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Reliance in Land Use Law

Kenneth A. Stahl

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Reliance in Land Use Law

*Kenneth A. Stahl**

ABSTRACT

For generations, Americans have tapped their life savings and assumed huge amounts of debt in order to achieve the American dream of owning their own home. Though investing so heavily in a single asset is a rather risky move on its face, buyers have been induced to purchase homes by a slew of public policies, most notably zoning ordinances that buffer single-family neighborhoods against an invasion of unwanted uses. As a result, homeowners have a fairly convincing argument that they possess some sort of vested reliance interest in the existing zoning of their neighborhoods that should prevent municipal authorities from enacting unwanted zoning changes.

Courts, however, have not been receptive to homeowners' pleas when such zoning changes are threatened. While courts will frequently safeguard the reliance interests of landowners who have undertaken substantial expenditures to develop their property, they offer no such protection for the reliance interests of landowners who desire to prevent development on neighboring property. I argue that the distinction between developers' and neighbors' reliance interests rests on judicial intuitions about the nature of the local political process: courts suspect that homeowners are likely to be the dominant faction in most municipalities and can therefore prevent unwanted development through their influence with city hall, whereas developers are unlikely to be powerful in a local political process dominated by antidevelopment homeowners, especially once a developer has made substantial expenditures on a particular project. This conclusion leads to a broader insight: judicial review of land use decision making is largely driven by a desire to protect the reliance interests of both developers and homeowners. Thus, courts are generally deferential toward most

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municipal land use policies that privilege homeowners' reliance interests but occasionally temper that deference with solicitude for developers.

The courts' fetishization of reliance interests has come at a substantial price, however. For the sake of protecting reliance interests in existing zoning schemes, courts have essentially reified a longstanding pattern of de facto income and racial segregation in most metropolitan regions by licensing suburban communities to maintain zoning barriers that enforce such segregation. Moreover, I conclude that the judicial enterprise to protect reliance interests by empowering local governments is entirely self-defeating because, as the recent real estate downturn vividly illustrates, property values are determined by a complex web of forces well beyond the control of local governments.

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INTRODUCTION

A recent survey by the real estate valuation website Zillow reveals that, although home prices have sharply declined since the economic crash of 2008, home sellers routinely overstate the value of their homes by 10% or more.¹ Another survey, by the consulting group The Saint Index, measured attitudes toward real estate development and found that homeowners are more hostile to new development now than they have ever been in the six-year history of the survey.² The Saint Index survey further concluded that concern about the impact of new development on home values was a significant factor in explaining this hostility.³ Taken together, these two studies demonstrate that homeowners are grimly determined to cling to a state of affairs that has since been wiped out by the economic calamity. They can hardly be faulted for their stubbornness. Millions of Americans have invested all or virtually all of their savings in the family home.⁴ To finance the purchase of that

1. See *Sellers Who Bought Post-Bubble Guilty of Overpricing Homes*, ZILLOW.COM (July 14, 2011), <http://zillow.mediaroom.com/index.php?s=159&item=231>. For further commentary, see Kenneth R. Harney, *Bridging the Great Divide Between Home Buyers and Sellers*, L.A. TIMES (Jan. 1, 2012), <http://www.latimes.com/business/realstate/la-fi-harney-20120101,0,6342117.story>.

2. See The Saint Consulting Group, *General Attitudes*, THE SAINT INDEX, <http://saintindex.info/general-attitudes#nimbyattitudes> (last visited Sept. 7, 2013).

3. See The Saint Consulting Group, *Activism*, THE SAINT INDEX, <http://saintindex.info/activism> (last visited Sept. 7, 2013). According to the survey authors, while only 14% of respondents answered that protecting the value of their homes was the principal reason for their opposition to new development, six years of survey results demonstrates that protecting home values plays a much larger role in opposition to development. See *id.*

4. See William A. Fischel, *Why Are There NIMBYs?*, 77 LAND ECON. 144, 146 (2001) [hereinafter Fischel, *NIMBYs*] (reporting that a vast majority of households have all of their savings in their homes).

home, most buyers have assumed an indebtedness so substantial that they can expect to spend nearly the rest of their lives paying it back.⁵ A major decline in the value of one's home can wipe out the homeowner's savings and jeopardize her ability to obtain further credit, while leaving the underlying debt firmly intact.⁶

Homeowners thus have a very good reason to *hope* that their property values will not decline after the initial purchase. But millions of Americans have not invested their savings and creditworthiness in a single asset of uncertain value by simply crossing their fingers and hoping for the best. Rather, it has been a principal aim of government housing policy for nearly the past century to encourage home purchases by assuring buyers that the value of their homes will be maintained. Policies such as cheap low-interest mortgages, generous tax deductions, and municipal zoning ordinances have all been designed to induce Americans to buy homes by giving them the confidence that their investments will not decline in value.⁷ After being plied with such assurances, it is understandable that homeowners would not be keen on seeing their property values plummet. Needless to say, homeowners become especially infuriated when the very government policies upon which they have relied in choosing to purchase their homes are changed in such a way that threatens to cause a decline in property values. As countless anecdotes reveal, homeowners who have purchased homes in a neighborhood zoned exclusively for single-family homes will revolt at the prospect of municipal authorities changing the neighborhood's zoning classification to permit a new development such as a shopping mall or a multi-family housing complex.⁸ Having purchased in reliance on the pre-existing zoning classification,

5. See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.1 (5th ed. 2007) (describing a typical 30-year, fully amortizing mortgage).

6. See *infra* text accompanying notes 32–33 (describing consequences of decline in property values).

7. See *infra* text accompanying notes 35–49 (describing government housing policies).

8. For discussions of various episodes in which homeowners (often dubbed “NIMBYs”) have fought tooth and nail against proposed new development, see, e.g., MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 153–219 (1990); RICHARD SENNETT, THE FALL OF PUBLIC MAN 301–08 (1977) (discussing a variety of tactics used by the neighborhood of Forest Hills, Queens, to prevent siting of low-income housing project); Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS'N 288, 290–91 (1992) (describing strategies used by development opponents to prevent unwanted growth).

homeowners often believe they have a vested right to maintain that classification in perpetuity.⁹ As with most things, this belief frequently ends up the subject of litigation.

The courts have indeed been hospitable venues for claims that a particular landowner has a cognizable reliance interest in a regulatory *status quo*. Since the 1920s, the courts have used numerous doctrines, such as nonconforming use, vested rights, zoning estoppel, and the “distinct investment-backed expectations” prong of the regulatory takings inquiry, to protect landowners in circumstances where they have been induced to make expenditures in the good-faith belief that the existing regulatory state of affairs would remain in place.¹⁰ These doctrines, however, have proven to be of little help to homeowners aggrieved by land use changes. Courts will typically only protect a landowner’s reliance interests when he or she has done something more than finance a purchase of real estate under an existing regulatory regime, such as making costly improvements to the property. In short, the courts are more concerned about protecting the reliance interests of *developers* of real property than the reliance interests of neighboring landowners who wish merely to *prevent* the development of nearby property.¹¹ The courts typically rationalize their solicitude for developers on two grounds: 1) fairness to those who have made expenditures in good faith reliance on the *status quo* and 2) the desire to incentivize investment in real property. As I explain further below, however,

9. See Ken Baar, *Facts and Fallacies in the Rental Housing Market*, W. CITY, Sept. 1986, at 57 (“One of the most cherished property rights in our ‘free enterprise system’ is not the right to do what one pleases with one’s property, but the right to live in a neighborhood in which no more multi-family housing may be constructed.”).

10. See *infra* text accompanying notes 15–17 (summarizing extant doctrine).

11. The tension between landowners who wish to develop their property and landowners who would prevent development on neighboring property has been the subject of an extensive literature. Fischel, for example, details the dynamic between “land at risk” and “land at rest.” See Fischel, *NIMBY’S*, *supra* note 4, at 253, 278–80 (citing JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 24 (1956)). Others refer to a conflict between “use” and “exchange” value. See, e.g., JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 31–49 (1987) (describing conflict between those who desire to maximize exchange value and those who desire to maximize use value, and how it is manifested in political terms in urban governance); MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS* 319 (1983).

both of these justifications would likewise favor the judicial protection of homeowners' reliance interests.¹²

This Article develops a model for explaining why courts treat developers' reliance interests so much more favorably than those of homeowners, notwithstanding the fact that homeowners seem to have a strong case for judicial protection of their reliance interests. Drawing on public choice scholarship—which urges that judicial doctrine should be sensitive to the nature of the political process by which legislation is enacted¹³—I argue that the principal reason courts decline to provide protection for homeowners' reliance interests is because they suspect, correctly, that homeowners have sufficient political influence with the regulatory authorities that make most land use decisions to protect their own reliance interests through the political process without judicial intervention (by, for example, pressuring the local city council to enact and maintain zoning ordinances that restrict unwanted new development). Thus, contrary to initial appearances, courts are not indifferent to homeowners' reliance interests; they simply believe that those interests are more appropriately vindicated within the political than the judicial sphere. In fact, as I demonstrate, courts have taken affirmative steps to ensure that homeowners have the ability to protect their own reliance interests through the political process, such as deferring broadly to municipal land use ordinances designed to protect homeowners' existing property values and endorsing the proliferation of small suburban municipalities in which homeowners can reliably exercise political control.

By the same token, however, because the local political process tends to advantage antidevelopment homeowners, courts intuit that developers are systematically underrepresented in that process. Thus, judicial protection is necessary to protect developers in circumstances where they are likely to be exploited by a hostile local majority. According to public choice theory, developers can typically avoid such exploitation by simply exiting the jurisdiction and seeking a friendlier regulatory environment elsewhere. Once a

12. See *infra* text accompanying notes 50–53.

13. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 12–37, 116–43 (1991); MAXWELL STEARNS & TODD ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 42–92 (2009).

developer makes a substantial investment in a particular project, however, the cost of exit rises dramatically and renders the developer vulnerable to majoritarian exploitation. For this reason, judicial intervention into the political process is appropriate where a developer has presented evidence of significant reliance interests.

This public choice model thus yields an important insight: judicial review of land use decision making is largely driven by the desire to protect reliance interests—both those of developers *and* homeowners. This solicitude for reliance interests equally explains why courts are generally deferential toward most municipal land use policies that favor homeowners and why they occasionally temper that deference in order to protect developers' reliance interests. Previous public choice scholarship on land use decision making has not trained its focus on the importance of reliance, and some scholars have affirmatively dismissed the significance of reliance.¹⁴ This paper argues, though, that reliance belongs at the heart of the public choice model of judicial review.

Recognizing the primacy of reliance is important because it enables a robust normative critique of the judicial approach to municipal land use decision making. For the sake of protecting reliance interests in existing zoning schemes, courts have essentially

14. Saul Levmore argues that public choice theory can explain the Supreme Court's regulatory takings doctrine insofar as that doctrine extends protection to smaller, isolated groups that are incapable of organizing to influence government, but typically denies protection to larger, well-organized groups. See Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 320 (1990). Levmore explicitly rejects the idea that the Court's takings jurisprudence centers on the protection of reliance interests. See *id.* at 317–18 n.74. I respond to Levmore's argument *infra* at text accompanying notes 86–89, 159–80.

In a pair of books, *THE HOMEVOTER HYPOTHESIS* (2001) [hereinafter FISCHEL, *HOMEVOTER HYPOTHESIS*] and *REGULATORY TAKINGS* (1995) [hereinafter FISCHEL, *REGULATORY TAKINGS*], William Fischel has argued that homeowners control the local political process, that developers are therefore vulnerable to exploitation by that process, and that courts should accordingly intervene to protect developers from majoritarian exploitation. While noting the role that risk plays in the homeowner's motivation to be politically active, Fischel does not draw attention to the significance of reliance interests in establishing the relative political influence of homeowners vis-à-vis developers, or the ways in which the courts have sought to protect the reliance interests of both homeowners and developers.

Finally, Joseph William Singer's landmark article, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988), argues that the law of property does in fact, and should as a normative matter, recognize that non-owners of property often have vested reliance interests in the use of real property owned by others. Singer's article spends little time discussing land use regulation, or how public choice theory specifically can justify robust protection for reliance interests.

reified a longstanding pattern of income and racial segregation in most metropolitan regions by licensing suburban communities to maintain zoning barriers that enforce such segregation. Courts have been clear that the protection of reliance interests is a perfectly sensible justification for discriminating in favor of existing residents and against prospective residents. The courts dismiss concerns about interlocal segregation by simply insisting that a municipality's land use policies have no impacts beyond its borders.

This last point is revealing because it demonstrates the very flimsy footing on which the entire reliance model of judicial review rests. The model presupposes that homeowners can protect their own reliance interests through their influence over local government, and therefore assumes that those reliance interests will not be adversely affected by actions taking place outside the municipality (over which homeowners would have no control). In truth, however, property values are determined by a complex web of forces well beyond the control of isolated local governments, as the recent real estate crash forcefully demonstrates. I conclude, therefore, that municipalities' charge to protect homeowners' reliance interests is a self-defeating enterprise, and unworthy of the judicial deference it has been granted.

Part I sets out the basic problem: courts appear to favor developers' reliance interests and disfavor homeowners' reliance interests, although homeowners have a strong case that their reliance interests are deserving of judicial protection. Part II considers and dismisses some superficially appealing explanations for this distinction. Part III sets out the basic public choice model of reliance and shows how that model can explain both judicial deference to land use policies that favor homeowners and judicial intervention to protect developers' reliance interests. Part IV then articulates a descriptive and normative critique of the model.

I. WHOSE RELIANCE INTERESTS COUNT?

This Part illustrates an apparent inconsistency in land use law: courts provide protection for the reliance interests of landowners who wish to *develop* their property, at least in some circumstances, but no such protection for the reliance interests of landowners who wish to *prevent* development on neighboring property. Section A sets out the basic law governing the judicial protection of reliance interests in land use law and explains how it distinguishes

developers from neighbors. Section B then argues that this distinction is, on the surface, indefensible: neighbors have at least as strong an argument for judicial recognition of their reliance interests as developers do. In the subsequent Parts, I will articulate a model of judicial review that explains why courts extend judicial protection for developers' reliance interests while denying it to neighbors.

A. Judicial Protection for Reliance Interests in Land Use Law

As is true in many other areas of the law, one persistent theme in land use law is the desire to vindicate the expectations of those who have taken substantial actions to their detriment in reasonable reliance on the status quo. Courts have fashioned a number of common-law doctrines designed to protect landowners who have reasonably relied on an existing scheme of land use regulations against an adverse change in that regulatory scheme. For instance, if a landowner has been using her property in a manner consistent with existing zoning regulations and the zoning is then changed to make that use of land unlawful, the landowner may be entitled to continue using the land as she did prior to the zoning change under the doctrine of "nonconforming use."¹⁵ Likewise, if a landowner has made substantial expenditures on an inchoate development project under a regulatory regime, the developer may acquire "vested rights" that prevent the regulatory authority from changing its regulations in a manner that interferes with the developer's expectations.¹⁶ Finally, the Supreme Court's regulatory takings doctrine provides that one touchstone for determining whether a landowner's property has been "taken" within the meaning of the Fifth Amendment is the extent to which regulation upsets a landowner's "distinct

15. See, e.g., JAMES C. SMITH & JACQUELINE P. HAND, NEIGHBORING PROPERTY OWNERS § 8:8 (2011) (describing nonconforming use doctrine). In most states, nonconforming uses can be amortized after a reasonable period of time. See DANIEL P. SELMI ET AL., LAND USE REGULATION 67–69 (3d ed. 2008) (collecting cases). In a minority of states, however, amortization is *per se* unconstitutional. See *id.* (collecting cases).

16. See, e.g., MICHAEL A. ZIZKA ET AL., STATE & LOCAL GOVERNMENT LAND USE LIABILITY § 2:11 (2011) (describing vested rights doctrine). A related doctrine to vested rights is "zoning estoppel." Zoning estoppel generally refers to a situation where a developer makes substantial investments in reliance on a representation by a government official. See SELMI ET AL., *supra* note 15, at 135 (collecting cases finding estoppel).

investment-backed expectations,” that is, the landowner’s reasonable reliance on a pre-existing state of affairs.¹⁷

Although courts have done a poor job articulating precisely why reliance interests deserve judicial protection, it appears that the respect accorded to reliance interests is rooted in considerations of both equity and efficiency. First, courts seem to think it fundamentally unfair that a landowner should expend significant resources on an investment in the good faith belief that the status quo would remain unchanged, only to endure a complete wipeout of that investment when an unpredictable change occurs.¹⁸ Second, protecting reliance interests encourages landowners to invest resources in real property by giving them some assurance that they will have the eventual opportunity to harvest the fruits of their labor.¹⁹ If the law provided no protection for reliance interests, landowners would be hesitant to invest in real property out of fear that their investment could be rendered worthless at the whim of a municipal zoning authority.

Courts, however, only offer protection to reliance interests in limited circumstances, perhaps out of deference to regulatory

17. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). In practice, the “distinct investment-backed expectations” test has proven to be more of a shield for government than protection for landowners because its “positivist” conception of property rights enables regulatory authorities to themselves determine the extent of the developer’s reasonable expectations. *See, e.g.*, Steven J. Eagle, *The Rise and Fall of “Investment-Backed Expectations,”* 32 URB. LAW. 437 (2000). On the other hand, the Court did invoke the idea of investment-backed expectations in finding a regulatory taking in one of its more significant recent cases. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 n.7, 1019 n.8 (1992); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993) (arguing that the “expectations” prong of *Penn Central* was key to the result in *Lucas*). I discuss *Lucas* further *infra* at text accompanying notes 54–75.

18. *See, e.g.*, Palazzolo v. R.I., 533 U.S. 606, 635 (2001) (O’Connor, J., concurring) (arguing that “distinct investment backed expectations” prong of regulatory takings test is rooted in fairness concerns); *City of Goleta v. Superior Court of Santa Barbara Cnty.*, 147 P.3d 1037 (Cal. 2006) (doctrine of equitable estoppel is “founded on concepts of equity and fair dealing”) (citation omitted); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulation*, 84 N.Y.U. L. REV. 1222, 1266–67 (2009) (discussing fairness rationale).

