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THE DEMISE OF PROPERTY LAW

E. F. Roberts†

The law of real property in this country... is now formed into a fine artificial system, full of unseen connexions and nice dependen-
dies; and he that breaks one link of the chain, endangers the dis-
solution of the whole.

Blackstone1

Fifteen hundred alleged violations of a local housing code in the Clifton Terrace apartment complex2 have finally undone the myth that residential landlord and tenant lore is a topic meriting treatment in a basic property course. No longer is it "law" that, absent an express covenant to the contrary, tenants suffer under an implied duty to make at least tenantable repairs.3 Shortly all landlords of residential units will function subject to an implied duty to keep their buildings in a state of repair commensurate with the standards set by building or housing codes.4 This will not be a duty landlords may avoid by express

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1 Perrin v. Blake (Ex. 1772), reprinted in 1 F. HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 487, 498 (1787).

2 Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970) (housing code violations held to justify tenants withholding rent because leases of urban dwelling units contain implied warranties of habitability the breach of which relieves tenants of their reciprocal duty to pay rent).

3 "In our judgment the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition." Id. at 1077.


Lest anyone doubt that Javins reflects the wave of the future, let him ponder the evolution of the implied warranty doctrine with regard to the sale of housing, summarized in Humber v. Morton, 426 S.W.2d 554, 558-62 (Tex. 1968).
agreements to the contrary.\footnote{5} No longer, moreover, are covenants in a residential lease independent of each other so that a landlord, even though he breaches his own promise to repair, can still expect the tenant to perform his promise to pay rent. "No repairs, no rent" is the name of the game today. Residential leases have become contracts pure and simple and merit first year law school treatment, if anywhere, in a general course in contracts.\footnote{6}

Residential leases, property-wise, are thus following the exodus already made by foxes,\footnote{7} themselves a topic of limited relevance to property law cast in an urban mold. In a similar vein, gifts are really the concern of the estate planner, and bailments the concern of the commercial lawyer. Bailments, after all, were the root of the notion of hire-purchase and perforce of conditional sales, which are the heart of our nationwide credit based merchandising system. Within commercial law, moreover, bailments could be studied not merely as history but as a viable alternative to the conditional sale. We are, after all, entering an era when we may prefer to rent our automobile\footnote{8} rather than buy it on the installment plan, particularly since our acquisition of "ownership" always seems to coincide nicely with the demise of the car.

What then of commercial leases? True, the ancient rules so peculiar to the law of landlord and tenant will probably carry on in this

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\begin{itemize}
\item \footnote{5} "We need not consider the provisions of the written lease governing repairs since this implied warranty of the landlord could not be excluded." Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1080 n.49 (D.C. Cir. 1970), \textit{citing, inter alia}, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).
\item \footnote{6} "In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract." Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970).
\item \footnote{7} See Pierson v. Post, 3 Cal. R. 175 (N.Y. Sup. Ct. 1805).
\item \footnote{8} See A. Toffler, \textit{Future Shock} 57-61 (1970).
\end{itemize}
field. Known rules in a game played among equals never grow archaic: only the games themselves lapse, and this game seems as popular as ever. Still, these rules play only a very minor role in the practice in this field, given the impact of sale and leaseback, rents fixed as a share of income, and massive shopping center promotions with mortgage financing the complexity of which boggles the imagination. Traditional landlord and tenant lore is merely an infinitesimal part of what has come to be "land financing," a contemporary kind of mercantile law which blends mortgage and tax law into a workable whole. Out then even with commercial leases.

After all is said and done, of course, the law insofar as it relates to the sale of residential dwellings would still seem to be the backbone of real property. Not so. The purchase and sale of the sacrosanct single family house is itself becoming just another aspect of the merchandizing syndrome which typifies this society. The home is just another commodity and is manufactured as such. Standardization and prefabrication are as much common denominators on suburban Sylvan Lane as on the nineteenth floor condominium unit in a center city flak tower. Indeed, there is no good reason why, to make merchandizing of housing as easy and cheap as other commodity sales, it could not be channeled into a commercial code of its own, replete with either a Torrens system or a complete turnover of the conveyancing trade to the title insurance companies.

Where does all this leave traditional property law? Kaputt. Commercial leases and private apartment house investments would become part of land financing, the sale or lease of independent dwelling units part of commercial law, and housing for everyone else who could not afford to pay for either a private apartment or house a part of the developing body of welfare law.

What has happened to justify this restructuring? Nothing much.

9 Game here means game, e.g., chess. That the rules of baseball and football change does not disprove the statement; it only illustrates how the market place corrupts.
11 See, e.g., Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965): "We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles . . . ."
12 Younger readers who do not know what a flak tower looks like are advised to consult the pictures contained in C. Ryan, THE LAST BATTLE 514 (1966).
15 See, e.g., R. Levy, T. Lewis & P. Martin, CASES AND MATERIALS ON SOCIAL WELFARE AND THE INDIVIDUAL ch. 7 (1971).
Real property became a commodity in 1660; it has only taken us to 1971 to see that an "estate in land" is not peculiarly the mark of the well-to-do requiring a lot of mumbo jumbo to acquire. The dollar has democratized, albeit at the price of vulgarization, the market in real estate. Whether in a used car lot or in a new subdivision, obscure rules and ceremonies which slow down turnover become anachronisms and are discarded. So it is with housing the middle class: commercial law will triumph over tradition.

Recently perceived is the palpable fact that dealing in this housing "market" is largely a privilege enjoyed by television's Patty Duke set. Many Americans must scavenge for an older house or trailer in order to "own" a home, put up with private apartments despite a conditioned preference for a house, or queue up for public housing of one sort or another. Here not only is it simply silly to cast law in terms of the estate system, but even to streamline it in terms of a commodity market is irrelevant. For many, housing has become a function of government, not of property law.

16 The Tenures Abolition Act, 12 Car. II, c. 24, 1 Eng. Rev. Stat. 725 (1660) converted all military tenures into socage tenures, abolishing the last incidents of wardship and marriage. Although socage duties were still due the king, the insignificant sums involved were not worth the trouble to collect. In practical effect, the Act made owners of landholders in the same way that holders of personal property were owners.

17 "To a foreign anthropologist land transfer in the United States would probably look . . . much like an aboriginal, ritualistic clambake." McDougal, Title Registration and Land Reform: A Reply, 8 U. Chi. L. Rev. 63, 65 (1940).

18 Between 1963 and 1969 the average new single family home increased in price from $19,500 to $27,900. U.S. Dep't of Commerce & HUD, Construction Reports—Characteristics of New One Family Homes: 1969, at 68 (1970). This price spiral is an old story by now. The median price of new single family homes insured by FHA doubled between 1950 and 1965, going from $8,300 to $16,600. President's Comm. on Urban Housing, A Decent Home 119 (1968). By first quarter 1971, the median price of all new single family homes had reached $24,300. U.S. Dep't of Commerce & HUD, Construction Reports—Characteristics of New One Family Homes: First Quarter 1971, at 1 (1971).

Take, for example, a house selling for $24,000. As one rule of thumb would have it, one should not buy a house worth more than twice one's annual income. Thus our buyer should be earning $12,000 a year. Yet in 1968 the median income of households was $7,700. 65 Bureau of the Census, U.S. Dep't of Commerce, Current Population Reports: Consumer Income 1 (1969).

What if a responsible person were able to find a lender willing to go 90% at 7% interest over a 20-year term? This would entail a debt of $21,600, and require a monthly payment of $167.47 to amortize it. As a rule of thumb, however, a mortgage banker wants his debtor's weekly takehome pay such that each month a week's pay will cover mortgage payments, property taxes, insurance, and utilities. Supposing that beyond the mortgage itself these other costs come to only $600 a year, this rule requires a weekly net income of $217. This means an annual net income of $10,850, which in most cases must push annual gross income over $12,000. The median house, therefore, exceeds the grasp of the median household.
Superficially, land-use planning appears to be the wave of the future. Real property law, insofar as it is a merchandizing surrogate is being subsumed under commercial law of one sort or another, and public housing has been taken over by welfare. The only thing left for property lawyers to do is to elect whether to recast themselves in the image of mercantile or welfare lawyers, or to adopt the garb of planners concerned with how land is used. Even the latter choice is illusory, however, because land-use planning itself tends to be an intellectual auxiliary servicing the commodity market. Zoning, for example, justifies itself largely as a device to prevent the sudden deterioration of land values by excluding gas stations on a residential street, thereby protecting the value of the liens of mortgage bankers who deal in ninety-percent-of-value loans. Then again, when it is not a mortgage security protection device, zoning finds its raison d'etre as a prophylaxis keeping out undesirables, spelled “poor” or “nonwhite,” from the suburban community. Urban renewal, it goes without saying, has simply been a gigantic subsidy to center city mercantilists paid for mainly by the lower orders whose housing, pitiable as it may have been, has disappeared without being replaced.

Blackstone may have been right after all. Clearly enough we have meddled and the edifice is collapsing. We could not help but meddle, however, because the medieval intellectual system had long outlived

20 See NATIONAL COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 211-17 (1968) [hereinafter cited as AMERICAN CITY].
21 Instead of a grand assault on slums and blight as an integral part of a campaign for “a decent home and a suitable living environment for every American family,” renewal was and is too often looked upon as a federally financed gimmick to provide relatively cheap land for a miscellany of profitable or prestigious enterprises.

Id. at 153.

[It has in itself failed to help the poor and near-poor who make up most of those who have been displaced. They have not been rehoused on the urban renewal sites, nor has the total volume of public housing been adequate to meet the needs created by demolitions, deterioration, and population growth.

Id. at 167.

Although it might seem nothing more than simple civic prudence to sweep away unsightly hovels and let the land of the affluent city be covered with good buildings, urban renewal has itself turned out to be a civic carbuncle. It has been very harmful and unfair to people dislodged from the slums; it has resulted in substantial benefits to families or business which hardly require subsidies; and it appears to create new slums where there were none before. This dubious bounty is obtained at prodigious expense, making the whole enterprise a kind of sequel to Alice in Wonderland. There must be a rational way to achieve slumless cities, but urban renewal is not it.

W. SMITH, supra note 19, at 480-82 (footnote omitted).

This is not a peculiarly American problem; the Swedes, too, have awakened to what is going on. N.Y. Times, July 22, 1971, at 13, col. 1.
its time. But here we reach the ultimate paradox, because if the phoenix represented by land-use planning is going to rise from the ashes we must return to medieval notions for inspiration.\textsuperscript{22}

\section*{I}

\textbf{THE ESTABLISHMENT OF SUBURBIA}

Our legal machinery has become little more than an engine for protecting the few owners against the necessities, the demands, or the hatred of the mass of their dispossessed fellow-citizens.\textsuperscript{23}

When most of today’s judges and lawyers were acquiring their education in the law, substantive due process was exposed as a heresy that had to be rooted out if the Republic was going to survive.\textsuperscript{24} In the early years of the New Deal a Supreme Court dominated by opinionated old men wrought havoc with the federal effort to regulate the economy by giving an unnecessarily broad sweep to the tenth amendment.\textsuperscript{25} Meanwhile, state efforts at social legislation had already been emasculated by the Supreme Court reading its own substantive notions of 	extit{laissez faire} into the due process clause of the fourteenth amendment.\textsuperscript{26} Ultimately, of course, this led to a tremendous row, the upshot of which was that the Court survived by beating a strategic retreat. Federal authority over the economy was assured by rediscovering the true breadth of the commerce clause.\textsuperscript{27} The state legislatures were unleashed.

