THE HOUSING BIAS

RETHINKING LAND USE LAWS FOR A DIVERSE NEW AMERICA

PAUL BOUDREAUX

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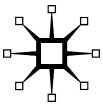

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For Lisa

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Introduction

The Housing Bias: The Last Privilege of Affluent Americans

This is a book of real-life stories about how local laws shape the communities in which we live. It travels from a recently booming suburb in Virginia, to a big development project in New York City, to the rural outskirts of a metro area in Michigan, and to the busy residential streets of California, with other stops along the way. In particular, the book explores the argument that the laws that govern our use of land are biased in favor of one specific group of Americans—affluent, home-owning families—who least need the government's help, and that newcomers, elderly people, and modest-income families bear the costs of this housing bias.

Whom Should Government Help?

Over the past several decades, we Americans have come to think of government as a force that helps the less fortunate in society. Our public debates usually revolve around whether and how to assist the vulnerable—around issues such as public-funded health care for the poor and elderly, antidiscrimination laws to support racial minorities, and pollution rules to limit injuries to the most susceptible in our communities. Advocates for these "social justice" policies argue that the government of a wealthy and sophisticated nation can and should help those who face great difficulties in life, often through no fault of their own. On the other side, opponents of "big government" argue with equal vigor that meddling with the private market for goods and services often does more harm than good, in that it draws resources away from profitable endeavors and subsidizes mediocrity.

Smart thinkers on both sides recognize that their opponents sometimes make valid points. Honest environmentalists recognize that tighter laws on air quality are likely to cause some businesses to consider moving

their operations overseas. It's just that the benefits of cleaner air for everyone outweigh this drawback, they argue. Likewise, honest opponents of government-funded health care know that it would help some hardworking Americans who don't have employer-sponsored insurance. It's just that the cost to the taxpayer and the skewing of the complex market for health services aren't worth it, the libertarians say.

Each public program, however, is intended, at least on its face, to assist the more vulnerable people in America. Rich people, healthy people, and white hetero males with successful careers aren't the ones who typically ask more from government. They look to government only for meat and potatoes basics, such as protection from crime and fire, decent public schools, and security against potential terrorists—things that everybody wants. All in all, they seek nothing special. Except, as we will see, in land use law.

Privileges for the Affluent: A Historical Backdrop

It wasn't always this way. A short history of privilege is a good place to start. Many historians say that the "modern world" began a little more than 200 years ago, with the American and French Revolutions of the late 1700s. In the pre-revolutionary France of the King Louises, many citizens—especially middle-class people—seethed over a legal system based on the concept of *privilege*. This seemingly innocent word meant more back then than it does today. It meant that nobles—specially recognized families who made up at most 1 percent of the population—were entitled to legal rights that weren't enjoyed by the remaining 99 percent. For the most part, rights weren't things that you held because you were a citizen, or even a human being, but were benefits that you enjoyed through your membership in a group. It wasn't what you did; it was how you were born. If you were a lucky nobleman, you had a lot of privileges—such as the right to carry a sword in public (no universal right to bear arms back then), the right to have one's chapel draped in black at a family funeral, and, most importantly, the right to be exempt from the big property tax, which was the government's (meaning the king's) chief source of revenue.

It might seem bizarre to modern Americans that the nobles who controlled lands would be exempt from this tax, called the *taille*, while poor farming tenants had to pay tax on the lands that they merely rented. After all, in today's society, the rich pay the bulk of the income and property taxes, while the poor often pay little or nothing. But the notion of privilege carved out a special place for the nobles. They were required to serve the king as aides and soldiers in times of war, for example. They also had some special duties (not much) to help their tenants. In return, they held

the great privilege of exemption from the property tax. However, as King Louis the Sixteenth increased the tax to pay for his war debts (and the king had also often sold noble titles to help further reduce his deficit), those who weren't privileged saw the rules of privilege as the essence of injustice. The privileges of nobility were like "those vegetable tumors which live only from the sap of the plant that they suck dry," wrote a radical priest, Emmanuel-Joseph Sieyès. He became one of the guiding lights of the French revolutionaries, who had as one of their most essential goals (even more important than chopping off the king's head) the abolition of all types of privilege.

It was in this political climate that the American form of government took shape under the federal Constitution, drafted in 1787 and molded by our presidents, Congress, and courts over the next few decades. Leaders such as Thomas Jefferson (who personally didn't have much to do with writing the details of the Constitution, because he was serving—and partying—as ambassador in Paris at the time) had privilege foremost in their minds when they crafted a new form of republican and democratic government. Revolutionaries such as Jefferson and his protégé James Madison ensured that traditional privilege wouldn't raise its head in the American system. One of the first things that the Constitution's drafters did was to make sure that "No title of nobility shall be granted by the United States." (It's in Article I, section 9 of the Constitution.) Otherwise, we might have had members of the Kennedy or Bush families literally "lording" over us as the Duke of Cape Cod or the Earl of Amarillo. The American and French Revolutions didn't wipe away entirely the concept of privilege in the Western world—a couple of decades after the French Revolution, a middle-aged musician in Austria named Ludwig van Beethoven had his lawsuit for custody of an orphaned nephew tossed out of the special court reserved for nobles when the judges discovered that the Dutch "van" didn't automatically mean that he was a noble, as did the German "von"—but Americans didn't want it in the new world.

In the early decades of the new country, Americans continued to argue over the appropriate role for government. On one side was Alexander Hamilton, a financial whiz and former aide to George Washington, who helped draft the Constitution and later drummed up support for its ratification. He strove to mold the ragtag confederation of little states into a solid nation that could hold up—economically and military—against the powerful nations of Europe. Born out of wedlock to a poor girl in the West Indies, Hamilton struggled for success in life, and he feared that a loosely tied United States would flounder in a world fraught with dangers. "The country has a galloping consumption," he warned the leaders of the new confederation, "I have a powerful remedy for this problem—strong

government." Although he failed to convince the Constitutional Convention in 1787 to agree to his president-for-life proposal, he continued to fight for great power to be granted to a handful of well-educated men, who would be given the authority (indeed, perhaps the privilege) to do what they saw fit. Accused of favoring an "aristocracy"—a term that in the midst of the French Revolution held a distasteful connotation—he replied, "And whom would you have representing us in government? *Not* the rich, *not* the wise, *not* the learned? Would you go to some ditch by the highway and pick up the thieves, the poor, and the lame to lead our government? Yes, we need an aristocracy to be running our government, an aristocracy of intelligence, integrity, and experience."

He lost many of his arguments on the structure of the nation, but he did succeed for a while in his contention that government should help business, especially in a sparsely populated new nation that hoped to compete with British, French, and Spanish interests in the rough-and-tumble world of trade. The European world of the 1700s had no experience with large "corporations" as we now know them—there was simply no industry big enough to require them. Any form of big private business inevitably had brought scrutiny, regulation, and, sometimes, support from the old monarchies. Hamilton was familiar with trade and the military—two pursuits with which government was traditionally interwoven, the former often through state-sponsored "companies" such as the British East India Company. To prosper and compete, he reasoned, business needed the backing and assistance of government. As the first secretary of the treasury under President Washington, he established a single currency for the United States instead of the dozens of local forms of money that made interstate trade so difficult, imposed tariffs on imports so as to nurture American manufacturing, and, most controversially, established a Bank of United States to lend to businesses, mostly in the northern states.

To his critics—Jefferson, most notably—Hamilton's economic policies were in effect new forms of privilege. Nothing worried the genius of Monticello more than that the country might slide down from the lofty principles set forth in his Declaration of Independence and toward the muck of state-sponsored privilege. "Equal rights for all, special privileges for none" was perhaps his most pithy slogan, and it sounds right and noncontroversial to our modern ears; we cherish Jefferson's democratic ideals more than we do Hamilton's elitist model. Indeed, in the few issues around which today's liberals do want to rein in government—for example, the rights of the criminally accused, abortion, and free speech (except by corporations)—they often trot out Jefferson and his fiery rhetoric about freedom. But liberals tend to avoid Jefferson as their guiding light these days, largely because of quotes such as these: "I have no fear that the result

of our experiment will be that men may be trusted to govern themselves without a master"; and "Experience hath shewn, that even under the best forms [of government], those entrusted with power have, in time, and by slow operations, perverted it into tyranny."

Jefferson was, as these words "shew," what we would call today a libertarian, of sorts. His romantic ideal was of a nation of farmers, planting and selling their crops in a free market and living an honest and simple life, free from kings, dukes, and other forms of big government. He favored free trade—which both helped American farmers and facilitated the import of Jefferson's beloved French wine—and fought Hamilton's Bank of the United States. The fundamental problem with Jefferson's small-government vision became painfully clear, however, even during his lifetime (he died in 1826), as the nation's political debate turned to the issue of the most downtrodden of all people—the issue of slavery. Although he opposed the slave trade, Jefferson was skeptical that the federal government could or should do anything to stop the "peculiar institution," and much of his later writings gave succor to the growing secessionist movement in the South.

Indeed, Jefferson's libertarianism made him a bedfellow of the late eighteenth-century Scotsman Adam Smith, who argued that the "invisible hand" of free market competition, not governmental laws, leads to the wealth of nations. It was Jefferson who said that "the principle of spending money to be paid by posterity, under the name of funding, is but swindling futurity on a large scale." This link of Jefferson to Smith might surprise us today (as it would have back in 1790) as Smith was interested in fostering hardheaded businessmen, and Jefferson noble farmers. We think of Jefferson as the founder of a political movement that strives to give the poor and the weak prominence over the powerful—the principles of the modern Democratic Party, which he helped found—whereas Smith is still a patron saint of business and capital—the heart of the modern Republican Party.

The reason for our confusion is encapsulated in the dramatic changes in the meaning of the word "liberal." In Jefferson's day, to be liberal meant in effect to rebel against ideas of traditional and religious moralityand to oppose Hamilton's ideas for having the government grant privileges to business and the wealthy. This sense of "liberal"—the advocacy of freedom that we associate today with the American Civil Liberties Union—is still common in Britain, where to be called a liberal means that you speak out for a free trade bill or against Christian influence in schools. In the United States, however, the role of government has changed radically since the days before the Civil War. The early nineteenth-century "liberals," such as the young Illinois congressman Abraham Lincoln, who resisted

business-protecting tariffs and opposed the business-prompted war against Mexico in 1848 were the same leaders who later used government to help free African Americans from slavery. During Lincoln's career, the conception of government changed. Instead of the old idea of government's existing to help the wealthy and successful lead the nation, government now existed to help the poor and underprivileged achieve a bigger share of society's happiness.

Bias and Privilege in Today's Land Use Law

In our policy debates today, government is usually invoked as a means to help those who are struggling in the market economy. We have enacted laws against racial discrimination in employment, set pollution standards to protect those with health problems, and created programs to insure inexpensive medical care for the elderly. While today's liberals complain from time to time about a handful of "corporate welfare" programs, they usually see laws as a force for good. It is the conservatives who complain about "big government" and argue that government should "get off our backs." While conservatives often accept public programs once they are entrenched—Medicare and Social Security, for example, are now as American as the stars and stripes—they usually seek to restrain the breadth and cost of these programs.

It would be unthinkable today, therefore, for a politician to utter this speech: "The free market doesn't give enough benefits to the richer and more successful in our nation. Because these wealthy people are obviously the best and brightest, we should enact a government program to give them more than they get in the free market and take away some of the things that the poor and unsuccessful get." Such a position would be laughable, for both liberals and conservatives. To be sure, laws sometimes award benefits to the rich through obscure provisions snuck into appropriations or tax bills by sneaky lobbyists. But no politician would plainly and openly argue for tilting the playing field to help the rich; even the big-bank bailouts of 2008 and 2009 were done not to help the bankers themselves, of course, but to prop up the financial system from even greater collapse. To assert explicitly that government should help the rich at the expense of the poor would be a bizarre twenty-first-century revival of the discredited idea of privilege.

There is one area of governance, however, in which our laws *do* tilt the free market in favor of the affluent. These laws give wealthy people more than they would get in the market and modest-income Americans less than they otherwise would receive. The laws grant a privilege, not unlike the

discredited rules of King Louis of France. These laws govern the use of land, especially as to where and how housing can be built.

As I try to show in the chapters of this book, American land use law—often called "zoning" law because of the practice of drawing geographical zones for different land uses—routinely limits the free market to benefit the owners of single-family houses, especially those with large houses on large lots. These homeowners prefer, no surprise, to live in a community of similar homeowners. They prefer a community that not only bars factories and stores, but which also keeps out certain kinds of residences—apartments, condos, mobile homes, and even smaller single-family houses. Because existing homeowners often control the politics of their local governments—typically suburbs—these governments enact laws that in effect bar the low-cost housing. Lower-income families and single-person households are left searching for places where inexpensive housing is allowed. Barred from many suburbs, low-cost residences end up segregated into smaller areas—often the central city or less successful suburbs, and often far from where so many of today's new jobs are found.

Critics call this phenomenon *exclusionary zoning*—meaning, in effect, that the land use laws exclude certain kinds of housing, and thus certain kinds of people, from much of our nation. Many writers and scholars have discussed ideas for battling this phenomenon, typically through lawsuits or state laws to restrain the powers of local governments. The goal of this book is different. Although it examines some of the theory, it focuses instead on real-world stories of how exclusionary zoning works, before moving on to some suggestions for legal reform.

Many educated people are only vaguely aware of the notion of bias in land use law. One reason is that zoning laws typically are created and enforced at the local level of cities, towns, and counties. Accordingly, you don't hear much debate in national, or even state, politics. One term that is used in everyday speech is *NIMBY*, for "not in my backyard," in reference to the desires of homeowners to keep out new construction near them. But just because we don't hear Barack Obama or Sarah Palin talk much about zoning doesn't mean that it's not crucially important. Arguably, land use law affects how American citizens live on a day-to-day basis more than do any other set of laws.

Another reason for indifference toward the housing bias is that, to some people, it seems natural for successful homeowners to work to keep others out of their neighborhoods. Hasn't class segregation always existed? For sure; even ancient Rome had its wealthy neighborhoods and its poorer ones. The most famous of the French Louises—the fourteenth—disliked the clamor and smells of central Paris so much that he moved his entire court and bureaucracy out to Versailles, perhaps the world's first exclusive

suburb. But unless they had the clout of a king of France, city dwellers before the modern age had to put up with what urban commentators today call "density." Before the coming of cars or commuter trains, people had to live very close to their jobs, and cities were by necessity very small—you could walk across the big cities of London and Paris in an hour or so (depending on how often you stopped to scrape the horse dung off your shoes). Because they had no other choice, the rich had to live fairly near to the poor. While rich Victorian Londoners congregated in townhomes in the old West End, for example, even the fanciest streets were often only a few blocks away from desperately poor neighborhoods (which always outnumbered the wealthy places). The cholera epidemic of London's Soho in 1854 killed both the poor and the rich; it also spurred the creation of the modern city of sewers, planning, and active government. In Paris, the west side similarly has long been more fashionable than the east (nasty smells tend to drift east with the breeze), but in the denser, apartment-dominated French capital, separation was often limited merely to floor by floor. There is a great French newspaper drawing from the mid-1800s showing life in a Paris apartment block—the idle rich live on the floor above ground level; industrious middle-class families dwell a floor above; the working poor have to climb one more floor; and in the top garret live destitute and crazy bohemians. Needless to say, these classes of people probably had to encounter each other at the front door from time to time, and certainly did so on the street each day.

Even into this century, the rich lived fairly close to the poor in many cities. The ultimate early twentieth-century capitalist, John D. Rockefeller, Sr., spent much of his billionaire life in a luxurious townhouse on New York's West 54th Street. Inside was a palace of expensive carpets, furniture, and paintings. Just a couple of blocks away, however, was a squalid neighborhood of cold-water tenements, immigrant groceries, and rough taverns. Some of the poor could even see the top windows of Rockefeller's house (although the big guy probably kept the shades drawn). This was life in the city until well into the twentieth century. Rockefeller's house, his son's even larger house next door, and the tenements were all torn down for the Rockefeller Center project in the 1930s, which is a topic of discussion in Chapter 2.

But Rockefeller's great business achievement—the efficient distribution of gasoline—changed the way that Americans live, especially rich folks who could afford a nice car and a detached house. No longer tied to the city, affluent citizens were drawn by the allure of the suburbs, which offered the peace of the countryside combined with proximity to the city. As people spread out, the rich were able to move farther away from the offending poor. But real estate developers and planners took things a step

further: Why not try to use the *law* to ensure a more pleasant life for the new suburbanites? Why not use the coercive power of government to ensure that no factory, no wooden shack, and no immigrant apartment block would ever be built nearby, or anywhere in the jurisdiction for that matter? The certainty of legal prohibitions against potential unpleasantness would maximize the sale value of the properties, both for the developer and for future homeowners.

In the early 1920s, a group of lawyers drafted what they called the Standard State Zoning Enabling Act. Once adopted by state legislatures, the act allowed localities—counties, cities, and towns—to regulate tightly the geography of what could be built where. Although it's not well known outside the world of real estate law, this model act probably belongs in the National Archives in Washington, alongside the Constitution and the Bill of Rights. It shaped how our American communities are built and is one of the reasons why metropolitan Baltimore or Minneapolis don't look much like Bordeaux or Munich, for better or worse.

While this new form of regulation made a lot of existing homeowners happy, it didn't satisfy everybody, of course. Some landowners *wanted* to build a factory, a shop, or an apartment building, depending on the local market and what might make the most money. Now the government was telling them what they could or couldn't do with their land. Wasn't the right to control property one of the bases of America? Wasn't a man's land his castle (assuming he could afford a castle)? Things came to a head in the mid-1920s, when the rapidly developing suburb of Euclid, Ohio, east of Cleveland, enacted a tight new zoning law. Through the middle of the town ran Euclid Avenue, which was the suburban extension of Cleveland's main street. To the Ambler Realty Co., which owned a lot of land in Euclid, it seemed perfectly logical to stretch retail and apartment construction out of the city and into the suburb. But the town, following a new trend of suburban communities, outlawed both stores and apartments along much of Euclid Avenue. A federal trial judge that first heard the case ruled in favor of the realty company. Relying not only on property rights, Judge David Westenhaver looked through the zoning rules, especially those restricting housing, and made a prescient observation: The zoning law would have the effect of unfairly segregating the population by income and class. In effect, lower-income people would be zoned out of much of Euclid. Otherwise not known as a dynamite-throwing social revolutionary, Westenhaver didn't see this government-enforced class segregation as a justifiable exercise of governmental authority.

After the town appealed, however, the U.S. Supreme Court ruled that it was acceptable, and indeed commendable, for local governments to order the separation of land uses. The segregation would "increase the safety and

security of home life," reduce traffic, decrease noise, and create better places to raise children, the court reasoned. The viewpoint was that of a suburban homeowner, of course. We can easily see today the benefit of not having a Standard Oil refinery of Rockefeller's (who started in Cleveland) in the middle of a residential neighborhood of playing children. But what about apartments? The Court took special aim at the supposed ills of apartments, calling them "parasites" that eventually destroyed the residential character of a neighborhood. Just like "a pig in the parlor instead of the barnyard," the Court vividly concluded, apartments don't belong in modern suburban neighborhoods. The town could ban them. (Chapter 4 explores in more depth the Euclid case and its legacy.)

With this decision, the Supreme Court paved the way for class segregation in the suburbs, which by the end of the twentieth century housed more than half of all Americans. Why couldn't a landowner put an apartment building on Euclid Avenue? Because a majority of the existing residents of Euclid, acting through their local government, didn't *want* it there. The residents' wishes overrode both the claims of the landowner and the dreams of low-income families who might have wanted to move to nicer apartments in the suburbs. Why? Because the residents of Euclid, mostly affluent single-family homeowners, held the privilege of keeping them out.

Seeking Out the Housing Bias across the United States

This book explores stories of the housing bias in modern America. Here's how the book progresses. Chapter 1 relates the recent controversy over overcrowding and immigration in suburban Prince William County and Manassas, Virginia. Chapter 2 examines the use and abuse of the government's power to seize land for a private development through eminent domain in New York City. After a side trip to New Jersey's Mount Laurel in Chapter 3, Chapter 4 moves to the rural Midwest and brings the debate over class segregation to a twenty-first-century plan for a mobile home community in Putnam County, Michigan. Chapter 5 heads to Los Angeles, where the struggle concerns how to "fill in" more people into a huge metro area that already seems full. The Conclusion offers a new vision for combining community-minded thinking with the powerful force of the free market to develop a new American law that fosters a greater variety of housing for a changing nation.

1

The Third Battle of Manassas

As I drove west on Interstate 66 out of Washington, D.C., it occurred to me that the suburbs of northern Virginia are a powerful testament to the American Dream. The counties south and west of the capital are home to nearly 2 million people—more than three persons for every one in the nation's capital. At the center is Fairfax County, with a population of more than a million people, most of them living in pleasant single-family houses with trees and rich green lawns. Fairfax is the richest big county in the country, with a median annual household income of more than $100,000. The homeowners might work for the government, but they are more likely these days to be lobbyists, information consultants, or corporate executives of the many firms, such as General Dynamics and Hilton, that have moved their headquarters to be near their main source of both revenue and regulation. Closer to Washington are the smaller jurisdictions of Arlington, Alexandria, and Falls Church (the last two are independent cities under Virginia's unique form of local government). The first was named after the estate of Robert E. Lee that was seized during the Civil War and was made (to the general's great displeasure) the kernel of our most famous military cemetery.

Outside bustling Fairfax are the exurban counties of Loudoun (home to AOL and Washington Dulles Airport) and Prince William, which surrounds the small independent cities of Manassas and Manassas Park. The most notable site in Prince William is Manassas National Battlefield Park, the site of the two great Civil War clashes that northerners tend to call "Bull Run" after the nearby creek. The now-peaceful site, where morning dew settles on the oak-lined fields, was for long the most notable aspect of the quiet county to outsiders. It was, that is, until the first decade of the current century, when an anti-illegal-immigrant blog called Black Velvet Bruce Li stirred the anger of long-time residents, when the house-sized sign painted

by a Latino on Liberty Street likened new local laws to genocide, and when Prince William became a national symbol of the racial and cultural clash over land use. This chapter is about what might be called the Third Battle of Manassas.

Stonewalling the Invaders, Nineteenth-Century Style

The northern Virginia suburban counties are fairly recent additions to the great suburbanization of America. After Virginians cinched a deal to locate the new capital in the South, George Washington's influence steered the placement to a spot just below the last falls of the Potomac River, near the president's Fairfax plantation of Mount Vernon. Although Congress purchased a 10-mile-square diamond of land that straddled the river on the Maryland and Virginia sides, the capital city made few strides in the nineteenth century to becoming the Athens of the West, as many locals hoped. The smaller, underutilized Virginia side of the District of Columbia really wasn't needed and was ceded back to the state in 1846. While Baltimore and cities further north were laying down railroads in a frenzy by then, the slower, agriculturally oriented South saw less need to speed its cotton and tobacco to market at a feverish pace. The northern Virginia counties, sparsely populated by landowners of English and Scots-Irish heritage, along with their enslaved Africans, remained so rural that they held only one rail route. Although rolling Prince William County, named in the 1700s for a son of Britain's George II, was just 25 miles from the big new Capitol Dome that was under construction by 1861, it hadn't changed much over the past century. In fact, to span the 100-mile distance from Washington to Richmond, one couldn't simply take a train—there was no direct route. A traveler had to sail down the Potomac halfway to near Fredericksburg, south of Prince William, where one could finally catch a train to the Virginia capital.

By 1861, the Army of the United States sought to breach that gap, by force of arms. While sensible Virginians, such as General Robert E. Lee, opposed joining the Deep South states that had rashly declared their independence after the election of Abraham Lincoln as president, the capture of Fort Sumter in South Carolina spurred the South's most populous—but most vulnerable—state to join the rebellion. The attitude of many southerners was given voice by Confederate General Patrick Cleburne, who stated: "We propose no invasion of the North, no attack on them, and only ask to be let alone." But it was impossible for Virginia in 1861 to isolate itself from the Union in which it had so long been an integral part. And it was impossible to avoid what Virginians saw as an invasion by the

"foreigners" almost literally at their doorstep. This miscalculation would reverberate 140 years later.

Although the Civil War Union had very little by way of a trained standing army—like their modern counterparts, nineteenth-century Americans didn't like to pay taxes, and many of the top officers were southerners—the northern public, and President Lincoln, pushed for a quick strike against the rebels in the spring of 1861. It took two days in warm June weather for General Irvin McDowell's unwieldy, wool-clad army—with plenty of civilian spectators in tow—to reach Bull Run Creek near the town of Manassas, where the railroad led to Richmond, and where a Confederate force was waiting. A series of botched orders and blunders hampered tactics on both sides, and the two armies improvised fighting on the hills, swamps, and fields of Prince William County. Eventually the bulk of the Yankee force panicked into a retreat, toppling over sightseers' picnic baskets in their rush back to their capital. The South, which named the battle after the town, had won the first big clash of the war and anointed their first great hero, a former military college teacher named Thomas Jackson, who had stood like a "stone wall" during the heat of the action.

Although the somewhat stunned and untrained southern troops had repelled the invader, they failed to follow up on their victory (though they might have been able to threaten Washington). A year later, the Union Army had secured the Virginia defenses around the capital and seized the Potomac River home of General Lee, who was now commander of the Confederate Army of Northern Virginia. In August, Lee and Jackson attacked the northern troops dug in around Manassas, and once again the southerners sent the Yankee troops reeling back north. Emboldened, Lee and his toughened army—sporting a new "southern cross" flag to avoid confusion with the Union's stars-and-stripes on the smoke-filled fields—invaded the North twice over the next year, only to meet defeat at both Antietam and Gettysburg. Meanwhile, Lee's northern Virginia home was dug up for the Union dead and, with its two moments in the spotlight complete, Prince William County returned to a sleepy rural existence that lasted for almost another century.

The features of the modern world began to creep into the quieter counties of northern Virginia in the second half of the twentieth century. In 1950, Prince William still had only about 22,000 people—about the population of a moderate-sized neighborhood in Washington, D.C. But the federal government built Interstate 95 down the Potomac riverside of the county in the 1960s, enabling a freeway trip from Prince William to the capital to be completed in half an hour. The area was a natural home for the military (the Pentagon had been built near the Arlington cemetery), and both the U.S. Marines and the FBI greatly expanded their operations

at Quantico, in the southern part of the county. The growing number of residents in Manassas, always the county's biggest town, enabled the residents to take advantage of Virginia's unique laws and, in 1975, secede from the county as an independent city.

By this time, the closer-in counties of northern Virginia had firmly joined the Washington metropolitan area, burgeoning with new bureaucracies and their attendant lobbyists and businesses. While Ol' Virginny still conjured up somewhat pejorative images among many northerners, powerful families as progressive as the Kennedy clan found that the pleasant horse farms of northern Virginia made for fine weekend and country homes. With zoning laws decreeing that land could be developed only with single-family houses, but with a libertarian attitude that otherwise favored residential construction, Fairfax County became a great honeypot for residential development, as subdivision after subdivision spread out in a great arc west of Washington. By the 1980s, an amorphous Fairfax area with the bucolic-sounding name of Tysons Corner, conveniently near both the new Dulles airport and the auto Beltway around the capital, was home to more office space than were many big rustbelt cities. Tysons was a model for the service and information age, filled with offices for defense contractors, lawyers, and, of course, real estate businesses.

While the boom of the 1980s seemed perfectly natural to some, the rise of the northern Virginia suburbs also depended on a factor that most only whispered about—race. Although popular perception often juxtaposed black central cities against white suburbs, in the Washington area things were more complicated. In Washington, as in many cities (e.g., London, Paris, Los Angeles), wealthier citizens had always congregated in the upwind, west side of town. By the 1960s black citizens were the majority in the eastern half of Washington, which some African-American politicians called "chocolate town"; good schools, new houses, and antidiscrimination laws enabled them to move seamlessly over the eastern city border into suburban Prince George's County, Maryland, in the 1970s. The result was, simply put, white flight in its purest form (my own family was a part of it). By 1980 Prince George's was the nation's first majority-black suburban county. While the jurisdiction held governmental centers such as the University of Maryland and Andrews Air Force Base, most capitalists and white families shunned it.

Where would new development go? To Virginia, where—ironically, considering its history—far fewer blacks lived than in Maryland, in part because of the barrier of the Potomac River and in part because of a perception in the black community that Virginia was still the racist South. The fact that Virginia was the biggest recipient of the military buildup during the Ronald Reagan presidency of the 1980s helped speed up its

development. As happened in nearly every growing metro area, one side of the suburban realm boomed—often, the side with the airport—while the other sides languished. Land use experts often call this "the favored quarter" phenomenon. In the Washington area at the end of the twentieth century, northern Virginia blossomed with wealth and business, while the Maryland suburbs significantly lagged behind.

One result of the great boom in Fairfax County was that low- or even moderate-cost housing became more and more difficult to find. With plenty of affluent families moving in, the median value of a home in Fairfax rose to more than $500,000 by 2000. Where was a modest-income family tied to a Tysons job supposed to live? For many, the answer was the further-out jurisdictions of Prince William and Manassas.

South to Manassas

On a gray and blustery January day, I continued west on Interstate 66 through Fairfax. The freeway, limited to carpools during rush hours, is bordered by subdivisions of large brick and vinyl-siding houses, punctuated from time to time by truly enormous suburban palaces. It's the kind of place where you expect to find routes with names like Pleasant Valley Road—and find them. In outer Fairfax, the developments die out and are replaced by fields and woods—courtesy of Fairfax's tightened zoning laws. As in many places in the nation, you can tell the jurisdictional boundary simply by the land use changes. As soon as one crosses over into Prince William County, the laws change and development sprouts anew. I exited onto Route 234, into the heart of Prince William, toward the city of Manassas. Like many routes off American freeways, Route 234 is a middle-class capitalist paradise of fast-food outlets, tourist motels, strip malls, and big boxes—all of which are surrounded by acres of parking lots. At my first stoplight, a lone pedestrian anxiously passed across the front of the panting phalanx of cars and trucks; there was no crosswalk. In the three-mile stretch of retail suburbia before entering the city proper, I saw only one other pedestrian during the busy lunchtime rush hour. Stopping at a Chipotle, a sort-of-upscale fast-food place, I made the cherubic girl taking orders smile by ordering a burrito with no meat (even meatless, it was almost big enough to feed a family of four). About a third of the patrons seemed to be Latino; the rest were a mix of whites, blacks, and Asians.

The approach to the city of Manassas offered the first signs that this wasn't just another nondescript exurb in the middle of America, however; a number of non-chain restaurants with Aztec pyramids on them began to appear. As I passed over the city boundary, the intensity of the retail

development dropped. As many American towns once were, Manassas is still divided dramatically in half by railroad tracks, with an affluent northern half and rather poor southern half. Greeting the visitor from the north are lovely Victorian homes on large wooded lots, gracing streets such as Stonewall Road. On the "wrong" side of the tracks are houses on tiny lots, some with smudged shingles and crumpled blinds behind the windows. In a symbol of the schizophrenic nature of the once-Confederate city now pulled into a modern metro area, a main street through the poor side of town is called Grant, while an intersection in a townhouse complex just off it (amusingly named "Georgetown South") reveals the intersection of Taney and Pickett Roads, named after two heroes of the slave-owning Confederacy. Latino families were returning in their cars from lunch, perhaps from the La Jarochata Restaurant or the kabob place in the little strip mall nearby.

Downtown Manassas itself retains some of the charm of nineteenth-century America. Redbrick storefronts are lovingly maintained. Along with inevitable antique shops and a Thai restaurant were, however, a distressing number of empty storefronts. Although the Route 234 strip had been clogged with cars during the lunch hour, downtown Center Street was quiet and the sidewalks were nearly empty on the early weekday afternoon.

On the southern edge of Manassas a development of large but uninspiring single-family houses stood near one of only a few apartment complexes in the city of 30,000—an attractive new luxury garden apartment complex called Wellington Place. As I moved on, the abrupt end of development and a return to fields and forests signaled that I had passed back into Prince William County proper. The surprising lack of housing just outside the city was misleading; the county was home to more than 360,000 people—more than half of the entire state of Vermont and more than half of Virginia's population during the revolutionary days of Washington, Jefferson, and Madison. As much as many long-time residents were pained to think of it, Prince William was no longer a rural county, but had been swallowed into one of the nation's biggest and fastest growing metropolitan areas.

In part because rush-hour trips to or from downtown Washington are often nightmares, most northern Virginians work not in the capital but in another suburb. Arlington's Pentagon, the world's busiest office building, employs more than 23,000, and thousands of more military workers, both uniformed and civilian, are stationed at other posts, including Prince William's Quantico. Fairfax's Tysons Corner employed about 100,000. In fact, many northern Virginians, especially those in the outer suburbs of Fairfax and Prince William, boasted that they rarely if ever found the need to "cross the bridge" into the nation's capital. A result was that northern

Virginia suburban street routes were often clogged with big Lexus SUVs and Toyota Prius hybrids alike. According to a study in 2009, a Prince William development called One Meadow Lane held the longest average daily commute of any neighborhood in the nation—more than 46 minutes each way.

With so many jobs in suburban Virginia, outer suburbs such as Prince William were no longer so far "out." By the 1990s, real estate developers looked beyond Fairfax into Prince William, and into the promised land. There were many reasons, beyond race and Fairfax's congestion, why Prince William beckoned. Unlike Maryland on the other side of the Potomac, Virginia had especially strong laws upholding private property rights, including the right to build. In many states, for example, local governments may directly regulate the appearance of new houses and office buildings—all in the name of keeping up property values of neighbors and providing for the general public good. Not so in Virginia, at least in theory; the courts of the Old Dominion have held consistently that governments don't hold the power to regulate for "aesthetics." While local land use authorities often got around this by linking appearance to functional components, such as layout and traffic flow, developers found that Virginia's land use officials weren't as domineering as they were in other states. In fact, the whole idea of social engineering—the notion that government should work to create a more "perfect" community—didn't fly very well in conservative Virginia. As a result, the commonwealth had a rather meager "farmland preservation" movement. Much of Prince William is hilly and not ideal for big farms, which is one reason why its population in 1950 had been, like much of rural tidewater Virginia, not much greater than it had been a century before.

At the end of the twentieth century, however, with a pro-development county government in place, housing subdivisions sprouted across Prince William like yellow crocuses after a March snowmelt. From only about 22,000 in 1950 (in other words, less than the daytime population of the Pentagon alone), the county's population increased by more than this amount in each of the next five decades, reaching more than 280,000 by 2000. The little independent cities of Manassas and Manassas Park, surrounded by Prince William, together held another 40,000. By the turn of the century, however, the real estate market was just heating up. To the delight of real estate developers, the housing boom would swell the size of a typical new house, the mortgage loans of its buyers, and the population of the county. The reasons had less to do with the local land use laws or the Virginia economy, and more to do with changes north along I-95, in Washington and New York.

Irrational Exuberance: The Great Housing Boom

Some had worried in the 1990s, with the end of the Cold War, that northern Virginia's economy would suffer. They needn't have been concerned; in good times or bad, government always grows. In fact, the end of the Cold War often meant that military jobs that once were in California or Germany were now simply consolidated in the Pentagon or at Quantico. Because the federal government was riding so high—at one point, with a booming economy and cuts in defense spending, the federal treasury ended up with a short-lived budget surplus—Washington felt rich and bold enough to start up new domestic projects. And nothing thrills Americans, at least in good times, more than the idea of fostering homeownership.

There are a number of ways to measure a nation's prosperity and happiness. Gross domestic product is the measure most often used by economists; the more goods and services that a nation generates, the idea goes, the more there is to go around, and the happier its citizens will be. By contrast, social advocates often point to unemployment statistics; after all, a nation can produce a lot of big-ticket items, but still not have an economy that is diverse enough to offer jobs for all its citizens. But in the United States, we have often relied on a third measure—the rate of homeownership. The "American Dream," of course, has always been a home that the family owns, a place to call its own. This ideal isn't so important everywhere in the world. In countries with dense cities, it's expected that even affluent families will rent urban apartments, with no loss of pride and not necessarily any loss of happiness. Indeed, homeownership and wealth don't always go together. West Virginia, one of our poorest states, has the highest rate of homeownership in the nation, at nearly 75 percent, even though its poverty rate was 17 percent in 2009; meanwhile, Switzerland, which by some measures is the richest and happiest nation of all, has a homeownership rate of only 37 percent. In countries where a single household may be home to multiple generations ("extended families," we tend to call them), whether the head of the household owns the title to the property really isn't so important, especially to the grandmother or adult child living under the same ceiling. But in America, where children are expected to head out on their own by 21, and where old people most often live apart from the rest of the family in their declines, we cherish the ideal that as many families as possible should own their own home.

The Jeffersonian ideal of a nation of humble but proud landowners took a while to reach the majority of Americans, as many rural folks in the farm era couldn't afford to buy the land they worked; urban dwellers as well most often rented. As recently as the end of World War II, fewer than half of all households owned their abode—with rates lower than a third in

dense urban states such as New York and in poor rural states such as South Carolina. But the idea of the government's fostering homeownership was already an ingrained part of American policy. A program to boost residential construction in the early twentieth century—the tax deduction for home mortgage interest payments—quickly became a sacred subsidy for the owner. New Deal programs in the 1930s, such as the Federal National Mortgage Association, greased the wheels of mortgage credit. After the war, the GI Bill and a strong economy spurred massive suburban construction for countless families, many of which were newly empowered with a personal automobile. Thus, the homeownership rate shot upward, from only 44 percent in 1940 to nearly 62 percent by 1960. The stereotype of the typical American family of mom, dad, and kids in a nice house and mortgage of their own was becoming true, for the first time, for the majority of Americans.

The one group for whom homeownership was still typically out of reach—black Americans—was given a boost by the Fair Housing Act of 1968, which made it unlawful for lenders and agents to discriminate on the basis of race. No longer could banks conclude simplistically, "We don't lend to blacks because they're not a good credit risk," and no longer could agents simply say, "Sorry, this is a white neighborhood." The national ownership rate continued to inch upward, topping at close to 66 percent in 1980, as Americans continued to push for the ability to drive a nail into their wall, despite the 1970s economic slump and 20 percent mortgage interest rates. But the 1980s Regan era—characterized by some as the rich getting richer and others treading water—wasn't so good for the homeownership rate, which slipped down to below 64 percent. When Bill Clinton was elected president in 1992, one of his priorities was to nudge this number up, especially among blacks and other racial minorities, for whom the rates were still below 50 percent. The Clinton administration pushed for tougher enforcement of the Community Reinvestment Act, which required banks to "reinvest" in the lower-income segments of the community, in part to make up for past discrimination, such as the "redlining" of certain neighborhoods in which banks wouldn't make loans. To the surprise of many, the homeownership rate shot up dramatically again. By the last year of the century, for the first time more than two-thirds of American households owned their home.

It wasn't all Washington's doing, of course; the financial world was also revolutionizing the way it did business. Back in the mists of history—say, the 1960s—banks earned profits by miserly lending money to solid credit risks and paying low rates to depositors; they made a profit on the interest rate differential. Bankers passed around the 5-3-4 joke about their inherent conservatism: They lent at 5 percent, paid interest at 3 percent, and

were on the golf course by 4. But this kind of complacency didn't last in the accelerating world of the end of the century. The inflated interest rates of the 1970s broke up traditional ways of thinking, and the saving-and-loan collapse of the 1980s forced many bankers to rethink their business models. Meanwhile, in the booming economy of post-Cold War America, citizens were richer than ever before, and acting like it. Nobody remembered what grandpa and grandma had gone through back in the 1930s; they steamed ahead for the good life. Meanwhile, financial whizzes were developing a new model for profitability. The old notion of simply making a small but safe spread on interest rates and then hitting the links seemed both boring and timid. Instead of making money on good credit risks, lenders figured out that they often could make more money on "bad" credit risks—through penalties, fees, and other charges. Back in the 1930s, a modest-income family would have been scandalized to be penalized by their bank; by the 1990s, it was no big deal to a family that had dreams of a three-car garage and Caribbean vacations. Young people whose parents had been turned down for a cherished American Express card a generation ago were now showered with credit offers—in large part because the lenders hoped to chisel them here and there with finance charges and other occasional fees for sloppy money handling. Banks were thrilled that Americans no longer frowned on being debtors; in fact, to many it seemed silly not to run up a big balance on the credit card: Why turn down all the great stuff that a credit card could bring? And the banks could charge 20 percent interest. In the mortgage world, lenders programmed their computer models and found that they could make unprecedented profits by making high-rate loans to modest-income people who used to be considered poor credit risks. Lenders found it easy to push these high-rate loans—euphemistically called "subprime" loans—to moderate-income families, who were thrilled that the loan could get them a fantastic new house in a sparkling new development in the distant suburbs. If the bank thought that you were a good enough risk to lend to you, why doubt them, right?

A striking example of this crazed lending and buying was reported in the *Washington Post* in 2009. Although it occurred on the Maryland side of Washington exurbs, it reflected, in extreme form, what was going on in Prince William in the new century. A single mother named White had rented a modest single-family house in a suburb of houses built in the 1950s and 1960s for government bureaucrats and the like. Although she was college educated, her income came mostly from running a day care business out of her house, which earned her typically around $20,000 a year. She also got government aid. Like so many Americans, however, she wanted more. When her landlord decided to sell (and many landlords sold

their rental homes after the year 2000, hoping to catch the top of the wave of the housing boom—a phenomenon that further shrank the supply of low-cost rental housing in the suburbs), she went looking to buy. Like most Americans, she looked at the newer, shinier, and better-equipped new homes further out. After all, the exurbs were where the new money was rolling in, where so many new jobs were found, and where the promises of the American Dream seemed brighter than ever.

A generation ago, White might have first visited her bank or another mortgage lender, which quickly would have tossed cold water on her hopes and would have warned her that, with her small income, the best she could hope to buy in Montgomery County was a small condo, as many other moderate-income African Americans had done in recent years. But things had changed, and many home sellers didn't worry about whether prospective buyers could get financing—almost everybody seemed able to get financing these days. Because so many different layers of the housing business were now making money off the very fact that a house was sold, there was little of the old pressure to guard against potential mortgage failure and foreclosure. Unhappily for White, she ran into a seller at the cutting edge of the new world of real estate shenanigans, who encouraged her to buy a $698,000 home in northern Montgomery County, 15 miles from the Washington boundary, in an area that was corn fields and horse farms 20 years before. The almost-new house was far from her old day-care customers, but it was spectacular—three stories, three big bedrooms, a built-in two-car garage, and all the magnificent appliances and amenities in which America is still the world leader.

How could a woman with such a small income possibly buy such a house? By stating on her mortgage loan application, with the seller's encouragement, that her income was multiples higher than the truth. Her savings, which before her search had been negligible, were bumped up by a contribution from the seller. A generation ago, a tight-fisted lender would have demanded better documentation of her stated income and would have nixed the application. But by 2005, many lenders had adopted a new policy: We won't demand documentation if you agree to a high—very high—interest rate. White was saddled with an interest rate that was initially 8 percent, rising to 15 percent—more than double the "prime" rate. While it might have seemed to an outsider that the lender was covering its risk by charging a high interest rate, this really wasn't what was going on. In fact, the lender wasn't worrying about whether White was ever going to pay back her loan (although it would be pleased to report that it had approved yet another loan to a racial minority, which would help quell the old complaints that lenders discriminated against blacks and Latinos). The lender—actually, the business that dealt with the buyer these days was most

often merely an "originator" of a loan—knew that it could immediately sell off this loan, along with dozens of others like it, to people who would package them, and then sell slices of these loans to hungry buyers across the world. Who wouldn't want to buy an asset that was going to pay twice the prime interest rate? Even if the distant investor had known even the crudest details of the homebuyers' finances—which it didn't of course, because it was merely investing in a slice of a package of mortgage obligations—the investor might have figured thus: Well, if a particular homebuyer gets into trouble, she can always just sell her property for a profit, just as everybody has over the past few years in this crazy, glorious housing market. And even if a rational-thinking analyst realized that booms don't last forever, the analyst also knew, quite rationally, that the bust might come years later after he or she, and everybody else around, had made tidy sums, changed jobs a few times, and bought their own dream houses.

What about the federal government? A key feature of policy for decades had been "disclosure" and "truth in lending." Government didn't want to tell lenders how to run their businesses—this would be anti-American—but it did want prospective buyers to see information about what they were getting into. In the mess and tumble of real life, however, the idea of requiring information by law and making sure that it actually gets conveyed are two different things. So is ensuring that those were supposed to be helped actually paid attention and understood what they were told. In White's case, she said she didn't know until the real estate "closing" how much her monthly payments would be. She hoped that, once she built up her day-care business anew, she could afford to pay about $2,600 a month. When told that her initial payments would be about $5,600 (to rise later, of course), she panicked and left the room. She called a friend, who advised her to back out. But on returning to the room and being reassured by the seller (who stood, of course, to make an instant profit on a house bought for half as much some years before), she signed.

The denouement was predictable, of course. Within a year, White had stopped trying to make her colossal mortgage payments and was served with a foreclosure notice. Like many others in this situation, she in effect chose to ignore it, until her belongings and those of her children were literally tossed onto the lawn. She failed to build up her business to the level she previously had. White and her kids briefly moved into a homeless shelter and then into a subsidized motel room and apartment in Montgomery County. For those who might have been loath to have any government money go her way, the story ended with her moving into a pleasant apartment unit with a fireplace and complex pool—all largely on the public tab. Why so lavish? The truth is that there simply isn't much low-cost housing at all in Montgomery County, thanks in large part to its exclusive zoning

laws. So indigent families such as White's end up in government-subsidized housing that is more comfortable than the housing that's enjoyed by most people on the planet.

A More Diverse Union

A similar flood of money and optimism poured in Prince William County in the first decade of the new century. Armed with mortgage credit (often, quite literally ARM-ed with a dangerously flexible rate), families looked for a first house, or a newer, better house. A little brick 1950s rambler in inner Fairfax or other older suburbs would no longer do. The real excitement was in the "exurbs"—regions beyond the traditional suburbs—such as Prince William, where developers were responding to all this new money and demand and giving consumers exactly what they wanted. Let the architectural critics scoff at McMansions (only people in real mansions were doing the sniggering); middle-class and even modest-income families couldn't get enough of the new homes with two-car garages, four bathrooms, a kitchen with a central "island," and an atrium hallway with cut glass windows on the front door, now relabeled an "entry portal system." All this, and all you had to do was ask for the loan.

As the national homeownership rate crested at 69 percent, families flooded into Prince William and into the green arms of developers. The once-rural county's population mushroomed from about 280,000 in 2000 to more than 360,000 in eight years. Who was actually building all these houses—that is, setting up the beams and driving in the nails? A couple of generations ago, it had been a simple answer: Workers who lived in more modest houses in older neighborhoods built the bigger houses further out. Blacks and whites from central Washington built the first modest bungalow suburbs of Arlington and Alexandria for the Model T set in the 1920s, and dreamed of owning one themselves one day, and the next generation built the bigger brick houses in Fairfax in the 1950s. But this system was gone by 2000. There were few young men in Fairfax who wanted a job setting drywall in Prince William, and if for some reason they did want such a job with minimal pay, they probably wouldn't be trusted by their supervisors. By the new millennium, it was standard practice that almost all basic construction jobs in places such as the Washington metro area were handled by Latino laborers—this was as straightforward an unwritten law as that which decreed back in the 1940s that porters on the railroad had to be black. Even African-American laborers from Washington or Alexandria couldn't get jobs—they wouldn't have the connections to the labor suppliers, they might not be able to communicate well with their coworkers, and

they might not be willing to put up with the tough working conditions and low pay.

The explosion of Latino immigration—both awful and unlawful—to the United States has radically changed the country in so many ways that we still can't fully comprehend. For one thing, the greater diversity of America, filled out further by the immigration of Asians, especially to high-tech areas such as northern Virginia, has exploded the old and simplistic notion of the United States as, quite literally, a white-and-black nation. Issues of segregation, discrimination, and affirmative action, which were at least understandable two generations ago, have become extraordinarily more complex today. Subcultures such as suburban non-English-speaking Latino immigrant laborers and high-achieving low-income Asian students have overturned old conceptions about what it means to be a "minority." By 2000, Latinos had outnumbered blacks as Prince William's largest minority group, and their numbers continued to grow. The percentage of foreign-born residents in the county skyrocketed by more than ten times from 1980 to 2006, with much of the growth happening in the new millennium. From 2000 to 2006 alone, the Hispanic population jumped from about 27,000 to 68,000. More than half of all the new residents arriving in Prince William in the new century were Hispanic.

As Prince William's population shot past that of Richmond, the state capital, and it became an ethnically diverse suburb, one might have expected that its housing stock would change to reflect this diversity. After all, when Latino immigrants move into a community, it is no surprise that the local grocery stores replace some Wonder bread with tortillas and the local video stores begin to stock Spanish-language videos. Shouldn't the housing stock change to reflect the new demand with more modest-size and low-cost housing? But, as we will see throughout this book, the market for housing doesn't work like those for bread or videos. Through the power of zoning and land use law, entrenched residents can control what sort of housing is available in the jurisdiction in which they live.

The Map that Makes a Community

One way to understand the power of zoning laws is through color—that is, through blues, reds, yellows, beiges, and an assortment of other hues. Most every locality in the nation has a zoning code that tells landowners what they can and can't do (Prince William's is typical, in that its code runs hundreds of pages). Along with the code comes a map with the most basic information of all—which types of land uses are allowed in which areas. As Prince William County officials printed me out a fresh

"zoning classification map" on the cold January day, I thought of the similarity between the colorfully splotched zoning map and some of the joyous abstract expressionist paintings of the 1950s. But neither Jackson Pollock nor Frank Stella dreamed that the choice of whether to plant a yellow splotch here or draw a blue line there would affect how a community is created. There's no more "meaningful" art than zoning maps.

Each category of land use—industrial, commercial, and the myriad residential zones—is drawn with a different color. The most striking feature of the Prince William County map is how much of the county of 338 square miles is tinted with the palest cream color—zoned as "agricultural." (A brighter color for this land use would have overwhelmed the artistic balance, I mused.) Of the land controlled by the local government—about a third of the county is federally owned, for the battlefield and the Marine base—nearly half is reserved for farming. For some undeveloped areas, the county had changed the zoning in the 1990s from residential to agricultural, in a vain attempt to slow down population growth. In later chapters, I'll question the wisdom of this preference for agricultural zoning in suburban areas and examine why many farmers aren't happy to be tied to this classification. In any event, the agricultural zoning, put in place in many cases decades ago when Prince William was still a sparsely populated rural area, in effect locks up an enormous chunk of the county as off-limits to any residences other than farmhouses.

Of the remaining land, only a few sites—a few square miles—are shaded blue for industrial and transportation uses, mostly north of Manassas and along the Potomac River. One of the key rationales for zoning laws in the early twentieth century was to separate, by law, smelly and noisy industrial areas from residential neighborhoods. Similarly small chunks of land—on the Route 234 strip (where I got my burrito) off I-66 and just off I-95 near the town of Woodbridge—are painted red for "business" uses. The rest of the county is shaded various varieties of yellow and beige, for "residential" uses. Here's where the law gets really complex. In the early days of zoning, there typically were a few different residential zones—say, single-family houses, townhouses, and apartments. But the number of residential categories has grown, as local governments have become more savvy, and existing residents have learned the remarkable ways that they can shape their community through subtle zoning distinctions. In Prince William, there are zones that allow at most 16 houses per acre and those allowing only six per acre. Other zones demand houses that are even more spread out—one for lots of 10,000 square feet or more and another for lots of at least 20,000 square feet (which is close to half an acre). Then there are categories that demand truly rural appearances—a zone allowing no more than one house per acre and another permitting no more than one house

per five acres. One house every five acres ensures its owners that they won't get a lot of neighbors slowing them down on the adjacent roads. In the 1990s, thousands of acres of unbuilt land in Prince William that had been zoned for more dense housing were "downzoned" to require fewer houses per acre (indeed, more acres per house). This both slowed the potential population growth and at the same time ensured that the buyers would most often be wealthy taxpayers, not modest-income families.

Zones are drawn over decades, in Prince William as in most places, through a complicated process that takes into account a variety of factors. For areas that were already built up before zoning began in the twentieth century—for example, the town of Woodbridge in the eastern part of the county was constructed in the nineteenth century with small houses clustered together, as demanded by the pre-automobile world—the zones typically are drawn to acknowledge what's already there. If a somewhat rural region tends to have only a few houses per acre, this often leads the government to zone a large chunk of land around these houses as requiring a similar sparseness. And, of course, the desires of existing landowners play an often-compelling role. Residents lobby zoning officials to keep the housing density low in the areas around their own houses. If the current homeowners are dissatisfied, they will vote the government out and demand new zoning rules.

Once these zones are tinted on the map, they hold the force of law to control what can be built on private property. A quick perusal of the residential zones on the Prince William map shows that the most widespread color is the classification SR-1 (one house per acre), which covers much of the semirural central part of the county, between Manassas and Woodbridge. Interestingly, the land immediately adjacent to the southern border of Manassas—recall that south Manassas is the "wrong" side of the tracks—is zoned either agricultural or with the big-lot requirements of SR-1. The second most common color is R-4 (allowing lots of at least 10,000 square feet) in the busier suburban-type neighborhoods around the two towns.

Fans of zoning have touted the reassurance that it gives to homeowners about the future character of their region—if you buy a house in an SR-1 zone, you can be pretty certain that developers won't turn your countryside into a Dallas or Detroit any time soon. It's against the law. Expectations—and the home values that go with them—are secure.

So what's the problem with having zoning law fix the land uses for years to come? Here's the problem. Let's say around the year 2000 you owned some acres of undeveloped property that was zoned as SR-1 just south of the city of Manassas. This region might have a few houses, some open fields with grazing horses, or perhaps some small woods on slopes that were

abandoned as farmland decades ago. As the market for suburban housing pushed into Prince William, you'd be foolish not to notice that there was a lot of money being made in new housing. The new migrants weren't farmers, of course, but were typical American families looking for a suburban home not too far from their office jobs in Manassas or in nearby Fairfax. You'd make money by dividing your property into typical suburban lots of eight to an acre and selling them to happy droves of middle-class families looking at Prince William for the first time. But you can't do this. You've got to keep your land semirural—not because this necessarily makes sense for a county being enveloped in suburbia, but simply because a zoning map written years before decreed so.

