How the Gentry Won: Property Law's Embrace of Stasis

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

Until the 1970s, American property law differed sharply from its English antecedents. English law was dominated by a land-owning gentry class who favored stability of ownership and dynastic control of landed estates using perpetuities and trusts, generous compensation for condemnees, and irregular lot lines based on local custom that impeded land's alienability. After World War II, the same gentry-driven culture imposed greenbelts and local restrictions that shut down new housing construction for the preservation of rural land. By contrast, the central focus of American law from the early republic to the 1970s was to make land easy to buy and develop, even at the expense of incumbent owners' interests in stability, local landowner control, and prevention of externalities. That focus on development, however, has changed since the 1970s. We demonstrate how different aspects of real property law and regulation have increasingly prioritized "stasis"—protecting existing owners, limiting change, and preserving local control—over "development"—promoting growth, liquid markets, and cosmopolitanism. This shift extends beyond well-documented changes in zoning to areas such as covenants, conservation easements, forms of ownership, and property taxation. The Article provides evidence of this trend through several examples: the rise of effectively permanent homeowners' association covenants that limit future land use changes; the explosion of conservation easements that permanently restrict development; the failure to reform archaic forms of ownership that inhibit efficient land use; and property tax reforms that discourage property turnover and new development. We further argue that this shift toward stasis has imposed substantial economic costs, contributing to housing crises and reduced growth, without providing sufficient offsetting benefits. While some degree of stability in property rights is necessary, the Article concludes that property law has tilted far too far toward protecting incumbent interests at the expense of development and change. It suggests various reforms across property law domains to restore a better balance between stability and growth.

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

** Walter E. Meyer Professor of Property and Urban Law, Yale Law School. We thank Molly Brady, Nestor Davidson, Justin Driver, Daryl Levinson, Yair Listokin, Eric Posner, and Lior Strahelivitz for comments and discussions about this Article. Thanks also to participants at workshops at William & Mary Law School and Yale Law School. Thanks to Jared Hirschfield and Ashley Mehra for research assistance.

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Introduction

"We used to make shit in this country, build shit."[1] When people say things like this—and they do frequently—they are generally talking about a decline in manufacturing output or infrastructure investment in America.[2]

1. THE WIRE: *Bad Dreams* (HBO television broadcast, aired Aug. 17, 2003).

2. *See, e.g.*, Aaron Gordon, *Why Doesn't America Build Things?*, VICE (Aug. 22, 2022), https://www.vice.com/en/article/why-doesnt-america-build-things/? [https://perma.cc/6LX5-6S7Z] (discussing lack of infrastructure); Jerusalem Demsas, *Why Does It Cost So Much to Build Things in America?*, VOX (June 28, 2021), https://www.vox.com/22534714/rail-roads-infrastructure-costs-america [https://perma.cc/UY3R-2S4B] (discussing increasing infrastructure costs); Marc Andreessen, *It's Time to Build*, ANDREESSEN HOROWITZ (Apr. 18, 2020), https://a16z.com/its-time-to-build/ [https://perma.cc/KDS8-T5P8] (discussing lack of manufacturing and construction); Dan Breznitz & David Adler, Opinion, *America Can't Even Produce the Things It Invented*, N.Y. TIMES (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/opinion/manufacturing-united-states-masks.html [https://perma.cc/N6J6-H7JL] (discussing decline in manufacturing). Many of the underlying problems with infrastructure construction are similar to problems in housing. *See* David Schleicher, *Why Can't We Build? Explanations and Reasons for the Building Crisis*, 17 N.Y.U. J.L. & LIB. 379, 379–80, 384 (2024).

But one can tell a similar story about American property law. We used to have a system of property law and regulation that encouraged the building of improvements and changes in ownership. Over the past forty-or-so years, however, shifts in property law have largely served to slow building and transfers in ownership in the name of preserving the security of investments by incumbent landowners and the stability of communities.

Here is how that story would go: From before the United States became an independent country and throughout most of our history, American property laws and regulations were animated by values that stood in sharp contrast with the British law from which they emerged.[3] American property law was more crassly commercial, encouraging mortgages and foreclosure, and barring tools designed to keep estates in families for generations such as the fee tail.[4] Information about property ownership was made public on registries, bringing down information costs for even distant purchasers.[5] From the 1811 Commissioners' Plan to create a street grid in New York City to the Rectangular Survey System laying out property demarcation for much of the country, aggressive policies were used to produce straight and right-angled property boundaries, making ownership claims and property transactions easy.[6] Government officials using eminent domain to build railroads offset the amount of compensation for condemned property by the amount that neighboring property gained in value, encouraging infrastructural development.[7] Property taxes based on assessments of market value encouraged owners to put property to its highest and best use.[8] From the Preemption Act of 1841 and the Homestead Act of 1862 all the way through the creation of the Federal Housing Administration, the goal of getting land in the hands of the largest number of people who would use the land actively underlay much of what was distinctive about American property law and regulation.[9] Across doctrines and policies, American property law prized growth, alienability in a liquid national market, changes in uses, and putting real property in the hands of active users.

In contrast, American property law gave relatively less respect—not no respect, but less—to the dynastic claims of large landowners, to complaints that competition harmed the predictability of investments, and to arguments about the importance of the continuity of land uses and community stability. American property law's difference from British property law was not rooted in a thoroughgoing commitment to strong property rights; American law

3. This Article discusses real property, not personal or intellectual property, except where noted.
4. *See infra* subsection I(B)(2)(d).
5. *See infra* notes 41–43 and accompanying text.
6. *See infra* subsection I(B)(2)(a).
7. *See infra* subsection II(B)(2)(b).
8. *See infra* notes 303–05 and accompanying text.
9. *See* notes 92–94, 181 and accompanying text.

included many pro-development and pro-liquidity tools that involved imposing substantial constraints on property owners. Instead, American property law reflected a greater commitment to growth and active use, whether that involved enhancing the rights of property owners *or* restricting them.

This is not the only story one could tell about the history of American property law and regulation; it is but one view of the Cathedral.[10] Nor is this history always attractive. America's embrace of a more commercial, more developmental, and more egalitarian real property law was driven in part by the desire to take Native land more effectively; the demands of British investors similarly played an important early role.[11] There are, of course, other ideological strains in property law, and many changes over time in multiple directions, as there are in any area of law or policy over the long course of American history. Further, there is substantial regional variation in property regulation; one master narrative cannot capture this diversity.

But it is fair to say that the pro-developmental strain in property law and regulation was, for most of American history, a dominant one. The pro-commercial tilt in American property law can be tracked from the founding era through the great century of American economic growth from the 1870s through the 1970s.[12] However, in the 1970s and 1980s support for policies aimed at encouraging economic activity and change withered in property law, or so this Article will argue.[13]

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10. "As Professor Harry Wellington is fond of saying about many discussions of law, this article is meant to be only *one* of Monet's paintings of the Cathedral at Rouen. To understand the Cathedral one must see all of them." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 n.2 (1972) (citation omitted).

11. *See infra* section I(B)(1), notes 165–67 and accompanying text. While we will discuss the history at issue, this Article is fundamentally not about *why* American property law was different, nor is it about *why* American property law shifted in the 1970s. That is, unlike much of our other work, it is not aimed at questions of political economy or public choice. Instead, the Article analyzes ideological throughlines in American property law and discusses their effects. For different theories about why property law shifted in the '70s and '80s, see *infra* note 13 and accompanying text.

12. *Cf.* ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH 1–2 (2016) (discussing how economic growth in the United States was very fast from 1870 to 1970 and has declined since).

13. That this period saw a break in attitudes towards growth more broadly is something noted in other fields, but largely undiscussed in property law scholarship, outside of the context of zoning. *See, e.g.*, TYLER COWEN, THE COMPLACENT CLASS: THE SELF-DEFEATING QUEST FOR THE AMERICAN DREAM 11 (2017) (dating the decline in interest in growth and risk to the early 1980s); PAUL SABIN, PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM 4–7 (2021) (arguing that the public interest movement associated with Ralph Nader helped break the New Deal coalition and imposed many procedural limitations on growth-oriented policy); William A. Fischel, *The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day*, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 13, 13 (Lee Anne Fennell & Benjamin J. Keys eds., 2017) (discussing shift in land use policy in the 1970s).

This Article will make four major claims:

First, one useful way to understand real property law and regulation is that most conflicts are fought between two broad opposing clusters of values or beliefs about what is economically useful and troublesome about systems of private property. "Developmental" arguments focus on how property law can facilitate or even mandate development, encourage liquid markets, allow changes in uses, mitigate monopoly power exercised by large landholders, and foster cosmopolitanism. These arguments stand in contrast to values and beliefs that we dub "stasis" arguments. This valence in real property law and regulation seeks to protect existing landowners from externalities and nuisances and preserve their ability to determine the future uses of their properties; prizes local preferences over fostering national and international markets; and is conservative or conservationist in its attitude towards changes in land use or ownership. A system of private property will necessarily protect the status quo to some extent, as existing owners get to decide how land is used and who gets it next, but it will also encourage changes in ownership and uses in service of greater economic activity. In contested cases, though, the policy question is often whether a thumb should be put on the scale in one direction or another, towards development or towards stasis.

Second, American property law and regulation were historically quite different from British law in that American policymakers and courts regularly embraced developmental arguments. Deviations from our inherited English legal traditions largely focused on furthering alienability, supporting ownership of land by active users, and reducing protections for landholders from creditors. American property law reflected that, as economist Edward Glaeser put it, we were a "nation of real estate speculators," interested in

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Arguments that the 1970s marked a break with pro-growth ideas are quite different from another common narrative about this period, that the 1970s and 1980s marked the beginning of a "neo-liberal" era. *E.g.*, GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER 1–4 (2022); MEHRSA BARADARAN, THE QUIET COUP: NEOLIBERALISM AND THE LOOTING OF AMERICA 66–67 (2024). There were surely some traces of what some call the "neo-liberal turn" in property law as well, particularly the rising discomfort with rent control in the 1990s and 2000s, after a surge in adoptions in the 1970s and 1980s, and the reliance on private securitizations of mortgages in the period leading up the Great Recession. *See* Paige Curtis, *Return of Rent Control? How Some US Cities Are Trying to Keep Roofs over People's Heads*, GUARDIAN (June 9, 2023), https://www.theguardian.com/us-news/2023/jun/09/rent-control-comeback-america-massachusetts [https://perma.cc/S4PD-TS2P] ("Most towns with rent regulation abandoned the policies by the 1990s . . . ."); Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 U.C. DAVIS L. REV. 1111, 1167–68 (2013) (discussing rise of private securitizations of mortgages). But focusing on "neo-liberalism," however defined, is just not the best way to understand trends in property law beginning in this period, which are marked by stricter land use regulation, substantial interest in conservation, and rejection of the use of market values to assess property tax. This suggests that the neo-liberal turn was not as all-encompassing as proponents of this way of thinking argue. But fully establishing that argument is beyond the scope of this Article.

liquid markets and growth.[14] Notably, the fast economic growth of the period from 1870 to 1970 was built partially on the back of the bias towards development in our property law.[15]

Third, starting in the 1970s and 1980s, American real property law and regulation moved sharply in the direction of "stasis." This has been most clearly established in the field of land use regulation. There is a broad academic consensus that changes in zoning regulations, and related tools such as historic preservation, building codes, and subdivision requirements, started becoming much stricter in this period. There is also a broad consensus that these regulations have excessively limited new construction in many American metropolitan areas, creating housing crises and inhibiting economic growth to a very substantial degree, without providing sufficient offsetting benefits. Supporters of zoning restrictions speak clearly in the language of stasis: They worry about externalities, very broadly defined, oppose land use changes that would threaten "neighborhood character," and favor local, or even hyper-local, control.[16] But the same basic trend exists across the broader field of real property law and regulation. This Article will focus on the law of covenants, easements, forms of ownership, and property taxes. Each area has either been reformed to tame creative destruction in property markets or not reformed to meet clear economic changes.

Fourth, the post-1970s changes in property law have been normatively unattractive. They have reduced economic growth and increased economic inequality, without providing sufficient benefits.

The dichotomy between "development" and "stasis" is certainly not the only way of understanding property law, but we believe it is an especially fruitful framework. In most popular discussions of law and policy, the distinction between stasis and development is ignored in favor of contrasts between preferences for regulations seeking political and economic equality versus preferences for market ordering. Whatever the broader merits of thinking about public policy in left–right terms may be, doing so fails to capture the ideological direction property regulation has taken since the 1970s.[17] Importantly, neither development nor stasis is reliably right- or

14. Edward L. Glaeser, *A Nation of Gamblers: Real Estate Speculation and American History*, 103 AM. ECON. REV. (PAPERS & PROC.) 1, 2 (2013).

15. *Cf.* GORDON, *supra* note 12, at 94–97, 127–28 (discussing the transformation of homes during periods of fast growth); *id.* at 129–32, 168–69 (discussing the transformation of transportation infrastructure and attendant land use changes).

16. *See* David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1323–33 (2021) [hereinafter Schleicher, *Exclusionary Zoning*] (summarizing the literature).

17. The existence of a pro-development and a pro-stasis dimension to ideological conflict is in no way limited to property law. *See, e.g.*, JAMES PETHOKOUKIS, THE CONSERVATIVE FUTURIST 18 (2023) (describing conflict between "Up Wing," or techno-optimist, and "Down Wing," or techno-skeptic, factions as a useful alternative to the traditional left–right dichotomy in the technology-policy context).

left-wing. Pro-development attitudes can take a right-wing form, in favor of liquid markets and creative destruction, or a left-wing one, focusing on efforts to use state power to disrupt the entrenched power of the landed gentry.[18] Pro-stasis attitudes can too, whether they focus on right-wing values such as conservatism and allowing property owners unfettered control over future uses, or left-wing ones such as local participatory democracy, controlling externalities, and conservation.[19] Without using a different framework, it is hard to see how consistent the shifts in property law since the 1970s and 1980s have been or to assess them normatively.

Further, in the distinction between development and stasis, the idea of "efficiency" is not necessarily on one side or the other. Protecting landowners against externalities can be efficient, but excessively limiting development to do so will not be. Encouraging sales can be efficient, but too much churn in ownership may not be. That said, it may be the case that a particular property law ideology is a good fit for solving the problems of particular times and polities. Indeed, we argue that policymakers and judges adopting a more thoroughgoing pro-development property law ideology today would increase welfare.

The contrast between development- and stasis-oriented property law is only visible by expanding the scope of what is considered property law. Property law theorists generally put most of their efforts into fighting over the meaning and definition of property and about traditional common law doctrines.[20] A substantial part of the shift towards stasis in property law and regulation has happened outside of the domains property law scholars generally focus on, in fields such as land use and property tax. In these fields, notably, policy arguments about the value of development and stasis are explicit—the terms of the debate over things such as California's Proposition 13 are fundamentally about whether we should privilege the interests of incumbent owners in communities or whether we should instead allow for more growth and change. By using a way of looking at problems that is common in these areas, this Article brings to the fore a radical shift in

18. For instance, zoning reform has both Democratic and Republican opponents and supporters. Christian Britschgi, *In State Legislatures, Targeted Bills and Bipartisan Support Were Key to Passing Housing Reforms*, REASON (June 7, 2023), https://reason.com/2023/06/07/in-state-legislatures-targeted-bills-and-bipartisan-support-were-key-to-passing-housing-reforms/?nab=0 [https://perma.cc/F8HY-NXPB] ("That's because the partisan valence of zoning reforms is all over the map, with Republicans and Democrats both for and against it.").

19. *See* KARL POLANYI, THE GREAT TRANSFORMATION 138, 259 (Beacon Press 2d ed. 2001) (1944) (noting that "the deleterious action of the market" over land, labor, and finance was opposed by both "the working and the landed classes" for either "democratic" or "aristocratic" purposes).

20. Roderick M. Hills, Jr. & David Schleicher, *What Is Property Law in an Age of Statutes and Regulation?*, 79 N.Y.U. ANN. SURV. AM. L. 89, 92 (2023) [hereinafter Hills & Schleicher, *What Is Property Law?*]; Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 135 (2015) [hereinafter Hills & Schleicher, *Planning*]; *see also infra* notes 68–72 and accompanying text.

the ideological direction of property law, one that occurs in the common law as well as in regulation. This shift is the most important change in the regulation of real property in the last fifty years, but property law scholars have largely not discussed it, perhaps because crucial parts fall outside of their narrow definition of the field.

Part I of the Article states abstractly the dichotomy used throughout the paper between "development" and "stasis." It then lays out the Article's broad historical claim that eighteenth-, nineteenth-, and (most of) twentieth-century American property law and regulation, in contrast with their English antecedents, favored development and aimed at undercutting incumbent landowners' power.

Part II describes the "YIMBY" argument for reforming land use regulation.[21] It discusses the broad academic consensus that land use regulation has become much too strict since the '70s and '80s, reducing growth and exacerbating wealth inequality. It also shows that this argument is not, or should not be, limited to regulations on the built form of cities. Instead, the broader logic of YIMBYism applies equally to regulations about who can buy, rent, and use property. Finally, it shows that the claims of zoning reformers fit neatly into the broad developmental history of American property law.

Part III argues that what has happened in land use has happened throughout the broader field of real property law and regulation. The law of covenants, the law of easements, forms of ownership, and property taxes either have moved in the direction of stasis or have not been reformed despite economic shifts that suggest they should have been. In each case, these reforms or lack of reforms have generated substantial harms without providing much in the way of offsetting benefits.

The Article then concludes, suggesting paths forward for reform.

I. Development v. Stasis in Property Law: Theory and History

This Part will lay out the theoretical framework that will be used in the rest of the Article. It argues that a major theme in property law is balancing values we collectively call "developmental"—in favor of building, changing uses, churn in ownership, and cosmopolitanism—against a set of values we call "stasis"—focused on protecting owners' investments, worried about nuisances, and promoting conservation and localism. It will also show that—for most of American history—American property law differed from its British roots by embracing developmental values to a greater degree, but that this American developmental emphasis has changed in recent years.

21. YIMBY stands for "Yes In My Backyard." *See infra* notes 207–10 and accompanying text.

A. Development v. Stasis in Property Law Theory

The regulation of real property is too central to both our economy and our lives to be understood using only one tool or way of looking at the world. "One view of the cathedral" of property law is to look at it as a tool for managing the extent to which property, as an institution, both facilitates *and* frustrates development, change in uses, and churn in ownership.[22]

On one hand, property rights clearly encourage development, change in uses, and churn in ownership. Clearly defined property rights make it easy to buy and sell goods and land.[23] We take for granted the idea that land can be purchased and owned by someone distant from it, but this capacity for long-distance transactions is a product of property laws. Secure property rights provide owners with knowledge that they will receive the benefits—and bear the costs—of the use of assets, providing incentives for efficient use.[24] Further, property rights make investments in acquiring and improving assets possible, as costs today can be borne with confidence that benefits will be captured tomorrow (and that investments will capitalize into asset values).[25] Secure property rights enable debt markets to work, providing a source of collateral, as Hernando de Soto has famously argued.[26] As a result, economists regularly argue that the protection of property rights is essential to economic growth.[27]

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22. *See* Calabresi & Melamed, *supra* note 10, at 1089 n.2.

23. *See* Ryan Bubb, *The Evolution of Property Rights: State Law or Informal Norms?*, 56 J.L. & ECON. 555, 566 (2013) (citing Timothy Besley, *Property Rights and Investment Incentives: Theory and Evidence from Ghana*, 103 J. POL. ECON. 903 (1995)) (noting that the perceived availability of common property rights is commonly linked to increased property investment).

24. *Cf.* Armen Alchian & Harold Demsetz, *The Property Rights Paradigm*, 33 J. ECON. HIST. 16, 23–24 (1973) (discussing advantages of private rights over communal rights); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968) (describing problems that commonly arise absent private property rights).

25. *Cf.* Besley, *supra* note 23, at 926, 931, 936 (examining the relationship between theoretical property models and real-world investment outcomes); DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 6 (1981) (discussing how property rights incentivize economic growth).

26. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 6–7, 49, 64–65 (2000).

27. *See* Douglass C. North & Robert Paul Thomas, *An Economic Theory of the Growth of the Western World*, 23 ECON. HIST. REV. 1, 10 (1970) (discussing the improved economic efficiency brought about by developments in property rights); J. Bradford De Long & Andrei Shleifer, *Princes and Merchants: European City Growth Before the Industrial Revolution*, 36 J.L. & ECON. 671, 671 (1993) (introducing the conflict between a disregard for property rights and economic development); Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131, 134–35 (2004) (demonstrating that the quality of institutions and property rights are key predictors of national wealth). *But see* Michael Trebilcock & Paul-Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, 30 U. PA. J. INT'L L. 397, 405–06 (2008) (challenging the broad scholarly consensus that establishing strong formal property rights is a necessary precondition for economic growth).

So understood one way, property rights promote development, changes in uses, national and international markets, and competition for resources. However, a set of familiar challenges in property law thinking places property rights on the opposite side of these same forces.

Property ownership, by its very nature, allows owners to resist changes, if they want. Blackstone famously described "the right of property" as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[28] That a property is not being used according to its highest and best use, as determined by others, is not important in the face of this sole and despotic dominion. Indeed, owners will sometimes promote property protections so strong that they go beyond what is necessary to maximize the value of their property. This is particularly common for what are sometimes described as "collective property rights" such as the right to allow or forbid new construction in whole neighborhoods or towns, exercised by homeowners through zoning regulations imposed by the small local governments they dominate.[29] Excessively strict land use rules can be understood as reflecting a commonly held taste among property owners in preserving land and communities as they are: Landowners are often conservative and resistant to change.[30] Alternatively, as William Fischel has argued, the same rules can be understood as an effort by property owners to reduce the variance in the value of their property by limiting change nearby—something that is particularly important to homeowners, who usually have most of their wealth invested in their homes.[31]

Either way, giving today's owners greater influence over uses of nearby properties, through land use regulation, and over the future of their own property, through the ability to put conditions on how their heirs use it, slows the pace at which land uses and communities develop and change.