\textsuperscript{22} See text accompanying notes 223-52 infra.
\textsuperscript{23} H. Belloc, \textit{The Servile State} 85 (2d ed. 1913).
\textsuperscript{24} For an urbane but quick summary of this era, see A. Mason, \textit{The Supreme Court} ch. 5 (1962). For a standard liberal gloss, see A. Schlesinger, Jr., \textit{The Politics of Upheaval} pt. III (1960). For an axe-wielding assault on the Court as “the establishment” symbol of that era, see F. Rodeck, \textit{Nine Men} ch. 7 (1955).
\textsuperscript{26} E.g., Lochner v. New York, 198 U.S. 45 (1905).
\textsuperscript{27} E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). Chief Justice Marshall had initially given a very broad reading to the notion of the authority to regulate commerce.

\begin{quote}
It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.
\end{quote}

\begin{quote}
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). And what was commerce?
\end{quote}

Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in
when the fourteenth amendment was found to be without any overtones of substantive due process.\textsuperscript{28} Indeed, the whole lesson was summarized in a new litany celebrating judicial restraint, reduced by Mr. Justice Brandeis to the first law in a nutshell.\textsuperscript{29}

True enough, \textit{laissez faire} never operated independently of politics; tariffs, for example, played a positive role. But still the myth persisted that "the economy" functioned in its own right. There was, therefore, a significant change in outlook as the result of the New Deal imbroglio.\textsuperscript{30} The function of government has since been seen to be that of maintaining the private economy on an even keel by way of fiscal, monetary, and tax devices.\textsuperscript{31} Government's role, however, remained that of ballast: the New Deal's newly won authority was not employed to socialize the economy. Planning and control of the day-to-day economy were taken over by the large corporations, many of which now exceed in wealth whole nations. Thus while government maintains the economy in equilibrium, the decisions as to what the public shall eat, drink, wear, and otherwise consume, both physically and intellectually, are made by the managers of the so-called private sector.\textsuperscript{32} Indeed, opin-

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By numerous and complicated measures, sometimes connected with the policy of taxing and spending and sometimes standing alone, manufacturing, commercial, financial, and agricultural interests, once treated as primarily private and as forming the chief economic basis of politics, were made dependent upon politics to an extent which in this respect signalized a breach with the past. \textit{C. Beard, The Economic Basis of Politics} 95 (1945) (emphasis in original).
\bibitem{note31}
Sources which have inclined me to this view include J. \textit{Galbraith, The New Industrial State} (1967); M. \textit{Harrington, The Accidental Century} (1965); G. \textit{Means, The Corporate Revolution in America} (1962); A. \textit{Shonfield, Modern Capitalism: The Changing Balance of Public and Private Power} (1965).
\bibitem{note32}
The individual serves the industrial system not by supplying it with savings and the resulting capital; he serves it by consuming its products. On no other matter, religious, political or moral, is he so elaborately and skillfully and expensively instructed. \textit{J. Galbraith, supra} note 31, at 37-38. \textit{See also M. Harrington, supra} note 31, at 28. Cf. \textit{H. Marcuse, An Essay on Liberation} 11 (1969):

The so-called consumer economy and the politics of corporate capitalism have created a second nature of man which ties him libidinally and aggressively to the commodity form. The need for possessing, consuming, handling, and constantly renewing the gadgets, devices, instruments, engines, offered to and imposed upon the people, for using these wares even at the danger of one's own destruction, has become a "biological" need . . . .

\end{thebibliography}
tionated young men have recently discovered as a by-product of a misconceived war, that "the system" is something of a fraud since it turns out to be either a form of corporate socialism or a corporate state.

The death of substantive due process did not, of course, license the several states to abolish free speech; at least the fundamental rights guaranteed by the Bill of Rights required the respect of state level jurisprudence. What was unleashed was the states' authority to regulate their economic infrastructure as long as they did not trample upon basic civil rights. Interestingly enough in light of the expanded commerce power, the states' exercise of their police power was tolerated even when commerce was affected, at least where the state regulation was reasonable and there was no clear showing of prior federal occupation of the particular field. As a practical matter, therefore, the param-

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33 The phrase is Mr. Ralph Nader's. Discussion, in LAW AND THE ENVIRONMENT 248, 274 (M. Baldwin & J. Page eds. 1970) (remarks of R. Nader). Yet the whole thrust of Nader's own work to me betrays belief in a return to a "true" laissez faire in which the best products resulted from honest competition guaranteed by real government controls ensuring that competition. Although his fervor makes him the ideal leader of an emotionally charged counter-reformation, experience would seem to indicate that you cannot recreate what was. To me at least, there remains a tragic aura around him which I should think would make sensitive people feel some concern for what he can do over the long run with his extraordinary energy and charisma.

34 The American Corporate State today can be thought of as a single vast corporation, with every person as an involuntary member and employee. The Corporate State is a complete reversal of the original American ideal and plan. The legal system is not primarily concerned with justice, equality, or individual rights; it functions as an instrument of State domination, and it acts to prevent the intervention of human values or individual choice.


Instead of government planning there is boardroom planning that is accountable to no outside agency: and these plans set the order of priorities on national growth, technological innovation, and, ultimately, the values and behavior of human beings. If the contours of the economy and the society are being shaped in a few score boardrooms, these decisions, so far as the average citizen is concerned, are in the lap of the gods.

Unlike their predecessors, neither of these critics encourages one to become active in reforming "the system"; a sense of a Weimar hopelessness pervades their work. Professor Reich avoids any real consideration of a revolutionary alternative by proposing a lollipopt Utopia, which might cause a cynic to wonder in view of the potential juvenile market whether he was practicing some of the sins he inveighed against. See, e.g., Novak, The Greening of a Con-III-Man, COMMONWEAL, Dec. 4, 1970, at 245. Professor Hacker is content to mimmick Spengler and actually seems to enjoy wallowing in the general decline of it all.


The commonly held view that the growth of the national commerce power
eters of the states' police powers were enormously expanded as a result of the confrontation between the Court and the New Deal.

Police power, the general authority of any sovereign to legislate, was defined traditionally in terms of health, safety, and morals. These were ends toward the protection of which the exercise of legislative authority was justified. Even so, the means adopted to achieve these ends had to be reasonable ones. For example, a state might require everyone to be vaccinated to protect the public health. It could not, however, require that the vaccine be applied with a hot branding iron when a simple scratching technique would suffice. Thus, in its protection of public health, safety, and morals, the police power also protected general welfare. All of this sounds innocent enough, except that in the trend towards exercising authority over the economy, the term "general welfare" better represented the object sought by the reformers than did the more limited health-safety-morals triad. Gradually, almost imperceptibly, the trinitarian litany was transposed into a fourfold one; that is, the police power could be exercised to protect the public health, safety, morals, and general welfare.

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has completely displaced state power is far from true. To be sure, the Supreme Court has undertaken the role of guardian of the national market against obviously discriminatory and parochial efforts to re-erect the type of trade barriers that marked the preconstitutional era. But the Court has increasingly recognized the danger of leaving large areas of commercial activity free from all regulation, which would be the inescapable result if Congress cannot or will not act and the states are forbidden to act.


37 "According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).


40 Cooley, for example, spoke of the police power in terms of "the comfort, safety, or welfare of society." T. Cooley, A Treatise on the Constitutional Limitations 577 (1868). Even so, a reading of his chapter on the police power illustrates a law and order notion of general welfare in which the thrust is a negative one. To protect the general welfare, nuisances can be outlawed. Police power is very much a "police" power. Id. at 583. Compare with this Mr. Justice Harlan's similarly restrictive attitude, supra note 37. Even as late as 1950, a very fine casebook carved up due process in terms of "health, safety and morals" versus economic (i.e., general welfare) cases. N. Dowling, Cases on Constitutional Law ch. 9 (4th ed. 1950).

Arguably, "general welfare" as an end in itself entered the intellectual picture obliquely. The federal government can tax, inter alia, to "provide for the . . . general Welfare of the United States." U.S. Const. art. I, § 8. The unreconstructed Court refused to accept the use of the taxing power, justified in terms of the general welfare, to create a farm subsidy mechanism. United States v. Butler, 297 U.S. 1 (1936). In this instance the money to create a subsidy fund with which to bribe farmers not to grow surpluses was
The licensing of government to enter the realm of economic legislation was also accompanied by a general trend towards the exercise of judicial restraint. According to this doctrine, judges should not test the reasonableness of a police power measured in terms of what they would have voted for had they been members of the legislature. Instead, the question became whether a reasonable legislator could, in light of the data available to him, believe that the legislation was necessary to protect the public health, safety, morals, and welfare, and whether the means were reasonably adapted to achieve those ends. Thus, Mr. Justice Holmes was proved right when, before the New Deal precipitated transvaluation of attitudes, he had protested that the fourteenth amendment did not require adherence to Mr. Herbert Spencer's *Social Statics*.

Consider now how another Holmes thesis was being incorporated into the new majoritarian creed:

I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State . . . .

Given the demise of substantive due process, the full impact of this idea remains to be seen.

What relevance does all this have to land-use planning? Everything, but be patient. Reflect for a moment that the police power itself was once defined in terms familiar enough to land-use planners:

This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, *Sic utere tuo ut alienum non laedas*, which being of universal application, it must of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.

Raised by a tax on processors. Mr. Justice Roberts writing for the majority, could not see how money raised from A to pay B was a "tax." 297 U.S. at 61. Indeed, for "over a century there had been doubt whether the general welfare phrase added to the powers of Congress." B. Wright, *The Growth of American Constitutional Law* 185 (1942). Be that as it may, Roberts concluded that the Congress could not employ the taxing power to regulate agriculture, a subject over which the Constitution did not give the central government authority. 297 U.S. at 69. Then came Helvering v. Davis, 301 U.S. 619 (1937) and Steward Mach. Co. v. Davis, 301 U.S. 548 (1937), which effectively reversed *Butler*, Roberts by this time having switched sides. Congressional judgments about what was conducive to the general welfare were now controlling. Even so, the Constitution's general welfare clause pertaining to federal taxes—now treated as a source of legislative authority—is not the same thing as general welfare describing the authority contained in the police power and used as a catchall phrase to summarize the health-safety-morals triad.

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Beyond the maintenance of mere law and order, therefore, the police power ideally aimed to establish among the citizenry "those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."44

In order properly to appreciate these nuances, consider the dialectic employed by the unreconstructed Court in Village of Euclid v. Ambler Realty Co.,45 the "open sesame" of land-use planning in this country. The idea that local governments could limit the height of buildings was sustained on the basis, *inter alia*, of *Welch v. Swasey*.46 That case had justified the limitation in terms of safety, because, among other things, the theoretical height to which buildings could be erected according to modern technology might outstrip the capacity of fire fighting equipment to deal with them in the event of a fire.47 The idea that nonresidential uses could be excluded from residential districts was first shown in *Euclid* to be merely a natural progression from traditional nuisance law theory which had always abhorred "a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."48 Then the application of these new regulatory controls was justified in terms of health and safety. Industry, after all, presented the threat of conflagration and heavy traffic.49 Parasites and near nuisances anyway, apartment houses blocked out the sun so as to destroy the healthful environment of residential playing fields, while the traffic they generated was a threat to safety.50 Stores, moreover, only invited idlers and loiterers when they did not breed rats, mice, fleas, and ants.51 Even so, the unreconstructed Court sharply divided in sustaining zoning.52

One wonders, however, whether in an earlier period the Court would not have sustained zoning without all of this intellectual huffing
and puffing about health and safety. Would not zoning’s contribution to public convenience and prosperity have sufficed? Consider, for example, *Chicago, B. & Q. Ry. v. Illinois ex rel. Drainage Commissioners.* This controversy arose when a railroad company was ordered to widen at its own expense the passage under one of its bridges so that a drainage authority could widen and deepen the channel that ran through the aperture. As a practical matter, the railroad company would have had to demolish its old bridge and build a new one, a fact which led it to view this order not as a mere regulation but as a taking of property without just compensation. The railroad lost the case because it was said that the bridge crossing was held subject to the paramount right of the public to widen the watercourse as needed. Mr. Justice Harlan gave the case a very modern twist when he suggested that, since the state held its powers over waterways in trust, it could not have granted the company permanent rights in the watercourse even if it had tried.

What is significant about the case is that the lawyers attempted to argue that, conceding the public authority to regulate watercourses, those regulations had to be rooted in the public health or safety. A drainage project which merely involved increasing the supply of tillable land, argued the lawyers, did not come within the ambit of the police powers; hence no regulatory order could be made by the authorities. Harlan demolished this thesis.

We cannot assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety . . . . The foundations upon which the power rests are in every case the same.

Intriguingly enough, Harlan had already authored a dissenting opinion in *Lochner v. New York,* albeit one devoid of the rhetorical flourishes that made Holmes’s dissent therein so memorable. More intriguing

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53 200 U.S. 561 (1906).
54 This has become a big issue in land-use litigation. See, e.g., *St. Paul v. Chicago, St. P., M. & O. Ry.,* 413 F.2d 762 (8th Cir.), cert. denied, 396 U.S. 985 (1969).
56 200 U.S. at 592-93.
57 198 U.S. 45, 65 (1905).
58 Holmes wrote a peculiarly fussy concurring opinion in *Chicago B. & Q. Ry.* He emphasized the point that when it came to widening and deepening the channel itself, as distinct from widening the bridge opening, the public authorities would have to pay the bill. 200 U.S. at 595. Again Holmes was quick on the intellectual trigger when it came
still, it would appear to be a safe wager that Euclid would not have been a cliffhanger had the Harlan thesis about general welfare not been aborted by the focus on substantive due process between 1917 and 1934.59

Even after the demise of substantive due process, the general welfare basis of the police power made a somewhat slow comeback. In California, for example, a prohibition against building beachfront homes set on piles was sustained in terms of morals, lest at night the obscure areas under the houses invite fornication.60 Still, at the very least, the New Deal controversy did confirm that states could concern themselves with the economic well being of the community. General welfare tended to make its reappearance on the jurisprudential stage in the garb of economics. When New Orleans, for example, imposed architectural controls on the Vieux Carre, regulations which did not better the public health and safety, and certainly were not directed at improving the public morals, the litany ran like this:

The preservation of the Vieux Carre... is a benefit to the inhabitants of New Orleans generally, not only for... sentimental value... but for its commercial value as well, because it attracts tourists and conventions to the city... 61

This “tourist trap” rationale has subsequently been repeated elsewhere.62

Aesthetics, as a subject for governmental concern in its own right, became firmly established with Berman v. Parker.63 In this case the owner of a sound building located in a blighted area of Washington, D. C. contested the authority of a local public agency to condemn the building as part of an urban renewal scheme. The controversy came to be phrased in terms of the scope of the police power, condemnation being treated merely as the tool, selected in lieu of a regulatory approach, to attack the problem of urban blight.64 This being the case,
the usual grounds of health, safety, and morals would seem to have justified the exercise of government authority, to say nothing about the general welfare approach. Indeed, if judicial restraint had been exercised, the only issue would have been whether in order to expedite the reconstruction of a blighted area it was reasonable to include for seizure even the occasional sound buildings within the project area. Mr. Justice Douglas, however, chose the occasion to concoct an expansive thesis.

