to the 'settlement' that liberals imagine" and are now successfully framing their objections to liberal programs and the administrative state in constitutional terms.[297] The New Deal settlement, they contend, is dead: If progressives do not engage in constitutional economic arguments, they have abandoned the battlefield to conservatives.

Despite the considerable fit between our theory and the Democracy-of-Opportunity tradition, there are potential tensions between them concerning the role of the judiciary and the role of government regulation. While our theory calls for the judiciary to strike down government regulation in the limited domain of zoning, Fishkin and Forbath want the judiciary to stop impeding government regulation. In fact, the anti-oligarchy tradition is not even mostly about courts but is instead "directed primarily to the political branches."[298] The anti-oligarchy constitution reaffirms the "affirmative obligations on all branches of government, but especially on the elected branches, to pass and implement [] legislation."[299] Often, the best thing that courts could do is just "get out of the way."[300]

Fishkin and Forbath make the elected branches the star players in the anti-oligarchy constitution because they believe elected representatives have a comparative advantage over courts in redistributing wealth and political power. Courts primarily "block[] legislative action" and "this works quite well for economic libertarians."[301] But progressives want the opposite; they want government to act, and the judiciary is ill-equipped to force the government's hand. Put differently, courts lack the expertise, democratic legitimacy, and institutional capacity to reshape the political and economic order. To accomplish this transformation, Fishkin and Forbath lay out an ambitious agenda for the elected branches, such as transformative labor law reform, a wealth tax, aggressive enforcement of anti-trust law, more powerful public banks, and a revamping of corporate governance to empower

295. *Id.* at 22.
296. *Id.* at 420.
297. *Id.* at 19.
298. *Id.* at 21.
299. *Id.* at 3.
300. *Id.*
301. *Id.* at 29.

employees in their place of work.[302] On these matters, the judiciary operates primarily as a shield to uphold these statutes.[303]

But our theory calls on the judiciary to wield the sword of judicial review against zoning. This tension on the role of government and the judiciary is resolvable because for the anti-oligarchy tradition, the role of government has "change[d] radically over time in a dynamic way in response to changes in the economy and in politics."[304] Fishkin and Forbath acknowledge that early advocates of the Democracy-of-Opportunity tradition—the Jeffersonians and Jacksonians—believed in "limiting government so that it could not grant monopolies or other favors that promoted the accumulation of unequal wealth."[305] These Jacksonians believed in free markets but they were not "laissez-faire for its own sake," because in that era free markets helped "prevent the capture of government by the rich."[306] The *Lochner* school, which progressives oppose, "actually shares certain common roots with the democracy-of-opportunity tradition, particularly in the Jacksonian era."[307] Free markets may have been plausibly liberatory in time when the economy was composed of small businesses, farmers, and mechanics. But by the nineteenth century with the rise of cities and corporations, progressives argued, government was needed to counteract these larger social forces. The role of markets in the anti-oligarchy tradition varies based on the needs of the age.

In today's age, would the commitments of the progressive coalition that Fishkin and Forbath envision support the abolition of detached single-family housing? The answer is "yes," but possibly as one necessary component as part of a larger program of government regulation of housing. For years, the left was divided on the question of zoning.[308] The anti-zoning faction, the "YIMBYs" ("Yes in my backyard") heavily emphasized that reducing zoning would reduce rents. For much of the center-left, zoning has become one part of a much larger agenda, sometimes called the "abundance agenda" or "supply-side progressivism."[309] Such progressives continue to support the

302. *Id*. at 448, 450–51 (labor law reform); *id.* at 465 (wealth tax); *id.* at 473–75, 77 (anti-trust law); *id*. at 482 (public banks); *id.* at 477–79 (corporate governance).

303. *See id.* at 428 (arguing that the political economy motivates and defends legislation).

304. *Id*. at 30.

305. *Id*. at 10.

306. *Id*. at 76–77.

307. *Id*. at 20.

308. Ross Barkan, *The YIMBY War Breaking Out on the Left*, N.Y. MAG.: INTELLIGENCER (Sept. 16, 2022), https://nymag.com/intelligencer/2022/09/a-war-is-breaking-out-on-the-left-between-yimbys-and-nimbys.html [https://perma.cc/E232-RLY3].

