

# A COMMON LAW OF ZONING

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*This Article for the first time identifies a common law of zoning, describes the typology of this essential and overlooked element of American land use law, and establishes the historical and structural context for its pervasive set of rules and principles. Over the past 100 years, American judges, filling in the gaps and resolving the ambiguities of a surprisingly uniform set of state enabling statutes, have produced this body of common law. The story will take the reader to Iowa cornfields that surround an iconic baseball diamond; to a federal agency that gave an important impetus to the nationwide adoption of this Progressive Era tool at the state and local levels; to early railroad litigation in Massachusetts yielding a workable definition of the common law that was popularized by a legendary set of law school teaching materials; to the provisions of, and cases interpreting, other model legislation; and to the pages of dozens of state court reports from every region of the country. Critics have long raised their voices about the evils of height, area, and use controls; and commentators have directed their attention predominantly to the constitutional and environmental aspects of land use law. In the meantime, state courts, left to their own devices, have continued to frame, adapt, and reshape the common law of zoning.*

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### INTRODUCTION

Looking back over a century of experience, we can perceive that American state court judges, assisted and inspired by experts in academia and in practice, have shaped a fairly consistent body of law that seamlessly traverses jurisdictional boundaries and reflects a joint effort to resolve ambiguities in, and fill in the gaps of, a surprisingly uniform set of enabling statutes whose origins can be traced to efforts centered in, of all places, a federal agency. This is the common law of zoning.

This Article will trace the development of the common law of zoning since its origins in the opening decades of the twentieth century. Once the idea of dividing municipalities by means of height, use, and area classifications received the U.S. Supreme Court's imprimatur in its 1926 decision in *Village of Euclid v. Ambler Realty Co.*,<sup>1</sup> American local governments throughout the nation swiftly adopted "Euclidean" zoning schemes under the express authority of state zoning enabling legislation. During most of the twentieth century, there were many similarities in those enabling statutes, which is not remarkable given that many of these laws were based on a model act circulated by a federal agency in the 1920s.<sup>2</sup>

Much more unexpected has been the fact that state courts asked to adjudge the validity and applicability of local zoning ordinances, the same tribunals that have often developed contrasting and conflicting doctrines in the law of real property,<sup>3</sup> have articulated rules and principles that are strikingly similar. This is not to say that there are *no* variations from state to state.<sup>4</sup> Nevertheless, as this Article explains, on

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1. 272 U.S. 365, 379–84, 396–97 (1926).

2. See DEP'T OF COMMERCE ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (1924) [hereinafter SZE 1924].

3. For a few of the many examples of such contrasts and conflicts in the American common law of real property, see for example POWELL ON REAL PROPERTY § 51.02 (state variations regarding joint tenancies), § 60.04[3][c] (state variations regarding privity for real covenants), § 64A.04[1] (jurisdictions that recognize trespass by indirect invasion), and § 91.05[1] (definitions of hostility as an element of adverse possession) (Michael Allan Wolf gen. ed., 2018). Statutory variations on American real property law are even more prevalent. See, e.g., *id.* §§ 14.01–14.07 (variations in fee tail statutes), § 16B.04[3] (warranty of habitability statutes), § 52.10[3] (variations in tenancy by the entirety statutes), and §§ 75.03–75.52 (statutes regarding rule against perpetuities).

4. There is certainly no requirement that the common law be unswervingly uniform across state borders. Majority and minority positions abound in the common law of real property, contracts, and torts, as any overburdened first-year law student seeking the

many key issues the basic framework of zoning case law varies very little from jurisdiction to jurisdiction and from region to region.

Following this Introduction, Part I sets the stage by reviewing a recent opinion of the Supreme Court of Iowa in a case involving a parcel of property that is iconic, thanks to a motion picture starring Kevin Costner and James Earl Jones. The court's decision concerning the *Field of Dreams* property—*Residential & Agricultural Advisory Committee, LLC v. Dyersville City Council*<sup>5</sup>—raises and resolves some classic common law of zoning questions concerning “spot zoning,” the legislative nature of zoning changes, and the relationship between zoning and comprehensive planning. While the majority of cases featured Iowa citations, at key points the state supreme court turned to opinions from sibling jurisdictions, or to principles derived from other state court decisions for guidance.

Part II takes the reader back to the mid-nineteenth century and the exploration of the idea, expressed memorably by Massachusetts Supreme Judicial Court Chief Justice Lemuel Shaw, that “the rules of the common law, so far as cases have arisen and practices actually grown up, are rendered, in a good degree, precise and certain, for practical purposes, by usage and judicial precedent.”<sup>6</sup> Shaw's oft-cited<sup>7</sup> conception of a flexible and adaptable common law provides a useful interpretive lens for analyzing the common law of zoning.

Part III focuses on the intriguing provenance of the initial set of state zoning enabling acts. The Standard State Zoning Enabling Act (“SZE A”), drafted and circulated under the auspices of the U.S. Department of Commerce, provided a general framework for zoning on the local government level.<sup>8</sup> The SZE A and the zoning case law it spawned are contrasted with more intricate and detailed uniform acts, such as the Uniform Commercial Code, that incorporate decisional rules for courts, and with the American Law Institute's failed effort in the 1960s and 1970s to update the SZE A through its Model Land Development Code. There were many questions that were left unaddressed by SZE A-inspired acts and by the local zoning ordinances they produced. The answers to those questions that judges (almost always in state tribunals) proffered, often after sampling decisions from other jurisdictions, form and reflect much of the common law of zoning.

The gist of the Article is the typology found in Part IV, identifying several prototypes of the common law of zoning and tracing their origins and evolution: (1) the illegality of spot zoning; (2) the legislative (or quasi-judicial) nature of zoning

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“right” answer would attest. While this Article emphasizes several instances in which courts from various parts of the nation arrived at similar conclusions, it also highlights questions that resulted in contrasting approaches. As Stewart Sterk reminded the Author, even in instances in which judges resolving zoning disputes have arrived at different conclusions, they have employed a “shared terminology.”

5. 888 N.W.2d 24, 39–46 (Iowa 2016).

6. *Norway Plains Co. v. Bos. & Me. R.R.*, 67 Mass. 263, 267 (1854).

7. The popularity of the case is thanks in no small part to its inclusion in the legendary Hart and Sacks *Legal Process* materials. See *infra* notes 76–77 and accompanying text.

8. SZE A 1924, *supra* note 2.

decisions; (3) the disqualification of variance applications because of self-imposed hardships; (4) the notion that zoning is about use and not ownership; and (5) the legitimacy of aesthetic zoning. The process of arriving (or failing to arrive) at consensus or near-consensus has followed the pattern highlighted by Chief Justice Shaw nearly two centuries ago, and each of the five examples typifies an aspect of common-law decision-making found not only in the specific realm of zoning but beyond.

The conclusion considers how the notion of a common law of zoning helps us to understand the surprising vitality of height, area, and use classifications even today, when zoning's birthday cake holds more than 100 candles.<sup>9</sup> While critics have raised their voices about the evils of height, area, and use controls; and while commentators have focused their attention on the constitutional and environmental aspects of land use law; state courts, left to their own devices, have continued to frame, adapt, and reshape the common law of zoning.

### I. A SPOT FOR DREAMS: ZONING CASE LAW IN ITS SECOND CENTURY

The Dubuque County, Iowa, farm owned by Donald and Rebecca Lansing provided the setting for the 1989 motion picture *Field of Dreams*.<sup>10</sup> Because of the film's enduring popularity, the Lansings welcomed thousands of visitors a year.<sup>11</sup> In 2010, when the Lansings listed their 193-acre property—including the farmhouse, the diamond visited by specters from baseball's past, and 193 acres of farmland—they stipulated that the sale “was contingent upon the property being rezoned for commercial use, among other things.”<sup>12</sup> One of the “other things” was a condition that the City of Dyersville would annex the Lansings' property,<sup>13</sup> which would, of course, subject the farm to the city's planning and zoning regime. The purchasers, Mike and Denise Stillman, also planned “to create an All-Star Ballpark Heaven on the land, a baseball and softball complex with up to twenty-four fields to be used for youth baseball and softball.”<sup>14</sup>

After several months of meetings and hearings, at which nearby residents and businesses expressed support for and concerns with the Stillmans' proposal, the

9. The American Law Institute has commemorated the first century of American zoning law in its own way, by including zoning and land use regulation in its current Restatement of the Law Fourth, Property project. *Property*, THE ALI ADVISER, <http://www.thealiadviser.org/property/> (open the drop-down menu titled “Volume 6: Servitudes and Land Use”) (last visited June 26, 2019) (noting that Division Three (chapters 29–37) in Volume 6 will be devoted to “Zoning and Land Use Regulation”).

10. *Dyersville*, 888 N.W.2d at 30.

11. *Id.*; see also FIELD OF DREAMS MOVIE SITE <https://fieldofdreamsmoviesite.com/> (last visited June 26, 2019).

12. *Dyersville*, 888 N.W.2d at 31; see also Ken Bilson, *New Dreams for Field*, N.Y. TIMES, Oct. 30, 2011, at SP-1 (“The Lansings wanted to sell only to someone who would preserve the authenticity of the field, which has been free to visitors.”).

13. *Dyersville*, 888 N.W.2d at 33.

14. *Id.*; see also ALL-STAR BALLPARK HEAVEN, <http://allstarballparkheaven.com> (last visited June 26, 2019).

Dyersville City Council voted unanimously, on June 18, 2012, to approve a Memorandum of Understanding (“MOU”) between the City and Go the Distance Baseball, LLC.<sup>15</sup> The MOU provided that the city would use its “best effort” to annex the Lansings’ property by October 1, 2012 and to “rezone the Property to commercial use or other appropriate use to allow the Company to use it for its intended purpose,” to “connect the Property to the city’s water and sewer services for an estimated cost of \$2.48 M[illion],” and to “undertake the authorization of a development agreement under which the City would agree to make economic development payments . . . to the Company for a period not to exceed 15 years.”<sup>16</sup>

Each aspect of the MOU was subject to a separate vote by the city council.<sup>17</sup> On July 2, 2012, the city council passed the annexation resolution by a 4–1 vote and unanimously approved a “resolution to refer the rezoning of the property from A-1 Agriculture to C-2 Commercial to the planning and zoning commission.”<sup>18</sup> After hearing from members of the public, the commission, six days later, “unanimously voted to approve a positive recommendation in favor of the proposed rezoning,”<sup>19</sup> which provided

for the preservation of the existing white farmhouse with wrap-around porch overlooking the Field of Dreams, the preservation of the existing Field of Dreams, and the creation and construction of All-Star Ballpark having a complex featuring 24 baseball and softball fields targeted for competition and training for youth 8 to 14 and incidental uses thereof.<sup>20</sup>

Not surprisingly, despite opposition voiced by some community members and their attorney, the city council on August 6 voted 4–1 to approve the rezoning.<sup>21</sup> On September 4, some of those opponents filed a petition for writ of certiorari in state district court seeking a stay and an injunction, alleging that by approving the rezoning “the city council acted in violation of both Iowa law and Dyersville city ordinances; in excess of its authority; arbitrarily and capriciously; and against public safety, health, morals, and the general welfare.”<sup>22</sup> After taking a detour that included two stops at the state court of appeals,<sup>23</sup> the district court conducted a trial in February of 2015, issuing an order upholding the actions of the city council three months later. The opponents filed an appeal, and the Supreme Court of Iowa agreed to hear the challenge.<sup>24</sup>

The petitioners before the state high court raised several objections:

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15. *Dyersville*, 888 N.W.2d at 33–34.
  16. *Id.* at 34.
  17. *Id.*
  18. *Id.* at 35.
  19. *Id.* at 34–36.
  20. *Id.* at 35.
  21. *Id.* at 37.
  22. *Id.*
  23. *Id.* at 38–39.
  24. *Id.* at 39.

They argue the district court applied the incorrect standard of review to the city council's rezoning of the land. They argue the council's actions were quasi-judicial in nature rather than legislative, triggering a different standard of review. They allege Ordinance 770 [the original rezoning] is invalid for a number of reasons. They also argue there was sufficient opposition to the ordinance from adjacent landowners to trigger Dyersville Code section 165.39(5).<sup>25</sup> They assert Ordinance 777 [which corrected an error in the legal description of the land subject to the rezoning] is invalid because it purported to rezone property without following proper procedure. Last, they assert equal protection and due process violations.<sup>26</sup>

The supreme court, in a majority opinion written by Justice Bruce B. Zager, rejected all of these arguments, concluding, "[t]he city council acted in its proper legislative function when it rezoned the *Field of Dreams* property. Both ordinances were validly passed, and no procedural or substantive errors affected the decisions of the city council in its rezoning decisions."<sup>27</sup>

The supreme court's conclusions are neither revolutionary nor remarkable. Indeed, aside from the novelty of the Hollywood connection, the reason for including the *Dyersville* case to open the substantive portion of this Article is the familiar and commonplace nature of the justices' approach to answering the questions of zoning law posed by the All-Star Ballpark Heaven proposal. When called upon to resolve issues that fall between the cracks of provisions found in state zoning enabling statutes and local zoning ordinances, the justices, like their counterparts throughout the nation, did not hesitate to invoke tried-and-true principles and concepts—the common law of zoning—from within and, more significantly, from well outside their jurisdiction.

A few examples should suffice. The Iowa high court invoked the trans-boundary common law of zoning in its determination of whether the rezoning of the

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25. Section 165.39(5) reads as follows:

If the Commission recommends against, or if a protest against such proposed amendment, supplement, change, modification or repeal is presented in writing to the Clerk, duly signed by the owners of twenty percent (20%) or more either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom, or of those directly opposite thereto, extending the depth of one lot or not to exceed two hundred (200) feet from the street frontage of such opposite lots, such amendment, supplement, change, modifications, or repeal shall not become effective except by the favorable vote of all members of the Council.

DYERSVILLE, IOWA, CODE OF ORDINANCES § 165.39(5) (2003), <http://www.cityofdyersville.com/186/Code-of-Ordinances>. Visitors to the City of Dyersville website will see the code (and other features of the website) framed by a photograph of men in old Chicago White Sox uniforms standing in front of a cornfield.

26. *Dyersville*, 888 N.W.2d at 39.

27. *Id.* at 51.

farm constituted illegal “spot zoning.”<sup>28</sup> Justice Zager began his discussion with a quotation from the court’s 2001 decision in *Perkins v. Board of Supervisors*<sup>29</sup> that defines this key term: “Spot zoning is the creation of a small island of property with restrictions on its use different from those imposed on surrounding property.”<sup>30</sup> Tracing the provenance of this definition would take the researcher to *Perkins* (Supreme Court of Iowa, 2001), then to the same court’s 1998 decision in *Fox v. Polk County Board of Supervisors*,<sup>31</sup> which in turn quoted the court’s 1995 decision in *Kane v. City Council*,<sup>32</sup> in which the court quoted language from its 1994 decision in *Little v. Winborn*,<sup>33</sup> which reached back to its 1970 decision in *Jaffe v. City of Davenport*.<sup>34</sup> The *Jaffe* court’s definition, the first in this line to use the “small island” metaphor, derived from the state high court’s ruling in 1954’s *Keller v. Council Bluffs*,<sup>35</sup> in which the court explicitly noted that the question before the court “has not been passed upon by this court but has been given consideration in other jurisdictions.”<sup>36</sup> The following paragraph from the *Keller* decision, replete with citations to sibling jurisdictions (and a leading treatise), is a wonderful example of the common law of zoning in action:

‘Spot Zoning’ when construed to mean reclassification of one or more like tracts or similar lots for a use prohibited by the original zoning ordinance and out of harmony therewith is illegal. When done under certain other conditions and circumstances in accordance with a comprehensive zoning plan such action will not be declared void. It depends upon the circumstances of each case. *Higbee v. Chicago, B. & Q. R. Co.*, 235 Wis. 91, 292 N.W. 320, 128 A.L.R. 734 [1940]. Courts have upheld amendments where established though they might appear out of harmony with the general plan, because they did no violence to the spirit and intent of the general zoning ordinance. 1 *Zoning Law and Practice 1*, 2d Ed. by Yokley (1953), p. 202. Also see *Ellicott v. Mayor and City Council of Baltimore*, 180 Md. 176, 23 A.2d 649, 652 (1942); *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427, 430, 86 A.L.R. 642 (1931).<sup>37</sup>

The *Dyersville* court’s ultimate ruling that the city had not engaged in illegal spot zoning when rezoning the *Field of Dreams* parcel was truly based on an *American* law of zoning.

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28. *Id.* at 45.

29. 636 N.W.2d 58 (Iowa 2001).

30. *Dyersville*, 888 N.W.2d at 45 (quoting *Perkins*, 636 N.W.2d at 67).

31. 569 N.W.2d 503, 508 (Iowa 1997).

32. 537 N.W.2d 718, 723 (Iowa 1995).

33. 518 N.W.2d 384, 387 (Iowa 1994).

34. 179 N.W.2d 554, 556 (Iowa 1970) (“Spot zoning results when a zoning ordinance creates a small island of property with restrictions on its use different from those imposed on the surrounding property.”)

35. 66 N.W.2d 113 (Iowa 1954).

36. *Id.* at 116 (italics omitted).

37. *Id.* at 120.