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. . . . 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. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. . . .

. . . The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

The full results of these sentiments remain to be seen.

Long before the environment became a popular topic, the New Jersey courts proved to be peculiarly sympathetic to the notion of an unspoiled countryside. Their opinions tended to wax so eloquent about the rustic countryside that they remind the reader of the legendary Whig judges who concocted Fletcher v. Rylands in a pique against the

powers which a state may exercise over its affairs. . . . We deal, in other words, with what traditionally has been known as the police power. . . .” Id. at 31-32. “For the power of eminent domain is merely the means to the end.” Id. at 33.

65 This issue arose in Euclid, the question being whether, if it was reasonable to exclude industry as a danger to health and safety, it was reasonable to exclude all industry since some might not present these hazards. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-89 (1926).

66 348 U.S. at 32-33.


incursions of industry into the English countryside.\textsuperscript{69} Comparing the joys of the countryside with the densely packed conditions in the cities, the New Jersey judges went on to approve devices making it more difficult for the lower orders ever to enjoy the selfsame countryside.\textsuperscript{70} Done in the name of protecting the public health\textsuperscript{71} or in the name of preserving the character of the affected communities,\textsuperscript{72} it was also designed to preserve property values. The suggestion that these decisions involved a healthy dose of invidious social discrimination simply did not register.\textsuperscript{73}

\textit{Berman v. Parker} proved a Godsend to these judges. Palisades Park, a miniscule bedroom community just across the George Washington Bridge, enacted an ordinance totally excluding motels from its environs, notwithstanding that the town did have boarding houses and commercial areas. The danger of motels was clear: "The environmental characteristics of many of our beautiful residential communities are such that the establishment and operation of motels therein would be highly incongruous and would seriously impair existing property values."\textsuperscript{74} Fortunately a new day had dawned to save these "environmental characteristics" and the resultant tax base:

We are satisfied that at long last conscientious municipal officials have been sufficiently empowered to adopt reasonable zoning measures designed towards preserving the wholesome and attractive characteristics of their communities and the values of taxpayers' properties.\textsuperscript{75}

Needless to say, the authority relied upon was Mr. Justice Douglas.\textsuperscript{76}

Sad to relate, this was not the end of the story. The New Jersey court went one better and approved, upon the basis of these precedents, the exclusion of a trailer park from a potential industrial zone in a


\textsuperscript{70} Minimum bulk requirements were fixed in Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952). In Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952), five acre minimum lot area zoning was approved.

\textsuperscript{71} 10 N.J. at 173, 89 A.2d at 697.

\textsuperscript{72} 11 N.J. at 205, 93 A.2d at 384.

\textsuperscript{73} Certain well-behaved families will be barred from these communities, not because of any acts they do or conditions they create, but simply because the income of the family will not permit them to build a house at the cost testified to in this case. Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 182, 89 A.2d 693, 701 (1952) (dissenting opinion).

\textsuperscript{74} Pierro v. Baxendale, 20 N.J. 17, 30, 118 A.2d 401, 408 (1955).

\textsuperscript{75} Id. at 29, 118 A.2d at 408.

\textsuperscript{76} Id. at 28, 118 A.2d at 407, citing \textit{inter alia}, Berman v. Parker, 348 U.S. 26 (1954).
community ripe for urban population overspill.\textsuperscript{77} Trailer parks were treated to the same "near nuisance" technique employed against apartment houses in Euclid,\textsuperscript{78} their very existence being said to constitute a threat to the public health, safety, and morals, and to cause an unenumerated "host of problems."\textsuperscript{79} The opinion was built upon twin pillars. First, exercising judicial restraint, the court noted that it is not the function of judges to pass on the wisdom of zoning ordinances.\textsuperscript{80} Second, the court held that each community is free to plan its own social, economic, and political infrastructure under the umbrella of the general welfare.\textsuperscript{81}

This time the majority logic was subjected to a searching critique by two dissenters. As to the shibboleth "judicial restraint," they quoted extensively from a perceptive analysis by Norman Williams, including:

> The leaders of liberal-democratic thought are all too often so confused with abstractions ("health, safety, morals and welfare," "character of the neighborhood," etc.), so full of respect for local autonomy, and so fearful of judicial review generally, as to be unable to understand the implications of what is going on. It has not been generally realized that in many instances the problems arising in this field of constitutional law are closely akin to those involved in civil liberties law, and call for similar attitudes toward the exercise of governmental power.\textsuperscript{82}

The dissenters suggested that zoning was concerned with physical planning which, while it might achieve some salutary social results, was not the same thing as a blanket license to engage in social planning. It was fallacious to believe that general welfare meant whatever a given municipality says that it means, "regardless of who is hurt and how much."\textsuperscript{83} No matter how broadly one conceives the notion of general welfare, it never authorized a community to erect an "isolationist wall on its boundaries."\textsuperscript{84}

\textsuperscript{78} See text accompanying notes 48-50 \textit{supra}.
\textsuperscript{79} Id. at 246, 181 A.2d at 136-37.
\textsuperscript{80} Id. at 242, 181 A.2d at 134.
\textsuperscript{81} Id. at 247, 181 A.2d at 137.
\textsuperscript{83} 37 N.J. at 262, 181 A.2d at 145.
\textsuperscript{84} Id.
While on the eastern fringes of Camden-Philadelphia the New Jersey courts were extrapolating this gloss of exclusionary zoning, a similar social iron curtain was descending on the western front. The little hamlet of Paoli marks the end of the Main Line, the prestigious string of suburban communities which over the years developed out of Philadelphia. By the 1950's, the exodus from center city had reached even Paoli, and new construction was going on apace north and south of it. Just south of Paoli and south of Lancaster Pike which paralleled the railway line, Easttown Township responded by enacting one acre minimum lot area zoning along its northern boundary, notwithstanding the fact that smaller lot sizes were in vogue across several streets in the adjoining township. Ultimately, of course, a developer wanted to build on smaller scale lots commensurate with those of the homes across one of these streets, and the issue was joined.

The validity of this one acre zoning was sustained in Bilbar Construction Co. v. Easttown Township. The zoning pattern across the street was ruled irrelevant since in that respect each township was a master of its own fate. Upon this inward looking postulate was constructed an intellectual edifice dedicated again to the twin pillars of judicial restraint and the expansive scope of local authority licensed by the notion of general welfare. Indeed, the majority apologized for not having previously given enough consideration to the general welfare approach, the importance of which lay "partly in the fact that it admits of aesthetic considerations when passing upon the validity of a zoning ordinance." Needless to say, Berman v. Parker figured prominently in this exercise.

Handed down the same day, moreover, was Best v. Zoning Board of Adjustment, an opinion pari materia because it rounded off the exegesis in Bilbar. The issue in this case was simple enough: was the petitioner entitled to a zoning variance authorizing her to convert her mansion into a rooming house even though when she purchased the premises there was nothing unique about them and the area was zoned exclusively for single family residences? Conventional wisdom would

86 The "Main Line" is a four lane railway track which in better days carried the Broadway Limited overnight to Chicago. Paoli is significant simply because it is the terminal point for the two outside tracks used by commuter trains into Philadelphia.
87 "It is plain enough that zoning restrictions in one township cannot be permitted to control or impinge upon the zoning regulations which a contiguous township may see fit to adopt." Id. at 68, 141 A.2d at 854-55.
88 Id. at 72, 141 A.2d at 856-57.
89 Id. at 73-74, 141 A.2d at 857.
have disposed of this case in a trice with a resounding negative. Cognizant of this, petitioner attempted to outflank conventional wisdom by arguing that police power restraints could not be imposed upon her property to inhibit her decision-making capacity, because a rooming house did not entail a threat to the public health, safety, or morals. Thus the constitutional issue was created: whether the general welfare standing by itself would support the authority of government over her parcel. Rising to the bait, the majority pointed out that this issue had already been affirmatively decided in Chicago, B. & Q. Ry. v. Illinois ex rel. Drainage Commissioners. Lest this case appear obsolete, the majority invoked the recent New Jersey motel decision to demonstrate its relevance. Even so, the coup de grace was delivered with yet another elucidation of Berman v. Parker.

What is interesting is the attack on the majority opinions by a conservative member of the court. Justice Bell concurred in the result in the Best case, but categorized the exegesis therein about general welfare as obiter dicta and doctrinally nothing less than a “violation of all the fundamental rights guaranteed by the Constitution” because it licensed nothing less than the exercise of an “unlimited police power.” Working into good form with his dissent in Bilbar, Bell categorized the developments thus far rehearsed as “the most pernicious doctrine ever enunciated in Pennsylvania.” These regulations, after all, were nothing more than a stratagem designed “for the benefit of only the rich or well-to-do and are not for the general welfare.” Nowhere did the Constitution sustain the regulation of private property for such a purpose.

Read in light of the contemporary conventional wisdom, Bell’s opinion must have caused many a snicker. Yet at least one highly respected conservative commentator predicted that the Bilbar result was not the last word on the subject of exclusionary zoning techniques. According to Professor J. G. Stephenson:

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91 Id. at 109-10, 141 A.2d at 609. The court noted that the case involved self-inflicted economic hardship and that a variance is not a matter of right when the hardship is not unique or peculiar to the property itself, but rather one imposed on the entire district.
92 Id. at 114, 141 A.2d at 611.
93 200 U.S. 561 (1906).
94 393 Pa. at 115, 141 A.2d at 612. See text accompanying notes 74-76 supra.
95 Id. at 116-17, 141 A.2d at 612.
96 Id. at 120, 141 A.2d at 614 (emphasis in original).
98 Id.
The causes of conflict still exist. There is pressure from people desiring to move from the city to the suburbs, which creates a demand for suburban housing. . . . On the other hand there is the resistance of the suburban community which sees itself about to become urbanized, fears the prospect of increased taxation, and seeks to defend itself against an invasion by incompatible elements. Incompatibility ranges over a vast front, and includes economic, ethnic, aesthetic, cultural and even political aspects.100

Perceptively he suggested that allowing each suburban community to exploit the concept of general welfare in order to gather the force of the state behind its precepts of what the character of the community should be was licensing invidious discrimination. Stephenson reasoned this was because, although “the American people have advanced politically to the stature of a nation, they have not advanced culturally beyond the condition of a tribal society.”101

Both Bell and Stephenson, interestingly enough, were treating their readers to a healthy dose of none other than Holmes’s whipping boy, Mr. Herbert Spencer.102 After sometime reading the full texts adverted to here, consider Spencer’s notion:

[T]he duty of the state is to protect, to enforce the law of equal freedom, to maintain men’s rights—or, as we commonly express it, to administer justice.

. . . .

. . . . [W]henever the state begins to exceed its office of protector it begins to lose protective power.103

More germane to the purposes at hand, however, we are told by another of Spencer’s few modern day fans how that sage demonstrated that “no man . . . has ever been wise enough to foresee and take account of all the factors affecting blanket-measures designed for the improvement of incorporated humanity.”104 Some contingency, he says, always arises to give the measure a turn entirely foreign to its original intention.

