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Property Rights, State Police Powers, and the Takings Clause: The Evolution Toward Dysfunctional Land-Use Management

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**PROPERTY RIGHTS, STATE POLICE POWERS,
AND THE TAKINGS CLAUSE: THE EVOLUTION
TOWARD DYSFUNCTIONAL LAND-USE
MANAGEMENT**

*Robert F. Pecorella, Ph.D.**

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INTRODUCTION

By their very nature, land-use management plans are proactive exercises requiring public trust in both the capability of experts and the capacity of government to achieve a nonmarket-based version of the public good. In recent years, however, public trust in experts and in government has been in notably short supply in the United States. In some quarters, expertise is increasingly caricatured as elitism and the capacity of government has been

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more a punch line than a matter of belief among many Americans. Such negative attitudes have been fed by the popularization of a libertarian cultural message,¹ the influence of the increasingly powerful financial sector,² the political mobilization of the disaffected and alienated on the extremes of the Republican Party,³ and the ascendance of right-wing media.⁴

In stark contrast to the popular attitudes outlined above, there have been increasing calls among academics and professional planners for sustainable development, a comprehensive form of land-use management, motivated by concerns about metropolitan sprawl and climate change.⁵ Sustainable land-use development can be characterized as “a long term approach to decision making, a holistic outlook integrating various disciplines, interests, and analytical approaches”⁶ to the way we envision, allocate, and ultimately use land. To promote sustainable development, a land-use management system must incorporate commitments to economic growth,

1. The classic example of the popularization of libertarian thought is found in a sentence from Ronald Reagan’s 1981 inaugural address: “In the present crisis, government is not the solution to our problem; government is the problem.” This sentiment appears to lie at the core of increasingly negative public assessments of American governance. *See, e.g.,* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS (1995).

2. *See* Gautam Mukunda, *The Price of Wall Street’s Power*, HARV. BUS. REV., June 2014, at 70-78; *see also* SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2011).

3. *See* THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM (2013); *see also* JUSTIN GEST, THE NEW MINORITY: WHITE WORKING CLASS POLITICS IN AN AGE OF IMMIGRATION AND INEQUALITY (2016); JOHN B. JUDIS, THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS (2016).

4. *See* Jackie Calmes, *They Don’t Give a Damn about Governing: Conservative Media’s Influence on the Republican Party*, SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL’Y, HARV. U., July 27, 2015, <http://shorensteincenter.org/conservative-media-influence-on-republican-party-jackie-calmes/> [<https://perma.cc/X6KV-HP2K>]; *see also* Amy Mitchell et. al., *Political Polarization & Media Habits*, PEW RES. CTR.: JOURNALISM & MEDIA, Oct. 21, 2014, <http://www.journalism.org/2014/10/21/political-polarization-media-habits/> [<https://perma.cc/Q3KK-XTY3>].

5. Columbia University’s Earth Institute and Oxford University’s Environmental Change Institute represent just two of the many academic programs focused on sustainable development, while the American Planning Association’s decades-long support for smart growth initiatives emphasizes the need for sustainable land-use management policies as part of a strategy to address both the causes and the impacts of climate change. *See, e.g.,* JEFFREY D. SACHS, THE AGE OF SUSTAINABLE DEVELOPMENT (2015); *see also, e.g.,* Stuart Meck, *Growing Smart-Legislative Guidebook: Model Statutes for Planning and the Management of Change*, AM. PLANNING INST. (Jan. 2002), https://www.huduser.gov/Publications/pdf/growingsmart_guide.pdf [<https://perma.cc/UL6E-39B8>] (providing an example of the sustainability work of the American Planning Association).

6. STEPHEN M. WHEELER, PLANNING FOR SUSTAINABILITY: CREATING LIVABLE, EQUITABLE, AND ECOLOGICAL COMMUNITIES 34 (2013).

intergenerational environmental consciousness, and social equity.⁷ To realize these commitments, sustainable land-use management must take a long-term perspective; must rely on the assessments of planning professionals; and must include a wide variety of stakeholders in land-use decisions.⁸

This Article argues that both the underlying values and the political processes which define land-use management in the United States act as major impediments to any form of sustainable land-use development. More specifically, this Article contends that the accepted legal notions of private property in the United States, particularly real property, coupled with political decisions on governmental land-use regulation, push the land-use management system to emphasize individual market values, rather than the social implications of market transactions. In fact, neither the values nor the practices surrounding land-use management are necessary components of a free-market in real property.

Following a brief presentation of the philosophical and political bases underlying the centrality of private property rights in the United States, Part I of this Article distinguishes between and among three approaches to land-use management—libertarianism, civic republicanism, and the positive state model—that have emerged from within the political and cultural norms of American society. Part II analyzes the political forces that led to the dominance of the civic republican approach to land-use management in the wake of the 1926 *Village of Euclid, Ohio v. Ambler Realty Co.*, ruling.⁹ Part III explores the historical tension between private property rights and the state police power in American jurisprudence and argues that the 1992 decision in *Lucas v. South Carolina Coastal Commission* represented a decidedly libertarian legal rebalancing on this issue.¹⁰ Part IV examines the environmental consequences of trends in American development.

I. PROPERTY AND ECONOMIC DEVELOPMENT AS CULTURAL NORMS: THE CONTEXT OF LAND-USE MANAGEMENT IN THE UNITED STATES

Understanding the context around cultural notions of private property and economic development in the United States is essential to explaining the political constraints on land-use management. From the classical liberal perspective underlying the American experience, individual autonomy and therefore individual rights are inextricably connected to the

7. See SACHS, *supra* note 5, chs. 1 & 13 (2015).

8. See *id.* ch. 13; see also WHEELER, *supra* note 6.

9. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

10. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

rights of property.¹¹ The framers of the American Constitution certainly acknowledged the centrality of property to their undertaking.¹² During the debates at the Constitutional Convention, for example, Alexander Hamilton spoke to the symbiotic connection between liberty and property: “It was certainly true that nothing like an equality of property existed; that an inequality would exist as long as liberty existed, and that it would unavoidably result from that very liberty itself.”¹³ Echoing Hamilton, Madison in *Federalist Number 10* characterized the new government’s commitment to private property as primary: “The diversity in the faculties of men, from which the rights of private property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the *first object of government*.”¹⁴ Private property rights represent more than a complement to individual rights; these rights are integral to, and even define, the classical liberal worldview.¹⁵

Reflecting the cultural emphasis on private property, economic development in the United States is largely the province of the private sector.¹⁶ The coupling of well-established private property rights with private-sector economic development reflects the libertarian perspective that free people operating in free markets will produce the greatest amount

11. See, e.g., CREEL FROMAN, *THE TWO AMERICAN POLITICAL SYSTEMS: SOCIETY, ECONOMICS AND POLITICS* (1984); see also, e.g., JOSEPH BERTOLINI, *THE SERPENT WITHIN: POLITICS, LITERATURE AND AMERICAN INDIVIDUALISM* (1997); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

12. See *THE FEDERALIST* (analyzing factions).

13. H. MARK ROELOFS & GERALD HOUSEMAN, *THE AMERICAN POLITICAL SYSTEM: IDEOLOGY AND MYTH* (1983).

14. *THE FEDERALIST* No. 10 (James Madison) (emphasis added).

15. In analyzing the centrality of property rights to the classical liberal worldview, Froman writes:

Let there be no mistake about it. Politics is about property; Government is to protect property; those who wish change are engaged in a ‘wicked’ project and are to be impeded. Whether you agree or disagree with Madison’s side of the issue is not the point. The point is that Madison is making a very forthright and candid statement with respect to what politics is all about—i.e., property. FROMAN, *supra* note 11.

16. It is useful to distinguish between economic growth, which relates to GDP size, and economic development, which “occurs when individual agents have the opportunity to develop the capacities that allow them to actively engage and contribute to the economy.” See Maryanne Feldman, et. al, *Economic Development: A Definition and Model for Investment*, U.S. DEP’T OF COM., ECON. DEV. ADMIN., <https://www.eda.gov/files/tools/research-reports/investment-definition-model.pdf> [<https://perma.cc/ZWC7-QMMT>]. The authors note the primacy of the private sector in economic development matters but they also make note of the vital role that government plays in research and development. Joseph Schumpeter argues that economic development of the kind portrayed in the definition above has been driven in the United States largely by the innovation and entrepreneurship of private industry. See also JOSEPH SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE* (1961).

of total wealth in the most efficient manner possible.¹⁷ From within this perspective, therefore, government efforts to direct or modify market forces obstruct the natural operations of market forces, decrease productive efficiency, and are socially injurious, at least in some usually undefined but often cited long run.¹⁸ One consequence of this philosophy is that the federal government's role in economic development is designed to complement market forces entailing "transferring public monies and subsidies to corporations to make it profitable for them to do the work that the central government wanted done."¹⁹ Government economic development initiatives support private sector growth by providing public goods such as basic research, infrastructure development, and public education as well as by incentivizing selected private market transactions, with policies such as the home mortgage interest deduction, the oil depletion allowance, and free trade agreements.²⁰

The market model of economic development sees economic growth as an unintended, but natural, consequence of the individual profit motives pursued in private transactions between and among property owners. Richard Epstein's characterization of property rights and contracts between and among private property owners as a "one-two punch that facilitates the economic growth that satisfies human wants" points to the symbiotic

17. FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* 15 (1944) ("The conscious realization that the spontaneous and uncontrolled efforts of individuals were capable of producing a complex order of economic activities could come only after this development (of libertarian practice) had made some progress."); *see also* MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); ROBERT L. HEILBRONER, *BETWEEN CAPITALISM AND SOCIALISM* 5-9 (1970).