19. *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 395 (Utah 1980) (recognizing vested rights and noting “[t]he economic waste that occurs when a project is halted after substantial costs have been incurred in its commencement”); Serkin, *supra* note 18, at 1270–71 (discussing efficiency concerns); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of “Just Compensation” Law*, 17 J. LEGAL STUD. 269, 269 (1988) (“In a world lacking any compensation requirement, the obvious fear is that private investors will be inhibited by the thought that government will snatch . . . the fruits of their venture.”).

authorities' need for flexibility in adapting land use regulations to changing circumstances.²⁰ Thus, courts will generally recognize vested rights only where a landowner has made substantial improvements to the property²¹ based on some very particularized regulatory activity, such as an application for a building permit or a site-specific rezoning.²² Merely financing a purchase of real property under an existing zoning classification is generally insufficient.²³

In practice, these requirements favor landowners who have taken steps to *develop* their property and disfavor those landowners who desire to *prevent* development on neighboring property.²⁴ I illustrate

20. See, e.g., *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 553 P.2d 546, 54 (Cal. 1976) (rejecting claim that developer acquired vested rights after obtaining final discretionary approval because recognizing vested rights would impair "government's right to control land use policy" by "freez[ing] the zoning laws applicable to a subdivision or a planned unit development as of the time these events occurred").

21. Many courts require some evidence of construction and do not recognize pre-construction activities as sufficient. See, e.g., *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124 (2d Cir. 1998) (requiring substantial construction and substantial expenditures); *W. Land Equities*, 617 P.2d at 392 (noting that most courts typically require "some physical construction" and will not consider "[p]reconstruction activities such as the execution of architectural drawings or the clearing of land and widening of roads"); J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)Reasonable in State Courts?*, 38 URB. LAW. 81, 98-101 (2006) (describing "get a shovel in the ground" rule used by many state courts to evaluate whether a landowner has reasonable investment-backed expectations under regulatory takings inquiry).

22. Many states require the issuance of a permit in order for rights to vest. See *Avco*, 553 P.2d at 553 (stating that vested rights require substantial expenditures in reliance on a government permit). *Avco* represents the strictest approach to vested rights. Other courts require only the submission of an application for development approval. See *W. Land Equities*, 617 P.2d at 388 (holding developer established vested rights upon submitting application for subdivision approval, despite failure to move beyond stage of pre-construction planning). Still others will base vested rights on a site-specific rezoning. See *City of Suffolk ex rel. Herbert v. Bd. of Zoning Appeals*, 580 S.E.2d 796 (Va. 2003), *rev'd by statute on other grounds* (stating that vested rights accrued based on earlier rezoning, absent permit or application). For a comprehensive discussion of the various approaches, see ZIZKA ET AL., *supra* note 16, at § 2:11.

23. See, e.g., *Belvidere Twp. v. Heinze*, 615 N.W.2d 250 (Mich. Ct. App. 2000) (stating that purchase and acquisition of financing, coupled with numerous other preparatory acts, deemed insufficient to establish vested rights).

24. This is not to say that developers are necessarily pleased with the amount of protection the extant doctrine affords them. The requirements for establishing vested rights are daunting for any developer to satisfy, and some commentators have concluded that the common-law vested rights regime provides far too little protection for developers. See Donald G. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U. L. REV. 545 (1979). As a result of pressure from developers, many states have enacted statutes providing additional protections for vested rights beyond those granted by the courts. See STEWART E. STERK & EDUARDO M. PENALVER, *LAND USE REGULATION* 157 (2011) (at least eighteen states have enacted vested rights

this problem with two examples. First, assume a developer desires to construct a commercial development on a parcel of land. She spends a total of \$500,000 to acquire the parcel of land, obtain a rezoning of the land from single-family residential to commercial (so that commercial uses are now permitted), and begin construction of the development. This developer could, depending on the state, obtain vested rights that would prevent the municipality from changing the zoning so as to prevent commercial development. Now consider the second, converse scenario. An individual purchases a home for the same \$500,000 in a neighborhood zoned exclusively for single-family homes, financed with a hefty mortgage. If the municipality subsequently changes the neighborhood's zoning classification to *permit* commercial uses, the homeowner would have no vested rights—in any state—that could block the land use change, even if the homeowner could plausibly claim that she relied upon the pre-existing zoning classification in choosing to purchase her home in this neighborhood. The law distinguishes between the developer and the homeowner because 1) the developer has undertaken substantial improvements based on the pre-existing regulatory state of affairs whereas the homeowner has not (her claim is simply that she purchased her property and obtained financing in reliance on the pre-existing zoning); and 2) the developer obtained some site-specific regulatory assurance (a rezoning of the parcel) whereas the homeowner did not (she seeks to maintain the zoning classification not only on her own property, but on an entire neighborhood). Hence, several courts have specifically held that neighbors have no “eternally vested rights” in the perpetuation of an existing zoning classification.²⁵

statutes). On the other hand, it is fair to question why courts should recognize developers' vested rights at all. Protecting vested rights may overly constrain a municipality's ability to change its land use regulations in response to changed circumstances, and may also encourage inefficient investment in land by developers for the sake of obtaining vested rights. See Serkin, *supra* note 18, at 1283–87. I explore further *infra* at text accompanying notes 71–73 the reasons why courts have not provided more robust protection for developers' vested rights.

25. See *Rodgers v. Vill. of Tarrytown*, 96 N.E.2d 731, 733 (N.Y. 1951); see also, e.g., *Grund v. Jefferson Cnty.*, 277 So. 2d 334 (Ala. 1973); *Spiker v. City of Lakewood*, 603 P.2d 130, 133 (Colo. 1979) (stating that neighbors have no “vested right, per se, in the maintenance of a particular zoning classification”); *McGee v. City of Cocoa*, 168 So. 2d 766, 769 (Fla. Dist. Ct. App. 1964) (“[V]ested rights in a particular zoning ordinance do not accrue to neighboring owners”); *Norbeck Vill. Joint Venture v. Montgomery Cnty. Council*, 254 A.2d 700 (Md. 1969); *Navin v. Town of Exeter*, 339 A.2d 12 (N.H. 1975); *Gray v. Trs., Monclova Twp.*, 313 N.E.2d

At first blush, it makes sense that the law does not protect neighbors' reliance interests. It seems ludicrous to think that a landowner could have vested rights in how a neighboring landowner uses her own property. If we look closely at the homeowner's reliance claim, however, we will see that the matter is far more complex. In fact, there is a strong argument that, judged by either the criterion of fairness or efficiency, homeowners often have reliance interests in existing zoning classifications that are just as compelling, if not more so, than the reliance interests of those developers to whom the law offers its protection.

366 (Ohio 1974); *Buhler v. Racine Cnty.*, 146 N.W.2d 403, 408 (Wis. 1966).

Illinois appears to be the lone state that will, in certain circumstances, recognize neighbors' vested rights in a zoning scheme. See *Cosmopolitan Nat'l Bank of Chi. v. City of Chi.*, 190 N.E.2d 352, 355 (Ill. 1963) ("[I]t is a well-established principle that one who buys land has a right to rely upon the classification which existed at the time the purchase was made . . ."). As Fred Bosselman details in a fascinating article, Illinois's land use jurisprudence, which emerged from a desire to stabilize property values and encourage investment in real estate during Chicago's chaotic development of the late nineteenth and early twentieth centuries, features some unique protections for neighbors. See Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527 (1991).

To say that neighbors have no common-law right, outside of Illinois, to maintain an existing zoning classification is not to say they have no legal recourse in the event of an undesired zoning change. Neighbors may, for example, be able to bring suit against a municipality for "spot zoning" when the municipality zones a small area of land in a way that is inconsistent with the zoning of the surrounding area. See *SELMI ET AL.*, *supra* note 15, at 69–76 (discussing spot zoning). There are several inadequacies with a spot zoning lawsuit, however, including: 1) Many states limit standing to bring such suits to individuals who have suffered "special damages" beyond the damage suffered generally by other members of the public; 2) the spot zoning inquiry is very vague, depending on whether a court thinks the area rezoned is sufficiently small to warrant invalidation; 3) spot zoning challenges can easily be circumvented by simply rezoning a larger swath of land; 4) many courts will uphold spot zoning so long as it is otherwise reasonable; and 5) collective action problems will often prevent neighbors from bringing suit to challenge spot zoning. For a discussion of some of these shortcomings, see *id.*

In some states, such as California, neighbors can also attempt to stymie unwanted development by bringing suit under statutes requiring developers to prepare detailed environmental impact reports explaining the potential impacts of a project and exploring alternatives. My goal here, though, is to understand why the *judiciary* distinguishes developers' and homeowners' reliance interests, so I have focused on common-law rights that landowners may have to attack zoning changes, not statutory rights.

Incidentally, neither the spot zoning doctrine nor environmental impact reporting statutes provides a cause of action based solely on a plaintiff's reliance interests or diminution in property values. These factors may give neighbors standing to sue, but do not entitle them to relief on the merits unless they can prove that some independent harm has been done.

*B. The Neighbor's Case**1. Capitalization and reliance interests*

Let us return to our hypothetical purchaser of the \$500,000 home in a neighborhood zoned for single-family homes. What exactly is this individual buying for \$500,000? The answer may seem obvious: a house. In reality, however, she is purchasing a good deal more than just a house for \$500,000. The purchase of a home comes bundled with numerous other amenities, such as the local public schools, the property tax burden, and the character of the surrounding neighborhood. Economic studies demonstrate that these amenities are “capitalized” into home values—high-quality local schools, low property taxes, or a preponderance of neighbors who are homeowners rather than renters have been shown to significantly increase home values, for example.²⁶ Perhaps the most important amenity that is capitalized into home values, however, is the neighborhood’s zoning classification.²⁷ In essence, zoning provides an assurance that all of the parcels in a neighborhood will remain restricted to single-family usage, and the home buyer pays a premium for this assurance. Without the zoning, which is to say without this assurance against adverse change, our \$500,000 home would undoubtedly be valued at far less.

The reason the homeowner values this assurance so highly is because, absent zoning, a home purchase is a *risky* investment. Since few individuals can finance a \$500,000 purchase with cash on hand, the homeowner will most likely pay a down payment of 10% of the purchase price (here, \$50,000) and finance the rest with a mortgage, which is simply a loan that is secured by the home purchaser’s interest in the property.²⁸ For most purchasers, a down payment of

26. See FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 45–46 (describing studies detailing the extent of capitalization phenomenon). According to Fischel, impacts such as traffic congestion, high crime rates, large public housing projects, and localized air pollution have been shown to decrease property values for nearby property owners, while growth controls, high-quality local schools, and having homeowners rather than renters as neighbors have demonstrably increased property values. *See id.*

27. See FISCHEL, REGULATORY TAKINGS, *supra* note 14, at 218–52 (using case study of growth controls in California to demonstrate that land use regulations are capitalized into land values).

28. For a depiction of the real estate financing process, see NELSON & WHITMAN, *supra* note 5, § 1.1.

\$50,000 alone would be sufficient to require a substantial share of one's life savings. This now becomes the homeowner's "equity" in the property.²⁹ After making the initial down payment to the seller, the homeowner will typically be required to make a substantial payment of principal and interest on the mortgage to the lender every month for a period of up to thirty years.³⁰ Any payments on the principal are added to the homeowner's equity. In addition to the mortgage, the homeowner must also pay regular property taxes, and may also pay homeowners' association dues or other types of special taxes or assessments, which are not tax deductible.

Provided that the value of the home remains at or above its initial \$500,000 assessed value, the homeowner can still hope to cash out this equity upon a sale of the property. This is important because for most homeowners, the equity in their homes is the most significant savings—often the only savings—they possess.³¹ If the value decreases, however, the homeowner will begin to lose equity. The more the value of the home falls, the more equity the homeowner loses. If the home's value drops to the point that the homeowner's equity is wiped out, the homeowner is "underwater"—she owes more on the property than the home is worth.³² The homeowner is now in the untenable position of either continuing to pay a large mortgage on an asset of depreciated value in which she has no equity, or walking away from a home into which she has already invested a substantial amount. The latter course may seem more appealing, but will surely result in a diminished credit rating and perhaps also a deficiency judgment by the lender to recover the amount still owed from whatever other assets the homeowner possesses.³³ For all of these reasons, home buyers are very keen to

29. See *id.* § 1.4 (describing concept of equity).

30. For an example of a typical 30-year, fully amortizing mortgage, see *id.* § 1.1.

31. See FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 14, at 4 (providing data showing that for most homeowners, "the equity in their homes is the most important savings they have").

32. See Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971 (2010).

33. See *id.* at 983–86 (explaining consequences of "walking away" from an underwater mortgage). White argues that these consequences are not very significant by comparison to the benefits of shedding a severely underwater mortgage. He may be right that walking away is a better option than continuing to pay down an underwater mortgage, but the point here is that *both* options are bad from the perspective of a homeowner who has invested her life savings into her home.

ensure that the value of their property does not decline from the date of purchase.

This, ultimately, is why zoning is such an important factor in an individual's decision to purchase a home. Given the size of the investment and the stakes for the homeowner if property values diminish, a prospective purchaser needs the assurance that property values will *not* diminish as a condition of making this investment. In the event, therefore, that the regulatory authority chooses to alter the zoning in the neighborhood so as to permit more intense uses, the homeowner loses the protection against unwanted change that induced her to purchase the home at a premium price initially, and the value of the property will very likely decline. As it does so, it may trigger the parade of horrors canvassed above.

The foregoing explains why many homeowners *think* they have a protected reliance interest in the zoning of their property. A disinterested observer might wonder, though, whether it is *reasonable* for a homeowner to invest such enormous resources in a single asset under the expectation that the zoning will never change. After all, zoning ordinances usually have built-in mechanisms to facilitate change, such as variances, special use permits, and rezonings.³⁴ Homeowners are presumptively aware of these mechanisms before they purchase their homes, and zoning's susceptibility to change is presumably also capitalized into property values. The law, of course, only provides protection for reasonable expectations, so this may explain why courts do not recognize neighbors' vested rights claims.

2. The federal government's role in inducing reliance

If purchasing a home in reliance on pre-existing zoning were unreasonable, however, then it must be asked why millions of Americans have been doing just that for the past century. Home ownership in this country skyrocketed after zoning was widely adopted in the early twentieth century, and policymakers, historians, and economists have all concluded that zoning was a major factor in sparking the home ownership craze.³⁵ Indeed, it has long been

34. See, e.g., SELMI ET AL., *supra* note 15, at 69–106 (discussing various mechanisms municipalities use to exercise flexibility in the land use approval process).

35. In the years between 1922 and 1929, "new homes were begun at the rate of 883,000 per year, a pace more than double that of any previous seven-year period." KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 175 (1985). Peter Hall

public policy at the national level to *induce* Americans to incur massive amounts of debt to purchase homes by providing them with the assurance that their investment would be protected against unpredictable declines in value. Two principal tools have been used to accomplish this goal: zoning and mortgage lending policy. To start with the first, zoning was initially adopted during an age of rapid urbanization and industrialization, which entailed the increasing introduction of intense industrial uses in close proximity to more delicate commercial and residential neighborhoods.³⁶ This caused property values to become extremely unstable as potential investors could not reliably predict the future of areas in which they chose to invest.³⁷ City leaders in the early twentieth century quickly turned to zoning as a solution to this problem; as one early zoning advocate put it, zoning would provide “greater safety and security in investment”³⁸ by stabilizing property values against unpredictable change. Secretary of Commerce (later President) Herbert Hoover saw zoning specifically as a means of facilitating homeownership, which he believed would be the foundation of a prosperous society.³⁹ Hoover spearheaded a very successful movement to encourage municipalities nationwide to adopt comprehensive zoning ordinances.⁴⁰ Shortly thereafter, in the famous case of *Village of Euclid v. Ambler Realty Co.*,⁴¹ the Supreme Court placed its imprimatur on zoning, which the Court saw as an effective mechanism for protecting single-family residential neighborhoods

identifies zoning along with federal government-guaranteed mortgages, new highways, and the baby boom as key factors in the post-World War II suburban homeownership boom. See PETER HALL, *CITIES OF TOMORROW* 316–22 (3d ed. 2002).

36. See generally SEYMOUR TOLL, *ZONED AMERICAN* 35–116 (1969) (describing early origins of zoning).

37. See Bosselman, *supra* note 25, at 567–72 (describing how uncertainty over property values led to early zoning ordinances in turn-of-the-century Chicago).

38. See HALL, *supra* note 35, at 317–18 (quoting New York City Commission on Building Heights); see also Richard Briffault, *Our Localism: Part II – Localism and Legal Theory*, 90 COLUM. L. REV. 346, 367 (1990) [hereinafter Briffault, *Our Localism: Part II*] (“By precluding undesirable changes in land use and providing a firm basis for predicting the future physical and social evolution of the community, zoning reduced the risks to investors in urban real estate.”).

39. See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1256–63 (2008).

40. The keystone of this effort was the adoption in 1922 of the Standard State Zoning Enabling Act (SSZEA). See *id.*

41. 272 U.S. 365 (1926).

against invasion by more intense uses.⁴² Home ownership and the municipal adoption of zoning ordinances soared in the years after Hoover's efforts and the *Euclid* decision.⁴³

In the 1930s, policymakers began to encourage home purchases in another way: they created federal housing agencies such as the Home Owners' Loan Corporation (HOLC) and later the Federal Housing Administration (FHA), which were empowered to insure or guarantee privately issued home loans so that lenders would liberally offer low-interest, long-term loans with low down payments to a broad class of consumers.⁴⁴ The U.S. Government made mortgages even more attractive by offering a generous income tax deduction for mortgage interest payments.⁴⁵ These policies effectively made it cheaper for Americans to buy than to rent,⁴⁶ giving them a strong incentive to assume a large amount of debt to finance a home purchase.

Federal mortgage policy was thus closely linked with zoning policy—both were designed to encourage home purchases.⁴⁷ But mortgage policy and zoning were connected in a deeper way as well. An important underlying premise of the mortgage lending policy, like zoning, was that home values were primarily a function of neighborhood character and neighborhood stability, not simply of the qualities of the home itself. The lending agencies appraised the value of properties and their suitability for credit by determining how likely their surrounding neighborhoods were to maintain their existing character over time, looking at factors such as the age, size and type of housing stock in the neighborhood, the proximity of the neighborhood to other neighborhoods undergoing change, and, most infamously, the racial composition of the neighborhood.⁴⁸ Given its

42. See *id.* at 394 (enumerating the benefits of segregating single-family residential areas from other types of uses).

43. Whereas at the end of 1916, just eight cities had enacted zoning ordinances, by the end of the 1920's, nearly eight-hundred municipalities had done so. See TOLL, *supra* note 36, at 193.

44. See HALL, *supra* note 35, at 318–19; JACKSON, *supra* note 35, at 195–218 (describing HOLC and FHA).

45. See JACKSON, *supra* note 35, at 293–94.

46. See *id.* at 205 (“Quite simply, it often became cheaper to buy than to rent.”).

47. See HALL, *supra* note 35, at 319 (“The central objective of the FHA was identical with that of zoning: it was to guarantee the security of residential real-estate values.”).