And what about the Latino immigrant families, many of whom just recently moved here from El Salvador or Mexico to work constructing new houses, cleaning them, or stocking shelves in the local big box? They're unlikely to be able to buy an acre-sized lot. What they want is low-cost housing. In a free market, the profit motive would encourage you to consider meeting this new demand by building on your land some small houses, an apartment block, or maybe even a mobile home park. After all, you can fit a lot of low-cost units in the space taken up by one McMansion's yard. But not in the world of zoning. The law says that only home lots of at least one acre are allowed. One house every acre is too small for a decent farm, of course, but it's also far too big to create a suburban neighborhood. So if an immigrant family of four, or perhaps a single man looking to make money and send it home to his mother in Latin America, asked if there were any inexpensive housing in the area, chances are that the answer would be "no."

Apartments play a special role in American land use law, as we'll see throughout this book. Americans have a schizophrenic attitude toward this most dense style of living, in which even simple "garden" units can accommodate comfortably more than a hundred households per acre. Whenever artists are asked to portray the future of metropolitan areas, they typically come up with images of dizzyingly large modern apartment structures, often with train lines running through them and rooftop gardens to help feed and cool the residents. This kind of low-impact, land-saving, carbon-sipping kind of lifestyle is an environmentalist's dream. It's also prohibited under most American suburban zoning laws.

If one scrolls through the hundreds of pages in the Prince William zoning code, which governs things such as how far back from the property line a house must be built and whether an owner may attach a carport to the home, one finds the classifications of zones that seem to offer a more dense style of neighborhood. There is a zone called "Urban Residential," allowing more than 30 dwellings per acre, including apartment buildings, and

"Village," permitting "street grid" construction with buildings built smack against each other, allowing for a "pedestrian" rather than an auto-oriented environment. Like a village. But if you look for these colors on the zoning map, you won't find any. While the categories exist on the code, there aren't any printed on the map. No urban residential neighborhoods or villages are permitted in Prince William.

Yes, there are some apartment units in the county. There are a few spots of rust-colored R-16 close to the towns of Manassas, Woodbridge, Occoquan, and Dumfries. As of the year 2000, in the midst of the housing boom, about 17 percent of Prince William's housing units were multifamily dwellings. This might seem like a decent amount, considering our stereotypical image of suburbia as nearly all single-family houses. But most suburbs across the nation have become increasingly diverse in character, as they would have to, considering that more than half of all Americans now live in suburbia. Fewer than a quarter of all households in America are two parents with kids today; a rapidly expanding number of households include elderly people living alone, young singles starting out, couples putting off having kids, and other types of "households" that don't meet the Ozzie-and-Harriet family model. In fact, more than half of all households consist of only one or two persons. Many jurisdictions that were once uniformly suburban now more closely resemble entire states, with all diversity of population that this entails. For example, across the wide Potomac River from Prince William lies another county named after an eighteenth-century English prince—this one is Prince George's County, Maryland. Larger than its Virginia neighbor and adjacent to Washington, Prince George's holds a population of more than three-quarter million people. There, more than a third of all housing units are apartments. Likewise, in the inner Virginia suburban jurisdictions of Arlington and Alexandria, close to half of all dwellings are multifamily units. In cities such as Washington, of course, the vast majority of units are apartments, even in the wealthy neighborhoods west of Rock Creek Park, where the Champs Elyseés of the capital, Connecticut Avenue, is lined for miles not with Connecticut-like mansions but with big apartment blocks that are home for lawyers, doctors, and lobbyists.

With Prince William's population growing by hundreds every week at the turn of the century, and home prices doubling in less than a decade, advocates for low-cost housing called for the county government—and governments everywhere—to adjust the zoning laws and allow more low-cost apartments. Many profit-driven developers would have been happy to oblige, especially in places experiencing a boom in the migration of low-income people. But it didn't happen. A sour combination of restrictive zoning laws, local opposition to attracting low-income residents, and

easy credit for buying single-family homes led to, ironically, a stagnation in new apartment construction in the midst of a population and housing boom. Because people from outside the jurisdiction—say, a modest-income worker from Alexandria who just found a job in Manassas—have no political say in what happens inside the county, they hold no sway in how the county government shapes its housing policy. Only the entrenched residents get to vote on local politicians and local policy. For every new apartment built in Prince William from 2000 through 2004, at the height of the boom, six new single-family houses or townhouses (often big three-story town mansions) were constructed.

The New Millennium Challenge

The housing boom of the new millennium created many bizarre phenomena. For one, it was possible to get loan for a half-million dollar house with an income of less than $50,000 a year, simply by being "creative" with the income line on the application form (often with the encouragement of the loan originator) and being willing to sign up for a complicated adjustable rate mortgage. The spike in prices raised fears among some housing researchers that moderate-income families—both immigrants and long-term citizens—would be priced out of the market, especially if they weren't willing to take on one of the crazy mortgage loans. But experience had taught advocates for low-cost housing that it was political suicide, especially in the suburbs, to talk about providing more housing for poor people. Close your eyes and picture this concept; now imagine how a settled suburbanite would think of such an image in his or her community.

By the year 2000, therefore, advocates had developed a more sympathetic image and marketing name—"workforce housing." Just as supporters of "affirmative action" in the 1980s retooled the tarnished concept into "diversity," the marketing of "workforce housing" involved the idea that the kinds of people that an affluent suburb both needed and admired—schoolteachers, police officers, and librarians—were finding housing too expensive. Government should loosen its land use laws to encourage more "affordable housing," to use another market-tested term. "It is for our elderly, our kids and police and firefighters," argued a Republican member of Prince William's governing Board of Supervisors in 2004. "We're talking about neat, clean, nice-looking affordable housing units," she said, countering the image of affordable housing as, well, slums. Housing analysts warned that low-income families shouldn't be spending more than 35 percent of their income on housing. But little came of the idea in Prince William, especially when so many families were willing to spend more than

50 percent of their money on a house. It also failed to get much support in a county where another Republican supervisor called the idea of government intervention in the housing markets unwanted "social engineering"—a catchphrase guaranteed to raise the hackles of a skeptical Virginia suburbanite. But what was the entire idea of zoning, with its strictly delineated colors and restrictions on housing construction, other than a rigid form of "social engineering"—only one designed largely to serve the desires of current homeowners?

One answer to the dearth of cheap housing was that low-income people simply would have to live elsewhere—after all, the original idea of the suburb is that it served as a refuge from the chaos and complexity of the city. This idea might have made some sense in the close-in suburbs of the 1920s, but not in 2005. Where were modest-income people hired to work in Prince William supposed to live? Nearby Fairfax County was a short drive away, but the median house price peaked at a dizzy $732,000 around this time. The counties south of Prince William were rural and zoned predominantly for agriculture. The apartments of Washington, D.C., were a commute of at least an hour away. One solution was for groups of people—single men working to send pay home to Latin America, extended families, or even parties that were in reality just acquaintances—to buy or rent as a group, in numbers that weren't traditional for a so-called "single-family" house. As we will see, this solution ended up at the heart of the political firestorm that engulfed the county. Why wasn't this affluent Virginia suburb able to accommodate a growth in population and immigration more effectively?

Once Upon a Time in America

History shows how it used to work. One hundred years ago, in the midst of the great European immigration to a nation bursting with energy and jobs, housing for poor immigrants was fairly simple. Unless a family from Europe had, say, relatives in Wisconsin or Texas that wrote to them about opportunities for homesteading, many migrants first settled in the cities. In southern Manhattan today, a fascinating ghost of this age lives in the form of the Lower East Side Tenement Museum. At 97 Orchard Street, the museum evokes the real-life stories of the families that lived in the narrow, six-story walk-up apartment building, originally built in 1863. A century ago, families such as the Levines and Baldfizzis squeezed into narrow two- or three-room Orchard Street tenements, the largest of which were about 280 square feet total—about 11 feet by 27 feet, or not much larger than a good-sized master bathroom in the new houses of Prince William County

today. The tenement kitchen, in which the family cooked, ate, and placed their only table, and on which children studied schoolwork, typically was the largest of the rooms, even though it often separated the two other, smaller rooms, usually used as bedrooms. The tenement had no running water, bath, or toilet. Children sometimes slept in the same room as their parents, and some big families had six people sharing a single room, with little children sleeping on the floor. Some families ran small trades, such as sewing, cobbling, or washing, from their tiny units. It seems to us today an impossibly crowded and difficult way to live, but this was all that poor immigrant families could afford in a place such as New York City. The tenements may have been even more crowded than the houses back in Europe, but the immigrants had hope. Most of the families worked hard and saved money, the museum explains, and most eventually moved on to bigger and better homes and bigger and better lives. Because many of them had fled Europe because of discrimination, war, or lack of employment, they undoubtedly were grateful all their lives for the chance given to them by the tiny tenements of Orchard Street, Manhattan, New York City, America.

There are no tenements in Prince William County for twenty-first-century immigrants, of course. Zoning law prohibits them; even if the basic zoning map were radically changed, the laws would still prohibit the running of a business from a house or families living without indoor plumbing or parents sleeping in the same room as their children.

Family life has changed over a century, of course. What's interesting, however, is that new conceptions of family cry out for small housing units just as much as did the world of a century ago. Until fairly recently, most young Americans married in their early 20s, and started a family soon thereafter. Indeed, in the 1950s, when many basic suburban zoning laws were set in place, the typical American girl was married by the time she was 21. In the twenty-first century, ideals have changed. Seniors now account for one in every eight Americans—a 50 percent increase from the 1950s. Most choose not to burden their children with housing, even in widowhood. Young people are putting off marriage and children. Reared not on *Father Knows Best* but on the characters of *Friends*, *Seinfeld*, and *Sex and the City*, young adults now view living alone in town as a socially expected norm (another manifestation of today's self-centered society, some say). In 2009, more than one-quarter of all American households consisted of simply one person living alone—an all-time high. In places such as the Washington area, a magnet for young singles seeking well-paying office jobs, the number is close to 30 percent. In the District of Columbia and close-in Arlington County, almost half of all households are just a single person. Which local county had the smallest share of one-person households? Prince William, with only 18 percent. The relative paucity of solo

households in Prince William and other outer suburbs isn't simply a matter of less demand—after all, thousands of single Latino men were employed in Prince William in recent years. There just aren't many housing units designed for only one person.

Back in the 1960s, many commentators still thought of local laws as furthering "the general public welfare," a shining ideal that was accessible through the straightforward workings of democracy. Eventually, a more skeptical public—hardened by Vietnam, Watergate, and muckraking local journalists uncovering scandals that previously would never have been brought to light—became more cynical about their elected officials, even at the local level. People began to pay attention to skeptical writers of political science who called themselves the "public choice" school of thinking. Politicians don't simply do what's best for the community, these unromantic writers asserted. Governments are often taken over by various special-interest groups that realize that laws can tilt the playing field in their direction. In the 1980s, a scholar named William Fischel noted that when a growing suburb first puts in place a comprehensive zoning law, it typically mandates low-density development—just as the existing residents want. Many, if not most, of the residents of these suburban jurisdictions want to keep crowds, traffic, and "excessive" development away from the pleasant neighborhoods in which they've just bought a house. If they can ensure that any new residents will be fairly affluent ones—which land use law can do pretty effectively, by mandating large and expensive lots—the suburb's budget is likely to stay in good shape. More recently, economists Edward Glaeser and Joseph Gyourko have crunched numbers and concluded that restrictive zoning laws—lobbied for by the entrenched homeowners—have greatly exacerbated the housing affordability problem in America. Choke off the supply and you get, of course, higher prices, which suits the current homeowners just fine. In fact, Glaeser and Gyourko speculated that raising the values of existing homes is probably the most important factor in local government politics.

Who loses out? Everybody who is not already a homeowner in the community. Let's say you're a young married couple seeking a nice apartment in the suburb in which you've just secured jobs. Or maybe you're an immigrant who's come to the United States to find a decent-paying construction job in the housing boom. You'd prefer that suburban governments allow the construction of a variety of housing options, including low-cost apartments. But that's not what the existing homeowners want. You can't do anything politically to change the situation, because you're not yet a voting resident of the community in which you can't yet afford to live. Political scientist Richard Briffault has pointed out that if each comfortable suburb defers to the desires of the privileged, huge swaths of metro areas will be

in effect off-limits for the lower-income half of the society. Where will they live—not only the construction workers and young couples, but the public school teachers, garbage collectors, firefighters, and maids, as well? If they all have to drive an hour through traffic to reach their jobs, what concern is it for the privileged suburbanites?

Not all jurisdictions can play the game of twisting zoning laws to let in only the wealthy and keep out the poor, of course. If Washington, D.C., decided that it wanted more big houses on big lots inside the city limits, there is not much that it could do; the city was built up with modest townhouses and apartments decades ago. Moreover, most metro areas have a wealthy side and a not-so-wealthy side, even in the suburbs. The richer side tends to be the area in which new jobs and new development pressures rise. In less affluent suburbs, often where there are higher percentages of racial minorities and more crime, rich prospective homeowners simply won't even consider moving. In Atlanta and Chicago, the wealth tends to be in the north, not the south. In the Washington area, as in many places, it is the west side that's the favored. In the 1990s, as wealth moved to northern Virginia, Fairfax County overtook Montgomery County, Maryland, as the richest in the country by median household income, while the outer western suburbs of Loudoun and Prince William were transformed from farming areas to mostly affluent suburbs. By 2007, Loudoun had surpassed Fairfax in median household income. Prince William was the thirteenth richest in the nation, with a median household income of above $84,000—just above the famously wealthy Silicon Valley county of Santa Clara, California.

Build Them and They Will Come

The boom in Prince William meant, of course, a huge demand for workers—workers to pour concrete foundations, to nail the structural beams of the houses, to lay the asphalt on the winding exurban streets, and to dig and lay the underground sewer pipes, as well as to sell beans and socks to those who did all of the aforementioned. So the great demand for laborers in places such as Prince William stoked a great migration—of young men, especially—from Latin American countries.

The influx of Latinos—through both legal migration and unlawful border crossings—has transformed America over the past generation. By 2009, some estimates placed the number of immigrants unlawfully residing in the United States at near 11 million, most of them from Latin America. This migration elicited a not untypical schizophrenia in American society. At the same time that our politicians and citizens

expressed outrage that foreigners were illegally entering into our country and taking jobs, much of our economy was buttressed by the cheap and reliable labor that these workers provide.

Why wasn't the federal government doing a better job of enforcing the immigration laws? The old communists of Eastern Europe were successful for decades in keeping their own citizens from fleeing to the West; why couldn't the United States prevent foreigners from coming into the country? One reason is simply a matter of money—it would require billions of dollars to build and maintain an effective curtain along all our entire southern border. Another reason is private initiative—for centuries, people who have sought to migrate to America for a better life have used extraordinary pluck in evading law enforcement and achieving their goal. But perhaps the largest reason is that the effort to stop illegal immigration has been done half-heartedly. For every suburban racist who closes his or her eyes and imagines a horde of thieving immigrants charging over the Rio Grande, there is an American who depends on this illegal immigration. For many employers, especially in the suburbs, cheap migrant labor has proven to be a godsend. One of the most striking examples of this phenomenon was shown early in the Bill Clinton administration when two consecutive nominees for attorney general withdrew because they had hired nannies who were in the country unlawfully. It was simply difficult to find an American citizen to do such work cheaply. Meanwhile, millions of suburbanites happily hired poorly paid laborers to mow their lawns, clean their gutters, or replace their drywall. The reluctance to vigorously enforce the nation's immigration laws is another manifestation, of sorts, of the privileges of American suburban homeowners.

Straining the Suburban Social Contract

Early in the new millennium, some residents of Prince William and Manassas began to grumble over what they saw as unwelcome changes in the "character" of their community. Were some simply expressing a racist dislike of too many Latinos in their previously mostly white communities? Certainly. Those who deny the racial aspect in American home choices are deluding themselves. I sometimes ask liberal friends whether they would send their kids to a school in which black or Latino students were the majority—often, after a pained look, I get the response that it would depend on the school's reputation and test scores. For those white Americans who disliked the idea of having to live with, or to send their kids to school with, many darker people, the influx of Latinos placed them in a dilemma. For decades, they were able to flee from racial diversity. Until the

1950s, explicit discrimination segregated most black Americans into urban and rural ghettos. When fair housing laws and a more open society allowed blacks to move into new neighborhoods, race-conscious whites moved to the suburbs. When blacks migrated to less-expensive suburbs, the race-conscious whites moved away or further out, to exurban locales such as Prince William. But from here, a recently rural exurb at the border of a metro area, to where could one flee? An alternative was to stand and fight the migration.

Were other residents expressing arguably race-neutral concerns? Probably yes, here too. One can't paint everyone with a single broad brush. Some complained that the school system was being overtaxed by large numbers of Latino children, many with marginal skills in English. Some grumbled that groups of scruffy-looking young men were congregating in parking lots early in the morning, hoping to be hired for a day job. But most significantly, suburbanites began to notice that some of their neighbors were no longer acting (it was the conduct, not the color of skin, they emphasized in public) in ways that we expect suburbanites to act.

Sociologists say that we develop "social contracts" for behavior in certain situations in our society. Conduct that is perfectly acceptable at a football game—yelling, cheering, or even cursing—isn't proper in a movie theater. One can wear a bikini to a beach bar, but not to a fancy city restaurant. In suburbia, there are standards of conduct that seem to have coalesced into a social contract. One is that a suburbanite isn't supposed to make a lot of noise at night, with a handful of exceptions, such as a Fourth of July party. After all, there is plenty of room inside a suburban house for all but the biggest party. A suburbanite isn't supposed to run a business with auto traffic at the house, regardless of local zoning laws (which in many places ban all such conduct). And, perhaps most significantly, a suburban household is supposed to revolve around a nuclear family—mom, and/or dad, kids, maybe a grandparent, and maybe an out-of-work sibling for at most a month or two.

A suburban household isn't supposed to include many relatives of multiple generations, and it certainly isn't supposed to include a group of unrelated people, such as a commune or a student group house. In fact, in many places such group houses are outlawed by zoning rules. It doesn't matter that the homeowner is happy to rent to a group, such as four college kids, and is ready to guarantee any harm that they might cause—it's just plain against the law. There wasn't always such an antipathy toward group homes. For centuries, cities and towns were filled with boarding houses—homes in which the owner (often a widow) rented rooms to all sorts of people who couldn't or didn't want to have their own housing unit. Such homes were attractive to young people just off the farm, women who

moved to the city in wartime to work in factories, or old folks who couldn't afford or take care of a house by themselves any more. But as the country got more affluent, demands for privacy increased, and the suburbs mushroomed, expectations changed. Just as most 16-year-old suburban girls no longer want to waste an evening babysitting for a few dollars (and as many parents no longer trust their child with a teenager), single people were less often satisfied with the constraints of the boarding house. As these expectations changed, the social contract in effect was amended to shun the boarding house, at least in the suburban realm where a majority of Americans now lived.

In Prince William County in 2005, however, some Latino immigrant families were straining this new social contract. Unlike their white neighbors, they often didn't follow the modern American pattern of a small nuclear family to a house; often, they invited relatives, acquaintances from their old hometown, or even coworkers to live with them. This was especially the case with young men who immigrated to the United States for work without a family. With no wife or kids on hand and no source of inexpensive housing nearby, they sometimes rented houses in a group. While such a living arrangement might seem sensible and unremarkable in many parts of the world, it was exceptional in suburban America. Unlike their white counterparts, the Latino immigrants didn't stay inside for most of the day, venturing out only to mow the lawn on summer Sundays or to a twice-yearly backyard barbeque. The immigrants from El Salvador, the Dominican Republic, and elsewhere socialized in their backyard, as is common in countries without widespread air-conditioning and with a more social community structure. Unlike the long-time suburbanites, for whom privacy and a sparkling home were paramount ideals, many of the immigrants preferred to play music in the backyard or to work on old cars in the driveway, instead of planting daffodils or cleaning the vinyl siding. To many of the traditional suburbanites, the influx of Latinos with a different value system—not to mention the threat of crime always palpable when unattached young men hang out and drink—challenged their understanding of what life in America was supposed to be like.

Black Velvet Bruce Li and Friends

Anger among Prince William's white conservatives in the new millennium manifested itself in an unusual medium. Ten years before the Prince William Controversy, the mainstream media exclaimed surprise and dismay at the "angry white male" followers of radio advocate Rush Limbaugh,

who supposedly marched into the voting booths and brought Republicans to power in Washington. By 2005, however, angry white voters gathered in a more twenty-first-century manner—through the Internet. Common wisdom held that it was mostly young and hip people who were taking advantage of online communication—first through chat rooms and instant messages, and later through social networks such as Facebook and Twitter. These young people kick-started the short-lived campaign of Howard Dean in the Democratic presidential campaign of 2004 (which ended after Dean yelled like a teenager after one primary early in the campaign) and were more successful in galvanizing youthful support for Barack Obama's election in 2008. Meanwhile, however, and without much media attention, middle-aged white males were figuring out that online communication wasn't just for their kids. Often being college-educated, equipped with a high-speed computer, and blessed with plenty of free time typical of a suburban male, this demographic discovered that many like-minded citizens were on the Web, sharing ideas about what they perceived to be the descent of American suburbia. While their wives and sisters were often most comfortable in face-to-face conversations, the rough-and-tumble world of online communication appealed most often to men. And the freedom of the Internet from old-fashioned journalistic ethics allowed them to vent their opinions more vociferously than was typical in the traditionally staid world of county and city politics.

In Prince William and Manassas, one such Internet blogger carved for himself a central place in the anti-immigration battle. Greg Letiecq was a trim and mild-looking computer programmer in his 40s who became convinced that illegal aliens were threatening the way of life for himself, his family, and his suburban neighbors. In the traditional public realm, he became a leading spokesman for a group called "Save Our Manassas" that became a force in pushing for a crackdown on illegal immigrants in both the city of Manassas and Prince William. As early as 1998, he spoke in public about the need for local governments, not the federal one, to be the driving force against illegal immigration. "Every change that has really made a difference in this country didn't come from somebody knocking on the doors of Congress," he said. "It came from localities demonstrating that change can happen there." In person and at public meetings, he spoke calmly about religious faith and of helping illegal immigrants "return to their culture" in Latin America. On the Internet, however, he was more daring—he led a blog called "Black Velvet Bruce Li," at www.bvbl.net. The name appears to derive from the Internet term "blog fu," which signifies both the skill of the user and the aggresive nature of such blogs. According to a newspaper profile in 2007, Black Velvet Bruce Li was "a virtual ninja, practicing character assassination, innuendo and exhortation with the skill

of a black belt." Regardless of politics, such skills were bound to draw the envy of any red-blooded middle-aged suburban male.

Subtitling BVBL as "driving liberals insane since 2005," Letiecq verbally attacked gays in the public sphere, advocated traditional Christian religion, and claimed that the police were hiding increases in crime. Most of all, he fought with a white-hot passion against the influx of illegal immigrants into his community, which, he wrote, threatened a "headlong rush to become a third world country." Among the plagues that illegal immigrants brought, he asserted, were gang violence (especially a branch of the notorious MS-13); drunken parties; draining of social services; and overcrowding of schools, hospitals, and houses. Lawmakers soon signed on to this fiery rhetoric, even if the complaints about groups of single laboring men living in Prince William houses didn't always match the complaints that illegal immigrants were filling the school with the children of parents who didn't pay taxes.

Letiecq brushed off charges that he was a racist with challenges to affluent liberals who argued for tolerance and understanding of the Spanish-speaking neighbors: "It's easy to talk about 'earned citizenship' for illegal aliens when you only encounter them when they come to mow your lawn instead of inundating your schools, overcrowding a third of the houses on your street, and filling your community with MS-13 gang-bangers." To counter the "invasion," we need to "raise an army," he said.

The practical problem for Letiecq and like-minded suburbanites was that local governments traditionally had little to do with immigration. In the absence of Washington's tripling the number of guards at the southern border or building the world's most impenetrable fence, it seemed as if the prosperity and promise of America would, as it has for more than 300 years, keep immigrants streaming over into the United States. In some countries, a citizen has to get official permission to move from one town to another; in open-minded and restless America, by contrast, the freedom to move has always been a cherished right. Putting up police barriers at the border of Prince William would undoubtedly have been enjoined as an unconstitutional restraint.

But what if immigrants could be dissuaded from moving to or staying in the community? Federal law has for years included half-hearted steps to prevent employers from hiring illegal aliens; employers were supposed to verify the legal status of new employees or suffer fines. While this meant that office workers in Nebraska had to dredge up their birth certificates, this did little to prevent the employment of unlawful migrants in the shadowy world of day labor. Against this backdrop, some communities decided to move more boldly into blocking the day-to-day lives of the unwelcome.

Two localities got the biggest headlines. In Farmer's Branch, Texas, a middle-class suburb north of Dallas, the city government enacted in 2006 a sweeping new ordinance that, among other things, required landlords to check and verify the legal status of prospective tenants. Like Prince William, the once nearly all-white Farmer's Branch feared a flood of immigrants in the new century, with some estimates that nearly one in three residents was Latino and that there was no real way to determine how many were illegal. Latino advocates cried foul over the new law. What landlord, faced with potential fines for renting to an illegal alien, would risk punishment by renting to anyone with an accent? The law was open season, they argued, for discrimination, open or subtle, against all immigrants, in a state in which one in every four persons was Hispanic.

Meanwhile, Hazleton, Pennsylvania, a small city north of Philadelphia, adopted an ordinance to revoke the license of any business that did not verify the legal status of its employees. A once-bustling industrial city that had gone through hard times, Hazleton, like Farmer's Branch, suffered from a panic among long-time residents over a perceived influx of Latino immigrants to work in farms and small businesses. Again, the new local law had teeth, in that it imposed the burden on the employer, not the government, to prove that it hadn't hired an illegal immigrant. Again, the law was written so as to discourage an employer from hiring anyone about whom there was any doubt—indeed, anyone who looked foreign or who spoke with a foreign cadence.

The American Civil Liberties Union (which prefers the term "undocumented persons," as if the papers were simply missing) led challenges against both the Hazleton and Farmer's Branch ordinances (which is a lawyer's term for a local law). In both cases, federal district court judges enjoined the operation of the laws, holding that they improperly stepped on federal prerogative in enforcing federal immigration laws. Neither case was decided by an appellate court, however, and legal scholars disagreed about the wisdom of the district court opinions. Although everybody agrees that local governments can't enact laws that conflict with a federal policy, some scholars argue that there is no reason why cities and counties shouldn't be able to act in a manner consistent with federal law. It's against federal law to sell crack cocaine over state lines, for example, and nobody suggests that it would be illegal for a state or city to add local penalties for such a sale within their borders. Why shouldn't local governments be allowed—at least as a matter of constitutional law—to enforce illegal immigration policy, as long as it is not unfairly discriminatory (as both the Farmer's Branch and Hazleton ordinances may have been)? This question remains unresolved, even after the state of Arizona made international news in 2010 with tough new state laws against illegal immigrants.

Police Power Trumps Property Rights

In Virginia, interestingly, the focus of the anti-immigration effort was not employment, but housing. There were a number of reasons for this. One factor was that many immigrants living in Prince William or Manassas worked in other jurisdictions, such as Fairfax, Loudoun, or Arlington Counties. Another reason was that many of the Latino workers were day laborers who often worked in informal and shadowy conditions, in which it was hard to find and punish employers—and who might have included a number of average suburban homeowners.

But while employment could skirt the law by movement, housing has to stay put. Fortunately for the anti-immigration movement, there is a long history of government regulating how people live. For centuries, governments in the Anglo-American tradition have wielded the power to regulate buildings and construction, dating as far back as the requirements for building in stone, not wood, that followed the devastating Great Fire of London in 1666. The key concept is called "the police power," meaning the authority of local government to regulate aspects of local life. Traditionally, anything that arguably helped the "health and safety" of the community was fair game for regulation under the police power, as long as it didn't violate any specific human right. Courts ruled fairly consistently that the police power trumps the right to property. Needless to say, this wide-reaching authority sometimes runs headlong into the principle that one's home is one's castle, as it did in Prince William.

In modern times, governments have regulated not only the physical construction of buildings and houses but also the occupants themselves. As the social contract changed, "overcrowding" became fair game for local police power regulation. At first blush, there certainly appear to be good safety reasons for regulating overcrowding. We don't let 90,000 people into a football stadium designed to hold only 50,000; why shouldn't homes be the same way? We don't want teenaged boys and girls sharing a bedroom, do we? Back in the days of chamber pots and the dumping of sewage into tenement alleys, regulating the number of people in apartment houses might have had a direct relation to hygiene and health.

But for most of American history, there was little if any regulation of how many people could live in a house or apartment. In city flats and in small farmhouses, big families often crowded into small spaces, and the community simply let the families work out any difficulties. For example, young Robert Dole of Russell, Kansas, spent much of the Great Depression sharing a single bedroom with his three brothers in their family's little house; this experience didn't prevent him from becoming U.S. senator and being nominated as the Republican candidate for President in 1996.

But as America grew more affluent and more suburban in the twentieth century, old practices of tight and meager living no longer seemed appropriate. Suburbanites weren't satisfied merely with creating a comfortable lifestyle for themselves; they often wanted their entire community to reflect their own values of living. One way to see how suburban dwellers view their communities is through the lens of the private homeowners' association, a phenomenon that blossomed in the twentieth century to encompass nearly half of all new housing in many places by early in the next century. Left to their own devices, homeowners often vote to regulate the colors of their neighbors' houses, how their neighbors may prune their trees, and how long their neighbors are allowed to park cars on the street. Although advocates of such rules speak of "maintaining property values" for everyone, some who chafe at this intrusiveness prefer the term "busy-bodies."

Americans have spoken with their dollars about their preferences for how to live; the widespread popularity of detailed rules in the modern private subdivision shows that *controlling how one's neighbor lives* is a common desire of the modern American. So it is not surprising that this desire worked its way into the public laws of housing. In the twentieth century, suburbs voted to keep out apartments—and apartment-dwellers, of course—with zoning laws that restrict what kind of housing can be built. With this power firmly embedded in American law, governments began to regulate not only what kind of house can be built, but *who* could live in them.

Too Many People

At first blush, the police power would certainly seem to encompass "overcrowding," with its connotations of tenements and unsanitary conditions. The fact that a common mind's eye image might include people of color may also have something to do with the new laws. Indeed, some of the first overcrowding laws were adopted in New York City and in San Francisco in the 1870s, where Chinese immigrants often jammed into small living spaces. The San Francisco Lodging House ordinance banned dwelling units that offered less than 500 cubic feet of living space (which works out to about 70 square feet for today's houses); an impetus to the law was the Anti-Coolies Association, which fought the immigration of Chinese laborers who supposedly took low-paying jobs away from American-born citizens.

From these beginnings, more and more communities began to adopt rules mandating minimum square footage per person. The practice spread after World War II, a time when "scientific" solutions for all of our

problems seemed right and natural. According to law professor Frank Alexander, however, "the scientific basis for the standards has been less than overwhelming." In some instances, numbers appear to have been, in effect, picked out of a hat. Alexander notes that a group called the American Public Health Association published in 1950 a recommendation of a minimum of 400 square feet per person or 1150 square feet for a family of four. Where did these numbers come from? The association didn't base its figures on any scientific study, but rather on a typical number for "high-income groups."

Meanwhile, other organizations were trying to define "overcrowded" by measuring the number of people per room. In 1940, a rule of thumb was that more than two persons per room was too much; later, a more affluent America decided that more than one person per room was unacceptable. The change was made not because Americans have gotten fatter (which is true, of course), but rather because the people who make the rules prefer only people who live in the same comfortable, uncrowded surroundings that they enjoy. If suburbanites can use the power of law to keep out crowded households, why not do so?

As the housing controversies in Prince William eventually wound down in 2008 and 2009, the county commissioned a study of how to respond to the perceived problem of overcrowding. A private consultant's report was non-confrontational. Attuned to the political sensitivity of the issue, the report never used the word "immigrants" and made no mention of ethnicity. Rather, the report focused on the difficulties of finding, investigating, and enforcing occupancy laws. As for the reasons for such laws, the report included three pictures of "examples of neighborhood deterioration" (not making clear whether these were from Prince William or not) that showed untrimmed vegetation, trash, and old cars parked on a lawn. It explained:

> Pressure on schools, water and sewer systems, and the transportation system are primary issues of concern. Additionally, outside storage, trash and debris, and inoperative or prohibited vehicles on residential lots have been identified in complaints. Community members are also concerned about parking on unimproved surfaces, lack of adequate street parking, and noise issues associated with coming and going at all hours and continuous partying in the household and their friends.

This is a revealing passage. It seems to assert that the problems of overcrowding relate to annoyances to neighbors that are visible or perceptible outside the house—too many cars, too much trash, too many loud parties. All these things are within the traditional power of local government to regulate directly. There have always been unpleasant neighbors (at least in

some communities). But the proposed solution was not to engage in the relatively straightforward process of targeting specifically these unwanted practices—by ticketing and towing vehicles, issuing citations for dumped garbage, or mobilizing police to turn down loud parties. Rather the proposed solution to these annoyances perceptible outside the house was, oddly enough, to regulate more tightly the number of people *inside* the house.

The report went on to quote a study from the nearby town of Herndon in Fairfax County. Considering the comments, the consultant may not have wanted to associate itself directly with these assertions:

> Over-occupancy of units creates health and safety dangers to home occupants and their neighbors. These dangers include fire hazards, spread of diseases to occupants and the general population, an opportunity for domestic violence and abuse, effects to mental health, and other adverse impacts on the peace, comfort, and safety of residents.

Wow. If a large number of people in a dwelling truly poses a fire and disease hazard so extreme that government must outlaw it in the suburbs, surely we should be alarmed at the existence of college dorms and big-city apartments, as breeding grounds for disease, mental illness, and domestic abuse. One would have thought that germs, not proximity to other humans, were the chief cause of disease. It is true that if we all lived alone there certainly would be less chance for domestic violence, although I'm not sure that it would help our mental health. And the most striking of all the putative harms—fire hazards—certainly is affected more by smoke alarms and precautions, rather than by the simple number of people.

If we acknowledge, as the Prince William consultant did, that it is very difficult to ascertain, verify, and enforce occupancy limitations, why do governments turn to these difficult-to-enforce laws that have only an indirect effect on public welfare, as opposed to the more direct targeting of cars, trash, and fire hazards? Is it because the goals are not really to protect the residents from these hazards, but rather to discourage certain *types* of people (the types that tend to live in big families or groups, of course) from the neighborhood?

The "public choice" school of economics says that we should be skeptical whenever government says it's doing something for the good of the public as a whole. Lawmaking is just another example of a marketplace, they argue, in which people hassle and trade for what they want. When politicians say that something is good for the community, they may really mean that it will help a re-election bid or that they've taken money from a lobbyist to push the legislation. A classic example was the laws against

margarine, which was taxed heavily and even banned in many states—dairy-producing states, of course—in the early twentieth century, on the grounds that it was dangerous to health and that consumers would be confused as to whether it was butter. The state of Wisconsin, which once had an entire government department devoted to targeting the supposed evils of margarine, lifted its laws only in 1967. We can chuckle now, because it is so easy to see through the obvious influence of the dairy industry. But how can we separate today those laws that are truly good for the public from those that are simply the victory of a special interest?

"Family" Values

There's one big problem with tough laws dictating how many people can live in a house—the sanctity of the American family. What if a family of five in a small house gets a call from a recently widowed grandmother, who says she needs to move in with her children? She says that she'll sleep in the little basement, keep to herself, and won't be a problem to anybody. Even if the grandmother were to make the house overcrowded in terms of people per square foot, would you want to be the government housing inspector who ordered her out on the street? No, you wouldn't. This would be a public relations and political suicide. It's the don't-mess-with-kindly-grandma principle of law. So there has to be an exception for a single "family." And it's this word—"family"—that is the crux of most of the overcrowding laws in America today, including in Prince William and Manassas.

The term "single-family" house is something that we're all familiar with. Even the landmark ordinance from Euclid, Ohio, back in the 1920s (discussed in Chapter 4) restricted much of the town to "single-family" houses. But what exactly does it mean? Back in the 1920s, the term referred simply to the look and construction of a house. We all know what a single-family house looks like—one or two stories; probably a slanted roof; and outside walls built of something warm and pleasant, such as brick, siding, or stucco. If a five-story concrete building with a flat roof, strip windows, and a loading dock were occupied only by one family, we wouldn't call it a "single-family house" and no self-respecting suburb would want such an ugly behemoth in the middle of a suburban block, regardless of who lived there. It was a matter of size and design.

Because of this early focus on what the building looked like, early zoning laws rarely regulated the composition of the "family" itself. If the household across the street had eight kids and two grandparents, well, that might be a little annoyance, but there wasn't anything you could do about it. After all, didn't owners have the right to their own house?

As the twentieth century wore on, however, suburban governments began to think about regulating the "family" itself. Although today we sometimes think of "family" and "household" as equivalent, it wasn't always this way. A century ago, a household often wasn't just a single family. Rich families often shoehorned their maids and butlers (who, despite their tuxes and bows, typically earned only poverty-level wages) into tiny bedrooms in stuffy attics of the family home. In rural areas, many farms and ranches weren't truly "family" farms but were in effect small businesses, in which farm or ranch hands lived in small rooms or shacks on the farm property. But there were few calls for government regulation; this is simply how the working class made their living and how they lived, often with dreams of saving up enough money to move out on their own. If a childless couple of cousins lived in a wing of a big and drafty Victorian house, did this make them part of the same family? The answers weren't so clear, and didn't seem very important. In fact, the U.S. Census measured only "households," but not "families," until 1950.

In the more affluent postwar world, however, the ideal of the suburban family began to coalesce. As law professor Frank Alexander points out, the term "nuclear family" was coined only in 1949 by anthropologist George Murdock, influenced no doubt by the great potential that all things "nuclear" posed at the time. While it was still typical for a household in, say, China to have three generations living together, in America the standard was becoming two parents and their kids. Now that grandfather had his Social Security payments, he was expected to live on his own. And the spinster sister could no longer simply sleep in a back room; she was expected to get in her car and drive elsewhere.

While early laws that limited occupancy to "families" made exceptions for servants (guess who had political power?), there wasn't much action or enforcement of "family" restrictions until the 1950s. One of the first areas of contention arose, ironically enough, because of the mushrooming growth of colleges. The number of college fraternities and sororities—not the kind of neighbors that most suburban families want—expanded, and neighbors rapidly enacted and enforced "family" limitations to keep them away. Although the owners of houses for college students asserted property rights, the neighbors typically won in court. In a famous case from the early 1970s, the affluent "village" suburb of Belle Terre in Nassau County, New York, enforced its no-group-house law against a homeowner who rented his house to a small group of students from the nearby State University of New York-Stony Brook (without the university, the town might never have seen the need for such a rule, of course). In response to the homeowner's argument that the government didn't have any right to tell him to whom he could rent, Supreme Court Justice Thurgood reasoned

that the law was spurred by stereotyping. A law based on an assumption that college students will misbehave is just as impermissible as a law spurred by stereotypes of people based on race, argued Marshall, the first black Supreme Court justice. But a majority of Court agreed with Justice William O. Douglas, who reasoned that it was perfectly acceptable for a town to keep out group houses. "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs," Douglas wrote for the Court's majority opinion. (As for the restrictions on motor vehicles, the aging Douglas, who grew up in the Model T age, might not have understood well what the driveways of typical suburban homes look like.) "It is ample to lay out zones where family values, youth values, and blessings of quiet seclusion and clean air make the area a sanctuary for people," he concluded. In other words, suburbia is a privilege for affluent families, not for noisy college students.

Although many critics today snicker at Douglas's naiveté, the *Belle Terre* decision is still good law, and local governments generally remain free to enforce household composition rules. With the battle won to limit households to families only, suburban jurisdictions moved to narrow precisely what is meant by a "family." Not just any large group of related people can claim to be family—images of Thanksgiving dinner notwithstanding, of course. As San Francisco housing activist Jim Morales has pointed out, suburban conceptions of "family" are often shaped by the fact that large groups of relatives living together are most often Latinos or other immigrants. In California, a Latino family is more than twice as likely as a white family to hold five or more persons.

Sometimes, local governments went too far. Some suburbs decided simply to limit the number of children allowable in a home; this triggered a pro-child backlash and resulted in amendments to the federal Fair Housing Act in 1988 that made it unlawful to discriminate against "families with children." But these changes haven't stopped both governments and landlords from using other steps—such as zoning laws that restrict the number of bedrooms allowed in a house or apartment—to quietly discourage children. Why would a locality not welcome kids? For one thing, more children in a community mean more schools and more taxation. Surreptitiously antikid laws are especially popular in places such as Florida towns, where childless senior citizens often hold great political clout.

Restraints on the definition of "family," according to Frank Alexander, reflect "the values, customs, and prejudices of a dominant subclass of American culture" and "the social and cultural rejection of certain lifestyles" that don't match the ideal. Governments have in effect tested how far they can tighten the "family." In a handful of cases, courts have

blown the whistle. San Diego, California, passed in 1991 an occupancy limit that applied only to rental housing, not to owner-occupied ones. A court struck down the law, pointing out that any real concern for health or safety would have to apply to both renters and owners. The issue of ethnicity in a city adjacent to the Mexican border didn't have to be spoken, of course. In another case around the same time from Edmonds, Washington, the Supreme Court held that the federal Fair Housing Act, which makes it illegal to discriminate against the handicapped, but which allows occupancy restrictions, didn't necessarily protect a city ordinance that barred a group home for recovering drug and alcohol addicts. The city had rejected the group's argument that, by living and cooking together, it was in effect a permissible "family." Most entertaining was a case from East Cleveland, Ohio, where the government saw fit to limit certain variants of children and grandchildren allowed in a single home. Inez Moore lived in a house with her adult son Dale; when one of Inez's daughters died, she took in her orphaned grandchild. This violated the law of the city, which prosecuted and convicted her as a criminal. What had East Cleveland forgotten? The don't-mess-with-kindly-grandma rule, of course. The Supreme Court overturned the law, at least as it applied to the kindly grandmother.

What's a Manassas Family?

What didn't change, however, was the authority of a government to limit occupancy to a single family and to restrict, within limits, what a "family" means. This was from *Belle Terre*. Back in Prince William and Manassas in the new century, long-time residents were starting to grumble about the new migrants. Not only were Latinos migrating in large numbers, but their houses often seemed to be full of people, each claiming to be an uncle, a nephew, or a cousin, some older residents complained. This didn't mess with the standard conception of a suburban family. It was the city of Manassas, spurred by Bruce Letiecq and others, that struck first.

The number of Latinos in Manassas, which once had been negligible, was over 15 percent of the population and rising by 2003. The city offices were getting complaints about litter, multiple cars parked in front of houses, and what seemed like a lot of people living in single houses. City building officials blamed these problems on a growing immigrant population. In anticipation of city council elections in 2004, the city manager announced the start-up of a "Residential Overcrowding Enforcement Program." Through this program, the Manassas government encouraged residents to notify it of houses that appeared to be "overcrowded." At the time the city used the guidelines of the impressive-sounding International

Property Maintenance Code, which suggested that bedrooms should offer at least 50 square feet per occupant (a single bed occupies less than 20 square feet). It is safe to say, however, that most of the complaints didn't come with a confirmation that the neighbor's sleeping arrangements ran afoul of this code.

The city explained its plan in a 2004 memo:

> If a complaint is received the Fire Marshall will ask the occupants to provide the names and number of occupants that reside at the property and ask if the dwelling may be inspected to verify that the sleeping arrangements are safe and meet code requirements. If the owner or occupant is not receptive and does not comply with the request evidence must be gathered and documented by surveillance of the property in the evening by the fire marshal and or a video system set up in a vehicle to document who is occupying the residence.

The city also opened school records, in an effort to find too many children living in the same house. Although housing inspectors were flooded with complaints, the city and its CSI-type surveillance efforts revealed few violations of the overcrowding code. Meanwhile, the number of Latinos—many perceived to be illegal—continued to grow. Some angry residents felt that tougher steps were needed.

In 2005, Manassas's mayor, Douglas Waldron, asked the Virginia governor to declare a state of emergency. Illegal immigration "is being felt on our once-quiet neighborhood streets, which now in many cases are littered with trash and lined with far too many vehicles due to overcrowded boarding houses and multi-family dwellings," he wrote. "The situation is eroding the strong spirit of our city." Vice mayor Harry J. "Hal" Parrish II later told a reporter, "It isn't just too many people in the house. It's impacting parking on the streets. It's impacting the hospital and its costs, our emergency services, our schools to a great extent."

The city could have responded with specifically targeted laws, such as one regulating the number of cars allowed in each house. Imagine how this might have been received in a typical American suburb. Nor did it take more steps to stop littering, or to shore up its schools or emergency services. Rather, the city moved to regulate more tightly *who* was living in the houses.

First, Manassas established an "overcrowding hotline" to grease the wheels of communication from annoyed neighbors. Then, at a meeting on December 5, without much yelling or much debate, the city council amended its ordinance to redefine the "family" that was permitted to live in a single-family residence. A family was redefined as only those persons

within a "second degree of consanguinity." This was pretty complicated. It included somebody's parents, grandparents, children, and grandchildren, but not necessarily aunts, uncles, nieces, or nephews. Manassas was not alone in this redefinition. Many localities across the country were adopting tough new restraints on occupancy and what sort of "family" was permitted in the communities. In many cases, the changes were spurred by the phenomenon of extended immigrant families.

Soon after the Manassas law went into effect, reporter Stephanie McCrummen for the *Washington Post* traveled with the city police who enforced the restrictions. After receiving a complaint from a neighbor, a police inspector knocked on the door of the house of Leyla Chavez sometime after 5 P.M. on the evening of December 8. He told her of the complaint and handed her a form asking for a list of names of everyone who lived in her house. Chavez and her husband, who had moved lawfully to the United States from Honduras in 1980, had saved their money and in 2003 bought a big house with five bedrooms. The inspector told her that she could be prosecuted for making false statements. In fact, Leyla Chavez lived with her husband, their two sons, their 22-year-old nephew, and a renting tenant. They took in the tenant to help pay for the mortgage—not an uncommon occurrence in Manassas at the time, when an average house was selling for more than $300,000.

The police officer reviewed the form and interpreted the law. "Your nephew, under our law, is considered unrelated," he said, and instructed Chavez to tell him he had to leave. Indeed, the nephew wasn't "family" under Manassas's new second-degree-of-consanguinity rule. The tenant had to go, as well. The Chavezes had 30 days in which to push out her nephew or face fines and potential criminal prosecution. The inspector then walked through the house, looked into each bedroom, and told Chavez that she would have to remove immediately a door that led to a finished basement where the tenant lived. Sometime later, the Chavezes received a "Notice of Violation," reiterating that there were too many people living in the house. Their nephew and the tenant moved out.

A few other Latinos in Manassas didn't respond so meekly to the new legal atmosphere. On the portentously named Liberty Street, an immigrant from Mexico named Gaudencio Fernandez and his wife painted an enormous sign on the remaining wall of a house that they owned and which had recently burned down. In its first incarnation, it read: "Prince William Co. Stop Your Racism to Hispanics!" After being vandalized, a second sign quoted Martin Luther King, Jr., and a call for tolerance. A third incarnation was full of incendiary charges, including the likening of local laws to the genocide of native Americans and the KKK. As of 2010, Fernandez was

still embroiled in legal battles with the city over the legality of his sign in its changing forms under the city's zoning rules.

These regulations provide a fascinating perspective into the unique powers that America gives to laws governing "land use." Government cannot, of course, tell you what kind of car to drive, what to cook for dinner, whether to watch reality TV, whether to fill the living room with ceramic gnomes or tchotchkes, or whether to pay for your kid's college education. All these things are considered, and rightly so, within the realm of human privacy and basic human freedom. But under the label of land use law, governments are able to tell you who to consider your family and who can live in your house. Government can do so regardless of how much you might have paid off on your mortgage or how long you've lived in the house. Why can government be so intrusive? Because the neighbors might not like how you live and because they have pushed the local government, through civic local democracy, into passing a law regulating your household. It's an accepted exercise of the police power. This is all that's needed.

"It's not only unfair; it's racism. It's basically a way to just go after certain communities," said Edgar Rivera, who organized for a Virginia group called Tenants and Workers United. The head of the local American Civil Liberties Union called it "a shameful episode in our history." But this was not the feeling of most of Manassas's residents in late 2005. Many longtime homeowners called the overcrowding hotline and welcomed the sight of police officers ordering neighbors to leave. The officer who inspected the Chavezes' house said that he rarely found safety code violations; the enforcement was all about the relations of the people living under one roof.

In retrospect, Manassas's tightening the definition of "family" was a turning point. Perhaps imperiled by the new law or perhaps simply unhappy at the prospect of police intimidation, many Latino families—legal and illegal—moved out of Manassas and into jurisdictions that were perceived to be friendlier. Prince William and Fairfax, which adjoin the city, were obvious potential options. For city residents who complained about the immigrants, this would be at least half a victory. But as discouraged Latinos started to leave the city, Manassas was threatened by a lawsuit. Embarrassingly, the city had failed to heed the simplest rule of all—the don't-mess-with-kindly-grandma rule.

Few doubted the right of the city to enforce the arbitrary bedroom-overcrowding rules. After all, these seemed to be scientific and safety oriented, and everybody knew that government had wide-ranging powers to enforce rules for health and safety. Moreover, most governments felt safe enforcing laws against groups of unmarrieds living together, with the precedent of *Belle Terre* still on the books. But Manassas had gone too far in its redefinition of "family." Although Leyla Chavez didn't live

with a grandchild, as had the grandmother in the East Cleveland, her case was awfully similar. Eventually, in 2007, the city was sued by Chavez and a number of other Latino families in Manassas, along with a civil rights organization called the Equal Rights Center, based in Washington. Their lawyers were the Washington Lawyers' Committee for Civil Rights and Urban Affairs and a top-notch Washington law firm. This was another one of Manassas's gaffes—failing to remember that it was within spitting distance of the offices of some of the nation's most hawk-eyed civil rights lawyers. Although there was no guarantee that the Manassas redefinition would be struck down under the East Cleveland precedent and the don't-mess-with-kindly-grandma rule, it seemed like a tough fight.

This kind of battle is something that many small local governments are loath to fight. Manassas is a small independent city, with a tiny budget that would fit into the corner of a big corporation's annual expenditures. Simply to begin to litigate against a savvy law firm would put a big hole in the city's budget. To fight and lose such a case would force it to cough up attorneys fees that might run to more than $300 an hour for a team of opposing attorneys—a potentially catastrophic total. In early 2006, the city announced that it was "suspending" its new redefinition of family, although it didn't tell all the families, such as the Chavezes, that had been sent Notices of Violation.

Simply suspending a rule doesn't stop a good lawyer, of course, and the lawsuit went forward. The plaintiffs alleged that the city had harassed them because of their ethnicity and national origin, in violation of the federal Fair Housing Act and various federal constitutional rights. In 2008, Manassas succumbed, agreeing to a big money payment to the plaintiffs and agreeing to change many of its practices, including getting rid of the overcrowding hotline. But the settlement didn't change the overcrowding square footage rules. Even more significantly, it didn't stop the anti-immigrant pressures from simply shifting over to neighboring Prince William County.

Chickens, Corns, and Immigration in Prince William

One complaint truly "woke up" some Prince William residents, according to anti-immigration activists. By 2006, a number of county residents began to complain that their Latino neighbors were harboring chickens in their backyards and that the roosters were waking them up at dawn. But the county didn't simply consider banning early morning poultry sounds; opponents were thinking much more boldly. Black Velvet Bruce Li reported on "houses transformed into apartment buildings" with too many people

living under the same roof of a "single-family" house. (Interestingly, there were few calls for changing the zoning laws to allow for construction of real apartment buildings.) In one instance, he wrote of a

> nice little house that would probably have suited a small family . . . being transformed into a monstrosity that clearly has structural deficiencies that will not only make this into another ugly home that doesn't fit the character of the neighborhood, but is structurally unsafe. How the [government] can approve these disasters-in-waiting is beyond me, and I'm stunned that they can be so casual about the safety and security of their residents.

An ally of BVBL was Carrie Oliver, whose vocal complaints about bad behavior in her neighborhood made her a symbol of suburban exasperation in Prince William. She charged that new residents played loud music and left beer bottles and diapers as litter. Neighbors drilled holes into trees for hammocks and residents of a house that sold for $500,000 and planted corn in the front yard—something that a typical suburbanite just didn't do. She said that she and her husband would carry both trash bags and a gun when they went for walks in their neighborhood.

Even determined opponents of the immigration to Prince William, however, faced tough choices in what to do about it. Perhaps nervous about stepping into the "family" quagmire that was smarting Manassas, Prince William moved in the same direction as Hazleton, Pennsylvania, and Farmers Branch, Texas—local police enforcement of illegal immigration. It surprised many people that Virginia, once a quiet Southern state that had rarely been at the center of national politics for the past two centuries (one exception was Virginia's short-lived "massive resistance" to school racial integration in the 1960s), was becoming a focus of the national debate over multiculturalism and immigration. In the summer of 2006, former governor George Allen was expected to be reelected easily to his U.S. Senate seat, which some saw as a springboard for the good-looking son of a former Washington Redskins football coach to run in 2008 for the Republican nomination for president. But Allen made the gaffe of a lifetime at a campaign rally in rural southwestern Virginia by pointing out a staffer for his Democratic opponent. The staffer, S.R. Sidarth, was videotaping the event. In front of a friendly outdoor crowd, Allen pointed at Sidarth and twice called him "macaca." This term was used by French-speaking North Africans, such as Allen's mother, who had been born in Tunisia, to refer to dark-skinned Africans. Although Allen claimed that the word had just popped into his head, his campaign was derailed. Some observers found it even more interesting that Allen taunted Sidarth, who is of Indian descent, with the comment, "Welcome to America and the real world of Virginia!"