309. *See* Derek Thompson, *A Simple Plan to Solve All of America's Problems*, ATLANTIC (Jan. 12, 2022), https://www.theatlantic.com/ideas/archive/2022/01/scarcity-crisis-college-

government spending money to help the poor increase access to education, housing, and health care, but emphasize that excessive government regulation that suppresses the supply of those goods will make them excessively expensive for the government and for the working poor.[310] Those further on the left, often associated with the Democratic Socialists of America (DSA), dismissed the YIMBYs as stalking horses for young professionals, developers, and landlords seeking to gentrify poor neighborhoods.[311] In addition to increasing regulation such as rent control and eviction protections to protect vulnerable tenants, their preferred solution is to build public or socialized housing and they cite to its supposed success in Vienna and Singapore.[312]

But at this point, both groups "are finding common ground."[313] Some YIMBY groups recognize that without some kind of government intervention, even market rate rents will not serve the working class. Many YIMBYs agree that city governments should require new construction to reserve a certain portion for lower-income residents. Even more striking is the shift among politicians and thinkers associated with the DSA left. They increasingly see zoning deregulation as a positive complement to their agenda. Bernie Sanders, Elizabeth Warren, and other progressive politicians included measures against exclusionary zoning in their presidential platforms.[314] More recently, Alexandria Ocasio-Cortez has introduced a bill

housing-health-care/621221/ [https://perma.cc/UG8S-SKS6] (terming progressive movement focused on reducing supply-side constraints the "abundance agenda"); Ezra Klein, Opinion, *The Economic Mistake the Left Is Finally Confronting*, N.Y. TIMES (Sept. 19, 2021), https://www.nytimes.com/2021/09/19/opinion/supply-side-progressivism.html [https://perma.cc/YNA3-7JZT] (terming it "supply-side progressivism").

310. Klein, *supra* note 309.

311. *See* Barkan, *supra* note 308 (remarking on pro-development antipathy to working-class housing movement's proposals).

312. *See, e.g.*, Daniel Denvir & Yonah Freemark, *Just Build the Homes*, SLATE (May 22, 2023), https://slate.com/business/2023/05/public-housing-upzoning-yimby-affordability-crisis.html [https://perma.cc/L36F-FNRH] (arguing in favor of building more public housing); Francesca Mari, *Imagine a Renters' Utopia. It Might Look Like Vienna*, N.Y. TIMES MAG. (May 23, 2023), https://www.nytimes.com/2023/05/23/magazine/vienna-social-housing.html [https://perma.cc/3T4G-GXKZ] (describing the successes of Vienna's social housing model).

313. Daniel Marans, *Why Rival Sides in the Housing Crisis Plaguing Major U.S. Cities Are Considering Peace*, HUFFPOST (Feb. 6, 2023), https://www.huffpost.com/entry/yimby-leftist-peace-affordable-housing-fight_n_63ded746e4b0c2b49ae35781 [https://perma.cc/D5XB-D7F4].

314. Maggie Astor, *How Bloomberg, Sanders and Warren Responded to a Survey on Housing*, N.Y. TIMES (Mar. 3, 2020), https://www.nytimes.com/2020/03/03/us/politics/democratic-candidates-homeless-affordable-housing-survey.html [https://perma.cc/9MJU-N8LD]; DATA FOR PROGRESS, ELIZABETH WARREN'S HOUSING POLICY 3 (2019), https://www.filesforprogress.org/memos/housing/Warren_DFP_memo_7_19.pdf [https://perma.cc/DF8H-2CCV]; Matthew Yglesias, *Bernie Sanders's Housing-for-All Plan, Explained*, VOX (Sept. 19, 2019, 2:30 PM), https://www.vox.com/2019/9/19/20873224/bernie-sanders-housing-for-all [https://perma.cc/546C-7XJD].

to reduce federal funding to "jurisdictions blocking equitable growth" through exclusionary zoning and made opposition to exclusionary zoning one of the criteria for her political action committee's endorsement.[315] Even those interested in building public housing recognize that doing so will be difficult without addressing exclusionary zoning. In a widely circulated article calling for socialized housing, socialist Daniel Denvir and his co-author Yonah Freemark capture this new spirit among parts of the far left, writing that proposals for socialized housing "can be implemented hand-in-hand with upzoning designed to attract more market-rate development (best complemented with rent control). YIMBY, meet PHIMBY: *Public housing in my backyard*."[316] At this point, much of the progressive left is united in their commitment to the abolition of exclusionary zoning, but many argue that additional measures by the government are necessary to keep housing open to the poor.

