LIGHT, AIR, OR MANHATTANIZATION?: COMMUNAL AESTHETICS IN ZONING CENTRAL CITY REAL ESTATE DEVELOPMENT

GEORGETTE C. POINDEXTER*

*Assistant Professor of Real Estate and Legal Studies, Wharton School, University of Pennsylvania; Assistant Professor of Law, University of Pennsylvania Law School. Generous research funding was provided by the University of Pennsylvania Research Foundation. My sincere thanks go out to all who read and commented on previous drafts of this Article: Richard Briffault, John Costonis, Jerry Frug, Peter Linneman, Tim Poindexter, Louis Pollack, Donald Siskind, participants in the Northeast Corridor discussion group, and participants in the Wharton Real Estate Department Seminar Series. Thanks also to my able research assistant Susannah Barber. Any errors remaining are, of course, solely attributable to me.

INTRODUCTION

An imaginary person, living in such a state of nature, would be at liberty to use his land as he pleased, to build on it to any height . . . without restraint. But as man was formed for society, and is incapable of living alone, organized society is essential to his well-being and happiness, and every person who enters society must give up a part of his so-called natural rights and liberties for the benefit of the community.[1]

Distilled to its essence, zoning proclaims the supremacy of collective action over individual will. Through the zoning laws, the community prevents or limits the right of a private person to use his or her property in the manner in which he or she chooses. In commercial real estate development, zoning pits the individualism of American capitalism against deeply rooted notions of communal public good.

Although there are certainly many other instances where the law regulates individual action based upon collective will,[2] zoning occupies a unique niche. Historically, zoning regulation may share an ideological foundation with other areas of regulation that limit or prohibit individual action for the public good. No longer concerned with factories,[3] piggeries,[4] or brickyards,[5] zoning laws have grown beyond the narrow scope of regulation legislated to promote health, safety, or welfare of citizens. They have moved even from

---

[1] Cochran v. Preston, 70 A. 113, 114 (Md. 1908).

[2] Minimum wage laws, food processing standards, and various safety standards are just such examples.

[3] *See, e.g.*, American Smelting & Refining Co. v. Godfrey, 158 F. 225, 229 (8th Cir. 1907) (holding that the factory was a nuisance and stating that "[t]he rights of habitation are superior to the rights of trade, and whenever they conflict, the rights of trade must yield to the primary or natural right").

[4] *See, e.g.*, Commonwealth v. Banholzer, 156 A. 237 (Pa. 1931) (holding that a department of health could regulate the operation of a piggery found to be a nuisance).

[5] *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 171 (1915) (holding that a city may regulate a brickyard that is a nuisance by its operation).

the intermediate step of separating conflicting uses as nuisance.[6] Rather, modern zoning laws often dictate the manner in which a community will grow aesthetically. Whereas cities originally enacted building height restrictions to protect public health by ensuring adequate light and air,[7] today communities enact these restrictions because of fear of the "Manhattanization" of their downtown.[8] As it has evolved, modern zoning law has more to do—in some instances—with what I will call "communal aesthetics" than it has to do with harm prevention.

Communal aesthetics signifies the manner in which the residents of a community implement their vision of the physical ideal of their city.[9] This vision embodies the physical form and architectural aspirations of how the community wishes to express itself to the world. Broad lawns, cobblestone historical districts, and a distinctive skyline are examples of communal aesthetics. These serve to satisfy citizens' need for belonging to a certain place and to be surrounded by a familiar, comforting, and reassuring cityscape.[10]

---

[6] *See, e.g.*, Reinman v. Little Rock, 237 U.S. 171, 176 (1914) (holding that a city may forbid a livery from locating in a downtown area if it deems such a use to be a nuisance at that location).

[7] Natural air circulation within buildings was necessary in the era before modern heating, ventilation, and cooling technology. *See* TERRY JILL LAZZAR, CARROTS AND STICKS: NEW ZONING DOWNTOWN 88 (1989) (noting that zoning to preserve light has been a long-standing practice). Adequate natural light, which tall buildings often "stole" from others, was, of course, needed for illumination before the invention of artificial lighting. *See id.*; *see also* Michael Holleran, *Boston's "Sacred Skyline": From Prohibiting to Sculpting Skyscrapers, 1891-1928*, 22 J. URB. HIST. 552, 555 (1996) (observing that natural light was a prized commodity in the late nineteenth century). Light, in this context, should not be confused with shadow casting. Shadow casting is an aesthetic concern, while adequate light in the absence of artificial lighting was a health concern. *See* LAZZAR, *supra*, at 88-94 (discussing various cities' shadow controls).

[8] Residents of San Francisco objected to what they termed the "Manhattanization" of their downtown. *See New Realities: A Survey of the Commercial Real Estate Market in the United States*, ECONOMIST, Feb. 7, 1981, at 11.

[9] The theory of communalism rests upon the marriage of localism with a corporately shaped moral existence. *See* BARRY ALAN SHAIN, THE MYTH OF AMERICAN INDIVIDUALISM: THE PROTESTANT ORIGINS OF AMERICAN POLITICAL THOUGHT 49 (1994) (discussing the concept of community in colonial America). More than collectivism, it connotes the normative commitment to a particular moral vision. *See id.* at 23 (commenting that by this theory, the community and families influenced the individual to further the public good).

The voice of the residents is heard through the dialog surrounding the implementation of zoning regulation. Although no dialogue can include every member of every community, the adoption of zoning regulation is generally open to all interested parties. *See infra* notes 318-60 and accompanying text (discussing the coming together of members of a community in shaping communal aesthetics).

[10] *See* JOHN J. COSTONIS, ICONS AND ALIENS: LAW, AESTHETICS, AND ENVIRONMENTAL CHANGE 46 (1989) ("We bond to our icons for reassurance; and they, in turn, reinforce our sense of order in the world no less than religion or popular culture.").

Encompassing more than an individual's aesthetic hopes, communal aesthetics capture the social implementation of collective aesthetics values. As one commentator noted: "The common hopes and pleasures, the sense of community may be made flesh. Above all, if the environment is visibly organized and sharply identified, then the citizen can inform it with his own meanings and connections. Then it will become a true place, remarkable and unmistakable."[11]

The collective nature of communal aesthetics, though, relies on government regulation for its implementation. The focus-shift in zoning laws from prevention of harm to manipulation of visual space forces a confrontation between property rights proponents and communal zoning supporters. The property rights movement advocates the right of landowners to use their property free from governmental regulatory restrictions. The movement spearheaded legislative initiatives in several states that compensate landowners for diminutions in property value resulting from governmental regulation.[12] Adherents to the movement define a "zoning-inspired taking" as a regulation designed to "preserve historic districts or accomplish other social goals."[13] Because of the property rights movement, local governments have begun to proceed cautiously in enacting regulations that may impinge upon private property use.[14]

Although the property rights movement has concentrated on compensation for regulatory takings, it is not difficult to imagine the next step to be questioning the legitimacy of land use regulation altogether.[15] Because the current push for compensation assumes a valid public purpose underlying the regulation, the next logical step is to challenge the stated public good. If there is no public good underlying the regulation, then the legislation itself is subject to attack, whether compensation is provided or not. This is where zoning

---

[11] KEVIN LYNCH, THE IMAGE OF THE CITY 92 (1960).

[12] One estimate is that over sixty property rights bills have been introduced at the state level across the nation. *See* Nancie G. Marzulla, *State Private Property Rights Initiatives As a Response to "Environmental Takings,"* 46 S.C. L. REV. 613, 633 (1995) (providing overview of property rights legislation at state level). For example, Florida enacted such legislation in 1995 as the Private Property Rights Protection Act, which provides: "When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property the property owner of that real property is entitled to relief." FLA. STAT. ANN. § 70.001(2) (West 1997).

For an overview of the positions of the property rights movement, see generally WAYNE HAGE, STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS (1989).

[13] Christopher Nicholas, *Property Rights Reform & Local Zoning Can Co-Exist*, PENNSYLVANIAN, Oct. 1996, at 30.

[14] *See, e.g.*, Peter Mitchell, *New Property Rights Law Sends City Planners Scrambling for Cover*, WALL ST. J., Oct. 25, 1995, at F1 (Florida ed.) (discussing the impact of Florida's 1995 property rights act on county and local officials).

[15] *See* Charles Means, *Property Reform Bill is Anti-Zoning, Anti-Owner, & Anti-Taxpayer*, PENNSYLVANIAN, Dec. 1996, at 28.

communal aesthetics steps onto shaky ground. When zoning was implemented for the health, safety, or welfare of the people—or even when enacted based on nuisance—owners of private property were forced to acknowledge an accepted public good. If zoning is no longer based on this recognizable public good, however, owners of private property will challenge the authority to regulate use of their property. This possibility begs the question of whether there is a jurisprudential foundation for imposing communal aesthetics justifying regulation of private property. The requisite public good justifying regulation proves elusive when zoning communal aesthetics. This Article proposes to solidify the present gelatinous form of public good underlying the zoning of communal aesthetics, submitting that the public good is the process of zoning communal aesthetics, not the aesthetics standing alone.

Although the notion of communal aesthetics exists in many facets of zoning, this Article concentrates on its most obvious manifestation: the development of real estate in the central business district ("CBD"), specifically high-rise office tower development. Analysis of CBDs facillitates this examination for two distinct, yet symbiotic, reasons. First, the CBD is a city's face to the world. The manner in which a city chooses to mold its most public visage is a function of the character and aspirations of its inhabitants.[16] Whether it is the World Trade Center in New York, the Sears Tower in Chicago, the John Hancock building in Boston, or the Transamerica building in San Francisco, a skyline reifies community spirit.[17]

This image of the office building as a symbol of community spirit coexists alongside the recognition that office tower development, unlike other city symbols, is a capitalistic endeavor. Quite bluntly, developers build towers to make money. The result is that the two seemingly incompatible goals of individual capitalism and communal aesthetics must operate together. While real estate development awakens in the late 1990s, the conflict between private property holders and communal aesthetics will intensify as we enter a new century.[18]

The architectural term "vernacular" refers to structures that are "less *de-*

---

[16] *See* MICHAEL A. PAGANO & ANN O'M. BOWMAN, CITYSCAPES AND CAPITAL: THE POLITICS OF URBAN DEVELOPMENT 47 (1995) (discussing the different ways a city's image can be created).

[17] *See id.* (discussing cities' use of symbols to create "a unique place identity"). Of course, identifiable city symbols include more than office towers. Times Square symbolizes New York City, while Wrigley Field represents Chicago. "The Washington Monument means Washington, D.C., the Arch means St. Louis, the Space Needle means Seattle, the Astrodome means Houston. These readily identifiable landmarks are unique, peculiar to a specific place, and are seldom mistaken." *Id.*

[18] It is also likely that this battle will be fought in the suburbs of major cities as commercial development decentralizes.

signed than *evolved.*"[19] Wider than the philosophy that the "form follows function"[20] or that "form follows finance,"[21] the form of the skyline is expressed as a vernacular of regulation comprised of aesthetics and economics.[22] The ability of these underlying components to work together determines the power of the regulatory vernacular. If one element overpowers the other, the result may be radically different. As we are faced with challenges to communal aesthetics, the possibility arises that economics may assume a greater role in the make-up of the vernacular of our cityscapes. So that it may continue as an integral factor in shaping the evolving urban landscape, this Article seeks to provide a solid jurisprudential grounding for communal aesthetics.

Part I begins with an overview of the existing form of office tower development in several CBDs, namely Washington, D.C., Boston, San Francisco, New York, Chicago, and Philadelphia. Each of these cities represents different approaches to zoning height restrictions: strict approaches, as found in Washington, D.C., Boston, and San Francisco; permissive approaches, as found in Chicago and New York; and the informal approach, as presented by Philadelphia. Introducing the actual manifestations of zoning regulation will tie the theoretical arguments made later in the discussion with existing concrete and steel.

Part II places zoning in general, and height restrictions in particular, in context with an analysis of the historical limitations on private action and the evolving bases upon which regulation has been accepted or rejected. This analysis introduces the unfolding relationship between the public good and government regulation.

Part III extracts the aesthetic zoning discussion from the broader regulatory scheme. Building on the changing role of public good, this discussion addresses the issue of whether zoning for purely aesthetic reasons can withstand challenges based on public good. Because zoning is intertwined with nuisance, this Part also discusses the role of aesthetic nuisance. By comparing aesthetic zoning with the intertwined concept of aesthetic nuisance, this Part examines the legal foundations for regulating aesthetics. Part III concludes that purely aesthetic grounds may not furnish a sufficient basis for a public good argument to withstand a challenge by the property rights movement.

Part IV proposes that the public good in communal aesthetics is the very

---

[19] CAROL WILLIS, FORM FOLLOWS FINANCE: SKYSCRAPERS AND SKYLINES IN NEW YORK AND CHICAGO 7 (1995) (contending that local conditions in different cities acted to modify the standard high-rise "template").

[20] LOUIS H. SULLIVAN, THE AUTOBIOGRAPHY OF AN IDEA 258 (1956).

[21] WILLIS, *supra* note 19, at 15-16.

[22] As used in this context, the term "vernacular" refers to the fact that office towers evolved in response to the demands, or lack thereof, placed upon them by zoning regulation, rather than being a result of only either design considerations or economic demands.

process of arriving at and implementing a community's aesthetic ideal. This analysis addresses process factors such as interest groups, public choice, and bureaucratic politics. This discussion of balancing communal aesthetics with private property rights would be incomplete without placing those private rights in context with community rights. Part V therefore squares private rights with community rights to justify the overlay of regulating communal aesthetics.

Identifying the shift in the zoning paradigm away from traditional notions of health, safety, and welfare toward broad-minded notions of community spirit necessitates realigning the relationship between zoning and private property rights. It is no longer sufficient to analyze central city zoning premised upon traditional assumptions of public good. Public good in zoning has been twisted, manipulated, and coerced into an almost unrecognizable form. This Article seeks to smooth out the theoretical basis of this collective will overriding individual choice and chart aesthetic zoning's course along those lines.

I. STEEL, CONCRETE, AND GLASS

> *The social significance of the tall building is in finality its most important phase. In and by itself, considered* solus *so to speak, the lofty steel frame makes a powerful appeal to the architectural imagination where there is any . . . . The appeal and the inspiration lie, of course, in the element of loftiness, in the suggestion of slenderness and aspiration, the soaring quality as of a thing rising from the earth as a unitary utterance, Dionysian in beauty.*[23]

A. *How We Arrived Where We Are*

At the turn of the century, commercial office buildings began to edge above 20 stories.[24] A major construction surge occurred in the 1920s that led to the development of many buildings over 25 stories in cities across the United States.[25] Construction ended with the Depression and did not really begin again until the late 1950s and 1960s.[26] High-rise development was

---

[23] SULLIVAN, *supra* note 20, at 313-14.

[24] *See* JAMES W. PYGMAN & RICHARD KATELY, TALL OFFICE BUILDINGS IN THE UNITED STATES app. at 85 (1985) (noting that after the completion of a 32 floor commercial office tower in 1896, 3 more buildings of above 20 stories were constructed before 1910 and 11 more before 1920).

[25] *See id.* at 8-9 (describing the boom of tall building construction that occurred during the 1920s and 1930s).

[26] *See id.* at app. at 88-89 (tracing the development of tall buildings and observing that although over 100 were constructed in the late 1920s and early 1930s, only 7 were constructed between 1934 and 1950).

concentrated, though, in a few cities.[27] By 1960, only New York, Chicago, Detroit, Philadelphia, and Pittsburgh had more than two buildings taller than 25 stories.[28] Some markets, particularly in larger cities, continued their building surge into the 1970s.[29] In the mid-1970s, however, many financial institutions reacted to overbuilding by significantly reducing funding for projects.[30] To a limited degree, the trends in building height also followed this lack of funding and cyclical downturn.[31]

Building activity rebounded with the beginning of the new decade. The early 1980s witnessed a surge in building construction, especially among large projects.[32] In 1982, 75 projects of 100,000 square feet or more were completed and in 1983, this number reached a high of 100.[33] Following 1983's boom, there was a slight fall-off in activity in the next few years.[34] Economic factors such as a general recession and rising downtown vacancy rates contributed to this decline in construction.

Beyond real estate economics, though, the skyscraper stands as a testament to fundamental socioeconomic change in the United States during the 20th century. The nation's business cycle and the underlying changes in its socioeconomic structure are the twin economic engines fueling the development and proliferation of high-rise office buildings. At the beginning of the century, blue-collar workers accounted for nearly 90% of the workforce,[35] so the demand for office space was not great. By 1980, about 40% of the United States' workforce were employed in the office sector.[36] This shift

---

[27] *See id.* at 9 (observing that only five cities, in addition to New York and Chicago, "could claim an impressive skyline before the postwar construction period").

[28] *See id.* (noting that New York boasted more than 75 high-rises before World War II, Chicago had 23, Detroit had 8, Philadelphia had 6, and Pittsburgh had 5).

[29] *See id.* (noting that Atlanta, Denver, Los Angeles, Miami, San Diego, San Francisco, St. Louis, and Tampa constructed their first tall downtown projects in the late 1950s through the early 1970s).

[30] *See id.* (explaining that "[t]he boom ended precipitously in 1975 when urban financial institutions reacted to overbuilding by cutting off funding, and in many cases, by taking over projects").

[31] *See id.* at 14 (describing the trends in building height between 1970 and 1983 and noting that the average number of stories of all buildings peaked in 1974 at 36 stories, reached a low of 19 in 1977, remained relatively constant at 20 stories until 1980, and began to increase again in 1981). *But see id.* ("[T]he proportion of tall (from 25 to 49 floors) and very tall (50 floors and over) buildings remained relatively constant over time at about 55% and 18%, respectively, of the average annual additions of space.").

[32] *See id.* at 11 (noting that the skyscraper boom began in 1980, with 15 new "megabuildings" constructed in 1982 and 1983).

[33] *See id.* at 10.

[34] *See id.*

[35] *See* PYGMAN & KATELY, *supra* note 24, at 4 (noting that less than ten percent of the labor force was engaged in office occupations).

[36] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHARACTERISTICS OF THE

away from the manufacturing sector and into the service sector increased demand for concentrated office space and led to the construction of tall buildings in the urban centers of commerce.[37]

While the existence and necessity of high-rise towers may flow from economic pressures and socioeconomic metamorphosis, the evolving form and design of these office towers depended on technological inventions. Traditional masonry bearing wall construction reached its load limit at about ten stories.[38] Advances in building materials drove up the height of buildings. Constructing a building with a steel frame shifted the load of the building from the walls to the frame, freeing it to soar, no longer dependent on masonry piers.[39] New York's first steel frame structure was the Tower Building at 50 Broadway, built in 1888-1889.[40] The impact of electric lights, plate glass, and telephones on high-rise development cannot be overstated.[41] Likewise, the development of the passenger elevator played a significant role in skyscraper development.[42]

Economics and technology, however, do not exist in a vacuum. As society's needs have evolved, so have the zoning requirements adapted to meet the exigencies—real or imagined—of such evolution. Most of the high-rise buildings were constructed in the CBDs of urban areas.[43] Located as such, zoning of these buildings became an outward expression of public sentiment dictating the desired pattern of urban growth.[44]

POPULATION, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS 1-73 (1983) (calculating that about 40% of the United States workforce was employed in managerial and specialty occupations and administrative support occupations).