While Allen was born in southern California, Sidarth was born and raised in Virginia.

In Prince William, meanwhile, the once predominantly white county saw its percentage of non-Hispanic whites fall to barely half the population by 2006. Meanwhile, the number of Hispanics doubled from 2000 to 2006—to nearly one in five county residents (in addition, blacks comprised somewhat fewer than one in five residents). Some areas saw striking changes. Immigrants tended to settle in neighborhoods with smaller and cheaper houses, such as the wrong-side-of-tracks sectors near Manassas and the older "down county" neighborhoods of Woodbridge and Dale City, near to I-95, according to a 2009 report by the Brookings Institution. In some areas, more than half of all mortgage loans in Prince William in 2006 were made to Latinos, a jump from less than 10 percent in 1997.

Alarmed by these changes and the supposed costs to the county in providing for the illegal immigrants, the county government took action. Spurred by BVBL and others, Republicans on the Board of County Supervisors proposed an ordinance that instructed the police to inquire into the immigration status of any person detained by them for any reason, if the police officer had "probable cause" to suspect that the person was an illegal alien. If evidence led to a conclusion that the person an was illegal alien, he or she would be arrested and sent to the federal immigration officials for deportation proceedings. Although the county board adopted the new policy in July 2007, it did not go into effect immediately. Three months later, the import of the law had sunk in. Some county police officers warned that implementing the policy would be costly, time-consuming, and risky for officers, who would be exposed to civil rights lawsuits for unconstitutional racial profiling. Meanwhile, Latinos feared that it would create an open season for harassment of anyone with dark skin or an accent. Before the law could be implemented, the county had to approve a resolution for funding—always a tricky proposition for conservatives of both fiscal and moral values. The inclusion of an outreach program added to the potential cost but did little to appease Latino fears.

At 2 P.M. on October 16, the Board convened for a public hearing and vote. The scene was documented by filmmakers Annabel Park and Eric Byler in their film *9500 Liberty*, titled after Fernandez's sign, and which was later presented in parts for public discussion on YouTube. Hour after hour, Prince William residents walked to the public podium and offered their opinions to the all-white board. Advocates of the law warned in quavering tones about the fate of the community in the face of the estimated 12 million "illegals" in the United States. On the other side, opponents warned that it was a product of raw racism. "Do I have to carry my passport [around Prince William] because of this?" said one exasperated citizen,

pulling at her dark skin. A group called Mexican Without Borders (a name not designed to engender sympathy in those who believe in immigration control) waved banners outside and didn't help their cause by displaying the flag of Mexico and other Latin American countries more prominently than that of the United States.

Wearing little red stickers were white residents in the group Help Save Manassas, who warned that failure to fund the policy would result in a voter backlash in the election the following month. Board supervisors, no doubt, recalled the example of Herndon, a nearby town in Fairfax County, that had approved the opening of a hiring center for day laborers in 2005. The center was designed to address the otherwise haphazard system, common in the suburbs, in which laborers congregated in the hopes of being hired for manual labor for that day. Shop owners, often in poor areas, complained that these groups, an example of raw capitalism at work, congregated in their parking lots, causing shoppers to shun the area. A hiring center could control and facilitate the system. Nonetheless, anti-immigration groups, including one called the Herndon Minuteman, quickly rose up in vocal opposition. City council members who had voted for the center were thrown out of office and the policy was reversed. This was a classic example of the suburbanite's privilege—homeowners and businesses demanded the cheapness and flexibility of day labor, but they didn't want to pay a few dollars more or encourage the laborers to remain in their town for any longer than the minimum time possible. The Herndon debacle was surely in the minds of the Prince William board.

As the hearing wore on into night, emotions were rubbed raw, and a sense of potential violence, on both sides, filled the hearing room. Finally, after more than 12 hours, the council voted after 2 A.M., unanimously, to fund the "probable cause" policy.

When it went into effect in full force in early 2008, "the message of the initial crackdown had immediate and lasting effects," according to a study by the Brookings Institution. Many Latinos felt that Prince William, although seemingly a center of the American Dream, was not the place to live. As one resident stated plainly in the documentary film, "I'm leaving!" Latinos of both legal and illegal status began to move out.

As disturbing as the new law was, however, it quickly became only part of a bigger and somewhat unexpected wave that transformed the lives of Prince William's Latinos. At the same time, in 2008, the housing bubble imploded. Prices fell, adjustable rates mortgages rose, construction stopped, pink slips were handed out, and house after house went into foreclosure. The implicit promise of a few years before—that being saddled with a heavy mortgage was nothing to worry about because one could always sell for a profit if needed—was now revealed as nonsense. As the

payments mounted and work became more scarce, many families, both Latino and not, stopped paying their mortgages or simply packed up and left. Within a year, county officials estimated that there were more than 4,000 vacant houses, and few potential buyers with the ability to secure a mortgage loan in the suddenly dried-up credit market. When I asked a zoning official in the city of Manassas in 2010 about affordable housing in the city, she quickly pointed to the hundreds of vacant properties that still dotted the city.

The flood of houses on the market pulled down prices even further. The median sale price of a home in Prince William plummeted from more than $400,000 in 2005 to less than $200,000 by 2009—a collapse that was hastened by the fact that so many sales were of foreclosed homes. The flood of Latinos moving out of Prince William was exacerbated by the fact that so many of them had arrived for jobs in building houses during the boom; some of them had even bought one of these new houses. But with the bust, the jobs disappeared all but completely, and thousands of families—including the grocery store proprietors, Latin American restaurateurs, and clothing retailers who depended on the large Latino community—were forced to look elsewhere for work. An economist at George Mason University's Center for Regional Analysis, Stephen Fuller, warned that "Neighborhoods that have been weakened because of the migration of the Hispanic community out of the county have economic consequences that show up as decreases in retail spending, rental income, and potential decreases in the valuation of some housing."

Not everyone was distressed by the glut of vacant houses. "With an empty house," Letiecq said, "there's hope that the house is going to have somebody move into it that's going to be a good neighbor, rather than an overcrowded house that is a neighbor from hell." Carrie Oliver was thrilled that the bad behavior in her neighborhood, including both the loud music and the corn stalks in the front yard, seemed to disappear.

If some in Prince William's government quietly rejoiced that so many Latinos were leaving, their happiness was interrupted, at least briefly, by the intrusion of federal law, as it had happened earlier in the city of Manassas. The federal Civil Rights Commission investigated assertions of racism in Prince William and hailed before it Corey Stewart, chairman of the county board and a leader of the anti-illegal-immigrant initiative. When asked why the county had cited crime as a leading factor in its actions, in the face of evidence that crime per capita had actually fallen in Prince William over the past decade, Stewart fell back on a claim that input from "the community" had provided him the increased concern over crime. Documentary filmmaker Annabel Park later told me that her impression of the "community"

input in Prince William was of wild assertions that the sky was falling, when in reality the concerns of many homeowners were much more mundane. "If you don't want chickens in your front yard, deal with that," she said. Instead, as is common in local land use controversies, the impressions and desires of the entrenched homeowners pushed the direction of the law.

Return to Manassas, and Beyond

On the cold winter day in 2010, the documentary *9500 Liberty* was screened at George Mason University's Prince William campus. A series of aerial photos outside the auditorium demonstrated proudly how fields and forests had been transformed since 1990 into a classically self-sufficient American campus of huge new buildings and parking lots, both physically and psychologically far removed from the city of Manassas just a few miles away. Eating in the university cafeteria before the screening, I saw many South Asian and East Asian students, but few Latinos. The documentary about the immigration battles ended on a somewhat upbeat note—the Prince William government revised the law so that police inquire about a person's immigration status only when he or she is arrested, and a majority of Prince William voters supported the election of Barack Obama as president in late 2008.

The discussion after the screening took a sour turn, however, when Gaudencio Fernandez, whose sign gave the film its title, rose to speak. He explained that just that week he and his wife had been fined $1,200 by the City of Manassas for displaying, unlawfully, the sign on his property that complained about the anti-immigration movement. First, he related, the city said that the sign itself was okay, but the wall that supported it was unsafe and had to be removed. He then removed the sign and hung it between two trees. In 2009, the city amended its land use laws on signs (the sign regulations by themselves run to many pages) to prohibit display of a sign in certain areas zoned as residential to a maximum of 32 square feet—far smaller than Fernandez's sign. "They said that it wasn't the message of my sign," Fernandez stated, but he asserted his belief that the change was indeed made "because of my message." He vowed to fight on but faced the dilemma of legal precedent that allows governments to regulate the dimensions and placement of signs in residential areas. The Manassas city attorney later told me that not only was the sign too large, but that Fernandez and his wife had failed to seek the required permit for displays in the city's historic district and had attached it to vegetation—all of which were against city law. The rationale for these regulations? To further public safety and public welfare, of course.

I asked the black-clad filmmakers what had happened to the Latinos that had left Prince William and Manassas. Park said that many of them had left for nearby Fairfax or Arlington counties—the latter of which was the closest in to Washington and which held a significant amount of apartment housing. A businessman in the housing field suggested to me that many of them had moved to states further south, where manual labor jobs were still available. Ruth Henriquez, a fluidly bilingual real estate agent in Prince William, said that many people had simply abandoned their homes. Forty-seven of the 50 houses she had sold in 2009 were bank-owned properties. She explained that many Latinos took off for Montgomery County, Maryland, across Washington from Prince William.

Montgomery County was where I grew up; the place had a solid reputation for tolerance. Once mostly white and once nearly all middle class or better, it had earned applause in the 1980s for its vanguard efforts to foster affordable housing by requiring that new residential developments set aside a portion of the land for less-expensive units. A result of this effort was that Montgomery attracted many low-income residents, mostly black and Latino; it too was now struggling with a heavy demand for social services and the strains of diversity. In early 2010, I picked up the local monthly newspaper of the suburban Montgomery town in which I used to live. The little city of Takoma Park is famous for its liberal politics, including its "sanctuary" law, through which criminal suspects cannot be questioned about their immigration status. I was surprised to read in the paper a letter to the editor about a recent incident in which a dozen or more young men had got into a fight with bats and knives. The angry letter writer had previously complained to the paper about the migration of illegal immigrants. After the recent fight, he now wrote, some of the fleeing young, who were Hispanic, attempted to break into his house through the back door before being apprehended. "Revoking the City's Sanctuary Law isn't the complete answer to the City's gang-related crime problems, but it is a start," he wrote. "Choose to do nothing and it could be your turn soon to have knife and/or gun wielding gang members come knocking on your door."

A few days later, a Latino economic development leader was quoted as warning that "there is a very vocal anti-immigrant presence in Montgomery County that has been attacking every which way. They have created a climate of fear and intimidation, the likes of which I've never seen."

Competing Suburbs

Liberals look at suburb-to-suburb migration and assert that it's a "race to the bottom"—jurisdictions such as Prince William compete with their

neighbors with laws, in an effort to both attract taxpaying businesses and push social problems to other locales. Places that act sympathetically to the poor, by contrast, end up being flooded with them. Sophisticated conservatives see in this an example of the famous thought game called the "prisoner's dilemma." When faced with a social problem such as illegal immigration, it might make sense for the nation to act in a coordinated fashion. But this is difficult to do, and each locality is left with a short-term incentive to simply shove the problem elsewhere. Each county holds an incentive to use its land use laws to lure in affluent residents and to discourage poor ones, even though the poor ones must live someplace. The eventual result is that the nation as a whole is left worse off. As Virginia Tech urban affairs professor Arthur Nelson puts it, land use policies that require "low density only, minimum housing size, or laws against attached or cluster housing . . . are, in fact, specifically intended to make housing more expensive and thereby exclude lower income families, who often are people of color."

What about the counties even further out than Prince William? They too experienced population growth at the turn of the century, as the search for affordable houses pushed exurbia into the once almost wholly rural counties. In Stafford County, south of Prince William along I-95, the government acted quickly to "downsize" zoning laws to allow fewer houses per acre. While such a change might slow down population growth somewhat, the requirement of big lots encourages the destruction of farmland and forests in order to build the huge residential lots. Meanwhile, in one neighborhood where some inexpensive houses had already been built before the rezoning, the county prohibited the owners from making any improvements that would require a building permit. The county took a number of other steps to discourage low-cost housing, such as requiring new developments to sod their lawns as opposed to more inexpensive seeding.

But the biggest step was to institute a new system of "proffers" on developers.Supposedly designed to help a government offset the costs of additional police, fire, school, and other services, these proffers, which are a variant of the "impact fee," can also help a locality discourage certain types of potential new residents. Stafford's required proffer of more than $20,000 per new house, regardless of size, made it much more likely that new houses would be big and expensive, and thus affordable only by the more affluent. According to housing expert Ronald Utt, who now works for the Heritage Foundation, a libertarian group, such laws amount to an "admission fee" into a county, which few low-income families can afford. And that's the point, of course.

Who Won the Battle?

Did anyone win the Third Battle of Manassas? In a sense, advocates such as Black Velvet Bruce Li did achieve their main aim, which was to push large numbers of Latino immigrants out of the county. But this appears to have been due as much to the foreclosure plague and the collapse of the construction industry as to the legal maneuvers of the city of Manassas or Prince William County. Even with the out-migration from 2005 to 2009, it is inevitable that suburbanization will continue to engulf these jurisdictions, as the American population rises well above 300 million, as the Washington area climbs toward 5 million, and as people from across the globe continue to emigrate to the United States for its relative prosperity and freedom.

Will governments learn their lessons and be better prepared for the next big outer suburban migration? There is hope. In 2008, Prince William County created its latest Comprehensive Plan—an enormous document setting forth ideas and plans for the future of the county. At nearly the last minute, housing advocates got the county to include a section that pledged a greater commitment to permit a wider and greater variety of low-cost, "affordable" housing.

I picked up one final colored map during my trip to the Prince William offices. Unlike the zoning map, which reflects the state of the current law, the 2009 Long Range Land Use Plan Map sets forth how implementation of the Comprehensive Plan might change the zoning in the future. Its delineation of types of residential zoning is not as sharp as the current zoning map. But changes may be on the horizon. In some built-up areas, some chunks (but still less than 1 percent of the county) might be rezoned for "urban residential," meaning more housing units per acre. There is even a small "village mixed use" zone near the town of Dumfries and the Quantico Marine Base; this zone would allow for small apartments above storefronts and loosened requirements for parking spaces—features that suburban counties traditionally have been loath to allow. A long-range planning official for the county told me that Prince William was "looking for ways to urbanize." The agricultural belt in the center of the county, in which subdivisions have been intruding for years, would be rezoned mostly for housing—but for single-family residences only, not apartments. Will these changes, if carried out, be enough to allow the market to offer a variety of affordable housing options for the next generation of migrants? Or will existing homeowners, resistant to change, try to wield their privilege again, in the next battle of Manassas, to keep out the complexity of the diverse new America?

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Public Uses and Abuses: Eminent Domain in and around the Empire State

It shone as a beacon of hope in the darkest depths of the Great Depression. Above the ragged apple peddlers and the legions of unemployed New Yorkers rose the greatest commercial real estate complex ever built by humankind. Radio City, as it was called in the early 1930s, was an agglomeration of Art Deco office spires; studios and theaters (including Radio City Music Hall, which even before its opening was the most famous auditorium in the world); architecturally bold features such as parking garages built inside towers; and elegant shops of luxury items from France, Italy, and Britain. It was finished off with modern decoration and dramatic landscaping by many of the world's leading artists and designers. The project provided immediate work to thousands of underemployed welders, masons, painters, and electricians, and offered hope of an economic recovery to millions of other struggling Americans during the economically bleakest years. When the original plans ran afoul of a homeowner who wouldn't sell—not even to the richest family in the world—the project was redesigned to build around the holdout's townhouse. The grouping of buildings that we now call Rockefeller Center remains the heart of New York City to this day. From the wintertime skaters under the famous "golden boy" statue to the countless skyward offices—including the TV studios that filmed shows from *Ed Sullivan* to *30 Rock*—the midtown complex still outshines almost any other commercial development in America. This is where, according to critic Paul Goldberger, "almost everything that a city should be comes together: skyscrapers, plazas, movement, detail, views, stores, cafes." And it was assembled and built without the help of the government and without its unique power of eminent domain.

Atlantic Avenue, 2010

Fast forward to 2010. As I emerged from the narrow subway stairway at the Atlantic Avenue Station in Brooklyn, New York, my senses were instantly overloaded. On the busy streets of New York, noises, smells, views, and colors are all more intense than one is used to. Stop on the sidewalk for a moment to write notes, and you're likely to be bowled over by the constantly swirling streams of humanity that inhabit the city of 8 million. Don't watch your step and you're likely to step on a half-eaten burger or soda—New York etiquette apparently allows a pedestrian simply to drop his or her garbage on the sidewalk without much thought. Breathe and your nostrils are filled with the "New York smell"—a combination of the smells of subway exhaust, bagels, urine, pizza, and sweat. It's both a little repelling and rather exhilarating at the same time.

The Atlantic Avenue subway station is an incredible feature in itself. No fewer than ten different subway lines—not counting the dozens of trains of the adjacent terminal of the Long Island Railroad—cross like a tossed pile of spaghetti underground. As pedestrians walk up toward the sunlight, they encounter one of the subway's famous century-old decorative tile murals; this one reads "Church of the Redeemer," in still-bright century-old tiles. Why is this in a public subway station? Because this part of the labyrinth of the Atlantic Avenue station is actually underneath, and part of, the nineteenth-century Gothic church.

It was a warm, sun-kissed April afternoon at the intersection of Atlantic and Flatbush Avenues. Students were heading home from school and shoppers were strolling to the nearby discount shopping mall, built by a development company called Forest City Ratner in the 1990s. About half the faces that I passed were black; the rest were a mix of Asians (most in groups of students), whites, and Latinos. As I moved further away from the station, and as afternoon passed to evening, more white people appeared—and a remarkably large number of them were on bicycles.

As I took in the sensory feast, I had to remind myself of my chief mission: I was on my way to visit Daniel Goldstein, who lived with his family a couple of blocks away, in a condominium. He was on the verge, however, of being evicted by a court from his home. The legal ownership of his condo and others nearby had been taken by the government as part of a complex deal under which the land would be transferred to Forest City Ratner. The developer's plan was to transform a 22-acre "Atlantic Yards" site into perhaps the largest private office, residential, and sports complex in New York history—the original plan was for 16 large buildings, more than 2 million square feet of office and retail space, and more than 4,000 condo and apartments, at a cost of more than $2 billion. As the negotiations worked out,

Ratner's company would get from the government a complex package of financial breaks, including tax-exempt bonds, that some estimated at more than $100 million; in return, New York would get jobs, affordable housing units, and a basketball team.

The site extended to a fence at the point of Atlantic and Flatbush Avenues, just above the subway station. Beyond the fence was a stretch of unbuilt land and some tall bulldozers. The project couldn't really start, the developer asserted, until Goldstein's home, a condominium in an eight-story renovated warehouse that was plainly visible from the bustling intersection, was seized and torn down, against Goldstein's will, through the government's power of eminent domain.

The Once and Future Greatest Suburb

Brooklyn once was, and in a practical sense may still be, the greatest suburb in the world. On the western tip of Long Island, just across the East River from the southern point of Manhattan Island, Dutch settlers founded a town in the 1600s, and named it after the village of Breukelen in Holland. As Manhattan's town of New Amsterdam, renamed New York, mushroomed into the new nation's biggest city in the nineteenth century, nearby Brooklyn became a center for docks, food distribution, light industry, and residences. By 1880, the city was home to more than half a million people, surpassed in the United States only by its big neighbor and Philadelphia. Despite the endless cycling of ferries across to New York and back, however, it didn't really become a commuter suburb until the Brooklyn Bridge, the world's first great suspension span, opened in 1883. The tallest structure in the city for many years, the bridge enabled New Yorkers to travel by foot or trolley each day from Manhattan workplaces to houses in relatively quiet and green Brooklyn. As its population passed a million, a state law in 1898 incorporated it into the city of New York as the borough of Brooklyn (also remaining as Kings County, somewhat confusingly). But the 70-square-mile borough retained its separate identity, exemplified by its legendary baseball team, the Brooklyn Dodgers, and the fact that residents, then and now, say they are "going into the city" when subwaying or driving into Manhattan.

Brooklyn has developed a reputation as a storehouse of colorful American images. As recently as the 1970s, the mention of "Brooklyn" to outsiders tended to conjure up a vision of ebullient ethnic working-class urbanites. Two iconic movies from 1977 distilled the old stereotype: In *Saturday Night Fever,* John Travolta's young Italian stud tries to parlay dancing skill and hairspray into success; in Woody Allen's *Annie Hall,* the

autobiographical Allen character remembers back to his colorful Jewish childhood in a house located directly underneath the roller coaster in Brooklyn's Coney Island. These white ethnic stereotypes—typically the children or grandchildren of European immigrants—lived in modest gentility in narrow Brooklyn townhouses, but burned with ambition to make it out of their working-class neighborhoods and into the bright lights of Manhattan. Many did, although thousands more simply had kids and moved to split-level homes in the more truly suburban Long Island communities further east (among which Belle Terre, mentioned in Chapter 1, was one of the wealthiest).

By 1980, however, the romantic old Brooklyn stereotype had evolved. The borough's population, which had peaked at more than 2.6 million in 1950, was falling, while crime was soaring. The contemporary stereotype of Brooklyn was exemplified though a new generation of movies, such as *She's Gotta Have It* and *Crooklyn,* by black director Spike Lee (whose operations were based in Brooklyn's Fort Greene neighborhood, just a few blocks north of Atlantic Avenue) and through the rise of hip-hop music, much of which was nurtured in Brooklyn neighborhoods. Although the new image of the angry rapper seemed far less appealing to many whites than did the happy-go-lucky Italian, the young blacks of Brooklyn were the same as their predecessors in that they yearned for, and often achieved, far greater success than their parents.

The 1980s and 1990s brought a great revival to New York City as a whole, and a new influx of wealth back into Brooklyn. As Wall Street boomed and Manhattan rents shot upwards, office workers noticed that Brooklyn was still just a couple of subway stops away. A new generation of educated young people who were putting off having kids in favor of an urban life of bars and music and art—lampooned as "bobos" by writer David Brooks—were attracted to the still extant charm of the brownstone townhouse neighborhoods built a century before. The most popular TV program in the late 1980s was *The Cosby Show,* about a professional black family in Brooklyn. Although the characters in 1990s hits *Seinfeld, Friends,* and *Sex and the City* were Manhattanites, their jobs would have made it more likely that they would have had to settle for Brooklyn. The borough's population, which had fallen dramatically in the 1970s, shot up by more than 7 percent in the 1990s. Brooklyn was back.

Perhaps the most stunning turnaround was in Park Slope, just south of Atlantic Avenue, whose reputation in the 1970s—perhaps a little unfairly—had been of a once-wealthy neighborhood now turned to decay, prostitution, and crime. No more. On the April day of my visit, the sun lighted up a gentle shower of cherry and redbud blossoms onto the tranquil residential streets and sidewalks. Most of the three- or four-story

brownstone and granite townhouses had beautifully stained wooden doorways, next to which was a list of residents, showing that each house—originally built for one big family—was now divided into multiple small units. But the residents of Park Slope spent little time in their apartments; nearby Seventh and Fifth Avenues offered scores of inviting restaurants, bars, and artisanal cheese shops that made a visitor think for a second that he or she was in Manhattan's Greenwich Village or the hip Upper West Side—only that there were no towers to block the warm sun. Dinner at an exposed brick sports pub made clear that this was not Manhattan—there was a surprising and pleasant mix of young white singles and black families.

Just north of Atlantic Avenue, on the other side of the development site, are the neighborhoods of Clinton Hill and Fort Greene, both of which hold blocks of brownstones that for the most part aren't as freshly scrubbed as those of Park Slope. The former neighborhood is mostly African American, and in the playground of the local Catholic high school kids ran around an outdoor track and played handball. Just to the east was the neighborhood of Bedford-Stuyvesant, with its reputation as one of the roughest and most dangerous in the city. In fact, many in Brooklyn are poor; its median household income in 2009 was only about $43,000, more than $12,000 below the state average, and 21 percent of Brooklynites lived in poverty. Fort Greene was becoming more "gentrified"—a term used by skeptics to refer to the migration of moneyed white people—if the number of young white faces and bohemian restaurants was any indication. It's also home to the famous 12-story gothic Brooklyn Tech High School, a magnet for science-oriented students from across the city. On the gorgeous April afternoon I climbed the big hill in large Fort Greene Park, which offered lime-green new oak leaves, crimson tulips, and views of the distant Empire State Building in Manhattan. The park seemed like a public service commercial for urban harmony—a pair of instructors, one a young Asian and the other a young black, were giving martial arts lessons to a racially mixed group, blacks and whites played tennis on the public courts, and a lot of couples (some interracial) were welcoming spring by locking lips. It was a mirror of the borough itself, which was about 44 percent white, 36 percent black, 10 percent Asian, and nearly 20 percent Latino (who may be of any race). Although blacks tended to live in eastern Brooklyn and whites in western Brooklyn, closer to Manhattan, the idea of integration and harmony seemed to working in Fort Greene Park that afternoon.

The character of neighborhoods changes rapidly in modern Brooklyn, however; south of Atlantic Avenue again and just one block away from the sports pub was Fourth Avenue, where Park Slope and gentrification apparently reached their abrupt ends. I yelled my dinner order across a counter the following night at a stereotypically greasy New York hole-in-the-wall

Chinese carry-out, staffed by East Asians but apparently run by a Muslim who had placed a donation box for "Mosque Bangladesh." The windows above Fourth Avenue's brick retail spots—a pupuseria, an Islamic center, and a tire dealer that changed wheels in the right lane of the avenue—showed a motley variety of beat-up blinds and flowered sheets—more signs that this was not a gentrified street. But under no possible definition could the street, which held hardly an empty storefront or vacant lot in the entire mile south from the subway station, be considered a slum. A few blocks to the west was my incongruously placed Holiday Inn Express in the Gowanus neighborhood, which was dominated by light industry—one-story auto body shops, a guard-dog training center, and a glass repair facility—that made it hard to believe I was less than three miles from lower Manhattan's 66-story AIG headquarters, which I could see from my hotel window. I also wondered why more of these low-density industrial sites weren't turned into apartment buildings. The answer was in part, of course, zoning.

Back up on the hill at Fort Greene Park, a tattooed young woman reading a book in the sun snapped my mind back to my assignment. She was wearing a T-shirt that read "Develop Don't Destroy Brooklyn"—the name of a local group for which eminent domain challenger Daniel Goldstein was the spokesperson, and that was fighting the plan for the Atlantic Yards development. I had noticed very little activity on the development site during my first visit, despite the perfect weather. Recent news reports had suggested that the project, planned during the real estate boom, was very much up in the air in the slump of 2010. "I hope it doesn't happen," the tattooed woman said, looking up from her book. "Things have to be decided from on high." Meaning not the economy, or the multi-millionaire developer Bruce Ratner, but the government of New York City and New York State. They had decided years before that the project was essential to bring jobs and money into Brooklyn, and that Goldstein's and others' homes simply had to go.

Brooklyn's Times Square?

Down the hill and just out of sight was the spot of the proposed Atlantic Yards development, running east from the point of the intersection of Flatbush and Atlantic Avenues. Just north of the crossing was the discount mall, built behind the terminal of the Long Island Rail Road. Although the city subway is the most iconic image of New York commuters, it runs only within the city boundary; more than 300,000 suburban Long Islanders commute each weekday toward the city on the Long Island Rail Road, now run by the subway authority. Although most commuters (the term

was coined in the early days of suburban railways, when daily riders had their fares cut, or "commuted," by virtue of frequent ridership) end up at the terminus of Penn Station in midtown Manhattan, those heading for Wall Street can ride instead to the terminus at Flatbush and Atlantic in Brooklyn, where they then can hop the subway for the short trip to lower Manhattan. The terminal makes the intersection as close as Brooklyn gets to a "Grand Central," referring to Manhattan's other big railway station. But to a developer, the sharp intersection, surrounded mostly by low buildings, also seems like a potential location for a new Brooklyn version of Manhattan's Times Square. Flatbush Avenue is the borough's great unifying thoroughfare, as Broadway is for Manhattan. Atlantic Avenue serves as Brooklyn's version of Seventh Avenue or 42nd Street. Where these two avenues meet, at the rail terminal, an intrepid developer is bound to think that this would make a perfect spot for new high-density office and residential development. (The Williamsburgh Savings Bank thought so back in the 1920s, when it built Brooklyn's largest office tower just off Flatbush; the neo-gothic skyscraper failed to act as a catalyst, however, and it now sits, rather lonely and largely empty, in the midst of a housing-boom conversion to expensive condos.) Such a bold step would signal the arrival of Brooklyn as an outer borough business hub and would bring jobs and money to Brooklyn—and the city—that might otherwise go to the suburbs, such as those in New Jersey, whose own real estate market had gotten a boost after the terrorist attack on lower Manhattan in 2001.

It was no surprise that a plan for development came from Bruce Ratner, the successful real estate mogul with a long history of involvement in both the economic and cultural life of Brooklyn. His plan, called Atlantic Yards, when first floated in 2003, was astonishing in scope. Stretching east from the intersection, it would have included 16 new office, retail, and residential towers. It would radically transform central Brooklyn; in fact, by some measures it would exceed the Rockefeller Center model and become the biggest single development project in American history. Remarkably, most of the land for the project was readily available. More than half the site was a sunken Long Island Rail Road yard, called the Vanderbilt Yards. This could be purchased in one step. The remainder of the site included three long blocks of warehouses, light industry, and a small number of apartments and condominiums. Most homeowners sold out, but a few refused. The condo of Daniel Goldstein, who moved into his renovated residential building just before Ratner's plans became public, stood in the way of Ratner's plan. The building was on the site of the proposed showcase building of the Atlantic Yards development, just off the prow of Flatbush and Atlantic—a new basketball arena for a National Basketball Association

team, which Ratner planned to buy and move from New Jersey (take that, suburbs!) and rename the Brooklyn Nets.

The prospect of government's using its unique power of eminent domain—which had been reported in the press as early as 2003—caused many homeowners to sell out to Ratner's company. When Goldstein and others declined, however, Ratner turned to the government. Under New York law, a state "development" agency can seize somebody's home and then transfer it to a private developer; the law permits the seizure, however, only if the area is found to be *blighted*. Such a designation would justify condemning the homes and businesses around Atlantic Avenue that had refused to sell out, including Goldstein's condo. Politicians from the mayor to the borough president quickly expressed their support for the plan proposed by Ratner, who had a history of smooth relations and cooperation with politicians who mattered. But in light of the vigor, diversity, and growing wealth of the neighborhoods around the Atlantic Yards, how could the government find that they were "blighted"? How could it be fair for the government to take the home of a middle-class citizen and give it to a rich developer through this strange power of eminent domain?

The Joy of "Blight"

Words are the essence of the law—they are the blood that runs through every organ and limb of the craft. It is no surprise, therefore, that lawyers like to use words that are nearly exclusive to their profession—indeed, it may be that they prefer to use language that is often impenetrable to the untrained, as a way of retaining both their mystique and their fees. One of these terms is *eminent domain*. Although one wouldn't know from the individual words themselves, eminent domain is simply the power of government—federal, state, or local—to seize property from its private owner, along with payment, regardless of the owner's wishes. Like many concepts in law, the outmoded term comes from medieval England. (Ironically, England itself has modernized its legal lingo and now calls the process "compulsory purchase," which is more straightforward.) American law, which is complicated by 50 different state systems, retains the old-fashioned term, although some states have advanced to calling it *appropriation*. One also often hears the term *condemnation* as a synonym for eminent domain, as in "the government condemned the land to widen the highway." But this later term itself is problematic, and it reveals a little more of the twisted history of one of the greatest powers of government.

Ever since humans realized that planting crops could add variety to the food they hunted and gathered, ownership of land has been a fundamental

source of wealth, power, and happiness. Across centuries and cultures, humans have either worked land communally or divided it up into private ownership, with many variations in between. In medieval Europe, the newly emergent great kings consolidated their power by, among other things, declaring an ultimate sovereign control over all land in their realm (anticipating the famous assertion by Mel Brooks in his satirical movie *The History of the World Part I* that "it's good to be the king"). England's legal system under the Norman kings held a complicated set of rules and obligations, through which land was in theory held by the king, then controlled by a set of lords, and eventually worked, with some rights to the crops, by the people. While most of these rules have of course turned to dust, we retain today the word *landlord* for someone who owns property that is rented to others (bizarrely, a recent Microsoft Word language check program suggested that one use *proprietor* in place of *landlord*), as well as *tenant*—Norman French for "holder," meaning someone who occupies land for the short term. One of the powers of the king, at the top, was the power to have ultimate, or eminent, domain over the land when the king saw fit. Theory was one thing; exercising it was another. While the king wanted to be able to use or take land in times of necessity, such as wartime, too arrogant use of this power might rile up both the lords and the tenants. Accordingly, kings learned to soften the blow by providing compensation—either money or land elsewhere—to subjects whose lands they seized. As put by Dutch legal writer Hugo Grotius in the 1600s, *dominium eminens* allowed the crown to take property from its private owners "for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the state is bound to make good the loss to those who lose their property."

During the crafting of the American Constitution in the late 1700s, the leaders of the new nation had squarely in mind the challenge of balancing the legitimate needs of government against the risk of "tyranny" by an excessively powerful sovereign. (Modern pundit George Will and others have noted the irony that the first big battle of the Revolutionary War, the Battle of Brooklyn in 1776, was fought around the Atlantic Yards site.) Thus, it's not surprising that when the drafters wrote a Bill of Rights, they focused not on clarifying the power of eminent domain—which everyone apparently assumed to be a natural power of government—but rather on the necessity for providing recompense for the owners. The drafters finished the Fifth Amendment with one of the most maddeningly elusive sentences of the entire document: "nor shall private property be taken for public use without just compensation." Legal historians say that the writers were thinking of eminent domain when they referred to property as being

"taken." It's also agreed that "just compensation" meant the payment of what we would call today the fair market value. If government takes a farm worth $250,000, the government has to pay the farmer the quarter-million; the farmer can then, in theory, use the money to go buy a similar farm and thus not be harmed much (except for the annoyance, of course) by the eminent domain. But what about those three words "for public use"? Here's where the real debate begins—a debate that would have had little meaning 200 years ago, but that heats up great controversy in the modern world of more active government.

One reading of the words "for public use" is that they simply are part of the bigger term "taken for public use"—meaning, in other words, the use of eminent domain. Under such a reading, the government wouldn't have much, if any, restriction on its power to seize private land, as long as it pays compensation. But this is not how the courts have interpreted it—realizing, perhaps, the potential for abuse if government could simply take anybody's land at any time for any purpose. Instead, the U.S. Supreme Court has concluded that these three words *restrain* the government's power to circumstances in which the government (meaning the public) "uses" the land (even though the sentence isn't really written this way; if it had been, it would read something like "Government can use eminent domain only for a public use, and in such cases it must pay just compensation.").

The issue of how far government can push the "public use" of eminent domain wasn't much of an issue until the twentieth century. In the old days of limited government, public authorities didn't use their power very often. The most common exercise of eminent domain back in the eighteenth century was for forts or other military needs; when the government took land to build a naval yard, for example, it simply paid compensation and that was the end of it (not that the landowner couldn't complain about whether the payment was big enough; owners have always been vigorous about litigating whether the government has given them sufficiently "just" compensation). In the twentieth century, however, government began to insinuate itself in many new areas of human interactions—sometimes for the good, sometimes for the less good. And the question arose: Is this exercise of eminent domain really a "public use"?

One case that wasn't about eminent domain at all is a great example of the concerns of skeptics. In 1869, the Illinois legislature passed a law that transferred to the Illinois Central Railway, a private company, most of the lakeshore of the booming frontier city of Chicago. But the U.S. Supreme Court invalidated the law, citing an ancient doctrine that says that the government isn't allowed to give away the public's right to valuable navigable shorelines. Historians still argue about the motivations of the Illinois legislature: Was it simply a case of bribery and undue influence by a powerful

corporation over a weak state government? Or were there some honest if misguided reasons for the law? In any event, the story is remembered as an example of the potential for rich private interests to use government and its unique powers to pass goodies to themselves. For a country that has always prided itself on equality and the squelching of special privilege, this specter casts a shadow over the modern controversies of eminent domain.

Let's move to Washington, D.C., in the aftermath of World War II. As the nation's fears rapidly shifted from fascism to Soviet Communism, the experience of the war, during which nearly every facet of the economy was controlled by the government, lent greater respect to the notion that scientists, technicians, and experts could solve almost any problem. After all, didn't American shipbuilders figure out a way to mass-produce ships in such number that almost literally overwhelmed our enemies? Didn't organizational experts build an army that was better fed, better trained, and better motivated than any in history? And, most of all, didn't our scientists manage to build and use a miracle weapon, the atomic bomb, that almost literally ended the war in a flash and save the lives of thousands of American boys? Americans had great faith that experts could fix our social problems, too, if only we gave them the right tools.

A wealthy nation sought to perfect itself at home after the war, and few things were more embarrassing than the state of urban "slums" (a word not much in use anymore). Since the days when tenements housed families of immigrants, these marginal apartments had continued to deteriorate, and were more likely by 1950 to be occupied by blacks who had moved from the backbreaking work of the southern fields to work in the factories of the north. At the time, few housing codes demanded safe or healthy units. When confronted with the problem of poor people crammed into rundown apartments and urban shacks, often without indoor plumbing, a starting point seemed obvious to the experts (who, after all, didn't have a choice of changing the culture of discrimination): tear down the slums. A few swipes of the wrecking ball wouldn't bring happiness, of course, but it would at least make sure that nobody would live in the rickety and damp slum tenements any more.

It was also an era in which advocates sought out experimentation of grand social ideas, in a country traditionally skeptical of big government, by starting with the government itself. Convinced that the nation needed to do something about racial discrimination but equally certain that he couldn't get anything through the U.S. Congress, President Truman took the limited but bold step of integrating the U.S. military in 1948, decades before real desegregation happened in schools, restaurants, or neighborhoods. Likewise, in the world of housing, a new breed of land use "planners" trained their sights on the slums that were easiest to get their

hands on—the slums of Washington, D.C., where the federal government controlled the land use laws. Within sight of the U.S. Capitol were the low-lying slums of Southwest Washington, occupied for the most part by blacks whose families had moved to Washington to escape the crushing oppression of life in the southern states. These slums were the target of reformer Eleanor Roosevelt, as well as congressmen who worried about how this glaring poverty looked to diplomats of countries weighing the relative benefits of American capitalism and Soviet Communism. In a neighborhood of 5,000 people, more than 29 percent of the dwellings had no electricity, 57 percent had no indoor plumbing, and 83 had no central heating. How could the federal government send its wrecking ball into the privately owned slums of Southwest Washington? For perhaps the first time, eminent domain appeared as a solution to the social problems of the city.

With a law passed just after the war ended, Congress established a special "redevelopment" agency for the capital. The agency's task was to attack "substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare." The agency was authorized to create a new plan for the area; one of its powers was the right to use eminent domain to seize privately owned land and then sell it to private developers, who would be required to rebuild according to the plan. One owner of a small Southwest store, Samuel Berman, complained; he argued that his shop was his livelihood and certainly wasn't "blighted" itself. Thus, he reasoned, it couldn't be seized—especially since the government wasn't planning to use it for a school or fire station, but to transfer it to a private landowner. How was this a "public use" of the land, as the Fifth Amendment required? In the famous case of *Berman v. Parker,* the U.S. Supreme Court in 1954 held that the term "public use" encompassed the seizure of private property for slum clearance, even if the government didn't plan to use the land itself. A public "benefit" is equivalent to a public "use," the court reasoned. In response to Berman's argument that the project was "a taking from one businessman for the benefit of another businessman," the Court held that "once the public purpose has been established . . . the means of executing the project are for [the government] alone to determine."

Did this project offer a public benefit? The elimination of slums was such a benefit, the court reasoned: "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden." The fact that Berman's store itself wasn't a slum and didn't really stop the tearing down of the miserable housing was of little importance: "The experts concluded that if the community were to be healthy, if it were

not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole." The author of the Court's opinion, by the way, was William O. Douglas, who, as with the *Belle Terre* case that upheld the outlawing of group houses for college students, had a soft spot for the idea of utopian communities. The sweeping deference of the courts to the government's "experts" on redevelopment was remarkable; indeed, *Berman* deserves to be remembered as one of the great turning points in the jurisprudence of American communities. For generations after *Berman,* courts almost uniformly said, in effect, "We're not in the business of second-guessing governments' use of eminent domain. If a government says it's good for the community to use eminent domain, that's the end of it." One of the most striking examples was the Hawaii government's massive taking of rural land from wealthy families and redistribution to less affluent farmers (and, yes, opponents called it socialism), which was given a *Berman*-based thumbs up by the Supreme Court in the *Midkiff* case in 1984. Despite the howls of complaint across the nation after the 2005 eminent domain in *Kelo v. City of New London,* which we'll get to later in this chapter, *Kelo* didn't say or do anything that *Berman* hadn't already said or done.

In fact, the Southwest Washington plan achieved exactly what it was supposed to do—it eliminated the slums. Today, the area is a rather dull sector of town occupied by a few government offices; some high-priced condos (many built near the Potomac River during the recent housing boom); a couple of schools, police stations, and churches; a few parking lots; and some presentable low-income housing. (In the new millennium, in fact, the most noticeable feature of the neighborhoods south of the capitol is the new major league baseball stadium, built on land taken largely by eminent domain.) But no slums.

Today, however, many people read *Berman* and shift uneasily in their seats. They see in Douglas's opinion a naiveté, at best, and downright disingenuousness, at worst. The first reason is the shortsighted swallowing of the idea that simply knocking down slum housing is a good thing. As any post-Reagan American can tell you, things such as miserable housing do not create poverty; they are merely symptoms of it. Generations of once-pristine public housing buildings turned bad are testament to this. Even more significant, perhaps, is the affirmative harm that a big eminent domain land grab such as in *Berman* can do to a community. The plan was simply to tear down the slums and build something new; there was no coherent plan to find decent housing for the former residents (almost all of whom were tenants, so they didn't get any compensation themselves; the landlords got the money). Nor was there any plan to try to keep communities intact. The residents of Southwest Washington were merely told, in

effect: Your residences are going to be bulldozed; find someplace else to live. It's hard to track down now, but perhaps some of them looked elsewhere and found somewhat better housing. Others undoubtedly moved into low-cost, unsanitary slums in other parts of Washington. What is certain is that neighbors and friends were forced to move, and that any sense of community that had been created in those poorly heated and poorly drained slum units of Southwest Washington was lost.

What's also interesting today is the racial angle that was all but ignored in the 1954 decision. Read Douglas's opinion now and one gets a vague sense that he (and the other eight justices who signed on) saw eminent domain as a worthy example of the Lincolnesque federal government offering a hand to the helpless black people of Southwest Washington. But some modern black scholars are scornful of the notion that simply telling poor black people that their community is a "slum" and that they have to move, without real assistance in improving their lives, is any help at all. It is especially ironic that the naïve *Berman* opinion was handed down just a few months after the famous *Brown v. Board of Education* decision, in which the same justices sliced through years of precedent and held that segregated public schools were unconstitutional. Both Wendell Pritchett, a current-day legal scholar who writes about urban history, and David Harris, a southern lawyer who focuses on rural land, have written scornfully of the abuse of eminent domain to push black people out of their homes. In response to the once-commonly-uttered phrase that such projects were "urban renewal," they have called such examples "Negro removal."

Pritchett has also studied the uneasy history of a word that was central to the District of Columbia law and remains at the heart of eminent domain controversies to this day: *blight*. As noted in Douglas's opinion, the word was originally botanical, in reference to plant diseases that first pop up on one leaf, turning it brown, but that can quickly spread to kill the entire plant and those around it. To stop the spread of blight, quick and decisive action to rip out the infected plants is needed. When governments and their expert planners were looking to justify eminent domain to seize entire neighborhoods—something that government hadn't done in the past—the arresting image of spreading "blight" was tremendously useful in getting legislatures and judges to accept this new and expanded use of eminent domain. In one of the most striking legal developments of modern land use law, state legislatures across the country (as well as the U.S. Congress) authorized government to use eminent domain to stop the spread of "blight." But does it make sense? Is a neighborhood or collection of buildings really like a plant disease that passes germs and bacteria to other areas? Does a block of unsanitary apartments create a real risk that the decent apartments in the next block will rapidly turn into slum

as well? Or was this simply a preposterously vivid image foisted onto government by overzealous expert planners? Pritchett has suggested that the word was used, at least in part, as a means of stopping what some people viewed as a kind of disease in the early and mid-twentieth century: the spread of black people into a community. To push the argument further, if one allowed a small black slum building to remain in the community, one risked the phenomenon spreading to other blocks as well. The fact that the outmoded idea of *blight* remains the standard for eminent domain across much of the nation, including New York, is one of the most astounding features of modern land use law.

This devastating criticism of the blight standard brings up another, slightly less odious, criticism. This is that eminent domain might be used not only to remove people that the government doesn't want, but to encourage other people that the government—and those private interests on which it relies—*does* want to move in. The expert planners offer, of course, idyllic images of cities remade into pleasant, safe, and prosperous communities—if only they get the land with which to create their paradises. Douglas wrote of the plan for Southwest Washington: "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers." This last category—always among the most common land uses in the American metro areas—is bound to prick up the ears of a government official, because shopping centers offer something that schools, churches, parks, and low-cost housing do not offer: revenue. The first job of government, especially local government, has always been to figure out its budget—indeed, one can't do much else, including feeding the homeless, building good schools, or fostering safe housing, if one doesn't have the money. The attraction of taxpaying businesses is almost irresistible.

Can a City Use Eminent Domain to Make Money?

The obsession that local governments have with attracting business was highlighted by New York political scientist Paul Kantor in a book called *The Dependent City.* Kantor began his study by relating the tale of alarm in New York City government in the 1980s after NBC, the most famous occupant of Rockefeller Center, announced that it was considering leaving the city. Why stay in cramped and aging skyscrapers when cheaper and more spacious suburban locations—and governments that would be glad to give financial incentives—beckoned? For New York City, a departure of the entertainment giant would have meant not only the loss of jobs and

tax revenue but, even more important, a blow to its reputation as a city friendly to business, especially in the communications world. How humiliating to New York it would have been to hear on television, "Live from New Jersey, it's Saturday Night!" (Okay, maybe that wouldn't have happened.) For two years, the city offered up a growing set of inducements to get NBC to stay. Finally, the company agreed to stay, by virtue of a complicated package of property tax breaks and tax-exempt bonds, totaling an estimated $97 million over 30 years.

New York is not alone, of course. Indeed, cities with fewer built-in advantages or a less robust economy must rely even more on financial gifts to keep, or more important, to lure businesses to their city. Because local governments depend largely on property taxes for their survival, they become financially dependent on attracting new taxpaying corporations. "The reality is that cities cannot survive economically without the jobs, dollars, and tax revenues that these businesses can provide," Kantor wrote. "Local governments scramble to compete with each other . . . in a competition where large corporations pick and choose in an investment game where they have powerful bargaining advantages." When a corporation floats the idea of relocating or opening a new business center, the resulting tussle is "a political process in which a privileged group in able to extract rewards." In the course of the "fierce bidding wars," governments typically offer up a smorgasbord of goodies—including prime land through the use of eminent domain.

In today's America, not a day goes by in which state and local leaders do not tout their efforts to try pull new businesses to their jurisdictions. As I was typing these words, a story in the Washington area addressed the high-stakes competition among suburban counties to attract the headquarters of Northrop Grumman, the big defense contractor, which desired to move from California to be closer to its chief source of revenue. Each suburban county offered a package of tax breaks, land, and other attractions to pull in the company. Eventually, the company chose a spot in northern Virginia.

Indeed, governments often desire to seduce a corporation in order to create a business "climate" that will attract others in the future. One of the most bold and striking examples was in Florida in 2004 (led by usually libertarian but business-friendly governor Jeb Bush), where the government spent nearly $500 million to build a research facility and pay the salaries for seven years for researchers in a new branch of the famous Scripps Research Institute. One of the justifications for such extraordinary use of taxpayer money was the gamble that the establishment of Scripps in Palm Beach County would be a catalyst for more biotechnology firms to think about moving to Florida, whose image has been linked more to

tourism, suntans, and retirement condos than to innovative technology. Time will tell whether it made sense to try to buy a reputation; in 2004, however, both leading Democrats and Republicans thought it was worth the money. While there are critics, of course, few people questioned the honorable motivations of the government; nobody alleged, for example, that Scripps had bribed Florida politicians to get the payout.

One of the most politically popular types of business to attract is a professional sports teams, as Bruce Ratner undoubtedly knew in making the Brooklyn Nets a key selling point of the Atlantic Yards project. In a sports-obsessed culture, nothing captures the public's fancy like a new team in town. What politician doesn't like to see his or her face in the paper, beaming alongside a famous franchise owner or star player? This is bound to stick in the memory of even the most cynical fan/voter come Election Day. Hence, cities often spend millions to lure sports franchises. Los Angeles, the nation's second largest city, lost both its pro football teams in the 1990s to smaller cities that offered juicy financial deals. One of these, Oakland, California, had been the original home of the Raiders before their move south in the 1980s. At that time, Oakland had tried to force the Raiders to stay in their gritty city in northern California by trying (and failing) to seize the ownership of the team by . . . eminent domain.

Although a city probably can't "condemn" a team, cities can seize land by eminent domain for a shiny new stadium (with the modern amenities of high-priced luxury boxes instead of regular seats) to attract or retain a sports franchise. In fact, because of the size of sports venues' "footprint," which may cover many private owners, it has become routine for governments to use their power to speed up the acquisition of land. From the colossal new billion-dollar football stadium for the Dallas Cowboys to the relatively cozy new baseball park in Washington, team owners have come to expect that government will use its unique power to facilitate a relocation.

New York, in fact, was one of the first cities to wield eminent domain for a ballpark. When the city heard grumbling about the location and condition of the old Yankee Stadium in the Bronx in the 1970s, it used eminent domain to seize ownership of the building, for about $2.5 million, from Texas's Rice University, which by a quirk of business had owned the concrete and steel. The city then spent close to $100 million to renovate it in the 1970s; the city then split with the Yankees owners the costs of more than a billion dollars for infrastructure improvements and development of the glistening new stadium that opened in 2009. But the city's efforts didn't stop the football team, the Giants, from being lured out of Yankee Stadium to a big state-funded stadium in the Meadowlands of New Jersey—New York's Jets then followed—which also became the home, in a smaller arena, of the Nets.

While cities often trot out claims that spending money on eminent domain to lure a sports team will help the city's finances through added jobs and dollars spent at or near the stadium, many economists say that the numbers usually don't pan out. One of the most notable number crunchers was Charles Euchner in *Playing the Field.* According to him, money spent on sports would most likely have been spent on other forms of entertainment. Another economic skeptic of sports stadiums is Andrew Zimbalist, who was commissioned by Forest City Ratner back in 2004 to study the Brooklyn project; he predicted that the entire Atlantic Yards project as then planned, although not necessarily the basketball component by itself, would be good for Brooklyn.

Other kinds of eminent domain plans may be less costly, but a little more unpleasant to consider. In the Florida city of Riviera Beach, the government for many years after 2000 tried to use eminent domain to seize a neighborhood of low-cost houses, many of them occupied by African Americans. But this was not an example of a white-dominated town trying to squeeze out minorities; African Americans are the largest ethnic group in the city. The mayor's rationale was simple: The neighborhood was one of the least densely developed on all of the Atlantic coast of Florida; redevelopment to big condos, facilitated by eminent domain, would bring great riches to a rather poor city. "We'll eliminate poverty in Rivera Beach," he boasted. From Lakewood, Ohio, to Alabaster, Alabama, to Las Vegas, Nevada (where the government used eminent domain to take land for city-based casino parking, in an effort to battle casinos on the strip, which technically is outside the city's limits), cities have used eminent domain under the hard-headed rationale that a different use of the land would bring in more money for the city, which in turn would help everyone. If they don't use this technique, cities say, jobs, taxes, and wealth will be drained to neighbors near and far that *do* use eminent domain for fiscal purposes. The idea of security of homeownership simply has to go by the wayside. One of the nation's leading urban scholars, Bruce Katz, has defended the practice: "Cities actually have very few tools at their fingertips to maintain their completive edge. I think eminent domain is a critical tool for these places."

Although cities as competitors in a marketplace may seem unsettling, it's difficult to figure out how to stop this competition. One theory of government, named after its creator, Charles Tiebout, asserts that it's an inevitable and healthy thing for governments to compete. If you as a citizen would prefer that your town not use eminent domain as a tool to attract new businesses, you can always vote for local government politicians who'll vow to disapprove any such project. But your city or county or state may then lose out to neighboring jurisdictions that do more to lure jobs and

tax revenue. This relatively benign view of eminent domain—that it may be unfair to those who lose their homes and businesses, but it's done with the greater good of the city in mind—differs from the view of eminent domain as a sinister plot between evil businesses and greedy politicians who do their bidding for personal gain. It's rare for eminent domain to be linked to brazen bribery of a government official by a beneficiary of the land transfer. But *extortion*—when a person with power uses it to squeeze money from another—well, that's another ball of dirt.

Poletown and Atlantic City

When businesses know that governments are competing, pleading, offering, and begging them to bring money to their city, they do what businesses do best—they get the best deal as they can. This often includes a sweetening of eminent domain.

One of the most striking examples was back in the late 1970s in Detroit. Then, as now, the city was suffering from unemployment, poverty, and a shrinking population, as Americans bought fewer and fewer Detroit-made cars. Back then, Toyota, Datsun (now Nissan), and a rising new automaker named Honda were attracting away Americans with their efficient, gas-sipping little boxes, instead of the chugging tanks with which the Detroit "big three"—General Motors (GM), Ford, and Chrysler—had been so successful for so many decades. One way that GM hoped to regain its once-top-dog status was by replacing its old factories with efficient new plants. The city of Detroit worried, with good reason, that GM might well move jobs to other locales, where workers would demand less pay and fewer perks (a startup GM brand, Saturn, was eventually located in Tennessee in the late 1980s). The city and its biggest private employer started talking, with GM holding most of the cards.