48. See *id.* at 197–203 (HOLC policy), 207–218 (FHA policy). The agencies' policies of

focus on the neighborhood, the FHA naturally endorsed the use of single-use zoning that would ensure neighborhood homogeneity.⁴⁹

The sum total of these federal housing policies has been to strongly incentivize Americans to assume massive amounts of debt to finance home purchases by providing them with the assurance that the value of their homes would be protected through zoning ordinances that stabilize the character *of the entire neighborhood*. Thus, it is not so easy to dismiss, as the courts so often have, a homeowner's claim that she should have vested rights in the zoning classification of her neighborhood at the time of purchase. Indeed, judged by either the fairness or the efficiency criterion courts have employed to assess developers' reliance claims, the homeowner appears to have a fairly convincing case for judicial protection of her expectations. From the fairness perspective, considering that it has been long-standing national policy to induce Americans to incur substantial debt to finance home purchases with the assurance that home values would be protected against adverse land use changes, equity counsels that homeowners should be entitled to at least as much relief as the developer who has made substantial expenditures in good faith reliance on a development permit or site-specific rezoning. In fact, the homeowner's case may be even more compelling than the developer's. Many developers are in the business of taking risks on real estate and have the ability to diversify that risk across numerous projects. The homeowner, by contrast, typically only makes one real estate investment—the family home—which is by far the most significant financial investment of that person's lifetime.⁵⁰ The only rational reason a homeowner would take what seems to be such a substantial financial risk on a single asset is because lawmakers have deliberately undertaken to

designating mixed-race and minority neighborhoods as unacceptable credit risks, deemed "redlining," has of course been extremely controversial, and has been cited as a central cause of urban decay and interlocal segregation in many metropolitan regions. *See id.*; *see also* JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 295–302 (1961) ("There is no telling how many city districts have been destroyed by [redlining]."). I return to the subject of interlocal segregation in Part IV, *infra*.

49. *See* JACKSON, *supra* note 35, at 207–208 (FHA endorsed zoning and restrictive covenants that would maintain neighborhood homogeneity).

50. *See* FISCHEL, *HOMEVOTER HYPOTHESIS*, *supra* note 14, at 10–11, 30 (distinguishing homeowners from other investors by noting lack of diversification of assets); *id.* at 4 (noting that home equity is most Americans' most significant asset).

remove the risk. It would be extremely harsh and unfair for government to induce home purchases by insuring that investment against risk only to then reintroduce the risk after the purchase has been made, thereby catalyzing a decline in property values and leaving it to the homeowner to confront the likely consequences (loss of equity, diminished credit rating, and a possible deficiency judgment).

With regard to efficiency, I noted previously that one reason courts protect developers' reliance interests is to induce investment in real property—what developer would sink substantial resources into a parcel of land if the municipality could just change the rules and wipe out the investment at any time? Likewise, the very justification for federal mortgage lending and zoning policy has been to encourage investment in home ownership by removing purchasers' concerns about investing in an asset of uncertain and unpredictable value.⁵¹ Moreover, the reason national policymakers have seen fit to encourage homeownership on a massive scale is because it has long been a staple of national lore that homeownership carries numerous advantages, such as ensuring that individuals have a stake in the community and the affairs of local government, instilling respect for the institution of private property, and providing a salutary environment for families.⁵² Thus, there is a strong efficiency argument for recognizing homeowners' reliance interests.

In sum, homeowners have a pretty convincing case that their reliance interests are at least as deserving of judicial protection as developers. Yet, as mentioned previously, courts have expressly held that neighbors simply have no vested rights to maintain pre-existing zoning.⁵³ Courts rarely state their reasons for foreclosing relief to neighbors, however, and the reasons they do provide are not very persuasive.⁵⁴ In the remainder of this Article, I seek to discover the

51. *See supra* text accompanying notes 35–53.

52. For a sampling of the arguments advanced in favor of homeownership, see, for example, JACKSON, *supra* note 35, at 45–72, 190–95.

53. *See supra* note 25.

54. The most frequently stated rationale is that awarding neighbors a vested reliance interest in existing zoning would make it impossible for municipal authorities to change zoning ordinances to meet changing conditions. *See, e.g.,* Rodgers v. Vill. of Tarrytown, 96 N.E.2d 731, 733 (N.Y. 1951) (“Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if

real reason why courts make this distinction. As it turns out, the answer to this seemingly narrow doctrinal question goes to the heart of the judicial approach to municipal land use decision making, and in the process reveals the deeply flawed nature of that approach.

II. ADMINISTRATIVE EFFICIENCY: THE EVIDENCE FROM REGULATORY TAKINGS LAW

As an initial matter, I suspect that one reason courts distinguish developers' reliance claims from those of neighbors is simple administrative efficiency. In short, while neighbors may often have a legitimate grievance when the zoning is changed, courts worry that it would create insurmountable administrative difficulties to judicially recognize a remedy for such a grievance, given the enormous number of neighbors who could plausibly claim to have endured a depreciation in property values from any particular regulatory change. By contrast, recognizing the reliance-based claims of developers who have undertaken substantial improvements based on some site-specific regulatory assurance is a much more manageable task because that class is likely to be far smaller and more easily identified. I conclude that this explanation has some persuasive force, but is ultimately unsatisfying. It nevertheless proves important, for it will light the way toward a more compelling account of why courts distinguish developers' from neighbors' reliance claims.

As I mentioned earlier, courts are rarely explicit about why they make this distinction between developers and neighbors. Nevertheless, an analogous doctrinal area, the law of regulatory takings, provides some evidence that the courts may indeed be driven by the administrative concerns sketched in the preceding paragraph. Consider one of the more important recent Supreme

the public interest demands otherwise.”). This is an unsatisfying explanation, however, because it proves too much: if it has any validity, it would be an equally powerful rejoinder to *developers'* vested rights claims, which likewise require a municipality to “freeze” its regulatory regime at a particular point in time. Indeed, those courts that have been most resistant to developers' vested rights claims have argued that recognizing such rights would hamstring municipalities' flexibility in dealing with changing circumstances. *See, e.g., Avco Community Developers, Inc. v. S. Coast Reg'l Comm'n*, 553 P.2d 546, 553 (Cal. 1976). Yet, the majority of courts continue to recognize that developers do acquire vested rights at some point in the approval process, whereas neighbors can never acquire vested rights.

Court decisions on regulatory takings, *Lucas v. South Carolina Coastal Council*.⁵⁵ There, legislation by the state of South Carolina designed to prevent beach erosion on a barrier island prohibited the plaintiff from building any “occupiable improvements”⁵⁶ on land he owned. Based upon a trial court finding that the prohibition rendered plaintiff’s land economically “valueless,”⁵⁷ the Supreme Court held that where a regulation “denies all economically beneficial or productive use of land,”⁵⁸ the regulation amounts to a taking of property under the Fifth Amendment, unless the regulation coincides with some independent common-law prohibition on the use of land such as the law of nuisance.⁵⁹ In practice, this means that a landowner has at least some right to alter the land from its natural state—to *develop* it—free from state interference, so long as she is not committing a common-law nuisance.⁶⁰ By negative implication, those who may have an interest in leaving land undeveloped, such as neighboring landowners whose land may now be threatened by beach erosion, are out of luck unless they can assert a common-law cause of action against the would-be developer. Like the vested rights doctrine, here the Court privileges developers at the expense of neighboring landowners.

The key to understanding the disparate treatment that the *Lucas* court accords developers and neighbors lies in a provocative footnote. In dissent, Justice Stevens argued that the Court’s holding would have arbitrary results because the landowner whose property suffered a 100% loss of all economic value due to a government regulation would get fully compensated under the Court’s “valueless” rule, whereas a landowner who suffered a 95% or even a 99% wipeout would get no compensation.⁶¹ In a footnote, the Court agreed that this outcome was possible, but argued: “that occasional

55. 505 U.S. 1003 (1992).

56. *Id.* at 1009.

57. *Id.* at 1020.

58. *Id.* at 1015.

59. *See id.* at 1029–30.

60. *See id.* at 1018 (stating that deprivation of all economically beneficial or productive use of property typically takes the form of “requiring land to be left substantially in its natural state”); *cf. id.* at 1031 (citations omitted) (referring to the “erection of any habitable or productive improvements” as an “essential use” of one’s land).

61. *See id.* at 1064 (Stevens, J., dissenting).

result is no more strange than the landowner whose premises are taken for a highway (who recovers in full) and the landowner whose property is reduced to 5% of its former value by the highway (who recovers nothing). Takings law is full of these ‘all-or-nothing’ situations.”⁶² The Court’s footnote references a common issue in takings law, that of so-called “condemnation blight,” in which the government’s condemnation of one parcel of land (here, for a highway) causes neighboring properties to suffer a diminution in property value (as a result of increased noise, traffic congestion, environmental degradation, diminished quality of life, and so forth). Courts have uniformly held, as the *Lucas* majority correctly notes, that the owner of the condemned property is entitled to compensation for what was taken, but absent something more, the neighboring landowners are entitled to nothing for the diminution in property value.⁶³ Thus, as we have seen in the case of vested rights, the law refuses compensation for neighbors who endure a decline in property values as a result of some government activity, but provides compensation for some other class of affected landowners, despite the relative equivalence in the quantum of injury suffered by both classes.

The *Lucas* footnote does not explicitly answer *why* takings law makes these subtle differentiations, but commentators have filled in the blanks. According to the commentators, the rationale for this distinction is administrative efficiency.⁶⁴ The introduction of a new

62. *Id.* at 1019 n.8.

63. A recent case is *City of L.A. v. Superior Court of L.A. Cnty.*, 124 Cal. Rptr. 3d 499 (Cal. Ct. App. 2011). There, the city of Los Angeles acquired a number of properties in the vicinity of Los Angeles International Airport and demolished them, leaving the land vacant. Several nearby landowners complained that the city’s actions had drastically diminished the value of their property. The court held, however, these facts were insufficient to state a cause of action for a taking, absent a physical occupation of the complaining landowners’ property. *See also* FISCHER, REGULATORY TAKINGS, *supra* note 14, at 169–71 (describing condemnation blight and arguing on efficiency grounds that landowners should often be compensated when properties are devalued by nearby condemnation); Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277 (2001) (arguing that condemnation blight is a “derivative taking” that should be compensable).

64. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 75 (8th ed. 2011) (arguing that “[w]hen a government regulation affecting property values is general in its application” government will face enormous difficulties “identifying and then transacting with” everyone affected). Frank Michelman similarly argues that liability for takings should ordinarily be denied

land use such as a busy highway in a once quiet rural town may have numerous adverse impacts, and these impacts can extend imperceptibly for a considerable distance. Because capitalization studies show that home values are sensitive to even slight changes in the local environment,⁶⁵ any land use change could conceivably give rise to a very large number of plausible claims by homeowners that the change has caused some diminution of their property values. If a court were to hold that the diminution in property value suffered by an adjacent landowner was alone sufficient to state a compensable takings claim, then any other landowner who could likewise establish that the land use change resulted in some decrease in his or her property values would seemingly be entitled to compensation, even if the property in question were located at a considerable distance from the new land use and suffered only a *de minimis* decrease in value. The potential claimants could number in the dozens or even hundreds. Courts would be flooded with litigation and tasked with the unenviable chore of determining whose injuries are sufficiently severe to warrant compensation,⁶⁶ while legislatures would have to worry that every regulatory intervention would subject them to massive liability for damages. Limiting recovery to those whose land was actually condemned seemingly solves these problems. The class is relatively smaller and more discrete, and there is a fair presumption that a physical occupation of one's land has caused fairly serious injury to the landowner. Thus, courts are relieved of having to make fine distinctions and legislatures need only condemn land in the path of the proposed highway. In other words, the juridical distinction between the owner whose land is taken for a highway and the owner whose land is devalued by the highway has nothing to do with any presumed difference in the

where "settlement costs" are high. He defines settlement costs as "the dollar value of the time, effort and resources which would be required in order to reach [adequate] compensation settlements. . . . Included are the costs of settling not only the particular compensation claims presented, but also those of all persons . . . not obviously distinguishable by the available settlement apparatus." Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967).

65. See *supra* notes 26–27 (discussing capitalization).

66. Bell & Parchomovsky, *supra* note 63, at 299–300 (discussing traditional concern with opening "floodgates" in condemnation blight cases). Bell and Parchomovsky go on, however, to claim that the administration problem can be easily cured by requiring landowners seeking compensation to self-assess their damages. See *id.* at 300–04.

magnitude of injury endured by the two landowners, but entirely to do with the relative ability of the state's administrative apparatus to address their respective grievances.

Courts are perhaps understandably reluctant to state outright that seemingly arbitrary administrative concerns cause them to deny recompense to many landowners with compelling claims for relief. Nevertheless, the logic of administration is implicit in the text of the *Lucas* decision. The Court notes that the practical reason why courts generally permit "the government, by regulation, to affect property values without compensation"⁶⁷ is that "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."⁶⁸ This consideration, however, "does not apply to the relatively rare situation where the government has deprived a landowner of all economically beneficial uses."⁶⁹ In other words, the class of individuals whose property values stand to be diminished by government regulation is so large that "government could hardly go on" if it were forced to either compensate all of those individuals for the diminution in property values or forego regulation entirely. However, the total wipeout of all economic value is sufficiently rare that government would only have to bear the very manageable burden of making the occasional payment to a truly aggrieved landowner, or regulating in a way that has a less harsh impact on that particular landowner. The individual who has suffered the total wipeout, then, is much like the landowner whose property has been taken for a highway in that she is likely to be a member of a very small and easily identifiable class to which courts can award recompense without creating too many headaches for themselves or for legislatures.

The logic of *Lucas* and the condemnation blight cases easily extends to the differential treatment accorded developers' and neighbors' reliance interests in pre-existing land use regulations. Given the highly diffuse nature of modern land use impacts, the number of homeowners who could plausibly claim to have suffered a depreciation in property values from a single adverse land use

67. *Lucas*, 505 U.S. at 1018.

68. *Id.* (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

69. *Id.*

change is apt to be very large and amorphous.⁷⁰ Awarding recompense to every member of this class, or attempting to ascertain a dividing line between compensable and noncompensable claims within this class, would be administratively impractical. Courts would be inundated with litigation, often with complex evidentiary problems involving the extent of the diminution of property value, and they would have little way of precisely delimiting the group of homeowners who could bring a cognizable claim for relief. The ability of fiscally-strapped legislatures to adopt broadly applicable regulations would be greatly impeded by the prospect of dozens or perhaps even hundreds of claimants entitled to relief for every diminution in property values. By contrast, limiting vested rights claims to developers who have made substantial expenditures and whose claims are based on some site-specific criteria (such as a permit application or small-scale rezoning) rather than a broad regulatory regime necessarily circumscribes the class of claimants to a small, discrete, and easily identified group, all of whose members, by virtue of having made substantial expenditures in reliance on a pre-existing regulatory regime, can be fairly presumed to have endured considerable harm from the regulatory change.⁷¹

The foregoing account of why courts differentiate developers' from neighbors' reliance interests, while adequate as a descriptive matter, is also disquieting. Because the administrative concerns described above require that recovery be limited to a small and discrete class, it is necessarily the case that courts will only recognize a viable cause of action, as *Lucas* appears to acknowledge, in relatively "rare" cases.⁷² This means that a great many plaintiffs who are deserving of recompense will be turned out of court on the rather

70. This concern appears to be captured in the case of *Hecton v. People ex rel. Dep't of Transp.*, 58 Cal. App. 3d 653 (1976). There, the plaintiff claimed that a diminution of property values allegedly attributable to condemnation of neighboring properties for the construction of a freeway resulted in a taking of his property. The court disagreed, noting that "[t]he economic ramifications of the construction of a freeway are complex and unbounded." *Id.* at 658.

71. The distinction between a small, discernible class and a large amorphous class may also explain why some courts have limited standing in spot zoning challenges to those who have suffered "special damages" above those suffered by the public as a whole. *See supra* note 25; *see also* SMITH & HAND, *supra* note 15, § 8:5 (discussing standing requirements for spot zoning challenges). This distinction may also underlie the administrative law dichotomy between legislative and quasi-adjudicative decisions, which I take up *infra* at text accompanying notes 159–81.

72. *Lucas*, 505 U.S. at 1018.

arbitrary grounds of administrative efficiency. Indeed, although it appears to have been *Lucas's* purpose to provide more robust protection for developers against intrusive government regulation than the pre-existing regulatory takings law offered, development advocates have been quick to criticize *Lucas* on the grounds that the “total wipeout” is so rare as to hardly ever appear in practice.⁷³ Likewise, developers have frequently lamented that the protection offered by the common-law vested rights doctrine is plainly inadequate because the threshold for establishing vested rights is so high.⁷⁴

Perhaps it is simply the case that courts have self-consciously sacrificed fairness to particular claimants in the interests of administrative expediency. But *Lucas* and other takings cases do purport to take account of the concerns of equity as well as those of administration. In asserting that the landowner who suffers a total wipeout is entitled to special solicitude, *Lucas* states that:

[I]n the extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life” in a manner that secures an “average reciprocity of advantage” to everyone concerned.⁷⁵

The Court here expresses a familiar concern in regulatory takings jurisprudence that the burden of government regulation should, as a matter of fairness, fall generally on the public and not be borne disproportionately by an individual or small group of landowners.⁷⁶ For the *Lucas* court, this means that the public at large should not be

73. For discussion and criticism of *Lucas*, see, for example, Epstein, *supra* note 17, at 1369. See also Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759 (2006).

74. See *supra* note 24 (discussing efforts by developers to strengthen vested rights protections by statute).

75. *Lucas*, 505 U.S. at 1017–18 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)) See also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

76. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Harlan, J., dissenting)(quoted in *Lucas*, 505 U.S. at 1071) (the takings clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”). But see *Penn Cent.*, 438 U.S. at 133 (“Legislation designed to promote the general welfare commonly burdens some more than others.”).

able to enjoy for free the benefits of protection against beach erosion by imposing the burden of a total wipeout on a single landowner or small handful of landowners.