Strong property rights can stall more intense development of land. When some prospective use of land requires assembling a number of properties, the owner of each property can try to "hold out" for all the profits

28. 2 WILLIAM BLACKSTONE, COMMENTARIES *2. However, Blackstone had qualms about this understanding of property rights. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–06 (1998).

29. *See* Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 278 (2009) (discussing how communities in Boston with low density levels are not maximizing land values). For a discussion of theories of "collective property rights," see *infra* note 214.

30. Schleicher, *Exclusionary Zoning*, *supra* note 16, at 1320–21. One of us described arguments against land use deregulation as being "the incumbents' lament: Why does change have to come when things are so good for me already?" *Id.* at 1342.

31. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 9–12 (2001).

the higher-value use would create.[32] If a developer sees an opportunity to redevelop a block of single-family homes as a tall apartment building, there is nothing to stop any of the homeowners from holding out and demanding all of the gains from redevelopment, potentially stopping the redevelopment even if it would increase the total value of land. In the absence of some coordination mechanism among landowners or eminent domain, holdout problems or "tragedies of the anti-commons" can pose very substantial costs.[33] Relatedly, property rights often extend beyond the boundaries of a single lot, given the ability to make claims in nuisance. Such rules protect the interests of existing owners against the interests of newcomers and changes in nearby uses.

In sum, clear property rights are necessary for development, but giving owners an unlimited power to use those rights to hold out against changes can also retard development.

Further, owners of land can profit without making commensurate investments in improving land. Economists use the term "rents" to describe returns that are not the result of investments made in improving property but rather reflect only the intrinsic value of particular pieces of land or locations.[34] One can understand land rents as the returns on ownership of a monopoly that takes the form of control over a unique location.[35] These monopolies can be enhanced by owners' decisions to combine properties. If a single owner has exclusive access to a particular resource without clear substitutes, such as a long stretch of coastline, the owner can charge high

32. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1472–74 (2008).

33. Land that is already assembled into large plots trades at a 15%–40% premium in Los Angeles. Leah Brooks & Byron Lutz, *From Today's City to Tomorrow's City: An Empirical Investigation of Urban Land Assembly*, 8 AM. ECON. J. ECON. POL'Y 69, 70–73 (2016); *see* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 639, 673–74 (1998) (describing underuse caused by fragmentation and holdouts); Lee Anne Fennell, *Property Attachments*, 87 U. CHI. L. REV. ONLINE 55, 57–58 (2019) (highlighting that urbanization can exacerbate holdout problems).

34. *See* Joseph Bankman, Mitchell A. Kane & Alan O. Sykes, *Collecting the Rent: The Global Battle to Capture MNE Profits*, 72 TAX L. REV. 197, 200–01 (2019) (defining economic rent generally).

35. As Henry George famously argued, taxing such land rents is an efficient form of tax, as it mostly does not change incentives to create or invest because the amount of land is relatively fixed. HENRY GEORGE, PROGRESS AND POVERTY 412–14 (Robert Schalkenbach Found., 75th anniversary ed. 1954) (1879). Economists today generally agree that taxes on land are quite efficient, if not going as far as George. *E.g.*, Mason Gaffney, *The Role of Ground Rent in Urban Decay and Revival: How to Revitalize a Failing City*, 60 AM. J. ECON & SOCIO. (SUPPLEMENT) 57, 74–75 (2001); Joseph E. Stiglitz, *The Theory of Local Public Goods*, *in* THE ECONOMICS OF PUBLIC SERVICES 274, 282 (Martin S. Feldstein & Robert P. Inman eds., 1977). That said, there are criticisms as well. *See, e.g.*, Martin Feldstein, *The Surprising Incidence of a Tax on Pure Rent: A New Answer to an Old Question*, 85 J. POL. ECON. 349, 356–57 (1977) (noting that land value taxes over time can act as an inefficient tax on capital and investment broadly).

prices, limiting overall output by reducing access.[36] If a few owners control most of the rental buildings in a neighborhood, they can jack up rents.[37]

The absolute nature of property ownership can slow the flow of assets to their highest value users. A holder of property will usually sell to the person who bids the most for the property or to someone willing to bid an amount above her reservation price for keeping it.[38] But there is no requirement that they do so, and transaction costs will often mean they do not. Failures to transact are endemic in the economy and create enormous economic losses, on the order of trillions of dollars of economic value worldwide.[39] Further, as Thomas Merrill and Henry Smith have argued, giving owners total free reign to decide on how property rights are structured would raise information costs for potential purchasers, reducing market liquidity.[40] It often takes limitations on property rights—policies such as mandatory property registries or the creation of gridded streets through eminent domain—to create liquid markets.

While property rights generally allow for national and international markets in property, some invocations of property rights embody a belief in localism, or a near-exclusive concern for the welfare of people near the sites of particular pieces of real property.[41] Property law rules can discourage or fail to encourage transactions by, say, allowing property owners to create complicated future interests or failing to require them to publicize their

36. This is the justification that Supreme Court gave for the creation of the "public trust" doctrine, that granting exclusive private property rights over certain types of property will reduce output and access. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–56 (1892) (stressing how the exclusive land grant at issue in the case would impinge on important public interests in using and accessing the underlying land). For background information on the history of the public trust doctrine, see generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799 (2004).

37. C. Luke Watson & Oren Ziv, *Is the Rent Too High? Land Ownership and Monopoly Power* 9 (CESifo, Working Paper No. 8864, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3774672 [https://perma.cc/XK6S-A9LH].

38. Indeed, the existence of systems of alienable private property, in contrast with other systems of control over resources, makes it much, much more likely that the highest bidder does get the asset. *See* Trebilcock & Veel, *supra* note 27, at 406 (noting that systems of alienable private property encourage land transfers to users who can best extract value from the transferred land).

39. *See* Eric A. Posner & E. Glen Weyl, *Property Is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51, 56–60, 114 (2017) (reviewing the literature on inefficient property transactions before concluding that the regular failure of assets to flow to their highest-valued users costs the global economy $5 trillion annually).

40. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*].

41. *See* KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA'S HOUSING CRISIS 32–33 (2020) (identifying property rights as a possible tool for property owners to slow or stop development before describing localism-based motivations for doing so).

ownership on property registries.[42] These decisions make it harder for "outside" individuals and firms to discover, buy, and move into communities. This is good for people near the property, who know more about these complex but hidden interests in land. But it is bad for outsiders. Similarly, complex local zoning rules may help people in the community but impose costs on outsiders, both by giving the former participatory rights to fight changes in the status quo and by increasing information costs for foreign developers.[43]

The two-faced nature of the interaction between property rights and development runs through property law disputes. While property law disputes are formally about bits of doctrine or regulatory choices, the underlying normative content is often about whether property law should encourage or limit growth and change.

We will call "developmental" the constellation of values on the side of this divide favoring growth and change. Developmental rules encourage building, liquid markets, widely diffused ownership, changes in uses, and cosmopolitanism. Developmental values are not the same as libertarian or deregulatory values: Promoting growth and change sometimes calls for limits on property rights, sometimes for protecting such rights. Either way, the goal is *more*—more building, more sales, more competition.

It is easiest to see "developmental" arguments in fights over zoning, where the question is whether to permit new buildings, which both leads directly to new economic growth and reduces the power of "homeowner cartels" of incumbent homeowners to profit from scarcity.[44] But similar arguments are present in decisions that reduce what "sticks" are included in the "bundle" of property ownership in order to facilitate more active use, such as the narrow interpretation of the charter at issue in the *Charles River Bridge Case*[45] or the limitation on the *ad coelum* rule to facilitate air travel in *Hinman v. Pacific Air Transport.*[46] Similarly, the reason some courts use liability rules in nuisance cases is that they encourage more active use of land.[47] In both this context and in zoning reform fights, those embracing

42. *Cf.* Merrill & Smith, *supra* note 40, at 32–33, 40–42 (introducing the costs engendered by convoluted property interests and separately describing the impact of public property registries on transaction costs).

43. *Cf.* EINSTEIN, GLICK & PALMER, *supra* note 41, at 25–26 (discussing the myriad costs that can be imposed on developers by property owners with participatory rights).

44. *See infra* notes 201–04 and accompanying text; *see also* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977) (developing the concept of homeowner cartels).

45. 36 U.S. (11 Pet.) 420, 549–50 (1837).

46. 84 F.2d 755, 758 (9th Cir. 1936).

47. *See* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 872, 875 (N.Y. 1970) (allowing a polluting cement plant to continue operating and pay damages rather than face an injunction despite committing a nuisance); Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972)

developmental attitudes are as concerned about rules that inhibit the positive benefits of co-location, what economists call agglomeration economies, as they are about the negative externalities created by incompatible uses.[48] Policies such as demarcating property in rectangles and squares encourage alienability by reducing transaction and information costs.[49] Such rules also promote cosmopolitanism by making it easy for purchasers, wherever they are from, to identify property they would like to acquire and to move to opportunity. Other property law rules that can be put into the developmental category include adverse possession,[50] easements by necessity,[51] and anti-monopoly "private-private" takings from landholders.[52] Rules that limit the power of owners of property to dictate future owners and uses serve similar ends.[53]

In contrast, we will call efforts to enhance the rights of real property holders—their rights to exclude, their rights to determine land uses by others, and their ability to influence future uses—as protections for "stasis."

Laws focused on "stasis" are the opposite of "developmental" rules and give landowners and particularly owner-occupiers of land greater powers to resist and shape change and growth. Again, this is easiest to see in debates over zoning, where incumbent homeowners use their control over local governments to promote regulations to reduce growth, limit perceived externalities from new construction, preserve home values, and protect existing neighborhood character.[54] But arguments that property owners should have the power to impede development in the future through boutique

(requiring a developer to pay damages to a feedlot facing an injunction in a coming-to-the-nuisance case); Calabresi & Melamed, *supra* note 10, at 1116–19 (describing the famed "second" and "fourth" rules).

48. *See* Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON. L. REV. 637, 638–40 (2012) (discussing how land use regulations can inhibit agglomeration economies).

49. *See infra* note 108 and accompanying text.

50. *See* Posner & Weyl, *supra* note 39, at 53–54 (describing adverse possession as a method to increase allocative efficiency that marks an exception to ordinarily strong protections for property rights).

51. *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1024–25, 1024 n.183 (2004) (discussing easements by necessity as an example of a situation where there is a dilemma between the general rule that property favors exclusion and "governance" rules where stakes to economic activity are high).

52. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (discussing established Supreme Court precedent that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid" (internal quotation marks omitted) (quoting Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937))); *see also id.* at 241–42 ("The people of Hawaii have attempted, much as the settlers of the original 13 Colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs." (footnote omitted)).

53. *See infra* notes 289–95 and accompanying text.

54. *See infra* notes 212–15 and accompanying text.

forms of bequests that reduce future alienability advance the same set of "stasis" values. Decisions that provide punitive damages for trespass suits even in the absence of actual damages,[55] the "ameliorative waste" doctrine,[56] and property tax assessments based on "value in use" rather than market value all promote stasis.[57] Nuisance rules that strongly privilege the existing mix of uses in a community also fall into this camp.[58] So too do tax laws such as California's Proposition 13, which provides benefits to long-term holders of property but effectively penalizes sales.[59]

"Stasis" rules protect the rights of incumbents, reduce negative externalities, and privilege localism. They reduce the rate of change in land uses, as existing owners can limit potential new uses of their own property in the future through conditions on transfers, and can, through land use regulations and nuisance lawsuits, limit change in the uses of nearby properties. They inhibit the movement of people and capital to fit today's preferences and technologies, preferring to preserve what was over what might be.

One need not be too dogmatic about this dichotomy between stasis and development. One can favor some developmental rules and not others; the same goes for policies that lean towards stasis. Even so, it should be clear that strong property rights are simultaneously a friend and foe of development. Defining and protecting property rights is essential to growth and liquid markets, but property rights also sometimes stand in the way of these very ends.

We are far from the first to describe property law as a conflict between development and stasis. Gregory Alexander's classic book, *Commodity and Propriety*, argues that American property law thinking has been a dialectic between two ideas: property-as-commodity, or the desire for alienability and commerce, and property-as-propriety, or a civic conception of the role of property that focuses on establishing and maintaining the social order.[60] Further, as Alexander notes, within both traditions there has always been a debate about whether property should be a "dynamic" or "static" institution

55. *See* Jacque v. Steenberg Homes, Inc., 209 Wis. 2d 605, 609, 621 (Wis. 1997) (awarding punitive damages due to "actual harm" caused by intentional trespass even when no actual damages are present).

56. *See* Zach Villemez, Comment, *Misconstruing* Melms*: The Fall of Ameliorative Waste*, 28 GEO. MASON L. REV. 1153, 1153–55 (2021) (describing ameliorative waste and noting the decline of the doctrine).

57. *See infra* note 314 and accompanying text.

58. RESTATEMENT (SECOND) OF TORTS § 821F cmt. e (A.L.I. 1979) ("The location, character and habits of the particular community are to be taken into account in determining what is offensive or annoying to a normal individual living in it.").

59. *See infra* notes 313–17 and accompanying text.

60. GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, 1 (1997).

(in some periods rendered as a fight between "liberality" and "technicality"), favoring fluid social relations and markets or preserving existing hierarchies and investments.[61]

There is plenty of other work that makes theoretical moves that overlap with the perspective of this Article. John Sprankling argued American property law differed from British property law by adopting an "anti-wilderness bias," and a variety of tools to "exalt the user over the idler."[62] Nestor Davidson described the core conflict in some aspects of property law as being about "foundationalism and dynamism," a conceptualization that is not too far from what we offer here.[63] Eric Posner and Glen Weyl argued that strong property rights protect investment efficiency over allocative efficiency, concepts that partly overlap with the dichotomy we propose here.[64] Lee Fennell has argued that property rights should be defined in functional terms to encourage development.[65] In contrast, Christopher Serkin has argued that property law should be understood as a way to slow the pace of change in land uses.[66] Sarah Harding likewise has argued that "collective yearnings for stability" have pushed the law to embrace property claims of increasing longevity.[67]

The dominant mode of contemporary property law scholarship, however, is less focused on property law's consequences and more on property law's essences. Sometimes called the "New Essentialism" and associated with the work of Thomas Merrill and Henry Smith, this line of scholarship focuses on definitional questions about the internal logic of

61. *Id.* at 31–33 (discussing dynamism and stability in civic republican thought); *id.* at 78–80 (comparing dynamism and stability in Federalist thought, particularly in the work of Noah Webster); *id.* at 98–99 (explaining how arguments about liberality and technicality mapped on to debates about dynamism and stability); *id.* at 142–43 (discussing dialectic of dynamism and stability in the thought of James Kent about property law); *id.* at 204–05 (using the *Charles River Bridge Case* to discuss conflict between two views of the importance of property to production).

62. John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 537–38 (1996).

63. Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1600 (2008).

64. ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 35, 38–39 (2018).

65. *See, e.g.*, Lee Anne Fennell, *Property as Service Streams*, *in* RESEARCH HANDBOOK ON PROPERTY, LAW AND THEORY 247, 247 (Chris Bevan ed., 2024) ("Property's job is to help people derive benefits from resources." (footnote omitted)); Lee Anne Fennell, *Property Beyond Exclusion*, 61 WM. & MARY L. REV. 521, 524, 572 (2019) (arguing that exclusionary property rights' functional utility has been diminished by recent social and technological developments in the modern economy).

66. Christopher Serkin, *What Property Does*, 75 VAND. L. REV. 891, 893 (2022) ("[P]roperty law serves an underappreciated purpose: protecting reliance on resources by favoring slow changes over fast ones in the evolution of property rights."); Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 752 (2020) [hereinafter Serkin, *Zoning*] ("Zoning . . . much more often slows or constrains change." (footnote omitted)).

67. Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 288 (2009).

property.[68] In particular, the New Essentialists focus on the *in rem* nature of property claims, arguing that property law is distinguished from *in personam* contractual rights by the need to reduce the costs of identifying asset owners.[69] An important part of the New Essentialists' project is assessing decisions and rules to determine whether or not they reflect this internal *in rem* logic.[70]

The New Essentialists' focus on common law rules provides little leverage on how to evaluate many legislative and regulatory proposals, which are governed by logics different than the *in rem* idea of reducing costs of identifying owners and interests.[71] As a consequence, New Essentialist scholarship and the many other forms of property law scholarship that share its common law and definitional focus have not taken much notice of the

68. For prominent examples of this kind of work, see generally Yun-chien Chang & Henry E. Smith, *The* Numerus Clausus *Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275 (2015); Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON., Nov. 2011, at S77; Smith, *supra* note 51; Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); Merrill & Smith, *Optimal Standardization*, *supra* note 40; Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) [hereinafter, Merrill & Smith, *What Happened?*]. Katrina Wyman dubbed this work the "New Essentialism." Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 184–86, 205 (2017) (describing the "New Essentialism" of Merrill, Smith, and others and arguing that its aspirations for formalistic determinism disguise a deep functionalism).

69. *See* Merrill & Smith, *What Happened?*, *supra* note 68, at 359 ("[T]he in rem character of property and its consequences are vital to an understanding of property as a legal and economic institution." (footnote omitted)).

70. Notably, one of the central projects of the "New Essentialism" is a Restatement, seeking to clarify the eminent architecture of property law. *See* Henry E. Smith, Thomas W. Merrill, John C.P. Goldberg & Christopher M. Newman, *Reporters' Guide to: Restatement of the Law Fourth, Property*, THE ALI ADVISER (May 20, 2020), https://thealiadviser.org/property/reporters-guide-to-restatement-of-the-law-fourth-property/ [https://perma.cc/DX6V-CT5R] (discussing the essentialist goals of the Fourth Restatement of Property); Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 707–08 (2014) ("Despite the many volumes appearing under the title 'Restatement of Property,' property has never really been restated . . . . Such a Restatement would be truly valuable only if animated by a shared conception of an imminent architecture in the law of property.").

71. We have argued elsewhere that "New Essentialist" property scholarship focuses too much on the common law and fails to appreciate the (far greater) importance of land use regulation and other types of public law as forms of real property regulation. *See* Hills & Schleicher, *What Is Property Law?*, *supra* note 20, at 92 (asserting that most real property laws and policies are shaped through statutes and regulations); Hills & Schleicher, *Planning*, *supra* note 20, at 96 (imploring property scholars to focus more on expected political behavior of key governmental stakeholders). This Article offers a broader version of that same critique. Property law scholars—whether "new essentialist" or otherwise—have largely (although not entirely) missed the most important trend in real property regulation over the last fifty or so years, the trend away from the values of the development and towards stasis, because they have largely not been focused on the fields in which most of the action is taking place.

sharp ideological changes in the content of property law and regulation happening during the last fifty years.[72]

This Article does not seek to define property rights. It is our view that, from the crooked timber of pluralistic politics and institutions that regulate real property, no straight theory can be fashioned.[73] Instead, we understand property law as a domain for legislatures, administrators, and judges to argue about whether we should favor development or stasis, about whether changes in land uses fit current economic needs or instead create too many externalities that burden existing owners and residents, and about whether we should favor liquid national markets or local regulations and owners' preferences about the future uses of land. That these issues are what we debate when we fight over property law is not random—these are the issues raised by the relationship of property and markets in a broadly capitalistic system—but it is not necessary either. Instead, there is ideological conflict, and these have been the sides in that conflict. But there is no single definition or settled answer to what property law is or what it does, just ongoing disputes in a raucous, diverse, multinodal political system about how land (and other assets) should be used, traded, and regulated.

Further, there are trends in how society, law, and politics answer these questions, of course, and there are reasons to favor one view over the other. The Article will contend that American property law was, in its early years, largely defined by its deep embrace of development, in sharp contrast with British property law. But, in the last fifty years, property law has shifted, quite significantly, in the direction of stasis.

B. History, or How American Property Law Once Favored Development

Eighteenth- and nineteenth-century American property law, in comparison to both English property law of the same period and American property law today, clearly favored development. This preference for growth and markets does not have a pretty pedigree: As we explain below in section I(B)(1), the preference for raucous, commodified land markets has its origins in numerous white yeoman farmers' ownership of small amounts of land, a pattern of property holding produced by a massive and racist land

72. Framed in New Essentialist terms, almost everything interesting—things that are changing and have policy stakes—in property law today is inside "governance" regimes, rather than being about whether "exclusion" regimes can be justified or even about the line between governance and exclusion. *Cf.* Smith, *supra* note 51, at 972–73, 979 (explaining difference between governance and exclusion).

73. The term "crooked timber" originates with Emmanuel Kant, of course, but we mean it very much in the spirit of Isaiah Berlin. ISAIAH BERLIN, *Political Ideas in the Twentieth Century*, *in* FOUR ESSAYS ON LIBERTY 39–40 (1970). Nestor Davidson expressed this perspective well, describing it as pluralistic: "Pluralism in property theory eschews singular narratives in understanding property law, focusing instead on the varied and often competing normative and instrumental concerns embodied in the institution." Davidson, *supra* note 63, at 1600.

theft from indigenous peoples. As we explain in subsection I(B)(2)(d), another major source was that British investors wanted to be able to recover on their loans, with little consideration paid to the interests of landholders. The moral paradox of American property is that, despite these origins, the American preference for market ordering is also highly egalitarian, insofar as it disfavored large landed estates and promoted widespread ownership of small amounts of property.[74] That dispersal of land, in turn, promoted "developmental" values because new waves of small-scale owner-occupiers had incentives to ensure quick improvement and high turnover of land that family dynasties, land companies, large-scale capitalists, or the federal government all lacked. In the American market-ordering tradition, land was regarded as a commodity to be purchased, improved, and resold. Property rights were not so much sacrosanct as they were tools to promote growth: Where property rights frustrated growth, they were frequently abandoned or limited.