In 1980, the pair announced a deal: The automaker would buy a recently shuttered Dodge plant and use this as the center of giant new facility that would keep auto jobs in Michigan. To fulfill the plan, however, GM said it needed more land nearby—in particular, most of a small neighborhood of wooden homes, bars, and shops called Poletown for its history of housing Polish immigrants. The city agreed to acquire the neighborhood and transfer it to GM. While some Poletown residents sold, others resisted, and some grumbled that Mayor Coleman Young, who was black, didn't care much about the community. The resisters drafted to their side the famous consumer advocate Ralph Nader, who railed against what he saw as the unfair clout of GM against a working-class neighborhood. Young tossed back that Nader, who had made his name in the 1960s with indictments of unsafe

autos, was a "carpetbagger from Washington" with a "psychotic hatred of GM." Despite a 29-day sit-in at the Immaculate Conception Church, the Detroit city council overwhelmingly approved in late 1981 the use of eminent domain against the holdouts. The Michigan courts gave a thumbs-up to this use of governmental power, reasoning that if the elected representatives of Detroit thought that it was good for the city, it was a valid exercise of eminent domain. (The *Poletown* decision was eventually overturned by the Michigan Supreme Court in 2005, just before the U.S. Supreme Court decided *Kelo*.) It's safe to say that most residents of Detroit weren't too distraught at the sight of a handful of Poletown residents being forced to leave their old homes, money in hand, to make way for a shiny new GM plant that employed thousands. Many Poletown residents, no doubt, moved to the suburbs, where most white Detroiters of a few decades before had already moved. Today, Cadillac cars are still assembled on the site. The old Poletown now exists only as a memory.

In recent decades, cities around New York have witnessed some of the most striking examples of eminent domain to help corporate interests. By 1990, the crumbling old beach resort of Atlantic City, New Jersey—once a vacation spot for New Yorkers and Philadelphians, who now opted for Florida or Hawaii in the jet age—was being remade into a Las Vegas of the East through the introduction of legalized gambling. Gleaming new casinos sprung up like gaudy tulips in a field of weeds. One of the biggest was the Trump Plaza Casino-Hotel. A problem with the new location, the Trump people noted, was that it bordered a block of unsightly old buildings, including a rusting mega-casino structure that had failed, a shuttered old motel, and a handful of houses. Trump's plan was to renovate the motel into another Trump property, connect it by a skyway with Plaza, and relandscape the entire block, with a big new porte-cochere entrance to the Trump Plaza and, of course, a parking lot. The house of Raymond Coking would be torn down and paved with asphalt. New Jersey's redevelopment agency, the Casino Reinvestment Development Authority, used eminent domain to take Coking's house, among others. As some skeptics of the government grumbled, whatever Trump wanted, Trump got, even if it was to have government use eminent domain to seize somebody's house for a parking lot.

Coking and others sued the state, arguing that this wasn't a valid "public use" of eminent domain, considering that the land was going straight to Trump (who admittedly was paying for it). In one of the first cracks in the deferential body of law put in place by *Berman, Poletown,* and other decisions, a New Jersey court held that this eminent domain went beyond the government's authority. This wasn't a case in which a city took land in order to attract a developer who wasn't yet there, the court

noted; in this case it was clear that the land was going to Trump and only Trump. Although New Jersey law stated that eminent domain for casinos was indeed a valid public purpose (because it would attract tourists to Jersey who otherwise might go to Vegas or overseas to toss dice), the court distinguished the case before it because of the fact that Coking's house was to replaced not by hotel rooms or slot machines but by asphalt.

It was a little odd for the court to base its decision on the fact that the parking lot wouldn't be a building itself; after all, a hotel and casino can't really attract tourists to the Jersey shore if it doesn't have parking. Let's continue this thought to a conclusion. If one accepts the notion that the government can seize somebody's home and then transfer it to a business, simply because it's good for the town financially, then why impose any restrictions on what plans the business has for the property? If the financial bottom line of the city is our only goal, why not allow the government to seize modest-income houses and hand over the land to billionaire Montgomery Burns for a vacation home, if the switch promises more jobs and higher property tax revenue? If we accept that the police power allows government to do pretty much whatever it wants as long as it believes it will benefit the community, then perhaps eminent domain should have no limits. Unless one doesn't trust the government.

Read between the lines of the Trump decision and one can discern a fear that letting government seize homes at the behest of a powerful and influential developer might not really be in the best interest of the community: "Under the circumstances present here, any potential public benefit is overwhelmed by the private benefit received by Trump," the court concluded, and thus violated the public benefit requirement. But, what about *Berman* and *Poletown?* Weren't courts supposed to defer to the government's decision—if New Jersey stated that it was best for the public to take Coking's house for a Trump parking lot, wasn't a court supposed to say that this was up to the government to decide? What had changed was that the scales of naiveté had fallen from the eyes of many judges. Unlike in the 1950s, we Americans no longer have an implicit trust in our government to act in good faith for the public interest. After the mishaps of Vietnam and Watergate, and increasingly hostile political battles, some political scientists concluded, people simply don't trust the motivations of their government as they used to. Cynicism, in fact, was the more common attitude. Meanwhile, people's opinions about business changed as well. It wasn't that people hated businesspeople more than they used to—in fact, some business leaders were among the most respected people in the country—but Americans became more realistic about what businesspeople's goals are—business. It didn't really bother people to learn that a company would take whatever legal steps necessary to improve the

company's bottom line—that's what businesses do. And it didn't surprise more sophisticated modern Americans to recognize that some businesses use the expansive new government for their own ends—such as by twisting the government's arms to get through eminent domain the land they want. Even people who have never heard of the "public choice" theory of governance—which posits that private interest groups compete to use the political process to benefit themselves—understood that powerful forces used whatever leverage they could to get the government to do things that they want. That's just how the world works.

Kelo

The public's cynicism caught up with the law, and surpassed it, in the wake of a remarkable case decided by the U.S. Supreme Court in 2005. It also arose from another middle-sized seaside city a few hours from New York—this time, to the north, in the old city of New London, Connecticut. Unlike the playground of the Jersey shore, Connecticut's coast was built on the more sober business of maritime and military service. Protected from big Atlantic storms by New York's Long Island, Connecticut's undulating and deep-water coast was perfect for shipyards and docks. New London—which never became a big city, despite its auspicious name—was established as a naval center in the Revolutionary War, with Fort Trumbull on the west side of the wide Thames River, and Fort Griswold on the east shore, in the town of Groton. Both forts and the town of New London were captured by the British, with the help of Connecticut's Benedict Arnold, in 1781, as part of an unsuccessful plan to distract American General Washington from his march to Yorktown, Virginia. After serving a whaling center in the nineteenth century, New London was a natural choice for the home of the U.S. Coast Guard Academy in 1876. Across the river in Groton, the oddly named Electric Boat Company established a shipyard in the early twentieth century; by the end of World War II, the company, today part of General Dynamics, was the world's leading submarine builder—a title it still holds today. The Navy's chief Atlantic base for subs was also located in Groton (although it's still confusingly called "Naval Submarine Base New London"). As part of a great synergy of maritime expertise, the Navy located at New London's Fort Trumbull its Naval Underwater Sound Laboratory, which became one of the city's leading employers, with 1,500 workers. While the rest of the nation typically thought of Connecticut as the wealthy suburban home of New York corporate commuters and insurance executives, New London remained focused on the more gritty work of engineering and maintaining the naval machines that stood ready

to fire nuclear missiles at the Soviet Union through the decades of the Cold War.

The sudden and victorious end of that war struck a blow to New London as big as any since the Revolution. With military concerns refocused on shadowy terrorists instead of Russian missiles, the Navy closed the New London laboratory and stopped ordering submarines (something that Connecticut's congressmen quickly went to work on, of course). The feds transferred Fort Trumbull, on a small peninsula just south of downtown, to the state in 1996. The vagaries of legal boundaries also hit New London. As in most northeastern states, cities in Connecticut are often very compact and financially independent of their neighbors; the fact that Groton still held the Electric Boat yard, the sub base, and a research facility of pharmaceutical giant Pfizer did little for the bigger city across the river.

New London undoubtedly experienced what might be called Pfizer envy—jealousy over the success of other Connecticut cities in attracting new businesses (if the military was the greatest industry of much of the twentieth century, drugs seemed to be the golden goose for the aging nation in the twenty-first century). Many cities in western Connecticut were hitting the jackpot by luring in big corporate headquarters (HQs) from New York City itself, as corporate executives realized they could improve their hellish commutes simply by shifting their company's HQs from an expensive Manhattan tower to a green suburban "campus," conveniently near the executives' sprawling suburban homes and weekend golf courses. IBM relocated to Armonk, New York, near the Connecticut border; General Electric, NBC's parent company, made the move from its flashy Art Deco skyscraper on Lexington Avenue all the way to a spacious new home in Fairfield, Connecticut. New London, however, wasn't such a great attraction. Although it still had the Coast Guard Academy and a now-underutilized waterfront, it held few other attractions. It was a little too far a drive away from New York, and had too rough a reputation as salt-soaked maritime town. Corporations with white-collar, college-educated employees didn't want to move to a city that had few quality restaurants, little culture, under-funded schools, and few other people like them.

To jump-start their initiatives for attracting business, struggling cities often take two steps. First, they try to establish, through one big effort, a large office complex for a variety of employers, to assure pioneering companies that they would not be alone. Second and more significantly, they set up "development corporations" to speed the process of using public power to foster private business. Here's how it works. The corporation is usually not bound by traditional rules of governmental agency operation, so its decisionmaking doesn't have to be open to the public, and it doesn't have to be directly responsible to the democratic process. A choice made

by a development corporation won't be subject to second-guessing by a displeased electorate. It will, however, enjoy many of the special powers of government, including the power of eminent domain—meaning that it can take private homes and land against an owner's wishes.

According to the authorities of New London, here's how the remarkable redevelopment plan transpired. In January 1998, the city revived the once-dormant New London Development Corporation, which it funded with bonds sold to the public. In a wonder of wonders, within two months Pfizer announced plans to build a new research facility—right next to the now-mostly vacant Fort Trumbull! New London had its pioneer. With Pfizer now seemingly set, the Development Corporation drew up plans for 90 acres downtown, including the 32 acres of the old Fort Trumbull, which the government already owned. As approved by the city in 2000, the new development would include a new Coast Guard Museum, a path along the Thames (called a "riverwalk," of course) next to a new marina, a "small urban village" including a conference center, restaurants, shops, residences, and new office space, along with a spruced-up park. In addition to bringing jobs and tax revenue to the city, the project would "build momentum for the revitalization of the rest of the city." It seemed like a happy new dawn for New London's economy.

Susette Kelo didn't see it that way. She was a single woman who lived in a small pink house in the Fort Trumbull neighborhood, with a view of the water. To build the new development as planned, the government concluded that it needed to demolish her house and about 100 others from the neighborhood. Gone are the days, as with Rockefeller Center, in which a big real estate project is simply built around holdouts. Today's plans tend to involve the widening and rerouting of streets for traffic purposes, the laying down of huge areas for parking lots, and, most fundamentally, an architectural and planning desire to allow no intrusions into the grand, "integrated" plan. What modern developer would want to have a bunch of old wooden private houses in the middle of a new office and retail development? Prospective clients would see it as odd—there obviously was some problem with the plan here—and businesspeople wouldn't sleep well at night with the thought that potentially hostile (and potentially litigious) homeowners were still living in the middle of the development. Today, all homeowners must go, and so Development Corporation began the process of taking houses by eminent domain. Although they called it "condemnation," the government didn't allege that the houses were run-down, dangerous, or "blighted." It was taking them simply because they were in the way of the big plans. This was permissible under Connecticut law. Kelo and a handful of neighbors didn't want to sell. Among the things that bothered them was the fact that, as with the homeowner in Atlantic City some

years before, some of their houses were apparently destined to become merely parking lots.

The timing of the Fort Trumbull plan also annoyed skeptics. Was it really true that Pfizer just decided on its own to build its new facility next to Fort Trumbull, without an understanding, or even any expectation, that the area would be redeveloped to its liking? If the redevelopment plan had been part of an agreement to lure Pfizer, of course, it would have complicated the argument that the eminent domain was accomplished for a "public" benefit, as opposed to a private one.

Some observers were surprised when the U.S. Supreme Court, which largely can pick and choose whether it wants to consider any particular case, decided to hear Kelo's petition, written after she had lost in the Connecticut courts. In effect, she sought a reargument of the *Berman*'s interpretation of "public use." One reason that the court was interested was that the Institute for Justice, a conservative and property-rights-oriented legal group, pushed hard to bring this case before the court. The growing use of eminent domain was one of the group's targets. Although appellate court judges like to say that they decide issues on reason, logic, and precedent, it really does matter if one party is especially sympathetic; even Supreme Court justice are human begins, after all. And Susette Kelo seemed like the perfect, middle-class, hard-working, mild-mannered plaintiff in a little pink house to juxtapose against big government and the bean-counting redevelopers.

But the challenge failed in the Supreme Court, by a 5-4 vote. Five justices—essentially the liberal wing—followed the *Berman* logic that it's up to a local government to decide how to regulate land use, including whether eminent domain is good for the community. After all, there was nearly a century of precedent that allowed detailed and often-onerous restrictions of private use of land, through "planning" and zoning, in order that the "public welfare" was served as the government saw fit. Eminent domain was just another part of land use regulation, the Court reasoned. As the majority put it: "Just as we decline to second-guess the City's considered judgments about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project."

Why did the challenge fail? One reason was the way that it was argued before the Supreme Court. Kelo's lawyers were libertarians with the Institute for Justice; they argued forcefully about the principle of private property rights (which is the group's reason for being). This spoke to the conservative wing of the court, which sided with Kelo. But the lawyers didn't propose a compelling new rule of law that might have convinced any of the more liberal justices. The lawyers proposed, among other options,

that the court could bar eminent domain in cases when it looks like a development plan is a bad financial deal for a town. But how are a bunch of black-robed judges, ensconced in their judicial chambers, supposed to second-guess the number crunching of a city's accountants? Judges don't want to, and shouldn't, attempt this kind of operation. This approach was a dead end. Another option was to bar eminent domain for any "economic development" project—covering any of the business-luring projects for which so many cities are constantly striving. This made sense for libertarians, who don't like or trust government to meddle with the economy. But such an argument of restraining city and town councils, no doubt, raised the eyebrows of liberal-oriented judges, who generally are sympathetic to governmental projects to help a community. This fear was confirmed by reading the briefs of a bunch of local-government-oriented groups that argued that cities and towns would suffer mightily—especially those that were struggling to rebuild their local economies—without the power of eminent domain for redevelopment. The specter of having struggling cities lose one of their most cherished powers was simply too much for these liberal justices.

But Kelo's case was not doomed from the start. What she needed, perhaps, was a stronger argument that spoke the "social justice" language of the liberal wing; such an argument might have convinced them that this case wasn't simply about property rights versus government planning, but about the almost inevitable potential for *abuse* that eminent domain brings. To be sure, there was no smoking gun of bribery or arm-twisting by private developers in the New London case; there is unlikely to be such evidence in many cases. But we know that undue influence happens—it's human nature. Liberal judges have for decades approved the regulation of campaign finance because of the assumption that shenanigans will ensue if wealthy interests are allowed to contribute unlimited amounts directly to politicians. A similar approach might have made some headway with the liberal justices. Moreover, we know who most often lose their homes to eminent domain—the poor and the less powerful, of course. The rich don't lose their homes, if only because it costs the government too much to compensate them. We also know what kinds of people cities want to attract—wealthy taxpayers and businesses, of course. The argument could have been framed as rich versus poor. But the libertarian lawyers perhaps simply didn't have their heart in such an argument of social justice.

While the court's majority glossed over the issues of undue influence with the point that there was no proof of it in this case, the dissenting conservatives were naturally uncomfortable with the conclusion that judges can simply assume that rules are needed to restrict the power of money in American life. The strongest words came from a dissenting opinion written

by Justice O'Connor. (She had written the opinion allowing the redistribution of land through eminent domain in Hawaii back in the 1980s; she tried to backpedal in *Kelo* by calling her former equation of public benefit with public use in the Hawaii case "errant language"!) The beneficiaries of eminent domain, she wrote, rather unconservatively, "are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more." O'Connor recognized that it is a dangerous thing to allow eminent domain for a dependent city seeking the most "productive" (in other words, money-making) use of land: "For who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."

When the *Kelo* decision was announced in June of 2005, many land use experts weren't surprised—after all, *Kelo* was just like *Berman,* wasn't it? The only difference was that New London didn't have the "blight" justification, but most experts knew that this was often a half-baked justification for getting land into the hands of money-generating owners; New London at least was honest about its economic motives. But then an extraordinary thing happened. There are certain stories in American life that catch the public's mood in such a way that it sparks an outcry. When fanned in just the right way—in 2005, by the conservative media and an army of bloggers—it turns into a wildfire. The notion that Susette Kelo's city could just seize her little house, throw some money at her, and then hand over the land to a real estate developer hit home—perhaps quite literally—for many Americans. Here, the public quickly recognized a point that, strangely enough, hadn't played much of a role at all in the legal arguments and reasoning: the idea that ownership of the American home is something special, something close to untouchable, and something that shouldn't be demolished simply because of some real estate income-flow calculation. Columnists fumed with overheated headlines such as "It's open season on private property." Property-rights bloggers used even more pungent language. Both right-wing Rush Limbaugh and left-wing Ralph Nader condemned the decision. Oddly, at least three syndicated comic strips—*Tank McNamara, Mallard Fillmore,* and *Prickly City*—ran strips criticizing eminent domain.

The timing also helped the critics; many state legislatures are in recess during the summer, during which time opponents drafted proposed legislation and drummed up votes in time for sessions in fall 2005 or early 2006. Because most eminent domain is carried out at the state or local

level, it was here that a flurry of laws were introduced and quickly adopted to restrain eminent domain. Wisconsin tightened its once-loose definition of "blight" to cover only truly run-down land uses. Arizona explicitly empowered judges to make their own assessment of whether slum clearance by eminent domain was truly necessary. Florida's voters approved a law requiring that a three-fifths vote of the state legislature to take land. A number of states, including Iowa, simply outlawed the use of eminent domain for economic development, over the moans of city planners that this would hamstring towns looking to revitalize. In fact, more than 40 states (but not New York) took some response to *Kelo*.

Some saw this as a stinging rebuke of the Supreme Court, the likes of which hadn't been seen since the southern states' resistance to the racial integration orders in the 1960s. In the most amusing response, some libertarians tried to get the town of Weare, New Hampshire, to seize by eminent domain the home of Justice David Souter, who joined the *Kelo* majority opinion, in a moment of pique. After all, pictures of the bookish bachelor's rural home showed peeling paint, sagging windows, and a rusty mailbox—features that might get an urban house characterized as blighted. But the court itself had noted that if states wanted to restrain their own cities' powers of eminent domain, they were free to do so through state law—after all, states can always grant rights to their citizens that go beyond those granted by the federal constitution.

Souter didn't lose his house. As with almost any emotional political movement, the great eminent domain backlash of 2005 and 2006 petered out soon thereafter, as the public's attention moved to the wars in the Middle East, the burst of the housing bubble, *Dancing with the Stars,* and a host of other distractions. Many people didn't pay attention long enough to notice that New London's great development plan never came to fruition; Susette Kelo's little pink house was taken (and moved) but the slump in the real estate market and other factors led to the site's being largely empty as of 2010. Most people aren't ever directly affected by eminent domain; it's a wonder that it ever got such a bright moment in the sun. In retrospect, however, we can see that some approaches to eminent domain reform—such as O'Connor's suggestion that the power be limited to cases of blight—might not be effective in stopping the abuses of eminent domain in taking from Peter's little house to give to big developer Paul.

The Most Exclusive Street in Brooklyn

Daniel Goldstein warned me that I might get hassled a bit when I tried to approach his condo building on Brooklyn's Pacific Street, just a block

from the big intersection of Atlantic and Flatbush Avenues. But when I approached the guard at Pacific Street, next to the barriers that said "Private Street—Residents Only," the guard simply asked me to sign a logbook, as I might at a private office building. In contrast to the previous day's warmth, it was now an overcast, raw day in Brooklyn. On the south side of Pacific Avenue stood a handful of structures, including Goldstein's now almost empty building. On the north side was a fence that bordered the work site of what had recently been the Vanderbilt rail yards. On neither the sunny nor cloudy weekdays did I see or hear much activity on the site of a project that had been hailed as a great injection of jobs and money into the city.

It was more than six years before, in late 2003, that Bruce Ratner announced to Brooklyn and the world his plan to build a giant new office, residential, and sports development around this location. Ratner's family started out in real estate in Cleveland (the "Forest City" in his company's title, and also the birthplace of both John Rockefeller and George Steinbrenner, two of New York's most famous tycoons of the twentieth century), but he was commissioner of consumer affairs under Mayor Edward Koch in the 1980s and made his name in real estate through a number of big projects in Brooklyn. He didn't present Atlantic Yards as merely a development plan. Rather, he orchestrated his "theatrical presentation," as the *New York Times* called it, outside Borough Hall (a good half mile from the actual building site) and focused on two things that were a lot more exciting than real estate margins. First was sports. His plan was to buy the New Jersey Nets NBA team and move them to Brooklyn. This was a great sentimental story line for a borough that was still notable for losing its once-beloved baseball team more than a half-century ago. Ratner was joined by borough president Marty Markowitz, who was 12 when the Dodgers left in 1957. Also at the presentation were former 1970s' Nets star Bernard King and Shawn Carter, aka Jay-Z, the Brooklyn-born rapper and entrepreneur who owned a small stake in the team. This was guaranteed to garner some notice among both the young and the old in Brooklyn's black community.

Also flanking Ratner was Frank Gehry, the "starchitect" hired to build the office tower that would stand in front of the arena, right at the sharp-angle prow of the two avenues. "This started with basketball, a Brooklyn sport," Ratner said at the time. "This was always the site. But it became clear it was not economically viable without a real estate component. And Frank Gehry was the perfect architect for this site." Gehry, probably the most famous architect in the world at the time, said that he was excited about the prospect of being able to "build a neighborhood from scratch in an urban setting." His design for what he called the "Miss Brooklyn"

building was an undulating, writhing mass of metal that was his trademark. The 60-story skyscraper was to be clad in shiny aluminum; a rendering made it look like an armored colossus striding through Brooklyn.

Having Gehry aboard gave the project an immediate stamp of seriousness among New York's development, design, and architectural elite. Oh, and Ratner also had along the mayor, Michael Bloomberg, who for once was not necessarily the center of attention in the city. With star power such as this, it was clear that Ratner was a force. The *New York Times* story (which noted the paper's business links to Ratner's company, Forest City Ratner) quoted the developer as saying that the project "will be almost exclusively privately financed." It then added, almost in passing, that Ratner said he needed the state to "condemn" some residences on the site by eminent domain. It seemed almost like a formality. But this is where Ratner's glistening plans ran into Daniel Goldstein and his condo.

"I thought that eminent domain was wrong," Goldstein told me in his home, across the street from the bulldozers at the Atlantic Yards site. "I didn't want them to get away with it." Out of the spacious windows facing south, in the other direction, one could see much of central Brooklyn, almost all low-rise buildings, punctuated by old church steeples that have dominated the skyline for a century. He chose his words carefully, befitting a man who had spent much of the past half decade fighting Ratner's project. The former graphic designer bought his three-bedroom condo in 2003 for $590,000—not an unreasonable price for a fine Brooklyn location at the height of the housing boom. The space showed signs of being a converted warehouse—the ceilings were high and there were huge concrete supports throughout, but this was no hip urban loft—the furniture was modest and the floor had wall-to-wall carpeting. Goldstein, a thoughtful young man with some prematurely graying hair, was still living with his wife and young child in this condominium; by the spring of 2010, however, having fought and lost the eminent domain battle in the New York courts, he now realized that he soon would have to leave.

When he first heard rumors that a big real estate project was being planned on the site of his home, Goldstein said that he asked a friend "We live here—how can they do that? The answer was eminent domain." Simply the threat of eminent domain, he noted, caused many homeowners to sell out. But not him. He became the spokesman and cofounder of a community group that battled Ratner's plan. The group's name—Develop, Don't Destroy Brooklyn—appeared to be chosen deliberately to emphasize that this was not some not-in-my-backyard (NIMBY) group that simply didn't want anything built near them. Goldstein said that he was proud that this group and others had succeeded in at least slowing down what had

once appeared to be a "done deal" for an enormous complex of buildings that otherwise might have been deep in construction by 2010.

The opponents recognized that the three big blocks of sunken rail yard wasn't necessarily the best use of valuable land in central Brooklyn. In 2005, when the government's transit agency formally put the rail yard up for sale, DDDB helped push a bid of about $150 million from a developer rival of Ratner's; the bid was many millions higher than Forest City Ratner's. The rival plan would have included a hotel, apartments, a school, a library, and stores, but would have been limited to the long, thin site of the rail yard, thus avoiding any need for eminent domain. The government chose Ratner's bid. Goldstein and others don't believe that the government ever truly considered selling to anybody but the biggest and best-connected player in Brooklyn real estate. "It was a sham bidding process" for the yards, Goldstein said, and "no bidding process" for the rest of the site.

Although he played down the assertion that Ratner held undue influence simply by the fact that he went to Columbia University law school with New York's former governor George Pataki, Goldstein did not hesitate to characterize the whole Atlantic Yards saga as being "about corruption and influence." One of Ratner's goals, he said, was to create a real estate monopoly in the area. It was especially galling that the government helped this goal by the use of eminent domain, through a process in which no politician ever had to vote. Goldstein summed up his assessment of the far-too-cozy relationship between Ratner's company and the New York City and state governments with: "Ratner said, 'Here's the land I need.' They said 'OK.' "

It wasn't always this way with eminent domain. Back in the 1930s, when John D. Rockefeller, Jr., and his associates were developing Rockefeller Center in midtown Manhattan, they ran into a number of real estate thorns. Most notable was that the project site included a townhouse occupied by octogenarian lawyer William N. Cromwell, just off Fifth Avenue on West 49th Street. Columbia University owned much of the land that Rockefeller was developing, and the university concluded that it owned the land on which Cromwell, founder of the famous firm of Sullivan & Cromwell, lived and stored his collection of statues and French champagne. Cromwell disagreed with this legal conclusion, and said that he would "take his pants off and fight" any effort to take his house. In response to offers of money and land, as well as pleas that the redevelopment would "result in creating for the City of New York an enormous increase in its tax roll; furnish relief in congestion of traffic; aid the unemployed, turn the wheels of manufacture and . . . constitute a great public benefaction," Cromwell said simply, "no." He wanted to keep his house. What did Rockefeller do? At great expense,

and a loss of one of the three buildings that were planned to face the famous Fifth Avenue, he reworked the building plans to build around Cromwell. The land still isn't part of the center, and nobody remembers or cares today that the plans had to be changed to accommodate Cromwell.

Although no sane developer would compare his project to Rockefeller Center, there were a lot of striking similarities between the 1930s development and Ratner's Atlantic Yards plan. They were about the same size: Rockefeller's site was originally about 14 acres, which expanded to 22 acres with the construction of new buildings in the 1960s; Ratner's project was 22 acres. The 1930s development covered nearly all of three long Manhattan blocks, which became six blocks when the famous Rockefeller Plaza was laid down in the middle; the Brooklyn project would cover six existing blocks. Both were located on auspicious real estate that was relatively underdeveloped: Rockefeller built on land occupied largely by incongruously small houses and shops within the shadows of office towers on Fifth Avenue; Ratner's plan was to build on the old rail yard and warehouses at the intersection of Brooklyn's two grandest avenues. (Although one of the opponents' complaints was that even the *New York Times* for years errantly referred to the location as "downtown Brooklyn," which technically it is not—the area of downtown government buildings is nearly a mile closer to Manhattan; opponents preferred to refer to the neighborhood of Prospect Heights.) Both developers took advantage of the unusually simple real estate ownership—most of the Rockefeller land belonged to Colombia University; half the Brooklyn location was the rail yard owned by the city, which jumped at the chance to sell to the famous developer. Both projects originally were conceived around public entertainment centers: While Ratner used the basketball arena as an anchor, the midtown Manhattan plan was first conjured up in the 1920s as a development around a splashy new home for the Metropolitan Opera, which then dropped out of the plans after the stock market crash of 1929. Although Wall Street tanked again in 2008, which caused Ratner to scale back his plan, the sports arena remained a centerpiece.

In other ways, however, the Atlantic Yards plan couldn't have been more different from Rockefeller Center. While the Manhattan project was very much a part *of* the city—the buildings fit the existing city grid and encouraged pedestrians to travel through it, drawn to the skating rink and sunken café at its center—the Brooklyn project was designed in effect as an enclave *apart* from the swirling city. Streets would be removed, making the project an insulated "plaza" of the sorts that many mid-twentieth-century architects had preferred to the city grid, but which most twenty-first-century designers now scorn as being antiurban. Although most of the towers would border Atlantic Avenue, the planned park and open space would,

in effect, hide behind the big buildings. And while the 14 big buildings of various sizes in the 1930s fit like comfortable new furniture in midtown Manhattan, the 16 buildings of the Brooklyn plan, a dozen of which would be residential, would literally tower over the low-rise Brooklyn neighborhood, like a party of giants walking single file through a community of mice.

One of the first things that had struck me when exiting the subway was how welcoming, unlike Manhattan, the neighborhood felt—nearly all the buildings were low, and the midday sun warmed the sidewalks. The addition of a dozen or so skyscrapers would send long shadows over much Clinton Hill and Fort Greene; if I lived there, I wouldn't be happy. As seen throughout this book, new developments often engender opposition from people who live very close by; nobody wants more traffic, congestion, or shadows to invade their neighborhood. Although people in New York, of course, tolerate more than would a suburbanite in Virginia in Michigan, the sheer number of New Yorkers, combined with their opinionated nature and eagerness to activism, made it inevitable that a forceful and organized resistance would arise.

A developer as experienced and savvy as Ratner had to know that pushing through a development plan this big would require as much preparation and as much work as a war, and perhaps take longer. Years go by as real estate acquisitions are haggled, environmental impact statements are written and revised, and a plethora of government agencies have to be convinced that the plan will meet what they see as the public's needs. Opponents fight at every turn. But a smart developer also knows that while people who live in the prospective shadow of Miss Brooklyn might oppose it, they are not the real constituency that has to be satisfied. It's up to the entire borough of Brooklyn and the city and state of New York to make land use decisions. While Ratner's plan brought frowns to the faces of urban preservationists and designers, more important was to get the support of vocal citizen constituencies. Asserting that you'll provide both jobs and "affordable" housing is a great way to do this. The plan was marketed with the catchy slogan of "Jobs, Housing, Hoops." A big coup came when Forest City Ratner announced a "community benefits agreement," worked out largely with a couple of citizen groups. The most notable one, ACORN, was a once-powerful advocacy organization for low-income people. Its Brooklyn leader, Bertha Lewis, asserted that the group got commitments from Ratner after tough negotiating. Opponents of the project, such as Goldstein, preferred to point to the financial boosts that Ratner gave to the organizations. "They're indebted to him," Goldstein said. In turn, Lewis did not appreciate, to put it mildly, Goldstein's legal efforts in holding up the affordable housing that Ratner's project promised.

But this is understandable—an organization whose mission is to help poor people doesn't have as one of its goals defending the rights of a middle-class homeowner such as Goldstein. Somebody else—the law—is supposed to do this.

In 2006, Brooklynites received in the mail a glossy brochure called "A Vision for Downtown Brooklyn," with a note from Brooklyn's borough president, Marty Markowitz, stating that Ratner City's Atlantic Yard project was "the right kind of progress—thoughtful and visionary—for the Brooklyn we know and love." The brochure, filled mostly with heart-warming photos of smiling Brooklynites, promised more than 2,000 units of "affordable housing" (although, under New York's unique definition, this can include some units that are "affordable" for big households making $100,000 a year). The commitment to build a fraction of new housing units as modest-cost housing, in return for a government permit to build a larger fraction of higher-cost units, is a typical process in many places today. By using the profit motive, the government doesn't have to lay out much money itself for low-cost housing. Goldstein pointed out, however, a number of other, more straightforward, projects to build low-cost housing in the area, which were built much more quickly.

Ratner originally promised 3,800 permanent jobs and 15,000 temporary construction jobs. The construction unions stood behind him at every turn, including sending teams of supporters to various public hearings. Although each page of the brochure stated that the community benefits agreement was "legally binding," Goldstein pointed out that because the agreement wasn't with the city, but merely with the private organizations, it wasn't really enforceable either by the city or by an average citizen. It was "a public relations tool, nothing else," he said, characterizing the organizations' attitude as "this project is going to happen; let's get something out of it." The brochure did not mention eminent domain.

In fact, it was more than a year after Ratner's original statement about the need for eminent domain that somebody got around to the process of actually determining whether the power to condemn property was permissible under state law. Ratner's company didn't have the power of eminent domain, of course; the authority had to be exercised by the Empire State Development Corporation, New York's agency whose job it was to, well, seize land by eminent domain and do other things to help private urban redevelopment projects. In most instances in the recent past, the determination that eminent domain was permissible had been merely a formality. It shouldn't be, of course, under state law. Unlike in Connecticut, New York law, in effect, allows the seizure of private property only for a project that is located in an area that is, or threatens to be, "substandard or insanitary." The law defines this term as "interchangeable with a

slum, blighted, deteriorated or deteriorating area, or an area which has a blighting influence on the surrounding area."

This definition seems to include either of two conceptions of "blight": It can include both run-down buildings, because they are run-down, and the supposed effect that such run-down buildings have in spreading slums elsewhere. But the two problems can, potentially, be handled quite differently. While blight laws were adopted in the early twentieth century as a drastic but effective way of getting rid of slums, at least temporarily, the late twentieth century came up with alternatives that are less drastic. These include housing and building codes that require landlords to provide indoor plumbing, safe electric wiring, and a locking front door, and to remove lead paint—a myriad of features whose absence in the past would get a building tarred as a "slum" building. These steps make it unnecessary to tear down a building, in most cases. In many cases, enforcement of these housing codes is quicker (and cheaper for the taxpayer) than the often-long and expensive process of condemnation and demolition. But the open-ended laws for eminent domain haven't been changed to account for these much more effective ways of dealing with run-down buildings—an oversight that redevelopment corporations take full advantage of.

There's nothing in the New York statutes, however, to answer the question of seizing Goldstein's condo—whether the government corporation is allowed to condemn *all* of the buildings in an area simply because *some* of them are blighted. This question was answered affirmatively, however, in 1975 by the top New York court—a court still firmly in the grasp of postwar thinking that "redevelopment" was an unquestionably good thing for the public. The benefits of redevelopment aren't limited to slums, the court reasoned, but also include areas that are merely "underdeveloped" or stagnant. The court didn't seem to realize the breadth of this statement. It seems to imply that any area that's not getting bigger and bigger (is your neighborhood "stagnant" because the buildings haven't gotten bigger in recent years?) is fair game for "redevelopment," including the tool of eminent domain. In guiding later courts in figuring out what "blight" means, this landmark 1975 case held that factors can include "the irregularity of the plots, inadequacy of the streets, diversity of land ownership making assemblage of property difficult, incompatibility of the existing mixture of residential and industrial property, overcrowding, the incidence of crime, lack of sanitation, the drain an area makes on municipal services, fire hazards, traffic congestion, and pollution." Some of these, such as the difficulty of assembling the property, have nothing at all to do with whether the buildings are run-down.

Here's the heart of the problem. For a while in the twentieth century, the law—legislatures and courts—was so enamored of the idea of

"redeveloping" urban areas that it gave almost unlimited powers to government development corporations, under the assumption that we could always trust them to use their powers wisely. We're no longer so naïve. In its thrall of the promise of urban redevelopment, the law included right to seize private property, pretty much as long as the seizure seemed useful for the redevelopment project. The fatal flaw in this approach is that it focuses solely on the supposed benefits of the project; it loses sight completely of the landowners, especially homeowners, who may be the target of eminent domain. It loses sight of the fact that private property is a *right*—not an absolute right, of course, but a constitutional right, nonetheless. Viewing the Fifth Amendment's "taking" clause as an individual right, the law should put at least some weight on the side of the homeowner in figuring out whether a particular exercise of eminent domain is a "public use." But courts such as the 1975 New York court said, in effect, that as long as it fits the police power (and as we've seen in this book, just about anything can), then the government can use eminent domain to seize private homes. This is no way to interpret a right.

Because the courts don't take the right seriously, blight determinations in New York have become close to a joke. In a story about the blight determination for Goldstein's block, a *New York Times* headline read, "Blight, Like Beauty, is in the Eyes of the Beholder." This might be accurate if we added that the person who got to proclaim beauty had a personal incentive to proclaim that every face was beautiful. Goldstein's assessment is more to the point: "Blight is absurd." In his view, the basic outline of how blight and eminent domain was used—first used as a sword hung over owners' heads in 2003 to get them to sell, followed years later by a study that found "blight" in exactly the places that Ratner needed land—should have been enough for a court to find improper private influence.

In the Atlantic Yards case, the Empire State Redevelopment Corporation hired a firm called AKRF. The firm studied each of the 73 parcels on the site of Ratner's plan and discovered, in a 381-page study that, lo and behold, the area was blighted. The rail yard, which comprised nearly half of the site, was characterized as "creating a significant visual and physical gap," as well as a "sense of desolation" in the neighborhood. This was fair enough; a sunken rail yard is never what people think about when they envision a nice community. But what about the built-up adjacent blocks to the south, where Ratner's company was busy buying up titles and leases and demolishing buildings, and where Goldstein and others were standing firm? The study found that the rail yard had a "blighting effect" on nearby Pacific Street, where Goldstein lived—meaning that it was causing Pacific Street to become blighted. The blight studiers went parcel by parcel along the street and found "blight" in many but not all of the parcels, in some instances by

noting cracks in the sidewalk or poor paint jobs. In Goldstein's apartment, he showed me an exhibit that he and his lawyer used in court; it showed four modest townhouses that had been studied; all four were typical and modest Brooklyn homes. Two were found to be blighted and two were not. None of the four looked to me anything like an image of "slum." The study found that the area was "underdeveloped" because it had a low floor-to-area ratio—in order words, that it had fairly low buildings, in a borough full of low buildings. Critics noted that some of the blight findings focused on land that had already been purchased by, or next to properties bulldozed by, Ratner—what the critics call "planner's blight." In their conclusion, the blight-finders noted that the number of various parcels "hinders site assemblage and impedes . . . the development of the overall project area." They also noted approvingly the benefits of Ratner's idea, including the plan for housing and open space, as well as the infusion of jobs and tax revenue to the city. Only by a bizarre definition would this information be relevant to the question of whether a block is blighted. It makes sense, however, if you read the report as an answer to the question of whether a justification can be found to seize private homes for a politically popular development plan. Nowhere in the blight study was the question asked whether the worst part of the area—the rail yard, owned by the city—could be developed by itself (which of course it could, as the rival developer's plan showed), thus eliminating its supposed blighting influence, without having to seize people's homes.

When the Empire State Development Corporation began the process of eminent domain, Goldstein and a bunch of other property owners sued in federal court, alleging violation of their Fifth Amendment right not to have property taken except for "public use." In one of their court briefs, they asserted that the use of eminent domain "serves only one purpose: it allows Ratner to build a Project of unprecedented size, and thus reap a profit that [the government defendants], tellingly, have attempted to conceal at every turn. This is not merely favoritism of a particular developer in the classic sense, although it is that. Here, the 'favored' developer is driving and dictating the process, with government officials at all levels obediently falling into line." But both the trial and appellate courts held, following *Berman* and *Kelo,* that they must defer to a governmental agency that finds that eminent domain provides a benefit to the public. The homeowners tried the U.S. Supreme Court but in 2008 it declined to hear the case; only Justice Samuel Alito, a dissenter in *Kelo,* said that he wanted to consider it.

Stymied under federal law, Goldstein and others then tried the court system of New York State, which had an identical "public use" requirement but which wasn't bound by *Berman* and *Kelo*. Under New York law, however, a challenge to eminent domain doesn't entitle the plaintiff to a trial or

to cross-examine the people who wrote the blight study; the appellate court merely reviews the study to see whether it makes sense on its face. "It's all so theoretical to the judges," Goldstein lamented. The challengers again lost twice, with New York's highest court in 2009 relying on that 1975 decision, which was just as naïve as *Berman* in its reverence for the idea of "urban renewal." In effect, the New York court held that it wasn't in the business of deciding complaints of unfair influence by a developer or assertions that the blight determination was bogus. These were left to the government and its development agency. In response to the homeowners' contention that eminent domain "should not be permitted to constitute an invasion of property rights and the razing of homes and businesses," the court fell back on the tried-and-true technique of a court that simply doesn't want to get involved with a complicated issue—it's "a matter for the Legislature, not the courts."

It wasn't long after, in early 2010, that Goldstein got a notice that his condo no longer belonged to him, and that the government was beginning proceedings to have him evicted. Under New York City's protenant eviction laws, a judge has to actually visit in person the site of the residence before signing the eviction order—but not, perversely enough, if judges are reviewing a determination of blight that allows the government to seize a home by eminent domain. "If any judges came to this site," Goldstein told me, "they would know it's not blighted." It seemed impossible to disagree. But no judges had visited. The case was over and it was just a matter of time.

It was cold comfort when, just a month after Goldstein's final New York court defeat, an intermediate state court in Manhattan struck down another controversial plan to use eminent domain in the city. Columbia University (once the owner of the Rockefeller Center land), which had its primary campus in upper Manhattan, adjacent to Harlem, wanted to expand north, from 125th and 133rd Streets, in the neighborhood called Manhattanville. Confined into its tight urban campus, Columbia felt that it needed to grow, in part to keep up with Ivy League competitors such as Harvard and Yale. Like Ratner, the university was able to buy up most of the land that it wanted, but not all; as in Brooklyn, the plan stoked some vigorous opposition from local residents and shop owners. Like Ratner's case, but unlike its 1930s project in midtown, Columbia didn't want to simply build around the holdouts. And like Ratner, Columbia sought out the Empire State Development Corporation, which in turn hired AKRF, which had helped Columbia with some of the planning, to study blight. It again found blight, of course, in a report with a remarkable number of similarities to the report for Brooklyn. But the property owners in upper Manhattan got judges who weren't as ready to defer. Scornfully calling

the plan "the Taking of Manhattanville," the judges concluded that the plan wasn't for the public good, but simply for the purpose of helping an "elite private education institution." Referring to some of the factors that led to the blight determination, the court dismissed "the folly of underutilization" and "the idiocy of considering things like unpainted bock walls or loose awning supports as evidence of a blighted neighborhood." The judges also noted a point that scholarly critics have been arguing for years—that "unbridled use of eminent domain not only disproportionately affect minority communities but threatens basic principles of property as contained in the Fifth Amendment."

Why was the Manhattanville case, which bore so many similarities to the Brooklyn case, decided so differently? One reason is simply that different judges are different human beings—some think that they should defer to government agencies that wield eminent domain; others want to break with precedent and scrutinize the power much more closely. As of mid-2010, it was not clear whether Columbia was going to appeal to the same high court that had ruled against Goldstein. But it also made a difference that Columbia couldn't take advantage of the powerful marketing tools that Ratner had gathered—the basketball team, the affordable housing, the support of big labor unions, and long-standing connections with political movers and shakers in New York.

End of the Line

Daniel Goldstein and I stood on the roof of his building, looking over the Atlantic Yards site. Although the weather had turned cool and blustery, Goldstein wasn't wearing a jacket and didn't seem bothered by it. While his eminent domain cases had run through the courts, Ratner's project went through an extraordinary series of ups and downs. In 2008, the *Brooklyn Paper* declared "Atlantic Yards dead," reporting that Ratner was unable to get an anchor tenant for the Miss Brooklyn tower in a rapidly declining economy. Although the obituary was an exaggeration, it was clear that in the real estate recession Ratner would have to ratchet down his plans. Neither the promised offices nor the affordable housing units would be built any time soon. In 2009, Gehry was replaced in favor of a less famous and less expensive architectural firm; later that year Ratner announced that he was selling a majority stake in the Nets basketball team to young Russian billionaire Mikhail Prokhorov, a six-feet-seven-inch basketball enthusiast. The complex deal was contingent in part on Ratner's getting the eminent domain holdouts out of the way. Prokhorov also agreed to buy a large share in the Atlantic Yards project (according to Bloomberg.com, the news

business established by the man who became mayor) at a time when few real estate plans were going forward.

A bulldozer was now starting to tear up some of Pacific Avenue in front of Goldstein's building, but there wasn't much else going on the site. "Nobody knows what the project is now," he said. "Maybe only an arena and tower or two." He told me that he expected eviction in about a month, although he was still paying his mortgage. He recently had been offered $80,000 less for his condo than what he had paid for it back in 2003. "It's a low-ball offer," Goldstein said, shaking his head. He said that he was now looking for a new job and new place to live with his family. I shook his hand and wished him good luck.

Less than a week later, a headline in the *New York Times* trumpeted "Daniel Goldstein, Last Atlantic Yards Holdout, Leaves for $3 Million." All of a sudden, Forest City Ratner had offered him a deal that, with the writing on the wall, couldn't be rejected. Although he agreed to step down as the spokesman for Develop Don't Destroy Brooklyn, he refused to agree to be silent about the project. He also agreed to vacate the condo within a few weeks. Scorn rapidly rained down on him; ACORN's Bertha Lewis, who loathed his holdout for its supposed effect on delaying affordable housing, wrote that the "flim flam man" "finally got what he really wanted: a deal." But Goldstein wrote, on the DDDB website, that there was another reason why he abruptly was given such as generous payout. By getting Goldstein out quickly, Prokhorov would be able to speed up the vote of NBA owners to approve his purchase of the Nets (which they did on May 11, just a few days after Goldstein left), in plenty of time before the NBA's yearly draft of college players the succeeding month. Prokhorov hoped to use the draft to rebuild the Nets, which had one of the worst records in league history the previous year, before the planned move to Brooklyn in 2012. The supposed "public use" of the Atlantic Yards basketball arena was now slated to be called the Barclays Center, after the British-based bank.

A New Vision for Eminent Domain

It's safe to say that no one ever really thought that Daniel Goldstein's block was really blighted, in the sense of being a slum, or that the adjacent rail yard had a "blighting" influence on the block. Rather, the reason that the strange word *blight* is still a key to eminent domain is that the historical quirk is a convenient way for developers with big ideas—and the city governments that are dependent on bringing in new business—to get big real estate projects accomplished quickly and without the hassle of dealing with

holdouts. These powerful interests like the fact that a seemingly public-spirited idea—the elimination of slums—can be used to grease the wheels of so many big real estate developments.

The fact that Daniel Goldstein's renovated condo building itself was never blighted made no difference to the fact that he was forced to leave, of course. From *Berman* to Goldstein's case, courts held that if an area shows some blight, under whatever standard the government chooses, then eminent domain can be used to seize property homes and business throughout this area, regardless of whether these private parcels are stalwarts of the community. In the days of revulsion over large urban slums with no housing code protections, a broad-brush demolition of neighborhoods seemed like a reasonably brutal approach. But it's not so today.

Allowing a broad sweep of eminent domain is cockeyed reasoning. First, as I've noted, the attitude loses sight of the special right of the individual person to his or her *home*. The *Berman* case created a lousy precedent in part because the plaintiff was merely a shopkeeper, not a homeowner. While we all have sympathy for a modest store owner losing his or her property (with compensation, of course), our sympathy should expand into a legal right when it concerns someone's home—the place that holds a nearly singular spot in the hearts of so many Americans. In a 1994 case holding that government can't prohibit you from putting a political sign in front of your house, the court noted, "A special respect for individual liberty in the home has long been part of our culture and our law." The takings clause is, after all, an individual *right,* like the right to free speech and the right against self-incrimination, which is also in the Fifth Amendment. Yet the law of the takings, since *Berman,* has tossed "public use" challenges to eminent domain into the pile of land use cases in which government's police power is almost unlimited—with the exception that government must compensate when it takes. But this completely misses the point. A homeowner challenging "public use" doesn't want compensation; he or she wants to keep his or her home. But the law has developed no substantive right whatsoever to protect a homeowner from eminent domain in cases of urban redevelopment. With other rights, courts interpret the principles broadly because we believe that this is consistent with the notion of liberty at the heart of the American ideal. Except with eminent domain.

The tear-down-everything approach to eminent domain also loses sight of a simple alternative—a development plan that *doesn't* involve demolishing the non-blighted houses. If it is so important that blighted buildings be demolished and replaced, why can't this often be done without seizing the good ones? Why can't a homeowner say, "Okay, you can build new office towers around me, but you can't take *my* house"? Rockefeller built around holdouts, and other developers doubtless would be able to do so as well.

This book suggests a new standard for eminent domain in cases of government-aided redevelopment. This test would work whether we define blight as simply being run-down, or as causing neighboring property to deteriorate, or both. It refocuses the legal standard away from facilitating redevelopment to giving some substantive weight to the singularity of the American home. The test is: *Is it feasible to construct new buildings in the area without taking homes by eminent domain?* Unless the answer is "no," the government can't use eminent domain to take the houses. In cases of supposed blight avoidance, the question could be rephrased as: Can we feasibly replace the blighted buildings without taking the decent ones? Unless the answer is "no," eminent domain isn't allowed. This standard shifts the burden to the government, backed by the developer, if necessary, to prove that eminent domain of decent houses is a *necessary* and *essential* feature of any redevelopment of the area.

Let's see how this plays out in some of the famous eminent domain cases. It seems that the run-down slum buildings in Southwest Washington, D.C., could have been torn down and replaced with nicer buildings in 1954 without taking nonblighted houses. Indeed, the redevelopment in Southwest Washington was not one giant project, but rather involved the erection of a variety of new buildings. There was no reason why some decent houses couldn't have stayed. Likewise, in the New London case, it might have made it more difficult to construct new buildings around Susette Kelo's house—businesses typically don't like having houses as neighbors—but it's likely that somebody could have figured it out. And in central Brooklyn, the old city rail yard certainly could have been developed without eminent domain; remember, the city received and rejected a handsome bid from a rival of Ratner to do just this. Fewer offices and condos (and yes, perhaps fewer affordable housing units) would have been planned, and the Nets might have had to look elsewhere for a new arena location. (Goldstein suggested that the arena could have been built on the site of the Ratner-developed discount mall across Flatbush Avenue, or at Coney Island, the famous beach entertainment area in south Brooklyn, where the city owns a lot of land.) But the government couldn't have taken Daniel Goldstein's condominium against his wishes.

3

Side Trip: Mount Laurel and the Fair Share

The interstate highway runs south from New York first through the gritty port cities of Newark and Elizabeth and then to the greener center of the state, where the nickname "the Garden State" seems a little more plausible. The suburban gardens get bigger as one travels further from the city, but the suburbs of New York now bleed into those of Philadelphia to the southwest. About 20 miles east of downtown Philadelphia is the township of Mount Laurel, a quintessential outer suburb of ample homes owned by doctors, lawyers, and successful plumbing contractors. In 2006, the town made headlines for a state supreme court decision that upheld the government's taking, by eminent domain, of land on which a small housing development was under construction. The town told the court that it took the land for "open space," even though it had no plan to turn the land into a park, a nature preserve, or any other specific public use. The court's approval of eminent domain allowed the government "to shape the future of the community," a town attorney said. Critics complained that the real motivation was simply a desire to limit new housing development. A New Jersey builder asserted that the town was "clear that they grabbed the land to stop families with children from moving into town." More children means, of course, that the town has to pay for public schools and other services. This case was merely the most recent chapter in Mount Laurel's long and illuminating history as a focal point of the effort to fight exclusionary land use laws—a saga that may help point the way to a successful reform of American politics and law.

As recently as 1950, Mount Laurel was still mostly rural, with only 2,800 persons, including more than a few tomato farmers. As the freeways were laid down, however, the suburbanites quickly followed; Mount Laurel's

population shot up to more than 11,000 by 1970, and totaled over 44,000 by 2010. Perhaps the most notable resident is the corporate NFL Films, which occupies a suburban campus; a number of local pro sports stars own big homes in the town.

Under the system common in the Northeast, the most important level of local government in New Jersey is not the county or city, but the township, which in Mount Laurel's case occupies nearly 22 square miles of Burlington County, some of it built-up suburban housing but some still farmland. Zoning and land use laws are the prerogative of the township government.

As in many rural areas, Mount Laurel saw little need for zoning laws until suburban developments started to sprout up in the 1950s. In 1964, the township adopted a restrictive land use ordinance that was typical of American suburbs then and now. While a fair amount of land straddling to the New Jersey turnpike was zoned for industry—residences of any kind not permitted—more than 70 percent of the township was zoned for single-family residences only. The densest development allowable was for about four houses per acre. Slightly more than half of the township was zoned to allow only two houses for each acre, with a minimum house size of 1,100 square feet. No apartments, no attached townhouses, no mobile homes, and no residences of any kind other than the classic suburban house with a yard were permitted under the basic zoning law. By 1970, the only exceptions were a few specially planned garden apartment complexes (with requirements to restrict the number of children) that the government approved before the state repealed the authority for these kinds of developments in 1971. As a result, as a state court would conclude in 1975, the laws "realistically allowed only homes within the financial reach of persons of at least middle income."

So what?, township leaders at the time undoubtedly thought. Wasn't the point of the suburbs to ensure a community's insulation from the density, poverty, and crime of the city? It wasn't the case, after all, that all the region's poor people were ensconced across the river in Philadelphia; on the Jersey side was the city of Camden—to Philly what Newark, Gary, or Oakland are to their bigger neighbors—an industrial suburb that was one of the poorest and crime-ridden places in the nation. Zoning laws were a way that the troubles—and people—of Camden were kept out, just as they are in suburbs across the nation. In a famous quotation, a city council member asserted to those who complained about the laws: "If you can't afford to live in Mount Laurel, pack up and move to Camden!"