If this logic is accepted, however, then there is a strong case that the law's protection should extend to at least some neighbors' reliance interests. One of the central problems with the siting of highways and other so-called "locally undesirable land uses" (LULUs) such as shopping malls, nightclubs, or garbage dumps is that while they bring benefits to the region or city as a whole, their costs (increased noise, traffic congestion, and so on) are largely borne locally by those landowners in the vicinity of the new land use, in the form of depreciated property values.⁷⁷ While the group of landowners adversely affected by a new LULU may be sizeable in comparison to those relatively rare individuals who suffer a total wipeout or who have built up significant reliance interests based on some site-specific regulatory activity, it is nevertheless difficult to "indulge our usual assumption" that the "burdens and benefits of economic life" are being distributed relatively evenly when one group of landowners is asked to shoulder such a heavy burden in order to confer a benefit on the general public. Given that fact, it seems courts should provide at least some solicitude for neighbors' reliance interests in pre-existing zoning regulations. Why, then, do they not?

III. A PUBLIC CHOICE MODEL OF RELIANCE INTERESTS

Contrary to appearances, the courts are actually very cognizant and, indeed, protective of neighbors' reliance interests. How can this be the case when courts repeatedly reject neighbors' reliance-based claims? This Part argues that the reason courts opt not to provide judicial protection for homeowners' reliance interests is because they intuit that homeowners have sufficient influence with the local governmental authorities that make most land use decisions to protect their own reliance interests through the political process (by, for example, pressing for zoning regulations that tightly restrict new development). For this very reason, however, courts suspect that the local political process is likely to disadvantage developers, especially

77. See, e.g., Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 *FORDHAM URB. L.J.* 787, 789-90 (1994); Bell & Parchomovsky, *supra* note 63, at 290-94.

where a developer has already sunk substantial resources into a particular project and is thus incapable of escaping an oppressive regulatory regime except at great cost. As a result, courts are likely to deny judicial protection for neighbors' reliance interests while extending it to those developers who have undertaken substantial expenditures in reliance on a pre-existing, regulatory *status quo*.

This narrative dovetails neatly with the administrative efficiency account detailed in the preceding Part. Deferring neighbors' reliance interests to the political process allows courts to escape from the dilemma of either providing judicial protection for such interests and thereby creating an administrative nightmare or denying such protection and thereby depriving many deserving claimants of relief. Courts can rest easy that they need not intervene to protect neighbors' reliance interests because the political process is perfectly adequate to do so. Moreover, the very fact that creates the divide in administrability between neighbors' and developers' reliance interests—the relative size of the class affected—also explains the disparity in political power between these groups. The relatively large size of the class of homeowners accounts for both why the judiciary is incapable of providing effective protection for homeowners' reliance interests and why we can expect homeowners to be influential in the local political process, whereas the relatively smaller size of the class of developers with substantial reliance interests makes that class both more susceptible of judicial protection and less likely to prevail in the political sphere.⁷⁸

In its emphasis on political process, this Part follows in the tradition of “public choice” scholarship. Public choice theory emphasizes that judicial doctrine should reflect the practical realities of the political system, particularly the extent to which interest groups have the ability to organize and influence the political process.⁷⁹ This interest-group perspective has spawned an influential theory of judicial review, which suggests that courts should broadly defer to a political process that seems to be working effectively and intervene to shore up that process where it disadvantages “discrete

78. See POSNER, *supra* 64, at 75 (“[A] regulation, because it affects more people than a single taking, is more likely to mobilize effective political opposition.”).

79. See generally FARBER & FRICKEY, *supra* note 13; STEARNS & ZYWICKI, *supra* note 13.

and insular minorities” who cannot effectively form interest groups.⁸⁰

A number of scholars have applied public choice theory to land use decision making, with most focusing specifically on the law of regulatory takings.⁸¹ Saul Levmore, for example, uses public choice theory to explain the distinction we have seen in takings law between physical occupations and regulatory burdens (the “condemnation blight” scenario). Because relatively fewer individuals will have their property condemned than will see their property values decline from a nearby condemnation, the former will have a less effective opportunity than the latter to influence the political process to press their interests. He writes:

[P]hysical takings (as opposed to regulatory or tax burdens) usually burden fewer people, who will have relatively more trouble organizing into a political force. Often the government takes property from just one or two property owners, while regulatory burdens almost always affect large numbers [T]he nonphysical burdens of such a project are likely to fall on thousands of properties (such as the homeowners who lose value because of noise from the new highway) whose owners can more easily organize than can the set of owners whose properties are physically taken.⁸²

Levmore argues accordingly that regulatory takings law appropriately awards compensation to those whose land has been condemned but not to those whose property values have been affected by a condemnation.

In the following Part, I refine the public choice account in two principal ways. First, I argue that *reliance*, rather than merely group size, has driven the disparity in political power between developers and homeowners. On one hand, the large size of a group is no assurance of political power, because organization is often more

80. This theory of judicial review traces its origins to the Supreme Court’s famous fourth footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), and was most fully elaborated in John Hart Ely’s classic work *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–179 (1980). Under this theory, the judiciary’s proper role is one of monitoring the political process to ensure that it has incorporated the appropriate degree of deliberation, accommodation of competing interests, and solicitude for minorities.

81. See, e.g., FISCHER, *REGULATORY TAKINGS*, *supra* note 14, at 114–40; Michelman, *supra* note 64, at 1217–18.

82. Levmore, *supra* note 14, at 320.

important than sheer size; indeed, public choice scholarship has demonstrated that smaller groups can often organize much more effectively than larger groups.⁸³ What assures homeowners of political power, in addition to their relative size, is that their enormous stake in their homes gives them tremendous motivation to organize and be involved in local politics in order to protect their property values. On the other hand, although developers may be a small and politically isolated group, they can easily resist unfavorable regulation in one municipality to the extent they can simply exit to a neighboring jurisdiction. Once a developer invests substantial resources into a particular project, however, her exit costs rise dramatically and make it harder for her to escape an exploitative regulatory regime. Thus, reliance interests play a central role in explaining both the homeowners' predominance within the local political process and the developer's vulnerability within that same process.

The second refinement is that courts have not simply accepted the descriptive point that homeowners tend to be powerful and adjusted the doctrine around that reality. Rather, courts have taken an affirmative role in *enabling* homeowners to capture the political process for their own ends, perhaps because courts are all too keenly aware of their own institutional limitations in directly enforcing homeowners' reliance interests. The courts have facilitated homeowner domination of the local political process principally in two ways: 1) they have broadly legitimized municipalities' use of the zoning power to protect homeowners' reliance interests; and 2) they have liberally endorsed state policies that favor the proliferation of small suburban municipalities in which homeowners can be assured of being the politically dominant faction. This last point offers an ironic twist on the public choice account: while that account hinges on the class of homeowners being sufficiently *large* to have political clout and defy judicial cognizability, it also demands that the class be sufficiently *small* to permit effective organization and domination of the local political process. This reinforces my point that organization

83. See MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION* (1965) (postulating that small groups of intensely interested individuals can more effectively organize as interest groups than large groups whose members are each less intensely interested).

is at least as important as size in assuring that homeowners are politically powerful.

Once we understand the role courts have played in creating a “majoritarian” local political process that systematically favors homeowners, we can likewise understand why they are especially solicitous of developers’ reliance interests. A small polity dominated by a particular faction with fairly uniform interests raises the classic Madisonian concern that a politically unpopular minority (here, developers) may be consistently exploited within the political process.⁸⁴ Thus, it makes sense that courts would complement their deference to a political process dominated by homeowners with special judicial solicitude for developers in circumstances where developers would be especially susceptible to majoritarian exploitation—such as, where they have expended substantial resources in reliance on a site-specific regulatory assurance.

Section A below explains how homeowners’ reliance interests, combined with the assistance of the courts, enables homeowners to come out ahead in the local political process under the basic public choice model. Section B then shows how courts’ solicitude for developers’ reliance interests can likewise be traced to the public choice model.

A. Homeowners and the Public Choice Model of Local Government

According to economist William Fischel, local politics are dominated by “homevoters”: homeowners who consistently press for policies that will maximize the value of their most valuable asset—their homes.⁸⁵ This means, among other things, that homevoters will consistently place pressure on municipal authorities for highly restrictive zoning regulations that prevent the siting of any new development that may threaten property values.⁸⁶ For this reason, homevoters have often been given the derisive moniker NIMBYs (“Not in My Backyard”). Because these NIMBYs/homevoters are the

84. See *infra* text accompanying notes 150–59 (on Madison’s concern with faction and how it applies to land use politics in small municipalities).

85. See FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 4–12, 72–93.

86. *Id.*; see also sources cited *supra* note 8 (discussing various Land Use conflicts involving NIMBYs (“Not in my backyard”).)

dominant political faction in most municipalities, local governments must accede to their wishes.

What makes homeowners so dominant in local politics? In part, as Levmore notes, it is a question of numbers. Most municipalities accord voting rights only to *residents* of the municipality.⁸⁷ And the majority of local governments in the United States are small, suburban municipalities in which the overwhelming majority of residents, and hence voters, are homeowners.⁸⁸

It is curious, though, that theorists like Levmore would place so much emphasis on *size* when one of the most critical insights of public choice theory is that smaller groups often do a better job of organizing to influence public policy than larger groups.⁸⁹ This is both because smaller groups face fewer barriers to organizing—for example, they can more easily identify sympathizers and police free-riding—and because regulation tends to visit benefits and burdens disproportionately on particular small groups, providing those groups with the motivation to be politically active.⁹⁰ As Daniel Farber states, in a critique of Levmore, “[i]f public choice has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process.”⁹¹

The major reason homeowners are so politically powerful at the local level is thus not their size, but the “high stakes” they possess in local politics; that is, their reliance interests. As discussed in Part I.B., homeowners stand to lose a great deal if their property values depreciate from the date of purchase, and property values are heavily determined by a municipality’s zoning regulations.⁹² As Fischel has

87. See Briffault, *Our Localism: Part II*, *supra* note 38, at 440.

88. See Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 77 (1990) [hereinafter Briffault, *Our Localism: Part I*] (stating that three-quarters of municipalities have fewer than 55,000 residents); Fischel, *NIMBYs*, *supra* note 4, at 145 (stating that two-thirds of homes are owner-occupied and homeowners vote fifty percent more frequently than renters).

89. See OLSEN, *supra* note 83 (postulating that small groups of intensely interested individuals can more effectively organize as interest groups than large groups whose members are each less intensely interested).

90. See generally Einer Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 37–41 (1991).

91. See Daniel Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992).

92. See *supra* text accompanying notes 26–33.

detailed, the size of the homeowner's stake gives her a huge incentive to be active in the local political process in order to ensure that the political process operates to protect the value of her home.⁹³ Indeed, we recall that one of the central purposes of the long-standing national policy in favor of homeownership has been precisely to induce Americans to have a stake in the affairs of government.⁹⁴ Thus, the combination of size and motivation makes the homeowner a powerful force in local politics.

Perhaps an equally important factor in explaining homeowner dominance in local government is the role of the courts. After some initial reluctance, courts have repeatedly affirmed that municipalities may legitimately use the zoning power to protect homeowners' reliance interests. Furthermore, courts have played an active role in facilitating homeowner control of the local political process by broadly affirming state policies that enable homeowners to *create* local governments in which they call the shots. In short, despite the superficial appearance that courts are not particularly concerned about homeowners' reliance interests, in reality courts have taken major steps to empower homeowners to protect their own reliance interests, thus obviating the need for courts to provide direct judicial protection for those interests.

1. Judicial deference to zoning

For the past century, courts have accepted as a matter of course that zoning is a legitimate means of protecting the reliance interests of homeowners. When zoning was first introduced in the United States in the early twentieth century, many courts greeted it with considerable skepticism, seeing zoning as an encroachment on a landowner's constitutional right to make unrestricted use of her property⁹⁵ and a crude means of social segregation.⁹⁶ Rather quickly,

93. See FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 14, at 8–12, 30, 74–76; see also FISCHER, REGULATORY TAKINGS, *supra* note 14, at 259 (“[M]ost voters in smaller jurisdictions are homeowners. They have an incentive to pay attention to politics: good decisions will increase the value of their major asset, and bad ones will reduce it. Political scientists have long been impressed by the high rate of participation by middle-class homeowners in local politics.”).

94. See *supra* text accompanying notes 51–52.

95. See *Ignacinas v. Risley*, 121 A. 783, 785 (N.J. 1923) (“A law which forbids a certain

though, the judicial tide turned in favor of zoning, as courts began to recognize the desirability of stabilizing single-family residential neighborhoods. In the landmark *Euclid* decision, the United States Supreme Court heartily endorsed zoning as a useful means for preventing the invasion of unwanted uses into single-family residential neighborhoods, despite the fact that the zoning ordinance at issue caused the appellant to suffer a 75% decline in the value of its property because of new use restrictions.⁹⁷

Early decisions made it clear that zoning was legitimate because it aimed to secure a society of homeowners with a firm stake in the affairs of government. For example, in upholding a zoning ordinance that created exclusive districts for single-family homes, the California Supreme Court stated:

The establishment of single family residence districts offers inducements, not only to the wealthy, but to those of moderate means to own their own homes. With ownership comes stability With ownership comes increased interest in the promotion of public agencies, such as church and school, which have for their purpose a desired development of the moral and mental make-up of the citizenry of the country. With ownership of one's home comes recognition of the individual's responsibility for his share in the safeguarding of the welfare of the community⁹⁸

Courts likewise lauded zoning for protecting homeowners' expectations in pre-existing property values. According to one court: "The stabilizing of property values, and giving some assurance to the public that, if property is purchased in a residential district, its value as such will be preserved, is probably the most cogent reason back of zoning ordinances."⁹⁹

use of property deprives it of an essential attribute. The result in effect is a proscription of its ownership."); *Spann v. City of Dallas*, 235 S.W. 513, 514–15 (Tex. 1921) ("The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.").

96. *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307 (N.D. Ohio 1924), *rev'd* 272 U.S. 365 (1926) ("In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life.").

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

98. *Miller v. Bd. of Pub. Works of L.A.*, 234 P. 381, 387 (Cal. 1925).

99. *Marrs v. City of Oxford*, 24 F.2d 541, 548 (D. Kan. 1928); *see also Flower Hill Bldg. Corp. v. Vill. of Flower Hill*, 100 N.Y.S.2d 903, 907 (N.Y. Sup. Ct. 1950) (purpose of zoning ordinance is to protect residents against "radical zoning changes" that will diminish property values).

Ever since zoning's legitimacy was established in the early part of the century, courts have repeatedly cited the protection of property values as one of zoning's central purposes and have found that purpose sufficiently weighty to immunize zoning against all manner of legal challenges.¹⁰⁰ In a similar vein, courts have frequently held that the protection of neighboring landowners' reliance interests in a pre-existing regulatory scheme is a legitimate reason for municipalities to decline to change their zoning regulations.¹⁰¹

100. *See, e.g.*, *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993) (no due process violation in refusing authorization to site a warehouse in a residential neighborhood because record showed that city's decision was motivated by concerns over safety, traffic, noise, and decreased property values); *Greenbriar v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989) (no due process violation because city's refusal to authorize rezoning was rationally based on concerns that rezoning would cause decrease in neighboring property values); *Dry Creek Partners, LLC v. Ada Cnty. Comm'rs*, 217 P.3d 1282, 1291 (Idaho 2009) (zoning's valid purposes include "preventing visual blight, stabilizing neighborhoods, maintaining neighborhood property values, and preserving the character of the community"); *City of Lewiston v. Knieriem*, 685 P.2d 821, 825 (Idaho 1984) (restrictions on siting of mobile homes was legitimate because one of the central purposes of zoning is to "conserve and stabilize property values"); *Mack T. Anderson Ins. Agency, Inc. v. City of Belgrade*, 803 P.2d 648, 651 (Mont. 1990) (upholding exclusion of mobile homes from general residential district, citing "a concern for long-term planning, the unique qualities of manufactured homes, and the property values of surrounding residents"); *Farley v. Zoning Hearing Bd.*, 636 A.2d 1232, 1238 (Pa. Commw. Ct. 1993) ("[P]revention of undue concentration of population, prevention of traffic congestion and maintenance of property values are all legitimate purposes of zoning.").

Some modern courts refuse to consider property values standing alone as a legitimate basis for land use controls and require that this be coupled with some other valid consideration. *See, e.g.*, *Redevelopment Auth. of Oil City v. Woodring*, 445 A.2d 724, 727 (Pa. 1982) ("[N]either aesthetic reasons nor the conservation of property values or the stabilization of economic values in a township are, singly or combined, sufficient to promote the health or the morals or the safety or the general welfare of the township or its inhabitants or property owners.") (quoting *Appeal of Medinger*, 104 A.2d 118, 122 (Pa. 1954)). Because standards such as "morals" and "general welfare" are highly subjective, however, courts often consider diminished property values to be prima facie evidence that some important non-economic value is being affected. *See* RICHARD F. BABCOCK, *THE ZONING GAME* 75-79 (1966) (courts are not concerned about property values per se but see property values as a sign that some exogenous value such as neighborhood character is being impacted). Altogether, this discussion suggests that courts are somewhat uncomfortable with explicitly permitting homeowners' economic self-interest to serve as the basis of municipal land use policies, but nevertheless allow such self-interest to reign under the more neutral guise of "morals" or "general welfare."

101. *See Burns v. City of Des Peres*, 534 F.2d 103, 110 (8th Cir. 1976) (refusal to rezone properly based on opposition from neighboring landowners because "[p]roperty owners in the area who have relied on the existing zoning classification have an interest in the perpetuation of such scheme unless the public good dictates a change"); *State ex rel. Barber & Sons Tobacco Co. v. Jackson Cnty.*, 869 S.W.2d 113, 120 (Mo. Ct. App. 1993) (following *Burns* for the proposition that reliance interests of neighbors are a legitimate basis on which to deny a rezone). *See also* *Dover v. City of Jackson*, 541 S.E.2d 92, 96 (Ga. Ct. App. 2000) (upholding denial of rezone from residential to commercial, citing, in part, the legitimate governmental interest in preserving the existing character of the neighborhood); *Du Page Trust Co. v. Cnty. of Du Page*, 335 N.E.2d

Modern courts have gone even further than the early decisions in a few key respects. Where early courts were reluctant to recognize that aesthetics could be a valid purpose of land use regulations, modern courts have broadly upheld sweeping aesthetic and historic preservation laws, often by citing the connection between aesthetic or historic significance and neighborhood property values.¹⁰² In addition, where early courts were perhaps willfully oblivious to the politicization of zoning, many modern courts have explicitly acknowledged that the local political process is dominated by owners of developed land who seek to use that process to protect their reliance interests by preventing new development. Rather than condemning zoning on these grounds, however, the courts have accepted that the capture of the local political process by interest groups intent on using regulation to advance their own self-interest is a legitimate part of our democratic system.¹⁰³

A striking example of this judicial approach is the Seventh Circuit Court of Appeals' decision in *Coniston Corp. v. Village of Hoffman Estates*,¹⁰⁴ authored by one of the most prominent public

61, 66 (Ill. App. Ct. 1975) (upholding denial of rezone from residential to commercial, citing, in part, the reliance interests of homeowners in maintaining the residential character of the area). Similarly, courts have held that reliance interests are a valid basis for distinguishing between pre-existing uses and prospective uses when formulating new land use regulations. For instance, in *Haves v. City of Miami*, 52 F.3d 918 (11th Cir. 1995), the Eleventh Circuit Court of Appeals rejected an equal protection challenge against a zoning ordinance that prohibited houseboats within city limits, but had a grandfather provision for existing houseboats on a particular river. The court upheld the grandfather provision as a rational means by which to achieve the legitimate governmental goal of protecting the reliance interests of existing homeowners: "A state may legitimately use grandfather provisions to protect property owners' reliance interests." *Id.* at 922. I examine the implications of distinguishing pre-existing from prospective uses further *infra* in Part IV.