18. *See* WILLIAM J. BAUMOL ET. AL., *GOOD CAPITALISM BAD CAPITALISM AND THE ECONOMICS OF GROWTH AND PROSPERITY* 67-70 (2007) (critically analyzing "the pitfalls of state-guided capitalism"); *see also* GEORGE GILDER, *WEALTH AND POVERTY: A NEW EDITION FOR THE TWENTY-FIRST CENTURY* (2012) (analyzing the positive economic development outcomes of supply-side economics, as well as a normative defense of capitalism); BERTRAND DE JOUVENEL, *THE ETHICS OF REDISTRIBUTION* xxi-xiii (1990); CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* (1984) (analyzing the dysfunctions produced by government social policy).

19. GARY GERSTLE, *LIBERTY AND COERCION: THE PARADOX OF AMERICAN GOVERNMENT FROM THE FOUNDING TO THE PRESENT* 120 (2015).

20. *See* BAUMOL ET. AL., *supra* note 18, at 8 (highlighting policies like effective antitrust laws and openness to trade and arguing that "in the successful entrepreneurial economy, government institutions must ensure that the winning entrepreneurs and the established companies (which were launched at earlier times by some entrepreneur) continue to have incentives to innovate and grow."); *see also* Feldman et. al. *supra* note 16, at 12-19. Much of this government sponsored economic development, particularly federal initiatives providing incentives to selected industries, seems to be a rejection or at least a modification of libertarian values. This paradox is captured by historian William R. Block's conclusion that "Americans have a unique capacity for living in one world of theory and another of practice." PAUL KENS, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 20 (1998).

connection between such rights and economic development.²¹ Adam Smith succinctly defines the causal connection between individual desires for profit and collective economic development as well as the maintenance of the larger social order when he writes: “The uniform, constant, and uninterrupted effort of every man to better his condition, the principle from which [public] and national, as well as private opulence is originally derived, is frequently powerful enough to maintain the natural progress of things toward improvement.”²² Therefore, to proponents of unfettered market processes, economic growth, and development emerge quite naturally from the liberal emphasis on individual property rights.²³

A. Land-Use Management: Three Approaches to Markets

The general consensus that a system grounded in protection of private property rights fosters economic development does not mean that there is universal agreement on “the conditions under which individuals, households and communities can make productive use of their assets and appropriate their returns.”²⁴ Indeed, reflecting other controversies surrounding the actual practice as opposed to the general philosophy of governance in the United States, there are three contrasting perspectives on land-use regulation—a libertarian view, a civic republican view, and a positive state model.²⁵ A libertarian perspective believes that a land-use policy guided by an emphasis on affording property owners the maximum possible autonomy in the use and transference of their real-property protects individual liberty, diminishes tendencies toward discrimination in the real estate market, and results in optimal social uses of real property.²⁶

21. Richard A. Epstein, *Deliberative Democracy at Zero Prices*, 136 *DEADULUS* 67 (2007).

22. *See generally* Adam Smith, *THE WEALTH OF NATIONS* 373 (2000 ed.).

23. *See generally* Stijn Claessens & Luc Laeven, *Financial Development, Property Rights, and Growth*, 58 *J. OF FIN.*, 2401, (2003); *see also* Armen A. Alchian, *Property Rights*, in *THE CONCISE ENCYCLOPEDIA OF ECON.* (David R. Henderson ed. 2013), <http://www.econlib.org/library/Enc/PropertyRights.html> [<https://perma.cc/5AMT-5KPF>].

24. *See generally* Mike Dennison & Robyn Klingler-Vidra, *Annotated Bibliography for Rapid Review on Property Rights*, LSE ENTERPRISE (2012), <https://partnerplatform.org/?tcafind80> [<https://perma.cc/PF5P-7TVR>]; *see also* Epstein, *supra* note 21 at 67.

25. Political tensions over economic policy are as old as the Republic. They were evident in: the debates between Federalists and Republicans, specifically Hamilton and Jefferson, over the Federal Government’s economic role at the founding; the arguments over the National Bank during the Jackson era and beyond; the political conflicts involved in the regulatory and conservation policies of the early twentieth century; the battles over the New Deal to Great Society’s efforts at proactive governance; and the debates in recent years over supply-siders plans to reemphasize markets and deemphasize the impact of formal governance.

26. *See generally* Epstein, *supra* note 21; *see also* Alchian, *supra* note 23.

A civic republican perspective broadens the implications of real property ownership to include “local communities” in a network of private property actors.²⁷ From this perspective, because land-use matters have social implications, they require regulation by local governments, as opposed to the laissez-faire market approach favored by libertarians.²⁸ Lastly, a positive state perspective broadens the nature and sweep of the concept of communities in its analysis of property rights.²⁹ From this perspective, because land-use matters have implications beyond the local communities within which they are housed, these policies need to be regulated by state or national governments, in the interest of a larger common good than that envisioned by civic republicans.³⁰ Table 1 distinguishes between libertarian, civic republican, and positive state approaches on a variety of social values and political strategies related to land-use management.

27. See generally George Hornsey & Mildred Warner, *Cities and Sustainability: Polycentric Action And Municipal Governance*, 51(1) URB. AFF. REV. 46, 46-73 (2015); see also Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVTL. CHANGE 550 (2010)

28. See generally Vincent Ostrom, Charles Tiebout & Robert Warren, *The Organization of Government In Metropolitan Areas: A Theoretical Inquiry*, 55 AM. POL. SCI. REV., 831 (1961).

29. See generally Lum T. Fobi, *Dealing with Dysfunction in the Nation’s Increasingly Obsolete System for Land Use Management: Guidance from the Past for State-Coordinated Planning and Decision-Making*, (May 2012) (M.A. thesis, Tufts University); see also Rebecca Lewis & Gerrit-Jan Knapp, *Institutional Structures for State Growth Management: An Examination of State Development Plans*, 44(1) ST. AND LOC. GOV’T REV. 33, 33-34 (2012).

30. For an analysis of state level land-use management models, see Meck, *supra* note 5; see also Lewis & Knapp, *supra* note 29. For an analysis of federal level land-use management models, see Jayne E. Daly, *A glimpse of the past—A vision for the future: Senator Henry M. Jackson and national land-use legislation*, 28(1) URB. LAW. 7 (1996); see also Landon G. Rockwell, *The planning function of the National Resources Planning Board*, 12 J. OF POL. 169 (1945); M.L. Wilson, *The report on land of the National Resources Board*, 17(1) J. OF FARM ECON. 39 (1935).

Table 1: Three Approaches to Land-Use Planning

	<i>Libertarian Planning</i>	<i>Civic Republication Planning</i>	<i>Positive State Planning</i>
<i>Notion of Property Rights</i>	The use and transference of real property is the exclusive province of an individual property owner	The use of real property lies within the province of a local network of ownership; property transference is the province of an individual owner	The use of real property lies within the province of a state, national or global network of ownership; property transference is the province of an individual owner
<i>Social Values</i>	Market efficiency	Community input	Social equity
<i>View of the Market</i>	Self-regulating	Requires local parameters	Requires at least regional parameters
<i>Primary Fear</i>	Distortion of market forces by planning	Imposition of one size fits all models of planning	The tragedy of the commons
<i>Spatial and Temporal Focus</i>	Limited to immediate market transactions	Broadened to proximate community concerns	Extended to the longer time frames of regional, national, and/or global stakeholders
<i>Locus of Public Authority</i>	Reactive authority through the courts	Proactive authority through local government	Proactive authority through state and/or national governments
<i>Planning and Strategy</i>	Nuisance rulings	Development of community-based "neighborliness"	Development of regional, state, and/or national plans
<i>Vertical Policy Integration</i>	Not relevant	Not necessary	Recommended or mandatory part of planning

B. The Libertarian Market Model of Land-Use “Management”

The libertarian perspective emerges from classical liberalism and reinforces the cultural notion of individualism in the United States.³¹ To libertarians, the concept of private in the phrase private property is virtually sacrosanct, particularly when applied to real property.³² In legal terms, Blackstone’s common law definition of private property as “that sole and despotic dominion which one man claims over the external things of the world, in total exclusion of the rights of any other individual in the universe” clearly makes this point.³³ From this perspective, ownership provides an individual with unfettered control over some object, in this case land as well as all the natural resources and structures associated with the land.³⁴ This physical dominion means that an owner has the exclusive rights of use and transference of the property, within the limits of law. The right of use includes direct personal use, income-generating applications, and development activities designed to improve the property.³⁵ The right of transference includes an owner’s ability to sell, lease, or otherwise profit from the conveyance of the title to another party.³⁶

The first rule of libertarian land-use management is for government to “do no harm,” by protecting the private ownership rights to real property as well as the efficient market transactions that result from protection of these rights.³⁷ Libertarian planning (perhaps observing is a better term) focuses on the short-term efficiency of wealth production through market processes.³⁸ From this perspective, real property markets, like markets generally, should be self-regulating mechanisms that adapt and adjust themselves according to the natural laws of classical economics.³⁹

31. For analyses of the philosophical origins of modern libertarian thought in classical liberalism, see RAYMOND PLANT, *MODERN POLITICAL THOUGHT*, chs. 2-3 (1991); see also BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); see also ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); LINDA J. MEDCALF & KENNETH M. DOLBEARE, *NEOPOLITICS: AMERICAN POLITICAL IDEAS IN THE 1980s* 43-45 (1985).