The common law of zoning also informed the *Dyersville* court's determination of whether the city council's decision to rezone the property was legislative or quasi-judicial in nature. The court focused first on statutory provisions, particularly a code provision mandating that the city council "shall provide for the manner in which the regulations and restrictions and the boundaries of the [zoning] districts shall be determined, established, and enforced, and from time to time amended, supplemented, or changed."<sup>38</sup> Because the statute is silent on the nature of the rezoning decision (legislative versus quasi-judicial), the court turned to the case law, noting that "we have also recognized that there are some situations in which a zoning decision can take on a quasi-judicial nature that may necessitate a different standard of review than the normally limited standard of review we utilize when reviewing zoning decisions."<sup>39</sup>

The Iowa case cited as an example of the "different standard of review" is *Sutton v. Dubuque City Council*,<sup>40</sup> in which a city council "reclassified property from a commercial recreation district to a planned unit development ("PUD") district."<sup>41</sup> As noted by Justice Zager, the *Sutton* court had

expanded on the two-part test from *Buechele v. Ray*<sup>42</sup> by citing to factors identified by the Washington Supreme Court in determining whether zoning activities are quasi-judicial in nature or legislative in nature: "(1) rezoning ordinarily occurs in response to a citizen application followed by a statutorily mandated public hearing; (2) as a result of such applications, readily identifiable proponents and opponents weigh in on the process; and (3) the decision is localized in its application affected a particular group of citizens more acutely than the public at large."<sup>43</sup>

Ultimately, the *Dyersville* court distinguished *Sutton* (and the Washington precedent upon which it relied), concluding that "the city council was acting in a legislative function in furtherance of its delegated police powers," doing so by "weigh[ing] all of the information, reports, and comments available to it in order to determine whether rezoning was in the best interest of the city as a whole."<sup>44</sup>

A third example of the *Dyersville* court's engagement with the common law of zoning appeared in Justice Zager's discussion of the Iowa enabling act's requirement "that any zoning regulations adopted by a city council or board of supervisors 'shall be made in accordance with a comprehensive plan.'"<sup>45</sup> The

38. IOWA CODE § 414.4 (2019) (emphasis added).

39. Residential & Agric. Advisory Comm., LLC v. Dyersville City Council, 888 N.W.2d 24, 40–41 (Iowa 2016).

40. 729 N.W.2d 796, 797 (Iowa 2006) (cited in *Dyersville*, 888 N.W.2d at 40–41).

41. *Dyersville*, 888 N.W.2d at 42.

42. 219 N.W.2d 679 (Iowa 1974).

43. *Dyersville*, 888 N.W.2d at 42 (quoting *Sutton*, 729 N.W.2d at 798). The Washington decision cited by the *Sutton* court was *Fleming v. Tacoma*, 502 P.2d 327, 331 (Wash. 1972) overruled by *Rayners v. Leavenworth*, 821 P.2d 1204, 1209 (Wash. 1992).

44. *Dyersville*, 888 N.W.2d at 43.

45. *Id.* at 44 (quoting IOWA CODE § 414.3 (2010)).

opinion noted that “[t]his requirement was adopted to prevent haphazard zoning” and that its purpose was “to ensure a board or council acts rationally in applying its delegated zoning authority.”<sup>46</sup> The Supreme Court of Iowa decision from 1992 cited in support of this analysis was *Wolf v. City of Ely*.<sup>47</sup>

The *Wolf* court’s discussion of the “in accordance” requirement reached back to the 1922 draft of the SZEA,<sup>48</sup> and leading cases from New Jersey, Iowa, and Wisconsin interpreting this key language:

The “comprehensive plan” requirement was imposed to prevent piecemeal and haphazard zoning. Standard State Zoning Enabling Act (United States Department of Commerce, § 3 n.22 (1922)). The word “plan” connotes an integrated product of a rational process; the word “comprehensive” requires something beyond a piecemeal approach. *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 166, 131 A.2d 1, 7 (1957). We have suggested the purpose of a comprehensive plan is “to control and direct the use and development of property in the area by dividing it into districts according to present and potential uses.” *Plaza Recreation Ctr. v. Sioux City*, 253 Iowa 246, 258, 111 N.W.2d 758, 765 (1961); *see also Bell v. City of Elkhorn*, 122 Wis.2d 558, 564-65, 364 N.W.2d 144, 147 (1985) (list of objectives sought to be achieved through development of a comprehensive plan).<sup>49</sup>

Using these authorities for guidance, the *Dyersville* court was comfortable affirming the district court’s finding “that the rezoning was passed in accordance with and in furtherance of the comprehensive plan, despite none of the council members expressly linking their votes to the plan.”<sup>50</sup>

Assured that the city’s handling of the rezoning was sensible, rational, and in compliance with statutory and “common law of zoning” requirements concerning these three as well as other relevant issues,<sup>51</sup> the Iowa high court affirmed the district court’s rulings in favor of the local government.

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46. *Id.* at 45.

47. 493 N.W.2d 846, 849 (Iowa 1992).

48. *See infra* text accompanying notes 83–92.

49. *Wolf*, 493 N.W.2d at 849.

50. *Dyersville*, 888 N.W.2d at 45.

51. For example, the court rejected the petitioners’ claim that by “including a 200-foot buffer zone of agricultural land that surrounded the property that was rezoned to commercial, the city had sought ‘to prevent the nearby property owners from objecting to the project . . . .’” *Id.* at 47. The justices noted that “a number of other courts have held that a council may avoid a supermajority vote requirement by creating a buffer zone between the property to be rezoned and the land of adjacent property owners.” *Id.* (citing *Schwarz v. City of Glendale*, 950 P.2d 167, 170 (Ariz. Ct. App. 1997); *Armstrong v. McInnis*, 142 S.E.2d 670, 679 (N.C. 1965); *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 786 S.E.2d 335, 345 (N.C. Ct. App. 2016); *St. Bede’s Episcopal Church v. City of Santa Fe*, 509 P.2d 876, 877 (N.M. 1973); *Eadie v. Town Bd. of N. Greenbush*, 854 N.E.2d 464, 467–68 (N.Y. 2006)).

## II. PRECISE AND CERTAIN RULES: CHIEF JUSTICE SHAW'S RECIPE FOR COMMON LAW

“Common law” is a term and concept whose meaning and import have shifted significantly over the course of Anglo-American legal history. While a complete discussion of the origins, meanings, and implications of the term is far beyond the bounds of this Article, it is important to situate the discussion of the “common law of zoning” in a specific and, it is hoped, serviceable context. Not to address this question might result, for example, in an understanding that *all* case law qualifies as “common law.” Such an ahistorical, all-encompassing reading would mean that all statutory interpretations and constitutional analyses undertaken by courts would qualify. Similarly, to confine the term “common law” to a specific period, such as prior to the passage of a reception provision in a state constitution or code by one of the new American states,<sup>52</sup> would, because American zoning is an early twentieth century development, disqualify any judicial discussion of zoning principles as “common law.”

Those seeking assistance from U.S. Supreme Court justices will be disappointed. Justice Oliver Wendell Holmes, Jr., known more for his clever turns of phrases than for clear guidance to future generations of judges and lawyers, memorably, but most unhelpfully, quipped, “The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified.”<sup>53</sup> Justice Antonin Scalia contrasted “modern devotees of a turbulently changing common law”<sup>54</sup> with “the theoretical model of common-law decisionmaking accepted by those who adopted the Due Process Clause,”<sup>55</sup> noting that “common-law jurists believed (in the words of Sir Francis Bacon) that the judge’s ‘office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.’”<sup>56</sup>

Professor John Stinneford, in the course of making his compelling argument that the Eighth Amendment’s Cruel and Unusual Punishments Clause

52. For example, New York’s original constitution (1777) provided as follows:

And this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare that such parts of the common law of England, and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th day of April, in the year of our Lord one thousand seven hundred and seventy-five, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same . . . .

*The Constitution of New York: Apr. 20, 1777*, THE AVALON PROJECT, [http://avalon.law.yale.edu/18th\\_century/ny01.asp](http://avalon.law.yale.edu/18th_century/ny01.asp) (last visited Jan. 30, 2019).

53. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

54. *Rogers v. Tennessee*, 532 U.S. 451, 474 (2001) (Scalia, J., dissenting).

55. *Id.* at 472 (Scalia, J., dissenting).

56. *Id.* (quoting Francis Bacon, *Essays, Civil and Moral* [1625], in 3 HARVARD CLASSICS 137 (Charles W. Eliot ed., 1909)).

“incorporates the common law doctrine of desuetude,”<sup>57</sup> brushes aside the justices’ (and others’) fanciful and misleading notions, explaining:

At the time the Constitution was adopted (and for centuries prior to that time), the common law was not seen as the product of judges exercising a “legislative function,” nor was it seen as the series of fixed, transcendent rules Justice Holmes mockingly described as a “brooding omnipresence in the sky.” Rather, the common law was considered to be a kind of customary law—the law of “custom” and “long usage.” . . . Such laws were considered normatively superior to laws imposed by the sovereign because long usage guaranteed that they were reasonable and that they enjoyed the consent of the people.<sup>58</sup>

Thus, “custom” and “long usage”<sup>59</sup> are terms that more accurately and usefully isolate the DNA, the essential nature, of the common law.

Nurture, too, plays an important role in the understanding and composition of the common law, especially in the American context. Environmental factors—the temporal and geographic setting; the social, political, and economic context; technological developments; and, perhaps most important, the presence of statutory or administrative law shaping the contour of the dispute before the court—contribute to the evolution of as yet unwritten law.

This last observation is far from original. A discerning and very useful articulation of the adaptive nature of the common law can be found in the opinion of Chief Justice Shaw in *Norway Plains Co. v. Boston & Maine Railroad*.<sup>60</sup> Chief Justice Shaw was a larger-than-life figure who warranted a detailed study<sup>61</sup> of his long judicial career, a career that featured opinions in notable cases involving topics

57. John F. Stinneford, *Death, Desuetude, and Original Meaning*, 56 WM. & MARY L. REV. 531, 532 (2014) (italics omitted).

58. *Id.* at 561 (footnotes omitted).

59. Inevitably the question arises: Just how long is long enough to qualify as “long usage”? The common-law mode of decision-making consists of trial and error by a variety of courts over an extended period of time. The life cycle of many Anglo-American common-law rules can be measured in centuries, it is true. Nevertheless, the zoning rules explored *infra* Part IV (and others as well) derive from the thousands of reported appellate opinions concerning zoning, from dozens of American jurisdictions, that have been published between the third decade of the twentieth century and the present. In other words, the *trials* and appeals over nearly one hundred years that have yielded longstanding and consistently applied precedents and have filtered out outlier *errors* should easily qualify as “long usage.”

60. 67 Mass. 263 (1854); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 480 (1911) (“No more superb statement of the manner in which the principles of the Common Law are to be adapted to new conditions of modern law has ever been made than by Shaw, in 1854, in a case involving the liability of railroads as warehousemen . . .”).

61. LEONARD W. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 3 (1957) (“No other state judge through his opinions alone had so great an influence on the course of American law. A critical study of his work can illuminate much of the history of that law in its formative stage.”).

such as the status of slaves brought to a free state,<sup>62</sup> labor unions,<sup>63</sup> police power regulations of land,<sup>64</sup> and the fellow servant rule.<sup>65</sup> The issue Chief Justice Shaw addressed in his 1854 opinion in *Norway Plains* concerned the liability of a railroad company for the destruction of a company's goods that had been shipped by the railroad, unloaded and placed in a depot, and then destroyed in a fire that consumed the depot. The Massachusetts high court refused to hold the railroad liable as a common carrier for damage to goods in transit because to do so "would greatly mar the simplicity and efficacy of the rule, that delivery from the cars into the depot terminates the transit."<sup>66</sup>

The court's decision not to attach common carrier liability to this new form of transportation in this specific set of facts seemed to be a departure from settled law. This was not the case at all, Chief Justice Shaw asserted, in the process distancing himself from the more metaphysical notion of the common law as an autonomous entity fixed in time and space, waiting to be discovered by judges and other jurists.<sup>67</sup> To Chief Justice Shaw and his colleagues, the common law was expansive, adaptable, and up to the task of meeting modern concerns.

Rather than attempting to paraphrase this great jurist's turns of phrase, Chief Justice Shaw should be allowed to speak for himself. First, he observed that the common law has a great advantage over less flexible written codes:

[I]nstead of a series of detailed practical rules, established by positive provisions, and adapted to the precise circumstances of particular cases, which would become obsolete and fail, when the practice and course of business, to which they apply, should cease or change, the common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy,

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62. Commonwealth v. Aves, 35 Mass. 193 (1836).

63. Commonwealth v. Hunt, 45 Mass. 111 (1842).

64. Commonwealth v. Alger, 61 Mass. 53 (1851).

65. Farwell v. Bos. & Worcester R.R., 45 Mass. 49 (1842).

66. *Norway Plains Co. v. Bos. & Me. R.R.*, 67 Mass. 263, 276 (1854).

67. Professor Thomas Grey used Chief Justice's *Norway Plains* opinion as a "classic" example of how "American judges before the Civil War . . . sought guidance, but not dictation, from general principles." Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 8 n.27 (1983); Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1244, 1244 n.12 (2015) (citing *Norway Plains* in support of their assertion that "the open-ended nature of legal concepts renders them capable of accommodating different normative values and ideals. It is for this reason that most common law concepts are structured as legal standards (as opposed to rules)."). Professor David Strauss, in his important and influential work exploring "common law constitutionalism," has observed that "[t]he common law method has not gained currency as a theoretical approach to constitutional interpretation because it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind." David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 885 (1996). The common law of zoning is a similar pairing of unusual partners.

modified and adapted to the circumstances of all the particular cases which fall within it.<sup>68</sup>

Second, while practice and usage in the “real world” are important, Chief Justice Shaw explained that judges play the most important role in articulating what the common law is and how it should be applied in future litigation:

These general principles of equity and policy are rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition; so that, when in a course of judicial proceeding, by tribunals of the highest authority, the general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.<sup>69</sup>

Third, to Chief Justice Shaw and his colleagues, the judiciary was capable of adapting these “general principles” to changing circumstances:

[W]hen new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances. The consequence of this state of the law is, that when a new practice or new course of business arises, the rights and duties of parties are not without a law to govern them; the general considerations of reason, justice and policy, which underlie the particular rules of the common law, will still apply, modified and adapted, by the same considerations, to the new circumstances.<sup>70</sup>

In the case before the court, it made little sense to apply the established rule—that “the carrier of goods by land is bound to deliver them to the consignee, and that his obligation as carrier does not cease till such delivery”<sup>71</sup>—to this new form of surface transportation. After all, for railroads, the “line of movement and point of termination are locally fixed,”<sup>72</sup> and as with ships “the merchandise can only be transported along one line, and delivered at its termination, or at some fixed

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68. *Norway Plains*, 67 Mass. at 267.

69. *Id.* This is an articulation of the attribute of “long usage” identified by Professor Stinneford. *See supra* text accompanying notes 57–59; *see also* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 40 (2001) (“Even the usage of the community did not always isolate a single right answer. What really made the common law’s general principles ‘precise, specific, and adapted to practical use’ was ‘judicial precedent’—which Shaw defined as ‘judicial exposition’ that had been ‘well settled and acquiesced in.’”).

70. *Norway Plains*, 67 Mass. at 267–68.

71. *Id.* at 271.

72. *Id.*

place by its side, at some intermediate point.”<sup>73</sup> Furthermore, “the car cannot leave the track or line of rails, on which it moves,”<sup>74</sup> and, because a stationary car both prevents the train from moving and blocks the tracks, the goods inside “should be discharged as soon and as rapidly as it can be done with safety.”<sup>75</sup> In this manner, the court, applying the general principles of the common law within a new technological setting, rendered judgment in favor of the railroad.

Thanks to the decision of the legendary law professor duo of Henry Hart and Albert Sacks to feature the *Norway Plains* opinion prominently in their highly influential legal process teaching materials,<sup>76</sup> generations of law students at Harvard and dozens of other law schools were familiarized with the idea of courts invoking and reshaping an adaptive and responsive common law.<sup>77</sup>

For the purpose of considering the idea and prominent components of a common law of zoning, and drawing directly from Chief Justice Shaw’s 1854 peroration, we can distill five aspects of American common law:

1. It “consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy.”
2. It is “modified and adapted to the circumstances of all the particular cases which fall within it.”
3. It is “rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition.”

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73. *Id.*

74. *Id.*

75. *Id.*

76. 2 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 386–95 (tent. ed., 1958). *Norway Plains* served as Problem No. 11, which was labeled “Decision without Closely Relevant Precedent: The Case of the Burnt Bundles.” It was the first of two problems in Section 2 (“The Reason-For-Being of Judicially Declared Law”) of Chapter III (“The Courts as Places of Initial Resort for Solving Problems Which Fail of Private Solutions”). *Id.* at 366, 386.

77. In their introduction to the 1994 Foundation Press edition of *The Legal Process*, Professors William Eskridge and Philip Frickey explained:

Hart and Sacks’ opus has had a great run as teaching materials. It was the text for a popular perspectives course at the Harvard Law School for more than three decades, and dozens of other law schools offered similar courses from the materials during this period. Thousands of law students . . . studied the materials in the classroom. Some law schools still teach Hart and Sacks’ *The Legal Process* as a regular course.

William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). See also Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 61 (2013) (describing the “philosophical backdrop to the teaching materials”); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2047 (1994) (“*The Legal Process* has influenced new generations of law professors who never took the course.”).

4. When a “general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.”

5. Cases of first impression “must be governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.”<sup>78</sup>

Before exploring elements of zoning’s common law as they appeared and evolved in state court decisions from throughout the nation, a slight detour through New York City municipal government and the U.S. Department of Commerce is in order.