102. See, e.g., *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 309 (Mo. 1970) (acknowledging that protection of property values is valid purpose supporting aesthetic regulation); *Farley v. Graney*, 119 S.E.2d 833, 848 (W. Va. 1960) (recognizing ordinance regulating locations of junk yards appropriate because, *inter alia*, such uses have "a tendency to depress neighborhood property values"); *State ex rel. Saveland Park Holding Corp. v. Weiland*, 69 N.W.2d 217 (Wis. 1955) (holding that aesthetic zoning for the purpose of preserving property values "falls within the exercise of the [state's] police power . . ." because "[a]nything that tends to destroy property value . . . necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village").

103. As I explore *infra* in Part III.B.1, a few courts have considered the parochial nature of the local political process to justify more searching judicial review, but those cases are in the minority.

104. 844 F.2d 461, 469 (7th Cir. 1988).

choice theorists, Judge Richard Posner. In *Coniston*, a developer brought a Constitutional due process challenge against a city council's denial of the developer's site plan for a commercial office building. The court noted that, although the council had given no reason for the decision, it seemed plausible that the decision was "an effort to transfer wealth from the plaintiffs" to existing owners of office space by protecting the existing landowners from competition.¹⁰⁵ The court nevertheless rebuffed the challenge, stating that "much governmental action is protectionist or anticompetitive and nothing is more common in zoning disputes than selfish opposition to zoning changes."¹⁰⁶ As the court held: "The Constitution . . . does not outlaw the characteristic operations of democratic (or perhaps of any) government, operations which are permeated by pressure from special interests."¹⁰⁷

Numerous other decisions have similarly concluded that it is legitimate for zoning decisions to be rooted in the local constituency's desire to protect its pre-existing reliance interests.¹⁰⁸ Most of these cases, unlike *Coniston*, involve *homeowners* rather than owners of commercial office buildings. For example, in a decision by the Fourth Circuit Court of Appeals, *Gardner v. City of Baltimore Mayor*,¹⁰⁹ the Court held that the planning commission for the city of Baltimore was justified in denying approval of a development

105. *Id.* at 467.

106. *Id.*

107. *Id.*

108. *Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 828–29 (4th Cir. 1995) ("It is not pernicious *per se* for a zoning authority to be influenced by political pressure in the community."); *Gardner v. City of Baltimore Mayor*, 969 F.2d 63, 72 (4th Cir. 1992) ("Those who live near proposed development have the most significant personal stake in the outcome of land-use decisions and are entitled, under our system of government, to organize and exert whatever political influence they might have. Nor is it necessarily improper for municipal government to consider or act upon such political pressure. Such give-and-take between government officials and an engaged citizenry is what democracy is about."); *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 46 (1st Cir. 1992) (refusal to issue waste disposal permit permissibly based on local opposition to waste dump siting); *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1579 (11th Cir. 1989) ("[A] planning commission or a City Council is not a judicial forum; it is a legislative body held democratically accountable" through the political process.); *Burns v. City of Des Peres*, 534 F.2d 103, 110 (8th Cir. 1976) (refusal to rezone properly based on opposition from neighboring landowners because "[p]roperty owners in the area who have relied on the existing zoning classification have an interest in the perpetuation of such scheme unless the public good dictates a change").

109. 969 F.2d at 72.

proposal. The developer argued that it had been deprived of due process because the planning commission had acted at the behest of “politically influential residents”¹¹⁰ who opposed all development near their neighborhood. The court held, however, that:

Those who live near proposed development have the most significant personal stake in the outcome of land-use decisions and are entitled, under our system of government, to organize and exert whatever political influence they might have. Nor is it necessarily improper for municipal government to consider or act upon such political pressure. Such give-and-take between government officials and an engaged citizenry is what democracy is about.¹¹¹

Gardner affirms the central tenet of the public choice model of local government, which is that homeowners indeed have an enormous “stake” in land use decisions that induces them to participate actively in local government. Decisions like *Gardner* and *Coniston* take the next step, however, in holding that landowners have not only the incentive but also the *right* to capture the reins of local government and use them to protect that “stake.”

2. Judicial endorsement of small, suburban municipalities

What has been said so far suggests that courts have played a fairly passive role, deferring to a local political process that they acknowledge is captive to homeowners who use that process to protect their own reliance interests. In fact, courts have taken a much more active role—they have affirmatively helped to *place* homeowners in power in local politics so that homeowners can protect their own reliance interests without the need for ad hoc judicial protection. Courts have done this by broadly endorsing state policies that favor the proliferation of small suburban municipalities in which homeowners are practically assured of being the dominant political faction.

As discussed above, the public choice model holds that homevoters control the local political process because of their relative *size* and their enormous incentives to participate in local politics.¹¹² Standing alone, though, these characteristics would be

110. *Id.* at 71.

111. *Id.* at 72.

112. *See supra* text accompanying notes 86–94.

insufficient to bestow homeowners with a reliable degree of political control. Political scientists have shown that large, diverse cities tend to be characterized by a “pluralist” governance model in which there are many sizeable, well-organized, and highly motivated pressure groups who all exercise some influence with city hall.¹¹³ In a pluralist system, homeowners might be powerful, but they would have to share power with groups such as renters, construction firms, labor unions, and developers, all of whom would likely have more favorable attitudes toward new development than homeowners.¹¹⁴ The intensity of homeowner interests in particular land use matters would be counterbalanced by the deep pockets and repeat-player advantages of developers, or other groups, who could exercise outsized influence through their ability to make campaign contributions and to help grow a dwindling urban tax base with new development.¹¹⁵ And, in a large city, homeowners might not share uniform interests if they are widely diffused geographically and would thus feel the impacts of different proposed land use changes in widely disparate ways. As such, the balance of empirical literature generally concludes that homeowners exercise considerably less influence in larger, more diverse cities.¹¹⁶

In order for homeowners to effectively protect their own reliance interests by preventing new development, then, it is not enough for

113. See ROBERT A. DAHL, WHO GOVERNS? (1961); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956) [hereinafter DAHL, PREFACE]; FISCHER, REGULATORY TAKINGS, *supra* note 14, at 328 (“[T]he biggest cities are apt to have pluralistic politics because of their large population and resulting heterogeneity of interest groups.”); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 89 (1998) (noting that with increasing size, cities are more vulnerable to influence by “rent-seeking groups such as political machines, municipal unions, public works lobbies, and downtown business interests”).

114. See FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 14, at 90–97 (conceding that homeowners have far less influence in more diverse urban centers than in smaller suburbs); Briffault, *Our Localism: Part II*, *supra* note 38, at 372–73 (noting that in larger cities, neighborhood groups cannot control their own zoning because they must share power with other interests, but smaller suburbs, which are frequently just incorporated neighborhoods, can zone to protect the neighborhood’s interests).

115. See, e.g., LOGAN & MOLOTCH, *supra* note 11, at 50–98, 154–62, 230–32. On developers being repeat players, see ROBERT C. ELICKSON & VICKI L. BEEN, LAND USE CONTROLS 306 (3d ed. 2005).

116. See ELICKSON & BEEN, *supra* note 115, at 305; FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 14, at 90–92. As I explain *infra* in Part IV.A, however, there is some evidence emerging that homeowners are able to exert outsized influence in larger cities as well. For reasons I discuss there, I am not entirely convinced by this evidence.

courts to merely defer to the local political process. Rather, homeowners must have the ability to form a stable political coalition with other, similarly motivated homeowners that can reliably dominate the local political process without countervailing pressure from interest groups with divergent demands—a “majoritarian” rather than pluralist political system.¹¹⁷ The best way to accomplish this is by carving out a small, homogenous municipality comprised primarily of homeowners who will all be affected in relatively similar ways by any new land use siting.¹¹⁸ In such a municipality, homeowners would exercise tight control over the land use power to prevent unwanted new development and to maintain the general homogeneity of the community, such as, for example, by zoning exclusively for large-lot, single-family homes.¹¹⁹ Furthermore, a small jurisdiction dominated by homeowners would dilute the influence of deep-pocketed developers, as campaign contributions from developers would be less decisive in a small, homogenous jurisdiction than in a large, diverse one, and the community could manage its tax base with fiscal zoning rather than by luring big-ticket development.¹²⁰ Thus, if it were the case that policymakers and courts desired to provide homeowners with the ability to protect their own reliance interests through the local political process, we would expect them to facilitate the proliferation of very small suburban municipalities dominated by homeowners.

Indeed, that is exactly what has happened. Most states have enacted a suite of policies that enable and, indeed, encourage the creation of small, homeowner-dominated suburban municipalities, and courts, by and large, have been extremely deferential towards these policies. Courts liberally permit the incorporation of new

117. See FISCHER, REGULATORY TAKINGS, *supra* note 14, at 105–07 (contrasting majoritarian with pluralist political system); *id.* at 328–29 (small suburbs are majoritarian; large cities are pluralistic).

118. See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to the New Regionalism*, 88 GEO. L.J. 1985, 2018 (2000) (stating that “smallness and homogeneity” of suburbs enables them effectively “to wield local powers to exclude undesirables and pursue the locality’s collective self-interest”).

119. See *id.*; FISCHER, REGULATORY TAKINGS, *supra* note 14, at 259–62 (discussing use of fiscal zoning to ensure homogeneity in small suburbs).

120. FISCHER, REGULATORY TAKINGS, *supra* note 14, at 259–62 (on advantages of fiscal zoning); *id.* at 287 (campaign contributions ineffective in small governments).

municipalities by groups as small as seventy-five individuals¹²¹ and will typically approve petitions for incorporation as a matter of course—there is little need for the petitioners to demonstrate that they represent a cohesive community.¹²² As such, areas routinely incorporate because they prefer to live in a town composed exclusively of residences or because they wish to seize control of the land use power to place tight constrictions on new development—both purposes the courts consider perfectly legitimate.¹²³ Indeed, historians have demonstrated that the modern trend toward the liberalization of incorporation standards—which led to a rash of new incorporations—coincided with the Supreme Court’s placing its imprimatur on the constitutionality of zoning.¹²⁴ In other words, communities were incorporating specifically in order to control their own land use.

Richard Briffault reports that courts have also endorsed a number of other state policies designed to enable the proliferation of small suburban communities. Where states have incentivized incorporation, such as by delegating the zoning power and the ability to assess property taxes to incorporated communities, courts have been broadly deferential.¹²⁵ And courts have likewise endorsed state policies designed to facilitate incorporation by minimizing the tax burden of incorporation, such as the use of special-purpose districts and interlocal contracting that enable local governments to cheaply outsource the provision of services such as water, police, or pest control while retaining local autonomy over the land use and taxing powers.¹²⁶ Finally, courts largely defer to state laws enabling small

121. See Briffault, *Our Localism: Part I*, *supra* note 88, at 74.

122. See *id.* at 75–76 (courts liberally sustain municipal incorporations without regard to whether the area to be incorporated represents a “community of interest”).

123. See FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 14, at 242–58 (describing incorporations in Seattle metropolitan region); Briffault, *Our Localism: Part II*, *supra* note 38, at 361. See also *In re Incorporation of Oconomowoc Lake*, 97 N.W.2d 189, 191 (Wis. 1959) (“A community devoted exclusively to residential development and possessing that spirit of togetherness or that core of community spirit characterized by a unity of action and purpose is a village in fact within the meaning of the constitution. These villages in fact may only be concerned with those services necessary for residential community development such as fire and police protection, zoning and sanitation.”).

124. See FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 14, at 215.

125. See Briffault, *Our Localism: Part II*, *supra* note 38, at 363–74.

126. See *id.* at 374–82.

unincorporated areas to resist annexation to larger communities.¹²⁷ As a result of this combination of policies, there are over 19,000 incorporated general-purpose municipalities today, the vast majority of which are exceptionally small (three-quarters have fewer than 5,000 residents) and primarily composed of homeowners.¹²⁸

As Briffault notes, courts see the proliferation of small local governments “as a healthy development, reflecting an area’s growth and the democratic desires of its residents.”¹²⁹ Small jurisdiction size is seen as a way of bringing government closer to the people and enabling them to have tighter control over their governmental policies. As one court put it, residents of small communities often prefer to live “relatively free from regulation and have a direct voice in such municipal matters as zoning or the granting of a liquor license.”¹³⁰ Courts’ abiding concern in boundary change cases appears to be one of self-determination for smaller local areas.¹³¹

Given that the courts have taken such an active role in assuring homeowners a reliable degree of political control in suburban municipalities, it makes sense that they would refrain from providing direct judicial protection for homeowners’ reliance interests by awarding them vested rights in existing zoning regulations. Indeed, it may very well be that the reason courts have given homeowners the means to protect their own reliance interests through the political process is to spare themselves the administrative difficulties of adjudicating homeowners’ reliance claims on an ad hoc basis. In any event, the foregoing discussion demonstrates that courts have been very active in facilitating and legitimizing a local political process in which homeowners have the ability to protect their own reliance interests.

127. See *id.* at 361–62.

128. See Briffault, *Our Localism: Part I*, *supra* note 88, at 77 (three-quarters of municipalities have fewer than 5,000 residents); Fischel, *NIMBYs*, *supra* note 4, at 145 (two-thirds of homes are owner-occupied, and homeowners vote fifty percent more frequently than renters).

129. Briffault, *Our Localism: Part I*, *supra* note 88, at 77.

130. *Moorman v. Wood*, 504 F. Supp. 467, 469 (E.D. Ky. 1980) (upholding statute permitting smaller cities to annex contiguous portions of larger cities with consent of majority of residents in area to be annexed).

131. See *Bd. of Supervisors v. Local Agency Formation Comm’n*, 838 P.2d 1198, 1200 (Cal. 1992) (“[C]ommunity residents and landowners often prefer to govern their local affairs insofar as possible, and cityhood provides them with greater opportunities for self-determination than does residence or ownership in a more amorphous unincorporated area.”).

3. *The primacy of reliance*

It could be argued that the courts' deference to local land use decision making and state structuring of local governments has less to do with an affirmative judicial solicitude for reliance interests and more to do with a general institutional posture of judicial restraint. Courts subject most legislation—including land use legislation—to the minimal scrutiny of “rational basis review,” under which laws require a merely reasonable justification to survive judicial review, not an especially important or compelling one.¹³² And under the venerable *Hunter* doctrine, which holds that local governments are mere creatures of the state, courts are supposed to be especially deferential toward state decisions regarding the organization of local governments.¹³³ In other words, arguably reliance interests are not so significant as to compel judicial deference; rather, deference is the court's default stance, and reliance is simply one of many rationalizations courts can use to justify that stance.

It is difficult to conclusively answer this potential objection, as doing so would require an examination of subjective judicial motivations. Nevertheless, I have reason to suspect that reliance, rather than a general policy of deference, is driving judicial review in this area. As an initial matter, the rational basis review to which courts have long subjected most land use regulation is actually inconsistent with the legal doctrine governing municipalities. Unlike states, local government actions are not entitled to a presumption of legitimacy; according to the well-known Dillon's Rule, courts are required to strictly construe any delegation of power from the state to the local level.¹³⁴ Virtually all local governments exercise the land

132. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (holding that most land use regulations are subject to rational basis review).

133. See *Hunter v. Pittsburgh*, 207 U.S. 161, 178–79 (1907) (holding that state has broad power to dictate the terms of municipal boundary change because “[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them . . .”); see also *Town of Lockport v. Citizens for Community Action at the Local Level*, 430 U.S. 259, 269 (1977) (holding that states have “wide discretion . . . in forming and allocating governmental tasks to local subdivisions”).

134. See, e.g., JOHN DILLON, *TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS* § 9, at 2122 (1st ed. 1872); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109–13 (1980).

use power pursuant to a state legislative delegation, which means that, in principle, courts should be construing the zoning power very narrowly. Yet, as we have seen, the courts have given local zoning laws a wide berth. By contrast, courts have often been rather skeptical of state delegations in other areas.¹³⁵ There must be some reason why courts have quietly violated the spirit of Dillon's Rule in land use cases while observing it elsewhere.

Likewise, although the *Hunter* doctrine commands deference to state structuring of local governments, a more recent doctrinal line beginning with *Avery v. Midland County*¹³⁶ holds that states cannot simply structure local governments however they like but must conform local governments to constitutional mandates such as the one person/one vote rule.¹³⁷ Courts have, however, disregarded the one person/one vote rule when it comes to local government formation—upholding, for example, state policies that permit small areas to incorporate without obtaining consent from residents of the surrounding area.¹³⁸ The courts have never articulated a persuasive reason for why this deviation from the *Avery* rule is permissible.¹³⁹

I suspect that the significance of reliance interests explains these doctrinal inconsistencies. First, as already detailed, courts frequently

135. *See, e.g.*, *Olesen v. Town of Hurley*, 691 N.W.2d 324 (S.D. 2004) (delegation permitting municipality to operate a bar did not authorize it to serve food); *Arlington Cnty. v. White*, 528 S.E.2d 706 (Va. 2000) (statute authorizing municipalities to provide health benefits to employees and their dependents did not include authority to define dependents to encompass same-sex partners).

136. 390 U.S. 474, 485–86 (1968).

137. *See also, e.g.*, *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50 (1970); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969).

138. *See, e.g.*, *Bd. of Supervisors v. Local Agency Formation Comm'n*, 838 P.2d 1198, 1200 (Cal. 1992) (holding that state could constitutionally restrict vote on incorporation of new city to the voters residing within the territory to be incorporated notwithstanding one person/one vote rule, holding that “the essence of this case is not the fundamental right to vote, but the state's plenary power to set the conditions under which its political subdivisions are created”); *cf. Lockport*, 430 U.S. at 269 (holding that one person/one vote rule is inapplicable to state structuring of local governments because, per *Hunter*, states have “wide discretion . . . in forming and allocating governmental tasks to local subdivisions”).