But Mount Laurel's exclusion got the town in hot water. There were a number of reasons. First, unlike many suburbs, which are small and wholly affluent, the expansive size of the township encompassed a number

of poor people, including some long-time black residents. With the help of local abolitionist Quakers, black persons freed from slavery had settled in the area before the Civil War. Some of their descendents had rented small houses that were being replaced by new suburban homes; their long-time residency gave them "standing," both in a legal and in a moral sense, to challenge the zoning laws. Because most courts held that only persons with a special stake in the outcome of a legal case could sue, in many other suburbs there literally was no one with the legal ability to sue the government over its restrictive laws. Second, the suburb was in New Jersey, a state with an active movement in the 1960s and 1970s to advance the causes of poor people and black people.

Most importantly, New Jersey judges at the time were at the vanguard of what critics then and now call "judicial activism." In 1970, many judges took their cues from heroes such as Justice Roger Traynor, the crusading California chief justice who among other things struck down a ban on interracial marriage in the state in 1948, and most of all Earl Warren, the chief justice of the United States. The "Warren Court" had boldly reversed precedent in a blizzard of decisions, including the barring of state-enforced school segregation, imposing on the police a duty to inform criminal suspects of their right to a lawyer, and proclaiming a right to "privacy" that isn't in the written constitution. Warren and his fellow activists believed that they held within their power the ability to change the world for the better through judicial opinions. Instead of feeling bound by judicial precedent—what older cases had held—many of these judges believed that "fairness" was the goal to which judicial decisions should aspire. Critics complained, of course, that their ideas of fairness weren't the same as everybody else's; indeed, they often weren't the same as those of the elected representatives of the people, whose laws Warren and Traynor often struck down or ignored. By the early twenty-first century, our public debate has shifted so much that judges such as Sonia Sotomayor and Elena Kagan must at least give lip service to the principles of judicial restraint and subservience to legislatures. But back in 1970, the activist judges were truly heroes, at least to the liberal half of the country.

The local chapter of the NAACP took the case of Ethel Lawrence, a Mount Laurel resident who was part of a group that wanted to build low-cost apartments in the town, in part to counter the rising prices and exclusivity of the growing suburb. Their plan had run into the roadblock of the town's zoning laws, of course. The NAACP's lawyers found the New Jersey courts in a mood to change the world. While the federal courts had taken the lead in school desegregation, rights of the criminally accused, and the separation of church and state, they had done little in the fields of housing and land use law. These were considered exclusively state and local

issues; thus it was up to state courts to lead the crusade for social justice under state law.

The New Jersey Supreme Court's opinion in 1975 astonished even the optimistic plaintiffs' lawyers. Reading more like a political speech than a traditional legal decision, Justice Frederick Hall's opinion took an ax to the notion that a suburb may use its land use laws to maintain an exclusive character. Asserting that the state faced a "desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families," the court concluded that Mount Laurel's policies were destined to keep property taxes low, "without regard for nonfiscal considerations with respect to *people*, either within or without its boundaries." While the town had strived to "attract a highly educated and trained population base," this stood "in sharp contrast to the lack of action, and indeed hostility, with respect to affording any opportunity for decent housing for the township's own poor." Nor was Mount Laurel alone; Hall opined that "almost every [town] acts solely in its own selfish and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base." The result was that Mount Laurel's land use laws "unlawfully excluded" low- and moderate-income families from the municipality. Indeed, Justice Hall decreed, each developing town in the great widening masses of suburbs in New Jersey had the obligation to consider the low-cost housing demands of the entire region, not just the desires of its current residents (which of course might not include many poor people, if a town's laws had been tight enough for long enough).

Where did the court find the legal authority to make these stunning pronouncements of a local government's responsibility? Such niceties didn't bother much the activist judges of the 1970s. To the extent anyone demanded a legal grounding, the court found it in the state constitution's commandment that each citizen has "certain natural and unalienable rights," which include "property" and "pursuing and obtaining safety and happiness." If this vague platitude seems wide enough to justify just about any sort of judicial pronouncement, under the court's reasoning, so be it. Judges were changing the world, they believed, and changing it for the better.

It's easy to criticize local laws; it's much harder, of course, to come up with a change that can really work. To its credit, the court recognized a fundamental problem with any effort to battle exclusionary zoning laws—the fact that each suburb, such as Mount Laurel, holds an incentive to use its laws to welcome the rich and discourage the poor. This incentive is both financial and cultural. A town with mostly affluent suburbanites is going to have a healthy budget and isn't going to need to spend much money; what's

more, it will probably seem like a very pleasant place to its well-situated residents. The problems of poorer people are shunted elsewhere, to places such as Camden, which ends up both as a tough place to live and as a place without much money to make things better. Accordingly, any kind of legal solution has to take into account not just a single town but all the towns in a metro area, or at least much of it. The court's approach to a legal remedy, therefore, was to demand that each town use its land use laws to provide a range of housing. The court concluded that each "developing" town had to allow its "fair share of the regional housing needs of low and moderate income families" in the region.

The "fair share" principle remains one of the most powerful ideas in land use law. It was a breakthrough in thinking about the laws of the American community. Until the Mount Laurel decision was disseminated, almost everybody assumed that a town's overriding purpose was to make better the lives of the people currently living in the town, and no one else. Issues of the public good at a national, state, or even regional level simply weren't the concern of a local government. As a result, land use and housing law remained the most backward and insular form of law, where broader concerns—not to mention the idea of freedom to build and freedom to move—had little say. The decision ordered towns to revolutionize their thinking about what it meant to act for the "general welfare." The welfare that they were now supposed to think about wasn't simply that of Mount Laurel residents, who voted them into office, but rather the welfare of everyone in south Jersey. The housing needs of a struggling family in Camden, or even the needs of low-income migrants looking for a job in New Jersey, were now in part the concern of the government of Mount Laurel.

In some circles, the Mount Laurel decision was seen as one of the towering achievements of American law in the twentieth century. In some sense, the break from the past in land use law was bolder than the more famous pronouncements about desegregation or the rights of the accused, which had their bases in the fairly straightforward principle of "equal protection" and other rights set forth plainly in the U.S. Constitution. In seeking to remake land use law, the New Jersey judges developed an entirely new field of justice out of . . . well, out of thin air. In a book about Mount Laurel, law professor Charles Haar hailed the "audacious judges" who made it happen. Recognizing that our institutions had failed, Justice Hall "succeeded in evoking the conscience of the people" in opening up opportunities for a better life for poor people trapped in inner cities, Haar wrote. The judges conceived of law as an "instrument of social change," that is, "a means to link buildings, neighborhoods, and regions" that had been separated and to set forth a bold new conception of the goals of a community.

One of the glories of the idea was that free market capitalism would be on the side of court-ordered social justice. Developers who saw potential profits in building low-cost housing—not everyone can live in a split-level suburban home, of course—had the same desire as advocates for the poor in getting rid of the restrictiveness of local zoning laws. The New Jersey Supreme Court tapped into this capitalist incentive by approving what's called a "builder's remedy"—if a developer won a case against a town for restraining low-cost housing, the developer would get the right to build more housing than it otherwise would be allowed. The prospect of the NAACP having the same interests as the real estate industry seemed wonderful, as a matter of social justice.

Like most revolutions, however, the "Mount Laurel doctrine" one came with a raft of problems. As it turned out, to order towns to shape their laws to help low-income people who didn't live in the towns was about as easy as telling teenaged kids that they have to become close friends with distant cousins that they loathe. You can tell them to do this, but it's going to be almost impossible to get the kids to change their attitude, and it's going to be intolerably difficult to enforce your command. They may reluctantly mumble that they'll try, but when it comes to acting like real friends, they're going to pull back. They're going to cut short the forced meetings at the mall. They're not to return to phone texts and calls. Pretty soon, they're going to start asking, "What does friends mean, anyway? I think I've done enough. Now leave me alone." Soon after the Mount Laurel decision, an obviously puzzled township attorney said, "I don't see how you can compel a community to provide any kind of housing." Indeed, the court didn't command that a town do anything specific, other than the gloriously vague command to provide for its fair share of low-cost housing. The court stated, in fact, that the town was supposed to just go and do it, without court supervision: "We trust it will do so in the spirit we have suggested."

It did not. Ordered by the court to come up with a plan, Mount Laurel and other suburban towns resisted. They submitted documents that showed that they had amended their laws—in circumstances such as a seven-acre plot zoned for low-cost housing in the middle of a profitable Christmas tree farm owned by a man who had no intention of selling. They mumbled that they were loosening their restrictions by allowing a few private developments to have some greater flexibility in housing construction. They argued that their town wasn't really a "developing" place and thus didn't have to meet the Mount Laurel command. They tossed up their hands at the prospect of figuring out the "regional" housing market, preferring to look at their own town and maybe only a few similar towns around them. They said they couldn't really understand what a "fair share"

was, and came up with their own definitions that resulted in low-cost housing units that numbered in the handful, not the thousands that Justice Hall undoubtedly had imagined. Nothing changed.

It's no surprise that the towns did worse than drag their feet; they stonewalled. For local politicians who depended on the votes of suburban homeowners, the prospect of changing laws to bring in low-cost housing must have seemed like suicide. As Haar put it, "any governmental action with the potential for drastically affecting housing values, changing the character of towns, and bringing an influx of minority populations into formerly white enclaves had the potential shake up the entire political system of the state." In sum, local refusal "made a near mockery" of the first Mount Laurel decision.

So the plaintiffs went back to court. Eight years after the first order, the New Jersey Supreme Court, this time writing through Justice Robert Wilentz (Hall had retired in the interim), tried to put some teeth into the "fair share" command. The 1983 decision (which lawyers quickly started calling *Mount Laurel II*) was even longer than the first, running to 250 pages of state court paper. Wilentz reaffirmed some of the commands of the first decision, such as by writing that "the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor." But the second decision spent less time on grand revolutionary pronouncements—Haar lamented that the court missed its opportunity for a "Gettysburg address of sorts" about exclusionary zoning—and more on what the court saw as the nuts and bolts of what towns had to do. No more could a town argue that it didn't have to change its zoning laws because it wasn't "developing"; all jurisdictions now had to act. The fair share duty required towns to set down precise numbers so that a court could tell whether they were meeting its obligation. Only certain judges approved by the Supreme Court would be allowed to handle Mount Laurel–type fair share cases. Most radical, however, was the breadth of the legal duty. To be sure, the court reaffirmed that towns "must remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety." A jurisdiction had to go beyond simply eliminating snobbish laws such as minimum lot sizes and restraints on apartments and mobile homes, the latter of which the court referred to approvingly as "increasingly important as a source of low cost housing." Now, a town had to adopt "affirmative governmental devices" to make sure that low-cost housing was built. How could a town do this? If a freer market for housing didn't get the units built, a town would have to use its own money to subsidize construction, give zoning "incentives," or mandate that any new private development include a certain percentage of units as low cost as a condition for getting a building permit. Local governments would

have to transform their laws from *excluding* poorer people to affirmatively *including* them.

If the local response to the first Mount Laurel decision can be characterized as puzzled resistance, the reaction to the second court order was downright horror. From the responses of politicians, one might have thought that the entire way of life for suburban Jerseyites was being threatened—which many, no doubt, thought was the case. As suburban voters were terrified at the thought of accepting low-cost housing in their midst, they demanded that their local leaders fight back. According to law professor John Payne, who called the order a "disaster," politicians in the suburbs "simply had to oppose Mount Laurel as a political matter, and it was a rare local official who could be induced to discuss settlement of litigation. Ironically, the effect was to drive the process ever more firmly into the courts and the litigation process, frustrating the 'voluntary' compliance that the state supreme court had hoped for." In the courts, lawyers for towns engaged plaintiffs in what Haar called "hand to hand combat." In the public debate, opposition was even more vociferous. The popular moderate Republican governor, who had been elected at the height of Reaganism, equated the Mount Laurel order with Communism. One city mayor threatened to go to jail rather than comply with the new duties.

It looked for a while as if suburban homeowners would empty out of their 1980s Oldsmobiles and Buicks with torches and pitchforks and storm the courthouses. But in the end they didn't have to. As with most court decisions that boil the public's blood (as did *Kelo*), the people went to their elected representatives to try to change the law. And so in 1985, the New Jersey legislature passed a state Fair Housing Act, which, in effect, superseded both of the Mount Laurel court orders. The statute appeared to do enough to appease the judges, who eventually held that it satisfied the amorphous constitutional requirements. But it also tried to appease suburban voters and their governments, who had howled in pain over the Mount Laurel opinions. The law placated local governments by removing the threat of expensive and time-consuming litigation, including the dreaded "builder's remedy," which the court decisions had hung over their heads. The law expressed an explicit "preference" to resolve disputes through a new state agency: the Council on Affordable Housing (or "COAH").

Even in its first iteration—which has been watered down a few times since the 1980s—the statute reflected compromises that bedevil most efforts to foster low-cost housing. The first compromise is that the responsibility for a fair share isn't automatic. Under the statute, a town can go to the state agency and get certified as meeting its fair share obligation; certification protects it from most lawsuits. But a town doesn't have to get certified; of the 567 municipalities in New Jersey, only 161 got certification

in the "first round" of the law, which ran from 1987 to 1993, although many others tried. A spur to action usually depends on the existence of motivated citizens, such as the plaintiffs in Mount Laurel, or a developer that both wants to take on the government and has a concrete plan for low-cost housing that the town is blocking. Some towns, including some who see the likelihood of litigation as small, have never sought certification.

One of the most controversial features of the system in its original form was the opportunity for "regional contribution agreements," under which a town could, in effect, pay another locality in the same region to take up to half of the first town's fair share obligation. This, of course, led to the selling of shares away from affluent, low-density towns that didn't want low-cost housing, such as Wayne, Holmdel, and Parsippany-Troy Hills, and toward poor, high-density cities that needed the cash, such as Newark, Trenton, and Camden. (One of the biggest trades was in 1991, when Par-Troy paid Newark to take 294 fair units.) As of 2006, more than 200 transfers had been made of just over 10,000 housing units, at a market rate of about $20,000 per unit. Critics complained that these sales concentrated low-cost housing in cities that already had lots of poor families and people of color; the transfers did nothing to integrate neighborhoods by race and class. But the Mount Laurel decisions themselves weren't necessarily about racial or even class integration. Although the local NAACP was the lead plaintiff, the court decisions made clear that the point of the doctrine was simply to get more low-cost housing built. If sales can make it politically easier (and more "efficiently," according to the economists), then this seemed fine. The real problem with the idea was the large size of the regions; the most populous region, in the northeast, includes both rural and hilly Sussex County, which borders Pennsylvania, and dense little Hudson County, a ferry trip across from lower Manhattan. Although somebody who cleans kitchens or gutters in the cul-de-sacs of the Sussex County theoretically could commute 40 miles each way from a low-cost apartment on the cracked old streets of Hudson County, it seems fairly nonsensical to view these two places as being in the same housing market. In 2008, the New Jersey legislature amended the law to bar any future trades.

Another aspect involved language. Although it might be straightforward to refer to *low-cost* housing, this term conjures up images of cheapness and poverty in the typical suburbanite's mind's eye. Much more pleasant is to repackage the concept as "affordable" housing. This is the term that the New Jersey statute uses. The benefit is, of course, that at first blush affordability can mean to a citizen whatever he or she imagines it to mean. Who is against the notion of affordability? The marketing of euphemistic slogans for low-cost housing continued in recent years across the nation

with the rise of "workforce" housing. This concept was defined as meaning housing for people that affluent suburbanites need in their community—firefighters, police officers, schoolteachers, and so on—who might not be able to afford a place in the community under exclusionary land use laws. Some say that the term arose in the posh ski resorts of Aspen and Telluride, Colorado, where houses are exceedingly costly (in part because of extremely tight building laws) and where the nearest town with cheap housing is, quite literally, across a mountain range. Without workforce housing, the marketing goes, who would be able to guard the multi-million-dollar houses in the off-season and who would serve appetizers at the tony restaurants? The psychological benefit is that, in effect, it tells affluent homeowners, "We're not doing this for the general public welfare or the benefit of the less affluent; we're doing it for *your* benefit!" That's a potentially successful marketing idea.

A telling point is the New Jersey law's definition of affordable housing. It includes the categories of *low-income housing* and *moderate-income housing*. The latter is defined as residences affordable for households that earn up to 80 percent of the median household income in the state region. Affordability is figured out by using the rule of thumb that people shouldn't spend more than 30 percent of their income on housing. For New Jersey's Region 5, which includes the three counties outside Philadelphia, and thus Mount Laurel, this income number worked out, as of 2010, to above $45,000 a year for a single person and more than $65,000 for a family of four (the numbers are even higher for the suburbs of New York City). These numbers might make buying a house difficult in a place such as Mount Laurel, where a typical home sold for more than $350,000 a few years ago, but the incomes are still pretty high in comparison to many poor households, even in New Jersey. This is typical of many social justice initiatives. While an idea might start out as a way to help poor or underprivileged people, politics inevitably pulls it toward helping subsidize the voting middle class. Consider social security. It could have been a system to give money to poor people when they get old (after all, affluent people don't really need the government to squirrel away their money for decades), but there's no way that a government retirement plan would garner support among a majority of Americans unless it's sold as being useful for everyone. Or health insurance reform. When President Barack Obama made it the centerpiece of his new administration in 2009, he could have pushed for the goal that many Democrats argued for years—subsidize people who don't get insurance from their job. But it wouldn't have passed unless it was marketed as a way of decreasing health-care costs for the middle class as well. Accordingly, much of the affordable housing built in New Jersey under the fair share system isn't apartments or mobile homes for poor families, but

single-family homes for fairly moderate income households. This fits well with the federal policy, fostered for many years by both Republicans and Democrats, of encouraging as many modest-income families as possible to buy their own homes—a policy that contributed to the disastrous spread of subprime mortgage loans to families that really couldn't afford them.

It's one thing to proclaim that each town has to generate a fair share of low-cost housing; it's another thing to figure out precisely what the fair share is for each particular locality. The second Mount Laurel decision had already made clear that even a jurisdiction that claimed it was fully developed (meaning full) didn't automatically get an exception. But it's also almost inevitable that towns with a lot of land on which to build probably are going to be assigned a bigger share of low-cost housing than towns with less room. In the late 1990s, rural towns such as Cranbury fumed that they might be assigned shares that were as big as their existing population, while more towns filled with existing large suburban lots were given a break. It's not surprising that many towns jumped at an opportunity offered by the courts to assert that its undeveloped land was off-limits to low-cost housing because it was special land worthy of protection—"open spaces, rural areas, prime farmland, conservation areas, limited growth area, parts of the Pinelands [southeast Jersey's surprising pine forests], and certain Coastal Zone areas," was the list offered in the Mount Laurel decision. This far-reaching loophole inadvertently revealed a clash of differing strains of liberalism—the aspiration for low-cost housing versus the desire to protect the natural environment. It also showed a bit of naiveté if the courts didn't realize that towns would fall over themselves in efforts to conjure up reasons for declaring undeveloped land as necessary "open space." We'll revisit this topic in more depth in Chapter 4.

After some stabs at incredibly complicated formulas, the state agency, COAH, adopted in 2004 a simpler way of calculating fair share. Most important for many suburbs, each town's "growth share" was figured out by assigning one affordable housing unit for every five new residential units that were projected to be built in the near future, plus one unit for affordable housing unit for every 16 expected new jobs. A state agency, not the towns, made the housing and job projections. For Mount Laurel, this worked out to a share of more than 1,400 units by 2018—one of the biggest in the state. Next is the "rehabilitation share," which means units that need replacing because of major health or safety code violations. Needless to say, this left room for a lot of judgment calls and argument. While Mount Laurel had only a handful of such units, Camden had more than 1,200 and Newark more than 4,600. Finally, the fair share also included unmet obligations from previous years, which included big tabs for some towns that had been more recalcitrant than Mount Laurel over the past couple of

decades. All in all, the growth share for the state was projected to be a little more than 100,000 units, with a similar number split among rehabilitation units and obligations from earlier years, making a grand total of just over 200,000 low-cost housing units that were supposed to be created by 2018. This system, which was more straightforward and easier to calculate than previous tries, was nonetheless the target of a number of suburban lawsuits and grievances after the agency adopted it in 2004.

In fact, this vision for the future greatly exceeded the number of low-cost housing units that had already been built during more than two decades of local resistance. According to COAH's report for 2003, it had approved only 34,000 new units that were complete or under construction, as well as about 14,000 rehabilitated units. These came in a state with more than three million households and three and half million units of houses, apartments, condos, and mobile homes. Critics pointed out that COAH's system had fallen prey to the middle-class-ization of so many laws. In some localities, half of the fair share units were for residences for the elderly or for special needs persons, such as severely handicapped people. Old people in particular might need housing assistance, but such assistance doesn't generate the kind of the class opposition that is stirred up by housing for poor single people and poor families. Housing for the elderly also wasn't what the Mount Laurel courts necessarily had in mind. But it's better than nothing.

In Mount Laurel itself, the first fair share residences weren't built until 1998—nearly 30 years after the first lawsuit was filed. The town had eventually approved the construction of 140 moderately priced townhouses and apartments, now called the Ethel Lawrence Homes, in honor of the advocate who died in 1994. Local opponents fought the plan until the bitter end. When tenants finally moved in 2001, one observer was Ethel Lawrence-Halley, daughter of the honoree. "On that afternoon, when I saw little kids running from school buses to their moms in the new apartments, I cried," she was quoted as saying. "We had come so far." Meanwhile, a city councilman concluded that: "I think the original opposition, which was based on fear of the unknown, fear of people you didn't know, has gone away."

By 2009, Mount Laurel Township had approved a total of 722 units, of which 460 were already built. This contribution was one of the largest in the state. In affluent little Ho-ho-kus in Bergen County, by contrast, the town had received, as of 2009, credit for setting up exactly one affordable housing unit—an accessory apartment to another home. Of course, Ho-ho-kus, extending less than two square miles, most of which is filled with the expansive plots of its 4,000 suburbanites, probably doesn't worry too much about a builder's challenge. In many towns, the most efficient way of

getting affordable housing built was through "inclusionary development," through which a profit-making developer gets government approval from the town to build in return for an agreement to construct a share of low-cost units. This method both uses the profit motive to get the housing built and minimizes local opposition; the developer naturally has an incentive to shape the mixed-income development as carefully as possible, with the low-cost units not having too big an adverse impact on the sale prices of more expensive houses.

While low-cost housing advocates were proud of New Jersey's modest steps, the road of politics kept winding. In 2008, Jersey voters, considered among the most reliably liberal in the nation, of course, gave their electoral votes to Barack Obama, who became the first president to have been at one time a low-income community organizer. But in the next year, disappointment with Democratic politics led New Jersey voters to elect conservative Republican Chris Christie as their governor. (The Democratic governor in 2004 had resigned after a sex scandal involving a male aide; the succeeding elected Democratic governor was nearly killed in 2007 because he wasn't wearing a seat belt when his official car crashed while speeding on a highway shoulder.) In early 2010, Christie signed an order freezing all activities of the state's Council on Affordable Housing, except for actions specially approved by his newly appointed commissioner of consumer affairs. He made clear that he was acting in the interests of the suburbs: "In short, the message to municipalities in New Jersey is that their COAH nightmare is over," he was quoted as saying. "We're going to move towards making sure that development gets placed back into the hands of local municipalities." Later that year, Christie pushed through the Democratic-controlled state Senate, with little opposition, a bill that would permanently abolish the state oversight of the fair share idea. "We are going to hold a funeral for COAH," Christie said at a town hall meeting. In its place would be a much simpler system of mandatory set-asides for new developments, under which a developer could pay to avoid the low-cost housing. But there would be, in effect, no state oversight—the key factor that made the old court decisions so revolutionary. If the controversial and long-suffering Mount Laurel doctrine wasn't yet dead, its condition appeared to be critical.

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4

Guarding the Rural Myth in Michigan

The ghost of Henry Ford floats as both an angel and a demon over the state of Michigan. These days, it's easy to rue the fact that Ford's innovations in auto manufacturing a century ago made the state too reliant on an industry that the Japanese, Germans, and even Koreans appear to be better at than Americans are these days. He also gets some of the blame for the nation's addiction to gasoline, as well as the tailpipe emissions that threaten the planet's climate. But Ford also championed decent wages for the working man—an astounding $5 a day back in 1914—which helped make Detroit, as recently as the 1970s, the center of the highest-paying blue-collar jobs in the world. The increased wages allowed, perhaps for the first time in world history, a working man to achieve a life of suburban leisure, in which he could leave the factory at the end of his shift, start up his Ford, and drive on fine publicly built asphalt roads through the leafy streets of southern Michigan to a small frame or brick house with a yard that the family called its own.

On the outskirts of the Detroit Metro area, in Livingston County, Jeff Hendee and his brother and sister have just lost their eight-year battle to get local government approval to build a housing complex on a remnant of land that was once their family's farm. Neighbors opposed plans to build either a cluster of houses or a mobile-home community; the neighbors said they wanted to retain the rural atmosphere of the area, whose population had doubled over the previous 20 years. With Michigan's economy now depressed and housing starts all but dried up, it appears that they surely will get their wish—for now. But the Hendees' plan to give themselves a retirement package by building low-cost housing in an exurban area sits as empty as the weeds and fields on their Livingston County property.

Caught in Michigan's Mitt

In many old cities, freeways end as they approach the built-up downtown. Not so in Detroit, however, where the clout of the automobile ensured that a lattice of interstates criss-cross downtown. Although they ripped up many old city neighborhoods, the freeways spurred Detroiters to move to growing suburbs that fan out far to the north, south, and west (Canada lies to east). Only about 1 percent of Detroit metro area commuters use public transportation—the lowest of any big city outside the Sunbelt. Environmentalists like to point to the Detroit metro area as a prime example of unnecessary sprawl; while the region's population has grown only slightly over the past half century, the physical size of the built-up area has extended far into places that used to be farms and forests and wetlands. The process was familiar: Factory workers, with big union-boosted paychecks, fled the crime, grime, and drugs of the big city for suburban neighborhoods (sending the central city even further along its vicious spiral downward), while white-collar managers left these same older suburbs and built new exurban homes, with all the new bells and whistles, in developments even further out into the Michigan countryside. A result is the bizarre phenomenon, also visible in St. Louis and other declining cities, of Detroit city freeways clogged with cars each morning, crawling through abandoned and empty city blocks.

The glory of its famed industrial past is still plainly on view in Michigan. As my plane banked to approach the Detroit airport runway, I got to look straight down at the famous Ford River Rouge plant, once the world's largest factory, employing almost 100,000 workers. It's still an extraordinary sight from the sky, even if today some of it is leased out to other manufacturers; Ford has revived the factory tour, where a visitor can see the F-150 pickup truck, today's jewel of the American auto market, being assembled. After landing, I drove west, under a sunny and warm July sky, away from the city, as suburban neighborhoods quickly turned to fields. I zipped past the famous Willow Run facility, built in World War II, as Ford defied critics who said that a military aircraft couldn't be mass-produced like a Model A; by 1944 Willow Run was turning out more than 400 B-24 bombers a month. Sold to Ford's rival General Motors after the war, the facility cranked out trucks and the ill-fated Corvair in the 1960s. In 2009, GM, which took a government bailout as a way to avoid bankruptcy, announced plans to close the remaining transmission manufacturing operation.

Livingston County lies about 30 miles northwest of Detroit. For those coastal Americans who might think of the Midwest as monotonously flat, Michigan is a pleasant surprise of rolling hills, ponds and streams, and

carefully tended home gardens. Until fairly recently, "I could run my car 100 miles an hour down this road without worrying," Jeff Hendee told me. But Interstate 96 (one of those single-state "interstates" funded largely by federal taxpayers) was opened in part by the late 1950s and enabled a drive from Detroit to Livingston County in less than an hour. Eventually connected by freeways to the even closer cities of Lansing, Ann Arbor, and Flint (the founding city of General Motors and most infamous in more recent decades as the focus of native Michael Moore's film *Roger and Me*), the gentle hills of Livingston County became a choice for commuters to all four areas. While Detroit and Flint saw their populations plummet by nearly half over the past half century, Livingston's mushroomed from only about 38,000 in 1960 to more than 180,000 in 2010, regardless of the ups and downs (and there were more of the latter in recent years) in the southern Michigan economy.

The Hendee family were pioneers in Michigan; his grandfather owned more than 600 acres of farmland in the area, Jeff Hendee tells me at a local coffee shop. They raised cows and horses, and ran a dairy farm. Although he has recently retired in his early 60s, the white-mustachioed Hendee is tanned and well-built. When he was young, he told me, he could drive a tractor at eight years old and a hay-bailor at 12. Like many of his generation, however, he later left the farm. After a stint in the Navy during the Vietnam era, he returned home and drove car-haulers from Michigan to spots around the country for more than 30 years. He's now enjoying the early years of not having to go to work every day.

The coffee shop is the kind of place that meets every expectation of a small-town hangout. While we're talking, one of Jeff Hendee's leading opponents in the land use fight shows up for lunch; the two men shake hands, laugh, and discuss the other man's recent hand surgery. The coffee shop is in Pinckney, a village surrounded by, but technically not part of, the rural Livingston township of Putnam. Land use law here is made at both the township and county level, making development even more bureaucratic and time-consuming than it is in other places. About 7,500 people live in the 36 square miles of the township, about ten miles south of the interstate, in the southern part of the county. The most colorful place in Putnam is a crossroads called "Hell" (explanations abound as to the name's origins), which holds the "Dam Site Inn," a motorcycle hangout, and is popular for postmarking and an occasional movie shoot. If the traffic is right, one can reach Putnam Township from suburban office parks outside Detroit in less than half an hour, and the capital of Lansing in about the same length of time. While many residents still think of it as rural, a quick driving tour reveals a bushel of big-lot suburban developments built within the past generation, with names such as "Saddlebrook,"

"Meadowland," and "Hearthside Estates." With white-collar workers now outnumbering farmers, Putnam has become a suburb.

Over the years, pieces of the Hendee family's farm, like many others in the area, were cut up and sold for houses and even a school. After his parents passed away in the 1980s, Jeff and his brother and sister, both of whom still live nearby, began to think of their remainder of the land—a 144-acre, L-shaped piece on the D-19 asphalt road, which runs straight down from the interstate—as an ace in the hole for their retirement. But the long-term master plan for the area had long included the Hendee land and much around it as agricultural, and most of the land was zoned as "agricultural/open space." Although such zoning might seem to demand that the land remain as farms, the zoning classification, in fact, allows residential lots of at least ten acres in size, without any restraint that the land be used for farming. One can't live off the income of a farm of only ten acres in Michigan, of course, so the zoning really ensures only that this area will remain low in population density. Indeed, some of the plots have been turned into big suburban estates.

The Hendees couldn't help notice the number of suburban developments sprouting up in Putnam in the easy-credit housing boom around the turn of the millennium—some made possible through development-friendly zoning changes. The Hendees decided to try to sell. "It only made sense," Jeff Hendee told me. They linked up with a real estate development company and requested that the town rezone their land to allow one-acre lots. Because a development of all of the 144 acres might necessitate destruction of wetlands on the land and construction of a number of roads—the kind of features that often lead to government disapproval—the owners eventually came up with a plan that has become routine for new developments in today's exurban areas—a "planned unit development," or PUD, as it's called in the business. The PUD acknowledges that today's housing developments aren't simply a matter of lining up houses on streets, as it used to be decades ago. Today, a developer prefers to orchestrate an entire little community, complete with winding roads, a variety of houses arranged in a manner most appealing to prospective customers, and perhaps slices of nature, including small groves of trees and a fountain or lake—the latter two of which are lumped into the development category of "water features." Neighbors also prefer the PUD, in that the houses are "clustered" in the center of the development, while woods, wetlands, or other "open space" occupies the fringes of the land near the neighbors' homes. Although the clustered houses may not each occupy the full amount of land required by traditional zoning laws—say, no more than ten houses per acre of land—a PUD's ample open space ensures that the total development meets the required average low density. Because it imposes

much of responsibility of creating infrastructure on the developer, not the fiscally strapped local government, and because it often ends up as more insulated and attractive to others nearby, the PUD is today's preferred form of big suburban development. It's a good example of entrenched zoning laws finally adapting to the modern world.

With the clustered housing proposal, the Hendees asked for 95 houses on their 144-acre planned development. This number was unusually large for Putnam Township. Although the Livingston County planning staff had suggested that a PUD would be a good idea, calling it "a significant improvement over a traditional development plan," the Hendees' plan ran into opposition in the governmental planning commissions for both the county and Putnam Township. At a public meeting before the township commission in 2003, a resident of Patterson Lake Road argued against the change because he liked the "rural atmosphere" of Putnam. A man on Peaceful Valley Road said he wanted a "rural atmosphere." A neighbor on Swarthout Road, not far from the Hendee lot, liked the "rural atmosphere." And a man on Farley Road said he drove 40 miles to work each day because he liked the "rural atmosphere" of the township. The commission voted unanimously to recommend "no" on the Hendees' request to the township Board—the legislative body that makes final zoning amendment decisions.

Although local government controversies rarely make the evening news, tempers can quickly rise to fever pitch when a new real estate development plan pops up. People see, rightly or wrongly, the "character" of their community at stake. When the Putnam Board finally held a hearing on the Hendees' plan in July 2003, local interest was so strong that the meeting was moved to the local elementary school auditorium. The word was out that the Hendees were considering suing the township, and adversarial neighbors were bothered by the fact that the developer had hired a court reporter to transcribe precisely what people said at the hearing. A representative for the real estate development company, Village Pointe Development, tried to make two subtle points. First, he argued that population growth was coming to Putnam Township, whether the current residents liked it or not. The recent doubling of Livingston County's population was proof of that. The Hendees' plan, which would cluster homes on a main road, D-19, would slow the sprouting of new houses further into the rural parts of the town, much of which still had gravel roads, and where the current zoning would allow for many more houses than were currently built. Moreover, the ten-acre and five-acre minimum-lot-size requirements that covered much of the town simply didn't make sense. Young couples or people without kids or high incomes simply can't afford a house on a five-acre lot; a smaller lot in a clustered development is the kind of moderately affordable housing that the township needed.

The township Board wasn't moved. The Hendees' lawyer later characterized the township government as an "anti-growth contingent" that didn't want low-cost housing near their backyards. Worried about its potential stance in litigation, the Board delayed a final vote in order to collect opinion letters from local planners; these opinions dutifully noted that the land contained wetlands that shouldn't be disturbed and concluded that the PUD was too big for the area. Then the Board voted definitively to deny the Hendees' request for rezoning. The Hendees then field their lawsuit in state court.

From Pigs in Parlors to Midwest McMansions

The green light for local government to use law to pick and choose its residents arose not too far away, along the shores of Lake Erie. In the first quarter of the twentieth century, lawyers and law professors began to think of themselves not as merely people who resolved disputes, but as scientists who used reports and studies and rules to shape a more perfect community. They drafted model ordinances for local governments to enact that gave the elected officials the ability to separate potentially clashing land uses. Why allow a factory to be constructed next to the house of a doctor or lawyer, when the government could simply decree that factories should be segregated to certain districts? Across the nation, big cities and small villages alike pulled out local maps and began to draw lines to "zone" their communities. They were confident that they, like the "Progressive" thinkers of the time, most notably Theodore Roosevelt, were using law for the public good.

New political movements often generate opposite reactions, of course. In response to this bright new view of government stood the old guard of nineteenth-century thinkers who still believed that the best government was the smallest government. It was business, not government, that led the United States to mature into the world's richest and most dynamic nation, they concluded, and even a distant relative of socialism and Bolshevism seemed to them a horribly wrong turn. This reaction—the Tea Party of its day—held a key bottleneck in American law: the federal judiciary. Because federal judges were (and still are) appointed for life, the old thinking still held sway behind the benches of the federal courts. In case after case—from employment to housing to industry—conservative judges ruled that government didn't have the right to tell private businesses what to do. The most famous case struck down a New York City law that limited the hours per week that a baker could be forced to work. The city had been spurred by the fact that bakers, typically immigrants, were ordered to start shoving

their arms into hot ovens well before dawn and were told to stay on their feet for 12 hours a day. But the U.S. Supreme Court concluded that the bakers had a choice whether or not to take the job, and that their "freedom" to make employment contracts made the city's working-hour law unconstitutional. An even more notorious case told a local government that it couldn't restrict the labor of children, at a time when many factories employed nine- and ten-year-olds. In a fascinating reverse echo of today's constitutional debates, progressives pointed out that their copies of the Constitution didn't have any "freedom of contract" in the bill of rights; the conservative judges brushed away this complaint, asserting that the limitations were inherent in the American system. The judges' convoluted reasoning, which included the creation of a body of judge-made constitutional law with the contradictory name of "substantive due process," lives on. Today it supports unwritten rights of people against their government, such as the right to abortion and the right to "free expression," and acts as an ironic irritant to today's constitutional conservatives.

So when the Ambler Realty Company of Ohio took a zoning case to the U.S. Supreme Court in 1925, it had good reason to believe that the justices would issue a decision that would free landowners, such as itself, from the constraints of the new land use laws. Ambler Realty bought some undeveloped land in a burgeoning suburb of Cleveland, with the expectation that its value might go up. The tendentious word for this utterly American activity is "speculation." The company thought that it had made an excellent decision to buy property on Euclid Avenue, Cleveland's main drag, as the road extended east to a community that it named itself after the avenue. Although the suburban stretch was still sparsely populated, the automobile was encouraging more and more Clevelanders to consider moving to new houses being built in suburbs such as the Village of Euclid, only ten miles straight down the avenue to Cleveland's bustling downtown.

The short but lively history of Euclid Avenue itself seemed to summarize the natural changes in land use in America. In the late nineteenth century, the street had been the boulevard of choice for Cleveland's millionaires. These newly minted industrialists were so rich that Clevelanders of the time liked to boast that the wealth of the Euclid Avenue clan exceeded that of the aristocracy of New York's more famous Fifth Avenue. One of the Cleveland tycoons was a local boy named John D. Rockefeller, who built a business of buying crude oil sucked from the ground of the early wells of nearby western Pennsylvania and refining it into gasoline and industrial oil that Americans were starting to demand by the millions of barrels. But soon after the turn of the century, the millionaires started to move away from Euclid Avenue. With their shiny new Cadillac and Peerless automobiles, they didn't have to live near their Cleveland factories; they would build

green and quiet suburban estates. As the rich decamped to the new suburbs (Rockefeller himself took his young family to New York), the ornate Victorian palaces of Euclid Avenue were unceremoniously torn down and replaced by stores, hotels, and apartments, and downtown Euclid Avenue turned into Cleveland's greatest commercial street. This is why Ambler Realty coveted the vacant land it owned east of the city. Surely it made economic sense, as the new houses sprouted up in Cleveland's pleasant suburbs, for commercial Euclid Avenue to fill up with a line of furniture stores, groceries, auto repair shops, and gasoline filling stations. The company would make some handsome profits on its sale of land to local businesses.

But Ambler Realty hadn't accounted for the vision of their community held by the purchasers of the new suburban houses. They had bought their homes with a vision of a perfectly balanced lifestyle—a green and tranquil suburban home in the Village of Euclid, with quick access down the avenue to the hustle and bustle of the city. Why bring commerce and noise to the suburb, when it was just a quick and safe drive away? In 1922, the village council, undoubtedly with its ear to the sentiment of the suburban voters, adopted an extensive zoning law that dramatically limited the development options inside its borders. A torn and faded original copy of the zoning map can be found online; it looks somewhat like the image of an ancient Egyptian hieroglyphic.

Much of the zoning made perfect sense; part of Ambler Realty's land that was zoned for industry adjoined the New York, Chicago, and St. Louis Railroad ("the Nickel Plate Road," in cute old railroad lingo; the rail lines ran into Cleveland's mighty Terminal Tower skyscraper, later bought in the twenty-first century by Bruce Ratner's company). After all, few suburbanites, then or now, wanted to live directly on the rail lines on which rumbling and coal-belching steam engines constantly plied. But along Euclid Avenue itself—the stretch that the realty company hoped to sell for commerce—the village council decreed that the land was to be used for residences only. No shops, no groceries, and no gas stations. The company saw its profit potential plummet. In court, the company asserted that the land of one plot was worth $10,000 an acre unfettered, but only $2,500 per acre in the town's zoning straightjacket.

A federal trial court judge in Cleveland did what many expected a business-oriented judge to do—he held that the zoning law violated the company's private property rights. A government can't just take away value from land without paying for it, he reasoned. This thinking is more than a bit rigid; what about the history of laws regulating land for safety reasons, such as London's no-wooden-building statute? In any event, had the trial judge's reasoning stood—and many believed it would—it would have

nipped in the bud any serious land use regulation in the United States, perhaps for generations. But the judge also tucked in a passage that resonates today with a different sensibility. Picking out the aspect of Euclid's zoning law that separated single-family houses from apartments—not the feature that had most bugged the landowner—the judge reasoned that the effect of the law was to unfairly and unlawfully "classify the population" and "segregate them according to their income or situation in life." This slice of egalitarianism came from a conservative Ohio judge.

The U.S. Supreme Court was on the verge of affirming the lower court judge, by a 5-4 vote, the story goes, until Justice George Sutherland changed his mind. The resulting decision to uphold Euclid's zoning ordinance stands today as the foundation for modern American land use law. Born in England but raised as a pioneer in Utah, Sutherland had attended the University of Michigan Law School in Ann Arbor, just down the road from the Hendee property. Later a congressman and then a Supreme Court justice, Sutherland, who was 64 years old when he wrote the Euclid decision, appeared to see land use laws as a way to battle the increasing annoyances of the twentieth century. "Until recent years," he wrote in his court opinion, "urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. . . . Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable."

But how could restraints on private property be justified in an era of business freedom? Sutherland extended the law of "nuisance"—a venerable and elastic old doctrine that allowed a landowner to sue a neighbor to stop especially annoying practices, such as odors, smoke, or noises. Whether something is a nuisance depends on the circumstances, he noted: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard." So what was the pig here? Undoubtedly swinish were slaughterhouses, oil refineries, and factories. What about stores—the kinds of land uses that Ambler Realty had planned for Euclid Avenue? Here, the esteemed justices took a path of great deference to the policy choices of the local government—something that they hadn't done in matters such as the child labor case. Although the court had rejected sociological studies in the infamous case involving baking hours, the justices now relied on "reports" of the benefits of mandatory separation of land uses. This segregation would

> make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life, greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease noise and other conditions which produce or intensify nervous disorders, preserve a more favorable environment in which to rear children, etc.

Sutherland reasoned, employing a rare and slovenly "etc." in the annals of Supreme Court jurisprudence.

The final category of pigs to be kept out of parlors concerned apartment buildings. Here, Sutherland truly warmed to his approval of legal segregation.

> The development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities—until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.

Ignoring the fact that "height, bulk, and traffic" could be ameliorated by simple limits on the size of buildings, the Supreme Court thus lumped apartments in with pigs, parasites, and offensive smells.

As a final green light to regulation, Sutherland noted that, although Euclid was economically a suburb of Cleveland, it was also "politically a separate municipality, with powers of its own and authority to govern itself as it sees fit." While this conclusion would not have been welcomed by a modest-income Cleveland family looking for an apartment in the leafy suburb of Euclid, it was poetry to the eyes of existing suburban homeowners. If they were allowed to restrict land use as they "saw fit," localities could decree all varieties of land use restrictions to make life more pleasant

for themselves, regardless of the potential effects on outsiders. Through the rest of the century, suburban governments expanded their powers to make their communities more attractive and more exclusive, and to cater to the desires and property values of existing homeowners. Although some state courts at first hesitated at letting governments use power that strayed far from the traditional regulations of nuisances, eventually nearly all of them fell into line. We're furthering the "general welfare"—which meant, of course, the welfare of the current residents—was all that government had to say. Limit apartment buildings? Fine, because limiting cars on certain streets kept down traffic, and thus served the general welfare. Require that houses follow design rules? Acceptable, because a harmonious-looking neighborhood kept up property values and thus the general welfare. Ban big box stores, such as Walmart, even though their low prices were godsends for low-income families? Okay, because big stores hurt old downtown shops run by "mom and pop" and because the big boxes might have relied on Asian child labor; thus the ban furthers the general welfare.

Large Lots and Minimum Sense

How about laws that outlaw small houses? Or moderate-sized housing lots? Here, land use law reaches its limits. From its origins, in *Euclid*, in regulating nuisances and facilitating firefighting, the law now came pretty close to admitting that it was being used to regulate not just types of land *uses*, but the kinds of *people* that would be admitted into a community. By requiring that houses or lots have to be of a certain size, a town in effect may be saying that it doesn't want people of modest incomes. Although a town might come up with some more noble-sounding reason for its law, we all know what's going on.

Or do we? In 1941, as World War II menaced the United States, the town of Needham, Massachusetts, a wealthy suburb west of Boston, increased the minimum lot size in much of the town to one acre. A landowner who was in the process of getting approval of smaller housing lots for his wooded property, adjacent to some "country estates," sued but lost in a Massachusetts court. Although the court cautioned that zoning law "cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there," and that a town can't use zoning simply to save money (Needham had mentioned that fewer houses meant less government services), it still upheld the restriction. Why? The court trotted out the usual litany—avoiding congestion in the streets, curbing overcrowding (to avoid having Needham turn into

a Western version of Calcutta, I suppose), allowing more "light, air and sunshine," allotting more places for children to play, and enabling "better cultivation of flowers, shrubs and vegetables." The judges noted repeatedly that there are "advantages" to living on a larger lot. This is, no doubt, true, just as there are advantages to having a big bank account; but this doesn't seem like a reason to bar the less affluent from Needham, today one of the richest suburbs in the nation. The court also noted approvingly that neighboring towns had similar laws—they can't all be bad, can they?

What's most notable about the court's decision was the judges' reasoning that even if a town was motivated in part by unsavory reasons—such as keeping out the "thrifty"—this nasty motivation can be overcome by even the possibility that the town may have, in addition, a better rationale. Under this way of thinking, the town wins unless it is very, very incompetent in arguing its motivations. The Needham case, like *Euclid*, has been cited hundreds of times and has provided a legal basis for the spread of minimum-lot-size laws across suburban and rural America.

Laws requiring that the *house* itself be a certain minimum size would seem to be more problematic to defend. After all, here a town isn't necessarily decreasing the number of houses—which might limit congestion and save a town money—but merely their size. Under the Needham rationale, a smaller house might even make more room for flowers and vegetables. An interesting early case was from Wayne, New Jersey, an affluent suburb about 13 miles west of New York City. After World War II, as city dwellers were buying cars by the thousands and moving to their own plot of land in the suburbs, a developer began selling tiny little houses—some only about 500 square feet—to modest-income couples and singles glad for a chance to get their own slice, albeit rather thin, of green suburbia. While 500 square feet was very cramped for American suburbia, it might have seemed ample for a young couple raised in a crowded Bronx or Manhattan tenement (the old Lower East Side tenement mentioned in Chapter 1 was less than 300 square feet). Alarmed at this development, the township imposed a minimum house size of 768 square feet. One dilemma for the town was that both informal federal and state "overcrowding" guidelines at the time allowed smaller houses. Stymied in this path, the town relied on the notion that it's better for a citizen's well-being to live in a bigger house. The court agreed, reasoning, "One does not need extensive experience in matrimonial causes to become aware of the adverse effect of overcrowding on the well-being of our most important institution, the home." So, to keep the husband and wife from getting on each other's nerves, or perhaps literally stepping on each other's toes, we'll simply prevent them from buying a small house in Wayne, even if they want to.

Was this paternalism all that was going on? Of course not. The New Jersey court (this was decades before *Mount Laurel* and its sensibility) wasn't shy about patting the suburb on the back for its exclusion of low-income people: "It requires as much official watchfulness to anticipate and prevent suburban blight as it does to eradicate city slums." The court applauded the town for keeping "shanties" away from the summer homes on Wayne's pleasant lakes. This kind of exclusion improves the property values of the existing citizens. So much for Wayne allowing modest-income families; they'll simply have to live someplace else.

From time to time courts have struck down large lot laws. One notable decision was in conservative Virginia, somewhat ironically, where a court held in 1959 that a two-acre minimum in western Fairfax County, adjacent to Prince William, had the "exclusionary" effect of concentrating low-income people into the rest of the county and violated the property rights of landowners who wanted to sell smaller lots. As the property rights argument faded away in Virginia and elsewhere, however, and as suburbs became more sophisticated in defending their restrictions—the "shanty" argument is no longer one that many city lawyers would like to argue in front of a judge today—courts became less and less scrutinizing.

In the twenty-first century, in a less idealized America, towns rarely trot out the old justifications of preserving "light and air" or fostering places for children to play; this is a nation where so few children are allowed to play outside except under closely monitored group activities, and so many adults spend nearly all their time in centrally air-conditioned homes. Instead, towns offer up the more hardheaded rationale of saving money. Lower population density means less demand for costly government services such as police, schools, firefighting, and sewers. This usually persuades, even though more people would also mean more tax revenue, of course, and one town's exclusion simply pushes population pressures elsewhere. But a bottom-line financial argument seems to fulfill the undemanding legal duty to show that the town is trying, in some way, to further the "general welfare." For those judges who might be skeptical of fiscal claims, the vaguely environmental argument of "preserving open space" can also work.

A modern example arose in Brandon, Mississippi, in 2009. A suburb just ten miles east along I-20 from Jackson, the small city adopted in 2006 new rules to require a minimum lot size of 8,500 square feet and that all new houses had to be at least 1,600 square feet. (It's interesting that the minimum house size in Mississippi was twice the size of that required under the New Jersey law a half century before.) Faced with decades of precedent in which courts deferred to local laws of this type, the Homebuilders

Association of Mississippi, which saw the law as hindering new construction, turned into civil rights advocates. The homebuilders argued that the law had an unlawfully discriminatory effect on African Americans, even if there was no proof that Brandon's government adopted the rules specifically in order to keep out black people. (The city was already about 12 percent black—more than in many American suburbs—in a state in which about 40 people of the citizens are black.) Courts are less deferential to governments when claims of racial discrimination arise. Of course, any income-based standard is going to have an unbalanced effect on black Americans; in such cases the judge typically will turn to the government and ask for a good, non-race-based reason for the law. In the Brandon case, the city argued successfully that the law would help "protect the city's tax base," which was good enough for the court. Wealthy folks are better for the budget—and that was the end of the matter in a fiscally minded suburban America. Whether the law had made it more difficult for lower-income families in the area to find decent housing and build decent lives was simply no concern of the suburb of Brandon. And such exclusionary zoning could be adopted by every city in the state.

Today, a leading legal treatise calls minimum lot size laws "by far the most common form of density control in zoning." Most suburban, exurban, and rural areas require large lots in order to slow population growth—a practice that sometimes succeeds but sometimes doesn't, as population pressures are squeezed into the few places where greater "density" is allowed. Because lot-size rules obviously increase prices—they both decrease the number of homes available for sale in a certain area and skew the market to big houses—why are they so universally popular, even in communities that aren't full of rich people? One reason is that lot-size laws are the most effective and foolproof way that existing homeowners can get the community they want.

Here's how it works. One almost-universal truth is that existing suburban and rural homeowners want to guard against rapid population growth in their jurisdiction. Nobody wants more traffic on the roads, more congestion in the grocery lines, and more kids needing seats in the local schools. Residents of older suburbs want to keep the relative peace and quiet of their neighborhoods, and newer suburban areas don't want to become as busy as the older suburbs. Rural areas facing suburbanization, such as Putnam, often desperately want to hold on to their "rural feeling." If this desire to limit population growth is so widespread, why don't localities simply pass laws to cap their populations? This surely would foster the "general welfare" of the community, wouldn't it? One reason is that courts have been skeptical of clear-cut population limits. They conjure up images of unsavory anti-American ideals, such as China's one-child policy, which

sometimes has been enforced through methods such as forced abortions or sterilizations. They also would pose obvious practical problems, in that landowners and developers that are thinking of building would rush to sell houses while there is still room under the cap. The scramble to grab scarce resources before they disappear is known as the "tragedy of the commons." This would create a risk, for current homeowners, that the winner of the lottery for a big, dense development might build next to them.

Perhaps the most famous example of a failed cap was in Boca Raton, Florida, an affluent city in Palm Beach County. In the 1970s, the citizens of Boca, alarmed at the hordes moving south to Florida, passed a referendum limiting the total number of housing units that ever would be allowed in the city at 40,000. Period. No matter how many millions of people flooded into the Sunshine State. Citizen voters often aren't bothered by things such as the likelihood that a referendum might be declared unconstitutional. There's no risk for the voter; why not try? In fact, a Florida court struck down the law as an unlawful. Few other towns have since tried a similarly bold step.

One reason that a cap isn't popular is that rules to enforce it would, almost certainly, result in some landowners not being able to build any house on their land. It's unconstitutional, under both federal and most state laws, for government to prevent a property owner from making any money at all from the land. The U.S. Supreme Court announced this principle in a 1992 case, in which a developer in South Carolina named Lucas spent nearly a million dollars for a great Atlantic Ocean homesite in a development he managed. Before he built, however, the state passed an ecologically based statute that prevented anybody from building another new house as close to the sea as Lucas's homesite. Because he now didn't have any economically beneficial use of his land (perhaps a dubious conclusion), the court reasoned, the government had, in effect, "taken" his land and thus had to compensate him for his lost investment of nearly a million dollars. (The state ended up paying Lucas and then selling the land to another rich person.) In a place such as Putnam, therefore, the government probably can't use a population cap that might end up barring some landowners from building *anything* valuable.

What can a suburb do, then, to ensure that its population growth slows down? A solution is the device of minimum lot sizes, which chokes off the number of new houses that can be built, while still allowing each landowner the right to make some money off the land. Tight population limits can be imposed by a velvet glove, and by euphemistically calling it "growth management." Suburbanites have quickly learned to avoid the uncouth language of "population control" limits, in favor of the more acceptable and technical-sounding lingo of "density" limitations.