A supporter of the anti-oligarchic constitution would likely support the farther left side that would like to pair the abolition of exclusionary zoning with extensive investment in building public housing or other government interventions. But it would recognize a division of labor: The judiciary is the best option for striking down exclusionary zoning, and then the elected branches must step in to complete the job.

Lastly, an anti-oligarchic interpreter of the Constitution would embrace the judiciary for lack of better alternatives. Fishkin and Forbath repeatedly emphasize that the elected branches are the proper tool for redistributing wealth. But they are severely limited in the case of zoning, which falls under the power of states and cities. At most, the federal government can condition its spending in a "noncoercive" manner.[317] Given these limits and given the high stakes, the judiciary must act in limited ways to help preserve the Democracy-of-Opportunity tradition.

IV. Options for Change

There are several potential options for revising takings doctrine in ways that would implement the ideas set out in this Article. The most obvious would be to rule that exclusionary zoning restrictions on housing

315. A Just Society: A Place to Prosper Act of 2019, H.R. 5072, 116th Cong. § 8 (2019); Marans, *supra* note 313.

316. Denvir & Freemark, *supra* note 312.

317. *See generally* South Dakota v. Dole, 483 U.S. 203 (1987) (holding that Congress constitutionally and noncoercively exercised its spending power when it conditioned the receipt of federal highway funds on states' agreement to set the minimum drinking age at twenty-one); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (holding that a provision of the Affordable Care Act conditioning states' receipt of existing Medicaid funding on their expansion of Medicaid coverage was unconstitutionally coercive).

construction qualify as per se takings, and are therefore presumptively unconstitutional, much in the way that physical invasion takings are. In its 2021 ruling in *Cedar Point Nursery v. Hassid*,[318] the Supreme Court ruled that even temporary physical occupations of property are per se takings.[319] That has also long been the rule for permanent physical occupations,[320] and for regulations that deprive the owner of "all economically beneficial or productive use" of his property.[321] Exclusionary zoning could potentially be added to this list.

As with other types of takings, there would still be an exception for some exercises of the police power protecting the public against threats to health and safety.[322] For example, some courts held during the COVID-19 pandemic that the police power created an exemption from takings liability for COVID shutdowns.[323] But most restrictions on housing construction could not be defended on that basis, especially if they categorically barred multi-family residences as opposed to merely mandating safety measures.[324]

In our view, the per se approach would be most consistent with versions of originalism emphasizing the importance of the right to use and develop property,[325] and with living constitution theories that abjure detailed judicial analysis of economic and social policy issues. Under the per se rule, there would be little room for judicial discretion, and—in most cases—little need for courts to analyze the pros and cons of particular zoning rules, or particular building projects.

A less aggressive approach would keep exclusionary zoning under the *Penn Central* framework, but make that framework far less deferential. For example, exclusionary zoning restrictions could be classified as having particularly egregious characteristics under one or more of the three prongs of the *Penn Central* test: the "economic impact of the regulation on the claimant," the "extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the government

318. 141 S. Ct. 2063 (2021).

319. *Id.* at 2072.

320. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

321. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

322. *See supra* subpart II(C).

323. *See, e.g.*, Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020) (holding that a temporary executive order forcing closure of all non-life-sustaining Pennsylvania businesses during the COVID-19 pandemic was a valid exercise of the police power and did not constitute a regulatory taking); State v. Wilson, 489 P.3d 925 (N.M. 2021) (holding that issuance of public health orders restricting the capacity and operation of certain New Mexico businesses during the COVID-19 pandemic was a valid exercise of the police power and did not constitute a regulatory taking).

324. *See supra* subpart II(C).

325. *See supra* subparts II(A–B).

action."[326] The simplest way to heighten judicial scrutiny under *Penn Central* would be to treat the first and third prongs ("economic impact" and "character of the government action") as presumptively favorable to the property owner. This would give courts more wiggle room than the per se approach but would still lead to the invalidation of many exclusionary zoning restrictions. The "character of the government action" prong is particularly malleable, and thus particularly susceptible to expanding to include special consideration of exclusionary zoning.[327]

This approach might also have the possible virtue of being less disruptive to existing precedent. Zoning restrictions would still be under the *Penn Central* framework, and *Euclid* would technically remain on the books. But judicial scrutiny of exclusionary zoning would, nonetheless greatly increase.

