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VILLAGE OF EUCLID V. AMBLER REALTY CO., SEVENTY-FIVE YEARS LATER: THIS IS NOT YOUR FATHER'S ZONING ORDINANCE

Melvyn R. Durchslag†

INTRODUCTION

At first blush, Village of Euclid v. Ambler Realty Co.1 appears anomalous, out of character for a Court deeply immersed in substantive due process and preoccupied with protecting property and contractual rights from regulation-prone federal and state governments. Just three years before, the Court had invalidated a law setting minimum wages for women, holding it an unwarranted intrusion with the parties’ right to contract.2 And in 1928, two years after Ambler Realty, in an opinion written by Justice Sutherland, the author of Ambler Realty, the Court invalidated a law limiting entry into the pharmacy business because it denied non-pharmacists’ rights to pursue a lawful business.3 The right to own a business, said the Court, is a property right and as such cannot be denied without some substantial justification.4

A bit of reflection, however, reveals that Ambler Realty was a product of its time, quite in step with substantive due process rulings both before and after. Cases in that era had a common denominator—the perimeters of the Due Process Clause were defined by the common law.5 The Euclid zoning ordinance was saved because it was

† Professor of Law, Case Western Reserve University. I appreciate the efforts of Peter Gerhardt and Wendy Wagner in deciphering and criticizing an earlier draft of this Article. I am also indebted to Adam Rosen for his diligent research efforts.

1 272 U.S. 365 (1926).
4 See id. at 111.
premised upon, and in its application operated very close to, the baseline of common-law nuisance. The Court tells us that the Village’s twelve square miles were divided into six distinct use districts, ranging from single-family residential (the highest use) to sewage and garbage disposal facilities, penal and correctional facilities, homes for the mentally feeble, and so on—uses no “right thinking” person would want to reside within a stone’s throw of. What justified these six different use zones, which, at least according to the realty company’s unchallenged assertion, reduced the value of its parcel from $10,000 per acre to $2,500 per acre? Common-law nuisance. As the Court said,

the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. . . . A nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.

True, the Court did not hold that Euclid’s zoning districts were so discretely drawn that one use was sufficiently incompatible with its adjacent use so as to constitute an unreasonable interference with its neighbor. Such a claim was unnecessary because the plaintiff sought an injunction alleging the ordinance was unconstitutional on its face. And Euclid’s ordinance was close enough to nuisance prevention to leave for another day the constitutionality of its application.

Since Ambler Realty, there has been a sea of change in the zoning paradigm, so much so that a good portion of modern-day zoning

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6 See Ambler Realty, 272 U.S. at 380.
7 See id. at 384.
8 Id. at 387-88 (citations omitted). The Court then launched into a lengthy discussion that clearly reflects a bias in favor of the single-family homeowner. Not only did the Court recognize the obvious—that heavy industrial uses (the only kind back in 1926) were incompatible with residential use—but it also recognized that homeowners had to be protected from apartment dwellings and those who occupied them. The Court explained: “[T]he 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 . . . .” Id. at 397. The Court goes on to talk about how children in detached houses will lose their play areas and eventually there will be nothing left of single-family residences in the community. See id. at 394-95. One might speculate that the leeway the Court extended to local zoning regulations was prompted more by its belief that the values of those residing in single-family homes must be protected from foreign influences than by any respect the Court owed to the regulatory decisions of local governments. Euclid, in other words, used zoning correctly by pursuing ends the Court approved of—more evidence that Ambler Realty fits comfortably within the due process decisions of its era.

9 That occurred two years later in Nectow v. City of Cambridge, 277 U.S. 183 (1928) (declaring a Cambridge zoning ordinance unconstitutional as applied). Nectow was the last case in which the Court declared a local zoning ordinance unconstitutional as a violation of due process. See infra note 15.
would be unrecognizable to Mr. Justice Sutherland and the United States Supreme Court of 1925. Many modern zoning ordinances, particularly those enacted by communities with significant development potential, care little about whether apartment buildings might somehow steal the light and air from single family residences or whether factories will make life miserable for those living downwind. Developing communities worry about preserving wetlands, historically significant buildings, open space, agricultural land, views of the Pacific Ocean (environmental amenities), and/or ensuring a viable local tax base.