Minimum-lot-size laws also fit well with another common desire of existing homeowners—keeping out poorer households. There are many potential reasons for this antipathy, of course. Poorer people are more likely to bring crime with them. They're more likely to have more kids crowding the schools. Not to mention the issue of race. Using law to make it unlawful to sell a house on a small lot is an extremely effective and legally justifiable way to keep out the poor. Professor David Ray Papke asserts that "zoning is the major legal process used by contemporary American suburbs to keep the underclass, the rental housing in which it lives, and 'the city' itself out." This claim conjures up the dramatic image of armed suburbanites building a moat around their community to keep out poor urban people of color. In fact, even those suburbanites who are completely free of class and racial bias can hold another reason for excluding the poor: Households that earn less money pay less in taxes, and often demand more in government services, than affluent households. Accordingly, even a suburbanite who wouldn't necessarily mind having a neighbor in a small house, or neighbor who is a member of a racial minority, or a neighbor who isn't affluent ends up supporting minimum-lot-size laws. Keeping out the poor is simply a way to shore up the community's fiscal health—Who could object to this? If the courts permit a suburb to boost its tax base, lower its potential expenditures, and keep down congestion in the suburb with large lot limits, why not do so? And so suburb after suburb imposes the restrictions. The harmful effects of these laws aren't felt at all inside the suburbs, where residents often feel that they have no responsibilities for people and communities outside their borders.

The Lure of "Open Space"

One term almost always pops up in justifying large lot laws. This term is "open space." As in, "we want to preserve 'open space.' " But what does this really mean? A typical mind might conjure up images of a public park with kids playing tag, or a happy couple strolling along a meadow path. But often this is far from the truth. Often the open space means a private, manicured grass yard in big-lot property, surrounded by a fence and closed off to anyone but the lucky homeowner.

The term "open space" appeared in the model zoning act of the 1920s, drafted by the lawyers around the time of the *Euclid* decision. At the time, of course, the biggest concern of city managers was overcrowding, as farmers and immigrants were streaming into cities such as Detroit and Cleveland for decent-paying jobs in the urban factories. Block after block in big cities were built up with tenements packed with people, while the

streets were clogged with trolleys, newfangled automobiles, and a dwindling population of horses, which were, no doubt, often terrified by the clamor around them. Any lot that was empty was probably the spot of an old building recently torn down to make way for something bigger. It's no surprise, therefore, that the planners put into their model law a call for cities to put some needed "open space" in their zoning maps. While elegant eastern cities such as Boston and Philadelphia set aside impressive public parks, grittier Midwestern cities such as Detroit and Cleveland typically had less interest in such frivolities.

As the great suburbanization began to fan out, however, the affluent new suburban homeowners warmed to the idea of a more organized system of "open space." In 1961, a pair of Ivy League professors summarized a broad new ideal. They split the concept into two categories. The first was open space to reserve land for later development. They quoted President John Kennedy's statement while signing a federal housing bill that "land is the most precious resource of the metropolitan area." The other, more interesting purpose, was the idea of a "greenbelt" in the suburbs around the city. Such a greenbelt—in effect a large and long open space of trees, grass, and nature—would offer the benefits of recreation and conservation to just about everybody in the metro area, not just those who were fortunate enough to live near a confined public park. What distinguished their idea from being just a bigger public park was the notion of including in this greenbelt many acres of private land. How could the government do this? Not by large-lot zoning—which simply creates a sparsely populated suburb—but by government contracts with landowners of undeveloped land, under which the landowners would agree not to build, in return for the government's agreement to pay the landowner whenever the forces of suburban development reached them. This ideal of publicly controlled greenbelts around cities bears no resemblance to today's widespread invocation of "open space."

The 1960s and 1970s saw the rise of environmental consciousness. People began to realize that nature often benefits even when it isn't in a public park. They discovered that cutting down a forest on private land, for example, not only resulted in a loss of trees that might take decades to regrow, but also in the loss of habitat for birds and mammals and the loosening of soil that then eroded into nearby creeks and rivers. Filling in a marsh eliminates a place that filters pollution; collects stormwater; and offers a home for ducks, catfish, and oysters. Laws that fostered the protection of such natural areas, even on private land, often served the wider good. The protection of nature, even on private lands, became a goal of the nation's environmental policy. A recent study showed that more than 6 million acres of land have been sheltered as specially designated "open

space," largely through an easement (by which the landowner agrees not to build, often in return for a payment from the government or a private organization), a land trust, or other means. The popularity of these practices, according to one commentator, "dispels the myth that open space protection is the province of a few well-heeled cappuccino drinkers."

Perhaps the most famous use of an organized open space policy is the "urban growth boundary" around the city of Portland, Oregon. The legal ring around the city and its inner suburbs makes it difficult to construct new housing developments outside the boundary. The belt was justified as a way to protect Oregon's spectacular nature and its rich farmland. What has separated Portland's policies from run-of-the-mill antisprawl laws, however, is that at the same time Portland has encouraged vigorous new construction inside the ring. Land use folks call this "infill," and it's discussed more in the next chapter. Unlike many American metro areas, in which infill is successfully fended off by neighbors, Portland's policies have actively encouraged the city to look like moderately sized European cities—dense, full of apartments, plenty of public amenities, and a heavily subsidized system of public transportation.

But the appeal of "open space" has extended well beyond the mere conservation of nature or the creation of greenbelts. As the term earned a reputation as wholesome as apple pie or as shimmering as the American flag, open space has been invoked throughout the nation as a way to limit population growth, with no requirement that the "space" do much of anything to nurture nature or help the environment. It is safe to say that every week in the United States, someone cries "open space" in opposing a new development plan. The place to be developed could be the site of demolished factory, land zoned for large suburban yards, or even a weedy old parking lot. Whenever current homeowners want to stop new construction, the invocation of open space gives a veneer of respectability to even the most craven examples of "not in my backyard."

Using land use laws to keep out unwanted people occurs everywhere, even in the most sparsely populated areas. As I was writing this chapter, I read about a debate in rural Wyoming, where a group of Roman Catholic hermit monks bought land on which it wanted to build a monastery for around 100 monks. The monks rarely travel (they're hermits, after all), but they make money by, among other things, roasting coffee. Nonetheless, their plans ran into opposition from neighbors—who would typically be miles apart in this region of Wyoming—including some cattle ranchers. Their grievances? The universal worry about too much "traffic," of course (this in a state with a total population smaller than that of Tucson), as well as a complaint that the monastery, the plans for which include a French

gothic cloister and tower, would be inappropriate in a landscape of barns and feedlots. If monks aren't welcome neighbors, who would be?

A variant of open space laws is "agricultural zoning." The idea here is that farms are good; thus government should use land use law to keep them in place. This kind of logic drives free market economists crazy. Lots of things might be good, they say, but that's no reason for us to skew laws to favor it. Why not? Because the market does the work. Socks and underwear are very important too, for example, but this doesn't mean that the government should meddle in the market to funnel money and resources into the hosiery business. We know that this industry will always do well because people will always pay good money for good products. And as long as people eat, they'll keep supporting the market for farm products.

A more pointed argument for agricultural zoning is that law needs to protect farmland from urban sprawl. At some extreme, of course, this argument would make some sense: If billions of rich families were to crowd into the United States and each of them desperately wanted a McMansion on a large zoysia grass lot in the Midwest, we might have reason to worry about a serious loss of much of the nation's farmland. But we're nowhere near this problem, even with sprawl from cities such as Detroit and Chicago and Sacramento. If we took all the built-up land in U.S. metropolitan areas and combined them, they still wouldn't match the amount of acreage used for agriculture. There's still plenty of land in Michigan, Iowa, North Dakota, and Oregon for the production of food. Even in China, were there are four people for every American, the country essentially feeds itself, on less farmland than we have in the United States. How would we know if the food supply *were* getting pinched? This is easy, economists say: If demand for munchies began to outstrip supply, food prices would rise and resources would flow into farming, making farmland relatively more valuable compared to housing and encouraging more efficient food production. Failure to understand this simple principle of economics was the flaw in the famous argument 200 years ago of Englishman Thomas Malthus, who reasoned that the rapidly increasing population of Europe back then would ensure massive starvation for the future of Europe. It didn't happen, because of both the opening up of new places for food production and, most important, the improvement of agricultural efficiency. How do we know that American agriculture has become more productive? Over the past half century, as suburban sprawl has spread across our nation, the prices for the most popular kinds of food have gotten relatively cheaper over the years. Take a dozen eggs, for instance. In 1950, a carton of eggs cost around 80 cents; in 2010, it cost only $1.37—less than twice as much. Meanwhile, average consumer prices have gone up by more

than 500 percent over this period, and the price of an average house has gone from only $7,354 in 1950 to over $172,000 in 2009—an increase of more than 2,000 percent. So which item—cheap eggs or cheap houses—do our laws need to foster? Indeed, the federal government has for decades worried more about *too much* food production, which stifles prices earned by farmers, and has for decades paid certain farmers not to grow some crops.

Despite this good news about food, agricultural zoning has become a rooted premise of American local land use law. From New England to the west coast, land use laws command that land must remain agricultural and that denser housing should be kept out. If the production of food is the chief reason, it's interesting that no place requires that farmers grow particular kinds of food, such as chicken or eggs (which comes first?) or wheat, that might be considered essential. Indeed, if we are truly concerned that sprawl threatens our ability to feed ourselves, shouldn't a farmland protection law be accomplished at a national, or even state, level and not left to the whims of thousands of little local governments? The reason that we don't have an organized farm preservation system, of course, is that we're not in risk of running out of food.

Another justification for agricultural zoning is that it "protects" the farmer from losing his or her farm to developers. But land use restrictions merely limit choice; a farmer can always refuse to sell, as some do. What zoning law does is to tell the farmer that she or he can't sell out for another land use. There are plenty of farmers in their 60s—or ex-farmers, such as Jeff Hendee—who would like to sell to a housing developer but can't because of zoning. Indeed, some argue that agricultural zoning laws are often ineffective because they attempt to restrain land that is no longer viable as profitable farmland. In 2004, Oregon farmers helped push a successful referendum (later modified) that loosened Portland's urban growth boundary and let more farmers make money by selling land for suburban houses.

It's pretty clear, therefore, that much of the impetus for agricultural zoning doesn't really come from an anxiety over the future of agriculture. Not surprisingly, the kinds of law we end up with aren't necessarily very good for farming. One supportive commentator on farmland zoning has written that a successful zoning law should cover very large areas, referring to laws that range from "one house per 40 acres to one house per 160 acres." But in Putnam Township, Michigan, like many others in modern America, land designated for "agricultural zoning" allows for lots of merely ten acres. Such a piece of land can hold some rows of corn, as the Hendees' lot did, but it certainly doesn't allow for a sustainable family farm. This makes sense if agricultural zoning is seen not as a serious means of fostering

essential food products or the protection of family farmers, but as a mask for keeping out suburban development—in particular small-lot, low-cost suburban housing.

Some defenders admit that "stopping sprawl" is an impetus to farmland zoning. In response to the criticism that it restricts affordable housing and sometimes merely pushes sprawl further out, a defender can always point to the city and older suburbs—"infill"—as a solution to housing needs. But an outer jurisdiction typically has no say at all over the development in the inner towns and cities. Indeed, the reluctance to allow denser development is often just as great in cities as it is in exurbs, as discussed in the next chapter. In the Michigan context, it would be cold comfort for a modest-income family looking for housing around Putnam to be told that there are plenty of vacant lots in central Detroit.

The clash between "open space" zoning and low-cost housing is something that farmland advocates probably prefer not to think about. But at least one scholar, Mark Bobrowski, has studied the results of this conflict. Analyzing state land use laws that give a community a choice of preserving more open space or fostering more affordable housing—both characterized as public "goods"—he concluded that governments choose open space over housing time and time again. Low-cost housing is "getting the short shrift," he wrote. We shouldn't have been surprised, really, that what most towns want is to exclude low-cost housing, and that they use the smiley face of open space preservation to help keep such houses and apartments out.

The "Most Broadly Vilified" Housing in America

Back in Putnam, the Hendees, stymied in their effort to get their land rezoned for one-acre lots, changed course. They proposed, instead, that the land be zoned for a mobile home park—in modern terminology, a "manufactured housing community" or "MHC"—of 498 units. As their case went to the court, a representative of their prospective developer, Village Pointe Development, explained that the housing market in Michigan was already going soft by 2004, making low-cost housing a better option. But it also plainly was the case that the Hendees were upping the ante against the town, because, in the words of one commentator, "no other type of housing in America has been more broadly vilified."

While it's no longer acceptable in public circles to stereotype immigrants or racial minorities, it is still commonplace for comfortable suburbanites to snicker at people who live in mobile homes. People who wouldn't dare utter racially offensive nicknames don't blink at referring to "trailer trash." This is especially unfair because these prefabricated homes

are a classic example of American ingenuity. What Henry Ford was to the automobile—he made it affordable by mass-producing simple cars for the average American—the mobile home is for single-family housing. It provides low-income families, especially in rural America, with their own four walls and a plot of land, at minimal cost. Jeff Hendee told me over coffee that he and his siblings "thought we were doing good" by proposing affordable housing in Putnam. He also said that they wanted to make a profit, of course.

The confusion over the appropriate name for the uniquely American form of home reflects the mobile home's rapidly changing history. As the nation fell in love with the auto in the 1920s, ingenious Americans came up with the idea of building a small "trailer" on wheels as a house that could be towed around behind a car wherever one wanted. First popular for vacationers who didn't want to spend money on a hotel room, the trailer was quickly embraced by some restless Americans as a permanent home. These unique homeowners would occupy empty fields and out-of-the-way farms, for as long as they could, where they often greeted fellow trailer-travelers. By the 1950s, manufacturers had perfected the moveable house so much that it resembled a traditional house more than a vehicle, and the term "mobile home" was born. Many buyers began to settle down on plots of rented or purchased land. Not surprisingly, governments responded by relegating them to special "parks," separated from more rooted houses. Courts routinely approved such segregation. In 1953, Pennsylvania judges characterized mobile home owners as "nomads at heart," while social critics snickered that the houses were "slums on wheels." The fact that most owners were white, not black, made the overt discrimination more acceptable in certain circles.

One way to marginalize this housing was through a variety of manufacturing standards that were adopted ostensibly in order to ensure the safety of the inhabitants, but in part motivated by a desire to discourage the low-cost houses. The diversity of rules and regulations among local governments, some of which contradicted each other, naturally made it difficult for national manufacturers to comply. Just as federal law trumped state law with regard to auto safety, the U.S. Congress enacted in 1975 a statute that preempts inconsistent state and local rules of mobile home safety. The uniform standards, watched over by the U.S. Department of Housing Urban Development, try to facilitate interstate commerce and ensure that the houses aren't overly susceptible to fire, storm damage, earthquakes, and other hazards. Recognizing that most mobile homes never really move, except from the factory to the home lot, Congress chose to refer to post-1975 houses as "manufactured housing," not mobile homes. The new rules fostered a boom, including the popularity of the relatively spacious

"double wide" house. The primary distinction today is that this category of houses is "manufactured" into a whole in the factory, as opposed to being "constructed" on site.

Today, the manufactured house serves the same purpose in a rural area as the apartment does in the city—it is the sensible low-cost choice for those who cannot afford or do not want to live in a traditionally site-built house. Although those living in metro areas may not realize it, manufactured housing forms an integral part of the American landscape. More than 22 million Americans—or nearly one in 14 persons—live in an MH. For new houses, the share is much higher. In the 1990s, as much as 30 percent of new houses were of the manufactured kind, and in some rural counties, especially in the South, more than half of new starts were manufactured homes. Because they are small, hold a fairly uniform shape, and can be easily moved into position, they give many families the ability to own their home and garden on a small "footprint" of land—just what the effort to battle suburban sprawl seems to call for.

But the stereotype of a trailer resident—one source estimates that the average MH household income is only about $28,000—ensures that they suffer discrimination. First, it's common for localities to segregate manufactured homes to special sectors. A Pennsylvania town in the early 1970s allowed these houses only in the limited locations zoned for "commercial" use, with the knowledge that such zones command such relatively high land prices that no low-cost housing would get built. While some rural places don't explicitly prohibit them on residential plots, large-lot requirements do the trick indirectly—rarely will a landowner who can afford a ten-acre single-family lot decide to locate a manufactured house there. Many governments simply refuse to provide any zoning at all for this form of low-cost living. When localities have the wiggle room to marginalize MHs, they will do so.

In 2008, when the Hendees had won an appellate court decision, Putnam Township heard local opposition at a public meeting to consider whether to appeal to the Michigan Supreme Court. Although the appeal would cost money, a town trustee said that "having a manufactured housing community on this property is far more risky for this township in what it would do to our community." Local residents expressed their fear that the manufactured housing project would attract "unsavory residents."

I asked Jeff Hendee whether comments such as the one about "unsavory residents" were meant to refer to blacks from Detroit; he offered that this was possible, noting that there was prejudice in the area. But the Hendees' lawyer, Roger Myers, later told me in his office that the opposition probably was based more on class than on race. There just aren't that many blacks anywhere in the outer suburbs of Detroit. A lawyer in his early 40s, Myers

met me in a small office building that used to be an old mansion in the pleasant town of Howell, in the northern part of Livingston County, just north of Putnam. Although he played down the role of racial animosity, he was adamant in his assertion that the Hendees were victims of unfair discrimination against low-cost housing. "I've never seen such compelling evidence of exclusionary zoning," he said.

When localities bar mobile homes entirely, some courts have put their judicial feet down, holding that a rural jurisdiction must make some accommodation—a rural equivalent to the Mount Laurel duty to accept low-cost housing. In Michigan, a statute makes it unlawful for a local government to ban entirely a type of housing for which there is a "demonstrated need" in the region, unless the zone simply can't be accomplished in the jurisdiction. Thus, a small and wealthy suburb might plead successfully that it is "full" and simply can't accept any low-cost apartments or manufactured homes. This type of argument is one reason why many suburban areas are divided up into a multitude of small towns. In rural areas, it's much hard for a government to assert that it has no room, although arguments based on traffic flow, freshwater, and environmental damage are more promising. Indeed, Putnam Township raised all of these factors as reasons to deny the Hendees' application for rezoning. Because they would have used septic systems, mobile homes on the Hendee land wouldn't have needed government water or sewer services. But there's no doubt that 498 new households would have greater impact on the environment than 14 houses on big lots, although keeping the low-income households off the Hendee land simply meant that they'd have to find someplace else to live.

Luckily for the Hendees—or so it seemed for a while—the state of Michigan has been the vanguard of using state law to restrain its localities from discriminating against mobile homes. One can't be sure, but it's no stretch to suggest that a state whose economy was anchored on the manufacture of moving vehicles has looked more kindly on citizens who chose to live in a house that could be moved by car or truck. If stark population limits seem anti-American, then laws that punish mobile homes seem somehow, well, anti-Michigan. As early as the 1950s, the state supreme court held that a rural township couldn't totally prohibit "trailer camps." Although the town worried about what such housing might bring, the court reasoned that merely a fear of harm to "health, safety, morals, or general welfare" wasn't enough to impose a blanket ban.

As time passed, governments became savvy enough to know that simply tarring mobile home residents as potentially "immoral" wasn't the best legal strategy. If a town couldn't outlaw the houses, why not simply make it very difficult to build them? A Michigan township in the 1960s amended its land use laws to allow a zoning district for a "trailer coach park" (the word

"coach" never caught on as a euphemism, either for mobile homes or for buses), but then failed to actually draw on its zoning map any location for such a park. This little trick didn't fool an appellate Michigan court, which ordered the government to make some zones permissible for trailers. But another court around the same time said that it was okay for a town to be "miserly" in its zoning for trailers, as long as it allowed some.

This rule that every jurisdiction had to accept some trailers highlights a quirk in American land use law. Because zoning laws are made at the local level, it makes a difference whether the local government covers a big area or a little one. In some states, such as California or Maryland, most decisions are made at the county level. This ensures that both town and rural interests will be considered by the relevant county government. But in most eastern states, such as Michigan, the laws are made mostly at the level of the city or "township," which in rural regions can be very sparsely populated. Thus, a requirement that each jurisdiction allow some trailers might result in greater burden on local governments, and result in more mobile homes, in a state such as Michigan, with hundreds of little townships, than it would in a state where the burden is placed only on a smaller number of bigger counties.

Trying to make more sense of the duty to permit affordable rural housing, the Michigan courts came up with a new test. No longer would townships face the simplistic rule that they had to accept some trailers, regardless of the size of the town or local demand. Instead, the courts created a new rule that was more subtle, but also harder to figure out. Under the new rule, a locality had to craft its zoning laws to allow for mobile homes if there was a "demonstrated need" in the area. In a case in the 1990s from Augusta Township, not far from Putnam, a landowner testified that he had received a number of inquiries from developers who wanted to buy land for a mobile home park. The township kept refusing to rezone the land. The court ruled in favor of the landowner's application to re-zone in part because it found that the government had an unwritten policy of trying to exclude low-cost housing (no shock here). Even more telling was that the town had tried to fulfill its duty for low-cost housing by zoning as a "mobile home park" a parcel of land that was owned by a township supervisor (the Michigan term for a local elected legislator) who had used it as a successful family farm and had no intention of selling it to a developer. The fact that the land was near a toxic-waste landfill and a federal prison also didn't help the town's argument.

This case signaled how the mobile home duty would be approached, quite often, by local governments—the township would try to meet its obligation by zoning a small piece of land that it hoped was unsuitable for the low-cost housing. Meanwhile, a landowner who wanted to build would

have to come up with some sort of evidence that there was a proven need for manufactured housing. This clash was solidified when the Michigan legislature codified in its statutes that a government's zoning law can't have the effect of "totally prohibiting" a kind of land use when there is a "demonstrated need" for this land use "within either the township or surrounding area," unless there is really no suitable land in the township.

The "demonstrated need" standard is a potentially complicated test, which makes it delightful for lawyers and for consultants who are hired to give their opinion, on either side. The Hendees hired Brian Frantz, a certified planner who previously had worked for the Putnam government. His report, written at the height of the housing boom in 2005, concluded that "Putnam Township is severely lacking affordable housing options" and that "there exists a demonstrated need for manufactured housing in the township."

Putnam Township, Frantz wrote, is "an extremely desirable place for people to live and commute to work in." Because of the convenient freeways that can whisk commuters to the many metro areas of southern Michigan, the township was a classic example of the trend of commuters moving further out to enjoy the "more relaxed lifestyle" of the exurban counties. Like the other portions of Livingston County, Putnam saw rapid population growth in recent years (from 2,433 in 1970 to 5,359 in 2000 and eventually to about 7,500 in 2010) as farms were subdivided into suburban developments. At the time—that is, before the bust and recession—it was reasonable to expect the growth to continue. And the area was filling up with richer people. The percentage of households making more than $75,000 a year shot up from less than 8 percent in 1990 to more than a third of all households in 2000—a spectacular jump, even factoring in the modest inflation of the 1990s. Clearly, many people with good jobs in southeast Michigan were moving to Putnam. Meanwhile, while more than a third of households still made less than $50,000, enabling them, under reasonable standards, to afford a home of not much more than $100,000 (this probably doesn't account for impracticable "subprime" loans, of course), the median home price in Putnam had jumped to nearly $180,000 (up from less than $119,000 in 1995)—thus posing a dilemma for households with modest incomes. Most new homes were expensive. If you were a head of a household making $40,000 and were lucky enough to have bought back in 1990 when prices were lower and had no intention of moving for years, you were in decent shape. But if you were a young couple with a modest income looking for a starter house or an older person with few assets seeking a modest house for retirement, you were in trouble.

The traditional suburban assumption that households are mostly families with children simply wasn't accurate anymore, Frantz noted.

Households without kids greatly outnumbered those with children in Putnam, and the prediction was that this trend would continue, with childless households outnumbering those with kids by nearly three to one by 2030. This nationwide trend is fed by the fact that young people are marrying later and having children later, if at all, that more people are now divorced, and, especially for Putnam, that a rapidly growing sector of the population is, like Jeff Hendee, an older person without kids at home.

But Putnam's land use laws, like those of many other American suburbs, hadn't responded to the changing America. Because so much of the town was zoned for large lots, about 92 percent of the housing units in Putnam were single-family, detached houses—a number that had increased over the previous ten years, as nearly one-quarter of Putnam's current housing stock was being built. Only 2 percent of the units were for more than one household (there are no real "apartments" at all in the township, and only 4 percent of houses were a scattered sprinkling of mobile homes). In sum, Frantz reasoned, Putnam was "severely lacking affordable housing options to meet the needs of its residents." There was a "demonstrated need" for "manufactured housing" in the town. "If the Hendees were allowed build mobile homes on their land," he concluded, "the township will be able to close the gap" in meeting the "affordable housing needs of the escalating population."

When faced with state demand to allow more low-cost homes, a town can take one of two steps. It can acquiesce to the state law and accept its share of modest-income households. Or it can fight tooth and nail against the legal duty, resorting to loopholes and even trickery in its struggle to keep out the unwanted. This later course was chosen by many of the New Jersey towns after the Mount Laurel case, and it is the choice made every year by jurisdictions across the nation. Not surprisingly, it was also the step taken by Putnam in response to the effort to build mobile homes on the Hendees' land.

Both the trial judge that heard the Hendees' case and the court that decided the town's appeal concluded that the Putnam government was giving lip service to the state law duty for low-cost housing. The town was "effectively precluding mobile home" communities, the appellate court concluded, through "evident game playing" in zoning some property for mobile homes. During the litigation, the town had pointed to 80 acres just outside the village of Pinckney as land designated for mobile home in its long-term "master plan." But it had never rezoned any land—a necessary step for the low-cost housing to be placed in Putnam. The trial court also chastised the town for its "arbitrary scheme" of first designating and then removing spots for mobile homes. It was a "shell game," as lawyer Roger Myers characterized it. One site designated by the town at one point was

too small and too far from the village, which the town had conceded would be a reasonable criterion for a mobile home park. Another site, which the town pointed to in arguing that it was fulfilling its duty, turned out, on closer inspection, to be a lousy spot for any kind of house. Nearly half the land was wetlands and the soil on much of the rest of it was poorly drained "muck"—a photo showed that a utility pole had to be held up by supports to keep it from falling down. It also was contaminated with environmental waste. Today, Jeff Hendee told me, part of it is being used as a paintball course. Knowing this, the appellate court wrote, it is reasonable to infer that "the township was hopeful and confident that no one would ever attempt to develop that land for" a mobile home community. Given this "gamesmanship," the court concluded that Putnam had unlawfully intended to exclude manufactured housing from the growing suburban area. When the appellate court decision was handed down in 2008, the Hendees' retirement dream finally seemed to becoming a reality.

An Exhausting Finish

Under a pale blue Michigan sky, Jeff Hendee drove me on a quiet Putnam asphalt road, past houses, new subdivisions, and small farms, to his family's land on road D-19. Near an intersection stood a discount store whose owner supported the development plan, Hendee said. Other nearby residents were, not surprisingly, against the idea of dozens or even hundreds of new neighbors. Because of the deer flies, Hendee warned, we didn't spend long outside the car. The quiet property revealed some rows of corn, close to being ready for picking in the summer sun, but much of it was quite hilly, with bushes and small trees. Earlier, at his brother's house not far away, we had seen some sandhill cranes grazing—the first time I had ever seen these elegant and remarkable migrating birds—and I lamented the fact that I hadn't brought my camera. But here, the only striking sight or sound was the chirping of the cicadas. The scene was peaceful but unextraordinary.

It will probably stay this way for quite some time. The day before my visit, the Michigan Supreme Court handed down its decision, six years after the Hendees' first case was filed in federal court. The Supreme Court judges overturned both the appellate decision and the trial court's judgment, leaving the Hendees with nothing. Their reasoning was that the Hendees had never pressed thoroughly enough their request for a zoning variance from the Putnam authorities. Because the local government had denied their application for one-acre homes, the Hendees had argued that it would have been "futile" to spend more time and money making a full application for a variance and then wait for an inevitable denial of the request

to build hundreds of mobile homes. Both of the lower courts had agreed that it would have been a waste of time. But many judges are protective of the principle that the "judicial machinery" should be wound up only in cases that a court absolutely has to hear. If there is some conceivable way that a dispute could have been resolved outside of court, especially involving the government, many judges are quick to toss the plaintiffs' case out of court. This is so even if, as with the Hendees' case, years have gone by. Because it was technically conceivable (but not conceivable under any sense of reality) that the Putnam government would have welcomed the mobile home plan, the court ruled that it couldn't conclude that the township had failed to make an allowance for manufactured housing. Without having the Hendees go through the motions, their case wasn't "ripe" enough for the court. This kind of hurdle stands as yet another reason why lawsuits are both an expensive and highly unpredictable way of challenging unfair land use laws.

It was "kick in the teeth," Jeff Hendee said of the Supreme Court's ruling. His lawyer, Roger Myers, called it a "punch in the gut," adding that it was "borderline delusional" for the court to reason that it was not futile for the Hendees to spend more time and money on presenting their mobile home application to the local government. It was now still possible for the Hendees to file again their application, wait for it to be denied, and then file yet another case in the court system. But 2010 was not 2004. While mortgage credit was easy six years before, and the south Michigan economy was doing fairly well, making SUVs for American families, the world of 2010 was one of dried-up credit, idling auto factories, and almost no demand for new homes, even low-cost ones, in the Michigan market. As in many areas of the country, "affordable housing" now seemed temporarily available in the form of bidding for foreclosed houses with plummeting prices—if one could get a mortgage loan.

So it seemed unlikely that any form of a housing community would come to the Hendee property any time soon. Eventually, of course, things were bound to change. The economy would recover. Banks would eventually feel comfortable enough to lend. And the people of southern Michigan would once again start looking for new homes—both fancy and modest—in the green and pleasant outer suburbs. The only thing that wasn't certain was whether the voters and homeowners and politicians of a town such as Putnam would move away from the pack and drop their legal barriers to low-cost housing where it is needed.

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Filling in the World's Biggest Suburb: Los Angeles

It's a cliché to say that Los Angeles is the world's biggest suburb without a city. As my plane broke through the clouds on a rare rainy autumn day in southern California, miles upon miles of single-family homes stretched along ramrod straight roads far into the mist. Houses, houses, houses, strip mall. Houses, houses, houses, gas station, shopping mall. But where's the city? The claustrophobic scene was a shock after the long flight over the empty brown Southwest United States, where canyons, mountains, and thin desert streams revealed little evidence of human activity from west Texas until the California coastal mountains. Some travelers may dream of sipping a drink on a Caribbean cruise or driving through rolling hills with the radio blasting; as for me, give me a plane trip across the Southwest with a window seat and the sun warming my face.

I drove my rental car through the drizzle to the affluent "Westside" of the Los Angeles area—specifically to a hair salon owned by a wife and husband, Chris Rios and Arthur Viecco. Until recently, they had lived in a West Hollywood house with their kids and Chris's mother, Tami Moe, in a backyard "granny flat"—a form of affordable housing that was a source of controversy in California. Arthur finished with his client and he talked with me under the front window of his salon. "Many thought we were crazy" to live in this multigenerational lifestyle that runs counter to modern American trends, he said. But he was happy that the grandparent lived as an "essential part of our lives." The kids learned "connections you can't get any other way," he said. In addition to the "nurturing" lifestyle of three generations living on the same plot of land, the separate unit for the grandmother allowed that "when you want your own privacy, you can do your own thing."

"We love this dynamic," her daughter Chris told a reporter in 2008. "She has her own living space, her own life, and has her own close relationship with my boys."

The grandmother, Tami Moe, liked the arrangement of living in her own little place behind the yellow rental house. "I think it's good for my grandkids to see the respect between me and my children, and for them to respect me," she said.

This kind of accessory housing, which "fills in" unbuilt areas, helps relieve the low-cost housing crunch in an expensive and crowded city such as Los Angeles. In fact, some analysts estimate that hundreds of thousands of people live in such accessory units across the Los Angeles metro area. But unlike the legal house in the little suburb of West Hollywood, this type of low-cost living is most often unlawful, even after a strong legal push in 2009, in the great city of Los Angeles.

The Bay of Smokes

When Spanish explorer Juan Rodriguez Cabrillo sailed north from Mexico along the Pacific Coast in 1542—just a half century after Columbus's first voyage west—he landed near a small bay and noted clouds of smoke hanging over Indian campfires inland. He called the place *Bahia de los Fumos*—Bay of Smokes—and the geographic phenomenon that keeps pollution trapped in the large basin between sea and mountains bedevils Californians to this day. More than two centuries passed until, in 1781, just days before George Washington began to lay siege to British troops at Yorktown a continent away, the Spanish established a settlement that they called *El Pueblo de Nuestra Señora la Reina de los Ángeles del Río de Porciúncula*—in English, the Town of Our Lady the Queen of the Angels, on a river they had first seen on the day of a Spanish jubilee. Nearly all of the first handful of settlers were of part-Indian or part-African blood. Less than 70 years later, Washington's restless and swelling nation took ownership of what became the southwestern part of the United States, including the little town of Los Angeles.

Of the 17 or so million people in the "Southland" today, about half live in the Los Angeles Basin, between ocean and mountain, that had attracted the Spanish settlers to the dry but mild coast of California. Another million and a half live in the flat San Fernando Valley to the north, over the Santa Monica Mountains, and a couple million more are squeezed onto hillsides and in innumerable canyons and ravines. For decades, critics have warned that Los Angeles's famous sprawl must stop. The first reason is geography. The area is hemmed in by the ocean to the west, the severely

sloped and unstable San Gabriel Mountains to the north, and the parched Mojave Desert to the east. The second is resources. Since 1900, southern California has strained to soak up freshwater supplies wherever it can find them and by whatever means it can employ. The Golden State grabbed a big share of the Colorado River's flow when it was divvied up among the southwestern states earlier in the century. In the 1920s, Los Angeles used a combination of cleverness and fraud to seize the legal right to the water that fed the Owens Valley, just east of the Sierra Nevada Mountains, more than a hundred miles north. There is only so far that Los Angles can go to siphon water to its eager millions, if only because it clashes with the demands of other thirsty cities, including San Francisco and Las Vegas and Phoenix. A third reason is sociological. How wide can a metro area get before people are driven crazy by miles after miles of traffic, pollution, and congestion? A caustic critic of the suburbs, James Howard Kunstler, asserted in 1993 that "the great suburban build-out is over." He predicted that Americans would refuse to engage any more in 90-minute commutes over soulless highways; instead, they would return to denser lifestyles in the city, where they would give up a striving for fancier houses and bigger garages in return for an ability to walk, bicycle, and chat with their neighbors on city streets.

How wrong he was. For the next decade and a half, the nation experienced its greatest and most maniacal boom in suburban sprawl. Developers and homeowners in Los Angeles simply refused to accept the geographic limitations of the Southland and burst through them. New subdivisions bloomed like flowers after a desert shower. To the east, far inland from the old center, in places that were merely sand and scrub a couple of generations ago, arose giant new suburbs such as Moreno Valley, a city in Riverside County that has attracted mostly Latino and black families, and that now holds more than 180,000 people. To the northwest, the direction to which most affluent white families looked, developers simply pushed through the mountain passes. One of the most popular new locations is a city called Santa Clarita, which was the shimmering subject of a profile in my airline magazine. The pictures showed happy people shopping and jogging beside human-made lakes, under a backdrop of dramatic desert mountains. People flock to these distant exurban communities because the old concept of the "central city" has little resonance in southern California today. While perhaps a few hardy commuters make the colossal commute from Santa Clarita to downtown Los Angeles, the vast majority work in other suburban areas closer to them. I had never heard of Santa Clarita before, a new city recently cobbled together, which by 2010 housed nearly as many people as Moreno Valley. I knew of Moreno Valley, however, largely through its reputation as one of the centers of the exurban foreclosure disaster.

Infill: The Only Thing Hated More than Sprawl

With babies and immigrants, the United States in the twenty-first century adds more than 2 million people to its population every year. Our population is 40 percent larger than it was in 1980, and more than twice what it was in 1950. California's population has grown even more rapidly—it's double the 1965 total—although its once-phenomenal growth has slowed, as people are deterred by the Golden State's high cost of living and urban congestion. The million new households that are added to the nation each year have to live someplace, and very few of them choose to live in rural areas or in small towns. Most of them want to live in metro areas—places of cities and suburbs. If we don't want to encourage suburban "sprawl" at the edges of our metro areas, where so much of our population has shifted, the only real alternative is that we allow population growth *inside* the neighborhoods that we have already built up—inside cities and established suburban areas. The filling in of these areas is called, in the land use business, *infill*.

There are many ways to foster infill. Vacant parcels, excess parking lots, and failed strip malls (maybe outlets that rented videotapes or made quickie subprime loans) can be turned into housing. A stretch of old houses or small garden apartments can be bought up, torn down, and replaced by a big apartment building. Or an entire neighborhood can be transformed from a low-density, auto-oriented American suburb to a higher-density metro district that is oriented toward public transit and a mixed use of housing, shopping, and business.

These sorts of transformations were universal phenomena in the age before modern zoning, of course. When the Spanish pioneers first settled Los Angeles, hundreds of miles from any competing national power, settlers with means built spacious haciendas and ranchos, often with plenty of space for a garden to bloom and horses to feed in the California sunshine. As the city's population boomed in the nineteenth century, however, the introduction of office and industrial work allowed people to live in tight proximity, without the need for direct access to fields, crops, or animals. Just as the land use on key routes such as Atlantic Avenue in Brooklyn or Cleveland's Euclid Avenue shifted away from single-family houses, the big "boulevards" of Los Angeles, such as Wilshire, Olympic, and Sunset, saw their structures swell in size, and the number of yards and gardens diminished. It seemed like a natural progression.

Zoning stops this transformation. By legally freezing the uses of land, the bulk of buildings, and the proximity of one structure to its neighbors, zoning fights the forces of the free market and keeps density to fixed maximum levels. By preventing infill, the strictures of zoning ensure that

most population growth will occur on the suburban fringe of the metro area. To get infill, therefore, cities and older suburbs would have to make changes in their zoning laws to allow new construction. In an older suburb, this might mean rezoning a block to allow a shift from small single-family houses to townhouses. In a city, it could involve changing the permissible zoning from two-story garden apartments with big parking lots to six-story mixed-use buildings of apartments with stores on the ground floor. In an outer suburb, it might mean changing the rules that demand only one house every acre to allow six houses in an acre, or maybe even a mobile home park or a cluster of apartments.

Infill can make a modern U.S. metro area look more like a European city or an American city of 1900. Modern designers have a name for this concept: "new urbanism." The name is a little contradictory. The idea is that we should rebuild American communities to look more like old neighborhoods. (The moniker of "new" is a nod, in part, to the American love of all things new—a tendency against which many new urbanists struggle.) Part of the reason that so many people find places such as New Orleans' French Quarter, old San Francisco, or quaint Savannah so nice is that they are existing urban centers that were built before the strictures of modern zoning. The essence of the idea is that different land uses can be mixed together, in a way that the free market decides, and that makes for an invigorating lifestyle. Houses are often small and built close to each other. Apartments are placed willy-nilly on top of stores. Residents give up big yards and big garages in return for the ability to walk down the corner grocery to pick up a quart of milk, and stop and chat with neighbors on the way. They spend warm evenings sitting on the front porch watching the world go by, instead of lounging on sofas in front of giant-screen TVs (well, at least the residents *could* do so). New urbanism is old urbanism. If we built these pleasant urban neighborhoods a century ago, why can't we do so again?

Perhaps the most famous proponents of new urbanism are Miami-based architects Andres Duany and Elizabeth Plater-Zyberk. Their firm designed a founding monument of the concept—the resort town of Seaside in the Florida panhandle, in the 1980s. While designers point to it as a successful community that de-emphasizes the car, the average American is more likely to remember it as the location of outdoor scenes of the 1990s movie *The Truman Show*, in which Jim Carey's character turns out to be the unwitting subject of a "reality" TV show in which everyone else is an actor, surrounding his seemingly perfect life. Seaside was chosen because it seems so idyllic that it can't possibly be true. Almost every house is built of wood and has a big front porch. No house looks like the one next to it, although almost all have two stories, and spacious homes sit cheek-to-jowl with townhouses and small apartment buildings. Streets are straight but

narrow, with trees lining the sidewalks on both sides. Everybody in the town can walk to the central shopping area, which holds the only parking lot of any size in the town. It's so appealing that houses go for multiples of what houses of similar sizes sell for nearby in the panhandle (raising complaints that new urbanism is "elitist").

On a much larger scale, the best example of law promoting urban infill is on the West Coast, in Portland, Oregon. For decades, the state has imposed an "urban growth boundary" that makes it difficult to build sprawling new subdivisions at Portland's suburban outskirts. To make up for these limitations, Portland has done as good a job as any city in the nation of encouraging greater density downtown. Portland has zoned to allow the construction of big apartment buildings downtown, permitted mixes of residences and stores, encouraged big department store retailers to stay downtown, built a vibrant central city square where there was none before, and funded one of the nation's best urban transit systems (including free rides downtown). Although some Oregonians chafe at the unique system, most have adapted. As a result, Portland, once known as a dour workaday town, has developed a vibe and reputation as one of the nation's most exciting urban centers. In many ways, it seems like a successful northern European city, complete with clouds and drizzle.

Probably the most entertaining advocate of new/old urban ideals is the aforementioned James Howard Kunstler, a writer who lives in upstate New York State. His writings froth at the literary mouth in their hatred of modern suburbia, which he blames on the land use laws of the twentieth century. The originally simple idea of separating industry from houses has been taken an "absurd extreme," he has written, creating a "human habitat dictated by zoning" that is a "formless, soul-less, centerless, demoralizing mass." Because Americans dislike their recently built habitat, he contends, they have turned to NIMBY—softened with the euphemism of "anti-growth"—that stops us from building the kind of decent communities we need. In addition to blaming modern zoning for sending families into financial distress (because of the high prices of government-dictated big houses and the costs of cars) and destroying the environment (because of air pollution and the paving over of nature), Kunstler also asserts that zoning artificially created the concept of "affordable housing," by restricting the market's ability to build cheap housing for those who need it. "The best way to make housing affordable," he has written, "is to build or restore compact, mixed-use, traditional American neighborhoods."

New urbanism is often associated with new places, such as Seaside, but its most important role could be in offering a vision for changing the communities that we've already built. Places like the city of Los Angeles, which was built largely during decades in which space and gasoline and American

wealth seemed endless. "Filling in" Los Angeles could do a world of good. Take the soulless stretches of zoned cities and retrofit them for a busier twenty-first century, the urban visionaries say, focusing on creating one nice and vibrant neighborhood at a time.

Here's a key point. It's fine to complain about sprawl and the suburbs, but in a rapidly growing nation such as modern America, there has to be some workable alternative to sprawl. We can't just simply stick our heads in the sand and hope that population growth and the demand for housing will somehow go away. The only alternative to sprawl is infill. By letting our cities become denser, with more apartments, more shops, and more offices, we could shape population growth in a sensible way. It's remarkable, therefore, how little infill gets discussed in the public debate. For fun, I asked an online database of legal articles to tell me how many published articles have the word "sprawl" in their titles. The answer was more than 100. Then I inquired about "infill." The answer was one—a short bar journal piece about Los Angeles.

The problem is that "the only thing that Americans hate worse than sprawl is density." This pithy and accurate assessment was made by Robert Freilich, a lawyer and professor who has worked on fighting sprawl for nearly half a century. But his epigram may need some clarification. Americans certainly hate sprawl when it threatens to bring new neighbors to clog up their commuting roads; but they don't hate sprawl at all when it offers them a chance at a bigger and better new house in a fringe subdivision. But existing residents of both city and suburb naturally rebel when a government suggests changing zoning laws to bring infill to an established neighborhood. It is NIMBY in its purest form; Americans may dislike abstractly the idea of sprawl, but when it comes to using zoning laws to figure out where the thousands of new households in a metro area each year will live, infill often stirs up more opposition than sprawl.

From a certain angle, the opposition to infill makes common sense. Let's say a developer is considering a new housing plan for 500 units, either on an old farm or on a city block of 20 old rental houses. Either plan is likely to generate local resistance. But there are a lot more people who are likely to live within eyesight of the urban block than there are people who live adjacent to the old farm. "Not across from my back city deck" is a lot more forceful than "not down the country road from my house."

Infill can face astonishing local resistance when it threatens to upset settled expectations of homeowners. A fine example comes from near where I used to live, in the Takoma neighborhood, which straddles the border of Maryland and Washington, D.C., about five miles from downtown. When the Washington subway line reached Takoma, this racially diverse and middle-class community included, then and now, a collection of small

retail stores and many comfortable old bungalows with big yards. The subway offered a perfect chance for infill. A parking garage could have encouraged suburban workers to park at the transit stop and commute downtown, thus cutting down on city traffic. The zoning laws could have been changed to allow more apartments and denser retail. This is what's called transit-oriented development. By steering housing and commerce to clusters near transit stops, law can lessen some of the market pressure to build sprawl on the outskirts of the metro area. It's a classic example of "smart growth." But the homeowners of Takoma simply refused. They liked their neighborhood as it was and they said "no" to infill. They fought zoning changes and transit-oriented development, to the extent that the laws today still forbid *any* all-day parking in the immediate vicinity of the subway stop. This intransigence against infill percolated up as recently as 2008, when a plan to fill in a small green spot near the station with apartments was shot down. Today, many pedestrians walk to the station, and others ride buses there, but the station has always been underused, and the prospect of using this unique location for transit-oriented infill has been lost.

Even where urban infill is allowed, the particular desires of local residents often hamstring the free market. A few miles from Takoma, but a world away sociologically, is Connecticut Avenue, the main street of affluent white Washington, and one of the nation's most successful urban shopping streets. From the White House to the Maryland border five miles north, this avenue has held for decades an unbroken succession of fancy stores, boutiques, and restaurants. But in 2009 the *Washington Post* reported a disturbing trend of empty storefronts along one of Washington's most energetic retail stretches. The reason was a fairly recent zoning law that limits the share of restaurants and bars to 25 percent in an area. Local residents don't want the traffic and noise that such busy and successful establishments bring, and they prefer to encourage businesses such as dry cleaners and groceries, which serve more of their day-to-day needs. Because of the residents' demand for a "perfect" community, and their ability to use land use law to further their desires, a street that should be endlessly lined with successful businesses now displays a multitude of empty storefronts. Complicated urban rules such as these encourage developers to build on the suburban outskirts, where there are fewer strictures and fewer local expectations to upset.

Different types of infill generate different kinds of local opposition, of course. Perhaps the toughest kind of infill might be a big building to house people with severe mental retardation, or perhaps recovering drug addicts, in a way that requires a change in zoning. Such a plan would face extraordinary hurdles and a powerful local resistance. Such opposition often steers

land use law. "Protecting individual property rights and property values are traditional and broadly accepted objectives" of law, laments Tim Iglesias, one of the nation's leading commentators on low-cost housing. "Home owners often assume that their own property rights somehow extend to 'their community' or that they have some implicit right to decide who can live in their neighborhood." And they usually don't want people who they fear would upset the tranquility of their neighborhood or bother them in some way. "Fear, racism, classism, and ablism"—which means discrimination against the disabled—all feed into local antagonism toward infill, he asserts.

Another example of infill for which it might be easier to get approved would be replacing a low-density apartment with a larger building of market-rate apartments—a situation that doesn't require any change in the zoning laws. There are many gradations in between the two extremes. One kind of low-cost housing infill that falls in between is the *accessory dwelling unit,* or granny flat.

Granny Flats in a Graying America

Where will the elderly live in modern America? Such question wasn't all that important a century ago, when most people didn't live to reach retirement; those who did often occupied a back room in their child's farm house or finished out their penniless final years in squalid little city hovels. But the question of elderly housing has become one of the most pressing issues for modern America. Today, nearly 13 percent of Americans are 65 years old or beyond, compared with less than 10 percent in 1970 and less than 5 percent back in the 1920s, when zoning became popular. Most are widowed or unmarried. The number of older people is expected to grow to more than one in every five people within 40 years.

Ironically, however, the affluent modern America of the past couple of generations has adopted land use laws that seem to be blind to the graying of America. True, laws favor elderly-oriented condo complexes in places like Florida or Arizona (you can legally discriminate against the young in such developments), and an image of happy retirees spending their senior years golfing and scrapbooking in the sun creates a powerful and satisfying image for many Americans. But not all seniors can afford to, or want to, follow such a path. In generations past, and in many other cultures today, it is expected that the younger breadwinners will house old people as they decline. But a more self-centered and narcissistic modern America plays down such intergenerational responsibilities. A stereotypical fictional example can be found in the popular TV show *The Simpsons,* where the

suburban nuclear family often laughs at the depressing old-folks home at which "Grampa" Abraham Simpson must live. After World War II, a trend was to tighten zoning laws to ensure that "single-family residential" zoning meant only one building per lot. Today, it is common for laws to make illegal the old practice of remodeling the garage to house an elderly relative or other ways to put add an additional unit on a single home plot.

But the pressures of changing demographics are pushing law, slowly in many places, to loosen these suffocating housing policies. One lesson has come from the fiftieth state, Hawaii, where the term for a separate unit for a grandmother or grandfather is an "ohana" unit, using the native Hawaiian word for an extended family. Where housing prices are shockingly expensive, as they are in Hawaii or California, law is more likely to listen to calls for changing laws to allow granny flats. The accessory unit is "one of very few tools" to fill in the suburban fabric, according to John Peterson, a San Francisco architect who has designed these units.

Accessory dwelling units, or ADUs, hold some obvious advantages for elderly people who can't or don't want to live completely on their own. As exemplified by the experience of the Moe/Rios/Viecco household in West Hollywood, the backyard units can allow elderly people to retain a rewarding daily connection with their children and grandchildren. For an older person who has grown up in the community, perhaps even in the big house before passing it on to a child, an ADU can allow the person to "age in place." At the same time, it can offer privacy and separate personal space, which has become so important in modern America. The accessory units can also be much cheaper than other forms of housing; the family in the big house can charge a small amount for rent, or ask for a fixed fee to cover the construction cost (which in most places will run less than $100,000), or offer the unit for free. For the bigger family, the elderly resident can provide a needed source of income to pay for a fat mortgage, or at least help with household chores.

While their term "granny flat" is appealing, a small accessory unit can help with another modern American demographic trend: the growing number of young adults who live at home during college or well into their 20s. Such a lifestyle was common in the extended-family living of the nineteenth century (the Massachusetts poet Emily Dickinson, for example, lived nearly all of her adult life in her parent's house), but became disfavored in the affluent automobile age, when people began to marry younger and buy houses earlier. With a reversal of these habits, more families are looking for ways to convert the garage into an accessory unit for the 22-year-old who is still adjusting to adult life. Moreover, unlike a big apartment building, which would run counter to the zoning rules of most

single-family-home neighborhoods, ADUs can fit in fairly quietly, without changing the fundamental "character" of a residential community.

The problem, of course, is that these units are illegal under most modern residential zoning laws. Even towns that accept ADUs often succumb to local pressures and restrict the units only to houses on very big lots, impose tight restrictions on setting them far back from property boundaries, or, perhaps most onerous of all, impose special requirements for an additional off-street parking space dedicated for the accessory resident.

After the influential lobbying group for older Americans, AARP, issued in 2000 a model local law to allow accessory dwelling units, the most notable example of a city that adapted its rules to the new America was Santa Cruz, California, half way up the state's coast from Los Angeles. A city that sometimes boasts of being "Berkeley with a beach," because it holds a well-respected state university, a history of liberal politics, and great surfing (but sunning on the beach can be a chilly experience except during mid-summer), Santa Cruz is the kind of place that people visit once and want to stay forever. Because of its attractions, as well as the fact that it is nestled cozily between sea and redwood-clad mountains, however, Santa Cruz has become one of the most expensive places in the country to live, with a typical house price of more than $700,000 in the first decade of the new century. Dozens of people reportedly were living illegally in accessory units. (Nationwide, estimates were that up to 300,000 units existed illegally.) In response, the small city bucked a trend and adopted in 2002 a vanguard law that not only tolerates ADUs, but actually encourages them.

The city's website touts the benefits of ADUs to an affluent and environmentally conscious community. The units "help minimize the impact of population growth on the community"—in other words, they slow the demand for sprawling suburbs—and promote "infill development to help preserve the surrounding natural greenbelt." To minimize the likelihood of clashes with neighbors, however, the Santa Cruz law restricts the units to residential lots of at least 5,000 square feet; limits the size of ADUs to a maximum of 500 square feet to 800 square feet, depending on the size of the lot; and caps the height of the one-story units at 13 feet. The property owner must own either the main house or the accessory unit, and cannot sell the ADU, in order to maintain stability and responsibility. If an accessory unit touches an alley, its front door should face the alley. The design of units must fit the neighborhood. And each lot must provide a parking space for the accessory dwelling unit.

Despite these restrictions, the Santa Cruz law is seen as a victory, albeit a small one, for low-cost housing. Dozens of ADUs have been built under the program, although the numbers of permit applications have not been as

large as some had hoped. The city offers technical assistance to those thinking about building an ADU and provides design models for homeowners to follow. One key to success, advocates have found, is to minimize the ability of the local government to use its discretion to deny a permit on a case-by-case, "conditional" basis. In such circumstances, the rational long-term policies of favoring affordable housing can often fall victim to the emotions stirred when a single neighbor objects at a public hearing. Local officials don't like conflict and they don't like angry voters. If potentially contentious hearings are limited, and ADUs are available "as of right," the units are much more likely to get built. Then, the hope is, the local opponents will find that the accessory unit isn't as jarring to the neighborhood as they feared. These lessons led progressive California legislators in 2002 to consider a new state law to open the door to legal ADUs across the state. As with so many efforts at curtailing the privileges of affluent American homeowners, however, this proved to be harder than it first seemed.

Over the Hills, around the Bends, and into the Westside

On my second day in Los Angeles, the raincloud vanished and an autumn sunshine warmed the city. I decided that it was a perfect day to see some more of the city, starting on its famous freeways. Looking at the map, I mused at the extremely odd shape of the big city limits. Local boundaries mean the opportunity for differing local laws, in ways that the typical citizen often isn't aware of. Decades ago, somebody in L.A. obviously convinced the state government to draw boundaries in a way that favors the city. After covering the old downtown, the boundary narrows to a thin neck that works its way south, more like a river than a city border, before opening up to encompass the important port of San Pedro on the Pacific. The city of Los Angeles extends northwest over the Hollywood Hills and takes in nearly all of the huge San Fernando valley, which a few generations ago was filled with valuable farms, but today is mostly houses—and more than a million and half people. In fact, many of the more distinctive places in L.A. County are actually part of the city—the once-alluring Hollywood, the famously bohemian beach area of Venice, and the hillside mansion enclave of Bel-Air. Other famous places are their own towns—Santa Monica, Beverly Hills (the developers here wanted complete control over its fate), and Pasadena.