32. See RICHARD EPSTEIN, *TAKINGS* (1985); see also WENDELL COX, *WAR ON THE DREAM: HOW ANTI-SPRAWL POLICY THREATENS THE QUALITY OF LIFE* (2006).

33. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1765-1769) BOOK 2, CHAPTER 1, <http://lonang.com/library/reference/blackstone-commentaries-law-england/bla-201/> [<https://perma.cc/BEU3-EWYG>].

34. See generally Alchian, *supra* note 23.

35. See *id.*

36. See *id.*

37. See generally COX, *supra* note 32; see also Fred Siegel, *Is Regional Government the Answer?*, 137 *PUB. INT.* 85, 91 (1999).

38. For a general philosophical assertion of this principle, see HAYEK, *supra* note 17; see also FRIEDMAN, *supra* note 17. For an analysis of this perspective pertaining specifically to planning, see EPSTEIN, *supra* note 32; see also COX, *supra* note 32.

39. For an analysis of the natural operations of market systems, see FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY* (Routledge 1976); see also Paul G. Mahoney, *The*

Government efforts to formulate or implement land-use plans disturb efficient operation of the market.⁴⁰ In line with these libertarian views, Economist Armen Alchian raises the “interesting paradox” that although we characterize property as private, assessments of a property’s value and ultimately its use are usually “based on public, or social, evaluation.”⁴¹ It is worth noting, however, that from the libertarian perspective, such social evaluations of value are themselves grounded in the same philosophical and institutional frameworks that reflect and reaffirm a notably narrow emphasis on individual self-interest.

If there are any negative externalities to market transactions governing land-use, proponents of libertarian planning believe that they should be addressed in the courts, rather than through government oversight.⁴² To libertarians, legal mechanisms such as nuisance laws sufficiently minimize externalities by allowing parties negatively impacted by another’s actions to challenge a particular land-use practice as injurious to the use or enjoyment of their own property.⁴³ In suggesting that government authority be employed by the judicial branch only after some “harm” is explicitly alleged, the libertarian view is classically reactive in terms of public authority.⁴⁴ To libertarians, land-use planning is best left to market forces generating the most efficient uses of land and the government’s role is to first reaffirm these market forces, and then react to negative externalities if and only if they are brought to the attention of the courts.⁴⁵

C. The Civic Republican Complementary Model of Land-Use Management

The civic republican approach envisions land-use management as an accommodation of market forces with local community values, in a process which is best described as neighborly.⁴⁶ From this perspective, it is critical that the community values forming the context for land-use management be reflected in and implemented by local government. This is because it is the level of government closest to the people, and local officials, that best

Common Law and Economic Growth: Hayek Might Be Right, 30 J. OF LEGAL STUD. 503 (2001).

40. See generally COX, *supra* note 32; see also Siegel, *supra* note 37.

41. Alchian, *supra* note 23.

42. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

43. See *id.*; Mahoney, *supra* note 39, 503-25.

44. See Ellickson, *supra* note 42.

45. See *id.*; Mahoney, *supra* note 39, at 503-525.

46. See, e.g., BARRY CULLINGWORTH & ROGER CAVES, *PLANNING IN THE USA: POLICIES, ISSUES, AND PROCESSES* 97-160 (4th ed. 2014); see also MEL SCOTT, *AMERICAN CITY PLANNING SINCE 1890* (1969).

understands the needs of the local community.⁴⁷ Civic republicans argue that efforts to include larger units of government with broader concerns in the local land-use process will result in one-size-fits-all bureaucratic mandates that may not accurately reflect local interests.⁴⁸

Unlike their libertarian counterparts, civic republicans acknowledge that there is a proactive land-use management role for local government that is rooted in state police power.⁴⁹ The police power is based in the Tenth Amendment and is generally defined as the right of the states to make laws governing health, welfare, morals and general welfare in a community.⁵⁰ Civic republicans support state delegation of police powers in a wide variety of policy areas including land-use management to local governments.⁵¹ It is worth noting here that because local governments are permitted to exercise authority only in those matters expressly delegated to them by their state governments, state governments can reassume land-use management authority by empowering state-level regulatory agencies. However, most governors and legislatures attempting to do so would face strong political opposition from affected groups in their localities.⁵²

D. The Positive-State Model of Land-Use Management

Proponents of positive-state land-use management view private property in a broader and more nuanced context than their civic republican counterparts.⁵³ From this perspective, ownership of real property has

47. See Ostrom, *supra* note 27, at 550-57; Ostrom, Tiebout & Warren, *supra* note 28, at 831-42; PIETRO S. NIVOLA, *LAWS OF THE LANDSCAPE: HOW POLICIES SHAPE CITIES IN EUROPE AND AMERICA* 11-34 (1999).

48. See George C. Homsy & Mildred E. Warner, *Cities and Sustainability: Polycentric Action and Multilevel Governance*, 51 *URB. AFF. REV.* 46, 46-73 (2015); see also Ostrom, *supra* note 27, at 550-57; see also Ostrom, Tiebout & Warren, *supra* note 28, at 831-42.

49. See CULLINGWORTH & CAVES, *supra* note 46, at 97-160; see also SCOTT, *supra* note 46.

50. The Tenth Amendment states that: "The Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. For analysis of the Amendment's impact on the development of state police powers, see GERSTLE, *supra* note 19, at 87-182 (2015).

51. See Ostrom, Tiebout & Warren, *supra* note 28, at 841.

52. See Richard Briffault, *Principal Provisions of State Constitutions: A Brief Overview*, in *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK* 33-34 (Gerald Benjamin ed., 1994); see also Richard Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, 67 *CHL.-KENT L. REV.* 1011, 1011-1024 (1991).

53. See, e.g., Fobi, *supra* note 29; Lewis & Knapp, *supra* note 29, at 33-44; ERIC T. FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* (2007) [hereinafter FREYFOGLE, *ON PRIVATE PROPERTY*]; ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD*, (2nd ed. 2003) [hereinafter FREYFOGLE, *THE LAND WE SHARE*]; Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 *HARV. ENVTL. L. REV.* 281 (2002); Jayne E. Daly, *supra*

implications for a wider range of people than those in the local community, as well as for the object owned.⁵⁴ On an immediate level, for example, this complexity derives from property owners' interactions with lenders, insurers, tax assessors, etc., all of whom have or can have some claim on the value and use of the property in question.⁵⁵

Such interactions are reflected in property scholar Craig Anthony Arnold's notion of property as a "web of interests," which he defines as "a set of interconnections among persons, groups, and entities each with some stake in an identifiable . . . object, which is at the center of the web."⁵⁶ From this perspective, because real property ownership is a highly integrated social reality, decisions about use of the land have broader and more complex implications for a wider variety of property stakeholders than can be addressed by the civic republican reliance land-use management through local governments. Since the impacts of private land-use and local planning may stretch well beyond a single locality, the governing authority in charge must be accountable to a wider range of stakeholders than local political interests. Positive statist therefore contend that land-use management plans must be formulated, if not implemented, by units of government larger than those with only local jurisdiction.⁵⁷

II. AMERICAN LAND-USE MANAGEMENT IN PRACTICE

Positive-state proponents do not necessarily promote one-size-fits-all plans; rather they support having state and federal agencies develop somewhat flexible land-use plans, to guide local governments in developing their own plans.⁵⁸ For example, Daniel Fiorino suggests a "mixed scanning" legislative approach to planning which affords both state and local officials a wide variety of strategic options connected to local

note 30, at 7-39; Rockwell, *supra* note 30, at 169-78 (1945); Wilson, *supra* note 30, at 39-50.

54. See Arnold, *supra* note 53, at 281-334.

55. See FREYFOGLE, *THE LAND WE SHARE*, *supra* note 53; Arnold, *supra* note 53, at 281-334.

56. Arnold, *supra* note 53, at 333.

57. See generally Paola Plevak, *A More Sustainable Urban Living in the United States*, 4 J. MULTIDISCIPLINARY RES. 85, 85-92 (2012); see also BRUCE BABBITT, *CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA* (2007); MARION CLAWSON, *NEW DEAL PLANNING: THE NRPB* (1981); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *Environment, Land Use and Growth Policy*, in ACIR STATE LEGISLATIVE PROGRAM (1975) (describing state land-use planning).

58. For variations in state planning models, see generally DANIEL J. FIORINO, *THE NEW ENVIRONMENTAL REGULATION* (2006); see also MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993).

needs when formulating and implementing land-use regulations.⁵⁹ Generally, positive statisticians envision overarching state or national government guidelines that incorporate a broad range of stakeholders, while maintaining local implementation of state-formulated land-use plans.⁶⁰ Moreover, by locating the authority to formulate land-use plans in state or national levels of government, positive state policies require not only vertical integration of state and local agencies but also the horizontal integration of local agencies from different communities whose jurisdictions may be impacted by each community's land-use decisions.⁶¹

The next two sections of this Article examine the actual practice of land-use management in the United States. The first section examines the origins of modern American land-use management in two pieces of model federal legislation: the Standard State Zoning Enabling Act ("SSEA") and the Standard City Planning Enabling Act ("SCPEA") issued in the wake of the 1926 *Village of Euclid v. Ambler Realty Co.* decision, which affirmed the government's right to implement zoning regulation.⁶² The analysis in this section suggests that as a consequence of the states following these two federal guidelines, land-use management has reflected a civic republican approach to planning and zoning that ensures property owners the most narrowly-defined, and consequently, the least intrusive form of government regulation of their property. The following section analyzes the history of legal efforts to address the tensions between individual property rights and state police powers on land-use matters. The analysis suggests that, in its 1992 *Lucas v. South Carolina Coastal Council* decision, the Supreme Court rebalanced the relationship between the exercise of state police powers and the protection of individual property rights in favor of property owners.⁶³

59. FIORINO, *supra* note 58, at 218-20.

60. *See generally* ROBERT J. MASON, *COLLABORATIVE LAND USE MANAGEMENT: THE QUIETER REVOLUTION IN PLACE-BASED PLANNING* (2007); *see also* Meck, *supra* note 5, at 195, 265.