### III. A FEDERAL MODEL FOR STATE EXPERIMENTATION

The tapestry of zoning law is highly unusual if not unique in American jurisprudence. Because the police power—the authority and obligation to protect the public health, safety, morals, and general welfare<sup>79</sup>—resides at the state level,<sup>80</sup> it could be asserted that cities and other local governments did not have the inherent power to enact zoning ordinances without state approval. Once New York City, with the blessing of state lawmakers, passed the nation’s first modern zoning ordinance in 1916,<sup>81</sup> many states and municipalities were anxious to follow suit. Unsure of whether local governments had the inherent power to segregate residential, commercial, and industrial uses, the most practical solution was to follow the examples of states such as New York and Massachusetts<sup>82</sup> by passing a state enabling act specifically authorizing all or selected local governments to use the new zoning tool. While a few more states took this step on their own initiative, officials in, of all places, the U.S. Department of Commerce believed that other states might require assistance and inspiration to jump on the zoning bandwagon.

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78. *Norway Plains*, 67 Mass. at 267–68.

79. *See, e.g.*, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (“[T]he reasons [for the city’s passage of a zoning ordinance] are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”).

80. *E.g.*, *California v. LaRue*, 409 U.S. 109, 114 (1972) (“[T]he States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power.”).

81. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 128 N.E. 209, 209–10 (N.Y. 1920) (“The resolution referred to was passed July 25, 1916, pursuant to chapter 466 of the Laws of 1901, as amended by chapter 470 of the Laws of 1914, and as further amended by chapter 497 of the Laws of 1916. The restrictions imposed are due to the so-called Zoning Law.”).

82. *In re Opinion of Justices*, 127 N.E. 525, 526 (Mass. 1920) (determining, in an advisory opinion, that “[a]n Act to authorize Cities and Towns to limit Buildings according to their Use or Construction to Specified Districts . . . would be legal and constitutional if enacted into law”).

Herbert Hoover, serving in the cabinets of Presidents Warren Harding and Calvin Coolidge, started the ball rolling:

[H]e created the Division of Building and Housing within the National Bureau of Standards and appointed the able John Gries, a housing specialist at the Harvard University business school, to head it. Hoover instructed Gries to consult with others in the housing field and come up with ways to increase the numbers of homeowners, improve the mortgage financing system, standardize building materials, and—most significant for us today—encourage zoning to protect homeowners from commercial and industrial intrusions.<sup>83</sup>

Gries appointed a talented group of experts to the newly created Advisory Committee on City Planning and Zoning, with a subcommittee assigned to draft what became the SZEA. The original drafting subcommittee included New York lawyer Edward Bassett, U.S. Chamber of Commerce representative Morris Knowles, and New York housing expert Lawrence Veiller.<sup>84</sup>

Following a survey of existing zoning statutes and local ordinances, the subcommittee produced several drafts of a model statute beginning in late 1921, soliciting and receiving suggestions from leading experts. Even the drafts were used by state lawmakers to craft new enabling legislation.<sup>85</sup> In May 1924, the U.S. government issued the final version of *A State Zoning Enabling Act Under Which Municipalities Can Adopt Zoning Regulations*,<sup>86</sup> introduced by Commerce Secretary Hoover. In his foreword, the future President explained that “[t]his standard act endeavors to provide, so far as it is practicable to foresee, that proper zoning can be undertaken under it without injustice and without violating property rights.”<sup>87</sup>

83. Ruth Knack et al., *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, 48 LAND USE L. & ZONING DIG. 2, 3 (1996).

84. *Id.* at 4. Bassett played major roles in crafting and promoting New York City’s trailblazing zoning ordinance. *Id.*

85. See Newman F. Baker, *Zoning Legislation*, 11 CORNELL L. REV. 164 (1926). Baker offered this early scorecard of the success of the SZEA:

[I]t was adopted by eleven states within a year of its issuance in 1922. Today we find that over half of the states in our country have used it in drawing up their enactments and it is safe to say that practically all the states which have provided for zoning have felt its influence.

*Id.* at 175. Baker also cited examples of states (New Jersey, New York, and Pennsylvania) that had amended their existing zoning enabling acts to incorporate elements of the SZEA. *Id.* at 176–77.

86. SZEA 1924, *supra* note 2.

87. Herbert Hoover, *Foreword* to SZEA 1924, *supra* note 2, at III. The Department of Commerce also published and widely circulated a promotional pamphlet for zoning. See DEP’T OF COMMERCE ADVISORY COMM. ON ZONING, A ZONING PRIMER (rev. ed. 1926). The 1926 edition included a list of hundreds of “Zoned Municipalities” from 35 states and the District of Columbia. *Id.* at 8–10; see also Knack et al., *supra* note 83, at 6 (“The *Primer* turned out to be a popular publication. . . . In less than a month and a half [after its release], Gries told Hoover, the Commerce Department had distributed over 25,000 copies.”).

The 1924 version of the SZEA, like the Revised Edition issued two years later,<sup>88</sup> was divided into nine substantive sections. The first part (“Grant of Power”) in one heavily footnoted sentence: (1) provided the constitutional (police power) justification for American zoning; (2) resolved any doubt concerning whether local governments would be delegated the authority to enact zoning ordinances; and (3) conveyed the main attributes of American zoning:

For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes.<sup>89</sup>

The remaining sections described the division of municipalities into separate districts within which regulations and restrictions would be uniform (“Districts”); provided more details on the health and safety benefits of zoning (“Purposes in View”); mandated public hearings before promulgation and amendment of zoning provisions (“Method of Procedure”); created a mechanism for neighbors to object to zoning modifications (“Changes”); established a regulatory body to recommend boundary districts and regulations (“Zoning Commission”); described the make-up and responsibilities of the board charged with hearing and deciding upon special exceptions, appeals, and variances, and provided for review of the board’s decisions by writ of certiorari (“Board of Adjustment”); authorized local governments to implement and use civil and criminal remedies designed to punish those who violate zoning regulations and to prevent use and occupation of buildings not in compliance with those regulations (“Remedies”); and established that, in the event of a conflict between zoning and other land use regulations, the more restrictive rule (“higher standard”) would prevail (“Conflict With Other Laws”).<sup>90</sup>

By the middle of the twentieth century, every state had enacted state legislation that tracked very closely with the SZEA,<sup>91</sup> incorporating, often with only

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88. DEP’T OF COMMERCE ADVISORY COMM. ON ZONING, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS (rev. ed. 1926).

89. SZEA 1924, *supra* note 2, at 4–5 (footnotes omitted).

90. *Id.* at 5–12.

91. See Stuart Meck, *Model Planning and Zoning Enabling Legislation: A Short History*, in 1 AMERICAN PLANNING ASSOCIATION, MODERNIZING STATE PLANNING STATUTES: THE GROWING SMART WORKING PAPERS 1, 3 (Planning Advisory Service Report No. 462/463, 1996) (“[T]he SZEA was adopted by all 50 states and is still in effect, in modified form, in 47 states.”). In his tour de force championing replacements for public controls, Professor Robert Ellickson observed that “[t]he regulatory framework of zoning ordinances in the United States is surprisingly uniform.” Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 691 (1973).

minor variations,<sup>92</sup> components found in each of the nine sections of the model act. This record of adoption and imitation puts the SZEA in the same league as the most popular uniform or model state laws, such as the Uniform Commercial Code (“UCC”), adopted in whole or in part by all 50 states, plus the District of Columbia and the Virgin Islands,<sup>93</sup> and the Uniform Transfers to Minors Act (“UTMA”), included in the codes of all but one of those same jurisdictions.<sup>94</sup>

Of course, what distinguishes the SZEA from more “typical” uniform or model laws is the role that the federal government played in convening the skilled experts responsible for drafting the provisions, not to mention the Commerce Department’s wide promotion of the work product, efforts that would probably make officials at the National Conference of Commissioners of Uniform State Laws (“NCCUSL”) and the American Law Institute (“ALI”) green with envy. Even decades after the initial push, the provisions of the SZEA are still important component parts of state zoning statutes, despite efforts by the ALI in the 1960s and 1970s to update and augment this vestige of the Jazz Age through promulgation of *A Model Land Development Code* (“MLDC”).<sup>95</sup>

The MLDC was an ambitious project that offered states a menu of model statutory provisions from which to choose, on topics ranging from zoning substance and procedure (with a strong state presence), growth management, eminent domain, and land banking. Professor Patricia Salkin has offered a brutally honest post-mortem for the MLDC: “[T]here was little practical impact realized from this work beyond the academic exercise of debating drafts and promulgating a model code. In reality, the Model Code became little more than a shelf document.”<sup>96</sup>

In the 1990s, the American Planning Association embarked on its Growing Smart project, another large-scale effort designed to make land-use planning more

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92. For example, a few states chose the title “Board of Zoning Appeals” to perform the functions of the “Board of Adjustment.” See, e.g., OHIO REV. CODE ANN. § 519.14 LexisNexis 2009); S.C. CODE ANN. § 6-29-780 (2004); VA. CODE ANN. § 15.2-2308 (2012).

93. U.C.C. Table of Jurisdictions Wherein Code Has Been Adopted, 1 U.L.A. 1–2 (Supp. 2019).

94. UNIF. TRANSFERS TO MINORS ACT Table of Jurisdictions Wherein Code Has Been Adopted, 8C U.L.A. 1–2 (Supp. 2019). The exception, South Carolina, has held onto the UMTA’s predecessor—the Uniform Gifts to Minors Act. See S.C. CODE ANN. §§ 63-5-500 to -600 (2019).

95. AM. LAW INST., A MODEL LAND DEV. CODE: COMPLETE TEXT AND COMMENTARY (1976).

96. Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 115 (2002) (footnote omitted). In a footnote, Professor Salkin did concede that the MLDC “has, however, been influential as persuasive authority in cases in court and in advocacy positions before state legislatures, to support growth management and regional planning models.” *Id.* at 115 n.24; see also Daniel R. Mandelker, *Fred Bosselman’s Legacy to Land Use Reform*, 17 J. LAND USE & ENVTL. L. 11, 21 (2001) (“History was not kind to the [MLDC]. Although states have included a few of the ideas in the code in state legislation, the DRI [developments of regional impact] and especially the critical area proposals are the only ones that have received serious legislative attention.”).

efficient with an eye on the prize of sustainability. With talented experts and consultants such as Stuart Meck, Patricia Salkin, and others, Growing Smart showed great promise. Yet the economic realities of the Great Recession and its aftermath, as well as political apathy (at best) toward sustainability, have made it more difficult for advocates of slowing and managing growth to achieve dramatic and widespread legislative change.<sup>97</sup> So, for better and for worse, most states still in large part cling to zoning enabling statutes that can be traced directly to the Roaring Twenties.<sup>98</sup>

A legitimate question at this point would concern the role the common law plays in a legal regime that appears to be dominated by legislation, particularly state legislation adopted by a large number of sibling jurisdictions and local ordinances that often fall into the same basic patterns. Consideration of other successful model acts can be of great assistance in answering this question.

The relationship between the common law and uniform laws has three separate but related dimensions. First, many provisions of uniform acts are designed to codify preexisting, well-functioning common-law rules. For example, § 9-203(g) of the UCC (a joint project of the ALI and the NCCUSL) “codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.”<sup>99</sup> Similarly, the NCCUSL’s Uniform Trade Secrets Act, which has been adopted by all but two states,<sup>100</sup> “codifies the basic principles of common law trade secret protection, preserving its essential distinctions from patent law.”<sup>101</sup> The drafters of the NCCUSL’s Uniform Trust Code (“UTC”), used by more than 30 states, explained that “[m]uch of the [UTC] is a codification of the common law of trusts.”<sup>102</sup>

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97. See, e.g., Jerry Weitz, *The Next Wave in Growth Management*, 42/43 URB. LAW. 407, 408 (2010) (“The initial excitement and feverish paces of state legislative reform seem to have waned considerably, however, in recent years. And, given the state of the economy today, it appears unlikely that huge numbers of states will become ‘growth management states,’ or in other words, those adopting significant state-sponsored programs aimed at efficient infrastructure and growth management.”).

98. This is not to say there have been no significant modifications of zoning statutes or ordinances since the 1920s. See, e.g., CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND USE PLANNING AND THE ENVIRONMENT: A CASEBOOK* 222–29 (2010) (reviewing and providing examples of “post-Euclidean devices that local and state land use regulators have devised over the past few decades to add flexibility and responsiveness”); DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, *LAND USE LAW* §§ 10.01–10.07 (6th ed. 2018) (describing growth management programs employing devices such as urban growth boundaries and concurrency requirements).

99. U.C.C. § 9-203 cmt. 9, 3 U.L.A. 177 (AM. LAW INST. & UNIF. LAW. COMM’N 2010).

100. UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS Table of Jurisdictions Wherein Act Has Been Adopted, 14 U.L.A. 170–71 (Supp. 2019).

101. UNIF. TRADE SECRETS ACT WITH 1985 AMENDMENTS Prefatory Note, 14 U.L.A. 531 (2005).

102. UNIF. TRUST CODE Prefatory Note, 7D U.L.A. 4 (2018). Other examples include UNIF. TRUST CODE § 703, which, according to cmt., 7D U.L.A., at 243, allows co-trustees to act by majority decision (and “rejects the common law rule . . . requiring unanimity among the trustees of a private trust”); and UNIF. TRUST CODE § 602, 7D U.L.A., at 217–18,

Second, some uniform acts serve to abrogate or significantly modify preexisting common-law rules deemed out-of-date, unfair, or inefficient. The drafters of NCCUSL's Uniform Residential Landlord and Tenant Act of 1972, for example, offered this rationale for their work product (adopted by more than 20 states<sup>103</sup>):

Existing landlord-tenant law in the United States, save as modified by statute or judicial interpretation, is a product of English common law developed within an agricultural society at a time when doctrines of promissory contract were unrecognized. Thus, the landlord-tenant relationship was viewed as conveyance of a lease-hold estate and the covenants of the parties generally independent. These doctrines are inappropriate to modern urban conditions and inexpressive of the vital interests of the parties and the public which the law must protect.<sup>104</sup>

In like manner, § 705 of the UTC “rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries.”<sup>105</sup>

The third relationship between uniform statutes adopted by numerous states and the common law is more complex. At times, judges, in several cases from numerous jurisdictions over an extended period of time, are asked to resolve ambiguities in statutory provisions or to address questions that, because they fall between the lines of the legislation, were not addressed by lawmakers in their final product. This relationship, unlike the first two described above, constitutes the common law of a model or uniform act.

Once again the UCC can serve a useful prototype. As Professor Gregory Maggs has noted,

Drafters of legislation sometimes state rules that accidentally fail to address certain possible situations that may arise. This type of error tends to occur when the drafters focus their attention on the most common fact patterns, and forget about those that occur less

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which presumes that an inter vivos trust is revocable unless its terms expressly provide otherwise (abrogating the common-law presumption to the contrary).

103. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT OF 1972 Table of Jurisdictions Wherein Act Has Been Adopted, 7B U.L.A. 269 (2006) (withdrawn and superseded 2015).

104. UNIF. RESIDENTIAL LANDLORD AND TENANT ACT OF 1972 § 1.102 cmt., 7B U.L.A. 278 (2006) (UNIF. LAW COMM'N, withdrawn and superseded 2015); *see also* John E. Murray, Jr., *A Tribute to Professor Joseph M. Perillo: Contract Theories and the Rise of Neoformalism*, 71 *FORDHAM L. REV.* 869, 888 n.87 (2002) (“While it is common for courts to view U.C.C. § 2-207 as ‘rejecting’ the common law ‘mirror image’ rule of contract formation, that rule continues with respect to ‘dickered’ terms such as the subject matter and price. Thus, it is more precise to recognize U.C.C. § 2-207 as a major modification of the ‘mirror image’ rule.”).

105. UNIF. TRUST CODE § 705 (amended 2001) cmt, 7D U.L.A. 251 (UNIF. LAW. COMM'N 2018).

frequently. Eventually litigation may cause a court to confront a type of case that the drafters overlooked.<sup>106</sup>

The “most famous example” identified by Professor Maggs can be found in UCC § 2-207:

Section 2-207(1) states that a purported acceptance of an offer may suffice to form a contract even if it contains additional or different terms. Section 2-207(2) then states how courts should treat any additional terms contained in the offer. The section, however, notoriously fails to specify how courts should treat different terms. Courts, for many years, have struggled to resolve the question.<sup>107</sup>

The efforts of state and federal judges to fill in the blanks of this key provision of an important uniform act that is national in scope is an example of the development of the “common law” of the UCC.<sup>108</sup> In other words, when, over the course of an extended period of time, a critical mass of judges resolve these ambiguities or fill in these gaps, in the process citing rulings from their own and other courts and thereby creating or rejecting precedent, these judges are crafting a common law for this ubiquitous statutory regime.

American zoning was a new legislative creature that first appeared and gained a significant foothold in the second decade of the twentieth century. The rules and procedures comprising the SZEA were not addressed by preexisting common law. Therefore the first relationship noted above—*codification* of the common law—did not exist for this model act. Moreover, the experts who crafted the SZEA, and those responsible for introducing and shepherding state enabling legislation resembling and based on that model, could not have intended to abrogate substantive common-law rules,<sup>109</sup> making the second relationship equally inapplicable.<sup>110</sup>

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106. Gregory E. Maggs, *Patterns of Drafting Errors in the Uniform Commercial Code and How Courts Should Respond to Them*, 2002 U. ILL. L. REV. 81, 90 (2002).

107. *Id.* at 90–91.

108. See *id.* at 91 n.62 (citing *Daitom, Inc. v. Penwalt Corp.*, 741 F.2d 1569, 1578–80 (10th Cir. 1984), for its survey of “various approaches to the problem”). The decisions cited by the *Daitom* court derived from California, Washington, and Michigan courts, as well as federal courts applying the law of Ohio, Idaho, New York, and Kansas. See *Daitom, Inc.*, 741 F.2d at 1577–80.