While the big city covers many affluent areas, its boundaries stop abruptly before the area that's usually called "East L.A," and which has always been poorer and more Latino than the western side. There are many towns here that many native Angelenos undoubtedly have never heard

of. One of the most obscure—Bell, which sits just six miles southeast of downtown—made headlines for the wrong reasons in 2010. The dense little city, which squeezes about 36,000 people in less than three square miles, is mostly Latino, many of whom are immigrants, and many of whom are poor (more than one-quarter of the city is under the poverty line). In 2010, reports surfaced that Bell's government was awarding its city manager a salary of nearly $800,000 per year—more than three times that of Los Angeles's mayor—an assistant more than $300,000, and the police chief above $400,000. They resigned after public outcry from citizens, most of whom had no idea about the extraordinary payments. The salaries were paid after the city changed its charter in 2005, through a vote that turned up only about 400 voters—another warning about limited citizen awareness of the operations of their local laws.

Before taking a scenic spin on the famous mountain route of Mulholland Drive (where I excitedly accosted German tourists to tell them they should be thankful for the rare rain-cleared and smog-less skies), I toured through some of central Los Angeles's residential neighborhoods. As I drove the suburban streets of the Los Angeles, it became clear that Los Angeles may be in a sense one big suburb, but it's unlike most suburbs in the eastern states. There's no wasted space. Houses don't sit leisurely upon grass lawns; they are typically dropped like chess pieces very close to their neighbors, along the rigorous street grid of the basin. Major streets, even in affluent areas, are retail thoroughfares, with shops, restaurants, gas stations, and parking lots fitting together snugly like a jigsaw puzzle. While most of the retail is in single-story buildings, of course, Los Angeles has recently perfected a new form of shopping: the two-story strip mall of a handful of shops, with colorful and bright signs to draw attention, behind a packed little parking lot. Although the two-story complex doesn't rise more than about 25 feet above the ground, it seems alien and almost un-American to me—the kind of thing I would expect to run into in an impossibly tight and crowded city such as Shanghai or Cairo, not in a city that used to be a synonym for sprawl.

Although most Angelenos live in a single-family house, of course, there are a surprisingly large number of apartments in the city. There are few big towers, as in Chicago or even San Francisco; rather, there are hundreds of two- and three-story apartment blocks in Los Angeles that fit snugly in their neighborhoods. But they, like the shopping strips, don't have any squandered space—almost every useable square yard of the city has been constructed with a building, a garden, or a parking space. Indeed, Los Angeles doesn't waste its parking on endless lots that are empty of cars except on the weekend before Christmas, such as one might find in the suburbs of Detroit or Orlando. There are few empty parking spots in Los

Angeles, which is a constant source of stress for the southern Californian. Land is simply too valuable here. Californians have done an extraordinary job of squeezing the concept of the low-density suburb—detached homes, low apartment homes, and strip malls—into a tight and close-fitting urban configuration. Los Angeles may still be one of the world's biggest suburbs, but it's a densely built suburb.

I made my way back toward the Westside, the large area that includes many affluent neighborhoods and many middle-class ones (or, at least, they were middle class until southern California prices pushed many of them out). I drove down Sunset Boulevard, including the famous stretch called the "Sunset Strip," which lies in the small independent city of West Hollywood. Here was another lesson in the importance of local laws and boundaries in the shaping of our communities. The city of Los Angeles officially stops at Sunset and Harper; for decades the "strip" west of here was in no incorporated city, just an area Los Angeles County. Because of looser county land use laws, casinos popped up here in the 1920s, followed in later years by swank nightclubs, famous rock venues, and chic restaurants. The city of West Hollywood itself, which calls itself "WeHo" or "the creative city," wasn't established until 1984.

I parked on the street in which Arthur Viecco and Chris Rios used to live with their kids and Chris's mother in a granny flat. The street was filled with the pungent aroma of eucalyptus trees. The houses weren't huge, but nearly almost all of them were lovingly maintained, in a stereotypical California variety of styles—a Spanish colonial here, an English cottage there, and a plain gray house over there. Quite a few German autos were parked on the quiet street, under bougainvilleas and lemon trees, but the sound of highway traffic was a constant hum in the distance. What struck me most of all was that tall and firm walls stood between nearly all of the houses. The only places in which walls didn't stand were where the houses themselves nearly touched. This is a design typical of Mediterranean Europe, where houses are focused inwards, often toward courtyards, as opposed to focused outwardly toward yards and streets, as houses usually are in England and the eastern United States.

The wall-and-courtyard approach fits southern California, both because of its warm climate and because of its pressing of millions of single-family homes into a compact area. The walls also appeared to favor the construction of granny flats: One's neighbors would hardly know that another person was living in an accessory unit in the small backyard. Considering the cost of housing on the Westside, as well as the relative seclusion of the house lots in this area, it seemed like the perfect location in which to allow accessory dwelling units. But then again, I mused, perhaps I'm

underestimating the desire of the American homeowner to preserve the traditional legal landscape of the single-family home suburb.

California versus Los Angeles

In the wake of the AARP report on accessory units and Santa Cruz's vanguard law, it was not surprising that the advocacy for low-cost infill moved to the California legislature. It was 2002, housing prices were rocketing skyward, and the news was filled about how, for the first time ever, more native-born Americans were leaving California than were arriving, largely because of the high cost of housing. Governments felt that they had to do something, and the California legislature took a small but significant step.

States and cities typically approach housing from different perspectives. At the local level, the need for low-cost housing is often presented, not surprisingly, as a way of helping the existing homeowners. Who will police our streets, pick up our garbage, and teach our public school kids if they can't afford to live here? Initiatives to foster low-cost housing tend to be slow and piecemeal. A single town doesn't want to adopt laws that attract too many less affluent people, lest their tax base slide, criminals be enticed, and the local "character" suffer. But efforts are often bolder at the state level. The state government doesn't suffer nearly as much from the fear of losing wealth and attracting undesirables. Thus, it's no surprise that the policy requiring each locality to accept its "fair share" of low-cost-housing needs was created as a matter of state law in New Jersey, not from the efforts of individual places such as Mount Laurel. California too has a state "fair share" law, although most observers say it has fewer teeth than New Jersey's policy, and the California affordable housing law is far less powerful than other legal forces that restrain low-cost housing, such as environmental, wildlife, and water restrictions.

The California legislature adopted in 2002 a new law to try to get reluctant local government to permit more accessory units—what the state law called "second units." The chief sponsor was Assembly member Roderick Wright (later elected state senator), who represented neighborhoods in south central Los Angeles County. At the time, no one knew how many unlawful accessory units were being occupied in L.A. county—some estimated that it was more than 100,000. Because most of these units were not lawfully permitted, they often were built or maintained in ways that failed to meet housing and safety codes.

Like much legislation, the California law showed clear signs of compromise. On one hand, it set forth the declaration that second units "provide

housing for family members, students, the elderly, in-home health care providers, the disabled, and others, at below market prices within existing neighborhoods." Most significantly, it required all localities to consider an application for second unit "ministerally, without discretionary review." This was the biggest change. Ministerial decisions are those that involve very little or no governmental discretion; the government official simply checks to see whether an applicant has met predetermined standards, and then figuratively stamps the application as approved or disapproved, based on these standards. Police who issue parking tickets make their decisions based on the simple rules as stated on the parking signs and how long the car has been parked, not on whether the cop thinks personally you've parked too long on one spot, according to his or her ideas of fairness, and not on whether somebody else looking for a parking spot complains that the parked car has been there a long time.

The standards had to be "predictable, objective, fixed, quantifiable, and clear," wrote the state Department of Housing and Community Development in a memo distributed to local governments after the state law was adopted. The idea was to avoid "excessively burdensome conditions of approval," including the burden of having to go through a public hearing. The unspoken story was that the state didn't want local governments to go through the often-contentious process of collecting local opinions. At hearings for accessory unit applications, local officials predictably heard loud complaints of "not in my backyard"—or, more precisely—"not in my neighbor's backyard," which often led timid local officials to take the easy course of backing down and denying the permits. It's usually safer politically to maintain the status quo than to change the law and anger even a small number of voters. The housing department also warned localities that the state constitutional right to privacy probably prevented them from restricting second units only to blood relatives of the property owner, regardless of whether they're called "granny flats" or not (California has gone beyond the universal "kindly grandma" rule).

But the state law didn't go so far as to give each and every homeowner the right to build a second unit. Cities and towns had the power to adopt their own local laws in order to restrict the size of the units, to limit how far they must be set back from property boundaries, and to impose parking requirements. Most importantly, a locality could limit the sections of a city in which second units are permitted, based on factors such as the availability of water, sewer service, and traffic needs. These "outs," which had to be done on a town-wide basis, not case by case, nonetheless gave local governments considerable wiggle room to try to limit the spread of second units. It requires little imagination to envision a town using this wiggle room to restrict second units to only small sections of the town, either because

there are a lot of cars in the area (this covers a good deal of California, of course) or because the roads are too clogged. In fact, the affluent suburb of Pasadena, outside of Los Angeles, confined ADUs by city law to lots of at least 15,000 square feet—a nice trick that, in effect, banned the units in the vast majority of the homes in the city.

The state law went into effect in 2003, after which time, across the state of California, very little happened. Localities didn't rush to adopt their own rules on accessory units, and applicants didn't charge by the thousands down to the city halls, demanding that they receive a ministerial permit. One reason was that so many households were surreptitiously using accessory units in their backyards for years, and they figured that letting sleeping dogs (or grannies) lie was probably the safest course of action. Another reason was that just about everybody (and her grandma) was getting able to get a fat mortgage loan in 2003 (although many would soon regret it), thus lessening the pressure for low-cost housing options. Finally, there was the simple matter of bureaucratic inertia. Everybody knew that creating new local rules concerning second units would spark tremendous local controversies, including demands that the governments fight the edict from the out-of-touch state government in Sacramento. Most cities, including Los Angeles, failed to adopt any new local rules.

In the absence of action by the City Council, L.A.'s Planning Department came up with "interim" guidelines for what it called accessory dwelling units (the term "second unit" not having caught on in Los Angeles). These guidelines didn't open the doors to widespread permitting of ADUs. They would be allowed only on residential lots of at least 7,500 square feet and on lots that were 50 percent larger than the minimum size permissible under the residential zoning law. This allowed an ADU on a few really outsized lots in a neighborhood. But it also ensured that accessory units wouldn't be allowed in any neighborhood in which all the lots were just a little larger than what the law demanded. An ADU wasn't allowed in a hillside area, in an "equinekeeping district," along a scenic highway, or on an especially narrow street. The unit had to have at least a kitchen and a bedroom. And it had to come with a special off-street parking space; arguments that granny only drove to church on Sundays using her family's station wagon wouldn't fly. Nor would the argument that the ADU resident promised only to ride her horse to the equinekeeping district. As a result, the city saw little increase in the number of ADU applications, and no lawsuits to demand that the city adopt a more "ministerial" process.

But the wheels of government eventually did turn. One reason was the burst of the housing bubble and stock market in 2008, which sent foreclosure notices flying and forced many homeowners to feel an uncomfortable economic pinch. (Does California real estate ever fall in value? Yes it does,

many found to their dismay.) Meanwhile, news stories reported troubling incidents of fires in unlawful accessory units, pointing out a good reason for making the owners get housing permits. Pressure mounted to clarify the second unit policy of the state's biggest city.

In the autumn of 2009, the city's Planning Department announced a series of public workshops on the issue of ADUs. Meanwhile, Councilman Paul Koretz and two colleagues presented a motion to the L.A. City Council. Koretz was a Democrat who had helped form the city of West Hollywood back in the 1980s, but who now represented many of the affluent neighborhoods of the big city's Westside, including Hollywood. Citing the disturbing climb in both home prices and rental rates in recent years, as well as the more recent foreclosure crisis, the motion concluded that the housing situation was "particularly dire for those with low incomes, those with special needs, and the homeless." It called on the Planning Department to "study and report back in regard to the legalization" of unpermitted ADUs, and in doing so to "consider the character and scale" of the city and the obligations of the state law.

This was the high watermark in the effort to broadly legalize ADUs in Los Angeles. Before the story is finished, however, it must make a detour. The Planning Department's notice of a public workshop in Hollywood warned citizens that there was no off-street parking in the area and that public transit was encouraged. Every story in Los Angeles implicates its complicated history of trains, buses, and cars; this history in turn will help illuminate how the city eventually responded to the debate over low-cost housing.

Trains, Buses, Race, and Class

The problem of transportation hangs over Los Angles like no place else. Angelenos complain about it, agonize about it, and even boast about how long and arduous their commutes are. It's not uncommon for drivers to be on the road for more than 90 minutes—in heavy stop-and-go traffic—to get from home to work. Its freeways were a wonder of the world 50 years ago; they remain an extraordinary system of interlocking routes that theoretically could enable one to drive within a few miles of almost any location in the Southland, traveling hundreds of miles while doing so, without stopping. But today you're almost certain to stop—because of clogged traffic. The freeways are one place in which everyone, from the richest Hollywood mogul to the poorest barrio waitress, is equal.

I took a number of deep breaths before I plunged into the great maw of the L.A. freeways, an array of maps beside me in the passenger seat.

After all, I was going to be competing with America's most skilled and most experienced drivers, wasn't I? Perhaps because my adrenaline was running so high, I was surprised, and almost a little disappointed, when I zipped my way around freeways with hardly a delay, snickering that California drivers didn't seem so impressive after all. But I paid a price later that night, as I tried to make it back from the coast and found myself crawling past stoplights on the surface streets through the neighborhoods of west central L.A. I moved slowly past a stopped city bus and remembered the controversies surrounding these seemingly simple forms of public transport. It's ironic, or perhaps oddly appropriate, that the policy debates over public transportation and class privilege—a debate that mirrors the controversies over housing—have been crystallized in Los Angeles as in no place else.

More than a century ago, unless you were a farmer with a horse, a city dweller walking, or a rich dandy with a newfangled horseless carriage, transportation meant rail. The invention of the self-propelled train in the nineteenth century enabled people to travel between cities with ease, for the first time in history, and to live many miles from work. These everyday riders got their fares cut, or "commuted," thus adding a new meaning to the language. In addition to long-distance trains between cities, or streetcars and subways that took people from one urban spot or another (L.A. never had cable cars like its great rival San Francisco, which was preposterously built along steep slopes), a new type of rail system emerged early in the twentieth century. A great promoter was Henry Huntington, heir to a California fortune. With so much open space in the Los Angeles Basin, why not extend the streetcar routes far from downtown, enabling Californians to build houses far from the smells of the city, and whisk them quickly downtown? The new system looked like the streetcar, or "trolley," but ran from the central city to other towns, such as the pleasant little village of Pasadena, seven miles distant, eventually making this town a suburb of its larger neighbor. Thus sprawl first came to Los Angeles. These "interurban" railways eventually ran in and out of almost every decent-sized city in the nation. Today, we'd call these sorts of lines "commuter rail" or "light rail."

No other place had as impressive a tangle of interurban lines as did Los Angeles. The area was perfect, it must have seemed to Huntington, who for a time owned both the Pacific Electric Railway's "Red Cars" and the competing Los Angeles Railway's "Yellow Cars." The basin was mostly flat, there were few forests or rivers to slow construction, and local farmers and villagers welcomed rail links to the burgeoning city. Huntington added to his millions through investment in southern California real estate, which in turn became more valuable because of the rail access. At its peak around 1920, the L.A. interurban lines ran for more than 1,000 miles, from downtown south to Long Beach and the port, up into the rural San Fernando

Valley, and, astoundingly, more than 50 miles east into the desert, to the dusty towns of Riverside and San Bernardino. Today, residents of Riverside County, such as those in Moreno Valley, probably don't think of themselves as Los Angeles suburbanites, considering that the city is a long and stressful journey away over clogged freeways. But in 1920, it could be done by a relaxing train ride through walnut groves and chaparral.

It's difficult to imagine Los Angeles in the 1920s without a sigh over a lost paradise. Yes, it was in a nation of gender and racial discrimination, with plenty of poverty and other complications. But the city of sunshine, citrus, and silent movie stars seems as close to perfect as American urban civilization has ever been. And the interurbans were an essential part of this life. As L.A. architect Charles Moore, who was born into this world, put it:

> From a rose-covered cottage in Pasadena, it was simple but dazzling experience of a winter morning to take the scenic railway to the top of snowy Mount Lowe, return to a picnic lunch in an orange grove, then travel on the interurban Red Cars to the Santa Monica beach and be back home for supper in Pasadena—all in the same sunny day!

But paradise, even an imaginary one, never lasts. The Great Depression hit Los Angeles hard, and the profits of the interurban companies evaporated. World War II led to a boom in the city's fortunes like never before, but the postwar years saw the rapid decline and eventual disappearance of the commuter rail routes.

For years, it was dogma of environmentalist history that one of the greatest corporate scandals in American history was how the General Motors Corporation, in cahoots with tire companies, bought up the interurban systems in Los Angeles and elsewhere after the war and replaced rail with bus. They did this to wean Americans off trains and get them used to riding on tires wherever they went, eventually to wean them entirely off the idea of public transit. GM was criminally prosecuted in the late 1940s with somewhat inconclusive results, but congressional testimony in the 1970s (during a gasoline crisis) painted the company as a sinister destroyer of fast and pollution-free rail networks in favor of "smoke-belching, rattle-bang GM buses which bogged down with cars and trucks in traffic."

This story was a conforming one in the 1970s, when the nation feared that we would run out of oil any day, and that we could blame our predicament on a rapacious company such as GM (this was long before the taxpayers became GM's biggest owner, of course) for having ruined a transportation paradise. The story was even a theme in the popular 1980s cartoon movie, *Who Framed Roger Rabbit?*, set in the L.A. of the 1940s.

But like many great conspiracy stories, the story of the "great American streetcar scandal" was more complex and less patently evil than it seemed. Certainly, the auto and tires companies favored road over rail. But there were other factors at work. The California interurban railways had been financially shaken by the 1930s (after which the war gave only a temporary reprieve), which opened the door for replacement by buses. The bus held many advantages. The most important is that buses can run on any existing asphalt street, without the need for the upkeep of special electric rail lines. A bus system can run within a mile or less of the homes of far more people than can almost any rail system. Moreover, this was in the late 1940s, when there were few dissenters from the attitude that roads and autos were the finest form of ground transport yet created. Gasoline was cheap and plentiful (millions of gallons poured out of California wells) and few worried about the added pollution. Governments of the time were drawn to the cost savings and flexibility that roads offered over railways.

The biggest news in California transportation in the 1940s wasn't public transit at all, but rather the coming of the freeway. While Californians didn't invent the limited-access highway without lights or stops, they made it famous, especially as a way to get around a big metro area, not just as a route between cities. The Arroyo Seco Parkway opened in 1940 between downtown L.A. and Pasadena, and the Hollywood Freeway followed, making the San Fernando Valley, north of Hollywood, readily accessible to the central city. Millions upon millions of dollars, at all levels of government, poured into the southern California freeway system. A tourist poster targeted to Europeans in the 1950s showed a photo of a three-level L.A. freeway "stack" with the caption "Decouvrez un nouveau monde." (Today, if you want to discover a new world, you can visit Shanghai, which has five-level freeway stacks.) An unspoken aspect of the postwar focus on freeways, instead on transit, was a shift of public emphasis in favor of the exploding middle class of automobile owners, instead of the shrinking number of people who traveled by public transport. As the years moved on, this latter group became poorer and darker in skin color in places such as Los Angeles. The last electric rail line in L.A., which ran from downtown in Long Beach, closed in 1961. As one commentator has concluded: "it required no conspiracy to destroy the electric railways; it would, however, have required a conspiracy to save them."

The bus lines chugged on, however. One factor was Los Angeles's ballooning immigrant population, which included many people who had grown up in cultures in which the car was a luxury, not a necessity. By 1980, the bus routes carried more than a million people a day, making it one of the largest systems in the world. This was a time in which public transportation was revived as a policy choice. The oil shocks of the 1970s led

many to believe that the end of gasoline was near; the clogging of the L.A. freeways made the exasperation with road transportation especially acute. A solution seemed clear: rail. That shining, clean, and seemingly efficient form of transportation in which the United States was once a leader, but now lagged woefully behind. Look at Paris, look at Tokyo, look at Buenos Aires, the train advocates cried. If other nations can get their millions of urbanites around by rail, why can't we? The federal government poured billions of dollars into expensive subway lines. Some turned out to be fairly successful, such as those in the San Francisco and Washington, D.C., areas, but others were much less successful, such as those in St. Louis and Baltimore.

When public opinion turned toward public transit in Los Angeles, many advocates saw the choice as clear: Trains, not buses, were the wave of the future. Los Angeles County voters (the public votes on almost everything in California) approved a referendum to raise a tax and funnel more public money to mass transit, including rail. One of the leaders of the movement was former county supervisor Kenneth Hahn, who saw a revival of urban electric rail as the way to solve L.A.'s transportation dilemma. One smart decision was to run the system through a Los Angeles County authority, as opposed to a city-only bureaucracy, as in New York City. A suburban emphasis had been essential to the success of the San Francisco and Washington subways; on the other hand, it left out Orange County, L.A. County's giant bedroom neighbor. But the efforts of Hahn and others seemed to pay off when the first rail line opened—fittingly, from downtown south to Long Beach, where the last interurban line had run—in 1990. The final tab was a little less than a billion dollars, plus a constant subsidy to cover most of the operating costs. The Los Angeles Metropolitan Transit Authority was now shoveling money into rail, and at the same rerouting bus routes to serve as mere feeders to the new top dog of rail transit.

Why did rail, not bus, become the favored child of public transportation in Los Angles and elsewhere? One reason is public perceptions. People who study public attitudes have identified an often-stark difference between conceptions of bus and rail transit. Think first of buses: What images come to mind? For many people, buses conjure up thoughts of bad smells (the bursts of black smoke from the exhaust at the back), noise (the big motors must propel a vehicle many times the size of an SUV), ill comfort (because they ride in traffic lanes, they can't be that much wider than a Chevy Suburban, even though they often squeeze five people across), slowness (stops typically are closer together), and constant stomach-churning stopping and going. All in all, an unpleasant experience. Now imagine trains. Putting aside any bad thoughts of the New York subway, one might think

of the sleekness, quiet, lack of exhaust, smooth ride, and relative comfort of a train whisking under or over city streets. Trains often cost more, of course, and they tend to be more convenient only for commuters who can park their cars at rail hubs.

The perceptions over the differences between rail and bus also lead to perceptions about the kinds of people who ride the two forms of transportation. "Buses are for losers," is how many Americans think of public transit on rubber tires. Environmental writer Bob Schildgen laments that "many non-riders are so leery of contact with the masses, they're no more inclined to board a bus than to invite a homeless person to dinner." Many people assume that a typical bus is filled with drug addicts, the mentally unstable, and people that are likely to vomit on you by the next stop. By contrast, trains are "glamorous" and offer up visions of well-dressed suburban commuters, according to Jim Motavalli, a perceptive commentator on transportation issues. In part because of the slowness of buses, they tend to be associated with tedious travel in the central city, especially by people too poor to own a car, whereas metro train travel is associated with suited suburbanites, whisking their way downtown while checking their smartphones for stock quotes. Inevitably, in a city such as L.A., these perceptions, even if they are gross exaggerations, lead to assumptions and characterizations based on race.

Los Angeles's emphasis of rail over bus in the 1990s generated a reaction. It was led by a coalition of urban and minority forces, the most notable of which was the Bus Riders Union. While the L.A. County Metropolitan Transit Authority (MTA) was building a second rail route—the Red Line from downtown along Wilshire Boulevard, once the city's great shopping thoroughfare, toward the affluent Westside—the Bus Riders Union charged unfair discrimination. Why was the government spending billions on rail lines heading toward wealthy white suburbs, while city buses were getting more crowded and more expensive to ride? By then more than 80 percent of L.A. bus riders were Latino, black, or Asian, and 60 percent came from households earning below the poverty line. The issue of rail versus bus was painted as rich versus poor, and white versus dark.

The Bus Riders Union went to court. Along with other groups, it hit the L.A. MTA with a racial discrimination lawsuit in 1994. The complaint filed in federal court asserted boldly that the authority has created a "discriminatory two-tier, separate and unequal system of public transportation—one for poor minority bus riders and another designed to serve predominantly white and relatively wealthy rail riders." The transit authority, which, no doubt, had previously seen itself on the side of angels for bringing modern public transit to the county, fought back, noting that such a lawsuit could be successful only if the Bus Riders Union

proved that the authority had intentionally discriminated against nonwhite groups. Surely this wasn't true, was it?

But as the Bus Riders Union collected documents and data about the transit systems, it became clear that the wonderful promises of a revival of the L.A. rail service were greatly oversold. The key problem was the nature of the area's population and work patterns. While a limited rail system can work well in an area with a defined central business district and a compact population that can easily reach the rail stops—such as in many European cities, or in Los Angeles of 1920—rail is unlikely to meet the needs of a metro area such as modern Los Angeles County, where houses fan out over hundreds of square miles, and jobs are dotted in a multitude of destinations. As put by Jonathan Richmond in the 1990s, "Light rail is ill-suited to the travel needs of the Southland, will attract few drivers out of their cars and will consume more subsidy money than more appropriate and efficient bus operations."

MTA officials had tried to spin the numbers to claim success. How could you do this? First, you make projections of enormous ridership, in order to lure government funding. Then, after your funding is secure, you radically shrink your projections, in order to be able to assert, once the system is up and running, that it's more successful than you'd just previously forecast. This is what the L.A. MTA did with regard to its west-east Green Line. But the little game didn't work all that well; it was clear that rail wasn't going to radically transform the way Angelenos get around.

Environmental utopians can argue that if Angelenos lived like people in Tokyo or Paris—crowded into cramped apartments without cars—then rail lines could serve as the most efficient form of transportation. Realists, by contrast, point out that while the utopians figure out a way to compress the millions of the Southland into little apartments, the flexible tentacles of a bus system are a better way to serve the public. As Motavalli has pointed out: "Light rail routes are expensive to build, and each mile of new construction has the potential to cause a cost reduction in other parts of the system. The L.A. transit system, under the best circumstances, has a difficult time coping with a metropolitan region that was wholly built up around the needs of automobiles."

The financial numbers that came to light were astonishing. The Bus Riders Union asserted that more than two-thirds of the MTA's budget was going to the rail system, which at the time served only about 6 percent of the area's total transit riders. Another number tossed out was that each rail trip used up a taxpayer subsidy that was eight times that of a bus ride. The most vocal of the bus advocates, Eric Mann, claimed that the transit officials "have made an implicit statement that they fund rail projects and

whatever is left over can fund the bus. We say 'Invest in the bus first.' " He called the rail system a "boondoggle" for a "hypothetical white rail rider."

Stung by the fiscal revelations, as well as the stories of low-income Angelenos that were hurt by rising bus fares and declining levels of service, the L.A. transit authority relented. It signed a settlement with the Bus Riders Union and the other plaintiffs in 1996. The authority pledged to cut bus fares, including those for monthly passes and on routes in some of the county's poorest areas. It agreed to add hundreds of more buses to the streets and to beef up bus transit police. A much-vilified plan to extend the rail Blue Line to Pasadena was scrapped. Like most big settlements, its aftermath has been one of returns to the court, with the bus riders arguing that the authorities haven't fulfilled their end of the deal, and the MTA responding that it is doing the best that it can with limited resources and competing demands.

In 2010, about 39 million rides were taken each month on the L.A. County transit system. Angelenos boarded buses more than 31 million times on nearly 200 bus routes, while only about 8 million trips were made on the five rail lines; about half of the riders were on the western-oriented Red and Purple lines. All in all, about 7 percent of commuters in the L.A. metro area and about 10 percent in the city use public transportation to get to work—numbers that are far lower than those in New York or in foreign cities, but bigger than the meager 1 percent in the Detroit metro area. In mostly black and Latino central and south-central Los Angeles, public ridership covers more than 30 percent of all commutes. This is true even though the vanguard Blue Line runs through this area. The Blue Line's ridership is hampered by the fact that it runs on the city streets (often on the old interurban electric right-of-way) and has many stops, giving it little advantage over the numerous nearby bus routes. In sum, the estimate for 2010 is that a total of about 470 million public transportation trips were taken in L.A. County. Remarkably, this total (which is somewhat lower than 2008's, because of the economic recession) is a little below the 496 million trips made by bus alone in 1985. In fact, the newest trend in urban transport is called "bus rapid transit," in which low-emission buses run on bus-only street lanes (to make them faster) and stop at elevated curbs so that riders don't have to step to get on or off. While some marketers prefer to avoid using the three-letter word entirely because of its bad connotations, it's really just a nice bus. Meanwhile, the great hope that electric rail would revolutionize transportation in Los Angeles simply hasn't happened, at a cost of billions of dollars a year.

What happened in Los Angeles? At a time when the United States was spending money as never before on public transit, why did Los Angeles

funnel so much money of its share on a rail system that could never serve more than a tiny fraction of the region's needs? One way to look at the transportation controversy is that it mirrors the mistakes of land use law. Our policymakers imagine a world that appears perfect to them, with their biases in favor of affluent and middle-class lifestyles; then, they try to implement this skewed vision through law and policy. One critic of the L.A. transit system, urban scholar James E. Moore II, has written that rail projects and their big budgets "provide very perverse temptations for upwardly mobile, growth-minded bureaucrats." As a result, the needs of modest-income households aren't met, even when the authorities are supposed to be acting for the general welfare. Just as the super-modern images in the 1950s predicted a "Jetsons"-style future for happy American families (all of which had white dads wearing skinny ties), policymakers in Los Angeles envisioned a California in which large numbers of Angelenos would somehow find a way to ride a shiny, efficient, and energy-saving train from one place to another. But this isn't what happens in the real world.

One of the most penetrating critics of Los Angeles's transit troubles has been Jonathan Richmond, who has studied the promise of rail in Los Angeles as matter of political psychology. He calls rail a "mythical conception." His study concluded that "decision-makers do not act according to a logic of either conscious analytical or reflective reason, but subconsciously according to their experience in the symbolic world in which they live." To them, "the train—concrete, sexy, transport of intimate memories and powerful idea—provides a solid basis for political support." Part of the reason is that modern America is lured by the siren song of technological quick fixes, which seem easier than addressing the true causes of our social problems. The promises of rail ignored rational arguments, Richmond wrote, and acted instead on a "symbolic logic which draws on our experiences and emotions to create its own far more powerful picture of apparent reality."

One doesn't have to accept this Freudian analysis to conclude from the Los Angeles story that our policies too often shoot for pie-in-the-sky visions of an affluent paradise, while ignoring the less-glamorous needs of the average Angeleno just trying to make his or her way home from the grocery store a mile away. This Californian doesn't need or want an expensive train that can speed at 70 miles per hour; what's needed is a cheap bus that runs every now and then along the local avenue. The needs of this average American—such as for a bus fare or for an inexpensive housing unit—and the ability of this person to express these needs through the free market are too often overlooked when government makes law.

The End of the Line for the New Infill Idea

I parked my rental car in a lot about a block from Los Angeles's famous classical City Hall, built in the 1920s. For decades it was by law the tallest building in the city, and became its symbol, playing a prominent role on the old TV series *Dragnet* and proudly displayed on the badges of city police officers. As I approached the white granite tower, it appeared that I had two choices: an entrance on Spring Street, which was the official address, or an entrance from a large park, facing south, which had the benefit of being closer and offered a climb up a regal-looking staircase. I chose the park entrance. As I trudged halfway up the stairs, however, I noticed that no one else was around, and that there was a tiny sign taped to the impressive doors. I guessed that this sign said "no entrance." I walked back down and trekked around to the Spring Street side; here I was greeted with a sign that said "no public entrance." I retraced my steps, walking the equivalent of a full city block to the back of the enormous edifice, and finally succeeded in entering on Main Street. Welcome to the Los Angeles government.

Much more pleasant was my conversation with Christopher Koontz, a young planning deputy for City Councilman Koretz, who specializes in city land use issues. "The phone rang off the hook" after news of the ADU study became public, he noted, and most of the comments were not favorable. His office had hoped that the Los Angeles's residents would recognize that a plan to legalize many of the city's thousands of illegal units would serve the general welfare. "These are our neighbors," he said. Part of the problem was that many Angelenos were connected to a rumor mill that the ADU study was part of "a secret plan to upzone" sections of the city—allowing denser housing types than currently permitted under city law.

Many citizens in his boss's affluent district complained about the potential for ADUs to exacerbate problems with traffic, parking, health, and safety. In addition to grannies and college students, some Westside homeowners might be encouraged to allow a nanny or housekeeper to live in the backyard unit. While constituents were savvy, and no one said, "We don't want these poor or brown people," an obvious apprehension circled around the people who would be living in these second units. As it was, his office received about a complaint a week over supposedly unlawful units in their neighborhoods.

Councilman Koretz's deputy didn't attend the public workshops about ADUs in the autumn of 2009, and the city's planning department told me that there was no public record of the proceedings. But rumor is that public comments were overwhelmingly hostile to the idea of a new law to facilitate the legality of accessory units. This is a fundamental problem with public input to land use laws; people who complain are more likely to show

up, and communicate more loudly, than people who favor low-cost housing. Political psychologists say that laws that impose a burden on a few people are more likely to create emotion and action than a granting of a small benefit. There is no better example than in changes in homeowners' neighborhoods.

An article in the *LA Weekly* news, entitled "Invasion of the Granny Flats," warned in December that the city's plan for ADUs "could double the population of some of the city's most attractive neighborhoods, permitting what are essentially duplexes where single-family houses now exist, a possibility complicated further by infrastructure that cannot adequately handle the population invasion." In fact, the plan could "wipe out key rules against parking your car in your yard." Finally, the article made an interesting contention that ADUs aren't really affordable housing because there was nothing in the proposals to restrict them from being rented at market rates. This argument overlooks the point, of course, that without an ADU one can't build or rent an apartment of any kind in the huge swathes of the city zoned for single-family residences.

As with so many homeowner efforts to stop infill these days, the Internet provided a ready forum to share complaints and drum up public support. An online "dad" from Westchester, a city neighborhood near the airport, complained that ADUs "would change the nature of our neighborhoods by allowing your neighbors to rent out that freshly built unit . . . to overlook your backyard and they would not have to provide parking so the 'tenant' would end up parking on the street," which would cause your home value to plummet. This writer also asserted that the state government wanted more ADUs because they would increase the state's population and thus the state's tax revenue. This is a common complaint of opponents of infill housing—the assumption that allowing inexpensive housing would increase the overall population. This is countered by growth advocates, who assert that infill more often simply shifts to the city some of the population growth that otherwise would occur on the outskirts.

Online writers railed that the city Planning Department was trying to ram though new rules favorable to ADUs regardless of citizen opposition. One commentator suggested that the city was "attempting to manipulate the citizenry with false information." This writer repeated the fear that a city law favorable to ADUs would "double the residential density of R1 single family lots in one stroke of the legislative pen." Such a dramatic occurrence would be almost impossible to transpire, of course, considering that most houses wouldn't have an accessory unit and that most such units house only one person.

Perhaps the most forceful online critic was Ron Kaye, a former newspaper editor who wrote a widely read blog about the city. In early 2009,

he typed an entry called "Who's Killing My Neighborhood," about a house in his neighborhood that had been illegally turned into a three-unit apartment building. This "cancer in the neighborhood" threatened to turn his neighborhood "into a slum." Kaye wrote that his amateur detective work revealed that Los Angeles "is filled with thousands of illegal conversions, illegal granny flats, illegal dwellings that don't meet minimum standards for a civilized city." The government's slowness in prosecuting offenders was in effect "killing L.A." He concluded, "Power must be pushed down and the people must rise up."

When the city proposed a new ADU law, he sounded an alarm: "Can there be any doubt that the city is at war with the middle class, with home owners, with the ordinary people who pay most of the city's bills?" The accessory unit idea "ought to be called the Tenement Law," he opined, and that opponents of the plan, like him, envisioned "single-family tracts with people everywhere, cars all over the place, backyards without any privacy." He called for homeowners to fight back, "or maybe just convert our houses into tenements, reap the profits and let the city go to hell."

By the end of 2009, the game was up. The public opposition was too much. Councilman Koretz, who just a few months before had touted the low-cost housing benefits of ADUs, sent a public letter to the city's planning department. "Our office has received a large amount of public interest and inquiry" on ADUs, he wrote. "Extra units are tantamount to upzoning and are not appropriate for existing single family neighborhoods." The zoning code "provides protections and sets expectations for our single-family neighborhoods," Koretz asserted, and suggested that the city follow a "discretionary approach" that allowed for design review and community input. "We believe that the protection of single-family neighborhoods is of paramount importance and necessitates a restrictive approach for new ADUs." This was a fine summation of the privilege of existing homeowners to control land use law to their advantage.

Ron Kaye's blog attributed the city's retreat on ADUs in part to a "network of computers linked by viral email," which "spread the word" about the "Granny Flat Gambit." He cited a quotation about self-governance that was chiseled on the Main Street façade of City Hall (I must have overlooked it in my attempt to find a working door); Kaye wrote the story serves as "a warning to the populace that their values and interest will not be served unless they are vigilant."

In conclusion, the city of Los Angeles didn't return to a discretionary permitting process, which so often was deadly to permit applications. The Planning Department first announced that it was putting "on indefinite hold" its plan to foster a new local law on ADUs, because of "staff reductions." A memo in 2010 stated that, in the absence of new city rules, Los

Angeles would fall back on the basic requirements of the state law, now more than seven years old. Under this statute, the city is required to issue a permit for a "second dwelling unit" (the terminology keeps changing) if the unit is for rental only, comes with an extra off-street parking spot, isn't bigger than 1,200 square feet, doesn't increase the total built-up area on the lot by more than 30 percent (thus a bigger house can have a bigger second unit), and meets other local zoning rules for houses.

When I asked a city official how many applications had been approved in the first few months of this newly published policy, I was told that the city didn't keep any records. The scuttlebutt, however, is that very few permits had been sought. It seems that, in the wake of the public outcry, those who have second units or who want to build them prefer to do so without approval, behind the tall walls of Los Angeles residential neighborhoods, and with the hope that their neighbors won't catch on or won't complain. The promise that law might be used to make this form of low-cost housing above-board and legal has so far, like so many other similar efforts, failed.

6

Conclusion: Overcoming the Housing Bias for Twenty-First-Century America

Close your eyes and picture an American household. Okay, you may open them now (which, if you're reading this, I suppose you've already done). Did you picture a mom, dad, and a kid or two? If you did, you're not alone—studies have shown that most people think of this traditional image. Now guess what percentage of households consists of parents and one or more children? According to the 2000 Census, only about 26 percent—or barely one in four—of all American households include parents and one or more of their kids. This total covers households with stepparents, unmarried couples, stepchildren, and other variations. Now guess what fraction consists of only one person living alone? The answer is just about the same—just under 26 percent. The number of single people has been growing rapidly in recent decades because of a number of factors, including the immigration of solo people to the United States, the fact that young people marry later and divorce earlier, and, perhaps most of all, the growth in the number of elderly single people. When details of the 2010 Census are released, the figures will, no doubt, show that single-person households are now by far the most common type of household. Of the remaining households, the most common is a couple living without any other people, which constituted about 25 percent of households in 2000.

Moreover, Americans' attitudes toward housing are changing. During the housing bubble around the turn of the millennium, the homeownership rate reached a record high of 69 percent, fed by subprime loans and easy credit. With the bust, however, Americans have been drawn toward

less expensive housing. But the supply has not increased to meet this demand, in large part because of zoning restrictions. Accordingly, between 2007 and 2009, while housing sale prices slumped, the cost of rentals rose by a remarkable 8 percent. In the Washington, D.C., area, average rentals grew in price by a whopping 22 percent over a decade, countering the trend of slumping sales prices and overall inflation. (On the same day of publishing the story about rising rental costs, the *Washington Post* reported intense local opposition to a plan to build new apartments in a close-in suburb, Kensington, Maryland, that would otherwise be permissible under long-standing zoning laws; local residents expressed fear that their suburb would lose its "village-like character.") Nationwide in 2009, more than 40 percent of all renting households were spending more than 30 percent of their incomes—the upper limit typically advised by experts—on their rentals. There can be no doubt that the nation's housing needs have been transformed in recent decades by changes in immigration, medicine, marriage, and finance.

Our land use laws, by contrast, are stuck in the past. They were for the most part created in a bygone age, during which most American households, or at least those in the public consciousness, were a traditional family of parents with children. Across the American landscape, especially in suburbia, where the great majority of people now live, our land use laws require that housing consist of a site-built "single-family house" designed for a large and affluent household. It is illegal for the landowner to build or maintain an apartment, a townhouse, or a manufactured home. Land use law has failed to keep up with the transformations in American society. Why is it resistant to change? The chief reason, which this book has sought to highlight, is that the existing residents of these areas—mostly homeowners with good incomes—prefer to keep it this way. They have come to expect that their communities will consist largely or even exclusively of single-family houses, and they use the power of law to prevent other forms of housing from entering their communities. This is a privilege that they have built and sustained. This book has explored stories of the privilege of these homeowning Americans, from immigration in the suburban tracts of Prince William, Virginia, to eminent domain for a private development project in Brooklyn, New York, to the preservation of rural character in Putnam, Michigan, to granny flats in the neighborhoods of Los Angeles, California. The privilege truly has shaped what American communities look like—indeed, it warps what American communities look like. Laws block the building of low- and moderate-cost residences that are needed and demanded by a changing America. This book has endeavored to show that the privilege is unjustified and should be broken down.

It is remarkable, however, how rarely the ills of land use law catch the public's attention. One reason, as I've mentioned, is that land use law is created almost exclusively at the local level in the United States; accordingly, it is "only" a local issue and thus seemingly less important than policies decided at the federal or even state level. But when unwise local laws are repeated from place to place, they constitute a national phenomenon and a national dilemma. Sometimes, national attention is drawn to local laws; in the 1950s and 1960s, it was mostly local rules that prevented black Americans from going to school, shopping, eating, or living in the same places as white Americans. These local laws were successfully demolished, largely through the intervention of federal law, both by the courts and by the U.S. Congress.

The stories in this book have built the following lesson: American land use laws should allow a greater variety of housing than the favored single-family house on a large lot. In particular, the United States needs more low-cost residences, including more apartments, more townhouses, and mobile homes. This housing is especially needed in the suburbs, where most new jobs are located. Concededly, this prescription clashes with the traditional American policy that as many people as possible should own their own home. But the changing demographics and finances of modern America should make us withdraw from our old assumptions.

It might seem like a terrible concession for the United States to withdraw from a policy of fostering homeownership for all. But internationally, it is not the case that affluence, education, and happiness all correlate with widespread homeownership. Some rich nations, such as Spain and Italy, have homeownership rates that exceed the United States' current 67 percent; this is explained in part by a tradition of multigenerational households, in which unmarried adults and elderly people also reside. In other nations, however, such as Germany, Switzerland, and the Netherlands—all of which are near or at the top of most lists of the most successful countries in the world—homeownership rates are below 50 percent. Owning a home is not a necessity for happiness.

To see how a greater variety of low-cost residences might help modern America, let's consider three hypothetical examples of twenty-first-century households. The first example is a young married couple of 21-year-olds living in a small town. They each earn modest incomes working in retail jobs. A decade ago, common advice would have been for them to buy a three-bedroom single-family house as soon as possible in order to start building up equity, even if they are uncertain whether they will have children and even if they must go deeply into debt. After all, house prices never go down, do they? But the volatility of prices in recent years shows that

real estate is not always a foolproof investment. Indeed, a hundred years ago, better advice would have been to save money for a number of years in order to make a large down payment. This kind of advice may make sense once again. In the interim, it may be wise for this couple to rent or buy an inexpensive mobile home.

A second example is an immigrant family with two small kids that has recently moved from a teeming foreign city to a big metro area in the United States. They arrive with few assets, limited skills in English, but a dream of a big American house with all the modern conveniences. A few years ago, this family might have been ripe for targeting for a subprime mortgage loan. A "predatory" lender might have tried to convince the family that it could afford a home mortgage that would quickly result in monthly payments that might eat up 60 percent of their family income (the federal government recommends no more than 30 percent). Today, it would be more sensible for the family to rent a two-bedroom apartment (complete with the protections of top-notch American housing codes, central heat and air conditioning, and off-street parking) while they become acclimated to the United States and American finance. It would be best, of course, if the apartment were located near the suburb where the parents both have jobs.

The final example is an 80-year-old woman whose husband has recently died; a variety of ailments limits her mobility, and her retirement savings have shrunk with the recent stock market slump. The single-family house in which she has lived for decades is now too big and too difficult to navigate. She considers a smaller single-family house with a mortgage or a condominium. But it might be smartest for her to sell her home, save the hefty capital gain (which is free from taxation because of her age) to help pay for her retirement, and lease a modest ground-floor unit in a garden apartment.

States to the Rescue?

It is unlikely that federal law can serve as the primary tool with which to fight unfair local laws that choke the supply of low-cost housing. The U.S. Supreme Court has stated clearly that laws that discriminate against the poor are not, by themselves, a violation of any constitutional or statutory right. This principle avoids the enormous can of worms that might be opened if every law were scrutinizing for its effects on poor people. This is a capitalist nation, after all, where relations and abilities are often based on money; the fact that somebody can't afford something because they don't have enough money doesn't mean that they should be entitled to it. Laws

involving crime, education, transportation, and a myriad of other things make life somewhat more difficult for poorer people, and there is simply no sensible way around this effect.

Moreover, just about everyone agrees that land use law, especially when it concerns where and when housing is built, has always been and should remain a matter in which the federal government stays out. To have "Washington bureaucrats" make decisions whether there should be a mobile home development in Michigan, small-lot zoning in Virginia, or granny flats in California is simply not something that makes sense under our system of shared responsibilities of government.

It's ironic that some governments seek out ways to encourage more low-cost housing at the same time that land use law cuts off their supply. But it's usually different levels of government that act at cross-purposes. We've seen why localities often want to restrict inexpensive housing: The rules shore up the "character" and reputation of a locality; they help the local balance sheet by excluding those who pay few taxes but demand many services; and they avoid attracting poorer people from neighboring places. But states feel these competitive pressures less intensely. It's less likely that land use laws will spur a person to move from one state to another. In fact, with the structural and legal barriers to action at both the local and federal levels, it's safe to say that the most promising ideas for encouraging low-cost residences arise at the state level.

It is often asserted that the bias of land use laws toward affluent homeowners is simply a result of local democracy, and thus something for which there can be no structural change. Just as Americans hate any idea for a new or higher tax and like the idea of getting "tougher" on violent criminals, the argument goes, Americans like our land use law system, and there's not much we can do about it. In contrast to this argument, I contend that our restrictive land use laws are pretty poor examples of democracy. There are two broad reasons for this contention.

First, if what we mean by democracy is rule by what the "people" want, then local land use laws often fail to meet these desires. Who are the "people" in local lawmaking? As we've seen, much local lawmaking is created to meet the demands of current residents of the locality. These are the people who get to vote. The residents of a county, city, or town vote for representatives who will do what they want. But this group of voters—the current residents—often doesn't reflect the true community at issue. Consider the example of the effort to allow zoning for mobile homes in Putnam Township, Michigan. These manufactured houses would have provided low-cost housing to hundreds of people in southeast Michigan. But most of the people who would have wanted one of these houses didn't live in Putnam when the land use decisions were made. Why? Because of the zoning, with its

bias in favor of houses on large lots, which keeps out households of modest incomes. Accordingly, a family who lived in a run-down house in a nearby community, but who might have preferred a modest new place in Putnam, couldn't use its votes to affect Putnam's exclusionary laws. We saw the same problem in the fight for apartments in Mount Laurel, New Jersey, and the effort to legalize accessory dwelling units in California. The fact that one town's laws "spill over" and affect people outside its boundaries forms the fundamental argument for decisionmaking by a regional authority or the state government.

Why Can't Housing Be Like Groceries?

A second reason to question the "democratic" nature of local land use laws is the assertion that some matters in American society just shouldn't be put to a vote. While the spillover argument comes from a liberal perspective, the criticism of the overreaching nature of local government comes from a conservative, or libertarian, slant. To understand this point, imagine if a local government decided that it wanted to ensure that people's food diet followed government regulations. (Some do want to do this, of course.) Specifically, the local government decides to regulate which foods would be available and where they would be placed in local private grocery stores. Through the process of representative democracy, and perhaps even through a citizen referendum or two, the government figures out a list of foods that are desired most by the voters. Milk, eggs, a few kinds of cheese, hamburger meat, steaks, sliced white bread, frozen peas, and a number of other popular items are on the list. With this information, the government "zones" the grocery stores by law—dairy up front, meats in the back, the handful of fruits and vegetables over in the corner. Foods for which the government perceived little demand are zoned out—not allowed. If you question or doubt whether government has the right to do this, you're in the same boat as landowners such as Ambler Realty in Euclid, Ohio, back in the 1920s, which asserted that government had no right to tell landowners what kinds of buildings to construct. As we've seen, the "police power" of government to regulate life to serve the "general welfare" is an enormous and amorphously wide authority.

Now imagine that you're a food shopper whose desires don't match those of the "democratic" outcome. Perhaps you prefer unsliced rye bread to the broader preference for sliced white, or maybe you want crimini mushrooms instead of buttons. (These foods are available in many real grocery stores today, even though they're not as popular, because stores know that there's a decent if limited demand for them.) But the local grocery

zoning law allows no zoning for them. It's possible that a store might be able to petition the government to get a "variance" to allow such foods in a corner in the back; but it's possible that there might be local opposition to varying from the usual zoning laws. Imagine a town in which no ice cream had been available, during which time many dieting shoppers had lost a great deal of weight, and were happy about it. These dieters might argue against allowing ice cream back in, because it would upset their expectations. Now imagine a petition to allow Latin American pupusas and Ethiopian injera bread into the stores. And remember that the government thinks of its job not as allowing for individual preferences, but as coming up with rules to further a single "general welfare."

The analogy of groceries to land use law isn't perfect, of course. Many grocery stores hold an enormous amount of shelf space, and they can stock many different kinds of foods without cutting out any popular item. This stands in contrast to land use, where a town contains only a certain number of square miles, and one form of land use can cut into the provision of another. Unlike grocery shelves, which can constantly be restocked, land use tends to stay fixed for years or even decades. The most significant difference is that the market's "diversity" of foods in a grocery store has a much smaller effect on people than does land use. A busy homeowning suburbanite who has stopped in to buy some prepaid meals might be slightly annoyed at the fact that the unfamiliar person ahead in line is slowly unloading a variety of strange foreign foods onto the checkout belt, but this same suburbanite is likely to be much more annoyed if a garden apartment building were built next door and attracted poorly educated immigrants.

The point of the grocery example remains, however: Some things should be left to the free market. We let grocery consumers express their desires with their dollars, and suppliers seek out this money by offering what consumers want. Because suppliers know that not everyone wants the same thing—some will want white bread, some will want rye, and some will want jalapeno-tomato corn bread—a few stores will focus on offering foods that only a minority wants, as long as it can make a profit. The only manner in which today's government significantly insinuates itself into the consumer's transactions of choosing and buying food is by providing subsidies, in the form of food stamps, for poor people.

It's different with housing, of course. The book has explored how land use law, especially as it applies to housing, is a perverse feature of American life. It is perverse in that law restrains the free market, not in order to help poor Americans get decent housing, but to warp the free market against low-cost residences, in order to serve the privilege of existing homeowners. Fortunately, what law has taken away it can give back. Under a variety

of uncoordinated federal, state, and local policies, current law encourages some forms of inexpensive housing. In many cases, state laws coerce (yes, there is no way around admitting it) local governments into counterbalancing their restrictive zoning laws with programs targeting precisely at the construction of low-cost housing. After outlining these scattered efforts, this Conclusion offers a new course for twenty-first-century land use law.

Fostering Low-Cost Housing

The good news for state efforts to foster low-cost housing is that there are few procedural hurdles to imposing new duties on local governments. Under American law, local governments aren't "sovereigns"—the localities exist only because the state has created them and the state can impose whatever rules it wants. The bad news is that most of the ideas for low-cost housing have severe limitations, not the least of which is that they break with long-held expectations about the powers of local governments and the entrenched expectations of existing homeowners. Here are some of the ideas.

Regional "Fair Shares." The most notable example is New Jersey's experience, made famous by the *Mount Laurel* litigation, discussed in Chapter 3. To recap, the idea here is that a metro area has a need for a certain amount of low-cost housing that needs to be met. Each suburb—and there are dozens of townships in the South Jersey county of Burlington alone—holds an incentive to keep out poor people and the housing that attracts them. Each wields its land use laws to forbid or at least strongly discourage inexpensive apartments, townhouses, and mobile homes. Accordingly, less affluent people are confined into old cities such as Camden, just across the river from Philadelphia, or in distant rural areas where housing is cheaper, often far from decent jobs. No township wants to be the first to facilitate low-cost residences. This dilemma can be fixed, the reasoning goes, by imposing on each town a duty to provide for its "fair share" of the region's low-cost housing needs. After the New Jersey court imposed this duty, the state legislature took over and codified the responsibility through a state affordable housing agency. This was fortunate, because agencies, not courts, are the only ones who can effectively handle the day-to-day dirty work of monitoring and regulating fair share obligations. A handful of other states, such as Massachusetts, California, and Florida, require their local governments to consider residential needs beyond the borders of the jurisdictions. But the Garden State's system is still the most famous, perhaps the toughest, and certainly the most controversial.