[37] *See* PYGMAN & KATELY, *supra* note 24, at 4 (noting that changes in the workplace from agrarian to white-collar in this century led to changes in the types of building necessary for the workforce).

[38] *See* SEYMOUR I. TOLL, ZONED AMERICAN 50-51 (1969).

[39] *See id.* at 51.

[40] *See id.* at 49.

[41] *See id.* at 51 (arguing that the invention of electric lights, plate glass mass production, and the telephone were necessary for the utility of skyscrapers).

[42] *See id.* at 47 (noting that the elevator was an important contribution to the growth of skyscrapers). Elisha Graves Otis introduced the world's first safe elevator at New York Crystal Place exposition of 1853. *See id.* In 1870, Equitable Insurance Company installed the first elevator in a commercial office building at 120 Broadway in New York City. *See id.* at 48.

[43] *See* PYGMAN & KATELY, *supra* note 24, at 5 (noting that early skyscraper development was limited to central business districts).

[44] The decision to implement a new zoning code in the central business district usually is influenced by several factors including: (1) the old code does not respond to development pressures; (2) the new project is so large as to force the city to prevent duplication; and (3) the code is used as a tool to actively shape the character and scale of downtown buildings. *See generally* LAZZAR, *supra* note 7, at 6-7 (stating that "downtown zoning [uses] . . . techniques such as overlay districts, special use districts, and height[,] density

Wide variations between cities emerged in both density and style of tower development that was a direct function of varying zoning regulation. Although technological advances may be national and economic conditions may be regional, zoning is local. Examining the growth of the CBD of several cities in tandem with an analysis of their respective zoning schemes will lay the groundwork for a discussion of the role of communal aesthetics as it shapes a city's skyline.

B. *City Analysis*

Cities representative of the three approaches to zoning high-rise development illustrate the role of zoning on office tower development. Washington, D.C., Boston, and San Francisco exemplify the first approach, strict zoning. These cities restrict height for height's sake with little room to maneuver around limitations. The second approach, permissive zoning, uses zoning as a guidepost to development, not as a limitation upon growth. As the examples of New York and Chicago demonstrate, zoning classifications can influence the very shape and design of towers under this approach.[45] The third approach to zoning the central city, the informal approach typified by Philadelphia, is not strictly zoning at all. Rather, it is the unspoken—that is, uncodified—expression of desired development that depends on a shared civic heritage to perpetuate its existence.

1. Strict Height Limitations

a. *Washington, D.C.*

In 1910, Congress limited the height of buildings in the District of Columbia to preserve the views of the U.S. Capitol.[46] The Building Height Limitation Act of 1910,[47] now incorporated into local zoning,[48] limited the height of buildings in relation to street width to protect the siteline of the Capitol.[49] Although there are some exceptions to this width requirement along Pennsyl-

---

limits[,] . . . linkage requirements, commercial development caps, and tiered bonus programs").

[45] *See id.* at 77-78 (discussing zoning regulations' unintentional and intentional effects on building design); *id.* at 78 (noting the "wedding cake" skyscraper in New York as a prime example).

[46] *See id.* at 98-99 (discussing congressional efforts to preserve views of the Capitol's dome and other public buildings and monuments, setting a height cap of 130 feet for commercial sectors and 110 feet for residential areas).

[47] Act of June 1, 1910, ch. 263, 36 Stat. 452.

[48] D.C. Mun. Regs. tit. 11, § 2510 (1995) (adopting the stricter of local regulations or the Building Height Act).

[49] *See* Ch. 263, § 5, 36 Stat. at 453 (stating that the width of the street governs the height of buildings); LAZZAR, *supra* note 7, at 99 (noting that D.C. height restrictions are aimed at protecting the Capitol's siteline).

vania Avenue, there are no exceptions to the Capitol height requirement.[50] This severe height limit encouraged flat square buildings that some architecture critics describe as "ice cubes poured out of a tray."[51]

Inflated land costs and lack of large spaces for development in downtown Washington have forced much of the major development into the Maryland and Virginia suburbs where regulations are not as strict. In 1993, construction in suburban Maryland and Virginia accounted for 91% of the 2.1 million square feet of office space added in the D.C. metropolitan area.[52] Areas such as Bethesda and Silver Springs in Maryland, and Rosslyn and Crystal City in northern Virginia, have become major hubs of large office development in the last fifteen years, each with several tall office towers.[53] Such development has prompted some to offer unflattering descriptions of the areas. Rosslyn is described as a "clump of towers"[54] and Crystal City as "a maze of 40 rather ugly buildings."[55]

b. *Boston*

The first American city to impose a flat ceiling on building heights,[56] Boston is perhaps second only to Washington, D.C. in the rigidity of its height limits. Some developers consider it one of the most difficult cities in which to build.[57] Boston is often considered the exact opposite of Chicago, which has no height limitations and is very developer-friendly.[58] Indeed, Boston and Chicago are cited as "polar opposites in their spectrum of urban responses to intensive growth pressures. Boston reacted with a demanding set of regulations and expectations; Chicago sat back and let 'er rip."[59]

---

[50] *See* Ch. 263, § 5, 36 Stat. at 453 (dictating that buildings in business streets may not exceed 130 feet, except on the north side of Pennsylvania Avenue between First and Fifteenth Streets, where a height of 160 feet is allowed).

[51] Barbara Smith, *L'Enfant's Legacy*, ECONOMIST, Apr. 16, 1988, at 11 (Survey of Washington, D.C.).

[52] *See* Real Estate Research Corporation, *Washington, D.C., Metropolitan Area*, *in* 1 ULI MARKET PROFILES—EASTERN NORTH AMERICA AND EUROPE 209, 213 (1994).

[53] *See id.* at 213-14.

[54] Smith, *supra* note 51, at 11.

[55] *Id.*

[56] *See* Holleran, *supra* note 7, at 552 (discussing Massachusetts's role in setting zoning law precedents).

[57] *See* John King, *While Boston Tinkers, Chicago Lets 'er Rip: A Love Affair With Size*, BOSTON GLOBE, May 28, 1989, at 33, 36 ("I wouldn't work in Boston unless I had the building pre-leased before I started. The process there is made for adversity." (quoting developer Richard Stein)).

[58] *See infra* notes 131-44 and accompanying text (discussing Chicago's absence of height restrictions).

[59] King, *supra* note 57, at 33.

Boston passed a law in 1891 that prohibited buildings over 125 feet.[60] One year later, the legislature further restricted building heights in narrow streets, prohibiting buildings from rising higher than 2.5 times the width of the widest street or square on which it stood.[61] Boston's height limits were motivated by practical concerns such as blocked light, street congestion, and increased fire risk.[62] However, only when economic interests reinforced the practical and aesthetic considerations did these height restrictions become possible.[63] Further, the restrictions did not impede development with construction continuing as usual, indicating a comfortable status quo.[64] While other cities experienced great fluctuation in real estate prices during this period, Boston's height restrictions stabilized land values and protected Boston from significant real estate cycle busts and booms.[65]

In the 1920s, Boston slowly began to emerge as a national market for commercial development.[66] With real estate demand growing at an exponential pace, developers petitioned the legislature to eliminate the height restrictions to bring Boston in line with cities such as New York and Chicago.[67] Although some developers urged abandoning all height restrictions, the legislature compromised, adjusting the height limit to 155 feet, still low by other cities' standards.[68] By the late 1920s, many cities had abandoned flat height restrictions in favor of setback zoning similar to that pioneered by New York City.[69] In 1928, the Massachusetts legislature enacted a law that provided for certain exceptions to the limit of 155 feet.[70] For example, the regulation stated that a building could rise above 155 feet as long as it compensated by a reduction in volume.[71] The setback requirement for any build-

---

[60] *See* Act of May 21, 1891, ch. 355, § 1, 1891 Mass. Acts 919 ("No building more than one hundred and twenty-five feet in height . . . shall hereafter be erected in any city . . . .").

[61] *See* Holleran, *supra* note 7, at 562.

[62] *See id.* at 555-58. *See generally* Marc Weiss, *Skyscraper Zoning: New York's Pioneering Role*, 58 J. AM. PLAN. ASS'N 201, 207 (1992) (contrasting the basis for Boston's height restrictions with Chicago, where business and realty interests opposed them as thwarting economic growth).

[63] *See* Holleran, *supra* note 7, at 555.

[64] *See id.* at 566.

[65] *See id.* ("The height restriction served real estate owners' interest in the stability of their investments . . . . During a period when real estate prices in other American cities went through devastating cycles, Boston was free of bust as well as boom.").

[66] *See id.* at 576.

[67] *See id.* at 577.

[68] *See id.* (noting that the new ceiling passed in 1923).

[69] *See* Weiss, *supra* note 62, at 209 (noting that "many big cities were changing their zoning focus to adopt 'volumetric' controls and the [New York] set back system for tall buildings").

[70] *See* Holleran, *supra* note 7, at 578 (discussing the 1928 enactment).

[71] *See id.*

ing over 125 feet, was 1 foot for every 2 1/2 feet that it rose.[72]

Height restrictions in Boston were both reactive and proactive. Not wanting to become like New York and Chicago, Bostonians eschewed the skyscrapers of these cities in fear of becoming another high-rise city.[73] Proactive planning of height regulations emulated European precedent of lower buildings.[74]

In 1964, however, Boston reversed its decision, removing all height limits downtown, along the harbor, and in major business districts in order to spur economic growth.[75] This new lack of restrictions led to construction of towers such as the 60-story John Hancock Tower in 1976 that Theodore S. Chandler, policy director for the Boston Redevelopment Authority ("BRA"), described as "cast[ing] a shadow on public art halfway across the city . . . ."[76] Additionally, in the absence of height restrictions, projects were reviewed on a case-by-case basis, which some criticized for leading to "arbitrary decisions and erratic growth."[77]

Facing a dynamic real estate market in the 1980s, in which experts expected the city to absorb more than two million square feet of office space per year,[78] Boston was pressured to create a new plan directed at future growth. After extensive community input, the BRA responded to nearly twenty years of unrestricted building by issuing new guidelines on future development in the downtown area of the city. In a statement billed as "Downtown Guidelines: Growth Policies for Central Boston 1985-1995", the BRA set forth proposals to slow the city's aggressive construction.[79] According to BRA director Stephen Coyle:

> Historic Boston and new, post-1965 Boston can be brought into harmony if we build buildings of moderate mass. . . . [In 1965, at that juncture in the city's history, when no one was willing to build in the downtown core] they [Mayor John Collins and then-BRA chief Edward

---

[72] *See id.* at 578-79.

[73] *See id.*

[74] For further discussion of the influence of European aesthetics and urban harmony, see *id.* For a discussion of the contrast between U.S. and European approaches to high-rise development, see Lee Polisano, *Complexity and Contrast: American and European High-Rise Buildings*, ARCHITECTURAL DESIGN, Jul.-Aug. 1995, at 30.

[75] *See* Susan Diesenhouse, *New Waterfront Zoning Sets Priorities*, N.Y. TIMES, June 2, 1991, § 10, at 5 (discussing new height restrictions placed on downtown and waterfront development, which were the first since 1964, when all height limits were removed to encourage economic growth).

[76] *Id.*

[77] *Id.*

[78] *See* Charles E. Dole, *City Review: Boston*, NAT'L REAL EST. INVESTOR, Oct. 1985, at 316.

[79] Jane Holtz Kay, *The Limits of Growth: Boston's Downtown Plan*, PROGRESSIVE ARCHITECTURE, Oct. 1985, at 29.

> Logue] were right [in eliminating height restrictions]. . . . But they created a market expectation for verticality. For the next 15 years, at least, we have to distribute development horizontally.[80]

The city of Boston, thus, reimposed its 1924 height cap of 155 feet except for two areas—the North Station area and the Essex Street Corridor area—where height could range from 300 to 450 feet.[81] By re-enacting height limits, the plan seeks to end the skyscraper mania of the 1960s and 1970s and prohibit proliferation of huge structures in Boston's skyline. "There'll be no more New England Lifes, no more International Places," said Coyle.[82] The BRA plan also encouraged development in economically disadvantaged neighborhoods by providing special zoning allowances and incentives for buildings located in these areas.[83]

c. *San Francisco*

From 1965 to 1982, San Francisco experienced a period of rapid growth fueled by the expansion of banks, engineering firms, federal and state government agencies, and public utilities.[84] During this period, new development contributed nearly 30 million square feet of high-rise office space, including 55 buildings, each averaging 23 floors and at least 100,000 square feet.[85]

Beginning in 1971, San Francisco began to impose safeguards to protect against a vast change in the architectural nature of the city.[86] Particularly after the development of the Bank of America building in 1969, considered too dark, and the Transamerica building in 1973, considered too eccentric, the

---

[80] Jonathan Wells, *Rezoning Would Cap Heights in City Core*, BOSTON HERALD, Apr. 5, 1987, at D1.

[81] *See* Kay, *supra* note 79, at 29.

[82] *Growth With Grace*, BOSTON GLOBE, May 18, 1987, at A1.

[83] *See* Michael K. Frisby, *Flynn Backs Limits on Building Heights*, BOSTON GLOBE, May 12, 1987, at A1 (noting that the BRA would encourage development in areas most in need). Based on guidelines from the BRA, the city of Boston also has established a linkage policy in which a developer will pay $5 per square foot for every foot over 100,000 square feet on a non-residential project. The money raised will go toward low- and middle-income housing in the city's neighborhoods. *See id.* at A6 (describing the inclusionary zoning aspects of the plan that require developers of ten units or more to set aside at least ten percent of the units to low- and moderate-income housing).

[84] *See* Kenneth MacDonald, *City Review: San Francisco*, NAT'L REAL EST. INVESTOR, Oct. 1985, at 247 (describing the boom in office development in San Francisco between 1965 and 1982).

[85] *See id.*

[86] *See* Spiro Kostof, *The Skyscraper City*, 140 DESIGN Q. 32, 46 (1988) (discussing the move toward increased limitations on construction in San Francisco because of dissatisfaction with previous safeguards that had already allowed construction of the Transamerica and the Bank of America buildings).

pace to impose limits on construction quickened considerably.[87] The San Francisco Urban Design Plan of 1971 sought to limit height and bulk like the 1916 New York ordinance, while granting some concessions to topography.[88] Although San Francisco did not formally enact the Urban Design Plan, the Plan produced two important results.[89] First, the city began to require increased and specific information about the environmental impact of tall buildings, and second, activists launched a major campaign to try to take construction decisions away from developers and instead force them through public initiatives.[90]

The interests stirred by this action in 1971, combined with the building frenzy and subsequent high vacancy rate[91] in the San Francisco CBD, led to the enactment of the Downtown Plan of 1985 as an effort control development.[92] With this plan, city officials and residents called for regulations to "restrict the intrusion of high-rise blocks . . . and to impose on developers a duty to keep the city a pleasant place to live in."[93] The goal of the plan was to limit the growth of San Francisco for the next 15 years, until 2000, by imposing height and development restrictions in the traditional business district.[94]

The restrictions sought to promote new buildings that were lower and smaller, and towers that were thin and tapered.[95] Specifically, the plan creates several measures that limit construction and architectural freedom. These measures promote the "design of light-colored, richly surfaced structures, and require[ ] sculpted rooftops on new office towers."[96] The plan further sought to create districts or locations with stricter limitations and tried to shift development into certain areas. It provided for the preservation of

---

[87] *See id.*

[88] *See id.* (discussing the Urban Design Plan of 1971).

[89] *See id.*

[90] *See id.*

[91] The soft rental market in the mid-1980s may not be entirely due to overbuilding. Skyrocketing rents prompted corporate relocation out of the San Francisco CBD and into the suburbs. *See* LAZZAR, *supra* note 7, at 71.

[92] *See* MacDonald, *supra* note 84, at 247 (discussing the Downtown Plan of 1985 that was a response to the surge of speculative office development of the 1980s).

[93] *San Francisco: Low is Beautiful*, ECONOMIST, June 15, 1985, at 27.

[94] The plan includes provision to move development to an area south of Market Street. *See* Paul Sachner, *Reshaping the San Francisco Skyline: Seven Current Projects Respond to the City's New Downtown Plan*, ARCHITECTURAL R., Mar. 1985, at 58. The plan also lowers the floor-area ratio throughout the CBD to reduce overall building density. *See id.* In addition, the plan sets bulk controls and height restrictions to create a sculpted skyline, tapering down toward the Bay. *See id.*

[95] *See San Francisco: Low is Beautiful*, *supra* note 93, at 27 (describing the restrictions in San Francisco's "downtown plan").

[96] John Gregerson, *The Democratization of Design*, BUILDING DESIGN & CONSTRUCTION, Apr. 1990, at 62.

most of the historic Financial District, and aimed to shift development patterns away from the Golden-Triangle Area, bounded by Market, Montgomery, and California Streets, into the area south of Market Street near the TransBay Terminal.[97]

There were a few exceptions to the plan. Like New York's incentive system, developers could obtain a 10% exception to the height limitation by reducing the tower bulk.[98] Also, former Mayor Diane Feinstein, concerned that businesses might leave the San Francisco area, stated that "exemptions from the Downtown Plan have be granted to companies that wish to remain in San Francisco and that want to expand."[99]

2. Permissive Limitations

a. *New York*

New York City played a pioneering role in the development of urban skyscraper zoning regulations. At the turn of the century, major construction coupled with a lack of development restrictions resulted in a surge of office buildings, many of which topped 20 stories. By 1913, downtown Manhattan contained nearly 1000 buildings rising between eleven and twenty stories, and 51 buildings between twenty-one and sixty stories.[100]

For several decades before 1916, urban reformers and advocates of the "City Beautiful" movement promoted height restrictions based on aesthetic arguments.[101] Support finally came from the real estate community in 1913, although for different reasons.[102] In 1913, the Board of Estimate of Apportionment established a Commission on Heights of Buildings to investigate the effects of skyscrapers on the safety and health of the community and to pro-

---

[97] *See* Sachner, *supra* note 94, at 58 (stating City Planning Commission recommendations for the downtown plan).

[98] *See id.* (describing the bulk controls of the downtown plan).

[99] MacDonald, *supra* note 84, at 256.

[100] *See* Carol Willis, *A 3-D CBD: How the 1916 Zoning Law Shaped Manhattan's Central Business Districts*, *in* PLANNING AND ZONING NEW YORK CITY 3, 6 (Todd W. Bressi ed., 1993) (describing the surge in office building construction prior to 1916).