The full irony of this cannot be appreciated without referring to the optimistic notions about the “general welfare” being purveyed at

100 Id. at 49.
101 Id. at 55.
102 Text accompanying note 41 supra. Quaere, did Holmes not have a great deal in common with Spencer? It is said that Spencer concluded that “since struggle between individuals is the plainest fact of evolution, society must do nothing to prevent that struggle.” C. BRINTON, ENGLISH POLITICAL THOUGHT IN THE NINETEENTH CENTURY 231 (1933).
103 H. SPENCER, SOCIAL STATICS 228, 249 (Schalkenbach Foundation ed. 1954). “But he was subject to insomnia, and we find him asserting the right of the State to prevent by law the unnecessary blowing of locomotive whistles.” C. BRINTON, supra note 102, at 228.
the national-level. In effect, the New Deal had replaced the old individual effort, *laissez-faire* capitalism with a new form of capitalism in which large, collectivized interest groups competed with each other and through which a political equilibrium of sorts was established because each group held the countervailing power to checkmate the others.\footnote{See A. Berle, *Power Without Property: A New Development in American Political Economy* (1959); J. Galbraith, *American Capitalism: The Concept of Countervailing Power* (1952); T. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (1969).}

This new equilibrium, however, depended upon a steady state of affluence, largely engineered through demand planning by the large corporations. Consumption and credit were the keys to this utopian never-never land wherein even the poor would be swept up in a spiral of ever increasing abundance.\footnote{See J. Galbraith, *The Affluent Society* (1958). See also R. Heilbroner, *The Making of Economic Society* (1962): "It was the tacit assumption—indeed, the obvious fact—that virtually every family was in some way directly engaged in the economic process which assured a general dispersion of income among all members of the community. But in the highly automated world toward which technology appears to be moving us, this universal participation in the economic process can no longer be taken as an unchallengeable assumption." Id. at 234 (emphasis in original).}

A central feature in this affluence was the single family house situated in suburbia. The substantive content of television, that is to say soap operas and situation comedies, demonstrated a suburban bias, while the commercial messages deliberately instilled it. Only Ralph Kramden lived in a deteriorating city flat, and everyone was in on the fact that he was a boob of the first rank. While the media conditioned the appropriate responses,\footnote{This has aptly been called “the private socialization of the public taste.” M. Harrington, *supra* note 31, at 28.} the federal government contributed its share by subsidizing expressways leading out into the suburbs\footnote{[C]ommunities making choices among alternative transport investments do not confront prices which properly reflect costs. The simple fact is that highway construction is heavily financed by the federal government . . . . The municipality is further shielded by the state, which matches federal grants and provides additional financing for other roads without federal participation. No such munificence is extended to mass transit systems or commuter railroads . . . . This naturally sets up a bias in favor of highways. Chinitz, *Introduction to City and Suburb: The Economics of Metropolitan Growth* 3, 39-40 (B. Chinitz ed. 1964).} tilting the income tax in favor of the homeowner,\footnote{Int. Rev. Code of 1954, §§ 163(a), 164(a)(1); Tress. Reg. §§ 1.163-1(b), 1.164-1(a)(1), 3(b) (1971).} and expediting the availability of mortgage credit.\footnote{See A. Axelrod, C. Berger & Q. Johnstone, *supra* note 10, at 99-102.} Meanwhile, the technological society's equivalent of the closure movement had caused a black migration into
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center city, a fact which only heightened the urge on the part of whites to join the exodus from it. Clearly, the effort at local levels to exploit "general welfare" as a license to practice exclusionary zoning was on a collision course with the nationally instilled urge of the masses to enjoy suburban status as part of their engineered needs. Only a Marxist could really appreciate the beauty of this contradiction.

The picture was complicated even more when affluent suburban communities began to zone themselves to accommodate polite industrial and commercial operations. While these enterprises escaped the high taxes of center city, they also provided a tax bonanza for the communities to which they moved. Indeed, considering the tax base, it made

111 Enclosure of grazing fields used by the English peasantry, although it began in the days of the Tudors, gathered momentum early in the industrial revolution and threw thousands of rural dwellers into urban residence. See, e.g., J. Bowle, England: A Portrait 150 (1966). Notice the similarity in this country since 1900:

While the proportion of Negroes to the total population has remained roughly the same since the turn of the century (between 10 and 12 percent), a major distributional transformation has taken place. Between 1940 and 1966 a net total of 3.7 million nonwhites left the South for other regions of the United States.

112 "Between 1950 and 1960 some 100,000 of Newark's white residents moved out, and Negroes and Puerto Ricans moved in." N.Y. Times, July 25, 1971, § 6 (Magazine), at 36.

113 For example, modern industrial plants and research laboratories are usually physically attractive. They can provide substantial amounts of property tax revenue, and they require very little in the way of local public services. In par-
far more sense to zone for these enterprises than for medium priced housing, because company headquarters buildings obviously do not need to be sent to school. Today, the real growth in commercial and industrial research park development, and perforce jobs, is in suburbia rather than in central city. If the economy was becoming suburban, then exclusionary zoning practices were acquiring a dual aspect of evil. They were excluding the moderate income people who could afford modest housing from ready access to work, and they were actually cutting the poor, not so likely to have cars, out of the picture entirely.

Inevitably, of course, this phenomenon was noticed in professional and popular literature. As a matter of fact, Father Theodore Hesburgh some ten years ago was complaining that "[t]here are the unspoken but very effective conspiracies of builders, real estate brokers and good neighbors who are downright arrogant in preserving the blessings of democracy for their own white selves alone." Mr. Justice Douglas himself discovered that "[r]eal estate brokers and mortgage lenders are largely dedicated to the maintenance of segregated communities." More interesting, however, the attack on exclusionary zoning was joined by some home builders, who discovered themselves subject to a "land-use squeeze" and who came out in favor of "higher-density development." This latter development should cause one to proceed cautiously in evaluating the "liberal" awakening of conscience.

What then had been accomplished under the caption of general welfare as perceived from the suburban perspective? In the New York metropolitan area, ninety percent of the vacant land was zoned for single family residences on lots of at least one-quarter acre, while two-

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114 [A] community composed of moderate-value houses will have a limited tax base, but its families are likely to be relatively young, with large numbers of school-age children . . . . For example, suppose that a community is spending, net of state and federal aid, $500 for each public school pupil, raised from the property tax. If the school property tax rate is 2 per cent of the market value of property, the school taxes on a $20,000 house will be $400. If the typical family has two children in the public schools, there will be a fiscal "loss" of $600 on each such house.

Id.

115 See text accompanying note 137 infra.


120 HOUSE AND HOME, July 1971, at 59 (editorial).
thirds was pegged at least at one-half acre. In Connecticut, more than half the vacant residential land in the whole state was zoned for lots of one to two acres, while almost forty percent of the residential land within mass transit commuting distance from New York City was zoned for four acres. At the same time, houses built on lots of one-quarter acre were selling for a minimum of $25,000 in the New York region; those on one-half acre lots in New Jersey for more than $30,000; and those on an acre or more in southwestern Connecticut for over $45,000. All of this caused two observers to conclude that "perhaps 25 percent of the population, earning $12,500 or more, can afford to buy houses built on this land." Thus what had begun in the context of liberalism resulted in a system of law at the local level which must have evoked a wry smile from the spirit of Hilaire Belloc.

II

THE EXPOSURE OF SUBURBAN BIAS

The civil power must not serve the advantage of any one individual, or of some few persons, inasmuch as it was established for the common good of all.

Leo XIII

It was Easttown Township which, in National Land & Investment Co. v. Easttown Township Board of Adjustment, provided the basis for a judicial response to this inherent contradiction. After Bilbar Easttown was subjected to even more overspill pressure from Philadelphia because a new expressway had opened up residential development north to Paoli. Thus an ever expanding circle of development began to move south to intersect the arc moving west along the Main Line itself. The local response was to upzone the community from one to as much as four acres. As viewed from Easttown's perspective, this strategy was designed to maintain the character of the community. Apart from some commercial activity along the Lancaster Pike, the township was predominantly a bedroom community. Whereas sixty percent of the citizens resided on twenty percent of the local area, the remaining forty percent occupied eighty percent of the area. Restrictive covenants al-

121 American City 214.
122 Id. at 215.
124 Id. at 525.
ready fixed a full ten percent of the township into a matrix of four, five and ten acre lots. Thirty-five percent of the township was left one acre, thirty percent was raised to four acres, while another seventeen percent was hiked to two acres.

This is not to say that the township had stopped growing. Public school population, for example, had been approximately 500 in the academic year 1955-56, but had risen to roughly 1,000 in 1963-64, and projections anticipated a figure in the 1,700 range by 1969-70. Building permits were being issued at the rate of one hundred per year. Even so, the southern half of Easttown was still held in large parcels; it was this semirural area that was being preserved by the imposition of the four acre requirement. The zoning ordinance had the effect of locking large parts of the township into a posture more appropriate to a Person v. Post\textsuperscript{127} scenario than to the land hungry appetite of a satellite community.

The ordinance was not without police power rationalizations. With the township still largely dependent upon septic tanks, large lots were said to protect the public health. Safety too was a factor, since the quaint, winding roads in the estate areas of the township were categorized as inadequate for modern traffic. Finally, proponents of the scheme contended that it preserved "an area of great beauty containing old homes surrounded by beautiful pasture, farm and woodland."\textsuperscript{128} Admittedly the area was "a very desirable and attractive place in which to live."\textsuperscript{129} Throughout the township one could detect Berman v. Parker providing the intellectual background music.

Inevitably confrontation arose when a developer wanted to construct a subdivision in the one acre mode. Suffice it to report that the ordinance was declared unconstitutional. The sewage argument was not credited\textsuperscript{130} and the road argument was demolished.\textsuperscript{131} The roads were adequate enough for the time being and the township could not rely on zoning as a new version of mortmain "to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring."\textsuperscript{132} The major thrust of the opinion was aimed at obliterating the notion that zoning was so readily available as a simple-minded device by which to preserve the character of a community.

\textsuperscript{127} 3 Cal. R. 175 (N.Y. Sup. Ct. 1805).
\textsuperscript{128} 419 Pa. at 529, 215 A.2d at 610.
\textsuperscript{129} Id.
\textsuperscript{130} Apparently sewage was brought into the equation after the upzoning was already accomplished and, even then, would only ultimately become a problem if the whole township were actually developed on a one acre basis. Other means than zoning, however, were available to attack this problem—\textit{i.e.}, establishment of a sewer system.
\textsuperscript{131} 419 Pa. at 526-28, 215 A.2d at 609-10.
\textsuperscript{132} Id. at 528, 215 A.2d at 610.
If the township really wanted to create a greenbelt, it behooved it to condemn one rather than to create one via the regulatory mode. If the township really wanted open space, then it should amend its zoning ordinance to encourage cluster development. If the town really wanted to preserve historic homes, then it should busy itself zoning their immediate environs and not the whole southern portion of the community. Finally, if the township really wanted to preserve its character, it should think again because a maze of even four acre homes ultimately would not be compatible with its own pseudo fox hunting characterization of itself.

Warming to the theme, Justice Roberts condemned fiscal zoning:

The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid.

Thus was Easttown thrown open, at least to those who could afford a house built in a residential development with a one acre minimum lot requirement.

More recently another, and much more significant, exclusionary zoning case was decided in Pennsylvania. This time miniscule Nether Providence Township, zoned predominantly residential, concocted a zoning ordinance which, although it did not explicitly prohibit multi-unit apartment buildings, failed to provide for them. According to the local authorities this lapse should not have caused any concern since one could always ask for a variance. Unwilling to undermine the restraints designed to limit variance-inspired leakage in zoning matrices, the majority in Girsh Appeal did not accept this “initially appeal-

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133 Fiscal zoning seeks to exclude . . . any proposed development that might create a net financial burden and to encourage development which promises a net financial gain. Fiscal zoners try to strike a balance so the tax revenue which new development will contribute to local coffers will at least pay for the public services which that development will entail. . . .

The most serious effect of fiscal zoning is the spate of exclusionary practices relating to residential development. The aim, of course, is to keep out the lower income groups, and especially large families which require significant public expenditures in education, public health and welfare, open space, recreational facilities, police and fire, and the like. . . . Usually nobody bothers to ask where the families who are being excluded should live.

American City 19.

Instead the majority reemphasized the National Land tenet that zoning could not be exploited in order to avoid the pressure of increasing population and the resultant need to expand the public service infrastructure. Going beyond the generalities of National Land, however, the majority took judicial notice of the place suburbia had come to occupy, not only as a massive bedroom, but also as a center for employment.

Figures show that most jobs that are being created in urban areas, including the one here in question, are in the suburbs. ... Thus the suburbs, which at one time were merely "bedrooms" for those who worked in the urban core, are now becoming active business areas in their own right. It follows then that formerly "outlying", somewhat rural communities, are now becoming logical areas for development and population growth—in a sense, suburbs to the suburbs.  

Once again judicial notice was introduced into the appellate procedure to expose the local legislature's lack of wisdom and good sense.

The real thrust of Girsh was illuminated by the majority's protestations of what it did not hold:

It is not true that the logical result of our holding today is that a municipality must provide for all types of land use. This case deals with the right of people to live on land, a very different problem than whether appellee must allow certain industrial uses within its borders.

Notwithstanding this jurisprudential protestation of modesty, it is arguable that, relative to living accommodations, the case did hold that a zoning scheme had to be premised on a philosophy of pluralism.