The biggest lesson from New Jersey's experience is a sobering one. Local governments will fight at every turn to avoid low-cost housing. They will battle at every juncture—the definition of the appropriate metro area, the regional need for housing, the reasonable fair share, and how to implement this share through changes in law. They will try every potential "out," such as by asserting that there is no room for the units, that they don't fit in their community, or that the plans will conflict with environmental or transportation imperatives. If possible, the towns will try to meet the duty by facilitating houses for middle-income people, as observers say happens under California's weaker requirements. If possible, governments will even pay poorer cities to avoid providing for their fair share. Just as with the old saying in real estate—that "location" is more important than price—a town will go to great and costly lengths to keep out unwanted types of residences and, just as important, unwanted people. Local opposition in New Jersey is exacerbated by the fact that the low-cost units aren't just routine apartments but are known as "Mount Laurel housing," with an accompanying baggage of racial and class stereotypes.

In the 30-plus years since New Jersey first imposed a fair share duty, tens of thousands of modest-cost units have been built under a Mount Laurel plan. But they have not come easy, and the total is still only a few drops in the bucket of the more than 3 million households in the thickly populated state. Some observers, such as John Payne, have suggested simplifying the obligation to require only a "growth share" of low-cost housing when a locality expands. Meanwhile, however, the fair share obligation and the work that localities must do remain thorns in the side of New Jersey's towns and cities. In 2010, both the Republican governor and some Democratic politicians vowed to end the duty once and for all; the wheels of lawmaking move slowly, however, and the state agency charged with implementing the duty soldiered on.

Reversing the Judicial Deference toward Land Use Laws. Other commentators have suggested reforming the way that courts scrutinize local land use laws in lawsuits that challenge these laws. Since the *Euclid* case in the 1920s, courts across the nation have followed a policy of "deference" toward land use laws, meaning that they rule in favor of the government as long as the government comes up with some decent, general-welfare reason for the regulation. Only when a challenger alleges a violation of an established and explicit constitutional right, such as racial equality, free speech, or religious freedom, do the courts scrutinize the government's actions more closely. Discrimination against poorer people is not such a right.

A bold idea would be to reverse this judicial practice. Instead of starting out with the thinking that the government's laws are to be upheld

unless there are reasons to overturn them, a judge could approach an "exclusionary zoning" case with the mind-set that the law is dubious, and will be convinced to uphold it only if the government provides a very compelling rationale for its land use restrictions. If a court were to consider a law requiring large housing lots in a certain area, for example, the restraint might prevail only if the government could show, for example, that there is a very limited supply of groundwater in the area, as well as the fact that it would be impractical to run water pipes and sewers to the area. But if the government defended the large-lot law by stating only that keeping out smaller lots helped keep down the locality's taxes, then the judge probably would not be persuaded away from the original mind-set that the restrictions are unlawful.

But it's not so easy to shift away from the traditional mind-set of deference. For one, judges are used to deferring to government in most cases, under the principle of judicial "restraint"; why should exclusionary zoning be different? More significantly, it would be hard to know the difference between good reasons to approve the government's restrictions and bad ones. Are environmental reasons okay? Traffic? Strains on sewer systems? If so, then towns will be encouraged to characterize any restraint as within the types of excuses that are acceptable. Indeed, the difficulties inherent in scrutinizing governmental rationales encouraged courts to fall back on the doctrine of deference in the first place.

Mandatory Set-Asides, Impact Fees, and Bargaining. The fundamental problem with the fair share idea is that local governments resist making the hard decisions about how to foster low-cost housing. An advantage is that real estate developers are sometimes eager to build such projects, in part because of the benefits of the "builder's remedy," under which a developer that has successfully challenged a restrictive law gets to build more units than otherwise would be allowed. Good policy alternatives, therefore, might maximize the incentive to developers and minimize the discretion of local governments.

One idea that has proven to be somewhat successful is that of "set asides." Here, the law requires a developer of any new big housing project to "set aside" a certain percentage of the housing units for low- or moderate-cost units. The developer, who might grouse over the requirement, nonetheless has an incentive to plan and get the inexpensive residences built; without them, the developer can't get approval to build the big houses that generate the profits. Moreover, because the set-aside percentage is usually applied evenly and across the board to all new big developments, there is less of a role for local government discretion and less opportunity for foot-dragging.

Here's a more detailed explanation of how set-asides work. A developer named Smith might have planned, without the requirement, to build a conventional suburban subdivision of 300 high-cost, single-family houses with big yards. Under the set-aside law, however, Smith has to ensure that a certain percentage of new units in the project are sold at a low cost. Local requirements vary, from 5 percent to 25 percent or more. Let's apply a 10 percent set-aside. Because lower-cost units usually occupy less land than traditional single-family houses, the result is that more housing units can be constructed. Smith might decide to redraw the blueprints and remove ten of the planned single-family houses, leaving 290 remaining. In the place of these big houses, the new plans include a 40-unit townhouse complex and a parking lot—assuming that the law permits townhouses. Because the 40 lower-cost units constitute more than 10 percent of the revised total of 330 units (290 plus 40) in the new plan, Smith has met the obligation.

In some jurisdictions, the set-aside rule may override tight zoning laws, allowing a developer to build some apartments in an area otherwise zoned for single-family houses only. In other places, however, the units still have to comply with the conventionally biased zoning, which excludes apartments or townhouses. In this situation, Smith is spurred to build the low-cost houses to be as small as feasible, and in locations that are inherently less attractive. Where will Smith want to place these inexpensive houses? A good choice might be at the edge of the complex, perhaps adjacent to the nearby shopping center, where noise and traffic make the location less desirable for prospective homeowners. (Is proximity to a shopping center an attraction? Only if we expect the residents to walk, and this is America.)

Set-asides can be imposed by state law or at the local level. One of the most famous programs has been in Montgomery County, Maryland, just north of Washington, D.C., where I grew up. Since 1973, more than 12,000 "moderately priced dwelling units" have been constructed, today making up about 3 percent of the units in the county. Sale and rental prices are restricted for ten years or more, no matter the number of times they change hands, and must be sold or rented only to households with modest incomes. Because a majority of the county's units end up being rented or sold to minority households, the program has helped turn what was once a predominantly white county into a very diverse place for suburbia: Today more than 15 percent of Montgomery County's residents are black and more than 14 percent are Latino. To make up for the set-aside requirement, which restrains profits, a developer gets a "density bonus" that allows it to build about 20 percent more units than otherwise would be allowed under the applicable zoning laws. But here's the rub: Note that

the program refers to "moderately priced dwelling units." In an expensive place like Montgomery County, "moderate" encompasses a house that is affordable for a family of five with an annual income of $68,000. This fact exposes the flaw in most affirmative government programs to foster low-cost housing—in order to become politically more palatable, such programs tend to end up expanding to include middle-income households and moderate-priced housing as well.

Because some developers resist the idea of mixing expensive houses with inexpensive units, an alternative to requiring set-asides inside developments is to build them away from the high-priced houses. A developer can be allowed to build apartments in another part of town, or even join in a group of developers that meet their obligation together with a single big apartment complex. Such a housing "pool" might be the easiest way to get inexpensive housing built under the set-aside system, although it probably won't do a decent job of integrating affluent people with less affluent ones, to the extent that this is one of the goals of the program. It also would make it less likely that the low-cost residences will be built in the affluent areas where so many new jobs are located.

Once law allowed a set-aside to be spatially separated from the big development, it occurred to local governments that the low-cost housing doesn't have to be built by the developer at all. If the law simply imposed a flexible fee on the developer, then the government could use this money to fund low-cost residences in a variety of ways, at times of its choosing. Localities love the fee approach because fees immediately funnel money into county, city, and town budgets, and they offer the government flexibility in using the money (and which in turn might call for a watchdog over the government). One form is the most popular land use device of recent decades—the *impact fee*. Many localities today charge a developer an impact fee to help compensate the government for a variety of services necessitated by the new development—schools, police, fire, sewers, and so on. One type of fee acts as the equivalent of a housing set-aside: The fee is used to help subsidize affordable housing. Some governments "link" the housing fee to a fund that is held in trust specifically to subsidize affordable residences. It might seem odd that the only parties that have to pay a special fee for low-cost housing are those that actually build housing, as opposed to the affluent homeowners who support laws that otherwise zone out such housing. Nonetheless, most courts have upheld such housing impact fees, in part through the rationale that the developer is using up the limited geographic space of the town by building expensive houses.

Another way that the power of money can be wielded to build low-cost residences is through bargaining with the government. A famous theory of legal rules, developed by Ronald Coase, is that we needn't worry if a legal

rule makes sense; if it doesn't, parties can always use money to "bargain" around the rule. For example, if a developer truly wants to build a particular development, it can always openly offer large amounts of money to the government, which could be persuaded to enter into an agreement with the developer to change the land use laws and at the same time use the money for supposedly worthy government services. A variant of the concept is to conduct an auction between the government and a developer of a proposed low-cost housing project; in this way, the locality's strength of opposition (reflected in its auction bid) could be matched against the profit potential of the proposed private project. Considering the thin profit margins that low-cost housing projects often bring, however, neither of these ideas is likely to generate a large number of inexpensive residences.

Subsidized Housing, Vouchers, and Discrimination Laws. The most straightforward way for governments to foster low-cost housing is to build and operate the units themselves, typically through public housing authorities. Crowded European cities such as Vienna saw enormous public housing apartment blocks rise early in the twentieth century. But the American experience has been more hesitant. To be sure, some great American success stories have begun in public housing, including rock 'n' roll pioneer Elvis Presley in Memphis, Supreme Court justice Sonia Sotomayor in the Bronx, Massachusetts governor Deval Patrick in Chicago, and rap entrepreneur (and part-owner of the Nets) Jay-Z in Brooklyn. Often, however, public housing has fulfilled all the unfortunate stereotypes of "public" ventures into the market. Buildings are often poorly maintained and become focal points for some of the most socially alienated members of society. Drugs, crime, and vandalism thrive. Some of the stories of infamous public housing complexes—such as the Pruitt-Igoe apartments in St. Louis and Cabrini-Green in Chicago—were resolved by evicting all the residents and demolishing the buildings.

The modern trend in all types of government activities—from central-city education to suburban toll-roads to foreign wars—is to contract out much of the responsibilities to private companies. Housing is no exception. Instead of running the buildings themselves, governments offer subsidies to landlords, tenants, or both. The most famous approach is called "section 8," after a provision of an old housing law that has since been changed, but whose name has stuck as part of the vernacular. Today's Housing Choice Voucher Program helps more than 2 million poor households pay for their apartments or small houses. By most assessments, almost all people would prefer a voucher to a public housing unit. The problem is, however, that the program is extraordinarily expensive. Although billions of federal dollars are passed out each year, there is not enough to go around. In most big cities there is a long waiting list; in 2010 dozens of people were hurt in

a tussle in an Atlanta line to sign up for vouchers. Like school vouchers, housing subsidies are a fine idea that will always be limited, in effect, by the fact that they are too expensive to help everyone who is deserving.

One valuable lesson from the history of publicly supported housing is that concentrating the recipients tends to work out badly, both for them and for the larger community, whereas allowing poor people to live and work among other kinds of families achieves some good results. The most famous story came from Chicago, where Dorothy Gautreaux sued the city housing authority and the federal government in the 1970s over the fact that assistance in the Chicago area was limited to public housing units that were always located in poor black neighborhoods and never in wealthier or whiter places. She and others won their lawsuit and eventually got Section 8 vouchers; these allowed them to move their families to suburbs if they wanted. This step was accomplished only after tough battles from suburbs that didn't want to take the poor families, of course. Sociologists found that poor kids who relocated to middle-class suburbs tended to do much better in school than those in tough city neighborhoods did. This phenomenon is, no doubt, affected by the fact that the most motivated of poor families were those that chose the adventure of moving out of the city. Moreover, the idea of improving the lives of poor urban Americans by scattering them throughout affluent suburbs is resisted by those who see advantages in retaining racial and ethnic majorities in city neighborhoods; sending a black kid to a mostly white suburban school might help his English test scores but also might diminish his cultural identity.

Indeed, the broader history of racial discrimination laws helps underscore the power of the bias against low-cost housing. Although the principle of "equal protection" was set forth in the Fourteenth Amendment to the U.S. Constitution after the Civil War, the practice of "separate but equal," which in reality meant unequal, held sway for nearly a century. Oddly, one surprising dent in the policy of segregation was that the Supreme Court in 1917 held unconstitutional a local law that mandated racial segregation in housing—in effect, zoning by race. But residential segregation remained, of course, largely through racial discrimination in the private markets, abetted by governments.

The next big step was in 1954, when the Court ruled that government-required racial segregation of public schools was unconstitutional, which led to decades of further litigation. Ten years later, Congress enacted the most famous of the Civil Rights Acts, which made it unlawful to discriminate in employment, restaurants, and lodging. The following year, a Voting Rights Act eliminated many local barriers to voting by black Americans. Even after this, however, it was perfectly lawful and quite common, throughout the United States, for a real estate agent and a developer

to say to a black family looking to buy a house, "Sorry, this is a white neighborhood." In 1968, Congress finally enacted the Fair Housing Act, which made it unlawful for agents, developers, and landlords to discriminate on the basis of race or ethnicity.

But the Fair Housing Act was targeted at discrimination by private players in the housing market; it didn't explicitly cover government land use laws. There have been a handful of scattered successes in using the federal law to challenge zoning—such as when a city council chairman says, "Let's zone out apartments to keep out the minorities from the city." But such examples are rare, of course. It's true that zoning against low-cost housing has a disproportionate effect on racial minorities in most places; the correlation might be close enough to justify a legal challenge against a job test of a private employer, for example. But governments can always defend their exclusionary zoning laws by asserting that they're not doing it to discriminate against blacks or Latinos or Asians; rather, they're doing it to discriminate against poor people in general. Okay, they'll probably say that they're doing it to shore up the local tax base, which is saying the same thing with nicer words. And the courts almost uniformly have held that this form of bias in favor of wealthier people is acceptable. After all, as far back as the *Euclid* case in 1926, the Supreme Court rejected the argument that zoning unfairly and unconstitutionally separates people by class. Just as it makes sense to keep a pig out of a parlor, the Court reasoned, it made sense to keep low-cost housing out of a suburb.

Challenging the Housing Bias

All of the techniques for affirmatively fostering low-cost housing do some good. But they are insufficient because they fail to challenge, head on, the bias in American law in favor of the single-family house. They fail to address the facts that land use laws demand housing for traditional and affluent families and make housing scarcer for poorer and nontraditional households. A more successful legal initiative for housing variety needs to take this next step.

The housing bias is especially maddening, as this book has endeavored to show, because it interferes with the free market for housing. It restrains low-cost residences that otherwise would be built and offered by the market. This is especially ironic considering the fact that nearly all of the other modern governmental policies that restrain the free market do so in order to *help* those, such as the poor, the elderly, and racial minorities, who otherwise would get less through the free market. Land use law, by contrast, often acts to warp the market to give less to these groups. Consider the fact

that giving a developer a "density bonus" is one method of fostering low-cost housing. It is a universal truth in the real estate world that developers want to build more housing units—more "density," in the lingo—while governments typically act to restrain density. A more straightforward way of fostering inexpensive units would be to loosen the restraints on the amount, and types, of allowable residences.

Because the housing bias distorts the free market, one might think that conservative and libertarian thinkers would complain loudly about land use law's biases, as they do in so many other areas, such as progressive taxation of the rich, employment regulations, and restraints on business practices. Indeed, some economists, notably Edward Glaeser and Joseph Gyourko, have studied extensively the adverse effects of property laws, especially on the cost of housing. By limiting supply, laws drive prices up. But most conservative commentators on land use law have shied away from challenging the fundamental housing bias.

A critic of land use laws, Jonathan Levine, has written insightfully about the odd phenomenon that befalls many advocates of the free market. These people assume that the modern system of Euclid-based zoning, with its bias in favor of single-family homes, *is* the free market and that legal efforts to overcome this bias are unjustified governmental *interferences* with the market. The criticism extends even to efforts of state governments to push their localities to drop some of their regulatory barriers to low-cost housing. The expectation that our suburban neighborhoods will be limited to single-family houses is "in the air we breathe," Levine says. This attitude aligns libertarians with homeowners who want to use law to further their own parochial interest of "not in my backyard," thus creating an impenetrable barrier to legal reform.

Why isn't the housing bias seen as an affront to the free market? I'll identify two reasons. The first is theoretical. Some scholars have asserted that a locality's set of land use laws, in effect, create "collective property rights." Accordingly, if the voters or the government of a town (Manassas, say, or New York or Mount Laurel or Putnam or Los Angeles) decides to favor certain kinds of housing and disfavor others, this creates a system of "rights" that deserves respect. If somebody else—the state government, a landowning developer, or a citizen desiring disfavored housing—challenges the system, the effort is viewed with the same disdain as would any challenge to a "right." Just as a citizen holds the right to criticize the president and an adult has the right to vote, the theory goes, a locality's citizens have the right to use land use law to create the town of their liking.

But this logic is cockeyed. To refer to a set of land use laws as creating a collective property right makes as little sense as saying that a city's law restricting criticisms of the mayor would be the city's "collective discourse

right," or that a rule that limited voting rights to landowning males would be a "collective electoral right." Yes, it is true that the *Euclid* case and others after it gave local governments wide-ranging power to craft land use laws. But such precedent has always coexisted with other authorities. First is the qualified right of landowners to control their property. In many instances, courts have vindicated rights of private landowners against overreaching by government. A town can't forbid a landowner from placing signs in the front yard; it can't stop the landowner from selling the property; and it can't regulate the land so tightly that the landowner is unable to use it in any productive way. Indeed, this is also an important angle of interpreting the *Mount Laurel* decisions: Real estate developers were empowered to challenge towns that didn't offer their fair share of inexpensive housing. A second level of authority is the power of state governments. Just as state statutes created the towns and counties in their jurisdictions, they ultimately control all of the laws in the state. If a state government decides that it wants a fair share requirement, as New Jersey has done, or even to abolish local laws entirely, it has the power to do so. The state, not the locality, holds the ultimate say as to what types of laws best serve the "general welfare." Accordingly, if a state concludes that localities can't use their land use powers to elbow out needed low-cost housing, the state is making a valid policy choice, not somehow usurping an authority that inherently belongs to towns and cities.

A second reason why the "collective property rights" idea has gained credence is the *attitudes* of Americans, especially suburban homeowners, toward their neighborhoods. Because of the dominance of local land use laws, many homeowners have come to believe that the land in their community somehow "belongs" to them, in the sense that they, with their neighbors, are entitled to determine what sort of construction goes on there. If they don't want an apartment building to be built, they believe that it is their prerogative to bar it, through their local government. Any successful effort to build a greater variety of housing for modern Americans must, therefore, overcome this asserted privilege.

A New Vision for American Land Use Law

Using these lessons, we can draw the outlines of a new vision for American land use law. This new vision needs to be in tune with the housing needs of the twenty-first century. It draws on the experiences of what has worked and what hasn't worked in the trenches of land use battles, all of which are valuable and must continue. It learns from both the left and the right. The new vision seeks a law that makes sense, both in the residential markets

and in the political arenas. There is no magical solution. But we can create an outline for this vision with three points:

First, the law must be regional. Left to their own devices, local governments have an incentive to favor large single-family houses and zone out low-cost housing, which increases population and strains local finances. This incentive is inevitable. The only way around this incentive is to shift much of the decision making for land use laws to a higher level of government—either the state government or a regional authority. Such a regional government would dampen the competition among neighboring localities and would be in a better position to assess the housing needs of the region.

A regional government would have to overcome complaints that it is commandeering governmental decisions that have been, and should remain, at the local level. But there are few other areas of law that are completed at the local level. From criminal justice to employee relations to transportation, state law dominates local law in most realms. We don't have many local criminal laws and we don't have many localities building their own highways. Americans a century ago saw land use law as a local prerogative because land use was a matter of only local interest. This might have been true in the age of the horse and the small town. But this old-fashioned attitude has been overcome by modern transportation and the rise of the metropolitan area, where the vast majority of Americans now live. The land use laws of one suburb affect lives in neighboring jurisdictions; accordingly, these rules should be coordinated.

Moreover, New Jersey's experience shows that simply imposing a duty on local governments to consider regional needs is likely to encounter resistance at every turn. Only by transferring to a regional authority some of the powers to create land use law are the regional needs likely to receive the attention they deserve. Big governments can handle land use law; cities such as New York, Los Angeles, and Chicago each organize zoning for millions of people, and they tend to do a better job of offering a variety of housing than do a myriad of uncoordinated and competing suburbs.

Making law at a higher level of government doesn't necessarily mean "more" government. Indeed, this book has endeavored to show that a primary reason for the limited diversity of housing in the United States is the oppressive hands of local governments. A higher level of government might be able to do better, in that it holds the opportunity to rewrite the land use laws in a more fundamental manner. If we were somehow able to transform the history of a state's laws over the past century, we would be able to facilitate a far greater variety and number of inexpensive apartments, townhouses, and mobile homes throughout the state, including the suburbs—so much so that we might not have to focus legal reform specifically on what

we call "low-cost" housing. In many places, homeowning suburbanites tend to interpret, sometimes correctly, the push for "affordable housing" as being an effort to build units for racial minorities, with all the complications that such an interpretation brings. If we reformed land use law thoroughly at the state or regional level, housing variety wouldn't have this coloring.

Second, the law must seek to change attitudes. When a landowner proposes to change zoning law to build a new apartment complex on a vacant suburban plot of land, homeowners down the street will start complaining: We don't want this kind of density, congestion, and strain for our community. Because local officials respond to these voters, their desires often translate into law, and the proposal for the apartment building is defeated. It is as if the existing residents feel that they *own* the plot of vacant land, at least to the extent that ownership means control over its destiny. This attitude must change if the nation is to embrace a greater variety of housing.

The attitude alteration needs to draw on lessons from both the left and the right of the political spectrum. Free market conservatives emphasize that the fundamental ownership of land in the United States remains with the private individual, corporation, or organization whose name is on the title to the land. Just as we leave the supply of food or cars or the computers to the market, our laws should respect to a greater extent the ability of the free market to respond to the demands for places to live. Advocates for affordable housing often contrast the fight for inexpensive housing with "market-rate" residences. But if land use law were more open, the market would respond better to the demands for low-cost housing. Landowners and developers would try their best, through the motive of profit, to build and offer the types of housing that Americans want. This private market, not government, is best able to detect changes and shift emphases as America's population and desires change.

On the other side, communitarians emphasize that land is "owned," or at least controlled, not only by the private landowner but also by the broader "community." This community includes not only the homeowners down the street, but everyone who is affected by the land use choices. An immigrant family who lives in a crumbling apartment in the big city, but who dreams of moving closer to a job in the suburbs, wants the option of having low-cost housing, even though it doesn't have a vote in the suburb. A young single person or an elderly retiree in the adjoining suburb, which has neither vacant lots nor inexpensive housing, also has a stake in the outcome of the land use decision. Regional governance can encompass these interests and offer a truly communitarian approach to the control of land.

Third, the law should look for places to remove land use restrictions. Location, location, location is the old mantra of real estate. Any successful effort to create a legal system that offers a greater variety of housing must figure out a way to locate these residences in a crowded America. If existing homeowners are able to bar new units by arguing that their neighborhood is fully "built out" or is "inappropriate" for new housing, then the effort is hamstrung from the start. One of the major flaws of the early Mount Laurel system was that it imposed obligations only on "growing" communities—a tilt that pushed new housing to the sprawling outskirts, while ignoring old suburbs. A regional authority that seeks to foster low-cost housing must find a way to shoehorn these units into built-up American communities and at the same time withstand the tremendous local opposition that such infill engenders.

No method is perfect, but some hold promise. One approach would be to reverse, at least temporarily, the bias in favor of single-family houses. Laws could be revised to command that almost all new construction must be for inexpensive housing—apartments, mobile homes, and the like. This switch in the usual presumption could be justified by pointing out that we have built our communities for nearly a 100 years with a bias in favor of single-family houses; some years of bias the other way only begins to even things out. Moreover, the burst of the twenty-first-century housing bubble—followed by plummeting house prices, foreclosed homes, and rising rental prices—proves that there is unmet demand for low-cost units for years to come. Such a flip would generate complaints from some developers that law is hindering their ability to make a profit, but *Euclid* has already decided that law can zone land to serve the public interest.

Another technique would be to rethink where we permit residential units. Low-cost housing advocates often lament "market-rate" housing, even in the form of market-built apartments, because such units tend to be built in places that generate high prices—quiet, green neighborhoods with convenient access to the freeway, and so on. But what about locations that we haven't typically thought of as good places for housing? Imagine the idea of apartments on top of stores. Such a land use design is routine in New York City and in most cities outside the United States, and is being used tentatively in new urbanist "loft" developments. But it is anathema, and indeed unlawful, in most other places in America. What if law didn't outlaw it, but encouraged it? Law could require that every new strip mall have a two-level stretch of apartments constructed on top. Parking wouldn't be that much of a concern, to the extent that residents tend to be gone during the day, when stores are open, whereas the latter are closed at night when residents are home. We could even encourage hundreds of apartments to be built on top of existing suburban shopping malls. In fact,

law could encourage, through taxation and impact fees, that mall parking lots be turned into garages with housing on top.

One ostensible problem is that many people would hesitate to live in such locations. Living in an apartment on top of a shopping mall garage may not sound ideal. But this is precisely the point. Our laws have favored an ideal of housing that drives up prices, while ignoring or outlawing places for truly low-cost housing. The change would not strive for an idyllic residential paradise (the goal of much land use over the past century), but rather to get inexpensive residences built. The immigrant family with no assets, the young couple just starting out, and the elderly single retiree (who might spend the day mall-walking) all might welcome the chance to rent low-priced units in a location not favored by the affluent family of four in the suburban split-level home.

Giving this idea a broader reach, law could *remove land use restrictions entirely in certain locations*. This idea might seem shocking. To some low-cost housing advocates, the act of ripping up laws appears to conflict with their usual aim of using government to battle the forces of the free market. It should be remembered, however, that the first step in the *Mount Laurel* remedy was an order to dismantle legal barriers to inexpensive housing. To be sure, laws act differently in different places. In a built-up and affluent suburb, removing zoning might result only in the construction of expensive lofts and not affordable residences. But in other areas, getting rid of law might well spur profit-seeking developers to respond to pent-up demand and build more low-cost units. Such a move also would hold the benefit of working *in conjunction with the free market*—a powerful force to harness and a selling point in getting political support.

Let's consider two hypothetical locations. The first example is a neighborhood of single-family homes where demand appears to be less than robust. Perhaps the limited interest is because the neighborhood is near a roaring elevated freeway or an industrial cluster. Perhaps it is because the houses are mostly small boxes built in the early 1950s for blue-collar World War II veterans; the houses for the most part have small rooms (although they have multiple bedrooms for big 1950s families) and no central air-conditioning. Because of these features, they are less desirable for modern families who can secure mortgage loans. Indeed, the fact that many houses in a neighborhood are rentals, and not occupied by owners, might make it a good candidate for changes in zoning. At the same time, let's assume that the metro area holds a scarcity of inexpensive apartments, in large part because of skewed zoning laws. The regional land use authority decides to remove zoning restrictions, which since the 1950s has required only single-family residences, for this neighborhood. This step would free up the market to respond to demand for different types of housing. Perhaps

no developer would respond; so be it. But perhaps a developer would see the opportunity to buy up some of the residential blocks (easier if they are rentals) and build a complex of four-story apartment buildings. These units could answer local demand for inexpensive, low-maintenance units that are preferred by elderly citizens and less affluent couples in which both partners work two jobs. Indeed, one of the lessons from the experience of Portland, Oregon, and its urban growth boundary is that suburban sprawl can be battled successfully only by allowing infill and by allowing greater residential density in built-up areas. Free market advocates could also encourage the regional authority to scrap other laws that they see as costly and unnecessary, such as housing "safety" codes that require multiple elevators, ample parking, and minimum footage sizes for the units. All of these steps would make the apartments less expensive.

Not everyone would be happy with this change, of course. Homeowners who live nearby the new apartment complex would, no doubt, complain that the new structures are ugly (remember *Euclid's* comments about "monopolizing the rays of the sun"?), add to traffic, and otherwise damage the expected "character" of the neighborhood. But to make an omelet one has to break some eggs. To be successful, initiatives for a greater variety of housing have to fight against the outlook that an entire neighborhood belongs to its current residents. If the government wanted to assuage local opposition, it could accompany the zoning change with a requirement that a developer of large infill buildings compensate a handful of immediately adjacent homeowners with small payments. Such a plan might not work, but it is better than not trying at all.

If the neighborhood with the apartment complex constituted a large chunk of a small independent suburb, the local government might have reason to worry that the new apartments would put strains on its elementary school, sewer lines, and small fire station. These sorts of fiscal concerns can be ameliorated by having the regional government transfer revenue from areas of slow population growth (such as affluent towns "full" with big single-family houses) to places such as our growing suburb, where expenditures are needed to respond to population growth of immigrants, elderly persons, and others taking advantage of the relaxed zoning. Such a fiscal system is not "socialism"—it is merely handling finances at a higher, and more sensible, level of government.

A second hypothetical example is a rural area that is in the path of future suburban sprawl. Although a housing slump has stalled plans for more subdivisions of McMansions, there is, no doubt, that demand will revive eventually. Like most such regions, this area has long been zoned for large lots, to both retain agriculture and discourage dense development. By removing the zoning restrictions, however, the regional authority sets

the market free. To meet the needs of modestly paid retail workers and part-time employees who make up an increasingly large share of the local workforce, a developer might be spurred to build a neighborhood of manufactured homes. These mobile homes would no longer be segregated by law to euphemistically named "parks" stuck in tiny corners of the region. Rather, the mobile home is treated by market forces as what it is—a decent type of housing that responds to the American desire for privacy and a spot of green, at a low cost. Poorer rural people in many nations of the world live in leaky and badly ventilated wooden shacks; in the United States, less affluent people have the chance to live in a well-manufactured aluminum building with central heat, a small washer and dryer unit, and space for a flat-screen TV. And you can buy this type of housing, in many locations, for less than the price of a fancy German car.

In the rural area, unlike in the built-up neighborhood, there are fewer existing residents whose expectations might be upset. Nonetheless, some current homeowners will, no doubt, complain that the rural sensibility of the region would be disturbed by a dense new development. But again, there is no right of existing owners to prevent the growth of a metropolitan area in their direction. Local opponents might warn that the manufactured home community would dangerously increase the region's population. Environmental watchdogs might complain that the development would strain sewer lines, require the disruptive laying of new roads, and necessitate chopping down stands of trees. At a minimum, a local government might be encouraged to slap expensive impact fees to pay for or discourage this market-driven housing growth.

But such arguments would be fundamentally misguided. As I was writing this conclusion, the Census Bureau announced that the population of the United States had risen by 2010 to nearly 309 million, and is expanding by nearly 3 million persons each year. Our nation welcomes new children and serves as a magnet for striving peoples across the globe. Penalizing the construction of new housing for a growing nation makes little sense. These rules, like so many of our complicated land use laws, have been predicated on a parochial and shortsighted view of a nation that we should no longer tolerate. The old bias of land use law in favor of large, widely spaced single-family homes served a myth of twentieth-century America that we can no longer afford. Proponents of a wider variety of housing need to work together with advocates of the free market, in unprecedented but exciting ways, to build a nation that is able to adapt to and serve a new American population.

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Bibliography

Sources for Chapter 1

Prince William and Manassas land use laws:

Brookings Institution, *Immigrants, Politics, and Local Response in Suburban Washington* (2009) (authors: Audrey Singer, Jill H. Wilson, and Brooke DeRenzis), http://www.brookings.edu/~/media/Files/rc/reports/2009/0225_immigration_singer/0225_immigration_singer.pdf.

City of Manassas, Va., Zoning Code and Zoning Map, http://www.manassascity.org/index.asp x?nid=747.

Prince William County, Va., Zoning Code, Zoning Map, and Related Documents, http://www.pwcgov.org/default.aspx?topic=040073001420002653.

U.S. Census Bureau, *Examining American Household Composition: 1990 and 2000*, http://www.census.gov/prod/2005pubs/censr-24.pdf (2005).

9500Liberty (2009) (film by Annabel Park and Eric Byler).

Prince William County governmental reports:

Prince William County (2005), *Housing Market Analysis*.

Prince William Housing Data (2005), http://www.pwcgov.org/docLibrary/PDF/003877.pdf.

Prince William County Comprehensive Plan (2008), http://www.pwcgov.org/docLibrary/PDF/10012.pdf.

Prince William Neighborhood Study Report and Consultant Recommendations, Oct. 7, 2008 (Community Planning and Design report Sept. 22, 2008), presented to County Council on Oct. 14, 2008.

Black Velvet Bruce Li:

Black Velvet Bruce Li, www.bvbl.net, entries on June 30, 2007; April 4, 2008; April 19, 2008; May 14, 2008; July 6, 2008; July 10, 2008; Oct. 15, 2008; Dec. 29, 2008; Feb. 26, 2009; March 20, 2009; Dec. 11, 2009.

Greg Letiecq in 1998: http://www.youtube.com/watch?v=NuwiqTbzvL0.

Prince William repercussions:

John Gizzi, "Northern Va. County Confronts Illegal Immigration," *Human Events*, July 30, 2007.

Nick Miroff, "A Hispanic Population in Decline," *Washington Post*, July 10, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/07/09/AR2008070902173.html.

Eric Weiss, "Pr. William Employees Priced Out; County Wants More Affordable Housing," *Washington Post*, May 4, 2004.

Manassas "Family" lawsuit:

Complaint and court papers in Equal Rights Center v. City of Manassas, 1:07-cv-01037-TSE-TRJ (E.D. Va.) (filed Oct. 12, 2007).

Elizabeth Kolbert, "On the Kansas Prairie, the Window to Dole," *New York Times*, May 19, 1996, at 1, 10 (Bob Dole's youth), http://www.nytimes.com/1996/05/19/us/a-political-life-the-kansas-years-on-the-kansas-prairie-the-window-to-dole.html?pagewanted=all.

Manassas Park memo, May 20, 2004, from William Armstrong to City Manager David Reynal, on Manassas city surveillance techniques.

Stephanie McCrummen, "Manassas Changes Definition of Family," *Washington Post*, Dec. 28, 2005 (Chavez incident), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/27/AR2005122701216.html.

Montgomery County incident:

Jack Carson, Letter to the *Takoma Voice*, Feb. 2010, http://www.takoma.com/voicebox/2010/02/voicemail-revoke-tp-sanctuary.html.

Carol Morello, "Montgomery Urges Hispanics to Mail in Census Forms," *Washington Post*, Feb. 18, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/02/17/AR2010021704765.html.

Academic commentary:

Frank S. Alexander, "The Housing of America's Families: Control, Exclusion, and Privilege," *Emory Law Journal* 54 (2005) 1231.

Jim Morales, "The Emergence of Fair Housing Protections against Arbitrary Occupancy Standards," *La Raza Law Journal* 9 (1996) 103.

Dowell Myers, William C. Baer, and Seong-Youn Choi, "The Changing Problem of Overcrowded Housing," *Journal of American Planning Association* 62 (March, 1996) 66–84.

Ronald D. Utt, *Not in My Back Yard: Removing Barriers to Affordable Housing* (2002) (prepared for Aspen Systems, Inc. and the U.S. States Department of Housing and Urban Development), http://www.demographia.com/db-nimbyreview.pdf.

Sources for Chapter 2

Introduction to eminent domain:

Origin of term eminent domain: Hugeo De Grotius, *De Jure Belli et Pacis* (1625).

Illinois Central case: Joseph D. Kearney and Thomas W. Merrill, "The Origins of the Public Trust Doctrine: What Really Happened in Illinois Central," *University of Chicago Law Review* 71 (2004) 799.

Berman and its critics:

David H. Harris, Jr., "The Battle for Black Land: Fighting Eminent Domain," *National Bar Ass'n Magazine* (March–April, 1995), at 12.

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

Wendell E. Pritchett, "The 'Public Menace' of Blight: Urban Renewal and the Private Uses of Eminent Domain," *Yale Law & Policy Review* 22 (2003) 32–36.

Poletown:

Jenny Nolan, "Auto Plant vs. Neighborhood: The Poletown Battle," *Detroit News*, Jan. 27, 2000, http://apps.detnews.com/apps/history/index.php?id=18#ixzz0kS1DlP0v.

The city's "dependence" on business:

Cadence Mertz, "Scripps Reveals Research Plans," *Sun-Sentinel*, Aug. 4, 2004, http://articles.sun-sentinel.com/2004-08-04/news/0408040135_1_scripps-florida-scripps-campus-dozen-top-scientists.

Paul Kantor, *The Dependent City: Revisited* (Boulder: Westview Press, 1995).

Derek Kravitz and V. Dion Haynes, "Northrop Grumman Narrows Choices for Its Washington Area Headquarters," *Washington Post*, April 1, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/01/AR2010040103682.html.

Criticism of publicly financed sports stadiums: Charles C. Euchner, *Playing the Field* (Baltimore: Johns Hopkins University Press, 1993).

Rockefeller Center and William Cromwell's holdout:

Daniel Okrent, *Great Fortune: The Epic of Rockefeller Center* (New York: Viking, 2003).

New York's blight laws:

New York State Urban Development Corporation Act, McKinney's Unconsolidated laws of New York secs. 6250–6260.

Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 481 (1975) (setting the breadth of eminent domain for redevelopment as wide as the police power).

Sources for Chapter 3

Josh Getlin, "Low-Income Housing Wins a Beachhead in the 'Burbs,' " *Seattle Times*, Nov. 14, 2004, http://seattletimes.nwsource.com/html/nationworld/2002090397_housing14.html.

Charles M. Haar, *Suburbs under Siege* (Princeton: Princeton University Press, 1995).

John M. Payne, "Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies," *Real Estate Law Journal* 16 (1987) 20.

New Jersey Council on Affordable Housing, *Third Round Substantive Rules* (2009), http://www.state.nj.us/dca/affiliates/coah/regulations/thirdroundregs/597.pdf.

New Jersey Council on Affordable Housing, *2002–2003 Annual Report*, http://www.state.nj.us/dca/affiliates/coah/reports/annualreport.pdf.

New Jersey Council on Affordable Housing, *Current Municipal Affordable Housing Obligations*, http://www.state.nj.us/dca/affiliates/coah/reports/.

NJ. com, *N. J. Gov. Chris Christie Creates Task Force to Review Affordable Housing*, Feb. 9, 2010, http://www.nj.com/news/index.ssf/2010/02/nj_gov_chris_christie_creates_1.html.

NJ.com, *N.J. Senate Votes to Abolish Affordable-housing Council, Move Control from State to Towns*, June 10, 2010, http://www.nj.com/news/index.ssf/2010/06/nj_senate_disbands_coah_moves.html.

Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975) [*Mount Laurel I*].

Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) [*Mount Laurel II*].

Sources for Chapter 4

Hendee case: Hendee v. Putnam Township, 486 Mich. 556 (2010), reversing 2008 WL 3979446 (Mich. App., 2008).

Euclid, Ohio, case: Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (U.S. 1926), reversing 297 Fed. 307 (N.D. Ohio, 1924).

Needham, Mass., case: Simon v. Town of Needham, 42 N.E.2d 516 (Mass., 1942).

Wayne, N.J., case: Lionshead Lake, Inc. v. Wayne Township, 89 A.2d 693 (N.J., 1952).

Fairfax. Va., case: Board of County Supervisors v. Carper, 107 S.E.2d 390 (Va., 1959).

Brandon, Miss., case: Homebuilders Ass'n of Mississippi, Inc. v. City of Brandon, 640 F.Supp.2d 835 (S.D. Miss., 2009).

Legal treatise: Am. Law Reports 5th, Vol. 1, 622 (1992).

Papke quote: David Ray Papke, "Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation," *Urban Lawyer* 41 (2009) 787.

Open space and "greenbelts": Jan Z. Krasnowiecki and James C.N. Paul, "The Preservation of Open Space in Metropolitan Areas," *University of Pennsylvania Law Review* 110 (1961) 179.

Open space and "cappuccino" quote: Douglas R. Appler, "America's Converging Open Space Protection Policies," *Urban Lawyer* 36 (2004) 341.

Oregon's urban growth boundary and challenges to it: Metro (Portland), *Urban Growth Boundary*, http://www.metro-region.org/index.cfm/go/by.web/id=277.

Wyoming monastery: Bob Moen, "Hermit Monks Plan Monastery on Remote Wyo. Ranch," *Associated Press*, Sept. 29, 2010, http://www.medievalarchives.com/2010/09/26/hermit-monks-plan-monastery-on-remote-wyoming-ranch.

Agricultural zoning: Mark W. Cordes, "Agricultural Zoning: Impacts and Future Directions," *Northern Illinois University Law Review* 22 (2002) 419.

Prices in 1950: U.S. Census Bureau, U.S. Bureau of the Census, *Historic Values*, http://www.census.gov/hhes/www/housing/census/historic/values.html.

Open space versus affordable housing: Mark Bobrowski, "Affordable Housing v. Open Space: A Proposal for Reconciliation," *Boston College Environmental Affairs Law Review* 30 (2003) 487.

"*More broadly vilified*" *quotation*: David Ray Papke, "Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation," *Urban Lawyer* 41 (2009) 787, 795 (quoting Allan D. Wallis, *Wheel Estate: The Rise and Decline of Mobile Homes* 199 (Baltimore: Johns Hopkins University Press, 1997)).

Putnam Township 2008 meeting report: Leanne Smith, "Putnam Taking Land Battle to State Supreme Court," *mlive.com*, Sept. 9, 2008 (referring to the "unsavory residents" comment).

Manufactured housing data: Maria Marshall and Thomas L, Marsh, *Consumer and Investment Demand for Manufactured Housing Units* (2004).

Michigan statute on exclusionary zoning and duties of townships: Mich. Consol. Laws sec. 125.3207 (2006).

Michigan mobile home cases: Gust v. Canton Tp., 342 Mich. 436, 70 N.W.2d 772 (1955) (striking down total ban on "trailer camps").

Anderson v. Highland, 21 Mich. App. 64, 174 N.W.2d 909 (1969) (town must draw a trailer park district on its zoning park).

Rottman v. Waterford, 13 Mich. App. 271, 164 N.W.2d 409 (1968) ("miserly" trailer park zoning is sufficient).

English v. Augusta Township, 204 Mich. App. 33, 514 N.W.2d 172 (1994) (rejecting township's claim that it satisfied its duty by zoning as mobile home park a farm owned by a town supervisor).

Report on "demonstrated need" for mobile homes in Putnam Township: Brain M. Frantz, AICP, *Manufactured Housing Analysis of Putnam Township and Surrounding Area,* Feb. 24, 2005.

Sources for Chapter 5

Moe/Rios/Viecco household: Personal interview with Arthur Viecco, Oct. 6, 2010; Diane Wedner, " 'Granny Flats' Let Aging Relatives Live Close – But Not Too Close," *Los Angeles Times*, Nov. 15, 2008, http://articles.latimes.com/2008/nov/15/home/hm-granny15.

Los Angeles history: Gordon DeMarco, *A Short History of Los Angeles* (San Francisco: Lexicos, 1988).

Andres Duany & Elizabeth Plater-Zyberk: Duany Plater-Zyberk & Co., www.dpz.com.

New Urbanism: Congress for the New Urbanism, www.cnu.org.

Seaside, Fla.: Seaside Institute, www.seaside.org.

James Howard Kunstler, "Home from Nowhere," *Atlantic Monthly*, Sept. 1996, http://www.theatlantic.com/past/docs/issues/96sep/kunstler/kunstler.htm.

James Howard Kunstler, *Home from Nowhere* (New York: Touchstone, 1996).

Washington, D.C.'s Connecticut Avenue: Katherine Shaver, "A Hush in Cleveland Park," *Washington Post*, Sept. 10, 2009.

Freilich quotation: Robert H. Freilich, "To Sprawl or Not to Sprawl: A National Perspective for Kansas City," *Western Historical Manuscript Collection, Kansas City* (1997), http://www.umkc.edu/whmckc/publications/KIMBALL/CNKPDF/Freilich-04-21-1997.pdf.

Infill challenges and strategies: Tim Iglesias, "Managing Local Opposition to Affordable Housing: A New Approach to NIMBY," *Journal of Affordable Housing* 12 (2002) 78.

Advantages of accessory dwelling units: AARP Public Policy Institute, *Accessory Dwelling Units: Model State Act and Local Ordinance* (2000) (drafted by Rodney L. Cobb and Scott Dvorak, of the American Planning Association), http://transformca.org/ia/acssdwel/sup/AARP+APA_ADUReport_ModelAct+Ordinance.pdf.

"*Age in place*"*:* Leigh Anne King, Rocky Mountain Land Use Institute, *Housing Diversity and Accessibility* (2008), http://law.du.edu/images/uploads/rmlui/rmlui-sustainable-housingDiversity.pdf.

Santa Cruz: City of Santa Cruz ADU Development Program, http://www.cityofsantacruz.com/index.aspx?page=1150; Fred A. Bernstein.

Fred A. Bernstein, "Granny Flats for Cool Grannies," http://www.fredbernstein.com/articles/display.asp?id=91.

Conditional uses and ADUs: Center for Housing Policy, *Accessory Dwelling Units*, http://www.housingpolicy.org/toolbox/strategy/policies/diverse_housing_types.html?tierid=42.

Bell salary scandal: Ruben Vives, "Bell Council Seeks Resignations of 3 City Officials," *Los Angeles Times*, July 21, 2010, http://www.latimes.com/news/local/la-me-721-bell-20100721,0,3475382.

California's "fair share" laws: Cecily T. Talbert, *California's Response to the Affordable Housing Crisis* (American Law Institute—American Bar Association) (2007).

California state law on "second units": Cal. Assembly Bill 1866, chapter 1062 (2002), codified at Cal. Govt. Code sec. 65852.2.

Guidance on California law: Cal. Dept. of Housing and Community Development, *Memorandum on Second-Unit Legislation Effective January 1, 2003 and July 1, 2003.*

Opposition to state law on second units: Daniel S. Levine, "Cities Scrambling to Comply with New 'granny flats' Law," *Sacramento Business Journal*, June 27, 2003, http://www.bizjournals.com/sacramento/stories/2003/06/30/focus6.html.

Concerns over safety in ADUs: L.A. City Council, File: 04-1948, *Granny Flats/Companion Units* (2004).

Los Angeles ADU guidance: L.A. Planning Department, *Interim Departmental Guidance for Accessory Dwelling Units (ADUs)* (undated).

Los Angeles City Council motion: Motion 09-2589, of Councilmen Paul Koretz, Bill Rosendahl, and Eric Garcetti, Oct. 20, 2009.

Charles Moore quotation about the 1920s: Charles Moore, Peter Becker, and Regula Campbell, *The City Observed: Los Angeles* (New York: Vintage, 1984) p. xx.

Quotation about GM's takeover over the interurban lines: Robert Snell, *Industrial Reorganization Act, Hearings before the Subcommittee on Antitrust and Monopoly*

of the Committee on the Judiciary, United States Senate, Ninety-Third Congress, Second Session on S. 1167, Part 3: Ground Transportation Industries (1974).

"*Conspiracy" to save the electric railways*: David Brodsly, *L.A. Freeway: An Appreciative Essay* (Berkeley: University of California Press, 1981).

Buses:

Jim Motavalli, *Breaking Gridlock* (San Francisco: Sierra Club Books, 2001).

Jim Motavalli, "All Aboard," *Sierra* (Jan.–Feb., 2002), http://www.sierraclub.org/sierra/200201/buses.asp.

Jim Motavalli, "Second-Class Transit? Los Angeles' Bus Riders Union Fights for Equal Treatment," *EMagazine.com* (Sept.–Oct., 2001), http://www.emagazine.com/view/?1072.

Bob Schildgen, "Ode to the Bus," *Sierra* (Jan.–Feb., 2002).

Bus Riders Union lawsuit: Complaint in *Labor/Community Strategy Center v. L.A. County Metropolitan Transit Authority*, C.D. Cal., No. CV-94-05936-TJH. A later appellate decision in the case is found at 293 F.3d 1041 (9th Cir., 2001).

Jonathan Richmond, including the Green Line story: Jonathan E.D. Richmond, "The Mythical Conception of Rail Transit in Los Angeles," *Journal of Architecture and Planning Research* 15 (1996) 4, http://americandreamcoalition-org.adcblog.org/transit/mythRail.pdf.

Rail versus bus fiscal numbers:

Richard Simon, "Driven Man Keeps Heat on the MTA," *Los Angeles Times*, Jan. 16, 1996, http://articles.latimes.com/1996-01-16/local/me-25181_1_mta-staff/2.

Henry Chu, "Planned Fare Hike Points up Inequities in Bus, Rail Subsidies," *Los Angeles Times,* June 18, 1994, http://articles.latimes.com/1994-06-18/ . . . / me-5458_1_bus-fare-increases.

Erich Mann, "Hop on the Bus Bandwagon," *Los Angeles Times*, July 17, 1994, http://articles.latimes.com/1994-07-17/news/ss-20586_1_transit-system.

Eric Mann and Lisa Duran, "MTA Can Boost Ridership and Stay Viable Transit: Put the High-priced Rail Projects on Hold and Add More Buses with Lower Fares," *Los Angeles Times*, March 22, 1995, http://articles.latimes.com/1995-03-22/local/me-45562_1_rail-projects.

James E. Moore quote: James E. Moore II, "Shift the Spending to Buses," *Los Angeles Times*, Sept. 7, 1994, http://articles.latimes.com/1994-09-07/local/me-35462_1_rail-transit-systems.

Christopher Koontz quotations: Personal interview with Christopher Koontz, planning deputy for Los Angeles City Councilman Paul Koretz, Los Angeles City Hall, Oct. 6, 2010.

Granny flats "invasion" article: Steven Leigh Morris, "Invasion of the Granny Flat," *Los Angeles Weekly*, Dec. 9, 2009.

"*False information" quotation*: Karen Silver, *So What Happened Next!*, Nov. 15, 2009; Gerald Silver and Karen Kanter, *Is the Planning Department Pulling a "Fast*

One" on the Public?, Nov. 17, 2009, http://ourla.org/city-wide/965-viral-email-the-truth-about-granny-flats-and-city-planning.

Ron Kaye: http://ronkayela.com, entries for April 28, 2009, Oct. 23, 2009, Nov. 16, 2009, Dec. 4, 2009, and Dec. 19, 2009.

Koretz letter: Letter of Los Angeles City Councilman Paul Koretz to S. Gail Goldberg, Director of Planning, Dec. 17, 2009.

Los Angeles Planning Department memo on "staff reductions": Open Letter of S. Gail Goldberg, Planning Director, Dec. 17, 2009.

Los Angeles Planning Department memo on second unit policy: L.A. Office of Zoning Administration, Memorandum No. 120, May 6, 2010.

Sources for Chapter 6

Household composition: U.S. Bureau of the Census, *Examining American Household Composition: 1990 and 2000* (2005).

Rental prices: Dina El Boghady and Dan Keating, "Region's Tenants Caught in a Clamp," *Washington Post*, Dec. 21, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/20/AR2010122006525.html.

Kensington, Md.: Katherine Shaver, "In Md. Town, Anxiety over 'Revitalizing,'" *Washington Post*, Dec. 21, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/20/AR2010122005633.html.

Nationwide rental data:

U.S. Bureau of the Census, *American Community Survey 2009.*

Joint Center for Housing Studies, *The State of the Nation's Housing 2010*, http://www.jchs.harvard.edu/publications/markets/son2010/son2010_key_facts.pdf.

Methods of fighting exclusionary zoning, generally:

Julian Conrad Juergensmeyer and Thomas E. Roberts, *Land Use Planning and Development Regulation law* (St. Paul: Thomson-West 2d ed., 2007); Daniel R. Mandelker, *Land Use Law* (5th ed., 2003).

Fair share:

New Jersey, Council on Affordable Housing, http://www.state.nj.us/dca/affiliates/coah/about.

Nico Calavita, Kenneth Grimes, and Alan Mallach, "Inclusionary Housing in California and New Jersey: A Comparative Analysis," *Housing Policy Debate* 8 (1997) 1, available at http://www.knowledgeplex.org/kp/text_document_summary/scholarly_article/relfiles/hpd_0801_calavita.pdf.

Harold McDougall, "From Litigation to Legislation in Exclusionary Zoning Law," *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987) 623.

Growth share: John Payne, "Remedies for Affordable Housing: From Fair Share to Growth Share," *Land Use Law and Zoning Digest* 49 (1997) 6.

Bargaining:

Ronald Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960) 1.

William A. Fischel, *The Economics of Zoning Laws: A Property Rights Approach to American Land Use Controls* (Baltimore: Johns Hopkins University Press, 1985).

Benjamin Harney, "The Economics of Exclusionary Zoning and Affordable Housing," *Stetson Law Review* 38 (2009) 459.

Set-asides:

Montgomery County, Md., *MPDU Program*, http://www.montgomerycountymd.gov/dhctmpl.asp?url=/content/dhca/housing/housing_P/mpdu/history.asp.

Discrimination laws:

Buchanan v. Warley, 245 U.S. 60 (1917) (no racial zoning).

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (no segregation in schools).

Fair Housing Act of 1968, 42 U.S.C. §§3601–3619.

Housing Voucher Program ("section 8"): U.S. Department of Housing and Urban Development, http://portal.hud.gov/portal/page/portal/HUD/topics/housing_choice_voucher_program_section_8.

Federal housing voucher statistics: Budge of the U.S. Government, Fiscal Year 2010, Appendix, p. 570, http://www.gpoaccess.gov/usbudget/fy10/pdf/appendix/hud.pdf.

Atlanta 2010: Craig Schneider and Tammy Joyner, "Housing Crisis Reaches Full Boil in East Point; 62 Injured," *Atlanta Journal-Constitution*, Aug. 11, 2010, http://www.ajc.com/news/atlanta/housing-crisis-reaches-full-589653.html.

Gautreaux: Greg Duncan and Anita Zuberi, "Mobility Lessons from Gautreaux and Moving to Opportunity," *Journal of Law and Social Policy* 1(2006) 1, http://www.law.northwestern.edu/journals/njlsp/v1/n1/5/index.htm.

Encyclopedia of Chicago, *Gautreaux Assisted Housing Program*, http://encyclopedia.chicagohistory.org/pages/507.html.

Levine's critique:

Jonathan Levine, *Zoned Out* (Washington: Resources for the Future, 2006).

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