139. *See, e.g.*, Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993) (criticizing inconsistent application of one person/one vote rule to local governments). As I explain *infra* at notes 219–25 and accompanying text, it may be that courts indulge the assumption that local government actions have no extraterritorial impacts and therefore that residents living outside areas to be incorporated simply have no interest in the matter. I argue there, however, that this assumption is highly implausible.

invoke reliance interests in justifying deference to local land use decision making and state structuring of local governments. Second, when courts have gone against the grain of judicial deference and invalidated local zoning enactments, it has frequently been in order to protect reliance interests. We have already seen, and will see further below, how courts will intervene into the political process on occasion to protect developers' reliance interests. But courts will also disturb the political process to protect *homeowners'* reliance interests where courts are convinced that the political process is incapable of adequately protecting those interests.

I illustrate this point by examining two contexts in which courts have acted affirmatively to protect homeowners' reliance interests against an unfavorable political environment: variances and the extraterritorial impacts of municipal land use regulations. As shown previously, the local political process *usually* advantages homeowners, because of their relative numbers and their extremely high degree of motivation to be active in local government. For this reason, I have argued, courts will usually defer to the political process so that homeowners can protect their own reliance interests. On occasion, however, that process can work to the disadvantage of homeowners. For instance, while many land use decisions (such as rezonings) are made by elected city officials, who are accountable to the demands of their constituents, some land use decisions are made by unelected administrative bodies which are not so accountable. Thus, requests for a variance (an application by a developer to deviate from the strict requirements of a zoning ordinance because of a hardship), are typically adjudicated by an appointed body such as a zoning board of adjustment.¹⁴⁰ Because the zoning board is insulated from the political pressure of homeowners, there is a risk that the board will grant variances without regard to homeowners' reliance interests in the pre-existing zoning scheme.¹⁴¹ Perhaps for

140. See ELICKSON & BEEN, *supra* note 115, at 286–96 (discussing variances).

141. Studies have demonstrated that zoning boards approve an extremely high number of variance requests. See, e.g., *id.* at 294–95 (collecting studies).

this reason, courts apply stricter judicial review to the granting of variances than to rezonings and other legislative decisions.¹⁴²

This reasoning is made explicit in *Topanga Ass'n for a Scenic Community v. County of Los Angeles*.¹⁴³ There, the California Supreme Court set forth rigorous standards for the judiciary to apply in reviewing municipal decisions regarding the approval of variances. The court reasoned that "the membership of some zoning boards may be inadequately insulated from the interests whose advocates most frequently seek variances."¹⁴⁴ In other words, because developers are likely to be repeat players before zoning boards, (and because there is no countervailing political pressure from homeowners) there is a serious risk that zoning boards will be biased in favor of developers. Accordingly, the *Topanga* court stated, strict judicial scrutiny is necessary

in order to protect the interests of those who hold rights in property nearby the parcel for which a variance is sought. A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare. If the interest of these parties in preventing unjustified variance awards for neighboring land is not sufficiently protected, the consequence will be subversion of the critical reciprocity upon which zoning regulation rests.¹⁴⁵

Thus, although courts normally defer to municipal land use decision making because they trust the local political process to adequately protect homeowners' reliance interests, here the court deviates from its usual posture of deference and applies vigorous judicial review because it lacks the confidence that the zoning board will protect those reliance interests.

142. See, e.g., *Bd. of Zoning Adjustment v. Summers*, 814 So. 2d 851, 855 (Ala. 2001) ("We have repeatedly recognized that variances should be granted sparingly, and only under unusual and exceptional circumstances . . ."); *Valley View Civic Ass'n. v. Zoning Bd. of Adjustment*, 462 A.2d 637, 640 (Pa. 1983) ("The reasons for granting a variance must be substantial, serious and compelling."). I address further *infra* in Part III.B.1. the broad distinction courts make between legislative and quasi-judicial decision making.

143. 522 P.2d 12 (Cal. 1974).

144. *Id.* at 19.

145. *Id.* (citations omitted).

Another context in which courts apply heightened judicial scrutiny to protect homeowners' reliance interests from an inadequate political process is the extraterritorial impact of municipal land use decisions. As we have seen, often a land use siting or rezoning will affect property values of nearby homeowners. This is what gives homeowners an incentive to lobby city hall to prevent unwanted sitings or land use changes. Some of the affected homeowners, however, may not actually live in the municipality making the land use decision—they may live just across the border in a neighboring town. Because voting rights are apportioned based on residence, however, these homeowners have no political power with which to influence the land use decision.¹⁴⁶ Hence, the local political process may neglect their reliance interests. Accordingly, courts typically hold that municipalities are required to consider the interests of such homeowners before making a land use decision.¹⁴⁷ For instance, in *Scott v. City of Indian Wells*,¹⁴⁸ the California Supreme Court held that a municipality was required to provide notice and an opportunity to be heard regarding the authorization of a new development near the municipality's borders to owners of real property situated just outside the borders of a municipality whose property values stood to be affected by the proposed development. The court held that the landowners in question had a sufficient property interest to state a due process claim because "it is clear that the development of a parcel on the city's edge will substantially affect the value and usability of an adjacent parcel on the other side

146. See Briffault, *Our Localism: Part II*, *supra* note 38, at 440 (most municipalities accord voting rights only to residents).

147. See, e.g., *Borough of Creskill v. Borough of Dumont*, 104 A.2d 441, 445–46 (N.J. 1954) ("At the very least Dumont owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of residents and taxpayers of Dumont."); see also *Brd. of Cnty. Comm'rs v. City of Thornton*, 629 P.2d 605 (Colo. 1981) (homeowners have standing to bring suit against neighboring town challenging land use decision that affects plaintiffs' property values); *Allen v. Coffel*, 488 S.W.2d 671 (Mo. Ct. App. 1972) (same); *Wittingham v. Woodridge*, 249 N.E.2d 332 (Ill. App. Ct. 1969) (same); *Koppel v. City of Fairway*, 371 P.2d 113 (Kan. 1962) (same); *Hamelin v. Zoning Bd.*, 117 A.2d 86 (Conn. Super. Ct. 1955) (same). I discuss these decisions further *infra* at note 222.

148. 492 P.2d 1137, 1142 (Cal. 1972).

of the municipal line.”¹⁴⁹ The court’s intervention was necessary here because the municipality had no political incentive to consider the impacts of its land use decisions on the reliance interests of homeowners who lacked voting rights there.

We can thus fairly conclude that judicial review of land use decision making is strongly motivated by a desire to protect homeowners’ reliance interests. This explains both why courts typically defer to a political process that tends to advantage homeowners (despite a doctrinal rule apparently requiring heightened judicial review of land use regulation), and why courts will occasionally intervene in the political process to protect homeowners’ reliance interests where they perceive that the political process is inadequate to do so.¹⁵⁰

B. Developers as “Discrete and Insular Minorities”

Although the foregoing explains why, under the public choice model, courts would facilitate a local political process dominated by homevoters, the public choice model also cautions courts to be wary about such a political process. It has been a staple of public choice theory ever since Madison’s famous *Federalist No. 10* that small polities are subject to capture by self-interested “factions,” which may then use their control over the polity to exploit vulnerable minorities for their own gain.¹⁵¹ Madison, ever the pragmatist, saw the solution to this problem not in eliminating faction itself, but in enlarging the size of the jurisdiction so that factions would neutralize each other’s influence and no particular faction could persistently dominate the political process.¹⁵² Madison’s intuition has been confirmed in recent decades by political scientists such as Robert Dahl, who have demonstrated that urban politics in many large cities does indeed

149. *Id.* at 1141.

150. I am grateful to Richard Norton for urging me to consider courts’ generally deferential posture toward legislation as an alternative explanation of the pattern described in this paper.

151. See THE FEDERALIST NO. 10 (James Madison); FISCHER, REGULATORY TAKINGS, *supra* note 14, at 104–07 (Madison was concerned about majoritarian exploitation in small republics such as local governments).

152. THE FEDERALIST was, of course, largely a propaganda piece designed to advocate for the more centralized form of government created by the new Constitution.

follow a pluralist kind of governance model in which shifting coalitions form and unform, and “minorities rule.”¹⁵³

Ironically, as we have just seen, the very reason why homeowners have sought refuge in small suburban municipalities has been to *escape* the interest-group pluralism of diverse cities so that they can exercise direct control over their own government without the need to engage in messy coalition-forming. These small suburbs, then, are exactly the sort of politics Madison was concerned about, in which a stable majority can exploit a weaker minority.¹⁵⁴ Indeed, Fischel argues that because of homeowners’ dominant position within local politics, and their motivation to use the political process to prevent most new development, developers are placed at a fairly consistent disadvantage in the local political process.¹⁵⁵ Homeowners tend to be skeptical of most new development because they worry that it may entail negative impacts such as noise, congestion, traffic, diminution in quality of life, and of course, a decline in property values.¹⁵⁶ Any given development project thus pits “a large and well-organized group of homeowners against a single prodevelopment landowner.”¹⁵⁷ Assuming the project requires some kind of land use approval from the municipality (which it virtually always does in an era of ubiquitous land use regulations), the developer will face a distinct disadvantage attempting to influence the municipal authorities against this large and well-organized adversary.

Accordingly, Fischel argues that courts should use more vigorous judicial review when assessing claims by developers against local government land use practices than when assessing claims by

153. See DAHL, PREFACE, *supra* note 113, at 133; Richard C. Schragger, *Can Strong Mayors Empower Weak Cities*, 115 YALE L.J. 2542, 2550–55 (2006) (arguing the modern cities are still characterized by “significant pluralism”); *supra* text accompanying notes 112–16.

154. See, e.g., Carol M. Rose, *Planning and Dealing: Piecemeal Land Use Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 853–57 (1983) (noting that local governments are suspect under Madison’s model).

155. See FISCHEL, REGULATORY TAKINGS, *supra* note 14, at 4–5 (Suburban politics pit “a large and well-organized group of existing homeowners against a single prodevelopment landowner, who may not even be a resident. . . . [T]he political process is skewed against [the developer].”); FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 15–16 (arguing that homeowners are the dominant faction in small, suburban communities and use zoning controls to protect their own wealth; developers are largely “supplicants”).

156. See FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 4–12, 72–93; sources cited *supra* note 8 (discussing various land use conflicts involving NIMBYs (“Not in my backyard”).

157. See FISCHEL, REGULATORY TAKINGS, *supra* note 14, at 4–5.

homeowners.¹⁵⁸ The homeowner, who has political power, can use the legislative process to protect her own interests, whereas the landowner without such power can only repair to the judiciary. In making this case, Fischel draws on a rich body of public choice literature that argues, by and large, that courts should use judicial review to ensure free and fair access to the political process, and should be particularly alert where those aggrieved by a legislative act are “discrete and insular minorities” who are vulnerable to consistent exploitation by a majoritarian political process.¹⁵⁹ Fischel argues that developers should be considered the equivalent of a discrete and insular minority because they are likely to be consistently victimized by antidevelopment homeowners in small suburban municipalities. Isolated and voteless, facing off against “a large and well-organized group of homeowners,” the developer stands little chance of influencing the local political process.¹⁶⁰

To what extent have the courts taken this public choice critique to heart? As noted earlier, courts are undoubtedly aware of the fact that the local political process in many communities is controlled by homeowners. We have seen, though, that courts nevertheless tend to be highly deferential to local land use decision making. In some circumstances, however, courts do recognize that developers are likely to be vulnerable in local politics and will depart from their usual deferential standard in order to protect developers against majoritarian exploitation. For instance, as Part III.B.1 below demonstrates, some courts have protected developers by applying heightened scrutiny to certain land use regulations, labeled “quasi-judicial” or “adjudicative,” that disproportionately impact particular landowners, while acknowledging that broad deference is appropriate for “legislative” acts that impact the public more generally. This distinction between legislative and quasi-judicial acts

158. *See id.* at 4–5, 114–40.

159. *See id.* at 114–40. Fischel draws on classic works such as JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 73–179 (1980) and Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1217–18 (1967). *See supra* notes 64 & 80 (discussing these sources).

160. *See* FISCHEL, *REGULATORY TAKINGS*, *supra* note 14, at 136–37 (discussing how majoritarian political process, such as that present in small suburban communities, gives rise to suspicion of exploitation of discrete and insular minorities much more readily than in a “pluralistic” political process).

appears to reflect the public choice logic that courts should more closely review regulations that affect isolated, disorganized groups than those that affect larger, well-organized groups.

Ultimately, however, most courts have declined to apply the “quasi-judicial” label broadly so as to protect developers against a majoritarian political process. While this may appear to show that courts do not follow a public choice understanding of the political process, in Part III.B.2 I argue that courts’ rejection of a broad use of the quasi-judicial standard is actually quite consistent with the public choice account. Under that account, heightened scrutiny for adjudicative decisions is largely unnecessary to protect developers because developers can prevent majoritarian exploitation to the extent they can simply *exit* one jurisdiction and seek a friendly regulatory environment elsewhere—an ability made all the easier by the proliferation of small municipalities within particular metropolitan areas. Thus, while developers do not require the heightened protections of a quasi-judicial proceeding, they *do* require protection in circumstances where they cannot easily exit a jurisdiction. Ordinarily, exiting a jurisdiction should be easy, because developers usually have the ability to diversify their risk across numerous projects in different jurisdictions. However, once a developer has sunk substantial resources into a particular project, exit becomes very costly. Thus, courts will intervene to protect a developer under circumstances where she has demonstrated significant reliance interests. Once again, reliance proves to be a central concern in judicial review of municipal land use regulations.

1. The legislative/quasi-judicial distinction: protection for developers?

A long-standing doctrine of administrative law holds that courts should defer to “legislative” acts that broadly affect the public at large, but apply stricter scrutiny to “quasi-judicial” acts that disproportionately affect particular individuals.¹⁶¹ As Saul Levmore notes, the heightened scrutiny for quasi-judicial as opposed to

161. *Compare* *Londoner v. City of Denver*, 210 U.S. 373 (1908) (requiring notice and opportunity to be heard where administrative process disproportionately affected few landowners) *with* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (dispensing with requirement of notice and opportunity to be heard where administrative action affected the public generally).

legislative matters reflects the underlying public choice logic discussed here.¹⁶² Specifically, where regulation disproportionately harms an isolated individual or small group, the affected party is unlikely to be capable of organizing to influence the political process so as to obtain relief from the regulation; by contrast, when regulation broadly impacts a larger class, that class can more easily organize into an interest group and influence the political process so as to protect itself against the harmful regulation. Therefore, consistent with the public choice view of judicial review, courts apply greater scrutiny to the former kind of regulation than the latter.¹⁶³ Levmore notes that the divide between quasi-judicial and legislative acts closely resembles the divide in takings law between a physical occupation and a regulation that broadly affects property values (recall the condemnation blight scenario discussed in the *Lucas* case).¹⁶⁴ Because a physical occupation is more likely to affect isolated, individual landowners who are politically powerless, whereas a regulation tends to affect a large group that is capable of organizing, the former is considered a compensable taking while the latter is not. Levmore argues accordingly that the courts are more concerned with group size and organizational ability than with reliance *per se*.¹⁶⁵

On the surface, there is some evidence to support Levmore's view. Historically, most land use decisions were considered legislative in character unless they were plainly individualized administrative matters, such as an application for a variance or a special use permit. In the early 1970s, however, a number of courts undertook to broaden the scope of the "quasi-judicial" label to cover matters such as small-scale rezoning requests.¹⁶⁶ One of the more

162. See Levmore, *supra* note 14, at 307 & n.51.

163. *Id.* Carol Rose likewise argues that the application of the quasi-judicial standard to municipal land use decisions reflects the traditional Madisonian concern that a majority "faction" may exploit vulnerable minorities. See Rose, *supra* note 154, at 851–57.

164. See Levmore, *supra* note 14, at 307 & n.51.

165. Levmore explicitly rejects that the Court's takings jurisprudence centers on the protection of reliance interests. See *id.* at 317–18 & n.74. He argues that takings law is more fruitfully explained by the distinction between larger, well-organized groups and smaller, isolated groups. See *id.*

166. This approach has come to be known as the "Fasano doctrine," after *Fasano v. Bd. of Cnty. Commissioners*, 507 P.2d 23 (Or. 1973), the leading case applying the quasi-judicial standard to small-scale rezonings.

notable cases to take this approach, *Snyder v. Board of County Commissioners of Brevard County*,¹⁶⁷ argued that it was necessary to treat small-scale rezonings as quasi-judicial in order to protect the isolated developers who typically seek such relief from a political process controlled by organized homeowners who are predisposed to oppose rezoning requests. In *Snyder*, a developer sought to have a one-half acre parcel rezoned from General Use (a very low-density zoning classification) to a medium-density, multi-family dwelling classification so that he could erect multi-family housing on the parcel.¹⁶⁸ The proposed rezoning was not anticipated to cause any significant environmental impacts and was consistent with the county's comprehensive plan, and as such the county's appointed Planning and Zoning Board recommended that the rezoning be approved.¹⁶⁹ Nevertheless, the elected county Board of Commissioners overruled the Planning and Zoning Board and denied the rezoning, without providing any reasons for its decision.¹⁷⁰ The court held that this sort of small-scale rezoning was quasi-judicial in character and thus required the Board to state reasons for its decisions and make findings of fact that would facilitate close judicial scrutiny.¹⁷¹

The court determined that applying these quasi-judicial standards was necessary in order to protect developers against a political process stacked in favor of anti-development homeowners. The court noted that rezoning decisions are often made based "not solely on the basis of the land's suitability to the new zoning classification and compatibility with the use of surrounding acreage, but, also, and perhaps foremost, on local political considerations."¹⁷² Chief among the relevant "local political considerations," the court observed, was the desire of existing homeowners to maintain the value of their own land by preventing new development.¹⁷³ Because homeowners' political opposition interferes with a developer's "constitutional right to use his vacant property or make a more

167. *Snyder v. Bd. of Cnty. Comm'rs of Brevard*, 595 So. 2d 65 (Fl. Dist. Ct. App. 1991) *rev'd in part*, 627 So. 2d 469 (Fla. 1993).

168. *See id.*

169. *See id.* at 67.

170. *See id.* at 67-68.

171. *See id.* at 78-82.

172. *Id.* at 73.

173. *See id.* at 73-74.

intense use of his underzoned land,”¹⁷⁴ the court held that the developer was entitled to the protections of a quasi-judicial proceeding before his request for a rezoning could be denied.