One might like to push the Girsh result to the point that it stood for the following proposition: resolved, that every zoning ordinance must provide places within the community for a full spectrum of classes, be they the five acre rich or the publicly subsidized poor in a crowded highrise. Internally scrutinized, Girsh does not go anywhere near this extremity. First, the developer who penetrated the exclusion-

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136 Id. at 240, 263 A.2d at 396.
137 Id. at 244, 263 A.2d at 398 (citation omitted).
138 The use of judicial notice by judges in the process of striking down legislation underwent a period of intellectual unpopularity when Mr. Justice Butler invoked a cracker-barrel homily in order to nullify an early marketing reform statute. Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924). In the same case Mr. Justice Brandeis's dissent exemplifies how judicial notice of facts could be employed to sustain the reasonableness of the legislation. After judicial restraint became the order of the day, most cases involved the use of the technique to sustain legislation.
139 437 Pa. at 245-46, 263 A.2d at 399 (emphasis in original) (footnote omitted).
ary wall wanted to construct "two nine-story luxury apartments,"\textsuperscript{140} hardly the answer to the majoritarian needs of nearby overcrowded Philadelphia. Second, the opinion tossed the ball back to the legislature, suggesting that enclaves of exclusionary zoning might be appropriate if in the suburban arc equally attractive areas were thrown open to settlement by lesser mortals.\textsuperscript{141} Given the suggestion that \textit{Bilbar} was also an invitation to the state legislature to become responsive to the demands of pluralism,\textsuperscript{142} this last throwout may have a dubious net value in the market of the politically practicable.

These reservations are not the end of the matter. Three justices dissented. The ultimate result, therefore, turned upon the reaction of now Chief Justice Bell. He preferred, understandably enough, to say, "I told you so":

One of the most important rights . . . which (at least until recently) has differentiated our Country from Communist and Socialist Countries, is the right of ownership and the concomitant use of property. The only limitation . . . was "sic utere tuo tu alienum non laedas" . . . .

Then along came zoning with its desirable objectives. However, desirable or worthwhile objectives have too often been carried to an unfair or unwise or unjustifiable extreme . . . .\textsuperscript{143} The result in \textit{Girsh} thus depended upon both a "liberal" response to urban woes and a "conservative" urge to limit again the authority of government to matters of the public health, safety, and morals.

Interestingly enough, the leading trade journal in the building field took up the banner of pluralism and condemned zoning as a tool all too readily exploited "to prevent new housing for anybody but the upper middle class and the rich."\textsuperscript{144} At the same time the \textit{Clearinghouse Review} suggested how to attack exclusionary zoning in an article in which the first caption brazenly proclaimed "Substantive Due Process."\textsuperscript{145} After this burst of enthusiasm, however, cooler heads began

\textsuperscript{140} Id. at 240, 263 A.2d at 396.
\textsuperscript{141} Id. at 245 n.4, 263 A.2d at 399 n.4.
\textsuperscript{142} I do not believe that the decision in the \textit{Bilbar} case means that one acre zoning is now permissible in Pennsylvania. I believe that the Supreme Court of Pennsylvania has simply said that this is a question which should be resolved in the first place by the General Assembly, which should also determine whether individual municipalities are competent to deal with zoning problems which now transcend county lines.

Stephenson, \textit{supra} note 99, at 50.
\textsuperscript{143} 437 Pa. at 246, 263 A.2d at 399-400 (concurring opinion).
\textsuperscript{144} \textit{HOUSE \& HOME}, May 1970, at 73.
to express some reservations. As for the builders, their "motivation is obvious; if required lot sizes can be sharply reduced, they can often sell the smaller lots for almost as much as larger lots, and thus receive a fine windfall—but with no benefit to those seeking inexpensive housing."\textsuperscript{146} As for loud hurrahs about the "liberal" legal crusade to force smaller lot zoning, the evidence does not support the notion that lot size zoning itself was a major factor in preventing cheaper housing.

There are several reasons for this. First, just because land normally costs so much less than enclosed space (\textit{i.e.}, housing), minimum-lot-size requirements inevitably have a far lesser impact in raising housing cost than do minimum-building-size requirements. Second, the implicit assumption in most attacks on large-lot zoning is that the price of land increases more or less \textit{pro rata} with the size of the lot—and, conversely, decreases \textit{pro rata} for smaller lots. . . . [W]ithin any given community, the cost of lots does not vary directly with their size, or anywhere near that. . . . Moreover, a countervailing factor may be at work. In many communities, more expensive subdivision improvements are required in more intensive subdivisions, frequently starting somewhere in the range from a half an acre to one acre. \textit{If such requirements are imposed, the result may even be that, as developed land, smaller lots are actually more expensive than larger lots.}\textsuperscript{147}

If, therefore, the pot has begun to boil, the plot has also begun to thicken insofar as the lower orders are concerned.

It is possible, of course, to anticipate a revival of substantive due process as attacks are made on suburban zoning.\textsuperscript{148} Taking at face value the flair for "doctrine" as opposed to "holdings" which now predominates in America one could suggest that the "law" now requires that each community must devise a zoning ordinance which anticipates the development of the community along the lines of residential pluralism.\textsuperscript{149} What is required, after all, is "a balanced community—[one] providing shelter for all economic levels that may wish to live in the


\textsuperscript{147} Id. at 496 (emphasis added). \textit{See also} American City 226:

Generally speaking, if zoning is changed to permit higher densities—more units per acre of land—the price per acre in most areas of strong market demand can be expected to increase. . . .

It is not surprising, therefore, that zoning is subject to enormous pressures by landowners and developers and that outright corruption is far from rare.

\textsuperscript{148} Thus the National Committee Against Discrimination in Housing has filed suit in Oyster Bay, L.I., the ACLU in Black Jack, Mo., and the UAW in Mahwah, N.J. \textit{See} Patterson, \textit{supra} note 117, at 284-85; N.Y. Times, June 15, 1971, at 1, col. 5; \textit{see also} N.Y. Times, June 23, 1970, at 33, col. 5.

\textsuperscript{149} This is precisely what the Girsh dissenters saw inherent in the majority result. 427 Pa. at 251, 263 A.2d at 402 (dissenting opinion).
community, for those who will teach in their schools, clerk in their supermarkets, and work in their industrial plants. As a matter of fact, this statement does not go far enough, because merely zoning areas for lower income groups does not necessarily mean that the housing will be built. Nay, the emerging truth is that no community's land-use plan is valid unless it programs pluralistic development and unless it includes a government-sponsored program to produce housing at the lower reaches of the spectrum should market forces prove unresponsive.

III
SUBSTANTIVE DUE PROCESS

Zoning law is public law... The treatment of zoning law as a branch of local real estate law rather than as a branch of constitutional law... is largely due to the unwillingness of the United States Supreme Court to see zoning as regulations affecting people and not just as regulations affecting land.

R. F. Babcock

Interest in the notion of substantive due process recently has been revived, particularly since Griswold v. Connecticut. That was the cause célèbre in which a divided Court cut down state legislation making it a crime to dispense birth control data even to married couples. The problem was that conventional wisdom fabricated during the New Deal days required a policy of judicial restraint since, morals and general welfare being involved, the wisdom inherent in the legislation was not of judicial concern. In point of fact, this very proposition...
was the whole thrust of Mr. Justice Black's dissent, rehearsing as it did the now ancient battle fought and won to exorcise substantive due process from the nation's jurisprudence.

Likely enough the justices who did the deed were embarrassed by it, because no coherent rationale emerged from their ratiocinations. To avoid the role of super-legislature, Mr. Justice Douglas chose to employ the obvious truth that in no event did the New Deal reconstruction ever license the several states to trample upon free speech and other basic rights. The problem was to discover a fundamental right in the Bill of Rights upon which to hang this idea. Never at a loss for originality, he discovered a "zone of privacy created by several fundamental constitutional guarantees" into which the offending legislature had trespassed. Perhaps more relevant to the effort to restructure the constitutional apparatus to the contemporary needs of the common man was Mr. Justice Goldberg's resurrection of the ninth amendment, but more of this anon.

Instead of trying to make too much of Griswold, it might be safer to chalk it up as an instance where substantive due process, however disguised, had to be revived momentarily in order to solve an awkward problem which the local authorities lacked the character to resolve themselves. Fluke that it was, the case is still instructive if one accepts Douglas's "zone of privacy" as something more than the product of expediency. That is, the notion of "privacy" as an extremely significant counter on the intellectual gameboards involves not merely ad hoc improvisations but a plan to consider "rights" in functional terms suitable to this age. Functionalism goes beyond substantive due process. Whereas substantive due process involved trying to graft the ideology of laissez faire onto the Constitution, functional reinterpretation entails actually recasting that document's concepts of personal rights into a meaningful form notwithstanding the nature of the economic realm.

In a sense the notion of "privacy" entered the dialectics of constitutional law obliquely in a series of cases concerning procedural due process. Thus, still reflecting New Deal postures, Mr. Justice Frankfurter could refuse to impose upon the state courts the federal rule excluding illegally obtained evidence, even though "one's privacy . . . is basic to a free society." Yet in 1961 Mr. Justice Clark, himself a

158 381 U.S. at 507.
157 See text accompanying note 35 supra.
159 381 U.S. at 485.
158 Id. at 487 (concurring opinion).
product of the New Deal experience, could affirm the turnabout enunciated in \textit{Mapp v. Ohio} and insist that “we can no longer permit that right to remain an empty promise.” Somehow the Court had come to perceive a new environment which demanded change notwithstanding the convention of judicial restraint. Even though the Court later eschewed the intention to promulgate any “general constitutional ‘right to privacy,’” it ultimately returned to the notion that there does exist a “fundamental . . . right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”

What happened was that the Court had sensed the old Horatio Alger myth was dead. One could no longer claim some remote homestead or hope to market a better mousetrap in order to create his own economically independent fiefdom; a private world was no longer a viable alternative to the public one. Farming had become collectivized and invention corporatized. Indeed, economic independence had become an illusion; everyone’s status was dependent upon the new governmental-industrial behemoth. Thus, as Professor Reich perceptively pointed out, status had become the new property which, if any freedom was to be possible, had to be protected by some new notions of due process. Even the poor began to acquire some rights in their status as a class entitled to welfare.

The point is that “privacy” is not merely a fourth amendment right to be free from police raids. It is much more encompassing, because what it really entails is the creation of a substitute for the old economic independence, in the form of a set of ground rules defining a property right in status in the new system. Barring the articulation of such a right, only the hippies are free when they opt to drop out of the system; but for most of us this avenue is not readily available and even for hippies appears to have become largely illusory.

\begin{enumerate}
\item \textsuperscript{162} 367 U.S. 643 (1961).
\item \textsuperscript{163} \textit{Id.} at 660.
\item \textsuperscript{164} \textit{Katz v. United States}, 389 U.S. 247, 350 (1967).
\item \textsuperscript{165} \textit{Stanley v. Georgia}, 394 U.S. 557 (1969).
\item \textsuperscript{166} \textit{Reich, The New Property}, 73 \textit{Yale L.J.} 733 (1964).
\item \textsuperscript{168} Drug merchants are profiting off them, while the fashion industry simulates their garb and makes their life style “fashionable” to emulate in straight society. \textit{Quaere}, is Marcuse all that wrong when he posits that we suffer from “repressive tolerance?” H. Marcuse, \textit{An Essay on Liberation} (1969).
\end{enumerate}
It would follow, of course, that if lawyers have a "right" to their licenses, the poor have a right to a decent roof over their heads. Interestingly enough, very much like the alleged right of every man to a decent environment, this latter right has largely been limited to exhortation\textsuperscript{169} and left by the judiciary to the legislature for implementation.\textsuperscript{170} Even so, the question ultimately will have to be decided by the Court. This is not merely to invoke again the observation that every question in America finally becomes a legal one, but rather to suggest that the secret to America is that the Court, in the last resort, performs the function of a House of Lords and contributes to the macrocosmic political restructuring necessary to keep the system responsive to fundamental change in the socio-economic sphere. Law in America is high politics pure and simple, albeit carried on by a self-perpetuating elite in their own language.

How, then, is exclusionary zoning going to be brought within the parameters of this functional restructuring? Most likely the equal protection concept is the Archimedean fulcrum by which restructuring may yet be engineered. Enough cases have already coalesced to sustain the proposition that planning and zoning decisions calculated to implement invidious discrimination violate the equal protection principle.\textsuperscript{171} Going further, authority has begun to accumulate which at least recognizes that under equal protection

\begin{quote}
{\textit{it may well be, as matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups.}}\textsuperscript{172}
\end{quote}

Add to this, in the area of black-white relations, the notion that the community must provide to the poor the same level of municipal ser-

\textsuperscript{169} E.g., Housing Act of 1949, § 2, 42 U.S.C. § 1441 (1970): "The Congress declares that the general welfare and security of the Nation ... require ... a decent home and a suitable living environment for every American family ... ."; National Environmental Policy Act of 1969, § 101(c), 42 U.S.C. § 4331(c) (1970): "The Congress recognizes that each person should enjoy a healthful environment ... ."