[101] *See id.* at 6-8 (discussing the height limitations suggested by urban reformers and proponents of the City Beautiful movement); *see also* WILLIS, *supra* note 19, at 68 (same).

[102] *See* WILLIS, *supra* note 19, at 68 (noting that economic actions called for the zoning regulations). Interestingly, the demand for height regulations came from private businesses and institutions concerned with long term real estate market stability. *See* Weiss, *supra* note 62, at 208 (discussing the motivations of the private businesses in seeking the height restrictions). Enacted during a period of cyclical downturn in the New York market, the actors pushing the new zoning ordinance saw zoning as a way to stabilize the city's economy, spread out property values, and create incentives for new investment and development. *See id.* (noting that support materialized largely due to a concern for maintaining property values).

vide suggestions for improvement.[103] Before the Commission's investigation, buildings could "cover the entire lot, rise to any height whatever, and maintain the lot size at the highest story."[104] The Commission found that this resulted in darkened streets and buildings, and recommended that in the interest of public safety, height along with area and use should be regulated.[105] After numerous hearings and revisions, the Board of Estimate and Apportionment enacted the first zoning restriction for the city of New York on July 25, 1916.[106]

The aim of the 1916 law was to establish a compromise to the conflict concerning the height and bulk of the buildings in commercial districts.[107] It therefore focused on setback requirements instead of flat building height limitations. One major issue in lower and midtown Manhattan was that tall and bulky buildings blocked sunlight from other buildings and from the streets.[108] Thus, the law sought to redesign the buildings to preserve more space and open air.[109] The regulations did not prohibit tall buildings, but rather bulky ones that covered the entire lot.[110] These zoning rules differed

---

[103] *See* EDWARD M. BASSETT, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS 20 (1936) (describing the investigative responsibilities of the Commission on Heights of Buildings).

[104] *Id.*

[105] *See id.* (discussing the Commission's recommendations). The motion adopted by the Board of Estimate and Apportionment to create the Heights of Buildings Commission read as follows:

> Whereas there is a growing sentiment in the community to the effect that the time has come when effort should be made to regulate the height, size and arrangement of buildings erected within the limits of the City of New York; in order to arrest the seriously increasing evil of the shutting off of light and air from other buildings and from the public streets, to prevent unwholesome and dangerous congestion both in living conditions and in [the] street . . . .

HEIGHTS OF BLDGS. COMM'N, REPORT TO THE COMM. ON THE HEIGHT, SIZE AND ARRANGEMENT OF BUILDINGS OF THE BOARD OF ESTIMATE AND APPORTIONMENT OF THE CITY OF NEW YORK 1 (1913).

[106] *See* BASSETT, *supra*, note 103, at 21 (discussing the first zoning resolution, originally called a "districting" resolution); *see also* Weiss, *supra* note 62, at 204. This height restriction, however, was set aside if the building was "set back to allow light, air, and open space to reach the lower floors and the street." *Id.* In addition, a tower of unlimited height could be built if it only covered 25% of the lot. *See id.*

[107] *See supra* note 101 and accompanying text (discussing the aesthetic considerations coupled with economic forces that led to height restrictions and the zoning ordinances).

[108] *See* Weiss, *supra* note 62, at 202-04 (explaining that early concerns regarding bulk and height of buildings were based on fear that buildings, such as the Equitable Building, would block sunlight and views from commercial areas, thereby reducing rents and property values of neighboring areas).

[109] *See supra* note 106 and accompanying text (discussing the setback requirements and the tower allowances).

[110] For example, the Equitable Building, which covered an entire city block, "cast its

from traditional flat regulations in that they were intended to permit and encourage private large-scale development, yet accomplish the stated goals of preserving space and avoiding congestion.[111]

The 1916 law limited height and bulk with a formula called a zoning envelope.[112] The zoning envelope required that the maximum vertical height of a building be stepped back as it rose in accordance with a fixed angle drawn from the center of the street.[113] This approach to zoning marked a sea change from former reliance on mere height limitations.[114] Many cities soon followed New York's lead and implemented similar setback requirements. The 1920s brought about a wave of zoning regulations throughout the country, and by 1930, "nearly eight hundred municipalities had enacted such laws, which affected about three-fifths of the nation's urban population."[115]

After several decades of large building development, and continuing battles between civic groups and real estate associations, New York zoning restrictions shifted their focus to open public spaces and density requirements. A new zoning law, passed in 1961,[116] reduced the maximum population density from fifty-five million to twelve million,[117] which in turn limited a building's volume of rentable floor space. The cutting edge of the new law, however, was to shift restrictions even further away from height and more toward bulk.[118] The new ordinance relied on a relationship between the total floor area of a building and the size of its site, the floor-area ratio ("FAR").[119]

New York's regulations set a maximum FAR of 15—the building has a

---

permanent shadow even on bright, sunny days over many of the financial district buildings whose owners had failed to prevent its construction." Weiss, *supra* note 62, at 203.

[111] *See id.* at 208 (discussing differences between the zoning politics in New York and those in other cities).

[112] *See* WILLIS, *supra* note 19, at 67 (describing the new concept of the zoning envelope).

[113] From this formula, the wedding cake building was born and "a new aesthetic clearly had evolved from the requirements of the zoning law." *Id.* at 77 (citation omitted).

[114] *See id.* at 67 (hailing the zoning code as a "landmark event"). New York is often credited with passing the first comprehensive zoning law because it combined the "precedent of districting by use with restrictions on the maximum mass allowed individual buildings." Willis, *supra* note 100, at 6.

[115] Willis, *supra* note 100, at 23 n.4; *see also* TOLL, *supra* note 38, at 188 (noting the phenomenal growth of zoning in the 1920s).

[116] *See* New York, N.Y., Comprehensive Amendment to the New York City Zoning Resolution (1961).

[117] *See* Weiss, *supra* note 62, at 209.

[118] *See* Norman Marcus, *Zoning from 1961 to 1991: Turning Back the Clock—But With an Up-to-the-Minute Social Agenda*, *in* PLANNING AND ZONING NEW YORK CITY 61, 63 (Todd W. Bressi ed., 1993) (noting that the 1961 provisions allowed removed some restrictions on towers and relied on new floor-area ratio restrictions to reduce bulk).

[119] *See* LAZZAR, *supra* note 7, at 9 (discussing the concept of the FAR).

maximum of 15 square feet of usable floor space for each square foot of the building's height.[120] Developers could obtain, however, a bonus of 20%, to a FAR of 18, by creating a public plaza on a portion of the lot.[121] The law also permitted towers covering up to 40% of the lot, an increase from 25% under the 1916 law, to rise to an unlimited height.[122] This type of zoning set a precedent for other cities in reforming their zoning regulations and moved FAR limitations into a national focus.[123]

The 1961 ordinance remains in effect for Manhattan as a whole, but recently some districts have set special requirements and restrictions. In response to overbuilding and a desire to ensure that new developments maintain neighborhood character and scale, the Upper West and East Sides and the Lincoln Square District have recently written additional zoning regulations that limit building heights and discourage tall towers.[124] The legislation introduced in 1993 and 1994, aims at building towers that are shorter and flatter. Termed "packing the bulk,"[125] the zoning regulations require that the majority of a structure's space be accomplished before a certain height.[126] These regulations seek to create buildings that are between 25 and 30 stories tall, and to encourage the "tower on a base," or even the "bulk on a base," form of building, thereby replacing the former "tower on a plaza" form, with the design of the base in line with the height and structure of the neighboring older buildings.[127] In fact, to discourage the "tower on a plaza" type of building, regulations on the Upper East Side eliminated the incentive structure that gave developers an extra 20% of floor space in exchange for public plazas at the base of buildings.[128]

b. *Chicago*

New York and Chicago are considered the first cities to introduce sky-

---

[120] *See* Marcus, *supra* note 118, at 64.

[121] *See id.* (discussing the incentives for providing plazas or arcades).

[122] *See id.* at 63.

[123] *See* LAZZAR, *supra* note 7, at 9 (explaining that the base FAR set by a city is one of the first considerations in many incentive zoning schemes and discussing the use of FARs by such cities as Cincinnati, Hartford, Los Angeles, and Seattle).

[124] *See* Lois Weiss, *Height Limits for Towers Imposed on East Side*, REAL EST. WKLY., Feb. 23, 1994, at 1.

[125] Therese Fitzgerald, *Planning Commission Seen 'Packing the Bulk' Again*, REAL EST. WKLY., June 9, 1993, at 1 (describing new zoning laws in the Upper East Side and Lincoln Center areas of New York that reduced building size from 55 to 36 stories).

[126] Specifically, 60% of the building floor area would have to be located in the first 500 feet and be built on an 85 foot base that was set back from the street (by about 15-20 feet). *See id.*

[127] Weiss, *supra* note 124, at 1.

[128] *See* Alan Finder, *Planning Panel Approves New Zoning Rules for High-Rises*, N.Y. TIMES, Dec. 21, 1993, at B4.

scrapers.[129] New York's boom in the early 1900s led to major building construction and, in turn, zoning regulations.[130] Witnessing its own boom in the 1920s, the city of Chicago, in 1923, abandoned its height restrictions for towers that had until then prohibited buildings above 260 feet.[131]

Although Chicago has not limited height, it has set limits on building volume. In contrast to other cities, such as New York, Chicago responded to expansionary pressures of the market by increasing the cubic volume permitted in high-rise buildings.[132] However, Chicago later responded to an oversupply of space by passing a new ordinance in 1942 that reduced the maximum volume of a high-rise.[133]

In 1957, Chicago further modified its zoning laws by including provisions for setbacks and FARs.[134] The 1957 regulations allow for a downtown based FAR of 16, consistent with New York City's CBD densities, and incorporates a system of bonuses permitting developers to trade arcades, setbacks, and plazas for a greater FAR.[135] And, unlike New York's regulations that allow a 20% FAR bonus, Chicago's regulations make it possible for developers to obtain a bonus that doubled the allowable FAR.[136]

In addition to the lack of height restrictions, Chicago is also less rigorous than other major cities, such as New York and Boston, in requiring sunlight and shadow studies and environmental impact studies.[137] These characteristics have solidified Chicago's reputation as one of the most developer-friendly cities in which to build.[138] One commercial developer exclaimed

---

[129] *See* PYGMAN & KATELY, *supra* note 24, at 9 ("New York was the focus for much of the early construction of large office buildings, followed by Chicago.").

[130] *See supra* notes 106-14 and accompanying text (discussing the introduction of zoning laws in New York in 1916).

[131] *See* WILLIS, *supra* note 19, at 109 (discussing the proliferation of tall buildings in Chicago in the early 1900s, following the repeal of the 260-foot height limit).

[132] *See id.* at 111 (comparing the New York City ordinance of 1916 which reduced building bulk, whereas the Chicago ordinance increased volume).

[133] *See id.* at 130 (describing the limitations imposed by Chicago's 1942 ordinance).

[134] It should be noted, however, that Chicago still did not set any flat height limits, except for the flight path into O'Hare Airport. *See* King, *supra* note 57, at 33.

[135] *See* Cheryl Kent, *World's Tallest Building Raises Questions*, N.Y. TIMES, Mar. 18, 1990, § 10, at 7.

[136] *See id.* (noting that the propsed Miglin-Beitler Tower had a FAR of 33, over twice the FAR of 16 permitted without bonuses).

[137] *See id.* at 13.

[138] Among the formidable buildings in the city of Chicago are the 1,468-foot Sears Tower, the 1,105-foot John Hancock building, and the Merchandise Mart, which with 4.2 million square feet is second only to the pentagon in the amount of building floor area, *see id.* at 7, all buildings that could not have been easily built in other cities across the U.S. Indeed, Chicago continues to live up to its historical reputation of a "size braggart." When Louis Sullivan described Chicago, he commented that "'Big' was the word. 'Biggest' was preferred. And 'Biggest in the world' was the 'braggart phrase on every tongue.'"

that, "[n]o city in the United States has the pro-development feeling Chicago does,"[139] and even the Commissioner of the city's Department of Planning, David Mosena, characterizes Chicago's zoning as "lenient."[140]

Chicago planners, however, do keep abreast of the projects considered by developers. After the 4.5 million square feet Sears Tower was built in 1974, the city amended zoning regulations to include a review for buildings higher than 600 feet.[141] This amendment forces developers to meet with Planning Department officials, who then analyze and evaluate the project.[142] This relatively easy process is usually complete within six months.[143] The review requirement is not designed to deter any construction; in fact, the city has not rejected any project due to its height.[144]

3. Informal Limitations

a. *Philadelphia*

For years, the city of Philadelphia had nothing more than a "gentleman's agreement" with developers that building height would be limited by the height of the William Penn statue on top of City Hall.[145] In 1985, the con-

---

SULLIVAN, *supra* note 20, at 200.

[139] King, *supra* note 57, at 33 (quoting Stuart Nathan, Executive Vice President of JMB Realty Corporation).

[140] Kent, *supra* note 135, at 7. *But see* Ed Zotti, *Mirror, Mirror on the Wall*, 30 INLAND ARCHITECT 47, 49 (1986) (noting that deputy commissioner of city planning David Mosena stated that city planners are increasingly sensitive to aesthetic considerations).

[141] *See* King, *supra* note 57, at 33 (discussing the review process instituted after construction of the Sears Tower).

[142] *See id.* Chicago also recently instituted a design review process. *See* Zotti, *supra* note 140, at 47 (discussing the beginnings of urban design review in Chicago). While not as rigorous or extensive as other cities', the Chicago Planning Commission is beginning to ask aesthetic questions of developers. *See id.* at 47-49 (noting the increased involvement of city planners in the aesthetic design of buildings and citing the example of an addition to Charlie Club, for which the developer had originally proposed to add a glass and metal facade, but was convinced by the planning department to substitute a concrete design more in keeping with the existing structure).

[143] *See* Kent, *supra* note 135, at 33 (explaining that the approval process takes no more than six months).

[144] *See id.* In 1989, the Chicago Planning Commission approved a proposal for the Miglin-Beitler Tower, which was to be the world's tallest building. *See id.* at 7. Although not constructed due to economic conditions, it appears that Chicago's love affair with all that is big continues. "Bigness now seems characteristic of Chicago." WILLIS, *supra* note 19, at 181.

[145] *See* LAZZAR, *supra* note 7, at 99 ("Until recently, no building in Philadelphia could rise above 491 feet, the height of William Penn's statue atop City Hall. This arbitrary ceiling . . . was founded on no more than a 'gentleman's agreement' that the tallest building in the city should be its city hall.").

struction of the 61-story office building known as One Liberty Place breached the agreement.[146] Rising 825 feet to the top of its roof structure and 945 feet to the top of its spire, the building stood out above the rest of the city.[147]

Philadelphia had traditionally been a low-skyline city, housing only small buildings. As recently as the early 1970s, only four of the city's buildings were more than 30 stories.[148] The impetus for abandoning the height regulation in 1985 was based less on zoning than it was on economics.[149] Because of the economic vitality Philadelphia witnessed in the early- to mid-1980s, the city faced a great need for more office space. With limited land space available, there was nowhere to go but up. Willard Rouse, a leading real estate developer, and the builder of One Liberty Place, felt that the 85-year-old tradition on height limits had been based on financial reasons rather than any aesthetic considerations.[150] Before the 1980s, "[t]here was no economical reason for building more than about 40-stories high. First people were unwilling to put together enough land, and second they thought there wasn't enough demand for office space."[151]

In creating the building that broke the height mold, however, Mr. Rouse did weigh the aesthetic considerations. Not knowing how the public would react to breaking the tradition, Mr. Rouse felt that if he offered an "attractive building that soared rather than edged above William Penn, the public would accept it."[152] Many Philadelphians and developers agreed with Mr. Rouse. Supporters of One Liberty Place also pointed out that although the tower of City Hall was for many years the tallest building in central Philadelphia, it was far from a controlling figure in the skyline.[153] Buildings erected in the 1960s and 1970s had been permitted to sidle up next to City Hall, effectively blocking the view of the William Penn statue.[154] City Hall's once towering statue thus became an empty symbol, "lost in the midst of a bunch of flat-topped office buildings."[155]

---

[146] *See Plans Revealed for Philadelphia's Tallest Office Building*, ARCHITECTURAL REC., Nov. 1986, at 32 Eb.

[147] *See id.*

[148] *See* Paul Gapp, *Philadelphia Stories: Jahn Skyscraper Breaks Height Taboo with Taste*, CHICAGO TRIB., Dec. 11, 1988, at 18.

[149] *See id.* (explaining that given the economic boom in the 1980s, "something was eventually going to rise above the City Hall limit").

[150] *See* Roderick Oram, *How They Broke the Mould (sic) and Went Over Penn's Head*, FIN. TIMES, Jan. 19, 1988, at 2.

[151] *Id.*

[152] *Id.*

[153] *See* Paul Goldberger, *Philadelphia Carves Out a New Skyline*, N.Y. TIMES, June 24, 1990, § 2, at 31.

[154] *See id.*

[155] *Id.*

The construction of the 61-story One Liberty Place brought 1.2 million square feet of office space to downtown Philadelphia. Following the development of One Liberty Place, several more towers have gone up in central Philadelphia. For example, Two Liberty Place, standing 58 stories tall, was constructed in 1988,[156] and the 54-story Mellon Bank Center followed in 1990.[157] The 53-story Bell Atlantic tower, also completed in 1990, stands out in the Philadelphia skyline by distinguishing itself from towers such as Mellon and One Liberty Plaza.[158] It is unlike the other downtown Philadelphia buildings in that it is not a pointed tower and is a different color and style.[159] Instead of the common tan or gray color used in downtown buildings, the Bell Atlantic tower is made of red granite, which some say creates warmth in the downtown area.[160]

C. *The Significance of it All*

Why is this comparative development analysis instructive? Because in each case zoning was used to shape a distinct city form and vision. Compare the skylines that reified Chicago's braggadocio with those that characterized Boston's rigidity; the law creates an environment that is the register of social values.[161] The implementation of a zoning plan is the process of communal values meeting the path of physical expression.[162]

Communal values are not inert. Both Washington, D.C. and Philadelphia expressed the importance of maintaining the sight line of a community treasure. Yet, although Washington, D.C., for better or for worse, clings to its view of the Capitol, Philadelphia has traded its view of William Penn for economic development. Image, and the vision that creates it, "is not only an abstraction, it is a guide for purposive action."[163] Action is not static. Consequently, image and vision are dynamic.

In shaping their image, communities need to visualize their city as distinct

---

[156] *See id.* (criticizing the design of Two Liberty Place).

[157] *See* Michael W. Armstrong, *Bank Tower To Open in 1990*, N.Y. TIMES, Dec. 3, 1989, § 10, at 17 (describing the then proposed 53-story Mellon Bank Center).

[158] *See* Gloria Ringel, *Yo, Philly's Got Its Own Structural Engineers*, FOCUS, Nov. 14, 1990, at 52 (describing the Bell Atlantic Tower as one "that helps define the city").