Obviously today's environmental zoning ordinances (if I may use that term) reflect the desire of those who dominate the political process, resident homeowners, just as the nuisance-based zoning ordinances seventy-five years ago reflected the desires of the same group of political constituents. The difference lies in the nature of the harms feared by the homeowners. But that is not the only reason for these new environmental zoning regulations. Many of us view land differently today than we did seventy-five years ago. No longer is land viewed through a frontier lens that assumed abundance. Land, particularly urban, suburban, and ex-urban land, is viewed by many as a scarce resource. Not only is land scarce, but it is also a commodity that can be consumed. And once consumed, it is forever lost; whatever enjoyment the public received from the land, whether it was the foliage, the scenery it afforded, or the wildlife it harbored, can never be retrieved. In other words, land, even land held in private hands, has taken on a public character. For instance, the Nollans may have had title to their southern California beach but it was not the Nollans' beach alone. The public, according to the California Coastal Commission, had a right to enjoy it as well. And the Justs' pristine lakefront property in northern Wisconsin was not reserved only for them to enjoy; Marinette County believed that all the residents abutting Lake Noquebay had a stake in the Justs' homebuilding plans. The examples go on.

As the focus of zoning has shifted from the effects of one use upon another's reasonable enjoyment to preserving the environmental character or amenities of a particular community or neighborhood, so too has the focus of constitutional litigation shifted from the substantive Due Process Clause of the Ambler Realty era (a clause protecting the individual's right to be distinct from the state) to the Takings

13 See Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).
Clause (a clause which presupposes that individuals owe a duty to the state) in the modern era. Much of the reason for this shift is the Court’s reluctance to invoke substantive due process. However, there are financial reasons as well. Landowners whose development goals are frustrated by local land use restrictions cannot be made whole by an injunctive remedy. After all of the negotiation, the re-submission of development plans, the judicial backlogs, and the like, the lag time between a developer’s purchase of the land and the hoped for injunction is too long. Modern-day developers want to be paid for their inability to build during this period. The Takings Clause permits this.

The question is whether the shift from substantive due process to the Takings Clause requires more than just a shift in the constitutionally prescribed remedy—damages or injunctive relief to just compensation—but requires us to rethink, as well, the respective roles of local governments and courts in local land use policy. There are those who claim that the answer is yes, that in some circumstances regulations which “down-zone” property, thus making it less valuable, should be presumptively invalid. My opinion is otherwise.

I.

There is no need to recount the history of regulatory takings. That would be well beyond the limited space allotted and has been well done elsewhere. Moreover, it has little to do with my point. One piece of history, however, does have something to do with my

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14 U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). Only one zoning ordinance was struck down by the Supreme Court between its 1926 decision in Ambler Realty and 1987, when the Supreme Court first used the Takings Clause to restrict local land use regulation and then only because its application was deemed to violate due process. See Nectow, 277 U.S. at 185. Takings litigation has been markedly more successful. In the last 14 years, the Court has struck down four land use regulations under the Takings Clause and has granted certiorari in another case, Palazzolo v. Rhode Island, 746 A.2d 707 (R.I. 2000), cert. granted, 121 S. Ct. 296 (2000).


16 See, e.g., City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999) (detailing the time from application to denial by the city as five years, five formal decisions, and 19 different site plans).

17 See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). The Due Process Clause would also support a damage action, but only if the ordinance itself is arbitrary and beyond reason, serving no legitimate public purpose. Moreover, assuming that such a finding was made, the city could pay damages, amend the ordinance, and force the developer to start the approval and litigation process all over again. According to First English, the compensation remedy not only gives damages for the period during which the community overregulated but would force the community to either approve the development plans or take the title to the property and pay the developer the property’s fair market value. See id. at 320-21.

point (which I promise to reveal shortly). The Court in *Lucas v. South Carolina Coastal Council*\(^{19}\) held that a land use regulation that reduces the value of one’s property to zero is presumptively a taking. The only way in which the presumption can be rebutted is to demonstrate that the restriction imposed by the regulation “inhere[s] in the title itself.”\(^{20}\) Translated, this means that only if the regulation mirrors the restriction imposed by common-law principles of nuisance will the regulating agency be excused from paying just compensation to the landowner. Legislative declarations of harm unrelated to that recognized by common-law nuisance that, in other circumstances (due process, e.g.), might be sufficient to justify the regulation are of no value or importance to the Court.