109. However, see *infra* notes 184–194 and accompanying text for a discussion of the maxim that zoning was in derogation of the private property *rights* of landowners.

110. While common law private and public nuisance were features of the Anglo-American legal landscape centuries before New York City implemented zoning, it would be a gross and inaccurate exaggeration to say that zoning is simply the codification or abrogation of nuisance. The Author has previously explored the complex and dynamic connections between the common law of nuisance (private and public) and zoning and other forms of land-use regulation. See Charles M. Haar & Michael Allan Wolf, Commentary, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2176 (2002) (noting that the Supreme Court’s decision in *Village of Euclid v. Ambler* “appeared during a crucial transition period in American legal and constitutional history, as statutory and administrative law began to supplant the common law as the primary source of law governing business and private property relationships.”); Michael Allan Wolf, *Fruits of the “Impenetrable Jungle”*: *Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U.

When, over the past 90 plus years, judges from throughout the nation collectively resolved the ambiguities in, or filled in the blanks of, state enabling acts and the zoning ordinances authorized by those strikingly similar statutes, they were, in accordance with the third relationship, shaping the common law of zoning.<sup>111</sup>

#### IV. FIVE COMMON-LAW COMPONENTS OF AMERICAN ZONING

Having established (based on a longstanding and well-respected judicial exposition) the essential character of American common law, and having considered the relationship between the zoning enabling acts, particularly those sharing the substantive and structural elements of the SZEA, it is time to explore several components of the judicial contribution to the canons of zoning law.

The five Sections that follow do not provide an exhaustive compendium or restatement. Rather, they serve as a typology featuring examples representing the major categories of cases comprising the common law of zoning.

##### A. *New Developments on the Ground: Illegal Spot Zoning*

Sometimes the common law of zoning addresses situations that arise in practice that may not have been anticipated by framers of the enabling legislation. Section 3 of the SZEA, for example, mandated that zoning “regulations shall be made in accordance with a comprehensive plan.”<sup>112</sup> The drafters explained in a footnote: “This will prevent haphazard or piecemeal zoning. No zoning should be done without such a comprehensive study.”<sup>113</sup> While the U.S. Department of Commerce had also convened a body of experts to draft a Standard City Planning Enabling Act (“SCPEA”), the SCPEA was not as popular as its zoning predecessor.<sup>114</sup> This meant that, even by the 1950s, hundreds of American

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J. URB. & CONTEMP. L. 5, 11 (1996) (“[T]he links between our centuries-old methods for reconciling discordant uses—private and public nuisance—and their modern, regulatory legacies—local land-use regulation and comprehensive federal and state environmental law—are undeniable and persistent.”).

111. The Author is by no means the first to note the phenomenon of cross-pollination of zoning law across state lines. *See, e.g.*, WILLIAM A. FISCHER, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION 72 (2015) (“[W]here in-state precedents are not quite on point, the common law encourages judges to look to other state courts’ decisions.”). This Article does quibble with Professor Fischer’s additional point that “[c]ourt opinions are not coordinated with other states by anything like a model statute. Instead, the coordination comes from the state constitutional provisions that litigants invoke, and these are similar throughout the states.” *Id.* Professor Jonathan Rosenbloom has suggested to the Author that because in an enabling act state legislators are inviting local lawmakers to engage in complementary lawmaking, there is more room for judicial gloss than with a detailed substantive act such as the UCC.

112. SZEA 1924 § 3, *supra* note 2, at 6.

113. *Id.* at 6 n.22.

114. *See* Knack et al., *supra* note 83, at 8 (“By 1930, the Commerce Department reported that 35 states had adopted legislation based on the SZEA, while the SCPEA had been used by 10 states in the preparation of 14 different acts.”).

municipalities were enacting zoning ordinances without preparing a freestanding document called a comprehensive (or “master”) plan.<sup>115</sup>

In 1957, the Supreme Court of New Jersey, in *Kozesnik v. Montgomery Twp.*,<sup>116</sup> addressed this apparent discrepancy in a case rejecting a challenge brought against a township that had amended its ordinance to allow rock quarrying. The court rejected the plaintiffs’ assertion “that there can be no comprehensive plan unless it is evidenced in writing *dehors* the zoning ordinance itself.”<sup>117</sup> Although acknowledging that “the historical development did not square with the orderly treatment of the problem which present wisdom would recommend,”<sup>118</sup> the court interpreted the enabling statute’s “in accordance” language generously, concluding that “no reason is perceived why we should infer the Legislature intended by necessary implication that the comprehensive plan be portrayed in some physical form outside the [zoning] ordinance itself.”<sup>119</sup> For the next several decades, state courts from around the nation debated this question, and a 1994 intermediate appellate court could take solace in *Kozesnik* and its progeny from at least ten jurisdictions, concluding that “the better reasoned cases . . . are those which do not require a comprehensive plan separate and apart from the zoning ordinance itself.”<sup>120</sup>

Perhaps the most prominent example of this aspect of the common law of zoning is the question of spot zoning, an issue that, as noted in Part I above, arose in the *Field of Dreams* litigation. The petitioners in *Residential & Agricultural Advisory Committee, LLC v. Dyersville City Council*<sup>121</sup> attempted to demonstrate that by changing the zoning classification of the property from agricultural to commercial use the city council had engaged in “illegal spot zoning.”<sup>122</sup> The state supreme court did “acknowledge that the rezoning *appears to* constitute spot zoning,” as the surrounding property was used for agricultural purposes and because the zoning change “created a commercial ‘island’ of property amidst land zoned as agricultural.”<sup>123</sup> But appearances can be deceiving and are not necessarily outcome-determinative. Applying a “three-prong test for determining whether spot zoning is valid,”<sup>124</sup> the court concluded that the city council was justified in allowing more intensive use of the property by the new owners.

In considering the allegation that the local legislature had engaged in illegal spot zoning, the *Dyersville* court was addressing a potentially troublesome situation

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115. See Charles M. Haar, “*In Accordance with a Comprehensive Plan*,” 68 HARV. L. REV. 1154, 1157 (1955) (“For the most part, . . . zoning has preceded planning in the communities which now provide for the latter activity [zoning], and indeed, nearly one half the cities with comprehensive zoning ordinances have not adopted master plans.”).

116. 131 A.2d 1, 7–8 (N.J. 1957).

117. *Id.* at 6 (emphasis added).

118. *Id.* at 7.

119. *Id.* at 7–8.

120. *State ex rel. Chiavola v. Vill. of Oakwood*, 886 S.W.2d 74, 80–82 (Mo. Ct. App. 1994).

121. 888 N.W.2d 24 (Iowa 2016).

122. *Id.* at 43.

123. *Id.* at 46 (emphasis added).

124. *Id.*

that arose early in the life of American zoning, a situation that was not directly addressed by the SZEAs or state legislation based on, or sharing great similarities with, that federal model.<sup>125</sup> Section 5 of the SZEAs—labeled “Changes”—makes no distinctions between large- and small-scale amendments: “Such regulations, restrictions, and boundaries may from time to time be amended, supplemented, changed, modified, or repealed.”<sup>126</sup> In a footnote, the SZEAs drafters made the case for flexibility, explaining that “[i]t is obvious that provision must be made for changing the regulations as conditions change or new conditions arise, otherwise zoning would be a ‘strait-jacket’ and a detriment to a community instead of an asset.”<sup>127</sup> What may not have been anticipated was that local legislators in many municipalities would be too generous in granting zoning classification changes to owners of small parcels who were then authorized to make more intensive (and lucrative) use of their properties than their surrounding neighbors. There was also the possibility that vindictive officials could single out landowners for negative treatment by changing their zoning classifications to their financial detriment.

The term “spot zone” found its way into the legal lexicon at least by the 1930s, as illustrated by the 1938 decision of the Supreme Court of Missouri in *Mueller v. C. Hoffmeister Undertaking & Livery Co.*<sup>128</sup> In that case, the state high court affirmed the trial court’s ruling that the St. Louis Board of Aldermen had acted unconstitutionally when it “amended the general zoning ordinance, by passing what is commonly known as spot zoning bill or ordinance, which changed all of defendant’s property fronting on Compton Avenue from residence classification to commercial classification.”<sup>129</sup> Contrary to the mortuary owner’s assertion that this was simply “a valid amendment to the general zoning ordinance,”<sup>130</sup> the *Mueller* court, citing Missouri and Illinois decisions in support of neighbors who challenged landowners that benefited from suspect zoning changes,<sup>131</sup> concluded “that the classification made of defendant’s property in the present case by the spot zone ordinance was, under the facts, arbitrary and without substantial reason, and that said ordinance is void.”<sup>132</sup>

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125. See MANDELKER & WOLF, *LAND USE LAW*, *supra* note 98, § 6.27 (“Zoning statutes and ordinances authorize amendments to the zoning map without differentiating between ‘spot’ and other types of rezonings.”).

126. SZEAs 1924 § 5, *supra* note 2, at 7.

127. *Id.* at 7 n.30; cf. Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 11 (2010) (“The drafters of the first zoning ordinances and the standard state zoning enabling act believed that once enacted, the zoning ordinance would resolve most issues, and exceptions to the zoning would be rare. That has not proved to be the case, for many reasons.”).

128. 121 S.W.2d 775 (1938).

129. *Id.* at 776.

130. *Id.*

131. *Id.* at 775–77 (citing *Wippler v. Hohn*, 110 S.W.2d 409 (Mo. 1937) and *Michigan-Lake Bldg. Corp. v. Hamilton*, 172 N.E. 710 (Ill. 1930)).

132. *Id.* at 776.

Over the course of the succeeding eight decades, state and federal<sup>133</sup> courts have taken various approaches to distinguishing permissible from impermissible small-scale zoning amendments. Indeed, the “three-prong test” used by the *Dyersville* court—“(1) whether the new zoning is germane to an object within the police power; (2) whether there is a reasonable basis for making a distinction between the spot zoned land and the surrounding property; and (3) whether the rezoning is consistent with the comprehensive plan”<sup>134</sup>—is a distillation of factors derived from dozens of opinions written by judges in numerous jurisdictions.<sup>135</sup> Spot zoning thus serves as an instructive example of Chief Justice Shaw’s idea that when a “general rule has been modified, limited and applied, according to particular cases, such judicial exposition, when well settled and acquiesced in, becomes itself a precedent, and forms a rule of law for future cases, under like circumstances.”<sup>136</sup>

While defining “spot zoning” and determining its validity remain challenges for judges and advocates to this day,<sup>137</sup> it is undeniable that spot zoning was and remains an essential component of zoning law. Moreover, spot zoning remains the quintessential example of judges shaping the common law of zoning to address developments on the ground that were not anticipated by statutory drafters.

#### ***B. Judicial Review Questions: Zoning Decisions as Legislative (or Quasi-Judicial)***

Questions of judicial review—particularly determinations of whether zoning decisions such as amendments, variances, and special use permits are legislative or quasi-judicial in nature—comprise another substantial segment of the common law of zoning. Once again, the *Dyersville* litigation serves as an instructive

133. See, e.g., *Wilcox v. City of Pittsburgh*, 121 F.2d 835, 837 (3d Cir. 1941) (“[S]o the evil of spot zoning and gradual return to original chaos is avoided.”) (footnote omitted).

134. *Residential & Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 46 (Iowa 2016) (quoting *Perkins v. Bd. of Supervisors*, 636 N.W.2d 58, 67 (Iowa 2001)).

135. See, e.g., *Parsons v. Town of Wethersfield*, 60 A.2d 771, 773 (Conn. 1948) (“The finding supports the conclusion that the change in zone was *in accordance with a comprehensive plan* for zoning the town.”) (emphasis added); *Polk v. Axton*, 208 S.W.2d 497, 500 (Ky. Ct. App. 1948) (“While the City Council has broad powers in respect to zoning, it is without authority to single out one lot in an amendatory ordinance and arbitrarily remove therefrom restrictions imposed upon the remaining portions of the same zoning district. There *must be reasonable ground or basis for the discrimination.*”) (emphasis added); *Esso Standard Oil Co. v. Town of Westfield*, 110 A.2d 148, 152 (N.J. Super. Ct. App. Div. 1954) (“The tenor of the neighborhood cannot be disturbed by wrenching a small lot from its surroundings and giving it a new rating *not germane to an object within the police power.*”) (emphasis added). For discussions of various tests to determine the validity of alleged spot zoning, see, for example, MANDELKER & WOLF, *supra* note 98, at §§ 6.28–6.31; PATRICIA E. SALKIN, *AMERICAN LAW OF ZONING* §§ 6A.1–13 (5th ed. 2019); 3 EDWARD H. ZIEGLER, JR., *RATHKOPF’S THE LAW OF ZONING AND PLANNING* ch. 41 (4th ed. 1994).

136. *Norway Plains Co. v. Bos. & Me. R.R.*, 67 Mass. 263, 267 (1854); see also *supra* text accompanying note 65.

137. See MANDELKER & WOLF, *supra* note 98, § 6.27 (“Probably no term in zoning jurisprudence is used more frequently by the courts and is less understood than ‘spot zoning.’”).

example. The neighboring property owners challenging the rezoning of the *Field of Dreams* site alleged that the city “council’s actions were quasi-judicial in nature rather than legislative,”<sup>138</sup> hoping to convince the court not to employ a limited scope of review.

As noted in Part I, the *Dyersville* court, after surveying relevant precedents, opted for the legislative alternative, meaning generous judicial deference to the local legislature:

Zoning regulations carry a strong presumption of validity. A zoning regulation “is valid if it has any real, substantial relation to the public health, comfort, safety, and welfare, including the maintenance of property values.” If the reasonableness of a zoning ordinance is “fairly debatable,” then we decline to substitute our judgment for that of the city council or board of supervisors.<sup>139</sup>

The provenance of the “fairly debatable” test is none other than *Village of Euclid v. Ambler Realty Co.*,<sup>140</sup> the seminal U.S. Supreme Court case that established the constitutionality of zoning. Justice George Sutherland wrote for the majority: “If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.”<sup>141</sup>

Over the subsequent 90 plus years, many courts and commentators have expressed discomfort with the notion that all zoning decisions made by the local legislature constitute “legislative” decisions that are owed such generous deference. The Supreme Court of Iowa explained in *Dyersville*, for example, “that there are some situations in which a zoning decision can take on a quasi-judicial nature that may necessitate a different standard of review than the normally limited standard of review we utilize when reviewing zoning decisions.”<sup>142</sup> As noted above,<sup>143</sup> one such situation arose in that same court’s decision in *Sutton v. Dubuque City Council*,<sup>144</sup> involving a city council’s reclassification of land “from a commercial recreation district to a planned unit development (PUD) district with a residential district designation.”<sup>145</sup> For more than 50 years, American courts throughout the nation have attempted to draw a defensible demarcation between legislative and quasi-judicial decisions in zoning cases. While the variations between state court approaches are greater than in other areas such as spot zoning, the effort to resolve questions regarding judicial review remains an instructive aspect of the judicial project of crafting a common law of zoning.

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138. *Dyersville*, 888 N.W.2d at 40.

139. *Id.* at 43 (citations omitted).

140. 272 U.S. 365 (1926).

141. *Id.* at 388.

142. *Dyersville*, 888 N.W.2d at 40–41.

143. *See supra* notes 40–43 and accompanying text.

144. 729 N.W.2d 796 (Iowa 2006).

145. *Id.* at 797.

In her persuasive and influential 1983 article on “piecemeal land controls,”<sup>146</sup> Professor Carol Rose observed that judges did not sit on the sidelines: “instead of seeing small changes as legislative acts that are judicially reviewable only for arbitrariness, courts began to say that in making changes, local governmental bodies were acting in judicial or quasi-judicial capacities.”<sup>147</sup> The judicial text that started this ball of confusion rolling was the opinion of the Supreme Court of Oregon in *Fasano v. Board of County Commissioners*.<sup>148</sup>

The *Fasano* case concerned a successful challenge brought by homeowners to the Board’s decision to change the zoning classification for a 32-acre parcel from Single Family Residential to Planned Residential, which would have enabled the landowner to build a mobile home park.<sup>149</sup> In affirming the trial and intermediate appellate courts’ ruling in favor of the homeowners, the Supreme Court of Oregon drew a crucial distinction between legislative zoning decisions made by local governments and “exercise[s] of judicial authority” by those same elected bodies, using the instant case as an instructive example:

Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority. On the other hand, a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority and its propriety is subject to an altogether different test. An illustration of an exercise of legislative authority is the passage of the ordinance by the Washington County Commission in 1963 which provided for the formation of a planned residential classification to be located in or adjacent to any residential zone. An exercise of judicial authority is the county commissioners’ determination in this particular matter to change the classification of A.G.S. Development Company’s specific piece of property.<sup>150</sup>

There were procedural and substantive components to this distinction. First, unlike in the legislative setting, the *Fasano* court placed “the burden of proof . . . , as is usual in judicial proceedings, upon the one seeking change.”<sup>151</sup> Second, that burden was much heavier:

The more drastic the change, the greater will be the burden of showing that it is in conformance with the comprehensive plan as implemented by the ordinance, that there is a public need for the kind

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146. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983).

147. *Id.* at 850.

148. 507 P.2d 23 (Or. 1973).

149. *Id.* at 25.

150. *Id.* at 26.