As explained in section (I)(B)(2), this treatment of land as a commodity led to four more specific legal tendencies in eighteenth- and nineteenth-century American property law: (1) the use of rectangular surveys and grid street plans to maximize the alienability of land; (2) promotion of infrastructure over protection of property rights through the benefit-offset rule in measuring compensation and special assessments to finance improvements; (3) hostility to perpetuities and land trusts as locking up land for the benefit of elites; and (4) protection of creditors' remedies over debtors' rights to promote credit for land development. In each of these four respects, American property law departed from the stasis-protecting stance of English law, which catered more to the interests of an aristocratic land-owning class and to arguments centered on protecting investors or promoting conservatism. This history extended well into the twentieth century.

1. The Great American Decentralized Land Steal and the Rise of Yeoman Power.—Between the Battle of Fallen Timbers in 1794 and the enactment of the Dawes Act in 1887, the federal government, along with state and local governments, engineered a gradual but massive land grab that transferred title to an immense quantity of land from North American indigenous tribes to white

74. That an anti-egalitarian and racist culture can simultaneously produce egalitarian rhetoric and attitudes is hardly a novel observation about American history. *See, e.g.*, EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 5–6 (1975) (arguing that Revolutionary Era white Virginian elites' aristocratic concept of "freedom" depended on enslaved labor to free the elite from economically productive drudgery that would practically prevent devotion of their time to politics and culture); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM 53–54 (2010) (discussing the underlying exclusion of certain groups despite the prevailing egalitarian and republican milieu).

settlers.[75] The continental scale of the transfer was arguably unprecedented in world history: Of the roughly 1.89 billion acres of land within the lower forty-eight states that Native nations collectively (albeit competitively) used and governed prior to European contact, Indian reservations now hold in trust only about 56 million acres, or less than 3%.[76] Their control over even that 3% is highly qualified even today by restrictions on their legal powers that are fairly characterized as colonial.[77]

The story of how Native lands were expropriated has been told in a rich historiography that we will not attempt to rehearse here.[78] Instead, we emphasize one paradoxical aspect of that expropriation: In the United States, the white settlers who imposed a colonial subjugation on Native nations invoked an anti-colonial ideology for their mass migration onto Native land.[79] That ideology favored allocation of land to household-scale occupants, free from any control by middlemen favored by the federal government such as land companies or wealthy individual speculators. Denouncing such middleman control as promotion of land "monopoly" or "aristocracy," settlers called for the land to be handed out directly to white occupants in small parcels at low prices to promote a nation of small-scale

75. Picking the Battle of Fallen Timbers as the decisive engagement ending Native nations' defense of their land is a matter of narrative convenience rather than empirical reality. In fact, Native nations fought back persistently and, for extended periods of time, successfully, both before and after 1794. *See* PEKKA HÄMÄLÄINEN, INDIGENOUS CONTINENT: THE EPIC CONTEST FOR NORTH AMERICA 188–89, 342, 389–90 (2022) (providing examples to this effect). The success of the Western Confederation of Indians between 1783 and 1794, however, posed the most significant impediment to western migration of white settlers after the American Revolution, making the Battle of Fallen Timbers a major watershed moment that opened up the federal public domain to occupation by white settlers. Reginald Horsman, *American Indian Policy in the Old Northwest, 1783–1812*, 18 WM. & MARY Q. 35, 44, 47 (1961).

76. *Compare* WILLIAM LARSON, U.S. DEP'T OF COM., BUREAU OF ECON. ANALYSIS, NEW ESTIMATES OF VALUE OF LAND OF THE UNITED STATES 27 tbl. 3 (2015), https://www.bea.gov/sites/default/files/papers/WP2015-3.pdf [https://perma.cc/K4VN-2QVY] (providing that the land area of the contiguous United States is 1.89 billion acres), *with Native American Ownership and Governance of Natural Resources*, NAT. RES. REVENUE DATA (2025), https://revenuedata.doi.gov/how-revenue-works/native-american-ownership-governance/ [https://perma.cc/D3GV-NVAL] (providing that 56 million acres of land are held in trust by the United States for Native tribes and individuals).

77. *See* Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 77–78 (2023) (describing Native tribes' status as "domestic dependent nations" as essentially that of colonized nations given the federal government's "unilateral power" over them).

78. For important recent accounts, see generally MICHAEL JOHN WITGEN, SEEING RED: INDIGENOUS LAND, AMERICAN EXPANSION, AND THE POLITICAL ECONOMY OF PLUNDER IN NORTH AMERICA (2021); NED BLACKHAWK, VIOLENCE OVER THE LAND: INDIANS AND EMPIRES IN THE EARLY AMERICAN WEST (2006); STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS (1989).

79. This paradox was explored by a case study of a single Alabama county in JEFFERSON COWIE, FREEDOM'S DOMINION: A SAGA OF WHITE RESISTANCE TO FEDERAL POWER 5–7, 10–11 (2022).

landowners.[80] Initially resisted by the Federalist founders of the American republic, this policy of giving land over to its white occupiers ultimately became the federal government's dominant means for disposing of the public domain. The result was not only the dispossession of Native nations but also the creation of a nation dominated by owner-occupant farmers with title to relatively small parcels of land.

The United States' eventual policy of turning over land to individual households who occupied it distinguished the United States' dispossession of indigenous peoples from otherwise analogous expropriations by British North American, Dutch, Spanish, and Portuguese imperialists. Those other empires relied much more heavily on a centralized process in which well-connected elites—proprietary grantees, shareholders in chartered corporations, patroons, and empresarios—acquired immense tracts of land by special grant from the Crown or Viceroy at some major imperial center (Mexico City, Rotterdam, London, etc.) in exchange for providing various goods, services, or revenue to the grantor.[81] These grantees played the role of a real estate developer on behalf of their empires by purchasing indigenous property rights, mapping out street plans, and importing residents to consolidate imperial control of contested land.[82]

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80. On the influence of squatters' demands for title to land that they occupied on American politics in the antebellum period, see generally JOHN SUVAL, DANGEROUS GROUND: SQUATTERS, STATESMEN, AND THE ANTEBELLUM RUPTURE OF AMERICAN DEMOCRACY (2022).

81. For a comparative overview of how Dutch, French, and English empires relied on custom-tailored and discretionary grants of very large tracts of land directly from the Crown or other imperial leader to settle their empires, see JOHN C. WEAVER, THE GREAT LAND RUSH AND THE MAKING OF THE MODERN WORLD, 1650–1900, at 182–88 (2003).

82. On the scale of these grants, consider that William Penn received from King Charles II the whole of what of is now modern-day Pennsylvania, a tract of land spanning over 45,000 square miles (or almost 29 million acres). *Pennsylvania History: 1681–1776*, PA. HIST. & MUSEUM COMM'N (Aug. 26, 2015), https://www.phmc.state.pa.us/portal/communities/pa-history/1681-1776.html [https://perma.cc/5WA7-K5RY]; *State Area Measurements and Internal Point Coordinates*, U.S. CENSUS BUREAU (last updated Dec. 16, 2011), https://www.census.gov/geographies/reference-files/2010/geo/state-area.html [https://perma.cc/T4QU-3L55]. In return, Penn forgave a £16,000 debt owed by King Charles to Penn's father and promised both to hand over to the king any gold, silver, and jewels discovered in the province and obey English trade rules and orders of the Privy Council. SYDNEY GEORGE FISHER, PENNSYLVANIA: COLONY AND COMMONWEALTH 4 (1896); PA. CHARTER OF 1681, § 2, https://www.phmc.state.pa.us/portal/communities/documents/1681-1776/pennsylvania-charter.html [https://perma.cc/C6DZ-VMFL]. Van Rensselaer, on the other hand, received a comparatively paltry 1,000 square miles to create a "manor" on the Hudson River. *See* Nicolaas de Roever, *Kiliaen van Rensselaer and His Colony of Rensselaerswyck*, *in* VAN RENSSELAER BOWIER MANUSCRIPTS 40, 53 (photo. reprt. 2024) (A.J.F. van Laer ed., Susan de Lacey van Rensselaer Strong trans., 1908) (stating that Kiliaen van Rensselaer initially acquired a tract of land that stretched twenty-four miles long and forty miles wide, encompassing around 960 square miles). For an account of van Rensselaer's grant and the patroon system, see generally A.J.F. van Laer, *The Patroon System and the Colony of Rensselaerswyck*, 8 PROCS. N.Y. ST. HIST. ASS'N 222 (1909). On Maxwell's empresario grant from the Mexican governor of New Mexico, a tract the size of Rhode Island, obligating him to settle households on the northern Mexican frontier, see generally MARÍA E. MONTOYA, TRANSLATING

White settlers in the United States ultimately rejected that sort of centralized delegation of power to well-connected insiders. That rejection was a gradual process. The Federalist planters, lawyers, and merchants who initially drafted the United States Constitution disfavored unmediated settlement of the western public domain, in part because they regarded the frontiersmen, often Scots-Irish in ethnic origin, as lawless "banditti" who provoked war with powerful Native nations.[83] While the Constitution was being hammered out by the Philadelphia drafting convention, the Confederation Congress in New York City (composed of many of the same people) handed out a vast tract of land north of the Ohio River to the Ohio Company.[84] That company, a land-development corporation run by New England army veterans, promised to settle sober, thrifty New Englanders—"reputable, industrious, well-informed men" who had "learned the Advantages of subordination to Law and good order"—in a well-planned company town that would live pacifically with Indian neighbors.[85]

This imitation of the colonization strategy of the Dutch, Spanish, and British, however, utterly failed. Federalist framers worried that any effort to govern the western settlers as a colony of the eastern states could provoke secession from irate frontier residents.[86] Little effort was made to impede western migration.[87] Land companies and individual speculators haplessly

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PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840–1900 (2002).

83. For a summary of such complaints about Scots-Irish westerners, see Roderick M. Hills Jr., *The Unwritten Constitution for Admitting States*, 89 FORDHAM L. REV. 1877, 1879–80 (2021).

84. PAYSON JACKSON TREAT, THE NATIONAL LAND SYSTEM: 1785–1820, at 48–50 (1910); MALCOLM J. ROHRBOUGH, THE LAND OFFICE BUSINESS: THE SETTLEMENT AND ADMINISTRATION OF AMERICAN PUBLIC LANDS, 1789–1837, at 11 (1968); Manasseh Cutler, *At New York and Philadelphia—Letters to Hazard and Sargent—Diary of 1787*, *in* 1 LIFE, JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D. 253, 293, 295–98 (William Parker Cutler & Julia Perkins Cutler eds., 1888) (describing negotiations of Reverend Cutler, a New England agent for the Ohio Company, in bribing members of Congress with shares of the Company).

85. R. DOUGLAS HURT, THE OHIO FRONTIER: CRUCIBLE OF THE OLD NORTHWEST, 1720–1830, at 156–57 (1996).

86. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 578–79 (Max Farrand ed., 1911) (statement of George Mason) ("[T]he Western States . . . will have the same pride & other passions which we have[] and will either not unite with or will speedily revolt from the Union, if they are not in all respects placed on an equal footing with their brethren."); *id*. at 605 (statement of James Wilson) (comparing the malapportionment of western seats based on wealth to Britain's treatment of the Thirteen Colonies and predicting that "[i]f the interior Country should acquire this majority they will not only have the right, but will avail themselves of it whether we will or no[t]"). Members of Congress continued to express this worry of western secession after the Constitution was ratified, with one representative warning that squatters would not "expose themselves to be preyed upon by" speculators but might instead "become an accession of power to a foreign nation" like Great Britain or Spain. 1 ANNALS OF CONG. 427–29 (1789) (Joseph Gales ed., 1834) (statement of Rep. Thomas Scott).

87. *See, e.g.*, GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. Territories 51–78 (2021).

sought federal recognition for their purchases of thousands or millions of acres of Indian land to no avail:[88] They all went bankrupt with the popping of the great land bubble in the late 1790s.[89] Auctioning off yet smaller lots through land offices located closer to white settlers failed to raise much revenue because squatters would form claims associations to rig bidding, enforced with community pressure including violence, to keep auction prices low.[90]

Congress, therefore, eventually settled on a policy of "preemption" under which squatters currently occupying surveyed land could, for a single year, purchase a quarter-section (160 acres) of the lands they improved for a set price of $1.25 per acre before such lands were offered for general auction.[91] The logic of preemption was extended in 1862 by the Homestead Act, which lowered the price of 160 acres to zero dollars for settlers who continuously occupied land for five years while making some improvements to the parcel.[92]

Preemption and homestead rights helped the nineteenth-century United States become a nation of owner-occupant farmers. To be sure, neither preemption nor homesteading completely eliminated tenantry.[93] By comparison with Great Britain, however, tenancy rates were astoundingly low.[94]

The federal government, in sum, decentralized imperialism by contracting out the takeover of Native nations' lands to white squatters. By

88. *Cf. id.* at 68 ("[Land companies] felt that the government had taken advantage of them, offloading the risks of settlement onto them while failing to fulfill its implicit promise of support.").

89. MICHAEL A. BLAAKMAN, SPECULATION NATION: LAND MANIA IN THE REVOLUTIONARY AMERICAN REPUBLIC 285 (2023); A.M. SAKOLSKI, THE GREAT AMERICAN LAND BUBBLE: THE AMAZING STORY OF LAND-GRABBING, SPECULATIONS, AND BOOMS FROM COLONIAL DAYS TO THE PRESENT TIME 30–32 (1932).

90. PAUL W. GATES, PUB. LAND L. REV. COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 236 (1968). Evidence suggests that claims clubs were simply local "rings" of early settlers who extorted money from late-comers by demanding payment for lands on which the club members had made no improvements. Allan G. Bogue, *The Iowa Claim Clubs: Symbol and Substance*, 45 MISS. VALLEY HIST. REV. 231, 239–41 (1958).

91. DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS 80 (1984); GATES, *supra* note 90, at 224–25, 238–40 (discussing the Preemption Act of 1830 and the Preemption Act of 1841).

92. GATES, *supra* note 90, at 394–95.

93. *See* Paul Wallace Gates, *The Role of the Land Speculator in Western Development*, 66 PA. MAG. HIST. & BIOGRAPHY 314, 327–28 (1942) (explaining how tenancy persevered as a result of the activities of land speculators and moneylenders); Jeremy Atack, *Tenants and Yeomen in the Nineteenth Century*, 62 AGRIC. HIST., Summer 1988, at 6, 6 (noting that despite public land policy, 1880 statistics showed that a quarter of all farmers did not own their own land). Atack notes that many of those tenants were actually part-owners of land they farmed. *Id.* at 17–18.

94. *Compare* Avner Offer, *Farm Tenure and Land Values in England, c. 1750–1950*, 44 ECON. HIST. REV. 1, 1 (1990) (explaining that 80%–90% of nineteenth-century British farmers were tenants), *with* Atack, *supra* note 93, at 6 (noting that 25% of American farmers were tenants in 1880).

surveying Native land and inviting preemptive claims by white settlers, the federal government harnessed whites' land hunger for the purpose of inducing a flood of migrants to move onto Native land. This turned out to be an effective way to dispossess Native nations while simultaneously creating a mass constituency of mostly white owner-occupants of Native land. Lured by the promise of cheap land, migrants poured into the west, creating a robust land market that motivated the military force needed to conquer the Native nations that resisted the white settlers' encroachment. In this way, the federal government simply defining property rights for squatters created the political incentives for depriving Native nations of their property.[95] Ironically, the very same mechanism of inegalitarian dispossession also created a mass constituency of owner-occupants interested in a much more egalitarian and growth-oriented property law.

2. Market-Facilitating America Versus Incumbent-Protecting England: Five Contrasts in Old and New World Property Law.—Distributing small amounts of property to large numbers of settlers has political and, therefore, legal ramifications. Because so many Americans owned the land that they occupied, they would profit from any increase in land values. Further, because the population of the nineteenth-century United States was growing rapidly, incumbent landowners had plentiful incentives to improve their land for resale to the next wave of migrants.[96] In fact, settlers were also small-scale speculators, squatting for title that they planned to resell as soon as local demand for land assured them a profit.[97]

These incentives drove American property law away from its English origins in at least five respects. First, more than English law, American law favored rectangular surveys and grid street plans to facilitate alienability of land. Second, more than English law, American law preferred land improvements over protection of incumbents' undisturbed title, a preference reflected in the American law of eminent domain and special assessments. Third, more than English law, American law disfavored trusts and other perpetuities. Fourth, American law, more than English law, promoted credit by protecting creditors' remedies from safeguards used in England to

95. *Cf.* K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 YALE L.J. 1487, 1492–97 (2024) (laying out role that county land registries played in ousting Native groups from control of their land); Carole Pateman, *The Settler Contract*, *in* CONTRACT AND DOMINATION 35, 46 (2007) (discussing the theoretical justifications driving colonization).

96. On the rate of population growth in the nineteenth century, focused on the time periods during which population doubled, see J. Worth Estes, *Population Growth Tables for the United States Since Colonial Times*, 21 J. AM. STUD. 255, 258–59 (1987).

97. On the proclivity of settlers to resell their land to later arrivals, see Allan G. Bogue & Margaret Beattie Bogue, *"Profits" and the Frontier Land Speculator*, 17 J. ECON. HIST. 1, 15–16 (1957).

preserve incumbent landowners' title from foreclosure. Finally, American zoning, far more than English planning, allowed for the expansion of housing into the suburbs during the 1950s and 1960s. In sum, compared with its English counterpart, American property law favored active users, national markets, and growth in multiple aspects from the nineteenth to the mid-twentieth centuries.

The choice of topics is necessarily a bit episodic—we could have just as easily focused on other issues as these ones—but we are confident that the choices matter little. The pro-commercial strain in American property law is deep enough to appear across the field for most of American history.

a. The Greatest Grids: Rectangular Surveys and Gridded Street Plans to Promote Alienability of Land.—American property law really likes rectangles. Since William Penn's 1682 street plan for Philadelphia, grids have been ubiquitous as plans for streets in American towns.[98] In street plans like Manhattan's 1811 grid north of Houston Street, vertical and horizontal streets create a two-dimensional Cartesian space allowing for the easy identification of any lot by their position on the vertical and horizontal axes.[99] Such grids also define the federal government's survey system for public lands since the 1785 Land Ordinance.[100] As with gridded streets, the Public Lands Survey System (PLSS) made it so any forty-acre lot can be uniquely identified by specifying horizontal and vertical axes defining a six-mile by six-mile township, divided into thirty-six full (640-acre) sections that are further subdivided into half, quarter, and quarter-quarter (forty-acre) sections.[101]

Although rectangular street and survey systems are popular in the United States, they are not the only way that Americans divide up land. The original thirteen colonies and significant portions of newer states fall outside the PLSS, the latter because their parcels were surveyed before the United States acquired them (e.g., French-defined lots in the territory of the

98. For a survey of grid systems in American towns, see Marten Kuilman, *The American Grid Towns*, QUADRALECTIC ARCHITECTURE (Aug. 26, 2013), https://quadralectics.wordpress.com/4-representation/4-1-form/4-1-3-design-in-city-building/4-1-3-4-the-grid-model/4-1-3-4-5-the-american-grid-towns/ [https://perma.cc/93WQ-7DQY].

99. Michael R. Bloomberg, *Reflection*, *in* THE GREATEST GRID: THE MASTER PLAN OF MANHATTAN 1811–2011, at 25 (Hilary Ballon ed., 2012); Reuben Rose-Redwood, *Selling Lots*, *in* GREATEST GRID, *supra*, at 95.

100. An Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory (May 20, 1785), https://www.loc.gov/item/90898224/ [https://perma.cc/ZWD4-S7ME].

101. The PLSS defines that grid by starting from vertical meridians and horizontal baselines unique to particular states or regions that are used, in turn, to define intersecting horizontal tiers and vertical ranges that create a comprehensive network of townships. *Public Land Survey System (PLSS)*, U.S. GEOLOGICAL SURV., https://www.usgs.gov/media/images/public-land-survey-system-plss [https://perma.cc/5MR2-7M4A].

Louisiana Purchase or Virginia's military district in southern Ohio).[102] Those non-PLSS boundaries are usually defined by "metes and bounds"—that is, often highly irregular shapes specified by a point of beginning, compass directions, distances, and angle points, with the last marked by monuments or physical features such as trees, rocks, walls, etc.[103] Metes and bounds are, in fact, the ordinary mechanism for defining property in the Old World, where most of the land was divided up gradually rather than in one fell swoop by a central government.[104]

The question has been repeatedly debated whether regular rectangular grids are better or worse than metes and bounds. One common complaint has been that grids are boring.[105] Many find the tangled lanes of New York City's West Village more charming than the relentlessly uniform gridded avenues further north. Molly Brady argues that metes and bounds, particularly as operationalized in pre-revolutionary New England, reinforced local community.[106] Metes and bounds, Brady argued, rely on angle points such as trees and rocks, the identities of which depend on local collective memory and neighbors ritually walking boundaries, thereby reinforcing community ties.[107] On the other hand, grids reduce information costs for potential purchasers, allowing distant outsiders without such granular local knowledge to buy lots, and thus enlarge the market for land.[108]

Both arguments for and against grids are equally accurate: The values of the grid are the values of development, while metes and bounds represent the values of localism and conservatism. There is no value-free way to show that one set of values is better than the other. Rectangles and squares produce

102. On the French "long-lot" system used to divide land in French-controlled North America, see Richard Campanella, *Arpents, Ligas, and Acres*, 64 PARISHES (Mar. 1, 2016), https://64parishes.org/arpents-ligas-and-acres [https://perma.cc/M5HD-F3QU]. On the system of "indiscriminate location" used to define lots in the Virginia Military District, see Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 654 (2018).

103. For a case study of metes and bounds in New Haven, Connecticut, see Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872, 885–91 (2019).

104. *Id.* at 889–91 ("Before and at the time of American settlement, conveyancing documents in England contained descriptions of properties by reference to monuments and markers").