[159] *See id.*

[160] *See id.* ("It's [sic] color is warmer, it carries on the tradition of the area." (quoting Branford White Fiske)).

[161] For further discussion, see COSTONIS, *supra* note 10, at 15 (discussing aesthetic considerations as underlying all zoning regulations).

[162] As expressed by Professor Haar: "Regulatory ordinances are, after all, the channels by which the master plan is brought into contact with physical events, since property rights and the course of land development are not affected by the mere promulgation of the plan but only by its implementation." Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1156-57 (1955).

[163] PAGANO & BOWMAN, *supra* note 16, at 50.

from others. The mere mention of "Manhattanization" contributed to the development of San Francisco's Downtown Plan.[164] A "distinctive and legible environment not only offers security but also heightens the potential depth and intensity of human experience."[165] Differing approaches to zoning highlight differing community values. Zoning is not produced in a vacuum, but is the result of community debate and deliberation.[166] By delineating a city skyline, zoning enables a citizen to proclaim proudly that this is my city for the entire world to see.

Production of a cityscape, however, depends on zoning, a form of regulation. To the developer in Washington, D.C., the community's desire to maintain views of the Capitol very well may be less important than the revenue lost by the height limitations. However, community control holds sway over the developer. A developer may build structures in Chicago that would never see the light of a zoning board meeting in Boston or San Francisco: different communities, different visions, and different controls. As the individual developer accedes to community vision, community vision limits the individual's rights to develop.

However strong the need for communal aesthetics may be, its very existence depends on the community's ability to regulate the private real estate market. Yet, freedom from excessive governmental regulation is at the heart of the property rights movement. Therefore, in addressing the community's capacity to regulate aesthetics, one must ground such an analysis in the broader question of the community's capacity to regulate individual action in general. The next step entails sketching the basis of such regulation in order to apply this knowledge to zoning communal aesthetics.

II. REGULATION OF THE INDIVIDUAL BY THE COMMUNITY

> *Society is produced by our wants, and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices. The one encourages intercourse, the other creates distinctions. The first is a patron, the last a punisher.*[167]

Zoning is the community's regulation of the economic decisions of the in-

---

[164] *See supra* notes 92-99 and accompanying text (discussing San Francisco's "Downtown Plan"). Interestingly, there are areas in Manhattan, such as the Upper East Side, that strive to carve their own visual niche by avoiding "Manhattanization." *See supra* notes 124-28 and accompanying text (discussing new zoning restrictions that discourage tower and plaza development).

[165] LYNCH, *supra* note 11, at 5.

[166] *See supra* notes 102-03 and accompanying text (discussing the impact of economics and social needs on zoning regulations).

[167] THOMAS PAINE, COMMON SENSE (1776), *reprinted in* THE WRITINGS OF THOMAS PAINE 67, 69 (Moncura Daniel Conway ed., G.P. Putnam's Sons 1894).

dividual developers. A discussion of the community's right to control the concrete shape—literally and figuratively—of the city must begin with a fundamental question: what right does the community have to control any aspect of individual initiative? Although a quick nod to the police power of the state as articulated in *Euclid*[168] may provide a superficial answer, a more rigorous analysis begins with an exploration of the rationale of regulation in general, before tackling zoning in particular.

Regulation may be defined as the legal response to the market's inability to compel the individual to undertake a course of action that, while good for society, is contrary to that individual's desires.[169] Justification for regulation "arises out of an alleged inability of the marketplace to deal with particular structural problems."[170] Alternatively, regulation may "describe how an essentially uncontrolled economy, in which the critical economic decisions are made by individuals, each separately pursuing his own interest, can nonetheless orderly and efficiently do society's work."[171] Ultimately, though, "[r]egulation necessarily makes distributive choices that compel allocative solutions. With no unique optimal use of resources and opportunities independent of rights identification and assignment, the legal system must select the result to be pursued . . . ."[172]

Regulation in general, and zoning in particular, carries implicit normative notions of societal good. Although economic endeavors may be the putative subjects of regulation, regulation is a means to noneconomic ends such as a "good life," justice, national defense, or the glory of a higher being.[173] As the normative goals of our society have evolved, so has our approach toward regulation. Today, we have begun to question the very existence of limitations on governmental intrusion into private economic affairs. As we search for the proper balance between communal aesthetics and private property rights, we must position our attitudes toward regulation in a historical context. By doing so, we may better respond to the claims of property rights advocates.

Because height restrictions evolved in one era of regulation, yet continue to exist in another, understanding such limitations depends upon an understanding of the history of regulation's normative underpinnings. This Article does not propose to set forth a treatise length dissertation on the history of

---

[168] Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) (upholding the validity of a zoning ordinance as consistent with the police powers).

[169] I resist sliding down the vortex of the free market's suggestion of the economic viability of altruism. At some point, an individual's choice will collide with what may be good for the community at large.

[170] STEVEN BREYER, REGULATION AND ITS REFORM 15 (1982).

[171] ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 1 (1970).

[172] WARREN J. SAMUELS, ESSAYS ON THE ECONOMIC ROLE OF GOVERNMENT 194 (1992).

[173] *See* KAHN, *supra* note 171, at 14.

regulation, but rather to highlight shifts in approaches to regulation to expose, and later discuss, the soft underbelly of zoning height restrictions.[174]

A. *Colonial Period Through Late 18th Century*

Those who attempt to derail zoning regulation call for a return to this country's historical roots that favored individual initiative over governmental regulation.[175] Yet, such faith in the talismanic incantation of history is misplaced.[176] When this country was founded, private goals were held subordinate to the public good.[177] In fact, throughout the 18th century, the public good took precedence over individual concerns.[178] Colonial governments wholeheartedly adopted the English tradition of minute regulation of business activities affected with a public interest.[179] Colonial land use statutes "indicate an understanding of private rights and public prerogatives on the part of colonial lawmakers that flatly contradicts the supposed tradition of minimal land use regulation in early America."[180] In colonial America, landownership was prized for the sense of personal liberty and economic independence that it afforded the owner.[181] However, such freedom was not

---

[174] As stated by Joyce Appleby: "Upon reflection we can see that the soft underbelly of any society, at least in ideological terms, is the gap between its shared moral commitments and day-to-day fidelity to those unifying principals." JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S at 85 (1984).

[175] For example, during the battle over Florida's property rights law, a Brevard County Commissioner and property rights advocate stated: "Individual rights; that's the whole basis of this nation. If you don't have individual rights, you're not going to have collective rights." Lou Misselhorn, *Searching for Common Ground*, FLORIDA TODAY, Mar. 17, 1996, at 1A.

[176] One commentator contends that the historical premise that land use was traditionally subject only to harm preventing regulation is flawed. *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1252-56 (1996) (stating that it is a "mistaken historical premise" that early American landowners could use their land as they wished if they caused no harm to others); *see also* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA 83 (1996) (establishing that "the predominance in theory and practice of an approach to economic life in early America antithetical to the classical separation of market and state").

[177] John Jay stated in 1790 that, "civil liberty consists, not in a right to every man to do just what he pleases," but only to do that which "the equal and constitutional laws of the county admit to be consistent with the public good." SHAIN, *supra* note 9, at 32.

[178] *See id.* at 26 (noting that "claims defending the good of the whole took precedence over the particular concerns of private individuals").

[179] *See* Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L.J. 553, 560-61 (1994).

[180] Hart, *supra* note 176, at 1281.

[181] Indeed, land improvement gave rise to the right to land ownership in colonial America. For example, when New England colonists were confronted with Native Ameri-

equated with a right against communal intrusion. Thus, colonial notions of independence should not be confused with the modern sense of individual autonomy that exempts the individual from societal oversight.[182] Rather, such freedom stemmed from the belief that protection of individual rights is a purpose of valid government and a measure of its legitimacy.[183] Superimposing property rights upon this analysis distorts the colonial concerns by suggesting that the preservation of unequal property ownership was the colonists' central focus, rather than the preservation of liberty or individual autonomy.[184]

Our reflexive reaction to paint the colonists with a patina of individualism perhaps stems from an inordinate reliance on liberal theory. The concepts of Lockean liberalism, which emphasize individual freedom, captivated the Federalists. The Republicans, who placed primary value on community welfare, however, challenged their ideas.[185] This tension between liberalism and republicanism existed when the Constitution was drafted.[186] However, the influence of liberalism in early American law was not evident until after the Revolution.[187] For although liberal theorists such as Hobbes criticized the Republicans' lack of interest in the immediate needs of the individual,[188] lib-

---

can conceptions of property ownership, they mistakenly equated lack of improvement with lack of ownership, surmising that only planted fields were "owned," with the "happy result" that the rest of the land lay open for ownership to anyone who would or could improve it. *See* WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 56-57 (1983) (noting that only the fields planted by Indian women could be claimed as property). The colonists' concept of land ownership comports with a Lockean approach to labor. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1689), *reprinted in* LOCKE'S TWO TREATISES OF GOVERNMENT 306 (Peter Laslett ed., 2d ed. 1967) (1690) ("Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property.*"); *see also* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 330 (1996) ("What induces people to labor? Property does.").

[182] *See* SHAIN, *supra* note 9, at 185 (commenting that communal intrusion into the life of an individual was prevented by freedom from personal dependence).

[183] *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 210 (1990).

[184] *See id.* at 207 (noting that for the Federalists, property was connected to liberty and security).

[185] Of course, the class differences between the Federalists and the Republicans cannot be discounted. The Republicans attacked elitist Federalist assumptions by recognizing that social and economic standing affects political power. *See* APPLEBY, *supra* note 174, at 73-74 (discussing the class-consciousness evident in the early years of the Republic).

[186] *See* JOHN BRIGHAM, PROPERTY AND THE POLITICS OF ENTITLEMENT 112 (1990) (emphasizing the tension existing when the Constitution was written between property possession and the public good).

[187] *See* Ballam, *supra* note 179, at 583 (noting that community welfare was emphasized before the Revolution, but that after the war individual freedom was reflected in the law).

[188] *See* THOMAS HOBBES, LEVIATHAN 162 (Michael Oakeshott ed., Collier MacMillan

eral theory was rejected by 18th century Americans.[189]

Thus, we find a recurrent emphasis on the importance of contributing to the public good or the public welfare, especially in the context of land use.[190] The prevailing ideology declared "*salus populi suprema est lex.*"[191] Rather than an absolute right to use the land in any way the owner saw fit, a landowner had a right of stewardship,[192] entrusting the landowner with the care and management of the land. While not prohibited from using the land for private gain, the owner remained a fiduciary for the public good. Hence, stewardship resulted in acquiescence to regulation that served the greater good.[193]

B. *Shifting Focus in the 19th Century*

Dominance of the public good followed land use regulation into the 19th century.[194] A well-ordered society continued to depend on a regulated economy. One historical commentator notes that "the deluge of restrictions on economic life passed by state and local authorities in this period suggests that regulation might supplant the market as a better metaphor for the age."[195]

1962) (1651). Hobbes criticized the Athenians' and Romans' embrace of republican "liberty" by pointing out that "particular men" did not have the liberty to "resist" their representative but rather their representative has the liberty to "resist, or invade other people." *Id.*

[189] *See* SHAIN, *supra* note 9, at 34-35.

[190] This concept was maintained despite the power of the libertarian argument for private property. *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 713 (1986) (suggesting that legal doctrine finds that some "property should not be held in private hands, but should be open to the public or at least subject to what Roman law called the 'jus publicum': the 'public right'").

[191] The welfare of the people is the supreme law. This concept evolved from the ancient Roman version, "*Salus Populi Romani*," which demanded individual responsibility to the health and safety of the people of Rome. *See* NOVAK, *supra* note 176, at 52.

[192] *See* SHAIN, *supra* note 9, at 183. The notion of stewardship survives in modern law under the moniker of "public trust," limiting the rights of the individual in consuming such natural resources as water and air. As one commentator states: "The idea of a 'public trust,' so prevalent in current land use literature, originated in doctrines relating to ownership of lands washed by the tides and lying beneath navigable waters . . . . This trust is in the nature of a inalienable easement, assuring public access." Rose, *supra* note 190, at 727-28.

[193] For example, colonial governments commonly regulated height of buildings and choice of building materials to mitigate the chance of conflagration. *See* Hart, *supra* note 176, at 1275.

[194] *See* NOVAK, *supra* note 176, at 83-84 (suggesting that 19th century Americans "understood the economy as another part of their well-regulated society," enacting numerous controls in aid of "public goods over individual interests").

[195] *Id.* at 84; *see also* Ballam, *supra* note 179, at 580 ("In fact the governments, at all

Change, however, was afoot. Although property rights in the early 19th century remained "social, relative, and historical,"[196] as opposed to "individual, absolute, and natural,"[197] the mercantilism of the 18th century was ceding ground to classical economic thought.[198] Increasingly, the focus centered on individual wealth as opposed to the state.[199] As the country embarked upon an economic shift to industrialization, society was forced to grapple with a shifting emphasis from individual rights to public welfare. As individuals engaged in economic development, property rights evolved accordingly.[200]

However, the power of the public good did not die. Classic examples of the enduring presence of regulation for the public good are fire and health restrictions. Even liberal thinkers such as Thomas Cooley[201] and John Dillon[202] cited such regulations to epitomize the power of the state to limit private property use.[203] Urban development could not function as a free market of private decisionmakers if it worked to the detriment of public safety.[204]

By the end of the 19th century, though, the philosophical bedrock of "*salus populi suprema est lex*" ceded to "*sic utere tuo ut alienum non*

---

levels, during this developmental period were extremely active in business affairs.").

[196] NOVAK, *supra* note 176, at 83.

[197] *Id.*

[198] *See* Ballam, *supra* note 179, at 594 (noting that classical economic thought, including Adam Smith's works, became dominant).

[199] *See id.* at 574; *see also* APPLEBY, *supra* note 174, at 22 (stating that at the beginning of the 19th century, "the productive goal of making wealth to produce wealth supplanted the older notion of wealth as the maintainer of status").

[200] *See* Hart, *supra* note 176, at 1286 (commenting that according to many scholars, the 19th century was "a time of innovative change in the field of property rights, change calculated to produce 'a release of positive energy' in the service of economic development" (citation omitted)); *see also* NOVAK, *supra* note 176, at 220 ("Many courts wrestled with the dilemma of where exactly common interest and general welfare actually lay in a rapidly industrializing, urbanizing economy.").

[201] Cooley was a Justice on the Michigan Supreme Court in the late 19th century who favored applying a narrow definition of public purpose. *See* Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* LAW IN AMERICAN HISTORY 329, 389 (Donald Fleming & Bernard Bailyn eds., 1971) ("In Cooley's view, there was an abstract (and inviolable) line that separated public-sector from private-sector activities.").

[202] John Dillon's seminal work, *Treatise on the Law of Municipal Corporations*, discusses the constitutionality of the public purpose doctrine. *See* JOHN F. DILLON, 1 TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 140-239 (1911).

[203] NOVAK, *supra* note 176, at 80.

[204] *See id.* at 67 ("Fire limits, then, were hardly a timid or primitive form of public regulation. They were prospective and preventative (rather than merely remedial), and they operated on behavior not inherently evil or pernicious.").

laedas."[205] The legal pronouncement of this shift occurred in *Munn v. Illinois*,[206] in which the Supreme Court upheld the regulation of storage warehouses. The regulation was justified, however, not based on stewardship, but rather on what has come to be known as the "affectation doctrine."[207] This doctrine dictates that if one devotes her property to a use in which the public has an interest, she must submit to regulation for the public good to the extent of the interest created.[208] The affectation doctrine, although criticized[209] and eventually overruled,[210] clipped the rights of private property ownership from the communal rights of society. Consequently, property owners' rights stand alongside of the rights of the community, rather than forming a constituent part. Only when property is put to use in a way that affects others may the government intrude.[211]

The affectation doctrine signaled a transformation in the fundamental role of the public good. No longer would an individual's right function subservient to the demands of the public good. Under the affectation doctrine, the public good functions as a brake on the private right that will only be applied when injury to another is imminent. Foreshadowing the nuisance standard that underpins zoning, the affectation doctrine was a middle step between the all-encompassing normative power of a supreme public good and the individual-centered laissez faire era.

What can account for this shift? The impact of classical economics and Lockean liberalism cannot be discounted. As economic competition is legitimized, the individual emerges as the source of power and strength in both business and law. Further, the foundation of communalism in America was

---

[205] Use your own so as not to injure another.

[206] 94 U.S. 113, 126-29 (1876) (holding that an owner of private property must submit to control by the public only to the extent that he devotes his property to a public use).

[207] *See* Scheiber, *supra* note 201, at 355 (discussing the affectation doctrine).

[208] *See Munn*, 94 U.S. at 126 (citing Lord Hale).

[209] *See, e.g.*, Tyson & Brother v. Banton, 273 U.S. 418, 445-47 (1927) (Holmes, J., dissenting) (characterizing the doctrine as "little more than a fiction intended to beautify what is disagreeable to the sufferers"). Justice Frankfurter pronounced the affectation doctrine an "empty formula." FELIX FRANKFURTER, COMMERCE CLAUSE 87 (1937); *see also* Scheiber, *supra* note 201, at 355 (discussing criticism of the affectation doctrine).

[210] *See* Nebbia v. New York, 291 U.S. 502, 539 (1934) (holding that regulations are "unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty").

[211] The dissent in *Munn* foreshadows public good jurisprudence in the 20th century. Justice Field does not dissent from the notion that individual rights must co-exist in balance with collective rights, but on the contrary, he contends that the majority opinion destroys the constitutional guaranty of prohibition of invasion of private rights, declaring that "[a]ll that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession." *Munn*, 94 U.S. at 141 (Field, J., dissenting).

reshaped in the 19th century. Beginning in the 1790s, and increasing as the new century unfolded, communalism began to lose its ethical and religious dimension.[212] Stripped of its normative moorings, the concept of public good is left to attach itself as a barnacle to the economically anchored rights of the individual.

C. *The* Lochner *Era*

Modern society often equates Supreme Court judicial activism with the Warren Court's zealous defense of civil rights and civil liberties.[213] However, another activist Court at the turn of the 20th century protected economic interests from government regulation.[214] The most famous case of this era is *Lochner v. New York*.[215] By striking down New York's maximum workday law,[216] the Court developed a standard for the state's power to regulate private business arrangements.[217] Without precisely defining the amorphous concept of police powers,[218] the Court implemented a speed bump, if not an outright stop sign, against their unfettered exercise.[219]

In his famous dissent, Justice Holmes enunciated that the newly minted limitations on police power had more to do with a specific economic agenda than a philosophical definition of the state's power over the individual.[220] The decoupling in *Munn*[221] of the normative role of the public good from the economic goals of the individual increased the confusion regarding the definition of public good.[222] As long as the two were united in identity, no pre-

---

[212] *See* SHAIN, *supra* note 9, at 60 (stating that "American communalism in the 19th century . . . changed from what it had been in the 18th, to say nothing of the 17th century").

[213] *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 64 (1991).