Why are legislative declarations of harm so heavily discounted? The *Lucas* Court is unclear.\(^{21}\) Possibly the Court believed that the right to compensation in the event of a taking is a fundamental right. Deference to legislative declarations is therefore unwarranted. But that reading would probably require overruling a decision decided two years after *Ambler Realty*, which upheld Virginia’s right, without paying compensation, to decide that the state’s apple crop was more valuable than its ornamental cedar tree crop, thus justifying destroying the latter to preserve the former.\(^{22}\) There is no hint that the *Lucas* Court questioned the continuing vitality of *Miller*. Moreover, reading *Lucas* as a formalistic fundamental rights case would not explain why the Court, just six years before *Lucas*, deferred to a city council’s adoption of boiler-plate, generic, and rather vague findings of harm, made without supporting evidence or even hearings in a case challenging a zoning ordinance that restricted the land available for “adult” entertainment on First Amendment grounds.\(^{23}\)

More likely, the Court, at least *sub rosa*, has in some part accepted a theory of political economics called public choice,\(^{24}\) a theory that ultimately places more trust in courts than in local policymakers. Adapted to local land use regulations, public choice theory posits that zoning ordinances promulgated either by small homogeneous communities or politically unaccountable state agencies (the South Caro-
lina Coastal Council, for example) that vary from the norm of zoning in that community should be presumptively invalid. I am not going to go into all the reasons supporting this conclusion, nor will I analyze the contrary literature; I have done that elsewhere. I will simply say that public choice adherents mistrust small homogeneous communities because they are controlled by what James Madison called factions, cohesive majorities which drown out minority voices. Land use regulations are particularly suspect because land is immobile—it cannot be moved to a more regulatory friendly jurisdiction. Moreover, many small local governmental units have little legislative authority over matters other than land use. Minority landowners thus have very little to trade for majoritarian support of their proposed land uses.

Public choice theory is, or at least was, a model, if you will, of political decision-making. With its apparent application in Lucas to land use regulations, however, the theory has taken on normative dimensions. I have no objection to fashioning new constitutional rules to account for changed circumstances; I ordinarily applaud efforts to do so. But even I have my limits. The new constitutional rule must either reflect a changed moral sense that requires an old constitutional rule be changed, lest respect for that rule, or (pardon a bit of hyperbole) maybe the rule of law itself, is put in jeopardy or the existing constitutional rule must have lost its empirical base. Brown v.


26 See Durchslag, supra note 10, at 464-67.

27 See THE FEDERALIST NO. 10 (James Madison).

28 Indeed, for purposes of the Takings Clause, Justice Scalia in Lucas distinguished between land use regulations and value-diminishing regulations affecting other forms of property. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992).

29 With one exception, Ohio townships do not possess general police powers. Rather, township powers are specific and are enumerated in various provisions of Title 5 of the Ohio Revised Code. The exception permits the voters of a township to adopt limited self-government—with the emphasis, however, on “limited.” Compare OHIO REV. CODE ANN. § 504.04 (West 1994), with OHIO CONST. art. XVIII, § 3 (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.”), and State ex. rel. Arey v. Sherrill, 53 N.E.2d 501 (Ohio 1944) (holding that all municipal corporations possess home rule powers whether or not they have chosen to adopt a charter pursuant to Article XVIII, § 3).

30 The textual assertion may sound familiar. The joint opinion for the Court in Planned Parenthood v. Casey, 505 U.S. 833 (1992), uses a somewhat similar rationale in asserting that stare decisis requires that Roe v. Wade, 410 U.S. 113 (1973), not be overruled. According to Justice O'Connor, the Court should not overrule cases like Roe "that have responded to national controversies" unless it can demonstrate that the outcome "rested on fundamentally false factual assumptions." Planned Parenthood, 505 U.S. at 861-62. Similarity of phrasing should not, however, mask my disagreement with the Casey joint opinion. Cases should be reconsidered.
Board of Education is an example of the first. Separate but equal simply became unacceptable as a matter of moral consensus, leaving the Court with little choice but to get rid of Jim Crow. Roe v. Wade may well be an example of the latter, although there are others, such as NLRB v. Jones & Laughlin Steel Corp. and other New Deal cases. Justice Blackmun’s opinion in Roe explicitly relies on then-recent medical evidence to support the Court’s trimester approach to a woman’s right to choose to terminate her pregnancy. Additionally, the joint opinion in Planned Parenthood v. Casey is in part justified by the fact that a woman’s right to choose to terminate her pregnancy is closely tied to her ability to fully participate in the economic, social, and intellectual life of the country.

I am confident that there is no moral outrage about the zoning regulations of small homogeneous communities even approaching that of the indignities of segregated public facilities, even in 1954. Moreover, what little empirical evidence exists with regard to whether the public choice model explains restrictive zoning ordinances is at best inconclusive. And (here comes my point) without a rather clear empirical basis for doing so, it would be improper to fashion a new constitutional rule of deference.