61. *See generally* FIORINO, *supra* note 58; *see also* MASON, *supra* note 60, at 173; *see also* Meck, *supra* note 5, at 2-10.

62. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).. For a description of the two pieces of model legislation, see U.S. DEP'T COM., *A STANDARD ZONING ENABLING ACT* (1926), http://www.farmlandinfo.org/sites/default/files/Stan.Zon_Enabling%20Act%201926.pdf [<https://perma.cc/M9DW-J7QU>]; U.S. DEP'T COM., *A STANDARD CITY PLANNING ENABLING ACT* (1928), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf [<https://perma.cc/UK34-E56A>].

63. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992).

A. American Land-Use Management: A Civic Republican Emphasis

A defining and on-going issue in a federalist system is deciding what level of government will be charged with what responsibilities. In the wake of the 1926 *Euclid* decision affirming the government's authority to manage land-use through zoning, the nature and degree of government involvement in land-use management became an open issue.⁶⁴ While the Court's ruling that the Village of Euclid's zoning regulations were a legitimate exercise of public authority was a major victory for those who supported regulating private use of real property, it was not necessarily a victory for either the Village of Euclid or other local governments. This was because the police power referenced in *Euclid* is the state government's plenary authority, which left state officials to decide how and by whom this authority would be exercised.⁶⁵ In other words, the decision gave state officials the opportunity to decide whether land-use management policy would reflect a civic republican or a positive state approach.

The process of state allocation of policy responsibilities to local jurisdictions is governed by a judicial norm commonly referred to as Dillon's Rule.⁶⁶ Under the aegis of Dillon's Rule, local governments are strictly limited to exercising those powers state officials expressly delegated to them. Unlike the dual sovereignty relationship between the national and state governments, local governments are creatures of their states and are therefore subject to state government authority.⁶⁷ In facing the post-*Euclid* world, therefore, state officials had several options for

64. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

65. Unlike enumerated power constitutions that specify what government may do, plenary power constitutions assume government authority subject to enumerated constitutional restrictions. The U.S. Constitution is an enumerated powers document while state constitutions are plenary power documents. See 2 FRANK P. GRAD & ROBERT F. WILLIAMS, *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS* 83 (2006); see also Michael E. Libonati, *The Legislative Branch*, in 3 *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM* 37-65 (G. Alan Tarr & Robert F. Williams eds., 2006); see generally Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, *supra* note 52.

66. *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 461 (1868). This case was disapproved of by *Berent v. City of Iowa City*, 738 N.W.2d 193 (Iowa 2007) (specifying three sets of powers municipal corporations may exercise: those expressly granted by their states, those necessarily implied by the powers actually granted, and those indispensable to the corporation's purposes). For analyses of the impacts of "Dillon's Rule" on state and local government, see League of Women Voters, *Dillon's Rule: Good or Bad for Local Governments?*, S-1 (2004), <http://www.lwv-fairfax.org/files/lwv-dillon-dtp-99041.pdf> [<https://perma.cc/3QKU-9BUL>]; BRIFFAULT, *Home Rule, Majority Rule, and Dillon's Rule*, *supra* note 52, at 1011-24.

67. See generally Briffault, *Principal Provisions of State Constitutions*, *supra* note 52; see also Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, *supra* note 52, at 1011-24.

managing land-use. Adopting a positive state perspective, they could have placed all land-use functions in the hands of state agencies, or they could have developed a mixed system where state officials formulated general guidelines for land-use management and local officials were granted discretion in applying these guidelines. Alternatively, following the civic republican model, state officials could have simply delegated land-use management responsibilities to their local governments. By 1930, thirty-five states had delegated their land-use authority to local governments⁶⁸ and by 1979 all fifty states had done so.⁶⁹

These decisions to delegate state land-use powers to local governments were directly influenced by two pieces of model legislation developed by the Department of Commerce. In 1926, the Department, under the direction of Secretary Herbert Hoover, produced the SZEAL, followed by the SCPEAL in 1928.⁷⁰ While acknowledging that the police power resides in state governments, the SZEAL advised that local government agencies exercise zoning authority and be the venue for appeals and reconsideration of zoning regulations.⁷¹ Although the SZEAL provided for a five-mile zoning outreach into unincorporated areas, it was quite clear that the authority to zone should be delegated to “the legislative body of cities and incorporated villages.”⁷² Moreover, the SZEAL recommended that local zoning decisions be based on land-use plans developed and maintained by local authorities.⁷³ To assist officials with this task, the SCPEAL outlined in some detail the planning model local governments ought to follow in setting up, empowering, staffing, and working with their planning departments.⁷⁴

Since the Court had ruled in *Euclid* that land-use outcomes did not have to be left to the natural patterns of real-property markets or the reactive regulation of the common law, the next best alternative, from a libertarian perspective at least, was for these decisions to be in the hands of local governments.⁷⁵ The model statutes proposed by the Commerce

68. See Ruth Knack, Stuart Meck & Israel Stollman, *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, LAND USE L. & ZONING DIG. 3, 8 (Feb. 1996).

69. See DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 217 (1979).

70. See generally A STANDARD ZONING ENABLING ACT, *supra* note 62; A STANDARD CITY PLANNING ENABLING ACT (1928), *supra* note 62.

71. See A STANDARD ZONING ENABLING ACT, *supra* note 62, at 7, 11.

72. See *id.* at 4.

73. See *id.* at 8-9; CULLINGWORTH & CAVES, *supra* note 46, at 107-08.

74. See A STANDARD CITY PLANNING ENABLING ACT (1928), *supra* note 62, at 44-51.

75. A local zoning code emerging from the SZEAL guidelines would “provide a defensible framework for an extension of the hard-to-define limits of the police power.”

Department were designed to encourage a civic republican approach to land-use management largely because such an approach is less of a regulatory burden on property owners than a positive state model would be.

To trace this reasoning, it is helpful to address the state of national politics during the *Euclid* period. The Republican Regime that began with Warren Harding's ascendance to the Presidency in 1921 and ended with Herbert Hoover's defeat in the election of 1932 was notably pro-market and anti-regulation.⁷⁶ Indeed, the libertarian nature of this regime was in stark contrast to the previous two Republican presidencies of Theodore Roosevelt and William Howard Taft, which had institutionalized the regulatory powers of the national government in a host of policy areas, including placing vast tracks of land in federal preserves.⁷⁷ Republican Presidents from 1921 to 1932, however, were more responsive to the business wing of their party than to the demands of the Progressive forces that had been influential earlier in the century, and this responsiveness to business interests had a number of policy impacts.⁷⁸ Republican appointees to positions on federal regulatory agencies evidenced notably pro-business and anti-regulatory attitudes;⁷⁹ by 1928, the marginal federal tax rate on upper-income earners went down by a nearly fifty percentage point difference from its level in 1921;⁸⁰ and federal support was withdrawn for public land-use initiatives such as dam construction projects in Muscle

permit "the exclusion of unwanted people and uses," and thus help ensure "the preservation of the status quo." CULLINGWORTH & CAVES, *supra* note 46, at 103.

76. See generally John A. Moore, *The Original Supply Siders: Warren Harding and Alvin Coolidge*, 18 INDEP. REV. 597 (2014); Daniel M. Du Bois, *From "Coolidge Prosperity" to "Voluntary Associationalism": Andrew Mellon, Herbert Hoover, and America's Political Economy in the Republican-Era 1920s*, in A COMPANION TO WARREN G. HARDING, CALVIN COOLIDGE, AND HERBERT HOOVER 212 (Katherine A.S. Sibley ed., 2014); Thomas E. Woods Jr., *Warren Harding and the Forgotten Depression of 1920*, 44 INTERCOLLEGIATE REV. 22, 22-29 (2009); Michael A. Bernstein, *The American Economy of the Interwar Era: Growth and the Transformation from the Great War to the Great Depression*, in CALVIN COOLIDGE AND THE COOLIDGE ERA: ESSAYS ON THE HISTORY OF THE 1920S (John Earl Haynes ed., 1998).

77. See generally DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* (2013); JONATHAN LURIE, *WILLIAM HOWARD TAFT: THE TRAVAILS OF A PROGRESSIVE CONSERVATIVE* 91-174 (2012); STEVEN R. WEISMAN, *THE GREAT TAX WARS: LINCOLN TO WILSON—THE FIERCE BATTLES OVER MONEY AND POWER THAT TRANSFORMED THE NATION* (2002).

78. See Moore *supra* note 76, at 601, 608; see generally Du Bois, *supra* note 76; Woods, *supra* note 76; Bernstein, *supra* note 76.

79. For analyses of appointment patterns to independent regulatory commissions during this period, see JOHN D. HICKS, *REPUBLICAN ASCENDENCY: 1921-1933* 65-67 (1960). See also William E. Leuchtenburg, *The Case of the Contentious Commissioner: Humphrey's Executor v. U.S.*, in FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER 276-312 (Harold M. Hyman and Leonard W. Levy eds., 1967).