151. *Id.* at 29.

of change in question, and that the need is best met by the proposal under consideration.<sup>152</sup>

Fully cognizant that its position would expose it “to criticism by legal scholars who think it desirable that planning authorities be vested with the ability to adjust more freely to changed conditions,” the Oregon high court revealed the key motivating factor for shifting and imposing these burdens: “[H]aving weighed the dangers of making desirable change more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are more to be feared.”<sup>153</sup> The dark underside of zoning—undue influence, favoritism, and bribery—was thus exposed to the light and confronted by a state supreme court.

Would other state courts follow suit? The answer is “yes, no, and yes and no.” Within a decade, as chronicled by Professor Rose, the highest courts in Kansas, Washington, Hawaii, and the District of Columbia had embraced the (quasi-)judicial characterization of small-scale (piecemeal) zoning amendments.<sup>154</sup> The California and Minnesota high courts begged off,<sup>155</sup> and the Supreme Court of Michigan adopted and then abandoned the *Fasano* approach.<sup>156</sup>

The development of this aspect of the common law of zoning continued in subsequent decades, though at a slower pace. In 1993, the Supreme Court of Florida, in *Board of County Commissioners v. Snyder*,<sup>157</sup> checked the quasi-judicial box,<sup>158</sup> an important move from a state with a burgeoning population whose legislature had taken a leading role in growth management.<sup>159</sup> In contrast, the Supreme Court of Alaska, at the beginning of the new century, rejected *Snyder*: “Courts in some other jurisdictions have held that small-scale rezonings should be treated as quasi-judicial proceedings. But we have chosen instead to treat small-scale rezonings as legislative decisions.”<sup>160</sup>

Even those jurisdictions that chose not to follow the lead of the *Fasano* court in cases involving rezonings were engaged in the process of “making” the

152. *Id.* at 29.

153. *Id.* at 29–30.

154. *See* Rose, *supra* note 146, at 845 n.18.

155. *See id.* at 845 n.19.

156. *Id.*

157. 627 So. 2d 469 (Fla. 1993).

158. *Id.* at 474–75 (“[L]egislative action results in the *formulation* of a general rule of policy, whereas judicial action results in the *application* of a general rule of policy . . . . [T]he board’s action on Snyder’s application was in the nature of a quasi-judicial proceeding and properly reviewable by petition for certiorari.”).

159. *See, e.g.,* Nancy Stroud, *A History and New Turns in Florida’s Growth Management Reform*, 45 J. MARSHALL L. REV. 397, 398 (2012) (footnotes omitted) (“[I]n 1939, the state population stood at less than 1.8 million, concentrated in several coastal cities. By 1972, growth had expanded exponentially and Florida was the fastest growing state in the country, with a population of approximately 6.7 million.”).

160. *Cabana v. Kenai Peninsula Borough*, 21 P.3d 833, 836 (Alaska 2001) (footnotes omitted) (citing *Snyder*, 627 So. 2d at 474).

common law of zoning. Moreover, despite some concerns,<sup>161</sup> the judicial project of drawing meaningful distinctions between legislative and nonlegislative land use decisions by local governments—in cases involving topics such as zoning referenda, variances, and special use permits—continues apace.<sup>162</sup> In other words, following Chief Justice Shaw’s formulation, this aspect of the common law of zoning has been “modified and adapted to the circumstances of all the particular cases that fall within it,”<sup>163</sup> even those cases that could not have been anticipated by the judges in *Fasano* and other seminal decisions.

### C. *The Equity of Zoning: Self-Imposed Hardships*

Judges in zoning cases, as they have in other disputes over the use of real property,<sup>164</sup> have grafted equitable principles onto the body of zoning law. The SZEA, like its progeny in state enabling legislation, provided that a Board of Adjustment, appointed by the local legislature, would have the authority

[t]o authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.<sup>165</sup>

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161. See, e.g., Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 342 (2013) (“There are some problems with the legislative/adjudicative distinction, however. Perhaps most importantly, the boundary between the categories of legislative and adjudicative is not nearly as clear-cut in the local government arena as it may be in other contexts.”). Professor Nestor Davidson has prodded the Author to consider why some common law of zoning aspects (such as spot zoning) gain more traction than others (such as the *Fasano* distinction for rezonings). My initial impression is that structural and jurisdictional innovations occupy a position closer to the legislative portion of the governmental spectrum, which could explain why judges wary of charges of judicial activism stay on the sidelines. This would be a fruitful avenue for further research.

162. See, e.g., *City of Cumming v. Flowers*, 797 S.E.2d 846, 848 (Ga. 2017) (“This case involves the procedure by which a local zoning board’s quasi-judicial decision on a variance request may be appealed to the superior court.”); *Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls*, 697 N.E.2d 181, 186 (Ohio 1998) (“The passage by a city council of an ordinance approving a site plan for the development of land, pursuant to existing zoning and other applicable regulations, constitutes administrative [not legislative] action and is not subject to referendum proceedings.”); *Armstrong v. Turner Cty. Bd. of Adjustment*, 772 N.W.2d 643, 650–51 (S.D. 2009) (“[A] local zoning board’s decision to grant or deny a conditional use permit is quasi-judicial and subject to due process constraints.”).

163. *Norway Plains Co. v. Bos. & Me. R.R.*, 67 Mass. 263, 267 (1854); see also *supra* text accompanying note 69.

164. Perhaps the best example, and the one most relevant to zoning, is the way in which courts developed the notion of an equitable servitude, a theory that enables a party benefiting from a restrictive covenant to enforce that covenant against one who took ownership with knowledge of the restriction, even though the legal formalities for enforcement were lacking. See, e.g., POWELL ON REAL PROPERTY, *supra* note 3, § 60.01[4].

165. SZEA 1924 § 7, *supra* note 2, at 10.

The ease with which applicants have been able to convince board members of the presence of an “unnecessary hardship,” and thereby secure a variance from use, height, and area restrictions, has long caused concern among legal and planning commentators.<sup>166</sup>

Judicial recognition of the problem came early, as illustrated by the 1927 opinion of Chief Judge (later Justice) Benjamin Cardozo of the Court of Appeals of New York in *People ex rel. Fordham Manor Reformed Church v. Walsh*.<sup>167</sup> The state high court found that New York City’s Board of Appeals had improperly granted a variance to a landowner who “wished to build a garage upon the southerly 150 feet of his total plottage, but the zoning law forbade.”<sup>168</sup> In support of its ruling, the Board noted the existence of a garage adjoining the applicant’s parcel, explaining that “[t]he existence of said garage which accommodates approximately 180 cars is sufficient justification to permit another garage next door.”<sup>169</sup>

The unanimous court could find no evidence in the record “that this land, if not occupied by a garage, is incapable of application to profitable use.”<sup>170</sup> Chief Judge Cardozo showed little sympathy for the landowner who acquired the property with notice of the residential restriction and who probably paid a reduced price for that reason.<sup>171</sup> Tellingly, he noted, “[t]here has been confided to the board a delicate jurisdiction and one easily abused.”<sup>172</sup> Seeing no evidence in the record that the zoning scheme had imposed upon this landowner an “unnecessary hardship,” the court invalidated the variance.

Concern that landowners were taking undue advantage of the empathy of their neighbors on the board of adjustment (known as the board of zoning appeals in some jurisdictions<sup>173</sup>) eventually led courts to develop a new rule that variance applicants would be disqualified if the only hardship they could demonstrate was self-created or self-imposed. *Josephson v. Autrey*,<sup>174</sup> a 1957 decision of the Supreme Court of Florida, is a good representative of this class of cases. After the appellees

166. See, e.g., Robert M. Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353, 354, nn.9–14 (1962) (citing criticisms beginning in the 1920s); Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 273 (1962) (“With increasing vigor critics have charged that boards of adjustment pay little attention to the legal limitations on their powers and operate without safeguards adequate to assure citizens of equal treatment.”).

167. 155 N.E. 575 (N.Y. 1927).

168. *Id.* at 576–77.

169. *Id.* at 577 (quoting board hearing proceedings).

170. *Id.*

171. *Id.* (“Presumably this owner, who acquired the parcels with notice of the zoning resolution, paid a consideration appropriate to the limitation of the use. There is no element of the unexpected or the incalculable to aggravate his plight.”).

172. *Id.* at 578.

173. See, e.g., VA. CODE ANN. § 15.2-2308(A) (2012) (“Every locality that has enacted or enacts a zoning ordinance pursuant to this chapter or prior enabling laws shall establish a board of zoning appeals that shall consist of either five or seven residents of the locality. . . appointed by the circuit court for the locality.”).

174. 96 So. 2d 784 (Fla. 1957).

purchased a parcel of land in Daytona Beach, the zoning for the neighborhood was changed from residential use to a zoning classification that allowed motels and accommodations for tourists. This was not good enough for the appellees, who hoped to build a gasoline filling station on the site. Rather than asking the local legislature for a rezoning, the appellees sought a use variance<sup>175</sup> from the zoning board of appeals. A neighboring landowner challenged the board's decision to grant the variance, and the trial court affirmed. The neighbor had better luck in the supreme court, which was troubled by the fact that the appellees had "contended 'hardship' solely on the basis that the land was not worth what they paid for it burdened by the use restriction which they knew to be in existence when they bought the property."<sup>176</sup>

The *Josephson* court, citing Florida cases and decisions from New York, New Jersey, Maryland, Rhode Island, and Minnesota, explained that "[w]hen the owner himself by his own conduct creates the exact hardship which he alleges to exist, he certainly should not be permitted to take advantage of it."<sup>177</sup> The court accurately noted that "[t]he authorities are generally in accord on the proposition that in seeking a variance on the ground of a unique or unnecessary hardship, a property owner cannot assert the benefit of a 'self-created' hardship."<sup>178</sup> As the phrases "self-created hardship" and "self-imposed hardship" had first appeared in the variance context in New York intermediate appellate and trial court cases from 1942 and 1950,<sup>179</sup> the principle and the terminology had thus spread widely and swiftly.

There being no language in the enabling legislation disqualifying variance applicants who appeared to be gaming the zoning system, American courts, as had English courts a century before in the covenant context,<sup>180</sup> exercised their equitable powers<sup>181</sup> and considered the applicant landowner's knowledge of the land use

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175. See, e.g., *Alumni Control Bd. v. City of Lincoln*, 137 N.W.2d 800, 802 (Neb. 1965) ("A use variance is one which permits a use other than that prescribed by the zoning ordinance in a particular district," while an area variance "is primarily a grant to erect, alter, or use a structure for a permitted use in a manner other than that prescribed by the restrictions of the zoning ordinance.").

176. *Josephson*, 96 So. 2d at 789. Professor William Fischel reminded the Author that such behavior is the classic bootstrap that is universally condemned by judges and economists alike.

177. *Id.*

178. *Id.*

179. See *Thomas v. Bd. of Standards & Appeals*, 33 N.Y.S.2d 219, 222 (N.Y. App. Div. 1942) ("In no event may such a self-created hardship be made the basis for a variance . . ."); *Union Free Sch. Dist. v. Vill. of Hewlett Bay Park*, 102 N.Y.S.2d 81, 83 (N.Y. Sup. Ct. 1950) ("[T]he plaintiff could not obtain a variance for it could not prove that any hardship was not self-imposed.").

180. The key, if not seminal case is *Tulk v. Moxhay* (1848) 41 Eng. Rep. 1143, 1144 (Ch) ("[N]othing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.").

181. See, e.g., *Hydeck v. Suffield Twp. Bd. of Zoning Appeals*, No. 91-P-2319, 1992 Ohio App. LEXIS 1017, at \*15 (Mar. 6, 1992) (Nader, J., concurring) ("[T]he appellee

restriction before acquiring the property a key factor in deciding whether to bind that owner to the terms of the restriction. Over time, to quote Chief Justice Shaw, this rule was “rendered precise, specific, and adapted to practical use, by usage, which is the proof of their general fitness and common convenience, but still more by judicial exposition.”<sup>182</sup> Moreover, state lawmakers apparently took note, as several legislatures subsequently incorporated this rule into the variance provisions of their enabling legislation.<sup>183</sup>

***D. Maxims and Motifs: Derogation, Use, and Ownership***

One of the more familiar (and quaint and curious) practices of judges formulating the common law has been the invocation of legal maxims. About these oft-used phrases (frequently though not necessarily in Latin)—which are known pejoratively as platitudes, truisms, or chestnuts—law professor Jeremiah Smith memorably wrote in 1895:

The truth is, that there are maxims and maxims; some of great value, and some worse than worthless. And the really valuable maxims are peculiarly liable to be put to wrong use. . . . How common it is to meet with decisions on important points, where the only hint at an expression of the *ratio decidendi* consists in the quotation, without comment, of a legal maxim!<sup>184</sup>

Smith’s skepticism echoed in Columbia law professor (and legal-realist lion) Karl Llewellyn’s (in)famous 1950 article deconstructing *The Rules or Canons About How Statutes Are to be Construed*: “When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. As in argument over points of case law, the accepted convention, still, unhappily requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point.”<sup>185</sup>

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board may have relied, in part, on the fact that the hardship was self created. The equities of appellant’s conduct may be weighed pursuant to the seventh factor promulgated in *Duncan [v. Vill. of Middlefield]*, 491 N.E.2d 692, 695 (Ohio 1986) (i.e., that ‘substantial justice’ be done.”); see also Jeremiah Smith, *The Use of Maxims in Jurisprudence*, 9 HARV. L. REV. 13, 19 (1895) (“Indeed, the adoption by the common law of many doctrines which were originally purely equitable, has been so complete that it has often been seriously, though unsuccessfully, contended that the jurisdiction originally exercised by courts of equity in like cases should now be regarded as abrogated.”).

182. See *supra* text accompanying note 69.

183. See, e.g., UTAH CODE ANN. 1953 § 10-9a-702 (LexisNexis 2012) (“[T]he appeal authority may not find an unreasonable hardship if the hardship is self-imposed or economic.”); see also SALKIN, *supra* note 135, at § 13:16 n.1 (list of similar statutory provisions).

184. Smith, *supra* note 181, at 13.

185. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); see also Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1328 (2018) (footnote omitted) (“At least since Professor Karl Llewellyn’s famous exposition in 1950, canons have always been part of the intellectual debate over statutory interpretation. Are there

In fact, one of the most popular zoning maxims cited with regularity by state courts is a variation of one of Llewellyn's canons: "Statutes in derogation of the common law will not be extended by construction."<sup>186</sup> The earliest sighting of the zoning version of this maxim came in a 1932 decision of the Supreme Court of North Carolina, a case involving property owners who had been given permission to install gasoline pumps on their property before a city's zoning ordinance went into effect.<sup>187</sup> The question before the court concerned whether the landowners, by "the placing of a grease dispenser and certain merchandise upon the premises" had "started" activities that could be deemed "construction" on the site within the 90-day period specified in the new ordinance.<sup>188</sup> The court read the ordinance narrowly, in accordance with the principle that "[z]oning ordinances are in derogation of the right of private property, and where exemptions appear in favor of the property owner, they should be liberally construed in favor of such owner."<sup>189</sup> Three years later, the New York Court of Appeals offered this variation in a case involving permission to lower the curb to allow access to parking: "The zoning ordinance is in derogation of common law rights to the use of private property. Its provisions should not be extended by implication."<sup>190</sup> By the end of the next decade, state high courts in New Jersey, Maryland, Arkansas, Oklahoma, Louisiana, Arizona, and Connecticut had climbed aboard the derogation bandwagon, often citing decisions from courts far and wide.<sup>191</sup>

Although some courts have taken a more deferential stance to the legislative branch,<sup>192</sup> most other state high courts have at least recited the maxim

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too many? Are they simply tools for post-hoc justification of what is really result-oriented judging?").

186. Llewellyn, *supra* note 185, at 401.

187. *In re W.P. Rose Builders' Supply Co.*, 163 S.E. 462, 463 (N.C. 1932).

188. *Id.*

189. *Id.* at 464.

190. *Monument Garage Corp. v. Levy*, 194 N.E. 848, 850 (N.Y. 1935).

191. The key cases, arranged chronologically, include *Bronston v. Plainfield*, 194 A. 809, 810 (N.J. 1937); *Landay v. Bd. of Zoning Appeals*, 196 A. 293, 296 (Md. 1937) (citing *Levy*); *440 E. 102nd St. Corp. v. Murdock*, 34 N.E.2d 329, 331 (N.Y. 1941); *City of Little Rock v. Williams*, 177 S.W.2d 924, 925 (Ark. 1944) (citing *Murdock*); *Modern Builders, Inc. v. Bldg. Inspector*, 168 P.2d 883, 885 (Okla. 1946) (citing *Landay*, distinguishing *Howard*); *Carrere v. Orleans Club*, 37 So. 2d 715, 720 (La. 1948) (citing *Murdock*, *City of Little Rock*, and several other cases); *Kubby v. Hammond*, 198 P.2d 134, 138 (Ariz. 1948) (citing *City of Little Rock* and *Murdock*); *Langbein v. Bd. of Zoning Appeals*, 67 A.2d 5, 7 (Conn. 1949) (quoting *In re W.P. Rose Builders' Supply Co.*).