[214] *See id.* (describing economic protections as one of the Court's "main activities").

[215] 198 U.S. 45 (1905).

[216] *See id.* at 64 (holding that the statute was an unconstitutional interference with the right to contract).

[217] *See id.* at 49 (asserting that regulations designed to "secure the public comfort, wealth or safety . . . must appear to be adapted to that end, . . . [and] cannot invade the rights of persons and property").

[218] *See id.* at 53 (stating that police power relates to the "safety, health, morals and general welfare of the public").

[219] *See id.* at 56 (conceding that "there is a limit to the valid exercise of the police power by the state").

[220] *See id.* at 75 (Holmes, J., dissenting) (criticizing the majority for relying upon a particularly popular economic theory).

[221] Munn v. Illinois, 94 U.S. 113 (1976).

[222] *See Lochner*, 198 U.S. at 61 (describing such statutes as "meddlesome interferences" with an individual's rights that could only survive if clear support existing for a material danger to the public good).

cise definition of "public good" was warranted. When broken apart, however, the role of public good was rendered impotent in limiting state intrusion on the individual. Although both the majority opinion and Justice Holmes's dissent in *Lochner* agreed that the public good was not the issue in the case,[223] the majority's unwillingness to define a new standard of public good left the principle limp and blowing with the economic wind.

Justice Holmes revisited the power of the public good in *Pennsylvania Coal v. Mahon*.[224] Although generally cited for holding that the state must compensate a property owner for a "taking" at a certain point,[225] the majority also noted that, "[t]he extent of the public interest is shown by the statute to be limited[,] . . . [I]t is not justified as a protection of personal safety."[226] Despite their omission of a definitive public good, the Court nonetheless relied upon the extent of public interference with private property in striking down the ordinance.[227] While unwilling to confront and define public good directly, the holding was consistent with increasing attention to the existence of an independent public good.

Zoning emerged amidst this nebulous period. In the middle of the conflict over the limits of governmental intervention, in *Euclid v. Ambler Realty Co.*,[228] the Court held that land use regulations must satisfy the traditional public good requirement of a substantial relationship to public health, safety, and morals and must not be "clearly arbitrary and unreasonable."[229] The zoning ordinance by the Village of Euclid satisfied the public welfare requirement.[230] Again, returning to the maxim, "*sic utere tuo utalienum non laedas*."[231]

Although the emergence of private rights limiting governmental intrusion began before *Euclid*,[232] its application to real property is significant. It represents a clean break from the concept of stewardship of the land.[233] Although

---

[223] *See id.* at 60 (stating, without further discussion, that the statute had "the most remote relation" to the public good).

[224] 260 U.S. 393 (1922).

[225] *See id.* at 415 (stating that the Fifth Amendment recognizes the public use of private property but also requires compensation).

[226] *Id.* at 414.

[227] *See id.* at 417 (Brandeis, J., dissenting) (noting that a property restriction would be invalid if it had no public purpose).

[228] 272 U.S. 365 (1926).

[229] *Id.* at 395.

[230] *See id.* at 387-88 (noting that nuisance law provides helpful analogies in analyzing the zoning scheme at issue).

[231] *Id.*; *see also supra* notes 205-11 and accompanying text.

[232] *See, e.g.*, Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 662 (1874) (striking down a tax imposed to finance iron manufacturing for lack of a public purpose and stating that "there are such rights in every free government beyond the control of the State").

[233] *See Euclid*, 272 U.S. at 387 (stating that the application of the constitutional princi-

vestiges of stewardship may remain today,[234] during the *Lochner* era the Court pitted the "public good" against private ownership of land.

D. *New Deal Era*

The social and economic climate of the Great Depression forced the courts and the American people to reexamine the power of the public good.[235] While the redistributive tendencies of the public good always bubbled under the surface, the grave realities of the national economic disaster brought the tension to the surface.

In sharp contrast to the *Lochner* era limitations imposed upon the public good, at the beginning of the New Deal era the concept of "public interest" was again expanding. Broadening its scope from *Munn*'s "affectation doctrine,"[236] the Court upheld minimum milk prices in *Nebbia v. New York*,[237] stating that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."[238]

However, in a series of decisions, the court returned to the reasoning and limitations of public good previously found in *Lochner*. In *Morehead v. New York ex rel. Tipaldo*,[239] the Court struck down a New York law that set a minimum wage for women as violative of the due process clause.[240] Although acknowledging, without elucidation, that the state may regulate businesses impressed with a public interest,[241] the Court stated that, "[f]reedom

---

ples behind regulations "must expand or contract to meet the new and different conditions").

[234] *See, e.g.*, Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 4601 (1994); Air Pollution Prevention and Control Act, 42 U.S.C. § 7401 (1990); Water Pollution Prevention and Control Act, 33 U.S.C. § 1251 (1987).

[235] *See* Robert Reich, *Policy Making in a Democracy*, *in* THE POWER OF PUBLIC IDEAS 123, 127 (Robert Reich ed., 1988) (observing that after the Depression, the "public goals seemed self-evident—to get the economy moving again and ameliorate some of the worst suffering").

[236] *See supra* notes 207-11 and accompanying text (discussing the affectation doctrine).

[237] 291 U.S. 502 (1934).

[238] *Id.* at 537. In writing for the majority, Justice Roberts conceded that the expression "affected with a public interest" is not susceptible of definition. *See id.* at 536. However, he links public interest with due process limitations on arbitrariness of operation and effect, stating that "[s]o far as the requirement of due process is concerned . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare . . . ." *Id.* at 537.

[239] 298 U.S. 587 (1936).

[240] *See id.* at 618 ("[T]he state legislation fixing wages for women was repugnant to the due process clause of the Fourteenth Amendment . . . .").

[241] *See id.* at 611.

of contract is the general rule and restraint the exception."[242] Similarly, in other cases, the Court gave a very restrictive reading to the federal power to regulate the national economy under the commerce clause and the taxing and spending clause.[243] Read together, these cases call into question the power of the federal government to manipulate private economic matters.

This era of a laissez faire approach to market regulation ended in 1937 with *West Coast Hotel v. Parrish*.[244] Reasoning that the government has the power to restrict contracts between employer and employee when in the public interest,[245] the Court upheld a minimum wage law for women, obliterating the strict boundaries between public good and private enterprise.[246] After *West Coast Hotel*, courts virtually abandoned the notion that private property rights could limit the public good,[247] and left the definition of "public good" to the legislatures. Accordingly, only arbitrary application limits the public good, reminiscent of Justice Roberts' opinion in *Nebbia*.[248]

The New Deal's economic programs were thus free to operate expansively for the public good.[249] Consequently, economic changes forced social and political change, solidifying a republican version of society.[250] The relationship between communal well-being and the government brought the role of public good back to the center stage of governmental regulation. No longer powerless, public good was as expansive as legislators desired, capable of overpowering private economic decisions if necessary.

---

[242] *Id.* at 610-11.

[243] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 288 (1936) (striking down a portion of the Bituminous Coal Consumption Act as an impermissible exercise of Congress's taxing powers); U.S. v. Butler, 297 U.S. 1, 68 (1936) (rejecting the Agricultural Adjustment Act because it invades the states' reserved rights); Railroad Retirement Bd. v. Alton R.R. Co., 295 U.S. 330, 347 (1934) (holding that the Railroad Retirement Act exceeded Congress's Commerce Clause authority).

[244] 300 U.S. 379 (1937).

[245] *See id.* at 392.

[246] *See id.* at 392-93 (discussing areas of the law that permissibly interfere with the private employment contract).

[247] *See* NEDELSKY, *supra* note 183, at 247 ("The *Lochner* era's aggressive use of property and contract to limit governmental power was followed by a virtual abandonment of property as a constitutional barrier and the current state of disintegration of the concept.").

[248] *See supra* note 210 and accompanying text (discussing Nebbia v. New York, 291 U.S. 418 (1927)).

[249] *But see* Panama Refining Co. v. Ryan, 293 U.S. 388, 414 (1935) (referring to a section of the National Industrial Recovery Act as an unconstitutional delegation of legislative power); Schechter Poultry Corp. v. U.S., 295 U.S. 495, 529 (1935) (holding that another portion of the National Industrial Recovery Act was an unconstitutional delegation).

[250] *See* Ballam, *supra* note 179, at 629.

E. *Modern Era*

As the political economy moved out of the New Deal era, the role of public good was again challenged. Although many citizens currently reject governmental interference into private economic matters, the courts have yet to launch an effective challenge against lawmakers' pronouncements of public good that often accompany legislation.[251] While most analysis tends to focus on the arbitrariness or overreaching nature of land use legislation, the question of whether such legislation promotes a legitimate public good receives scant attention. Even in the extensive body of takings jurisprudence, the general assumption is that the particular regulation serves the public good.[252] For example, in *Dolan v. Tigard*,[253] the case hailed as a victory for property rights,[254] the issue was not the municipality's ability to force a bicycle path and a flood plain upon an unwilling landowner, but the question of just compensation.[255] If the property rights movement gains more momentum, it is only a matter of time before public good regulation undergoes further scrutiny.[256]

Analysis of the two sets of conflicting values in our regulatory cycles can best explain the public good's fluctuating strength. The U.S. political and economic culture unites two incongruous elements: individualism and democracy.[257] This combination produces conflict because individualism is closely linked to capitalism and emphasizes private achievement, yet democ-

---

[251] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1986) (deferring to the Pennsylvania Legislature's specific findings that "important public interests are served" by its coal subsistence act).

[252] *See, e.g.*, Agins v. Tiburon, 447 U.S. 255, 261-62 (1980) (assuming that the zoning ordinance advanced the public interest in that it will "discourage the 'premature and unnecessary conversion of open-space land to urban uses'"); *see also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978) (assuming that New York City's decision to not allow a tower to be constructed above Penn Central Station under the city's historic preservation laws was in the public interest); NEDELSKY, *supra* note 183, at 233 (noting that most commentators are content to focus on other issues, such as compensation).

[253] 512 U.S. 374 (1994).

[254] *See* David W. Dunlap, *Community Interests vs. Property Rights*, N.Y. TIMES, July 21, 1996, § 9, at 3 (writing that "[*Dolan*] put a new arrow in the quiver of those who are challenging takings").

[255] *See Dolan*, 512 U.S. at 395 (noting that "[a] strong public desire to improve the public condition [will not] warrant achieving that desire by a shorter cut than the constitutional way of paying for the change" (citation omitted)).

[256] *See* Joseph L. Sax, *Takings Legislation: Where it Stands and What is Next*, 23 ECOLOGY L.Q. 509, 515 (1996) (questioning Congress's belief that it can better articulate standards of fairness to property owners than the courts).

[257] *See* SIDNEY A. SHAPIRO & JOSEPH P. TOMAIN, REGULATORY LAW AND POLICY 37 (1993) (stating that the conflict's cause is the close relationship between the two).

racy values the rights of popular majorities over private market decisions.[258] As our capitalist economy grows stronger, individualism may overtake democracy and dictate permissible scope of regulation.

Previous generations did not consider regulation necessary simply because the public good, standing alone, was supreme. Rather, they realized that regulation was a necessary by-product of a communal economy. After all, if my neighbor carelessly built his building as a fire trap, my building would, likewise, burn. Or, when we are in the midst of economic devastation, it may well be in my best interest to allow the government to "jump-start" the economy. But as our economic relationships begin to have more to do with others far removed from our physical—and political—space, the tolerance for regulation diminishes.

As the concept of the public good loosens its ties to the ideological premise of preventing specific harm, it advances toward the point where nearly anything—or nothing at all—can be in the "public good." Given such a malleable concept, some could argue that certain regulations actually hurt the general public, rather than promote it.[259] From landmark preservation[260] to taking private land in order to dilute concentration of landownership,[261] the public interest has evolved into an amorphous justification for land regulations. As one commentator noted: "Public use has for so long ceased to be an effective barrier that almost none of the extensive commentaries . . . deal

---

[258] *See id.* (observing that the public generally supports both principles, despite the conflicts).

[259] *See* BREYER, *supra* note 170, at 10 (observing that many economists and historians have argued that "many forms of regulation, such as trucking or airline regulation, injure the general public").

[260] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978) (upholding the application of New York City's historic preservation zoning ordinance). The acceptance of the public purpose in landmark designation has long been settled. *See* Curtis J. Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799, 810 (1976) ("Preservation as a goal of government is no longer debatable; the community may both regulate the use of landmark property and spend public money to further preservation.").

[261] *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (upholding a law under which the state took condemned property from lessors and transferred it to lessees, thereby reducing the concentration of landownership, because it was "rationally related to a conceivable public purpose"). While the Court acknowledged that even with compensation one person's property cannot be taken for the benefit of another private person, it held that if "the exercise of the eminent domain power is rationally related to a conceivable pubic purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id. But see* Amendariz v. Penman, 75 F.3d 1311, 1321 (9th Cir. 1996) ("If officials could take private property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a public use, . . . the public purpose provision of the Takings Clause would lose all power to restrain government takings.").

with it at all."[262]

The imprecision of the public good has a profound impact upon communal aesthetics. Zoning is premised upon the very foundation that some "public good" results from land use regulations.[263] Although identifying and defending this public good in land use regulation may have, at one time, been easy, we now take its existence for granted. This uncertainty extends to communal aesthetics, making it a prime target for scorn and derision from opponents to land use regulation in general, and zoning in particular.[264]

As discussed above, an individual today may be mistaken if relying on the land use regulations of the founders of this country to support claims of resistance to modern land use regulation.[265] However, we cannot deny that modern culture increasingly resists land use regulation.[266] If communal aesthetics are to survive, and if we are to continue to use our buildings and our public spaces to define ourselves, then we must search for a terra firma of public good that can support our efforts. The survival of communal aesthetics requires a resolution between the public's reliance on Lockean liberalism and the law's adherence to republicanism.[267]

The concept of public good has transformed over time to the point where its present meaning turns upon the legislators' decision. Although we may trace the foundations of our land use policy to the principles of stewardship,[268] *sic utere tuo ut alienum non laedas*,[269] or the laissez faire philoso-

---

[262] NEDELSKY, *supra* note 183, at 233; *see also* Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 (1993) (stating that the public use clause is "of nearly complete insignificance").

[263] *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926) (stating that zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare").

[264] *See generally* MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA (1993) (criticizing modern courts' inability to derive general principles for whether regulations constitutes compensable takings of property); Bernard H. Siegan, *Non-Zoning is the Best Zoning*, 31 CAL. W. L. REV. 127, 130 (1994) (questioning the appropriateness of giving a voice to anyone other than trained experts in land development).

[265] *See* SHAIN, *supra* note 9, at 31 (stating that in the Framer's era, the public good took precedence over individual interests).

[266] *See* Marzulla, *supra* note 12, at 632 (noting that the 103rd Congress attacked property rights amendments to every regulatory reauthorization in the House and Senate, causing some sponsors to withdraw their legislation).

[267] *See* Ballam, *supra*, note 179, at 637 (stating that modern governmental regulation blends "aspects of both Lockean liberalism with its emphasis on the primacy of the individual, with the republican approach of a proactive government," which has yielded "inconsistencies and contradictions").

[268] *See* SHAIN, *supra* note 9, at 183 (discussing notions of stewardship in land use policy).

[269] *See supra* note 205.

phies behind nuisance prevention,[270] these foundations are not easily discernable in the policies of today. Because government can use zoning to control height limitations completely, it does not operate as a corrective instrument at the margins of the market. Rather, the government's use of zoning makes it the "central arena in which members of society choose and legitimize their collective values."[271]

Faced with such limitless and indefinite abstractions, one wonders why the "public good" requirement still exists to legitimize land use at all. Is it time to stop giving lip service to the possibility of limits on police power and accept it as infinite? In a word, no. This would separate zoning from other forms of state regulatory power, unleashing zoning boards that would run amok with complete discretion.

As an the alternative, this Article proposes that we challenge the "public good" behind regulations and reveal exactly how they serve the public good. Traditional justifications of light and air protection ring hollow and no longer justify today's height limitations.[272] Height regulations should be based on some pubic good other than light and air. We either identify a specific public good or suffer the consequences of regulating communal aesthetics without police power.

---

[270] *See* Euclid v. Amber Realty Co., 272 U.S. 365, 387-89 (1926) (discussing nuisance law).

[271] SHAPIRO & TOMAIN, *supra* note 257, at 46 (citation omitted).

[272] *See* ROBERT H. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 174-75 (1977) ("If one must rely on the traditional justifications for public controls over use of personal property, neighborhood zoning literally has no intellectually respectable justification. Although long explained as an exercise of police power, most [zoning law] applications . . . have little to do with protection of health, safety, or morals.").

Historically rejecting the English doctrine of "ancient lights," American courts have held that there is no duty to avoid building on your property in such a way as not to cut off a neighbor's access to natural light. *See, e.g.*, Justice v. CSX Transp. Inc., 908 F.2d 119, 122 (7th Cir. 1990); American Nat'l Bank & Trust v. Chicago, 568 N.E.2d 25, 40 (Ill. App. Ct. 1990) (holding that there is no legal right to light and air such that one has a duty not to block another's access to such). Other courts, while recognizing the unpopularity of the doctrine of ancient lights, note that planning restrictions and interests such as solar heating have called the rejection into question, yet, even in questioning such rejection, factors other than aesthetic considerations have supported upholding access to natural light. *See, e.g.*, Tenn v. 889 Assoc. Ltd., 500 A.2d 366, 370 (N.H. 1985) (holding that the law of private nuisance applies to a property owner's claims of interference with interests in light and air); Fagan v. Philadelphia Zoning Bd. of Adjustment, 132 A.2d 279, 280 (Pa. 1957) (upholding "open air zoning" based on the "health, safety, moral and general welfare of the community"). *But see* N.Y. REAL PROP. ACTS LAW § 843 (McKinney 1997) (prohibiting property owner from erecting fence or structure over ten feet in height that prevents owner or occupier of adjacent land from enjoying light or air).

III. AESTHETIC ZONING

Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats.[273]

In our search for the public good upholding height limitations, perhaps we need look no further than aesthetics. When a city enacts height restrictions, these regulations create a cityscape, a skyline. Because the state no longer regulates height for safety's sake,[274] height has become a proxy for communal aesthetics. These aesthetic values form a public good.

Aesthetic zoning has evolved from an impermissible use of police power to a possible public good. Two Ohio cases illustrate this shift. In 1925, the Ohio Supreme Court failed to find any public good in aesthetic zoning and struck down a height limitation.[275] Almost sixty years later, the court rejected dismissing aesthetics and chose to follow the "evolving trend . . . to grant aesthetic considerations a more significant role"[276] in police power and held that "a legitimate governmental interest in maintaining the aesthetics of the community"[277] existed and "may be taken into account . . . in enacting zoning legislation."[278]

The difficulty behind blind reliance on such pronouncements is that although these developments rested upon the public good in aesthetic zoning, there is no clear enunciation of how it serves the public good.