By contrast, the per se approach would likely require largely overruling or sidelining *Euclid*, at least as to exclusionary zoning that constrains housing construction. In our view (which we do not elaborate in detail here), this would be justified under the Court's standards for overruling constitutional precedent.[328] But it would be a more revisionist approach than trying to work within the *Penn Central* framework.

Under either the per se or *Penn Central* approaches, imposing takings liability for exclusionary zoning would not automatically terminate all such restrictions. The government could potentially maintain them if it were willing to pay compensation, usually set at the "fair market value" of the property taken.[329] But, in practice, it would be difficult to maintain exclusionary zoning over large areas if local and state governments had to pay compensation to all of the large number of property owners affected. Even governments that are often insensitive to costs would find it difficult to expend so much on compensation. In most localities, remaining exclusionary zoning restrictions would be confined to relatively narrow areas.

One possible obstacle to bringing takings cases against exclusionary zoning restrictions is the fact that many such restrictions predate the period at which the current owner of a given property acquired it. But in *Palazzolo*

326. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

327. For an overview of elements that might figure into assessing this prong of the *Penn Central* test, see Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649 (2012). Merrill concludes that lower courts have interpreted the "character" prong in an "open-ended" way that incorporates "a multiplicity of considerations." *Id*. at 653.

328. The most recent major elaboration of these standards is, of course, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

329. For an overview and critique of this standard, see YUN-CHIEN CHANG, PRIVATE PROPERTY AND TAKINGS COMPENSATION: THEORETICAL FRAMEWORK AND EMPIRICAL ANALYSIS (2013).

v. Rhode Island,[330] the Supreme Court ruled that property owners can bring such challenges even if "they purchased or took title with notice of the limitation."[331] As the Court explained in its majority opinion, a contrary rule would seriously undermine the Takings Clause:

> The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. . . . The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. . . . Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.[332]

If zoning restrictions violate the Takings Clause, there should be no "expiration date" on challenging them created by a transfer of title.

If it is not overruled completely, *Euclid* could potentially be constrained by the simple expedient of limiting its applicability to claims arising under the Due Process Clause of the Fourteenth Amendment, while excluding those based on the Takings Clause. In *Lingle v. Chevron*,[333] decided in 2005, the Supreme Court already described *Euclid* as "a historic decision holding that a municipal zoning ordinance would survive a *substantive due process challenge* so long as it was not 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"[334]

Lingle did not clearly indicate that *Euclid* doesn't apply to Takings Clause claims. In its wake, some lower courts have continued to apply *Euclid* to takings cases involving zoning.[335] But it would not be hard for a future Supreme Court decision to unequivocally confine *Euclid* to the Due Process

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330. 533 U.S. 606 (2001).

331. *Id*. at 626–27.

332. *Id*. at 627.

333. 544 U.S. 528 (2005).

334. *Id*. at 541 (quoting *Euclid*, 272 U.S. at 395) (emphasis added).

335. *See, e.g.*, 3000–3032 St. Claude Ave., LLC v. City of New Orleans, 368 So.3d 1160, 1174–75 (La. App. 2023) (applying *Euclid*-like standards to zoning taking case); Tubbs v. Shreveport, 1991 La. App. LEXIS 3607, at *6–7 (La. App. 1991) (same); *cf.* Diversified Holdings, LLP v. City of Suwanee, 807 S.E.2d 876, 887–88 (Ga. 2017) (holding that zoning is largely immune from takings challenges); Walters v. City of Greenville, 751 So.2d 1206, 1211–12 (Miss. App. 1999) (holding zoning is subject to less takings scrutiny than other restrictions on property rights subject to the *Penn Central* test).

Clause context. This would enable the Court to use the Takings Clause to constrain zoning without having to overrule a longstanding precedent, though the scope of that precedent would be given a limited construction. Such an approach would also be consistent with *Lingle*'s general insistence that Due Process Clause claims and takings claims are separate and distinct categories.[336]

There may be situations where the originalist and living-constitution theories addressed here would have different implications. For present purposes, the most significant is likely to be "inclusionary zoning," under which some local governments require developers to set aside units of "affordable," below-market rate housing in exchange for the right to undertake new construction projects. Under the originalist approach, inclusionary zoning would likely be a restriction on the use of property, for much the same reasons as exclusionary zoning.[337] Both restrict the type of housing that may be built in a given area, and neither—in most cases—falls within the "police power" exception.[338]

Fortunately, the invalidation of inclusionary zoning is unlikely to meaningfully reduce the availability of affordable housing. Studies find that inclusionary zoning actually reduces the availability of housing, by functioning as a kind of "tax" on development,[339] or at best leads to only minor increases in the availability of multifamily housing, which are counteracted by an increased cost of single-family homes.[340] Thus, an approach that invalidates both exclusionary and inclusionary zoning would be a huge net gain for the availability of affordable housing.