105. *See* Spiro Kostof, *The City Shaped: The Grid*, *in* GRIDDED WORLDS: AN URBAN ANTHOLOGY 55, 61 (Reuben Rose-Redwood & Liora Bigon eds., 2018) (listing numerous complaints as to the grid layout's "shallowness and callousness"). *But see* REM KOOLHAAS, DELIRIOUS NEW YORK: A RETROACTIVE MANIFESTO FOR MANHATTAN 20 (Monacelli Press 1994) (1978) (arguing that the grid, by creating block-sized limits, forced the development of a more creative and dynamic architecture).

106. Brady, *supra* note 103, at 945.

107. *Id.* at 880–81.

108. *See* Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426, 435–36 (2011) (showing costs of metes and bounds and benefits of grids); Gary D. Libecap, Dean Lueck & Trevor O'Grady, *Large-Scale Institutional Changes: Land Demarcation in the British Empire*, 54 J.L. & ECON. S295, S306–07 (2011) (explaining how standardization in a grid system reduces transaction costs in land markets).

much higher property values over time, showing that they increase growth, but it is also the case that they lead to greater mobility and disrupt patterns of land uses.[109]

Americans' fondness for grids, in sum, suggests that, for better or worse, we Americans preferred market-driven efficiency to neighborly localism in the nineteenth century when we perfected our property demarcation systems. Throughout the nineteenth century, the United States was swept by booms in land values driven by the waves of migrants pouring into the country in need of homes.[110] Purchasing lots and platting entire towns for speculative resale was an ordinary American practice: In Edward Glaeser's memorable phrase, "America has always been a nation of real estate speculators."[111] Getting tied down to a particular community was not the goal of landownership: Buying for resale and profit was more the American way. As historian Allan Bogue noted, "the man who came west, bought a tract . . . and then tilled it for the rest of his life was rare indeed. The more common picture was one of several moves or repeated purchases and sales."[112] In such a restless world, landowners want to enlarge their market of buyers to realize higher prices through bidding wars, not settle down to foster tight relations with long-term neighbors.

That material self-interest was accompanied by an ideology regarding property that tended to be dismissive of incumbents' interest in preserving the status quo for aesthetic reasons unrelated to marketability of title. Epitomizing that latter interest, Clement Clarke Moore denounced the 1811 grid imposed on Manhattan north of Houston Street in an anonymous pamphlet published in 1818.[113] An owner of much of what is now the Chelsea neighborhood in New York City,[114] Moore saw the plan as a disruption of incumbent landowners' expectations in existing roads and natural features, "cut[ting] up and tear[ing] down the face of the earth without the least remorse" and with "no higher notions of beauty and elegance than straight lines and flat surfaces."[115] "These are men," Moore declaimed, "who would have cut down the seven hills of Rome on which are erected her triumphant monuments of beauty and magnificence, and thrown them into the [Tiber] or

109. We think those are all good things! But your mileage may vary.

110. For a survey of antebellum land booms and busts, see generally Stanley Lebergott, *The Demand for Land: The United States, 1820–1860*, 45 J. ECON. HIST. 181 (1985).

111. Glaeser, *supra* note 14, at 2.

112. ALLAN G. BOGUE, FROM PRAIRIE TO CORN BELT 51 (1963).

113. "A LANDHOLDER" (CLEMENT CLARKE MOORE), A PLAIN STATEMENT, ADDRESSED TO THE PROPRIETORS OF REAL ESTATE, IN THE CITY AND COUNTY OF NEW-YORK 5–8 (New York, J. Eastburn & Co. 1818).

114. Douglas Martin, *Celebrating Santa's Birth as New Yorker*, N.Y. TIMES, Dec. 20, 1995, at B1, B3.

115. "A LANDHOLDER" (CLEMENT CLARKE MOORE), *supra* note 113, at 24.

the [Pontine] marshes."[116] The commissioners who approved the 1811 grid, however, were moved more by commerce than beauty and magnificence: "When . . . the price of land is so uncommonly great," their report drily observed, "it seemed proper to admit the principles of economy to greater influence than might, under circumstances of a different kind, have consisted with the dictates of prudence and the sense of duty."[117] They were not surveying the land to accommodate existing residents who would be ruthlessly pushed aside by the geometric network of streets and avenues they cast over Manhattan but instead providing land "for a greater population than is collected at any spot on this side of China."[118]

b. The Benefit-Offset Rule as Growth-Oriented Finance in American Property Law.—Both the United States and England expanded their transportation networks in the nineteenth century, thereby improving the value of nearby land. The expansion in the United States, however, was faster and cheaper. One reason for this is that the American law of eminent domain paid less compensation to condemnees, reducing compensation awards by the amount of benefit that the condemnees' remaining parcels derived from proximity to the infrastructure created through condemnation.[119] In extreme cases, this rule meant that farmers who lost part of their land to a railroad would receive only a dollar in nominal damages because the value of proximity to the railroad for their remaining land exceeded the value of their condemned land.[120] English law, by contrast, refused to reduce offset compensation awards by such benefits.[121]

The difference in doctrine reflected a difference in how each country allocated land and thus political power. In England, both Parliament and local communities were dominated by aristocratic and gentry landowners who

116. *Id.* at 49–50.

117. WILLIAM BRIDGES, MAP OF THE CITY OF NEW YORK AND ISLAND OF MANHATTAN; WITH EXPLANATORY REMARKS AND REFERENCES 26 (New York, T. & J. Swords 1811).

118. *Id*. at 30 (describing how New York was specifically designed to accommodate commerce, to include "the Canal and Markets," "carts and waggons," and "business").

119. On the dominant nineteenth-century American rule, see PHILIP NICHOLS, 2 THE LAW OF EMINENT DOMAIN § 251, at 774–75 (1917) (summarizing the benefit-offset rule that prevailed in the first half of the nineteenth century).

120. *Cf., e.g.*, Nichols v. City of Bridgeport, 23 Conn. 189, 210 (1854) (articulating the benefit-offset rule in the general landholding case); Pittsburgh, C., C. & St. L. Ry. Co. v. Town of Walcott, 69 N.E. 451, 454 (Ind. 1904) (same). It wasn't just railroads either. When New York City took land to lay out its street grid, it would pay for the expropriation with special assessments on street-front property, often charging a landowner for the price of taking his land. Andrea Renner, *The System of Street Openings, in* GREATEST GRID, *supra* note 99, at 76. Landowners complained bitterly, until it made them filthy rich.

121. On the English rule rejecting benefit offset, see *Senior v. Metro. Ry. Co*. (1863) 159 Eng. Rep. 107, 111; 2 H. & C. Ex. Rep. 258, 264–65.

owned enormous tracts of land.[122] While these landowners often desired the increased value that a nearby railroad would confer on their land, they also wanted to wring as much money as possible out of the urban businessmen who sponsored such railroads.[123] Excluding any provision for offsetting benefits from the Land Clauses Consolidation Act of 1845 (LCCA) ensured that landowners could reap a larger share of the revenue generated by railroads.[124] Owners of larger parcels, especially those with clout in the House of Lords, were notorious for extracting large sums for small losses of land.[125]

The tendency of landed gentry to demand excessive compensation for the loss of their land conflicted with the interests of their less wealthy neighbors. Railroads were generally popular with owners and lessors of smaller parcels because they increased trade and employment for the entire community.[126] Squires and nobles, however, tended to ignore these benefits because railroads shifted labor away from agricultural pursuits and towards manufacturing, thereby undermining the landed aristocrats' social position.[127] Owners of landed estates also had less capacity to realize any gains from increased valuation of their real estate because, until the Settled Land Act of 1882, their estates were often tied up in "strict settlement," a form of trust giving the ostensible owner only a life estate in the land and requiring the agreement of various heirs and trustees before the land could be sold.[128]

Landed gentry in England, therefore, had strong incentives to milk railroad investors of whatever compensation they could extract, heedless of the advantages to their neighbors from the arrival of train service. In theory, local juries could reduce the more extravagant demands of these landowners, but the LCCA equipped these owners with the power to evade juries shaving

122. On landowner influence over English politics in the first half of the nineteenth century, see generally Peter J. Jupp, *The Landed Elite and Political Authority in Britain, ca. 1760–1850*, 29 J. BRIT. STUD. 53 (1990).

123. R.W. Kostal, LAW AND ENGLISH RAILWAY CAPITALISM 1825–1875, at 145 (1994).

124. Land Clauses Consolidation Act 1845, 8 & 9 Vict. c. 18.

125. Kostal, *supra* note 123, at 150.

126. *Id*. at 156–57. For cross-county evidence that a lack of access to railroads would have decreased the value of American agricultural land by 60% during the nineteenth century, see Dave Donaldson & Richard Hornbeck, *Railroads and American Economic Growth: A "Market Access" Approach*, 131 Q.J. ECON. 799, 839–41, 854 (2016).

127. *See* Dan Bogart et al., *Railways, Divergence, and Structural Change in 19th Century England and Wales*, 128 J. URB. ECON. 1, 15 (2022) (showing that railroad extensions increased the population of impacted communities while shifting employment away from agriculture and into manufacturing).

128. JOHN HABAKKUK, MARRIAGE, DEBT, AND THE ESTATES SYSTEM: ENGLISH LANDOWNERSHIP, 1650–1950, at 1 (1994). On the prevalence and operation of strict settlements for landed estates in nineteenth-century England, see generally *id.* at 1–51. "Strict settlements" were subject to the rule against perpetuities and so were typically broken and renewed every generation, typically when the eldest son reached the age of 21. *Id.* at 19.

their excessive demands by giving landowners the right to insist on binding arbitration instead of a jury trial.[129] Arbitrators favored condemnees by "saw[ing] off" half of landowners' initial demand, predictably incentivizing demands that exceeded twice the actual loss.[130]

The result of landowner power was a slower and more expensive expansion of England's rail network.[131] The failure to deduct the community benefits of railroads from compensation awards predictably added to aristocratic and gentry landowners' inclination to ignore those benefits.[132]

In contrast with England, the broad distribution of the public domain in the United States limited the number of landowners with either the power or incentives to block railroad development. Landowners in the Midwest and West competed aggressively with each other to attract railroad development because their land values depended on market access. Indeed, local governments dominated by local landowners issued a huge number of bonds to buy stock in and otherwise support railroads that would come through their towns.[133]

The benefit-offset rule adopted by American courts in the early period of railroad development reflected this eagerness to attract railroad investors.[134] Its terms were simple: If one's land was taken using eminent domain for new infrastructure, the compensation paid was offset by the increases in value the rest of your property saw as a result of the infrastructure.[135] The adoption of this rule effectively made landowners assume a risk that their land would be expropriated with little compensation in return for most landowners benefiting from more railroads.[136] Farmers

129. Kostal, *supra* note123, at 170.

130. *Id.*

131. On the toll imposed by demands for excessive compensation, see *id.* at 173.

132. On the incentive effects of failure to offset compensation, see generally Ariel Porat & Eric Posner, *Offsetting Benefits*, 100 VA. L. REV. 1165 (2014).

133. *See* DAVID SCHLEICHER, IN A BAD STATE: RESPONDING TO STATE AND LOCAL BUDGET CRISES 42–44 (2023) (summarizing the railroad bond crises). These bond issuances led to successive rounds of crises, as railroad failures led to local government defaults. When state legislatures or local governments sought to get out from under their debts using a number of clever legal maneuvers, the Supreme Court stepped in, issuing a huge number of pro-bondholder decisions using its then-available federal common law powers in diversity cases. Ideologically, these are best understood as capturing a similar focus on development as the benefit-offset rule.

134. On the persistent efforts of communities in the United States during the nineteenth century to attract railroads to boost the value of local land and thus local tax revenue, see generally Jac C. Heckelman & John Joseph Wallis, *Railroads and Property Taxes*, 34 EXPLS. ECON. HIST. 77 (1997).

135. Louis M. Russo, Note, *From Railroads to Sand Dunes: An Examination of the Offsetting Doctrine in Partial Takings*, 83 FORDHAM L. REV. 1539, 1546–50 (2014).

136. Notably, New York City imposed a similar rule when laying out the streets for its famous street grid, often charging landowners' who saw their land taken for streets more in special assessments than they were paid in compensation. Renner, *supra* note 99, at 76. This reflects the

who lost a portion of their land for a rail line suffered the inequity of paying more for the locational advantage than their neighbors whose land was spared, but the gains from being connected to the rail network for everyone exceeded the benefit of spreading the loss more fairly.[137] As the rail network expanded and the marginal value of proximity to railroads declined, landowners amended their state constitutions and statutes or elected state judges to trim down or eliminate entirely the benefit-offset rule.[138] Even after watering down the pure rule for the sake of equity, however, American courts continued to use it to reduce compensation for severance damages by any special benefit that landowners gained from proximity to new infrastructure.[139]

Americans' greater willingness compared to the English to embrace the benefit-offset rule fits in well with, and perhaps is explicable by, the high turnover in nineteenth-century American land markets. Financing infrastructure by taxing the increase in value that nearby property gains from such improvements made sense when such gains would be realized quickly because land turnover was rapid. By contrast, turnover in the English real estate market was far less frenzied, with large estates tied up in settlement trusts that restricted their alienation. In a world of such slow-moving property markets, taxes on theoretical gains in property value could force an unwanted sale. It made sense, then, that nineteenth-century English law differed from American law not only in rejecting the benefit-offset rule for compensation but also in lacking any practice of financing street improvements with special assessments.[140] Both differences suggest that American law was future-oriented, maximizing property values for resale, while English law was backward-looking, protecting incumbent owners from changes in the status quo that would disturb their right to enjoy land as it existed upon purchase.

Again, as with the gridding of lots without regard to natural features, the indifference to equity between condemned and "untouched" neighbors reflects an ideology suspicious of the obstacle posed by incumbents' property rights to development of transportation infrastructure. That ideology was epitomized by the Supreme Court's refusal to construe an existing bridge

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fact that widely distributed landownership and the broadly commercial nature of American property ownership led to infrastructure-supporting rules, whether for farmers or for city-dwellers.

137. For an analysis of landowners' incentives to adopt the benefit-offset rule when the marginal value of railroad lines was high, see WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 80–84 (1995).

138. Robert K. Fleck & F. Andrew Hanssen, *Courts, Legislatures, and Evolving Property Rules: Lessons from Eminent Domain*, 93 EXPLS. ECON. HIST. 1, 2 (2024).

139. On the evolution of the benefit-offset rule in the late nineteenth-century United States, see Nichols, *supra* note 119, at 774–83.

140. *Id.* at 761 (on English law's lack of betterment taxes); *cf.* ROBIN L. EINHORN, PROPERTY RULES: POLITICAL ECONOMY IN CHICAGO, 1833–1872, at 14–17 (1991) (discussing the prevalence of special assessments as financing mechanisms in pre-Great Fire Chicago).

company's charter to preclude the construction of a nearby competing bridge in the famous *Charles River Bridge* case:[141] "Let it once be understood, that such charters carry with them these implied contracts, . . . and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this Court to put down the improvements which have taken their place."[142] The Court went on to state that "[w]e shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied," a self-evident absurdity given "the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world."[143] That principle that vested rights must give way to the improvements and prosperity created by development underlay the innovations of special assessments, offset benefits, and narrow interpretation of charter rights alike.

c. Distrust of Trusts and Perpetuities as Promotion of Growth and Liquid Markets.—The revolution against the British Empire was also a self-conscious rejection of perpetuities, most obviously manifested in state statutes that abolished fees tail. Starting with Virginia's statute in 1776, state after state prohibited "entailment" of estates in which legators barred their heirs from selling or giving away land to anyone outside the family line of descent.[144] Thomas Jefferson defended the abolition of fees tail and primogeniture as a blow against a landed aristocracy's concentrating ownership of land in a single family.[145] As Claire Priest has persuasively argued, however, the anti-aristocratic characterization of abolishing fees tail was only part of the story.[146] The other part was promoting market alienability by giving heirs the power to pledge the land as a collateral, thereby promoting access to credit and investment in land.[147]

Priest's insight regarding fees tail in the Revolutionary generation can be extended more generally to the hostility towards perpetuities in the Jacksonian era and beyond, most dramatically illustrated by the "anti-rent" movement in New York. Arising as a protest against Hudson Valley patroons' efforts to recover back rents from their tenants in 1839, this

141. Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. (11 Pet.) 420, 548–49 (1837).

142. *Id*. at 552–53.

143. *Id*. at 553.

144. Richard B. Morris, *Primogeniture and Entailed Estates in America*, 27 COLUM. L. REV. 24, 25–26 (1927) (providing a summary account of the abolition of fees tail).

145. THOMAS JEFFERSON, *Autobiography*, *in* 1 THE WRITINGS OF THOMAS JEFFERSON 1, 49 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1892).

146. Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 L. & HIST. REV. 277, 280 (2015).

147. *Id.* at 302–05.

movement focused on the lack of any time limit in patroons' leases. The lack of a term of years allowed tenants to not only use the land indefinitely but also to bequeath the lease to their heirs and even sell the lease, subject to a payment of some percentage of the sales price to the landlord.[148] New York Whigs argued that the perpetual lease impeded the alienability that would ensure that the land was put to its highest and best use. Governor William Seward, for instance, branded the perpetual leases as "unfavorable to agricultural improvement, inconsistent with the prosperity of the districts where they exist, and opposed to sound policy and the genius of our institutions,"[149] a conclusion that the Whigs inferred from the fact that neither tenants nor landlord wanted the relationship to continue, but neither could get rid of it.

Put in modern law-and-economics terms, the Whigs were complaining about a problem of bilateral monopoly.[150] The patroons could block sales to third parties by extracting a quarter-sales tax; the tenants could block the patroons' sales to third parties by paying their rent on time. With such a thin market, each side had incentives to misrepresent their true reservation price.

The New York Whigs had a simple solution to the allocative inefficiency of the perpetual lease: They urged that New York use its power of eminent domain to condemn the manor estates' land and resell the property to the tenants.[151] Such a solution anticipated the holding of *Hawaii Housing Authority v. Midkiff* by almost a century and a half.[152] Between 1840 and 1846, the Whigs succeeded in getting the state constitution amended to

148. For an overview of the movement's origins, see REEVE HUSTON, LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM NEW YORK 87–92 (2000). For a detailed overview of these "perpetual leases," see generally SUNG BOK KIM, LANDLORD AND TENANT IN COLONIAL NEW YORK: MANORIAL SOCIETY, 1664–1775, at 162–234 (1978). On the fees that discouraged alienability of land, see Colin D. Campbell & Rosemary G. Campbell, *Early Land Leases in the Cherry Valley Patent, 1743–1851*, 90 N.Y. HIST. 59, 65, 65 n.28 (2009) (explaining "quarter-sales" in patroons' leases as the tenants' obligation to pay a third or a fourth of the sale price to the landlord).

149. STATE OF N.Y. ASSEMB., REPORT OF THE COMMITTEE ON SO MUCH OF THE GOVERNOR'S MESSAGE AS RELATES TO THE DIFFICULTIES BETWEEN THE LANDLORD AND TENANTS OF THE MANOR OF RENSSELAERWYCK, No. 271, 63d Sess., at 2–3 (1840). A committee of Whigs in the State Assembly likewise decried the patroons' "feudal tenures" as violations of the "modern policy . . . to leave land free like other property" and view "with jealousy" any "settlements or dispositions of land[] whereby its alienation is impeded." *Id.* at 4. Because "no man has . . . complete control and enjoyment of the land," the Whig legislators argued, "a difficulty is constantly interposed to [the land's] perfect use and the complete development of its resources." *Id.* at 5.

150. For the canonical economic proof of how thin markets impede efficient trading, see generally Roger B. Myerson & Mark A. Satterthwaite, *Efficient Mechanisms for Bilateral Trading*, 29 J. ECON. THEORY 265 (1983).

151. STATE OF N.Y. ASSEMB., *supra* note 149, at 18.

152. 467 U.S. 229, 231–32, 242 (1984) (noting that "[t]he land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes" and that eliminating "the oligopoly problem" was not "irrational").

condemn "feudal tenures," ban any lease provisions requiring payment for the tenants' sale of land, limit leases to twelve years in duration, and ban quarter-sales or other taxes on alienation of land.[153]

The Whigs' pro-development stance on property law was not uncontested. Democrats pushed back with a stability-oriented position, blocking the Whig program of eliminating the patroons' estates through eminent domain because they opposed any public expenditures for what they regarded as local purposes.[154] The New York Court of Appeals in 1843 likewise endorsed a broad view of vested rights in *Taylor v. Porter*.[155]

The Whigs' ultimately unsuccessful campaign against the patroons' estates was not the only manifestation of the American rejection of perpetuities accepted by English law. More generally, American law placed stricter limits on the duration of trusts than English law. Starting with North Carolina in 1776, eleven state constitutions prohibited "perpetuities," with North Carolina's original prohibition pairing "perpetuities" with "monopolies" as "contrary to the genius of a free state."[156] New York lacked any such prohibition, but, in 1828, as part of a general revision of its laws governing property, the legislature eliminated most trusts, preserving trusts for four limited purposes but barring long-term trusts.[157] New York's

153. Between 1840 and 1846, the liberal wing of the Whig Party was able to persuade the rest of the Whigs and a few Democrats to endorse a general attack on perpetuities, amending the New York State constitution in 1846 to condemn "feudal tenures." N.Y. CONST. of 1846, art. I, §§ 11–15.

154. *Cf.* CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS 1839–1865, 57–58 (2001) (noting how New York Whigs were unable to maintain support for this eminent domain program). On the Democrats' general skepticism for the Whigs' program of undermining the patroons' tenure, see, for example, *id.* at 159–60 ("[T]he Whig Party's dalliance with the anti-renters disturbed the composure of Democrats.").