II.

I have decided to focus this paper more on the public choice/process side of the constitutional change equation than on the normative/moral outrage side. Consequently, my comments with respect to the latter will be limited. Richard Epstein has written (and this is and must be for sake of space a gross oversimplification) that any regulation, land use or otherwise, that extracts from the regulated party more value than it returns to the general public in the form of benefits is a taking. Professor Epstein opines that anything less is a simple wealth transfer from one person or group to another, what

and constitutional principles revised if they are wrong, whether the error stems from factual assumptions that were at the time or later proven false, or from flawed internal reasoning of the decision, or, as suggested in the text, from an evolution in the moral consensus, if any, that supported the old principle.

32 410 U.S. 113 (1973) (holding that a Texas law banning abortion violated the Due Process Clause of the Fourteenth Amendment).
33 301 U.S. 1 (1937) (holding that the National Labor Relations Act was neither an invalid exercise of Congress’s commerce power nor a violation of the Fifth Amendment’s Due Process Clause).
34 505 U.S. 833 (1992) (holding that stare decisis required that the essential holding of Roe v. Wade be affirmed).
35 See id. at 860-61.
Cass Sunstein calls a naked preference. And naked preferences are arbitrary and thus unfair. Therein lies the basis for a normative rule that when a majority of landowners wish to use government to preserve the environment they have become used to enjoying by preventing others, primarily outsiders, from enjoying those same benefits in that community, they should be prevented from doing so unless (a) the regulations are efficient (i.e., that the benefits to the residents outweigh the costs to the regulated landowners and potential housing consumers); and (b) the regulations are equitable (i.e., “the landowner should be able to recognize that . . . his own long term self-interest in avoiding the administrative costs of minor compensatory payments makes it fair to deny him compensation”).

If Brown is the paradigm of consensus on the moral justification (or lack thereof) for a particular set of regulations, then the attempt to preserve the rural character of a suburban or ex-urban community, to ensure that no individual can have exclusive rights to view the beauty of an ocean, or to limit the density of development so that wildlife habitats are not unduly disrupted, hardly rises to the same level of moral outrage as imposing significant burdens on individuals because of the belief that certain physical characteristics make those individuals unfit to associate with the rest of humankind. That is why the courts pay no attention to legislative declarations of justification for regulations that limit benefits on the basis of race, religion, gender, or sexual preference but care little for second-guessing legislatures when the same claim of discrimination is based on whether one is an optician or an optometrist, a lawyer or a debt adjuster, or a bakery employee or a bakery proprietor.

The only time zoning regulations even arguably approach the moral outrage of Jim Crow is when they deprive a landowner of all economic value of her investment: the facts of Lucas, in other words. The reason is that all regulation either does or certainly has the potential to reduce one person’s wealth and enhance that of another.

38 Ellickson, supra note 25, at 419.
39 See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (declaring a Colorado constitutional amendment prohibiting the state or any local political subdivision from adopting any law specifically protecting homosexuals from discrimination to be a violation of the Equal Protection Clause).
40 See Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (upholding a law that permitted only an optometrist or ophthalmologist to fit eyeglass lenses).
41 See Ferguson v. Skrupa, 372 U.S. 726 (1963) (permitting a law which allowed only lawyers to be debt adjusters).
42 But see Lochner v. New York, 198 U.S. 45 (1905) (striking down a law which limited bakery employees’ work hours).
That is why we regulate; it is certainly why we tax. Moreover, when we regulate in a way that removes all economic value from a person’s property, as South Carolina did in *Lucas*, there is no consensus that even reaches the moral indignation level of Jim Crow when other public values are at stake, as the *Lucas* dissents attest.43

But that is not the point, for the same lack of moral consensus could be said of how we view homosexuals. Yet the Court decided *Romer v. Evans*.44 The question is not whether we, as a polity, believe that an economic wipeout for environmental benefits is an arguable trade—Justice Scalia’s opinion in *Lucas* made a pretty good case that it is not. Moreover, most would agree that wholly unanticipated government regulations wiping out individual investment, which come out of left field, as it were, might be morally indefensible without the compensation remedy.45 But the Court’s takings jurisprudence is strangely lacking in expressions of moral outrage. In *Hawaii Housing Authority v. Midkiff*,46 the Court unanimously upheld the Hawaii Land Reform Act of 1967, which permitted the state to condemn large residential tracks of land in order to transfer ownership to current lessees. If ever there was a case for the exercise of moral outrage, *Midkiff* was it, for even though compensation was paid, the purpose was simply to redistribute oligarchic wealth to peasant tenant farmers. It was, in other words, the epitome of special interest, democracy-run-wild legislation. Justice O’Connor’s opinion recognized that compensation does not justify a simple governmentally dictated wealth transfer. But having paid lip service to that moral principle, the Court simply deferred to Hawaii’s determination that breaking the land oligopoly served larger public purposes. Indeed, the Court’s deference to the legislative determination that the condemnation was for a “public use” all but made the “public use” requirement of the Fifth Amendment non-justiciable.