192. See, e.g., *City of Juneau v. Thibodeau*, 595 P.2d 626, 635 n.31 (Alaska 1979) (curiously referring to derogation as the "minority rule"); *Women's Christian Ass'n v. Brown*, 190 S.W.2d 900, 904 (Mo. 1945) ("Defendants also contend for the rule of strict construction of zoning laws because they are in derogation of common law. That rule was abolished in this state in 1917."); *Howard v. Mahoney*, 106 P.2d 267, 269 (Okla. 1940) ("There are authorities to the effect that zoning ordinances are in derogation of the common-law rights to use property so as to realize its greatest utility ([*Levy*]), and should not be extended by implication to cases and situations clearly not within the scope of the purpose and intent manifest in the language ([*Landay*]); but there are also authorities to the effect that such ordinances will be given a reasonable and fair construction in the light of the subject dealt with and the manifest intention

favorably.<sup>193</sup> Even in the age of the sharing economy, the bandwagon is not losing speed, as illustrated by the opinion of a New York appellate tribunal in an unsuccessful zoning challenge to a homeowner who “began listing the property on the Internet offering to rent it for terms ranging from one night to a month or an entire season.”<sup>194</sup> Treatise writers, too, have acknowledged the popularity of the derogation maxim,<sup>195</sup> while cautioning that, as with most maxims, its recitation by

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of the lawmakers. Appeal of Perrin, 305 Pa. 42, 156 A. 305, 79 A.L.R. 912, [(1931)], and other cases.”); *see also* MO. ANN. STAT. § 1.010(1) (West 2019) (“[B]ut no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law, or with such statutes or acts of parliament; but all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.”).

193. The key cases, arranged chronologically, include *Lukens v. Zoning Bd. of Adjustment*, 80 A.2d 765, 767 (Pa. 1951); *Red Acres Imp. Club, Inc. v. Burkhalter*, 241 S.W.2d 921, 923 (Tenn. 1951); *Toulouse v. Bd. of Zoning Adjustment*, 87 A.2d 670, 673 (Me. 1952); *Purdy v. Moise*, 75 S.E.2d 605, 607 (S.C. 1953); *Lamothe v. Zoning Bd. of Review of Cumberland*, 98 A.2d 918, 920 (R.I. 1953); *Hauser v. Arness*, 267 P.2d 691, 698 (Wash. 1954) (quoting *Landay*); *City of Sioux Falls v. Cleveland*, 70 N.W.2d 62, 65 (S.D. 1955) (quoting *Levy*); *Morin v. Johnson*, 300 P.2d 569, 571 (Wash. 1956) (citing *Hauser and Kubby*); *In re Willey*, 140 A.2d 11, 14 (Vt. 1958) (citing *Toulouse*); *Bd. of Cty. Comm’rs v. McNally*, 95 N.W.2d 153, 160 (Neb. 1959); *Lane Cty. v. R. A. Heintz Constr. Co.*, 364 P.2d 627, 630 (Or. 1961); *Ridgewood Land Co. v. Simmons*, 137 So. 2d 532, 535 (Miss. 1962); *Ben Lomond, Inc. v. City of Idaho Falls*, 448 P.2d 209, 219 (Idaho 1968); *Cohen v. Dane County Bd. of Adjustment*, 246 N.W.2d 112, 114 (Wis. 1976); *Nesbit v. City of Albuquerque*, 575 P.2d 1340, 1342 (N.M. 1977) (citing *Kubby*); *In re Appeal of Univ. Circle, Inc.*, 383 N.E.2d 139, 141 (Ohio 1978); *Cty. of Lake v. First Nat’l Bank*, 402 N.E.2d 591, 593 (Ill. 1980); *Batalden v. Cty. of Goodhue*, 308 N.W.2d 500, 501 (Minn. 1981); *Carl M. Freeman Assocs., Inc. v. Green*, 447 A.2d 1179, 1182 (Del. 1982); *Whistler v. Burlington N. R.R.*, 741 P.2d 422, 425 (Mont. 1987); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 953 P.2d 1315, 1330 (Haw. 1998); *Snake River Brewing Co. v. Town of Jackson*, 39 P.3d 397, 404 (Wyo. 2002); *Story Bed & Breakfast, LLP v. Brown Cty. Area Plan Comm’n*, 819 N.E.2d 55, 66 (Ind. 2004); *Fulton Cty. v. Action Outdoor Advert., JV, LLC*, 711 S.E.2d 682, 686 (Ga. 2011).

194. *Fruchter v. Zoning Bd. of Appeals*, 20 N.Y.S.3d 701, 702 (N.Y. App. Div. 2015). The court chose not to adopt a deferential posture, noting, “[s]ince ‘zoning restrictions are in derogation of the common law . . . [they] are strictly construed against the regulating municipality.’” *Id.* at 703 (quoting *Saratoga Cty. Econ. Opportunity Council, Inc. v. Vill. of Ballston Spa Zoning Bd. of Appeals*, 977 N.Y.S.2d 419, 421 (N.Y. App. Div. (2013))).

195. *See, e.g., MANDELKER & WOLF, supra* note 98, § 1.13 (“Another rule that influences land use cases, although it appears out of place in modern legal jurisprudence, is the rule that a court must construe zoning ordinances strictly because they are in derogation of property rights.”); 1 EDWARD H. ZIEGLER, JR., *supra* note 135, § 5:03(3)(a) (“Since a zoning law or ordinance is in derogation of the owner’s common law rights in the use of his land, most state courts hold that ordinance provisions will be construed in favor of the free use of land.”); SALKIN, *supra* note 135, at § 41:4 (“The rule requiring strict construction of regulations in derogation of the common law is recited in most opinions relating to the meaning of words found to be ambiguous.”).

judges does not necessarily determine or indicate the substantive outcome of the case.<sup>196</sup>

American zoning law features another maxim—that zoning concerns use, not ownership—which serves as a kind of leitmotif for the entire field. Indeed, this maxim serves as a valuable example of Chief Justice Shaw’s “broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy.”<sup>197</sup> The idea actually appears to precede its most familiar formulation, as illustrated in a 1945 decision of the Supreme Court of Rhode Island, *Olevson v. Zoning Board of Review*.<sup>198</sup> The court reversed the grant by the town council (sitting as a zoning review board) of a “petition for variations and exceptions,” which would have permitted a potential purchaser of the property in a restricted residential district (Duffy) to operate a boarding and rooming house on the condition “that the variation or exception shall apply only to Duffy personally and shall not run with the real estate or pass to his heirs, devisees, lessees or assigns.”<sup>199</sup>

The *Olevson* court was not troubled by either the availability of “variances and exceptions” or by the practice of imposing conditions thereon.<sup>200</sup> What struck the court as “unusual and peculiar,” and ultimately improper, was the *personal* nature of the condition: “The variation or exception as granted is made applicable to Duffy as such vendee, and the condition attached to such grant is plainly personal to Duffy himself, instead of being attached to the use of the Thompson property as such.”<sup>201</sup> This was problematic, the court explained, because the zoning board of review was “concerned fundamentally only with matters relating to the real estate itself then under consideration and with the use to be made thereof, but not with the person who owns or occupies it.”<sup>202</sup>

Ten years later, James Metzenbaum, in the second edition of his early zoning treatise, cited *Olevson* for the proposition that “the ‘use’ limitation may be said to be the cardinal and primary motif of comprehensive zoning; *not* its ownership.”<sup>203</sup> Metzenbaum had established his zoning bona fides by successfully representing the Village of Euclid in its defense of zoning in the U.S. Supreme

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196. See, e.g., MANDELKER & WOLF, *supra* note 98, § 1.13 (“The rule survives, but its impact is more limited than its statement suggests, as courts usually apply the strict construction rule only when they interpret definitions and restrictions in zoning ordinances.”); SALKIN, *supra* note 135, § 41:9 (“In fact, each rule of construction may be matched by its opposite, leaving the entire matter to the unfettered discretion of the court.”); 1 EDWARD H. ZIEGLER, JR., *supra* note 135, § 5:03(a) (“[T]his rule of construction favoring the free use of land should not be applied where common sense indicates the result would be contrived, unreasonable, or absurd in view of the manifest object and purpose of the ordinance.”).

197. *Norway Plains Co. v. Bos. & Me. R.R.*, 67 Mass. 263, 267 (1854); see also *supra* text accompanying note 69.

198. 44 A.2d 720 (R.I. 1945).

199. *Id.* at 721–22.

200. *Id.*

201. *Id.* at 722.

202. *Id.*

203. 1 JAMES METZENBAUM, *THE LAW OF ZONING* 12 (2d ed. 1955).

Court,<sup>204</sup> four years before *The Law of Zoning* first hit the shelves.<sup>205</sup> Metzenbaum even gets credit for inspiring a more familiar articulation of this maxim: two years after *Olevson*, the Supreme Court of Errors of Connecticut, in *Abbadessa v. Board of Zoning Appeals*,<sup>206</sup> protecting the continuation of a nonconforming use, cited the first edition of *The Law of Zoning* for the proposition that “[z]oning is concerned with the use of specific existing buildings and lots, and not primarily with their ownership.”<sup>207</sup>

Over the succeeding seven decades, the use-not-ownership maxim would appear in numerous decisions from throughout the nation, in cases involving not only conditions<sup>208</sup> and nonconformities,<sup>209</sup> but also certificates of occupancy,<sup>210</sup> residential use restrictions,<sup>211</sup> change of ownership of an approved development,<sup>212</sup>

204. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 367 (1926); see also MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: EUCLID V. AMBLER 49–53, 57–63, 65–74, 89–93 (2008).

205. JAMES METZENBAUM, THE LAW OF ZONING (1930).

206. 54 A.2d 675 (Conn. 1947).

207. *Id.* at 677 (citing METZENBAUM, *supra* note 205, at 14).

208. In addition to *Olevson*, see for example *Preston v. Zoning Bd. of Review*, 154 A.3d 465, 468 (R.I. 2017) (“The fourth condition explicitly provides that . . . ‘if the [Sposatos] sell this property the next owners are not permitted to keep alpaca.’ However, it is a basic principle that a zoning authority is not free to impose such a condition on the use of land.”).

209. In addition to *Abbadessa*, see for example *Arkam Mach. & Tool Co. v. Twp. of Lyndhurst*, 180 A.2d 348, 350 (N.J. Super. Ct. App. Div. 1962) (“Appellants contend that there has been an enlargement of the nonconforming use because the premises are now occupied and used by two different manufacturing concerns, whereas prior to the enactment of the zoning ordinance only one manufacturing company occupied and used said premises. This argument, standing alone, is invalid.”); *Gibbons & Reed Co. v. N. Salt Lake City*, 431 P.2d 559, 564 (Utah 1967) (“Lawful existing nonconforming uses are not eradicated by a mere change in ownership. The very nature and use of an extractive business contemplates the continuance of such use of the entire parcel of land without limitation or restriction of the immediate area excavated at the time the ordinance was passed.”); *Vt. Baptist Convention v. Burlington Zoning Bd.*, 613 A.2d 710, 711 (Vt. 1992) (“The fact that plaintiff’s activities are church-related does not alter the actual use of the property. Furthermore, the use proposed by the prospective purchaser is the same as plaintiff’s current use of the property.”).

210. See, e.g., *Watergate W., Inc. v. D.C. Bd. of Zoning Adjustment*, 815 A.2d 762, 767 (D.C. 2003) (“No provision exists, in the regulations or elsewhere, which would justify such differentiation between universities and private parties in their use of property located off campus.”).

211. See, e.g., *City of Baltimore v. Poe*, 168 A.2d 193, 196–97 (Md. 1961) (“We conclude therefore that the principal use which this fraternity is making of the premises in question does not constitute a ‘service customarily carried on as a business’ under the zoning ordinance.”); *Town of Castine v. Me. Mar. Acad.*, No. CV-07-085, 2009 Me. Super. LEXIS 11, at \*2–3 (Jan. 13, 2009) (“MMA [a post-secondary school] is no more restricted from owning and maintaining a residence in Village District III than any other person or entity.”).

212. See, e.g., *ML Plainsboro Ltd. Partnership v. Twp. of Plainsboro*, 719 A.2d 1285, 1288 (N.J. Super. Ct. App. Div. 1998) (“The Planning Board cannot dictate to perpetuity who can use, buy, own or rent the properties—as a single or multiple owner.”).

state immunity from zoning ordinances,<sup>213</sup> owner occupation requirements,<sup>214</sup> development by multiple owners,<sup>215</sup> conditional use permits,<sup>216</sup> and short-term rentals.<sup>217</sup>

That the use of maxims is a favorite of common-law judges is undisputed, which makes the derogation and use-not-ownership decisions yet another marker of the common law of zoning. Still, whether these zoning law maxims are merely shortcuts for analysis or mandates requiring adherence is subject to debate. Indeed, in a recent survey of the use of canons of construction by current federal appellate judges, the two authors apparently differed over this key inquiry: “Is the mere fact that canons may provide a common language for parties in the legal system to talk about statutory cases enough to justify their use, even if judges do not really have a justification for which ones are used and why?”<sup>218</sup> Answering “emphatically ‘no’” was none other than the prolific and widely cited former judge Richard Posner.<sup>219</sup>

### *E. Evolving Rules: Aesthetic Zoning*

Like so many other examples of social engineering crafted by experts during the Progressive Era,<sup>220</sup> height, area, and use zoning garnered its fair share (at

213. *See, e.g.*, *Dearden v. Detroit*, 269 N.W.2d 139, 143 (Mich. 1978) (“We reject the city’s contention that the archdiocese, as a private lessor, cannot claim immunity from defendant’s zoning ordinance even if its lessee is immune . . .”).

214. *See, e.g.*, *City of Wilmington v. Hill*, 657 S.E.2d 670, 672 (N.C. Ct. App. 2008) (“Plaintiff only is entitled to regulate the *use* of defendant’s single-family residence with the accessory use of a garage apartment, not the ownership.”); *Beers v. Bd. of Adjustment*, 183 A.2d 130, 136 (N.J. Super. Ct. 1962) (“Defendants do not even suggest, nor do we believe they properly could, that owner-occupation of a dwelling is a different use of the property in a zoning sense from tenant-occupation, the actual occupancy of the residence in either case being by a single family.”).

215. *Feinberg v. Southland Corp.*, 301 A.2d 6, 11 (Md. 1973) (agreeing with lower court that “the development of lands by combining dual owners must be carried out as fully in accordance with the development plan as is land being developed by a single owner.”).

216. *See, e.g.*, *Graham Court Assocs. v. Town Council of Chapel Hill*, 281 S.E.2d 418, 422 (N.C. Ct. App. 1981) (“[T]he petitioner here is not required to apply for or receive a special use permit in order to convert its tenant occupied apartments to owner occupied apartments.”); *In re Sardi*, 751 A.2d 772, 774 (Vt. 2000) (“The fact that the facility may also be classified as a private club does not affect the actual use of the property, which will be as a lodge.”).

217. *See, e.g.*, *Dawson v. Holiday Pocono Civic Ass’n*, 36 Pa. D. & C. 5th 449, 454 (C.P. 2014) (“Common sense dictates that the right to lease these homes, especially on a short-term basis, is important . . . To [“relinquish this right”] by zoning is prohibited as a matter of law since the regulation of the exercise of ownership rights is distinct from the regulation of how property is used.”).

218. *Gluck & Posner, supra* note 185, at 1329.

219. *Id.*

220. Perhaps the most notorious examples of flawed programs championed by some Progressives (often with other Progressives in the opposition) involved eugenics and immigration restriction. *See, e.g.*, Herbert Hovenkamp, *The Progressives: Racism and Public Law*, 59 ARIZ. L. REV. 947, 949 (2017) (conceding that “many Progressives” were racists, and that “[s]ome Progressives also held strongly exclusionary views about immigration and supported the sterilization of perceived mental defectives,” but also pointing out that

least) of serious criticisms. Judge D.C. Westenhaver, who wrote the lower federal court opinion declaring unconstitutional the zoning ordinance of the Village of Euclid, Ohio, offered one of the most incisive and prescient critiques of this new land planning device. In his opinion, which suffered reversal at the hands of the Supreme Court majority (despite the best efforts of Newton D. Baker, the landowner's counsel and the judge's former law partner<sup>221</sup>), Westenhaver criticized the potential use of zoning to exclude people based on socioeconomic status and the arbitrary nature of land regulations based on subjective notions of beauty:

In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. . . . Aside from contributing to these results and furthering such class tendencies, the ordinance has also an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful.<sup>222</sup>

In the nine decades since these words appeared, American courts, counsel, and commentators have wrestled with these and other negative attributes of zoning.

The struggle against zoning's exclusionary character has been waged in state and federal courthouses and legislative chambers. Prompted in part by the warnings and concerns of respected voices such as Professors Charles Haar<sup>223</sup> and Norman Williams,<sup>224</sup> several state courts attempted to rein in the most egregious

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"Progressives inherited these views, and they were not appreciably different from those held by most of their non-Progressive predecessors and contemporaries.").

221. On the relationship between Baker and Westenhaver, see WOLF, *supra* note 204, at 49–51.

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

223. See, e.g., Charles M. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1062 (1953) ("Yet segregation of many kinds is on the increase in the land-use field."). Examples of judges' recognition of Haar's concerns include *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 735 (N.J. 1975) [hereinafter *Mount Laurel I*] (Pashman, J., concurring) (noting that "even those sympathetic to the goals and methods of zoning began to express concern" about its potential to segregate based on social and economic factors); and *Pierro v. Baxendale*, 118 A.2d 401, 407 (N.J. 1955) ("We are aware of the extensive academic discussion following the decisions in [earlier New Jersey minimum-building-square-footage and large-lot-size] cases, and the suggestion that the very broad principles which they embody may intensify dangers of economic segregation which even the more traditional modes of zoning entail." (citation omitted)).