A. *Legitimacy of Aesthetic Zoning*

The example of Mr. Francis Welch illustrates the status of aesthetic zoning at the beginning of the 20th century. Welch, a Boston real estate developer, attempted to build a tower on the corner of Arlington and Marlboro

---

[273] City of Youngstown v. Kahn Bros. Bldg. Co., 148 N.E. 842, 844 (Ohio 1925).

[274] Although density may be a consideration for reasons of infrastructure, it is less of an issue in central city construction where infrastructure already exists. *See* Welch v. Swansey, 214 U.S. 91, 107 (1909) (observing that tall buildings in a city's downtown commercial area may actually be safer than residential areas because of construction materials and access to fire personnel and other infrastructure); *see also* Weiss, *supra* note 62, at 210 (noting that many cities debate the density levels of their downtown urban developments).

[275] *See City of Youngstown*, 148 N.E. at 844. The court stated:

> There must be an essential public need for the exercise of the [police] power in order to justify its use. This is the reason why mere aesthetic considerations cannot justify the use of the police power . . . . It is commendable and desirable, but not essential to the public need, that our aesthetic desire be gratified.

Id.

[276] Village of Hudson v. Albrecht, Inc., 458 N.E.2d 852, 856 (Ohio 1984) (citations omitted).

[277] *Id.*

[278] *Id.*

streets in Boston.[279] The zoning Board of Appeal denied Welch permission to build on that site because his building was 124 feet 6 inches high—24½ feet above the permissible height.[280] Welch litigated his case up to the United States Supreme Court, which upheld Boston's height restriction and its denial of the permit.[281] Conceding that "police power cannot be exercised solely for aesthetic purpose[s],"[282] the Court held that such regulations were legitimate exercises of the state's police power for the safety of the people, particularly fire safety.[283]

Much has changed in Boston since Welch's day, but building height limitations still remain.[284] What we must now confront is whether the regulation's reasons remain valid to support its continuing existence. What is the police power cum public good behind height restrictions? For example, the technological evolution of fire safety equipment has enabled rescue at heights above the Boston code mandate of 155 feet.[285]

Building on the premise that a city's skyline grows out of the aesthetic visions of the community, the question becomes whether height restrictions can be enforced solely for aesthetic purposes. *Berman v. Parker*[286] expanded the reach of permissible police power to include aesthetic considerations, stating:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[287]

Berman's expansive statements continue as a beacon to every court considering the propriety of aesthetic zoning.[288] Indeed, it is a road well trod-

---

[279] *See* Welch v. Swansey, 214 U.S. 91, 92 (1908).

[280] *See id.* at 92-93.

[281] *See id.* at 107-08 (upholding the height restriction as a reasonable interference with his property rights and justified by the police power).

[282] *Id.* at 107.

[283] *See id.* at 107-08. In contrast, the Pennsylvania Supreme Court invalidated a ban on billboards in *Bryan v. City of Chester*, 61 A. 894 (Pa. 1905), because there was no infringement on public safety. The court held that the ordinance was a "gross attempt at interference with the lawful use of private property . . . [and] a limitation without reason or necessity [that] cannot be enforced." *Id.* at 895.

[284] *See supra* notes 78-83 and accompanying text (discussing new zoning restrictions and development guidelines in Boston).

[285] For a discussion of Boston's height limitations, see *supra* notes 68-83 and accompanying text.

[286] 348 U.S. 26 (1954).

[287] *Id.* at 33.

[288] The reliance on *Berman* as a justification for aesthetic zoning comes in disparate situations. *See, e.g.*, Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 805 (1984) (citing *Berman* in political signs controversy); Metromedia, Inc. v. San Diego, 453 U.S.

den; its once precise borders have become indefinite with age and time. The limits on aesthetics, a broad and somewhat indefinable concept to begin with, are not clear. Does simply calling a skyline an "aesthetic goal" miraculously exempt it from the same justifications that health and safety standards face?[289]

Even in *Berman*, and the many cases to follow, aesthetics do not stand alone in justifying regulation. The difficulty in finding a clearly stated legitimate purpose that supports purely aesthetic zoning[290] stems from the fact that aesthetics is based on beauty, a concept which itself is impossible to define in any fixed terms.[291] Because "aesthetic values . . . are inherently subjective,"[292] courts "cannot act as arbiters of proper aesthetics and good taste."[293] The old adage rings true: beauty is in the eye of the beholder.[294]

In light of the courts' reluctance to uphold zoning based on purely aesthetic grounds,[295] anchoring such zoning in a public good becomes trou-

---

490, 508 (1981) (citing *Berman* in billboard case); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 129 (1978) (citing *Berman* in historic preservation case); Village of Belle Terre v. Boraas, 416 U.S. 1, 5 (1974) (citing *Berman* in quiet neighborhood zoning case); Geo-Tech Reclamation Ind., Inc. v. Hamrick, 886 F.2d 662, 666 (4th Cir. 1989) (citing *Berman* in solid waste disposal facility case); Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp., 771 F.2d 44, 46 (2d Cir. 1985) (citing *Berman* in urban renewal case); People v. Stover, 191 N.E.2d 272, 275 (N.Y. 1963) (citing *Berman* in clothesline case); Village of Hempstead v. SRA Realty Corp., 611 N.Y.S.2d 441, 444 (Sup. Ct. 1994) (citing *Berman* in metal security gates case).

[289] I am not suggesting that the goals of health and safety be strictly defined. I agree that we need not require that "values advanced be solely economic or directed at health and safety in their narrowest senses." Mayer v. New Orleans, 516 F.2d 1051, 1060 (5th Cir. 1975). Nor do I imply that police power be confined to the "elimination of filth, stench, and unhealthy places." Rogin v. Bensalem Township, 616 F.2d 680, 688 (3d Cir. 1980).

What is troublesome is that the amorphous, if not boundless, scope of aesthetic zoning travels close to the distortion of language denounced by George Orwell, who wrote: "A mass of Latin words falls upon the facts like soft snow, blurring the outlines and covering up all the details." GEORGE ORWELL, *Politics and the English Language*, *in* 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 136-37 (Sonia Orwell & Ian Angus eds., 1968).

[290] This is as opposed to zoning that may involve aesthetics, but serves other societal goals, such as urban renewal.

[291] *See* Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L.J. 141, 152 (1987) ("[T]he attempt to isolate a set of formal visual qualities which constitute beauty remains unsuccessful.").

[292] Sauer v. Board of Zoning Appeals, 629 N.E.2d 893, 898 (Ind. Ct. App. 1994) (refusing to label landowner's antique tractors and other items as "junk," and dissolving injunctions granted to zoning board to enjoin appellant from keeping items on lawn).

[293] *Id.*

[294] *See* Coletta, *supra* note 291, at 151.

[295] *See id.* at 141 (discussing "judicial reluctance to recognize an action in nuisance

bling.[296] Despite earlier predictions,[297] the notion that aesthetics alone may constitute a public good has received little support.[298] When viewed closely, any argument for public good based solely on beauty evaporates into a subjective quagmire incapable of definition.[299] What is "beautiful" today may have been an "eyesore" when constructed, and vice versa.[300] Accordingly, aesthetics alone is a dangerous basis on which to ground the public good underlying the zoning of communal aesthetics.[301]

B. *Aesthetic Zoning Meets Aesthetic Nuisance*

Furthermore, zoning based solely on aesthetics forces us to break completely with the nuisance argument, which underpins zoning as explained in *Euclid*.[302] Although breweries,[303] liveries,[304] brickyards,[305] and piggeries[306]

---

based on aesthetic considerations").

[296] *See* Kenneth Regan, *You Can't Build That Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013, 1020 (1990) ("[M]any states . . . find that protection of aesthetic value alone is not a valid general welfare purpose.").

[297] *See* Cochran v. Preston, 70 A. 113, 114 (Md. 1908). The court stated:

> [I]t may be that, in the development of a higher civilization, the culture and refinement of the people has reached the point where the educational values of the fine arts, as expressed and embodied in architectural symmetry and harmony, is so well recognized as to give sanction . . . to the exercise of [police] power, even for such purposes.

Id. Despite this language, however, the court upheld Baltimore's height limitations based not on aesthetics, but rather on the threat of fire in tall buildings. *See id.*

[298] *See* Regan, *supra* note 296, at 1015 & n.13 (listing cases from 13 jurisdictions that have upheld zoning based on aesthetic factors alone).

[299] *See* Coletta, *supra* note 291, at 147 ("Because criteria for determining 'beauty' have yet to be articulated, courts fear that aesthetic judgements cannot be expressed with . . . precision.").

[300] *See* Harris B. Steinberg, *Introduction* to *Aesthetics vs. Free Enterprise - A Symposium*, 15 PRAC. LAW. 17, 18 (1969) ("We all remember when *art nouveau* was a sort of period joke, but now it is very expensive. We can remember when the Fauves were wild beasts, and now they are the darling of the auction place.").

[301] *See* Coletta, *supra* note 291, at 146 & n.35 (attributing courts' reluctance to accept aesthetics as basis for zoning in part to the fact that aesthetic considerations tend to change with the passing of time).

[302] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 359, 387-88, 391-95 (1926) (finding zoning ordinance valid where it restricted owner's use of land). This nuisance separation argument has prompted some to question why zoning authorities do not simply regulate the nuisance directly, rather than rely on use segregation. *See, e.g.*, Frederick W. Acker, *Performance Zoning*, 67 NOTRE DAME L. REV. 363, 371 (1991).

[303] *See* Mugler v. Kansas, 123 U.S. 623, 671 (1887) (holding that a state has "power to declare that any place, kept and maintained for the illegal manufacture and sale of [intoxicating] liquors, shall be deemed a common nuisance").

[304] *See* Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915) (holding that "in

have long been recognized as cognizable bases for nuisance claims,[307] courts have been reluctant to uphold nuisance claims based on visual aesthetics.[308] A citizen is unlikely to bring a successful action against a developer by claiming that an "ugly" building is a nuisance.[309]

As an example, finding that "[h]eight alone is not enough—unsightliness or offense to the esthetic [sic] senses is not sufficient to constitute a public nuisance,"[310] the District Court for the Eastern District of Virginia permitted construction of high-rise office buildings despite objections by the federal government.[311] The government based its objections on common law nuisance theory, arguing that the buildings were improperly being constructed in the area intended as a "green backdrop" of various monuments in the Nation's capitol.[312] The court held, however, that the government had "failed to prove, that the visual intrusion complained of is, in fact, a public nuisance."[313]

The reluctance of the courts to validate visual nuisance, despite years of

---

particular circumstances and in particular localities, a livery stable shall be deemed a nuisance").

[305] *See* Hadacheck v. Sebastian, 239 U.S. 394, 411 (1915) (holding that police power may be exerted, under some circumstances and in certain localities, to deem brickyards as a nuisance).

[306] *See* Albaugh v. Abbot, 235 N.W. 263, 264-65 (Mich. 1931) (upholding lower court decree prohibiting defendants from collecting and hauling garbage to their lands and from maintaining piggeries); Commonwealth *ex rel.* Woods v. Banholzer, 156 A. 237, 238 (Pa. 1931) (upholding lower court finding that defendants' piggery was a nuisance). *But see* Lichtman v. Board of Health, 26 A.2d 503, 503 (N.J. 1942) (stating that the denial of a permit for a piggery did not promote public health, safety, and welfare because all adjoining farms were operated as piggeries.).

[307] *See* Coletta, *supra* note 291, at 167 ("Courts have had little problem in finding that various noises or odors constitute unreasonable interference with an individual's use and enjoyment of land.").

[308] *See, e.g.*, Sauer v. Board of Zoning Appeals, 629 N.E.2d 893, 898 n.7 (Ind. Ct. App. 1994) ("[I]t is well settled throughout the country that unsightliness or lack of aesthetic virtue alone does not constitute a . . . nuisance." (citation omitted)); Coletta, *supra* note 291, at 141 (stating that "nuisance law . . . has consistently denied redress to individuals claiming injury to their visual sensibilities"). *But see* Members of the City Council of Los Angeles v. Taxpayers, 466 U.S. 789, 806 (1984) ("[T]he visual assault on the citizens . . . presented by an accumulation of signs . . . constitutes a significant substantive evil within the city's power to prohibit.").

[309] *See Sauer*, 629 N.E.2d at 898 n.7.

[310] United States v. County Board, 487 F. Supp. 137, 143 (E.D. Va. 1979) (explaining the meaning of "nuisance").

[311] *See id.* at 144.

[312] *See id.*

[313] *Id.*

prodding,[314] creates an intellectual gap in the argument for recognizing a public good on purely aesthetic zoning. In this sense, the current state of the law is such that a group of people have almost unlimited power to dictate to an individual what is "beautiful."

Because the nuisance argument generally has been unsuccessful,[315] the idea that purely aesthetic zoning serves the public good continues to flounder.[316] The question presented, at its core, is whether beauty, in itself, can be viewed as a public good.

IV. THE PUBLIC GOOD OF COMMUNAL AESTHETICS

We shape our buildings, and afterwards our buildings shape us.[317]

Rather than focusing on whether beauty, itself, can serve the public good,[318] courts may justify aesthetic zoning by recognizing that it validates the collective choice of residents. Although other beauty-based arguments are conceivable,[319] the public good may result from the process itself—not the product—by which the result is achieved. When a community enacts legislation to implement its visual ideal, it comes together and democratically enunciates its collective vision for the physical environment. While one may disagree with a community's vision, the process that gave rise to its expression

---

[314] *See id.* at 175 ("It is time for the law of private nuisance to recognize actions based on aesthetics. Judicial hesitancy to base an action in nuisance upon aesthetic considerations is simply misguided."); George P. Smith & Griffin W. Fernandez, *The Price of Beauty: An Economic Approach to Aesthetic Nuisance*, 15 HARV. ENVTL. L. REV. 53, 55 (1991) ("The traditional distinction of visual versus aural and olfactory interferences with the enjoyment of property lacks sufficient justification.").

[315] *See* Sauer v. Board of Zoning Appeals, 629 N.E.2d 893, 898 n.7 (Ind. Ct. App. 1994).

[316] *See* Smith & Fernandez, *supra* note 314, at 54 ("[C]ourts continue to deny relief for injury to the aesthetic interests of . . . landowners."). During the 1930s, planning theory attempted to bolster the argument by asserting the plans produced were of such scientific and technical skill that they reflected a broader interest. *See* Nelson, *supra* note 272, at 27 ("An especially critical element in the planning theory of zoning was the conviction widely held at the time that planning was a scientific and technical skill.").

[317] John Gregerson, *The Democratization of Design*, 31 BUILDING DESIGN & CONSTRUCTION 62, 62 (1990) (quoting Winston Churchill).

[318] *See* Mark Bobrowski, *Scenic Landscape Protection Under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 744 (1995) (arguing that the importance of visual resource protection "makes it a [public] purpose that may stand alone as an exercise of the police power").

[319] *See* Kerry D. Vandell & Johnathan S. Lane, *The Economics of Architecture and Urban Design*, 17 J. AM. REAL EST. & URB. ECON. ASS'N 235, 258 (1989) (discussing statistical evidence supporting the argument that perceived design quality affects rents); *see also* Tom Appelquist, *Beauty in the Public Eye Sends Spirits Soaring*, PHILADELPHIA INQUIRER, Nov. 15, 1996, at A39 (noting the "connection between a beautiful, historic cityscape . . . and economic vitality").

validates the public good.

Process, however, will vary depending on the participants and the method by which such decisions are made. If full and fair participation can be ensured, and structural limitations overcome, then purely aesthetic zoning can more readily be seen as a public good.

Exactly who is making aesthetic decisions? Although, ideally, one would hope for broad and deep-based community-wide participation, reality indicates that this is probably not attainable.[320] Three possible problems may arise that can undermine the decisionmaking process:[321] (1) the influence of narrow interest groups;[322] (2) limitations on democracy imposed by collective decision making processes;[323] and (3) bureaucratic self-interest.[324]

A. *Interest Groups*

Interest group theory explains regulation as a commodity that is "'sold' by government officials in return for the votes of those who are benefited" by the regulation.[325] Under this theory, then, interest groups with political power and influence may determine the path of regulation.[326] Some suggest that these special interest groups engage in "rent-seeking" efforts that use

---

[320] *See* BREYER, *supra* note 170, at 9 (discussing both justifications for, and problems with, regulation).

[321] This list is not all-inclusive. Certainly, questions of political and social disenfranchisement color any discussion of the legitimacy of political process. However, these problems are beyond the scope of the present discussion because I assume citizen involvement in the zoning process.

[322] *See* BREYER, *supra* note 170, at 9 (discussing "'interest group' theories").

[323] *See* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2128-35 (1990) (discussing social choice theory and the effect that "Voter's Paradox" may have on legitimacy of collective decisionmaking).

[324] *See* BREYER, *supra* note 170, at 6 ("[A]ll regulation is characterized by administration through bureaucracy.").

[325] *Id.* at 9 (explaining the rationale behind "'interest group' theories").

[326] *See* Daniel A. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883-89 (1987) (discussing empirical research on influence of interest groups). Farber and Frickey state:

> In 1935, a classic case study . . . concluded that interest groups pursuing their own narrow economic objectives profoundly shaped the Smoot-Hawley Tariff of 1930. By the early 1950s, a pluralistic interpretation of politics had emerged, in which legislative outcomes were said to simply mirror the equilibrium of competing group pressures.

Id.; *see also* BREYER, *supra* note 170, at 9 ("Some writers argue that regulatory programs, initially advanced to serve the 'public interest,' became distorted because . . . it becomes 'captured' by the very persons or firms it was designed to regulate."); Jonathan R. Macey, 86 COLUM. L. REV. 223, 229 (1986) (suggesting that "special interest groups tend to dominate the legislative process").

regulation to "raise the welfare of more influential [special interest] groups."[327] Instead of capturing the vision of the community, then, communal aesthetics may reflect the vision only of those in the community with the loudest voices (and deepest pockets).[328] Consequently, the strength of interest groups may turn aesthetic decision making into the "tyranny of the minority."[329]

Are interest groups, however, necessarily bad? After all, the people who will participate in the process are, arguably, those who are most concerned with the vision and shape of their urban environments. In the mid-1970s, the Municipal Art Society, now located in New York City, recruited a group of celebrities to join the Committee to Save Grand Central.[330] The group's efforts culminated in the Supreme Court ruling in its favor in *Penn Central Transportation Co. v. New York City*.[331] In fact, some commentators directly attribute to the Committee's efforts the difference between Justice Brennan's opinion in *Penn Central* and his later dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[332]

If, however, the real estate developers control the decisionmaking process, then confidence in the process is misplaced, for their interests may differ from those of the community. Boston and San Francisco provide good models for community participation in the process. Before these cities passed their most recent legislation regarding height limitations, zoning authorities

---

[327] FARBER & FRICKEY, *supra* note 213, at 15 (citation omitted) (discussing "Impact of Interest Group Theory").