The deference shown to the findings of harm by the politically accountable Hawaii legislature when compared to the lack of respect accorded the declarations of harm by the politically unaccountable

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43 See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1047-52 (1992) (Blackmun, J., dissenting); id. at 1071-75 (Stevens, J., dissenting). There is certainly nothing wrong, for example, with levying a tax that forces businesses to close, with whatever attendant loss of investment that entails. See *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974) (upholding a 20% gross-receipts tax on those who operate parking lots).


45 See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214-15 (1967); cf. Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999). Professor Levmore argues that there should be no takings compensation at all unless the takings claimant could not have reasonably expected to be regulated at all, whether the regulation was in place at the time she made the investment or not. This rule, Levmore argues, would encourage individuals to anticipate government regulations and take the necessary corrective action in advance. See *Id.* at 1657-60.

coastal commissions of California and South Carolina leads me to conclude that the Court's takings jurisprudence is grounded not in moral concerns but in the process-based suspicion about politically unaccountable bodies and the public choice assumptions regarding certain popularly elected legislative bodies which are particularly prone to factional rule. In those bodies, legislative declarations of harm, particularly in a land use context, are little more than self-serving, post hoc attempts to rationalize wealth transfers and are thus entitled to no judicial respect. Only the majesty of the common law of property and nuisance can justify a regulation that extracts too much value from a parcel of property. It is to the concerns of government by faction that I now turn.

III.

A.

I have already stated how public choice theory intersects with the Takings Clause, but it bears repeating. Public choice advocates posit that people act out of their own self-interest. They compromise only when necessary to achieve what they want and only when that given up is equal to or less than that received in return.\(^47\) Elected representatives, on the other hand, maximize their desires by getting reelected. And they do that by responding to the wishes of their constituents. Thus, if residents of a small suburban or ex-urban community feel their lifestyle being threatened by a large new housing development or a new shopping mall, they will demand that their elected representatives do everything possible within the boundaries of their legislative capacities to stop or limit the development proposals. The representatives will likely do so because they want to remain in the same seat after the next election. Moreover, the smaller the community and the more it is dominated by a single faction, such as homeowners in suburban and ex-urban communities,\(^48\) the less yielding the elected governors will be to developing counter pressures. And since land use issues dominate the political agenda of these communities, developers and dissenting landowners will find it very difficult to change anyone's mind because they have nothing to offer in exchange, except maybe an increased tax base. But the residents have already decided that an increased tax base, even if that produces enhanced services, is not worth the cost to their lifestyle. The prob-

\(^47\) This is certainly in part what Justice Holmes meant in \textit{Mahon} when he said that regulation is justified if it gives the regulated individual "an average reciprocity of advantage." \textit{Pennsylvania Coal Co. v. Mahon}, 260 U.S. 393, 415 (1922). Homeowners therefore might sacrifice the monetary advantage of selling their property to one who wants to build a shopping center on it because they understand that their neighbor is similarly restricted.

\(^48\) See Fischel, \textit{supra} note 11.
lem is exacerbated by the fact that dissenting property owners, because of a lack of exit opportunities, are pretty much stuck with the local community's views. To top it off, there is a process-based concern exacerbated by, but independent of, the public choice assumptions. More often than not, neither the person stuck (the developer) nor consumers of the ultimate product, be they potential homeowners or shoppers looking for Wal-Mart's bargain prices, reside in the community. Thus they have limited, if any, opportunity to have their views considered by local political decision-makers.

If things worked this way on a broad enough scale, those who would turn a model for explaining political behavior into a constitutional rule would have a strong argument. But the evidence that the a priori public choice assumptions described above explain land use regulatory behavior of local communities and/or their zoning boards is neither terribly strong nor overly persuasive. That is not to say that some local governing boards do not fit the model. I am sure there is plenty of anecdotal evidence to support that such governing boards exist. They may even represent a majority or at least a significant plurality. On the other hand, there is anecdotal evidence that would indicate zoning authorities with a far more objective and republican approach to local land use disputes. In other words, even if individuals who reside in the community act only out of narrow self-interest, their representatives do not follow in lock step. Moreover, several recent studies of rural zoning authorities suggest that the public choice model of land use decisions in small, homogeneous communities, even if demonstrable at some level, is not sufficiently universal to justify a new constitutional rule or even the Supreme Court's current level of distrust. I will briefly describe my own anecdotal evidence, limited though it may be. I will then note the conclusions of more scientifically conducted studies. While some support the public choice model, others do not. And taken as a whole, these studies tend to raise more questions than provide answers.