155. 4 Hill 140, 148 (N.Y. Sup. Ct. 1843) (striking down colonial-era state law authorizing compensated expropriation of private road easements). Although the 1846 New York Constitutional Convention overruled *Taylor*'s specific holding regarding private roads by constitutional amendment, the Court of Appeals persisted in banning private-to-private transfers in other contexts, holding, for instance, in 1850 that New York City could not condemn land to widen a road if part of the land was not directly used for the road itself but rather conveyed to a private party. Embury v. Conner, 3 N.Y. 511, 516–17 (1850). For further discussions of *Taylor* and its significance, see MCCURDY, *supra* note 154, at 110–16. For an argument that these decisions help mark the advent of "legal formalism" in constitutional law, see also MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 259–60 (1977) ("Creating [in *Taylor*] for the first time a sharp distinction between public and private takings . . . . the court refused to accept what before had been a standard and virtually unchallenged utilitarian justification of [using eminent domain to build private roads].").

156. N.C. CONST. of 1776, art. I, § 23, available at https://avalon.law.yale.edu/18th_century/nc07.asp [https://perma.cc/P9TA-M3U8]. The ten other states that eventually prohibited "perpetuities" in their constitutions were Tennessee, Florida, Arkansas, Texas, California, Nevada, Wyoming, Montana, Arizona, and Oklahoma (although Florida and California later repealed their bans). Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1787–88, 1788 fig. 2 (2014).

157. ALEXANDER, *supra* note 60, at 122–24.

statutory revision followed the general trend in other states of skepticism towards perpetual trusts. Unlike English law, which excepted charitable bequests from the Rule Against Perpetuities (RAP), the law of most states during most of the nineteenth century limited the power of donees to create perpetual charitable trusts.[158] The New York Court of Appeals most famously adhered to this skeptical attitude towards property owners' power to create charitable trusts by invalidating the provision of Samuel Tilden's will creating a trust for charitable purposes with his estate on the ground that the trustees had too much power over the selection of the trust's objects.[159]

By the end of the nineteenth century, some of this American skepticism towards perpetual trusts eroded, encouraging a rising class of plutocrats to bequeath their estates for charitable purposes.[160] Even so, hostility to perpetual trusts persisted in the early twentieth century, manifested by popular anger at John D. Rockefeller's effort to obtain a federal charter from Congress in 1910 for his charitable foundation.[161] The rhetoric directed against Rockefeller's proposal reflected the same concerns underlying North Carolina's 1776 ban on "perpetuities and monopolies," namely, that perpetuities locked up too much property in a democratically unaccountable institution to preserve dynastic wealth.[162]

Those complaints have not ceased.[163] They echo the persistent worry in American property law that perpetuities are "conducive to the power and grandeur of ancient families, and gratifying to the pride of the aristocracy," in James Kent's phrase, but "inconsistent with the free and unfettered

158. The English exception for charitable bequests stems from the 1601 Statute of Charitable Uses. Charitable Uses Act 1601, 43 Eliz. c. 4 (1601). For an overview of the American view that the 1601 statute did not apply in the states, see Edith L. Fisch, *American Acceptance of Charitable Trusts*, 28 NOTRE DAME LAW. 219, 222–23 (1953). On early Americans' skepticism towards charitable trusts, see Peter Dobkin Hall, *Philanthropy, the Nonprofit Sector & the Democratic Dilemma*, 142 DAEDALUS 139, Spring 2013, at 139, 139–41 (2013).

159. Tilden v. Green, 28 N.E. 880, 882 (N.Y. 1891). The Court's decision attracted a lot of commentary in non-legal periodicals. *See generally, e.g.*, James L. High, *The Tilden Trust, and Why It Failed*, THE ATLANTIC, October 1893, at 481.

160. The New York legislature, for instance, overruled the New York Court of Appeals by enacting a statute allowing charitable trusts despite "indefiniteness or uncertainty of the persons designated as the beneficiaries." An Act to Regulate Gifts for Charitable Purposes, ch. 701, 1893 N.Y. Laws 1748.

161. On the political controversy over the Rockefeller Foundation's bid for a federal charter, see Hall, *supra* note 158, at 147–48; JOHN LANKFORD, CONGRESS AND THE FOUNDATIONS IN THE TWENTIETH CENTURY 16–19 (1964).

162. For an overview of the purposes underlying state constitutional bans on perpetuities, see Horowitz & Sitkoff, *supra* note 156 at 1795–98.

163. For a recent argument that the power of private charitable foundations is inconsistent with democratic equality, see ROB REICH, JUST GIVING: WHY PHILANTHROPY IS FAILING DEMOCRACY AND HOW IT CAN DO BETTER 69 (2018).

enjoyment of property."[164] In America, unlike England, property still wants to be free.

d. Promotion of Alienability with (Mostly) Contractual Limits on Creditors' Remedies.—Throughout the nineteenth century, the American law of mortgages tended to make it easier than British law for mortgagees to recover the money that mortgagors owed to them by taking control of pledged land.[165] Part of the reason for this difference was an artifact of the United States' colonial origins: As Claire Priest has explained, British merchants pushed through the Debt Recovery Act of 1732 to make it easier to recover money owed by defaulting American colonists, often planters whose borrowing was secured by mortgages on land and slaves.[166] The Debt Recovery Act was part of the legal legacy inherited by the states from the British Empire, a colonial inheritance ironically defended by Americans as a way to cast off the English tradition of protecting dynastic control over landed estates from financial risk.[167]

As Priest acknowledges, however, states did not uniformly follow the British statute.[168] In any case, Americans had many decades to cast off the British law's pro-creditor bias between the Revolution and the end of the nineteenth century. Why did Americans generally stick with a version of mortgage law that protected mortgagees at the expense of mortgagors?

We suggest that the most plausible explanation is that nineteenth-century Americans favored development over stability. Credit is necessary for development: One cannot easily invest in improvements to land unless one can borrow against the land's improved value. Even when pressured by debt-ridden farmers resentful of foreclosing banks, fear of drying up that all-important credit drove Americans to limit debtors' protections from foreclosure.

English and American property law differed substantially in the solicitude shown to creditors. With respect to "strict foreclosure," in which land was transferred directly from mortgagor to mortgagee without any judicially supervised sale, there was, according to a leading treatise on mortgage law, a "marked difference in the speed, severity, and finality of the

164. JAMES KENT, 4 COMMENTARIES ON AMERICAN LAW 137 (Lonang Inst. 2006) (1830).

165. On the differences between American and British law of mortgages in the nineteenth century, see Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 U. CHI. L. REV. 575, 592–93 (1937); GEORGE E. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 312, 318 (2d ed. 1970).

166. CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND LEGAL INSTITUTIONS IN EARLY AMERICA 79 (Joel Mokyr ed., 2021).

167. *Id.* at 129–31 (describing the "commercial republican" view of the early American economy, which defended policies which allowed landowners to "alienate the property or to incur debts" on the basis of property holdings as opposed to the traditional English belief that landowners "violated [their] heirs' natural rights" if they incurred debts that might jeopardize future interests in the property).

168. *Id*. at 135–36.

proceeding in this country as compared with that in England."[169] In particular, American courts did not adopt the English Chancellor's equitable doctrines allowing debtors to string out the process of redeeming property past deadlines set by judicial decrees.[170] State legislatures modified this rule but still rejected English law by allowing mortgagees to bid for the mortgaged property, often in circumstances in which the mortgagee might be the only bidder.[171] Foreclosing banks could, therefore, bid low to acquire valuable real estate and then later sue the debtor for a deficiency judgment, a danger that the mortgagor's statutory right to redeem the property after sale only imperfectly deterred.[172]

The American law of mortgages in the nineteenth century was, in short, quicker for creditors and harsher for debtors than its English counterpart. Although these disparities have eroded with the enacting of various federal and state debtor-protection laws since the Great Depression, it is still the case today that American lenders foreclose on mortgages at roughly double the rate of British lenders.[173]

Why did Americans favor creditors more than the British courts and Parliament? Foreclosure risk was, after all, a likely cause of agrarian unrest in the nineteenth- and early twentieth-century United States.[174] Yet even states' debtor-protection laws tended to respect contractual freedom because homestead protections, for instance, were effectively alienable as debtors had to dedicate the land in advance of using the land as security for borrowing to benefit from the laws' protection.[175] Even in states where farmers faced a

169. OSBORNE, *supra* note 165, § 312.

170. *Id.*; Tefft, *supra* note 165, at 588.

171. OSBORNE, *supra* note 165, § 319; Tefft, *supra* note 165, at 589–90.

172. Tefft, *supra* note 165, at 595.

173. On the comparative foreclosure rates, see Nicholas Krebs, *British Cures for American Foreclosure Woes*, 15 CHI.-KENT J. INT'L & COMPAR. L. 1, 9 (2015). On the roughly comparable time consumed by the foreclosure process in the United Kingdom and United States, see Michael Moore, Marta Rodríguez-Vives & Nolvia N. Saca-Saca, *Mortgage Markets and Foreclosure Processes in Europe and the United States*, *in* FROM FRAGMENTATION TO FINANCIAL INTEGRATION IN EUROPE 409, 421–22 (Charles Enoch et al., INT'L MONETARY FUND, eds., 2014).

174. James H. Stock, *Real Estate Mortgages, Foreclosures, and Midwestern Agrarian Unrest, 1865–1920*, 44 J. ECON. HIST. 89, 90–91 (1984).

175. Debtor-protection laws included mandatory stays on foreclosure, mandatory appraisals of mortgaged properties, and homestead laws protecting certain assets from creditors. EMILY ZACKIN & CHLOE N. THURSTON, THE POLITICAL DEVELOPMENT OF AMERICAN DEBT RELIEF 25–26, 57–58 (2024). On the limits of homestead protection, see Paul Goodman, *The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840–1880*, 80 J. AM. HIST. 470, 497 (1993); Charles Romeo & Ryan Sandler, *The Effect of Bankruptcy Exemptions on Consumer Credit*, 66 J.L. & ECON. 699, 700 (2023) (finding homestead exemptions have trivial effects on access to credit); Richard M. Hynes, Anup Malani & Eric A. Posner, *The Political Economy of Property Exemption Laws*, 47 J.L. & ECON. 19, 20, 33 (2004) (noting that states at high risk of foreclosure tended to draw such exemptions narrowly to preserve credit where default risk is high).

high risk of foreclosures from debt defaults, the state legislatures or state courts limited the protections extended to defaulting debtors.[176] Even the Taney Court, mostly appointed by Presidents Jackson and Van Buren, two presidents with little love for banks, struck down debtor protections that were enforced retroactively against mortgages entered into before the laws were enacted, finding that the laws impaired the obligation of contracts.[177]

One plausible (albeit admittedly speculative) explanation for this pro-creditor bias was that Americans were more credit-hungry than the British. Americans, after all, had a continent's worth of land to develop and a scarcity of investment capital. American policymakers, therefore, favored limited debtor protections to avoid high interest rates.[178] By contrast, the British policymakers were biased in favor of protecting gentry families' power to retain land across generations.[179]

Limits on debtors' protections, in sum, ran parallel to the same developmental impulse that underlay limits on condemnees' compensation, the non-enforceability of perpetual trusts or leaseholds, and the preference for simple rectangular lots. In all of these instances, American property law preferred development of land over preservation of community and stable title. That preference was not absolute: Americans also worried about excessive risk from development when economic downturns hit. By comparison to England, however, American property law put a thumb on the scales in favor of alienability and land improvement over preservation of incumbent landowners' expectations.

e. The Twentieth Century: Permissive American Zoning versus Prohibitive English Planning.—The examples of the developmental impulse in American law offered above are illustrative and not exhaustive. We could have discussed other distinctions between English and American law suggesting the

176. Allan G. Bogue, *To Shape a Western State: Some Dimensions of the Kansas Search for Capital, 1865–1893*, *in* THE FRONTIER CHALLENGE 203, 222–26 (John G. Clark ed., 1971) (describing the Kansas legislature's revising of foreclosure rules to attract creditors between 1867 and 1873, adding a right of redemption only in 1893); ROBERT S. HUNT, LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROAD ON WISCONSIN LAW IN THE NINETEENTH CENTURY 44–48 (1958) (describing the Wisconsin Supreme Court's striking down state legislation impeding foreclosures on farms that their owners had mortgaged to subsidize railroads); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 406–07 (4th ed. 2019) (same).

177. Bronson v. Kinzie, 42 U.S. (1 How.) 311, 320–22 (1843).

178. For a model of political behavior that balances the *ex ante* risk of discouraging investment against the *ex post* need to keep land in production without the interruption of foreclosure, see generally Patrick Bolton & Howard Rosenthal, *Political Interventions in Debt Contracts*, 110 J. POL. ECON. 1103 (2002).

179. William M. McGovern, Jr., *Forfeiture, Inequality of Bargaining Power, and the Availability of Credit: An Historical Perspective*, 74 NW. U. L. REV. 141, 151 (1979) (suggesting that English sentimental attachment to keeping land within mortgagors' families biased English land law in favor of pro-debtor procedures).

developmental emphasis of the latter, such as state laws' preference for shorter limitations periods for adverse possession and rejection of easements for light and air.[180] There are important later developments that had a similar structure, such as the creation of federal mortgage insurance and entities that buy mortgages on the secondary market, which led to standardized mortgage terms and better access to home financing for buyers.[181]

One final illustration, however, is needed to bring the contrast between the United States and the United Kingdom up to the middle of the twentieth century: When compared to British land-use regulations, American zoning tended to be more permissive of sprawl into the suburbs.

The United States and the United Kingdom both adopted systems for controlling the use of land through local regulation rather than common law litigation during the first two decades of the twentieth century.[182] Housing production in the two nations, however, diverged from each other following World War II, after the United Kingdom enacted the 1947 Town and Country Planning Act. In the United States, developers converted millions of acres of rural land into suburban housing, a massive conversion epitomized by Levitt & Sons' Levittown developments in Long Island, Pennsylvania, and New Jersey.[183] Between 1950 and 1960, the United States added more than 12 million new units to the existing stock of 46 million units, growing total

180. On western states' preference for short limitations periods to allow land to be transferred through adverse possession from absentee owners to actual occupants, see Friedman, *supra* note 176, at 392. On Americans courts' rejection of the doctrine of ancient lights, see generally John A. Robinson, *Implied Easements of Light and Air*, 4 YALE L.J. 190 (1895).

181. Adam J. Levitin & Susan M. Wachter, *Regulation or Nationalization? Lessons Learned from the 2008 Financial Crisis*, *in* REGULATORY BREAKDOWN: THE CRISIS OF CONFIDENCE IN U.S. REGULATION 68, 74–75 (Cary Coglianese ed., U. Pa. 2012) (describing how the 1934 creation of the Federal Housing Authority (FHA) and the mortgage insurance it provided helped standardize mortgage terms nationwide).

182. The United States' zoning revolution began with New York City's 1916 Zoning Resolution and began sweeping the nation sometime between Secretary of Commerce Herbert Hoover's publication of the Standard State Zoning Enabling Act in 1922 and the United States Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *See* SEYMOUR I. TOLL, ZONED AMERICAN 201–02 (1969) (discussing the historical spread of zoning and the influence of the Standard State Zoning Enabling Act); *id.* at 240–41 (discussing the importance of the Court's decision in *Euclid* on the expansion of local zoning laws). The causes of the zoning revolution remain a subject of debate. *See, e.g.*, William A. Fischel, Review, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1513 (2010) (reviewing LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES (2009)) (arguing that the rise of automobiles caused homeowners and developers to look for tools beyond nuisance and servitudes to regulate land uses). The United Kingdom enacted its first statute authorizing local governments to adopt "planning schemes" to govern the construction of new structures, including housing, in 1909, expanding these powers with the 1919 Housing and Town Planning Act. For an overview of these statutes, see generally Lee S. Greene, *Town and Country Planning in Great Britain*, 15 J. LAND & PUB. UTIL. ECON. 125 (1939).

183. For an overview of the Long Island Levittown with photos, see Richard Longstreth, *The Levitts, Mass-Produced Houses, and Community Planning in the Mid-Twentieth Century*, *in* SECOND SUBURB: LEVITTOWN, PENNSYLVANIA 123, 141–44 (Dianne Harris ed., 2010).

housing by more than 26%.[184] By contrast, the rate of private residential construction in the United Kingdom rose unevenly in the 1950s, stalling between 1947 and 1951 under Clement Atlee's Labour Government, rising after Conservatives won an election on the promise of boosting housing production to 300,000 units per year, and then stalling out again after 1955.[185] In contrast to the United Kingdom's housing boom in the 1920s and 1930s, when housing grew by 2.3% annually, housing crept upwards at under 2% between 1947 and 2019.[186] By the 1980s, it was widely acknowledged that the United Kingdom faced a housing crisis.

What happened in 1947 to produce such a different attitude towards housing in the United Kingdom than in the United States during the 1950s? The problem was neighbors' opposition to new suburban housing, driven by aesthetic and cultural hostility to suburban structures viewed as vulgar departures from cottager and manorial tradition.[187] Sir Patrick Abercrombie and his lobbying organization, the Council for the Preservation of Rural England, pushed for restrictions on new development in rural areas and, following World War II, persuaded the government to create a seven-to-nine-mile greenbelt around London within which no development was permitted, and which was later enlarged to over 30 miles in some locations by 1962.[188] For both the Tories and Labour, the obstacle to housing production was the same: Homeowners resisted the construction of new housing in new suburbs close to their existing homes.

Why did American developers like Levitt & Sons not face the same obstacle of neighbors' opposition? One obvious reason is that American builders in the 1950s and 1960s were erecting houses in rural areas far from

184. U.S. CENSUS BUREAU, 1 CENSUS OF HOUSING pt. 1, at xix tbl. A (1960), https://www2.census.gov/library/publications/decennial/1960/housing-volume-1/41962442v1p1ch01.pdf [https://perma.cc/W9CK-KP26].

185. For housing production rates in England and Wales, see A.E. HOLMANS, HISTORICAL STATISTICS OF HOUSING IN BRITAIN 46 (2005). For an account of the shifts on housing production in British politics, see SAMUEL WATLING & ANTHONY BREACH, CENTRE FOR CITIES, THE HOUSEBUILDING CRISIS: THE UK'S 4 MILLION MISSING HOMES 10–13 (2023).

186. Watling & Breach, *supra* note 185, at 10–11.

187. For a summary of complaints about the aesthetics of suburban housing in rural areas during the 1930s, see BRIAN LUND, HOUSING POLITICS IN THE UNITED KINGDOM: POWER, PLANNING AND PROTEST 42 (2016). For a detailed account linking interwar hostility to the aesthetics of suburban housing to social snobbery, see generally Ian Bentley, *Arcadia Becomes Dunroamin: Suburban Growth and the Roots of Opposition*, *in* DUNROAMIN: THE SUBURBAN SEMI AND ITS ENEMIES 54 (Paul Oliver, Ian Davis & Ian Bentley eds., 1981). For a narrative account of the politics of English planning from the 1930s through the present, see Samuel Watling, *Why Britain Doesn't Build*, 11 WORKS IN PROGRESS (2023), https://worksinprogress.co/issue/why-britain-doesnt-build/ [https://perma.cc/8A8H-FYCE].

188. David Thomas, *London's Green Belt: The Evolution of an Idea*, 129 GEOGRAPHICAL J. 14, 19–22 (1963).

existing homeowners.[189] Levittown, New York, for instance, was built on potato farms in Nassau County, surrounded by other similar farms in the Town of Hempstead, where there were fewer nearby homeowners to complain.[190] The Baby Boomers' explosive migration into the suburbs after World War II was largely a move into farmland that abutted other lots used primarily for farming, the value of which increased with new residential bidders.[191]

In addition to an abundance of land, fiscal decentralization in the United States also eased the way for new housing in the 1950s. State law generally allowed local governments to impose property taxes from which the costs of infrastructure and schools required by new housing could be recovered.[192] As suburban populations grew, the costs of governmental services could be spread over a larger group of taxpayers, generating a fiscal boon to incumbent residents just so long as the taxes paid and services required by the newcomers balanced out.[193] As local zoning required new suburban structures to be single-family homes, the fiscal impact of new housing for local communities was generally positive.[194] In effect, local zoning and

189. We do not mean to exclude other explanations for lack of opposition to suburban housing from existing residents. The racially restrictive covenants used by Levitt & Sons, for instance, insured that newcomers would be white, reducing racist opposition from overwhelmingly white neighbors. Thomas J. Sugrue, *Jim Crow's Last Stand: The Struggle to Integrate Levittown*, *in* SECOND SUBURB, *supra* note 183, 175, 178. Racial heterogeneity, however, cannot explain why English homeowners bitterly opposed new suburban housing. That there were few neighbors at all for new suburban construction in the 1950s, therefore, also likely smoothed the path for zoning approvals.

190. Julie Lasky, Levittown, N.Y.: The Original Starter Community, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/realestate/levittown-ny-the-original-starter-community.html [https://perma.cc/2T9P-2Q58].

191. The total amount of farmland in the United States began a steady decline from 1.2 billion acres in 1950 to 977 million in 1992. JOHN JONES & PATRICK N. CANNING, USDA ECON. RSCH. SERV., STAT. BULL. NO. 855, FARM REAL ESTATE: HISTORICAL SERIES DATA, 1950–92, at 3 tbl. 1 (1993). On the rapidly diminishing number of farms from 1950 through the 1990s, see generally Daniel G. Brown et al., *Rural Land-Use Trends in the Conterminous United States, 1950–2000*, 15 ECOLOGICAL APPLICATIONS 1851 (2005). On the use of farmland for farmers' retirement because farmers' children do not wish to continue farming, see generally STEVE RICHARDS, NY FARMNET, USING FARM ASSETS FOR RETIREMENT (2021). On the effect of urban proximity to rural land values, see generally USDA ECON. RSCH. SERV., *Urbanization Affects a Large Share of Farmland*, 10 RURAL CONDITIONS & TRENDS, no. 2, 2000; Rigoberto A. Lopez, Adesoji O. Adelaja & Margaret S. Andrews, *The Effects of Suburbanization on Agriculture*, 70 AM J. AGRIC. ECON. 346 (1988).