80. See Moore, *supra* note 76, at 603.

Shoals that would ultimately be reinstated as part of the Tennessee Valley Authority created during Franklin Roosevelt's Administration.⁸¹ And for the first time ever, the 1928 Republican Party National Platform included a "home rule" section that highlighted the libertarian bent of the party in those years in its statement that: "There is a real need of restoring the individual and *local sense principles*; there is a real need of restoring the individual and *local sense of responsibility and self-reliance*."⁸² In short, this twelve-year Republican Regime was more inclined to support business interests with favorable tax policies and less likely to favor government regulatory action, over land-use development or much of anything else, than either Roosevelt or Taft.⁸³

The analysis here suggests that this libertarian bent in Washington, D.C. was very much in evidence in the response to the *Euclid* decision's legitimation of government's authority to regulate private property rights through zoning.⁸⁴ Officials in the Department of Commerce charged with developing model zoning and planning statutes for use in the states had two basic options available to them: a statist choice that would have advised states to locate land-use management authority at the state level of government, or a civic republican approach that would have encouraged states to delegate land-use responsibility to their local governments. The option selected represented a civic republican commitment to zoning and planning by local levels of government.⁸⁵ From a libertarian perspective, the intent of the SZEA and the SCPEA seems clear: if private-property rights were to be modified by zoning regulations, as the *Euclid* decision affirmed that they could be, then the modifications should be as narrow and as non-intrusive as possible.⁸⁶ And this purpose could best be

81. See HICKS, *supra* note 79, at 62-65 (analyzing efforts by Harding and Coolidge to turn the Muscle Shoals project over to the private sector).

82. See Republican Party Platform of 1928 (June 12, 1928), <http://www.presidency.ucsb.edu/ws/?pid=29637> [<https://perma.cc/KU47-NJEP>] (emphasis added).

83. HICKS, *supra* note 79, at 81 ("On the fundamental question of his attitude toward business, Coolidge saw eye to eye with Harding. 'The business of America is business,' he later proclaimed; and the business of government, he might have added, was to help business in every possible way.").

84. See *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

85. See Knack, Meck & Stollman, *supra* note 68, at 3-9; GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* 196 (1996) ("The notion of local control of land has deep roots in American History. 'From the earliest days of the American nation, something approximating a natural right to the untrammelled occupation and exploitation of land and its resources for private benefit has been asserted by people living near the areas where publicly owned resources are located.'").

86. Imputing political motives to decision makers is a hazardous enterprise but analyzing policy choices from within decision makers' larger philosophical frameworks is less problematic. When crafting its model legislation for the land-use regulations that would define the post-*Euclid* world, Coolidge's Department of Commerce did what libertarian-

accomplished by empowering local and not state governments to manage land-use in their communities.⁸⁷

Political decisions about where policy responsibility lies result in the development of policy networks composed of participants who attach themselves to a particular policy area, at whatever level of government is charged with a specific policy responsibility.⁸⁸ These policy networks reflect and reinforce what E.E. Schattschneider calls the “scope and bias of the pressure system” that defines any particular policy area in the United States.⁸⁹ In the case of land-use management, where authority was delegated early on to local governments, policy networks have formed around local agencies dramatically limiting the range of stakeholders involved in land management issues. In so doing, local land-use authority prioritizes the economic and political interests of individual property owners and business interests in the local community.⁹⁰ As one example, the efforts of suburban communities in the Northeast and Midwest to avoid

minded officials do when confronted with political obstacles to their reliance on the social utility of market outcomes—they sought the least intrusive path to modification of market forces, which in the case of land-use is regulation by local government. There are a host of reasons for libertarian default support of local governance when pure reliance on markets is politically blocked. A focus on local governance emphasizes market values by providing local consumers with a wide variety of mobility options, thus affording metropolitan areas opportunities to enjoy optimal allocations of resources. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416, 416-24 (1956) (asserting that reliance on local governance empowers individuals to impact directly on policy matters of immediate financial concern to them).

87. Jerold Kayden notes that: “Although the national government inspired states to engage in land-use planning in the 1920s, especially through the preparation of model legislative acts on zoning and city planning . . . it never went further in its assertion of authority.” Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J. L. & POL’Y 445, 449 (2000). Two points merit mentioning here. One, the national government did not inspire states to engage in land-use planning, but rather to delegate this responsibility to local governments. And two, the federal government did not have to assert any more authority because the states did what was suggested. Indeed, Kayden also notes the ultimate impact of the decisions made as a consequence of the federal initiatives: “American experts would list, in order of importance, the local level, the state level, and the national level as exercising de jure and de facto authority over land-use planning and regulation.” *Id.* at 445.

88. There is a substantial policy analysis literature built around the concept of policy networks. See THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2nd ed. 1979); Hugh Heclou, *Issue Networks and the Executive Establishment*, in PUB. POL’Y: THE ESSENTIAL READINGS, 46, 46-57 (Stella Z. Theodoulou & Matthew A. Cahn eds., 1995).

89. This is the phrase Schattschneider employs to describe how he views interest-group politics in the United States. The scope is limited to middle and upper-class interests and the policy bias is consequently toward these interests. See ELMER E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 20-45 (1960).

90. See HERBERT J. GANS, *THE LEVITTOWNERS: WAYS OF LIFE AND POLITICS IN A SUBURBAN COMMUNITY* (1967); James C. Clingermayer, *Electoral Representation, Zoning Politics, and the Exclusion of Group Homes*, 47 POL. RES. Q. 969, 979 (1994).

annexation by the large cities in their regions and to instead be incorporated as local government entities can be traced to the desire of local stakeholders to control taxation and land-use in these communities.⁹¹ Moreover, these efforts by local property owners were strongly supported by housing developers, who were a crucial component of the policy networks that emerged in suburban communities of that time.⁹² Indeed, housing developers “were not merely the builders of homes; they were ‘community builders’ interested in shaping the character of entire neighborhoods.”⁹³

It is this type of community-based political insulation that emerged from local control of land-use management that so disturbs positive statist. Whereas statewide planning considers the impact of local plans on neighboring communities, the region where the community is located, and often the state as a whole, local plans usually consider no geographically wider area of concern than the impact of plans on a particular community.⁹⁴ While state planning increases the range of stakeholders involved in the planning process, local planning limits relevant stakeholders to residents and business owners in the local community.⁹⁵ Moreover, having to assess regional and statewide impacts of necessity considers longer-term land-use time horizons, while local planning focuses on the immediate land-use effects in one community.⁹⁶ In short, positive statist argue that statewide planning would provide at least the opportunity for a wider, deeper, and longer-term land-use plan. More to the point of the present analysis, however, statewide planning with its wider variety of stakeholders, myriad of spatial concerns, and longer time horizons more dramatically modifies private property rights by increasing the sweep of land-use regulations much more than a does a narrowly focused system of local planning.

B. American Land-Use Management: A Libertarian Rebalance

This section explores the historical tension between the police powers of the state and the rights of individual property owners. This issue is

91. See DENNIS R. JUDD & TODD SWANSTROM, *CITY POLITICS* (9th ed. 2015).

92. See *id.* at 254-259.

93. *Id.* at 255. The authors borrowed the term “community builder” from MARK WEISS, *THE RISE OF COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING* (1987).

94. See CULLINGWORTH & CAVES, *supra* note 46 (describing local land-use); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 57 (describing state land-use planning).

95. See JUDD & SWANSTROM, *supra* note 91.

96. “Environmental histories are cautionary. They tell us that our land planning must extend ahead more than a few decades . . . We must work on a really long time frame.” David W. Orr, *Land Use and Climate Change*, 22 *CONSERVATION BIOLOGY* 1372, 1372-74 (2008) (quoting GARRY SNYDER, *BACK ON THE FIRE: ESSAYS* (2007)).

explored through a historical analysis of Supreme Court cases doctrine. State governments directly regulate a variety of private sector activities in addition to land-use.⁹⁷ The following analysis emphasizes the Court's decision in *Lucas v. South Carolina Coastal Council*, which involved a direct challenge by a property owner to a state environmental policy that he claimed was detrimental to his property interests.⁹⁸

Since 1897, when *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* incorporated the Fifth Amendment's Takings Clause into the Fourteenth Amendment's Due Process Clause, the federal judiciary has constrained the capacity of state and local governments to implement land management plans that have negative impacts on individual property owners.⁹⁹ Indeed, this 1897 decision was the first example of incorporation in American legal history—a case-by-case process where the Court applies the restrictions that the Bill of Rights imposes on the national government to the states as well.¹⁰⁰

In the wake of the *Chicago Burlington* decision, the central question concerning state land-use regulation became: when does the police power of the states intrude on the Fifth Amendment right of property owners to the use of, or compensation for, their land? This legal constraint on state police powers became more restrictive after the Supreme Court's decision in *Lucas v. South Carolina Coastal Council*.¹⁰¹ To introduce the argument, it is useful to examine three perspectives that the federal courts have used in their rulings on the takings issue. The first perspective asserted positive state values by affirming the authority of the police powers of the state; the second struck a case-by-case balance between state authority and the protection of property rights; and a third more libertarian perspective privileged the protection of property rights in the face of state police power. Table 2 provides an outline of the historical evolution of the three perspectives, to trace how the legal balance between state police power and individual property rights under the Takings Clause of the Fifth

97. See VIRGINIA GRAY, RUSSELL L. HANSON & THAD KOUSSER, *POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS* (10th ed. 2013); ROBERT F. PECORELLA & JEFFREY M. STONECASH, *GOVERNING NEW YORK STATE* (6th ed. 2012).

98. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

99. 166 U.S. 226 (1897); see generally Leslie Bender, *The Takings Clause: Principles or Politics*, 34 BUFF. L. REV. 735 (1985) (describing the Takings Clause in the Fifth Amendment to the U.S. Constitution, in particular that “private property” will not be “taken for public use without just compensation,” and noting that a taking occurs when the government so appropriates property.).

100. For an analysis of the historical process of and legal complexities involved in incorporation, see Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992).

101. 505 U.S. 1003 (1992).

Amendment moved toward a libertarian-friendly protection of property rights.

Table 2: Legal Evolution of State Police Powers and Property Rights

	<i>Positive State</i>	<i>Civic Republican</i>	<i>Libertarian</i>
<i>Historical Evolution</i>	Colonial period through 1897	1920s through 1992	1992 to present
<i>Legal Grounding</i>	State police power	State police power as delegated and impact on investment expectations	For state police powers negating all the value of property—nuisance
<i>Political Values</i>	Protect community against harm	Balance between community harm and property owner rights	Balance weighed toward property owner
<i>Burden of Proof</i>	On the property owner	Variable—case-by-case	On the government
<i>Sample Cases</i>	Mugler v. Kansas, 123 U.S. 623 (1887)	Penn Central v. New York City, 438 U.S. 104 (1978)	Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992)
<i>Basis of Adjudication</i>	“The existence of facts supporting legislative judgment to be presumed.” (United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), cited by Justice Blackmun in <i>Lucas</i> .)	“If regulation goes too far, it will be recognized as a taking.” (Pennsylvania Coal v. Mahon 260 U.S. 393, 415 (1922)).	“A law or decree with such effect must . . . do no more than duplicate the result that could have been achieved in the courts . . . under the State’s law of private nuisance, or by the State under its . . . power to abate nuisances that affect the public generally, or otherwise” (Lucas, 505 U.S. at 1030).

First, guided by Justice Stone's maxim that "the existence of facts supporting the legislative judgment is to be presumed,"¹⁰² courts afforded state officials wide discretion to determine reasonable land-use regulation as an extension of valid police power.¹⁰³ This perspective is found in the 1887 case, *Mugler v. Kansas*, where the Court ruled that the state had no obligation to compensate a landowner for economic loss suffered when a public regulation rendered his property unusable, as long as the regulation was meant to prevent serious public harm.¹⁰⁴ As Justice Harlan noted, "such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests."¹⁰⁵ From this legal viewpoint, the police powers of the state trumped the claim to a taking by an individual property owner.

There were precedents in American history for such a broad interpretation of the state police power.¹⁰⁶ John F. Hart, for example, contends that colonial and early state legislatures, whose laws preceded the Takings Clause in the Fifth Amendment and therefore establish one basis for determining what the clause was intended to mean, enacted a variety of constraints on the use of real property above and beyond the existence of nuisance claims.¹⁰⁷ Colonial and state legislatures often compelled landowners to develop their land, drain wetlands, and even attend to aesthetic issues.¹⁰⁸

A second legal perspective sought to establish a judicial balance between the state's police power and individual property rights under the Takings Clause. This view is based in large part on Justice Holmes' admonition in *Pennsylvania Coal Co. v. Mahon* that "if regulation goes too far it will be recognized as a taking."¹⁰⁹ With Holmes' admonition in mind, the Court attempted to strike a balance in *Penn Cent. Transp. v. New York City*, when New York City's Landmark Preservation Commission prevented the owners of Penn Central Transportation from utilizing the air rights they held to construct a building above Grand Central Terminal, which had been designated as a City Landmark Building.¹¹⁰ Penn Central Transportation

102. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

103. *See, e.g., Mugler v. Kansas*, 123 U.S. 623 (1887).

104. *Id.* at 661.

105. *Id.* at 669.

106. *See* John F. Hart, *Colonial Land Use and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

107. *Id.* at 1253.

108. *Id.* at 1257.

109. 260 U.S. 393, 415 (1922).

110. 438 U.S. 104, 127 (1978).

sued under the Taking Clause of the Fifth Amendment, but the Court ruled that the economic impact of the Landmarks Preservation Commission decision on Penn Central did not interfere with either the normal operations of business or reasonable investor expectations.¹¹¹ In his opinion, Justice Brennan advocated for a case-by-case approach to the takings question, balancing the impact of the government's action on the individual plaintiff with the larger public purpose of the action.¹¹² Justice Brennan identified three factors courts should weigh when making determinations about whether government regulation represented a taking under the Fifth Amendment: the economic impact of the regulation, investor expectations, and the character of the government action.¹¹³ Noting that in the past "this court has upheld land-use regulations that destroyed or adversely impacted recognized real property interests," Justice Brennan offered a powerful reminder about the political stakes involved in deciding takings issues: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."¹¹⁴

The third more libertarian perspective abandoned Justice Brennan's balancing test, at least for some cases, and afforded more deference to individual property owners. This perspective drops the inquiry into the character of the government's action that Justice Brennan referenced, and only allows government regulations to negate full property value for the narrow purpose of preventing nuisance. From this perspective, the Court has afforded the legal notion of nuisance a "special status" in takings cases.¹¹⁵ As a consequence, individual real property rights outweigh state police powers with respect to the Takings Clause on regulations that deprive an owner of all economic use of a property, unless the nuisance exception applies.

The Court's assertion of this third position is found in *Lucas v. South Carolina Coastal Council*. Having concluded that development of beachfront housing threatened to exacerbate the state's already significant problem with beach erosion, the South Carolina Legislature enacted the Beachfront Management Act of 1988.¹¹⁶ The law sought to manage development of beachfront property to maintain beach areas as storm barriers, habitats for animals and vegetation, a "natural health

111. *See id.* at 131 & 136.

112. *Id.* at 124.

113. *See id.*

114. *Id.* (citing *Pa. Coal Co.*, 260 U.S. at 413).

115. Hart, *supra* note 106, at 1254-55.

116. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1021 n.10 (1992).

environment” and a basis for the tourism industry.¹¹⁷ Prohibited by this law from constructing houses on two beachfront properties he owned, David Lucas sued, contending that the prohibition amounted to a taking under the Fifth Amendment.¹¹⁸ Although the trial court agreed with Lucas, the South Carolina Supreme Court overturned the lower court’s decision, finding that a regulatory prohibition placed on Lucas’s use of his beachfront property by the state law was a valid exercise of the state’s police powers.¹¹⁹ The United States Supreme Court then heard Lucas’s appeal.¹²⁰

Rejecting the South Carolina Supreme Court’s ruling, the U.S. Supreme Court ordered the state to compensate Lucas for what amounted to a taking of his land.¹²¹ Writing for the majority, Justice Scalia rejected the South Carolina Supreme Court’s conclusion that title to land is held subject to the “implied limitation” that a state’s interest in protecting “health, safety, morals, or general welfare” through exercising its police powers may result in a situation where the property in question loses all economic value.¹²² The Court ruled that the notion of such an “‘implied limitation’ . . . is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.”¹²³ Therefore, any state law that completely negates the value of real property constitutes a taking unless it replicates the legal outcome that would have emerged under the “State’s law of private nuisance.”¹²⁴

Under such interpretations, statutes and regulations that limit private use of land in the interest of some larger social goal, e.g., prohibiting development of wetlands, are always suspect. Indeed, in cases where landowners suffer loss of the full value of their property, state restrictions must pass the strictest test, i.e., the nuisance test, to avoid violating the Takings Clause.¹²⁵ In so ruling, the Court overturned the tripartite test from *Penn Central*.¹²⁶ By substituting the nuisance rule, *Lucas* rejected the notion that the character of the government’s action, even if it protected a legitimate community interest, must be part of the legal equation when determining if a taking has occurred.

117. *Id.*

118. *Id.* at 1003.

119. *Id.*

120. *Id.*

121. *Id.* at 1004.

122. *Id.* at 1023, 1028 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978)).

123. *Lucas*, 505 U.S. at 1028.

124. *Id.* at 1029.

125. *Id.*

126. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

There is a clear trend in the Court's decisions towards a more libertarian judicial perspective on property protection under the Takings Clause. Following an extended period of time characterized by a presumption of state authority to regulate land-use in the public interest and another period where the character of state interests was essential in deciding the validity of regulatory actions, the Court moved in *Lucas* to a position where, in at least some cases, the character of state interests is no longer even considered.¹²⁷ This evolution in legal philosophy, particularly with reference to the facts in the *Lucas* case, has important implications for environmental efforts to mitigate the impacts of climate change. State agencies, charged with protecting coastline populations from the rising tides and flood threats associated with climate change, must now heed whether or not the state treasury can afford the potential costs incurred under a Takings Clause action when they consider coastal land-use regulations. For example, state agencies must account for these expenses before mandating the removal of existing structures or prohibiting new structures on compromised beach areas or wetlands, regulations that by their very nature diminish property values and negatively impact property owners. In cases like this, state government may indeed "go on," but it must do so with regulatory timidity that belies the nature of the increasing threat.¹²⁸

Furthermore, courts may have difficulty applying *Lucas*' categorical test, grounded in the principle that a state law negating one hundred percent of a property's value is a taking unless it replicates the result of a nuisance action. Short of overturning *Lucas*, future courts may well face the issue of why a property owner who loses less than full value does not also merit categorical protection under the Takings Clause. As Justice Stevens observed in his dissent in *Lucas*, "the Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95 percent recovers nothing, while an owner whose property is diminished 100 percent recovers the land's full value."¹²⁹ Faced with such choices, a future court may well decide to extend the *Lucas* ruling in the only mathematical direction it can go and set the categorical test for a taking somewhere below one hundred percent of a property's value, encouraging even more timid state regulatory

127. See generally Robert M. Washburn, *Land Use Control, The Individual, and Society: Lucas v. South Carolina Coastal Council*, 52 MD. L. REV. 162 (1993) (commenting on the wider, and from the author's perspective, beneficial implications of the ruling, Washburn sees the decision as an affirmation of basic civil rights).