B.

In preparation for a talk in early November 2000, I collected approximately five months of newspaper articles about local zoning issues from the Chagrin Valley Times, a community newspaper that reports on the goings-on in southeastern Cuyahoga and southwestern and south-central Geauga counties. Most of the reported zoning

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49 It may cost me something, but I can move my money from stock investment A to stock investment B. My land, however, cannot be moved from township A to township B. Moreover, I am more likely to have my life savings tied up in my home than in Intel.

50 I chose that newspaper because it serves the community in which I live. For those unfamiliar with the local geography, the area described includes Cleveland's easternmost suburbs and exurbs (those too rural to meet or too proud to admit the suburban characterization).
disputes were rather routine: parking requirements for the only
downtown (more appropriately in-town) shopping area, bond issues
for sewer lines, disputes over commercial encroachments on residential
areas, and the like. With few exceptions, these were neighbor-to-
neighbor disputes, something very common to both urban and suburban
zoning boards and from which one can draw no conclusion regarding
whether zoning boards or village councils and township trustees resemble the public choice model. One exception concerned a
dispute between a shopping center developer and Bainbridge Town-
ship’s trustees regarding maximum lot coverage for a proposed new
shopping center.\footnote{See Joan Demirjian, Bainbridge Guide Plan Buried with Development, CHAGRIN VALLEY TIMES, July 6, 2000, at 16 (discussing Bainbridge plans for proposed shopping center); Joan Demirjian, Bye, Bye Bainbridge, CHAGRIN VALLEY TIMES, Aug. 3, 2000, at 1 (discussing an attempted annexation of the shopping center).} While the township ordinance limiting the shopping center to forty percent of the development parcel might be viewed by some as anti-development, it is hardly so severe as to constitute a taking. In addition, the amount of commercial development in the township scarcely reflects an anti-commercial development bias. If anything, it demonstrates that shopping centers in the town-
ship can operate very profitably on forty percent of their acreage. In
any event, the township and the developer eventually agreed upon an
acceptable lot coverage restriction, allowing the shopping center to
proceed and suggesting that the township trustees are perfectly will-
ing to compromise whatever anti-development bias they or their con-
stituents have.\footnote{See Joan Demirjian, It’s Official! Heritage Withdraws Annexation Petition, CHAGRIN VALLEY TIMES, Jan. 25, 2001, at 10.} Put differently, tax-base considerations prevailed
over concerns of over-urbanization and all its attendant problems.

Another land use dispute at approximately the same time is more interesting and more pertinent to the public choice model. The trustees of the township in which I live\footnote{See Joan Demirjian, Auburn Defends Plan for High-Density Zone, CHAGRIN VALLEY TIMES, Aug. 31, 2000, at 6 (discussing proposed township zoning amendment).} decided to encourage increased
development in the township by setting aside land for commercial
development and encouraging cluster home development. Their at-
ttempts were thwarted by none other than the Geauga County Planning Commission, which took the position that the good residents of the township could not possibly have wanted this kind of land use in their community.\footnote{Auburn Township could be the poster child for public choice theorists. The 2000 Cen-
sus reported that Auburn Township had a racially homogenous population (white) of 5,158 persons, up 56.4% (the largest growth rate in Geauga County and fifth largest in the five-county region). See Greater Cleveland, by the Numbers, CLEVE. PLAIN DEALER, Mar. 17, 2001, at 8A. The township covers a fair amount of land, most of which remains either farm land or small, older homes on large parcels. This very rural setting is punctuated by several (but increasing) housing developments scattered throughout the township in a more or less random way, most of which are, for want of a better term, “up-scale.”} The planning commission may have been right or
wrong in their assessment of local public opinion, but the commission did turn the public choice model on its head. The county, which appoints the planning commission and to which the commission is responsible, is far more heterogeneous than is the township. Yet it is the county that seems to be anti-development, or pro-NIMBY, if you prefer. And it is the township trustees who, according to the public choice model, should be jerking their collective knee to prevent development (at least if the commission is correct about the residents’ preferences). Yet, if one believes the county planning commission, the trustees are the ones who are seemingly ignoring the wishes of their constituents to promote what they perceive is the best long-term interest of the township as a whole.\footnote{The county, I believe, is wrong. The dispute over development occurred less than one month after a contentious election that saw two of the three township trustees replaced by those who, according to the county planning commission, had little idea of the township residents’ real desires. The two new trustees were not members of the same political party as the county commissioners.} No doubt one could dismiss all of this as terribly unscientific, underinclusive, and selective in the worst sense. But as the following sub-section would seem to demonstrate, my highly selective and limited examples may not be unrepresentative.