192. John Joseph Wallis, *A History of the Property Tax in America*, *in* PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE 123, 125 (Wallace E. Oates ed., 2001).

193. *See* William A. Fischel, *Fiscal Zoning and Economists' Views of the Property Tax* 4–5 (2013) (Lincoln Inst. Land Pol'y, Working Paper), https://www.lincolninst.edu/app/uploads/2024/04/2355_1695_Fischel_WP14WF1.pdf [https://perma.cc/2MDM-78DC] (describing theories of how property taxes and zoning interact to fund public services).

194. On the use of zoning to ensure that new homebuyers paid property taxes equivalent to incumbent owners, see generally Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975).

taxation combined to create a transactional framework in which local residents could get a share of the gains from conversion of farmland into vast residential subdivisions. State courts specifically relied on this interest in upholding minimum lot sizes to protect property values from new housing smaller than existing structures.[195]

By contrast, the New Towns planned by English builders in the 1940s and 1950s were much closer to areas densely populated with homeowners who settled there in the 1920s building boom.[196] The Council tax that local governments were permitted to impose on new development gave these homeowners relatively little revenue.[197] The New Towns, therefore, threatened a pleasant rural atmosphere while providing little compensating fiscal benefit, provoking opposition for aesthetic and cultural reasons.[198]

The difference between the United Kingdom and the United States, in sum, turned on a combination of land quantity and ideology: Home-buying Americans had much more land into which to expand, egged on by land-selling farmers and free from the opposition of home-owning Americans. In this sense, the great land steal of the eighteenth century in which millions of acres of land was transferred to white farmer-settlers laid the interest-based foundation for the great suburban expansion of the 1950s and 1960s. The pro-development ideology that underwrote Americans' local fiscal systems, with their reliance on special assessments, property taxes, and offset benefits for land development, also manifested a transactional attitude towards the use of land in which turnover for profit was expected and applauded.

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195. *E.g.*, Lionshead Lake, Inc. v. Wayne Twp., 89 A.2d 693, 698 (N.J. 1952).

196. The Greater London area covers roughly 157,000 hectares, nearly 35,000 of which are occupied by a legally mandated green belt. *Local Authority Green Belt: England 2022–23 - Statistical Release*, U.K. GOV'T (Oct. 12, 2023), https://www.gov.uk/government/statistics/local-authority-green-belt-statistics-for-england-2022-to-2023/local-authority-green-belt-england-2022-23-statistical-release [https://perma.cc/NCU5-YM4J]. By contrast, the land area of the New York City Metropolitan area contains over 75,000 hectares (300 square miles), with many discrete parks but no single greenbelt reducing land area for housing. *Coordinated Public Transit-Human Services Transportation Plan for the NYMTC Area*, N.Y. METRO. TRANSP. COUNCIL, at 3-2 (June 2009), https://www.nymtc.org/portals/0/pdf/CPT-HSP/NYMTC%20coord%20plan%20NYC%20CH03.pdf [https://perma.cc/6WJ4-KTDS]. On the private building boom between 1935 and 1939 that produced 263,000 homes per year, see MARIAN BOWLEY, HOUSING AND THE STATE, 1919–1944, at 169–79 (1945).

197. For an overview of the United Kingdom's relatively centralized fiscal system, see ANTHONY BREACH & STUART BRIDGETT, CENTRE FOR CITIES, *Centralisation Nation: Britain's System of Local Government and Its Impact on the National Economy* (2022), https://www.centreforcities.org/wp-content/uploads/2022/09/Final-Centralisation-Nation-02-09-2022.pdf [https://perma.cc/2HT6-C8ZL]. On debates over betterment and other land taxes in the post-War period, see LUND, *supra* note 187, at 39–40. For an argument that this absence of local fiscal incentives leads local communities to oppose new housing, see Paul Cheshire, *Broken Market or Broken Policy? The Unintended Consequences of Restrictive Planning*, 245 Nat'l Inst. Econ. Rev., Aug. 2018, at R9, R16.

198. *See* LUND, *supra* note 187, at 44–45 (discussing local homeowners' opposition to New Towns development in the post-War period).

II. The YIMBY Critique of the Stasis of Post-1970s American Property Law

Even as longstanding a trend as the American embrace of a developmental property law, however, could not stand up to the political changes of the 1970s and ’80s. By the early 1970s, the United States was becoming like the United Kingdom insofar as property law was concerned: The developmental impulse was gradually being replaced by an obsession with stability driven by local political participation. This Article will not seek to explain why such changes occurred, but instead will try to establish that they did, and to assess their effects.[199]

The best way to see the preference for incumbent-benefiting monopoly in property law over the last forty or so years is through the lens of zoning. Since its inception, zoning has been subject to intense criticism for furthering racial segregation, for excluding the poor from the neighborhoods and towns of the rich, for allowing the hoarding of property tax revenue, for

199. The academic literature has offered several theories about why the 1970s and ’80s saw such a radical shift in land use law. We cannot assess these theories in this Article, but it is worthwhile to briefly list them. (1) *Inflation*: William Fischel argues that the inflation of the 1970s combined with tax preferences for owner-occupied housing to make housing prices a topic of very substantial interest and to make land use controls an important mechanism for increasing and insuring the value of homes. Fischel, *supra* note 13, at 13. (2) *Increasing homeownership rates*: The 1950s and ’60s saw surging homeownership rates due to post-war economic policies and suburbanization, and these homeowners pushed for more restrictive policies. BRIAN J. MCCABE, NO PLACE LIKE HOME: WEALTH, COMMUNITY AND THE POLITICS OF HOMEOWNERSHIP 18, 53, 55 (2016). (3) *Environmentalism*: The rise of the environmental movement both directly created opposition to new growth because building cut down trees nearby and gave homeowners opposed to growth for other reasons a language for opposing growth. *See* Fischel, *supra* note 13, at 19–20. (4) *Race*: Zoning and racial exclusion and segregation have always been deeply linked, as many scholars have shown. *E.g.*, JESSICA TROUNSTINE, SEGREGATION BY DESIGN: LOCAL POLITICS AND INEQUALITY IN AMERICAN CITIES 5–7 (2018) (discussing long relationship between race and zoning). In the wake of the civil rights movement, school desegregation decisions, and rising black political power in cities, many white urban residents left cities for suburbs and sought exclusion through stricter zoning. *Id.* at 175. (4) *Degrowth and distrust of government*: The 1970s saw increasing distrust with government and growth in many domains, and the rise of public interest litigation as a tool for checking new public and private development, and the institutions built during this period survive to this day, even if the ideology of degrowth is less prominent. *See generally* SABIN, *supra* note 13. (5) *The decline of political machines*: We have argued elsewhere that the shift of big cities from being controlled by “growth machine” coalitions to stasis was caused in part by the decline of political machines, which for all of their flaws were citywide institutions and interested in growth; the regimes that followed devolved into hyper-localism and gave greater voice to squeaky-wheel opponents of growth. *See* Schleicher, *supra* note 2, at 401 (“Cities began excluding, particularly as the power of local political machines declined, and exurbs became too far away, leading to a run-up in housing costs in several metropolitan areas.”).

As with the rise of developmental property ideology, surely material interests—such as increased homeownership rates backed by borrowing giving rise to a desire to ensure the value of investments—paired with changes in tastes, such as environmentalism or the fear of desegregation, encouraged policymakers and thinkers to develop a pro-stasis property law ideology. But that story, about exactly what was going on in the minds and hearts of property law thinkers and policymakers in the 1970s, will have to wait for another day.

overregulating the harms created by nuisances, for excessively separating land uses, and for preventing regional coordination across parochial local governments, among other objections.[200]

There is, however, another line of attack that directly tracks the contrast between market- and gentry-oriented attitudes towards the status quo that is the focus of our Article. Robert Ellickson's classic critique of zoning, *Suburban Growth Controls: An Economic and Legal Analysis*, argues that zoning rules should be understood as the product of a cartel created by homeowners to inflate local housing prices.[201] Ellickson notes that the same tools promote continuity or conservatism: "Residents may genuinely prefer that their municipality remain the way it is rather than grow rapidly."[202] Land use controls at the local level thus protect existing investments, the interests of locals in reducing externalities, and conservatism, at the cost of reducing output, limiting access, and harming the interests of outsiders.

When Ellickson wrote that piece, the central concern of zoning reformers was suburban exclusion, rich suburbs using land use controls to keep per capita property values high (and thus protect property tax revenue per capita).[203] By the 1980s, however, supply-curbing zoning restrictions had spread more widely to high-demand central cities and lower-demand suburbs in the richest coastal regions of the United States.[204] As had happened in the United Kingdom, there was increasingly little as-of-right building and

200. The combination of broad political support and elite criticism is captured best by Richard Babcock's famous quip: "No one is enthusiastic about zoning except the people." RICHARD F. BABCOCK, THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES 17 (1966). The trial court in *Village of Euclid* noted that zoning would be used for frustrating regional development, "for the purpose of segregating . . . newly arrived immigrants," and for "segregate[ing] [the population] according to their income or situation in life." Ambler Realty Co. v. Village of Euclid, 297 F. 307, 308–09, 313, 316 (N.D. Ohio 1924). For a discussion of excessive separation of uses peculiar to American land use law, see SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 28–30 (2014); *see also* BERNARD H. SIEGAN, LAND USE WITHOUT ZONING 24, 48 (Rowman & Littlefield 2021) (1972) (discussing how conflicting land uses rarely locate near one another even in the absence of zoning); David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by The National League of Cities*, 81 OHIO ST. L.J. 883, 900 (2020) (discussing criticisms that zoning allowed for tax hoarding in rich suburbs and encouraged segregation).

201. Ellickson, *supra* note 44, at 400 ("Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding.").

202. *Id.* at 401. Karl Polanyi made a similar argument for social control of land markets to promote stability, noting that "[t]he economic function is but one of many vital functions of land. It invests man's life with stability; it is the site of his habitation; it is a condition of his physical safety; it is the landscape and the seasons." POLANYI, *supra* note 19, at 187.

203. Ellickson, *supra* note 44, at 409; David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1692–93 (2013); Schleicher, *Exclusionary Zoning*, *supra* note 16, at 1324–26.

204. Schleicher, *Exclusionary Zoning*, *supra* note 16, at 1324–26. *See also* ROBERT C. ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING 46–50, 84–88 (2022) (discussing the decline of pro-growth suburbs in Silicon Valley and outside of New Haven).

insufficient legal changes to allow more building. In regions that saw substantial economic growth and had strong land use controls, such as Silicon Valley and Boston, migration was walled off by the lack of housing. Prices predictably exploded, forcing workers into lower wage, lower productivity areas, and economic growth suffered as a result.[205]

In recent years, a consensus among experts has developed that land use controls are to blame for the crisis of high housing costs and lack of growth in many regions.[206] Influenced by this consensus, political groups supporting zoning reform have coalesced under the banner of "Yes In My Backyard" (YIMBY), responding to wildly appreciating housing prices by urging the deregulation of the housing supply.[207] By pushing for more housing density to allow more people to move into desired cities and locations, YIMBY critiques of contemporary land use controls directly invoke the values we describe as "developmental."[208] The point of YIMBYism is to allow for owners to use land more intensely and to allow for the migration of people. Further, YIMBYs broadly oppose localism in favor of simplified and centralized rules (city over neighborhood, state over city) that protect outsiders from politically incumbent insiders by preempting parochial rules supported by the latter.[209] The range of YIMBY advocacy goes beyond attacks on the zoning rules governing the built form of cities: YIMBY targets also include occupancy limits reserving housing for families related by

205. Schleicher, *Exclusionary Zoning*, *supra* note 16, at 1326–27. There were, of course, regions with laxer land use control that saw substantial economic growth; in these regions we saw huge population growth. *Id.* at 1335.

206. *Id.* at 1317–19.

207. For an engaging account of YIMBY activism, see CONOR DOUGHERTY, GOLDEN GATES: FIGHTING FOR HOUSING IN AMERICA 93–116 (2020); *see also* NPR: PLANET MONEY: *Yes In My Backyard* (July 27, 2018), https://www.npr.org/transcripts/633224790 [https://perma.cc/3DC3-R6WU] (describing the influence of economics scholarship on YIMBY organizers); Nolan Gray, *What Should YIMBYs Learn from 2018*?, MARKET URBANISM (Feb. 4, 2019), https://marketurbanism.com/2019/02/04/what-should-yimbys-learn-from-2018/ [https://perma.cc/5BMG-9CSF] (listing strategies for success for the YIMBY movement); Conor Dougherty, *The Surprising Left-Right Alliance That Wants More Apartments in Suburbs*, N.Y. TIMES (Mar. 12, 2024), https://www.nytimes.com/2024/03/09/business/economy/yimby-housing-conference.html [https://perma.cc/8SGS-6TEF] [hereinafter Dougherty, *The Surprising Left-Right Alliance*] (emphasizing the bipartisanship of the YIMBY movement).

208. *See* CAL. YIMBY EDUC. FUND, THE FRAMEWORK FOR CALIFORNIA, CHAPTER 1: HOUSING ABUNDANCE at 2–3 (2023), https://cayimby.org/wp-content/uploads/2023/11/CaliforniaYIMBYFrameworkChapter1.pdf [https://perma.cc/GLW5-TRCQ] (framing the YIMBY movement as supportive of "housing abundance.").

209. *E.g.*, Richard D. Kahlenberg, *How Minneapolis Ended Single-Family Zoning*, CENTURY FOUND. (Oct. 24, 2019), https://tcf.org/content/report/minneapolis-ended-single-family-zoning/ [https://perma.cc/B9AP-XC7H] (describing activists' success in pushing for citywide change rather than upzoning one neighborhood at a time); Dougherty, *The Surprising Left-Right Alliance*, *supra* note 207.

blood, marriage, or adoption and property tax breaks for long-term incumbent owners.[210]

We describe the YIMBY movement less for its specific prescriptions to cure excessive land use regulation[211] and more as an illustration of the long-running conflict over whether property law should be developmental or stasis-oriented. YIMBYism is, or should be, about more than the specifics of zoning laws: It is a movement to reinstate property law's developmental focus—cosmopolitan, favorable to turnover and easy alienability, and indifferent to preservation of the status quo—against a gentry of incumbent landowners who favor preservation of the built environment and protection of their vested rights in the zoned status quo.

That the ability of homeowners to preserve the status quo in land use rights drives economic inequality is well-documented.[212] Just as the old English gentry used their influence over local justices of the peace, homeowners today use their influence over the zoning board, the local referendum, and the individual city council member to promote their interests in continuity and preserving the value of their land.[213] This conservative view is captured by the academic defenders of contemporary zoning practices. William Fischel has argued zoning can be understood as a collective property right of incumbent landowners, regulation that allows them to avoid any perceived externalities unless they are paid off.[214] From a slightly different

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210. *See, e.g.*, Kate Redburn, *Zoned Out: How Zoning Law Undermines Family Law's Functional Turn*, 128 YALE L.J. 2412, 2415–17 (2019) (describing zoning limitations on numbers of unrelated persons in single-family houses); Village of Belle Terre v. Boraas, 416 U.S. 1, 7–9 (1974) (finding constitutional a ban on three or more unrelated persons in a single home); CAL. YIMBY EDUC. FUND, *supra* note 208, at 3–16 (presenting a wide-ranging platform for land use reform); *You can help Bedrooms Are For People win in November!*, BETTER BOULDER, https://betterboulder.com/you-can-help-bedrooms-are-for-people-win-in-november/ [https://perma.cc/9BFR-KM8Y] (describing support for repeal of restrictions on number of unrelated roommates); *see* notes 309–12 and accompanying text (discussing YIMBY resistance to California's Proposition 13).

211. We have discussed this issue elsewhere. *See generally* Hills & Schleicher, *Planning*, *supra* note 20 (arguing that binding and comprehensive urban planning can counteract housing shortages wrought by strict zoning rules); Schleicher, *City Unplanning*, *supra* note 203 (chronicling the increase in exclusionary zoning during the late twentieth and early twenty-first centuries).

212. On the contribution of rising land values to global inequality in wealth, see generally Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2015.

213. *Cf.* NORMA LANDAU, THE JUSTICES OF THE PEACE, 1679–760, at 27–28, 33 (1984) (discussing how England's landowners exercised local political power through justices of the peace).

214. *See* WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 100, 127–31 (1985) (applying the logic that assigning the right to develop to either the property owner or the town should result in the same amount of building but assigning the right to the town reduces transaction costs); *see also* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 15–18 (1977) (laying out a related set of ideas).

perspective, Richard Schragger and David Imbroscio defend local zoning as an expression of localism and resistance to market forces, while Christopher Serkin defends zoning as a protection of incumbent owners against quick "avulsive" changes in the character of their neighborhoods.[215]

In sum, the remaining academic defenders of contemporary zoning practices focus on how they protect the values we associate with stasis: to slow change, to protect landowners from externalities, and to preserve the power of local incumbent landowners to determine the "character" of their communities. Against these arguments for stasis, a growing consensus advocates for a loosening of zoning regulations to resurrect the developmental focus of property law.[216] This new consensus urges that regulations have done too much to protect the interests of landowners as a class and too little to allow markets to disrupt their comfort.

This debate, though, has largely been focused on land use controls, narrowly defined. There are also an increasing set of fights over building codes and rules for siting green energy installations.[217] But the basic structure of the argument has a much broader ambit. *All* of property law has moved in the same direction as land use controls, becoming increasingly dominated by the interests of existing owners protective of local control, and hostile to change and competition.

III. Contemporary Real Property Law Rules Favoring Stasis

As described in subpart II(B), American law has historically supported land development and raucous, competitive land markets, especially when compared to English law. Over the last fifty or so years, however, real property law and regulation—not only land use regulations such as zoning but also classic property law tools, such as covenants, easements, and regulation of forms of ownership, and public law tools such as the property tax—have favored stasis over development.

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215. Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 134 (2021); David Imbroscio, *Rethinking Exclusionary Zoning or: How I Stopped Worrying and Learned to Love It*, 57 URB. AFFS. REV. 214, 232–35 (2021); Serkin, *Zoning*, *supra* note 66, at 784.

216. There are those who would abolish zoning altogether, but their views are far from a consensus view. *See generally* M. NOLAN GRAY, ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT (2022) (arguing that we would be better off with no zoning); Joshua Braver & Ilya Somin, *The Constitutional Case Against Exclusionary Zoning*, 103 TEXAS L. REV. 1 (2024) (arguing exclusionary zoning is unconstitutional).

217. Henry Grabar, *The Single-Staircase Radicals Have a Good Point*, SLATE (Dec. 23, 2021), https://slate.com/business/2021/12/staircases-floor-plan-twitter-housing-apartments.html [https://perma.cc/2TT2-NLGE] (describing fights over single-stair buildings and building codes); J.B. Ruhl & James Salzman, *The Greens' Dilemma: Building Tomorrow's Climate Infrastructure Today*, 73 EMORY L.J. 1, 28–29 (2023) (discussing difficulty siting green energy installations).

A. Ubiquitous, Quasi-Public, Effectively Permanent Real Estate Covenants

The property law doctrine that has most clearly moved in tandem with public land use regulations in embracing the gentry view of property is an aspect of the private law of land use, or the law of covenants. Covenants, a category including the formally distinct legal tools of equitable servitudes and real covenants, are agreements among landowners about how to use their land.[218] Importantly, unlike ordinary contracts, they "run with the land," applying to future purchasers. Covenants that create Homeowners' Associations (HOAs) to govern Common Interest Communities (CICs) are usually understood as a private, additional layer of local governance, private agreements that limit incompatible neighboring land uses and coordinate the provision of local club goods.[219] In the traditional treatment, CICs and local government are substitutes; land owners create covenants to address land use conflicts unaddressed by public law and to deliver services that governments do not provide.

Over the last fifty years, though, the law of covenants has changed radically in three major ways. Covenants have become (1) increasingly ubiquitous, covering most new home construction, even as land use controls have themselves become stricter; (2) less private, as governments often require developers to create covenants as a condition for the right to build; and (3) effectively permanent, as government officials create form covenant contracts that require all or most owners to "opt out" of the covenant for it to go out of existence.

As a result, covenants are increasingly a *complement* to strict land use regulations as well as a substitute, locking in existing use patterns in ways that are more permanent than regulations. These legal changes inhibit redevelopment, allowing land use patterns, once set, to stay as they are, effectively forever. These changes have meant there is less growth and less adaptation to changing needs.

Perhaps the most famous form of real estate covenant is the racially restrictive covenant, agreements by white homeowners not to sell their homes to African-Americans or other racial minorities.[220] Such agreements are now unconstitutional, but they highlight the way in which covenants

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218. *See* JESSE DUKEMINIER ET AL., PROPERTY 740–44 (6th ed. 2006) (providing foundational definitions and examples of covenants).

219. Serkin, *Zoning*, *supra* note 66, at 796 ("[P]rivate covenants in HOAs are substitutes for municipal zoning."); Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 441–42 (2006) (discussing provision of club goods by HOAs and their use as a means of exclusion).

220. On the history and consequences of racially restrictive covenants, see generally RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS (2013).

substitute for land use controls.[221] The Supreme Court decided that explicitly racial zoning was unconstitutional in 1917.[222] This spurred white homeowners who wanted to keep African-Americans out of their neighborhoods to adopt racially restrictive covenants.[223] When public law could not be used to keep African-Americans out of their neighborhoods, white homeowners used covenants to do so.[224]

The same basic move is available to homeowners (or, more commonly, land developers in advance of selling homes) to regulate land use conflicts and to ensure that homeowners contribute to the creation and upkeep of neighborhood club goods such as swimming pools, private roads, and security. In CICs, covenants establish rules about land use directly and give power to HOAs to establish more rules and to charge fees to support club goods.[225] These rules extend beyond the usual topics of regulation by local governments, sometimes including picayune rules such as setting weight limits for pets, banning basketball hoops, mandating specific paint shades, or imposing penalties for leaving garbage cans on the curb for more than a few hours.[226] Courts review the restrictions imposed by covenants and HOAs extremely deferentially.[227]

CICs end up looking a great deal like small local governments, except they are created through private agreements rather than through efforts to incorporate as a new municipality. In the 1980s, there was a major debate among legal scholars about whether these private homeowner governments were attractive. Proponents argued they helped build social capital, provided

221. Shelley v. Kraemer, 334 U.S. 1, 22–23 (1948) (finding the enforcement of racially restrictive covenants to be unconstitutional state action).