Snyder appears to affirm Levmore’s view that the judicial process appropriately focuses not on reliance per se, but more broadly on circumstances in which an isolated individual or group is likely to be exploited by well-organized interests.¹⁷⁵ In *Snyder*, indeed, there was no evidence that the plaintiff developer had any protectable reliance interests—he had purchased the parcel in question while it was zoned for a restrictive zoning classification in which his proposed development was prohibited, and there is nothing in the record to suggest that he had received any assurances that his request for a site-specific rezoning would be granted.

Snyder, however, is an outlier. Most courts resist treating site-specific rezonings as quasi-judicial, opting instead to treat almost all rezonings as legislative in character.¹⁷⁶ In many of these cases, courts explicitly acknowledge the political dominance of homeowners in the local political process and the isolation of the individual developer, but nevertheless hold that homeowners are entitled to use the political process to their advantage regardless of the impact on the isolated developer.¹⁷⁷ The most glaring counterpoint to *Snyder*, though involving owners of commercial property rather than homeowners, is *Coniston Corp. v. Village of Hoffman Estates*.¹⁷⁸ As discussed previously, *Coniston* upheld a local government’s refusal to approve a site plan for development of a

174. *Id.* at 73.

175. A somewhat similar case is *Kennedy v. Upper Milford Twp. Zoning Hearing Bd.*, 834 A.2d 1104 (Pa. 2003). There, the court held that the local zoning hearing board did not violate state “Sunshine Laws” by deliberating privately regarding a developer’s application for a variance that would permit raising the height of a cell phone tower. The court reasoned that the zoning hearing board was a quasi-adjudicative body and, as such, private deliberations were appropriate in order to ensure that the board was insulated from the “emotional rancor” that often surrounds such decision. *See id.* at 1117.

176. *See, e.g.*, *Cabana v. Kenai Peninsula Borough*, 21 P.3d 833 (Alaska 2001); *Arnel v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980); SELMI ET AL., *supra* note 15, at 267 (“Most states . . . have rejected the *Fasano* doctrine and continue to treat all rezonings as legislative in nature.”).

177. *See Sylvia Dev. Corp. v. Calvert Cnty.*, 48 F.3d 810, 828–29 (4th Cir. 1995) (denying request for site-specific rezoning appropriately based on political pressure from homeowners who opposed rezoning; stating that “[i]t is not pernicious *per se* for a zoning authority to be influenced by political pressure in the community”); *see also* cases cited *supra* note 108.

178. 844 F.2d 461 (7th Cir. 1988).

small tract of land, even after acknowledging that the decision could plausibly be described as “an effort to transfer wealth from the plaintiffs” to existing landowners by protecting landowners from competition by the plaintiffs.¹⁷⁹ Parenthetically, the court took note of the public choice view that the legislative/quasi-judicial distinction hinges on the size of the affected class, and stated that “[t]he class here is small. This might support an argument that some type of individualized hearing was required.”¹⁸⁰ Nevertheless, the court shrugged off this argument and held that the action was legislative in character, stating that “the check on [the legislative authority’s] behavior is purely electoral, but . . . in a democratic polity this method of checking official action cannot be dismissed as inadequate per se.”¹⁸¹

Several other courts have followed *Coniston’s* lead and refused to apply heightened scrutiny in cases where developers have lost out in the political process as a result of the apparent dominance of homevoters.¹⁸² Moreover, as we have seen before, many courts who do apply heightened scrutiny to individualized land use decisions are motivated by exactly the opposite concern that drove *Snyder*: they worry that where individualized as opposed to broadly applicable land use regulations are involved, the developer is likely to have *too much* influence with regulatory authorities.¹⁸³ For these courts, heightened scrutiny of individualized land use decisions is necessary to protect *homeowners*—and specifically homeowners’ reliance interests—from an antidemocratic decision-making process that disregards their interests. These cases support my argument that what is really driving the judiciary is not a stylized distinction between large, organized groups and isolated, individual landowners,

179. *Id.* at 467.

180. *Id.* at 469.

181. *Id.*

182. See cases cited *supra* note 108.

183. See *supra* text accompanying notes 140–50; see also *Fasano v. Bd. of Cnty. Commissioners*, 507 P.2d 23, 30 (Or. 1973) (holding that developer’s request for small-scale rezoning must be considered quasi-judicial because of the “dangers of the almost irresistible pressures that can be asserted by private economic interests on local government”). Although *Fasano* was significantly revised, and arguably overruled, by the subsequent case of *Neuberger v. City of Portland*, 607 P.2d 722 (Or. 1980), it was later cited as persuasive authority by *Snyder*, even though its view about the relative power of developers in the local political process is precisely the opposite of *Snyder’s*.

as Levmore suggests, but rather the desire to protect reliance interests where the political process is inadequate to protect those interests. I pursue that theme further in the following section.

2. *The Tiebout model and the significance of reliance*

Given the courts' general refusal to provide isolated developers with heightened judicial protection against a local political process dominated by homeowners, can we conclude that courts are insensitive to the public choice model of local government and unconcerned about the exploitation of "discrete and insular" minorities by a majoritarian faction? Not necessarily. Public choice theorists have long noted that there is a built-in safety valve against majoritarian exploitation of minority interests in small local governments: the ability of exploited minorities to simply flee the jurisdiction. Ever since a path breaking article in 1956 by economist Charles Tiebout,¹⁸⁴ it has been a staple of public choice theory that where a given metropolitan region features a critical mass of local governments, individuals possess the ability to "vote with their feet" by choosing to locate in the jurisdiction they find most attractive.¹⁸⁵ Empirical studies have largely confirmed that such foot-voting does indeed take place.¹⁸⁶ The mobility of urban constituents works to discipline local governments: if municipalities choose to adopt policies such as redistributive taxes or oppressive land use policies, they pay for that mistake by losing their markets.¹⁸⁷ Thus, the threat of exit is a counterpoint to the Madisonian problem of majoritarian exploitation: where a jurisdiction is very small, it may indeed enable a particular faction to dominate, but small jurisdiction size will also tend to make exit relatively easy, provided that there is a catholicity

184. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

185. See, e.g., Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 506–28 (1991) (reviewing public choice model and evidence supporting it); Rose, *supra* note 154, at 882–87 (arguing that possibility of exit is a means of legitimizing local government).

186. See Been, *supra* note 185, at 506–28 (reviewing evidence).

187. See FISCHER, REGULATORY TAKINGS, *supra* note 14, at 277 ("The chief discipline on local government majoritarianism is mobility."); Been, *supra* note 185, at 506–28 (indicating that Tiebout model suggests that competition among jurisdictions for mobile residents and revenue will constrain opportunistic behavior by government officials).

of other small jurisdictions in the same metropolitan region.¹⁸⁸ Those who have “chosen” to stay in a particular jurisdiction with exploitative regulations by not exiting have presumptively consented to be governed by those regulations, and thus courts need not intervene.¹⁸⁹

The “Tiebout model” suggests, accordingly, that judicial review of municipal land use regulations should largely be confined to circumstances where a party is incapable of exiting a jurisdiction except at great cost. Ordinarily, as just mentioned, the implicit threat of exit is sufficient to prevent local governments from exploiting discrete and insular minorities. Once that threat is removed, however, local governments have a free hand to take advantage of vulnerable parties.

This, at long last, explains why courts are so solicitous of developers’ reliance interests. Where a developer has invested little in a particular project, exit is relatively cheap. Many developers, of course, are not residents or stakeholders of any particular community but simply businesspeople who will locate in whatever municipality offers the best return on their investment.¹⁹⁰ Thus, if a developer has optioned a piece of real property in a particular municipality with the intent to develop it, and the municipality subsequently makes clear that the approval process is going to be a difficult one, the developer can abandon the investment with nothing lost beyond the price of the option.¹⁹¹ Furthermore, a developer may invest simultaneously in numerous projects in different jurisdictions in order to hedge against the possibility of an unfavorable regulatory environment in any particular municipality. Given all this, municipal authorities are likely to refrain from placing overly burdensome regulatory hurdles upon the developer precisely because they are aware of how easily the developer can leave town. However, once a developer has begun making substantial investments in a specific project, the cost of exit rises dramatically. The municipality now has

188. See FISCHER, REGULATORY TAKINGS, *supra* note 14, at 289–324 (arguing that threat of exit can prevent exploitation of “discrete and insular” minorities).

189. See *id.* at 277 (judicial intervention unnecessary where mobility is easy).

190. Cf. Been, *supra* note 185, at 509–11 (discussing numerous options developer can exercise when dissatisfied with municipal regulatory regime).

191. See *id.* at 511–13 (noting widespread municipal awareness of developers’ ability to option land and thus to easily exit jurisdiction).

less of an incentive to maintain a favorable regulatory environment for the developer. In addition, the implicit logic of the Tiebout model—that a party has constructively consented to a jurisdiction’s oppressive regulations by choosing to do business there—is undermined if the oppressive regulations are not actually in place at the time the developer opts to plant firm roots in the jurisdiction, but are only adopted *after* the developer’s exit costs have dramatically increased. The Tiebout model presupposes that regulation will be reasonably transparent and predictable so that parties can make an informed decision to vote with their feet.¹⁹² Thus, if the Tiebout model is accepted, it makes sense that courts would seek to protect developers’ reliance interests in circumstances where their exit costs are sufficiently high that they cannot readily escape majoritarian exploitation.¹⁹³

This observation returns us to our starting point: why do courts protect developers’ reliance interests and not those of homeowners? After all, the homeowner has the same problem as the developer with the sunk costs: she has invested so much in a single asset in

192. See Rose, *supra* note 154, at 903–10 (arguing that “exit model” requires predictability).

193. Vicki Been argues that the Supreme Court’s jurisprudence restricting the ability of municipalities to extract concessions from developers in exchange for regulatory permits (the “exactions” jurisprudence) is inconsistent with the Tiebout exit model because the Court presumes that developers seeking regulatory permits are vulnerable to “extortion” by municipalities with a monopoly on the permitting power. Been, *supra* note 185; see *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987). According to Been, developers are not vulnerable to extortion where municipalities must be sensitive to interlocal competition and are presumptively aware of the ease with which developers can forego an investment opportunity in one locality for a better opportunity in a neighboring town. See Been, *supra* note 185. Nevertheless, these cases need not necessarily be read as inconsistent with the Tiebout model. The earlier two cases, *Nollan* and *Dolan*, involved landowners who were not developers but merely wanted to expand the existing use of their property. Arguably, then, their reliance interests and exit costs were high. See FISCHER, REGULATORY TAKINGS, *supra* note 14, at 344–45 (arguing that *Nollan* implicated landowner’s reliance interests). The recently decided *Koontz* case is harder to square with the Tiebout model because it involved a developer who wanted to build on vacant land and the record revealed no evidence of any significant reliance interests. However, as Justice Kagan noted in dissent, *Koontz* leaves open the question of whether it applies only to exactions imposed on an ad hoc basis or if it also includes exactions that are generally applicable. See *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (citing *Ehrlich v. Culver City*, 911 P.2d 429 (Cal. 1996)). As ad hoc exactions would make the issuance of regulatory permits unpredictable, whereas generally applicable exactions afford predictability to developers, subjecting the former but not the latter to the exactions doctrine would respect developers’ reliance interests. It remains to be seen what the long-term implications of *Koontz* will be.

reliance on the pre-existing zoning that exiting the jurisdiction after an adverse zoning change can only be accomplished at great expense (loss of equity, depreciated credit rating, and a possible deficiency judgment). There is a crucial difference, however, between developers and homeowners. As just explained, the high cost of exit caused by the incurrence of substantial reliance interests renders developers exceptionally vulnerable in the local political process. But the difficulty of exiting is precisely what enables homeowners to be so dominant within that political process. As we have already seen, homeowners' stake in the outcome of land use decisions gives them a strong incentive to organize and influence local government, because they do not have the freedom to simply exit when they dislike the regulatory regime.¹⁹⁴ Indeed, we recall that one of the central reasons why the federal government has sought to incentivize homeownership over the past century has been to induce Americans to be politically active by giving them a stake in governmental affairs.¹⁹⁵ Studies have confirmed that homeowners tend to be far more active in local politics than renters, likely because homeowners face much greater barriers to exit that force them to exercise their voice in local government.¹⁹⁶

Thus, the fact that reliance makes exit difficult provides a public choice explanation for both why developers are likely to be exploited in the local political process *and* why homeowners/neighbors are likely to be dominant in that same process, which likewise explains why courts generally provide judicial protection for developers' reliance interests while declining to provide similar protection for neighbors' reliance interests. In conclusion, it appears that *reliance* is

194. See *supra* text accompanying notes 89–94. Drawing on Albert Hirschmann's path breaking work EXIT, VOICE, AND LOYALTY (1970), Fischel, Rose, and other theorists argue that one alternative to exit is staying within the municipality and exercising one's "voice." See FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 72–76; FISCHEL, REGULATORY TAKINGS, *supra* note 14, at 289–324; Rose, *supra* note 154, at 883–87. Indeed, according to Fischel, it is precisely the inability to exit that requires homeowners to stay "loyal" and exercise their "voice." See FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 72–76.

195. See *supra* text accompanying notes 51–52. Rose mentions that lighting out to the frontier is a long-standing American tradition that legitimizes the notion of exit. See Rose, *supra* note 154, at 886. As I have mentioned *supra*, however, there is an equally strong tradition of encouraging Americans to plant firm roots in their communities, perhaps apotheosized by the efforts of policymakers like Herbert Hoover to encourage homeownership. This tension between "exit" and "voice" provides much of the underlying dynamics of local land use decision making.

196. See FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 80–81.

at the core of the judicial approach to the land use decision making process. The primacy of reliance interests explains courts' general policy of deferring to municipal land use regulations and state policies regarding municipal boundary change, their rejection of heightened procedural protections for developers in most circumstances where some evidence of reliance is *not* present, and their solicitude for developers' reliance interests where developers have made substantial expenditures based on some site-specific regulation.¹⁹⁷

In the remaining Part, I offer two critiques of the public choice account. The first assails its descriptive premise about homeowner control of the local political process, arguing that in fact the local political process is far more complex than the public choice account admits. The second, more fundamental critique is normative in nature. The public choice account so fetishizes reliance interests that it fails to give sufficient regard to equally weighty interests in land use decision making. In the ultimate analysis, furthermore, the lionization of reliance interests proves self-defeating even on its own terms.

IV. CRITIQUING THE PUBLIC CHOICE MODEL

A. Descriptive Critique: What About Big Cities?

A major presumption of the public choice account, of course, is that homeowners represent the dominant faction in local politics and that developers therefore constitute a vulnerable, isolated minority.

197. As I have argued here that courts are driven by a public choice understanding of how municipalities operate, I should note that there is also a public choice theory of how *courts* operate. Einer Elhauge argues, for example, that courts, like legislatures, are likely to be overly influenced by parties who can most effectively organize, because organization enables effective litigation efforts just as it does effective lobbying efforts. See Elhauge, *supra* note 90, at 66–71. It is not clear how much this matters in the context of land use litigation, however, which Elhauge does not discuss specifically. What tends to give homeowners the advantage in most small, suburban municipalities is not natural organizing ability but a political process in which homeowners are the dominant faction. I argue below that in larger, more diverse municipalities, developers are likely to be more influential because of their deep pockets and repeat-player advantages. These factors would seemingly give developers significant influence in the litigation process as well, but that influence may be counteracted by the ability of the municipalities defending land use restrictions to call upon the support of powerful and well-funded associations of municipal governments who seek to avoid an adverse precedent. I thank David Schleicher for directing me to consider the public choice theory of litigation.

However, as we have already seen, this premise is generally only true of small suburban municipalities, not larger cities. Larger cities are believed to follow a “pluralist” model of governance in which developers exercise a considerable degree of political influence and homeowners are less powerful.¹⁹⁸ Indeed, many theorists argue that cities are actually beholden to a “growth machine” that seeks to pursue heedless development regardless of the consequences to existing homeowners.¹⁹⁹ It is for this reason, as we have seen, that many homeowners have fled big cities and lighted out to smaller “majoritarian” municipalities in which they can call the shots.²⁰⁰

This observation suggests that courts should reverse their traditional approach when dealing with large cities: provide less judicial protection for developers and more protection for homeowners.²⁰¹ The courts, however, have taken a one-size-fits-all

198. See *supra* text accompanying notes 112–16.

199. See LOGAN & MOLOTCH, *supra* note 11, at 50–98 (articulating growth machine thesis).

200. See *supra* text accompanying notes 117–31. In recent years, some scholars have challenged the “growth machine” thesis. David Schleicher, for example, argues that the political structuring of most big cities actually favors NIMBY homeowners who desire to prevent new growth. Specifically, Schleicher argues that the formally nonpartisan nature of local elections disables city councils from forming alliances based on party allegiance, and thus councils simply defer to individual councilmembers to decide issues pertinent to the geographic districts they represent. See David Schleicher, *City Unplanning*, 122 *Yale L.J.* 1670, 1703, 1709–10 (2013). And because development brings diffuse citywide benefits while concentrating costs in one geographic area, councilmembers are predisposed to oppose new development in their own wards. See *id.* To the extent this is a general argument about how cities function, I find it unconvincing. Schleicher’s theory presupposes that city councils are all ward-based systems in which councilmembers represent specific geographic districts. This may be true of older, rustbelt cities, but most cities today, especially in the fast-growing Sunbelt, feature “at-large” electoral systems in which councilmembers do not represent individual geographic districts but are elected citywide. See ROBERT E. LANG & JENNIFER B. LEFURGY, *BOOMBURBS: THE RISE OF AMERICA’S ACCIDENTAL CITIES* 121–24 (2007) (reporting that virtually all of the large and increasingly diverse suburban cities in the Sunbelt, dubbed “boomburbs” by the authors, use at-large voting systems); JAMES H. SVARA, *NAT’L LEAGUE OF CITIES, A SURVEY OF AMERICA’S CITY COUNCILS* 25 (1991) (reporting that nationwide, 42.6% of cities use at-large elections, 29.1% use district elections, and the remaining 28.2% use mixed systems in which some seats are elected by district and others at-large). In these cities, the growth machine appears to still be predominant. See generally LANG & LEFURGY, *supra*, at 123–24 (arguing that the “growth machine” is dominant in boomburb municipalities). For a discussion of the consequences of at-large voting structures on land use conflicts in the southwest, see Kenneth A. Stahl, *The Artifice of Local Growth Politics: At-Large Elections, Ballot-Box Zoning, and Judicial Review*, 94 *MARQ. L. REV.* 1 (2010).