Under the three living-constitution approaches discussed in Part III, inclusionary zoning might potentially be upheld, since it does not have the same highly negative impact on the poor, disadvantaged, and racial

336. *See* Lingle, 544 U.S. at 537–44 (discussing the historical development of jurisprudence treating Due Process Clause claims and takings claims in a separate manner).

337. For discussion of the right to use, see *supra* Part I.

338. *See supra* subpart II(C).

339. *See, e.g.*, Emily Hamilton, *Inclusionary Zoning and Housing Market Outcomes*, 23 CITYSCAPE, no. 1, 2021, at 161–62, 176, 189 (concluding that inclusionary zoning functions as a tax and reduces available housing); CONNOR HARRIS, MANHATTAN INST., THE EXCLUSIONARY EFFECTS OF INCLUSIONARY ZONING: ECONOMIC THEORY AND EMPIRICAL RESEARCH 1–2, 6 (2021), https://media4.manhattan-institute.org/sites/default/files/exclusionary-effects-inclusionary-zoning-CH.pdf [https://perma.cc/GWK2-LDY7] (surveying relevant economic theory and empirical literature); Robert C. Ellickson, *The Irony of 'Inclusionary' Zoning*, 54 S. CAL. L. REV. 1167, 1170 (1981) (critiquing inclusionary zoning policies because of their tendency to reduce available housing).

340. *See, e.g.*, Antonio Bento, Scott Lowe, Gerrit-Jan Knaap & Arnab Chakraborty, *Housing Market Effects of Inclusionary Zoning*, 11 CITYSCAPE, no. 2, 2009, at 16–17 (concluding that there was a negligible increase in multifamily housing availability).

minorities as exclusionary zoning. It may still hurt them somewhat, though, by reducing housing availability at the margin.

Both originalist and living-constitution theories would still uphold some land-use restrictions in cases where they protect against significant threats to public health or safety, since they would fall within the police power exception.[341] The living-constitution theories might construe this limitation differently from originalist ones, however, as the former would be less constrained by historical conceptions of the scope of the exception.

The living-constitution approaches might also largely limit the right to use property to housing construction, leaving greater scope for regulation of industrial and other uses. For present purposes, we do not attempt a comprehensive analysis of the scope of the police power exception, except to note that few, if any, exclusionary zoning restrictions on housing construction would qualify for it.[342]

Litigation aimed at promoting stronger judicial review is not the only possible approach for combatting exclusionary zoning. There is an active political reform movement that has scored some successes at the state level in recent years.[343] State-level reform can be a valuable tool for overcoming entrenched local NIMBY resistance to allowing new housing construction.[344] But major obstacles to further progress still remain, including the political weakness of many of those harmed by zoning restrictions.[345] Judicial review can help overcome those obstacles.

In addition, stronger judicial enforcement of the takings clause could curb the use of state constitutional provisions to stymie zoning reform. Recent court decisions striking down zoning reform in California and Montana highlight the danger that such provisions can be used to protect exclusionary zoning against state-level reform.[346] Because the federal

341. *See supra* subpart II(C).

342. *See supra* subpart II(C).

343. *See* Kahn & Firth, *supra* note 3, at 1–5 (discussing four recent state-level reform movements that achieved legislative success); *see also* COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 165–67 (2024) (listing recent reforms).

344. *See*, *e.g.*, Rosser, *supra* note 1, at 858–60 (discussing state preemption of local zoning such that greater development is allowed).

345. *See supra* subparts III(A)–(C).