222. Buchanan v. Warley, 245 U.S. 60, 81–82 (1917).

223. Burt Neuborne, *Ending* Lochner *Lite*, 50 HARV. C.R.-C.L. L. REV. 183, 194–95 (2015). The same situation also caused cities to pass land use zoning codes. TROUNSTINE, *supra* note 199, at 82 ("Following *Buchanan*, many cities sought to enact constitutionally defensible racial zoning plans by turning to comprehensive city planning." (footnote omitted)).

224. This can go in the opposite direction as well. Maureen Brady has shown that landowners tried to use covenants to stop commercial land uses and, crucially, apartments from moving into single-family-home-filled residential areas in big cities in the early 1900s, but that efforts to stop apartments largely failed, leading opponents of apartments to push for the creation of zoning as a legal tool. Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1616–17 (2021).

225. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 19–20, 58 (1994) [hereinafter MCKENZIE, PRIVATOPIA]; EVAN MCKENZIE, BEYOND PRIVATOPIA: RETHINKING RESIDENTIAL PRIVATE GOVERNMENT 4 (2011) [hereinafter MCKENZIE, BEYOND PRIVATOPIA].

226. Cynthia Measom, *25 Worst HOA Rules and Regulations*, L.V. REV.-J. (Dec. 18, 2019), https://www.reviewjournal.com/business/housing/25-worst-hoa-rules-and-regulations-1917111/ [https://perma.cc/ES2N-5TN9]; *see also* Filipa Ioannou, *The Craziest HOA Rules in Northern California*, SFGATE (Aug. 28, 2019), https://www.sfgate.com/lifestyle/article/The-craziest-HOA-rules-in-Northern-California-13189006.php [https://perma.cc/784R-6JTE] (highlighting especially egregious HOA rules such as incurring a $200 fine for leaving garage doors closed).

227. DUKEMINIER et al., *supra* note 218, at 813.

services without the problems of local government, and—because they were both privately created and small—gave people more options.[228] Critics thought they led to excessive exclusion, homogeneity, and plutocracy.[229] But to both sides of this debate, covenants and HOAs were understood as substitutes for local governance—property owners getting from contractual agreements what they did not get from governments.

In the last fifty or so years, CICs have become ubiquitous. The number of CICs took off in the 1970s. By 2017, more than sixty percent of new housing construction was inside a CIC.[230] For a large number of ordinary homeowners, the collective entity that governs their life on a day-to-day level the most is an HOA.[231] HOA fees to support local amenities can be quite substantial; failure to pay them can lead to foreclosure.[232]

That said, covenants do not fully substitute for land use controls. Individual covenants rarely cover more than 1% of the land of a municipality, and do not preclude development as comprehensively as zoning regulations can.[233] The proof for this is in the pudding. Despite the growth of covenants, jurisdictions with loose land use restrictions have more housing growth and lower housing prices than we see in jurisdictions with strict land use regulation.[234] Houston, which famously does not have zoning but has many real estate covenants, still has a huge amount of housing construction.[235]

However, it is notable that covenants have gotten more extensive over the same period in which land use controls became stricter. While covenants and land use regulations are indeed substitutes, they also are increasingly complements to zoning for restrictive governments.[236]

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228. *See* Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1519–20 (1982) (arguing that HOAs are "the obvious private alternative to the city" to allow individuals to better "influence the decisions that affect their lives"); Robert C. Ellickson, Comment, *A Reply to Michelman and Frug*, 130 U. PA. L. REV. 1602, 1603 (1982). Ellickson revised his enthusiasm for some aspects of HOAs later. Robert C. Ellickson, *Stale Real Estate Covenants*, 63 WM. & MARY L. REV. 1831, 1851–52 (2022) [hereinafter Ellickson, *Stale Real Estate*].

229. *E.g.*, Gerald E. Frug, Comment, *Cities and Homeowners Associations: A Reply*, 130 PA. L. REV. 1589, 1589–90, 1593–96 (1982).

230. Ellickson, *Stale Real Estate*, *supra* note 228, at 1840, 1847.

231. *See* MCKENZIE, PRIVATOPIA, *supra* note 225, at 18–21 (describing HOA governance).

232. Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 FORDHAM L. REV. 2503, 2504 (2004) (discussing and advocating for an HOA's power to foreclose on homes when owners are delinquent in paying maintenance fees).

233. Ellickson, *Stale Real Estate*, *supra* note 228, at 1849–50.

234. Schleicher, *Exclusionary Zoning*, *supra* note 16, at 1336–37.

235. *Id.* at 1336.

236. We are far from the first to note this. *E.g.*, William A. Fischel, *The Rise of Private Neighborhood Associations: Revolution or Evolution?*, *in* THE PROPERTY TAX, LAND USE AND LAND USE REGULATION 273, 273 (Dick Netzer ed., 2003); Ron Cheung & Rachel Meltzer, *Homeowners Associations and the Demand for Local Land Use Regulation*, 53 J. REG'L SCI. 511, 527 (2013).

Jurisdictions regularly require developers of new subdivisions to create HOAs that provide some local public goods.[237] They do so to help ensure that tax revenue from existing residents is not shared with newcomers. As Bruce Hamilton argued, communities use zoning and other land use tools to ensure that new development will pay its own way in property taxes—i.e., that it has the same per capita value as existing houses—and thus does not require any transfers from richer existing residents to poorer new residents.[238] Communities charge developers impact fees to ensure development does not impose fiscal costs on existing residents for public services required by the new community.[239] Requirements that new developments are governed by HOAs serve the same function as impact fees. HOAs allow governments to offload the fiscal cost of providing a number of services to developers and future homeowners.[240] That developers have to pay privately for public goods—whether through impact fees or HOAs—raises the cost of building, relative to a world in which development is allowed without impact fees or HOA requirements, and reduces the amount of housing that is produced.[241] Rather than acting as a substitute for land use regulations, HOA requirements are part of exclusionary local governments' land use regulation toolbox.

Federal regulators, courts, and developers have also made covenants into effectively permanent, rather than temporary, restrictions on changes in land use. As Robert Ellickson argues, while there have long been examples of covenants that were effectively permanent, historically most covenants either had a fixed term—that is, they ceased to exist unless all owners "opted in" to a renewed covenant—or did not specify their intended length, leading courts to impose limits on their length.[242]

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237. Ellickson, *Stale Real Estate*, *supra* note 228, at 1851.

238. Hamilton, *supra* note 194, at 210–11; Bruce W. Hamilton, *Capitalization of Intrajurisdictional Differences in Local Tax Prices*, 66 AM. ECON. REV. 743, 748, 751 (1976). For a discussion critiquing these and related arguments in a more contemporary context, see Schleicher, *Exclusionary Zoning*, *supra* note 16, at 1340–42.

239. *See* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 180–82 (2006) (describing how impact fees represent the effort of local governments to force new development to pay for public goods without taxing existing residents).

240. Ron Cheung, *The Interaction Between Public and Private Governments: An Empirical Analysis*, 63 J. URB. ECON. 885, 897 (2008) (showing that higher rates of HOAs are associated with decreased government expenditures).

241. Dan Bertolet, *Impact Fees on Urban Housing Punish Renters and First-Time Buyers* SIGHTLINE INST. (Sep. 28, 2017), https://www.sightline.org/2017/09/28/impact-fees-on-urban-housing-punish-renters-and-first-time-buyers/ [https://perma.cc/63ZH-6K3A] (arguing that impact fees increase cost of construction); Gerald Korngold, *Cutting Municipal Services During Fiscal Crisis: Lessons from the Denial of Services to Condominium and Homeowner Association Owners*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 109, 113–14 (2012) (explaining that governments often not only charge developments for the costs of infrastructure development but also deny services to HOAs on an ongoing basis).

242. Ellickson, *Stale Real Estate*, *supra* note 228, 1842–43.

However, the federal government, through the Federal Housing Administration (FHA), changed how covenants work.[243] The FHA and the Urban Land Institute (ULI) endorsed a form contract for covenants that changed their duration. This was incorporated in the ULI's 1964 *Homes Association Handbook*, the "bible" for producing CICs that set off a boom in the 1970s.[244] The FHA also factored the form covenants took into their determinations about home mortgage insurance.

As a result of these interventions, most covenants last for an initial term of years, but then automatically renew unless a majority (or supermajority) of owners decides to opt out.[245] This "automatic renewal with opt-out" system effectively renders these covenants permanent, as there is rarely a supermajority of owners who want to redevelop their property at the same time.[246]

Courts have developed a small number of tools for limiting covenants that no longer increase the collective property values of all members, which Ellickson calls "stale covenants."[247] These tools are mostly ineffective, though, meaning almost all covenants will be in place effectively forever. A few state legislatures have passed limited reforms. California and Oregon have passed statutes forbidding covenants from barring certain land uses, from keeping house pets to building accessory dwelling units.[248] Massachusetts limits the term of covenants to thirty years but allows a majority to affirmatively vote to keep the covenant, and allows those who violate covenants to pay damages, rather than be enjoined from building, under certain circumstances.[249]

Covenants certainly provide homeowners with benefits when they are first created, increasing property values by ensuring that purchasers will not be subject to nuisances, even those not recognized by law, and by providing local club goods.[250] However, covenants impose harms over time. When conditions change, they impede the ability of homeowners to respond by redeveloping their homes. As a result, effectively permanent covenants can become costly, even if they were beneficial in their early years. As Ellickson argues: "Unless loosened, [covenant] restrictions, coupled with zoning restrictions and historic preservation regulations, threaten to freeze land uses in urban America."[251]

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243. *Id.* at 1845–47.

244. *Id.* at 1847 (pointing out that an FHA official contributed to the ULI handbook).

245. *Id.* at 1840.

246. *Id*.

247. *Id.* at 1856–61.

248. *Id.* at 1851 n.104, 1863–64.

249. *Id.* at 1862–63; MASS. GEN. LAWS ANN. ch. 184, §§ 27(b), 30 (2024).

250. Ellickson, *Stale Real Estate*, *supra* note 228, at 1847–49.

251. *Id.* at 1840.

Of course, there are reasons to allow and encourage effectively permanent covenants. They protect owners against unwanted changes in land uses, and they preserve the existing form of neighborhoods, absent agreement by the landowners. These are the same types of arguments that inspire resistance to zoning reform, and indeed the same type of arguments American rejected when they abolished the fee tail and established property registries. The changes in covenant law are best understood as moving property law towards the values of stasis and moving it away from the developmental view of property law.

B. Conservation Easements: Tax-Preferred Permanent Limits on Development at Odds with Contemporary Environmental Concerns

One of the clearest examples of the move in property law in the direction of stasis is the rise of the "conservation easement." Here's how they work: A landowner transfers a conservation easement to a government or non-profit land trust, giving that entity the power to ensure that the encumbered property is not developed.[252] In return for restricting development in perpetuity, the donor receives valuable tax benefits—a federal income tax deduction, a reduction in the value of property for estate tax purposes, a reduction in local property taxes, and often a variety of state tax benefits as well.[253] The landowner retains ownership of her property and can continue using it as long as the uses are consistent with the goals of conservation or preservation and are permitted under the terms set out in the easement.[254] Neither the holder of the easement nor the general public gains the right to access—conservation easements are "negative" easements, limiting what property owners can do, rather than positive ones that would give holders use rights.[255] Further, conservation easements "run with the land," and continue to limit development even if the original landowner transfers her interest.

Negative easements in gross,[256] such as conservation easements, were traditionally disfavored at common law.[257] Around the turn of the last

252. Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 741–42 (2002).

253. *Id.* at 751–52; Gerald Korngold, *Solving the Contentious Issues of Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public Land Use Process*, 2007 UTAH L. REV. 1039, 1050 (2007) [hereinafter Korngold, *Solving*].

254. Mahoney, *supra* note 252, at 742.

255. Conservation easements *can* give the public access rights, but only a minority of them do. Korngold, *Solving*, *supra* note 253, at 1044–46 (noting that conservation easements are negative easements and that they rarely grant public access).

256. An easement is "in gross" if it gives rights to its holder without regard to ownership of land. DUKEMINIER et al., *supra* note 218, at 671. An easement is negative if it limits the use of the servient parcel, rather than granting use rights to the dominant parcel. *Id.*

257. Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEXAS L. REV. 433, 470–83 (1984)

century, a few states enacted enabling legislation that allowed landowners to create and transfer development-limiting easements in gross.[258] The tool was not frequently used until famous journalist William H. Whyte wrote a report for the Urban Land Institute encouraging jurisdictions to acquire, by gift or by eminent domain, what he called "conservation easements."[259] They would be, he argued, a powerful tool to keep increasingly scarce undeveloped land free from construction.[260] Whyte argued that it would be cheaper and legally less complicated for governments to acquire conservation easements that ensured open spaces remained undeveloped than it would be to achieve the same end through regulation, eminent domain, or open-market purchases of land.[261]

Even as he advocated for them, Whyte noted potential problems with such easements. First, conservation easements mostly would be of interest to the "gentry," rich landowners interested to keeping their beloved land as it was.[262] Unlike other conservation tools, they would not make open space or nature accessible to the public. More pressingly, as he argued clearly in his book *The Last Landscape*, protecting open land would only be truly successful at encouraging conservation if it was paired with zoning and other policy changes that encouraged more intense use of the land that was not preserved. [263] "Open space and development are reciprocals; if we expect to save much more open space for the future, we are going to have to be equally concerned with finding more compact ways of developing the space that has to be developed."[264]

(elaborating on how conservation easements would have faced substantial legal hurdles under the traditional common law).

258. Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENV'T. L. REV. 119, 126–28 (2010) (discussing origins of conservation easements in early twentieth-century Massachusetts and their extension in the 1950s); Korngold, *supra* note 253, at 1052–54 (explaining why conservation easements would have faced challenges at law without enabling acts).

259. WILLIAM H. WHYTE, JR., URB. LAND INST., TECH. BULL. NO. 36, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 11, 15, 18, 36 (1959).

260. *Id.* at 18. For further discussion on Whyte's outsized impact on the conservation movement, see RICHARD K. REIN, AMERICAN URBANIST: HOW WILLIAM H. WHYTE'S UNCONVENTIONAL WISDOM RESHAPED PUBLIC LIFE 138–45 (2022) (describing Whyte's efforts); Molly Teague, Note, *Conservation Options: Conservation Easements, Flexibility, and the "In Perpetuity" Requirement of IRC § 170(h)*, 75 VAND. L. REV. 1573, 1577 (2022); Bray, *supra* note 258, at 127–28.

261. WHYTE, *supra* note 259, at 7–8; WILLIAM H. WHYTE, THE LAST LANDSCAPE 99–101 (1968) [hereinafter WHYTE, LAST LANDSCAPE].

262. WHYTE, *supra* note 259, at 36–37.

263. WHYTE, LAST LANDSCAPE, *supra* note 261, at 10–11. Notably, the final chapter of the book is entitled "The Case for Crowding." *Id.* at 331.

264. *Id.* at 13.

Conservation easements did not really take off, though, until Congress created a tax incentive for people to give away development rights.[265] In 1976, and with modifications in 1977 and 1980, Congress allowed property owners who donated perpetual conservation easements to governments or nonprofit organizations to take an income tax deduction equal to decline in property value caused by the easement.[266] States responded by passing enabling statutes, often enacting versions of the 1981 Uniform Conservation Easement Act.[267] Congress later expanded the deduction, allowing up to 40% of the value of property subject to a conservation easement to be exempted from estate taxes.[268] Many states also provide tax deductions, and local governments base property taxes on the value of land after the easement, a much lower figure than its value were it still developable.[269]

After these legal changes, the use of conservation easements exploded.[270] One can only capture the extent of conservation easements by comparing the amount of land covered by them to states. The National Land Trust estimates that land trusts—the primary repository of conservation easements—permanently limit development on sixty million acres, almost equal to the size of Colorado.[271] Some of that land, though, is owned by land trusts in fee simple, rather than being owned by others but subject to conservation easements. However, according to the National Conservation Easement Database, there are more than 221,000 conservation easements, controlled by both land trusts and governments, which cover more than thirty-seven million acres of land, bigger than the state of Michigan.[272] The National Land Trust's goal is to conserve to 120 million acres by the end of the decade, a total much larger than the state of California.[273]

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265. Bray, *supra* note 258, at 129.

266. *See* Teague, *supra* note 260, 1578–80 (discussing the development of the federal tax deduction for donated conservation easements).

267. Bray, *supra* note 258, at 128–30.

268. *Id.* at 132.

269. Korngold, *Solving*, *supra* note 257, at 1049–50.

270. Bray, *supra* note 258, at 129.

271. *See Together, Saving Land*, LAND TR. ALL., https://landtrustalliance.org/land-trusts/gaining-ground/conservation-progress [https://perma.cc/7R28-WT86] (noting that land trusts have conserved over sixty million acres); *Buying and Selling Land*, COLO. STATE LAND BD., https://slb.colorado.gov/buy-sell [https://perma.cc/AV27-WXQF] (stating that Colorado spans sixty-six million acres).

272. *Compare* NAT'L CONSERVATION EASEMENT DATABASE, https://www.conservationeasement.us [https://perma.cc/YS9P-UXPU] (stating that conservation easements currently cover more than thirty-seven million acres of land), *with* STATE OF MICH., OVERVIEW OF FORESTED AREAS, at *1, https://www.michigan.gov/-/media/Project/Websites/dnr/Documents/FRD/SFMP/13overview.pdf?rev=44d9b8f272cb439ca62540b650ba5ba9 [https://perma.cc/U36P-X9SS] (marking Michigan's land area at thirty-six million acres).

273. *Compare* LAND TR. ALL., *supra* note 271 (giving the goal of 120 million acres preserved by 2030), *with* CAL. DEP'T FOOD & AGRIC., AGRICULTURAL LAND LOSS & CONVERSION 19,

The total amount of taxes foregone due to conservation easements is enormous. The federal government loses $6.5 billion a year to conservation easement tax deductions, making it among the largest federal programs supporting the environment.[274] The policy is also regressive: Virtually all of the tax benefits flow to the very rich.[275]

Further, despite there being some academic debate over whether conservation easements allow for flexibility in the face of changing conditions,[276] the trend in the courts and Congress has been to make them stricter.[277] Courts have mostly rejected challenges to conservation easements based on traditional property law doctrines—laches, limits on restraints on alienation, the merger doctrine in easement law—designed to free up the property market. Interpretations of tax law have also made conservation easements less flexible.[278]

However, in the scholarly literature, a counternarrative emerged, arguing that conservation easements are costly. Julia Mahoney argued that permanent conservation easements fix in place the current generation's beliefs—more specifically, the beliefs of current large property owners and recipient organizations—about what land needs to be conserved.[279] This fails to acknowledge that our beliefs about what is environmentally necessary changes as science, nature, and society develop.[280] By being hard-to-unwind, conservation easements hinder today's governments, people, and property owners from achieving their desired ends based on current science and beliefs.

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https://www.cdfa.ca.gov/agvision/docs/agricultural_loss_and_conservation.pdf [https://perma.cc/S6U8-NLN3] (stating that California has a land area of roughly 100 million acres).

274. MOLLY F. SHERLOCK & ERIKA K. LUNDER, CONG. RSCH. SERV., IN12054, THE TAX DEDUCTION FOR CONSERVATION EASEMENT CONTRIBUTIONS 2 (2022); Adam Looney, *Estimating the Rising Cost of a Surprising Tax Shelter: The Syndicated Conservation Easement*, BROOKINGS INST. (Dec. 20, 2017), https://www.brookings.edu/articles/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement [https://perma.cc/F3TN-FY28] ("[C]onservation easements rank among the largest federal environmental and land management programs in the budget.").

275. *See* Elliott G. Wolf, Note, *Simultaneously Waste and Wasted Opportunity: The Inequality of Federal Tax Incentives for Conservation Easement Donations*, 31 STAN. ENV'T L.J. 315, 322–23, 322 fig. 2 (2012) (illustrating the regressive distribution of tax benefits derived from conservation easements).

276. *See* Bray, *supra* note 258, at 175 (discussing the debate over flexibility and finding empirically that "the problem of permanence may be at least as bad as some critics have suggested").

277. On judicial efforts, see Nancy McLaughlin, *Enforcing Conservation Easements: The Through Line*, 34 GEO. ENV'T L. REV. 167, 182–213 (2022). On legislative efforts, see Bray, *supra* note 258, at 133–35.

278. *See* Teague, *supra* note 260, at 1595–98 (discussing tax constraints such as those on modifying or on extinguishing conservation easements that limit these easements' flexibility).

279. Mahoney, *supra* note 252, at 767.

280. *Id.* at 753–62.

Further, Mahoney notes, in practice, conservation easements can encourage "sprawl," by limiting development in prime locations. This makes people move further away from cities (or to other metropolitan areas) rather than reducing the amount of land they use.[281] Whyte's hope that the preservation of open space be paired with zoning changes allowing densification on other lots did not come to fruition. Instead, the rise of conservation easements happened as zoning rules were getting stricter.[282] As a result, conservation easements inside or near metropolitan areas often instead displace development to areas with fewer limits on building (such as distant exurbs or states with fewer land use controls).[283] This may yet result in environmental benefits—the land preserved may be particularly important or nice—but it can also create greater environmental problems (e.g., greater greenhouse gas emissions). Crucially, determinations about what is and what is not permanently protected are made by landowners and local land trusts, without public review.[284]

For our purposes, what is most important is how the debate over conservation mirrors other debates in property law. Proponents of conservation easements claim that they are better than other methods for conserving land because they are private and local, rather than top-down efforts by a central government.[285] These are roughly the same arguments one sees from opponents of zoning reform, who frequently claim that zoning allows local communities to decide their own fates.[286]

Similarly, conservation easements allow owners to determine future uses of their land, reserving some for themselves and specifying exactly what

281. *Id.* at 762–63.