224. See, e.g., Norman Williams, Jr., *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317, 345 (1955) (noting that provisions mandating minimum building sizes "are partly snob zoning, and partly a rather extreme example of aesthetic zoning, heavily interrelated with snob attitudes"). Examples of judges' recognition of Williams's concerns include *Vickers v. Twp. Comm. of Gloucester*, 181 A.2d 129, 141 (N.J.

practices of local governments to use their zoning power to keep out those on the lower rungs of the socioeconomic ladder. The most prominent and controversial responses have come from the Supreme Court of New Jersey in its decades-long *Mount Laurel* litigation.<sup>225</sup> This saga<sup>226</sup> continued even after the Garden State's legislature finally responded to judicial activism by passing a Fair Housing Act ("FHA") that created an affordable housing agency,<sup>227</sup> and, most recently, the court has retaken the initiative after the failure of the other branches to live up to their earlier commitments.<sup>228</sup>

Nevertheless, even though it has much in common with the other examples discussed in this Article, the judiciary's struggle against exclusionary zoning does not fit comfortably within the framework of the *common* law of zoning. New Jersey's high court, in its first bite of the *Mount Laurel* apple,<sup>229</sup> disagreed with the idea that, "a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it . . ." <sup>230</sup> The basis for this dramatic ruling was neither the specific language of the state enabling act nor judicial attempts to interpret or read between the lines of that legislation. The New Jersey court instead based its ruling on the interpretation of provisions of its state *constitution*.<sup>231</sup> Such was also

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1962) (Hall, J., dissenting) ("What action is not legitimately encompassed by that [zoning] power and what is the proper role of courts in reviewing its exercise? . . . In the broad sense the considerations are well posed [by Williams]."); *Twp. of Willistown v. Chesterdale Farms, Inc.*, 300 A.2d 107, 114 (Pa. Commw. Ct. 1973) ("Despite its recent notoriety, the exclusionary use of zoning was first noted in the lower court's opinion in *Village of Euclid v. Ambler Realty Co.*, discussed by Norman Williams, Jr., during the fifties, and brought to national attention in 1968 by the Douglas Commission Report, Building the American City.").

225. See, e.g., *Mount Laurel I*, 336 A.2d 713, followed eight years later by *S. Burlington Cty. NAACP v. Twp. of Mt. Laurel*, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*].

226. See Roderick M. Hills, Jr., *Saving Mount Laurel?*, 40 *FORDHAM URB. L.J.* 1611, 1612 (2013) ("The *Mount Laurel* doctrine seems perennially hovering on the brink of extinction. It was surrounded by controversy when it was finally made effective with a 'builder's remedy' in 1983, and it barely survived its transition to statutory implementation in the form of the New Jersey Fair Housing Act in 1985.") (footnote omitted).

227. N.J. STAT. ANN. §§ 52:27D-301 ("Fair Housing Act"), and -305 (establishing Council on Affordable Housing ("COAH")) (West 2010).

228. See *In re N.J.A.C. 5:96 & 5:97*, 110 A.3d 31, 35 (N.J. 2015) [hereinafter *Mount Laurel IV*] ("Our order effectively dissolves, until further order, the FHA's exhaustion-of-administrative-remedies requirement. Further, as directed, the order allows resort to the courts, in the first instance, to resolve municipalities' constitutional obligations under *Mount Laurel*.").

229. *Mount Laurel I*, 336 A.2d at 713.

230. *Id.* at 724.

231. The *Mount Laurel I* court explained:

It is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws.

the case with leading exclusionary zoning rulings from other state high courts,<sup>232</sup> and in federal litigation as well.<sup>233</sup>

State judges have been much more active on the second front identified by Judge Westenhaver, first shying away from, then partially and ultimately fully embracing the idea that zoning and other land use restrictions based solely on aesthetics are legitimate. State courts' embrace of aesthetic zoning is an apt and revealing example of what Chief Justice Shaw described as new situations being "governed by the general principle, applicable to cases most nearly analogous, but modified and adapted to new circumstances, by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances."<sup>234</sup>

Even a few years before comprehensive height, area, and use controls debuted in New York City, judges and commentators cautioned against police power regulation based solely on subjective ideas of beauty. New Jersey's high court, in a 1905 decision invalidating a city ordinance regulating signs and billboards, cited cases from Kansas, Massachusetts, New York, Missouri, and Maryland in support of the notion that "[a]esthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."<sup>235</sup> One year later, the *Harvard Law Review* published an article in which the author noted:

a series of cases in different states holding that a legislature has no power to authorize a municipal corporation to prohibit the placing of signs or advertisements upon private property, or fences enclosing private property, or to limit the height and form of enclosures of private property, from merely aesthetic motives.<sup>236</sup>

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These are inherent in Art. I, par. 1 of our Constitution, the requirements of which may be more demanding than those of the federal Constitution.

*Id.* at 725 (footnote and citations omitted).

232. See, e.g., *National Land & Inv. Co. v. Easttown Twp. Bd. of Adjustment*, 215 A.2d 597, 613 (Pa. 1965) ("[T]he board of adjustment committed an error of law in upholding the constitutionality of the Easttown Township four acre minimum requirement as applied to appellees' property."); *Bd. of Cty. Supervisors v. Carper*, 107 S.E.2d 390, 396-97 (Va. 1959) (affirming the lower court's finding that a two-acre minimum was unconstitutional "insofar as the two-acre restriction in the amendment is concerned, is unreasonable and arbitrary and that it bears no relation to the health, safety, morals or general welfare of the owners or residents of the area so zoned.").

233. The United States Supreme Court has faced the evils of allegedly exclusionary zoning in court challenges originating in, among other locations, metropolitan Rochester, New York (*Warth v. Seldin*, 422 U.S. 490, 495 (1975)), a Chicago suburb (*Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977)), and Cuyahoga Falls, Ohio (*City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 191-92 (2003)). In none of these cases, however, did the justices find that the U.S. Constitution's Due Process or Equal Protection Clauses had been violated.

234. See *supra* text accompanying note 69.

235. *City of Passaic v. Paterson Bill Posting, Advert. & Sign Painting Co.*, 62 A.267, 268 (N.J. 1905).

236. Wilbur Larremore, *Public Aesthetics*, 20 HARV. L. REV. 35, 42 (1906).

Before the first decade of the twentieth century drew to a close, in dictum in *Welch v. Swasey*,<sup>237</sup> the U.S. Supreme Court offered a minor consolation to defenders of beauty. In a decision upholding height limitations imposed by the Massachusetts legislature on certain buildings in Boston, Justice Peckham conceded: “That in addition to these sufficient facts [regarding fire protection], considerations of an esthetic nature also entered into the reasons for their passage, would not invalidate them.”<sup>238</sup> Nevertheless, those responsible for crafting New York’s zoning scheme were aware that questions of beauty may be out-of-bounds.<sup>239</sup>

Newton Baker’s brief in response to the appellant Village of Euclid’s defense of zoning doubled down on Judge Westenhaver’s concern that zoning, with its concerns about beauty, was beyond the reach of the police power: “Even if the world could agree by unanimous consent upon what is beautiful and desirable, it could not, under our constitutional theory, enforce its decision by prohibiting a land owner, who refuses to accept the world’s view of beauty, from making otherwise safe and innocent uses of his land.”<sup>240</sup> Justice Sutherland and his colleagues in the majority did not take the bait, concluding Baker had not demonstrated that the provisions of Euclid’s zoning ordinance were “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>241</sup>

By the time Baker was preparing his brief, judges in the earliest state court challenges to zoning had already begun to offer hope to those who conceived of this new device as a way to address urban and suburban eyesores. In 1925, for example, the Court of Appeals of New York, in *Wulfsohn v. Burden*,<sup>242</sup> refused to grant a mandamus order sought by a property owner whose plans to construct an apartment building in a residential district were frustrated by the City of Mount Vernon’s zoning restrictions.<sup>243</sup> The judges noted both that “courts have not been ready to say that [zoning restrictions] might be sustained merely because they preserved the aesthetic appearance of a private residential district and prevented it from being blotched by the erection of some incongruous structure whereby the value of all property was impaired,” and that the *Welch* Court had “gone so far as to approve in substance the views . . . that aesthetic considerations might be considered as auxiliary of what thus far have been regarded by the courts as more effective and

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237. 214 U.S. 91, 108 (1909).

238. *Id.*

239. See, e.g., Lawson Purdy, *Introduction* in PROCEEDINGS OF THE FOURTEENTH NATIONAL CONFERENCE ON CITY PLANNING 133 (1922). Purdy, the first vice-chairman of New York City’s first zoning commission in 1913, explained, “[r]ather against my own convictions, when I attempted to do some zoning work in New York, I eliminated the word ‘beautiful’ from my vocabulary.” *Id.*; see also S. J. MAKIELSKI, JR., THE POLITICS OF ZONING: THE NEW YORK EXPERIENCE 17 (1966).

240. Brief and Argument for Appellee at 48, *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (No. 665).

241. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

242. 150 N.E. 120 (N.Y. 1925).

243. *Id.* at 125.

sufficient reasons.”<sup>244</sup> The *Wulfsohn* court rejected the landowner’s argument that, “[b]ecause the provisions permitting the erection of apartment houses provide in substance that there shall be no display of advertising visible from any street,” the city’s zoning scheme was “based upon aesthetic considerations, and therefore, not sustainable.”<sup>245</sup>

The inclusion of provisions in zoning ordinances that promoted aesthetics and beauty was therefore not a fatal flaw. As the Supreme Court of New Hampshire stated three years later, citing the ruling in *Wulfsohn* and other cases, even in states “where the law is that aesthetic value alone cannot be made the basis for regulation, it is held that where other elements are present and justify the regulation under the police power, the aesthetic considerations may be taken into account in determining whether the power shall be exercised.”<sup>246</sup> Over the next few decades, this seed, a hybrid of constitutional and common law, budded, flowered, and spread widely.<sup>247</sup>

By the late 1930s, state high courts were open to the idea that the protection of aesthetics was itself encompassed in the notion of general welfare. For example, the Supreme Judicial Court of Massachusetts ruled in a 1936 decision upholding signage provisions in the zoning ordinance that

[t]he beauty of a residential neighborhood is for the comfort and happiness of the residents and it tends to sustain the value of property in the neighborhood. It is a matter of general welfare like other conditions that add to the attractiveness of a community and the value of residences there located.<sup>248</sup>

One of the cases cited by the Massachusetts court in support of this notion was *State ex rel. Carter v. Harper*,<sup>249</sup> an early Wisconsin zoning case in which the owner of a pasteurizing plant sought to expand its nonconforming use in violation of the city’s ordinance. In ruling against the property owner, this pre-*Euclid* tribunal acknowledged that “[i]t is sometimes said that these [zoning] regulations rest solely upon aesthetic considerations,” but explained that it was “not necessary for us to consider how far aesthetic considerations furnish a justification for the exercise of the police power.”<sup>250</sup> This did not stop the court from waxing poetic about the

244. *Id.* at 123.

245. *Id.* at 124; *see also* *Ware v. City of Wichita*, 214 P. 99, 101 (Kan. 1923) (“With the march of the times, however, the scope of the legitimate exercise of the police power is not so narrowly restricted by judicial interpretation as it used to be. There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations.”).

246. *Sundeen v. Rogers*, 141 A. 142, 145 (N.H. 1928) (upholding setback provisions in zoning ordinance).

247. *See, e.g., Neef v. City of Springfield*, 43 N.E.2d 947, 950 (Ill. 1942) (“It is no objection, however, to a zoning ordinance that it tends to promote an aesthetic purpose, if its reasonableness may be sustained on other grounds.”); *In re Kerr*, 144 A. 81, 83 (Pa. 1928) (“While a zoning ordinance cannot be sustained merely on aesthetic ground, that may be considered in connection with questions of general welfare.”).

248. *Town of Lexington v. Govenar*, 3 N.E.2d 19, 22 (Mass. 1936).

249. 196 N.W. 451 (Wis. 1923).

250. *Id.* at 455.

evolving nature of beauty: “It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured.”<sup>251</sup> The Bay State’s highest court was not the only bench impressed by these words. Two decades after *Carter*, like a snowbird, this idea traveled from the frigid North to the Sunshine State.

In 1941, the Supreme Court of Florida, in turning down a challenge brought by a landowner who asserted that commercial restrictions had outlived their usefulness, cited its distant sibling jurisdiction:

In the Wisconsin case it is further pointed out that aesthetic considerations have also been recognized and we think what is said in the opinion is particularly relevant to the community of Miami Beach because of its general character . . . . It is difficult to see how the success of Miami Beach could continue if its aesthetic appeal were ignored because the beauty of the community is a distinct lure to the winter traveler.<sup>252</sup>

Looking back on the Miami Beach case four years later, the same court observed: “[W]e took into consideration aesthetics in connection with general welfare of a community having the characteristics and the appeal of Miami Beach.”<sup>253</sup>

The intricate interplay between constitutional and common law regarding aesthetic-based regulations continued when the U.S. Supreme Court announced its ruling in *Berman v. Parker*,<sup>254</sup> the 1954 decision upholding the constitutionality of the use of eminent domain for Washington, D.C.’s urban renewal program. Justice Douglas, writing for a unanimous Court, reflected that “[p]ublic safety, public health, morality, peace and quiet, law and order” constitute “*some* of the more conspicuous examples of the traditional application of the police power to municipal affairs,”<sup>255</sup> but not necessarily *all*. He continued with a statement that freed aesthetic regulation from its mooring:

The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.<sup>256</sup>

It would not take long for at least one highly astute commentator to note the implications for zoning. In his article published the following year, *Zoning for*

251. *Id.*

252. *City of Miami Beach v. Ocean & Inland Co.*, 3 So. 2d 364, 367 (Fla. 1941).

253. *Stengel v. Crandon*, 23 So. 2d 835, 837 (Fla. 1945); *see also* *City of Miami Beach v. First Trust Co.*, 45 So. 2d 681, 684 (Fla. 1949) (“[W]e believe, as we did when we adopted the opinion in [*Ocean & Inland*] that the peculiar characteristics and qualities of the City of Miami Beach justify zoning to perpetuate its aesthetic appeal, and that this is an exercise of the police power in the protection of public welfare.”).

254. 348 U.S. 26 (1954).

255. *Id.* at 32 (emphasis added).

256. *Id.* at 33 (citation omitted).

*Aesthetic Objectives: A Reappraisal*,<sup>257</sup> Professor Jesse Dukeminier, quoting “the frank recognition of aesthetics”<sup>258</sup> by Justice Douglas, provided a spot-on prediction: “Although eminent domain was involved here, the implications of the language seem very wide. The case may well provide the needed watershed in the field of aesthetic zoning.”<sup>259</sup>

That watershed materialized quite rapidly. Fewer than four months after Justice Douglas’s words hit the pages of the advance sheets, the Supreme Court of Wisconsin was the first of many state courts to perceive the language from *Berman* as an invitation to authorize aesthetic-based land use regulations, in that instance an ordinance mandating architectural review.<sup>260</sup> The state supreme court observed, “while the general rule is that the zoning power may not be exercised for purely aesthetic considerations, such rule was undergoing development.”<sup>261</sup> After *Berman*, however, “this development of the law has proceeded to the point that renders it extremely doubtful that such prior rule is any longer the law.”<sup>262</sup>

Subsequent state court decisions over the next decade followed this pattern of invoking *Berman*, in cases involving preservation of historic districts,<sup>263</sup> denial of a variance application to the owner of a large house hoping to lease to 15 tenants,<sup>264</sup> minimum lot sizes,<sup>265</sup> exclusion of a mobile home from a district for single residences,<sup>266</sup> an ordinance prohibiting clotheslines in a front or side yard,<sup>267</sup> and the

257. J.J. Dukeminier, Jr., *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218 (1955).

258. *Id.* at 237 n.70.

259. *Id.*

260. *State ex rel. Saveland Park Holding Corp. v. Wieland*, 69 N.W.2d 217, 222 (Wis. 1955).

261. *Id.*

262. *Id.*

263. *Opinion of the Justices to the Senate*, 128 N.E.2d 557, 561–62 (Mass. 1955) (“There is reason to think that more weight might now be given to aesthetic considerations than was given to them a half century ago.”).

264. *Best v. Zoning Bd. of Adjustment*, 141 A.2d 606, 612 (Pa. 1958) (“The broad scope of the concept of general welfare is illustrated by the decision of the United States Supreme Court in [*Berman*].”).

265. *Bilbar Constr. Co. v. Bd. of Adjustment*, 141 A.2d 851, 857 (Pa. 1958) (“[W]ith the passing of time, urban and suburban planning has become an accredited adjunct of municipal government, aesthetic considerations have progressively become more and more persuasive as sustaining reasons for the exercise of the police power.”).

266. *See Town of Manchester v. Phillips*, 180 N.E.2d 333, 336 (Mass. 1962). *Cf. Wright v. Michaud*, 200 A.2d 543, 550 (Me. 1964). The Court in *Wright* also quoted *Berman* but qualified its ruling: “[A] municipality in determining whether there should be a prohibition of individual mobilehomes throughout the municipality, may properly consider, among other factors, the impact of the use of that type of structure upon the development of the community.” *Id.* at 548.

267. *People v. Stover*, 191 N.E.2d 272, 275–76 (N.Y. 1963) (“Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power.”).

unauthorized expansion of a nonconforming automobile wrecking yard.<sup>268</sup>

This trend of acceptance continued over subsequent decades, as did the Supreme Court's occasional reiteration of its generous view of aesthetic controls. In 1978's *Penn Central Transportation Co. v. City of New York*,<sup>269</sup> Justice Brennan's majority opinion, shielding from a takings challenge New York City's landmark designation of Grand Central Terminal, made clear what was no longer controversial:

Because this Court has recognized, in a number of settings, that States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city, appellants do not contest that New York City's objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.<sup>270</sup>

Four years later, the Supreme Court of North Carolina, in a decision upholding a local ordinance requiring junkyards and automobile graveyards to erect fences to separate the property from residential neighbors, asserted that “[t]he former majority rule that aesthetic considerations alone could not support an exercise of police power is now the minority rule.”<sup>271</sup> In support of its decision to join that majority (of cases in which courts directly addressed the question), the court explained: “Aesthetic regulation may provide corollary benefits to the general community such as protection of property values, promotion of tourism, indirect protection of health and safety, preservation of the character and integrity of the community, and promotion of the comfort, happiness, and emotional stability of area residents.”<sup>272</sup>

268. *Oregon City v. Hartke*, 400 P.2d 255, 262 (Or. 1965) (quoting *Stover*, 191 N.E. 2d at 275) (“We join in the view ‘that aesthetic considerations alone may warrant an exercise of the police power.’”).