346. City of Redondo Beach v. Bonta, No. 22STCP1143, 2024 WL 1860434 at *8 (Cal. Super. Ct. Apr. 22, 2024); Montanans Against Irresponsible Densification, LLC v. Montana, No. DV-23-1248C, slip op. at 6–7 (Mont. Dist. Ct. Dec. 29, 2023), https://files.frontierinstitute.org/wp-content/uploads/2023/12/17-Decision-Order-re-TRO-Prel-Inj.pdf [https://perma.cc/L4VN-QATH]. The Montana ruling was recently reversed on procedural grounds by the Montana Supreme Court. But the case remains ongoing. *See* Montanans Against Irresponsible Densification, LLC v. State, 555 P.3d 759 (Mont. 2024) (reversing the lower court decision on the grounds that it failed to satisfy requirements for a preliminary injunction); *cf.* Teo Armus, *Counties and States Are Ending*

Constitution supersedes state constitutions when the two conflict, enforcement of Takings Clause constraints on exclusionary zoning can put an end to such resistance. More generally, enforcement of the federal Takings Clause against exclusionary zoning restrictions creates a realistic possibility of a nationwide resolution of the problem, while state-by-state reform is far less likely to achieve that result, given that NIMBY resistance might prevail in some states, even if it is defeated in others.

The experience of past constitutional reform movements strongly suggests that litigation and political action are mutually reinforcing strategies, not mutually exclusive ones. This was the case with the Civil Rights Movement, the feminist movement, the gun rights movement, and the same-sex marriage movement, among others.[347]

Perhaps the most immediately relevant precedent is that of the effort to reverse the Supreme Court's very broad definition of "public use" under the Takings Clause, which allows the government to condemn property for almost any purpose.[348] In *Kelo v. City of New London*,[349] the Institute for Justice, a public interest law firm, managed to bring a case challenging the broad view of public use to the Supreme Court.[350]

The Court narrowly upheld the broad view in a close 5–4 decision.[351] But the resulting publicity about the harms of condemnations for private "economic development" and the ways in which it victimizes the poor and minorities, among others, helped stimulate a massive political reform movement which led to the enactment of eminent domain reform laws in forty-five states.[352] While many of these laws were largely ineffective, about half nonetheless significantly curtailed the use of eminent domain in their respective states.[353] Moreover, the backlash against *Kelo* helped lead several state supreme courts to repudiate the broad view as a guide to the interpretation of their state constitutional public use clauses.[354] The debate

Single-Family Zoning. Homeowners Are Suing., WASH. POST (July 8, 2024, 5:00 AM), https://www.washingtonpost.com/dc-md-va/2024/07/08/single-family-zoning-lawsuit-arlington-missing-middle-trial [https://perma.cc/KJN3-HCZ5] (discussing how homeowners are suing local and state governments because of legislation ending single-family zoning); Ilya Somin, *How Constitutional Litigation Can Help End Exclusionary Zoning*, BETONIT (June 4, 2024), https://www.betonit.ai/p/how-constitutional-litigation-can [https://perma.cc/WG74-6YJN] (discussing how federal judicial review can curb such rulings).

347. On the interplay of political action and litigation for the latter, see generally WILLIAM N. ESKRIDGE JR. & CHRISTOPHER RIANO, MARRIAGE EQUALITY (2020).

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

349. 545 U.S. 469 (2005).

350. *Id.* at 477.

351. *Id*. at 477, 480.

352. SOMIN, *supra* note 34, at 137–42.

353. *See generally id*. at 135–80.

354. *See id*. at 181–203 (surveying the relevant decisions).

triggered by *Kelo* could potentially lead to that decision's reversal, possibly even in the near future, as multiple Supreme Court justices have expressed interest in revisiting the issue.[355] If a high-profile exclusionary zoning case reaches the Supreme Court, it could potentially have a galvanizing impact similar to that of *Kelo* on public use issues.

Conclusion

Both originalism and leading variants of living constitutionalism provide support for judicial intervention to curb exclusionary zoning by using the Takings Clause of the Fifth Amendment. Judicial review is not a complete solution to the problems caused by this pernicious practice. But it can be of great help. As with other constitutional reform movements, judicial review and political action can be mutually reinforcing.

355. *See id*. at 238–41 (assessing prospects for reversing *Kelo*); Ilya Somin, *Three Supreme Court Justices Signal Willingness to Reconsider* Kelo v. City of New London, REASON: VOLOKH CONSPIRACY (July 3, 2021, 12:30 AM), https://reason.com/volokh/2021/07/03/three-supreme-court-justices-signal-willingness-to-reconsider-kelo-v-city-of-new-london/ [https://perma.cc/S5U2-Y7FF] (discussing three Justices' dissent to denial of certiorari to a case challenging *Kelo*).