\textsuperscript{170} The Court has not really uttered a definitive word about zoning since Euclid, while its record relative to the environment can only be described in terms of an intellectually undignified rout. See Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971), and note particularly the dissent by Mr. Justice Douglas (id. at 505).


vices as it provides to other groups,\textsuperscript{173} and one has, without too much imagination, the basis for an argument that the community must zone to provide areas where low cost housing can be built and, if it is not provided by the market, to construct the requisite housing itself.

The problem, however, is that exclusionary zoning does not merely exclude blacks; it excludes even middle income whites.\textsuperscript{174} At issue are not merely questions of race but of class. Given human nature, racial prejudice is at least understandable; but given an overwhelmingly white society which has spent billions on public education to instill the democratic ethos, this element of class discrimination must give one pause. The time is ripe to examine several cases in which the Court has had an opportunity to deal with these questions within the context of purported democratic values.

In 1964 California voters overwhelmingly approved the enactment of an amendment to their constitution making legally sacrosanct the right of any person in his absolute discretion to sell or lease his property to anyone.\textsuperscript{175} In \textit{Reitman v. Mulkey}\textsuperscript{176} the Supreme Court of California condemned the measure on grounds of equal protection violation. The United States Supreme Court agreed\textsuperscript{177} in light of the finding below that the measure was designed to “encourage and significantly involve the State in private racial discrimination.”\textsuperscript{178}

The four dissenters\textsuperscript{179} were unable to see how the state, by adopting a neutral stance when it came to private prejudice, could have run afoul of the fourteenth amendment. Without positive proof that it had been inspired by any invidious purpose, an enactment which was “simply permissive of private decision-making . . . and one that has been adopted in this most democratic of processes”\textsuperscript{180} should not have been struck down, at least on federal grounds.\textsuperscript{181} What is particularly inter-

\begin{itemize}
  \item \textsuperscript{173} Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).
  \item \textsuperscript{174} N.Y. Times, Aug. 16, 1971, at 35, col. 4.
  \item \textsuperscript{175} Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.
  \item \textsuperscript{176} CAL. CONST. art. 1, § 26 (1964).
  \item \textsuperscript{177} 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966), aff'd, 387 U.S. 369 (1967).
  \item \textsuperscript{178} 387 U.S. 369 (1967).
  \item \textsuperscript{179} Id. at 376. The majority included Justices Warren, Douglas, Brennan, White, and Fortas.
  \item \textsuperscript{179} Justices Black, Clark, Harlan, and Stewart.
  \item \textsuperscript{180} 387 U.S. at 391.
  \item \textsuperscript{181} Discernible in the dissent is a hint that the California judges were making new federal constitutional law to strike down the enactment because they could not find any of their own law with which to do it.
\end{itemize}
esting about the dissent is the notion that the state can be neutral about anything, an intellectual idiom suitable perhaps to Spencer's era but hardly compatible with today's totally involved governmental structure.182

The real pyrotechnics were caused by Mr. Justice Douglas's concurring opinion. Apart from repeating Father Hesburgh's old condemnation of real estate brokers, mortgage lenders, and builders who conspire to maintain suburban segregation,183 he raised the crucial point184 that leaving the zoning function to local groups that practice racial discrimination is the very kind of state action condemned in Shelley v. Kraemer.185 Within the parameters of Reitman's issues this observation was dictum; but, it is difficult to see how this thesis, unlike Douglas's language in Berman v. Parker, could be exploited by exclusionary zoners to achieve their own ends.

More recently, the post-Warren Court was called upon to decide James v. Valtierra,186 another case originating in California. This time the controversy arose over a state constitutional amendment which provided that no low income housing project could be developed by public housing authorities until the project was approved by local voters in a referendum.187 California jurisprudence had traditionally given the local citizenry the power of initiative and referendum over the acts of local government, but a recent court decision had exempted housing agencies from this checkmate because they made "administrative" and not "legislative" decisions.188 Within six months of that judicial decision California voters adopted the constitutional amendment in question.

Again the word "neutral" figured in the Supreme Court's result. According to the majority,189 the measure was neutral because it ap-

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182 As an intellectual exercise the reader might consider for himself how "neutral" the government can be when it comes to the church and state issue. Compare the majority opinion in Reitman authored by Mr. Justice White with his opinions in Lemon v. Kurtzman, 403 U.S. 602 (1971) and Tilton v. Richardson, 403 U.S. 672 (1971).

183 387 U.S. at 382-83.

184 Id. at 384-85.

185 394 U.S. 1 (1949).


187 No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county . . . voting upon such issue, approve such project . . . .

CAL. CONST. art. 34, § 1 (1950).


189 This time the majority consisted of Justices Burger, Black, Harlan, Stewart, and White.
plied to "any low-rent public housing project, not only [to] projects which will be occupied by a racial minority." In addition, California history evinced a long tradition of giving "citizens a voice on questions of public policy." Indeed, according to the majority, rather than involving state approved discrimination, the system here manifested a "devotion to democracy." Having thus decided the neutrality of this enactment, the majority then trailed off into variations on the theme to the effect that the "people . . . have . . . decided," and that "all the people of [the] community will have a voice."

But Justice Douglas, having created an intellectual Frankenstein in *Berman v. Parker* and having seen the ultimate issue in *Reitman* without a word of apology for his own responsibility for the situation in suburbia, contributed not one iota to *James*. "DOUGLAS, J., took no part in the consideration or decision . . . ." Instead Mr. Justice Marshall authored the dissent, joined by Justices Brennan and Blackmun. They objected that the majority was now allowing class discrimination, which—given common knowledge of how suburbanites would vote—indeed they were. Thus the dissenters highlighted the very essence of the *James* decision: it is appropriate to discriminate against the poor as a class via the ballot box so long as the discrimination is not based upon racial criteria!

With *James*, any notion of substantive due process or functional restructuring, as an intellectual proposition was dealt a mortal blow when it came to opening up suburbia along truly pluralistic lines. As long as it was color blind, local decision making was the distillation of the democratic process. Yet, and here is the key, local decision making now could continue to exclude the white middle income types and in perpetuity escape the charge of invidious racial discrimination! As if to prove the Marxist thesis that economics will always triumph over race, it may now be true that a number of middle class blacks support this status quo.

To make matters worse, the concern over the quality of the environment threatens to be exploited for private ends, just as zoning has been. One recent suit seeks to halt further development in Suffolk County outside New York City "until ecologically sophisticated, environmentally responsible criteria for such development have been es-

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190 402 U.S. at 141.
191 Id.
192 Id.
193 Id. at 142, 143.
194 Id. at 137.
tablished. If successful, the suit would virtually halt all residential, commercial and industrial property development in the county.”

The Colorado Environment Commission proposes to limit the population of Denver and to construct a greenbelt around it to stop further growth. The difficulty with these ideas is that although they promise a fine environment for those already there, they raise serious questions about the rights of newcomers. In England, at least, the increment of class hypocrisy in the environmental movement has not escaped notice. In America, given the post-Warren Court, no clear answers appear to be in circulation.

IV

THE FUTURE: IRRELEVANCE OF CONVENTIONAL WISDOM IN A NEW BALL GAME

The trouble is that there is still no centre. The moral and intellectual failure of Marxism has left us with no alternative to heroic materialism, and that isn’t enough. One may be optimistic, but one can’t exactly be joyful at the prospect before us. Sir Kenneth Clark

Edmund Wilson perhaps best reflected democratic values when he observed that, even though one might be thoroughly disgusted with the rampant materialism inherent in the American system,

[he] ought not to complain of the many cars, the “mobile homes,” of the movies and television sets, of the grills for outdoor cooking. None of these things seems to me attractive, but I probably have no right to be contemptuous about or to blame them entirely on the people who manufacture and advertise them. If people want them, why should they not have them?

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197 N.Y. Times, Jan. 10, 1971, at 49, col. 5 (city ed.). Precisely how density within the new limits is to be controlled is not explained.
199 Their approach is hostile to growth in principle and indifferent to the needs of ordinary people. It has a manifest class bias, and reflects a set of middle and upper class value judgments. Its champions are often kindly and dedicated people. But they are affluent and fundamentally, though of course not consciously, they want to kick the ladder down behind them. They are highly selective in their concern, being militant mainly about threats to rural peace and wildlife and well loved beauty spots; they are little concerned with the far more desperate problem of the urban environment in which 80 per cent of our fellow citizens live. The Times (London), Jan. 8, 1971, at 10, col. 6 (summary of Fabian Tract 404).
This may be a lesson the extreme environmental activists still have to learn, since their ultimate no-growth policies seem almost designed to deny the working classes their place in the suburban sun.\textsuperscript{202}

"Snob zoning," of course, may best be "solved" by the legislature. This really is the lesson contained in \textit{Girsh}\textsuperscript{203} which seems, moderately enough, to suggest that a regional planning mechanism should be devised to create a pluralist suburbia in which each class could find its proper place. More interest, however, is being generated by the notion of statewide land-use planning\textsuperscript{204} which presumably would allow each class its niche outside center city. Whether this interest in formulating state planning derives from a concern for the lower orders or reflects instead an irritation at the lack of order when a multitude of tiny hamlets makes any planning impossible, is difficult to tell.\textsuperscript{205}

Then again, perhaps the best answer is to allow some state agency to punch holes in the suburban exclusionary ring by authorizing it to construct low income housing without regard to either local zoning ordinances or building codes. Massachusetts, for example, requires that a miniscule percentage of vacant residential land in each community be made available to non-profit or limited-profit housing sponsors for development.\textsuperscript{206} In New York the Urban Development Corporation is authorized to override local laws if it finds that a site is appropriate for low or moderate cost housing.\textsuperscript{207} Even so, the Massachusetts legislation in effect legitimizes exclusionary zoning of more than ninety-nine percent of a local community,\textsuperscript{208} and the UDC in New York has never exercised its power to enter a community against the will of the local government.\textsuperscript{209}

\begin{itemize}
  \item \textsuperscript{202} See, e.g., Gibbons, \textit{Hardhats, Hyacinths and Returnable Bottles}, COMMONWEAL, June 25, 1971, at 324. See also Harrington, \textit{The Politics of Pollution}, COMMONWEAL, April 17, 1970, at 111.
  \item \textsuperscript{203} 437 Pa. 237, 245 n.4, 263 A.2d 395, 399 n.4 (1970); text accompanying notes 155-43 supra.
  \item \textsuperscript{204} See, e.g., ALI \textit{MODEL LAND DEVELOPMENT CODE} xiii (Tent. Draft No. 3, 1971): [Tentative Draft Number 5] presents the most far-reaching and controversial material submitted up to this point. . . . To what extent should the interests of the state as a whole be brought to bear on the local desires reflected in a local plan or ordinance regulating land development?
  \item \textsuperscript{205} See also HAWAII REV. LAWS § 205-2 (Supp. 1970).
  \item \textsuperscript{206} \textit{American City} 208-10; Anderson, \textit{Symposium—Exclusionary Zoning: Introduction}, 22 SYRACUSE L. REV. 465, 467 (1971).
  \item \textsuperscript{207} N.Y. UNCONSOL. LAWS § 6268 (McKinney Supp. 1970).
  \item \textsuperscript{208} The Massachusetts approach applies to 10 acres or 0.3\% of vacant residential land, whichever is larger. MASS. ANN. LAWS ch. 40B, § 20 (Supp. 1970).
  \item \textsuperscript{209} It is common knowledge in New York that UDC is hampered as a developer because in land transactions it must operate so as not to suffer a loss. Until it can suffer
\end{itemize}
Court cases based upon notions of equal protection or judicial nuances hinting revival of substantive due process, together with legislation envisaging broader approaches to planning or limited efforts to interpolate some “poor” into suburbia, all reflect perfectly logical responses to the problem of exclusionary zoning. That is, if the problem is simply the abuse of the authority to zone at the local level, then a few minor adjustments in the system will set everything right again. The only trouble with this analysis is that it applies remedies which should have been applied to suburbia a score of years ago, before the existential scene had rendered the underlying structure something wholly different. Herein is a phenomenon that has to be elucidated.

To steal a technique from McLuhan, one must face the truth that “suburbia is the city.” Put another way, the “largest city in America is now the suburbs of New York.” These suburbs contain a million more people than New York City and cover 2,100 square miles. They are ceasing to be merely bedroom communities; instead they are becoming the place where new jobs are being created, particularly blue collar jobs. Like it or not, America has discarded the city, traditionally viewed as a populace psychologically loyal to a central core of civic buildings, and has instead adopted the style of Los Angeles—non-central, atomistic, free wheeling. In effect, while the authorities have been grappling with the problem of the ungovernableness of the large city, the people have elected to return to the modern equivalent of the village and to discard the city model. The real problem is that this new life style is only available to the relatively well-to-do. Economics have created a geographical barrier; the affluent exist in Los Angeles and the rest of the community exists in the classic city mold. The crunch comes when one realizes that it is not because of human failure that the problems of the large city are unsolved, but because the city in America is

writedowns and be clearly authorized to enter the new town field, UDC is closer to an enlightened private developer than a public agency. Whether it will actually develop into a significant force depends upon whether the voters in November 1971 approve a constitutional amendment. (1971) Sen. Int. No. 1432 (Mr. Barclay), (1971) Assy. Int. No. 7747 (Rules Comm.).