\section*{C.}

Two words describe the data on why local zoning authorities decide to do what they do: paucity and inconclusive.\footnote{I am not going to recite the literature pro and con on public choice and whether it comports with reality. That is well catalogued elsewhere. \textit{See} Durchslag, supra note 10, at 482-83, 487.} Apparent, however, is that the factors that determine whether the model resembles reality are far more varied than either the model or the argued-for constitutional rule would allow. Certainly local legislators are influenced by constituent desires. In a study of nine metropolitan areas, James Clingermayer concluded that local decision-makers are responsive to their constituents in land use decisions.\footnote{\textit{See} James C. Clingermayer, \textit{Quasi-Judicial Decision-Making and Exclusionary Zoning}, 31 URB. AFF. REV. 544 (1996). The nine metropolitan areas studied were Chicago, Los Angeles, Newark, Cleveland, Dallas-Ft. Worth, Denver, Portland, Orlando, and Atlanta.} Moreover, Clingermayer’s study, consistent with the public choice model, concluded that “a high rate of home ownership encourages exclusionary policies . . . that home values, income levels, and white population size are all significantly associated with exclusionary zoning.”\footnote{\textit{Id.} at 549. It is difficult to deny the influence of race in local zoning decisions. In an extensive study of 1,510 cities, towns, counties, and townships in the 25 major metropolitan areas of the United States, Rolf Pendall noted that “[z]oning . . . was invented in part to keep minorities away from non-Hispanic Whites” and that the most recent data on zoning decisions tend to support that zoning still has that effect. Rolf Pendall, \textit{Local Land Use Regulation and the Chain of Exclusion}, 66 J. AM. PLAN. ASS’N 125, 125-26 (2000). That may well have prompted the \textit{Ambler Realty} Court’s concern for the homeowner as well. \textit{See supra} note 8.} On the other
hand, Clingermayer also found that these same decision-makers are influenced by judicial rulings and the views of state zoning/planning agencies.

Clingermayer's finding of receptivity to the views of resident homeowners is largely confirmed by an extensive study of three Vermont and five New York rural towns. Leslie King and Glenn Harris found that the planning boards in these eight towns were far more "flexible and accommodating in their treatment of long-term residents of the community, particularly those with small, family projects" than they were to large, outside developers.\(^5^9\) In other words, these boards responded positively, by and large, to community pressure to preserve the rural character of their towns. It would be erroneous, however, to conclude that all towns were anti-growth. King and Harris found that two towns, one in New York and one in Vermont, were decidedly pro-growth and thus pro-developer. And two New York towns sought to manage growth rather than prevent or slow it.\(^6^0\)

It is also difficult to deny the public choice assertion that the size of the governing unit has something to do with the degree to which constituent desires are reflected in local land use decisions. In a one-year study of 2,290 rezoning applications in the City of Atlanta, Arnold Fleischmann concluded that "the image of rezoning as a highly charged political process controlled by public protest is misleading."\(^6^1\) In a large city like Atlanta, citizen participation was minimal and the decisions of the local zoning board regarding rezoning were strongly influenced, if not determined, by the recommendations of the professional planning staff. Fleischmann's findings appear to be supported, certainly inferentially, by Todd Donovan and Max Neiman, who studied the relationship between local political processes and local growth policies.\(^6^2\) Not surprisingly, the study found that direct democracy, such as initiative and referenda, was more likely than legislative enactments to be growth-restrictive. On the other hand, the converse is also true. Land use regulations drafted by legislative bodies are usually less restrictive and more encouraging of growth than the citizens' unfiltered desires. If nothing else, this study certainly raises questions about the strict agency assumptions of the public choice model.

\(^{5^9}\) Leslie King & Glenn Harris, Local Responses to Rapid Rural Growth: New York and Vermont Cases, 55 J. AM. PLAN. ASS'N 181, 185 (1989).

\(^{6^0}\) See id. at 186-87.