[328] *See* POLLOT, *supra* note 264, at 99 (defining "public" as "that group (regardless of number) having the loudest voice, [that] may have an 'interest' in the nonlegal sense in a multitude of things").

[329] This term is derived from Lani Guinier. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY 1 (1994) (including collection of personal essays in response to "political noise" resulting from her nomination for Assistant Attorney General in Charge of Civil Rights Division); *see also* Haar, *supra* note 162, at 1158 ("[T]here is danger that zoning, considered as a self-contained activity rather than a means to a broader end, may tyrannize individual property owners.").

[330] *See* RICHARD F. BABCOCK & CHARLES L. SIEMON, THE ZONING GAME REVISITED 65 (1985) ("At first the Committee consisted largely of the staff and members of the society, but when it called for help, more people volunteered . . . . [A]mong the members . . . were [Jacqueline Onassis], Jimmy Breslin, . . . Congressman Edward Koch, Bess Meyerson, . . . Helen Hayes, Celeste Holm . . . and Gloria Steinem.").

[331] 438 U.S. 104, 138 (1978) (upholding New York City's landmark Preservation law, as applied to Grand Central Terminal, by concluding that the law did not constitute a "taking," but rather merely restricted appellant's use).

[332] 450 U.S. 621, 633 (1981) (Brennen, J., dissenting) (declining to rule, due to lack of jurisdiction, on available remedies for alleged taking); *see also* BABCOCK & SIEMON, *supra* note 330, at 59 ("One may search the tea leaves for an explanation but the hypothesis most favored here is that in the former case, the courts were heavily swayed by the incredible campaign mounted in 1975 by the Committee to Save Grand Central.").

insisted that residents participate in the planning.[333] Structured citizen participation ensured that the result reflected community will.[334] In this manner, the public's will controls the parameters into which the developers must conform their projects.[335]

Nevertheless, the notion still exists that interest groups will not act to serve the public good, but rather will act to further their own private goals.[336] Self-interest, however, blends with community interest in zoning communal aesthetics.[337] Individuals do not participate solely to ensure personal gain.[338] Rather, they participate to ensure that the public gains by implementing a certain vision—albeit *their* vision—of the cityscape.[339]

Further, the intensity of concern for communal aesthetics will drive participation.[340] As long as there is a forum for participation, interest group politics may simply serve as a funnel to direct the intensity of desire for a particular cityscape. Interest groups can tap the widely held values of the public and mobilize policy around those values. While the interest group itself may not be a precise microcosm of the community, it plays the role of a "policy entrepreneur" when it links the goal of creating a defined cityscape with latent public support.[341] Interest groups, then, can be seen not as vehi-

---

[333] *See* Spiro Kostof, *The Skyscraper City*, 140 DESIGN Q. 32, 32 (1988) ("San Francisco citizens decided two years ago that they no longer wanted skyscrapers . . . ."); *Growth with Grace*, BOSTON GLOBE, May 18, 1987, at 18 ("Just as important as the specifics of the plan is the [Boston Redevelopment Authority's] insistence that neighborhood groups share in the planning.").

[334] *See* Kostof, *supra* note 333, at 46 ("The city government [of San Francisco] through its planning department and the public through referendums have become the controlling forces in determining what happens in downtown San Francisco."); *Growth with Grace*, *supra* note 333, at 18 ("[The neighborhood groups'] participation has ensured that the regulations are responsive to neighborhood needs . . . .").

[335] *See* Kostof, *supra* note 333, at 46; *Growth with Grace*, *supra* note 333, at 18.

[336] *See* FARBER & FRICKEY, *supra* note 213, at 14-15.

[337] *See* Gary R. Orren, *Beyond Self-Interest*, *in* THE POWER OF PUBLIC IDEAS 13, 13 (Robert B. Reich ed., 1988) ("People do not act simply on the basis of their perceived self-interest, without regard to the aggregate consequences of their actions. They are also motivated by values, purposes, ideas, goals, and commitments that transcend self-interest or group interest."); *see also* Steven Kelman, *Why Public Ideas Matter*, *in* THE POWER OF PUBLIC IDEAS, *supra*, at 31, 36 ("[I]t would take an observer not only cynical but also blind to fail to see that concern for others also can motivate behavior.").

[338] *See* Kelman, *supra* note 337, at 36; Orren, *supra* note 337, at 13.

[339] *See* Kelman, *supra* note 337, at 36; Orren, *supra* note 337, at 13.

[340] *See* Orren, *supra* note 337, at 14 ("[I]ntensely felt opinions are the most powerful forces in political life.").

[341] *See* James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 370 (James Q. Wilson ed., 1980) (explaining "entrepreneurial politics" as "a policy . . . that will confer general . . . benefits at a cost to be borne chiefly by a small segment of society," where policy entrepreneurs serve as vicarious representatives who push

cles of self-promotion, but rather as mechanisms that give voice to the community's values. Even if interest groups do have selfish motives, to mobilize widespread support for their position, the group's goals must nevertheless appeal to the values of the community at large.[342]

B. *Collective Action*

We cannot discuss giving voice to communal aesthetics without also acknowledging the limitations inherent in the democratic enactment of individual preference.[343] Social choice theorists claim that majority rule democracy is intrinsically "incapable of producing meaningful or rational results."[344] Armed with this theory, some have questioned the legitimacy of various tools, such as ballot initiatives,[345] labor law,[346] and voting rights,[347] which traditionally have been granted in notions of democracy.

Because communal aesthetics aggregate individual choice to construct the form of the city, social choice theory would dictate that we can never

---

legislation where incentive to organize is strong for opponents, but weak for beneficiaries).

[342] *See* GIANDOMENICO MAJONE, EVIDENCE, ARGUMENT AND PERSUASION IN THE POLICY PROCESS 149 (1989) ("[E]ven when policy change is best explained by the political and economic power of groups seeking selfish ends, those who attempt to justify those changes must appeal to the merits of particular issues.").

[343] *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 3, 94-95 (1951) (illustrating Arrow's "Impossibility Theorem," which asserts that individually transitive preferences, when aggregated, cannot guarantee a collectively rational outcome if the pure majoritarian voting is used); *see also* AMARTHA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 79-85 (1970) (explaining Pareto Optimality principle of social choice theory and how it is inconsistent with liberal values); David Luban, *Social Choice Theory as Jurisprudence*, 69 S. CAL. L. REV. 521, 524 (1996) (noting "the disturbing possibility that . . . rights, as well as public law, may be purchased only at the price of social rationality").

[344] Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2124 (1990) (discussing implications of social choice theory on democratic processes). This concept, based on the principle known as "Arrow's Impossibility Theorem," is beyond the scope of this Article. For a detailed discussion of the theorem, for which its author received the Nobel Prize, see *id.* at 2128-35.

[345] *See* K.K. DuVivier, *By Going Wrong All Things Come Right: Using Alternative Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185, 1185 n.3 (1995) ("Experts make very persuasive arguments about the shortcomings of the initiative process.").

[346] *See* Keith N. Hylton, *Efficiency and Labor Law*, 87 NW. U. L. REV. 471, 471 (1993) (stating that some in the area of law and economics argue that statutory labor law "is more often than not the product of rent-seeking efforts on the part of special interests groups" (citation omitted)).

[347] *See* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1488 (1991) (stating that critics "claim all group-based remedies will promote intergroup conflict, balkanizing what instead should be a uniform national identity").

achieve a rational decision in zoning of communal aesthetics. As such, what "communal" value does the final zoning decision offer?

The value lies in the process used to come to the final zoning decision.[348] The community meetings, the public participation, and the citizen initiatives all help to give voice to commonly shared norms and beliefs that residents want to see reflected in their cityscape.[349] While the breadth and intensity of interests may vary within a given community,[350] these variables need not be fatal to a legitimate and rational result. The norms, beliefs, and pressures are both internalized and reflected by the final decision.[351]

C. *Bureaucratic Self-Interest*

Another concern arising is the possibility that the decisions implementing communal aesthetics do not come from the community at all, but rather from a panel of bureaucrats.[352] The belief that communal aesthetics express the community's shared values is misplaced if the zoning process is, in fact, nothing more than an expression of bureaucratic workproduct.[353] Confidence in the ability of zoning regulation to rise above the morass of bureaucracy depends, therefore, on political structure in which zoning officials operate.[354]

According to Robert Reich, there are two paradigms of how public managers make decisions.[355] The first envisions the public manager intermediating among interest groups, acting "to accommodate—to the extent possible—the varying demands placed on government by competing groups."[356] The second involves a public manager acting through public regulation to maxi-

---

[348] *See* MAJONE, *supra* note 342, at 18 ("[T]he most important thing about popular voting and majority rule is less the actual outcome of the voter choice than the fact that the electoral process compels prior recourse to methods of discussion, consultation, and persuasion, and the resulting modification of views to accommodate the opinion of the minority." (citation omitted)).

[349] *See id.* (emphasizing the importance of group participation in decisionmaking).

[350] *See* Rose, *supra* note 181, at 342 (discussing the public choice dilemma that "people with relatively narrow but intense interests can capture the political process from those with wide but diffuse interests" (citation omitted)).

[351] *See* MAJONE, *supra* note 342, at 146 ("All important policies require political and moral choices to be made in a context that is characterized by norms, beliefs, goals, and pressures . . . .").

[352] *See* BREYER, *supra* note 170, at 6 ("[A]ll regulation is characterized by administration through bureaucracy.").

[353] *See id.* ("[T]he regulatory agency is itself an institutional bureaucracy. Those working within it . . . will act in accordance with their own internal rules . . . .").

[354] *See* Regan, *supra* note 296, at 1024 (asserting that "bribery may become standard practice when zoning is based solely on aesthetics").

[355] *See* Reich, *supra* note 235, at 122, 129 ("The postwar transformation of public administration centered on two related but conceptually distinct procedural visions of how public managers should decide what to do.").

[356] *Id.* at 129-31 (discussing the "Interest Group Intermediation" Theory).

mize net benefits.[357] Government action, therefore, is "justified primarily when it [results] in an allocation of goods and services better matched to what people want than the outcome generated by market forces alone."[358] Under either model, government officials base their decisions, and ultimately their legislation, on what they view are the interests of the people.[359]

One cannot completely discount the possibility that politicians and bureaucrats, at times, may act to further their own self-perpetuation rather than the public will.[360] Nevertheless, zoning decisions that arise from community debate and societal input may mitigate, if not eradicate, the selfish actions of politicians.

V. WHOSE RIGHT IS IT ANYWAY?

> *The history of our land laws, it cannot be too often repeated, is a history of legal fictions and evasions, with which the Legislature vainly endeavored to keep pace until their results . . . were perforce acquiesced in as a settled part of the law itself . . . .*[361]

In fashioning a public good from the expression of communal aesthetics, one must remember the role of private property rights.[362] Justifying police power to enact zoning regulations, assumes that some private property rights will be sacrificed in the name of the public good.[363] The way we define the scope of private property rights will either prohibit or facilitate exercise of police power.[364]

A. *Recognizing Private Property Rights*

Whether one adheres to the positivist theory that property rights descend from the sovereign and its courts,[365] or to the more traditional notion that

---

[357] *See id.* at 131 (discussing the "Net Benefit Maximization" theory).

[358] *Id.* at 131-32.

[359] *See id.* at 134 ("These two approaches to policy making . . . have understood the 'public interest' as nothing . . . other . . . than the disparate sentiments of diverse groups of people about what they want for themselves, combined with procedural norms for weighing and balancing such interests.").

[360] *See id.* at 155.

[361] NELSON, *supra* note 272, at 117 (quoting Sir Frederick Pollock).

[362] *See* Regan, *supra* note 296, at 1021 n.59 ("In the balance between citizen and government, increasing the police power [to legitimize governmental regulation of aesthetics] necessarily infringes on the . . . property rights of individual citizens.").

[363] This is illustrated by the Court's decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 107, 138 (1978) (holding, in part, that a city may place restrictions on development without effecting a "taking" requiring payment of just compensation).

[364] *See* SAMUELS, *supra* note 172, at 193.

[365] *See* J. Miles Hanisee, *An Economic View of Innovation and Property Rights Protec-*

such rights derive from customs of the community,[366] one thing is clear: the right to claim ownership in property is not dictated by the individual to society. Rather, property rights are products of social creation, granted by society to the individual. Although property rights are generally linked to individual control and possession, these same rights depend on the state for enforcement.[367]

At one end of the spectrum is the socialist notion of property as being inherently public, where no individual can claim rights superior to those of society-at-large.[368] At the other end lies the Lockean theory that the government's function is to protect people in what is theirs.[369] Regardless of where on the spectrum a society falls, land itself is without value until that society bestows rights upon the property owner.[370] Compare the meaning of the term "land ownership" as held by Native American culture to the general view of those today in the United States.[371] The term itself is meaningless until society defines the parameters and rights of individual ownership vis-à-vis other members of the community.

It is on this point where the property rights movement falters. By asserting an absolute right to develop, proponents of the movement remove property rights from their societal context, thus eliminating the parameters that give them meaning. The definition of property is not only cultural—it is contextual.[372] The right to build on one's land emanates from a societal choice to

---

tion in the Expanded Regulatory State, 21 PEPP. L. REV. 127, 130 (1993).

[366] *See id.*

[367] *See* BRIGHAM, *supra* note 186, at 110.

[368] *See* LOCKE, *supra* note 181, §§ 131, 138 (stating that government "is obliged to secure everyone's Property," and that "the preservation of Property [is] the end of Government"); *see also* Rose, *supra* note 190, at 720 (maintaining that there is a "distinct class of 'inherently public property' which is fully controlled by neither government nor private agents, but rather is collectively 'owned' and 'managed' by society at large, with claims independent of and indeed superior to the claims of any purported governmental manager").

[369] *See* LOCKE, *supra* note 181, §§ 131, 138; *see also* Rose, *supra* note 181, at 332 (discussing theories of Adam Smith).

[370] *See* CRONON, *supra* note 181, at 58 ("Saying that A owns B is in fact meaningless until the society in which A lives agrees to allow A a certain bundle of rights over B and imposes sanctions against the violation of those rights by anyone else.").

[371] *See id.* (discussing contextual and definition of property to the colonists and Native Americans). As noted above, lack of appreciation for differences of meaning of ownership led colonists to disregard Native culture and rights and impose a different rights regime, which stripped Native Americans of ongoing interests in real property. *See id.* For a further discussion of this topic, see *id.*

[372] *See* First Victoria Nat'l Bank v. United States, 620 F.2d 1096, 1102 (5th Cir. 1980) ("As we begin, we must remind ourselves that 'property' is an expansionist term. Its mooring is contemporary rather than historical.").

grant such a right, not from an inherent power over private property.[373] The government's power to sacrifice individual rights for communal needs, however, is limited.[374] Although we may find a legitimate public purpose in zoning communal aesthetics, the willingness of a community to zone in such a way will depend on the extent of private property rights in the community.[375] To answer the concerns of property rights advocates, it is not enough simply to enunciate the public good of aesthetic zoning. One must also address the role of private property rights working alongside the public good. To do this, one may conceptualize the right to zone communal aesthetics as a function of the right to unfettered use of property by the individual.

B. *Delineating Private Property Rights*

1. The Status Quo

Each municipality enacting aesthetic zoning regulations does not start with a blank slate. Rather, zoning begins with a status quo of existing structures. It would be disingenuous to propose a vision of communal aesthetics while denying that this vision is built on a foundation of the status quo. To graph the function that determines the trade-off between private property rights and communal rights, it is important to note how both entitlements and endowments affect this function. Process is the foundation of zoning communal aesthetics' public good. Participants in the process come to the table with different levels of expectation and entitlement based on private property ownership. To deny the existence of varying expectations is to ignore reality. However, to inflate expectations into the baseline of discussion distorts the process. Finding the fulcrum allows for informed and enlightened decision-making.

Entitlements and endowments define the conflict between private property rights and the community's right to zone communal aesthetics. The power to absolutely restrict development, if it is the will of the public, counterbalanced by the landowner's ability to develop land in any way, forms a continuum. The recognition of certain legal entitlements to private property modifies the

---

[373] *See* CRONON, *supra* note 181, at 58.

[374] *See* COSTONIS, *supra* note 10, at 21 (noting that "questions arise whenever we insist that a social impulse be legalized," and asking, "Will liberty or property rights reserved to citizens be infringed?").

[375] This concept is different from interest group theory discussed above. Interest groups can influence the outcome of certain legislation. The power of private property rights determines the structure in which interest groups will function. For example, it may be the will of the community that every house on the block plant only daffodils because in spring the block will be quite aesthetically pleasing. Although this may be the will of the community, the ability to implement this will necessarily depend on the ability of the city to enforce such a regulation. The city's ability to enforce the regulation will turn on the parameters of private property rights within that community.

trade-off between private property rights and communal aesthetics. The value of these entitlements will vary according to the initial allocation of property.

a. *Entitlements*

Simply stated, "much of what is generally called private property can be viewed as an entitlement which is protected by a property rule."[376] The right to limit public interference with the use of private property assumes there is a property rule that entitles the owner to protection.[377] Society is likely to grant such an entitlement to necessities such as education and bodily integrity.[378] Once we move beyond fundamentals, however, society's value system controls the granting of entitlements.[379] Because entitlements demand inquiry into values, decisions are rarely cut-and-dry. In fact, "fairness rather than illegality is the language of entitlement . . . ."[380]

Individuals in the community have different views, which may be expressed as utility curves, toward the relative value of protecting property rights and enacting communal aesthetics. Assuming that the value of protecting private property rights is a linear function of the value of the right to enact communal aesthetics,

Private rights = α - β *(Communal rights)*

where β is the marginal effect of a change in communal rights on private rights and α is the base level of property rights assuming no community rights (the intercept).[381] For each citizen, the slope (β) of the line is determined by Δ value of private rights to that citizen/Δ value of

---

[376] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972) (setting up a tautology of deciding whether something is valuable because it is protected, or protected because it is valuable); *see also* SAMUELS, *supra* note 172, at 158 ("The analytical problem . . . is that government does not protect something as property because it is property, but property is property because it is protected by government.").

[377] The classic example is the ongoing debate between loggers and environmentalists. The loggers claim that the environmentalists pay to prevent logging assumes that the loggers have some legally protected right to log that for which they must be compensated. *See* FARBER & FRICKEY, *supra* note 214, at 35 (noting that the loggers' argument assumes they have the right to control logging).

[378] *See* Calabresi & Melamed, *supra* note 376, at 1100 (characterizing these entitlements as "merit goods," and stating that "[w]henever a society wishes to maximize the chances that individuals will have at least a minimum endowment of certain particular goods—education, clothes, bodily integrity—the society is likely to begin by giving the individuals an entitlement to them").