269. 438 U.S. 104 (1978).

270. *Id.* at 129 (citation omitted) (citing, among other decisions, *Berman* and *Welch*).

271. *State v. Jones*, 290 S.E.2d 675, 679 (N.C. 1982). According to the Court, “[w]ith the 1981 Tennessee decision [*State v. Smith*, 618 S.W.2d 474 (Tenn. 1981)], the new majority includes seventeen jurisdictions where regulation based exclusively upon aesthetics is permissible, while the minority rule is adhered to by eight jurisdictions, including our own.” *Id.*

272. *Id.* at 681; see also Kenneth Pearlman et al., *Beyond the Eye of the Beholder Once Again: A New Review of Aesthetic Regulation*, 38 URB. LAW. 1119, 1185 (2006) (“[A]esthetics regulation in some form has become accepted by all state courts, even where they do not permit aesthetic regulation alone.”); Samuel Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125, 166 (1980) (counting decisions specifically addressing the question, while noting that “the validity of regulation based solely on aesthetic considerations is still an open question in twenty-six states”). On cases specifically addressing aesthetic zoning (not police power regulation generally), see Kenneth Regan, Note, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013, 1014–15 (1990) (“After *Berman*, several views developed concerning the propriety of zoning based on aesthetics alone. Currently, twelve states do not permit zoning based solely on

Judicial recognition of aesthetics as a legitimate goal of the police power did not guarantee a victory for the land use regulator.<sup>273</sup> Nevertheless, it is undeniable that, to paraphrase Chief Justice Shaw, over the course of several decades courts articulated the general principle that aesthetics-based regulation was not necessarily illegal, and this principle, in the hands of other judges from around the nation, was subsequently and consistently applied to nearly analogous cases and modified and adapted to a range of new circumstances, “by considerations of fitness and propriety, of reason and justice, which grow out of those circumstances.”<sup>274</sup> The product was yet another important feature of the common law of zoning.

### CONCLUSION

After 100 years, much can be, and has been, said and written about the American brand of comprehensive height, area, and use zoning. For concluding purposes the two most important things to say are: (1) in the words of Professor Sonia A. Hirt, “[t]raditional zoning . . . has been under fire since the 1950s;”<sup>275</sup> and (2) to quote Professor William Fischel, “reports of [zoning’s] demise have been greatly exaggerated.”<sup>276</sup> With an understanding of the nature and import of the common law of zoning, we now have one more reason why, despite the constant carping of critics, zoning endures, and even thrives, on the ground—where it counts.

Professor Hirt, a highly regarded comparative planning expert, has done an admirable job of highlighting the “broad streams of critique [of traditional zoning that] have emerged: libertarian,<sup>277</sup> economic, social, environmental, and aesthetic.”<sup>278</sup> Zoning, according to the naysayers, “works against the free market,” and “segregates people by class and by race . . . act[ing] as a gatekeeper that favors insiders (those who already have property in a given place) over outsiders (those who wish to acquire property in this place but cannot);” it “brings about excessive land consumption . . . [and] contribut[es] to pollution,” and “encourage[s] cookie-cutter environments . . . reduc[ing] the complexity of urbanism.”<sup>279</sup> Moreover, despite state and local legislative fixes to statutes and legislation, authorizing

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aesthetics while eleven states allow zoning based on aesthetic factors alone.”) (citation omitted).

273. See, e.g., *New Jersey v. Miller*, 416 A.2d 821, 824 (N.J. 1980) (The Court, while stating that “that a zoning ordinance may accommodate aesthetic concerns,” found a town’s restrictive sign ordinance violated free speech protections under the First Amendment).

274. See *supra* text accompanying note 69.

275. SONIA A. HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION* 44 (2014).

276. FISCHEL, *supra* note 111, at 68.

277. The best of these critiques was and remains Ellickson’s *Alternatives to Zoning*, *supra* note 91, at 781 in which the author memorably concluded, “[z]oning is today out of control and must be severely curtailed, if not entirely replaced.”

278. HIRT, *supra* note 275, at 44.

279. *Id.* at 44–46.

innovations such as incentive zoning,<sup>280</sup> noncumulative zoning,<sup>281</sup> development agreements,<sup>282</sup> planned-unit developments,<sup>283</sup> and form-based zoning,<sup>284</sup> the traditional segregation of uses, with single-family detached dwellings at the top of the hierarchy, remains the predominant model.<sup>285</sup>

To Professor Fischel, the esteemed economist of land regulation, the main movers behind zoning in the early twentieth century were not “progressives who supported scientific management of government, or lawyers who argued for an expansive view of the police power.”<sup>286</sup> Instead, to Fischel, the roles played by these actors were “supply response[s] to a popular demand for zoning,” a demand that “was filtered through housing developers, who . . . found that they could sell homes for more profit if the community had zoning.”<sup>287</sup> Under either theory (or a combination of the two), it is undeniable that American zoning spread quickly and widely during its first few decades.<sup>288</sup>

The fascinating question remains: why, after so many demographic, ideological, economic, and technological changes, has zoning not only hung on but continued to thrive after a century of unprecedented change? The simplest explanation might be legislative inertia attributable to the absence of obviously better alternatives, to the difficulty of tearing up zoning and starting over from scratch, to the fear of unintended consequences caused by change, or to partisan animosity resulting in legislative gridlock. Never satisfied with an ostensibly

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280. See, e.g., JEROLD S. KAYDEN, *PRIVATELY OWNED PUBLIC SPACE: THE NEW YORK EXPERIENCE 1* (2000) (expertly summarizing the good and bad of this post-Euclidean tool); Fennell & Peñalver, *supra* note 161, at 305–06 (describing incentive zoning as arrangements “in which landowners obtain permission to exceed zoning limits in exchange for providing various public goods (such as low-income housing or public space)”).

281. See, e.g., Roderick M. Hills, Jr. & David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 252 (2010) (“After World War II, municipalities began experimenting with noncumulative zones that excluded residential uses from industrial zones.”).

282. See, e.g., David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 URB. LAW. 221, 239 (1991) (explaining that many potential takings issues “are relatively easily resolved if landowner-developer and local government can come to agreeable terms over what the developer will contribute in exchange for guarantees from the local authority, such as certainty with respect to planning permissions, and memorialize these terms in a statutory development agreement.”).

283. See, e.g., Daniel R. Mandelker, *Legislation for Planned Unit Developments and Master-Planned Communities*, 40 URB. LAW. 419, 420 (2008) (“Simply put, it is an integrated land development project that local governments review and approve comprehensively at one time, usually under the zoning ordinance.”).

284. See, e.g., Sara C. Bronin, *Rezoning the Post-Industrial City: Hartford*, 31 PROB. & PROP. 44, 46 (2017) (“Form-based codes are a form of land development regulation that focuses on physical form, rather than the separation of uses, as its organizing principle.”).

285. *Id.* at 46–59; see also FISCHEL, *supra* note 111, at 67 (“[N]on-Euclidean innovations have not significantly displaced municipal zoning.”).

286. FISCHEL, *supra* note 111, at 170.

287. *Id.* at 171.

288. See *supra* notes 85 and 91; see also FISCHEL, *supra* note 111, at 171.

obvious explanation, in 1996, the then-venerable Professor Haar offered a provocative ideological explanation:

The popularity of zoning lies in its melting pot quality: while it embodies the strand of local democracy and political and legal, if not economic, equality, its most powerful attachment is to a free market operated on by individual liberties. But, at the same time, the public interest of a larger society asserts itself.<sup>289</sup>

Professor Fischel has offered an equally intriguing explanation, noting that the inflation in housing values in the second half of the twentieth century “is key to galvanizing the demand for regulation” such as exclusionary zoning devices and growth management schemes.<sup>290</sup>

There is more than a grain of truth to each of these explanations, but one significant factor has been overlooked by the many critics who focus on the overt *structures* of zoning, that is, the state statutes and local ordinances that, despite some modifications on the margins,<sup>291</sup> look so much like each other and like their original precursors. Flying under the radar has been the development of the common law of zoning, as hundreds of judges in dozens of jurisdictions, deciding thousands of reported cases, have through individual lawsuits subtly but significantly reshaped the corpus of zoning law.<sup>292</sup>

This extensive and expansive trial-and-error process has yielded several positive externalities, as judges have confronted and resolved unanticipated problems and issues, rendering unnecessary amendments to statutes and ordinances. For example, by identifying and developing rules to address spot zoning, courts have sent the message to local officials that they need to regulate responsibly and consistently. Similarly, some courts have employed the distinction between legislative and quasi-judicial functions of local elected bodies as a partial fix for local officials who succumb to developer pressures.

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289. Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1020 (1996); see also HIRT, *supra* note 275, at 12 (“U.S. zoning is at its base a cultural institution: it was built to reflect the values of its founders, values that have been and, arguably, continue to be in alliance with popular American ideals of good government and good urbanism.”).

290. FISCHEL, *supra* note 111, at 215. Professor Fischel also noted that “homevoters became much more caring about their major asset beginning in the early 1970s. This shift in attention to home values meant that any potential threat to those values . . . would draw homeowners’ attention.” *Id.* at 214.

291. See, e.g., Christopher Serkin & Gregg P. Macey, *Introduction to the Symposium: Post-Zoning: Alternative Forms of Public Land Use Controls*, 78 BROOK. L. REV. 305, 310 (2013) (noting that post-Euclidean techniques such as planned unit developments and overlay districts “are effectively add-ons—regulatory tweaks that operate within zoning’s existing framework. Zoning’s fundamental structure remains largely unchanged.”).

292. Professor Davidson has suggested to the Author that in developing a common law of zoning, judges may have improved the efficiency of this system of land use regulation. I would encourage others more Coasean-inclined to pursue this intriguing question.

It is unlikely that the drafters of the SZEAs and its progeny in state codes anticipated that landowners would game the zoning system by claiming hardships that the owners themselves created, but once that strategy became apparent, judges used their equity powers in an attempt to check the abuse. Sometimes the abuse might be on the public side, as when local land use regulators used their power to punish certain owners or types of ownership. This time, state courts from around the nation employed a maxim that articulated a fundamental principle of zoning law in an attempt to keep the playing field level. At other times, the challenge was modernizing zoning jurisprudence to keep up with changing needs and to accommodate new variations on traditional police power regulations, as was the case when state courts, abetted by developments in the U.S. Supreme Court, recognized the validity of aesthetic-based controls.

Not all aspects of the common law of zoning have been positive contributions to the body of land use law. Indeed, there are regrettable aspects of several of the examples discussed in Part IV. For all the ink spilled by courts in determining whether specific rezonings constitute illegal spot zoning, there is still a great deal of ambiguity regarding, and dissatisfaction with, the term.<sup>293</sup> The quasi-judicial approach taken by the Supreme Court of Oregon in *Fasano*, too, has earned its share of valid criticism, especially (as noted in Section IV.B) by other courts.<sup>294</sup> Some courts and commentators have expressed discomfort with using the self-imposed hardship rule in the context of height and area (as opposed to use variances), showing sympathy with property owners who purchase or inherit parcels from landowners who would have stood a good chance of meeting the relevant test for securing relief.<sup>295</sup> The distinction between use and ownership can easily be blurred in cases involving short-term rentals, particularly under the sharing economy, so it is fair to ask: does it make sense to treat apartments and rooms “rented” under Airbnb as hotel *uses*, or should the court instead focus on the fact

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293. See, e.g., Daniel R. Mandelker, *Spot Zoning: New Ideas for an Old Problem*, 48 *URB. LAW.* 737, 738 (2016) (“Spot zoning law is an archaic and elusive concept made up of standing law principles, procedural presumptions, and ambiguous doctrine that make analysis difficult.”). Nor is it necessarily a positive development that jurisdictions that have little in common—demographically, geographically, financially, politically, and otherwise—share the same basic statutory, administrative, and judicial land use regulatory system, as David Schleicher reminded the Author in a very helpful and provocative comment.

294. See Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 *IOWA L. REV.* 91, 102 (2015) (“[E]ven in states where the planning mandate has detailed scope and significant legal force, the power of the plan to trump zoning is substantially limited by the identity of the plan’s beneficiaries,” and that “court intervention will vary significantly based on unwritten assumptions about who the plan is supposed to protect from whom . . .”).

295. See, e.g., Richard Roeser, *Prof’l Builder v. Anne Arundel Cty.*, 793 A.2d 545, 561 (Md. 2002) (“[I]f the prior owner has not self-created a hardship, a self-created hardship is not immaculately conceived merely because the new owner obtains title.”); see also MANDELKER & WOLF, *supra* note 98, § 6.47 (“To hold that mere purchase with knowledge of existing zoning is always a self-created hardship improperly makes the purchase of land a basis for denying a variance.”).

that *ownership* has technically never changed hands?<sup>296</sup> Finally, aesthetic-based land use regulation may be taken too far, as critics of certain form-based codes have convincingly argued.<sup>297</sup>

Over the last half-century, much of zoning and land use scholarship has focused on constitutional lawmaking by the courts, particularly on the “brooding omnipresence of regulatory takings.”<sup>298</sup> Most of the leading regulatory takings cases in the U.S. Supreme Court have involved the justices weighing the rights of private property owners versus the public interest<sup>299</sup> in disputes over the constitutionality of local and state land use regulations designed to protect our fragile environment.<sup>300</sup> In hundreds of disputes in federal and state tribunals, property owners have waged a sustained assault on local environmental law, some of it under the zoning umbrella.<sup>301</sup>

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296. See, e.g., Daniel E. Rauch & David Schleicher, *Like Uber, But For Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 921 (2015) (“[A]reas once zoned as residential can become de facto commercial ‘hotel’ districts. Because of this, neighbors to Airbnb renters have often lodged complaints under zoning, landlord-tenant, or contract law.”).

297. See, e.g., Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOK. L. REV. 571, 580 (2013) (expressing “concerns about using the law to impose aesthetic preferences on the built landscape”).

298. Michael Allan Wolf, *The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects*, 40 FORDHAM URB. L.J. 1835, 1835 (2013).

299. For a fascinating empirical analysis of judicial attempts to strike this delicate balance, see James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 40 (2016) (“Supreme Court takings doctrine can be understood as the means to maintain and reinforce, in a very particular fashion, the tension between two conflicting commitments that have figured prominently throughout the Nation’s history—strong property rights on the one hand, and the imperatives of an activist government on the other.”); see also Steven J. Eagle, *Land Use Regulation and Good Intentions*, 33 J. LAND USE & ENVTL. L. 87, 144 (2017) (“[L]egal mechanisms for policing the boundary between private property rights and permissible government regulation . . . largely leave public officials and judges to their own devices.”).

300. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (wetlands); *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) (watershed protection); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (wetlands); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (protected species); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (floodplains and bike paths); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (beachfront management legislation); *Nollan v. Cal. Coastal Com.*, 483 U.S. 825 (1987) (coastal zone controls); *First Eng. Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304 (1987) (flood-protection area); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987) (damage caused by coal mine subsidence); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981) (open space); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (open space).

301. See, e.g., John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 365 (2002) (providing a compendium of such laws); Craig Anthony (Tony) Arnold, *Fourth-Generation Environmental Law: Integrationist and MultiModal*, 35 WM. & MARY ENVTL. L. & POL’Y REV. 771, 837–38 (2011) (including a list of two dozen tools that local governments can use to “adapt[] land use practices and patterns to protect waters,” several of which involve zoning).

The cases in which courts have framed, adapted, and reshaped the common law of zoning—several of which have involved the validity of these same aspects of local environmental law<sup>302</sup>—are an essential part of our uniquely American form of land use regulation.<sup>303</sup> It is a litigation landscape that has earned the serious attention of all parties concerned with making land use regulation more efficient, modern, fair, and sustainable.

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302. See, e.g., *Richard Roeser Prof'l Builder, Inc. v. Anne Arundel Cty.*, 793 A.2d at 545, 547 (Md. 2002) (concerning variance application by contract purchaser who sought to build on part of a lot “located in the Critical Area ‘buffer’ zone adjacent to wetlands.”); *Malerba v. Warren*, 438 N.Y.S.2d 936, 944 (N.Y. Sup. Ct. 1981) (derogation case in which the town sought “to enjoin defendants from maintaining a concrete block foundation and dwelling . . . which was erected and so placed without a permit and which structures, it is alleged, are prohibited by the zoning and tidal flood hazard ordinances of the Town of East Hampton”); *In re Schieber*, 927 A.2d 737, 740–41 (Pa. Commw. Ct. 2007) (rejecting Appellants’ argument “that the Borough’s enactment of Ordinance No. 945 constitutes illegal spot zoning by targeting Appellants’ Property and including it in the Borough’s flood plain despite scientific data that conclusively demonstrates that the 1996 FEMA map is less accurate” than the private study Appellants had performed).

303. See HIRT, *supra* note 275, at 15 (referring to “[t]he peculiarities of the current U.S. zoning system, with its focus on strict order, land-use segregation, and exclusive private spaces limited to particular family types and particular physical configurations”).