210 N.Y. Times, Aug. 16, 1971, at 1, col. 5.
211 Id.
212 Not one of the suburban counties around New York City sends even half its workers there. Id., col. 7.
213 NATIONAL COMM. AGAINST DISCRIMINATION IN HOUSING, JOBS AND HOUSING 6-7 (1970).
214 Los Angeles may swell physically to the size of a sub-continent, but the tropical luxuriance of its physical growth may never succeed in making a city of it. In order to become a city, it would have also to evolve at least the rudiments of a soul. Toynbee, *Introduction to Cities of Destiny* 13 (A. Toynbee ed. 1967).
a defunct institution which no cure can revive. The problem is not how to renew the city but how most gently to write it down.

Viewed as a rear guard action, the empirical results of urban renewal make sense. Insofar as habitability is concerned the deterioration of cities has probably been accentuated, but their viability as commercial and communications centers has been maintained. Let us put the paradox in its most ruthless perspective. Once upon a time cities were centers of urbane civilization, whereas Fort Riley, Kansas, was an outpost in the badlands where the law did not reach. Today the suburbs are the center of urbane civilization and the center city commercial blocks are the modern day equivalent of Fort Riley surrounded by hostiles. Thus the idea of tinkering with traditional city and suburb devices to reform this situation is a patent absurdity; the old dichotomy has been transposed into an entirely new phenomenon.

If the reader doubts what is being said, let him reflect upon the real world around him rather than upon the conventional images of that world portrayed in books. The posse has become a fact of life in residential neighborhoods in the city. Commercial blocks, as if protected by a moat, can be reached via direct public transportation from suburbia. The fortress idea, reminiscent of the middle ages, appears daily in advertisements for luxury apartments. Indeed, almost as proof in the pudding that the cities are passé, they are being left to the Blacks to inhabit, a hallmark in racist America that something has ceased to have any real value.

Even saying all of this does not really illuminate the ultimate crisis in this scenario. True, there is inherent here an element of apartheid, which currently attracts the most attention, perhaps because the idea of “equal protection” is still meaningful to Americans. Within the context of the new suburban city, however, the poor are no longer black; they are rather every man not a member of the upper middle class. That is to say that although racism may be bad, a society which discriminates immorally against ten or twelve percent of its members can nevertheless survive. A society, however, whose institutions manifestly discriminate against the majority is not likely to survive as a democratic society. Such is the inherent ultimate issue.

The real contradiction in American society is that its white, blue collar classes are being excluded from the new city developing in suburbia. It is not the minority which is being discriminated against but the majority. Incredibly, eighty percent of the families in the New York City area have been priced out of the new housing market en-

\footnote{See, e.g., N.Y. Times, July 8, 1971, at \textit{33}, col. 1.}
It is not guerrilla warfare by blacks in urban ghettos that is to be feared by those who would sustain American institutions, but the reaction impending in the lower middle classes when this discrimination becomes common knowledge. They are already confused by losing a war, resentful of public largesse being spent on welfare, and prone to bemoan the decline of law and order. The shock of recognition that the economic system has relegated them to a form of second class citizenship may prompt a radical reaction which could make the spectre of resurgent McCarthyism seem a mild threat indeed.

Adding an even more tragic dimension to this equation is the palpable fact that fortunes have been made speculating in land. More fortunes stand to be made by heeding the call to provide for some higher density areas in suburbia. This is so because the conventional system of land-use controls has been exploited at two very different levels. As a "democratic" device, exclusionary zoning accurately reflects the desires of the haves. Thus political careers can be based upon exemplifying a proper reverence for sound zoning. At the very same time, at the governmental level where day-to-day decisions are actually made, the land-use system can be exploited to keep developable land at a premium so that extraordinary capital gains are available for, shall we say, those persons more directly involved in the decision-making process.

By and large, conventional land-use controls are tainted with corruption, which must give one pause before accepting the idea that merely elevating decision making to the state, or even the federal level, will somehow set everything right.

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With apartment development blocked by zoning regulations, and with the minimum price for new houses ranging from $30,000 in Suffolk County to as high as $90,000 in Westchester, the vast majority of people taking new blue-collar jobs in the suburbs will continue to find themselves priced out of housing near their places of employment.


217 Land is the coin and the treasure of the suburbs around New York City and that land—some of which has risen in value in 20 years from $700 to $90,000 an acre—is the prize in a continuing battle for control of the 775 municipalities that make up the world's largest suburban area.

Id., Aug. 17, 1971, at 1, col. 2.

218 "But the top value of that acre depends on zoning—an acre worth $90,000 today for high-density use like office buildings or garden apartments is worth only $10,000 if it's zoned for one single-family home." Id. at 39, col. 2.

219 See, e.g., id.

220 Zoning affects land values in a number of ways. . .

. . . .

It is not surprising, therefore, that zoning is subject to enormous pressures by landowners and developers and that outright corruption is far from rare. Increasingly frequent newspaper exposes of corruption are dramatic and un-
Suburban land values have in some cases increased at a rate of fifteen percent a year. Inevitably the price of suburban land escapes the capacity of the lower orders to purchase it, because in no event is their purchasing power increasing at the same scale. Even if building codes could be modernized to expedite cheaper construction techniques, this escalation of land values must in and of itself price more and more people out of the market. Thus, and this is crucial, at the very same moment that discontent is arising about the efficiency of conventional land-use controls, the price of land on the urban fringe threatens to create an explosive political situation which could rock the Republic to its very foundations. Quaere, therefore, whether or not the times have actually become propitious to suggest that the answer to both these problems is for state government to acquire the land around suburbia, hold its value down to current levels, and release it only according to a statewide plan for pluralistic development.

Of no little moment is the fact that the ideas of Professor John Reps have reached the casebook level of visibility, including his notion that

some public agency with metropolitan jurisdiction might acquire raw land, plan it, provide street, utility, park, and other needed improvements, and then convey lots, blocks, or neighborhoods to private builders for development as planned and as controlled by deed restrictions. This would accomplish three things: it would provide a public yardstick operation against which purely private land development activities could be measured, it would establish a more precise tool of environmental control and guidance, and it would, paradoxically enough, aid private enterprise and the competitive market by making it possible for small builders who cannot afford the uncertainties and costs of the modern scale of land development to stay in business.

Reps, of course, does not stand alone; witness the brilliant young architect who, after considerable experience in the field, concluded that

fortunate testimony to the relation of the control process to private market forces.

American City 225-26.

221 Id. at 385. See also President's Comm. on Urban Housing, supra note 18, at 141.

222 Of those governments which had a building code, 66 percent of them prohibited the use of plastic pipe in drainage systems, 44.5 percent of them prohibited preassembled plumbing packages, and half (49.6 percent) of them prohibited 2-by-4 studs every 24 inches on non-load-bearing interior partitions, still requiring them to be only 16 inches apart. The last mentioned item requires 50 percent more studs every 4 feet of continuous wall.

American City 22.

"the concept of private ownership of land in the urban context is obsolete."²²⁴

More revealing still is the fact that at least some official state publications are beginning to talk in terms of widespread government land acquisition for future development projects.²²⁵ Public awareness of greenbelts²²⁶ and the concept of public ownership²²⁷ is not something novel within the American context. The whole scenario was rehearsed in a federal report in 1941 which, if read without reference to its actual date, appears to be contemporary:

Public acquisition of land is a powerful tool in controlling the development of new areas. . . .

One objective of land acquisition in new areas is the development of . . . self-contained neighborhood units . . . .

A second objective is the establishment of greenbelts. . . .

The purpose of the greenbelt is to break up the continuous, disorderly, sprawling growth of the city and, by permanently withholding certain areas from settlement, to force new development into a clustered pattern. It limits the size of neighborhoods and communities by girdling them with a greenbelt, yet does not limit the number of such communities that may gather as satellites around an urban center. . . .

The land within the greenbelt has far more than a negative value, however. The open land that weaves through the outer urban area is the logical path of modern motor highways, string parks and parkways. . . . The land need not remain in public ownership. Properly protected by zoning laws or deed restrictions, there is no reason why greenbelt land cannot be sold to private persons for truck gardens, golf courses, picnic grounds, athletic fields, or other extensive uses. . . .

Another objective of land acquisition in the urban peripheries is the establishment of municipal land reserves. The public land reserve, like the greenbelt, is a multipurpose project. First, it may serve as a greenbelt, if properly located. It will keep out ragged and spotty expansion, forcing new development to fill in existing open spaces. As parts of the land reserve are sold into private ownership, a residual part may be kept permanently in public ownership as a greenbelt. Second, it will serve as a source of well-planned house lots. As the pressure of urban expansion warrants

²²⁵ N.Y. URBAN DEVELOPMENT CORP. & N.Y. OFFICE OF PLANNING COORDINATION, NEW COMMUNITIES FOR NEW YORK 64 (1970).
²²⁶ E.g., National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 529, 215 A.2d 597, 610 (1965): "they cite the preservation of open space and the creation of a 'greenbelt' which, as most present day commentators impress upon us, are worthy goals." See also W. WHYTE, THE LAST LANDSCAPE 152-62 (1968).
²²⁷ E.g., N.Y. URBAN DEVELOPMENT CORP. & N.Y. OFFICE OF PLANNING COORDINATION, supra note 225, at 39-54.
it, the city may plat and sell lots designed on the self-contained cell concept, or it may sell the land in chunks to developers, reserving the necessary parks, school sites, and so on. Finally, it may be used to control speculative booms in building lots and to put a ceiling on land prices. When subdividing threatens to get out of control, the city's supply of usable lots at low prices may exercise a very salutary influence.\textsuperscript{228}

In short, we have long had available an alternative strategy with which to attempt to plan a more rational society.

We may yet choose a new praxis. Zoning and local government devices demonstrably have not worked very well to control haphazard development and urban sprawl (although they may have worked too effectively to exclude the lower orders from suburbia and catalyze them into action against the socio-political consequences of suburban land prices). That is, we might choose to socialize land, at least on the urban fringes, and then either keep it in public ownership, leasing it back to private use, or sell it back to private use at a subsidized price after stamping it with covenants locking it into regional master plans. Given the commitment to proceed along this avenue, we should have a way to develop some adequate responses not only to exclusionary zoning, but also to the broader question of whether we can plan a city and make it livable. Suburbia, after all, is our city of the future now being born, and there is still time to house-train the creature.

Observe how, as analyzed here, the decision to socialize is essentially a conservative response to the potential consequences of not making the decision. Within the traditions of property law, moreover, there is nothing particularly radical in visualizing land being owned by the sovereign and being channelled out again to persons who would hold it only as long as they performed the requisite duties which went with the land. In this instance, of course, instead of knighthood service, the landholder would have to hold and use his parcel according to the purposes set forth in the regional or statewide master plan.

Is the notion of a state condemning wholesale the fringes of suburbia in order to plan the future city constitutional? \textit{Berman v. Parker} would provide an affirmative answer. Given general welfare as the object of this exercise, and granted that the power of eminent domain

\textsuperscript{228} \textsc{National Resources Planning Bd., Public Land Acquisition in a National Land-Use Program pt. II, 17 (1940).} The report, however, was not naïve enough to ignore the fact that "public ownership of large tracts of open land, whose value may increase markedly over a decade . . . may prove to be an almost irresistible [sic] invitation to chicanery and favoritism." \textit{Id.} For my own part, I do not believe we can go on much longer refusing to regard the collusion of speculators and public officials as some kind of "economic crime" meriting punishment at least equal to that imposed for armed robbery.
would be employed merely as a means to the end, the judiciary would have to exercise restraint and, presumably, put its imprimatur on the scheme. We need not speculate about Berman v. Parker, however, because we now have Rosso v. Puerto Rico,\(^{229}\) a case more directly in point.