128. *Penn Cent. Transp. Co.*, 438 U.S. at 125 (the phrase "go on" is taken from Justice Brennan's admonition in *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

129. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1064 (1992).

behavior, and belying yet again the extent of the increasing threats of climate change.

III. CONSEQUENCES OF CIVIC REPUBLICAN LAND-USE MANAGEMENT AND LIBERTARIAN COURT DECISIONS

All public policy decisions, including those originating in the courts, have intended and unintended consequences. Although it would be an overstatement to blame today's problems of metropolitan sprawl and climate change solely on the delegation of land-use management to local governments, it is fair to argue that local control of land-use helped create and continues to exacerbate these problems.¹³⁰ In order to make this argument, it is first necessary to describe the connections between metropolitan sprawl and population density.

Metropolitan sprawl is low-density development "beyond the outermost boundaries of established cities."¹³¹ There is little doubt that the abundance of land in the United States encouraged low density development and population spread.¹³² In fact, in the nineteenth century, allocation of land served as a vehicle to settle the West and legitimize government authority there.¹³³ The focus on low-density development was also evident in the "streetcar suburbs" that appeared in the 1880s in the metropolitan areas of the Northeast and Midwest.¹³⁴ An additional impetus for sprawl was the overcrowding in the industrial cities of the early twentieth century that prompted social reformers and urban planners to push for lower density housing outside of the city.¹³⁵ Indeed, while acknowledging the negative impacts of overcrowding, several critics have argued that the urban

130. For analysis of the connections between land-use patterns and metropolitan sprawl see JUDD & SWANSTROM, *supra* note 91; David Rusk, *Growth Management: The Core Regional Issue*, in REFLECTIONS ON REGIONALISM (Bruce Katz ed., 2000). For analysis of connections between land-use patterns and climate change see George A. Gonzalez, *Urban Sprawl, Global Warming and the Limits of Ecological Modernisation*, 14 ENVTL. POL. 344 (2005).

131. Lesley R. Attkisson, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 VAND. L. REV. 979, 981 (2009); *see also* Neal Peirce, *The Senselessness of Urban Sprawl*, NAT'L J. 2326 (1993) (noting that by some estimates, the rate of land use expansion outpaces the rate of population growth by four to eight percent).

132. *See generally* KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985).

133. *See id.*

134. SAM BASS WARNER, JR., *STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870-1900* (2nd ed. 1978).

135. *See* Arza Churchman, *Disentangling the Concept of Density*, 13 J. PLAN. LITERATURE 389, 392 (1999).

planners of the early twentieth century often conflated the notions of density and overcrowding.¹³⁶

The Department of Commerce's zoning and planning models of the 1920s reflected these negative attitudes toward density and expressed a firm commitment to low-density development. Contending that the regulation of density is "highly desirable," the SZEA called for strict limits on the number of people per acre and the creation of single-family residence districts.¹³⁷ And, echoing the caution offered by the Supreme Court in the *Euclid* decision that apartment houses destroy the "residential character of the neighborhood,"¹³⁸ the SCPEA also expressed support for limiting the number of families in a residential districts.¹³⁹ The model statutes were successful, and suburban developments largely excluded multi-family dwellings.¹⁴⁰ This emphasis on low-density development, with its consequent metropolitan sprawl, was quite evident in the dramatic expansion of "bedroom suburbs" in the Northeast and Midwest following World War II,¹⁴¹ the emergence of "edge cities" located in previously

136. Arza Churchman suggests that planners often equated density with overcrowding. *See id.* This point is echoed by Jane Jacobs in her classic book on urban planning when she argues that "[t]he development of modern city planning and housing reform has been emotionally based on a glum reluctance to accept city concentrations of people as desirable, and this negative emotion about city concentrations of people has helped deaden planning intellectually." JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 221 (1961).

137. A STANDARD ZONING ENABLING ACT, *supra* note 62, § 1

138. *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926).

139. *See* A STANDARD CITY PLANNING ENABLING ACT (1928), *supra* note 62. The commitment to single-family home districts was bolstered by the notion that home ownership encouraged political stability by fostering a sense of civic responsibility. *See* JONATHAN BARNETT, *CITY DESIGN: MODERNIST, TRADITIONAL, GREEN, AND SYSTEMS PERSPECTIVES*, 134 (2011) ("William B. Wilson, then [Woodrow Wilson's] secretary of labor commented: 'I have found that the man who owns his own home is the least susceptible to the so-called Bolshevist doctrines and is about the last man to join in the industrial disturbances fomented by the radical agitators. Owning a home gives a man an added sense of responsibility to the national and local government that makes for the best type of citizenship.'").

140. *See* JUDD & SWANSTROM, *supra* note 91, at 268 ("Most suburbs banned the building of apartments entirely . . . [and by] the 1970s, over 99 percent of undeveloped land zoned residential in the New York region excluded apartments.").

141. Ironically for positive-state advocates, the post-World War II era of suburban development was characterized by *federally-incentivized* housing and transportation policies that encouraged the outward movement of populations from cities. These policies included subsidized Veterans Administration and Housing Finance Administration mortgages, largely for new housing construction in suburbs; the creation of the interstate highway system which helped decentralize cities; and income tax incentives that encouraged home ownership through the mortgage interest deduction. Federal policies encouraging population spread were abetted by technological advances in the construction industry reducing the costs of single-family homes, as well as extensive marketing of single-family homes and automobiles as the two main components of what would become known as the American Dream. For an analysis of the impact of federal mortgage incentives, see

residential and rural areas in these regions in the 1970s, and the sunbelt development of the latter half of the twentieth century.¹⁴²

Since the 1920s, then, the pressures for low-density development have been channeled through a system of local land-use management inspired by the SZEA and SCPEA.¹⁴³ Local government officials responsible for local land-use policy were understandably responsive to the demands of local political actors.¹⁴⁴ In suburban jurisdictions a critical set of local political actors was made up of single-family homeowners focused on preserving and enhancing the value of their property investments while minimizing the costs of their local tax burdens.¹⁴⁵ This goal was best accomplished through a land-use policy that excluded uses and people that threatened these interests and privileged uses and people that enhanced them.¹⁴⁶ In wealthier suburban areas, this usually meant excluding multiple-family dwellings which attracted lower-income tenants; much too often it also meant excluding African Americans.¹⁴⁷ On the other hand, it meant privileging wealthier groups through the imposition of large-lot and minimum house-size regulations, which by raising home prices, attracted a

JACKSON, *supra* note 132; JUDD & SWANSTROM, *supra* note 91. For an analysis of the impact of highway construction on suburban development, see OWEN D. GUTFREUND, 20TH CENTURY SPRAWL: HIGHWAYS AND THE RESHAPING OF THE AMERICAN LANDSCAPE (2004); ANN BROWN ET AL., SPRAWL: THE DARK SIDE OF THE AMERICAN DREAM (1999), <http://vault.sierraclub.org/sprawl/report98/report.asp> [<https://perma.cc/F4QF-XYL8>]. For an analysis of the impacts of mortgage-interest deductions on suburban development, see JACKSON, *supra* note 132; JUDD & SWANSTROM, *supra* note 91, 174-96. For an analysis of the building industry and suburban development, see GANS, *supra* note 90, at 3-22 (1967).

142. For an analysis of “edge city” development, see JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1991). *See also*, CARL ABBOTT, *THE NEW URBAN AMERICA: GROWTH AND POLITICS IN SUNBELT CITIES* (1981). Sunbelt development refers to the growth of cities and their metropolitan regions south of the Delmarva Peninsula and west to southern California.

143. *See generally* A STANDARD ZONING ENABLING ACT, *supra* note 62; A STANDARD CITY PLANNING ENABLING ACT (1928), *supra* note 62, § 3.

144. *See* CULLINGWORTH & CAVES, *supra* note 46, at 111-16; GANS, *supra* note 90; Clingermayer, *supra* note 90, at 969-84.

145. *See* CULLINGWORTH & CAVES, *supra* note 46, at 111-16; MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* (1976); JUDD & SWANSTROM *supra* note 91, at 254-59; Robert C. Wood, *Suburban Politics and Policies: Retrospect and Prospect*, 5 J. FEDERALISM 45 (1975). It should be noted here that since development of post-World War II bedroom suburbs, with their demographic and cultural stereotypes, the range of suburban types and the racial diversity of the people living in the suburbs have increased markedly.

146. *See* DANIELSON, *supra* note 145; Joe T. Darden, *Choosing Neighbors and Neighborhoods: The Role of Race in Housing Preference*, in *DIVIDED NEIGHBORHOOD: CHANGING PATTERNS OF RACIAL SEGREGATION* (Gary Tobin ed., 1987).