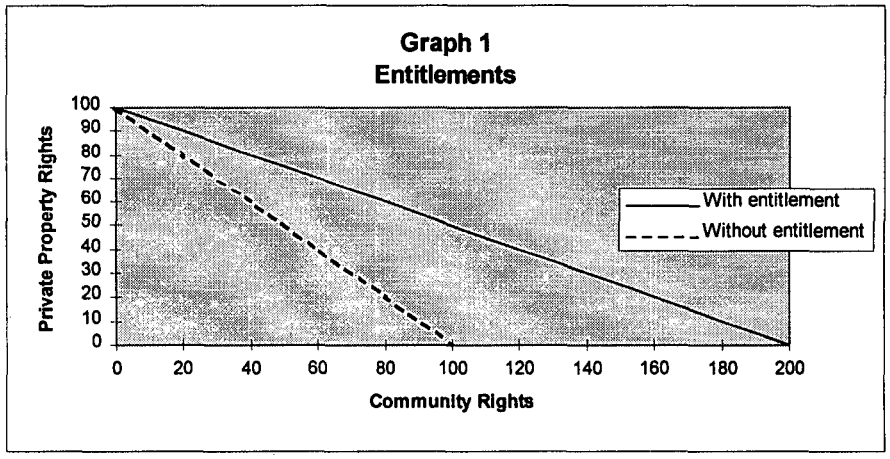
[379] *See* Orren, *supra* note 337, at 17 ("[I]t is values that create and preserve the very idea of property rights.").

[380] BRIGHAM, *supra* note 186, at 164.

[381] This equation assumes an independently identically distributed error term.

communal rights to that citizen.[382] The protection of a recognized legal entitlement to private property alters the relative weight accorded to each variable.

If there is no recognized entitlement to use of private property, there is a trade-off, with one unit of private rights the equivalent of one unit of community rights. However, if there is a recognized entitlement to the use of private property, the "cost" is an increased number of communal units to trade for each private unit.



Selection of a set of entitlements results from choices of economic efficiency or wealth distribution.[383] Economic efficiency employs a cost benefit analysis to the granting—or enforcing—of a right. Does it cost more to deny protection to private property than the benefit gained in communal aesthetics? In other words, do the benefits of granting the entitlement outweigh the cost to the community?[384]

There is evidence that limiting development increases the value of developed parcels and raises the residential land value in the zoned area.[385] Initially, it may be attractive to limit private property rights on economic effi-

---

[382] The symbol Δ represents the change in the values that follow.

[383] *See* Calabresi & Melamed, *supra* note 376, at 1097-98 (discussing how wealth distribution or economic efficiency can affect entitlement choice).

[384] *See id.* at 1094 (stating that the answers to these questions turn on the quest in economic efficiency for Pareto optimality, and that Pareto optimality is achieved when a decision makes one faction better off without making anyone worse off).

[385] *See* Paul K. Asabere & Forrest E. Huffman, *Historic Districts and Land Values*, 6 J. REAL EST. RES. 1, 5-6 (1991) (concluding that historical districting produces positive external benefits resulting in a price premium of 131% of residential parcels within the districts).

ciency grounds.[386] This temptation, however, should be resisted when dealing with strictly commercial property. Landmark designation is analogous to communal aesthetics because it also has a base in social engineering. Studies have shown that landmark designation does not produce a price premium for non-residential properties,[387] and, in fact, can oftentimes result in a price discount.[388]

An alternative approach for selecting entitlements is wealth distribution.[389] It is preferable to delineate property entitlements on this basis. Although more conceptually difficult, focusing on distributive justice forces the community to make a value decision up front instead of attempting to cloak it in an economic argument. Instead of relying on numbers to provide the answer, distributive justice compels an examination of basic values and norms.

As long as society grants the right to "private" property to the individual, there should be no hesitation in limiting the entitlement to private property based on the needs of society. Historically in this country, property theory has had a distributive component that leads one commentator to argue that "it makes no sense to argue that property rights must always be limited to achieve distributive justice; private property systems always contain within them a partial system of distributive justice . . . ."[390] Any entitlement to private property must work within the confines of the social model that created it. There should be no unchecked private property rights permitting landowners to use their property without regard to the needs of the community.

The idea of distributive justice, however, does not completely resolve the tension between private property rights and community rights. One cannot deny that certain private property rights must exist. Effective analysis of the trade-off between private property rights and community rights requires that both community rights and private property rights be explicitly recognized. Once recognized, community values and norms then determine their relative strength. One way to recognize both and come to a workable trade-off is to limit community rights by protecting the value of the endowment effect produced by entitlement to private property.

---

[386] *See* Calabresi & Melamed, *supra* note 376, at 1096-97 (describing methods of determining entitlements based on economic efficiency).

[387] *See* Asabere & Huffman, *supra* note 385, at 6 (noting that the price premium of nonresidential parcels in historic districts is insignificant).

[388] *See* Paul Asabere et al., *The Adverse Impact of Local Historic Designation*, 8 J. REAL EST. FIN. & ECON. 225, 232 (1994).

[389] *See* Calabresi & Melamed, *supra* note 376, at 1098 ("Difficult as wealth distribution preferences are to analyze, it should be obvious that they lay a crucial role in the setting of entitlements.").

[390] Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1466 (1996).

b. *Endowment Effect*

While property rules determine who is to receive an initial entitlement, they do not speak to the value of that entitlement.[391] The effect on valuation of an initial allocation of a commodity is commonly characterized as the endowment effect.[392] The endowment effect suggests that an existing building is more valuable than one not yet built. In other words, owners of existing buildings would demand more to tear down the buildings than one would be willing to pay to prevent the erection of a new building. In essence, there is a disparity between an owner's bid price and an owner's ask price. Because aesthetic zoning is negative,[393] the endowment effect of value of the status quo could distort the merits of communal aesthetics by giving disproportionate value to the existing form.

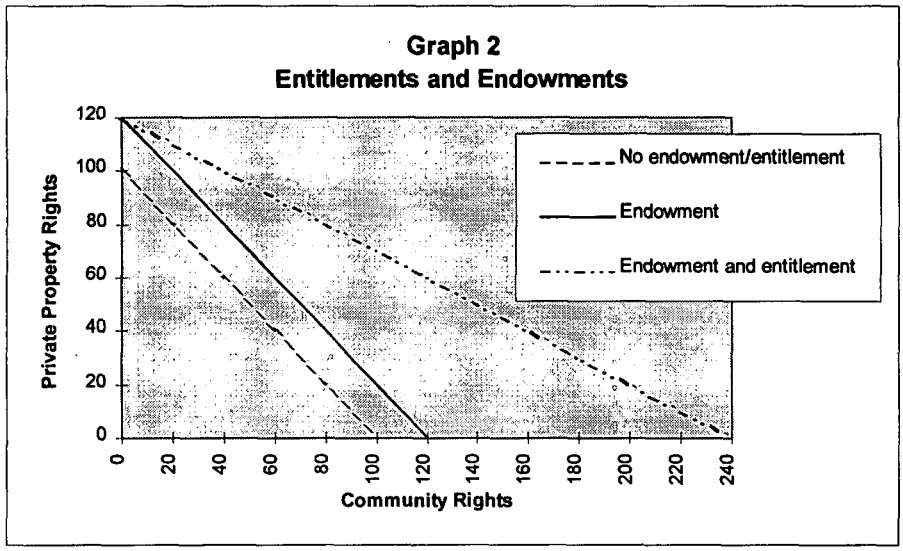
Returning to the utility curves of the community's different citizens, if α equals the value of private rights, assuming no value to the right to zone communal aesthetics, the value of the initial allocation would establish α and determine the intercept. If the endowment effect makes the owner of the entitlement value it twice as much as the non-holder, the base level of property rights—assuming no communal rights—would be higher.

---

[391] *See* Calabresi & Melamed, *supra* note 376, at 1092 & n.7.

[392] *See* Cass R. Sunstein, *Social Norms and Social Values*, 96 COLUM. L. REV. 903, 942 (1996) (noting that the initial allocation affects social understanding about presumptive ownership rights); *see also* Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules and Beyond*, 106 YALE L.J. 703, 749-50 (1996) (arguing that auctions should be considered as a means of ensuring that private property ends up in the hands of those who value it most).

[393] *See* NELSON, *supra* note 272, at 55 (discussing the measuring of success by excluding certain development to preserve character).



Recognition of the endowment effect's existence is the first step in overcoming it. If all land is privately owned, the landowners may value the initial allocation to such a degree that the right to zone communal aesthetics would be held to a minimum. The disparity between the value of the initial grant of the entitlement of private property to landowner A and landless B could be so great that A will try to block any attempt at communal zoning. In such a case, zoning of communal aesthetics is not a true reflection of the community's desires, but rather a remainder left after the assertion of private rights.

Once the endowment effect is recognized, elimination of the disparity must occur. Legal rules protecting the initial allocation "serve to create, to legitimate, and to reinforce social understandings about presumptive rights of ownership."[394] This challenge requires an examination of the social meaning of private property ownership. This does not require addressing the entitlement issue again. A legally protected entitlement to certain property rights remains. Distributive justice cannot completely discount the value of private property. Rather, the status quo should be critically examined to determine how it fits into the wider perspective of community expression. The granting of transferable development rights can overcome the endowment effect.[395] Another possible offset is to provide tax credits for non-development.[396] The landowner would thus be compensated for the disparity in bid and ask price.

---

[394] Sunstein, *supra* note 392, at 941.

[395] *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 137 (1978) (discussing the availability of transferable development rights).

[396] *See* NELSON, *supra* note 272, at 71 (suggesting that the solution to discriminatory treatment of property owners may be financial compensation).

Instead of diminishing private property rights to give the community a voice,[397] alternatives should be explored that allow the two ideologies to coexist. As one commentator noted: "Ideology and law render as the natural state of things what is in fact both an artifact and a matter of policy and thus subject to change."[398] Recognizing the importance and existence of entitlements and the endowment effect ensures that the will of the community, as expressed as communal aesthetics, is the true voice of the community, and as such serves a public good.

2. Demoralization Costs

Another danger of regulating communal aesthetics lurks in what is termed by Professor Michelman as "demoralization costs."[399] Demoralization costs are defined as the sum of:

> (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production . . . caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.[400]

Demoralization costs in zoning communal aesthetics are the economic losses in height limitations plus the discounted present value of future losses. Overcoming the endowment effect, as set forth above, would compensate for this loss. Compensation should be limited to the difference between the value of tall buildings to the landowner and the value of tall buildings to the nonlandowner (the endowment effect). Paying a landowner the economic value of the lost stories is no solution, as doing so would recompense as if this were a taking. There is a public good in zoning for communal aesthetics that allows regulation without working a taking.

3. Prevention Costs

There must also be consideration of the role of prevention costs. Prevention costs are the inefficiencies produced by over-regulation, which eliminate the regulated activity altogether.[401] The right to zone for communal aesthetics

---

[397] Alternatively, limiting the community voice to instances where it does not conflict with private property rights.

[398] SAMUELS, *supra* note 172, at 158.

[399] Frank I. Michelman, 80 HARV. L. REV. 1165, 1214 (1967) (introducing a quasi-mathematical structure to compensation).

[400] *Id.* (citation omitted).

[401] *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 694-96 (1973) (pointing to the bulk controls in New York City "caused major inefficiencies in the interior layouts of these

will not eliminate the right to build tall buildings. Internalization of inefficiencies occurs through acknowledgment and mitigation of the endowment effect and demoralization costs. Therefore, any prevention costs are minimal.

C. *Community Rights in Zoning Aesthetics*

There remains the fundamental question of the danger of finding a public good in a social impulse. Why regulate aesthetic choices at all? Why not allow market forces to determine the skylines of our cities? Property rights advocates argue that the free market may produce an aesthetically pleasing cityscape without government regulation.[402] This argument fails to convince. Market forces are incapable of capturing the public benefits of communal aesthetics on two basic fronts: externalities and collective goods.

1. Spillovers and Externalities

It is easier to support the free market model in economic decisions such as broadcasting,[403] securities regulation,[404] and even health care.[405] Although proponents of free market economics may disagree,[406] the market produces an imperfect result in some social functions.[407] In zoning for communal aesthetics, market prices do not reflect the external cost of a community unable to control its visual surroundings. However, it is felt by the community at

---

buildings and adversely affected architectural variety in the city in return for at best insignificant improvements in the protection of the city's light and air").

[402] Gated communities provide the closest approximation to a free market, because the by-laws of the homeowners association form a unanimous social contract concerning aesthetics. *See* Robert C. Ellickson, *Cities and Homeowner Associations*, 130 U. PA. L. REV. 1519, 1526-27 (1982) (comparing documents of a homeowners association with public laws.). However, the salient and crucial difference is that in a gated community one's vote ties inextricably to one's economic stake (one house, one vote). In defining a cityscape, it is important to give voice to all citizens without regard to economic interest.

[403] *See* Stephen A. Gardbaum, *Broadcasting, Democracy and the Market*, 82 GEO. L.J. 373, 377 (1993) (noting that defenders of broadcasting deregulation argue free speech should be understood in the same way as free trade).

[404] *See* Boyd Kimball Dyer, *Economic Analysis, Insider Trading, and Game Markets*, 1992 UTAH L. REV. 1, 6 (using game market theory to justify prohibitions on insider trading).

[405] *See* Alain C. Enthoven & Sara J. Singer, *A Single-Payer System in Jackson Hole Clothing*, 13 HEALTH AFF. 81, 81-82 (1994) (discussing the failure of President Clinton's Health Security Act to harness market forces).

[406] *See* COSTONIS, *supra* note 10, at 12 ("[A] powerful subsidy, coextensive with lost liberties, results every time the law is enlisted in aid of a social impulse.").

[407] For example, parental leave from employment. *See* Maria L. Ontiveros, *The Myths of Market Forces, Mothers and Private Employment: The Parental Leave Veto*, 1 CORNELL J.L. & PUB. POL'Y 25, 26 (1992) (stating that the free market will not provide parental leave due to market failures).

large.[408]

Externalities, sometimes denominated spillover costs, result when the price of a product does not sufficiently reflect all the costs that its creation imposes.[409] A community's inability to control the city's physical environment is an externality created by the free market. Termed "'symbolic externalities' . . . [they] distress people no less and often more for we experience incompatibility as a clash among the messages we associate with the environment's icons and aliens."[410]

However, although this non-economic goal may justify regulation, "pursuit of non-economic goals must be evaluated in light of the costs and trade-offs that such choices entail."[411] The basic issue is whether aesthetic regulation internalizes the externality of the community's lack of control. Internalization of this externality occurs during the zoning process. The public good of zoning communal aesthetics lies in the democratic process that empowers the community and avoids the externality.

2. Collective Goods

A cityscape is a collective good because the benefit derived from communal aesthetics provides indivisible benefits to the entire community. This creates another problem for the free market approach. Everyone benefits from a collective good no matter who carries the burden of payment and regardless of how many receive the benefit.[412] Once a city skyline is erected, noone can be excluded from sharing in its consumption.[413]

State regulation arguably may be necessary because collective goods are so fundamental to a society that market forces cannot safeguard them.[414] This

---

[408] *See* ANTHONY DOWNS, INSIDE BUREAUCRACY 32 (1967) ("Some important social functions cannot be performed adequately by market-oriented organizations because they involve external costs or benefits. An external cost or benefit does not reflect itself in market prices, but is felt directly or indirectly outside of markets.").

[409] *See* BREYER, *supra* note 170, at 192.

[410] COSTONIS, *supra* note 10, at 17.

[411] Sidney Shapiro, *Keeping the Baby and Throwing Out the Bathwater: Justice Breyer's Critique of Regulation*, 8 ADMIN. L.J. AM. U. 721, 733 (1995).

[412] *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION 14 (1965) (setting forth the argument for collective goods).

[413] *See id.* at 15 (noting that the definition of collective good means inherently that those who do not contribute to a collective good cannot be excluded from sharing in the consumption of the good); *see also* DOWNS, *supra* note 408, at 33 (stating that private markets' allocations cannot handle the provision of proper amounts of an indivisible benefit). Furthermore, the cost of a collective good remains constant regardless of how many consumers enjoy the good. *See* Nancy J. Knauer, *How Charitable Organization Influence Federal Tax Policy*, 1996 WIS. L. REV. 971, 1001 (discussing the free rider problem in setting up a town watch).

[414] *See* David DeCosse, *Beyond Law and Economics: Theological Ethics and the Regulatory Takings Debate*, 23 B.C. ENVTL. AFF. L. REV. 829, 844 (1996) (contending that

is, perhaps, an overstatement for communal aesthetics. However, market forces do produce troubling norms.[415] A small group of developers may decide the shape of the city. Unchecked by community regulation, the city form dissolves into a calculation of rent per square foot.

State regulation through zoning communal aesthetics is crucial to the efficient production of collective goods. Architects of the free market, by definition, cannot embody the voice of the community. Construction of the skyline will reflect the vision of the developers who control the free market, and not the vision of the community. The public good in communal aesthetics is not only its product, but also its process. Private parties cannot produce collective goods in this instance.

CONCLUSION

Washington, D.C., Boston, San Francisco, New York, Chicago, and Philadelphia are six American cities with six distinctive skylines. The skylines are "urban symbols" of each city's citizens' collective identity.[416] The growth and shape of these cityscapes reflect the communities from which they developed. This physical demonstration of community values is crucial for individuals to operate successfully in each one's environment.[417]

Constructing our cityscapes based on the values of communal aesthetics conflicts with the individual autonomy of landowners' private property rights. The "heroic autonomy"[418] of individuality threatens to silence the voice of the community. As land use regulations come under greater scrutiny, communal aesthetics must stand up against the increasing tide of private property rights. Although facially premised upon the health, safety and welfare of the people, communal aesthetics is often based upon nothing more than beauty. Finding the public good of communal aesthetics can be tenuous at best.

The public good of communal aesthetics is strengthened when viewed as

---

takings legislation poses an anti-democratic threat to federal environmental protection).

[415] A traditional view is that state intervention is necessary to produce collective goods. Some scholars, such as Professor Ellickson, argue that private groups can produce collective goods without state intervention. *See* ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 236-38 (1991) (noting that close-knit hierarchical groups can achieve the same internal order as a state enforcer). *But see* Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1743 (1996) (asserting that even in close-knit groups inefficient norms are produced, and that these norms may be less efficient than the rules produced by the state).

[416] *See* Kostof, *supra* note 86, at 47 (stating urban symbols carry collective meaning because "cities are considered amalgams of the living and the built").

[417] *See* LYNCH, *supra* note 11, at 46 (observing that group images are necessary if an individual is to operate successfully within his environment and to cooperate with his fellows).

[418] Rose, *supra* note 181, at 365 ("I can do what I please with my property.").

the process used to design a cityscape. Instead of seeing the public good as end state values (the subjective definition of beauty), communal aesthetics is validated as a process value (the manner in which the public good is expressed).[419] By encouraging community participation, the process of zoning for communal aesthetics gives citizens a voice. That voices connects them to their surroundings and psychologically locates them in their physical space. The true good of beauty is in its creation.

[419] *See* COSTONIS, *supra* note 10, at 34 (discussing end state versus process values).