Several years ago the Puerto Rican legislature determined that "lands adapted to urban development . . . are monopolized and kept unused by their owners, which creates an artificial shortage of land and raises its price at a rate higher than the raise [sic] in price of other properties and staple commodities" and that this phenomenon made it "impossible for persons of moderate or low resources to purchase land in appropriate areas, and forces such persons to build their homes . . . far from their places of work . . . ."\(^{230}\)

"[T]his ever-increasing price of land cannot be controlled, nor the problems thereby created can be solved, by any of the tools available to the Commonwealth and municipal governments; . . . the levy of taxes and the regulations of physical planning are insufficient; . . . the regulation on subdivision and zoning operates prospectively for undeveloped and underdeveloped areas and cannot prevent the undesirable, but legal, use of the land; and . . . the regulation on land subdivision is insufficient to control either the expansion of city limits or the disconnected and inadequate expansion of the cities . . . ."\(^{231}\)

The response to this problem entailed the creation of a Land Administration with sweeping authority to acquire land by purchase or condemnation.\(^{232}\) The Administration's powers included the authority to acquire real property

which may be kept in reserve towards facilitating the continuation of the development of public work and social and economic welfare programs which may be under way or which may be undertaken by the Administration itself [or] by the Commonwealth of Puerto Rico . . . for the benefit . . . of the community, including, but not limited to, housing and industrial development programs . . . .\(^{233}\)

Early in 1963 the Land Administration decided to acquire two

\(^{229}\) — P.R. — (1967), appeal dismissed per curiam, 393 U.S. 14 (1968). An English version of the decision can be found in Brief for Appellant at 82, Rosso v. Puerto Rico, 393 U.S. 14 (1968) [hereinafter cited as Brief].


\(^{231}\) Id., Statement of Motives (b).

\(^{232}\) P.R. LAWS ANN. tit. 23, § 311f(j) (1964).

\(^{233}\) Id. § (g). See also Ramón, The Puerto Rican Land Administration Act—Audacity in Land Planning, 24 REV. C. ABO. P. R. 555 (1964).
parcels owned by Rosso, a contractor and developer. Rosso asked both the agency and the governor to reconsider the decision, but the agency denied his request because his land was necessary to preserve the coherence of the plan for the San Juan area. When Rosso still refused to negotiate a sale of the parcels, the agency resorted to a “quick take” provision and title to the land was vested in the government. Rosso retaliated by suing to enjoin the condemnation proceedings until a court could determine the constitutionality of the whole scheme. After the proceedings had been stayed pending a decision on the merits, a lower court held the legislation unconstitutional.

The trial judge was of the opinion that the Land Administration could condemn lands “to reserve them for the purpose of aiding the development of definite housing projects and... known programs... In short, every condemnation is valid, when it pursues a public purpose.” The difficulty was that no one had concocted a precise plan for what was going to be done with the Rosso parcels, so it was really impossible to sustain the proposition that the public necessity required the exercise of the power to condemn in this instance. “The ‘necessity’ that justifies a condemnation,” according to the court, “is that which presently exists or which may exist in the immediate future and its existence is necessary both for the condemnation and the public work contemplated. A future, indefinite, remote or speculative necessity is not sufficient.” Immediate practical needs, therefore, had to be demonstrated by the agency; a vague notion of the need for a land reserve was not enough.

The Supreme Court of Puerto Rico, however, sustained the Land Administration in an opinion which, to say the least, has its unique aspects. First of all, the late Justice Becerra did not say that the trial judge’s doctrinal exegesis about public necessity was wrong in the sense

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234 At the time the complaint was filed in the Superior Court, estimated just compensation of $1,381,676.00 was deposited in the Registry of the Commonwealth Court, and a Declaration of Taking was filed pursuant to which an Order was entered by the Court vesting title to the property in the Commonwealth of Puerto Rico. Rosso v. Puerto Rico, 226 F. Supp. 688, 689 (D.P.R. 1964).


237 Id. at 63.

238 Id. at 77. See also Rueb v. Oklahoma City, 435 P.2d 139, 141 (Okla. 1967): “A future hope based on speculation is not sufficient to justify the taking of private property in a condemnation proceeding. But a condemning authority may consider those demands which may be fairly anticipated in the future.”

239 Puerto Rico v. Rosso, — P.R. — (1967); Brief 82-126.
that he had applied the wrong rules. Rather, it was "out of focus." That is,

[it responds to yesteryear which was characterized by the limited and restricted function of merely governmental acts ... It also represents the stale individualistic concept of the exclusive right to the use, enjoyment and disposal of property by the owner, which no longer prevails, when it is necessary to confront it with the common good.\textsuperscript{240}

Instead, according to Becerra, the environmental problems of this epoch involve urbanism, a phenomenon which necessitates a wholly new perspective.

Thus, for example, a United Nations report had suggested that "[t]he lack of the requisite legal power to promote development and to channel it in desirable directions often handicaps urban planners..."\textsuperscript{241} In light of speculation in land values, Stockholm authorities had concocted a land ownership program "to secure sites ... and to influence the price of land ..."\textsuperscript{242} Be that as it may, Becerra suggested that these concepts were not peculiar to "the Nordic and Anglo-Saxon communities which are today extensively socialized."\textsuperscript{243} Indeed, similar responses were now appropriate in Catholic countries. True enough, Leo XIII would appear to have made private property as sacrosanct as any fan of Adam Smith might have desired.\textsuperscript{244} Indeed, as John XXIII noted, this obsession with private property had the result

\textsuperscript{240} Id. at --; Brief 104-05.

The "common good" as opposed to the "general welfare" is a notion derived from scholastic philosophy. E.g., St. Thomas, Summa Theologica, ch. xiii, question 90, art. 2. Before anyone concludes that they are the same thing, let him see how the scholastic world may be very different from that of the common law by perusing the following:

The human person is a part of the political community and is inferior to the latter, according to the things which compensate in him the needs of material individuality ... Thus, for instance, a mathematician has learned mathematics thanks to the educational institutions which social life alone has made possible ... And the community is entitled to ask the mathematician to serve the social group by teaching mathematics.

And, on the other hand, the human person, as a superior whole, dominates the political community [sic] according to the things which belong to the ordination of personality ... And the community will never have the right to ask a mathematician to hold as true one mathematical system in preference to another one ....


\textsuperscript{241} P.R. at --; Brief 105, citing People and Living in V U.N. CONF. FOR APPLICATION OF SCI. & TECH. FOR THE BENEFIT OF UNDERDEVELOPED AREAS 167 (1955).

\textsuperscript{242} P.R. at --; Brief 106, quoting J. Graham, Housing in Scandinavia 7 (1940) (emphasis in original).

\textsuperscript{243} Id. at --; Brief 109.

\textsuperscript{244} Leo XIII, Rerum Novarum § 5 (1891).
that every "precaution was to be taken lest the civil authority intervene in any way in economic affairs." But in light of the way in which the existential world had evolved, John had gone on to modify this doctrine, even concluding:

Obviously, what we have said above does not preclude ownership of goods pertaining to production of wealth by States and public agencies, especially "if these carry with them power too great to be left in private hands, without injury to the community at large."

What was the meaning of all this? Nothing less than that private property is now a "social concept," and like all social concepts is subject to the duty of properly constituted authority to safeguard the rights of the human person. Modern existential reality fairly compels a notion of private property subject to the demands of the general interest. Included among these demands is the need to hold property according to a "socializing orientation" which admits of a broadened concept of the public need, thus justifying a new definition of the public use basis of the condemnation power.

With the emergence into philosophic respectability of a socializing orientation, the sovereign could condemn land simply to bank it; no specific project would have to be on the drawing boards. Left to its own devices, after all, the market in land was rampant with "profiteering, speculation and monopoly . . . and artificially fixed prices to the profit of the speculator."

The Trial Court was of the opinion . . . that Act 13 and its means and methods are not anything else but a mechanism in the hands of the State to freeze and regulate the price of land. If the freezing or regulation of prices of land produces a rational way to solve the problem under attack, there is nothing unconstitutional in it. Likewise, if an [sic] order to remedy the evil the Land Administration has to become a dealer in lands, even if for the purpose of keeping them in reserve to provide for the future, and all of which is for a social benefit, there is nothing unconstitutional in it.

As remarked by Judge [sic] William O. Douglas, the State, if it so desires, may adopt a socialist economy; even though in order

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246 Id., § 116, quoting PIUS XI, QUADRAGESIMO ANNO § 114 (1931).
247 — F.R. at —; Brief 121.
248 Id. at —; Brief 114.
249 Id. at —; Brief 116-17.
250 Id. at —; Brief 117.
251 Id. at —; Brief 123.
Thus was the notion established, at least in Puerto Rico, that land banking could be instituted by the state under the guise of a public purpose condemnation.

By mainland standards, the notion that land banking can be employed as a device to control disorderly suburban growth marks and possibly exceeds the outside limit of the public purpose concept which traditionally has defined the scope of the condemnation power. Again by mainland standards the ratiocination employed by the Puerto Rico court, and particularly its source materials, may strike some as totally alien. But this is the point: the court had to expand its intellectual horizons in order to redefine the institution of private property in terms of a new environment. The very same need exists on the mainland. The problem confronting us is not merely one of exclusionary zoning by which the poor are kept out of the suburbs. Rather it involves the exclusion of the majority from the city of the future during its formative stages. Given this existential situation, Rosso should be seen as “good law” even if, like other landmark decisions, law review addicts may have a field day critically dissecting its reasoning.

O Freunde, nicht diese Tönel! Let me simply suggest a few theses which can serve to wrap up this exercise.

(1) As a matter of substantive due process, any zoning ordinance which does not include a full spectrum of residential accommodations is void on its face and unenforceable.

(2) If the ordinance provides for residential accommodations for the lower economic classes but the authorized housing is not in fact built, the ordinance is also void on its face unless the local government itself builds or has built the requisite housing.

(3) A state agency must soon be created to draft a statewide master plan. Regional land administrations would supersede local government with respect to the implementation of the plan.

(4) The regional land administration would condemn land now on the fringes of expanding suburbia, together with all available undeveloped tracts within it. This land would then be fed back to developers so as to control where future growth occurs, in what fashion it

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253 See, e.g., Cannata v. City of New York, 11 N.Y.2d 210, 182 N.E.2d 395, 227 N.Y.S.2d 903 (1962) (vacant land can be condemned in order to be redeveloped as an industrial park); Rueb v. Oklahoma City, 485 P.2d 139 (Okla. 1967) (evidence of necessity justifies condemnation of land to allow for airport expansion).
occurs, and at what price it occurs. In short, land itself would be social-
ized.

Whereas the first two theses are “legal,” obviously the last two are ini-
tially “political”—although a conservative judiciary could certainly veto the implementa-
tion of the fourth thesis. In this regard, Rosso is a crucial case. More immediately, how-
ever, it is significant because it illustrates the willingness of at least one American jurisdic-
tion to face the political need to reexamine the mode in which development of land is to be controlled in this last third of the twentieth century. The difficulty is that, content as we are, only the first thesis has attracted our attention. There is little that we can do now but patiently await the ultimate crunch. But thus it always was.

CONCLUSION

Turning and turning in the widening gyre
The falcon cannot hear the falconer

Yeats

Engels once observed that human history appears to differ from natural history because “nothing happens without a conscious purpose, without an intended aim.” Even so, “the many individual wills active in history for the most part produce results quite other than those intended—often quite the opposite; . . . their motives, therefore, in relation to the total result are . . . of only secondary importance. . . .” Hence, “[h]istorical events . . . appear on the whole to be . . . governed by chance.” At this point the late Georg Lukács would suggest that the “essence of scientific Marxism consists . . . in the realisation that the real motor forces of history are independent of man’s (psycholog-
ical) consciousness of them.”

Certainly anyone who has studied the history of property law ought to have at least some sympathy for this truth. For example, the promulgators of Quia Emptores, hell bent to preserve their feudal rights, did not realize that they were injecting into the system a slow poison which proved fatal. The difficulty is that if we recognize that Engels was on to something, how do we relate to what is going on around us today? What actually are the motor forces compelling us

256 Id. at 623.
towards building a molecular city in what is now a suburb?258 Can we endure the freeways as we hobnob between its centers and nodes?259 Will we, in fact, have to seek liberation by turning inward to the psyche?260 Certainly it is only the Socratic law teacher who can feel secure in these times since, after all, his work is done when he simply poses the questions.

When murders in New York City run roughly half the rate of our losses in Vietnam, when our holiday vehicular accident toll exceeds the regimental casualty rate of a serious infantry firefight, when promiscuity becomes a way of life, when universities are reduced to trade schools—one may question whether this society can endure. The ultimate issue with which we shall eventually have to deal is whether planning is possible in a society which does not have principles and goals to attract the allegiance of its overwhelming majority. However stale, the challenge thrown down by Yeats still confronts us. Put another way, the final issue of our day is still the need to find an aesthetic which justifies cooperative existence in this world. I would suggest that the challenge facing us, notwithstanding the Soviet experience, is how it might be possible to substitute for contemporary chaos an aesthetic patterned upon an inspired socialism illuminated by humanism. Until we begin to grapple with this fundamental question, we are simply postponing the evil day until, unstructured completely, we shall be powerless to respond when the rough beast, its hour come round at last, slouches towards Bethlehem to be born.

258 See, e.g., Los Angeles Dep't of City Planning, Concept Los Angeles, Map, Aug. 18, 1970.
260 Toynbee, Introduction to id. at 27.