\(^{6^2}\) See Todd Donovan & Max Neiman, Citizen Mobilization and the Adoption of Local Growth Control, 45 W. POL. Q. 651 (1992) (discussing the increase land use controls and the effects of citizen mobilization).
Beyond these findings, a consistent pattern is difficult to discern. Two studies would suggest that neither homogeneity itself nor homogeneity coupled with a predominance of home ownership are reliable predictors of restrictive land use regulations. In a study of seventy-nine communities with populations ranging from 1,000 to 100,000 people, Stephen Pratt and David Rogers attempted to determine how population, economic growth, and organizational size explain the adoption of land use controls. They found (contrary to the Fleischmann study) that neither the size of a planning organization nor the existence of professional planners was important to adopting land use controls. Interestingly, the affluence of the community was also not important. Instead, the three most influential factors were (1) the number of annexations in the area (the more annexations, the more likely are land use controls); (2) the education level of the population (the more educated, the more likely are innovative and development-friendly land use regulations like planned unit zoning); and (3) the types of jobs the residents have (the more white collar jobs, the smaller the likelihood of restrictive land use regulations).

Finally, two studies of zoning decisions in rural Wisconsin appear to directly contradict the public choice model of local land use decisions. One was a study of four rural counties, one of which was populated largely by residents of incorporated yet small towns and villages under heavy development pressure, while the others were more rural and under little current development pressures. The most important concern of all four county boards was the health and safety of the residents—traditional police power concerns, in other words. Special interest politics, personal ties between the applicants and the members of the zoning committee, and the fear of a negative reaction from constituents played little role in the decisions. The same author, in a study two years earlier, reached much the same conclusion. Focusing on 100 rezoning decisions in the same four counties between March and August 1991, Last found that committee members heeded residents' concerns about proposed development projects only if "these objections were based on bona fide threats to health or property. . . . [The decisions were] based on case facts, hearing testimony, and especially [the committee members'] experience with prior deci-

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64 More likely than not, this is the result of pre-annexation agreements in which a developer agrees to land use regulations in exchange for city services such as water, sewer, etc.
65 See Pratt & Rogers, supra note 63, at 361.
66 See Donald G. Last, Understanding the Motives of Rural Zoning Decision Makers, 10 SOC'Y & NAT. RESOURCES 567 (1997).
Admittedly, one might argue that county zoning committees, even rural county zoning committees, may not be good examples from which to criticize the public choice model. They represent a wider constituency than does a town or township and, thus, are subject to a different set of constituency factors, not the least of which is that the greater size may mean less personal familiarity with citizen objectors and, more significantly, less reliance on any single zoning issue for reelection. But one does not know that a priori. One can only posit that that may be the case. And that is my point. Conflicting evidence, even if it leans in the direction of proving the public choice model, is nevertheless an insufficient basis for a federal constitutional presumption against the validity of local anti-development land use regulations. Federal constitutional presumptions operate like federal statutes—they apply a uniform standard nationwide. To use the words of devolution advocates, those who argue for a constitutional rule based on a public choice model must assume that “one size fits all.” That is an anti-federalism assumption, one that must be rejected based on current evidence.

CONCLUSION

If it is not already apparent, let me be clear. I am deeply suspicious of overarching explanatory theories that purport to decide or even explain decisions across a broad spectrum. Human behavior and motivations are far too complex for such simplicity. But these theories are useful as a way of beginning to think about complex problems, and, as long as they remain draped in policy judgment clothing, they are relatively harmless. Policy judgments are rarely if ever set in stone. Constitutional judgments are of a different order. They are set in stone, even if it is sandstone that can, over time, be rubbed away. Consequently, those committed to constitutional federalism as a sys-

68 Id. at 23.
69 Indeed Last's 1997 study found that the county zoning committees always denied rezoning applications where the town board objected to them, indicating a deference to local impact. See Last, supra note 65, at 570. On the other hand, one cannot be sure that the deference shown local town boards is not based simply on comity and a desire to avoid conflict between two political entities that have to work together consistently rather than knuckling-under to the selfish desires of a cohesive local citizenry. (More likely than not the county board and the town board are members of the same political party.) Nor can one be sure of the reasons for the town board's objections. These may or may not be based on constituent pressure. And even if the town board's concerns are based on constituent pressure, one doesn't know whether that was based only on NIMBY or whether more legitimate fears may have prompted the response. More studies might be illuminating.
tem of governance should think long and hard before embracing the public choice explanatory model as a constitutional *fait accompli*. 