201. Cf. FISCHER, *REGULATORY TAKINGS*, *supra* note 14, at 328 (advocating more judicial deference to land use decisions in large cities because of pluralistic decision making process).

approach to local governments that treats all general-purpose municipalities as formally equivalent, regardless of size or diversity. Courts have given no indication that the nature of judicial review is contingent upon whether a particular municipality has a “pluralist” or “majoritarian” political process. Perhaps courts believe they lack the institutional competence to make the fine distinction between “pluralism” and “majoritarianism,” or they desire to avoid the administrative difficulties of applying these labels on an *ad hoc* basis. It is understandable that courts would decline to engage in amateur political science, but if they do so, we cannot then rest a theory of judicial review on blanket assumptions about what groups are likely to exploit or be exploited in local politics. In short, the public choice model rests on a questionable empirical premise that courts are unwilling to question.

B. Normative Critique: Reliance Distorts Land Use Decision Making

The normative problem with the public choice account is that the courts’ single-minded focus on the protection of reliance interests causes important competing concerns to be shortchanged in the land use decision making process. Under the public choice model, existing residents have an enormous incentive to either keep out most new housing or to drastically increase the cost of new housing through burdensome regulatory hurdles.²⁰² This means that, for the sake of protecting *existing* residents’ reliance interests, *prospective* residents of these communities will either be wholly excluded or forced to pay a steep admission fee in order to settle there. As I demonstrate below, this simple dichotomy between existing and prospective residents has been a major contributor to racial and income segregation in most metropolitan regions.²⁰³

202. See, e.g., FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 14, at 4–12, 72–93; Richard Schragger, *Consuming Government*, 101 Mich. L. Rev. 1824, 1829 (2003) (explaining how homeowner-dominated jurisdictions use zoning to restrict the supply of housing so as to increase their own property values).

203. There are other equally significant costs to the courts’ fetishization of reliance interests. For instance, it can cause inefficiencies in land use sitings, because homeowners’ resistance to land uses such as multi-family housing, gas stations, or waste facilities makes it difficult to find suitable sites for these regionally necessary but locally undesirable land uses (often called LULUS). See, e.g., Been, *supra* note 185, at 788–90 (“The siting of LULUs . . . has become an extraordinarily difficult public policy challenge.”). Likewise, giving so much weight to homeowners’ reliance interests can promote wasteful urban sprawl, because developers can only

Courts have sidestepped this problem, however, by simply denying the causal relationship between reliance interests and segregation. In doing so, however, they have tipped their hand that the entire judicial enterprise of protecting reliance interests is fruitless.

1. Prospective vs. existing residents and the problem of interlocal segregation

When courts have directly confronted the conflict between existing residents' reliance interests and prospective residents' demand for affordable housing, they have unabashedly sided with the former by invoking the underlying premises of the public choice model. In *Nordlinger v. Hahn*,²⁰⁴ for example, the Supreme Court considered the constitutionality of California's Proposition 13, a controversial ballot initiative that imposes strict limits on property tax assessments for existing landowners but lifts those restrictions upon a change in ownership. As the Court noted, Proposition 13 is widely described as embracing a "Welcome, stranger" model in which newer homeowners are expected to bear a much greater proportion of the costs of local government than existing homeowners with similar homes.²⁰⁵ Indeed, the petitioner in the case, who purchased her home in 1988, alleged that she paid five times more in property taxes than her neighbors, who had owned comparable houses in the same neighborhood since 1975.²⁰⁶ As the only basis for this disparity was the date of home purchase, the petitioner claimed that the initiative arbitrarily distinguished between newer and existing residents in violation of the Equal Protection Clause.²⁰⁷

The Court held, however, that there was a reasonable basis for this distinction—reliance interests. As the Court stated:

[A]n existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of

satisfy the pent-up demand for housing by leap-frogging existing suburban communities for pristine exurban greenfields. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan. L. Rev. 1115, 1133–41 (1996) [hereinafter Briffault, *The Local Government Boundary Problem*]. I focus my attention here on interlocal segregation because I think it is sufficient to make the point that courts' solicitude for reliance interests is misplaced.

204. 505 U.S. 1 (1992).

205. See *id.* at 6.

206. See *id.* at 6–7.

207. See *id.*

protection than the anticipatory expectations of a new owner at the point of purchase. A new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all. By contrast, the existing owner, already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high.²⁰⁸

The Court's reasoning directly reflects the Tieboutian logic of the public choice model. According to that model, as we have seen, those who have no reliance interests in a particular parcel retain the freedom to "vote with their feet" and choose where to locate, whereas those who have established reliance interests face much higher exit costs and are thus essentially stuck with the regulatory policies of their existing jurisdiction. Accordingly, policymakers may legitimately favor the latter as against the former.

While *Nordlinger* dealt with the property tax, its logic makes practically unassailable any municipal policy that favors existing residents at the expense of prospective residents. It is commonplace for municipalities to protect homeowners' reliance interests by placing drastic restrictions on new housing, which will necessarily make housing for prospective residents either unavailable or extremely expensive.²⁰⁹ Homeowners are particularly adverse to new multi-family or affordable housing because of the anticipated impacts of such housing on property values and property taxes.²¹⁰ Zoning laws that restrict the availability of affordable housing are often referred to as "exclusionary zoning" laws because their impact, if not their intent, is to exclude those in need of affordable housing.²¹¹ Under *Nordlinger's* logic, however, exclusionary zoning policies are immune from assault because prospective residents can presumably locate elsewhere if the costs of entrance to a particular

208. *Id.* at 12–13.

209. See sources cited *supra* notes 8, 202.

210. See Briffault, *The Local Government Boundary Problem*, *supra* note 203, at 1133–41 (discussing political economy that causes suburban municipalities to exclude undesirable uses like affordable housing); Schragger, *supra* note 202, at 1834–52 (2003) (critiquing political economy of the suburbs in which homeowners have incentives to exclude undesirable uses such as affordable housing).

211. The literature on exclusionary zoning is voluminous, but for excellent short discussions, see Schragger, *supra* note 202; J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 *Geo. L. J.* 2265 (2000).

municipality are too high, whereas existing homeowners are already locked into their investment.

There is reason to doubt *Nordlinger's* presumption, however. Most metropolitan regions today feature dozens of suburban communities that all maintain substantially similar exclusionary zoning regimes; the cumulative effect is a pattern of de facto segregation in which small, affluent, largely white suburbs are able to maintain their exclusivity with zoning barriers, while the poor, often minority individuals excluded thereby are shepherded into deteriorating urban ghettos.²¹² The reality of ghettoization belies the premise of the public choice model that prospective suburban residents have the ability to vote with their feet: inner-city residents have no effective ability to exit because the surrounding suburban communities have all erected fairly uniform zoning barriers against entry.

Nevertheless, even in cases where the severe class and racial impacts of exclusionary zoning practices have been evident, the reliance interests of existing homeowners have provided a sturdy defense for such practices. An exemplar of this trend is *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,²¹³ one of the rare cases in which the Supreme Court has considered the constitutionality of a suburban exclusionary zoning ordinance. In this case, the village of Arlington Heights, Illinois, a suburb of Chicago, was zoned almost entirely for single-family homes. Census reports revealed that of 64,000 residents of the village, only twenty-seven were black. A developer proposed to build low-income housing on a parcel of land in a neighborhood zoned exclusively for single-family homes, and therefore requested that the parcel be rezoned from a single-family residential classification to multi-family residential. The city council refused to authorize the rezoning, after a series of public meetings at which city residents expressed their opposition to the project. According to the Court, opponents of the project argued that “the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance

212. See generally MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 1-78 (1976) (on the relationship between suburban zoning and urban ghettoization); Schragger, *supra* note 202, at 1838 (“The current extreme segregation of American metropolitan regions owes a great deal to the power of localities to restrict in-migrants based on income.”).

213. 429 U.S. 252 (1977).

on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites.”²¹⁴ The Court held that the plaintiffs had failed to prove that the village’s refusal to rezone was the result of intentional discrimination (required to establish a Fourteenth Amendment violation) because “[t]here is no reason to doubt that there has been reliance by some neighboring property owners on the maintenance of single-family zoning in the vicinity.”²¹⁵ *Arlington Heights*, like *Nordlinger*, thus stands for the proposition that the protection of reliance interests is a perfectly reasonable basis for favoring existing residents at the expense of non-residents, even where the result is a massively disproportionate impact on racial minorities.

Although the sanctification of reliance interests in *Nordlinger* and *Arlington Heights* is superficially consistent with the public choice model, these decisions are also troubling from the public choice perspective because they seem rather insensitive to the plight of “discrete and insular minorities.” As we have seen, one of the central concerns of the public choice model is to protect the interests of isolated minorities who may be subject to exploitation by majoritarian factions. Fischel, for example, argues that developers should be considered the equivalent of a discrete and insular minority because, given the dominance of homeowners in the local political process and their antipathy toward new development, developers are unlikely to be influential with municipal authorities.²¹⁶ By this logic, the primarily low-income minority populations that are consigned to living in poorer central cities by zoning decisions such as the one validated in *Arlington Heights* are the quintessential discrete and insular minorities. While homevoters are often opposed to *all* new development, they are most adamantly opposed to new affordable housing, which promises not only to dramatically increase the overall housing supply and thus lower property values, but also to increase the demand for additional municipal services, which will ultimately require higher property taxes.²¹⁷ At the same time, the poor, primarily minority individuals

214. *Id.* at 258.

215. *Id.* at 270.

216. *See supra* text accompanying notes 151–60.

217. *See* Briffault, *The Local Government Boundary Problem*, *supra* note 203, at 1133–41 (discussing political economy that causes suburban municipalities to exclude undesirable uses

who desire to live in suburban municipalities are the classic politically isolated “outsiders” who, not being residents of the communities in which they seek to live, have no voting power there—indeed, the very gravamen of the complaint in *Arlington Heights* is that the plaintiffs were *excluded* from living in the village. Yet, cases like *Arlington Heights* and public choice theorists like Fischel appear untroubled by the exclusion of minorities from suburban communities.²¹⁸

The Court and the public choice theorists have managed to avoid confronting this dilemma with a simple but revealing logic: they treat each municipality as a fully self-contained entity that has no impacts outside its own borders. As the effects of local land use policy are, by assumption, totally encapsulated within the municipality itself, the local political process simply need not concern itself with the interests of prospective residents, who can easily choose to locate in a neighboring jurisdiction if they dislike one community’s policies.

The Court’s decision in *Arlington Heights*, for example, conceptualizes the village as if it were an isolated island rather than a tiny fragment of a large metropolitan region. The opinion trains its focus on a single zoning decision by this lone municipality—the village’s refusal to rezone a parcel of land to enable a developer to build low-income housing—and, finding nothing amiss with that isolated zoning decision, holds that there is no constitutional problem. Absent from the decision is any of the broader context in which the rezoning decision took place, such as the village’s long-standing pattern of exclusionary zoning that resulted in the village being almost entirely devoid of minorities, or the fact that the sort of exclusionary zoning practices challenged in the case were so widespread in the Chicago area and throughout the country as to create a nationwide pattern of interlocal segregation.²¹⁹

like affordable housing); Schragger, *supra* note 202, at 1834–52 (critiquing political economy of the suburbs in which homeowners have incentives to exclude undesirable uses such as affordable housing).

218. Rick Schragger’s incisive critique of Fischel’s THE HOMEVOTER HYPOTHESIS notes: “[T]he book’s most glaring omission is any sustained treatment of race as a component of the homevoter’s political economy.” Schragger, *supra* note 202, at 1836.

219. *Arlington Heights*’ polar opposite in this regard is *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), in which the New Jersey Supreme Court held that the exclusionary impact of suburban zoning ordinances on minorities was sufficient to

In other decisions, the Court has more explicitly considered local governments to be autonomous entities whose decisions have no impacts beyond their borders. In *Warth v. Seldin*,²²⁰ an important precursor case to *Arlington Heights*, a group of plaintiffs identifying themselves as residents or taxpayers of the city of Rochester, New York, challenged the assertedly exclusionary zoning practices of a neighboring suburban community called Penfield. They claimed that Penfield's zoning practices directly affected them insofar as Rochester was forced to absorb the need for affordable housing that Penfield refused to accommodate at considerable cost to Rochester's own taxpayers. The Court found, however, that the causal link between high taxes in Rochester and Penfield's zoning practices was too speculative. "Whatever may occur in Penfield, the injury complained of—increases in taxation—results only from decisions made by the appropriate Rochester authorities, who are not parties to this case."²²¹ Likewise, in *Milliken v. Bradley*,²²² the Court held that a district court had exceeded its equitable powers in crafting a remedy for racial segregation in the Detroit public school system by requiring Detroit's predominantly white suburbs to participate in a desegregation plan for the metropolitan area as a whole. The Court held that the suburbs bore no responsibility for the predominantly black population of the Detroit public school system, which was instead the product of "unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears."²²³

establish a violation of New Jersey's equal protection clause, without regard to discriminatory intent. The court noted that Mount Laurel's zoning practices were emblematic of the practices in suburban communities throughout New Jersey, which in combination had led to the decline of core urban areas. *See id.* at 717, 723–24.

220. 422 U.S. 490 (1975).

221. *Id.* at 509.

222. 418 U.S. 717 (1974).

223. *Id.* at 756 n.2. One notable exception to the Supreme Court's general trend of seeing local governments as autonomous entities is *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69–70 (1978), in which the Court frankly acknowledged that one municipality's actions may have innumerable impacts on individuals outside the municipality's borders. Ironically, however, the Court reasoned from this premise that states could legitimately limit the franchise to municipal residents because it would be administratively impractical to extend the vote to all those affected by municipal decision making. *See id.* Interestingly, the state courts have by and large been much more willing than the federal courts to hold local governments accountable for the extraterritorial impacts of their land use regulations. In Part III.A.3, I explained that several state

2. *The public choice model's fatal flaw*

The Court's reluctance to recognize that one municipality's actions can have influence beyond its borders is not simply a Pollyannaish reaction to the realities of segregation; rather, the fiction that the impacts of local land use policies are wholly contained within municipal borders is necessary to sustain the entire public choice model. The model presupposes that municipalities can reliably use their land use powers to protect homeowners' reliance interests in pre-existing property values by, for example, excluding new development that may diminish property values. If in reality, however, one community could easily externalize the impacts of its land use practices onto neighboring communities, that presupposition would be completely undermined.²²⁴ For example, if a municipality approved the siting of a malodorous landfill right near the border of an adjacent town so that the offensive smells from the landfill would principally afflict homeowners on the other side of the border in the adjacent town, then whatever land use policies the latter community adopted to protect the property values of those unfortunate homeowners would be fruitless. This problem is especially likely to appear where there are numerous small communities in close proximity to one another, each of which is free to adopt land use policies to protect its own homeowners without regard to the impact of its policies on neighboring towns. Thus, a critical, albeit unstated premise of the public choice model is that such external impacts simply do not exist.²²⁵

courts have permitted homeowners to sue neighboring towns whose land use decisions affect their property values. In some cases, notably New Jersey, this recognition of the broad impacts of municipal land use regulation subsequently led the courts to question exclusionary zoning practices. See *Mount Laurel*, 336 A.2d at 727 (invalidating exclusionary zoning law based on regional impact and citing an earlier decision, *Borough of Creskill v. Borough of Dumont*, 104 A.2d 441, 445-46 (N.J. 1954), which held that homeowners have standing to challenge zoning decisions by neighboring towns). For the most part, though, state courts have not followed the decisions regarding standing to sue to their logical conclusion and invalidated exclusionary zoning laws.

224. See Schragger, *supra* note 202, at 1831 (local government's ability to safeguard property values may be undermined if there are significant "regional or interlocal spillover effects").

225. See, e.g., Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 969 (1991) (noting that the Tiebout model assumes externalities do not exist); Schragger, *supra* note 202, at 1831 ("Fischel has no place in his political economy for interlocal or regional effects.").

There is reason, though, to doubt this premise. As Richard Schragger has pointed out in an incisive critique of Fischel, the relationship between local government policies and home values is not nearly as robust as Fischel claims, largely because home values are *not* entirely determined by local land use decisions but are heavily affected by a wide variety of factors outside of local control, including land use siting decisions by neighboring communities and macroeconomic trends such as the state of the national real estate market.²²⁶ The recent real estate downturn should be sufficient to prove that point—the collapse of risky assets in which major Wall Street banks had heavily invested led to a loss of liquidity and consumer confidence in the real estate markets that then caused a sharp decline in property values across the nation.²²⁷ Local zoning practices could mount little defense against this powerful, destructive force. In short, the entire judicial enterprise to protect homeowner reliance interests by empowering small suburbs to control their own land use is largely ineffectual because localities have only a weak ability to prop up property values.

CONCLUSION

If the public choice model is to be believed, we should expect Americans by and large to be thrilled with their local governments. Under this model, as we have seen, the vast majority of local governments are small suburban communities in which homeowners—the primary constituency—are able to use their ample political influence to ensure that their property values are protected through restrictive zoning ordinances. Who would be unhappy with a government that gives the people exactly what they want? Yet, according to the Saint Index study mentioned in the Introduction, more and more Americans are becoming dissatisfied with their local governments' land use policies.²²⁸ This suggests that local

226. Schragger, *supra* note 202, at 1830–31 (“The existence of externalities means that the quality or availability of ‘local’ amenities is often beyond the control of a specific local government or the homeowners who vote within it.”).

227. See Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1181–85 (2011).

228. See The Saint Consulting Group, *supra* note 2 (stating that fifty-one percent of respondents rate local government as “fair to poor” on zoning and planning, and sixty-four percent believe land-use approval process is “unfairly” skewed in favor of developers).

governments are *not* giving the people what they want. The real estate collapse has made it increasingly obvious that local governments cannot cure the inherent volatility of real estate prices, and it is this disconnect between the promise of local governments to protect homeowners' property values and their evident inability to do so that likely explains homeowner dissatisfaction with local governments.

As we have seen, policymakers and courts have long romanticized zoning for stabilizing property values so that individuals could purchase homes and acquire a "stake" in the affairs of government. Judged by the levels of homeownership in this country and the high degree of political activism by homeowners in local government, zoning has been a great success. However, it should also now be clear that homeowners' "stake" in local politics is quite a mixed blessing. It has led, on one hand, to a political system in which it is nearly impossible to reverse the devastating impacts of interlocal segregation, and, on the other, to increasing cynicism about local government even among its supposed beneficiaries. All this has been the price for making homeowners' reliance interests our highest priority, and yet, as just mentioned, it is hardly evident that the existing political system does a particularly good job at protecting those reliance interests. This impoverished model of local government is unworthy of the judicial favor it has so long received.