282. DANA JOEL GATTUSO, NAT'L CEN. PUB. POL'Y RSCH., NAT'L POL'Y ANALYSIS #569, CONSERVATION EASEMENTS: THE GOOD, THE BAD, AND THE UGLY (May 1, 2008), https://nationalcenter.org/ncppr/2008/05/01/conservation-easements-the-good-the-bad-and-the-ugly-by-dana-joel-gattuso/ [https://perma.cc/UBA9-Y6K5].

283. Korngold, *Solving*, *supra* note 257, at 1060, 1060 n.100 ("Consider, for example, the recent dispute between environmentalists seeking to preserve scenery and those supporting the development of lower income housing for immigrant laborers living in crowded conditions in Monterey, California." (citation omitted)). However, Whyte thought that the possibility that the idea that conservation easements would contribute to a lack of housing was "unrealistic." Whyte, *supra* note 259, at 42.

284. *See, e.g.*, Nat'l Conf. of Comm'rs on Uniform State Laws, Uniform Conservation Easement Act, Prefatory Note (2007) (encouraging a flexible, individualized approach to conservation easements). Massachusetts only allows conservation easements that have gone through a governmental approval process; however, the Uniform Conservation Easement Act specifically criticizes this approach. *Id.* (rejecting public planning agency review for conservation easements); Bray, *supra* note 258, at 149–50; Jesse J. Richardson, Jr. & Amanda C. Bernard, *Zoning for Conservation Easements*, 74 L. & CONTEMP. PROBS. 83, 90–91 (2011).

285. Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 NEB. L. REV. 1043, 1047 (2006) ("[C]onservation easement advocates invoke the narrative of local decision making.").

286. Schragger, *supra* note 215, at 128–29.

will not be allowed on the land forever.[287] Crucially, the legal limits conservation enabling acts allowed donors to avoid are American property law limits designed to increase the alienability of land and efficiency of land markets. Just as English landed gentry kept their estates in their preferred form in perpetuity through tools such as the fee tail, today's large landholders can preserve their land in their preferred form (and get a tax deduction to boot).[288]

Proponents of conservation easements believe that large landowners and non-profits should be subsidized when they decide to restrict future land uses forever. They are in favor of the continuity of current land uses, an idea that is quite distinct from protection of the environment. They oppose allowing either the market or the public to decide where and when we should build, now or in the future. Conservation easements are a clear example of property law's embrace of stasis.

C. The Lack of Reform of the Forms of Ownership as a Sin of Omission

Property law's excessive embrace of stasis can be seen not only in sins of commission, but in sins of omission as well. Several core property law doctrines make little sense if the goal is increasing the usefulness of real property, rather than serving only to enhance owner autonomy.

One of the central concerns of contemporary property law scholarship has been forms of ownership and the *numerus clausus* principle.[289] Unlike contract law, which allows for infinite customization, property law only permits the existence of a few ways to own and possess property: traditionally, the fee simple, the life estate, and the lease, with ownership being either absolute or defeasible.[290] Property can also be owned concurrently by several people, but only in a few ways, through tools such as tenancy-in-common and joint tenancy.[291] The *numerus clausus* principle holds that private parties cannot break up ownership of property in devices or sales in new "fancy" ways, instead vesting legislatures with the sole power to develop new forms of ownership.[292] Thomas Merrill and Henry Smith famously argued in favor of the *numerus clausus* principle, claiming that, because property law allocates rights in "things" rather than against persons

287. Korngold, *Solving*, *supra* note 257, at 1054–56.

288. *See* Harding, *supra* note 67, at 302 ("As with the disappearance of the rule against perpetuities, [conservation easements] provide current owners with unprecedented powers to affect the management of their property indefinitely.").

289. *See* Davidson, *supra* note 63, at 1598–99 (describing "significant scholarly attention").

290. *Id.* at 1606.

291. *Id.*

292. *Id.* at 1616. In common law countries, *numerus clausus* is more of a principle for courts to consider, while in civil law countries a "strong form" of the doctrine exists, where the legislature is the sole body with any power to recognize new forms. *Id.*

(like contract law), it must consider the interests of third parties whether potential purchasers or passers-by, who might encounter those things.[293] Allowing individuals to develop new forms of ownership would increase information costs for third parties about who owned what and how.[294] Avoiding these costs are worth the "frustration costs" of parties' inability to use, sell, or devise property as they see fit.[295]

The logic of *numerus clausus*, at least as given by Merrill and Smith, is that it promotes market efficiency by reducing purchasers' information costs, even as it harms the autonomy of property owners. That said, *numerus clausus* does not impose much of a limitation on the autonomy of owners to determine the future use of their land. As long as they artfully use the terms of property law, owners can control the future uses of their land substantially.[296] The existing forms of ownership other than the fee simple and the leasehold—life estates and the whole variety of defeasible fees—can create very substantial information costs for third parties, as any confused first-year property law student can attest. Where bequests create many future interests, they limit alienability and development.

A doctrine that says that courts should not recognize efforts by private parties to create "fancy" new forms of ownership does not tell us much about which forms of ownership legislatures should create or allow to persist. There have been modest expansions in the forms of ownership, but no widespread reconsideration of existing forms.[297] The trend in the law of inheritance has been to increase the autonomy of those leaving bequests.[298]

But why should we continue allowing people to create things like life estates subject to conditions subsequent, or to create fees simple ownership subject to executory limitations? Even as the field of property law has spent years obsessed with the *numerus clausus* and the problem of information costs, no one has provided a decent cost-benefit analysis of this question. That there has not even been any consideration of whether to restrict existing

293. Merrill & Smith, *supra* note 40, at 8.

294. *Id.*

295. *Id.* at 35.

296. *See* Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORN. L. REV. 1009, 1025 (2009) ("[I]t is not really true that the estates system currently functions to simplify things."); Davidson, *supra* note 63, at 1625–26 ("The *numerus clausus* can provide the building blocks for almost any conveyance, albeit with less convenience than specialization would allow." (footnote omitted)).

297. The most important additions have been the timeshare and the condominium. Merrill & Smith, *supra* note 40, at 15. The conservation easement may also qualify as a new form as well. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1178 n.72 (1999).

298. DUKEMINIER ET AL., *supra* note 218, at 225–26, 236–37 (discussing legal changes). That said, the biggest change in the practice of bequests has dissolved some of the conflict between development and stasis in real property at least. The rise of the use of *inter vivos* trusts keeps wealth controlled by grantors but does not encumber particular assets. Heller, *supra* note 297, at 1178.

forms of ownership shows contemporary property law's deep embrace of the values of stasis.

We also might consider creating new forms of ownership that match the modern economy. Lee Fennell argues that the bedrock form of modern property ownership, the fee simple, is a bad fit for real property today, particularly in urban areas.[299] When most of the value of land came from inside its boundaries—say from its value as farmland—it made sense to allocate exclusive ownership over particular plots, forever, as the fee simple does. But, today, most of the value of land comes not from the land itself, but from where pieces of land (and buildings) are located relative to others. Fee simple ownership makes redevelopment hard, as it creates many potential holdouts against projects that would increase value by assembling lots.[300] Further, the fee simple does not encourage owners to produce the positive agglomerative externalities that are essential to urban economies.[301] While legal regimes such as nuisance limit negative externalities, positive externalities—say, operating a shop that fits well with neighboring shops—are hard to encourage. Urban economies rely heavily on this type of positive externality.

Fennell proposes creating new forms of ownership to avoid holdouts and encourage positive externalities.[302] The specifics of Fennell's proposal are not important here; its spirit is. Her idea is that we should embrace new forms of ownership to promote development.

D. Property Tax as a Tool of Stasis

Property law scholars generally do not think much about property taxes. But property taxes are one of the central ways governments regulate the use and transfer of real property. Changes in property tax law over the last fifty years have made it much more conservative and better for incumbent landowners. These reforms discourage changes in ownership and use, and broadly entrench the power of current owners, particularly richer owners. That is, property taxes, just like other areas of property law, increasingly encourage stasis.

Property taxes are based on the assessed value of real property, which traditionally is determined by government officials attempting to ascertain its market value. While there are multiple ways to assess property value and doing so is more of an art than a science, the property tax is supposed to tax

299. Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1461–63 (2016).
300. *Id.* at 1461.
301. *Id.* at 1464.
302. *Id.* at 1465.

real property wealth—the current value of the land and improvements (i.e., buildings) a person or business owns.[303]

Economists have long debated whether property taxes are an efficient or progressive mechanism for raising revenue for local governments.[304] But all economic models of the property tax assume that assessments track market values.

Basing property taxes on market values encourages owners to put property to its highest value use. If a farm is more valuable as a residential subdivision, an assessment based on market values will result in the land being taxed as if it were a residential subdivision. As a result, market-rate assessments encourage land to be put to its best use, lest it get taxed at a higher rate without providing the owner with commensurate benefits.[305]

Changes over the last fifty years, however, have shifted the property tax in many jurisdictions away from a tax on market-based determinations of property wealth. The most famous move in this direction was California's Proposition 13.[306] Passed in 1978, Prop. 13, among other things, changed the way property was assessed. While property is reassessed at market rates when it is sold or upon a major change (e.g., a massive renovation or a new building), assessments cannot otherwise increase by more than two percent per year.[307] Property values have increased substantially more than this over time, meaning that people who have owned property for a long time are taxed at much lower rates than people who have just bought property. The differences in property taxes paid on equally valuable pieces of property can be staggering.[308]

Both the California Supreme Court and the U.S. Supreme Court rejected equal protection challenges to Prop. 13's "acquisition value" assessment regime.[309] By reducing taxes on longer term holders of property, the courts found that Prop. 13 supported the state's interest in preserving "neighborhood preservation, continuity, and stability."[310] Further, taxing property at market values can be harmful for those who see their property

303. *See* David Schleicher, *Your House Is Worth More than They Think: The Strange Case of Property Tax Assessment Regressivity*, 62 HARV. J. ON LEGIS. 85, 88 (2025) (discussing the difficulties of assessing a property's value).

304. *Id.* at 111–12, 112 n.149.

305. Even better, a land value tax—one that exempted buildings from assessments—would remove the property tax's disincentive to build new structures. *See supra* text accompanying note 35.

306. CAL. CONST. art. XIIIA, §§ 1–6.

307. MAC TAYLOR, CAL. LEGIS. ANALYST'S OFF., *COMMON CLAIMS ABOUT PROPOSITION 13*, 2 (2016), https://lao.ca.gov/publications/report/3497 [https://perma.cc/Z3PR-2JTV].

308. *Id.* at 6.

309. Nordlinger v. Hahn, 505 U.S. 1, 11–13 (1992); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1292–94 (Cal. 1978).

310. *Nordlinger*, 505 U.S. at 12.

wealth increase while their cash income does not, perhaps forcing them to borrow or sell.[311] An acquisition assessment system respects the settled expectations and reliance interests of purchasers of property.[312]

The justifications that courts have accepted for Prop. 13 are clear statements of the values of stasis in property law. The courts accepted arguments that the settled expectations of property investors and a desire to slow change in neighborhoods justified inequality in assessment. Prop. 13 is clearly hostile to developmental values. Prop. 13 provides incentives for owners to hold on to property.[313] Low acquisition value tax assessments encourage people not to move, as they will have to pay higher taxes on a newly purchased unit, even if their current house no longer fits their needs—e.g., a big house for empty nesters.[314] Furthermore, because property tax status is inheritable, properties increasingly stay in families.[315] Prop. 13 also penalizes construction, as new construction causes a property tax revaluation.[316] On top of this, Prop. 13 is highly regressive, with almost all its benefits flowing to richer homeowners and families.[317]

Other states have moved in California's direction. Florida's property tax regime largely mirrors Prop. 13, although it only applies to primary residences and has no provision for the inheritance of low assessments.[318]

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311. *Id.* at 13.

312. *Amador Valley*, 583 P.2d at 1293.

313. Taylor, *supra* note 307, at 2–3; Nada Wasi & Michelle J. White, *Property Tax Limitations and Mobility: The Lock-In Effect of California's Proposition 13*, at 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 11108, 2005) (discussing the "lock-in effect" that arises from homeowners staying in the same home to take advantage of Prop. 13's tax benefits).

314. Connor Nielsen, *Mapping the Effects of California's Prop 13*, STRONG TOWNS (July 23, 2018), https://www.strongtowns.org/journal/2018/7/20/mapping-the-effects-of-californias-prop-13 [https://perma.cc/KE29-AGVM] (discussing how Prop. 13 discourages homeowners from moving). The "empty nest" problem was reduced by increasing the benefit Prop. 13 creates for incumbent owners, allowing owners over age fifty-five to take their low tax assessments with them if they sell their house. *See* Taylor, *supra* note 307, at 12 (explaining transferability for owners over fifty-five); *Proposition 19 and Property Taxes: How It Works, What It Means*, COLEMAN & HOROWITT, LLP (Feb. 19, 2021), https://ch-law.com/proposition-19-and-property-taxes-how-it-works-what-it-means/ [https://perma.cc/7FPZ-5333] (describing a recent expansion of this benefit for owners above the age of fifty-five).

315. *See* Liam Dillon & Ben Poston, *California Homeowners Get to Pass Low Property Taxes to Their Kids. It's Proved Highly Profitable to an Elite Group*, L.A. TIMES (Aug. 7, 2018), https://www.latimes.com/politics/la-pol-ca-california-property-taxes-elites-201808-htmlstory.html [https://perma.cc/R8Z9-AG7P] (describing benefits of inheritability under Prop. 13 and successive propositions). In 2020, voters limited the inheritability of acquisition assessments to primary residences and limited the amount of transferable tax benefit to $1M in assessed value. COLEMAN & HOROWITT, LLP, *supra* note 314.

316. Taylor, *supra* note 307, at 33–34 (finding vacant land less likely to be developed if it has been owned for longer). Additionally, local governments—starved of tax revenue by Prop. 13—increased impact fees, directly taxing new development. *Id.* at 37–38.

317. *Id.* at 9–10.

318. Mary LaFrance, *Constitutional Implications of Acquisition-Value Real Property Taxation: The Elusive Rational Basis*, 1994 UTAH L. REV. 817, 819 n.18 (1994).

Many other jurisdictions limit annual increases in assessed value, although usually not as strictly as California does.[319] While not as dramatic as Prop. 13, these changes slow property turnover and provide benefits to existing homeowners at the expense of purchasers and builders.

There are other moves towards the value of stasis in property tax law. For instance, almost all jurisdictions do not assess agricultural land according to its highest and best use, instead using its "use value."[320] That is, jurisdictions do not tax farmland that would be more valuable as housing based on its market value, but instead tax it based on what it would be valued by the market if it remained as a farm. The reason is straightforward: Jurisdictions do not want to encourage farmers to turn their land into subdivisions or other uses. Here, again, property law is acting to lock in existing land uses and slow change.

Conclusion

It should not be a surprise that most aspects of property law have moved in tandem with land use regulations since the 1970s and '80s in protecting landholders' ability to determine nearby and future uses, in reducing changes in uses and churn in ownership, and in preserving localism. After all, these policies were created at roughly the same time and by the same polities. But they do suggest that unwinding the costs of America's excessively restrictive property law regime will take more than land use reform.

So, what is to be done? If the embrace of stasis in property law over the last fifty years has gone too far and created substantial harms, the clear answer is to reform the areas of law we discuss above—land use, building codes, covenants, conservation easements, forms of ownership, and property tax—in ways that increase building, changes in uses and ownership, and cosmopolitanism. That is, we can turn the dial back towards development and away from stasis.

Other types of reforms could be enacted as well:

For instance, there are a variety of types of reforms that would increase competition in property markets. These include antitrust challenges to collusion among landlords when setting rents[321] and focusing increases in

319. Melissa J. Morrow, Comment, *Twenty-Five Years of Debate: Is Acquisition-Value Property Taxation Constitutional? Is It Fair? Is It Good Policy?*, 53 EMORY L.J. 587, 594–95 (2004) (discussing limits on annual increases in assessment in other states).

320. Neil E. Harl, Robert P. Achenbach, Jr. & Kurt R. Mattson, 13 AGRIC. LAW § 122.03 (Matthew Bender 2025); Randall Wayne Hanna, *"Right to Farm" Statutes—The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U.L. REV. 415, 417, 422–23 (1982).

321. Matt Levin, *RealPage Rent-Fixing Lawsuit Highlights Use of Algorithms to Set Rents*, MARKETPLACE (Apr. 16, 2024), https://www.marketplace.org/2024/04/16/realpage-lawsuit-algorithms-rent/ [https://perma.cc/V626-R7X3]; April Rubin, *U.S. Accuses RealPage of Helping Landlords Collude to Raise Rents*, AXIOS (Aug. 23, 2024), https://www.axios.com/2024/08/23/realpage-antitrust-lawsuit-justice-department-rentals [https://perma.cc/T6PW-LFPH].

supply in areas where property ownership is particularly concentrated.[322] Policymakers can also bring challenges to the market power of property market intermediaries, such as excessive occupational licensing or collusion among real estate brokers.[323]

Another focus could be using regulation to reduce information costs for purchasers and developers. This could include subsidizing the development of "zoning atlases," an effort to make zoning regulations across jurisdictions easily understandable.[324] More aggressively, states could require localities to use standardized zoning terminology across jurisdictions, giving terms like "R-1" or "C-2" the same meaning in different towns, making it easier for developers to know what is allowed on each lot.[325] Even more aggressively, states could pass laws stopping local governments from engaging in any "discretionary review," forbidding them from waiting until after a project is proposed to determine whether it meets amorphous standards and instead forcing them to announce regulations *ex ante* and only then allow development by-right.[326] Policymakers could replace deed recordation with "Torrens" title registries, where the government clears titles, making it easier for purchasers to know who owns what.[327] Or they could require the true owner of property to be recorded on deeds even if property is owned through a shell corporation.[328]

The values of stasis in property law are not beyond the pale or wrong in all instances. Our argument is just that real property law and regulation has

322. *Cf.* Watson & Ziv, *supra* note 37, at 33 (arguing that market power among landlords leads to excessively high rents, and that tight land use regulations help landlords maintain market power).

323. *See* Benjamin Powell & Evgeny Vorotnikov, *Real Estate Continuing Education: Rent Seeking or Improvement in Service Quality?*, 38 E. ECON. J. 57, 70–71 (2012) (demonstrating how excessive occupational licensing raises realtors' wages and forces agents out of the realty business while delivering no improvement in performance); Debra Kamin, *Powerful Realtor Group Agrees to Slash Commissions to Settle Lawsuits*, N.Y. TIMES (May 10, 2024), https://www.nytimes.com/2024/03/15/realestate/national-association-realtors-commission-settlement.html [https://perma.cc/B3ZR-7587] (discussing a lawsuit in which the plaintiffs alleged collusion in the realty business).

324. *About*, NAT'L ZONING ATLAS, https://www.zoningatlas.org/about1 [https://perma.cc/8E4G-6D43].

325. This may lead to increases in productivity in the construction industry, as firms would be able to increase their scale and still comply with regulations in many places. Leonardo D'Amico et al., *Why Has Construction Productivity Stagnated?: The Role of Land-Use Regulation* 49 (Nat'l Bureau of Econ. Rsch., Working Paper No. 33188, 2024).

326. *See* Bilal Mahmood, *87 Permits, 1,000 Days of Meetings and $500,000 in Fees: How Bureaucracy Fuels S.F.'s Housing Crisis*, S.F. CHRON. (Mar. 11, 2023), https://www.sfchronicle.com/opinion/openforum/article/sf-housing-development-red-tape-17815725.php [https://perma.cc/K34F-XFFB] (making the case against discretionary review).

327. DUKEMINIER et al., *supra* note 218, at 617 (discussing Torrens title system).

328. *Cf.* Kathryn Brenzel, *Hochul Signs LLC Transparency Bill into Law but Adds Big Caveat*, REAL DEAL (Dec. 23, 2023), https://therealdeal.com/new-york/2023/12/23/hochul-signs-llc-transparency-bill-into-law-but-adds-big-caveat/ [https://perma.cc/9YWV-ZRU2] (describing New York law that requires limited liability companies that own real estate to make their true owners known to the government but not to the public).

tilted too far—far far *far* too far—away from development and towards stasis. Real property regulation should re-embrace the longstanding American comfort with change in ownership and churn in uses. It should take into consideration the interests of distant potential purchasers and users of land. And it should seek to encourage more growth.

The post-1970s period of property law's embrace of stasis is notably the same period when economic growth slowed and inequality exploded.[329] During this period, both left-wing (e.g., conservation easements) and right-wing (e.g., Proposition 13) coded policies were premised on a skepticism that a rollicking property market was still a good thing for America. In the years since, we have seen the cost of this skepticism. It turns out our deeply bourgeois pro-development property law did have a lot of charm.[330]

329. GORDON, *supra* note 12, at 605 ("Just as 1970 was a watershed . . . , the dividing point between rapid and slow growth in [Total Factor Productivity], so there was a parallel and independent transition between equal growth for all before 1970 and unequal growth after 1970.").

330. *Cf.* METROPOLITAN, HBO MAX, at 29:15–29:55 (Allagash Films & Westerly Films 1990) ("You know the French film, 'The Discreet Charm of the Bourgeoisie'? When I first heard that title I thought, 'Finally, someone's gonna tell the truth about the bourgeoisie.' What a disappointment. It would be hard to imagine a less fair or accurate portrait . . . . The truth is, the bourgeoisie does have a lot of charm.").