147. Before the practice was outlawed in 1948 racial exclusion was implemented using restrictive covenants in mortgages. *See* *Shelley v. Kraemer*, 334 U.S. 1 (1948). *See also* SAMUEL E. WALLACE, *THE URBAN ENVIRONMENT* 209-11 (1980). For an analysis of post-*Shelley* tactics of exclusion, *see generally* Joe T. Darden, *Black Residential Segregation Since the 1948 Shelley v. Kraemer Decision*, 25 J. BLACK STUD. 680 (1995).

class of desired buyers.¹⁴⁸ As a result, over the course of much of the twentieth century, outgrowth in metropolitan areas was characterized by low-density, single-family home residential areas.¹⁴⁹ In the later years of the century, exurban development was characterized by mixed residential and commercial uses far removed from other cities in metropolitan areas.¹⁵⁰ In the words of one urban scholar, the various growth trends of the twentieth century “typically have the effect of legally requiring regional sprawl.”¹⁵¹ In short, the combination of widespread undeveloped land, negative attitudes toward density, and a locally-controlled land-use management system resulted in such a powerful and consistent push for population de-concentration that a majority of Americans now live in suburban jurisdictions.¹⁵²

Population de-concentration is not simply a demographic fact; it has had important implications for the way Americans live and the impact of their lifestyles on the larger environment. To make this point, it is useful to contrast the American experience of population de-concentration with the notion of sustainable development. Most scholars agree that sustainability is enhanced by the kind of high-density development that supports multiple land-uses within single communities, encourages walking or mass transit use, and limits lot and unit size to conserve energy in the heating and cooling of residences.¹⁵³ Indeed, arguments in favor of high-density development have evolved over the years from applauding density for encouraging diversity, economic interactions, and vibrant neighborhoods¹⁵⁴

148. See JACKSON, *supra* note 132, at 22 (“As has historically been the case in the United States, the distribution of population was governed primarily by the desire of property owners and builders to enhance their investments by attracting the wealthy and by excluding the poor.”); JUDD & SWANSTROM, *supra* note 91, at 262-69.

149. See ROSALYN BAXANDALL & ELIZABETH EWEN, *PICTURE WINDOWS: HOW THE SUBURBS HAPPENED* (2000); DANIELSON, *supra* note 145; Clingermayer, *supra* note 90, at 969-84.

150. See GARREAU, *supra* note 142.

151. Edward H. Ziegler, *The Case for Megapolitan Growth Management in the 21st Century: Regional Urban Planning and Sustainable Development in the United States*, 41 *URB. LAW.* 147, 160 (2009).

152. See Kenneth T. Jackson, *Why America Has Gone Suburban*, *N.Y. TIMES* (June 9, 1996), <http://www.nytimes.com/1996/06/09/opinion/why-america-has-gone-suburban.html> [<https://perma.cc/SK2C-PL2B>].

153. For a global perspective on sustainability, see generally Rep. of the World Comm’n on Env’t and Dev., *Our Common Future*, U.N. Doc. A/42/427 (1987); SACHS, *supra* note 5, at 366-74. For sustainability studies focused on American cities, see KENT E. PORTNEY, *TAKING SUSTAINABLE CITIES SERIOUSLY: ECONOMIC DEVELOPMENT, THE ENVIRONMENT, AND QUALITY OF LIFE IN AMERICAN CITIES* 247-73 (2nd ed. 2013); Eric S. Zeemering, *What Does Sustainability Mean to City Officials?*, 45 *URB. AFF. REV.* 247 (2009).

154. See JACOBS, *supra* note 136, at 142-51, 200-21. In her attack on the philosophies of traditional urban planners of the early twentieth century and the politics of the automobile-

to insisting that only through increased population concentration can we head off a potential climate disaster.¹⁵⁵

Although there is evidence of some movement toward “smart growth” initiatives in various communities around the country, the American population continues to sprawl.¹⁵⁶ And population de-concentration has immediate impacts on climate change. The imposition of large-lot and minimum house-size regulations, each of which increases the likelihood of extensive travel requiring the use of automobiles, are two examples of the land management strategies that enhanced the automobile’s already important role in the American economy.¹⁵⁷ This reliance on automobile travel has led to a situation where per capita consumption of gasoline in the United States dwarfs that of other countries.¹⁵⁸ As a result, by increasing the demand for fossil fuels, metropolitan sprawl has contributed substantially to climate change, which now represents an increasingly direct threat to the planet generally.¹⁵⁹ And by emphasizing more libertarian approaches to the Takings Clause, the *Lucas* decision limits the

focused developers of the middle twentieth century, Jacobs was arguing for sustainable development decades before the term had even been coined.

155. For an analysis on the global impacts of a continued emphasis on traditional and non-sustainable models of economic development, see DONELLA H. MEADOWS & JORGEN RANDERS, *LIMITS TO GROWTH: THE 30-YEAR UPDATE* (3rd ed. 2004); SACHS, *supra* note 5, at 34-42. For a notably useful analysis of why models of economic growth should be considered as parts of the larger environmental systems from which they import resources and to which they export waste, see generally HERMAN E. DALY, *BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT* (1997).

156. See Meck, *supra* note 5; WHEELER, *supra* note 6. For a useful analysis of the tensions between smart growth and traditional models of economic development, see PORTNEY, *supra* note 153, at 123-49. For an analysis of the destructive impacts of unsustainable development on one American city, see generally ANDREW ROSS, *BIRD ON FIRE: LESSONS FROM THE WORLD’S LEAST SUSTAINABLE CITY* (1st ed. 2011). For a critique of the arguments in favor of smart growth models of urban development from a libertarian perspective, see COX, *supra* note 32.

157. See Martin v. Melosi, *The Automobile and the Environment in American History*, *AUTOMOBILE IN AM. LIFE & SOC’Y* (2002) http://www.autolife.umd.umich.edu/Environment/E_Overview/E_Overview.htm [<https://perma.cc/3ZGF-ATA3>] (“Newer suburban communities . . . were designed for automobiles, not pedestrians, with drive-in markets, movies, and even churches.”); see also Qing Su & Joseph S. DeSalvo, *The Effects of Transportation Subsidies on Urban Sprawl*, 48 *J. REGIONAL SCI.* 567 (2008); Matthew J. Trowbridge & Noreen C. McDonald, *Urban Sprawl and Miles Driven Daily by Teenagers in the United States*, 34 *AM. J. PREVENTIVE MED.* 202 (2008).

158. See Ziegler, *supra* note 151, at 153-54 (“The per-capita consumption of gasoline in this country is four times that of European drivers and nearly ten times the amount of Asian drivers . . . [and] automobile travel is our single largest consumer source of greenhouse gas emissions”); see also JACKSON, *supra* note 132, at 10; JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE* (2003).

159. See Ziegler, *supra* note 151, at 153-54; U.S. DEP’T OF COM., NAT’L OCEANIC AND ATMOSPHERIC ADMIN., *GLOBAL SEA LEVEL RISE SCENARIOS FOR THE UNITED STATES NATIONAL CLIMATE ASSESSMENT* (Dec. 6, 2012). See also SACHS, *supra* note 5, at 366-74.

capacity of state government agencies to control shoreline development, thereby protecting the short-term financial investments of individual beachfront property owners at the long-term expense of the millions of Americans who live in coastal counties of the United States.¹⁶⁰

CONCLUSION

Policy makers today confront a legacy of environmental problems nearly a century in the making. Following the 1926 *Euclid* decision, land management policy institutions ensured that the relevant stakeholders in land-use matters reside in the immediate communities in which each particular land-use is found.¹⁶¹ And in 1992, the Supreme Court diminished the police powers of the states while enhancing the right to private property through its redefinition of the Takings Clause of the Fifth Amendment.¹⁶² As a result, even in policy areas where positive statisticians have their way and state governments directly exercise their police powers on behalf of the community, the ability of government to effectuate its desired outcome is more questionable than it was before *Lucas*. These two trends have meant that American land-use policy has largely served housing and lifestyle choices which seem rational at face value to those who make them, but prove damaging to society at large.¹⁶³ In other words, as a result of these two historical forces, land-use management in the United States has evolved into an incubator of the “tragedy of the commons.”¹⁶⁴

It has become increasingly clear that the consequences of these settlement patterns, manifested most directly in low-density housing, metropolitan sprawl, and its accompanying demands on land and energy consumption, are socially unsustainable; it is also clear that neither the current political nor legal system appears capable of addressing the problem. In a liberal society, the role of policy makers is to create public

160. In land-use regulatory situations where the positive statisticians have the institutional players they desire in charge, i.e., state government agencies, the *Lucas* decision threatens to discourage these agencies from forcefully addressing the impacts of climate change because of their fears of the fiscal costs that may be involved. Specifically, in the *Lucas* decision, the South Carolina Coastal Commission’s efforts to protect compromised beach areas were found to be in violation of the Takings Clause of the Fifth Amendment requiring payment to the property owner. Since state coastlines are replete with individual property owners, the fiscal costs of countering rising sea levels might well become prohibitive. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

161. See generally Section III.A.

162. See *Lucas*, 505 U.S. 1003.

163. For an analysis of the rationality of metropolitan location decisions from the point of view of the individuals making them, see generally ANTHONY DOWNS, *NEIGHBORHOODS AND URBAN DEVELOPMENT* (1981).

164. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968).

institutions that mitigate the negative social consequences of individual choices and make proactive efforts to reshape the incentive systems that constrain individual choices in the first place. The coupling of locally controlled land-use management with an increasingly libertarian legal interpretation of real property rights severely limits the creation of such institutions.